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Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception

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NOTES

INTERPRETING THE DIRECT EFFECTS CLAUSE OF THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION

INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA")\(^1\) was passed in 1976 to "define the jurisdiction of United States courts in suits against foreign states"\(^2\) and "the circumstances in which foreign states are immune from suit."\(^3\) General exceptions to foreign sovereign immunity under the FSIA include a foreign state's waiver of immunity, a plaintiff's rights to property situated in the United States, tort claims arising from foreign states' activities in the United States and certain commercial activity by foreign states.\(^4\) The last of these exceptions, the commercial activity exception,\(^5\) provides in part that a foreign state may lose its immunity from suit by engaging in commercial activities outside the United States that have a "direct effect" in the United States. Fourteen years after the FSIA was enacted, the circuits remain divided on how to interpret the direct effects clause.\(^6\)

At the threshold, federal courts must decide whether to combine "minimum contacts" due process analysis with the direct effects excep-

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1. 28 U.S.C. §§ 1330; 1332(a)(2)-(4); 1391(f); 1441(d); and 1602-1611 (1988).
3. Id.
5. The commercial activity exception, 28 U.S.C. § 1605(a)(2) (1988), provides that immunity from the jurisdiction of United States courts will be denied to foreign states in a case 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.
6. Most questions of interpretation regarding the FSIA have been resolved and, in general, the Act has accomplished its purpose reasonably well. See Feldman, The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View, 35 Int'l & Comp. L.Q. 302, 318 (1986); Note, Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach, 83 Colum. L. Rev. 1440, 1443 (1983). But see Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985) (FSIA is "a 'remarkably obtuse' document, a 'statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.' ") (quoting Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105, 1106 (S.D.N.Y. 1982)).
tion. Exceptions to sovereign immunity, including the direct effects clause, are considered part of a subject matter jurisdiction analysis. In contrast, minimum contacts, a constitutional due process requirement, is a fundamental element of traditional personal jurisdiction analysis. The FSIA and its legislative history, however, have been interpreted as integrating minimum contacts analysis with the analysis of sovereign immunity exceptions under the review of subject matter jurisdiction. The current trend among federal courts is to separate minimum contacts from the inquiry into sovereign immunity exceptions and to review minimum contacts solely within personal jurisdiction, rather than within subject matter jurisdiction.

A second question facing courts attempting to interpret the direct effects clause stems from the FSIA's legislative history. The legislative history suggests that the clause should be interpreted in a manner consistent with the principles of section 18 of the Restatement (Second) of Foreign Relations Law of the United States. The Restatement, in turn, calls for courts to consider whether the defendant's activity outside the United States has a substantial, direct and foreseeable effect in the United States.

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8. As the vast majority of FSIA cases are brought in federal court, this Note will refer to the fifth amendment when discussing due process. It should be noted, however, that FSIA cases can be brought in state court. In these situations, the Due Process Clause of the fourteenth amendment would apply.
9. Plaintiffs might be wary of bringing such cases in state court partially because of the effect of federal rules covering the service of summons to parties not found within the state. See Fed. R. Civ. P. 4(e). A foreign defendant with sufficient contacts with the United States to satisfy a federal statute could be shielded from the reach of state courts if that defendant lacked sufficient contacts with any single state to "support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction." Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure 30 advisory committee's note, reprinted in 127 F.R.D. 237, 295 (1989). A proposed change to the rules governing service of process attempts to address this problem: "[c]onstitutional limitation [would] arise[] from the Fifth Amendment rather than from the Fourteenth Amendment, which limits state-court reach . . . . The Fifth Amendment requires that any defendant have affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party." Id. at 295-96.
13. See id. at 6618.
States. While many circuits have accepted this interpretation, the Second Circuit has rejected it. The Second Circuit’s broader interpretation of the direct effects clause may be less predictable than an interpretation based on the Restatement.

Adoption of the Restatement’s interpretation of the direct effects clause throughout the federal circuits may help avoid detrimental effects to the American economy. Foreign states, like domestic persons, expect “a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” Fear of unpredictable litigation in American courts could result in foreign states taking their commercial transactions to other nations.

Part I of this Note discusses the purpose of the FSIA and explores subject matter and personal jurisdiction under the Act. Part II notes the emerging trend in the circuits toward reviewing minimum contacts within the analysis of personal jurisdiction rather than subject matter jurisdiction. Part III examines various interpretations of the direct effects clause. Part IV advocates adopting the Restatement’s interpretation of direct effects which requires that the effects be substantial, direct and foreseeable. This Note concludes that, in FSIA cases, minimum contacts should be reviewed under the personal jurisdiction analysis and that the use of the Restatement’s test in interpreting direct effects will result in a more uniform, structured and predictable method of analysis.

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. Background

Under the doctrine of sovereign immunity, domestic courts relinquish jurisdiction over foreign states. Developing restrictions on sovereign


15. The Third, Fifth, Sixth, Ninth and District of Columbia Circuits employ the Restatement’s interpretation when analyzing whether a commercial activity by a foreign state has a direct effect in the United States. See infra note 71 and accompanying text. The Second Circuit rejects the Restatement’s interpretation, preferring to focus on the activity’s actual impact in the United States. See infra notes 82-86, 92-96 and accompanying text.

16. See infra notes 95-102 and accompanying text.


Sovereign immunity is not to be confused with the act-of-state doctrine, which “precludes the courts of this country from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory.” Black’s Law Dictionary 34 (6th ed. 1990). See also Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir.
immunity in international law, coupled with the confusion among American courts in reviewing foreign states' claims to sovereign immunity, led to the passage of the FSIA in 1976.20

The FSIA sought to establish procedures for conducting domestic lawsuits against foreign states and to define the circumstances under which foreign states would qualify for sovereign immunity.21 Congress recognized that “American citizens are increasingly coming into contact with foreign states and entities owned by foreign states,”22 and that “there are no comprehensive provisions in our law available to inform parties when they can have recourse to the [federal] courts to assert a legal claim against a foreign state.”23 Congress responded to this problem by codifying the “restrictive” principle of sovereign immunity, which limits immunity to a foreign state's “public acts” and does not extend it to suits involving the foreign state's commercial activities.24

1985) (“[i]n the act of state context . . . we . . . decline to decide the merits of the case if in doing so we would need to judge the validity of the public acts of a sovereign state performed within its own territory”). The FSIA complements rather than supercedes the act-of-state doctrine for cases in which a foreign state is a party to an action in federal courts. See International Ass'n of Machinists v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). Thus, a defendant lacking sovereign immunity under the FSIA may still avoid liability under the act-of-state doctrine. See, e.g., West v. Multibanco Comermex, S.A., 807 F.2d 820, 824-29 (9th Cir.) (although jurisdiction found under FSIA, act-of-state doctrine precludes claim when American investor suffered financial loss as result of Mexican government's currency controls), cert. denied, 482 U.S. 906 (1987); Braka v. Multibanco Comerex, S.A., 589 F. Supp. 802, 804 (S.D.N.Y. 1984) (although commercial activity exception to FSIA exists, act-of-state supercedes); cf. Allied Bank Int'l. v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir.) (act-of-state does not preclude jurisdiction when defendant conceded American jurisdiction in agreeing to make payments to American plaintiffs in United States), cert. dismissed, 473 U.S. 934 (1985).

20. The preface of the Foreign Sovereign Immunity Act reads:

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.


22. Id. at 6605.

23. Id.

24. Id.
B. Jurisdiction Under FSIA

Subject matter jurisdiction\(^25\) and personal jurisdiction,\(^26\) both required for a court to hear and decide a case,\(^27\) are provided for under the FSIA.\(^28\) Although the FSIA generally accords foreign states immunity from suit in federal courts, if the dispute falls within one of the FSIA's specified exceptions to that immunity,\(^29\) subject matter jurisdiction\(^30\)

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\(^25\) Subject matter jurisdiction concerns the relationship between the claim and the judicial forum. In addition to being a statutory requirement, "it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign." Insurance Corp. of Ireland v. Compagnie de Bauxites, 456 U.S. 694, 702 (1982). United States federal courts have two basic kinds of subject matter jurisdiction. Federal question jurisdiction gives courts the "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1988). Diversity jurisdiction permits courts to exercise jurisdiction over disputes between citizens of different states or between citizens of a state and a foreign state, provided that the amount in controversy exceeds $50,000. See id. at § 1332(a) (1988).

\(^26\) Personal jurisdiction "is defined by constitutional limitations imposed upon the authority of [courts] over persons or things outside their borders and by limitations established by the states." J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 3.1, at 96-97 (1985). Asserting personal jurisdiction over a defendant not in the forum state requires both a long-arm statute authorizing the exercise of personal jurisdiction outside the forum state's borders, id. § 3.12, at 139-42, and the satisfaction of constitutional due process standards. Id. § 3.10, at 124. See, e.g., Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 702 (1982) (personal jurisdiction requirement flows from due process clause); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (minimum contacts to satisfy due process requires "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"); Hanson v. Denckla, 357 U.S. 235, 253 (1958) (minimum contacts requires "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"); International Shoe v. Washington, 326 U.S. 310, 316 (1945) (due process over defendants not present within forum state requires certain minimum contacts between the defendant and the forum state so as not to offend traditional notions of fair play and substantial justice). But see Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure 30 advisory committee's note, reprinted in 127 F.R.D. 237, 295 (proposed changes to Fed. R. Civ. P. 4 would "operate[] as a federal long-arm provision for claims arising under federal law. It extends the federal reach in cases arising under federal law to the full extent allowed by the Fifth Amendment and any applicable Congressional enactment.").

\(^27\) See, e.g., Insurance Corp. of Ireland v. Compagnie des Bauxites, 456 U.S. 694, 701 (1982) (courts must have both subject matter jurisdiction and personal jurisdiction over defendants); J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 3.1, at 96 (1985) (same).


\(^29\) Exceptions to sovereign immunity are found in 28 U.S.C. sections 1602-1611. Section 1605 covers general exceptions to the jurisdictional immunity of foreign states, including 28 U.S.C. § 1605(a)(1) (1988) (waivers of immunity); id. at § 1605 (a)(2) (commercial activity); id. at § 1605(a)(3) (rights in property in United States acquired by succession or gift or rights in immovable property situated in United States); and id. at § 1605(a)(5) (tort claims occurring in United States and caused by foreign state).

\(^30\) Subject matter jurisdiction for the FSIA is covered by 28 U.S.C. section 1330(a): "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in
exists.\textsuperscript{31}

The only requirements for personal jurisdiction expressly provided for under the Act are the finding of subject matter jurisdiction and service of process,\textsuperscript{32} provided that the defense of personal jurisdiction has not been waived.\textsuperscript{33} While the FSIA does not explicitly mention due process as the measure of the required personal jurisdiction, courts have concluded that the Act must comport with constitutional due process requirements.\textsuperscript{34}

II. DUE PROCESS UNDER FSIA

Courts turned to the FSIA's legislative history for assistance in determining how due process requirements were to be satisfied under the Act.\textsuperscript{35} The House Report notes that the exceptions to sovereign immunity, required for subject matter jurisdiction, "prescribe the ... contacts personam with respect to which the foreign state is not entitled to immunity ... under sections 1605-1607 . . . ." \textit{Id.}


32. "Personal jurisdiction over a foreign state [under the FSIA] shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [covering subject matter jurisdiction] where service has been made . . . ." 28 U.S.C. \textsection 1330(b) (1988); see also C. Wright \& A. Miller, Federal Practice and Procedure \textsection 1111, at 214 (1987) (subject matter jurisdiction, described under \textsection 1330(a), required before court can exercise personal jurisdiction, described under \textsection 1330(b)).


34. See, e.g. Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1352 (11th Cir. 1982) ("minimum contacts" standard must be applied to FSIA case to satisfy due process); Texas Trading \& Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981) (while FSIA does not have an express provision for due process, "the Act cannot create personal jurisdiction where the Constitution forbids it"), \textit{cert. denied}, 454 U.S. 1148 (1982).

35. The legislative history notes that:

Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states. ... The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. ... For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607 [covering the exceptions to sovereign immunity required for subject matter jurisdiction], requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13, \textit{reprinted in} 1976 U.S. Code Cong. \& Admin. News, 6604, 6612 (citations omitted) (emphasis added); see also C. Wright \& A. Miller, \textit{supra} note 32, at 214-17 ("Since Sections 1605 through 1607 require some connection between the lawsuit and the United States ... for a court to exercise subject matter jurisdiction under Section 1330(a), traditional requirements of minimum contacts are considered to be incorporated in the Act").
which must exist before our courts can exercise personal jurisdiction."  

Early FSIA decisions interpreted this as directing the incorporation of a minimum contacts analysis into the review of subject matter jurisdiction.  

This approach to minimum contacts, however, is flawed. For example, the direct effects clause and due process analysis both assess contacts with the forum but are distinct in several respects and therefore may not produce the same results. A direct effects clause analysis may preclude a court from exercising jurisdiction over a defendant who has sufficient contacts with the forum state. Conversely, a direct effects test may be satisfied even though the requirements of minimum contacts, as traditionally understood, are not met. As a consequence of the differences between direct effects and due process analysis, and of the danger

37. See, e.g., Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980) ("The words 'direct effect' . . . have been interpreted as embodying the minimum contacts standard of International Shoe"); Carey v. National Oil Corp., 592 F.2d 673, 676 (2d Cir. 1979) ("The legislative history of [section 1605(a)(2)] makes clear that it embodies the standard set out in International Shoe . . . that in order to satisfy due process requirements, a defendant over whom jurisdiction is to be exercised must have 'certain minimum contacts with [the forum state]'") (footnote omitted); Exchange Nat'l Bank v. Empresa Minera del Centro del Peru S.A., 595 F. Supp. 502, 505 (S.D.N.Y. 1984) ("subject matter jurisdiction is lacking under the Act because defendants do not have the requisite minimum contacts with the United States").  
39. In Meadows v. Dominican Republic, 628 F. Supp. 599, 605-06 (N.D. Cal. 1986), aff'd, 817 F.2d 517 (9th Cir.), cert denied, 484 U.S. 976 (1987), a Ninth Circuit court held that personal jurisdiction under the FSIA may be founded on general jurisdiction. Id. at 605-06. General jurisdiction "provides that a court may assert jurisdiction over a defendant whose continuous activities in the forum are unrelated to the cause of action sued upon when the defendant's contacts are sufficiently substantial and of such a nature as to make the state's assertion of jurisdiction reasonable." J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 3.10, at 126 (1985). See also Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n.9 (1984) ("When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant."). The Meadows court found subject matter jurisdiction over the defendant foreign state under the direct effects clause, noting that the American plaintiff suffered a financial injury as a direct result of the defendant's breach of contract. 628 F. Supp. at 604-05. The court also determined that it had personal jurisdiction over the defendant founded on general jurisdiction. Id. at 606-08. If the injury had not been held to be a direct result of the defendant's breach, the court could not have found subject matter jurisdiction over the defendant using the direct effects clause. In this situation, assuming no other exceptions to sovereign immunity were available, the direct effects clause would have precluded jurisdiction over a defendant who, nevertheless, had sufficient contacts to provide personal jurisdiction.  
40. See, e.g., Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu, 660 F. Supp. 1536, 1540-42 (S.D. Tex. 1987) (while subject matter jurisdiction was found under FSIA's direct effects clause, personal jurisdiction was not found because of insufficient minimum contacts); Exchange Nat'l Bank v. Empresa Minera del Centro del Peru, S.A., 595 F. Supp. 502, 505 (S.D.N.Y. 1984) (while plaintiff's conduct satisfied FSIA's direct effects clause, plaintiff's contacts with forum were insufficient for due process).
that analyzing them together may produce a blurred, confused review of each, commentators have supported a separate analysis of due process and of the sovereign immunity exceptions under the FSIA.

While the need for a separate analysis of due process and the sovereign immunity exceptions had previously been recognized, it was not until the Second Circuit's decision in Texas Trading & Milling Corp. v. Federal Republic of Nigeria that this notion was clarified and explicitly articulated. The court in Texas Trading held that, in addition to finding subject matter jurisdiction and providing service of process, personal jurisdiction under the FSIA required "a due process scrutiny of the court's power to exercise its authority over a particular defendant." Thus, the court required a test separate from the subject matter jurisdiction review of FSIA exceptions to determine whether the exercise of personal jurisdiction under the FSIA complied with the due process clause.

Although some courts persist in combining minimum contacts standards with the analysis of sovereign immunity exceptions, other federal courts have expressly adopted Texas Trading's handling of minimum contacts for FSIA cases under a separate personal jurisdiction analysis.

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44. 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

45. See id. at 308.

46. Id.

47. See id. In describing the minimum contacts necessary to satisfy due process, the Texas Trading court wrote:

Whether a defendant's contacts with the forum are so numerous that they reach the "minimum contacts" required by International Shoe Co. v. Washington depends broadly on whether "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " That standard, in turn, involves at least four separate inquiries. Under the cases from International Shoe to World-Wide Volkswagen Corp. v. Woodson, the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. at 314 (citations omitted).


49. See Gregorian v. Izvestia, 871 F.2d 1515, 1530 (9th Cir.), cert. denied, 110 S.Ct. 237 (1989); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1352-
The *Texas Trading* approach to due process encourages the rigorous analysis of minimum contacts that the Constitution requires and enables courts to concentrate on determining whether an exception to sovereign immunity applies. With the direct effects clause exception, the question is whether the case at issue is characterized by direct effects of the sort that the FSIA encompasses.

### III. The Direct Effects Clause

The commercial activities exception to sovereign immunity abrogates foreign states' immunity to the jurisdiction of United States courts "insofar as their commercial activities are concerned." Under the first two clauses of the commercial activities exception, the FSIA denies foreign states immunity from jurisdiction in United States federal or state courts in cases in which the foreign state carries on commercial activity in the United States, or where an act is performed in the United States in connection with commercial activities that the foreign state carries on elsewhere. The exception also denies immunity to a foreign state for an act committed "outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . [which] causes a direct effect in the United States." While most litigation arising from the commercial activities exception employs the direct effects clause, "direct effect" is not easily defined. In the absence of clear guidance from the Act itself, courts and commentators have differed in their interpretation of this clause.

#### A. Early Interpretations of Direct Effects

In *Upton v. Empire of Iran,* the Court of Appeals for the District of Columbia emphasized the supposed plain meaning of "direct effect" as an effect that "has no intervening element, but rather, flows in a straight

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50. See generally Texas Trading, 647 F.2d at 313 (holding that, in FSIA cases, foreign states are "persons" within meaning of due process clause).

51. 28 U.S.C. § 1603(d) (1988) (commercial activity defined as "either a regular course of commercial conduct or a particular commercial transaction or act"); see also H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6617 (commercial activity exception described as "probably the most important instance in which foreign states are denied immunity").


53. Id. at § 1605(a)(2).

54. Id.

55. See 2 P. Vishny, Guide to International Commerce Law § 12.08, at 12-20 (1990); V. Nanda & D. Pansius, supra note 20, § 8.03[1][c][e], at 8-18 & 8-19.


line without deviation or interruption." This literal approach has been criticized as “unduly restrictive.”

Perhaps a stronger criticism of Upton is that it provides an insufficient basis upon which to determine whether a direct effect occurred in the United States. While offering a useful test for determining whether the effect is “direct,” it does not consider whether the nature of the effect is such that sovereign immunity should be denied under the FSIA. Courts have reacted to the limited usefulness of the Upton approach by incorporating its literal definition into their own interpretations of the direct effects clause.

Another approach, which has fallen into disfavor, was based on the District of Columbia’s long-arm statute. Courts developed this interpretation by looking to the legislative history, which noted that the FSIA “provides, in effect, a Federal long-arm statute over foreign states... and is patterned after the long-arm statute Congress enacted for the District of Columbia.” The District of Columbia’s long-arm statute permits jurisdiction over a defendant who causes “tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.” This statute was used in several early FSIA decisions in which courts considered whether the foreign state’s commercial activity could have had a direct effect under the long-arm statute. The District of Columbia’s long-arm statute has since been held to be a guide rather than a “binding directive” in the analysis of direct effects, and courts no longer employ it when interpreting the direct effects clause. Commentators have criti-

58. Id. at 266; see also In re Rio Grande Transp., Inc., 516 F. Supp. 1155, 1162-63 (S.D.N.Y 1981) (“direct effect” found when no superceding cause present between defendant’s commercial activity and injury suffered in U.S.); Note, supra note 38, at 124-127 (subject matter jurisdiction found where effect immediately felt by plaintiff, where no intervening elements or causes and where effect in U.S. is substantial).

59. See Note, supra note 41, at 598.


cized the court's early use of the long-arm statute.66

Finally, one commentator advocated determining direct effect "by reference to the location of the business entity that sustained the primary loss as a result of the defendant's acts."67 While one federal district court employed this approach,68 it is not directly supported by the FSIA's legislative history and has not been widely adopted in the federal courts. Indeed, most courts have turned to the FSIA's legislative history for guidance in interpreting the direct effects clause.

B. Restatement's Interpretation

The legislative history provides little guidance, however, in interpreting the direct effects clause. It notes only that the clause should be interpreted in a manner "consistent with the principles set forth" in section 18 of the Second Restatement of the Law of Foreign Relations.69 Section 18 of the Restatement in turn refers to effects that are "substantial" and "direct and foreseeable."70 The Third, Fifth, Sixth, Ninth and District of

66. See, e.g., Note, supra note 41, at 596-598 (long-arm statutes inapposite to analysis of direct effects jurisdiction); Note, Effects Jurisdiction, supra note 42, at 505-507 (District of Columbia long-arm statute differs significantly from section 1605(a)(2) of FSIA, providing little additional assistance in defining direct effects in commercial cases); Note, supra note 38, at 120-122 (personal jurisdiction under FSIA only patterned after long-arm statute, purposes of two statutes are dissimilar, and long-arm statute is not referred to by Congress in connection with section 1605(a)(2) but with section 1330(b) of FSIA).
67. Note, Effects Jurisdiction, supra note 42, at 512 (footnote omitted).
70. Section 18 of the Restatement provides that:
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.
Restatement (Second) of Foreign Relations Law of the United States § 18 (1965) (emphasis added) [hereinafter Restatement]; see also Feldman, supra note 6, at 317 (FSIA drafter notes purpose of "direct effect" clause "to confine application of the controversial 'effects' doctrine to cases in which the effects were direct, substantial and foreseeable"); Restatement (Second) of Foreign Relations Law of the United States § 18 comment f at 50 (1965) (noting in reference to subsection (b) that "the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the terri-
Columbia Circuits have adopted the Restatement’s interpretation of direct effects.\textsuperscript{71}

The "substantial" element, the first of the three elements in the Restatement’s test, requires "significant financial consequences"\textsuperscript{72} to the plaintiff resulting from the foreign state’s activity, thus providing a safeguard against de minimis suits brought against foreign states.\textsuperscript{73}

Courts adopting the Restatement test define the second element, "direct," literally.\textsuperscript{74} For example, the District of Columbia in \textit{Zedan v. Kingdom of Saudi Arabia}\textsuperscript{75} adopted the Upton analysis and found "direct" to mean that there was no intervening event between the defendant’s act and the injury suffered in the United States.\textsuperscript{76} Similarly, in \textit{Gould, Inc. v. Pechiney Ugine Kuhlmann},\textsuperscript{77} the Sixth Circuit considered "direct" to mean that the plaintiff was the primary direct, rather than indirect, victim of the defendant’s activity.\textsuperscript{78}
"Foreseeability" is the third and perhaps the most important of the elements comprising direct effects under the Restatement.79 Courts have interpreted the Restatement's foreseeability requirement for direct effects as excluding injuries that the plaintiff suffered fortuitously.80

Use of the Restatement for interpreting direct effects has not been unanimously supported. The Second Circuit has expressly rejected the Restatement's interpretation of direct effects. In Texas Trading & Milling Corp. v. Federal Republic of Nigeria,82 the court stated that "[t]he reference is a bit of a non sequitur, since [the Restatement] concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts."83 Because the FSIA's statutory language "implies that federal substantive law will not always govern in FSIA cases",84 and because the Restatement's requirements of substantiality and foreseeability were intended to "minimize unnecessary conflict between United States and foreign substantive law,"85 these requirements are irrelevant in the FSIA.86

This criticism has been noted by other circuits that are nevertheless satisfied that the Restatement reflects Congress's intent and provides a

79. See infra notes 119-21 and accompanying text.
80. The utility of a foreseeability test is illustrated by the Supreme Court's adoption of a foreseeability standard in World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). The Court did note that foreseeability alone was an insufficient ground on which to base personal jurisdiction. See id. at 295-96. However, this should not diminish the importance that foreseeability plays in the Restatement's interpretation because the FSIA's direct effects clause determines subject matter jurisdiction, rather than personal jurisdiction. See supra notes 25-33 and accompanying text.
82. 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). The Texas Trading court held that a foreign state's breach of a contract, which was payable in the United States, to purchase cement from American plaintiffs constituted a "direct effect" in the U.S. under 28 U.S.C. section 1605(a)(2). Id. at 312.
83. Id. at 311. See also Note, Effects Jurisdiction, supra note 42, at 503 ("section 18 and cases construing it are concerned with jurisdiction to legislate, not jurisdiction to adjudicate."); Note, The Noncorporate Plaintiff: Hostage to the Gordian Knot of the Foreign Sovereign Immunities Act of 1976, 54 U. Cin. L. Rev. 907, 929 (1986) (because section 18 refers to application of U.S. law overseas, it "does not help determine whether an act causes a direct effect in the United States").
84. Texas Trading, 647 F.2d at 311 n.32.
85. Id.
86. Id. 28 U.S.C. section 1606 (1988), which defines the extent of liability under FSIA, provides:

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.
useful interpretation of the direct effects clause. In *Maritime Int'l Nominees Establishment v. Republic of Guinea,* for example, the District of Columbia Court of Appeals considered whether the Restatement should be used to interpret the FSIA's direct effects clause. The court was impressed that both the Restatement and the direct effects clause were intended to apply in commercial contexts. Given the similar functions of the Restatement and the direct effects clause and Congress's direction to the Restatement in the legislative history, the court "consider[ed] this source of guidance a proper one."

Rather than follow the Restatement, *Texas Trading* requires a court to ask whether the effect was "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." Whether this phrase offers courts any meaningful direction is questionable. All courts have a responsibility to apply statutes in accordance with the legislature's known intent. The Restatement's approach does not conflict with this responsibility. Its adherents argue that Congress intended it to be used to interpret the direct effects clause as evidenced by legislative history. Indeed, some federal courts that employ the Restatement's test for direct effects also favorably cite the *Texas Trading* approach.

*Texas Trading*’s rejection of the Restatement remains good law in the

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87. See, e.g., Zernicek v. Brown & Root, Inc., 826 F.2d 415, 417 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988) ("Although the concern evidenced by § 18 is therefore legislative rather than judicial, the congressional reference to it has led most courts to find guidance in its requirements in interpreting the FSIA."); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 n.9 (5th Cir. 1985) ("Although we agree with the *Texas Trading* court that Congress's reference to § 18 is 'a bit of a non sequitur' since that section relates to the extraterritorial effect of American substantive law, not to the extraterritorial jurisdictional reach of American courts, we nonetheless view § 18 as evidence of Congressional intent.") (citation omitted).
89. Id. at 1110-11.
90. Id.
91. Id. at 1111.
92. *Texas Trading*, 647 F.2d at 313. This will be referred to hereinafter as "the *Texas Trading* approach." In considering Congressional intent, the *Texas Trading* court noted that
[c]ourts . . . should be mindful more of Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a foreign sovereign than with cases defining 'direct' or locating effects under state statutes passed for dissimilar purposes. . . . Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it.

*Id.* at 312-13 (citation omitted).
93. See supra notes 69-70 and accompanying text.

Second Circuit. In the absence of a test on which to base its analysis, Second Circuit courts rely solely on precedent to give the direct effects clause meaning. Those courts that follow the Restatement, of course, also turn to precedent to determine which situations should fall within the direct effects clause. For example, in applying the "direct effects" clause, the Texas Trading court observed that the only injury a corporation can suffer is financial. Therefore, when considering whether a corporation suffered a direct effect from a foreign state's activities, a court has to ask "whether the corporation has suffered a 'direct' financial loss."

Courts adopting the Restatement's approach have not rejected this element of Texas Trading's analysis of direct effect, but have actually incorporated it into their own analysis. Thus, courts that follow the Restatement may also be said to follow the Texas Trading approach, in that they rely heavily on both legislative intent and precedent. The Restatement's approach is not a radical departure from the Texas Trading approach, but, with its foreseeability requirement, it offers a narrower interpretation of the direct effects clause.

The major problem with the Texas Trading approach is its lack of definition. The Texas Trading court believed that its broad approach to

95. See Martin v. Republic of South Africa, 836 F.2d 91, 94 (2d Cir. 1987); L'Europeenne de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 121 (S.D.N.Y. 1988).


98. Id. This language continues to be employed by federal district courts within the Second Circuit in analyzing the direct effects clause. See Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688, 690 (S.D.N.Y. 1986).

99. See Zernicek v. Brown & Root, Inc., 826 F.2d 415, 418-19 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988). Several courts employing this language from Texas Trading have also added a requirement that "something legally significant actually happen[] in the United States" before they will find that financial loss suffered by the plaintiff in the United States is a direct effect. See, e.g., America West Airlines v. GPA Group, 877 F.2d 793, 799 (9th Cir. 1989) (quoting Zedan at 1515); Rush-Presbyterian-St.Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 582 (7th Cir.) (jurisdiction not established unless foreign state performs legally significant act in United States), cert. denied, 110 S. Ct. 333 (1989); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir.) (same), cert. denied, 110 S. Ct. 237 (1989); Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (same).

100. See, e.g., America West Airlines v. GPA Group, 877 F.2d 793, 799 (9th Cir. 1989) (finding a foreseeability test to be "consistent with a narrow reading of Texas Trading, one which focuses upon the expectation on the part of the defendant that some significant impact would occur in the United States").

In fact, commentators have argued that the Texas Trading approach implicitly uses foreseeability in determining subject matter jurisdiction. See V. Nanda & D. Pansius, supra note 20, § 8.03[2][a][i], at 8-25. For example, by entering into a contract with an American, a foreign state necessarily foresees the possibility that its breach of contract will result in a direct effect in the United States sufficient for jurisdiction under Texas Trading. See id.
the direct effects clause would permit greater flexibility in providing the "access to the courts" permitted by Congress to persons injured by foreign states than would the Restatement's three-part test.101 Because the Texas Trading approach offers little real direction, however, it can lead to unpredictable results.102 The Restatement is superior to the Texas Trading approach because it reduces the likelihood of unpredictable outcomes with its foreseeability requirement. The Restatement's structured, three-part test should also be easier for courts to apply than the amorphous Texas Trading approach.

Supplementing the Second Circuit's criticism of the Restatement's approach, one commentator has argued that the FSIA's legislative history instructs courts to interpret direct effects in accordance with the principles of the Restatement, rather than with the express language of the Restatement.103 The principles of the Restatement "reflect the required moderation and restraint placed on a state's effects jurisdiction by the rights of other states in the international system."104 The commentator advocates a "conflicts of laws" approach, which would balance competing international comity considerations as more in accord with the principles of the Restatement.105 A major flaw in this approach, however, is that had Congress wished courts to adopt the conflicts approach, rather than the Restatement's "substantial" and "direct and foreseeable" test, it would have so provided in either the FSIA or in its legislative history.106


102. A recent example may be found in International Housing Ltd. v. Rafidain Bank Iraq, 712 F. Supp. 1112 (S.D.N.Y.), rev'd in part, dismissed in part, 893 F.2d 8 (2d Cir. 1989), in which a foreign plaintiff sued a foreign bank in a dispute arising from a breach of contract. The defendant's only contact with the United States was a correspondent account with a New York bank, which it used for deposits, payments and transfers of funds. The defendant used this account for a disputed transfer of funds. Neither the performance of the contract nor the payment of the debt were to be within the United States. See International Housing, 893 F.2d at 10-11. The district court in International Housing found subject matter jurisdiction over the defendant. See International Housing, 712 F. Supp. at 1117. On appeal, the Second Circuit found that the district court lacked subject matter jurisdiction and dismissed the appeal as moot. See International Housing, 893 F.2d at 12. Texas Trading's broad interpretation of "direct effect" led to disagreement between the district court and the court of appeals on whether the defendant foreign state's activity resulted in a "direct effect" in the United States. See id. at 12. The court of appeals had difficulty agreeing on whether the defendant's activity caused a direct effect in the United States, splitting two to one in the decision. See id. at 12-14 (Kaufman, J. dissenting). Had the Second Circuit used International Housing as an opportunity to adopt the Restatement's "direct effects" test, such confusion could have been avoided. Because Rafidain Bank could not have reasonably foreseen litigation arising in the United States as a result of its contract with International Housing, subject matter jurisdiction would not have been found under the Restatement's interpretation of "direct effects."

103. See Note, supra note 41, at 607-10.

104. Id. at 609.

105. Id. at 612-14.

106. Id. While actually advocating a conflicts approach, the author acknowledges the usefulness of the Restatement's formulation of "direct effect":
In the absence of support from either the statute or the legislative history, the conflicts approach should be rejected.

A final argument against using the Restatement is the redundancy of its foreseeability component. Because foreseeability is already an element in the due process analysis under personal jurisdiction, it need not be reviewed again under subject matter jurisdiction. However, the foreseeability required to satisfy the direct effects clause under the Restatement is not identical to that required for due process. The foreseeability required to satisfy due process "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." The Restatement is more specific, requiring that the plaintiff's injury be the foreseeable result of the defendant's commercial activity. Thus, activity that could foreseeably result in personal jurisdiction might not satisfy the Restatement if the activity were not linked to the plaintiff's injury.

This argument is also flawed in that it ignores the fact that subject matter jurisdiction, unlike personal jurisdiction, cannot be waived.

Both the statutory language and the express legislative intent support a definition of a direct effect which comports with the limiting principles of section 18(b). Moreover, the application of these limiting principles is not nonsensical. First, when direct effect jurisdiction is asserted under the Act, courts necessarily apply U.S. law to essentially foreign conduct. Second, the limiting principles of section 18(b) reflect sensitivity to what other states in the international system perceive as an acceptable basis of jurisdiction over conduct which substantially occurs outside the forum state. Incorporating these limitations into the direct effect provision will aid enforcement abroad of U.S. judgments and will reduce fears that American courts will overextend their jurisdictional reach or adversely affect U.S. foreign relations.

Id. at 609-10 (footnotes omitted).


108. See Note, Effects Jurisdiction, supra note 42, at 505 n.173; see also Comment, supra note 38, at 118-19 (sovereign immunity and due process determinations should be distinct and, as foreseeability involves due process determinations, it should be considered under due process analysis).


110. See, e.g., Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988) ("Within the contemplation of the statute, an effect is 'direct' in the sense that it is the direct and foreseeable result of the conduct outside the United States.").

111. See generally notes 38-40 and accompanying text (discussing differences between due process requirements and FSIA's direct effects clause).


It should be noted that the FSIA actually does permit the waiver of subject matter jurisdiction in certain limited situations. Finding subject matter jurisdiction requires satisfying an exception to the FSIA. 28 U.S.C. § 1330(a) (1988). One of these exceptions, section 1605, provides:
Should a foreign state waive the personal jurisdiction defense, the foreseeability of its commercial activities outside the United States having a direct effect in the United States would still have to be considered under the Restatement.

IV. ADOPTION OF THE RESTATEMENT'S APPROACH

Federal courts should adopt the Restatement's interpretation of the direct effects clause. This approach is consistent with the FSIA's legislative history and more effectively satisfies policy concerns than the Texas Trading test does.

Several policy considerations support the adoption of the Restatement's interpretation of the direct effects clause. A healthy American economy requires that rights of parties who contract with foreign states be protected. Jurisdiction over foreign states, however, should not be

(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.

Id. at § 1605. One district court noted that "[w]hile it is generally true that lack of subject matter is a defect which is not waivable by the parties, in FSIA Congress created a unique subject matter jurisdiction in the federal courts which may in fact rest on the waiver by a foreign state." Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, 1345 (1982), aff'd 727 F.2d 274 (2d Cir. 1984). Therefore, "a foreign state, by waiving its immunity, may waive what would otherwise be a defect in the subject matter of the court." Id. at 1346. The waiver of subject matter jurisdiction under FSIA will be valid where the foreign state has specifically agreed to such a waiver for the type of claim actually brought against it. See, e.g., Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340 (S.D.N.Y. 1988) (FSIA subject matter jurisdiction waived when foreign defendant's arbitration agreement named New York as forum for arbitration). The waiver of subject matter jurisdiction is unlikely in the absence of such an agreement. See, e.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (Soviet Union did not waive sovereign immunity by signing the United Nations Charter and the Helsinki Accords); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 333 (9th Cir.) (treaty between United States and Iran only extended to commercial activity provided for and did not provide complete waiver of sovereign immunity), cert. denied, 469 U.S. 1035 (1984); see also Meadows v. Dominican Republic, 628 F. Supp. 599, 603 (N.D.Cal.) (in the absence of a § 1605 exception, "[s]ubject matter jurisdiction, or competence cannot be waived; even if foreign state has not appeared the district court must determine whether immunity is unavailable under the FSIA.")., aff'd, 817 F.2d 517 (9th Cir.), cert. denied, 484 U.S. 976 (1987).

113. See supra notes 69-70 and accompanying text.

114. Advocating the extension of jurisdiction over foreign states, the Second Circuit noted:

The United States has an interest in maintaining New York's status as one of the foremost commercial centers in the world. Further, New York is the international clearing center for United States dollars. . . . The United States has an interest in ensuring that creditors entitled to payment in the United States in United States dollars under contracts subject to the jurisdiction of United States courts may assume that, except under the most extraordinary circumstances, their rights will be determined in accordance with recognized principles of contract law.
triggered solely by reason of economic activity involving American contacts.\textsuperscript{115} Business would be diverted from the United States if potential trading partners suspected that they could be subjected to the jurisdiction of American courts at the slightest contact.\textsuperscript{116}

American foreign policy interests may be compromised when suits are brought against foreign states under the FSIA. In addition to avoiding potential litigation in the United States by reducing commercial activity with American interests, foreign states might retaliate by expanding access to their courts in actions against the United States, or by passing legislation designed to impede their citizens' access to American courts.\textsuperscript{117} Indeed, the FSIA was intended to limit "the exercise of jurisdiction over foreign states, to those instances in which the propriety of asserting jurisdiction outweighs the possibility of a harmful impact upon foreign relations."\textsuperscript{118}

The foreseeability element in the Restatement's approach to the direct effects clause allows foreign entities to contemplate the possibility of litigation in a reasoned way when considering transactions that may have an impact on the United States. Under the direct effects clause, subject matter jurisdiction over foreign states will be found only if their commercial activity outside the United States could have produced a foreseeable direct effect in the United States.

For example, a foreign state should foresee that its failure to perform in a transaction involving a known American plaintiff will have a direct effect in the United States.\textsuperscript{119} Likewise, a foreign state should foresee that it will be liable under the FSIA for a tort occurring in the United


\textsuperscript{115. See supra note 102 and accompanying text.


\textsuperscript{119. See, e.g., America West Airlines v. GPA Group, 877 F.2d 793, 800 (9th Cir. 1989) (not foreseeable that faulty maintenance to aircraft engine would have direct effect in United States when defendant airline subsidiary unaware that engine to be used by U.S. airline); Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 582 (7th Cir.) (direct effect in U.S. foreseeable when contract with U.S. hospital payable in U.S. was breached by foreign defendant), cert. denied, 110 S.Ct. 333 (1989); Callejo v. Bancomer, S.A., 764 F.2d 101, 1111-12 (5th Cir. 1985) (breach of contract involving transaction with American investors resulted in foreseeable "direct effect" in U.S., irrespective of where payment was to be made). See also V. Nanda & D. Pansius, supra note 20, § 8.03[2][a][i], at 8-25 (1990) ("When a U.S. person enters into a contract, it is foreseeable that the sovereign's breach of that contract will have a direct effect in the United States."); P. Vishny, supra note 55, § 12.08, at 12-21 (1990) ("Failure to perform
States as a direct effect of the foreign state's commercial activity. Finally, for a foreign plaintiff to employ the direct effects clause, the defendant foreign state must conduct some commercial act outside the United States that could foreseeably result in a direct effect within the United States. In summary, use of the Restatement's foreseeability test in applying the direct effects clause should assist foreign states in predicting when they might lose their immunity from suit in the United States as a result of their commercial activities abroad. This predictability may in turn encourage commercial activity in the United States.

An exception to the rule that failure to perform in a commercial transaction involving an American plaintiff will have a foreseeable, direct result in the United States may be found in Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1514-15 (D.C. Cir. 1988). In this case the court held that a direct effect in the United States was not foreseeable when the defendant foreign state breached a contract with an American citizen that had been agreed to outside of the United States, was to be performed wholly outside of the United States and was not payable within the United States. Two commentators have strongly criticized this decision. See V. Nanda & D. Pansius, supra note 20, § 8.03[2][a][i], at 8-26.1 (1990). They argue that, while the court "appropriately relied upon the foreseeability test ... [the court] may have improperly incorporated subconscious concerns regarding minimum contacts and due process into the direct effect test." Id. The commentators conclude that "the better rule is that whenever a foreign sovereign knowingly and directly contracts with a U.S. person, sufficient foreseeable U.S. effect exists to satisfy the direct effects test." Id.

The direct effects clause is not held to apply to Americans injured outside of the United States as a consequence of the commercial activities of a foreign state. This is true for courts that accept the Restatement's interpretation of direct effects, as well as for those that reject it. See Compania Mexicana de Aviacion S.A. v. United States Dist. Ct., 859 F.2d 1360 (9th Cir. 1988); Martin v. Republic of South Africa, 836 F.2d 91, 94-95 (2d Cir. 1987); Zernick v. Brown & Root, Inc., 826 F.2d 415, 418 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), aff'd, 607 F.2d 494 (D.C. Cir. 1979).

In Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983), the Supreme Court held that foreign plaintiff's use of the FSIA was constitutional. Id. at 497. However, because foreign plaintiffs will have more difficulty proving that a direct effect in the United States was the foreseeable result of a foreign state's commercial conduct outside of the United States, foreign plaintiffs are less likely to employ the direct effects clause successfully than are American plaintiffs. See, e.g., Yugoexport, Inc. v. Thai Airways Int'l, Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984) (direct effect in U.S. not foreseeable when Yugoslavian plaintiff's goods damaged by defendant in Thailand), cert. denied, 471 U.S. 1101 (1985); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1111 (D.C. Cir. 1982) (direct effect in U.S. not foreseeable when American corporation's involvement in commercial transaction involving Liechtenstein plaintiff and Guinea was not reasonably contemplated by parties when agreement made), cert. denied, 464 U.S. 815 (1983); see also V. Nanda & D. Pansius, supra note 20, § 8.03[2][b], at 8-26.4-8-30 (1990) (discussing difficulty facing foreign states attempting to use FSIA direct effects clause).
Adoption of the Restatement's test would also provide the uniformity currently lacking in the courts.\(^{122}\) Justice and policy concerns mandate that foreign states should not be more exposed to suit in one United States judicial district than in another.\(^{123}\) Because the Restatement's test is narrower than the approach currently used in the Second Circuit,\(^{124}\) jurisdiction over foreign states is more likely to be found in the Second Circuit than in those that follow the Restatement. Different interpretations of the direct effects clause should not be permitted to influence commercial decisions by foreign investors. For example, a foreign state might choose to deal with a Detroit or Los Angeles company rather than one based in New York if it was concerned about the greater exposure to litigation in the Second Circuit. Adopting a single standard will resolve this problem. Uniformity may be achieved by adopting the majority view, which has embraced the Restatement approach to direct effects.

### CONCLUSION

A standard approach to the interpretation of direct effects under the FSIA's commercial activities exception, based upon the Restatement, is necessary. The first step in developing this approach is to review minimum contacts under personal jurisdiction analysis, as advocated by the Texas Trading court. Interpreting direct effects in accordance with the Restatement's substantial, direct and foreseeable requirements would complete the process, as it would provide foreign states with a uniformly applied interpretation of direct effects by which their exposure to suit in the United States may be predicted.

Hadwin A. Card, III

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\(^{122}\) The circuits are split on the adoption of the Restatement’s interpretation of direct effects. *See supra* notes 71, 82, 95 and accompanying text.

\(^{123}\) Congress was concerned that the granting of sovereign immunity was unpredictable, noting in its legislative history that

> [a]t present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. . . . [U.S. law] does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6605. Congress sought to remedy this situation by “provid[ing] when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.”

*Id.* at 6604; *see also* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1107 (5th Cir. 1985) (“the FSIA was intended to introduce uniformity into the process of granting sovereign immunity”); Vencedora Oceania Navigacion, S.A. v. Compagnie Nationale, 730 F.2d 195, 203 (5th Cir. 1984) (“[f]or obvious reasons, it is highly desirable to avoid circuit conflicts in the sensitive area of sovereign immunity”). Adopting the Restatement’s interpretation of “direct effects” would help provide the uniform standards for the granting of sovereign immunity that Congress sought.

\(^{124}\) *See supra* note 100 and accompanying text.