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Strangers In A Strange Land: Personal Jurisdiction Analysis Under The Foreign Sovereign Immunities Act

STRANGERS IN A STRANGE LAND: PERSONAL JURISDICTION ANALYSIS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act (FSIA or Act)[1] operates as a federal long-arm statute.[2] As such, the FSIA serves as an instrument through which United States courts can exercise jurisdiction over foreign states.[3] An issue that continues to arise under the FSIA is whether, for purposes of obtaining personal jurisdiction over a foreign sovereign defendant, the defendant's contacts must be with the state in which the court sits or whether minimum contacts between the foreign sovereign and the United States as a whole suffice. If contacts between the foreign sovereign and the United States as a whole suffice, an American plaintiff could sue the foreign sovereign in a state where the sovereign has no contacts.[4] Most courts that have considered the issue of personal jurisdiction under the FSIA have found that the relevant forum to be used in the due process analysis is the United States as a whole.[5] This approach, however, presents several problems.[6]

Sovereign immunity is a doctrine of international law under which domestic courts refrain from asserting jurisdiction over a foreign sovereign to avoid possible interference with the governmental functions of the foreign state.[7] Historically, a foreign sovereign absolutely was immune from suit unless the sovereign consented.[8] In 1812 the United States Supreme Court recognized the theory of absolute immunity, a theory that predominated in early judicial discussions and decisions.[9] Courts in the United States generally

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1. 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), 1602-1611 (1982).

2. See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1 (1976) [hereinafter H.R. REP. No. 1487] (discussing nature of FSIA), *reprinted in* 1976 U.S. CODE AND CONG. & AD. NEWS 6604, 6612).

3. *See id.* at 6604 (discussing purpose of FSIA).

4. *See infra* notes 94-104 and accompanying text (discussing application of FSIA jurisdiction when foreign sovereign defendant had no contacts with forum state).

5. *See* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) (holding that relevant area in determining foreign state's contacts is entire United States); Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivanos, 712 F. Supp. 383, 392 (S.D.N.Y. 1989) (determining that court must use foreign sovereign defendant's aggregate contacts with entire United States in personal jurisdiction analysis). *But see* Meadows v. Dominican Republic, 542 F. Supp 33, 34 (N.D. Cal. 1982) (declining to exercise jurisdiction over foreign sovereign defendant because foreign sovereign defendant had insufficient contacts with State of California), *appeal dismissed and remanded*, 720 F.2d 684 (9th Cir. 1983).

6. *See infra* notes 117-49 and accompanying text (outlining problems presented by using entire United States as relevant forum in personal jurisdiction analysis under FSIA).

7. *See* 48 C.J.S. *International Law* § 46 (1981) (discussing development of sovereign immunity).

8. *See id.* (outlining history of sovereign immunity).

9. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). In *The*

accepted the theory of absolute immunity until the early 1900s when the restrictive theory of immunity developed in the international community.[10]

Schooner Exchange the plaintiffs sought to reclaim a vessel allegedly belonging to them. *Id.* at 118. The plaintiffs claimed that Napoleon's forces seized the vessel on the high seas and converted the vessel into a warship. *Id.* The ship came into a Philadelphia port in distress after damage at sea. *Id.* at 119. The Supreme Court held that an American court could not assert jurisdiction over a vessel in which Napoleon, the reigning Emperor of France, claimed a sovereign right. *Id.* at 136. In *The Schooner Exchange*, Chief Justice Marshall observed:

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.
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> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Id.

All subsequent sovereign immunity cases, not only in the United States, but in the British Commonwealth as well, drew upon *The Schooner Exchange* and gradually expanded the doctrine of absolute immunity to include ordinary merchant vessels that foreign governments owned or operated. *See* The Parlement Belge, 5 P.D. 197 (C.A. 1880) (expanding doctrine of sovereign immunity to include mail packets); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 576 (1926) (upholding immunity plea in commercial claim against merchant ship solely on ground that Italian government owned vessel and used vessel for public purpose).

10. *See* J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 335 (3d ed. 1988) (discussing development of restrictive theory). The Supreme Court of Belgium adopted the restrictive theory in 1903. Societe Anonyme de Chemins de Fer Liegeois Luxembourgeois v. The Netherlands, [1903] Pasicrisie I, 294. In Egypt the Court of Appeals of the Mixed Courts sanctioned the restrictive theory in a litigation involving the United Kingdom in 1920. Captain Hall v. Captain Zacarias Bengoa, 33 Bulletin de Legislation et Jurisprudence Egyptiennes 25 (1920-1921). The Egyptian Court of Appeals already had made clear in a 1912 decision that the court would apply the restrictive theory. Dame Marigo Kildani v. The Ministry of Finance of Greece, 24 Bulletin de Legislation et Jurisprudence Egyptiennes 330 (1911-1912). By 1918 the Supreme Court of Switzerland also was applying the restrictive theory. Ministry of Finance of Austria v. Dreyfus, [1918] Journal des Tribunaux 594. Lower courts in Italy formulated the restrictive theory as early as 1886. The Supreme Court of Italy adopted the restrictive theory in 1925 when a trade commission of the USSR became involved in litigation before the Italian courts that arose from the USSR's commercial activities. Trade Delegation of the USSR v. Ditta Tesini e Malvezzi, [1925] Giurisprudencia Italiana I, 204.

By 1928 the lower courts in Greece were declining to grant immunity to the USSR in a suit involving a commercial act. X v. USSR, [1927-1928] Ann. Dig. 172 (No. 109). The Supreme Court of France sanctioned the restrictive theory in 1929 when a French business sued a trade commission of the USSR in connection with the trade commission's commercial activities in France. USSR v. Association France-Export, [1929] Dalloz Recueil Hebomadaire 161. In 1921 the Supreme Court of Germany declined to apply the restrictive theory on the ground that the restrictive theory had not yet acquired sufficient support to justify the theory's application. Selling v. United States Shipping Board (The Ice King), 1921, 26 Am. J. Int'l L. Supp. 620 (1932). The courts of the German Federal Republic since have become committed to the restrictive theory. Decision of the Federal Constitutional Court, Second Chamber, 1963, 59 Am. J. Int'l L. 654 (1965).

In the Netherlands lower courts applied the restrictive theory as early as 1916. In 1922

Under the restrictive theory, the immunity of a foreign state is limited to the foreign state's governmental acts (*jure imperii*) and does not extend to suits based on the foreign state's commercial or private acts (*jure gestionis*).[11]

At the Brussels Convention in 1926 thirteen nations signed an agreement that formally recognized the restrictive theory of sovereign immunity.[12] The United States, however, did not sign the Brussels Convention document.[13] At that time, United States courts relied heavily on State Department suggestions in deciding whether or not to grant immunity.[14] Although the courts and the State Department formally had not adopted the restrictive theory, the United States was moving away from the absolute theory of sovereign immunity.[15] In recognition of the development of the restrictive theory in many foreign countries, the State Department reexamined its policies regarding immunity of foreign sovereigns and their property.[16] In 1952 the Acting Legal Adviser of the State Department, Jack Tate, sent a letter (the Tate letter) to the Acting Attorney General advising the Department of Justice of the State Department's acceptance of the restrictive theory.[17] The Acting Legal Advisor recognized in the Tate letter that the prior absolute theory of sovereign immunity no longer was consistent with modern international law.[18] The Tate letter announced the policy that a

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an unclear decision of the Netherlands Supreme Court left the issue in a state of turmoil. De Booij Case, 48 Journal du Droit International 274 (1921), 26 Am. J. Int'l L. Supp. 538 (1932). In Austria the restrictive theory became a controversial issue as early as 1918. Austria's supreme court since has become a leading advocate of the restrictive theory. Dralle v. Republic of Czechoslovakia, 17 Int'l L. Rep. 155 (1956). As a result of the development of the restrictive theory and the repeated denial of immunity to the USSR's trade commissions by European courts in the years following World War I, the USSR adopted a policy of entering into international agreements whereby the USSR's trade missions submit in advance to local jurisdiction with respect to disputes arising from their commercial transactions. J. SWEENEY, *supra*, at 336.

11. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 327 (3d ed. 1979) (discussing history of sovereign immunity).

12. *See id.* at 329 (discussing history of sovereign immunity).

13. *See id.* (discussing development of sovereign immunity theory in United States).

14. *See* Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938) (stating policy of deference to State Department's view as to whether court should grant sovereign immunity); *Ex parte* Republic of Peru, 318 U.S. 578, 589 (1943) (accepting State Department's suggestion of immunity as conclusive determination of Peru's immunity from suit); Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (stating that courts should not deny immunity that executive branch has allowed).

15. *See* Republic of Mexico v. Hoffman, 324 U.S. at 35 (concluding that test for determining whether court should exercise jurisdiction is whether court's exercise of jurisdiction would embarrass executive branch in its conduct of foreign affairs).

16. *See* Letter from Jack B. Tate, Acting Legal Adviser to the Department of State to Philip B. Perlman Acting Attorney General of the United States (May 19, 1952) [hereinafter Tate letter] (stating that international acceptance of restrictive theory necessitated change in United States policy) *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

17. *Id.*

18. *Id.* at 985. *See also Foreign Sovereign Immunities Act of 1976: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House*

United States court could hold a foreign sovereign government responsible in a United States court in a dispute arising out of the sovereign's commercial or private acts, but not out of the sovereign's public or governmental acts.[19] After the publication of the Tate letter, United States courts completely deferred to State Department suggestions concerning the granting of immunity.[20] If a foreign defendant wanted to invoke the doctrine of sovereign immunity, the defendant first had to petition the State Department for a ruling that, if granted, United States courts then would follow. Under the guidelines of the Tate Letter, a plaintiff wishing to sue a foreign sovereign had to establish to the satisfaction of the State Department that the exercise of jurisdiction was judicious in the light of diplomatic considerations.[21] If the defendant failed to petition the State Department but later wished to raise the issue of sovereign immunity, the court would make its own determination of the defendant's status. The judiciary and the State Department, therefore, jointly articulated the law concerning the application of the doctrine of sovereign immunity.

In time, the State Department departed from the announced policy of the Tate letter and made suggestions of immunity that the Department did not base on the distinction between public acts and private acts.[22] Courts accepted the Department's suggestions as binding. The departure from the Tate letter policy resulted partly because the Tate letter placed the State Department in a difficult position. If the Department followed the Tate letter in a particular case, the Department was in the inconsistent position of a political institution applying a legal standard in a case before the

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of Representatives Comm. of the Judiciary, 94th Cong., 2d Sess. 24, 25 (1976) (testimony of Monroe Leigh, Legal Advisor, State Department) [hereinafter testimony of Monroe Leigh] (acknowledging trend away from absolute theory in international law).

19. Tate letter, *supra* note 16, at 985.

20. *See* National City Bank of New York v. Republic of China, 348 U.S. 356, 360 (1955) (determining that status and activities of foreign government are foreign policy matters for consideration by political branch of government); Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir.) (stating that courts would defer to State Department policy to avert possible embarrassment to executive branch in conducting foreign relations), *cert. denied*, 381 U.S. 934 (1964). The United States courts' practice of allowing the Department of State to control the grant of immunity was unique in the international system. J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 335 (3d ed. 1988). In no other country was a suggestion of immunity considered binding by the courts. *Id.*

21. Tate letter, *supra* note 16, at 985; *see also* Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 478 (1980) (discussing immunity decisions under Tate letter).

22. *See* Tate letter, *supra* note 16, at 985 (announcing State Department policy of following restrictive theory of sovereign immunity); Southeastern Leasing Corp. v. Stern Dragger Belogorsk Etc., 493 F.2d 1223, 1224 (1st Cir. 1974) (holding that courts should accept certificate and grant of sovereign immunity issued by State Department without further inquiry); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200 (2d Cir.) (deferring to State Department's suggestion of immunity although foreign sovereign defendant's actions were of purely private nature), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961) (holding that courts should accept certificate and grant of sovereign immunity issued by State Department without further inquiry).

courts.[23] If the Department disregarded the Tate letter in a given case, it was abandoning the very international law principle that the Department meant to observe.[24] Moreover, from a diplomatic standpoint, executive involvement in the immunity decision placed the United States at a disadvantage. Under the United States system, a foreign sovereign defendant could choose which cases the sovereign would bring to the State Department and, therefore, in which cases the sovereign would raise diplomatic considerations.[25] The United States, on the other hand, was unable to benefit from the raising of diplomatic considerations in foreign litigation to which the United States was a party because in virtually every other country in the world sovereign immunity was a question of international law decided exclusively by the courts and not by institutions concerned with foreign affairs.[26]

In response to criticism of the State Department's involvement in immunity determinations, Congress enacted the Foreign Sovereign Immunities Act.[27] The Act followed the restrictive theory of sovereign immunity.[28] In enacting the FSIA Congress had four objectives: to transfer the determination of sovereign immunity to the judicial branch; to codify the restrictive theory of sovereign immunity; to make foreign states more susceptible to execution on judgments that United States courts rendered against them; and to provide a means for serving process on a foreign state.[29] By placing immunity decision-making authority in the judiciary, Congress eliminated the possibility that foreign governments would place political pressure on the State Department to recognize the government's immunity from suit. Congress intended judicial determination of immunity to reduce the foreign policy implications of immunity decisions.[30] Under the FSIA courts must decide whether the activity involved is commercial or governmental to determine if the activity triggers the exceptions to sovereign immunity listed in the Act.[31] United States courts, therefore, must apply the restrictive theory in making sovereign immunity decisions.[32] The Act

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23. Testimony of Monroe Leigh, *supra* note 18, at 25.

24. *Id.*

25. *Id.*

26. *Id.*

27. 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), 1602-1611 (1982); *see also* H.R. REP. No. 1487, *supra* note 2, at 6605 (recognizing need for firm standards regarding when foreign state validly can assert defense of sovereign immunity).

28. *See* 28 U.S.C. § 1605(a)(2) (1982) (precluding use of sovereign immunity as defense when foreign state is acting in commercial capacity); H.R. REP. No. 1487, *supra* note 2, at 6605 (stating that one objective of FSIA was to codify restrictive theory of sovereign immunity).

29. Letter from the Secretary of State to the Speaker of the House, accompanying the draft bill of the FSIA (Oct. 31, 1975), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6634.

30. *See* H.R. Rep. No. 1487, *supra* note 2, at 6605 (stating principal purpose of FSIA was reduction in foreign policy implications of immunity decisions).

31. *See* 28 U.S.C. § 1605(a)(2) (1982) (preventing use of foreign sovereign immunity defense when foreign state is acting in commercial capacity).

32. *Id.*; *see also* H.R. REP. No. 1487, *supra* note 2, at 6605 (stating that one objective of FSIA was to codify restrictive theory of sovereign immunity).

assures litigants that courts will make immunity decisions on purely legal grounds under provisions assuring due process.[33]

Congress intended, and cases pursuant to the FSIA have held, that foreign sovereign defendants must assert sovereign immunity from suit as an affirmative defense.[34] Section 1604 of the Act establishes sovereignty as an affirmative defense that challenges the competency of the court to adjudicate a claim involving a foreign sovereign.[35] To raise the sovereign immunity defense a party must plead that the party is a foreign state or a political subdivision, agency, or instrumentality of a foreign state.[36] Once a defendant establishes its sovereignty for purposes of the Act, the plaintiff must demonstrate that the court nonetheless is competent to adjudicate the claim because the defendant's act falls under one of the exceptions to sovereign immunity named in section 1605.[37] If the defendant's act falls

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33. 28 U.S.C. § 1330(a) (1982); *see also* H.R. REP. No. 1487, *supra* note 2, at 6612 (stating that FSIA requires minimum jurisdictional contacts). In addition to the United States, the United Kingdom has codified the restrictive theory of sovereign immunity. The United Kingdom became a signatory to the European Convention on State Immunity of May 16, 1972. The European Convention on State Immunity incorporates the restrictive theory. 11 INT'L LEGAL MATERIALS 470 (1972). The convention entered into force on June 11, 1976. 24 INT'L LEGAL MATERIALS 933 (1985). In order to give effect to the convention, the United Kingdom enacted the State Immunity Act of 1978. 17 INT'L LEGAL MATERIALS 1123 (1978).

Following its incorporation in the legislation of the United States and the United Kingdom, the restrictive theory of sovereign immunity began to spread to the rest of the common-law world. *See* 20 CANADIAN YEARBOOK OF INTERNATIONAL LAW 79 (1982) (discussing Canada's adoption of the restrictive theory). Additionally, learned societies have come to support the restrictive theory of sovereign immunity. The International Law Association adopted a draft convention incorporating the theory at its 1982 meeting and directed its Executive Council to make the draft available to the International Law Commission of the United Nations for the commission's consideration in connection with the commission's study of sovereign immunity. *See* 22 Int'l Legal Materials 287 (1983) (containing draft articles of International Law Association). In 1983 the Inter-American Juridical Committee of the Organization of American States approved for ratification a draft convention which incorporated the restrictive theory. 22 INT'L LEGAL MATERIALS 292 (1983). The 1987 Restatement concluded that nearly all non-Communist states now accept the restrictive theory. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 451 comment a (1987).

34. *See* H.R. REPORT No. 1487, *supra* note 2, at 6616 (stating that under FSIA sovereign immunity is affirmative defense); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 482 (1983) (indicating that foreign defendants must assert sovereign immunity as affirmative defense); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1112 n.10 (5th Cir. 1985) (same); Meadows v. Dominican Republic, 817 F.2d 517, 521-22 (9th Cir.) (same), *cert. denied*, 484 U.S. 976 (1987).

35. 28 U.S.C. § 1604 (1982). Section 1604 states that:

> 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.

Id.

36. *See* 28 U.S.C. § 1603(a) (1982) (defining "foreign state" for immunity determination under FSIA).

37. 28 U.S.C. § 1605 (1982). Section 1605 states:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United

into one of the listed exceptions, the court has subject matter jurisdiction.[38]

If the court determines that the court has subject matter jurisdiction, the court next must consider whether it has personal jurisdiction over the foreign sovereign defendant.[39] Subsection (b) of section 1330 provides: "Personal jurisdiction over a foreign state shall exist to every claim for relief over which the district courts have jurisdiction under subsection (a)

States or 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 the 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 at issue and that property or any property exchanged for that 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 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 that this paragraph shall not apply to—

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

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

(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 of cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state. . . .

Id.

38. 28 U.S.C. § 1330(a) (1982). Section 1330(a) states:

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.

Id.

39. 28 U.S.C. § 1330(b) (1982).

where service has been made under section 1608 of this title."[40] The Act, therefore, makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction.[41] The Act, however, cannot create personal jurisdiction in violation of the foreign sovereign's right to due process.[42] Accordingly, each finding of personal jurisdiction under the FSIA also requires a due process scrutiny of the court's power to exercise the court's authority over a particular defendant.[43]

The FSIA's legislative history indicates that section 1330(b) includes the requirement of minimum jurisdictional contacts.[44] The House Report compares section 1330(b) with the United States Supreme Court's decision in *International Shoe Co. v. Washington*.[45] *International Shoe* is the first in a line of cases that defines modern due process requirements for personal jurisdiction.[46] In *International Shoe* the State of Washington sued a Delaware

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40. *Id.*

41. *Id.*

42. *See* U.S. CONST. amend. V (stating that no person will be deprived of life, liberty, or property without due process of law); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981) (holding that FSIA cannot create personal jurisdiction when constitutional due process constraints forbid personal jurisdiction), *cert. denied*, 454 U.S. 1148 (1982); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1352 (11th Cir. 1982) (same); Walpex Trading v. Yacimientos Petroliferos, 712 F. Supp.383, 390 (S.D.N.Y. 1989) (same).

43. *See infra* note 42 and accompanying text (discussing constitutional constraints on courts' exercise of personal jurisdiction under FSIA).

44. H.R. REP. No. 1487, *supra* note 2, at 6612.

45. *Id.*; 326 U.S. 310 (1945).

46. International Shoe Co. v. Washington, 326 U.S. 310 (1945). In *International Shoe* the Supreme Court considered whether it was permissible under the fourteenth amendment's due process clause for a Washington state court to exercise personal jurisdiction over an out-of-state corporation on the basis of the corporation's activities within Washington when the lawsuit was limited to the recovery of unpaid contributions to Washington's unemployment compensation fund. *Id.* at 311. The State of Washington sued International Shoe Co., an out-of-state corporation with its primary place of business in Missouri, before a Washington state agency to recover unpaid contributions to the state unemployment compensation fund. *Id.* International Shoe employed approximately 12 salespersons in Washington to solicit orders within the state. *Id.* at 313. The sales staff had no authority to enter into contracts or to make collections. *Id.* at 314. The sales staff transmitted the orders it had solicited to the home office, where the corporation either accepted or rejected the orders. *Id.* International Shoe had no office in Washington and maintained no stock of merchandise in Washington. *Id.* at 313. The corporation made a special appearance to challenge the Washington court's exercise of personal jurisdiction. *Id.* at 312. On appeal the Supreme Court of Washington held that the Washington court's exercise of jurisdiction was proper on the ground that regular and systematic solicitation of orders in Washington by International Shoe's sales staff constituted doing business. *Id.* at 314. International Shoe appealed to the United States Supreme Court. *Id.* at 311.

The Supreme Court held that the fourteenth amendment's due process clause gives a court authority to exercise personal jurisdiction only if minimum contacts, ties, or relations exist between the defendant and the forum state. *Id.* at 317. The *International Shoe* Court determined that such minimum contacts existed between the corporation and Washington because the corporation's in-state activities were neither irregular nor casual. *Id.* at 320. Moreover, the Court held that the defendant's contacts with Washington were systematic and

corporation for failing to pay assessments into the State's unemployment compensation fund.[47] The corporation claimed that the Washington court did not have personal jurisdiction because the corporation did not maintain offices in Washington.[48] In *International Shoe* the United States Supreme Court held that Washington had personal jurisdiction over the Delaware corporation.[49] The Court stated that the defendant did not have to be physically present in Washington for a court in Washington to exercise personal jurisdiction.[50] The plaintiff could sue the Delaware corporation in Washington as long as the corporation had minimum contacts with the state.[51] The Court explained that:

> Whether due process is satisfied must depend. . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the State has no contacts, ties or relations.[52]

The *International Shoe* Court stated that an analysis of the corporation's inconvenience in defending suit in Washington was necessary to determine if personal jurisdiction in the forum state was reasonable.[53] The Court conceded, as the defendant argued, that the corporation maintained no offices in Washington.[54] The *International Shoe* Court found, however, that the corporation hired salesmen in Washington.[55] The Court concluded that the corporation's contacts with the forum state, through the activities of the corporation's Washington based salesmen, were sufficient to give the Washington court personal jurisdiction.[56]

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continuous and accorded the defendant the benefits and protection of the laws of Washington. *Id.* The *International Shoe* court determined, therefore, that the Washington court's exercise of personal jurisdiction was fair in that it did not offend traditional notions of fair play and substantial justice. *Id.* Consequently, the Court held that the Washington court's exercise of jurisdiction was proper under the fourteenth amendment's due process clause. *Id.* at 321; *see also infra* notes 57-69 and accompanying text (discussing Supreme Court's refinement of *International Shoe* personal jurisdiction analysis in later cases).

47. *International Shoe*, 326 U.S. at 311.

48. *Id.* at 312.

49. *Id.* at 320.

50. *Id.* at 316.

51. *Id.* at 317.

52. *Id.* at 319.

53. *Id.* at 317.

54. *Id.* at 313.

55. *Id.*

56. *Id.* at 320. International law does not require that a defendant have minimum contacts with a particular state or subdivision. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 commentary (1987). Whether courts require a particular defendant to have minimum contacts with the foreign state is generally a question only of United States law. *Id.* If a nation justifiably can exert jurisdiction over the alien defendant, then for international law purposes, it is not important how the nation allocates that power among political subdivisions within the country. *Id.*

Cases after *International Shoe* have refined the Court's minimum contacts analysis.[57] In *McGee v. International Life Insurance Co.*[58] the Supreme Court held proper the forum state's exercise of personal jurisdiction over an insurance company whose only contact with the state stemmed from a contract with a resident of the forum state.[59] In concluding that the trial court properly exercised personal jurisdiction, the Court stated that the forum state's interest in providing claimants with access to the court system outweighed any inconvenience to the insurance company.[60] In *Hanson v. Denckla*[61] the Court found that a Florida court could not gain personal jurisdiction over a Delaware trustee.[62] Personal jurisdiction was improper, the Court held, because the transaction that gave rise to the cause of action was not consummated in the forum state.[63] The Court explained that the trustee had not invoked the benefit and protection of the forum state's laws because the trustee had not deliberately taken advantage of the privilege of conducting activities within the forum state.[64] In *World-Wide Volkswagen Corp. v. Woodson*,[65] New York residents sued a New York automobile dealer in an Oklahoma court for damages that resulted from a car accident in Oklahoma.[66] The Court rejected the plaintiffs' argument that foreseeability alone is sufficient to confer personal jurisdiction on a nonresident

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57. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 224 (1957) (holding that forum state's interest in providing access to court system outweighed inconvenience to defendant); Hanson v. Denckla, 357 U.S. 235, 233 (1958) (holding that defendant must purposely avail itself of privilege of conducting activities within forum state for forum state to have personal jurisdiction over defendant); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295 (1980) (holding that defendant's contacts with forum state must make it foreseeable that defendant would be subject to suit in forum state).

58. 355 U.S. 220 (1957).

59. McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). In *McGee* the United States Supreme Court upheld California's exercise of personal jurisdiction over an out-of-state insurance company in a suit by a California resident to collect the proceeds of an insurance policy that the company issued to a California resident. *Id.*

60. *Id.*

61. 357 U.S. 235 (1958).

62. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson* the Supreme Court determined that Florida's exercise of personal jurisdiction over a Delaware trust company was invalid. *Id. Hanson* involved a family fight over the assets of a deceased mother, who had established a trust in Delaware before moving to Florida, where the mother died. *Id.* at 238-40. The dispute concerned whether Florida or Delaware courts had jurisdiction over the Delaware trust; that dispute turned on whether Florida could acquire jurisdiction over the Delaware trustee. *Id.* at 240. The *Hanson* Court held that Florida's exercise of personal jurisdiction over the Delaware trustee was invalid because the trustee had no purposeful contacts with Florida. *Id.* at 253. The Court determined that the in-state activities of the trustee were not purposeful in the sense that the trustee did not purposely avail itself of the opportunity to conduct activities within Florida, thus invoking the benefits and protections of Florida's laws. *Id.*

63. *Id.* at 251.

64. *Id.* at 253.

65. 444 U.S. 286 (1980).

66. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 287 (1980).

defendant.[67] The Court stated that, to confer personal jurisdiction, a defendant's deliberate activity in the forum state must be such that a future suit against the defendant in the forum state is foreseeable.[68]

International Shoe and its progeny indicate that, even if a court determines that a defendant has crossed the minimum contacts threshold, the court still may not exercise personal jurisdiction over the defendant unless the court is able to find that asserting jurisdiction is consistent with notions of fair play and substantial justice.[69] The *International Shoe* standard, as the Supreme Court further refined that standard in the Court's later decisions, defines the constitutional limitations on a court's power to exercise personal jurisdiction over a defendant. Courts have held and Congress has recognized that courts must observe these constitutional limitations on the court's power to exercise personal jurisdiction over a foreign defendant under the FSIA.[70] In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*[71] the United States Court of Appeals for the Second Circuit interpreted the FSIA and the FSIA's legislative history to require a due process analysis of the court's power that examines the contacts of a foreign state with the entire United States rather than the contacts with the individual forum state.[72]

Texas Trading arose out of a breach of several contracts by the Federal Republic of Nigeria and its Central Bank.[73] The Nigerian government had executed 109 contracts with sixty-eight suppliers to purchase over sixteen million metric tons of cement at a price close to one billion dollars.[74] Nigerian docks and harbors became crowded with ships loaded with cement.[75] More vessels continued to arrive daily.[76] The Nigerian government

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67. *Id.* at 295.

68. *Id.* at 297.

69. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945); *see also* Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (holding that Delaware's exercise of jurisdiction was unfair and, therefore, invalid even though defendant owned property in Delaware); Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985) (determining that even after court has decided that defendant purposely established minimum contacts with forum state, court may consider contacts in light of other factors to determine whether assertion of personal jurisdiction would comport with fair play and substantial justice); Asahi Metal Indust. Co. v. Superior Court, 480 U.S. 102, 114 (1987) (holding that exercise of jurisdiction was unreasonable despite defendant's contacts with forum state).

70. *See* H.R. REP. No. 1487, *supra* note 2, at 6612 (stating that FSIA requires minimum jurisdictional contacts); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981) (holding that FSIA cannot create personal jurisdiction where constitutional due process constraints forbid personal jurisdiction), *cert. denied*, 454 U.S. 1148 (1982); Harris Corp. v. National Iranian Radio and Television, 691 F.2d 1344, 1352 (11th Cir. 1982) (same); Walpex Trading Co. v. Yacimientos Petroliferos, 712 F. Supp. 383, 390 (S.D.N.Y. 1989) (same); *supra* note 42 and accompanying text (discussing constitutional constraints on courts' exercise of personal jurisdiction under FSIA).

71. *Texas Trading*, 647 F.2d. at 300.

72. *Id.* at 314.

73. *Id.* at 302-06.

74. *Id.* at 303.

75. *Id.* at 302.

76. *Id.*

became unable to accept delivery and repudiated the government's contracts with the cement suppliers.[77] Consequently, Texas Trading & Milling Corporation, a supplier, brought suit in the United States District Court for the Southern District of New York against the Republic of Nigeria.[78] The Nigerian government invoked the defense of sovereign immunity under the FSIA.[79] The district court dismissed the action for lack of subject matter and personal jurisdiction.[80] The district court reasoned that, because all contract negotiations between the parties occurred outside of the United States, Nigerian law governed the contracts.[81] Additionally, the district court determined that the only effect in the United States was that the letters of credit were payable to the New York plaintiff through a New York bank.[82] Accordingly, the district court held that insufficient direct effects existed in the United States to support jurisdiction under the FSIA.[83] Texas Trading appealed to the United States Court of Appeals for the Second Circuit.[84] On appeal the Second Circuit addressed the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the plaintiff's claims, and the propriety of personal jurisdiction over the defendants.[85] First, the court of appeals held that subject matter jurisdiction over Nigeria was proper. The Second Circuit determined that subject matter jurisdiction was proper because Nigeria was acting in a commercial capacity and, therefore, that sovereign immunity was not a defense.[86] Accordingly, the court next considered the constitutional constraints on exercising statutory personal jurisdiction over the defendants.[87] In analyzing whether the defendant's relevant contacts satisfied due process requirements, the Second Circuit first considered whose contacts were relevant.[88] The court found that the Central Bank of Nigeria's commercial contacts and activities could be charged to the Republic of Nigeria and that the contacts of the New York correspondent bank, Morgan Guaranty Trust, could be charged to the Republic of Nigeria and the Central Bank of Nigeria.[89] Having found

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77. *Id.*

78. Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 500 F.Supp. 320, 322, (S.D.N.Y. 1980), *rev'd*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

79. *Id.*

80. *Id.* at 321.

81. *Id.* at 325-27.

82. *Id.* at 323.

83. *Id.* at 326.

84. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306 (2d Cir. 1981); *cert. denied*, 454 U.S. 1148 (1982).

85. *Id.*

86. *Id.* at 310.

87. *Id.* at 313-15.

88. *Id.* at 314.

89. *Id.* The *Texas Trading* court looked to the financial arrangements of the cement supply contracts in its examination of the relevant contacts. *Id.* The Second Circuit noted that Nigeria, as part of the supply contracts, established letters of credit with the Central Bank of Nigeria (Central Bank) and advised the letters of credit through the Morgan Guaranty Trust

that the activities involved in the dispute could be charged to the Republic of Nigeria, the court next considered the relevant geographical area for purposes of delineating the minimum contacts necessary for personal jurisdiction.[90] The *Texas Trading* court held that the area with which the defendants must have minimum contacts was the entire United States, not merely the State of New York where the action was pending.[91] The Second Circuit found that personal and subject matter jurisdiction existed under the FSIA and that the Republic of Nigeria had sufficient minimum contacts with the United States through Nigeria's New York correspondent bank to satisfy constitutional constraints.[92] Accordingly, the Second Circuit reversed the district court's order dismissing the case for lack of jurisdiction.

In *Texas Trading* the contacts of both the Nigerian government and the Central Bank with the United States were in New York, the forum state.[93]

Company (Morgan) of New York. *Id.* at 304. The *Texas Trading* court found that under the letters of credit, each seller was to present appropriate documents to Morgan, not to the named Central Bank. *Id.*

The Second Circuit further noted that after the Nigerian docks and harbors became clogged with ships delivering cement, the Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted—in addition to the documents required by the letter of credit as written—a statement from Central Bank that Morgan should make payment. *Id.* at 305. The *Texas Trading* court indicated that Nigeria's unilateral alteration of the letters of credit was the crucial step leading to the lawsuits against Nigeria. *Id.* The Second Circuit determined that the court could charge the Central Bank's activities to Nigeria and Morgan's activities to the Central Bank and Nigeria. *Id.* at 314. The *Texas Trading* court reasoned that if Morgan had not performed for the Central Bank, and the Central for Nigeria, the entire payment mechanism supporting the cement contracts, Nigeria would have been required to make the payments directly. *Id.*

90. *Id.* at 314.

91. *Id.* In determining that courts should examine national rather than forum state contacts in personal jurisdiction analysis under the FSIA, the Second Circuit in *Texas Trading* stated:

> Since service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely [the forum state of] New York. *Compare* 28 U.S.C. § 1608 (service of process provision for FSIA) *with* 15 U.S.C. §§ 21(f) (service of process provision for antitrust laws), 77v (same for securities laws). *See* Bersch v. Drexel Firestone, Inc. 519 F.2d 974, 998-1000 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974); Leasco Data Processing Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

Id.

92. *Id.* at 314-15. In its personal jurisdiction analysis, the *Texas Trading* court determined that the Central Bank, and through the Central Bank Nigeria, had repeatedly and purposely availed themselves of the privilege of conducting activities in the United States as a whole. *Id.* at 314. The contacts examined by the Second Circuit, however, all involved the forum state of New York. *Id.* The *Texas Trading* court determined that the Central Bank sent employees to New York for training, kept large cash balances in New York, and maintained a custody account in New York. *Id.* Furthermore, the Second Circuit found that the Central Bank made it a regular practice to advise letters of credit through Morgan, a New York company, and to use Morgan as the Central Bank's means of paying bills throughout the world. *Id.* Consequently, the contacts examined by the Second Circuit in *Texas Trading* all concerned the forum state of New York.

93. *Id.*

Accordingly, the *Texas Trading* court did not have to address a situation in which, although the defendant conducted some business in the United States, the plaintiff brought suit in a state where the defendant did not conduct any business. Nevertheless, courts subsequently have followed the Second Circuit's broad interpretation of forum for the minimum contacts test in cases in which the defendant had no relevant contacts with the forum state. For example, in *Harris Corp. v. National Iranian Radio and Television*,[94] the United States Court of Appeals for the Eleventh Circuit used the Iranian defendants' contacts with New York in determining that a Florida district court's exercise of jurisdiction over the defendants was proper.

In *Harris* an American manufacturer brought suit against Iranian defendants seeking a judgment declaring the supply contract between the parties to have been terminated by *force majeure* as a result of the Iranian revolution and the subsequent crisis created when Iranian militants seized hostages at the United States Embassy.[95] The United States District Court for the Middle District of Florida granted preliminary injunctive relief.[96] The defendants appealed, challenging the jurisdiction of the district court.[97] On appeal the Eleventh Circuit stated that the defendant's contacts with the State of New York, not the forum state of Florida, determined the result of the constitutional due process analysis required under the FSIA.[98] Citing *World-Wide Volkswagen* and *Texas Trading*, the court held that the foreign state's contacts with New York were sufficient minimum contacts with the entire United States to satisfy due process constraints.[99] Accordingly, the Eleventh Circuit held that the district court properly exercised jurisdiction over the defendants and upheld the district court's grant of preliminary relief.[100]

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94. 691 F.2d 1344 (11th Cir. 1982).

95. Harris Corp. v. National Iranian Radio and Television, 691, 693 F.2d 1344 (11th Cir. 1982).

96. *Id.* at 1346. In *Harris* an American manufacturer brought suit against Iranian defendants seeking to enjoin payment and receipt of payment on a guarantee and receipt of payment on a letter of credit, and also seeking a judgment declaring the contract underlying the guarantee and the letter of credit to have been terminated as a result of the Iranian revolution and the following crisis. *Id.* at 1346-49. The district court granted the injunctive relief that the manufacturer requested. *Id.* at 1349.

97. *Id.* at 1346. The defendants in *Harris* argued that the defendants had sovereign immunity, which deprived the district court of subject matter and personal jurisdiction. *Id.* at 1349.

98. *Id.* at 1352-53.

99. *Id.*; *see also* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) (holding that courts must apply "minimum contacts" standard to determine if maintenance of suit is consistent with due process), *cert. denied*, 454 U.S. 1148 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-99 (1980) (determining that notions of fairness are satisfied if defendants could reasonably anticipate being subject to suit in the forum state).

100. *Harris*, 691 F.2d at 1357-58. In upholding the district court's exercise of jurisdiction, the Eleventh Circuit in *Harris* examined the defendants' contacts with the United States as a

A district court in Arkansas also has used the national contacts analysis to evaluate the propriety of exercising jurisdiction over an agency of the Mexican Government.[101] In *Banker's Trust Co. v. Worldwide Transportation Services*[102] the United States District Court for the Eastern District of Arkansas held that the foreign agency's extensive economic activity in the United States when the agency repeatedly and purposely availed itself of the privilege of conducting business in this country satisfied due process requirements.[103] Consistent with the Second Circuit's interpretation in *Texas Trading*, the *Banker's Trust* court held that national rather than forum state contacts are determinative in any due process minimum contacts analysis under the FSIA.[104]

Not all courts, however, have followed this broad interpretation of forum in the courts' due process analyses.[105] In contrast to *Texas Trading*, the United States District Court for the Northern District of California in *Meadows v. Dominican Republic*[106] declined to exercise jurisdiction over a defendant foreign state because the defendant state lacked sufficient contacts with the State of California.[107] The *Meadows* court acknowledged that the Second Circuit in *Texas Trading* had applied a minimum contacts analysis based on any contact with the entire United States.[108] The district court in *Meadows*, however, found that the Second Circuit merely was applying the traditional minimum contacts analysis with respect to the forum state because the plaintiff in *Texas Trading* brought suit in New York, which was where the defendant actually conducted business.[109]

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whole. *Id.* at 1353. Consequently, the *Harris* court determined that the defendants' contacts with the State of New York, through the defendants' maintenance of an active office in New York City, were sufficient to render the defendants amenable to suit in Florida. *Id.*

101. Banker's Trust Co. v. Worldwide Transp. Serv., Inc., 537 F. Supp. 1101 (E.D. Ark. 1982).

102. *Id.*

103. *Id.* at 1110.

104. *Id.* at 1108-09. The district court in *Banker's Trust* cited the Second Circuit's opinion in *Texas Trading* and courts that have followed the Second Circuit's approach to personal jurisdiction analysis under the FSIA to support the district court's ruling that national rather than forum state contacts were determinative in the court's due process analysis under the FSIA. *Id.*

105. *See* Meadows v. Dominican Republic, 542 F. Supp. 33, 34 (N.D. Cal. 1982) (declining to exercise jurisdiction over foreign state defendant because defendant lacked contacts with the forum state), *appeal reversed and remanded*, 720 F.2d 684 (9th Cir. 1983), *cert. denied*, 484 U.S. 976 (1987); Olsen v. Government of Mexico, 729 F.2d 641, 648 (9th Cir.) (requiring contacts with forum state in due process analysis under FSIA), *cert. denied*, 469 U.S. 917 (1984) ; *infra* notes 106-15 and accompanying text (discussing *Meadows* and *Olsen* courts' departure from Second Circuit's *Texas Trading* approach.

106. *Meadows*, 542 F. Supp. at 33.

107. *Id.* at 34.

108. *Id.*; *see also Texas Trading*, 647 F.2d at 314 (holding that contacts with entire United States were determinative in due process analysis under FSIA).

109. *Meadows*, 542 F. Supp. at 34. In finding that national contacts were determinative, the district court in *Meadows* recognized that the Court of Appeals for the Ninth Circuit had not ruled on the forum issue at the time the district court decided *Meadows*. *Id.*

Since the *Meadows* decision, the United States Court of Appeals for the Ninth Circuit effectively has rejected *Texas Trading* by holding that to satisfy due process requirements the foreign sovereign must have contacts with the forum state.[110] In *Olsen v. Government of Mexico*[111] a Mexican government aircraft crashed in California.[112] The Ninth Circuit required contacts with the State of California in the court's due process examination.[113] In deciding whether or not Mexico's contacts were sufficient, the Ninth Circuit reasoned that Mexico purposely availed itself of the benefits of operating Mexico's aircraft over California and that the plaintiff's claims arose from the flight and the crash of the plane in California.[114] Consequently, the *Olsen* court determined that the Mexican government had sufficient contacts with California to make the exercise of jurisdiction proper.[115] The *Meadows* and *Olsen* decisions, therefore, represent a conflict among the circuits regarding the application of the national contacts due

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110. *See* Olsen v. Government of Mexico, 729 F.2d 641, 648-51 (9th Cir.), *cert. denied*, 469 U.S. 917 (1984). In *Olsen* the Ninth Circuit considered whether a Florida district court could properly exercise jurisdiction over Mexico in a case arising from the crash of a Mexican government airplane in California. *Id.* at 644. The *Olsen* court examined Mexico's contacts with California, the forum state, when making the court's due process analysis. *Id.* at 649. In *Olsen* the Ninth Circuit did not expressly reject the national contacts approach used by the Second Circuit in *Texas Trading*. The *Olsen* court, however, did not refer to *Texas Trading* in the court's personal jurisdiction analysis. *Id.* at 648-49. The Ninth Circuit's refusal to examine national contacts in *Olsen* constitutes an effective rejection of the Second Circuit's approach in *Texas Trading*.

111. *Id.* at 641.

112. *Id.* at 643-44. In *Olsen* the Ninth Circuit considered whether a California district court properly dismissed an action arising from the crash of a Mexican government aircraft in California for lack of personal jurisdiction. *Id.* at 643. In *Olsen* children brought suit for the wrongful death of the children's parents, who were prisoners of the Mexican government. *Id.* at 643-44. The parents were killed in a plane crash that occurred as the Mexican government was transferring the parents to authorities in the United States. *Id.* The California district court dismissed the action for lack of personal jurisdiction. *Id.* The district court held that general contacts between the defendant and the forum state of California provided no basis for jurisdiction. *Id.* at 643. Additionally, the district court concluded that personal jurisdiction based on defendant's forum related activities would be unreasonable and therefore violative of due process requirements. *Id.*

On appeal, the Ninth Circuit determined that Mexico was not immune from suit under the FSIA and that the district court's exercise of jurisdiction would be consistent with due process requirements. *Id.* at 648-49. The Ninth Circuit in *Olsen* reasoned that the plaintiffs' claims fell within the exception for noncommercial torts provided by § 1605(a)(5) of the FSIA and, therefore, Mexico was not immune from suit. *Id.* at 648. Additionally, the Ninth Circuit determined that Mexico purposely availed itself of the benefits of operating Mexico's aircraft over California and, therefore, California's exercise of personal jurisdiction would be reasonable. *Id.* at 649. The Ninth Circuit did not cite *Texas Trading* in the court's *Olsen* due process analysis. *Id.* at 648. By requiring contacts with the forum state of California in *Olsen*, however, the Ninth Circuit effectively rejected the national contacts approach taken by the Second Circuit in *Texas Trading*.

113. *Id.* at 648-49.

114. *Id.* at 649.

115. *Id.* at 649.

process test that the Second Circuit established in *Texas Trading*.[116]

The utilization of the entire United States as the relevant forum in the personal jurisdiction analysis under the FSIA presents several problems.[117] The *Texas Trading* court relied upon cases brought under the federal antitrust and securities laws for authority to undertake a due process analysis using national contacts rather than state contacts.[118] In *Texas Trading* the Second Circuit implied that, because nationwide service of process was constitutional under antitrust and securities laws, the relevant area for delineating contacts under the FSIA should be the entire United States.[119] Unlike actions based on antitrust and securities laws, however, a uniform federal standard governing the liability of a foreign state in actions arising out of contract or tort theories does not exist. While the FSIA sets forth procedures for bringing suit against a foreign state, courts must determine substantive issues of liability under state law.[120] If courts employ the *Texas Trading* concept of national contacts rather than the traditional approach followed by the Ninth Circuit in *Olsen*, any district court within the United States may exercise jurisdiction over a foreign sovereign defendant if the defendant has minimum contacts with any part of the United States.[121] The

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116. *Compare supra* notes 72-104 and accompanying text (discussing courts that have examined foreign sovereign defendants' national contacts in personal jurisdiction analysis under FSIA) *with supra* notes 105-15 and accompanying text (discussing courts that have examined foreign sovereign defendants' forum state contacts in personal jurisdiction analysis under FSIA).

117. *See infra* notes 118-49 and accompanying text (discussing problems presented by utilization of entire United States as relevant forum in personal jurisdiction analysis under FSIA).

118. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

119. *Id.*; *see also* Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 998-1000 (2d Cir.) (holding that nationwide service of process was proper under Securities Exchange Act of 1934), *cert. denied*, 423 U.S. 1018 (1975); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (same); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972) (same).

120. *See* H.R. REP. No. 1487, *supra* note 2, at 6604 (stating that FSIA provides means for determining when foreign state is entitled to sovereign immunity).

121. *See Olsen*, 729 F.2d at 649 (using forum state contacts in due process analysis under FSIA); *Texas Trading*, 647 F.2d at 314 (holding that courts should use contacts with entire United States in due process analysis under FSIA). Despite the potential for unfair assertion of personal jurisdiction by courts over foreign sovereign defendants, the venue provisions of the FSIA appear to provide some relief for foreign states. Section 1391(f) of the FSIA defines the proper venue of an action against a foreign state. 28 U.S.C. § 1391(f) (1982). Under § 1391(f), there are four express provisions for venue in civil actions brought against foreign states: (1) the action may be brought in the judicial district where a substantial part of the events or omissions giving rise to the claim occurred; (2) if the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, the action may be brought in the judicial district in which the vessel or cargo is located; (3) if the action is brought against the agency or instrumentality of a foreign state, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business; or (4) the action may be brought in the United States District Court for the District of Columbia. *Id.* The venue provisions might eliminate some unfairness in the application of

district selected by the plaintiff will determine which state's laws shall apply. Accordingly, the national contacts approach may subject a foreign state or the instrumentality of a foreign sovereign to the inconsistencies of the laws of various states, depending on where the plaintiff commences the action, unless the foreign state succeeds in having the action transferred to another district court on forum non conveniens grounds.[122] The national contacts approach thus enables a plaintiff to shop for a forum with laws favorable to the plaintiff's case.[123]

Additionally, because violation of the securities and antitrust laws that the Second Circuit cited in *Texas Trading* involve the entire United States economy, Congress determined that nationwide service of process was appropriate. When passing the Sherman Antitrust Act, Congress believed that only litigation which included all members of a business combination could deal with the nationwide nature of monopolies and cartels.[124] Accordingly, Congress added a provision to the Sherman Antitrust Act that allows federal courts to exercise jurisdiction over defendants anywhere in the country if "the ends of justice" so require.[125] The legislative history of

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the FSIA. The venue provisions, however, are broad and leave room for inequitable assertion of personal jurisdiction.

122. *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 n.15 (1983) (stating that FSIA did not appear to affect traditional doctrine of forum non conveniens). Forum non conveniens refers to the discretionary power of a court to decline jurisdiction over an action when the convenience of the parties and the ends of justice would better be served if the action were brought and tried in another forum. BLACK'S LAW DICTIONARY 589-90 (5th ed. 1979).

123. *See* 28 U.S.C. § 1391(f) (1982) (limiting plaintiff's choice of forum under FSIA); *infra* note 121 (discussing effect of FSIA's venue provision on due process analysis).

124. *See* 21 CONG. REC. 2640 (1890). When explaining his amendment to the Sherman Antitrust Act that provided for nationwide service of process, Senator Spooner (Wis.) stated:

> Most if not all of the combinations, however they may be called, aimed at by the bill are detrimental to the public interest. I think . . . it will be agreed that two of them, whose ramifications extend throughout the whole country and who directly affect the people generally in the country, the sugar trust and what is called the beef combine, are infamous in their oppression, the sugar trust dealing with an article which goes into the daily consumption of the people, which goes into every house, to every family. I believe 52 pounds per year per capita are used by the people of the United States. The object of this trust is to keep up to the consumers the price of sugar. The beef combine . . . has been so successful as to maintain at the war rate the price of beef to consumers throughout the United State, and to depress it among those, the farmers and others, who raise cattle, so as to render that industry no longer a profitable one.
>
> The sugar trust is made up, as I understand it, of seventeen different corporations, some of them citizens of different States. Manifestly to deal sufficiently with a trust or combination of that character it must be possible to bring one action, into one court, the essential parties defendant.

Id.

125. 15 U.S.C. § 5 (1988). The personal jurisdiction provision of the Sherman Act states:

> Whenever it shall appear to the court . . . that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and

the Sherman Antitrust Act clearly indicates that Congress wanted to ensure that federal courts would have the power to order effective remedies through nationwide injunctions if necessary.[126] Furthermore, the legislative history reveals Congress' recognition that the federal government would have to initiate multiple identical suits in separate judicial districts unless the government could join the relevant defendants in a single suit.[127] Both the desire for an effective remedy and the attempt to conserve government resources convinced Congress to expand federal court jurisdiction in the federal antitrust laws.[128]

In addition to providing the federal courts with nationwide personal jurisdiction in federal antitrust laws, Congress provided the federal courts with nationwide personal jurisdiction in cases arising under the federal securities laws. Like the antitrust legislation, the securities legislation was a congressional response to a nationwide economic problem.[129] Each of the six federal statutes Congress enacted between 1933 and 1940 to regulate securities contains a provision authorizing federal courts to exercise nationwide personal jurisdiction.[130] Although the legislative history says nothing

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subpoenas to that end may be served in any district by the marshal thereof.

Id.

126. *See* 21 CONG. REC. 2640-41 (1890). In addition to recognizing the nationwide effect of trusts, Senator Spooner (Wis.) stated:

> For myself, I think the efficacious remedy will be found to be, not the criminal prosecution provided for by the Senator from Texas but the vigorous and drastic use of the writ of injunction. Under the law as it stands to-day that writ can only be served and punishment for its disobedience enforced within the district over which the court has jurisdiction. By the amendment which I have sent to the desk, this writ of injunction may be served anywhere within the United States, and if it is disobeyed the attachment for contempt may be served anywhere within the United States. I think the amendment ought to be adopted.

Id.

127. *See* 21 CONG. REC. 2642 (1890). In addition to recognizing the need for conserving government resources Senator Spooner (Wis.) stated:

> [A]ll of these trusts, or nearly all of them, are made up of different firms, of corporations, and of citizens of different States . . . [A]s the law now stands, . . . the statutory rule is that no man shall, with a single exception or so, be sued in the United States courts except in the district where he happens to reside or where he happens to be found. So, then, in prosecuting the sugar trust under the provisions of this act, made up of seventeen distinct corporations, as I understand it, only one of which, if you please, is a citizen of the State of New York, there would be no power to obtain jurisdiction in a single suit except over one. Seventeen different suits would be necessary, possibly. That, it seemed to me, was a weakness in this bill which ought to be remedied.

Id.

128. *See supra* notes 124-27 and accompanying text (discussing legislative history of federal antitrust laws).

129. *See* L. LOSS, SECURITIES LEGISLATION 119-21 (1961). Congress passed the legislation regulating securities in the aftermath of the stock market crash of 1929 and the realizations of stock market manipulations and fraud. *Id.* By regulating securities, Congress attempted to restore investor confidence in the national stock markets. *Id.*

130. 15 U.S.C. § 77v(a) (1988). Section 22 of the Securities Act of 1933 grants jurisdiction

explicitly concerning the government interests furthered by nationwide personal jurisdiction, Congress must have believed that allowing investors to litigate securities fraud issues anywhere in the nation was a beneficial approach to policing the stock market and an important step in furthering the public interest in a stable United States financial community.[131] The types of disputes that fall under the FSIA, however, generally involve a breach of a contract or a tort action between a foreign sovereign and a specific American plaintiff.[132] The entire United States is not affected in

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of offenses and violations of the Act to the federal district courts. Section 22 provides:

> Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Id.

> Section 27 of the Securities Exchange Act of 1934 provides:
> Any suit or action to enforce any liability or duty created by this chapter or rules and regulations . . . may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Id. § 78aa.

> Section 25 of the Public Utility Act of 1935 provides:
> Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this chapter or rules, regulations, or orders thereunder, may be brought in any such district or the district wherein the defendant is an inhabitant or transacts business . . . or wherever the defendant may be found.

Id. § 79y. Section 322 of the Trust Indenture Act of 1939, 15 U.S.C. § 77vvv (1982), incorporates by reference the service and venue provisions of the Securities Act of 1933. *Id.*

> Section 44 of the Investment Companies Act of 1940 provides:
> Any suit or action to enforce any liability or duty created by, or to enjoin any violation of, this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

Id. § 80a-43.

> Section 214 of the Investment Advisers Act of 1940 provides:
> Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

Id. § 80b-14.

131. Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw.U. L. REV. 1, 69 (1984).

132. *See, e.g.* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1981) (involving contract claim), *cert. denied* 454 U.S. 1148 (1982); Walpex Trading v. Yacimientos Petroliferos, 712 F. Supp. 383, 386-88 (S.D.N.Y. 1989) (same); Olsen v. Government of Mexico, 729 F.2d 641, 643 (9th Cir.) (involving tort claim), *cert. denied*, 469 U.S. 917 (1984).

FSIA cases. Nationwide service of process, therefore, is not appropriate under the Act.

Personal jurisdiction doctrine originally rested on notions of sovereignty.[133] Because courts determined that each state had exclusive power over all persons within its borders, each state could render binding judgments in any suits brought against those persons.[134] Additionally, courts held that a state court could render a valid and enforceable judgment concerning the ownership of or title to in-state property, regardless of the whereabouts of the defendant, because the state also had sovereign power over all property within the state's borders.[135] Courts that compare the borders of the United States to the borders of a state and conclude that courts constitutionally can require any defendant physically present within or having minimum contacts with the United States to litigate in any federal court follow the sovereignty approach to personal jurisdiction.[136] The sovereignty approach, however, ignores the concern for fairness that the Supreme Court has displayed since *International Shoe* and ignores *International Shoe*'s requirement that before a court constitutionally can exert power over a defendant the court must make an estimate of the inconveniences that would result from a trial away from the defendant's home or principal place of business.[137] By focusing solely on the boundaries of the forum, the sovereignty approach allows distant litigation in which the defendant may be seriously inconvenienced. In the case of an instrumentality of a foreign sovereign, defending a suit in a forum that is distant from the agency's place of business would result in inconvenience comparable to that an American business would experience in the same situation. The interest in convenience of the foreign state instrumentality, therefore, should receive as much consideration as that of the domestic business.

The sovereignty approach also ignores the huge difference in size between the territory of one state and the territory of the entire country.[138] The inconvenience that geography can impose is increased when the courts of the forum literally span the continent. In terms of due process analysis, this difference in degree should be significant because the larger the forum, the greater the potential inconvenience to a defendant who is forced to

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133. *See* J. FRIEDENTHAL, CIVIL PROCEDURE § 3.2 (1985) (discussing traditional bases of courts' exercise of personal jurisdiction).

134. *See id.* (discussing traditional bases for courts' exercise of personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (stating that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory).

135. *See* J. FRIEDENTHAL, *supra* note 133, § 3.2 (discussing traditional bases for courts' exercise of personal jurisdiction); Pennoyer v. Neff, 95 U.S. 714 (1877) (holding that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory).

136. *See* Fullerton, *supra* note 131, at 19 (discussing application of sovereignty theory in personal jurisdiction analysis).

137. International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

138. *See* Fullerton, *supra* note 131, at 19 (determining that sovereignty theory ignores difference in size between state and entire country).

defend a suit away from the defendant's principle place of business. The rationale advanced to justify the view that the Constitution offers no protection regarding the place of trial within the federal court system focuses on article III of the United States Constitution.[139] Article III provides that the government vests federal judicial power in the Supreme Court and in any lower courts that Congress may establish.[140] Article III does not mention geographical constraints on the power of Congress to organize these lower federal courts. The Constitution, therefore, does not mandate the congressional decision to organize federal district courts along state lines and, consequently, Congress could change the organization of the federal court system. In fact, the text of the Constitution does not prohibit Congress from creating one federal judicial district covering the entire country.[141] Accordingly, some commentators argue that, if Congress can create a single federal district court and require all defendants to appear in that court, certainly Congress has the power to authorize each federal court to exercise personal jurisdiction over all defendants located in or having minimum contacts with any portion of the United States.[142]

Adherents to the view that article III gives Congress unfettered power to authorize nationwide personal jurisdiction either ignore the due process clause or presume that the clause does not modify article III. The followers of this view mistakenly read article III in isolation. Although other provisions of the Constitution limit federal government action,[143] the fact that article III contains no limits on the power of Congress to organize the lower federal courts does not mean that Congress has unrestrained power in the matter. Instead, courts must read article III as part of a unified document and interpret article III, as much as possible, to be in harmony with other constitutional provisions, including the due process clause.[144] Actually, courts have declared that the mere fact that the legislature enacts an amendment indicates that the legislature intended to change the original

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139. *See id.* (discussing impact of article III on personal jurisdiction analysis).

140. U.S. CONST. art. III, § 1. Article III, § 1 of the Constitution provides:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Id.

141. *See id.* (leaving establishment of lower federal court system to Congress).

142. *See* United States v. Union Pac. R.R., 98 U.S. 569, 603 (1878) (determining that Congress could create one federal trial court with nationwide jurisdiction).

143. *See* U.S. CONST. amend. I (prohibiting Congress from passing laws that abridge freedom of speech); U.S. CONST. amend. V (prohibiting federal government from taking life, liberty, or property without due process of law); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment).

144. *See* C. BLACK, DECISION ACCORDING TO LAW: THE 1979 HOLMES LECTURES (1981) (arguing for approach to constitutional analysis that emphasizes overall structure of Constitution).

act by creating a new right or withdrawing an existing one.[145] Therefore, if the due process clause and article III conflict, the more recent part of the Constitution takes precedence over article III. Thus, the due process clause would take precedence over article III.

Moreover, the population growth and dispersion that has occurred during the past 200 years well may limit the broad congressional power in article III to create courts. Although for an early Congress to have created only one nationwide federal judicial district with all litigation centered in the nation's capital might have seemed reasonable, the premise that Congress now constitutionally can create one nationwide judicial district and direct that all proceedings take place in one city is doubtful because of the limitations imposed by the due process clause.[146]

Additionally, supporters of the sovereignty theory cannot justify the theory on the ground that it greatly simplifies litigation. The Supreme Court has stated that if "the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice,' that cost is too high."[147] Furthermore, the sovereignty approach to personal jurisdiction allows harassment of defendants. Plaintiffs have been known to file suit in an inconvenient place for their adversaries, even at some inconvenience to the plaintiffs.[148] The sovereignty approach makes this practice constitutionally permissible as long as the defendant has minimum contacts with the United States.[149]

In sum, Congress enacted the Foreign Sovereign Immunities Act to regularize suits involving foreign sovereign defendants.[150] Consequently, the FSIA provides a means for courts to gain personal jurisdiction over foreign defendants that is based on the distinction between a foreign state's public and private acts.[151] Some courts interpreting the Act have determined that a foreign defendant's contacts with the United States as a whole are sufficient to confer personal jurisdiction on any federal district court.[152] In *Texas Trading* the Second Circuit determined that the national contacts

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145. *See* General Motors Corp. v. Ruckelshaus, 724 F.2d 979, 992-94 (D.C. Cir. 1983) (holding that amendment to act indicates legislature's intent to change original act); *In re* Bennett, 338 F.2d 479, 482-83 (6th Cir. 1964) (same); Magnolia Petroleum Co. v. Carter Oil Co., 218 F.2d 1, 5-6 (10th Cir. 1954) (same); C. SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, §§ 22.30-.32 (4th ed. 1972).

146. *See* Fullerton, *supra* note 131, at 32 (discussing effect of change in demographics on interpretation of article III).

147. Shaffer v. Heitner, 433 U.S. 186, 211 (1977).

148. *See* Gulf Oil v. Gilbert, 330 U.S. 501, 507 (1947) (noting that forum in which plaintiff filed suit was inconvenient to plaintiff).

149. *See* 28 U.S.C. § 1391(f) (limiting plaintiffs' choice of forum under FSIA); *supra* note 116 (discussing effect of FSIA venue provisions on due process analysis).

150. *See supra* notes 27-33 and accompanying text (discussing purpose of FSIA).

151. *See supra* notes 31-32 and accompanying text (discussing Congress' codification of restrictive theory of sovereign immunity in FSIA).

152. *See supra* notes 71-104 and accompanying text (discussing courts that have required national contacts under FSIA).

approach to FSIA personal jurisdiction analysis was proper.[153] To support the national contacts approach, the Second Circuit relied on cases upholding the constitutionality of nationwide service of process under federal securities and antitrust laws.[154] The FSIA, however, is fundamentally different than the securities and antitrust laws.[155] The Second Circuit's analogy, therefore, is inappropriate and courts should examine forum state contacts, not national contacts, in analyzing personal jurisdiction under the FSIA. Additionally, the national contacts approach ignores the Supreme Court's requirement of fairness in the exercise of personal jurisdiction.[156] Consequently, courts should remain true to the fairness requirement and require contacts between the foreign sovereign defendant and the forum state before exercising personal jurisdiction under the FSIA.

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153. *See supra* notes 71-92 and accompanying text (discussing Second Circuit's opinion in *Texas Trading*).

154. *See supra* notes 119-32 and accompanying text (discussing application of securities and antitrust cases to FSIA cases).

155. *See supra* notes 120-32 and accompanying text (discussing difference between FSIA and securities and antitrust laws).

156. *See supra* notes 45-70 and accompanying text (discussing Supreme Court's fairness requirement in minimum contacts analysis).