Washington and Lee Law Review Online

Volume 75 | Issue 2 Article 3

5-9-2019

If the Shoe Fits: Rethinking Minimum Contacts and the FSIA Commercial Activity Exception

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Recommended Citation

Jacqueline M. Fitch, *If the Shoe Fits: Rethinking Minimum Contacts and the FSIA Commercial Activity Exception*, 75 WASH. & LEE L. REV. ONLINE 123 (2019), https://scholarlycommons.law.wlu.edu/wlulr-online/vol75/iss2/3

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If the Shoe Fits: Rethinking Minimum Contacts and the FSIA Commercial Activity Exception

Jacqueline M. Fitch*

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I. Introduction

When United States citizens initiate legal action against a foreign entity, they face a significant jurisdictional obstacle—the Foreign Sovereign Immunities Act (FSIA).[1] The FSIA provides a general grant of immunity to foreign states and their instrumentalities from United States court jurisdiction;[2] however, it establishes a number of exceptions where a foreign sovereign's acts are subject to adjudication in the United States.[3] Prior to the FSIA, the United States exercised absolute sovereign immunity, leaving any citizen injured by foreign state action with no remedy.[4] But increased international commerce during the twentieth century led to the application of a more restrictive interpretation of immunity and the adoption of the FSIA's commercial activities exception.[5] The commercial activities exception contains three clauses, each providing grounds for lifting a foreign state's immunity when a state's commercial act impacts the United States.[6] This Note examines the third clause of the commercial activities exception—the "direct effect" clause. The direct effect clause provides an exception to the grant of immunity for "an act outside the territory of the United States in connection with a

1. 28 U.S.C. §§ 1602–1611 (2012).

2. *See* 28 U.S.C. § 1604 ("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.").

3. *See* 28 U.S.C. §§ 1605–1607 (outlining exceptions in addition to the commercial activities exception, including waiver, state-sponsored terrorism, and noncommercial tortious activity).

4. *See infra* Part III.A (discussing the international law principles behind the theory of absolute sovereign immunity).

5. *See infra* Part III.B (discussing the political motivations for codifying the application of restrictive sovereign immunity).

6. *See infra* notes 183–187 (detailing the three clauses of the commercial activities exception and the jurisdictional requirements for each clause).

commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[7]

Interpreting the direct effect clause has created confusion among the courts—particularly when determining the clause's personal jurisdiction requirements.[8] Initial interpretations of the direct effect clause divided courts on what constituted a "direct effect" in the United States. The first theory required that an activity caused an effect that was "substantial and foreseeable," while the second theory evaluated if the effect was "sufficiently direct" that Congress would have wanted a United States court to hear the case.[9] In its attempt to provide clarity on the clause's scope, the Supreme Court held in *Republic of Argentina v. Weltover*,[10] that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity."[11]

While the *Weltover* holding established criteria for acts constituting a "direct effect," the opinion remained silent on the clause's personal jurisdiction implications.[12] In *Weltover*, both parties raised the issue of applying a minimum contacts analysis, established by the Court in *International Shoe Co. v. Washington*,[13] which requires that an entity have sufficient minimum contacts with the forum state before that state's court can assert personal jurisdiction.[14] Ultimately, the Court did not determine if the direct effect clause required a minimum contacts analysis; rather, it declined to address the issue and left the question open.[15]

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7. 28 U.S.C. § 1605(a)(2).

8. *See infra* Part IV (outlining various courts' interpretations of the meaning of direct effect and the clause's personal jurisdiction requirements).

9. *See infra* Part IV.A (detailing the circuit split resulting from courts' initial interpretations of the direct effect clause).

10. 504 U.S. 607 (1992).

11. *Id.* at 618.

12. *See infra* Part IV.A (discussing that some circuits adopted additional requirements of substantiality and foreseeability).

13. 326 U.S. 310 (1945).

14. *See id.* at 316 (stating that due process required minimum contacts "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (citations omitted)).

15. *See Weltover*, 504 U.S. at 619 ("Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause, we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test.").

Following *Weltover*, the Sixth and Ninth Circuits split in their interpretations of the direct effect clause's personal jurisdiction requirement. In 2001, the Ninth Circuit in *Corzo v. Banco Central de Reserva del Peru*[16] analyzed the personal jurisdiction element by extending due process protection to a Peruvian government bank.[17] The court determined that asserting personal jurisdiction required a nexus between the activity of the foreign state and the cause of action—that connection required satisfying the minimum contacts test.[18] In reaching its decision, the Ninth Circuit emphasized the structure, purpose, and legislative history of the FSIA.[19] Contrarily, in 2016, the Sixth Circuit concluded in *Rote v. Zel Custom Manufacturing LLC*[20] that a foreign state did not need minimum contacts for personal jurisdiction under the direct effect clause.[21] The court found that the phrase "causes a direct effect in the United States" unambiguous,[22] and because it could resolve the issue by applying the plain language of the statute, examining the FSIA's legislative history was unnecessary.[23]

The question explored in this Note is whether, under the direct effect clause of the FSIA commercial activities exception, a foreign sovereign must have minimum contacts with the United States in order for a U.S. court to assert personal jurisdiction over the entity. Examining personal jurisdiction over foreign states under the direct effect clause requires exploring the interaction between constitutional law and principles of international law. The

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16. 243 F.3d 519 (9th Cir. 2001).

17. *See id.* at 525–26 (concluding that personal jurisdiction under the direct effect clause incorporates a minimum contacts analysis).

18. *See id.* at 526 (determining that a foreign state had insufficient contacts with the United States, so jurisdiction was improper and any incidental effects were irrelevant).

19. *See id.* at 523 (noting that the "waiver exception to sovereign immunity must be narrowly construed").

20. 816 F.3d 383 (6th Cir. 2016).

21. *See id.* at 394 (stating that following a minimum contacts analysis adds an unnecessary requirement to the statute).

22. *See id.* at 395 (arguing that the Ninth Circuit went beyond the plain meaning of the FSIA's terms by reading in additional statutory requirements).

23. *See id.* at 392–93 (stating that even if the court looked at the legislative history, the minimum contacts argument was still unpersuasive as it merely added "'unexpressed requirement[s],' rather than resolve any inherent ambiguity" (citing Republic of Arg. v. Weltover, 504 U.S. 607, 618 (1992).

minimum contacts analysis highlights the tension between applying constitutional due process protection to a foreign state, while simultaneously asserting jurisdiction over its commercial activities. Denying jurisdiction over a foreign sovereign under the Due Process Clause may defeat the intent of the FSIA's immunity exceptions created to provide relief for U.S. plaintiffs injured by foreign states. Deciding questions of personal jurisdiction over foreign entities requires identifying the goals of foreign sovereign immunity, why the FSIA established exceptions to that immunity, and what constitutional protections the United States should provide to foreign states.

This Note proceeds as follows: Part II of this Note examines personal jurisdiction under the Due Process Clause and how courts have applied due process protections to nontraditional entities.[24] Part III discusses the doctrine of foreign sovereign immunity, concerns that led Congress to pass the FSIA, and the purpose of the commercial activities exception.[25] Part IV explains the current circuit split involving the minimum contacts requirement following the guidance from the Supreme Court in *Weltover*.[26] Part V concludes by arguing that recognizing foreign sovereigns as "persons" under the Due Process Clause is improper, and that reading a minimum contacts test into the direct effect clause is contrary to the structure and intent of the FSIA commercial activities exception.[27]

II. Applying Due Process Protections to Foreign States

The minimum contacts test established in *International Shoe Co. v. Washington*[28] provides protection against unconstitutional

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24. *See infra* Part II (detailing how courts have applied due process protection to foreign corporations, aliens, and domestic states).

25. *See infra* Part III (discussing the restrictive theory of sovereign immunity and its impact of the development of the commercial activities exception).

26. *See infra* Part IV (detailing the current circuit split over whether a minimum contacts test is required to assert personal jurisdiction under the direct effect clause).

27. *See infra* Part V (arguing that the statutory provisions in the FSIA provide the appropriate personal jurisdiction criteria).

28. 326 U.S. 310 (1945).

exercises of personal jurisdiction. Deciding if a minimum contacts analysis is relevant to a foreign state requires examining what protections a foreign state receives under the Due Process Clause. The critical determination is whether a foreign state is a "person" for purposes of due process. This Part examines personal jurisdiction applied to nontraditional "persons" and what constitutional protections, if any, should apply to foreign states.

A. Personal Jurisdiction and the Minimum Contacts Test Established in International Shoe

Before discussing the application of a minimum contacts test to a foreign entity, it is helpful to examine the origin of the personal jurisdiction doctrine. Personal jurisdiction developed under a theory of territorialism—that a state's borders defined the limits of its jurisdiction.[29] Strict territorialism proved difficult to apply as modern commerce evolved to include cross-border transactions, leading the Supreme Court to adopt a more flexible standard to accommodate increasing interstate commerce.[30]

1. The Territorial Approach to Jurisdiction Prior to International Shoe

Prior to the Due Process Clause of the Fourteenth Amendment, personal jurisdiction in the United States was settled under common law, which was rooted in international law principles.[31] Common law rested on a theory of territorial

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29. *See* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 8–9 (2006) (describing that jurisdiction was based on the theory that each sovereign had jurisdiction to bind persons and things within its physical borders).

30. *See* Danielle Keats Citron, *Minimum Contacts in a Borderless World: Voice Over Internet Protocol and the Coming Implosion of Personal Jurisdiction Theory*, 39 U.C. DAVIS L. REV. 1481, 1506–07 (2006) (discussing that the modern changes in transportation and communication prompted the Supreme Court to expand jurisdiction).

31. *See* Roger H. Trangsrud, *The Federal Common Law of Personal Jurisdiction*, 57 GEO. WASH. L. REV. 849, 872 (1989) (discussing that applying common law principles was appealing to courts because its straightforward application yielded consistent results).

jurisdiction—that each sovereign had jurisdiction over the people and property within its physical borders.[32] The only constitutional provision relevant to jurisdiction was the Full Faith and Credit Clause requiring one state to recognize another state's final judgment.[33] But the Clause did not carry significant weight against the common law territorial personal jurisdiction restraint. The Supreme Court determined in *D'Arcy v. Ketchum*[34] that the Full Faith and Credit Clause did not modify the common law limitations on enforcing another state's judgement.[35] Following *D'Arcy*, the Clause was understood as an exception to the common law, not a provision which defeated the international principles of territorialism.[36]

In 1877, the Supreme Court's opinion in *Pennoyer v. Neff*[37] reinforced the idea of territorial jurisdiction.[38] *Pennoyer* concerned the validity of a default judgment entered by an Oregon state court where it asserted personal jurisdiction over the defendant, even though he was neither a resident nor a domicile of that state.[39] The Court recognized that following the ratification of the Fourteenth Amendment, a party could challenge this type of judgment on the ground that it violated due process for a court to determine rights and obligations of parties not subject to its jurisdiction.[40] The

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32. *See* Parrish, *supra* note 29, at 8 (noting that under international law, territorial jurisdiction came about as an important limit on independent sovereigns' actions towards each other).

33. *See id.* at 8–9 (arguing that constitutional law had no bearing on jurisdiction).

34. 52 U.S. 165 (1850).

35. *See id.* at 174 (determining that personal jurisdiction was proper when it conformed with well-established rules of international law).

36. *See* John N. Drobak, *The Federalism Theme in Personal Jurisdiction*, 68 IOWA L. REV 1015, 1025 (1983) (arguing that the Full Faith and Credit Clause did not displace international law as the original source of jurisdictional rules).

37. 95 U.S. 714 (1877), *overruled in part by* Shaffer v. Heitner, 433 U.S. 186 (1977).

38. *See* Parrish, *supra* note 29, at 11 ("As a result [of *Pennoyer*], presence within a forum state's territorial borders became the *sine qua non* standard for personal jurisdiction.").

39. *See Pennoyer*, 95 U.S. at 719 (outlining the Oregon statute that allowed for personal service on an individual's property).

40. *See id.* at 734 ("[D]ue process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered.").

Court determined that the Oregon state judgment was void—a plaintiff could only serve a nonresident defendant when the defendant was within the state's boundaries.[41]

While the *Pennoyer* decision reinforced the principles of territorial sovereignty found in international law, the Court accomplished this by grounding its decision in the Fourteenth Amendment, thereby associating territoriality with constitutional doctrine.[42] "*Pennoyer v. Neff* thus established the principle that a judgment is entitled to full faith and credit only if it satisfies the requirements of the Due Process Clause, for if it does not meet those requirements it is not properly enforceable even within the State which rendered it."[43]

2. International Shoe and the Minimum Contacts Requirement

The rise of corporations and an increase in interstate transactions made it difficult for courts in applying the rigid territorial principles set forth in *Pennoyer*.[44] Because corporations existed as separate "fictional" legal entities, courts initially recognized that the corporation was subject to personal jurisdiction only in its state of incorporation.[45] However, as corporations increasingly conducted business across state lines, multiple states developed an interest in asserting personal jurisdiction over their commercial activity.[46] As a result of the rise of interstate commerce, the Supreme Court adopted a less territorial approach in *International Shoe Co. v. Washington*[47]—a state may assert

41. *See id.* at 733 (distinguishing the requirement for proceedings impacting personal rights from in rem proceedings where the nature of the proceeding impacts a nonresidents property within the forum state).

42. *See* Parrish, *supra* note 29, at 10 (discussing that territorialism shaped the Court's interpretation of jurisdiction).

43. Philip B. Kurland, *The Supreme Court, the Due Process Clause, and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 573 (1958).

44. *See* Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 107 (2010) (stating that narrow territorial jurisdiction rules were "too inflexible to govern the modern reality of interstate corporate business").

45. *See id.* (discussing the initial limitations on personal jurisdiction over corporations).

46. *See id.* (noting that states other than the state of incorporation sought to adjudicate claims arising from corporations' activities).

47. 326 U.S. 310 (1945).

personal jurisdiction over a corporation, but only if the entity maintains sufficient minimum contacts with the forum state.[48]

In *International Shoe*, the Court had to determine if a Delaware corporation was subject to Washington state court jurisdiction because of its activities in Washington, and if so, if that jurisdiction was consistent with the Due Process Clause.[49] The defendant was incorporated in Delaware and had its principal place of business in Missouri.[50] While it maintained places of business in other states, it did not have an office in Washington and made no contracts for sale or purchase of merchandise in the state.[51] During a period of three years, the corporation employed thirteen salespeople who resided in Washington.[52] These employees generated $31,000 each year in commission based on activities solely within Washington.[53] These employees had authority to solicit orders from prospective buyers at prices fixed by the corporation, but they had no authority to enter into contracts or make collections on the corporation's behalf.[54] The Washington-based salespeople transmitted orders to the corporation's principal place of business in Missouri, and all merchandise was shipped from outside of Washington to the purchaser within the state.[55]

The commissioner of the state unemployment compensation fund issued an order and notice of assessment of delinquent contributions under a statute requiring employers to contribute to

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48. *See id.* at 316 (stating that a corporation's presence can only manifest through the acts of its authorized agents).

49. *See id.* at 311 (outlining the claim concerning unpaid contributions to Washington's unemployment compensation fund).

50. *See id.* at 313 (detailing the corporation's footwear manufacturing and sales operation).

51. *See id.* (stating that the corporation maintained places of business outside of Washington for manufacturing and distribution).

52. *See id.* (noting that these salespeople were the corporation's only agents in Washington).

53. *See id.* (discussing that while the salespeople lived in Washington, they reported to supervisors in Missouri).

54. *See id.* (stating that the employees had limited authority to act for the corporation).

55. *See id.* (discussing how the corporation filled orders from Washington customers).

the state's fund.[56] The statute authorized the commissioner to serve notice on an employer through personal service if the employer was in the state, or alternatively to mail it to the last known address.[57] The commissioner served notice on one of the sales agents located in Washington, and also mailed a copy to the corporation's headquarters in Missouri.[58] International Shoe moved to set aside the order and notice of assessment, claiming that it neither had authorized agents in Washington, nor conducted business in the state.[59] According to the corporation, it did not maintain sufficient activities in Washington, so subjecting it to the state court's jurisdiction violated due process.[60]

Applying the minimum contacts standard, the Court determined that the activities on behalf of the corporation in Washington were "neither irregular nor casual."[61] The corporation maintained continuous activities in Washington which provided it with great financial benefit.[62] Accordingly, because the corporation received the benefit of state law protections over its activities, it must answer to the state's courts when it adjudicates a matter arising from those acts.[63] The corporation had "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there."[64]

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56. *See id.* at 311 (noting that the state of Washington administered this unemployment fund).

57. *See id.* at 312 (describing the statutory requirements for service on an employer to notify it of the commissioner's assessment of delinquent contributions).

58. *See id.* (noting that either method alone satisfied proper service).

59. *See id.* (stating that International Shoe argued that it did not meet the statutory definition of an employer).

60. *See id.* at 315 (noting that International Shoe further argued that because it was not present in the state, Washington's fine assessment violated due process).

61. *See id.* at 320 (describing the corporation's presence in Washington as systematic and continuous).

62. *See id.* (noting that the corporation obtained significant interstate business from its operations in Washington).

63. *See id.* (discussing that the state court had jurisdiction because the claim arose from continuous activities in Washington).

64. *Id.*

The Court recognized that the territorial principles set forth in *Pennoyer* led to an outdated analysis when applied to modern, interstate corporations.[65] Chief Justice Stone set out the new minimum contacts standard, stating that:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[66]

The minimum contacts standard stemmed from careful consideration of unique corporate factors rendering a territorial analysis of personal jurisdiction imprecise. First, although a corporation "exists" only as a legal fiction, its "presence" can only be determined by the actions of its authorized agents.[67] Second, "presence" in a state is satisfied where a corporation operates continuously, but casual or isolated activities do not support a finding of general jurisdiction.[68] Finally, even if a corporation has insufficient acts in the state to establish general jurisdiction, certain acts by their nature subject the corporation to the jurisdiction of the forum state.[69]

These considerations led to the Court's conclusion that using states' physical boundaries to scrutinize a corporation's due process protections for purposes of personal jurisdiction produced an inaccurate analysis.[70] Rather, a due process analysis turned on

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65. *See id.* at 316 ("Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him." (citing Pennoyer v. Neff, 95 U.S. 714, 733 (1877))).

66. *Id.* (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

67. *See id.* ("[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.").

68. *See id.* at 317 ("[I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state [on] the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.").

69. *See id.* at 318 ("[D]ecisions holding the corporation amenable to suit have been supported by resort to the legal fiction that it has given its consent to service and suit, consent being implied from its presence in the state through the acts of its authorized agents.").

70. *See id.* at 319 ("It is evident that the criteria by which we mark the

"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."[71] Following *International Shoe*, an inquiry into personal jurisdiction focused on the relationship between the forum state, the defendant, and the nature of the underlying claim; sovereign territorial authority, while not irrelevant, took a subordinate role in the analysis.[72]

B. Foreign States' Right to Due Process

Before a court may hear a case, it must have both subject matter jurisdiction and personal jurisdiction over the parties.[73] While subject matter jurisdiction is typically determined by statute or the nature of the claim,[74] personal jurisdiction involves considerations of fairness towards the defendant.[75] In a claim involving a foreign entity, a finding of minimum contacts satisfies the due process requirements for specific jurisdiction.[76] When the

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boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative.").

71. *Id.*

72. *See* Parrish, *supra* note 29, at 13 (describing that *International Shoe* signaled a dramatic shift in jurisdiction theory).

73. *See* FED. R. CIV. P. 12(b)(1) (requiring dismissal for lack of subject matter jurisdiction); FED. R. CIV. P. 12(b)(2) (requiring dismissal for lack of personal jurisdiction).

74. *See* Pauline Whittinghill Klyce Pennoyer, *A New Frontera: Foreign Sovereign Immunity, Arbitral Awards and a Waive Goodbye to Assets*, 49 COLUM. J. TRANSNAT'L L. 115, 120 (describing subject matter jurisdiction as more clearly determinable).

75. *See id.* at 121 ("While the [personal jurisdiction] doctrine has evolved over several centuries, basic concerns of fundamental fairness toward the defendant remain at its center.").

76. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984)

> Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation.

defendant is a private party, a finding of either general or specific jurisdiction suffices.[77]

When Congress drafted the FSIA, it imposed specific exceptions to a foreign state's general immunity. Federal district courts have original subject matter jurisdiction over these civil claims when an FSIA exception applies.[78] The court is only required to determine that the foreign state's action giving rise to the claim qualifies under one of the express statutory exceptions.[79] Additionally, courts have personal jurisdiction over a state so long as service is made consistent with the requirements set out in the Act.[80] Beyond these statutory grants of jurisdiction, courts have come to varying conclusions about whether the FSIA imposes additional requirements.[81]

Determining whether a foreign state is entitled to constitutional protections under the Due Process Clause is essential to determining if the direct effect clause of the commercial activities exception requires minimum contacts for personal jurisdiction.[82] The Supreme Court avoided addressing this issue in *Republic of Argentina v. Weltover, Inc.*[83] In *Weltover*, the Court did not address the question of minimum contacts because it found the issue irrelevant provided that the foreign

77. *See id.* (discussing jurisdiction over a nonresident defendant).

78. *See* 28 U.S.C. § 1330(a) (2012) ("The district courts shall have original jurisdiction . . . 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 . . . .").

79. *See* 28 U.S.C. § 1605(a) (2012) (providing the statutory grounds for subject matter jurisdiction).

80. *See* 28 U.S.C. § 1330(b) (2012) ("Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.").

81. *See* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 400 (2d Cir. 2009) (determining that foreign instrumentalities are not afforded Due Process Clause protections); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 97 (D.C. Cir. 2002) (recognizing that safeguards under the Due Process Clause are inapplicable to foreign states); Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) (finding that a constitutional due process analysis supports personal jurisdiction over a foreign state).

82. *See supra* note 66 and accompanying text (describing the minimum contacts test).

83. 504 U.S. 607 (1992).

sovereign had clearly established minimum contacts with the United States, making the inquiry unnecessary.[84] Deciding whether the FSIA requires minimum contacts for jurisdiction has led to ambiguity and inconsistent application.[85] In several decisions following *Weltover*, courts have held that the minimum contacts test is inapplicable as foreign states are not entitled to constitutional protection.[86]

An entity must qualify as a "person" before it receives protection under the Due Process Clause. The Supreme Court has interpreted "person" more broadly to include entities other than human beings.[87] While the Supreme Court has never clearly addressed a foreign state's right to due process, courts have ruled on related issues: foreign corporations, aliens, and domestic states.

First, courts have regularly recognized that a foreign private corporation is a "person" for purposes of due process.[88] The Supreme Court applied this corporate personhood analysis in *Helicopteros Nacionales de Colombia, S.A. v. Hall*,[89] determining that the foreign corporation's contacts with the state of Texas were insufficient to establish personal jurisdiction.[90] The Colombian

84. *See id.* at 619 ("Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause . . . we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test.").

85. *See infra* Part IV (detailing the current circuit split on incorporating a minimum contacts test).

86. *See* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 694 (7th Cir. 2012) ("[T]he 'commercial activity' inquiry under the FSIA is not congruent with a general personal jurisdiction inquiry . . . ."); Wyatt v. Syrian Arab Republic, 266 Fed. App'x. 1, 2 (D.C. Cir. 2008) (determining that foreign states are not protected by the Fifth Amendment); Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 57 (D.D.C. 2012) ("Foreign sovereigns cannot use the constitutional constraints of the Fifth Amendment Due Process Clause to shield themselves from large punitive damages awards under the Foreign Sovereign Immunities Act terrorism exception . . . .").

87. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 111 (1987) (evaluating a foreign corporation's right to due process).

88. *See* Karen Halverson, *Is a Foreign State a "Person"? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 136 (2001) (stating that while it is clear that a foreign corporation is a person for due process purposes, "the rationale for this proposition has gone unexplained").

89. 466 U.S. 408 (1984).

90. *See id.* at 418 (determining that the brief presence of the corporation's employees in Texas were insignificant).

corporation, Helicol, crashed a helicopter while working on a Peruvian pipeline, killing four U.S. citizens in the accident.[91] The decedents were employed by a Peruvian company, Consorcio, that contracted with Helicol for work on the pipeline.[92] The contract negotiation between Consorcio and Helicol took place in Texas.[93] Helicol's contact with Texas outside of the negotiation included purchasing helicopters from a Texas company and sending its employees to the state for training.[94] The Court determined that Helicol's contact with Texas was insufficient to establish personal jurisdiction over the corporation for wrongful death actions brought in Texas. Helicol's employee's trips to Texas were not "continuous and systematic" and could therefore not establish minimum contacts justifying Texas's assertion of personal jurisdiction.[95]

Shortly after *Helicopteros*, the Court decided *Asahi Metal Industry Co. v. Superior Court*,[96] where it added the "substantial connection" requirement to the minimum contacts analysis for a foreign corporation.[97] In *Asahi*, the Court held that minimum contacts with a forum required more than the foreseeability that a corporation's product would enter the forum.[98] To establish personal jurisdiction under a minimum contacts analysis, there must be a substantial connection between a defendant and the forum state—this connection only arises from purposeful action

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91. *See id.* at 410 (stating that the flight was part of Helicol's routine business of providing helicopter transportation for oil and construction companies in South America).

92. *See id.* (discussing that Consorcio needed Helico helicopters to move personnel and equipment in and out of the construction area).

93. *See id.* (noting the Helio's CEO flew to Houston for the negotiations).

94. *See id.* at 411 (stating that Helio purchased helicopters and equipment from Bell Helicopter Company in Fort Worth and sent employees to the Bell plant for training).

95. *See id.* at 416 (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 320 (1945)) (noting that one trip by the CEO for negotiations was not sufficient contact).

96. 480 U.S. 102 (1987).

97. *See id.* at 112 (determining that the Due Process Clause requires more than the corporation's mere awareness that its product enters the forum state through the stream of commerce).

98. *See id.* ("The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.").

directed toward the forum.[99] Supreme Court decisions continue to reaffirm that a foreign corporation is a "person" under the Due Process Clause and that courts must make a finding of minimum contacts to assert personal jurisdiction.[100]

Second, the Court has interpreted constitutional provisions as applied to aliens. Aliens may be afforded some constitutional protections, but generally have not received the same level of protection as U.S. citizens.[101] The Supreme Court has extended protection to resident aliens under the Equal Protection Clause in the context of discriminatory state welfare laws,[102] and under the Due Process Clause concerning employment opportunities under federal hiring regulations.[103] Additionally, the Court recognized certain constitutional protections for illegal aliens during post-removal proceedings.[104] These decisions have extended protection where the conduct occurs within the United States, but the Supreme Court has refused to extend due process protections extraterritorially when aliens suffer constitutional rights violations outside of the United States.[105] In part, this reasoning stemmed from the idea that extraterritorial matters should be governed by principles of international law.[106] The dissimilar

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99. *See id.* at 113 (determining that asserting personal jurisdiction over a foreign corporation without this substantial connection violates traditional notions of fair play).

100. *See* Daimler AG v. Bauman, 134 S. Ct. 746, 749 (2014) (deciding that for a U.S. court to have general jurisdiction over a foreign corporation, due process requires that the corporation is essentially "at home" in the forum state (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011))).

101. *See* Halverson, *supra* note 88, at 136 (noting that while aliens have some due process protections, they are much "narrower" than protections for citizens).

102. *See* Graham v. Richardson, 403 U.S. 365, 376 (1971) (holding "that a state statute that denies welfare benefits to resident aliens . . . violate[s] the Equal Protection Clause").

103. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 116–17 (1976) (determining that the Civil Service Commission Regulations deprived resident aliens of employment opportunities).

104. *See* Zadvydas v. Davis, 533 U.S. 678, 688 (2001), *superseded by regulation*, 8 C.F.R. § 241.14 (determining that illegal aliens may raise constitutional challenges during post-removal detention proceedings).

105. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (determining that an alien had no Fourth Amendment protection against a warrantless search in Mexico because the alien had not developed substantial connections with the United States).

106. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936)

constitutional treatment of foreign corporations and aliens leads to conflicting interpretations of what entities constitute a "person" for due process protections.[107]

Finally, courts have determined that domestic states are not "persons" for purposes of due process.[108] The Supreme Court initially examined this issue in *South Carolina v. Katzenbach*,[109] when South Carolina sought an injunction against the enforcement of a federal statute, claiming it denied the state's right to due process.[110] The Court determined that the definition of "person" could not be construed to include states.[111] Although *Weltover* did not require the Court to determine a foreign state's right to due process, the Court cites to *Katzenbach* in the Due Process Clause section of the *Weltover* opinion.[112] Since then, courts have interpreted this as an indication that the Court did not intend to extend due process protection to foreign states if it would not extend the same protection to domestic states.[113] Prior to *Weltover*, the Second Circuit's decision in *Texas Trading & Milling*

("[O]perations of the nation in such [foreign] territory must be governed by treaties, international understandings and compacts, and the principles of international law.").

107. *See* Halverson, *supra* note 88, at 137 (arguing that the conflict may be reconciled by treating personal jurisdiction as a limit on U.S. sovereignty, separate from other rights the constitution provides).

108. *See* Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic, 582 F.3d 393, 399 (2d Cir. 2009) (refusing to treat foreign states and their instrumentalities as persons under the Due Process Clause); TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 302 (D.C. Cir. 2005) (holding that a foreign state and its agents are not persons for due process purposes); Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002) (rejecting the notion that a foreign state is a person under the Fifth Amendment).

109. 383 U.S. 301.

110. *See id.* at 323 (describing South Carolina's request for an injunction against enforcement of the Voting Rights Act of 1965).

111. *See id.* ("The word 'person' in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union. . . .").

112. *See* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992) (declining to determine if a foreign state is a "person" under due process while recognizing that precedent refused to acknowledge domestic states as "persons").

113. *See* Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393, 398–99 (2d Cir. 2009) ("*Weltover* did not require deciding the issue because Argentina's contacts satisfied the due process requirements . . . but the Court's implication was plain: If the 'States of the Union' have no rights under the Due Process Clause, why should foreign states?").

Corp. v. Federal Republic of Nigeria[114] determined that a foreign state was entitled to due process.[115] The court, resolving a question of immunity under the commercial activities exception, required that the foreign state receive due process scrutiny before the federal court could assert personal jurisdiction.[116] The *Texas Trading* decision pre-dated the Supreme Court's decision in *Weltover*, and in 2009 the Second Circuit decided *Frontera Resources Azerbaijan Corporation v. State Oil Company of Azerbaijan Republic*,[117] taking a different approach to applying due process to foreign states.[118] In *Frontera*, the court again confronted the issue of a foreign state's right to due process under the FSIA.[119] The court overruled its holding in *Texas Trading* in light of the *Weltover* decision.[120] The court noted: "[A]bsent some compelling reason to treat foreign sovereigns more favorably than 'States of the Union,' it would make no sense to view foreign states as 'persons' under the Due Process Clause."[121]

Determining the status of a foreign state raises difficult considerations of a foreign state's connection with the Constitution.[122] While the Supreme Court has not spoken extensively on this issue, some scholarship suggests that foreign

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114. 647 F.2d 300 (2d. Cir. 1981), *overruled by* Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393 (2d Cir. 2009).

115. *See id.* at 308 ("[E]ach finding of personal jurisdiction under the FSIA requires . . . a due process scrutiny of the court's power to exercise its authority over a particular defendant.").

116. *See id.* ("[T]he [FSIA] cannot create personal jurisdiction where the Constitution forbids it.").

117. 582 F.3d 393 (2d. Cir. 2009).

118. *See id.* at 400 (determining that a foreign state is not a "person" under the Due Process Clause).

119. *See id.* at 396 (noting that the foreign instrumentality did not dispute statutory jurisdiction under Section 1608 of the FSIA, rather that the district court failed to properly establish minimum contacts required for personal jurisdiction under due process).

120. *See id.* at 398 (arguing that *Weltover* stood for the principle that domestic states are not entitled to due process, therefore foreign states should not receive due process protection either).

121. *Id.* at 399 (quoting Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002)).

122. *See* Halverson, *supra* note 88, at 137 (noting difficult constitutional considerations as well as foreign policy implications).

states have no constitutional rights.[123] A number of issues arise when a foreign state is seen as a "person" under the Constitution—primarily that a foreign state has no constitutional relationship to the federal structure.[124] "When, on the other hand, a claim does not directly confront or conflict with the political branches' foreign policy, the federal courts should adjudicate the merits of foreign state claims by applying constitutional jurisprudence to sustain or reject the claim."[125] The Constitution does not explicitly detail how courts should treat foreign states with respect to the privileges that the Constitution grants to United States citizens, but it does anticipate the presence of foreign sovereigns and their involvement in federal judicial proceedings.[126] Although foreign states are significantly more engaged in commerce than earlier in history, the Constitution does not provide that foreign states are to receive the same treatment as domestic parties.[127]

III. The FSIA Commercial Activities Exception: A Legislative History

The current circuit split between the Ninth and Sixth Circuits highlights the role that the legislative history plays in courts' interpretation of the direct effect clause. The issue of personal jurisdiction under the FSIA becomes clearer in the full context of the concept of foreign sovereign immunity, the issues with absolute

123. *See id*. at 137–38 ("[T]he chief reporter for the Restatement [(Third) of Foreign Relations Law], Professor Henkin, has asserted elsewhere that foreign states simply 'have no constitutional rights' in the United States."); Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483, 487 (1987) ("To the extent that the Constitution is a social contract establishing a system of self-government, permanent outsiders such as foreign states seem to have little claim to invoke constitutional 'rights' against domestic political decisions.").

124. *See* Damrosch, *supra* note 123, at 489 ("[C]onstitutional claims against the actions of the federal political branches must fail on the merits because of the relationship of foreign states to the federal structure.").

125. *Id.*

126. *See* Frederick Watson Vaughan, *Foreign States are Foreign States: Why Foreign State-Owned Corporations Are Not Persons Under the Due Process Clause*, 45 GA. L. REV. 913, 933 (2011) (describing references to foreign entities in the Constitution).

127. *See id.* (noting that the purpose of the Constitution was to provide rights for citizens, not foreign entities).

immunity that led to the FSIA, and the purpose behind the commercial activities exception.

A. Sovereign Immunity in International Law

The doctrine of foreign sovereign immunity reflects the fundamental principle of international law that a foreign government and its instrumentalities shall not be subjected to another sovereign's domestic adjudication without its consent.[128] The ideas of sovereign independence of states and the dignity of coequal sovereigns are central to the notion of immunity.[129] Historically, the doctrine developed as an attempt to strike a balance of power between the nation-states of Europe.[130] At the time, the doctrine required states to refrain from action that would impede another state's ability to manage its internal affairs.[131]

The United States judiciary first recognized foreign sovereign immunity in *The Schooner Exchange v. McFaddon*.[132] The U.S. plaintiff brought suit claiming rightful ownership of a vessel owned by France but found docked in a Philadelphia port.[133] The Court explained that each nation has exclusive and absolute jurisdiction over everything in its own territory.[134] However, Chief Justice

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128. *See* Daniel P. Roy III, *(Don't) Take Another Little Piece of My Immunity Baby: The Application of Agency Principles to Claims of Foreign Sovereign Immunity*, 84 FORDHAM L. REV. 1283, 1290 (2015) ("Sovereign immunity is understood to naturally flow from the bedrock principles of this system, namely the inviolability and equality of sovereign states . . . ." (internal citations omitted)).

129. *See* Andrew B. Pittman, *Ambassadorial Waiver of Foreign State Sovereign Immunity to Domestic Adjudication in United States Courts*, 58 WASH. & LEE L. REV. 645, 650 (2001) (describing that an exercise of authority over another state historically signified hostility).

130. *See* David P. Vandenberg, *In the Wake of* Republic of Austria v. Altmann*: The Current Status of Foreign Sovereign Immunity in United States Courts*, 77 U. COLO. L. REV. 739, 740 (2006) (tracing the initial system of sovereign immunity to the signing of the Treaty of Westphalia).

131. *See id.* at 740 (noting that sovereignty was essential to promoting stability).

132. *See* 11 U.S. 116, 136 (1812) (determining that a foreign sovereign could not be subject to another sovereign's judicial process without consent).

133. *See id.* at 147 (detailing the seizing of the ship in a Philadelphia port).

134. *See id.* at 136 ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.").

Marshall reasoned that any foreign sovereign coming within the territory of another foreign sovereign does so under an express or implied understanding of immunity—to hold otherwise would compromise the principles of independent sovereign nations.[135] Consequently, the French sovereign owner of the ship was protected from the jurisdiction of the United States court by an implied grant of immunity.[136] This decision laid the judicial framework for recognizing that law and practice of nations supported granting absolute immunity.[137] This practice continued for the next century and a half as the United States repeatedly granted absolute immunity, even as tensions about the doctrine arose. For example, in *Berizzi Brothers Co. v. Pesaro*,[138] the Court refused to accept the State Department's view that the United States should not grant immunity to foreign vessels engaged in commerce.[139] The Supreme Court relied on *The Schooner Exchange* holding to extend immunity in an action against a merchant ship owned by the Italian government engaged in commerce in New York.[140] The Court essentially refuted what the FSIA would later codify as the commercial activities exception.[141]

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135. *See id.* at 137 ("This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.").

136. *See id.* at 147 ("[T]he [ship] . . . must be considered as having come into the American territory, under an implied promise, that while necessarily within it . . . she should be exempt from the jurisdiction of the country.").

137. *See id.* at 136 ("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.").

138. 271 U.S. 562 (1926).

139. *See* Michael E. Jansen, *FSIA Retroactivity Subsequent to the Issuance of the Tate Letter: A Proposed Solution to the Confusion*, 10 NW. J. INT'L L. & BUS. 333, 345 (1989) (noting the rising tension over immunity between the political and Judicial Branches).

140. *See Berizzi Brothers Co.*, 271 U.S. at 572 ("This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.").

141. *See id.* (demonstrating the Court's lack of deference to State Department wishes).

B. Concerns Leading to the FSIA

The doctrine of absolute foreign sovereign immunity became more complicated in the twentieth century with the rise of foreign states and entities in international commerce.[142] Traditional policy concerns protecting a state's military, economic, and political activities from undue infringement remained valid concerns; however, as foreign enterprises increasingly entered commercial trade, private parties had no judicial remedy if a foreign state harmed their economic interests.[143] Immunity provided an unfair advantage to foreign states interacting with the private sector.[144]

In response, the theory of immunity divided into two distinct practices. Some states maintained absolute sovereign immunity, while other states denied immunity in situations where the claim was commercial or purely private.[145] This second application, known as the restrictive theory of immunity, emphasized the idea that immunity should not apply to all types of state action.[146] While the United States still practiced the theory of absolute immunity, many nations adopted the restrictive theory of sovereign immunity, subjecting the United States to suits in the countries to which it granted immunity.[147]

Despite the shift in other states to the restrictive theory of sovereign immunity, the federal courts continued to apply absolute immunity as a way to defer political questions to the Executive Branch or Congress.[148] In *Compania Espanola de Navegacion*

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142. *See* Roy, *supra* note 128, at 1291 (emphasizing increased criticism of absolute immunity during this time).

143. *See* Pittman, *supra* note 129, at 652 (highlighting a shift in contemporary policy rationales).

144. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 303 (1986) (noting the protection foreign states enjoyed in private commerce).

145. *See* Vandenberg, *supra* note 130, at 741 (noting that primarily the European powers began the more restrictive movement).

146. *See id.* at 742 (describing the commercial and private suits as nonpolitical state action).

147. *See* Roy, *supra* note 128, at 1291–92 (noting the asymmetrical application of immunity).

148. *See* Republic of Mex. v. Hoffman, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); Oetjen v. Cent. Leather Co., 246 U.S. 297, 311 (1918) ("The

Maritima, S.A. v. The Navemar,[149] the Supreme Court declared that extending sovereign immunity was primarily the right of the Executive Branch.[150] Generally, the courts would defer to the Executive's decision on immunity; however, if the Executive gave no input, the courts were competent to make their own determinations.[151]

In 1952, Jack Tate, the Acting Legal Adviser of the State Department, issued a letter, known as the Tate Letter, adopting the restrictive theory of sovereign immunity as the Department's policy.[152] The driving force behind the adoption was the inequality that stemmed from applying absolute immunity when so many other states practiced restrictive immunity.[153] Following the Tate Letter, the State Department continued to make suggestions to the courts using a uniform approach of restrictive sovereign immunity.[154] This process created a problem by allowing the Executive Branch to have power over judicial procedure.[155] While prior decisions defaulted to absolute immunity, decisions following the Tate Letter required courts to consider the State Department's recommendation instead of automatically granting absolute

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conduct of the foreign relations of our government is committed by the Constitution to . . . 'the political'[] departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

149. 303 U.S. 68 (1938).

150. *See id.* at 74 ("If the claim is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction.").

151. *See id.* at 76 (proceeding to determine immunity status).

152. *See* Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]; Jansen, *supra* note 139, at 334 (describing the letter as the Department's formal adoption of restrictive immunity).

153. *See* Tate Letter, *supra* note 152, ("[T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.").

154. *See* Vandenberg, *supra* note 130, at 745 (discussing the impact of using the same procedure with a different standard).

155. *See id.* (describing that the State Department had penultimate power over the courts).

immunity.[156] If a foreign state did not involve the State Department, courts made the sole decision on immunity.[157] The State Department's recommendations often turned on the identity of the sovereign defendant, rather than the nature of the claim.[158] Further, the State Department was not legally obligated to inform parties pursuing a claim against a foreign sovereign that it was recommending immunity.[159] Varying input on immunity from both the Judicial and Executive Branches led to unpredictable decisions.[160] The post-Tate Letter application negatively impacted the legal standards for immunity, foreign relations, and private litigants.[161] As foreign states increasingly engaged in commercial activities resulting in disputes, the State and Justice Departments urged Congress to act.[162]

C. Goals of the FSIA

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156. *See* Yonatan Lupu & Clay Risen, *Retroactive Application of the Foreign Sovereign Immunities Act:* Landgraf *Analysis and the Political Question Doctrine*, 8 UCLA J. INT'L L. & FOREIGN AFF. 239, 243–44 (noting that courts had difficulty distinguishing between a foreign sovereign's public acts and private acts for determining immunity).

157. *See id.* at 244 (emphasizing that State Department intervention was significant during this period).

158. *See* Stella Havkin, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of* De Sanchez v. Banco Central de Nicaragua, 10 HASTINGS INT'L & COMP. L. REV. 455, 461 (1987) ("Judicial decisions were influenced so significantly by executive advice that foreign sovereigns often applied directly to the State Department to acquire a grant of immunity.").

159. *See id.* (detailing that plaintiffs were subjected to harm due to a lack of knowledge).

160. *See* Lupu & Risen, *supra* note 156, at 244 (discussing the unclear rulemaking resulting from split branch intervention).

161. *See* H.R. REP. NO. 94-1487 (1976), at 8–9, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (detailing the conflicting legal input from the Executive and Legislative Branches, the incentive for foreign states to exert diplomatic influences, and the uncertainty to private litigants).

162. *See* David E. Gohlke, *Clearing the Air or Muddying the Waters? Defining "a Direct Effect in the United States" Under the Foreign Sovereign Immunities Act After* Republic of Argentina v. Weltover, 18 HOUS. J. INT'L L. 261, 267 (1995) (emphasizing a motivation to eliminate politically motivated, inconsistent application of immunity).

Congress passed the FSIA to resolve this growing inconsistency. The FSIA provides the sole method of obtaining jurisdiction over a foreign state.[163] The Act set out to achieve four main objectives:[164] (1) to codify the restrictive principle of sovereign immunity;[165] (2) to ensure uniform application of immunity;[166] (3) to provide a statutory procedure for making service on a foreign state;[167] and (4) to provide relief for a plaintiff with a judgment against a foreign state.[168] One of the major driving forces behind passing the FSIA was to transfer decision-making power from the political branches to the Judicial Branch.[169]

The structure of the legislation removed executive influence and provided principles for courts to use to determine jurisdiction over claims against foreign states.[170] The structure of the Act maintains a presumption of immunity against a foreign state.[171] Thereafter, Congress carved out exceptions to the rule, codifying the restrictive principle of sovereign immunity that not all state action is out of the reach of United States courts.[172] The Act's presumption of immunity, with limited, specific exceptions, intended to balance providing a remedy for an injured party with

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163. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989) (determining that the text and structure of the FSIA demonstrate Congress's intent for it to be the sole basis of U.S. court jurisdiction over a foreign state).

164. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 7 (stating the urgent need for the legislation).

165. *See id.* (noting that the Department of State and U.S. courts had already adopted the narrower theory of immunity).

166. *See id.* (highlighting that a key feature of the Act was to transfer immunity decisions from the Executive Branch to the Judicial Branch).

167. *See id.* at 8 (remarking that the Act eliminates the need for the practice of seizing and attaching the property of a foreign government to obtain jurisdiction).

168. *See id.* (restricting the broad immunity in "ordinary commercial litigation").

169. *See* Joseph Dellapenna, *Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text*, 15 LEWIS & CLARK L. REV. 555, 563 (2011) (noting that Congress sought "to depoliticize immunity decisions by vesting them in courts").

170. *See* Republic of Austria v. Altmann, 541 U.S. 677, 717 (2004) (describing how the structure shifts the decision to the courts).

171. *See* Dellapenna, *supra* note 169, at 564 (detailing how Congress structured the FSIA).

172. *See* 28 U.S.C. §§ 1604, 1605(a)(1)–(5), (b), 1607 (2012).

avoiding undue intrusion into a foreign state's affairs.[173] Additionally, the Act sought to protect the State Department from embarrassing foreign affairs mishaps.[174] Lastly, the Act sought to overcome inconsistent legal application of immunity, both of foreign states in domestic courts and for the United States as a foreign sovereign compared to other states already practicing restrictive immunity.[175]

When Congress determined what types of claims to exclude from immunity, its primary concern was commercial interaction between foreign states and United States citizens.[176] Congress noted that, unlike other legal systems, the United States did not provide its citizens with a judicial remedy for legal disputes arising from foreign commercial activity.[177] Accordingly, one of the exceptions to the FSIA's general grant of immunity is the commercial activities exception.[178] The commercial activities exception was Congress's response to the increased participation of foreign state enterprises in global commerce.[179] As a result, the FSIA broadly defines commercial activity to capture acts ranging from individual transactions to regular instances of commercial conduct.[180]

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173. *See* Dellapenna, *supra* note 169, at 564 (describing the two biggest factors Congress balanced in drafting the FSIA).

174. *See id.* (noting the potential for embarrassment in doubtful cases).

175. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 7 ("U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.").

176. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 6 (emphasizing that the rise of commercial interaction between citizens and foreign states provided the most pressing need for an exception to immunity).

177. *See id.* (noting that U.S. law failed to provide a plaintiff with a way to obtain satisfaction of a final judgment against a foreign state).

178. *See* 28 U.S.C. § 1605(a)(2) (2012) (providing that a foreign state is not granted immunity for certain commercial activities).

179. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 7 (describing the urgent need for legislation concerning foreign states in global commerce).

180. *See* 28 U.S.C. §1603(d) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.").

D. The Commercial Activities Exception

The commercial activities exception consists of three clauses premised on the restrictive theory of sovereign immunity.[181] Each clause of the exception defines commercial action not protected by foreign sovereign immunity.[182] The first clause provides an exception to immunity when the claim arises from commercial activity performed within United States territory.[183] The second clause provides an exception to immunity for an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.[184] The third clause—the direct effect clause—provides an exception for the act of a foreign state outside of the United States that causes a direct effect within the United States.[185] This clause involves the most attenuated contacts with the United States of the three clauses.[186] Specifically, the clause provides:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any 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[.][187]

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181. *See* Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT'L L. 675, 682 (2005) (describing the commercial activities exception as "the heart of restrictive theory of immunity").

182. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 18 (stating that the commercial activities exception as the most important instance where a foreign state is denied immunity).

183. *See* 28 U.S.C. § 1605(a)(2) (2012) (requiring the activity to take place in U.S. territory before a court can assert jurisdiction over the foreign state).

184. *See id.* (detailing the second clause of the commercial activities exception).

185. *See id.* (detailing the third clause of the commercial activities exception).

186. *See* Working Group of the American Bar Ass'n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489, 555 (2002) (discussing that the first clause requires conduct partially or wholly in U.S. territory, while the third clause requires only a direct effect in the U.S.).

187. 28 U.S.C. § 1605(a)(2) (2012).

Congress defined "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."[188] By allowing courts to rely on an activity's commercial nature in determining immunity, the exception sought to (1) discourage forum-shopping, and (2) make its application more effective by preventing a foreign government from claiming a public purpose for its commercial transactions.[189]

The House Report states that commercial activity is subject to U.S. jurisdiction consistent with the Restatement (Second) of Foreign Relations Law.[190] For jurisdiction, the Restatement dictates that the effect of the conduct must be substantial, and occur as a direct and foreseeable result of the conduct.[191] The purpose of requiring the connection to the United States ensures (1) an appropriate foundation for applying domestic law, and (2) statutory support for section 1330(a), which permits a court to assert personal jurisdiction over the defendant.[192]

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188. 28 U.S.C. § 1603(d) (2012). It appears Congress intended to define "commercial activity" broadly. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 16 ("Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed.").

189. *See* M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 103 (1999) (describing the objectives of the FSIA's reliance on an activity's commercial nature).

190. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 19 (proscribing jurisdiction consistent with the Restatement).

191. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (AM. LAW INST. 1965)

> 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.

192. *See* Working Group of the American Bar Ass'n, *supra* note 186, at 556 (discussing the purpose of the connection requirement).

In examining the intended jurisdictional reach of the commercial activities exception, it is useful to examine the language that Congress used in similar exceptions to the FSIA. The FSIA provides an exception, commonly referred to as the noncommercial tort exception, which provides relief for tortious acts or omissions by a foreign state occurring in the United States.[193] The statute provides jurisdiction for claims not covered under the commercial activities exception.[194] This exception resolves the problem tort victims face in obtaining jurisdiction over foreign states.[195] Courts have interpreted the noncommercial tort exception to require a higher standard for jurisdiction—the act must occur within U.S. territory.[196] Comparison of the express jurisdictional requirements found in the noncommercial tort exception and the direct effect clause of the commercial activities exception supports the contention that if Congress intended stricter jurisdictional requirements for the direct effect clause, it would have written it into the statute.

IV. Progression of the Minimum Contacts Analysis

Following the passage of the FSIA, courts disagreed on defining a "direct effect" and what the Act required to assert personal jurisdiction. The Supreme Court first addressed the confusion in *Republic of Argentina v. Weltover, Inc.*[197] concluding

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193. *See* 28 U.S.C. § 1605(a)(5) (2012) (outlining the exception for a tortious act or omission of a foreign state).

194. *See id.*

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.

195. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 20–21 (extending the exception generally to all torts not covered by the commercial activities exception).

196. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989) (limiting jurisdiction under the noncommercial tort exception to events occurring within United States territory).

197. 504 U.S. 607 (1992).

that the direct effect clause did not require foreseeability or substantiality, only that the effect flowed immediately from the defendant's action.[198] The Court did not specifically address whether a foreign state must possess the requisite minimum contacts with the United States set forth in *International Shoe Co. v. Washington*[199] in order for U.S. courts to assert personal jurisdiction under the direct effect clause of the FSIA's commercial activities exception.[200] Instead, *Weltover* merely acknowledged that if minimum contacts were necessary, the foreign entity in that case possessed the requisite contacts for personal jurisdiction.[201]

Following *Weltover*, the Ninth and Sixth Circuits reached opposite conclusions on whether the direct effect clause of the commercial activities exception to immunity required that a foreign entity have minimum contacts with the United States. The Ninth Circuit required that a foreign state possess minimum contacts before personal jurisdiction was appropriate.[202] However, the Sixth Circuit explicitly rejected the Ninth Circuit's interpretation, determining that personal jurisdiction was satisfied without establishing minimum contacts.[203]

A. Early Interpretation of the Direct Effect Clause

After the passage of the FSIA, the majority of circuits adopted a narrower interpretation of activities with a "direct effect" on the United States.[204] This reading incorporated the "substantial and foreseeable" elements found in the FSIA's legislative history's

198. *See id.* at 618 (rejecting that the clause imposes a higher standard).

199. 326 U.S. 310 (1945).

200. *See Weltover,* 504 U.S. at 619 (stating that the Court would assume, without deciding, that a foreign state is a person for due process purposes).

201. *See id.* at 619–20 (determining that the foreign entity established minimum contacts by issuing debt instruments in U.S. dollars and appointing a financial agent in New York).

202. *See infra* Part IV.C (outlining the Ninth Circuit's interpretation of the FSIA's minimum contacts requirement).

203. *See infra* Part IV.D (discussing the Sixth Circuit's statutory interpretation of the FSIA's jurisdictional requirements).

204. *See* Gohlke, *supra* note 162, at 274 (noting that while the Second Circuit adopted the "broad view," five other circuits that considered cases brought under the direct effect clause adopted the "narrow view" requiring substantiality and foreseeability).

reference to the Restatement (Second) of Foreign Relations Law.[205] The Restatement suggests that jurisdiction is appropriate where the effect is substantial, or occurs as a direct and foreseeable result of the conduct outside the Unites States.[206] In *Harris Corp. v. National Iranian Radio and Television*,[207] the Eleventh Circuit was the first of five circuits to adopt this "substantial and foreseeable" interpretation of the direct effect clause.[208] Harris, a U.S. corporation, entered into an agreement with National Iranian Radio and Television (NIRT) for delivery of broadcast transmitters to Tehran.[209] Shortly after the agreement, Harris was unable to complete delivery due to the violence that erupted during the Iranian Revolution.[210] Harris sought a declaratory judgment that the contract was terminated due to force majeure.[211] NIRT challenged the district court's jurisdiction to enter a preliminary injunction.[212] The court determined that the effects of the contract in the United States were foreseeable enough to subject NIRT to jurisdiction under the direct effect clause of the commercial activities exception.[213]

The District of Columbia Circuit adopted the same standard in *Maritime International Nominees Establishment v. Republic of*

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205. *See* Nicolas J. Evanoff, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts*, 28 HOUS. L. REV. 629, 639–40 (1991) (describing the prevailing interpretation before the *Weltover* decision).

206. *See supra* note 191 (outlining the Restatement's jurisdictional requirements).

207. 691 F.2d 1344 (1982).

208. *See id.* at 1351 (describing that the clause applies to acts that Congress would want an American court to hear).

209. *See id.* at 1346–47 (noting that the agreement contained a provision releasing the performance guarantee upon termination due to force majeure).

210. *See id.* at 1348 (stating Harris's argument that it could not ship to Iran without a special license issued only in emergency situations or for humanitarian reasons).

211. *See id.* at 1348–49 (noting Harris's inability to ship materials due to the violent conditions in Iran, thereby forcing Harris to fail to adhere to the contract terms).

212. *See id.* at 1349 (stating that the foreign entity claimed it had sovereign immunity under the FSIA).

213. *See id.* at 1351 ("The letter . . . extends into this country, and the appellants' demands thus have significant, foreseeable financial consequences here.").

Guinea,[214] relying on the legislative history of the FSIA in its decision to apply the substantial and foreseeable standard.[215] The case involved a Liechtenstein corporation, Maritime International, that petitioned a D.C. district court to confirm an arbitration award against the Republic of Guinea for a breach of contract.[216] Maritime claimed that jurisdiction was proper because a portion of the contract activities were performed within the United States by a company, Global, and that Global suffered financial losses upon breach of the contract.[217]

The D.C. Circuit found that there was no direct effect because the claim was based on conduct not reasonably contemplated by the commercial activity.[218] Critical to the court's analysis was an examination of the legislative history of the direct effect clause, particularly the reference to Section 18 of the Restatement (Second) Foreign Relations Law concerning jurisdiction.[219] The court noted that "[a]lthough section 18 is therefore concerned with legislative rather than judicial action, Congress's clear reference has led some courts to find guidance in section 18's requirement that the effect be 'substantial' and 'occur' as a direct and foreseeable result of the conduct outside the territory."[220] Following the decision in *Maritime International*, three other circuits adopted the substantial and foreseeable test.[221]

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214. 693 F.2d 1094 (1982).

215. *See id.* at 1111 (finding clear reference to the Restatement in the FSIA's legislative history).

216. *See id.* at 1096 (noting that the Liechtenstein corporation asserted jurisdiction under the FSIA).

217. *See id. at* 1106 (noting that Global maintained an office in Stamford, Connecticut).

218. *See id.* at 1111 ("Only if involvement such as Global's was reasonably contemplated under the [agreement] can we view as 'direct' the injuries resulting from that involvement.").

219. *See id.* at 1110 (examining the portion of the House Report dealing with jurisdiction of the statute).

220. *Id.*

221. *See* Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988) (determining that an economic injury to a U.S. corporation was a direct effect where the corporation was the primary victim of the act and the economic consequences were foreseeable); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985) (deciding that the legislative history of the FSIA requires a direct and foreseeable standard); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 332 (9th Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984) (determining that the effects on the immediate family of a U.S. citizen murdered in Iran were not

The Second Circuit rejected the substantial and foreseeable standard in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[222] determining that the jurisdictional guidelines in the FSIA's legislative history were not applicable to interpreting the direct effect clause.[223] The case involved the Nigerian government's repudiation of contracts with four American corporations.[224] The Nigerian government sought to increase its infrastructure for its oil-exporting operations and contracted to purchase mass quantities of cement.[225] The contracts provided for a New York bank to make the payments to each corporation providing the cement.[226] Nigeria drastically overestimated the amount of cement it could physically accept in its port facilities, and shortly after the plaintiffs began delivery of the cement, Nigeria's ports were overwhelmed and stopped processing the deliveries.[227] After a few months, Nigeria canceled the contracts with the cement suppliers, and refused to accept further delivery or make payment to the corporations.[228] The plaintiff corporations sued in the Southern District of New York, claiming Nigeria's actions constituted anticipatory breaches of the contracts.[229] In

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sufficiently direct or foreseeable to assert jurisdiction).

222. 647 F.2d 300 (2d Cir. 1981), *overruled by* Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic, 582 F.3d 393 (2d Cir. 2009).

223. *See id.* at 311 (finding that Congress relied on principles of jurisdiction concerning applying American law to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts).

224. *See id.* at 303 (noting that all of the plaintiffs' contracts required delivering 240,000 metric tons of cement to Nigeria).

225. *See id.* (stating that the four plaintiffs represented four of the 109 contracts Nigeria executed to obtain mass quantities of cement for its infrastructure project).

226. *See id.* at 304 (noting that the actual financial arrangement operated differently from the terms of the contract, and that the sellers presented documents for payment to a separate bank in New York).

227. *See id.* at 305 (stating that while Nigeria's port facilities could only accept one to five million tons of cement per year, the government contracted for over sixteen million tons in eighteen months).

228. *See id.* at 305–06 (discussing that while forty corporations settled with the Nigerian government, dozens more sued in courts all over the world).

229. *See id.* at 306 (noting that the Nigerian government did not contest that their actions constituted an anticipatory breach).

response, Nigeria asserted its defense of immunity under the FSIA.[230]

The Second Circuit used the case as an opportunity to dive into the tangled legislative history of the FSIA—particularly the direct effect clause of the commercial activities exception.[231] The court determined that the FSIA's purpose was not to significantly restrict jurisdiction, but to standardize the exercise of jurisdiction over foreign states.[232] The opinion rejected the idea that the House Report's reference to the Restatement (Second) Foreign Relations Law defined the appropriate jurisdictional reach of the direct effect clause, calling it "a bit of a non sequitur" because section 18 concerned applying American law overseas.[233] The Second Circuit determined that when analyzing if a commercial activity had a direct effect in the United States, the substantial or foreseeable test was unnecessary; rather the court should ask "was the effect sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case?"[234]

The Second Circuit's holding in *Texas Trading* created a split with the majority of circuits that adopted requirements of substantiality and foreseeability.[235] Following the inconsistent interpretations among the circuits, the Supreme Court provided guidance on exercising jurisdiction under the direct effect clause in *Republic of Argentina v. Weltover, Inc.*[236]

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230. *See id.* (outlining Nigeria's assertion that the court did not have personal jurisdiction).

231. *See id.* at 307 ("These cases present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.").

232. *See id.* at 313 (discussing that prior to the FSIA, jurisdiction over foreign states was irregular and subject to State Department discretion).

233. *See id.* at 311 ("[Section] 18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts n'importe quelle substantive law.").

234. *See id.* at 313 (arguing that a rigid parsing of the direct effect clause leads to results contrary to the congressional intent to provide U.S. courts jurisdiction over cases such as this one).

235. *See* Gohkle, *supra* note 162, at 279 (discussing the need for a uniform direct effect test).

236. 504 U.S. 607 (1992).

B. Republic of Argentina v. Weltover, Inc.

In 1992, the Supreme Court attempted to provide clarity on the application of the direct effect clause in its opinion in *Republic of Argentina v. Weltover, Inc.*[237] In *Weltover*, several bondholders brought a breach of contract action against the Republic of Argentina and its central bank arising out of Argentina's unilateral extension of the time for payment on bonds issued as part of a currency stabilization plan.[238] *Weltover* required the Court to decide if Argentina's default on bonds issued as part of its domestic currency stabilization plan provided an exception to Argentina's sovereign immunity under the direct effect clause.

Before the Argentine government and central bank implemented its plan, Argentine businesses engaged in foreign transactions using internationally accepted currency instead of the Argentine currency.[239] To help Argentine businesses access accepted international currencies, Argentina established a foreign exchange insurance contract program (FEIC).[240] This program allowed Argentinian businesses with debt in U.S. dollars to pay the central bank a contractually predetermined amount of Argentinian currency.[241] In exchange for the payment, the bank gave the debtors the U.S. dollars necessary to repay the initial loan.[242]

As the FEIC contracts became due, Argentina did not have sufficient funds to make the required payments.[243] Argentina's solution was refinancing the FEIC debts by issuing government bonds to the creditors.[244] These bonds provided for payment in U.S.

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237. 504 U.S. 607 (1992).

238. Weltover, Inc. v. Republic of Arg., 753 F. Supp. 1201 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

239. *See Weltover*, 504 U.S. at 609 (highlighting that Argentinian currency was not accepted on the international market).

240. *See id.* (detailing Argentina's solution to help its financially struggling businesses).

241. *See id.* (noting that Argentina effectively assumed the risk of currency depreciation in cross-border transactions involving Argentine borrowers).

242. *See id.* (stating that Argentina offered this exchange regardless of intervening devaluations).

243. *See id.* (describing Argentina's lack of U.S. currency reserves to make payments on the contracts).

244. *See id.* (noting that these bonds, called "Bonods," provided Argentina an

dollars, and creditors could obtain payment through transfer on multiple major international markets.[245] When the bonds began to mature, Argentina still lacked sufficient funds to make the payments and notified bondholders that the bank would not make timely payments on the bonds.[246] The *Weltover* plaintiffs, two Panamanian corporations and one Swiss bank, refused Argentina's delay and substitute bonds, and demanded full payment in New York.[247] When Argentina did not pay, the plaintiffs brought a breach of contract action in district court, claiming jurisdiction under the FSIA commercial activities exception.[248]

The controversy required the Supreme Court to evaluate whether Argentina's unilateral refinancing created a direct effect in the United States.[249] The Court turned its attention to the argument that the FSIA's legislative history indicates that an act causes a direct effect only when it is both substantial and foreseeable. The Court interprets the House Report as a limit on legislating, not adjudicating, the issue:

> That suggestion is found in the House Report, which states that conduct covered by the third clause of § 1605(a)(2) would be subject to the jurisdiction of American courts "consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Section 18 states that American laws are not given extraterritorial application except with respect to conduct that has, as a "direct and foreseeable result," a "substantial" effect within the United States. . . . [T]his obviously deals with jurisdiction to *legislate* rather than jurisdiction to *adjudicate* . . . .[250]

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emergency solution to the insufficient funds).

245. *See id.* at 609–10 (noting that these markets included London, Frankfurt, Zurich, or New York).

246. *See id.* at 610 (stating that Argentina unilaterally extended the payment deadline by Presidential Decree).

247. *See id.* (detailing that the corporations and bank collectively held $1.3 million in Argentinian bonds).

248. *See id.* at 611 (describing the commercial activities exception as the most significant FSIA exception).

249. *See id.* at 612 (stating what the Court first had to address if the act was commercial activity before moving on to the direct effect question).

250. *Id.* at 617–18 (citation omitted).

While the Court recognized that a foreign entity must cause more than a trivial effect in order for the direct effect clause to apply,[251] it declined to hold that the direct effect clause required substantiality or foreseeability.[252] The Court affirmed the district court's determination that an effect is direct if it follows as an immediate consequence of the foreign entity's activity.[253]

After it defined the meaning of "direct effect" in the United States, the Court swiftly disposed of the issue of whether the direct effect clause required a foreign state maintain minimum contacts. Argentina's argument centered on the country's right to constitutional due process.[254] It argued that a nonresident defendant was entitled to constitutional due process protection, and that jurisdiction was appropriate only if it established minimum contacts by purposefully availing itself of the privilege of conducting business in the United States.[255] Relying on that standard, Argentina contended that jurisdiction was improper for a number of reasons.[256] First, mere foreseeability of being subject to U.S. court was an inadequate basis for jurisdiction.[257] Second, the constitutional basis for jurisdiction requires purposeful acts of the defendant, not just unilateral acts of the plaintiff.[258] According to Argentina, jurisdiction was improper because the act of calling

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251. *See id.* at 618 ("Of course the generally applicable principle *de minimis non curat lex* ensures that jurisdiction may not be predicated on purely trivial effects in the United States.").

252. *See id.* (rejecting to read any unexpressed requirements into the statute).

253. *See id.* (determining that the court of appeals correctly interpreted the meaning of "direct").

254. *See* Brief for Petitioner, Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992) (No. 91-763), 1992 WL 526250, at *35–36 ("[W]ere the Act construed to extend jurisdiction to Petitioners' conduct at issue here, it clearly would run afoul of the due process limits of the Constitution.").

255. *See id.* at *36 (arguing that the Petitioners' contacts with the forum are too insubstantial to survive constitutional scrutiny).

256. *See id.* at *37–39 (arguing that in addition to the constitutional due process concerns, the FSIA language and legislative history support the notion that jurisdiction is improper).

257. *See id.* at *37 (stating that though Argentina could have been aware of the Respondent's ability to call for payment in New York, that fact alone does not provide the necessary contact with the U.S.).

258. *See id.* ("[T]he Court has made it clear that the unilateral actions of a plaintiff—whether foreseeable or not—also are an insufficient basis upon which to exercise jurisdiction over a nonresident defendant.").

for payment in New York does not provide the necessary contacts with the forum.[259] Finally, even if Argentina maintained a connection with the United States, it was too attenuated for jurisdictional purposes.[260] Argentina relied on the holding from *Asahi Metal Industry Co. v. Superior Court*,[261] where the Court determined that jurisdiction was only proper where a defendant maintained a "substantial connection" with the forum state—this occurred only when a defendant purposefully directed an action toward the forum.[262] Argentina's argument was grounded in the assumption that the foreign state was entitled to constitutional due process protections.[263]

In response, Weltover contended that Argentina's argument improperly merged the requirements for subject matter jurisdiction and personal jurisdiction.[264] Respondent's looked to the language of the FSIA, arguing that personal jurisdiction under the direct effect clause did not require a constitutional analysis; subject matter jurisdiction combined with proper service under the statute resulted in statutory personal jurisdiction.[265] Weltover emphasized that Argentina's due process argument abandoned the FSIA's plain language grant of personal jurisdiction in favor of a constitutional minimum contacts analysis.[266]

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259. *See id.* at *37–38 (providing that performing contracts, conducting negotiations, and having employees constitute valid examples of minimum contacts).

260. *See id.* at *37 (arguing that selecting New York as one of multiple options for payment was not enough to establish contact with the U.S.).

261. 480 U.S. 102 (1987).

262. *See supra* notes 98–100 and accompanying text (outlining the Court's purposeful availment argument).

263. *See* Brief for Petitioner, *supra* note 254, at *39 ("[Argentina] clearly lacks the substantial connection with this country required as a constitutional minimum for jurisdiction.").

264. *See* Brief for Respondent, Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992) (No. 91-763), 1993 WL 431511, at *14 ("Apparently recognizing that the language of the [FSIA] provides them no support, petitioners for the first time in this Court take the position that the "nexus" reference in the House Report is identical to the due process requirement for personal jurisdiction.").

265. *See id.* at *14–15 (stating that 28 U.S.C. §§ 1605–1607 combined with service under 28 U.S.C. § 1608 grants statutory personal jurisdiction under 28 U.S.C. § 1330(a)-(b)).

266. *See id.* at *15–16 ("[Argentina's] effort to abandon the statutory language of Section 1605(a)(2) in favor of their analysis of personal jurisdiction turns out to be the equivalent of jumping from the frying pan into the fire.").

Because the Court had already determined that Argentina's activity was commercial in nature and had a direct effect in the United States, it did not rule on the minimum contacts test argument and the constitutional due process challenge.[267] The Court merely stated that if it were to apply a minimum contacts evaluation, Argentina's transactions with the United States were sufficient for establishing the requisite minimum contacts.[268]

This brief portion of the opinion left open the question of what role, if any, the minimum contacts test has in establishing personal jurisdiction under the direct effect clause of the commercial activities exception. The lack of clarity on the minimum contacts requirement set the stage for the current circuit split between the Ninth and Sixth Circuits.

C. The Ninth Circuit's Minimum Contacts Analysis

In *Corzo v. Banco Central de Reserva del Peru*,[269] the Ninth Circuit reaffirmed its view that granting an exception to sovereign immunity under the direct effect clause requires a finding that the foreign sovereign satisfies the minimum contacts test. In its decision, the court relied on its own precedent in *Security Pacific National Bank v. Derderian*,[270] finding that jurisdiction required the foreign sovereign to maintain minimum contacts with the United States.[271] *Derderian*, decided before the Supreme Court's *Weltover* opinion, involved a U.S. bank that sued to recover for illegal conversion and forgery of a check.[272] The

267. *See* Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 619 (1992) ("Assuming, without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause . . . we find that Argentina possessed 'minimum contacts' that would satisfy the constitutional test.").

268. *See id.* at 619–20 ("By issuing negotiable debt instruments denominated in United States dollars and payable in New York and by appointing a financial agent in that city, Argentina 'purposefully avail[ed] itself of the privilege of conducting activities within the [United States].'" (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985))).

269. 243 F.3d 519 (9th Cir. 2001).

270. 872 F.2d 281 (9th Cir. 1989).

271. *See id.* at 286 ("Our conclusion is reinforced by the fact that the requirement of a 'direct effect' incorporates the minimum contacts standards of *International Shoe Co. v. Washington*.").

272. *See id.* at 282 (stating that the defendant forger obtained $852,000).

defendant was a foreign bank, owned by the Mexican government, that accepted gold coins derived from the proceeds of the forged check.[273] The court determined that the Mexican bank's commercial activity was insufficient to cause a direct effect in the United States.[274] The bank neither had offices or agents, nor was licensed to do business in the United States; therefore, the plaintiff's claim rested solely on the bank's act of accepting a deposit which failed to establish minimum contacts.[275] The *Derderian* opinion was one of several pre-*Weltover* decisions that contributed to the initial inconsistent interpretation of the direct effect clause.[276]

In 2001, The Ninth Circuit examined the minimum contacts issue again, this time with the guidance of the Supreme Court's decision in *Weltover*. In *Corzo*, Novotec (Corzo's predecessor in interest), was a Peruvian company exporting computers made primarily from parts imported from the United States.[277] Novotec brought a lawsuit in Peru against the Banco Central de Reserva del Peru (BCRP), the monetary authority of Peru.[278] In 1988, the BCRP introduced a program for Peruvian exporters operating on the international market who suffered losses as a result of the exchange rates.[279] The BCRP designed this compensation program in response to the negative impact that the decline of the Peruvian dollar had on companies like Novotec.[280] Novotec submitted an

273. *See id.* (noting that following the forgery, $150,000 was taken from the U.S. to Mexico and deposited with the Mexican bank).

274. *See id.* at 286 (determining that if the court found jurisdiction appropriate in this case, it would subject all foreign sovereign banking institutions to U.S. jurisdiction merely by accepting funds from account holders).

275. *See id.* ("Therefore, under a minimum contacts analysis, [the bank's] actions did not cause a 'direct effect' in the United States, as defined by the FSIA.").

276. *See infra* Part IV.C.1. (detailing the various interpretations of the direct effect clause among the circuits after the implementation of the FSIA).

277. *See Corzo*, 243 F.3d at 521 (detailing Novotec's reliance on U.S. imports).

278. *See id.* (noting that both parties agreed that the BCRP was "an arm of the Peruvian government," immune from U.S. jurisdiction unless an FSIA exception applied).

279. *See id.* (stating that the BCRP gave companies the opportunity to apply to receive government compensation for the losses).

280. *See id.* (noting that losses occurred when the Peruvian currency declined between the time of purchase of imported components and the time of exporting the final product).

application to the BCRP claiming $400,000 in losses from exchange rate fluctuations.[281]

When the BCRP denied Novotec's application, Novotec brought suit in Peru for the original compensation amount plus interest.[282] The case reached the Supreme Court of Peru, which affirmed a judgment for Novotec, and Novotec subsequently assigned its interest to Corzo.[283] Shortly after, the Peruvian Supreme Court declared its own judgment null and void because the BCRP had been denied due process.[284] This action was unprecedented and caused great controversy within the Peruvian government.[285] Corzo was unable to obtain payment in Peru and filed a complaint to domesticate a foreign judgment in U.S. district court, seeking to attach the BCRP's assets in the United States.[286]

Corzo sought to establish jurisdiction under the commercial activities exception to the FSIA.[287] Corzo initially argued that the FSIA granted jurisdiction under the first clause of the commercial activities exception, because the claim was based upon a commercial activity carried on in the United States by a foreign sovereign.[288] Corzo claimed that BRCP's maintaining assets in the United States constituted commercial activity.[289] The court swiftly

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281. *See id.* (detailing that in addition to this application, the BCRP had previously extended a line of credit to Novotec).

282. *See id.* (stating that Novotec sought recovery for additional losses incurred after the initial application was filed and denied).

283. *See id.* (discussing the case's progress through the Peruvian appellate system).

284. *See id.* at 521–22 (describing that the Peruvian Supreme Court admitted the previous decision was issued by mistake).

285. *See id.* at 522 (detailing the Resolution of the National Council of the Judiciary, issued shortly after the decision, that alleges that the justices of the Peruvian Supreme Court issued a fraudulent judgment).

286. *See id.* (stating that the complaint alleged that Corzo as Novotec's predecessor in interest had a valid and final judgment against the BCRP).

287. *See id.* at 524 (noting that Corzo also claimed jurisdiction under the FSIA waiver exception, which the court rejected).

288. *See id.* at 525 ("His action is 'based upon' this activity, Corzo argues, because he is seeking to attach those assets."); 28 U.S.C. § 1605(a)(2) (2018) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state.").

289. *See* Corzo v. Banco Cent. de Reserva del Peru, 243 F.3d 519, 525 (9th Cir. 2001) ("The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than

rejected this argument as the exchange rate transaction was not commercial in nature.[290]

The court then turned to Corzo's argument that the BCRP's refusal to pay caused a direct effect in the United States. Corzo claimed that the BCRP's refusal to pay caused a cutoff of cash-flow, forcing Notovtec to breach contracts with computer companies in the United States.[291] Using the *Weltover* standard, the court determined that any negative impact on companies within the United States did not flow as an immediate consequence of the BCRP's activity.[292] After the court determined that there was no direct effect, it continued on to address the issue of the BCRP's minimum contacts.[293] The court stated an additional requirement for personal jurisdiction—a foreign sovereign must maintain a connection with the United States consistent with the *International Shoe* minimum contacts standard.[294] Because the transaction between the BCRP and Novotec occurred entirely within Peru, the court found no minimum contacts with the United States and refused to assert jurisdiction under the direct effect clause of the commercial activities exception.[295]

D. The Sixth Circuit's Plain Language Approach

In 2016, the Sixth Circuit expressly rejected the idea that the direct effect clause of the commercial activities exception required minimum contacts in its decision in *Rote v. Zel Custom Manufacturing LLC*.[296] The plaintiff in *Rote* suffered severe

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by reference to the purpose." (citing 28 U.S.C. § 1602(d) (2012))).

290. *See id.* ("The difference is critical, because the denial of the exchange-rate application was not commercial activity, but a sovereign act.").

291. *See id.* (stating that the United States companies injured as a result of the contract breaches allegedly constituted a direct effect).

292. *See id.* (noting the effects were secondary or incidental at best) (citing Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992))).

293. *See id.* at 525–26 (discussing the required nexus between the activity and the plaintiff's cause of action).

294. *See id.* at 526 ("The fact that United States computer companies might have been affected by Novotec's breaches is jurisdictionally irrelevant." (citing Int'l Shoe Co. v. Wash., 326 U.S. 310 (1945)).

295. *Id.*

296. *See* 816 F.3d 383, 393 (6th Cir. 2016) (determining that incorporating a

injuries to his right hand after a round of ammunition exploded upon firing a rifle.[297] The round that exploded came from a box of ammunition manufactured by Dirección General Fabricaciones Militares (DGFM).[298] The defective ammunition was purchased online from Ammoman, a company based in New Jersey.[299]

Rote filed a negligence and products liability suit against DGFM, alleging that DGFM manufactured the ammunition and introduced it into the stream of commerce.[300] DGFM moved for dismissal, claiming that it had sovereign immunity as an instrumentality of the Republic of Argentina.[301] DGFM's argument hinged on its assertion that any wrongful act could not cause a direct effect in U.S. territory because it lacked "substantial" contacts with the United States.[302] DGFM maintained that the FSIA's legislative history demonstrated requirements of minimum jurisdictional contacts.[303]

The court began its minimum contacts analysis by evaluating the plain language of the direct effect clause.[304] Following the Supreme Court's standard in *Weltover*, the court found it could give plain meaning to the phrase "causes a direct effect in the United States" without ambiguity; therefore, probing into the legislative history was unnecessary.[305] Going further, the court

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minimum contacts analysis adds unnecessary requirements to the statute).

297. *See id.* at 387 (noting that the plaintiff received proper loading and firing instructions).

298. *See id.* (identifying the source of the ammunition).

299. *See id.* (noting that "[t]he complaint does not indicate from whom Ammoman purchased the ammunition").

300. *See id.* (stating that the plaintiffs also alleged that DGFM defectively designed the rounds to have a protruding primer and that DGFM failed to provide adequate warnings).

301. *See id.* (noting DGFM's claim for lack of subject-matter jurisdiction).

302. *See id.* at 391 ("In other words, DGFM asserts that subject-matter jurisdiction is only proper if personal jurisdiction over the foreign state complies with the Due Process Clause of the Fifth Amendment.").

303. *See id.* at 391–92 (detailing DGFM's argument that jurisdictional prerequisites found elsewhere in the law are interconnected with the FSIA's jurisdiction).

304. *See id.* at 392 ("If the language of the statute is clear, then the inquiry is complete, and the court should look no further." (quoting Brilliance Audio, Inc. v. Haights Cross Commc'n, Inc., 474 F.3d 365, 371 (6th Cir. 2007))).

305. *See id.* at 393 (noting that though the statute does not define the terms, the court will give them ordinary meaning if possible).

emphasized, "[E]ven if we do look at legislative history, DGFM's argument is still unpersuasive where the legislative history is being used to inject into the statute additional 'unexpressed requirement[s],' rather than resolve any inherent ambiguity."[306] Comparing its decision to the Supreme Court's decision in *Weltover*, the Sixth Circuit noted that the Supreme Court similarly rejected a foreign instrumentality's argument that required reading into the legislative history to find requirements of substantiality and foreseeability in applying the direct effect clause.[307]

The Sixth Circuit expressly critiqued the Ninth Circuit's interpretation in *Corzo*, finding it overreaching and unpersuasive.[308] The court stressed that the Ninth Circuit followed precedent that was inconsistent with *Weltover*: "*Derderian* pre-dates *Weltover,* and so the court did not have the benefit of *Weltover*'s admonishment that we must not read 'unexpressed requirements' into the statute."[309] Thus, following the Sixth Circuit's 2016 decision, courts remain split on whether the direct effect clause of the commercial activities exception requires a minimum contacts analysis.

V. Eliminating the Minimum Contacts Analysis

The direct effect clause of the FSIA commercial activities exception should not require that a foreign state possess minimum contacts with the United States before a federal court can assert personal jurisdiction. Two considerations support excluding the minimum contacts analysis. First, constitutional protections should not extend to foreign states. Second, incorporating a minimum contacts analysis is contrary to the purpose of the

306. *Id.* (citing Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992)).

307. *See id.* ("The Supreme Court . . . found that legislative history inapposite and rejected the idea that the Act intended an 'unexpressed requirement of 'substantiality' or 'foreseeability.'" (citing Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992))).

308. *See id.* at 395 ("In reading the 'direct effect' element, the Ninth Circuit went beyond the plain meaning of the FSIA's terms and relied on the same legislative history we reject to read into the statute requirements that are simply not there.").

309. *Id.*

commercial activities exception. In an applicable future case, the Supreme Court should adopt the Sixth Circuit's holding that the direct effect clause does not require a minimum contacts analysis. The Sixth Circuit's holding in *Rote v. Zel Custom Manufacturing LLC*[310] correctly denies due process protection to a foreign state and accomplishes the purpose of the commercial activities exception—providing U.S. courts with the opportunity to adjudicate claims where Congress has expressly lifted a foreign state's immunity.

A. A Foreign State is Not a "Person" Under the Due Process Clause

The Ninth Circuit's conclusion in *Corzo v. Banco Central de Reserva del Peru*[311] that personal jurisdiction under the direct effect clause requires minimum contacts relies on an assumption that the Due Process Clause applies to foreign states.[312] A foreign state should not be considered a "person" for the purposes of due process; therefore, it is improper to extend it due process protection. Although the Supreme Court has examined applying the Due Process Clause to nontraditional entities, its analysis of domestic states provides the most helpful comparison.[313] A foreign state should not receive constitutional protections that are denied to domestic states.[314] The Supreme Court's decision in *South Carolina v. Katzenbach*[315] declined to extend due process protection to domestic states.[316] The Court could not justify interpreting "person" under the Due Process Clause to include a state.[317] If the Court cannot reasonably interpret "person" to

310. 816 F.3d 383 (6th Cir. 2016).

311. 243 F.3d 519 (9th Cir. 2001).

312. *See id.* at 526 (finding that personal jurisdiction was improper where the foreign sovereign had not established minimum contacts with the United States).

313. *See supra* Part II.B (outlining previous decisions applying due process protection to foreign corporations, aliens, and domestic states).

314. *See supra* notes 109–112 and accompanying text (discussing the Court's rejection of South Carolina's argument that it was entitled to due process).

315. 383 U.S. 301 (1966).

316. *See supra* note 110 (discussing South Carolina's argument that the Voting Rights Act deprived the state of due process).

317. *See Katzenbach*, 383 U.S. at 323–24 (determining that no court could

include a domestic state, it follows that a foreign state is also excluded from the definition of "person" under the Due Process Clause. When the Court in *Weltover* briefly addressed the concept of applying due process to a foreign state, it declined to make a decision; however, it referenced the *Katzenbach* decision, implying that the holding denying personhood to domestic states should also apply to foreign states.[318] Several federal circuit courts have followed this line of reasoning when declining to extend due process to foreign states.[319] It is inconsistent to extend constitutional protection to foreign states while at the same time declining to provide the same protection to domestic states.[320] The Second Circuit recognized this discrepancy when it overruled its own precedent in *Frontera Resources Azerbaijan Corporation v. State Oil Company of Azerbaijan Republic*,[321] where it determined that no compelling reason justified treating a foreign state as a "person" while simultaneously denying domestic states the same status.[322]

Second, extending due process protection to foreign states is contrary to the structure of the Constitution and how foreign states relate to the federal structure.[323] The Constitution anticipates foreign states participating in the U.S. judicial process, and Article III provides federal courts jurisdiction over a foreign state.[324] When the political branches have not spoken on a particular issue, it may be beneficial for a federal court to apply constitutional

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construe the definition of person to include a state).

318. *See supra* note 112–113 (discussing how federal courts have interpreted the portion of the *Weltover* opinion dealing with foreign states as persons).

319. *See supra* note 86 (listing courts that have declined to extend a minimum contacts analysis to a foreign state under the FSIA).

320. *See* Halverson, *supra* note 88, at 141 (arguing that not recognizing a foreign state as a "person" under the Due Process Clause is consistent with policy and case precedent).

321. 582 F.3d 393 (2d. Cir. 2009).

322. *See supra* notes 114–121 and accompanying text (outlining how the Second Circuit reevaluated its interpretation of "person" applied to foreign states).

323. *See supra* Part II.B (discussing issues that arise when foreign states receive constitutional protections).

324. *See* U.S. CONST. art III, § 2, cl. 1 (granting judicial authority over claims between a U.S. state or citizen and a foreign state).

considerations to a foreign state.[325] However, both the Executive and Legislative Branches expressly stated concerns about over-extending foreign sovereign immunity.[326] The State Department issued the Tate Letter in response to concerns over inconsistent application of immunity over foreign states.[327] The Department recognized an inherent unfairness in allowing all foreign state action to evade adjudication in U.S. courts.[328] The Tate Letter's advocacy for the restrictive theory of sovereign immunity was a key contributing factor in Congress adopting the FSIA.[329] The FSIA maintained a presumption of immunity for the majority of foreign state action; however, when Congress weighed the benefits of foreign immunity against potential injuries to U.S. citizens, there were circumstances where it found immunity unjustified.[330] These exceptions, including the commercial activities exception, indicate Congress's intent to promote the interests of U.S. citizens over the goals of sovereign immunity in these limited contexts.[331] Because the political branches expressed the appropriate application of foreign sovereign immunity, it is unnecessary for the Court to extend constitutional provisions to a foreign state.

Disqualifying a foreign state as a "person" under the Due Process Clause eliminates the need for a minimum contacts analysis to assert personal jurisdiction under the direct effect clause. Instead, a plain reading of the statute resolves the question of personal jurisdiction. The FSIA succinctly states requirements

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325. *See* Damrosch, *supra* note 123, at 496 (noting that benefits include promoting constitutional principles in the global context and fostering good relations with foreign states).

326. *See supra* Part III.B–C (outlining the Executive Branch's concerns over absolute sovereign immunity and Congress's response by adopting the FSIA).

327. *See supra* notes 152–154 (discussing the State Department's unilateral action to adopt restrictive application of immunity to reduce unfairness).

328. *See* Tate Letter, *supra* note 152 (arguing that increased foreign government commercial activity required U.S. courts to determine parties' rights and obligations).

329. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 8 (highlighting that the State Department faced the awkward position of interjecting into immunity litigation already before the courts).

330. *See supra* Part III.C (detailing the structure of the FSIA and its exceptions).

331. *See supra* note 168 and accompanying text (noting that providing plaintiffs with a judicial remedy was one of four major goals of the FSIA).

for both subject matter and personal jurisdiction. First, federal district courts have subject matter jurisdiction over any claim for relief arising under one of the FSIA exceptions.[332] Once subject matter jurisdiction is established, personal jurisdiction exists so long as the foreign state is properly served according to the requirements in 28 U.S.C. § 1608.[333] Personal jurisdiction over a foreign state is limited by requiring an initial finding of subject matter jurisdiction under one of the enumerated FSIA exceptions.[334] Foreign states have an additional procedural safeguard in that an appearance does not confer personal jurisdiction for purposes of the FSIA exceptions.[335]

The Sixth Circuit's decision properly dismissed the foreign defendant's assertion the FSIA's legislative history entitled it to personal jurisdiction only if it complied with the Due Process Clause.[336] In rejecting this argument, the Sixth Circuit appropriately denied reading in additional statutory requirements.[337] The Ninth Circuit's decision in *Corzo* incorrectly considers the legislative history of the FSIA instead of adopting the unambiguous statutory requirements. Because the language in the FSIA is clear and sufficient to give courts proper subject matter and personal jurisdiction, it is unnecessary to draw inferences about personal jurisdiction from the legislative history.

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332. *See* 28 U.S.C. § 1330(a) (2012) ("The district courts shall have original jurisdiction . . . 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.").

333. *See* 28 U.S.C. § 1330(b) (2012) (granting personal jurisdiction so long as service is made in accordance with section 1608). Section 1608 outlines four ways to serve a foreign state, including service on an authorized agent or use of an international convention on service of documents. 28 U.S.C. § 1608 (2018).

334. *See* 28 U.S.C. § 1330 (conditioning a finding of personal jurisdiction on an initial finding of subject matter jurisdiction).

335. *See id.* (denying personal jurisdiction over a foreign state by appearance outside of the context of the FSIA claim).

336. *See Rote*, 816 F.3d at 392–93 (determining that the defendant's reading was inappropriate because the statute was unambiguous).

337. *See id.* at 393 (refusing to insert additional requirements where it would not resolve any ambiguity).

B. Applying a Minimum Contacts Analysis is Contrary to the Structure and Purpose of the Direct Effect Clause

The FSIA provides blanket immunity for foreign states in U.S. courts. Congress included a number of exceptions to this immunity. 28 U.S.C § 1605 of the FSIA, which provides six general exceptions to immunity, reflects the important shift from an absolute to a restrictive theory of foreign immunity.[338] These exceptions capture circumstances where Congress determined that protecting the interests of U.S. citizens outweighed the long-standing principle of foreign sovereign immunity.[339] The exceptions are narrow and a claim against a foreign state only moves forward when expressly authorized by the statute.[340]

Requiring minimum contacts for personal jurisdiction creates a burden for U.S. plaintiffs not contemplated by Congress. The commercial activities exception demonstrates Congress's recognition that the commercial acts of foreign states have the potential to damage U.S. citizens.[341] The exception intended to provide relief for plaintiffs who had no judicial recourse against a foreign government who caused harm after entering into private commerce.[342]

A review of the structure of the commercial activities exception, as well as other FSIA exceptions, demonstrates that Congress intended a less restrictive jurisdictional requirement for the direct effect clause.[343] The first clause of the commercial activities exception dictates a territorial connection—specifically, that the act must have taken place in part or in whole within

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338. *See supra* Part III.B (discussing how increased interaction between U.S. citizens and foreign states rendered the theory of absolute immunity unworkable).

339. *See supra* note 176 (stating that foreign commercial activity was Congress's most pressing concern).

340. *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 493 (1983) ("[S]ubject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.").

341. *See supra* Part III.D (detailing Congress's motivation for adopting the commercial activities exception).

342. *See supra* notes 176–180 (noting that Congress's primary concern when drafting the exceptions was foreign states' commercial activity).

343. *See supra* notes 182–187 (detailing the jurisdictional differences in the three clauses of the commercial activities exception).

United States territory.[344] The second clause covers conduct in the United States that relates to commercial conduct abroad.[345] Unlike the first two clauses, the direct effect clause does not dictate a strict territorial requirement and provides for jurisdiction over commercial acts with less significant contact.[346] It follows that the direct effect clause does not require minimum contacts, rather it requires what is clearly written in the statute: that an act cause a direct effect in the United States. Congress was aware of the significance of asserting jurisdiction over a foreign sovereign, and included additional jurisdictional requirements where it deemed it necessary.[347] For example, the FSIA noncommercial tort exception specifically requires that the conduct occurs within United States territory—subject matter jurisdiction under this exception explicitly excludes extraterritorial conduct.[348] However, when Congress drafted the direct effect clause of the commercial activities exception, it chose to require only subject matter jurisdiction and personal jurisdiction through proper service.[349] Though the reference to the Restatement (Second) of Foreign Relations in the legislative history mentions requirements of substantiality and foreseeability,[350] Congress chose not to include those elements in the statute. These examples demonstrate that Congress used its discretion to impose a lesser jurisdictional nexus than minimum contacts under the direct effect clause.

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344. *See* H.R. REP. NO. 94-1487, *supra* note 161, at 17 ("It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.").

345. *See id.* at 19 (noting that although some of this activity overlaps with the first clause, it is advisable to expressly provide for the case where a claim relates to a commercial activity abroad).

346. *See supra* note 186 (describing the direct effect clause as requiring the lowest threshold of contact with the United States for jurisdiction).

347. *See supra* note 196 (providing that the noncommercial tort exception permits jurisdiction only for conduct within U.S. territory).

348. *See supra* notes 193–194 and accompanying text (noting the stricter jurisdiction requirements for the noncommercial tort exception).

349. *See supra* notes 78–81 and accompanying text (describing the statutory jurisdiction requirements for the commercial activities exception).

350. *See supra* notes 190–192 (discussing the Restatement's purpose of requiring the connection to the U.S. before allowing jurisdiction).

The Sixth Circuit's decision in *Rote* appropriately interprets what constitutes a direct effect by adhering to the plain text of the clause.[351] The Supreme Court determined in *Weltover* that an effect is direct where "it follows as an immediate consequence of the defendant's activity."[352] Adopting the same reasoning, the *Rote* court found the language of the statute unambiguous, therefore reading in additional jurisdiction requirements was unnecessary.[353] Contrarily, the Ninth Circuit decided *Corzo* according to precedent set before the Supreme Court gave its guidance in *Weltover* on the proper interpretation of the direct effect clause.[354] The Ninth Circuit's view rests on an outdated interpretation of the direct effect clause made at a time where the clause caused great confusion and the circuit courts struggled to come to a uniform conclusion.[355] The *Corzo* court's holding did not take into consideration the more recent guidance provided by *Weltover* on properly interpreting the direct effect clause.[356] Although the Supreme Court in *Weltover* did not make an express finding on the minimum contacts standard, it did provide guidance on the appropriate method of interpretation of the direct effect clause.[357] Therefore, the Court should definitively resolve the issue by following the *Rote* court's plain language interpretation to hold that establishing minimum contacts is not a necessary requirement for personal jurisdiction under the direct effect clause.

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351. *See* Rote v. Zel Custom Mfg. LLC, 816 F.3d 383, 392 (2016) (finding that the operative words in the statute were unambiguous).

352. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992).

353. *See supra* note 307 (explaining that the *Rote* court made its determination in accordance with the Supreme Court's guidance).

354. *See* Corzo v. Banco Cent. de Reserva del Peru, 243 F.3d 519, 525–26 (2001) (affirming the court's own precedent that the direct effect clause required minimum contacts).

355. *See supra* Part IV.A (discussing inconsistencies in the initial interpretations of the direct effect clause).

356. *See supra* notes 308–09 (arguing that the Ninth Circuit disregarded the Supreme Court's guidance not to read unexpressed requirements into the statute).

357. *See supra* notes 249–52 (stating that the clause is properly interpreted using a plain reading of the statute).

VI. Conclusion

The direct effect clause of the FSIA's commercial activities exception provides the only opportunity to hold foreign states accountable for those commercial acts occurring outside of U.S. territory. Providing foreign states with constitutional protections, or reading additional jurisdictional requirements into the language of the direct effect clause, precludes U.S. plaintiffs from the only path to a remedy for injuries caused by the foreign state. For these reasons, the Sixth Circuit's plain language interpretation of the direct effect clause of the commercial activities exception properly denies due process protection to foreign states while carrying out the purpose of the FSIA.