The Joy of Access to the Zone of Inhibition: Republic of Argentina v. Weltover, Inc. and the Commercial Activity Exception under the Foreign Sovereign Immunities Act of 1976

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Comment

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Stephen J. Leacock*

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I. INTRODUCTION

In Republic of Argentina v. Weltover\(^1\) the United States Supreme Court granted unprecedented access to U.S. courts for persons seeking to file suit against a sovereign state. In particular, the Court held that the commercial activity exception under the Foreign Sovereign Immunities Act of 1976 (FSIA)\(^2\) permitted the Court to exercise jurisdiction over the Republic of Argentina for refusing to repay its bonds. In a broader sense, the Court’s interpretation of the FSIA may spur additional litigation by significantly restricting when sovereign states can assert a defense of sovereign immunity.

Under the Court's interpretation of the FSIA and the commercial activity exception, a sovereign state cannot assert sovereign immunity when it acts as a market participant, and its actions directly affect the United States. A foreign government can only assert sovereign immunity when it engages in acts peculiar to sovereigns, such as the regulation of capital markets. Implicit in Republic of Argentina is the conclusion that if a sovereign state participates in private capital markets, its actions are not peculiar to sovereigns, and thus it cannot claim sovereign immunity.

First, this article identifies the issues presented in Republic of Argentina. Second, this article examines the historical development and definition of the foreign sovereign immunity doctrine. Third, this article discusses the disparate approaches of the circuit courts in defining the commercial activity exception.

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prior to Republic of Argentina. It explains why the Second Circuit came closest to Congress' intentions, in light of the legislative history of the FSIA. Fourth, this article contends that in Republic of Argentina the Court failed to clearly and satisfactorily define "commercial activity" in a manner certain to resolve the circuit conflict. As a result, what constitutes "commercial activity" is still in a state of evolution. This article concludes that the failure to more clearly define "commercial activity" will cause more sovereign states to be brought before American courts, particularly developing sovereign states, because of their greater need to intervene in their domestic economies.


In the early 1980's, the Republic of Argentina initiated a Foreign Exchange Insurance Contract (FEIC) program to stabilize its volatile currency by purchasing American dollars and exchanging them at a fixed rate for Argentine currency. The FEIC's goal was to allow Argentine businesses to repay troublesome foreign debt with "hard currency," while permitting the government to exercise some control over the process.

By 1982, Argentina did not have sufficient American dollars to retire all its contracts under the FEIC, and it therefore proceeded to refinance the remaining debt by issuing "Registered Bonds Denominated In United States Dollars" (Bonods) and promissory notes. Both the bonds and notes came due in 1986 and 1987. The refinancing enabled foreign creditors to

3. "The FEIC program was intended to protect private Argentine debtors from currency devaluations by allowing those debtors to purchase dollars at the then-current exchange rate for future payment of foreign debts." See Brief for the United States as Amicus Curiae Supporting Respondents at 7, Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992) (No. 91 - 763). "Under this program, the debtor paid a fixed amount of local currency to Banco Central in advance of the maturity date of the foreign debt. Banco Central agreed, in turn, to provide the dollars necessary to repay the foreign debt when it matured." Id.

4. See Republic of Arg., 504 U.S. 607 (the Argentine currency was then the austral and had formerly been the peso). See also Matthew Patrick McGuire, Direct Effect Jurisdiction in the 90's: Weltover, Inc. v. Republic of Argentina and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976, 17 N.C. J. Int'l. L. & Comm. Reg. 383 (1992). The Argentinean government was in the wake of economic and financial turmoil stemming from a devaluation of its currency when the FEIC program was introduced. Id.


6. Id.

7. Id.
either keep their original debt with the Bonods as a guarantee, or accept the Bonods and promissory notes in satisfaction of their debt. Argentina was to repay the Bonods in American dollars at the prevailing London Interbank market rate for 180-day Eurodollar deposits. In addition, foreign creditors could choose either New York, London, Frankfurt, or Zurich as the place of repayment.

When some of the debt came due in May 1986, Argentina still had insufficient American dollars to meet all of its obligations to its foreign creditors. Through a Presidential decree and an order from the Ministry of Economics, Argentina urged its creditors to allow it to defer the payments due under the Bonods. Weltover was one of several companies that insisted that Argentina honor the repayment contract and that repayment in New York proceed immediately. When Argentina refused to pay, Weltover filed suit against Argentina in the Federal District Court for the Southern District of New York. In defense, Argentina asserted sovereign immunity and moved to dismiss the suit based upon: (i) lack of in personam jurisdiction; and (ii) forum non conveniens. At trial, the District Court denied both motions and the Second Circuit Court of Appeals affirmed. Subsequently, the Supreme Court granted certiorari. In an opinion by Justice Scalia, the Court affirmed the lower courts and denied Argentina’s assertion of the sovereign immunity defense, concluding that the District Court properly exercised in personam jurisdiction over Argentina.

8. Id.
9. Id.
11. Id.
12. In addition to Weltover, Springdale Enterprises, Inc. and Bank Cantrade A.G. were also plaintiffs. See Republic of Arg., 504 U.S. at 607. For brevity, "Weltover" will be used to refer to all the plaintiffs.
17. Id.
II. HISTORICAL DEVELOPMENT AND DEFINITION OF FOREIGN SOVEREIGN IMMUNITY

Initially, the United States adhered to the absolute sovereign immunity doctrine under which sovereign states were always immune from the jurisdiction of American courts. This classical theory of sovereign immunity was first articulated in *The Schooner Exchange v. M'Faddon*, where the Supreme Court refused to permit certain American citizens to bring suit to reclaim a ship that agents of Napoleon's government commandeered from them. The fundamental rationales for granting sovereign immunity included the concept that an equal has no dominion over an equal and comity, as the Court later acknowledged. The doctrine of absolute sovereign immunity was also applied to activities of sovereign states when they en-

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19. See, e.g., *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). The Republic of Peru:

   followed the accepted course of procedure . . . [and] by appropriate representations, sought recognition by the State Department of [the] claim of immunity, and asked that the Department advise the Attorney General of the claim of immunity and that the Attorney General instruct the United States Attorney . . . to file in the district court the appropriate suggestion of immunity of the vessel from suit. These negotiations resulted in formal recognition by the State Department of the claim of immunity.

   *Id.* at 581 (emphasis added).

   Here the State Department . . . has allowed the claim of immunity and caused its action to be certified to the district court through appropriate channels. The certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of Government that continued retention of the vessel interferes with the proper conduct of our foreign relations.

   *Id.* at 589 (emphasis added). *See also* Verlinden B.V. v. Central Bank of Nig., 461 U.S. 480 (1983). "[I]nitial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department, and the courts abided by "suggestions of immunity" from the State Department." *Id.* at 487.

20. 11 U.S. (7 Cranch) 116 (1812).

21. *Id.* at 117.


gaged in commercial activities. For example, in *Ex parte Peru*, the Court permitted a state to successfully assert a sovereign immunity defense even though the claim was based upon a commercial transaction. The Court reached this conclusion despite its earlier dictum in *The Schooner Exchange* indicating that a “prince by acquiring private property in a foreign country... may be considered... [to be] laying down the prince and assuming the character of a private individual.”

In 1952, the United States, through the State Department, changed its foreign policy to embrace the narrower doctrine of “restrictive” sovereign immunity. In this regard, “[a]ccording to the newer [sic] or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).” Furthermore, the State Department urged courts to adhere to the doctrine of restrictive sovereign immunity, which the majority of European courts already followed. The State Department necessarily acknowledged that “a shift in policy by the executive cannot control the courts” but noted that “courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so.” Thereafter, the State Department participated in suits in...
volving sovereign states in American courts as *amicus curiae* in an attempt to clarify when courts should recognize a sovereign state's immunity.  

Amicus arguments often persuaded the courts, although one distinguished commentator cautioned that: “in the absence of legislation or of pronouncement by the Supreme Court, . . . [restrictive sovereign immunity] cannot . . . be said to be conclusive upon the courts of this country.” Despite this caution, the Supreme Court denied *certiorari* in *Victory Transport Inc. v. Comisaria General*, relying in part upon a State Department letter rejecting defendant Spain's assertion of absolute sovereign immunity. Finally, in 1973, the State Department persuaded Congress to codify the doctrine of restrictive sovereign immunity in the Foreign Sovereign Immunities Act of 1976.

### III. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

#### A. Purpose

In enacting the Foreign Sovereign Immunities Act of 1976, Congress sought to codify the doctrine of restrictive sovereign immunity.

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* cited 5 EMORY INT’L L. REV. 211, 230 (1991) (noting that the commercial activity exception was originally applied broadly by circuit courts as a means of circumventing the unrestricted approach).


immunity and to reduce the profile of the State Department in sovereign immunity litigation. The purpose of the proposed legislation, as amended, "[was] to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." The FSIA was intended to, inter alia, ensure application of the doctrine of restrictive sovereign immunity in litigation before American courts and establish standards for proper service and in personam jurisdiction over foreign states. Congress, while recognizing the sovereign immunity of foreign states, intended to restrict such immunity when foreign states engaged in commercial activity. Moreover, consistent with the constitutional separation of powers doctrine, Congress envisaged a reduction in the impact of the executive, through the State Department, in determining the sovereign immunity of states, noting that:

[A] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

Thus, enactment of the FSIA simultaneously codified the doctrine of restrictive sovereign immunity and perhaps more importantly, reserved its interpretation to the judiciary.

B. APPLICATION OF THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION BEFORE AND AFTER REPUBLIC OF ARGENTINA V. WELTOVER

Under the FSIA, a court can only assert jurisdiction over a sovereign state when that state's actions come under an enumerated exception to the FSIA.41 Engaging in commercial activity is one of the enumerated exceptions,42 therefore, if a foreign state engages in commercial activity it cannot assert sovereign immunity.44 The FSIA commercial activity exception provides that:

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

and (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.45

From the face of the statute, this exception imposes two requirements: (1) that the sovereign engage in a commercial activity; and (2) that the commercial activity must cause a direct effect in the United States.46 From the legislative history, it is clear that Congress intended a third requirement of minimum contacts to ensure that jurisdiction is constitutional.47 This minimum contact prong includes both subject matter and in personam jurisdiction.

First, Congress expanded the federal courts' exclusive subject matter jurisdiction through the FSIA, even though established practice had allowed a person,48 in certain circumstances,

41. "These exceptions include cases involving the waiver of immunity, § 1605(a)(1), commercial activities occurring in the United States or causing a direct effect in this country, § 1605(a)(2), property expropriated in violation of international law, § 1605(a)(3), real estate, inherited, or gift property located in the United States, § 1605(a)(4), non-commercial torts occurring in the United States, § 1605(a)(5), and maritime liens, § 1605(b)." 28 U.S.C. § 1602 (1982).
42. Id.
44. Id.
45. Id.
46. Id.
48. Congress did not limit the use of the FSIA to bring suit against a foreign state to only United States citizens. See Verlinden B.V. v. Central Bank of
to sue a foreign government in either state or federal court. Second, Congress intended that a court maintain in personam jurisdiction over a sovereign state only if exercising jurisdiction comported with traditional notions of due process. In this regard, Congress found that *International Shoe Co. v. Washington* and *McGee v. International Life Insurance Co.* suggested

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50. Congress did this in several ways. First, it abrogated the classical doctrine of “absolute” sovereign immunity, affirmed by the Supreme Court in *Berrizzi Bros. v. Steamship Pesaro*, 271 U.S. 562 (1926), reaffirmed some twelve years later by the Supreme Court in *Compania Espanola de Navegacion Maritime*, S.A. v. Navemar, 303 U.S. 68 (1938) and substituted the “restrictive” principle of sovereign immunity. Second, Congress included any political subdivision, agency or instrumentality of a foreign State under the auspices of the FSIA (such as a corporation, association, foundation, wholly or majority State-owned company, etc.). *See* 28 U.S.C. § 1603 (1982). Finally, Congress excluded private corporations incorporated under the laws of any of the fifty individual states or a third country, regardless of that corporation’s equity ownership by a foreign state. 28 U.S.C. § 1603 (1982). *See H.R. Rep. No. 1487, supra note 31, at 10, reprinted in* 1976 U.S.C.C.A.N. at 6613-14. *See also* Lisa D. Goekjian, *Jurisdiction Over Iran Under The FSIA And The Algiers Accord, A Loose Application: Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 59 Geo. Wash. L. Rev. 1311, 1315 (1991) (pointing out that the necessary “attribution” for the acts of an instrumentality to be imputed to the sovereign is the assertion of an agency relationship while Congressional intent in the FSIA was to preserve the presumption of separateness); General Electric Capital Corp. v. Grossman, 991 F.2d 1376, 1380 (8th Cir. 1993) (determination of foreign corporation’s status as a foreign state for purposes of FSIA must be made at the time of the acts complained of, not at time suit is brought); First National City Bank v. Banco Para El Commercio Exterior de Cuba, 462 U.S. 611, 629 (1983) (presumption of separateness was intended to be overcome only where “a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created” or where recognizing the separateness of the agency or instrumentality “would work fraud or injustice”). *But cf.* Gobay v. Mostazafan Found. of Iran, No. 92-C6954, 1993 WL 432131 at *3 (S.D.N.Y. Oct. 15, 1993) (control which must be shown to overcome presumption of separateness between foreign sovereign and its instrumentality is stronger than mere principal/agent relationship).


52. 326 U.S. 310 (1945).
that "the requirements of minimum jurisdictional contacts and adequate notice [be] embodied in the provision." Under the FSIA, Congress intended that substantive sovereign immunity law, in personam jurisdiction and Due Process minimum contacts analysis be determined coextensively and interdependently. In sum, a plaintiff needs to establish that a sovereign state has "descended" from its "Olympian heights" to the pedestrian status of "market participant" by engaging in commercial activity in the United States.

1. Commercial Activity

Congress expressly codified the restrictive theory of sovereign immunity by reserving protection only for public (i.e. non-commercial) acts of a sovereign state (jure imperii) and not for their private (i.e. commercial) acts (jure gestionis). In order to fully overcome the presumption of sovereign immunity under

55. See, e.g. Lipkind, supra note 34 (asserting that the FSIA's "intertwinning of concepts of personal and subject matter jurisdiction and immunity that United States law otherwise keeps separate has led to difficulty in judicial interpretation and application of the FSIA"); Hadwin A. Card, III, Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception, 59 FORDHAM L. REV. 91, 92 (1990) (noting direct effect analysis, meant to address subject matter jurisdiction, and minimum contacts analysis, meant to deal with personal jurisdiction, should have been kept distinct to achieve the aims of the FSIA).
58. For a discussion of the historical development of the commercial activity exception, see Leacock, supra note 18, at 13-16.
59. See OPPENHEIM, supra note 39, at 355-63 (noting that the United Kingdom, Italy, Belgium, Austria, Egypt, Switzerland, Germany, France, Netherlands, Canada, Australia and Pakistan all recognize the jure imperii/jure gestionis distinction).
this analysis, a court must first be persuaded that the state's acts are commercial in nature.

Prior to Republic of Argentina, there were no consistent standards by which courts classified activities as either public or private because, under the FSIA, Congress defined commercial activity very broadly. Commercial activity under the FSIA is a "regular course of commercial conduct or a particular commercial transaction or act." More specifically, Congress indicated that "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." As Congress explained, "it has seemed unwise to attempt an excessively precise definition of this term [commercial activity], even if that were practicable." Though Congress indicated that a "foreign government's sale of a service or product, leasing of property, its borrowing of money, . . . or its invest-

60. 28 U.S.C. § 1603(d) (1982). See also H.R. Rep. No. 1487, supra note 31, at 10, reprinted in 1976 U.S.C.C.A.N. at 6614-16 (establishing criteria for commercial behavior: 1) activities customarily carried on for profit; 2) conduct in which a private person might engage; and 3) contracts); Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80, 84 (2d Cir. 1983) (defining commercial activity broadly to include actions committed outside U.S. territory if those actions were "an integral part of the state's regular course of commercial conduct" or if they had "substantial contact with the United States").

61. 28 U.S.C. § 1605(a)(2) (1982) (emphasis added). See also Abrams, supra note 30, at 220 (noting that while the FSIA's legislative history supports the use of the nature test, many courts have applied the purpose test to effectively narrow the scope of the commercial activity exception). See, e.g., City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985) (holding that purchase of property by head of mission for personal use is not commercial activity, denying jurisdiction over sovereign); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 855 (S.D.N.Y. 1978). But see Charles D. Day, L'Europeenne de Banque v. La Republic de Venezuela: Unnecessarily Permitting Foreign Plaintiffs to Sue Foreign Governments Under the Foreign Sovereign Immunities Act, 17 BROOK J. INT'L L. 165, 179 (1991) (relying on a case decided in 1927, Metropolitan Sav. Bank & Trust Co. v. Farmer's State Bank, 20 F.2d 775, 780 (8th Cir. 1927), the District Court for the Southern District of New York used the purpose test of the FSIA to hold that the nationalization of a bank, traditionally an undeniably sovereign prerogative, which resulted in financial loss to a consortium of U.S. banks, was a commercial activity with direct effects in the United States).

ment of securities" are private acts, the essential inquiry looks at the intrinsic nature of the sovereign state's activities.

Subsequently, in Republic of Argentina v. Weltover, the Court declared that by performing an act which may just as readily be performed by a private citizen, a sovereign state cannot assert the defense of sovereign immunity. The Court based its rationale on the Second Circuit's private person test. Until the Court adopted this approach, the circuits were split, each applying the first prong of the FSIA's commercial activity exception differently.

a. The Different Approaches of the Circuit Courts

The different approaches the circuit courts utilized prior to Republic of Argentina lacked consistency and led to unpredictable outcomes. This was the inevitable result of Congress' broad definition of commercial activity. Of all the circuit courts, the Second Circuit, in Texas Trading & Milling Corp., enunciated perhaps the most rational and convincing test for interpreting the commercial activity exception under the FSIA. In Texas

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63. Id. (emphasis added). See Federal Ins. Co. v. Richard I. Rubin & Co., No. 92-4177, 1993 WL 21327 at *6 (E.D. Pa. Jan. 26, 1993) (holding a company's ownership interest to be a commercial activity). See also, JOHN R. STEVENSON ET AL., UNITED STATES LAW OF SOVEREIGN IMMUNITY RELATING TO INTERNATIONAL FINANCIAL TRANSACTIONS (1983) (presenting a general analysis of the FSIA, including comparisons with sovereign immunity laws of other countries, and concluding that financial transactions by foreign sovereigns, their agencies or instrumentalities are construed by the Act, as by the courts, as commercial activity).

64. E.g., ontology rather than teleology. Cf. De Sanchez v. Banco Central de Nicar., 770 F.2d 1383, 1393 (1985). See Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 617 (1992). "However difficult it may be in some cases to separate "purposes" (i.e., the reason why the foreign state engages in the activity) from "nature" (i.e., the outward form of the conduct that the foreign state performs or agrees to perform), . . . the [FSIA] unmistakably commands that to be done." Id.

65. 504 U.S. at 614.


67. 647 F.2d at 300.

68. Id. at 314-15. In addition to endorsing the private person test identified below, the Second Circuit also delineated a comprehensive jurisdictional analysis which lists five factors that must be present in order for a court to assert jurisdiction under the FSIA consistent with due process principals. Id. These include: 1) whether the activity qualifies as commercial (the private person test); 2) whether the salient activities of the defendant bear the type of relation
Trading, Nigeria had initiated an ambitious public works construction program and had contracted to purchase more than 960,000 metric tons of cement. The government, however, overestimated the tonnage of cement that it needed, and seriously underestimated the quantity of cement that its contractors could immediately ship under the contracts. Moreover, the capacity of its port facilities to cope with the arriving cement shipments was, to put it charitably, completely inadequate. Finding itself unable to unload the cement from waiting ships, Nigeria purported to repudiate both the supply contracts as well as its letters of credit.

The Second Circuit circumspectly approached the interpretation of the FSIA, noting that because "no provision of the Act . . . define[d] 'commercial'," Congress must have "deliberately left the meaning open . . . ." After carefully analyzing the FSIA, the Second Circuit reasoned that an activity is commercial "if the activity is one in which a private person could engage." Applying the private person test, the Second Circuit concluded that "Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose, to build roads, army barracks, whatever, is irrelevant." In contrast to the approaches of other circuit courts, the Second Circuit's private person test most accurately characterized the intent and logic of the FSIA and most closely reflected its legislative history. The Second Circuit has thereby developed the preeminent intellectual tool for analyzing the FSIA's commercial activity exception.

to the United States outlined in the FSIA; 3) whether the exercise of subject matter jurisdiction lies within the limits of "judicial power" set forth in Article III of the U.S. Constitution; 4) whether personal jurisdiction is proper; and 5) whether the exercise of personal jurisdiction is consistent with the due process clause. Id.

69. Id. at 303.
70. Id. at 305.
71. Id.
72. Id.
73. Texas Trading & Milling Corp., 647 F.2d at 308-09 (emphasis added).
74. Id. at 309. See also, Leacock, supra note 18, at 15 n.93.
75. Texas Trading & Milling Corp., 647 F.2d at 310 (emphasis added).
76. Id. at 308-10 (extensively documenting the basis for this interpretation by references to pertinent excerpts from the legislative history of the Act).
77. See generally Abrams, supra note 30 (pointing out that the Second Circuit's contribution to ending the confusion among the circuits was to abandon the vagaries of the nature/purpose dichotomy and adopt the second part of the House report's characterization of commercial activity. Thus, the opinion in Texas Trading & Milling Corp. chose a known definition and applied that concept with consistent results rather than inventing a de novo analysis).
The Court of Appeals for the Ninth Circuit adopted the private person test in *MOL Inc. v. Peoples Republic of Bangladesh.*\(^7\) In *MOL*, the Ninth Circuit recognized Bangladesh's sovereign immunity by declining to impose liability on Bangladesh for its refusal to honor a contract for the exportation of rhesus monkeys.\(^7\) The contract required construction of a breeding farm in Bangladesh to provide rhesus monkeys to be exported for medical and scientific research.\(^8\) When India curtailed the export of rhesus monkeys in 1977, the price of rhesus monkeys on the open market rose significantly, whereas MOL was entitled to continue paying the lower fixed price for its supply of rhesus monkeys from the breeding farm in Bangladesh under the terms of its contract.\(^8\) In 1979, Bangladesh alleged that MOL had breached the contract term restricting use of the monkeys to humanitarian research and terminated the contract.\(^8\) After unsuccessfully seeking to arbitrate the dispute and to resolve the matter through diplomatic channels, MOL filed suit against Bangladesh for damages.\(^8\) Applying the private person test, the Ninth Circuit concluded that the contract "concerned [both] Bangladesh's right to regulate imports and exports, a sovereign prerogative . . . [and] Bangladesh's right to regulate its natural resources, also a uniquely sovereign function."\(^8\) Moreover, since both activities were uniquely sovereign and public in nature, the Ninth Circuit reasoned that MOL did not successfully rebut Bangladesh's presumption of sovereign immunity.\(^8\) In a later case, *Shapiro v. Republic of Bolivia*, the Second Circuit continued to use the *Texas Trading* private person test.\(^8\) In *Shapiro*, the Second Circuit denied Bolivia's assertion of sovereign immunity with regard to its refusal to pay a promissory note held by an American citizen living abroad.\(^8\) Bolivia had issued forty promissory notes with a cumulative face value of $81 million in order to purchase fifty-two Starfighter aircraft

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78. 736 F.2d 1326 (9th Cir.1984), cert. denied, 469 U.S. 1037 (1984).
79. Id. at 1329.
80. Id. at 1327.
81. Id.
82. Id. at 1328.
83. *MOL Inc.*, 736 F.2d at 1328.
84. Id. at 1329. "A private party could not have made such an agreement."
85. Id.
87. *Shapiro*, 930 F.2d at 1020.
through its United States agent, International Promotions and Ventures, Ltd. (IPVL). 88 David Shapiro allegedly purchased Note 12, which Bolivia had unsuccessfully attempted to recover from IPVL in IPVL's bankruptcy proceeding. 89 In deciding Shapiro's suit against Bolivia for breach of contract, the Second Circuit categorized the pertinent activity giving rise to the claim as simply the issuance of promissory notes to IPVL. 90 Reasoning from this substantive premise, the Second Circuit concluded that "[i]t is self-evident that issuing public debt [securities] is a commercial activity within the meaning of Section 1605(a)(2) [of the FSIA]." 91 The court drew no distinction between the issuance of public in contrast to private debt securities, presumably viewing this as a distinction without a substantive difference in this context. The court's focus on the nature of the transaction was rationally consistent with the FSIA's intent and legislative history in determining that the issuance of promissory notes was commercial activity 92 and that Bolivia was thus ineligible for sovereign immunity protection. 93

Other circuits either did not adopt the private person test or applied it unartfully. For example, in Practical Concepts, Inc. v. Republic of Bolivia, 94 the Court of Appeals for the District of Columbia denied Bolivia's assertion of sovereign immunity after evaluating the substantive nature of a disputed contract for services between Bolivia and Practical Concepts Inc. (PCI). 95 Under the auspices of the Agency for International Development (AID), Bolivia had received funding for a contract with PCI to design and implement a program for rural development. 96 When AID withdrew funding, Bolivia terminated the agreement with PCI in the same month. 97 In fact, the terms of the contract entitled PCI to tax exempt status, preferential bureaucratic treatment and diplomatic privileges. 98 In spite of these factors, which only a sovereign state could offer, the Court of Appeals reversed the District Court's grant of sovereign immunity to Bo-

88. Id. at 1014-15.
89. Id. at 1015.
90. Id. at 1018.
91. Id.
93. See supra notes 41-44 and accompanying text.
94. 811 F.2d 1543 (D.C. Cir. 1987).
95. Id. at 1551.
96. Id. at 1545.
97. Id.
98. Id. at 1549-50.
The Court of Appeals reasoned that "[i]t is more sensible, and faithful to the probable intent of Congress, we believe, generally to center on the basic exchange (e.g., the sale of goods and services), not on the facilitating features (e.g., expediting entrance of personnel and supplies), in determining whether an obligation qualifies as a 'commercial activity' for FSIA purposes." Essentially, in the opinion of the Court of Appeals, Bolivia's decision to enter into a garden variety service contract with PCI was determinative, notwithstanding the fact that in return PCI had received benefits which only a state could validly grant.

The Court of Appeals for the District of Columbia may well have misconstrued the private person test by purporting to dissect the case into "its subsidiary . . . [and] its central prescriptions" rather than reaching a decision by evaluating the contract as a whole. The Court of Appeals' approach reached a decision based upon fragmentation of the contract, however elegantly accomplished, rather than analyzing and evaluating it as a coherent whole. In this regard, the decision of the District Court is preferable because as the District Court reasoned, the contract when taken as a whole was not one that a private party could have made.

99. Practical Concepts, Inc., 811 F.2d at 1552 (remanding the case to the District Court to determine whether any of Bolivia's alternate pleas were meritorious). E.g. Bolivia alternatively pled that the district court should stay the court proceedings and order resolution of the case by arbitration in accord with the arbitration clause in the contract. Id. at 1545.

100. Id. at 1548. See Segni v. Commercial Office of Spain, 835 F.2d 160, 165-66 (7th Cir. 1987) (stating a service contract to promote Spanish wine in the United States is a commercial activity sufficient to grant jurisdiction under FSIA).

101. Practical Concepts, Inc., 811 F.2d at 1551. But see Abrams, supra note 30, at 215 (suggesting that the approach of the court in Practical Concepts was actually superior to prior circuit court decisions because it applied the nature test which focused on the activity upon which the suit was based (breach of contract) without extending the analysis to query the nature of the counterpart to the contract (a foreign state)).


103. Practical Concepts, Inc. v. Republic of Bol., 613 F.Supp. 863, 870 (D.D.C.), recons. denied, 615 F.Supp. 92 (D.D.C.1985). Use of the "tail-wagging-dog" metaphor by the Court of Appeals for the District of Columbia may be particularly inept because the issue is not one of different parts of the anatomy of a single creature, but rather the difference between two distinctly separate creatures; e.g., the difference between a dog and an armadillo. Practical Concepts, Inc., 811 F.2d at 1550.
Subsequently, in *De Sanchez v. Banco Central de Nicaragua*, the Court of Appeals for the Fifth Circuit did not adopt the private person test in according the defendant, an agency of Nicaragua, sovereign immunity with respect to its issuance of a certificate of deposit. In 1978, Mrs. Najarro de Sanchez, a Nicaraguan national, purchased a certificate of deposit worth $150,000 from Banco Central, a privately-owned commercial Nicaraguan Bank. In 1979, when General Somoza’s regime was on the verge of collapse, Mrs. de Sanchez decided to redeem her certificate of deposit. Citing foreign exchange controls, Banco Central later declined to honor a check drawn on Nicaraguan funds in the United States made available to Mrs. de Sanchez in order to retire her certificate of deposit. The Fifth Circuit decided that Banco Central’s actions were sovereign because its "actions in selling foreign exchange reserves were not the same as those of a private bank...[b]y law, [it] had overall responsibility for the control and management of Nicaragua’s monetary reserves." The Fifth Circuit apparently based its conclusion upon "the different purposes motivating the sales," indicating that "the essence of an act is defined by its purpose." Unfortunately, the *De Sanchez* court's analysis of the activity at issue and its interpretation of the FSIA conflicts directly and irrevocably with the language under scrutiny. The Fifth Circuit ineffectively interpreted the explicit provisions of the FSIA applicable to this fact situation by misreading the legislative intent behind the FSIA. In concluding that Banco Central’s issuance of a check in these circumstances was a sovereign act meriting immunity, the Fifth Circuit disregarded the essential statutory requirement that the uniquely "public" or "sovereign" nature of the act or acts in controversy be unambiguously

104. 770 F.2d 1385 (5th Cir. 1985).
105. *Id.* at 1387.
106. *Id.* Although President Somoza personally intervened on de Sanchez' behalf to make good on the obligation, this resulted in the sale by the Central Bank of Nicaragua of dollars to Banco Central. *Id.* By the time the check from Citizens and Southern International Bank in New Orleans reached plaintiff, her account had been frozen by a group claiming to represent the newly installed Sandinista regime. *Id.* at 1387-88.
107. *Id.* at 1393. The court defined the relevant activities of the defendant as: 1) the issuance of and subsequent failure to honor a check; and 2) the sale of foreign exchange reserve. *Id.* The court asserted that the "sovereign nature" of the first action informed the defendant's (otherwise clearly commercial) second action. *Id.* at 1394. *Accord Callejo v. Bancomer, S.A.*, 764 F. 2d 1101, 1110 (5th Cir. 1985).
108. *DeSanchez*, 770 F.2d at 1393.
proven without regard to the *purposes* that motivated the pertinent conduct.\textsuperscript{109}

b. The United States Supreme Court’s Approach in Republic of Argentina

When the Court addressed the FSIA and its commercial activity exception in *Republic of Argentina*,\textsuperscript{110} it reasoned that “when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.”\textsuperscript{111} The Court noted that Congress intended to codify the *restrictive* principle of sovereign immunity\textsuperscript{112} as it had been originally used by the State Department in 1952 in formulating its restrictive foreign sovereign immunity policy.\textsuperscript{113} Extrapolating from this history, the Court cast the definition of commercial activity in terms of private versus public acts.\textsuperscript{114} Based on that distinction, the Court modified the private person test, declaring that “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in trade and traffic or commerce.”\textsuperscript{115} Applying this test, the Court concluded that Argentina’s issuance of Bonods was a commercial activity, since the Bonods were nothing more than garden-variety debt instruments\textsuperscript{116} that private parties routinely utilized in pursuit of planned financial objectives.\textsuperscript{117}

\textsuperscript{110} Republic of Arg. v. Weltover, Inc., 504 U.S. 607 (1992). See also Alfred Dunhill of London v. Cuba, 425 U.S. 682, 704 (1976) (noting that the use of the private person test is a means to remain within the bounds of “restrictive” immunity while maintaining a meaningful dichotomy between *jure imperii* and *jure gestionis*).
\textsuperscript{111} Republic of Arg., 504 U.S. at 607.
\textsuperscript{113} Republic of Arg., 504 U.S. at 607. The State Department first advanced the restrictive theory of sovereign immunity (denying immunity for private or commercial acts of a foreign state) by declaring in the “Tate Letter” in 1952 that the United States had adopted the restrictive theory of sovereign immunity thereby discarding the absolute theory of sovereign immunity previously applied. See Letter from Jack B. Tate, supra note 27.
\textsuperscript{114} Republic of Arg., 504 U.S. at 607.
\textsuperscript{115} Id. See Rush-Presbyterian-St. Luke’s Ctr. v. Hellenic Republic, 877 F.2d 574, 578 (7th Cir. 1989).
\textsuperscript{116} Republic of Arg., 504 U.S. at 607.
\textsuperscript{117} Id.
Furthermore, in order to avoid any future misinterpretation of the Republic of Argentina decision, the Court held that the FSIA squarely and unambiguously precludes court consideration of either the context or surrounding purposes of any ostensibly commercial activity, thereby over-ruling De Sanchez, its ancestors and progeny. Despite the need to further clarify the commercial activity exception in the FSIA, the Court simply adopted the essential components of Texas Trading & Milling and Shapiro into its Republic of Argentina reasoning, rather then addressing the issue afresh. Arguably, the Court was under an obligation to define commercial activity more clearly than had Congress or the Second Circuit. Disappointingly, however, the Court's opinion has left unanswered the question of exactly what constitutes commercial activity.

The Court's reticence has led to criticism that it simply followed the lead of other courts by incorporating into the sovereign immunity analysis the question of whether the foreign state has received an economic benefit. This criticism is justified only if in the Court's view, the absence of economic benefit disqualifies an activity as commercial. If the Court uses the presence of an economic benefit as a condition precedent to ruling that conduct constitutes commercial activity under the FSIA, the Court is unduly restrictive. Although obtaining economic benefits is often the objective of commercial (and thus private) activity, pursuit of profit is not always a motive. For example, a private party may engage in an activity such as purchasing art for purely aesthetic reasons. Thus, the absence of a profit motive does not deprive a transaction from being com-

118. Id. The Court indicated that any reference to a purpose test must be abandoned when it commented that there was "nothing distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as jure imperii [sovereign]." Id. This language is reminiscent of the Second Circuit's language in Texas Trading & Milling Corp. that the purpose behind Argentina's participation in the bond market was irrelevant. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 310 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).


120. Texas Trading & Milling Corp., 647 F.2d at 302.


122. See generally Thomas, supra note 22, at 480-86 (suggesting a methodology by which to determine the injury-causing activity and thereafter applying the FSIA commercial activity exception to that activity).


124. See, e.g., Callejo v. Bancomer, S.A., 764 F.2d 1101, 1109 (5th Cir. 1985).
mercial if done by a sovereign state. On the contrary, it is the fact that a private party can conduct such activity that denotes it a commercial activity encompassed by the FSIA. Therefore, it is quite irrelevant whether the particular activity is for profit or whether the activity results in an economic benefit to the sovereign state.

Furthermore, one commentator’s criticism that “[b]ecause sovereignty itself represents a concept encompassing a wide variety of potentially conflicting rights and obligations, judicial consistency and legal predictability will not result from immunity decisions based upon the maxim that the sovereignty of one state extends no further than the sovereignty of another,” 125 tends to ignore the practical realities. The more important question is whether it is rational to conceive of sovereignty as varying from state to state as a general principle. In the interests of intellectual consistency, the answer should be negative and the Republic of Argentina decision will probably not be interpreted as empowering American courts to apply different standards of sovereignty to different states. Yet, as Justice Holmes admonished in a different context, “[t]he life of the law has not been logic: it has been experience.” 126 This exhortation expresses its own inherent logic because fundamental policy considerations of American assistance in the economic development of developing countries may undergird granting sovereign immunity to developing countries, even in some instances where commercial aspects play a significant role in the particular transaction. 127

Shorn of pretense, one may wonder whether Republic of Argentina presented the Court with an invaluable opportunity to judicially codify American law on sovereign immunity and the commercial activity exception. If so, the Court apparently declined the opportunity to question either the principle itself, which is understandable in light of the separation of powers doctrine and because such questioning may fall within the bailiwick of the legislature, or the wisdom of the FSIA’s commercial activ-

127. In Practical Concepts, Inc. v. Republic of Bol., 811 F.2d 1543, 1543 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia denied Bolivia sovereign immunity. Id. The Court of Appeals arguably misinterpreted the private person test and failed to elevate policy considerations arising from fundamental rural economic objectives of a developing country to levels of legal potency sufficient to trigger sovereign immunity. Id.
ity exception in its present form. Instead, the Court sought to settle the conflict between the circuit courts by adopting the analytical paradigm enunciated in *Texas Trading* and Shapiro and essentially left it at that.

2. Direct Effect

After deciding that the injury-causing activity of the sovereign state is “commercial,” a court must next decide whether or not that commercial activity has caused a “direct effect” in the United States.128 Unfortunately, Congress only provided examples of activities that would have a “direct effect,” including: (a) commercial activity in the United States; (b) acts performed in the United States in connection with commercial activity of a sovereign state elsewhere; and (c) acts outside the territory of the United States in connection with the commercial activity of a sovereign state, which has had a demonstrable direct effect in the United States.129

Legislative history states that under the latter situation, the FSIA “would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in Section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).”130 This praying in aid of existing law in the FSIA’s legislative history, however, does not irrefutably clarify the degree of domestic effect required, leaving the determination to a case-by-case approach.

a. The Different Approaches of the Circuit Courts

In the absence of clear guidance, a number of circuit courts interpreted the FSIA’s legislative history as indicating that actionable commercial activity must cause a substantial and foreseeable effect within the United States in order to satisfy the direct effect requirement.131 For example, the Sixth Circuit

129. Id.
Court of Appeals decided that in order to justify direct effect jurisdiction, "the injurious and significant financial consequences to that corporation . . . [must be] the foreseeable, rather than fortuitous, result of the conduct."132 The Ninth Circuit also adopted substantiality and foreseeability tests as appropriate and concluded "that Congress intended this clause to reach only conduct causing an effect that is 'substantial' and 'direct and foreseeable.'"133 Similarly, utilizing a similar analysis, the Court of Appeals for the District of Columbia defined substantial and foreseeable effect as "something legally significant actually . . . [happening] in the United States; a bank refused to pay on a letter of credit, money was transferred, a debt was incurred."134 Therefore, in the opinion of the majority of the circuit courts, in order to have a direct effect, the commercial activity must be legally significant, with both substantial and foreseeable domestic consequences.

Arguably, in Texas Trading, the Second Circuit's interpretation of direct effect deviated from this majority view.135 The Second Circuit noted that the paradigm use of direct effect oc-

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133. America West Airlines v. GPA Group, Ltd., 877 F.2d 793, 798 (9th Cir. 1989). Accord, Walter Fuller Aircraft Sales v. Republic of the Phil., 965 F.2d 1375, 1386-87 (5th Cir. 1992) (noting that the district court properly had jurisdiction over Philippine Presidential Commission on Good Government (PCGG) because the act of contracting with a U.S. corporation for sale of aircraft, over which PCGG had obtained control but to which it did not have title, had substantial, direct and foreseeable effects in the United States).

134. Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (positing that financial loss is insufficient to constitute a direct effect without the occurrence of a 'legally significant event,' a view which further refined the Restatement definition of direct effect ultimately abandoned by the Supreme Court). See also Transamerican S.S. v. Somali Democratic Republic, 767 F.2d 998, 1004 (D.C. Cir. 1985).

135. Texas Trading & Milling Corp. v. Federal Republic of Nig., 647 F.2d 300, 311 n. 32 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). The Second Circuit's analysis not only adopts the financial loss approach to direct effect, which is more faithful to the legislative purposes of the Act, but performed groundwork for the Supreme Court's Republic of Argentina disposition by substituting the Restatement test with one that asked whether the Constitutional minima were satisfied to establish subject matter and in personam jurisdiction. Id. at 313-15.
curred in tort cases, where an injury was the direct effect of someone's negligence. However, as the court noted, "unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed... it can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a direct financial loss."\textsuperscript{136} The Second Circuit has continued to invoke this reasoning, concluding that there was no direct effect in \textit{International Housing, Ltd. v. Rafidain Bank Iraq}.\textsuperscript{137}

\textsuperscript{136} Id. at 312 (emphasis added).

\textsuperscript{137} 893 F.2d 8, 11 (2d Cir. 1989). Justice Kaufman's dissent held that payments in New York were a direct effect even though New York was not set as the situs of payment by the contract. "In my view, the payments of over $221,000... into Rafidain's New York account at Irving Trust at the direction of Rafidain constitute a 'direct effect in the United States.'" Id. at 12-13 (Kaufman, J., dissenting) (emphasis added). Accord \textit{General Electric Capital Corp. v. Grossman}, 991 F.2d 1376 (8th Cir. 1993) (events occurring in United States in the process of an acquisition of a U.S. corporation not held to be a direct effect although Canadian acquirer suffered financial loss); \textit{Stena Rederi AB v. Commission de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana}, 923 F.2d 380, 390-91 (5th Cir. 1991) (five million dollar financial loss by Swedish corporation as a result of the seizure of its vessel in the United States did not constitute a direct effect since plaintiff was not a U.S. entity; financial loss alone is not an adequate measure of the effect of a foreign entity's commercial activities in the United States, and the Mexican company's commercial activity did not cause effects in the United States which were substantial, direct and foreseeable); \textit{Mitchell v. Secretariat of Land Reclamation and Agr. Reform of Socialist People's Libyan Arab Jamahiriya}, 887 F.2d 1089 (9th Cir. 1989) (no direct effect where breach of contract by Libyan government in Libya led to default of U.S. company on its obligations and ultimately to that firm's bankruptcy); \textit{America West Airlines v. GPA Group, Ltd.}, 877 F.2d 793, 800 (9th Cir. 1989) (faulty engine maintenance performed abroad by subsidiary of foreign state's national airline did not have direct effect despite losses to domestic owner of aircraft since use of engine in United States was not foreseeable); \textit{Gregorian v. Izvestia}, 871 F.2d 1515, 1527 (9th Cir. 1989) (construing \textit{Zedan v. Kingdom of Saudi Arabia}, 849 F.2d 1511, 1515 (D.C. Cir. 1988) that mere financial loss cannot constitute direct effect); \textit{Security Pac. Nat'l Bank v. Derderian}, 872 F.2d 281, 286 (9th Cir. 1989) (no direct effect where Mexican state-owned bank accepted a deposit from the United States which depositor had acquired by conversion in the United States); \textit{Carey v. National Oil Corp.}, 592 F.2d 673, 677 (2d Cir. 1979) (per curiam) (Libya knew that its instrumentality intended to import oil into the United States in violation of a boycott even if the events which occurred abroad did not reach the level of direct effect); \textit{United World Trade v. Mangyshlakneft Oil Prod. Assoc.}, 821 F. Supp. 1405, 1409 (D. Colo. 1993) (mere financial loss suffered by United States plaintiff as a result of breach of preliminary agreement by foreign corporation for sale of crude oil was not direct effect); \textit{Maizus v. Weldor Trust Reg.}, 820 F. Supp. 101, 104-105 (S.D.N.Y. 1993) (holding an injury consisting of loss of money from a trust account at a U.S. bank did not constitute a direct effect, because the purported loss would not have any immediate consequence for any of the defendants who were only provisionally liable to the U.S. plaintiff as guarantors of a promissory note); \textit{Marathon Int'l Petro-
b. The United States Supreme Court's Approach in Republic of Argentina

In Republic of Argentina, the Court resolved the dispute between the circuits regarding direct effect by holding that the FSIA does not "contain[ ] any . . . requirement of 'substantial[ ]' [effect] or 'foreseeability.'"138 The Court also acknowledged that "jurisdiction may not be predicated upon purely trivial effects in the United States."139 In the Court's opinion, "an effect is 'direct' if it follows as an [inevitable and] immediate consequence of the defendant's . . . activity."140 In order to appropriately apply this direct effect analysis to Argentina, the Court, sua sponte,141 designated the United States as the place of per-


139. Id. (citing with approval the Court of Appeals in Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991), aff'd, 504 U.S. 607 (1992).


140. The Court noted that:

Although we are happy to endorse the Second Circuit's recognition of 'New York's status as a world financial leader,' the effect of Argentina's rescheduling in diminishing that status (assuming that it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the 'direct effect' requirement of the FSIA.

We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the Bonods had a 'direct effect' in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those ac-
formance for Argentina's ultimate contractual obligations. The Court then concluded that Argentina's unilateral rescheduling of the Bonods' maturity dates had caused a direct effect in the United States.

3. Minimum Contacts

Congress unmistakably intended to limit jurisdiction under the FSIA to situations where a foreign state had sufficient minimum contacts with the United States to satisfy due process. The FSIA's legislative history shows that "the requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision." Actually, minimum counts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. Republic of Arg., 504 U.S. at 618-19 (emphasis added).

142. Id. But c.f. Chuidian v. Philippine Nat'l Bank, 976 F.2d 561, 562-63 (9th Cir. 1992) (letter of credit obligations occur at place of payment only if payor bank is a confirming and not merely advising bank under the Uniform Customs and Practices for Documentary Credits).

143. Republic of Arg., 504 U.S. at 607.

144. To constitute constitutionally minimum contacts, the defendant's contacts with the applicable forum must satisfy three criteria. First, the contacts must be related to the plaintiff's cause of action or have given rise to it. . . . Second, the contacts must involve 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum . . ., thus invoking the benefits and protections of its laws . . .'. Third, the defendant's contacts with the forum must be 'such that [the defendant] should reasonably anticipate being haled into court there.' Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546 (11th Cir.), cert. denied, Regie Nationale Des Usines Renault S.A. v. Vermeulen, 113 S.Ct. 2334 (1993).

145. The relevant forum for purposes of due process analysis with respect to claims brought under the FSIA is the United States, not the particular forum state. See also, Republic of Arg., 504 U.S. at 607.


147. Id. See also, Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980) (personal jurisdiction under FSIA requires satisfaction of traditional minimum contacts standard); Maritime Ventures Intl v. Caribbean Trading & Fidelity, Ltd., 689 F. Supp. 1340, 1350 (S.D.N.Y.), aff'd, 722 F. Supp. 1032, 1037 (S.D.N.Y. 1988) (any exercise of jurisdiction over foreign sovereign under an exception to the FSIA must satisfy constitutional standards of minimum contacts and due process); Ruiz v. Transportes Aereos Militares Ecuadorianos, 103 F.R.D. 458, 459 (D.D.C. 1984) (the fact that the FSIA is the exclusive means of gaining personal jurisdiction over a foreign sovereign does not abrogate the need to find sufficient contacts between defendant and forum to satisfy constitutional due process); Decor by Nikkei
contacts analysis may very well be the area of most widespread agreement with respect to the commercial activity exception.

a. The Approach of the Circuit Courts

Courts must determine whether the commercial activities of a foreign state pass muster with regard to the minimum contacts criteria as well as analyze the facts and law to decide whether the direct effect requirements are met under the FSIA. In considering minimum contacts, the Court of Appeals for the Second Circuit has interpreted the legislative history of the FSIA to mean that a foreign state is a person under the Due Process Clause of the Fifth Amendment. In reaching its conclusion, the Second Circuit reasoned that

A court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Generally, other circuit courts have adhered to this approach, applying a due process minimum contacts test.

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148. "E.g. coextensively and interdependently. See supra note 55 and accompanying text.

149. Texas Trading & Milling Corp., 647 F.2d at 313.

150. Id. at 314. Accord Decor by Nikkei Int'l, Inc. v. Federal Republic of Nig., 497 F. Supp. 893 (1980). In determining whether sufficient minimum contacts are present between defendant foreign sovereign and the United States to satisfy commercial activity exception, the court must consider whether sufficient contacts exist with respect to the issue in dispute and whether maintenance of the suit offends "traditional notions of fair play and substantial justice." Id. at 905. Contacts between defendant and forum must indicate that it is reasonable to require defendant to litigate there. Id. Factors include: a) the burden placed on defendant in litigating in the forum; b) the interest of forum in adjudicating the dispute; and c) plaintiff's interest in obtaining convenient and effective relief. Id.

151. Despite general agreement in the circuit courts about the need to apply the due process minimum contacts test, results have diverged. See, e.g., Teledyne, Inc. v. Kone Corp., 892 F.2d 1404, 1411 (9th Cir. 1989) (District Court lacked personal jurisdiction over Canadian corporation's claims against state-owned Finnish corporations for acts not occurring in or directed toward United States); Gregorian v. Izvestia, 871 F.2d 1515 (9th Cir. 1989) (holding that in
determining minimum contacts under the commercial activity exception, the court would only have to consider contact of particular Soviet trading organization named as defendant, rather than contact of any Soviet trading organization or of entire Soviet government with the United States; Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. and Foodstuffs, 647 F.2d 317, 319-20 (2d Cir. 1981) (in an action brought to recover for breach of guaranty of demurrage, defendant company which solicited bids in the United States for food, being purchased under a U.S. government financing program paid for by letter of credit confirmed by a New York bank, had sufficient connection to permit jurisdiction under due process standard); Walpex Trading Co. v. Yacamientos Petroliferos Fiscales Bolivianos, 712 F. Supp. 383 (S.D.N.Y. 1989) (District Court did not have specific personal jurisdiction over corporate instrumentality of government of Bolivia which breached contract with U.S. corporation because minimum contacts were not satisfied: invitation for bids never published in United States; no employee of corporate instrumentality ever traveled to United States in connection with transaction; no evidence of direct communications with the United States concerning transaction; and the few employees of the corporate instrumentality which were permanently present in the United States were not involved in the transaction), reargument denied, No. 84-C4364, 1989 WL 67229 (S.D.N.Y. Jan. 13, 1989); Hester Int'l Corp. v. Federal Republic of Nig., 681 F. Supp. 371, 385-86 (N.D. Miss. 1988), aff'd, 879 F.2d 170 (5th Cir. 1989) (Nigerian corporation's commercial activities in the United States had sufficient nexus with American corporation's claim, for breach of contractual duty to provide interim financing for development and implementation of rice farm project in Nigeria, to subject Nigerian corporation to jurisdiction under commercial activity exception); Falcoal v. Turkiye Komur Isletmeleri Kurumu, 660 F. Supp. 1536, 1542 (S.D. Tex. 1987) (Turkish governmental entity's agreement to pay through letter of credit in New York under a contract for purchase of coal from a Texas corporation did not establish minimum contacts with Texas); Chisholm & Co. v. Bank of Jam., 643 F. Supp. 1393, 1402 (S.D. Fla. 1986) (court's exercise of personal jurisdiction satisfied due process minimum contact standards where Jamaican government bank and its former governor had availed themselves of privileges of American law by participating in export-import bank program and had the opportunity to obtain lines of credit from American banks; the bank and its governor should have foreseen potential of litigation in the United States); Crimson Semiconductor v. Electronum, 629 F. Supp. 903, 907-08 (S.D.N.Y. 1986) (seller of electronic components had sufficient contact with United States to justify jurisdiction under exception to FSIA where seller: did business with buyer and others in United States; delivered products to the United States; sought a market for its goods in the United States; had its representatives visit New York several times to negotiate distributorships; received and made payments through New York banks; advertised in national trade publications; and instituted attachment proceedings against buyer during pendency of suit); Unidyne Corp. v. Aerolineas Argentinas, 640 F. Supp. 354, 360 (E.D. Va. 1985) (Argentine airline lacked minimum contacts with forum state because it had no officer or agent in Virginia, never flew into Virginia, and had only engaged in conversations and negotiations with Virginia corporation and did not purposely avail itself of benefits and protection of Virginia laws); Continental Graphics, Div. of Republic Corp. v. Hiller Indus., 614 F. Supp. 1125, 1129-30 (D.C. Utah 1985) (where agency of Mexican government had availed itself of the privilege of doing business in the United States and potential for litigation was foreseeable, requiring defendant to appear in the United States did not offend due process minimum contacts).
Both the Second and Fifth Circuits recently indicated that the minimum contacts standard under the Due Process Clause should apply to the determination of whether a foreign state's activities had caused a direct effect within the United States. The Second Circuit not only acknowledged that Congress left it to the courts to "define the contours of the 'substantial contacts' between a foreign state's commercial activity and the United States," but further concluded that "it is clear that Congress intended a tighter nexus than the 'minimum contacts' standard for due process." Similarly, the Fifth Circuit concluded that "[i]solated or unrelated commercial actions by a foreign sovereign in the United States do not authorize the [commercial activity] exception."

b. The United States Supreme Court's Approach in Republic of Argentina

In Republic of Argentina, the Court concluded that Argentina had satisfied the minimum contacts criteria. At the outset, however, the Court assumed "that a foreign state is a 'person' for purposes of the Due Process Clause." As a result of this assumption, the Court avoided deciding whether a sover-


154. Shapiro, 930 F.2d at 1019.
155. Id. See also, Obenchain Corp. v. Corporation Nacionale de Inversiones, 656 F. Supp. 435 (W.D. Pa. 1987), aff'd in part and rev'd in part, 898 F.2d 142 (3d Cir. 1990) (the purposeful availment minimum contacts standard was satisfied for FSIA purposes when the defendant foreign sovereign, Corporacion Nacionale, entered Pennsylvania several times to inspect its operations there and negotiate a contract).
156. Aribba Ltd., 962 F.2d at 533. See also Jones v. Petty-Ray Geophysical Geosource, 954 F.2d 1061, 1069 (5th Cir.), cert denied, 113 S.Ct. 193 (1992) (court looks to place of contractual performance and purposeful activity to determine whether the making of a contract with resident of forum satisfies the purposeful availment standard for minimum contacts).
157. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 607 (1992). But see Carlos M. Vazquez, The Relationship Between the FSIA's Commercial Activities Exception and the Due-Process Clause, 85 Am. Soc'y Int'l. L. Proc. 257, 259 (1991). The author contends that Republic of Argentina is one in a series of decisions, including Wolpex Naval and Foremost McKesson, which misconstrue the Second Circuit's Texas Trading & Milling analysis by considering the direct effect and due process issues separately. Id. at 258. In applying the Texas Trading & Milling analysis, the activities of the foreign sovereign crucial to the direct effect analysis may be exclusive of those activities analyzed to satisfy the due process clause. Id. at 258-59. According to the author, this was in fact the case in Republic of Argentina. Id. at 259.
eign state is a person for purposes of minimum contacts, an issue critical to rational analysis under the FSIA. In any event, the Court unambiguously approved the application of a minimum contacts analysis as the basis for determining whether an American court has jurisdiction.

IV. IMPACT OF REPUBLIC OF ARGENTINA

A. COMMERCIAL ACTIVITY

*Republic of Argentina* may encourage litigation under the FSIA by failing to improve upon and clarify the definition of commercial activity. The Court simply declared that “when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are ‘commercial’ within the meaning of the FSIA.” As a result of the Court's laxity, courts may have too much latitude in defining commercial activity. Criticism of the Court's definition has continued even though the definition has not posed a significant problem in straightforward cases decided since Republic of Argentina.

1. Straightforward Cases

In *Vermeulen v. Renault, U.S.A., Inc.*, the Court of Appeals for the Eleventh Circuit lamented “this rather vague definition” that “the Supreme Court expounded on,” in ruling that Renault engaged in commercial activity by designing and manufacturing the LeCar for sale in the United States. The Eleventh Circuit concluded that the state-owned French manufacturer Regie Nationale Des Usines Renault satisfied the criteria of a foreign state acting as a market participant. The Court of Appeals compared Renault to Ford and General Motors as examples of private parties in the automobile industry.

159. *Id.* at 614.

160. Some Supreme Court Justices themselves have indulged this latitude. In *Saudi Arabia v. Nelson, 113 S.Ct. 1471, vacated, 996 F.2d 270 (11th Cir. 1993)*, Blackmun and White reason that running and operating a hospital, even a public one, is a commercial enterprise. *Id.* at 1481, 1483. Blackmun, Kennedy and Stevens categorize the conduct of hiring Nelson as an employee, without appropriately warning him was potentially actionable commercial activity. *Id.* at 1487, 1489.

161. 985 F. 2d 1534 (11th Cir. 1993).

162. *Id.* at 1544.

163. *Id.*

164. *Id.*
Other cases fall within the straightforward category, such as *Walter Fuller Aircraft Sales v. Republic of the Philippines*,

where the Court of Appeals for the Fifth Circuit ruled that the Philippine government had engaged in the market as a private player when it sold a Falcon 50 jet to Walter Fuller Aircraft in the United States. Similarly, the Federal Court in the Southern District of New York relied, for the most part, upon *Republic of Argentina* to deny sovereign immunity to Dubai when Dubai assumed control of the Union Bank of the Middle East and began to improperly liquidate the bank's assets.

In the same vein, where a former secretary sued the Brazilian government for sexual harassment, the Federal Court for the Southern District of New York observed that the statutory definition of commercial activity "is somewhat circular, since it defines commercial activity in terms of commercial conduct and commercial transaction." Because the court reasoned that "employment of a secretary is hardly within the unique sphere of sovereign authority, [and] . . . in employing a secretary the foreign enters the marketplace and acts just as a private party would," it concluded that the Brazilian government was engaged in commercial activity.

Even more recently, the Court of Appeals for the District of Columbia ruled that where former employees filed suit against Kuwait University as an instrumentality of the Kuwait government, the activity of operating a university satisfied the criteria of commercial activity under the FSIA. The Court of Appeals for the Ninth Circuit, after noting critically that "we are not the first court to acknowledge the confusing nature of the language and structure of [the statutory definition of commercial activity]," ruled that the University had engaged in commercial activity.


166. *Walter Fuller Aircraft Sales*, 965 F.2d at 1385-86.


168. *Id.*


170. *Id.* at 1092.

171. *Id.* at 1093.

172. *Id.*


174. "[T]here is nothing 'peculiarly sovereign' about unilaterally terminating an employment contract. Private parties often repudiate contracts in everyday commerce . . . ." *Id.* at 1537.
cial activity]" decided that in a suit against an agency of the Mexican government, interference with contract rights fell within the commercial activity exception.

2. Complex Cases

Where the facts of a case become more complex, the shortcomings of the Republic of Argentina’s definition of commercial activity become more apparent. Recently, the Court applied the Republic of Argentina definition to the facts of Saudi Arabia v. Nelson with mixed results. In Nelson, the Court lamented that in seeking to identify conduct which qualified as commercial activity, the FSIA was “too obtuse to be of much help.” The Court observed that to the extent that a definition was included in the FSIA, it was “one distinguished only by its diffidence . . . [and left] the critical term commercial largely undefined.” The Court acknowledged, “[w]e do not, however, have the option to throw up our hands. The term has to be given

175. Export Group v. Reef Indus., 54 F.3d 1466, 1473 (9th Cir. 1995).
176. Id. at 1477.
177. 113 S.Ct. 1471 (1993). Justice Souter authored the majority opinion, in which Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas concurred, and in which Justice Kennedy joined except for the last paragraph of part II. Justice White wrote a concurring opinion in which Justice Blackmun joined. Justice Blackmun filed an opinion concurring in part and dissenting in part. Justice Kennedy filed an opinion, concurring in part and dissenting in part, in which Justice Blackmun joined and Justice Stevens joined as to Parts I-B and II. Justice Stevens dissented.
178. In applying the commercial activity test articulated by the Supreme Court in Republic of Argentina, seven Justices concluded that in light of the pertinent facts the injury did not arise from the carrying on of commercial activity by Saudi Arabia and therefore the requirements of the exception had not been satisfied (viz. Rehnquist, C.J. and O’Connor, Scalia, Souter and Thomas, JJ., all five of whom joined in the entire opinion of the Court, plus Kennedy and Stevens, JJ., who joined in part and dissented in part); two Justices (viz. Blackmun and White, JJ.) reasoned that commercial activity had indeed been carried on (i.e., operation of a hospital), but in Saudi Arabia rather than in the United States and therefore the requirements of the exception had not been met in this regard; Justice Blackmun then joined with Justices Kennedy and Stevens in dissenting from dismissal of the “failure to warn” claims asserted by Nelson, supporting instead remand of these claims to the District Court for further consideration. Justice Stevens alone voted to affirm the judgment of the Court of Appeals based upon the failure to warn arguments. Id. The fractured splintering of the Court’s opinion in Saudi Arabia v. Nelson indicates the ineffectiveness of the Republic of Argentina decision in lucidly defining commercial activity.
179. Id. at 1478 (citing Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985)).
181. Saudi Arabia, 113 S.Ct. at 1478 (emphasis added).
some interpretation." The Court then embarked upon a factual analysis of the case "by identifying the particular conduct on which the ... action is based ...." In an opinion by Justice Souter, a majority of the Court decided that "the conduct boils down to abuse of the power of its police by the Saudi Government, and however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature."

Concurring in the judgment only, Justices White and Blackmun disagreed with the majority on the issue of commercial activity, reasoning that the injury-causing activity was the enlistment by the state-owned hospital of the police, and that this conduct was "certainly well within the bounds of commercial activity." Justice Kennedy, joined by Justices Blackmun and Stevens, dissented, agreeing with Nelson that Saudi Arabia engaged in commercial activity involving substantial contact with the United States by conducting their recruitment activities in the United States. These Justices categorized this conduct as routine commercial activity because "a negligent omission [was allegedly] made during the recruiting of a hospital employee in the United States." Justice Stevens also wrote a separate dissenting opinion in which he agreed with Justices White and Blackmun that Nelson's suit was based upon com-

182. Id.
183. Id. at 1477.
184. Id. at 1479. According to Justice Souter, exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce. Id. Souter noted that: "[S]uch acts as legislation, or the expulsion of an alien, or a denial of justice, cannot be performed by an individual acting in his own name. They can be performed only by the state acting as such." Id. at 1480 (citing Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Burr.Y.B. Int'l L. 220, 225 (1952)). Justice Kennedy concurred with the part of the majority opinion that held the "intentional wrongdoing by the Hospital and the Kingdom of Saudi Arabia are based on sovereign ... activity ...." Id. at 1484-85. But see, Jordan J. Paust, Draft Brief Concerning Claims To Foreign Sovereign Immunity and Human Rights: Nonimmunity for Violations of International Law Under the FSIA, 8 Hous. J. Int'l L. 49 (1985) (claiming that it should be universally recognized that judicial deference to sovereign state acts depends upon the sovereign state's respect for international law).
185. Saudi Arabia, 113 S.Ct. at 1481. Justices White and Blackmun concurred in the judgment because, in their opinion, the commercial activity did not have a direct effect in the United States nor was it carried on in the United States. Id. at 1484.
186. Id.
187. Id. at 1485.
commercial activity. From the fractured opinions present in Nelson, it is apparent that the debate over the definition of commercial activity continues.

Subsequently, in Cicippio v. Islamic Republic of Iran, the Court of Appeals for the District of Columbia acknowledged being puzzled by the Nelson case and arguably proceeded to narrow the interpretation of commercial activity as promulgated in Republic of Argentina. In Cicippio, victims of an international kidnapping filed suit against the government of Iran asserting, inter alia, that Iran had allegedly hired operatives to perpetrate a kidnapping and conditioned the release of the victims on the return of assets frozen by the United States. The court held that "we take from [Republic of Argentina] the key proposition that in determining whether a given government activity is commercial under the act, we must ask whether the activity is one in which commercial actors typically engage." Because kidnapping is hardly activity in which commercial actors typically engage, the court ruled that the kidnapping did not fall within the commercial activity exception and thus Iran could assert sovereign immunity.

Therefore, under the Cicippio test, acts that are atypical of commercial actors would fall outside the commercial activity exception, even though private parties could engage in them. This approach unmistakably conflicts with Republic of Argentina's broader interpretation, which includes both typical and atypical acts of private parties, because private parties are capa-

188. Id. at 1487-89. Stevens therefore disagreed with the majority as well as Justices White and Blackmun and agreed with Justice Kennedy's analysis of that aspect of the case. Id. at 1489. See Thomas, supra note 22 (suggesting that the methodology for the determination of whether an activity is commercial should be based exclusively on the injury-causing activity).
189. Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994).
190. Id. at 167.
191. Id. at 168.
192. Id. at 165.
193. Id. at 167 (emphasis added).
194. Cicippio, 30 F.3d at 168.
195. See supra note 193 and accompanying text.
196. In Cicippio, in the opinion of the Court, "[p]erhaps a kidnapping of a commercial rival could be thought to be a commercial activity. If so, it would . . . be . . . because the kidnapping took place in a commercial context." Cicippio, 30 F.3d at 168. However, under the test proposed by the Court itself in Cicippio, because such an act would not be typical for commercial actors it would not satisfy the requirements of the commercial activity exception under the FSIA; whereas, under the Republic of Argentina test, such acts, even though atypical, could nevertheless pass muster as commercial activity under the FSIA.
ble of engaging in both.\textsuperscript{197} Perhaps, in Cicippio, the Court of Appeals for the District of Columbia was noting its disapproval of its earlier decision in \textit{Practical Concepts v. Republic of Bolivia}, a somewhat atypical transaction which probably should have been immunized under sovereign immunity principles.\textsuperscript{198}

\section*{B. Direct Effect}

The Court's decision in \textit{Republic of Argentina} has had a similarly profound impact upon the determination of direct effect. The Court adopted the Second Circuit's interpretation of direct effect, rejecting a substantial and foreseeable requirement.\textsuperscript{199} In endorsing the Second Circuit's broad definition of direct effect, the Court prompts American courts to err on the side of finding a direct effect.

Subsequent to \textit{Republic of Argentina}, the Second Circuit has had second thoughts about jettisoning the substantial and foreseeable components of the direct effect test. In \textit{Antares Aircraft v. Federal Republic of Nigeria (FRN)},\textsuperscript{200} Antares Aircraft owned an aircraft registered in Nigeria.\textsuperscript{201} Nigeria's Airports Authority (NAA) detained the plane in Nigeria, allegedly because Antares failed to pay certain airport landing and parking fees.\textsuperscript{202} After negotiating with NAA, Antares transferred approximately $100,000 from a New York bank to Nigeria.\textsuperscript{203} Five months later NAA released the aircraft, but by then it had sustained physical damage from exposure to the elements.\textsuperscript{204} Alleging conversion of its aircraft, Antares filed suit against FRN and NAA in the Southern District of New York for damages.\textsuperscript{205} The District Court dismissed the action for lack of subject matter jurisdiction and Antares appealed to the Court of Appeals for the Second Circuit.\textsuperscript{206} The Second Circuit unanimously affirmed the District Court's decision, reasoning that the legally significant event, the conversion of the aircraft, occurred in Nigeria.

\begin{itemize}
\item \textsuperscript{197} "[T]he issue is whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in trade or commerce. . . ." Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992).
\item \textsuperscript{198} See supra note 94 and accompanying text.
\item \textsuperscript{199} Id.
\item \textsuperscript{200} 948 F.2d 90 (2d Cir. 1991), vacated and remanded, 112 S.Ct. 3020 (1992).
\item \textsuperscript{201} Id. at 90.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} \textit{Antares Aircraft}, 948 F.2d at 90.
\item \textsuperscript{206} Id.
\end{itemize}
and thus it denied jurisdiction under the FSIA. The Supreme Court vacated the Court of Appeals' decision and remanded for a decision consistent with the definition of direct effect adopted in Republic of Argentina.

On remand, the Second Circuit reaffirmed its prior decision. In the opinion of the Second Circuit, the Court had endorsed its view of direct effect. The Second Circuit conceded that the Court had not expressly adopted its "legally significant acts" test but the Court had used a similar analysis. Thus, the Second Circuit reaffirmed the use of its own "legally significant act(s) test." The Second Circuit noted that "the sole act connected to the United States in the instant matter, the drawing of a check on a bank in New York, was entirely fortuitous and entirely unrelated to the liability of [FRA and NAA]." Furthermore, the Second Circuit was not persuaded by Antares' argument that the Republic of Argentina's direct effect test was satisfied because Antares had suffered a financial loss as a result of the conduct of FRN and NAA. The Court reasoned that:

[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception . . . . If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states.

207. Id.
208. Id.
210. "In Weltover, the [Supreme] Court endorsed our view that an effect is direct if it follows as an immediate consequence of the defendant's activity." Id. at 35.
211. Id. at 36.
212. Id.
213. The court applied the test as follows:
214. Antares Aircraft, 999 F.2d at 36.
215. Id.
216. Id. (citations omitted).
The Court thus rejected the notion that a direct effect alone is sufficient, a result consistent with other circuits that had adopted a substantiality and foreseeability requirement. In *Antares*, the Second Circuit took a small step towards abandoning their earlier position. The Second Circuit may have decided *Antares* incorrectly, however, and the decision may not reflect a full understanding of its own test\textsuperscript{217} which the Court later endorsed in *Republic of Argentina*. The Court undoubtedly intended the direct effect test to impact individuals differently from artificial persons such as corporations and limited partnerships.\textsuperscript{218} The Court did not necessarily intend that a loss to an American individual standing alone would satisfy the direct effect test. The Court did, however, intend that a loss to a corporation standing alone could and should satisfy the direct effect test in appropriate circumstances.\textsuperscript{219}

Furthermore, on remand of *Antares*, the dissent concluded that a direct effect was proven because the Court had vacated the Second Circuit’s earlier decision and remanded the case for further consideration in light of *Republic of Argentina*.\textsuperscript{220} This was the case, the dissent argued, because “limited partnerships are not natural persons, and consequently can only suffer financial rather than physical injuries ... [and] these financial injuries are directly felt where a firm was organized or where its principal place of business is located.”\textsuperscript{221} Thus, the dissent reasoned that *Republic of Argentina* necessitated a finding of direct effect on the facts of the case.

In contrast to the arguably incorrect decision in the remand of *Antares*\textsuperscript{222} is the decision of the Southern District Court of Florida in *AMPAC Group v. Republic of Honduras*.\textsuperscript{223} In *AMPAC*, the court correctly applied the *Republic of Argentina* test. The court held that a direct effect existed where AMPAC, a United States corporation, suffered a direct financial loss when

\textsuperscript{217} See supra note 137 and accompanying text.

\textsuperscript{218} See *Antares Aircraft*, 999 F.2d at 37 n.1.

\textsuperscript{219} “Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when the plaintiff is a corporation is whether the corporation has suffered a direct financial loss.” See *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 312 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982).

\textsuperscript{220} *Antares Aircraft*, 999 F.2d at 37.

\textsuperscript{221} Id.

\textsuperscript{222} See id. at 33.

the Republic of Honduras breached its contract with AMPAC. As the Court had indicated in Republic of Argentina, the court in AMPAC acknowledged that the only meaningful injury is when a corporation suffers financial loss. Therefore, the court held that because financial losses necessarily occur in the place of incorporation, a direct effect occurred within the United States. The AMPAC decision was an inevitable consequence of the Court's direct effect test articulated in Republic of Argentina.

The Court of Appeals for the Tenth Circuit encountered similar difficulties in applying the Republic of Argentina direct effect test in United World Trade v. Mangyshlakneft Oil. In United World Trade (UWT), the Kazakhstan Commerce Foreign Economic Association (Kazcom) acted as an agent for Mangyshlakneft Oil Production Association (MOP) and contracted with UWT, whereby MOP agreed to sell oil to UWT. Payment was to be in United States dollars through a European/USA Bank. The oil was transported from Kazakhstan to Sicily and payment was made through a bank in Paris. The first two shipments took place uneventfully, but because difficulties occurred with the third shipment, MOP and Kazcom refused to supply any more oil to UWT. When UWT sued Kazcom and MOP in federal court, the district court ruled that the defendants were entitled to sovereign immunity and dismissed the suit.

In affirming the district court, the Tenth Circuit observed that it struggled to identify objective standards that would aid in determining what qualifies as a direct effect in the United States. The Tenth Circuit noted that the phrase "direct effect" seems "hopelessly ambiguous when applied to any particular transaction." The court appeared to mourn the loss of "the guideposts previously adopted by many courts, the requirement

224. Id. at 977.
225. Id.
226. Id.
227. See supra note 140 and accompanying text.
228. 33 F.3d 1232 (10th Cir. 1994), cert. denied, 115 S.Ct. 904 (1995). "We recognize the amorphous nature of the issue before us." Id. at 1239.
229. Id. at 1235.
230. Id.
231. Id.
232. Id. at 1236.
233. United World Trade, 33 F.3d at 1234.
234. Id.
235. Id. at 1237 (emphasis added).
that a direct effect be both substantial and foreseeable." It acknowledged that “[a]s a result, we are left to determine what qualifies as a direct effect largely from the Court’s example in applying the statute to the facts before it in [Republic of Argentina].” Nevertheless, the court decided that because “[t]he performance of this contract was to take place entirely in Europe,” any effects in the United States were insufficient to meet the direct effect requirements of the FSIA. In the Tenth Circuit’s opinion, although UWT, a Colorado corporation, lost profits within the United States as a result of MOP’s and Kazcom’s conduct, this did not suffice to meet the “direct effect in the United States” test.

In conclusion, despite subsequent attempts by the lower courts to properly apply the Court’s Republic of Argentina direct effect analysis, uncertainty remains regarding when the direct effect test is satisfied. The Court should have retained a substantiality and foreseeability requirement because it provides more concrete guidance to courts than the de minimus test the Court embraced in Republic of Argentina.

C. MINIMUM CONTACTS

Analysis of minimum contacts has not proven particularly controversial because the Court in Republic of Argentina “assum[ed] . . . that a foreign state is a person for purposes of the Due Process Clause . . . .” The circuit courts have developed

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236. Id.
237. Id. See, e.g., Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238 (2nd Cir. 1994). “The failure of the Iraqi Banks to remit funds in New York, as they were contractually bound to do, had a direct effect in the United States under Weltover.” Id. at 241 (emphasis added).
238. United World Trade, 33 F.3d at 1238 (emphasis added). “The process by which UWT obtained an exchange of currency in the United States is simply too attenuated from the defendant’s actions to be considered a direct effect.” Id. 239. Id.
240. Id. at 1238. Presumably because it was de minimis.
When all of the facts are examined together in this case, including the legally significant acts, we are compelled to find that the direct effect of the defendants’ alleged acts occurred in Europe rather than in the United States. The fact that UWT, had it received additional funds in London pursuant to the contract, would have then transferred those funds to the United States does not allow us to conclude that the loss suffered by appellant was sufficiently in the United States to warrant jurisdiction under [the FSIA].
Id. at 1239 (emphasis added).
their own standards by limiting the application of the due process minimum contacts analysis to those injury-causing commercial activities that yield a direct effect in the United States. For example, in Vermeulen the Eleventh Circuit accepted that the Court has not definitively decided "whether [the FSIA] incorporates the minimum contacts test."242 Thus, the Eleventh Circuit effectively limited the minimum contacts analysis to those commercial activities which satisfied the direct effect requirements.243 Similarly, the Second Circuit elected to apply the minimum contacts test only to the commercial activities causing the direct effect in Seetransport Wiking Trader Shiffahrts-gesellschaft MBH v. Navimpex Centrala Navala.244

V. CONCLUSION

The Court's decision in Republic of Argentina is disappointing. In construing the commercial activity exception under the FSIA, the Court held that a sovereign state may only assert sovereign immunity when it acts as a market regulator, not as a market participant. However, these concepts are not necessarily self evident and clear guidance would be helpful in applying them to complex factual situations. By failing to define commercial activity more clearly, the Court has left the definition too broad, so that nearly any activity of a business nature that a private party may engage in, whether typical or atypical, for profit or not for profit, would fall within the definition. At the very least, these penumbras need clarification. Although typical private party activity based upon custom and practice should not be immunized, atypical activity should stand on a different footing.245

availed itself of the privilege of conducting activities within the United States.” Id. at 619-20.
243. Id.
244. 989 F.2d 572 (2d Cir. 1993).
The Court also made it easier to establish a direct effect under the FSIA by discarding the substantiality and foreseeability requirement. The Court should have retained these guideposts, because removing them has introduced an unwarranted degree of indeterminacy into the judicial task of resolving sovereign disputes. Their removal has created a risk of lowering the threshold of direct effect in the United States, thereby effectively reducing the circumstances in which a sovereign state may invoke sovereign immunity.

Inevitably, the Court's less stringent standards may lead American courts to deny sovereign immunity to developing countries, whose governments often act as private parties engaging in commercial development to encourage foreign investment. Furthermore, Republic of Argentina will encourage parties to resort to American courts more frequently for resolving international commercial disputes which have a "direct effect" in the United States, as defined by American courts. This is not the best solution because it may restrict the ability to bring change to former communist countries and to developing countries as they pursue change in their economies. Hauling them into American courts may well chill some promising initiatives.

In Republic of Argentina, the Court failed to establish appropriate parameters for sovereign immunity. As a result, American courts have too much latitude to fashion their own responses to litigation under the FSIA and will continue to do so until the Court re-examines and retrenches the commercial activity exception to the doctrine of sovereign immunity.

247. See supra note 193 and accompanying text.
249. See supra note 193 and accompanying text.