

14-917-cv

Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term 2014

(Argued: April 24, 2015 Decided: February 3, 2016)

No. 14-917-cv

ATLANTICA HOLDINGS, INC., ALLAN KIBLISKY, JACQUES GLIKSBERG, BALTICA
INVESTMENT HOLDING, INC., BLU FUNDS, INC., ANTHONY KIBLISKY,

Plaintiffs-Appellees,

-v.-

SOVEREIGN WEALTH FUND SAMRUK-KAZYNA JSC, A/K/A NATIONAL WELFARE FUND
SAMRUK-KAZYNA,

Defendant-Appellant.

Before: WESLEY, LIVINGSTON, and CHIN, *Circuit Judges.*

Defendant, a Kazakhstani sovereign wealth fund that allegedly misled Plaintiffs regarding the value of its subsidiary’s securities in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, appeals from a March 10, 2014 order of the United States District Court for the Southern District of New York (Jesse M. Furman, *Judge*) denying its motion to dismiss based on sovereign immunity and lack of personal jurisdiction. The district court concluded that Defendant is not immune under the Foreign Sovereign

1 Immunities Act of 1976's ("FSIA's") commercial-activity exception, and that the
2 FSIA authorizes personal jurisdiction over Defendant. On appeal, Defendant
3 argues that the district court erred in rejecting its claim of sovereign immunity
4 and in neglecting to analyze whether exercising personal jurisdiction over it
5 would comport with due process. We affirm the district court's sovereign
6 immunity holding and decline to exercise jurisdiction over Defendant's personal
7 jurisdiction challenge.

8
9 AFFIRMED IN PART, DISMISSED IN PART.

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11 JOSEPH D. PIZZURRO (Jonathan J. Walsh,
12 Kevin A. Meehan, *on the brief*), Curtis,
13 Mallet-Prevost, Colt & Mosle LLP, New
14 York, NY, *for Defendant-Appellant*.

15
16 BRETT D. JAFFE (Jennifer S. Kozar, James S.
17 D'Ambra, Jr., *on the brief*), Alston & Bird
18 LLP, New York, NY, *for Plaintiffs-Appellees*.

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21 DEBRA ANN LIVINGSTON, *Circuit Judge*:

22 This interlocutory appeal presents a question of first impression: whether
23 the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub. L. No. 94-583, 90
24 Stat. 2891, immunizes an instrumentality of a foreign sovereign against claims
25 that it violated federal securities laws by making misrepresentations outside the
26 United States concerning the value of securities purchased by investors within
27 the United States. Plaintiffs-Appellees Atlantica Holdings, Inc. ("Atlantica");
28 Baltica Investment Holding, Inc. ("Baltica"); Blu Funds, Inc. ("Blu Funds"); Allan

1 and Anthony Kiblisky (the “Kibliskys”); and Jacques Gliksberg (“Gliksberg”)
2 (collectively, “Plaintiffs”) brought this action in the United States District Court
3 for the Southern District of New York, alleging that Defendant-Appellant
4 Sovereign Wealth Fund Samruk-Kazyna JSC (“SK Fund”), a sovereign wealth
5 fund of the Republic of Kazakhstan, misrepresented the value of certain notes
6 (the “Subordinated Notes”) issued by non-party BTA Bank JSC (“BTA Bank”), a
7 Kazakhstani corporation majority-owned by SK Fund, in connection with a 2010
8 restructuring of BTA Bank’s debt. Plaintiffs seek to hold SK Fund liable for these
9 misrepresentations under Sections 10(b) and 20(a) of the Securities Exchange Act
10 of 1934 (the “Exchange Act”), Pub. L. No. 73-291, 48 Stat. 881 (codified in relevant
11 part at 15 U.S.C. §§ 78j(b), 78t(a)).

12 The district court (Jesse M. Furman, *Judge*) held that the FSIA furnished
13 both subject-matter jurisdiction over Plaintiffs’ claims and personal jurisdiction
14 over SK Fund, and therefore denied SK Fund’s motion to dismiss. We agree with
15 the district court that SK Fund is not immune from suit under the FSIA because
16 Plaintiffs’ claims are “based upon . . . an act outside the territory of the United
17 States” that “cause[d] a direct effect in the United States.” 28 U.S.C. § 1605(a)(2).
18 We further decline to exercise appellate jurisdiction to consider SK Fund’s

1 argument that the district court could not exercise personal jurisdiction over it
2 consistent with due process. Accordingly, we affirm the appealed-from order in
3 part and dismiss the balance of SK Fund's appeal.

4 **BACKGROUND¹**

5 SK Fund, a joint-stock company wholly owned by the government of the
6 Republic of Kazakhstan, is the majority owner of BTA Bank, a Kazakhstani
7 corporation. In February 2009, SK Fund acquired 75.1% of BTA Bank's common
8 stock by making a \$1.5 billion investment in the bank. Shortly thereafter, in
9 April 2009, BTA Bank announced that it had ceased principal payments on all of
10 its outstanding financial obligations. Atlantica and Baltica, each a Panamanian
11 investment fund, were creditors of BTA Bank, having purchased certain of its
12 outstanding debt securities. These securities could only be held in accounts
13 maintained in specific clearing systems, access to which is generally limited to
14 large financial institutions ("Direct Participants"). However, Direct Participants
15 could hold BTA Bank securities for either their own account or their customers'

¹ The facts in this section are drawn from Plaintiffs' amended complaint as well as affidavits submitted by SK Fund in connection with its motion to dismiss. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 n.6 (2d Cir. 2001).

1 benefit. Atlantica and Baltica were customers of UBS Financial Services (“UBS”),
2 a large financial institution that was evidently a Direct Participant.

3 After ceasing to make principal payments on its outstanding securities,
4 BTA Bank undertook a restructuring of its capital structure in 2010 (the “2010
5 Restructuring”). In connection with the 2010 Restructuring, BTA Bank issued a
6 600-plus-page information memorandum (the “Information Memorandum”) that
7 incorporated by reference a deed of undertaking executed by SK Fund (the
8 “Deed of Undertaking”). The Information Memorandum was made available to
9 BTA Bank’s existing creditors on its website. An individual seeking to access the
10 document was required to certify that he or she (1) was located outside the
11 United States and was not a resident of the United States, i.e., not a “U.S.
12 person”; or (2) was an “accredited investor,” as defined in Rule 501(a) of SEC
13 Regulation D, 17 C.F.R. § 230.501(a), or a “qualified institutional buyer” (“QIB”),
14 as defined in SEC Rule 144A, 17 C.F.R. § 230.144A. J.A. 161. According to
15 Plaintiffs, SK Fund’s “dominance of and control over BTA Bank, . . . and the
16 inclusion in the Information Memorandum of certain statements from S-K Fund
17 by reference establish that S-K Fund was involved in the production of the
18 Information Memorandum and was aware of its contents.” J.A. 47.

1 The Information Memorandum described the terms of the 2010
2 Restructuring. SK Fund would receive additional equity in BTA Bank, becoming
3 an 80% owner. Preexisting holders of BTA Bank's debt would receive, in
4 exchange for their old securities, new ones, including the Subordinated Notes.
5 Like BTA Bank's old securities, the new ones issued in connection with the 2010
6 Restructuring could be held only by Direct Participants. Again, however, Direct
7 Participants could hold the new securities either for their own accounts or for
8 their customers' benefit. The new securities were subject to transfer restrictions.
9 In particular, because they would not be registered under United States securities
10 laws, they could be transferred only to non-U.S. persons or QIBs in transactions
11 exempt from this country's registration requirements. *See* 1 Louis Loss et al.,
12 *Fundamentals of Securities Regulation* 582–83 (6th ed. 2011). Interests in the new
13 securities could be transferred on the books of a Direct Participant, but such
14 transfers were subject to the same restrictions.

15 As required for the 2010 Restructuring to become effective, it was initially
16 approved by BTA Bank's creditors in May 2010 and then by a court in
17 Kazakhstan in July 2010. As creditors, Atlantica and Baltica committed to
18 participate in the 2010 Restructuring—i.e., to accept Subordinated Notes in

1 exchange for their existing securities—by communicating with their broker in the
2 Miami office of UBS. Atlantica and Baltica later acquired additional
3 Subordinated Notes on the secondary market between September 2010 and
4 October 2012, and the other Plaintiffs, who had not previously been creditors of
5 BTA Bank, acquired Subordinated Notes on the secondary market as well: Blu
6 Funds made its investment in April 2012, the Kibliskys made theirs in January
7 2011, and Gliksberg made several purchases between September 2010 and May
8 2011. Blu Funds, like Atlantica and Baltica, is a Panamanian investment fund;
9 the Kibliskys live in Miami, and Gliksberg lives in Highland Park, Illinois.

10 Plaintiffs' secondary-market purchases were all made through UBS's
11 Miami office, which sent Plaintiffs' orders to its broker-dealer in New York using
12 funds from Plaintiffs' UBS accounts. The orders were filled, and the transactions
13 completed, in New York. Plaintiffs allege that BTA Bank and SK Fund marketed
14 the Subordinated Notes "extensively in the United States, and directed that
15 marketing to U.S. investors," J.A. 44; in particular, the complaint avers that SK
16 Fund sent representatives to the United States, in the district court's words, "to
17 meet with investors and to assure them of the health of BTA Bank's balance
18 sheet." *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F.

1 Supp. 3d 550, 554 (S.D.N.Y. 2014). These efforts were successful, according to
2 Plaintiffs: a BTA Bank PowerPoint presentation from January 2012 indicates that
3 United States investors held 17% of the Subordinated Notes.

4 Plaintiffs claim to have made their investments in the Subordinated Notes
5 in reliance on a number of misrepresentations contained in the Information
6 Memorandum and made subsequently by SK Fund and BTA Bank. Principally,
7 the Information Memorandum—including the portion describing the obligations
8 undertaken by SK Fund in the Deed of Undertaking—stated that BTA Bank
9 would not pay SK Fund any dividends on its equity holdings until the bank’s
10 newly issued securities, including the Subordinated Notes, were paid in full.
11 This representation, in addition to other financial disclosures in the Information
12 Memorandum, was allegedly false in light of a complex, undisclosed series of
13 transactions between BTA Bank and SK Fund (the “Negative Carry Swap”)
14 pursuant to which BTA Bank paid interest on SK Fund deposits at a rate
15 significantly higher than BTA Bank was earning on bonds it had purchased from
16 SK Fund. According to Plaintiffs, the Negative Carry Swap resulted in SK
17 Fund’s effectively “siphon[ing] hundreds of millions of dollars from BTA Bank at
18 the expense of other creditors.” J.A. 20–21.

1 The Negative Carry Swap began to come to light in May 2011, when BTA
2 Bank issued an investor presentation disclosing that it was paying more on its
3 liabilities than it was taking in on its assets, and when the investment bank J.P.
4 Morgan published a research report disclosing additional details of BTA Bank's
5 asset-liability yield mismatch. As a result of these disclosures, the value of the
6 Subordinated Notes decreased to less than 40% of face value by June 2011, and
7 then to less than 10% of face value by January 2012.

8 Between July 2011 and December 2011, following the initial round of
9 disclosures regarding the Negative Carry Swap, high-ranking SK Fund officers
10 made a number of public statements to American press outlets, including
11 *Bloomberg*, seeking to "prop up" the value of BTA Bank's securities by assuring
12 investors that SK Fund would guarantee BTA Bank's ongoing viability. J.A. 53–
13 54. Plaintiffs allege that these statements, too, were false or misleading: BTA
14 Bank eventually defaulted on its debt in January 2012, less than eighteen months
15 after the 2010 Restructuring. BTA Bank then went through a second
16 restructuring (the "2012 Restructuring"), pursuant to which SK Fund gained a
17 97% ownership interest in the bank.

1 Plaintiffs allege that BTA Bank made additional false or misleading
2 statements in 2012, after its default. In PowerPoint presentations prepared in
3 connection with the 2012 Restructuring, BTA Bank failed to disclose its liability
4 on instruments called “recovery units,” which it had issued to some creditors
5 during the 2010 Restructuring. These recovery units entitled holders to
6 participate *pari passu* with BTA Bank’s senior creditors in the event that the bank
7 defaulted. When the market eventually learned of these previously undisclosed
8 senior liabilities, the value of the Subordinated Notes held by Plaintiffs plunged
9 even further.

10 Plaintiffs commenced this action in the United States District Court for the
11 Southern District of New York on December 5, 2012, and filed an amended
12 complaint (the “complaint”) on April 4, 2013. The complaint asserts claims
13 under Sections 10(b) and 20(a) of the Exchange Act against SK Fund; because
14 BTA Bank was bankrupt at the time, Plaintiffs did not sue BTA Bank, although
15 they later brought a separate action against it, which is now also before Judge
16 Furman in the Southern District. On May 6, 2013, SK Fund moved to dismiss the
17 complaint in its entirety for lack of subject-matter jurisdiction under the FSIA,

1 lack of personal jurisdiction, failure to state a claim, and failure to plead fraud
2 with particularity.

3 On March 10, 2014, the district court issued an opinion denying the bulk of
4 SK Fund's motion. *Atlantica Holdings*, 2 F. Supp. 3d 550. With respect to the
5 FSIA, the district court held that it had subject-matter jurisdiction under both the
6 first and third clauses of the statute's "commercial-activity exception," which
7 provide, respectively, that a foreign state is not immune from suit in actions
8 "based upon" the state's commercial activity in the United States or in actions
9 "based upon" its commercial activity outside the United States that has a "direct
10 effect" in the United States. 28 U.S.C. § 1605(a)(2). In a footnote, the district
11 court concluded that because the FSIA authorizes personal jurisdiction over a
12 foreign state whenever it is not immune from suit, *see* 28 U.S.C. § 1330(b), the
13 conclusion that SK Fund was not immune under the FSIA's commercial-activity
14 exception also meant that the district court could exercise personal jurisdiction
15 over SK Fund. *See Atlantica Holdings*, 2 F. Supp. 2d at 559 n.5.

16 With respect to the merits of Plaintiffs' claims, the district court concluded
17 that Plaintiffs (1) had adequately alleged a domestic securities transaction under
18 *Morrison v. National Australia Bank*, 561 U.S. 247 (2010), and *Absolute Activist Value*

1 *Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012), and (2) had adequately
2 alleged reasonable reliance on SK Fund’s alleged misstatements and omissions.
3 *See Atlantica Holdings*, 2 F. Supp. 3d at 559–62. However, because only Blu Funds
4 and Atlantica had purchased Subordinated Notes after July 2011, the other
5 Plaintiffs could not have relied on any statements from July 2011 or later in
6 deciding to invest; accordingly, the district court dismissed those Plaintiffs’
7 claims related to those statements. *Id.* at 562.² The court also rejected SK Fund’s
8 arguments that Plaintiffs had not adequately alleged loss causation, had failed to
9 plead scienter with particularity, and had not adequately alleged control-person
10 liability under Section 20(a) of the Exchange Act. *Id.* at 563.

11 The denial of a motion to dismiss on sovereign immunity grounds is an
12 immediately appealable collateral order, *see Rogers v. Petroleo Brasileiro, S.A.*, 673
13 F.3d 131, 136 (2d Cir. 2012), and SK Fund filed a timely notice of appeal from the
14 district court’s order on March 25, 2014. SK Fund also sought a certificate of
15 appealability pursuant to 28 U.S.C. § 1292(b) with respect to the district court’s

² The district court opinion states broadly that “[t]o the extent the Amended Complaint can be read to state claims arising out of statements in 2011 or later on behalf of Baltica and the individual plaintiffs, therefore, such claims are dismissed.” *Id.* at 562. The complaint alleges misstatements by SK Fund in 2011 beginning only in July of that year, after the purchases by the Kibliskys and Gliksberg, the last of which occurred in January and May 2011, respectively.

1 *Morrison* holding, which the district court granted on May 9, 2014. *Atlantica*
2 *Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, No. 12-cv-8852, 2014
3 WL 1881075 (S.D.N.Y. May 9, 2014). On July 28, 2014, however, a panel of this
4 Court denied leave to appeal the *Morrison* issue. In light of that decision, the
5 only issues argued by the parties on appeal are (1) whether the FSIA immunizes
6 SK Fund against Plaintiffs' claims and (2) whether the district court may
7 properly exercise personal jurisdiction over SK Fund.

8 DISCUSSION

9 I.

10 The FSIA "provides the 'sole basis' for obtaining jurisdiction over a foreign
11 sovereign in the United States." *Republic of Argentina v. Weltover*, 504 U.S. 607,
12 611 (1992) (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.
13 428, 434–39 (1989)). Under the FSIA, a "foreign state" is "immune from the
14 jurisdiction" of state and federal courts in the United States unless one of a
15 number of statutory exceptions applies. 28 U.S.C. § 1604; *see id.* §§ 1605–1607
16 (providing exceptions). Federal courts have subject-matter jurisdiction over an
17 action against a foreign state if, and only if, one of those exceptions applies. *Id.*
18 § 1330(a). Here, Plaintiffs concede that SK Fund qualifies as a foreign state for

1 FSIA purposes. *See id.* § 1603(a) (providing that an “agency or instrumentality”
2 of a foreign state is a “foreign state”); *id.* § 1603(b) (providing that a majority-
3 owned corporation formed under the laws of the foreign state is an “agency or
4 instrumentality” of a foreign state). Therefore, the question whether the district
5 court had subject-matter jurisdiction depends on whether one of the FSIA’s
6 exceptions to immunity applies.

7 “The single most important exception to foreign state immunity under the
8 FSIA,” *Hanil Bank v. P.T. Bank Negara Indon. (Persero)*, 148 F.3d 127, 130 (2d Cir.
9 1998), and the only one at issue in this case, is the commercial-activity exception.
10 This exception, which contains three independent clauses, provides that a foreign
11 state is not immune from jurisdiction “in any case” in which:

12 the action is based [1] upon a commercial activity carried on in the
13 United States by the foreign state; or [2] upon an act performed in
14 the United States in connection with a commercial activity of the
15 foreign state elsewhere; or [3] upon an act outside the territory of the
16 United States in connection with a commercial activity of the foreign
17 state elsewhere and that act causes a direct effect in the United
18 States.

19 28 U.S.C. § 1605(a)(2). Plaintiffs argue, and the district court held, that SK Fund
20 is not immune from jurisdiction because both the first and third clauses of the
21 commercial-activity exception apply in this case. *See Atlantica Holdings*, 2 F.
22 Supp. 3d at 557–59. Because we agree with Plaintiffs and the district court that

1 the third clause applies, we do not reach the parties' arguments regarding the
2 first clause.

3 The third clause of the commercial-activity exception is known as the
4 "direct-effect clause." Under the direct-effect clause, a foreign state is not
5 immune from jurisdiction if the plaintiff's "lawsuit is (1) 'based upon . . . an act
6 outside the territory of the United States'; (2) that was taken 'in connection with a
7 commercial activity' of [the foreign state] outside this country; and (3) that
8 'cause[d] a direct effect in the United States.'" *Weltover*, 504 U.S. at 611 (first and
9 third alterations in original) (quoting 28 U.S.C. § 1605(a)(2)). SK Fund primarily
10 argues (1) that the district court misperceived what Plaintiffs' claims are "based
11 upon," and (2) that the actions upon which Plaintiffs' claims are actually based
12 did not "cause[] a direct effect in the United States." We address these two
13 arguments in turn. Because the district court based its decision on undisputed
14 facts drawn from Plaintiffs' complaint and SK Fund's evidentiary submissions,
15 our review is de novo. See *Virtual Countries, Inc. v. Republic of South Africa*, 300
16 F.3d 230, 235 (2d Cir. 2002).

A.

1
2 The Supreme Court has explained that, within the meaning of § 1605(a)(2),
3 “an action is ‘based upon’ the ‘particular conduct’ that constitutes the ‘gravamen’
4 of the suit.” *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396 (2015) (quoting
5 *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993)).³ “Rather than individually
6 analyzing each of the [Plaintiffs’] causes of action, we zero[] in on the core of
7 their suit” *Id.* *Sachs*, handed down just this Term, describes the “gravamen”
8 as the “basis” or “foundation” of a claim, i.e., “those elements . . . that, if proven,
9 would entitle a plaintiff to relief.” *Id.* at 395 (quoting *Nelson*, 507 U.S. at 357).
10 Thus, suits for personal injuries sustained at a railway station in Austria, *see id.* at
11 396, or in a prison in Saudi Arabia, *see Nelson*, 507 U.S. at 352-54, 358, rest on
12 conduct that “plainly occurred abroad.” *Sachs*, 136 S. Ct. at 396. In this case,
13 identifying the “gravamen” of Plaintiffs’ complaint is straightforward. Plaintiffs’
14 core claim is that they were misled as to the value of the Subordinated Notes by
15 certain misrepresentations made by SK Fund and BTA Bank. So the gravamen of
16 Plaintiffs’ complaint is those misrepresentations. *See Black’s Law Dictionary* 817

³ We have applied *Nelson*’s understanding of § 1605(a)(2)’s “based upon” requirement in the context of the third clause of that provision. *See Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147, 155 (2d Cir. 2007).

1 (10th ed. 2014) (defining “gravamen” as “[t]he substantial point or essence of a
2 claim, grievance, or complaint”).

3 SK Fund disputes whether statements made by BTA Bank in investor
4 presentations and in the Information Memorandum may properly be attributed
5 to it for jurisdictional purposes. *See First Nat’l City Bank v. Banco Para El Comercio*
6 *Exterior de Cuba*, 462 U.S. 611, 623-28 (1983) (establishing presumption that
7 “government instrumentalities established as juridical entities distinct and
8 independent from their sovereign should normally be treated as such”). To be
9 sure, Plaintiffs seeking jurisdiction under the FSIA must allege facts sufficient to
10 establish an exception to sovereign immunity under the FSIA. *See Robinson*, 269
11 F.3d at 140-41. In this case, however, insofar as BTA Bank’s statements constitute
12 part of the “gravamen” of the complaint, Plaintiffs have advanced a Section 20(a)
13 “control person” theory which, if proven, “would entitle [them] to relief” from
14 SK Fund on the basis of BTA Bank’s alleged misrepresentations. *Sachs*, 136 S. Ct.
15 at 395; *see* 15 U.S.C. § 78t(a) (holding liable any person “who, directly or
16 indirectly, controls any person liable under any provision of this chapter or of
17 any rule or regulation thereunder”). The district court rejected SK Fund’s

1 challenge to the sufficiency of Plaintiffs' Section 20(a) "control" allegations in a
2 portion of its ruling not before us on appeal.

3 Thus, we need not reach the question whether Plaintiffs have shown that
4 BTA Bank is SK Fund's "alter ego," see *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs.*
5 *Co.*, 199 F.3d 94, 98 (2d Cir. 1999) (per curiam) ("Under certain circumstances, the
6 acts of a state's 'alter ego' may be attributed to the state in determining whether §
7 1605(a)(2) applies."), so as to recover under their Section 10(b) theory. See 17
8 C.F.R. § 240.10b-5(b) (holding liable any person who "make[s] any untrue
9 statement of material fact"); *Janus Capital Grp., Inc. v. First Derivative Traders*, 131
10 S. Ct. 2296, 2301 (2011) (reiterating Section 10(b)'s requirement that defendant
11 "make" the actionable misrepresentation). *Sachs* makes clear that in assessing
12 whether an action is "based upon" acts outside the United States, for FSIA
13 purposes, we look not to the analysis of each individual claim, but to the overall
14 question where a lawsuit's *foundation* is geographically based. See *Sachs*, 136 S.
15 Ct. at 396 ("[In *Nelson*,] we did not undertake such an exhaustive claim-by-claim,
16 element-by-element analysis of [Plaintiffs'] 16 causes of action, nor did we
17 engage in the choice-of-law analysis that would have been a necessary prelude to

1 such an undertaking.”). And here, the parties agree that all the
2 misrepresentations at issue occurred outside the United States.

3 For these reasons, we conclude that Plaintiffs’ claims against SK Fund are
4 “based upon” (at least) the misrepresentations alleged in their complaint.⁴ SK
5 Fund does not dispute that those misrepresentations were made outside the
6 United States. *See* Appellant’s Br. at 14 (“Plaintiffs cite certain statements made
7 by BTA Bank and SK Fund *in Kazakhstan . . .*”) (emphasis added). Nor does SK
8 Fund dispute that they were made in connection with a commercial activity of
9 SK Fund outside this country. Accordingly, this action is “based upon . . . an act
10 outside the territory of the United States in connection with a commercial activity
11 of [SK Fund] elsewhere,” and the only question remaining is whether “that act
12 cause[d] a direct effect in the United States.” 28 U.S.C. § 1605(a)(2).

13 **B.**

14 Plaintiffs argue, and the district court held, that losses suffered by United
15 States investors in the Subordinated Notes as a result of SK Fund’s alleged

⁴ The district court identified other acts that Plaintiffs’ claims are “based upon,” and SK Fund raises several objections to this portion of the court’s analysis. We do not reach these objections given our conclusions (1) that this action is based upon (at least) the misrepresentations alleged in the complaint, and (2) that those misrepresentations had a “direct effect” in the United States. *See infra* section I.B.

1 misrepresentations about those securities' value qualify as a "direct effect" in this
2 country. *See Atlantica Holdings*, 2 F. Supp. 3d at 558. We agree.

3 **1.**

4 In order to be "direct," an effect need not be "substantial" or "foreseeable,"
5 but rather must simply "follow[] 'as an immediate consequence of the
6 defendant's . . . activity.'" *Weltover*, 504 U.S. at 618 (second alteration in original)
7 (quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)).
8 In *Weltover*, the Supreme Court held that Argentina's nonpayment of funds into a
9 New York bank account that had been designated as the place of payment on
10 certain bonds issued by that country caused a direct effect in the United States
11 because "[m]oney that was supposed to have been delivered to [the] New York
12 bank for deposit was not forthcoming." 504 U.S. at 619. Based on *Weltover's*
13 holding, courts have consistently held that, in contract cases, a breach of a
14 contractual duty causes a direct effect in the United States sufficient to confer
15 FSIA jurisdiction so long as the United States is the place of performance for the
16 breached duty. *See, e.g., Rogers*, 673 F.3d at 139–40; *Hanil Bank*, 148 F.3d at 132;
17 *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994); *see also*
18 *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 40 (D.C. Cir. 2014).

1 Here, of course, Plaintiffs are asserting tort claims, not contract claims. “In
2 tort,” we have reasoned, “the analog to contract law’s place of performance is the
3 locus of the tort.” *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33,
4 36 (2d Cir. 1993). A tort’s locus—also known as the *locus delicti*, or “place of
5 wrong”⁵—is the place “where the last event necessary to make an actor liable for
6 an alleged tort takes place.” Restatement of Conflict of Laws § 377 (1934)
7 [hereinafter First Restatement]. And, “[s]ince a tort action traditionally has not
8 been viewed as complete until the plaintiff suffers injury or loss,” the cause of
9 action has generally “been considered to arise at the place where this damage
10 was sustained.” *Sack v. Low*, 478 F.2d 360, 365 (2d Cir. 1973); *see, e.g.*, Christopher

⁵ Traditionally, identifying a tort’s locus has been important primarily in choice-of-law analysis, where the rule of *lex loci delicti* held that “tort liability is governed . . . by the law of the place where the alleged tort was committed.” *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 234 F.2d 633, 639 (2d Cir. 1956). Most jurisdictions’ choice-of-law rules have, over the last half-century, abandoned this “bright-line” rule “in favor of more subtle and flexible inquiries” aimed at identifying the forum with the most significant connection to the parties’ dispute. *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 220 (2d Cir. 2014) (Leval, J., concurring); *compare, e.g.*, Restatement of Conflict of Laws §§ 377–390 (1934), *with* Restatement (Second) of Conflict of Laws § 145 (1971). However, the fact that choice-of-law rules no longer depend entirely on the locus of the tort does not alter our task in this FSIA case, which is to determine whether SK Fund’s alleged misrepresentations caused a direct effect in the United States. Regardless of trends in choice-of-law doctrine, it has remained the case that, for FSIA purposes, we have found a direct effect (at least) at “the locus of the tort.” *Antares Aircraft*, 999 F.2d at 36. We therefore draw on the body of law developed primarily under the *lex loci delicti* rule in order to identify the locus of SK Fund’s alleged misrepresentations.

1 A. Whitlock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev.
2 719, 724–25 (2009) (“The First Restatement defines the place of wrong as ‘the state
3 where the last event necessary to make an actor liable for an alleged tort takes
4 place.’ Usually this is the location where the plaintiff was injured, since liability
5 does not arise without injury.” (footnotes omitted) (quoting First Restatement §
6 377)). Thus, a determination that a tort’s locus is the United States is, in effect,
7 often a determination that the plaintiff has been injured in this country by the
8 defendant’s tortious actions—meaning that those actions caused a “direct effect”
9 (the plaintiff’s injury) in this country. As a result, such a determination will
10 ordinarily be sufficient, if not invariably necessary, to confer FSIA jurisdiction
11 under our precedents. See *Antares Aircraft*, 999 F.2d at 36 (leaving open the
12 possibility that even “a foreign tort may have had sufficient contacts with the
13 United States to establish the requisite ‘direct effect’ in this country”); see also
14 *Hanil Bank*, 148 F.3d at 133 (noting that the United States “need not be the
15 location where the *most* direct effect is felt, simply *a* direct effect”).

16 We have previously held that the locus of an alleged misrepresentation
17 actionable under Section 10(b) is the forum “where the loss is sustained, not
18 where fraudulent misrepresentations are made.” *Sack*, 478 F.2d at 365 (quoting

1 First Restatement § 377 note 4). In *Sack*, the defendants to a Section 10(b) claim
2 argued that it was time-barred. At the time, there was no federal statute of
3 limitations for such claims, so courts looked to the law of the forum state—in that
4 case, New York. New York’s “borrowing statute” provides that claims arising in
5 another state are governed by that state’s statute of limitations if it is shorter than
6 New York’s. See N.Y.C.P.L.R. § 202. The *Sack* defendants argued that the
7 plaintiffs’ claim arose in Massachusetts, raising the question of where a
8 Section 10(b) claim arises. In answer, Judge Friendly looked to the First
9 Restatement to identify the locus of “a cause of action for fraud or deceit, the
10 closest common law analogy to an action under [Section 10(b)].” 478 F.2d at 365.
11 The First Restatement provides that the locus of a fraud claim is the place where
12 the plaintiff sustains a loss. *Id.* at 365–66; *accord, e.g., In re Thelen LLP*, 736 F.3d
13 213, 220 (2d Cir. 2013). In particular, the First Restatement contains an
14 illustration for securities-fraud claims that Judge Friendly deemed “quite
15 pertinent”:

16 6. A, in state X, owns shares in the M company. B, in state Y,
17 fraudulently persuades A not to sell the shares. The value of the
18 shares falls. The place of wrong is X.

19 *Sack*, 478 F.2d at 366 (quoting First Restatement § 377 note 4). On this basis, the
20 *Sack* Court held that an alleged misrepresentation actionable under Section

1 10(b)—just like a claim for common-law fraud—arises “where its economic
2 impact is felt, normally the plaintiffs’ residence.” *Id.*; see also *Block v. First Blood*
3 *Assocs.*, 988 F.2d 344, 349 (2d Cir. 1993) (relying on *Sack*’s holding to conclude
4 that a Section 10(b) claim arose in the forum where the plaintiffs resided).

5 If the locus of a Section 10(b) claim is the place where the plaintiff suffers
6 economic loss from reliance on the defendant’s misrepresentations, then it
7 follows that in a securities fraud case, an FSIA direct effect may be felt where the
8 plaintiff suffers such loss. See *Antares Aircraft*, 999 F.2d at 36 (“In tort, the analog
9 to contract law’s place of performance is the locus of the tort.”). To be sure,
10 locating an economic injury within the United States, without more, will not
11 suffice to bring a foreign sovereign within the “commercial activities” exception.
12 See *id.* (“[T]he fact that an American individual or firm suffers some financial loss
13 from a foreign tort cannot, standing alone, suffice to trigger the exception.”).⁶
14 But here, as the district court correctly determined, Plaintiffs have adequately

⁶ In contrast, as indicated earlier, where an economic injury is more than the mere loss to an American individual or firm from a foreign tort—where the economic injury is itself the “last event necessary to make the actor liable for the alleged tort,” thus locating the tort within the United States, see First Restatement § 377—the connection between the foreign sovereign’s act and its effects may often, if not invariably, be “direct.”

1 shown that SK Fund “contemplated investment by United States persons” and
2 that SK Fund’s alleged misrepresentations caused a direct effect in the United
3 States when at least some investors in the Subordinated Notes—including
4 Gliksberg and the Kiblskys—suffered an economic loss in this country as a
5 result of those misrepresentations. *See Atlantica Holdings*, 2 F. Supp. 3d at 558
6 (“[A]ccording to the Amended Complaint, Defendant made a series of false or
7 misleading statements about the financial health of BTA Bank that, when the
8 dust settled, left holders of the Notes—including many United States investors—
9 with assets worth less than ten percent of their face value.”). On such facts, we
10 have no difficulty concluding that Plaintiffs’ loss “follow[ed] as an immediate
11 consequence” of SK Fund’s alleged misrepresentations concerning securities that
12 were marketed in the United States and directed toward United States persons.
13 *Weltover*, 504 U.S. at 618 (internal quotation marks omitted).

14 As noted, Plaintiffs’ amended complaint alleges that the Kiblskys reside in
15 Miami and that Gliksberg resides in Illinois. Plaintiffs allege that Gliksberg and
16 the Kiblskys purchased Subordinated Notes following the 2010 Restructuring in
17 reliance on the Information Memorandum, which allegedly included a number
18 of misrepresentations about the value of the Subordinated Notes. They made

1 these purchases by placing orders through their broker in the Miami office of
2 UBS. After the falsity of SK Fund's alleged misstatements was revealed, "the
3 Subordinated Notes lost substantially all of their value." J.A. 61. Nothing in the
4 amended complaint or the parties' other submissions suggests that Gliksberg
5 and the Kiblskys were injured by SK Fund's alleged misstatements anywhere
6 other than their place of residence. The locus of SK Fund's alleged securities
7 fraud, then, was the United States. *See Sack*, 478 F.2d at 366; First Restatement §
8 377 note 4. And the fact that the locus of the fraud was the United States means
9 (at least in circumstances where the securities were also marketed here and, as
10 the district court noted, the defendant contemplated and acted to encourage
11 investment by United States persons) the direct-effect clause is satisfied. *See*
12 *Antares Aircraft*, 999 F.2d at 36.

13 **2.**

14 SK Fund advances three primary arguments against our conclusion, none
15 of which is persuasive.

16 First, SK Fund emphasizes that the Plaintiffs other than Gliksberg and the
17 Kiblskys are not American, and therefore could not have been injured in the
18 United States by SK Fund's alleged misrepresentations. The import of this

1 argument is not entirely clear; perhaps SK Fund means to suggest that FSIA
2 immunity must be overcome on a plaintiff-by-plaintiff basis, so that even if SK
3 Fund's misrepresentations had a direct effect on Gliksberg and the Kibliskys in
4 the United States, the other Plaintiffs' claims would have to be dismissed.
5 Regardless, the premise of SK Fund's argument—that Plaintiffs must
6 demonstrate a direct effect *on themselves* in the United States to overcome FSIA
7 immunity—is incorrect; the FSIA requires only that SK Fund's alleged
8 misrepresentations had a direct effect *in* the United States. In other words, had
9 all of the Plaintiffs been foreigners, they could have successfully premised FSIA
10 jurisdiction on the effect that SK Fund's alleged misrepresentations had on non-
11 party United States investors, provided that Plaintiffs could adequately establish
12 the existence of United States investors so affected. *Cf. Verlinden B.V. v. Central*
13 *Bank of Nigeria*, 461 U.S. 480, 489 (1983) (noting that the FSIA “allow[s] a foreign
14 plaintiff to sue a foreign sovereign in the courts of the United States, provided
15 the substantive requirements of the Act are satisfied”).

16 This conclusion—that an FSIA plaintiff need only show a direct effect on
17 someone in the United States, plaintiff or not—follows directly from the text of
18 the direct-effect clause, which provides that a foreign state is not immune from

1 jurisdiction where the “action is based . . . upon an act outside the territory of the
2 United States . . . and *that act causes a direct effect* in the United States.” 28 U.S.C.
3 § 1605(a)(2) (emphasis added). Simply put, the statute says that the act on which
4 the plaintiff’s claims are based must have had a domestic effect, not that the
5 plaintiff’s claims must be based upon the act’s domestic effect. Our case law,
6 moreover, confirms this understanding of the FSIA’s text. In *Rafidain Bank*, 15
7 F.3d 238, a Kuwaiti bank sued two Iraqi banks for breaching certain loan
8 agreements. This Court found jurisdiction under the direct-effect clause based
9 on the defendants’ non-payment of funds into the United States, even though
10 “the United States [was] not the place of performance of any contractual
11 obligations owed to [the] plaintiff” because “the payments were to be made not
12 directly to [the plaintiff] but to New York bank accounts held by the lead banks
13 of the various lending syndicates” in which the plaintiff participated. *Id.* at 239.
14 We explained that “[t]he focus of § 1605(a)(2) is the activity of the sovereign,” not
15 the location of the plaintiff: “If the sovereign’s activity is commercial in nature
16 and has a direct effect in the United States, then the jurisdictional nexus is met,
17 no immunity attaches, and a district court has the authority to adjudicate
18 disputes based on that activity.” *Id.* at 241. For these reasons, the fact that

1 Plaintiffs here have shown a direct effect on Gliksberg and the Kibliskys in the
2 United States is more than sufficient to satisfy the direct-effect clause with
3 respect to Plaintiffs' entire lawsuit.

4 Next, SK Fund suggests that a financial loss to American investors cannot
5 qualify as a direct effect for FSIA purposes. We reject this argument, which rests
6 on a misreading of our direct-effect precedents. In contract cases, FSIA
7 jurisdiction is often premised on a financial loss, *see, e.g., Weltover*, 504 U.S. at 619
8 ("Money that was supposed to have been delivered to a New York bank for
9 deposit was not forthcoming."), and tort cases are no different.

10 To be sure, we have said that "the fact that an American individual or firm
11 suffers some financial loss from a *foreign tort* cannot, standing alone, suffice to
12 trigger" the FSIA's direct-effect clause. *Antares Aircraft*, 999 F.2d at 37 (emphasis
13 added). Thus, where an American citizen suffered a personal injury abroad at
14 the hands of a foreign state and returned to this country permanently disabled,
15 we held that his ongoing disability was not a direct effect of the foreign state's
16 actions, given that his initial injury occurred abroad. *See Martin v. Republic of*
17 *South Africa*, 836 F.2d 91, 95 (2d Cir. 1987); *accord, e.g., Princz v. Federal Republic of*
18 *Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) ("The lingering effects of a personal

1 injury suffered overseas cannot be sufficient to satisfy the direct effect
2 requirement of the FSIA.”); *see also* First Restatement § 377 note 1 (“[W]hen a
3 person sustains bodily harm, the place of wrong is the place where the harmful
4 force takes effect upon the body.”). Similarly, where an American firm’s airplane
5 was detained by a foreign state in that state’s own territory, we held that the
6 resulting financial damage to the firm in the United States was not a direct effect,
7 since the “locus of the tort” —the place where the airplane was detained—was in
8 a foreign country. *Antares Aircraft*, 999 F.2d at 36; *accord, e.g., Westfield v. Federal*
9 *Republic of Germany*, 633 F.3d 409, 416–17 (6th Cir. 2011) (holding that the Third
10 Reich’s conversion of plaintiff’s art in Germany did not have a direct effect in the
11 United States); *cf.* First Restatement § 377 note 3 (“When harm is caused to land
12 or chattels, the place of wrong is the place where the force takes effect on the
13 thing.”). And, where an American citizen was allegedly defrauded by a foreign
14 state in its own territory, we held that her being forced to live in “much reduced
15 circumstances” upon returning to the United States was not a direct effect; in that
16 case, too, the plaintiff’s initial injury was suffered—and the alleged tort itself was
17 therefore completed—outside this country’s borders. *Guirlando v. T.C. Ziraat*
18 *Bankasi A.S.*, 602 F.3d 69, 79 (2d Cir. 2010).

1 But in all of those cases, unlike in this one, the initial injury caused by the
2 defendant’s allegedly tortious conduct occurred in a foreign country, not in the
3 United States—that is, those cases all involved “foreign tort[s].” *Antares Aircraft*,
4 999 F.2d at 36. This distinction is critical. Where an American plaintiff is injured
5 abroad, it will often be easy for the plaintiff to cite some downstream financial
6 harm suffered in the United States (where the plaintiff lives or is headquartered),
7 and in those circumstances, courts must take care to distinguish the initial injury
8 caused by the defendant’s allegedly tortious conduct from the less immediate
9 downstream consequences of that injury.⁷ Otherwise, “the commercial activity
10 exception would in large part eviscerate the FSIA’s provision of immunity for
11 foreign states.” *Id.*; see *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*,
12 33 F.3d 1232, 1238 (10th Cir. 1994) (“Congress did not intend to provide
13 jurisdiction whenever the ripples caused by an overseas transaction manage
14 eventually to reach the shores of the United States.”). Here, by contrast, for
15 Gliksberg and the Kibliskys (as well as for other United States investors who
16 bought Subordinated Notes in reliance on SK Fund’s misrepresentations), the

⁷ Again, however, we note that this Court has left open the possibility that even “a foreign tort may have had sufficient contacts with the United States to establish the requisite ‘direct effect’ in this country.” *Antares Aircraft*, 999 F.2d at 36.

1 financial loss suffered when their investments declined in value *was* their initial
2 injury. In cases where the plaintiff's initial injury occurs in the United States—
3 that is, where this country is the locus of the tort—there is no reason why that
4 initial injury should not count as a direct effect merely because it happens to take
5 the form of a financial loss.

6 Because United States investors in the Subordinated Notes were initially
7 injured in this country (rather than abroad) by SK Fund's alleged tortious
8 conduct, this case resembles products-liability cases against foreign states more
9 than it does the cases cited by SK Fund involving foreign torts. In products-
10 liability cases, courts have consistently held that the direct-effect clause is
11 satisfied by allegations that a plaintiff was injured in the United States by a faulty
12 product manufactured by the defendant abroad. *See Lyon v. Agusta S.P.A.*, 252
13 F.3d 1078, 1083 (9th Cir. 2001); *Aldy ex rel. Aldy v. Valmet Paper Mach.*, 74 F.3d 72,
14 75 (5th Cir. 1996); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir.
15 1993); *Rote v. Zel Custom Mfg., LLC*, No. 13-cv-1189, 2015 WL 570973, at *9 (S.D.
16 Ohio Feb. 11, 2015); *see also* First Restatement § 377 note 1 (“[W]hen a person
17 sustains bodily harm, the place of wrong is the place where the harmful force
18 takes effect upon the body.”). This persuasive authority lends additional support

1 to our conclusion that SK Fund’s alleged misrepresentations caused a direct
2 effect in the United States.

3 Finally, SK Fund argues that the relationship between its alleged
4 misrepresentations and Plaintiffs’ financial loss is too attenuated for that loss to
5 qualify as a “direct effect.” In particular, SK Fund argues that United States
6 investors in the Subordinated Notes—including Gliksberg and the Kibliskys—
7 could only have obtained the Information Memorandum containing SK Fund’s
8 alleged misrepresentations from “third-party intermediar[ies]” such as UBS,
9 whose conduct in “forwarding the document to investors . . . was an intervening
10 act between the commercial activity and any resulting effect in the United
11 States.”⁸ Appellant’s Br. at 35–36. This argument, too, is unavailing.

⁸ SK Fund suggests that notwithstanding that the complaint alleges that it marketed the Subordinated Notes in the United States, Gliksberg and the Kibliskys were not intended recipients of the Information Memorandum, since they are neither non-U.S. persons nor QIBs and therefore presumably made their secondary-market purchases of Subordinated Notes in violation of those securities’ transfer restrictions. SK Fund also claims that the district court was wrong to suggest that the Information Memorandum was freely available on the Internet, since the version of the relevant website that was live during the events at issue could be accessed only by those who certified that they were either non-U.S. persons or accredited investors or QIBs. These arguments are irrelevant to our jurisdictional analysis. As noted, whether an effect is foreseeable to the defendant has no bearing on whether it is “direct” for FSIA purposes, *see Weltover*, 504 U.S. at 618, and because “an objection to subject matter jurisdiction goes to the power of the court to hear and decide the case, . . . parties may not create *or destroy* jurisdiction by agreement or by consent.” 5B Charles Alan Wright et al., *Federal*

1 The intervening actions of a third party may sometimes break the causal
2 chain between a defendant’s allegedly tortious actions and an effect felt in the
3 United States—rendering the effect in this country not “direct”—where the
4 defendant’s actions affect the third party, who in turn takes some independent
5 action that causes a further effect in the United States. *See Virtual Countries*, 300
6 F.3d at 237–38. In *Virtual Countries*, the Republic of South Africa issued a press
7 release suggesting that it might contest an American company’s ownership of a
8 web domain name; the company claimed that this press release had a direct
9 effect in the United States by discouraging third parties to do business with and
10 invest in it. We held that this effect was not “direct” because it fell “at the end of
11 a long chain of causation and [was] mediated by numerous actions by third
12 parties”:

13 First, the Republic issued the press release. Then wire services and
14 newspapers in South Africa and elsewhere obtained the release and
15 wrote articles about it. Current or potential investors—perhaps in
16 the United States, perhaps in other countries, and perhaps in both—
17 and a potential strategic business partner in South Africa, allegedly
18 then learned of the release’s contents. Drawing on news reports,
19 they then formed their own independent assessments of the
20 Republic’s intentions and the possible effect of those intentions on
21 [the plaintiff company] and people who would do business with

Practice & Procedure § 1350 (3d ed.) (emphasis added); cf. *Mortimer Off Shore Servs., Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 108 (2d Cir. 2010).

1 it... Only then could investors and the prospective business
2 partner have decided to give effect to their doubts as to the validity
3 of the plaintiff's current registration of [the domain name] and their
4 fears of reprisal by the Republic, by declining to invest in or do
5 business with [the plaintiff company].

6 *Id.* at 237. Thus, the press release (after being communicated through press
7 outlets) had its initial effect on third party investors and business partners, who
8 had to take further action as a result of the press release in order for the
9 American plaintiff to be affected at all.⁹

10 This case is different. Here, the third-party conduct cited by SK Fund—
11 UBS's distribution of the Information Memorandum—was not in any sense
12 undertaken in reliance on or as a result of SK Fund's alleged misrepresentations
13 specifically. In other words, third-party intermediaries such as UBS would have
14 distributed the Information Memorandum regardless of whether it contained
15 misrepresentations about BTA Bank's financial situation, so that the conduct of
16 such intermediaries cannot have been an *effect* of any such misrepresentations.

⁹ Notably, the result in *Virtual Countries* is also consistent with an approach that focuses on the locus of the alleged tort. See *Antares Aircraft*, 999 F.2d at 36. Although the plaintiff in *Virtual Countries* did not allege that South Africa's press release was itself tortious, its argument was analogous to a claim for defamation. And "[w]here harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated." First Restatement § 377 note 5; cf. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1185–86 (D.C. Cir. 2013) (finding no FSIA jurisdiction over claim for trade-dress infringement where allegedly infringing products were not "sold or advertised" in the United States).

1 Nor was it UBS's distribution of the Information Memorandum (as distinguished
2 from the misrepresentations themselves) that ultimately caused Plaintiffs' injury.
3 Unlike the press release in *Virtual Countries*, SK Fund's misrepresentations acted
4 directly on those whom they allegedly affected, namely, the investors induced to
5 purchase Subordinated Notes that were worth less than advertised.

6 Again, products-liability cases furnish a helpful analogy. Although a
7 defective product may reach the plaintiff only through a long sequence of sales
8 and shipments, that sequence does not attenuate the causal chain between the
9 manufacturing defect and the plaintiff's injury because the sequence is in no way
10 a function of the defect. *See, e.g., Vermeulen*, 985 F.2d at 1545 (“[T]he injuries
11 [plaintiff] suffered in an automobile accident on the roads of Georgia were the
12 result of [defendant's] negligent design and manufacture of the LeCar passenger
13 restraint system. We can hardly imagine a more immediate consequence of the
14 defendant's activity.”); *Lyon*, 252 F.3d at 1083–84 (finding FSIA jurisdiction while
15 recognizing that “much time passed between the manufacture and the injury and
16 that the [defective] aircraft even changed hands”). Likewise, the fact that a
17 misrepresentation reaches an investor in an offering document distributed by a

1 third party does not attenuate the causal chain between the misrepresentation
2 and the investor's loss.

3 Although it bears reiterating that an effect need not be foreseeable to be
4 direct, *see Weltover*, 504 U.S. at 618, we do not intend to—indeed, we have no
5 occasion to—foreclose entirely the possibility that an alleged misstatement by a
6 foreign state may be so far removed from the American investor who eventually
7 relies on it that FSIA jurisdiction will not lie. *See, e.g., Filler v. Hanvit Bank*, 247 F.
8 Supp. 2d 425, 429 (S.D.N.Y. 2003) (finding no FSIA jurisdiction over claims
9 against Korean banks that made alleged misstatements about their finances in
10 Korea, which were then incorporated into audit reports prepared by a Belgian
11 company doing business with the banks, and which were later sent to and relied
12 upon by the plaintiffs in investing in the Belgian company), *vacated on other*
13 *grounds*, Nos. 01-cv-9510, 01-cv-8251, 2003 WL 21729978, at *1 (S.D.N.Y. July 25,
14 2003). Here, however, Plaintiffs allege, and SK Fund does not dispute, that BTA
15 Bank and SK Fund marketed the Subordinated Notes “extensively in the United
16 States, and directed that marketing to U.S. investors.” J.A. 44. Gliksberg and the
17 Kibliskys placed their orders with UBS, which was a Direct Participant in the
18 2010 Restructuring, and the parties to the 2010 Restructuring contemplated that

1 Direct Participants would be able to hold the newly issued securities “for the
2 benefit of their customers,” including accredited investors in the United States.
3 J.A. 164, 485. Given that investors in securities offerings frequently make their
4 purchases through underwriters who distribute offering documents on behalf of
5 the issuer, adopting SK Fund’s argument that UBS’s actions broke the causal
6 chain between SK Fund’s misrepresentations and the losses suffered by United
7 States investors could effectively result in near blanket immunity for foreign
8 states against securities-fraud claims. We do not believe that such a result would
9 be consistent with, much less required by, our FSIA precedents.

10 On the facts presented here, the relationship between SK Fund’s alleged
11 misrepresentations and the resulting financial loss suffered in this country by
12 United States investors—including Gliksberg and the Kibliskys—is sufficiently
13 direct to overcome FSIA immunity. We therefore affirm the district court’s order
14 denying SK Fund’s motion to dismiss on FSIA grounds.

15 II.

16 In the alternative, SK Fund argues that regardless of whether it has
17 immunity from suit under the FSIA, the district court could not exercise personal
18 jurisdiction over it consistent with due process. The parties dispute (1) whether

1 SK Fund, as a foreign corporation wholly owned by a foreign sovereign, may
2 assert due process rights against the exercise of personal jurisdiction by
3 American courts, and (2) if so, whether exercising jurisdiction over SK Fund in
4 this case would violate those rights. We may exercise jurisdiction over this
5 claim, if at all, under the discretionary doctrine of pendent appellate jurisdiction.
6 For the following reasons, we decline to do so.

7 We have appellate jurisdiction over the issue of SK Fund's immunity
8 under the FSIA pursuant to the collateral order doctrine. That doctrine permits
9 interlocutory appeals from non-final orders involving "claims of right separable
10 from, and collateral to, rights asserted in the action, too important to be denied
11 review and too independent of the cause itself to require that appellate
12 consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial*
13 *Life Ins. Corp.*, 337 U.S. 541, 546 (1949). Because sovereign immunity is
14 conceptualized as immunity from suit, and not just immunity from liability, it is
15 well-settled that the denial of a defendant's motion to dismiss on sovereign
16 immunity grounds is an immediately appealable collateral order. *Rein v. Socialist*
17 *People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755–56 (2d Cir. 1998). By contrast,
18 an order denying a motion to dismiss for lack of personal jurisdiction is *not* an

1 immediately appealable collateral order.¹⁰ *See id.* at 756. So with respect to the
2 constitutional questions raised by SK Fund regarding the district court’s exercise
3 of personal jurisdiction, we must have jurisdiction, if at all, under the doctrine of
4 pendent appellate jurisdiction. *See id.*

5 The doctrine of pendent appellate jurisdiction “allows us, ‘[w]here we
6 have jurisdiction over an interlocutory appeal of one ruling,’ to exercise
7 jurisdiction over other, otherwise unappealable interlocutory decisions, where
8 such rulings are ‘inextricably intertwined’ with the order over which we
9 properly have appellate jurisdiction, or where review of such rulings is
10 ‘necessary to ensure meaningful review’ of the appealable order.” *Myers v. Hertz*
11 *Corp.*, 624 F.3d 537, 552 (2d Cir. 2010) (alteration in original) (quoting *Bolmer v.*
12 *Oliveira*, 594 F.3d 134, 141 (2d Cir. 2010)); *see Swint v. Chambers Cnty. Comm’n*, 514
13 U.S. 35, 51 (1995). The Supreme Court has narrowly circumscribed the situations
14 in which pendent appellate jurisdiction may appropriately be exercised in order
15 to avoid “encourag[ing] parties to parlay *Cohen*-type collateral orders into multi-

¹⁰ It is irrelevant that the district court denied SK Fund’s motion to dismiss on personal jurisdiction grounds in the same “order” in which it rejected SK Fund’s FSIA immunity arguments. Although courts often phrase the question as whether a particular “order” is immediately appealable, our appellate jurisdiction under the collateral order doctrine is limited to the specific “issue” that is immediately appealable—here, FSIA immunity. *Rein*, 162 F.3d at 756.

1 issue interlocutory appeal tickets,” thereby undermining the general rule that an
2 appeal may not be taken until a final judgment has been entered. *Swint*, 514 U.S.
3 at 49-50. Moreover, “[w]e have indicated that the exercise of pendent appellate
4 jurisdiction is discretionary, and that we will only exercise it in ‘exceptional
5 circumstances.’” *Myers*, 624 F.3d at 553 (citation omitted) (quoting *Jones v.*
6 *Parmley*, 465 F.3d 46, 65 (2d Cir. 2006)).

7 Even assuming *arguendo* that, upon analysis, the question of SK Fund’s
8 immunity from suit under the FSIA would be so “inextricably intertwined” with
9 its due process claim as to allow for pendent appellate jurisdiction, we choose
10 not to reach SK Fund’s due process argument. *See Myers*, 624 F.3d at 552. The
11 key, antecedent question to SK Fund’s constitutional claim—whether a foreign
12 corporation wholly owned by a foreign sovereign is a “person” within the
13 meaning of the Fifth Amendment Due Process Clause—is pending before
14 another panel in *Corporacion Mexicana de Mantenimiento Integral v. Pemex-*
15 *Exploracion y Produccion*, No. 13-4022-cv. This circumstance, far from the
16 “exceptional” instance warranting pendent appellate jurisdiction, favors
17 restraint. *Myers*, 624 F.3d at 553. Accordingly, we decline to exercise our

1 discretion to exercise pendent appellate jurisdiction over SK Fund's due process
2 challenge.

3 **CONCLUSION**

4 We have considered SK Fund's remaining contentions and find them to be
5 without merit. For the foregoing reasons, we **AFFIRM** the portion of the district
6 court's order holding that SK Fund is not immune from suit under the FSIA and
7 **DISMISS** the portion of SK Fund's appeal challenging the district court's
8 exercise of personal jurisdiction.