

The Commercial Activity Exception to Sovereign Immunity Under the Foreign Sovereign Immunities Act

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A Practice Note examining the requirements for jurisdiction over claims against sovereign defendants (including foreign states and their political subdivisions, agencies, and instrumentalities) under the Foreign Sovereign Immunities Act's "commercial activity" exception to sovereign immunity, codified at 28 U.S.C. § 1605(a)(2). This Note analyzes the core jurisdictional requirement that, for this exception to apply, the plaintiff's action must be based on a foreign state's commercial activity or an act in connection with a foreign state's commercial activity.

When a plaintiff sues a foreign state in US court, the Foreign Sovereign Immunities Act (FSIA) generally immunizes the defendant state from the court's jurisdiction. However, the FSIA also provides for certain exceptions to immunity. These exceptions are the only grounds on which a US court may exercise jurisdiction over claims against a foreign state. As a result, US courts lack subject matter jurisdiction over actions against foreign states unless one of the exceptions to immunity enumerated in the FSIA applies. (See *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).)

This Note addresses the most significant FSIA exception to sovereign immunity, namely the commercial activity exception under 28 U.S.C. § 1605(a)(2) (see *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992); see also H.R. REP. 94-1487 (FSIA House Report), at 18, reprinted in 1976 U.S.C.A.N. 6604, 6617). The commercial activity exception applies to a foreign state and its political subdivisions, agencies, and instrumentalities (see Exception Applies to a Foreign State's Political Subdivisions, Agencies, and Instrumentalities).

For a general explanation of the FSIA, see Article, A Primer on Foreign Sovereign Immunity ([3-502-7658](#)).

INITIAL CONSIDERATIONS

PURPOSE OF THE COMMERCIAL ACTIVITY EXCEPTION CODIFIED AT 28 U.S.C. § 1605(A)(2)

The commercial activity exception in the FSIA withdraws sovereign immunity from a foreign state if both of these requirements are satisfied:

- The plaintiff's lawsuit is based upon the foreign state's commercial activity (or an act in connection with the foreign state's commercial activity).
- The foreign state's act or activity has a sufficient US nexus.

(28 U.S.C. § 1605(a)(2).)

NATURE (NOT PURPOSE) OF ACTIVITY DETERMINES WHETHER IT IS COMMERCIAL

The FSIA defines "commercial activity" as either:

- "A regular course of commercial conduct."
- "A particular commercial transaction or act."

(28 U.S.C. § 1603(d).)

Under the FSIA, courts must determine whether a particular activity qualifies as commercial based on the **nature** of the activity rather than its **purpose**. (See 28 U.S.C. § 1603(d); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992).)

The US Supreme Court has held that, regardless of a foreign state's motive, courts must determine whether the conduct at issue is the **type** of conduct private parties engage in for "trade and traffic or commerce" (see *Weltover, Inc.*, 504 U.S. at 614 (citation omitted)). If so, the commercial activity exception may apply. On the other hand, if the conduct or transaction in question is "peculiar to sovereigns" and of a type in which private citizens cannot engage, the commercial activity exception does not apply. (See *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (quoting *Weltover*, 504 U.S. at 614).)

For example, the US Supreme Court in *Weltover* held that Argentina's refinancing of debt by issuing bonds was a commercial activity because the bonds:

- Were "garden-variety debt instruments" that private parties may hold.
- Were negotiable.
- Could be traded in international markets.
- Promised a future stream of cash income.

(504 U.S. at 615.)

In contrast, the Supreme Court later held in *Nelson* that Saudi Arabia's alleged wrongful arrest, imprisonment, and torture of an American citizen employed at a Saudi hospital was not commercial activity because it fell under the sovereign's police power (507 U.S. at 361).

Federal courts have applied the principles articulated in *Weltover* and *Nelson* in various circumstances. For example:

- The German government's alleged tortious interference with the plaintiff's existing exclusive distribution rights for machine tools manufactured in the former East Germany qualified as commercial under the FSIA despite the government's sovereign purpose of converting previously state-owned businesses in formerly communist East Germany into free market enterprises (*WMW Machinery, Inc. v. Werkzeugmaschinenhandel GmbH Im Aufbau*, 960 F. Supp. 734, 740 (S.D.N.Y. 1997)).
- Germany's actions to set up and fund programs to pay reparations to Holocaust survivors were not commercial within the meaning of the FSIA even though victims ultimately received monetary compensation (*Wolf v. Federal Republic of Germany*, 95 F.3d 536, 543-44 (7th Cir. 1996)).
- The state-owned Indonesian social security insurer's activities in its capacity as Indonesia's default health insurer did not equate to those of an independent actor in the private marketplace of potential health insurers. Therefore, they were sovereign in nature (*Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 178 (2d Cir. 2010)).
- The operation of a nuclear reactor by a state-owned Canadian corporation that marketed itself as a commercial enterprise and supplied a large portion of the worldwide need for medical isotopes was commercial in nature (*Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 788-89 (S.D.N.Y. 2012)).

COMMERCIAL ACTIVITY EXCEPTION USUALLY LITIGATED IN FEDERAL COURT

Like the other exceptions to immunity under the FSIA, the commercial activity exception usually arises in federal court. Most domestic cases against foreign states are litigated in federal district court because:

- District courts have original jurisdiction over all civil actions against foreign states, provided that one of the FSIA's exceptions to immunity applies (28 U.S.C. § 1330(a)). (For more information on a federal court's jurisdiction generally, see Practice Note, Commencing a Federal Lawsuit: Initial Considerations.)
- A foreign state may remove to federal court an action that the plaintiff commenced in state court (28 U.S.C. § 1441(d)). (For more information on removal, see Practice Note, Removal: Overview.)

EXCEPTION APPLIES TO A FOREIGN STATE'S POLITICAL SUBDIVISIONS, AGENCIES, AND INSTRUMENTALITIES

The commercial activity exception applies broadly to:

- Foreign states themselves.
- Political subdivisions of foreign states.
- Agencies and instrumentalities of foreign states.

(28 U.S.C. §§ 1603 and 1605; see, for example, *Samantar v. Yousuf*, 560 U.S. 305, 305-06 (2010)).

The commercial activity exception does not distinguish between a foreign state and its political subdivisions, agencies, or instrumentalities. It instead applies equally to all of them. Therefore, counsel should keep in mind that certain other provisions of the FSIA treat agencies and instrumentalities in particular differently from foreign states, such as, for example:

- The "expropriation" exception to immunity in 28 U.S.C. § 1605(a)(3).
- The rules on service of process in 28 U.S.C. § 1608.
- The exceptions to immunity from attachment and execution in 28 U.S.C. § 1610.

COMMON TYPES OF CASES IN WHICH THIS EXCEPTION MAY ARISE

Employment Disputes

In employment cases against foreign states, whether the plaintiff's employment constitutes commercial activity is a recurring issue. The FSIA's legislative history explains that employment is governmental (rather than commercial) activity if the employment is of diplomatic, civil service, or military personnel (FSIA House Report, at 16, reprinted in 1976 U.S.C.C.A.N. 6604, 6615).

However, the legislative history does not define civil service, leaving courts to interpret the issue (see *Kato v. Ishihara*, 360 F.3d 106, 110 (2d Cir. 2004)).

Many courts (including the D.C. Circuit and the Second, Seventh, and Ninth Circuits) have held that a foreign state's employment of civil servants, diplomats, and soldiers does not qualify as commercial activity (see *El-Hadad v. United Arab Emirates*, 496 F.3d 658, 664 (D.C. Cir. 2007) (collecting cases)). As a result, courts usually lack jurisdiction over employment-related claims by civil servants, diplomats, or soldiers against foreign states.

Further, some courts have found that even if the plaintiff employee is not a civil servant, diplomat, or soldier, the commercial activity exception still may not apply if the plaintiff is engaged in quintessentially government work, such as a judge (*El-Hadad*, 496 F.3d at 664). The Second Circuit appears to give less weight to the civil service characterization, describing it as merely an example of the "central inquiry" and "broader distinction" between commercial and non-commercial activity under the FSIA (*Kato*, 360 F.3d at 111).

On the other hand, some courts (including the Ninth Circuit) have adopted a bright-line rule that a foreign state's employment of personnel **other than** civil servants, diplomats, and soldiers qualifies as commercial activity, where courts have jurisdiction over non-civil service employment disputes against foreign states (see *Holden v. Canadian Consulate*, 92 F.3d 918, 921 (9th Cir. 1996)).

The D.C. Circuit originally interpreted the FSIA's legislative history as creating an exception whereby a foreign state's employment of "American citizens or third country nationals" (as opposed to its own citizens) in civil service positions constituted commercial activity (see *Broadbent v. Org. of Am. States*, 628 F.2d 27, 34 (D.C. Cir. 1980)). Yet more recently, that court has clarified that the employee's nationality is not dispositive. In other words, a foreign state's employment of an American or third country national in a civil service position usually constitutes governmental instead of commercial activity (see *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 33 (D.C. Cir. 2000)).

Illegal Activity

At least one court has found that for activity to be commercial, it must be *lawful* activity in which a private person may engage (see *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 793 (S.D.N.Y. 2005), adhered to in relevant part on reconsideration, 392 F. Supp. 2d 539 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008)). However, this is the minority view, as most courts addressing the issue have concluded that a given activity can be both illegal and commercial (see, for example, *Kensington Int'l Ltd. v. Societe Nationale Des Petroles Du Congo*, 2006 WL 846351, at *12 (S.D.N.Y. Mar. 31, 2006), *rev'd in part on other grounds sub nom. Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007)).

Examples of illegal activity courts have deemed commercial include:

- Fraud and bribery involved in the licensing and sale of medical equipment, because this was a type of activity in which private parties also may engage (*Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 816 (6th Cir. 2002), abrogated in part on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010)).
- An illegal contract to convert Nigerian government funds for certain government officials' personal use (*Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 874-75 (9th Cir. 2000)).
- A scheme in which Nigerian government officials purportedly sought to defraud a group of investors in connection with a contract for the assignment of proceeds from the sale of oil drilling equipment (*Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1217-18 (10th Cir. 1999)).

Counsel should keep in mind that illegal activity (like any other activity) does not qualify as commercial if it is not a type of activity in which a private party may engage (see, for example, *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 110-11 (D.D.C. 2012) (acts of confiscation and extortion by Kazakh government agencies and officials in connection with a criminal investigation were not commercial because abuses of official power for corrupt ends may not be undertaken by private parties in a marketplace)).

Expropriation of Private Property

Courts generally consider a foreign state's expropriation or nationalization of private property a non-commercial activity. Therefore, the commercial activity exception usually does not confer jurisdiction over expropriation claims (see, for example, *Garb v. Republic of Poland*, 440 F.3d 579, 586-87 (2d Cir. 2006); *Rong v. Liaoning Province Gov't*, 452 F.3d 883, 890 (D.C. Cir. 2006); but see *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 450 (D.C. Cir. 1990) (applying the commercial activity exception where a minority shareholder alleged that Iran had engaged in both commercial and governmental activity by

using its majority position to lock the plaintiff out of the management of the company). If a court has any jurisdiction over expropriation claims, it is only under the FSIA's separate expropriation exception to immunity (28 U.S.C. § 1605(a)(3)), which may apply where rights in property are taken in violation of international law.

PLAINTIFF'S ACTION MUST BE BASED ON THE FOREIGN STATE'S COMMERCIAL ACTIVITY OR AN ACT IN CONNECTION WITH SUCH ACTIVITY

CASE LAW CONCERNING THE "BASED UPON" REQUIREMENT

The commercial activity exception requires that the plaintiff's lawsuit must be "based upon" the foreign state's commercial activity or an act in connection with the foreign state's commercial activity (28 U.S.C. § 1605(a)(2)). The "based upon" requirement is satisfied when the foreign state's alleged commercial activity or act, if proved, entitles the plaintiff to relief under its theory of the case (see *Nelson*, 507 U.S. at 357). In other words, the foreign state's commercial activity or act in connection with a commercial activity must give rise to the plaintiff's claim.

The fact that a foreign state's commercial activity eventually led to the plaintiff's alleged injury is generally insufficient. In *Nelson*, the US Supreme Court held that the commercial activity exception did not apply because Saudi Arabia's recruitment of the American plaintiff to work in a Saudi hospital was not the basis for the plaintiff's lawsuit alleging mistreatment by the authorities in Saudi Arabia. Although Saudi Arabia's "arguably commercial" activity in recruiting and employing the plaintiff may have led to the plaintiff's mistreatment in Saudi Arabia, the plaintiff's claims were based on torts committed in that country and not due to the plaintiff's prior recruitment in the US (see *Nelson*, 507 U.S. at 358).

Courts must look to the core of the lawsuit to determine whether the "based upon" requirement is satisfied, instead of individually analyzing each claim (see *OBG Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 396-97 (2015) (injuries the plaintiff suffered while traveling in Austria were not based on the plaintiff's purchase of a rail pass in the US); see also *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 108 (2d Cir. 2016); *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, 2016 WL 3563504, at *5 (C.D. Cal. Mar. 9, 2016)).

Courts Must Identify the Particular Act or Activity that is the Basis for the Action

Courts applying the "based upon" requirement must first identify the particular act or activity that forms the basis for the plaintiff's claims against the foreign state (see *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006)). (For additional examples, see *Globe Nuclear Servs. and Supply (GNSS), Ltd. v. AO Techsnabexport*, 376 F.3d 282, 285-88 (4th Cir. 2004) and *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1171 (9th Cir. 2010)).

Activity in the US or Abroad?

Even where a foreign state's conduct unquestionably qualifies as commercial, the parties may dispute whether the plaintiff's action is "based upon" an act or activity of the foreign state in the US, as opposed to an act or activity elsewhere (see *In re: North Sea Brent Crude Oil Futures Litig.*, 2016 WL 1271063, at *2, *8-*9 (S.D.N.Y. Mar. 29, 2016)).

“Incidental” Commercial Activity in the US Likely Insufficient

A plaintiff’s claim is not “based upon” a foreign state’s commercial activity in the US where the US activity is “incidental” to the foreign state’s activity outside the US that forms the basis of the plaintiff’s claim (see *EM Ltd. v. Banco Cent. De La Republica Argentina*, 800 F.3d 78, 97-98 (2d Cir. 2015), cert. dismissed, 136 S. Ct. 1731 (2016)). A sufficient nexus must instead exist between the following:

- The commercial activity in the US.
- The gravamen of the complaint.

(800 F.3d 78 at 98.) The Second Circuit has applied this rule in at least two cases (*Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147, 156-57 (2d Cir. 2007); *EM Ltd.*, 800 F.3d at 97-98).

ACTIVITY MUST HAVE A SUFFICIENT US NEXUS

For a US court to have jurisdiction under the commercial activity exception to hear a plaintiff’s case against a foreign sovereign, the plaintiff’s action must be based on one of the following:

- A commercial activity carried on in the US by the foreign state (see Foreign State’s Commercial Activity in the US).
- An act performed in the US in connection with a commercial activity of the foreign state elsewhere (see Act in the US in Connection with Foreign State’s Commercial Activity Elsewhere).
- An act outside the US in connection with the foreign state’s commercial activity elsewhere and that causes a direct effect in the US (see Act Outside the US in Connection with Foreign State’s Commercial Activity Elsewhere That Causes a Direct Effect in the US).

(28 U.S.C. § 1605(a)(2).)

CLAUSE ONE: COMMERCIAL ACTIVITY CARRIED ON IN THE US BY THE FOREIGN STATE

The FSIA in 28 U.S.C. § 1603(e) defines the phrase “commercial activity carried on in the United States by a foreign state” as it appears in section 1605(a)(2) to mean “commercial activity carried on by such state and having substantial contact with the United States.” This statutory definition in section 1603(e) controls even though the lesser requirement of mere “substantial contact with the United States” may appear inconsistent with the seemingly clear requirement in section 1605(a)(2) of “commercial activity carried on in the United States.” Deference to the statutory definition in section 1603(e) reflects the general rule that when a statute explicitly defines a particular term, courts “must follow that definition, even if it varies from that term’s ordinary meaning” (*Stenberg v. Carhart*, 530 U.S. 914, 942 (2000)).

How Courts Determine Whether a Foreign State’s Commercial Activity Has “Substantial Contact” with the US

To help determine whether a particular commercial activity has “substantial contact” with the US, three basic principles can be distilled from the case law:

- To satisfy the substantial contact test, at least some (but not all) of the foreign state’s commercial activity on which the plaintiff’s claim is based typically must have occurred within the US.
- The Second Circuit has explained that “[w]hen a foreign state has carried on a commercial activity within the United States, the

first clause of § 1605(a)(2) ... withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise an integral part of the state’s ‘regular course of commercial conduct’ or ‘particular commercial transaction’ ‘having substantial contact with the United States.’” (*Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80, 84 (2d Cir. 1983)).

- Similarly, “commercial transactions performed *in whole or in part* in the United States” satisfies the “substantial contact” requirement; the transaction need not be “performed and executed in its entirety in the United States.” (FSIA House Report, at 17, reprinted in 1976 U.S.C.C.A.N. 6604, 6615 (emphasis added)).
- There is broad agreement among courts that the substantial contact requirement sets a higher standard than the minimum contacts standard for due process (see *Sachs*, 737 F.3d at 598; *Shapiro v. Rep. of Bolivia*, 930 F.2d 1013, 1019 (2d Cir. 1991); and *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988)).
- It is the defendant foreign state’s commercial activity (or the commercial activity of the foreign state’s agent, as explained below) that must have substantial contact with the US; a nexus between the **plaintiff’s** activities and the US generally does not confer jurisdiction under section 1605(a)(2) (see *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in Int’l and Foreign Courts*, 727 F.3d 10, 16-17 (1st Cir. 2013); *de Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985)).

However, one court in *Tonoga, Ltd. v. Ministry of Public Works and Housing of the Kingdom of Saudi Arabia* (135 F. Supp. 2d 350 (N.D.N.Y. 2001)) held that even if “executed in Saudi Arabia” and requiring “payments to an account in Germany,” the sovereign defendants’ guarantee of payment to a US-based plaintiff under a manufacturing agreement had the necessary “substantial contact” with the US where the defendants “understood and expected” that the plaintiff would “utilize its manufacturing facilities located in this country” to perform under the agreement (135 F. Supp. 2d at 356-57).

Whether Foreign State’s Counterparty is US Resident or Corporation Is Irrelevant

The fact that the plaintiff is a US citizen or US resident does not suffice to satisfy the “substantial contact” requirement (see FSIA House Report, at 17, reprinted in 1976 U.S.C.C.A.N. 6604, 6616). Several cases support this interpretation (*Schoeps v. Bayern*, 27 F. Supp. 3d 540, 545 (S.D.N.Y. 2014), aff’d sub nom. *Schoeps v. Freistaat Bayern*, 611 F. App’x 32 (2d Cir. 2015), cert. denied sub nom. *Schoeps v. Free State of Bavaria, Fed. Republic of Germany*, 136 S. Ct. 895 (2016); *Triple A Int’l, Inc. v. Democratic Republic of the Congo*, 721 F.3d 415, 417-18 (6th Cir. 2013)).

On the other hand, the Fourth Circuit in *Globe Nuclear Services* relied on the fact that the Russian instrumentality there contracted with a US corporation as one of several factors supporting the court’s conclusion that the instrumentality’s conduct “comfortably” satisfied the “substantial contact” requirement (376 F.3d at 291-92).

Some courts also have held that a foreign state contracting with a US-based counterparty may structure the parties’ transaction to avoid jurisdiction under FSIA § 1605(a)(2)’s first clause by dealing with the

counterparty outside the US. (For examples, see *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 185-86 (5th Cir. 1992) and *Triple A Int'l, Inc. v. Democratic Republic of the Congo*, 852 F. Supp. 2d 839, 848 (E.D. Mich. 2012), aff'd, 721 F.3d 415 (6th Cir. 2013).)

SATISFYING THE “SUBSTANTIAL CONTACT” REQUIREMENT BY ENGAGING IN COMMERCIAL ACTIVITY INDIRECTLY THROUGH AN AGENT

A foreign state may engage in commerce indirectly through an agent. Some courts have applied traditional agency principles to determine whether a foreign state is subject to jurisdiction under section 1605(a)(2)'s first clause based on the commercial activity of the foreign state's alleged agent having substantial contact with the US (see *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105, 1007 (D.C. Cir. 1983); *BP Chems. Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 687-88 (8th Cir. 2002); *Virtual Defense and Dev. Int'l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 5 (D.D.C. 1999)).

However, the US Supreme Court in *Sachs* found it unnecessary to determine whether the FSIA “allow[s] attribution through principles found in the common law of agency” because the plaintiff's claim in that case was not “based upon” any commercial activity in the US in any event (see 136 S. Ct. at 395).

A plaintiff also may argue that a foreign state is subject to jurisdiction under section 1605(a)(2)'s first clause based on the commercial activity of its instrumentality where the instrumentality can be deemed an alter ego of its parent state.

This alter ego theory derives from the US Supreme Court's seminal decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”) (462 U.S. 611, 626-29 (1983)).

To support jurisdiction on an alter ego theory, the foreign state must exercise more control over the instrumentality than is normal for any corporate parent over its subsidiary and must so completely dominate the subsidiary that the foreign state and its instrumentality are “not meaningfully distinct entities” but instead “act as one” (*Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000)).

TYPES OF COMMERCIAL ACTIVITY THAT MAY SATISFY THE “SUBSTANTIAL CONTACT” REQUIREMENT

The FSIA's legislative history cites examples of activities that satisfy the “substantial contact” requirement (FSIA House Report, at 17, 1976 U.S.C.C.A.N. 6604, 6615-16).

Among the recurring fact patterns courts have considered are cases involving:

- Contract negotiation and execution in the US.
- Solicitation of business in the US.
- Business torts in the US.
- Ticket sales by airlines and other common carriers in the US.

Contract Negotiation and Execution in the US

Several courts have considered whether contract negotiations in the US satisfy the “substantial contact” requirement. The decisions in these cases tend to be fact-specific, but at least three principles can be gleaned from the cases:

- The mere execution of a contract in the US that was neither negotiated, nor calls for any performance, in the US likely does not constitute “substantial contact.” (See *Terenkian v. Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013)).
- By comparison, the court in *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts* held that a Ukrainian instrumentality's delivery of letters the court characterized as “unilateral contracts” to a Massachusetts-based counterparty in the US, coupled with the fact that negotiations for an earlier agreement had taken place in New York, was sufficient to confer jurisdiction (727 F.3d 10, 25-26 (1st Cir. 2013)).
- A foreign state's participation in one or two isolated meetings in the US, standing alone, in connection with an otherwise foreign transaction is unlikely to satisfy the “substantial contact” requirement (see *BP Chemicals*, 285 F.3d at 686-87; *Gen. Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1383-84 (8th Cir. 1993); *Gerding v. Republic of France*, 943 F.2d 521, 527 (4th Cir. 1991); and *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 36 (D.C. Cir. 2014)).
- Courts are more likely to deem the “substantial contact” requirement satisfied where the foreign state has participated in multiple, significant meetings in the US (see, for example, *Devengochea v. Bolivarian Republic of Venezuela*, 2016 WL 3951279 (S.D. Fla. Jan. 20, 2016), at *8, report and recommendation adopted, 2016 WL 3951278 (S.D. Fla. Feb. 18, 2016); *Lanny J. Davis & Assocs. LLC v. Republic of Equatorial Guinea*, 962 F. Supp. 2d 152, 159 (D.D.C. 2013); and *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1101-02 (S.D.N.Y. 1982)).

However, another court recently held in *Packsys, S.A. de C.V. v. Exportadora de Sal, S.A. de C.V.*, (2016 WL 3563504 (C.D. Cal. Mar. 9, 2016)) that even if the underlying contract between the Mexican plaintiff and the majority state-owned Mexican defendant in that case was “conceived, negotiated, and signed” in the US, “those acts we[re] insufficiently significant to meet the commercial activity exception” where the contract was to be performed in Mexico (2016 WL 3563504, at *5 (internal quotation and citations omitted)).

Solicitation of Business in the US

Courts are usually reluctant to find “substantial contact” based solely on a foreign state's solicitation of business in the US (see, for example, *Lempert v. Republic of Kazakstan, Ministry of Justice*, 223 F. Supp. 2d 200, 203 (D.D.C. 2002)). However, this type of solicitation may support a finding of “substantial contact” when coupled with other US-related activity of the foreign state (see, for example, *Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. and Foodstuffs*, 647 F.2d 317, 319 (2d Cir. 1981) and *Virtual Defense and Dev. Intl., Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 5 (D.D.C. 1999)).

Business Torts in the US

The FSIA's legislative history cites “business torts occurring in the United States” as a form of commercial activity that usually satisfies the “substantial contact” requirement (FSIA House Report, at 17, reprinted in 1976 U.S.C.C.A.N. 6604, 6615-16). The FSIA also includes a separate “exception for noncommercial torts” in section 1605(a)(5) (see *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)). However, section 1605(a)(5) applies only in cases that the commercial activity exception does not otherwise encompass; therefore, sections 1605(a)(5) and 1605(a)(2) “are

mutually exclusive" (*De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984)).

Examples of business tort claims that have been litigated under the commercial activity exception include:

- Claims for misappropriation of trade secrets (see *BP Chemicals*, 285 F.3d at 686-87; *Gould, Inc. v. Mitsui Min. & Smelting Co.*, 947 F.2d 218, 222 (6th Cir. 1991)).
- Claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) (see *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 425 (S.D.N.Y. 2007)).

Ticket Sales by Airlines and Other Common Carriers in the US

Some courts have held that where a foreign state-owned airline or other common carrier (acting directly or through an agent) sells a ticket to a passenger in the US, the ticket sale satisfies the "substantial contact" requirement even if the ticket is for travel outside the US (see *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 781-82 (9th Cir. 1991); *Sachs v. Republic of Austria*, 737 F.3d 584, 591-99 (9th Cir. 2013), rev'd on other grounds sub nom. *ÖBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015)).

However, the US Supreme Court's reversal of the Ninth Circuit's decision in the *Sachs* case likely forecloses jurisdiction in most cases involving injuries sustained during travel between destinations outside the US. The Supreme Court's decision clarifies that even if an injured plaintiff's ticket purchase in the US satisfies the "substantial contact" requirement (an issue the Court did not address), the plaintiff's personal injury action still is not "based upon" that ticket purchase because there is "nothing wrongful about the sale of the [ticket] standing alone" (*Sachs*, 136 S. Ct. at 396; see What Guidance Has the US Supreme Court Provided Concerning the "Based Upon" Requirement?).

CLAUSE TWO: AN ACT IN THE US IN CONNECTION WITH A FOREIGN STATE'S COMMERCIAL ACTIVITY ELSEWHERE

GENERAL SCOPE OF CLAUSE TWO

The scope of section 1605(a)(2)'s second clause is significantly narrower than that of the first and third clauses. The acts or omissions it encompasses are only those that are sufficient "in and of themselves" to form the basis of the plaintiff's cause of action. Although some of these acts may also qualify as commercial activity having substantial contact with the US under the commercial activity exception's first clause, Congress wanted to provide expressly for jurisdiction in cases where the plaintiff's claim "arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad." (FSIA House Report, at 19, reprinted in 1976 U.S.C.C.A.N. 6604, 6618.)

(For examples of acts that may give rise to jurisdiction under the second clause, see FSIA House Report, at 19, reprinted in 1976 U.S.C.C.A.N. at 6617-18.)

HOW COURTS HAVE APPLIED CLAUSE TWO

Required Connection Between the US Act and the Foreign State's Commercial Activity Elsewhere

Jurisdiction under clause two requires a "connection" between the act performed in the US and the foreign state's commercial activity

elsewhere (see *Nelson*, 507 U.S. at 358). Although the *Nelson* Court did not directly address the nature of the "connection" required for jurisdiction under the second clause, later cases have provided additional guidance (see *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek*, 600 F.3d 171, 174-78 (2d Cir. 2010) (citation omitted) and *Kern v. Oesterreichische Elektrizitaetswirtschaft AG*, 178 F. Supp. 2d 367, 377 (S.D.N.Y. 2001)).

"Non-commercial Act" Limitation in the Second and Fifth Circuits

The Second and Fifth Circuits have further limited the scope of jurisdiction under the second clause by holding that it applies only to **non-commercial** acts performed in the US in connection with a foreign state's *commercial* activity elsewhere (see *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 892 n.5 (5th Cir. 1998); *Byrd v. Corporación Forestal y Industrial de Olancho S.A.*, 182 F.3d 380 (5th Cir. 1999), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010); and *Kensington Int'l Ltd. v. Itoua*, 505 F.3d 147, 157 (2d Cir. 2007)).

However, this limitation appears inconsistent with the FSIA's legislative history, which explains that Congress intended the second clause to confer jurisdiction where the plaintiff's claim arises out of a "**commercial or private**" act in the US that "relates to a commercial activity abroad" (FSIA House Report, at 19, reprinted in 1976 U.S.C.C.A.N. 6604, 6618 (emphasis added); see General Scope of Clause Two).

Scarcity of Cases Finding Jurisdiction Under Clause Two

Cases finding jurisdiction under § 1605(a)(2)'s second clause are rare (see *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 n.1 (7th Cir. 1991)). (For a few examples, see *Wye Oak Tech., Inc. v. Republic of Iraq* 666 F.3d 205, 216 (4th Cir. 2011) and *Ketty v. Saudi Ministry of Education*, 53 F. Supp. 3d 40, 53 (D.D.C. 2014).)

In several other cases, courts have declined to exercise jurisdiction under the second clause. The plaintiff's inability to satisfy the separate "based upon" requirement for jurisdiction was the dispositive factor in most of those cases (see Plaintiff's Action Must Be Based On the Foreign State's Commercial Activity or an Act in Connection with that Activity). (For a decision holding that jurisdiction under the second clause was lacking for a different reason, see *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 138 (2d Cir. 2012).)

CLAUSE THREE: AN ACT OUTSIDE THE US IN CONNECTION WITH A FOREIGN STATE'S COMMERCIAL ACTIVITY ELSEWHERE THAT CAUSES A DIRECT EFFECT IN THE US

HOW COURTS DETERMINE WHETHER A FOREIGN STATE'S ACT OUTSIDE THE US HAS A "DIRECT EFFECT" IN THE US

Section 1605(a)(2)'s third clause confers jurisdiction over actions that are "based upon ... an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" that "causes a direct effect in the United States." The difficult and fact-dependent question that often arises is whether the necessary "direct effect in the United States" required for jurisdiction under the third clause exists. As one court put it, the distinction between direct and indirect effects can be "a slippery business" (*Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183, 1190 (10th Cir. 2008)).

Weltover remains the foundational decision for any analysis of the “direct effect” requirement (504 U.S. at 618-19). In that case, bondholders brought a breach of contract action against Argentina and its central bank arising out of Argentina’s unilateral extension of the time to repay certain government bonds. The US Supreme Court held that:

To be direct, an effect must follow as an “**immediate consequence**” of the foreign state’s activity. If this requirement is satisfied, the effect of the foreign state’s activity in the US need not be substantial or foreseeable (504 U.S. at 618 (citation omitted, emphasis added)).

Because the bondholder plaintiffs in *Weltover* designated their accounts in New York as the place of payment, New York was the contractually required place of performance. Therefore, Argentina’s failure to repay the bonds when they came due had a direct effect in the US (504 U.S. at 619).

“Legally Significant Act” Requirement in the Second and Ninth Circuits

Some courts have adopted a “legally significant act” test to determine whether a particular action is “direct” within the meaning of Section 1605(a)(2)’s third clause. As originally formulated by the Second Circuit in *Weltover*, the “legally significant act” test refers to “the place where legally significant acts giving rise to the claim occurred” to determine “where the effect is felt directly” (*Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991), *aff’d*, 504 U.S. 607 (1992)).

However, the US Supreme Court made no mention of this test when it affirmed the Second Circuit’s decision in *Weltover*. The Second Circuit has also since clarified that there is no requirement “that the foreign state [must] have performed an act in the United States” (*Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010) (internal quotation omitted)). The test instead requires “simply that the defendant’s conduct that is alleged to have had a direct effect in the United States must be legally significant” (602 F.3d at 76-77).

A circuit split has developed over the “legally significant act” test:

- The Ninth Circuit is the only other circuit that has endorsed the test explicitly, holding that “a court must look to the place where legally significant acts giving rise to the claim occurred in determining the place where a direct effect may be said to be located” (*Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1134 (9th Cir. 2012)).
- In contrast, the Fifth and Tenth Circuits have explicitly rejected the legally significant act test (*Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 894 (5th Cir. 1998); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007)).

Relationship with “Minimum Contacts” Requirement for Personal Jurisdiction

Early FSIA decisions incorporated a “minimum contacts” standard when assessing jurisdiction under FSIA 1605(a)(2)’s third clause (see *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980); *Exch. Nat’l Bank of Chicago v. Empresa Minera Del Centro Del Peru S.A.*, 595 F. Supp. 502, 505 (S.D.N.Y. 1984)).

Whether and to what extent courts apply a “minimum contacts” analysis currently varies among the various circuits:

- Only the Ninth Circuit continues to incorporate the “minimum contacts” test across the board in its “direct effect” analysis (see *Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 525-26 (9th Cir. 2001)).
- The Eleventh Circuit has taken a more nuanced approach, noting that “[t]he ‘direct effects’ language of § 1605(a)(2) closely resembles the ‘minimum contacts’ language of constitutional due process and these two analyses have overlapped” (*S & Davis Int’l, Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1304 (11th Cir. 2000); see also *Guevara v. Republic of Peru*, 608 F.3d 1297, 1309-10 (11th Cir. 2010)).
- In contrast, the Sixth Circuit has deemed the minimum contacts analysis inapplicable when determining whether a “direct effect” exists (see *Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 395 (6th Cir. 2016)).

In some circuits, foreign states (but not their instrumentalities) may also lack due process rights entirely where they can never assert a “minimum contacts” defense to personal jurisdiction:

- The D.C. Circuit distinguishes between foreign states and their instrumentalities. In that circuit, a foreign state does not have due process rights and therefore cannot assert a “minimum contacts” defense. However, an instrumentality of a foreign state does have these rights and can assert a “minimum contacts” defense, unless the instrumentality is so extensively controlled by its parent state that it can be deemed the foreign state’s alter ego (see *GSS Grp. Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012)).
- Similarly, the Fifth Circuit has assumed, without deciding, that a foreign state “cannot raise a personal jurisdiction defense as it is not a ‘person’ under the Due Process Clause,” while affirming the dismissal for lack of personal jurisdiction of an instrumentality that was not an alter ego of its parent state (*First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 752, 755 (5th Cir. 2012), *as revised* (Jan. 17, 2013)).

TYPES OF COMMERCIAL ACTIVITY THAT MAY SATISFY THE “DIRECT EFFECT” REQUIREMENT

Breach of Contract Cases

Following *Weltover*, courts generally have held that a foreign state’s breach of a contract has the necessary direct effect in the US where the contract designates the US as the place of performance. In contrast, where the parties’ agreement establishes a place of performance outside the US or specifies no place of performance at all, the foreign state’s breach of contract “can affect the United States only indirectly” (*Odhiambo v. Republic of Kenya*, 764 F.3d 31, 38 (D.C. Cir. 2014)). (For examples of cases applying these principles, see *de Csepel v. Republic of Hungary*, 714 F.3d 591, 601 (D.C. Cir. 2013); *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513, 516-17 (6th Cir. 2010); *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 139-40 (2d Cir. 2012); *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83, 91 (D.C. Cir. 2005); and *Guevara v. Republic of Peru*, 608 F.3d 1297, 1309-10 (11th Cir. 2010).)

Courts have also considered whether a foreign state’s allegedly improper termination of a contract had a direct effect in the US (see *Cruise Connections Charter Mgmt. 1, LP v. Att’y Gen. of Canada*, 600 F.3d 661, 662 (D.C. Cir. 2010) and *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1138-39 (9th Cir. 2012)).

Tort Cases

Determining whether a foreign state's tort had a "direct effect" in the US requires close examination of where the relevant injury or damage occurred. The direct effect requirement is satisfied where a plaintiff has been injured in this country by a defendant's tortious actions. Yet the mere fact that an American plaintiff suffers an "economic injury" or "financial loss" in the US resulting from an otherwise foreign tort does not satisfy the direct effect requirement (see *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 109 (2d Cir. 2016) (citations omitted), cert. denied, 137 S. Ct. 493 (2016)).

Balancing these principles is often complex and fact-specific. For example:

- The Second Circuit in *Atlantica Holdings* held that the "direct effect" requirement was satisfied where investors in foreign "securities that were marketed in the United States and directed toward United States persons" incurred "an economic loss in this country" as a result of alleged misrepresentations that occurred outside the US (813 F.3d at 110-11).

- Yet, in *Antares Aircraft, L.P. v. Federal Republic of Nigeria* (999 F.2d 33 (2d Cir. 1993)), the same court held that the Nigerian authorities' wrongful detention in Nigeria of an aircraft belonging to an American partnership did not satisfy the "direct effect" requirement even though the partnership suffered a financial loss as a result of the aircraft's detention (999 F.2d at 36).

Courts have also held that no direct effect exists where an "intervening act breaks the chain of causation leading from the asserted wrongful act to its impact in the United States" (*Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 261-62 (5th Cir. 2016) (internal citation and quotation omitted); see also *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 79-80 (2d Cir. 2010) and *Chettri v. Nepal Rastra Bank*, 834 F.3d 50, 57 (2d Cir. 2016)).

In product-liability cases, courts have regularly held that "an injury caused by an allegedly defective product meets the 'direct effect' element" (*Rote v. Zel Custom Mfg. LLC*, 816 F.3d 383, 396 (6th Cir. 2016) (citations omitted), cert. denied, 137 S. Ct. 199 (2016); see also *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993) and *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1083-84 (9th Cir. 2001)).

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