FOREIGN SOVEREIGN IMMUNITIES ACT—IMMUNITY EXCEPTION PROVISIONS OF § 1330(A)—HARRIS CORP. V. NATIONAL IRANIAN RADIO & TELEVISION

On February 22, 1978, plaintiff Harris Corporation entered into a contract with defendant National Iranian Radio and Television (NIRT) to manufacture and deliver broadcast transmitters to Iran.[1] To facilitate payment on the underlying contract, Harris and the defendant, Bank Melli Iran,[2] structured a two-tiered letter of credit agreement. Harris obtained a standby letter of credit in favor of Melli[3] and Melli issued a performance guarantee letter of credit[4] in favor of NIRT, the latter to be paid if Harris failed to perform the underlying contract.[5]

During February 1979 revolutionaries overthrew the Imperial

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[1] Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982). The contract required Harris to deliver 144 FM broadcast transmitters to Teheran, Iran, and to provide related training and technical services. *Id.* at 1346.

[2] Bank Melli is completely operated by the Government of Iran. Iranian banks were nationalized in June 1979. As of early 1983, Bank Melli, one of Iran's largest state-owned banks, had over 1,760 branches in Iran and 11 branches abroad. THE MIDDLE EAST AND NORTH AFRICA: 1982-83 (1983).

[3] Any letter of credit arrangement normally involves at least three parties: 1) the issuer, or the bank opening the credit; 2) the customer, or the person who causes the bank to issue the credit, and 3) the beneficiary, or the person entitled to draw or demand payment under the letter of credit. Effros, *Current Legal Matters Affecting Central Banks*, 13 GA. J. INT'L & COMP. L. 621, 622 (1983). Essentially, a standby letter of credit is issued to secure the customer's performance of an obligation owed to the beneficiary. The beneficiary is entitled to draw on the letter of credit only if the customer fails to fully perform the underlying contract between the original parties to the business transaction. In some situations, as in *Harris*, the issuing bank may be asked to name another bank (*i.e.*, Bank Melli in *Harris*) as the beneficiary of the credit. The second, or beneficiary, bank will then issue an additional standby letter of credit in favor of the original beneficiary, normally the government agency negotiating with the customer. *See id.* at 623; Comment, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189, 192-93 n.25 (1980).

[4] Both the letters of credit issued by Melli and by Continental Bank are actually standby letters of credit. In order to distinguish the two letters of credit, the court refers to the letter of credit issued by Melli as a performance guarantee. *Harris*, 691 F.2d at 1346.

[5] In the instant case, the performance guarantee provided that Melli (the issuer) would pay NIRT (the beneficiary) any amount up to $674,035.20 (ten percent of the face value of the contract) upon Melli's receipt of NIRT's written declaration that Harris (the customer) had failed to comply with the terms of the underlying contract. *Id.*

The letter of credit structure described in *Harris* is typical of commercial transactions involving Middle Eastern governments. For a discussion of these so-called "suicide" standby letters of credit, see Comment, *supra* note 3, at 196-200.

Government of Iran. In November 1979, seizure of the United States embassy in Iran led to the United States' promulgation of the Iranian Assets Control Regulations.[6] The Regulations prohibited Harris from delivering the final shipment of transmitters.[7] NIRT informed Melli that Harris had breached the underlying contract. In June 1980, Melli telexed Continental Bank, issuer of Harris' standby credit, that NIRT had demanded payment under Melli's performance guarantee. Melli demanded payment from Continental on Harris' standby letter of credit.[8] Harris then filed suit in federal court seeking to enjoin (1) NIRT from making a demand on Melli, (2) Melli from paying NIRT under the guarantee, and (3) Melli from receiving payment from Continental under the standby letter of credit.[9] The district court granted preliminary injunctive relief[10] and defendants NIRT and Melli appealed asserting, *inter alia*, lack of jurisdiction under applicable immunity provisions of the Foreign Sovereign Immunities Act section 1330(a)(FSIA).[11] *Held*, affirmed. The exercise of jurisdiction over the agency of a foreign state is proper under the immunity excep-

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[6] In response to the Iranian seizure of the United States Embassy in Teheran, President Carter declared a national emergency on November 14, 1979 and blocked the removal or transfer of Iranian assets or property from the United States. Exec. Order No. 12,170, 3 C.F.R. § 457 (1980), *reprinted in* 50 U.S.C. § 1701 (Supp. V 1981). The Iranian Assets Control Regulations implemented the President's order by preventing shipment to Iran of all nonessential goods. 31 C.F.R. §§ 535.101-904 (1981).

[7] Harris, 691 F.2d at 1348. The court notes that under the terms of the Assets Control Regulations, sellers were required to obtain special licenses on a case-by-case basis before exporting goods. Harris alleged that it was advised by the Office of Foreign Assets Control that special licenses would be issued only in emergency situations or for humanitarian reasons and would not be issued for the transmitters. *Id.*

[8] *Id.* at 1348.

[9] *Id.* at 1349. The United States District Court for the Middle District of Florida granted a temporary restraining order (TRO) on June 13, 1980, pending a hearing on Harris' motion for a preliminary injunction. On June 16, 1980, a copy of the TRO was delivered to Melli's counsel. On June 20, 1980, three days after receipt of the TRO, despite the restraint against payment, Melli telexed Continental that it had paid the full amount of the guarantee after receiving NIRT's written demand about Harris' alleged non-compliance with the terms of the underlying contract. The telex also reiterated the demand that Continental pay Melli the amount of the standby letter of credit. *Id.* at 1349.

[10] *Harris*, 691 F.2d at 1344. The preliminary injunction: 1) enjoined NIRT from demanding payment on the performance guarantee; 2) enjoined Melli from making payment on the guarantee and from demanding payment on the standby letter of credit; 3) directed Harris to maintain a blocked account in the amount of the letter of credit ($674,035.20) in accordance with the Iranian Assets Control Regulations, 31 C.F.R. § 535.568 (1980); 4) enjoined removal of any funds from the blocked account; and 5) directed the attachment of the blocked account for Harris' benefit. *Id.*

[11] Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330; 1332(a)(2)-1332(a)(4); 1391(f); 1441(d); and 1602-1611 (1976)) (FSIA).

tion provisions of FSIA section 1330(a) when the agency maintains an office in the United States and demands payment under a letter of credit agreement negotiated with a United States corporation, because such commercial activities provide sufficient minimum contacts with the United States. *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982).

A foreign state and its agents are generally immune to the jurisdiction of United States courts under the FSIA.[12] Pursuant to FSIA section 1330(a), however, a federal court may exercise jurisdiction over a foreign state[13] if the state's commercial activities meet the requirements of FSIA sections 1605-1607[14] or those of an applicable international agreement.[15] Immunity waiver provisions are typically included in commercial treaties to which the United

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[12] Historically, the principle of foreign sovereign immunity prevented United States courts from hearing cases involving either public or private acts of a foreign state. *See* The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1912). By the 1920's the increase in which foreign states engaged in commercial (or private) activities necessitated a change in the traditional adherence to the principle of absolute immunity. *See* T. GUITTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 8-9 (1970).

In 1952, the State Department officially adopted the restrictive theory of sovereign immunity. Letter from Jack B. Tate, Legal Advisor of the Department of State, to Phillip B. Perlman, Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952). Under this theory, immunity is limited to public acts of a foreign state. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155 (1982).

Congress enacted the FSIA in 1976 intending that the statute codify the restrictive theory, transfer the responsibility of deciding pleas of immunity to the judiciary, and clarify procedures for obtaining jurisdiction over foreign states. H.R. REP. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6607 [hereinafter cited as HOUSE REPORT].

For further discussion of United States foreign sovereign immunity see generally Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L.J. 1009 (1980); Rabinowitz, *Can the Courts Cope with the Foreign Sovereign Immunities Act?*, 1 N.Y. L. SCH. J. INT'L & COMP. L. 130, 132-33 (1979-80); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 22 (1978).

[13] The FSIA definition of a "foreign state" includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state. 28 U.S.C. 1603(a).

[14] In addition to the commercial activity exceptions of § 1605, FSIA § 1606 limits the extent of a foreign state's liability and FSIA § 1607 establishes the requirements for counterclaims. 28 U.S.C. §§ 1606-1607.

[15] 28 U.S.C. § 1330(a). In fact, the statutory provisions of the FSIA and the immunity exceptions clause of an international agreement may work in conjunction with each other. Section 1605(a)(1) provides for an exception to immunity when a foreign state waives its immunity either explicitly or implicitly. 28 U.S.C. § 1605(a)(1). The legislative history of the FSIA indicates that a treaty waiver clause could be construed as an explicit waiver under § 1605(a)(1). HOUSE REPORT, *supra* note 12, at 6617. Thus, a domestic plaintiff could invoke a treaty waiver clause in order to establish a statutory immunity exception under § 1605(a)(1).

States is a party.[16] For example, one of the immunity exceptions at issue in *Harris* is from the 1957 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran (Treaty of Amity).[17] Article XI, section 4 of the Treaty provides:

> No enterprise of either High Contracting Party . . . which is engaged in commercial, industrial, shipping or other business activities within the territories of the other High Contracting party shall claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment, or other liability to which privately owned and controlled enterprises are subject therein.[18]

This waiver provision of the Treaty reflects United States commitment to the restrictive theory of sovereign immunity by denying the immunity defense to agencies of the sovereign government when those agencies engage in activities of a commercial nature.[19] Perhaps because the Treaty simply restates the restrictive immunity concept, no court has addressed the scope of the jurisdiction which section 4 provides.

In addition to the treaty waiver exception, FSIA section 1330(a) provides for waiver of immunity through the statutory exceptions of sections 1605-1607.[20] The most significant of these sections is the commercial activity exception (section 1605(a)(2)) which provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the

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[16] The typical commercial treaty is referred to as a treaty of friendship, commerce and navigation. Although such treaties are an intricate part of international diplomacy, "they are fundamentally economic and legal . . ., concerned with the protection of persons, natural and juridical, and of the property and interests of such persons." Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805, 806 (1958). For examples of United States commercial treaties containing immunity waiver clauses, see UNITED NATIONS LEGISLATIVE SERIES, MATERIALS ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY 131-34 (1982).

[17] Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, United States-Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 [hereinafter cited as Treaty of Amity].

[18] *Id.* art. XI, § 4.

[19] *See* T. GUITTARI, *supra* note 12, at 316; S. SUCHARITKEL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 196-98 (1959).

[20] 28 U.S.C. § 1330(a).

> United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . .[21]

The final clause of this section, which purports to reach acts occurring outside of the United States that have a direct effect in the United States, is of instant concern.

Before a court can exercise subject matter jurisdiction under section 1605(a)(2), it must first determine whether the foreign state's commercial activity is sufficiently connected to both the cause of action and to the United States.[22] The final clause of section 1605(a)(2) requires courts to interpret two ambiguous phrases: "direct effect" and "in the United States."[23] If the foreign state's commercial activity causes an effect that is both sufficiently "direct" and "in the United States," subject matter jurisdiction exists.[24]

Judicial analysis of the phrase "direct effect" initially developed in the context of personal injury litigation. In *Upton v. Empire of Iran*,[25] United States citizens living in Iran were injured by the collapse of an Iranian airport roof.[26] The District Court for the District of Columbia reasoned that the "direct effect" contemplated by the FSIA must be one "which has no intervening element, but, rather, flows in a straight line without deviation or interruption."[27] The *Upton* court held that the direct effect was the injury which the plaintiffs sustained in Iran; any effect in the United States, such as the plaintiff's suffering, was merely consequential.[28]

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[21] 28 U.S.C. 1605(a)(2).

[22] Duffy, *Foreign Sovereign Immunity in the Second Circuit After Texas Trading and Verlinden*, 48 BROOKLYN L. REV. 979 (1982).

[23] *See* Texas Trading & Milling Corp. v. Federal Rep. of Nig. 647 F.2d 300, 311-13 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The FSIA provides no definition of the phrase "direct effect in the United States." The House Report implies that the direct effect clause of § 1605(a)(2) is to be interpreted consistently with the principles set forth in Foreign Relations Law of the United States (1965). HOUSE REPORT, *supra* note 12, at 6618. Section 18 of the Restatement provides that in cases based on conduct not generally recognized as a crime or tort, the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory. Section 18, however, only specifies the circumstances under which a state may "prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). Section 18, therefore, does not establish a binding standard, only a guide for determining the definition of "direct effect."

[24] *Texas Trading & Milling Corp.*, 647 F.2d at 313.

[25] Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 414 (D.C. Cir. 1979).

[26] *Id.* at 264.

[27] *Id.* at 266.

[28] *Id.*

Additional definition of the direct effect clause was given in *Harris v. VAO Intourist.*[29] In *VAO Intourist*, a case involving the death of a United States citizen in a Moscow hotel fire, a New York district court reasoned that a "direct effect" must have substantial and foreseeable impact in the United States.[30] The court noted that, unlike the plaintiffs in *Upton*, the victim of the Moscow fire did not even suffer in the United States, nor did he use any United States medical facilities.[31] The New York court, therefore, ruled that the death of a United States tourist in Moscow did not cause a direct effect in the United States.[32]

The direct effect clause was most recently analyzed in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria.*[33] In that case, the Second Circuit Court of Appeals for the first time applied section 1605(a)(2) to a corporate plaintiff. Although *Upton* and *VAO Intourist* had defined "direct effect" in the context of personal injury suits, interpreting this phrase as applied to an intangible corporate plaintiff was much more complex.

Texas Trading involved Nigeria's breach of certain contracts and letters of credit that the Government of Nigeria had negotiated with a group of United States corporations.[34] The court stated that the relevant inquiry in defining "direct effect" was whether the United States corporation has suffered a financial loss.[35] The corporate plaintiffs were beneficiaries of the breached contracts and letters of credit, thus, the *Texas Trading* court ruled that the financial loss they suffered was a "direct effect" within the meaning of section 1605(a)(2).[36]

After a court determines that the foreign defendants' acts have caused a direct effect within the meaning of section 1605(a)(2), it must decide whether that direct effect satisfies the second phrase: "in the United States." The phrase "in the United States" reflects Congress' desire that traditional due process requirements limit the broad jurisdictional authority conferred by section 1605(a)(2).[37]

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[29] 481 F. Supp. 1056 (E.D.N.Y. 1979).

[30] *Id.* at 1065.

[31] *Id.*

[32] *Id.*

[33] *Texas Trading & Milling Corp.*, 647 F.2d at 300.

[34] *Id.*

[35] *Id.* at 312.

[36] *Id.* In reaching this conclusion, the court relied on an earlier Second Circuit opinion, Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979). There, the court decided that a direct effect could result from the cancellation of a contract for the sale of oil.

[37] The House Report states that the requirements of minimum jurisdictional contacts are

The defendant must "purposefully avail" itself of the benefits of transacting business in the United States before due process requirements are satisfied.[38] In determining that constitutional due process requirements were satisfied, the *Texas Trading* court relied on two facts: first, the defendant's actions prevented plaintiffs from collecting money in the United States and, second, each plaintiff was a United States corporation.[39] An attempt to locate the exact site of injury to a corporation would be difficult because of the nature of the corporate structure;[40] thus, the judiciary in corporate cases must be more flexible in construing the "in the United States" phrase of section 1605(a)(2).[41] The facts of this case, the court felt, satisfied this more flexible standard.

The *Harris* court addressed both types of immunity provided by FSIA section 1330(a) because the plaintiff invoked the FSIA commercial activity exception of section 1605(a)(2) and the immunity exception provision of the Treaty of Amity. The court initially discussed the scope of the immunity waiver provision of the Treaty of Amity.[42] Melli argued that the Treaty of Amity must be read as providing for a territorial transactional waiver, requiring a nexus between the United States and the commercial activity sued upon.[43] According to Melli, such a restrictive reading was necessary to prevent an overly-expansive use of the international agreement exception provided for in FSIA section 1330(a).[44]

The *Harris* court rejected Melli's argument on three grounds. First, the court noted that the language of the FSIA and its legislative history indicated that the jurisdictional requirements of a treaty provision are to be determined independently from those of sections 1605-1607.[45] Second, the court found that the Treaty of Amity conferred jurisdiction using a "doing business" type of test,

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embodied in the FSIA. HOUSE REPORT, *supra* note 12, at 6612.

[38] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denkla, 357 U.S. 253 (1958); International Shoe Co. v. Washington, 326 U.S. 310 (1945). For a discussion of the minimum contacts standard in the area of personal jurisdiction, see H. SCHACK, JURISDICTIONAL MINIMUM CONTACTS SCRUTINIZED (1983), Green, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961); Kamp, *Beyond Minimum Contacts: The Supreme Court's New Jurisdictional Theory*, 15 GA. L. REV. 19 (1980).

[39] *Texas Trading & Milling Corp.*, 647 F.2d at 312.

[40] *Texas Trading & Milling Corp.*, 647 F.2d at 313.

[41] *Id.* at 312.

[42] *Harris*, 691 F.2d at 1350; Treaty of Amity, *supra* note 17, art. XI, § 4.

[43] *Harris*, 691 F.2d at 1350.

[44] *Id.*

[45] *Id.*

which Melli satisfied through its substantial business activities in New York.[46] Finally, the court stated that a restrictive reading of the immunity exception provided for in the Treaty of Amity was unnecessary because the Constitution and statutes limit the exercise of jurisdiction under section 1330(a).[47] Jurisdiction over defendants under the Treaty was, therefore, proper.

Having found one basis for jurisdiction under the Treaty waiver provision, the court asked whether the immunity exception which the direct effect clause of FSIA section 1605(a)(2) provides could be applied as an alternative jurisdictional basis. The essential question was whether the effect of Melli's demand for payment was sufficiently "direct" and sufficiently "in the United States" to permit a federal court to hear the case.[48] The court answered that question affirmatively, noting that the letter of credit arrangement extended into the United States, and that Melli's demands triggered the entry of a blocked account on Harris' books, discharging the letter of credit.[49] Applying the *Texas Trading* financial loss rationale,[50] the *Harris* court found that the effect of Melli's demands could be a financial loss to Harris. That effect was sufficiently connected with the United States to satisfy section 1605(a)(2).[51]

The final question confronting the court was whether the exercise of *in personam* jurisdiction over Melli was consistent with the due process requirement of minimum jurisdictional contacts.[52] Satisfaction of due process involves an examination of the quality and nature, rather than the quantity, of activities in which the foreign

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[46] *Id.* at 1352-53. *See supra* note 32. The doing business test referred to by the court requires that the activities be continuous and substantial in nature. There is no general requirement that the activities be related to the act sued upon. H. SCHACK, *supra* note 38, at 37-38. *See also* Perkins v. Benquet Consolidated Mining Co., 242 U.S. 437 (1952).

[47] *Harris*, 691 F.2d at 1352-53.

[48] *Id.* at 1351 (quoting *Texas Trading & Milling Corp.*, 647 F.2d at 313). The *Harris* court did not analyze the phrase "commercial activity" because Melli's activities were clearly commercial in nature. *Id.*

[49] *Harris*, 691 F.2d at 1351.

[50] *See supra* notes 35-36 and accompanying text.

[51] *Harris*, 691 F.2d at 1351.

[52] Since the suit involved a domestic corporation and a foreign defendant, the appellate court in *Harris* held that the diversity jurisdiction clause of article III of the Constitution granted the district court power to hear the case. *Id.* at 1352. The court also affirmatively resolved the issue of whether the personal jurisdiction requirements of § 1330(b) were met. Section 1330(b) grants statutory personal jurisdiction when subject matter jurisdiction under § 1330(a) is established and service has been made under § 1608. 28 U.S.C. § 1330(b). Noting that both defendants had received actual notice (Melli did not challenge service of process), the court found that § 1608 requirements were met and § 1330(b) jurisdiction could be exercised. *Id.*

defendant engages while transacting business in the forum state.[53] The defendant's conduct and connection within the forum state must be substantial enough for the defendant to reasonably anticipate being subject to suit in the forum state.[54] The court first examined the nature of Melli's activities in the United States. Melli had maintained an active office in New York since 1969 and had emphasized the commercial significance of its New York office in its filings with New York banking authorities.[55] Additionally, the letter of credit transaction required substantial performance in the United States.[56] On these facts, the court concluded that Melli had "purposefully availed itself of the privilege of conducting activities in the United States" and, thus, constitutionally could be subject to suit in the United States.[57]

From both a legal and a policy standpoint, the Eleventh Circuit's conclusion in *Harris* was the result of a practicable analysis of the immunity exception provisions of the FSIA. While the court's decision is consistent with existing judicial interpretation of FSIA section 1330(a), it also enlarges upon the previous decisions. Although *Harris* presented the difficult task of analyzing the direct effect exception of section 1605(a)(2) and the immunity exception clause of the Treaty of Amity, the court developed a compact legal analysis that clarifies some of the jurisdictional requirements of both of the immunity exceptions provided by section 1330(a).

Harris is the first decision in which a court substantively analyzes the contacts required for the exercise of jurisdiction under the waiver provision of a commercial treaty.[58] In *Harris*, the court reasoned that the invocation of a treaty waiver provision under section 1330(a) necessitated a jurisdictional contacts analysis inde-

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[53] *International Shoe Co.*, 326 U.S. at 319.

[54] *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

[55] *Harris*, 691 F.2d at 1353.

[56] *Id.*

[57] *Id.*

[58] In Behring International, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979) and E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980), the federal court did confront the waiver clause of the Treaty of Amity with Iran. In both cases, however, the courts' focus was on the availability of prejudgment attachments under the treaty provision. Neither court addressed the jurisdictional requirements of the Treaty's waiver provision.

In Irving Trust Co. v. Government of Iran, 85 F.R.D. 135 (E.D. La. 1980), a United States bank sued a foreign government to enforce the terms of a letter of credit. Although the court dealt mainly with the plaintiff's request for a writ of attachment under FSIA § 1610(d), the court did state that Iran had expressly waived immunity under the 1957 Treaty of Amity.

pendent of the contacts requirements of sections 1605-1607.[59] Such a holding is clearly in accord with FSIA section 1604, which makes the FSIA subject to all international agreements existing at the time of the FSIA's enactment.[60] By refusing to apply FSIA contacts standards retroactively to the Treaty's provision, the *Harris* court effectuated the drafters' intent that the Treaty provide broad protection to United States business transactions with Iran.[61]

Concluding that the appropriate test for jurisdiction under the Treaty is a "doing business" type of test,[62] the *Harris* court decided that the contacts relied upon to demonstrate a foreign defendant's connection with the United States need not relate to the cause of action.[63] Thus, courts may look to a wider range of the

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[59] *Harris*, 691 F.2d at 1350. For a further discussion of the court's analysis of the Treaty's waiver provision, see *supra* notes 42-47 and accompanying text.

[60] Section 1604 provides: "Subject to existing international agreements to which the United States is a party at the time of enactment of this act a foreign state shall be immune from the jurisdiction of the courts of the United States. . . ." 28 U.S.C. § 1604.

[61] As shown in the court's analysis of the direct effect clause of § 1605(a)(2), the FSIA standards for sufficient transactional contacts requires more than the general, unrelated contacts sufficient to satisfy a doing business test. *See supra* text accompanying notes 17-35. The drafters of the Treaty, however, intended that the immunity waiver provision operate as an expansive jurisdictional base. One Senator commenting on the Treaty with Iran noted:

> Establishment of a comprehensive basis for the protection of American commerce and citizens, and their business and other interests in the underdeveloped areas should be an incentive to our citizens to aid in the development of those areas. Insofar, therefore, as such treaties can be negotiated with underdeveloped countries, the interests of the United States are advanced. The Iranian treaty affords a substantial degree of protection to American citizens, enterprises, and products.

102 CONG. REC. 12,287 (1956)(Statement of Senator George). Thorston Kalijarvi, Deputy Secretary of State for Economic Affairs at the time the Treaty was drafted, noted that the political expendiencies involved in negotiations with underdeveloped countries such as Iran necessitate the use of uncomplicated treaties. Hearings on Executive E Before the Senate Comm. of Foreign Relations, 84th Cong., 2d Sess. 19 (1956). The language of the Treaty was intended to be simple in order to encourage investment in Iran, yet provide maximum protection to those United States citizens ultimately engaging in business transactions with Iran.

[62] *Harris*, 691 F.2d at 1350. *See supra* note 46.

[63] *See supra* note 46. The doing business test as a basis for jurisdiction has not gone uncriticized. One commentator has noted that "a corporation's doing business as a general contact, *i.e.*, unrelated to the cause of action, is comparable with mere presence and just another fossil which is clinging tenaciously to life." H. SCHACK, *supra* note 38, at 37. One reason, however, for the continued use of the doing business test is the difficulty in distinguishing related contacts from unrelated ones. Related contacts are weighted more heavily in favor of jurisdiction; thus, a single related contact may be sufficient. The problem lies in analyzing what the phrase "related to the controversy" means when trying to establish forum contacts. Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77, 82. In contrast, courts applying the doing business test

foreign defendant's activities to establish subject matter jurisdiction. On the issue of sufficiency of contacts with the United States in *Harris*, the court emphasized that Melli maintained an active New York office and that the business transaction in question required substantial performance in the United States.[64] The court found Melli's contacts to be sufficient for jurisdiction,[65] because the "doing business" *type* of test does not require that the contacts relate to the act sued upon.[66]

In the final part of its analysis of the Treaty's waiver provision, the court stated that the possibility of an over-expansive exercise of jurisdiction under the Treaty provision is more properly constrained by the Constitution than by a restrictive reading of the Treaty's waiver provision.[67] Had the court accepted Melli's argument for a narrow reading of the Treaty provision, it would not have had to analyze due process requirements.[68] The court, how-

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must establish more forum contacts, but the court need not involve itself in a sometimes theoretical, and often perplexing, analysis of whether those contacts are related to the act sued upon. *See id.*

[64] Actually, the court delays discussion of the sufficiency of contacts until it addresses the due process requirements for personal jurisdiction. *See Harris*, 691 F.2d at 1352-53. Although this is not a major problem, the court's analysis could have been clarified by discussing the minimum contacts in the context of the treaty provision analysis.

[65] Most courts have held that any activities of the defendant, so long as the activities are continuous and substantial in nature, are sufficient to satisfy the doing business test. *See* H. SCHACK, *supra* note 38, at 37-39. One such activity often recognized as sufficient is the existence in the forum of an office owned by the defendant. *See, e.g.*, Hoffman v. Air India, 393 F.2d 507 (5th Cir. 1968); Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 260 N.Y.S. 2d 625 (1965). Additionally, the courts have generally taken an expansive approach to determine whether contract performance within the forum is sufficient for the exercise of jurisdiction. *See, e.g.*, Market & Distribution Resources, Inc. v. Paccar, Inc., 460 F. Supp. 990 (D. Mass. 1978); Cook Associates, Inc. v. Colonial Broach & Machine, 14 Ill. App. 3d 965, 304 N.E.2d 27 (1973). Thus, in *Harris*, the combined activities of Melli could be construed as providing sufficient contacts with the forum. *But see infra* notes 86-89 and accompanying text.

[66] *See supra* note 46.

[67] *See supra* note 47 and accompanying text. The court also notes that § 1330(b) requires that adequate service of process be made under § 1608. This limitation is merely procedural and does not provide an effective limitation on the court's exercise of jurisdiction. Moreover, § 1330(b) provides an automatic basis for *in personam* jurisdiction once the requirements of § 1330(a) are met. 28 U.S.C. § 1330(b). Thus, the constitutional constraints recognized by the court are clearly the more effective limitations on jurisdiction.

[68] While all jurisdictional tests are inherently subject to due process scrutiny, if the court can deny subject matter jurisdiction first, then there is no need to examine forum contacts in light of due process requirements. In *Harris*, the contacts relied on are sufficient to establish jurisdiction under the doing business test, but are only tenuously related to Melli's demand for payment under the letter of credit. Thus, under Melli's test, the court might not have reached the due process issues because the requirements for subject matter jurisdiction (*i.e.*, establishing specific, related contacts) would not have been satisfied. Had Melli's contacts been sufficiently related to the demand for payment, then the court would have been

ever, examined due process requirements separately from the jurisdictional requirements established by the language of the Treaty. The result is a clarified analytical process for application of a treaty waiver provision that is fair to the defendant, yet not unduly burdensome for the courts to apply.[69]

The court next examined the statutory immunity waiver provision provided in the final clause of section 1605(a)(2). In contrast to its lack of precedential guidance in analyzing the treaty provision, the court was able to rely on at least one prior holding to interpret the direct effect clause of section 1605(a)(2).[70] The *Harris* court cited *Texas Trading* and applied a two-pronged test, separately examining "direct effect" and "in the United States."[71] The *Harris* court's adoption of this two-pronged test provides for an ordered analysis of the minimum contacts standard required by section 1605(a)(2).[72] Thus, *Harris* not only reaffirms the analytical guidelines established in *Texas Trading*, but it also expands the type of transactional contacts sufficient under section 1605(a)(2). The court in *Texas Trading* had found that the defendant's breach of letter of credit agreements allowed it to apply the direct effect clause of section 1605(a)(2).[73] In contrast, the *Harris* court focused

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required to examine those contacts under due process standards.

[69] The *Harris* court noted that the exercise of jurisdiction under the Treaty provision "should only involve determining whether the activities engaged in by the enterprise of a foreign state in the United States are the type that should subject it to litigation in domestic courts." *Harris*, 691 F.2d at 1351. Thus, under the doing business test applied by the court, the requirements of minimum contacts and due process are incorporated to ensure that the defendant is fairly subject to jurisdiction. Moreover, the test applied in *Harris* does not require a determination of relatedness, only an inquiry into the quality of forum contacts. As a result, a court applying a similar treaty waiver provision need only 1) examine the quality of forum contacts, and 2) apply the personal jurisdiction requirements of § 1330(b) and due process to those forum contacts.

[70] *E.g., Texas Trading & Milling Corp.*, 647 F.2d at 300; *VAO Intourist*, 481 F. Supp. at 1056; *Upton*, 459 F. Supp. at 264.

[71] *See supra* notes 48-49 and accompanying text.

[72] Analysis of the phrase "direct effect" ensures that the injury suffered by the plaintiff was substantially and proximately caused by the foreign defendant. Analysis of the phrase "in the United States" ensures that the act sued upon has sufficient connection with the United States so as not to offend the constitutional requirements of due process. Together, these two phrases illustrate the legislative intent that the FSIA's jurisdictional provisions be limited by the requirements of minimum jurisdictional contacts. HOUSE REPORT, *supra* note 12, at 6612. Adoption of the two-pronged test enables the judiciary to examine each problematic phrase separately and, thus, establish workable standards for each part. Like a jigsaw puzzle, once each part of the clause is defined, the pieces may be fitted together to create a uniform picture of the minimum contacts required by § 1605(a)(2).

[73] *See supra* notes 27-35 and accompanying text. *See also* Carey v. National Oil Corp., 592 F.2d 673 (2d Cir. 1979) (suggesting that cancellation of contracts for sale of oil involves

on the defendant's demand for payment under the letter of credit agreement to determine whether the effect in the United States was sufficiently direct. Under *Harris*, then, the foreign defendant may be subject to jurisdiction without breaching an agreement; the defendant's demand for payment on a letter of credit which is payable in the United States is a sufficiently direct effect to satisfy section 1605(a)(2).

The *Harris* court's finding of sufficient minimum contacts in such a situation is not unprecedented. As Justice Brennan noted in *Shaffer v. Heitner*,[74] the judiciary is "concerned solely with 'minimum' contacts, not the 'best' contacts."[75] This comment does not imply that *minimal* contacts are sufficient;[76] however, the range of contacts acceptable under due process requirements in the domestic sphere has broadened.[77] The increasing number of international commercial disputes indicates that a similarly flexible standard should be applied when determining jurisdiction under the FSIA. Indeed, Congress intended that the FSIA contain a broad minimum contacts standard so that plaintiffs harmed by foreign states would have greater access to the federal court system.[78] Through a broad approach to the issue of minimum contacts, *Harris* approaches a uniform[79] standard of minimum contacts for interna-

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direct effect where corporate buyer is located).

[74] Shaffer v. Heitner, 433 U.S. 186 (1977) (Brennan, J., concurring and dissenting in part).

[75] *Id.* at 228.

[76] H. SCHACK, *supra* note 38, at 15. For a critical analysis of the range and type of contacts relied on by state and federal courts, see H. SCHACK, *supra* note 38; Brilmayer, *supra* note 63; Kamp, *supra* note 38.

[77] In earlier decisions, the judiciary read the FSIA narrowly and required that the defendant be physically present in the United States before sufficient minimum contacts were found to exist. *See, e.g.*, Carey v. National Petroleum Corp., 592 F.2d 673 (2d Cir. 1979); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980).

In contrast, the state courts recognized that advances in technology made the requirement of defendant's physical presence superfluous. *See* Cook Associates, Inc. v. Colonial Broach & Machine, 14 Ill. App. 3d 365, 304 N.E. 2d 27 (1973)(single business transaction initiated by nonresident defendant by telephone sufficient to authorize exercise of personal jurisdiction); Parke-Barnat Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 608 N.Y.S.2d 337 (1970) (foreign defendant who was active participant in auction as result of open telephone line had engaged in purposeful activity, thus properly subject to jurisdiction within forum state).

[78] HOUSE REPORT, *supra* note 12.

[79] Legislative history indicates that a uniform jurisdictional standard was intended to be applied under the FSIA "since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." HOUSE REPORT, *supra* note 12, at 6611. *See* Note, *Minimum Contacts Jurisdiction Under the Foreign Sovereign Immunities Act*, 12 GA. J. INT'L & COMP. L. 209, 229-30 (1982).

The determination of jurisdictional issues on a case-by-case basis, however, combined with the relatively small amount of litigation arising under the FSIA, hampered the creation

tional litigation that should prove more useful than the earlier, more restrictive standards applied to the FSIA.[80]

In addition to being consistent with prior rulings, the court's conclusion in *Harris* is good policy. Increasing instances of political upheaval abroad require more flexibility in granting plaintiffs access to the federal court system.[81] By applying the treaty provision and the direct effect exception of section 1605(a)(2) less restrictively, the *Harris* court establishes a realistic yet equitable standard for interpretation of FSIA section 1330(a).

Although *Harris* offers a commendable treatment of a very complex area of international law, the opinion does have weaknesses. For example, the "doing business" test for application of the immunity waiver provision of the Treaty of Amity is easily satisfied.[82] Melli's business activities in New York provide a single contact with the United States which is arguably unrelated to the cause of action. Melli's involvement in the business transaction relates to the act sued upon, but the court failed to explain what constituted substantial performance.[83] Typically, bank involvement in letter of credit transactions is limited to documentary verification of, rather than actual participation in, the performance of the underlying contract.[84] Thus, if the court is referring to substantial perform-

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of a consistent minimum contacts standard. *See* Delaume, *Long-Arm Jurisdiction Under the Foreign Sovereign Immunities Act*, 74 AM. J. INT'L L. 640 (1980).

The cautious approach adopted by the earlier courts may have been based on the fact that the FSIA granted the judiciary a power that previously had belonged to the executive branch. *See supra* note 12. The courts may have been hesitant to apply the broad jurisdictional mandate contained in the FSIA in deference to the executive's past practice of examining the political considerations involved in the exercise of jurisdiction over a foreign state. It was the express intent of Congress, however, that the responsibility for determining sovereign immunity issues rest solely with the judiciary. HOUSE REPORT, *supra* note 12, at 6604-06.

[80] *See supra* note 77.

[81] The Iranian situation exemplifies the problems plaintiffs may encounter when attempting to gain judicial relief from a foreign defendant. The court in *Harris* pointed out in its discussion that Harris' ability to pursue a legal remedy within Iran had been precluded. *Harris*, 691 F.2d at 1356. *See generally* Comment, *supra* note 3, at 227-33.

[82] *See* H. SCHACK, *supra* note 38, at 37-40. Noting that because the doing business test requires only general unrelated contacts, Dr. Schack concludes that the requirement that such activities be continuous and substantial is not an effective restriction. He goes on to state: "Doing business as a general contact has outlived its utility. It is superfluous, extremely vague, triggers circumventions by the plaintiff, and may, finally, have the effect of creating undue burdens on interstate commerce." *Id.* at 39. Although Dr. Schack refers to the possible burdens on interstate commerce, his reasoning is equally applicable to commerce between two sovereign nations. *See infra* notes 91-92 and accompanying text.

[83] *Harris*, 691 F.2d at 1353.

[84] U.C.C. § 5-114 comment 1 (1978).

ance of the underlying contract, Melli's involvement appears to provide only an attenuated contact with the United States.[85]

The simple language of the Treaty's waiver provision supports the court's conclusion that only a "doing business" type of test is required.[86] Commercial treaties, however, are drafted primarily to increase trade and investment; thus, the drafters probably did not intend for the Treaty's waiver provision to be applied broadly.[87] Using unrelated contacts as a basis for the exercise of jurisdiction may create a disincentive to foreign investment and trade. Additionally, the broader exercise of jurisdiction may complicate negotiations of subsequent commercial treaties with foreign states.[88]

The court's method of analysis creates some ambiguities. Most notably, the analysis appears to subsume one prong of the test required by the direct effect exception of section 1605(a)(2). After stating that it will separately analyze "direct effect" and "in the United States," the court blurs the distinction between these phrases.[89] Although its end result is correct, the court's failure to clearly address the phrase "in the United States" confuses its analysis of the minimum contacts issue. In view of the importance of a

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[85] Alternatively, the court could be referring to the fact that Continental Bank was to pay Melli in the United States. It has been noted, however, that payment "is a single act, quickly accomplished." WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 171 (2d ed. 1980). As such, it is doubtful that payment could constitute substantial performance.

[86] *See supra* note 61.

[87] The provisions of the Treaty were intended to be reciprocally applied to each contracting party. 102 CONG. REC. 12,287 (1956). In view of this reciprocity, a broad application of the waiver may result in a more expansive reaction by foreign courts in exercising jurisdiction over United States defendants. Consequently, a United States corporation may be less inclined to invest in the treaty party's country, despite the drafter's goal of increasing trade and investment by providing a broad waiver provision. The same reasoning would apply to a foreign state seeking to invest in the United States.

[88] Foreign countries seeking to negotiate a commercial treaty with the United States may well use the United States judiciary's broad jurisdictional interpretations as a bargaining tool. As a result, future commercial treaties may be more restrictively worded in the waiver provisions or, in the worst case, no mutually satisfactory provision could be adopted.

[89] The court's adoption of the two-pronged test implies that the court intended to analyze each phrase separately. Instead, the court answers the question in two sentences:

> The letter of credit arrangement-which was structured according to the wishes of the appellants-extends into this country, and the appellants' demands thus have significant, foreseeable financial consequences here. This sufficiently establishes a "direct effect" within the meaning of § 1605(a)(2).

Harris, 691 F.2d at 1351. While one can discern the court's general analytical approach, the language and structure of this section of the *Harris* decision is not as precise as the approach adopted in *Texas Trading*. The *Harris* court appears to hold that the "in the United States" requirement was satisfied by the fact that the letter of credit agreement extended into the United States. The language of the court's opinion, however, makes this point debatable.

uniform minimum contacts standard, the *Harris* court should have clearly identified its factual basis for concluding that Harris' financial loss was sufficiently in the United States.

With its decision in *Harris*, the Eleventh Circuit has provided a progressive, if somewhat problematic, analysis that addresses but does not master, the jurisdictional issues presented by the FSIA. Theoretically, the FSIA should provide statutory answers to all judicial questions in a civil suit against a foreign state.[90] In actuality, the FSIA is an ambiguous legislative scheme—a statutory labyrinth through which the courts may wander in a variety of interpretive directions.[91] Thus, if the FSIA is to effectuate the exercise of jurisdiction over a foreign defendant, the judiciary must work toward establishing a clear and uniform interpretation of the statute's requirements. *Harris* does not definitively interpret the immunity exception provisions of section 1330(a). *Harris* does, however, adequately define a transactional contacts standard for section 1330(a) that is crucial to the continued viability of the FSIA. Under its guidelines, United States businesses faced with financial loss due to the wrongful act of a foreign state can look forward to more favorable jurisdictional standards and, thus, greater likelihood of relief in the future.

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[90] *See supra* note 12.

[91] "The FSIA . . . owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar, but a constant bane of the federal judiciary." Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).