MINIMUM CONTACTS JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

I. INTRODUCTION

United States citizens wishing to contract with foreign states or foreign corporations face great uncertainty if the contract leads to a dispute. When a choice of law provision is absent from the contract, and the dispute cannot be resolved by negotiation, it is questionable whether a United States plaintiff has access to United States courts. This prospect seems to run contrary to the spirit of the Foreign Sovereign Immunities Act of 1976 (FSIA),¹ which is intended to give United States citizens the greatest opportunity possible to litigate if they have a valid claim against a foreign sovereign.

Unfortunately for many would-be litigants, a substantial number of plaintiffs never get the opportunity to argue their case on its merits because the connection between the foreign defendant and the United States is found to be too tenuous. The courts have applied the "minimum contacts" test of *International Shoe v. Washington*² and its progeny very conservatively when the defendant is a foreign state or corporation acting in a commercial capacity. This "minimum contacts" test requires that a defendant must have availed himself of the "benefits and protections" of the forum's laws before he is subject to suit in the forum.³ This restrictive approach discourages a United States citizen who wants to take advantage of international business transactions and trade but who is hesitant to enter into any such arrangement without the assurance of a forum in the event of a dispute.

This Note will focus on minimum contacts and the difficulties a plaintiff faces in trying to establish the jurisdictional requirements of the FSIA in a dispute. The problems of applying United States minimum contacts standards in international litigation will be explored, as well as the differing judicial views on what "minimum contacts" means. In addition, the Note will look at the future of the minimum contacts standard and whether that standard can survive as a viable FSIA tool.

² 326 U.S. 310 (1945).
³ Id. at 319.
II. SOVEREIGN IMMUNITY

A. An Overview

The doctrine of sovereign immunity originated in the philosophical works of Bodin during the sixteenth century.4 The influence of writers in this period, coupled with the lack of governmental activity in commercial ventures, gave rise to the doctrine of absolute sovereign immunity under which no state could be subject to the commands of another state.5 The absolute theory was given judicial support in two pioneer cases decided within eight years of each other on different sides of the Atlantic: The Schooner Exchange,6 an American decision; and The Prins Frederik,7 a British decision. Under these interpretations a foreign state or its instrumentality enjoyed immunity from lawsuits in the courts of another sovereign.8

The absolute doctrine prevailed in both jurisdictions well into the twentieth century.9 In Berizzi Bros. Co. v. S.S. Pesaro,10 the United States courts had the opportunity to reexamine the doctrine in light of increasing international trade conducted by foreign governmental commercial enterprises. The case dealt with a libel in rem action brought for cargo damages against a merchant vessel owned and operated by the Italian government. The Supreme Court ruled that absolute sovereignty would continue, reasoning that providing revenue for a national treasury through trade constituted

5 See Marasinghe, A Reassessment of Sovereign Immunity, 9 Ottawa L. Rev. 474, 475 (1977), for an excellent history of absolute sovereign immunity.
6 The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812). Chief Justice John Marshall, in writing for the Court, relied primarily on the writings of Bynkershoek and Vattel for justifying the absolute doctrine. A great deal of case law, put forth by counsel in briefs and arguments, was not used in the opinion. Thus, the United States policy on sovereign immunity for 140 years was based upon the views of two seventeenth century political philosophers.
7 2 Dods. 451, 165 E.R. 1543 (H.C. of Adm. 1820).
8 Marassinghe, supra note 5, at 474.
10 271 U.S. 562 (1926).
a public purpose." This analysis continued to be used in pre-World War II sovereignty cases.

Prior to 1976, American sovereign immunity determinations were based on State Department recommendations to the courts on how individual cases should be handled. The rationale behind this procedure was that these matters were questions of foreign policy and thus exclusively within the domain of the executive branch.

The State Department continued to follow the doctrine of absolute sovereign immunity despite the Supreme Court's language in *Republic of Mexico v. Hoffman (The Baja California)*, where the Department chose not to make a recommendation. The Supreme Court's decision turned upon the distinction between possession and title of a foreign vessel, the Court ruling that mere title held by the government was not enough to uphold the defendant's sovereign immunity claim. The extensive dicta by the Court on the sovereign immunity issue showed a willingness to dismiss the immunity claim even if the vessel had been in the possession of the Mexican government; however, the majority emphasized that the judiciary should not embarrass another governmental branch by making a ruling contrary to State Department policy.

The absolute sovereign immunity doctrine was abandoned by the State Department in the "Tate Letter" of 1952. In the Tate Letter, the State Department recognized a distinction between the public and private acts of foreign governments and refused immunity for actions based on private, commercial acts. The decision to change was based partially on political considerations (in that the United States was subjecting itself continually to litigation in countries that were absolutely immune from United States courts) and partially based on the practical need for United States citizens to have access to a forum when attempting to settle disputes with foreign commercial entities. This position was referred to as the doctrine of restrictive sovereign immunity.
B. The Foreign Sovereign Immunities Act of 1976

The restrictive doctrine was codified in the Foreign Sovereign Immunities Act of 1976 (FSIA), which transfers control of immunity determinations from the State Department to the federal courts in an effort to ensure that all decisions are based purely on legal grounds and not on administration policy. Given a United States plaintiff seeking a forum in the United States against a foreign state, the initial determination to be made is whether that state is immune from the jurisdiction of a United States court under the terms of the FSIA. Once it is established that there is no immunity, jurisdiction may be exercised over the foreign state only in accordance with due process of law under the United States Constitution.

The FSIA provides a number of exceptions to sovereign immunity in sections 1605 to 1607. One example of these exceptions is found in section 1605(a)(2), which states that a foreign state shall not be immune as a sovereign from United States jurisdiction when suit is brought against the state for an act performed "... outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." The court initially must determine if the foreign state acted in a commercial nature; if so, the court then determines if that activity caused a direct effect in the United States. Once commercial activity and direct effects are established, the foreign state is not immune as a sovereign to jurisdiction.

Even after the foreign state's claim of sovereign immunity is defeated, the exercise of jurisdiction is proper only if the defendant state has met the requisite "minimum contacts" with the forum such that due process of law is not denied the defendant. The FSIA provides for the exercise of personal jurisdiction over foreign defendants in section 1330(b).

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23 The F.S.I.A. defines a foreign state as any political subdivision, agency, or instrumentality of the state, 28 U.S.C. § 1603(a) (1976).
27 HOUSE REPORTS, supra note 22, at 6612.
III. MINIMUM CONTACTS

A. Applying National Standards to International Disputes

The concept of minimum contacts embodied in section 1330(b) of the FSIA is based upon due process limitations, as defined by the Supreme Court in *International Shoe v. Washington*\(^{29}\) and *McGee v. International Life Insurance Co.*\(^{30}\) and by Congress in the long arm statute for the District of Columbia.\(^{31}\) According to *International Shoe*, the exercise of jurisdiction over a foreign defendant is proper when his activities within the forum are such that he enjoys the "benefits and protections of the laws of that state."\(^{32}\) If the defendant is not physically present within the forum, his contacts in the forum must be significant enough that the exercise of jurisdiction is not unjust.\(^{33}\)

In *International Shoe*, a company located outside of the State of Washington employed salesmen to enter the State and solicit orders for shoes. The State of Washington sought to require the company to pay into the state unemployment compensation fund. The defendant maintained that it was not amenable to personal jurisdiction in Washington courts because it maintained no office in the State and never made contracts for the sale or purchase of goods in the State.\(^{34}\) Justice Stone, writing for the majority, stated that in analyzing whether the exercise of jurisdiction met the demands of due process, the Court must determine if the contacts made with the forum were sufficient to make it "reasonable" to bring the defendant into the Washington court.\(^{35}\) In making this

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\(^{29}\) 326 U.S. 310 (1945).

\(^{30}\) 355 U.S. 220 (1957).


\(^{32}\) § 13-423 Personal Jurisdiction Based upon Conduct

(a) The District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the persons:

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia.

(b) When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him.


\(^{34}\) Id. at 316.

\(^{35}\) The shoe company supplied each salesman with one shoe out of a pair in a line of design samples. The salesmen's only duties were to display the shoes to buyers and solicit orders. The orders were sent out-of-state to the company's St. Louis office where they were filled and shipped F.O.B. into Washington. The salesmen were not authorized to make contracts or collect money from their customers.

determination, the inconvenience to the defendant in coming to
the forum should be considered.\textsuperscript{36} The Court noted that the satisfaction of due process depends upon "the quality and nature of the activity in relation to the fair and orderly administration of the laws."\textsuperscript{37} Justice Stone concluded that the shoe company, through its regular contacts with Washington, conducted a large amount of business within the state and received the benefits and protections of the laws of Washington. Therefore, the requirements of due process were met in the exercise of jurisdiction over the defendant.

The second case that influenced Congress in the promulgation of section 1330(b) of the FSIA was \textit{McGee v. International Life Insurance Co.}\textsuperscript{38} This is a controversial case: some courts interpret it as a statement of the outermost limits on the exercise of long arm jurisdiction;\textsuperscript{39} others interpret it as an aberration, limited in its application to life insurance contracts.\textsuperscript{40} In \textit{McGee}, an insurer mailed a life insurance policy to the insured in California, received premium payments from the insured in California, and then, after the insured's death, refused to pay the beneficiary. The Supreme Court held that California could enter a binding judgment on the insurer within the limits of due process because "the suit was based on a contract which had substantial connection with that State."\textsuperscript{41} The substantial contact turned on the nature of the contract. The policy was mailed into California, the premiums were paid from California and the insured was a resident of California when he died. The Court balanced the state's interests against the defendant's inconvenience and found that the state's interest "in providing effective means of redress for its residents when their insurers refuse to pay claims"\textsuperscript{42} outweighed the defendant's inconvenience. Consequently, there was no denial of due process.\textsuperscript{43}

\textsuperscript{36} \textit{Id.} at 317.
\textsuperscript{37} \textit{Id.} at 319. Justice Stone went on to say:

\begin{quote}
But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of the state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can in most instances, hardly be said to be undue.
\end{quote}

\textit{Id.}

\textsuperscript{38} 355 U.S. 220 (1957).
\textsuperscript{39} See \textit{infra} notes 78-87 and the text to which they pertain.
\textsuperscript{40} See \textit{infra} note 80 and the text to which it pertains.
\textsuperscript{41} \textit{McGee v. International Life Insurance Co.}, 355 U.S. at 223 (1957).
\textsuperscript{42} \textit{Id.}
\textsuperscript{43} \textit{Id.} at 224. The Court noted that from the holding in \textit{Pennoyer v. Neff}, 95 U.S. 714 (1877), where the defendant's physical presence in the forum was essential to the exercise
Seven months after deciding *McGee*, the Supreme Court clarified its policy on minimum contacts in *Hanson v. Denckla.* Hanson also dealt with contracts sent through the mail from one state to another. The Court distinguished the situation in *Hanson* from that in *McGee*: in *Hanson* the foreign defendant had not solicited the plaintiff’s business in the forum, nor was there any “act done or transaction consummated in the forum State.” The Court also noted that the state interest in *McGee* was put forth explicitly in a statute that expressed the state’s interest in providing redress to residents injured by nonresidents in areas subject to state regulation. The Court concluded that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws” and refused to permit the exercise of jurisdiction.

The standards developed by the Supreme Court in *International Shoe*, *McGee* and *Hanson* were highly influential on state courts as the states began paring and interpreting long arm statutes. Illinois was quick to promulgate a long arm statute based upon *International Shoe* that was “in line with the general trend to expand jurisdiction over non-residents having contacts, ties, or relations with the State.” In both tort and contract cases, interpretations of the Illinois statute were broad, pushing the exercise of jurisdiction to the limits of due process.

In *Gray v. American Radiator and Standard Sanitary Corp.*, the Illinois Supreme Court approved the exercise of jurisdiction over a foreign defendant who had had no physical presence within the state, but who had shipped defective goods into Illinois. By not requiring the physical presence of the defendant in the forum, the court freed itself from the outdated standard announced in

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of jurisdiction, to *International Shoe*, 326 U.S. 310 (1945), the scope of jurisdiction had expanded significantly. *McGee* v. *International Life Insurance Co.*, 355 U.S. at 222. The Supreme Court attributed this expansion to the increase in interstate commerce:

> With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it less burdensome for a party sued to defend himself in a state where he engages in economic activity.

*Id.* at 223.

*“357 U.S. 235 (1958).*

*4 Id.* at 251.

*4 Id.* at 253.

*47 ILL. ANN. STAT. ch. 110, § 17(1)(a) (Joint Committee Comments (1)) (Smith-Hurd 1956).*

*48 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).*
1877 in Pennoyer v. Neff, and began to apply the International Shoe standard. The Illinois Supreme Court noted that the frequency and relative ease of shipping goods from state to state had effectively "effaced the economic significance of state lines" and removed the inconvenience of defending lawsuits in foreign jurisdictions. As the technology of transportation had developed and made interstate commerce a prevalent form of American business, this court broadened its standard for the exercise of jurisdiction to one that essentially equated the presence of the defendant's goods with the actual presence of the defendant.

In Koplin v. Thomas, Haab and Botts personal jurisdiction was exercised over New York defendants who had placed advertisements in Chicago newspapers, sent agents to Illinois to conduct seminars about option contracts, offered and sold put and call options to Illinois residents and registered with the Secretary of State to do business in Illinois. Although the defendants had no office in the state, did not sell options through agents in the state, and actually made all sales in New York, the court held that their activities in the state constituted transacting business and invoked the benefits and protection of the laws of Illinois. The court noted that the defendants could "reasonably anticipate that litigation might arise from the sales" because they conducted a large volume of business in the state. Illinois had a significant interest in providing a forum for residents seeking a remedy for a nonresident's violation of a state statute. Consequently, it was not unfair to compel the defendants to come to Illinois to defend the suit.

In Cook Associates, Inc. v. Colonial Broach & Machine, a single business transaction initiated by the nonresident defendant by tele-
phone was sufficient to authorize the exercise of personal jurisdiction. The defendant entered into a contract with an Illinois company. That contract was performed in Illinois and its validity was governed by Illinois law. Therefore, the court found that due process was satisfied when the foreign defendant was required to come to Illinois to litigate. "Although defendant's only contact within this state was a telephone call, that call was all that was necessary for defendant to achieve its purpose."\(^{54}\)

These Illinois cases do not turn on whether the defendant was physically present in the forum. Given the case of modern communications and shipping, minimum contacts with the forum can be established without physical presence. In tort cases, the shipping of goods into the forum gives a sufficient basis for the exercise of personal jurisdiction over a nonresident defendant. In contract cases, if the defendant initiates the transaction and the contract is performed in the forum, the nonresident may be called into the forum to defend.

Other jurisdictions have interpreted their long arm statutes very broadly. The long arm statute for the District of Columbia, the third foundation for section 1330(b) of the FSIA, was derived indirectly from Illinois' long arm statute.\(^{55}\) In Margoles v. Johns,\(^{56}\) the United States Court of Appeals for the District of Columbia stated in dicta that in some cases minimum contacts are established under the "transacting business" provisions when the contracts were made

\(^{54}\) Id. at 970, 304 N.E. 2d at 31. The plaintiff was an employment agency that sent resume flyers to prospective employers for one of its clients. A Delaware corporation called the plaintiff and requested the information about the client. Before releasing any information, the plaintiff requested a fee for its services and the defendant agreed to pay. Subsequently, plaintiff arranged interviews between the two parties (not located in Illinois) and the client was hired. Because there was an oral contract made, which the defendant initiated by telephone, and the contract was performed in Illinois, jurisdiction was exercised. See also Oce-Industries, Inc. v. Coleman, 487 F. Supp. 548 (N.D. Ill. 1980) (where defendant initiated hundreds of telephone calls placing orders for the plaintiff's goods); Tabor & Co. v. McNall, 30 Ill. App. 3d 593, 333 N.E.2d 562 (1975) (where contract, negotiated by phone, was partially performed); Colony Press, Inc. v. Fleeman, 17 Ill. App. 3d 14, 308 N.E. 2d 78 (1974) (where defendant ordered newspaper inserts by telephone, returned corrected copy, and accepted F.O.B. Chicago terms).

\(^{55}\) D.C. CODE ANN. § 13-423, supra note 30. The legislative history indicates that the expansive bases of jurisdiction found in the Uniform Interstate and International Procedure Act were models for the District of Columbia statute. S. REP. No. 405, 91st Cong., 1st Sess. 35 (1969) and H.R. REP. No. 907, 91st Cong., 2d Sess. 61 (1970). Section 1.03(a)(1) of the Uniform Interstate and International Procedure Act provides for the exercise of jurisdiction over a person who transacts any business within the forum. This section was derived from the Illinois long-arm statute. UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT 1.03(a)(1) Commissioner's Note at 310 (1962).

The court noted that the provisions generally are interpreted as limited only by the due process considerations set forth in *International Shoe, McGee,* and *Hanson.* In 1974, the District Court, citing *Margoles v. Johns,* exercised jurisdiction over a foreign defendant who had ratified a contract by telephone between two parties present in the forum, *Dorothy K. Winston & Co. v. Town Heights Development, Inc.* The contract was initiated by the defendant, formed in the District of Columbia and was to be performed partially in the forum.

The Oregon Supreme Court, in 1960, ruled that where a contract for the shipment of lumber from Oregon to Georgia was made “[o]n the strength of a telephoned offer and acceptance” and resulted in one shipment of lumber out of the forum, the defendant had significant contacts with the forum. An Oregon court could exercise jurisdiction over this defendant in *State ex rel. White Lumber Sales, Inc. v. Sulmonetti.* The defendant had received and paid for one shipment of lumber, but a dispute had arisen over the quality of the wood.

In *Parke-Barnat Galleries, Inc. v. Franklyn,* the Court of Appeals of New York held that where the foreign defendant had requested an open telephone line to an auction in New York and thereby placed high bids on two paintings and was considered the purchaser of those paintings, he had engaged in purposeful activity within the state. Personal jurisdiction was exercised over the defendant, not because he had placed a single order over the telephone, but because he had become an active participant in the auction as a result of the open telephone line.

In *Market & Distribution Resources, Inc. v. Paccar, Inc.,* the Massachusetts long arm statute was held to require a Delaware corporation to come to Massachusetts for litigation stemming from a breach of contract with a Massachusetts corporation; although the defendant was never physically present in the forum. The court

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57 Id. at 1218. The plaintiff in this case was suing an out-of-state newspaper for slander. The court ruled that the tort provisions of the longarm statute were not as far-reaching as those for breach of contract actions.
59 *State ex rel. White Lumber Sales, Inc. v. Sulmonetti* 252 Or. 121, 448 P.2d 571 (1968).
61 As dictum in this case, the court stated that the exercise of personal jurisdiction also could be based upon the fact that an employee of the plaintiff had acted as an agent of the defendant by making the bids for him and describing the auction to him as it progressed. Id. at 18, 256 N.E. 2d at 509, 308 N.Y.S. at 342.
found that the defendant had established the requisite contacts with the forum by negotiating a contract through calls and correspondence, contemplating that the contract would be performed within the forum, and directing the plaintiff to mail the product of the contract outside of the forum to the defendant's distributors. These contacts were deemed sufficient to forewarn the defendant that it might be called into the forum for litigation. The court noted that the defendant could have sued the plaintiff in Massachusetts, if the plaintiff had failed to perform, and concluded that the defendant purposefully had availed itself of the benefits and privileges of doing business in the State of Massachusetts.

In the cases discussed above, the foreign defendant was never physically present within the forum, but he initiated contact with the plaintiff, formed a contract that was performed in the forum and then breached that contract. The defendant used telephone and mail communications purposefully and significantly to affect the plaintiff in the forum. The contact by mail or phone was not the key. The courts looked instead to the effect of the contact to determine whether the exercise of jurisdiction over the nonresident defendant was proper.

Some courts do not require contract performance within the forum for the exercise of personal jurisdiction. In *Southern Idaho Pipe & Steel Co. v. Cal-Cut Pipe & Supply, Inc.*, the Supreme Court of Idaho found that its long arm statute (patterned after the Illinois statute) extended jurisdiction over a California based corporation that operated for years in Idaho through mail and telephone advertisements of its products. The defendant sold its products to Idaho buyers, but the buyer was responsible for shipping the goods from California to Idaho. In this case, a contract was negotiated by telephone and mail, the plaintiff shipped some of the defendant's goods into the forum and then the defendant refused to make the product available again, thereby violating the terms of the contract. The court found that the key to exercising jurisdiction over the defendant was not that its products entered the forum, but that the defendant had initiated sales transactions in the forum for a number of years with the purpose of realizing a pecuniary benefit. In *Hoster v. Monongahela Steel Corp.*, the United States District Court ruled that Oklahoma's long arm statute allowed the exercise of personal jurisdiction over a defendant who had initiated

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64 Id. at 497, 567 P.2d at 1248.
negotiations with the plaintiff for the sale of steel bars to the plaintiff. The defendant made telephone calls and corresponded through the mail to negotiate a contract. Although the defendant argued that no contract was made, the court found sufficient contacts with the forum in the “totality of contacts” and the purposeful initiation of negotiations with the plaintiff.66

The Idaho and Oklahoma cases indicate that purposeful initiation of negotiations with a plaintiff within the forum may be enough to satisfy due process requirements for the exercise of personal jurisdiction. The impact on the plaintiff within the forum is just as significant whether it is caused by telephone, mail, or personal negotiations. That impact coupled with the defendant’s purposeful activity fulfill the due process requirements of International Shoe, McGee and Hanson.

There are a number of courts that have rejected this expansion of minimum contacts. Even where the nonresident defendant has solicited the plaintiff’s business and delivered his product into the forum, jurisdiction has been denied.67 In Lakeside Bridge & Steel Co. v. Mountain State Construction Co., where the defendant initiated contact with the plaintiff and ordered goods from him, the Seventh Circuit held the defendant had not invoked the benefits and protections of the laws of the forum.68 In addition, jurisdiction usually is denied if the plaintiff has initiated all the contacts with the foreign defendant, and these contacts were made by mail or telephone.69

Since the 1958 Hanson v. Denckla decision, the Supreme Court has ruled in four cases that are regarded as a retrenchment from earlier decisions. In 1977, the court decided Shaffer v. Heitner.70

66 Id. at 1253.
67 Agrashell, Inc. v. Bernard Sirotta Co., 344 F.2d 583 (2d Cir. 1965). The third party defendant had solicited business in New York by mail, negotiated with the buyer by mail, delivered samples into New York, sent a purchase order to the plaintiff, and delivered 115 tons of walnut shells into the forum.
68 Lakeside Bridge & Steel Co. v. Mountain State Construction Co., 597 F.2d 596 (7th Cir. 1979).
69 Benjamin v. Western Boat Building Corp., 472 F.2d 723 (5th Cir. 1973); Frank E. Basil, Inc. v. Guardino, 424 A.2d 70 (D.C. Cir. 1980); see also Koster v. Automark Industries, Inc. 640 F.2d 77 (7th Cir. 1981) (eight letters, a telegram, and transatlantic call into the forum were not sufficient when the contract was executed in Italy and the goods were manufactured in Switzerland); Aaron Ferer & Sons, Co. v. Atlas Scrap Iron & Metal Co., 558 F.2d 450 (8th Cir. 1977) (the contracts were not to be performed in Nebraska, nor were the goods originating in or destined for the forum); Empresa Nacional Siderurgica v. Glazer Steel Co., 503 F. Supp. 1064 (S.D.N.Y. 1980) (calls and telexes were between the steel producer’s sales manager in New York and the chief executive officer of the buyer, who transacted business in Louisiana and Texas).
which held that even when a foreign defendant has acted within the forum state in some capacity, that act must be related directly to the cause of action and must avail the defendant of the privilege of conducting activities within the forum before the exercise of personal jurisdiction over that defendant is proper. In *Kulko v. Superior Court of California,* the Court stated that the defendant must receive or expect to receive a benefit by his activities in the forum state, such that the forum has a substantial interest in exercising jurisdiction over the defendant. These two cases illustrate the Court's shift of emphasis away from the impact on the plaintiff to the activities and expectations of the defendant. *World-Wide Volkswagen Corp. v. Woodson* and *Rush v. Savchuk* represent a revitalization of the concepts of federalism. In these cases, the Court emphasized that states must guard against overextending their boundaries in exercising jurisdiction over residents of other states.

In *World-Wide Volkswagen*, the Court delineated two functions of the minimum contacts concept. First, a minimum contacts standard guards against unduly burdening the defendant with litigation in a distant forum. Second, minimum contacts are "to ensure that the States . . . do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Rush v. Savchuk* emphasized that in analyzing whether due process will be served by the exercise of jurisdiction, the court must concentrate on the relationships among the defendant, the forum, and the litigation.

To determine whether the exercise of jurisdiction would overburden the foreign defendant, the Court balanced the burden against other factors. These factors were the interests of 1) the forum state in the litigation, 2) the plaintiff in obtaining relief, 3) the judicial system in efficient dispute resolution and 4) the other states in encouraging social policies. The Court noted that these interests may not outweigh the Due Process Clause if the doctrine of interstate federalism is violated by an overextension of one state's authority over another. The defendant, by his conduct and activities within the forum, must "reasonably anticipate being haled into court there." Using these tests, the Court in *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. at 297.
Volkswagen held that the sale of an automobile to persons in New York, who were later injured in that automobile in Oklahoma (where the seller did no business) was not a sufficient contact with Oklahoma to subject the seller to the jurisdiction of its courts. The Court said that if the car had been sold because of the seller's efforts to market its product in the forum state, then the exercise of jurisdiction would have been proper.

These four decisions do not necessitate a different outcome in the cases discussed earlier. World-Wide Volkswagen did not involve direct shipment of goods into the forum to a resident who then was injured by the product. Nor did these four cases involve contracts initiated by foreign defendants and then performed in the forum. The exercise of jurisdiction in the cases noted initially was based on purposeful activity by the defendant in the forum. All of the factors that counterbalance the burden on the foreign defendant can be present in the kinds of contract and tort actions the earlier cases described.

One decision that has analyzed minimum contacts in a breach of contract action and utilized the standards articulated in those recent Supreme Court cases is Alchemie International, Inc. v. Metal World, Inc. In this case, the United States District Court of New Jersey adopted a broad interpretation of McGee v. International Life Insurance Co., refusing to limit the reach of jurisdiction by the characterization of the contract. The court noted that some authorities have interpreted McGee as being limited to life insurance policies, but accepted a broader interpretation. According to the court, Hanson v. Denckla distinguishes McGee as involving a defendant who has invoked the benefits and protections of the forum's laws by purposefully soliciting a contract in that state. By doing this, the defendant has subjected himself to the forum state's jurisdiction. McGee was not tied only to the state's special interest regarding insurance policies, argues Alchemie. The state statute

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523 F. Supp. 1039 (D. N. J. 1981). Through the mailing of papers into the forum and certain telephone conversations, the defendant agreed to sell and the plaintiff agreed to buy a large quantity of molybdenum oxide material.


Id. at 1048-49.
governing jurisdiction over insurance disputes was passed after the contract had been entered into by the parties; thus, the defendant's only notice that he may have been subject to California's jurisdiction was the fact that he solicited the contract.\textsuperscript{83}

The contract in \textit{Alchemie} was solicited, negotiated and executed through the use of telephone and mail contacts. No products ever entered the forum. The defendant argued that the telephone and mail contacts were not sufficient to constitute minimum contacts. The court said the important factor was not the mode of entering into the contract, but the solicitation of the contract itself and whether that met the due process standards.\textsuperscript{84}

\textit{Alchemie} incorporated the values of federalism; thus a state must have an interest in the litigation with its territory, and that interest must outweigh any interest of the defendant's state. Given a state interest, it also must be substantially fair to the defendant to require his defense in the forum. These rather nebulous policies, often called the "twin limitations,"\textsuperscript{85} are fundamental to the idea of minimum contacts.\textsuperscript{86} In \textit{Alchemie}, the court concluded that "any rational state interest will be sufficient;" therefore, the interests in providing a forum for its residents (a stated goal of the FSIA) and holding persons responsible for their contractual obligations with state residents were deemed sufficient.\textsuperscript{87}

In addition, the defendant was found to have availed himself purposefully of the privilege of conducting business in New Jersey by soliciting the contract. That finding was mitigated by an agreement that New Jersey law would govern the performance of the contract. Given the defendant's purposeful contact with the state, he was held to have been able to anticipate being called to the forum. Therefore, it was not unfair to require him to litigate in New Jersey.

\textsuperscript{83} Id. at 1049.

\textsuperscript{84} The court stated:

\begin{quote}
Indeed, a refusal to acknowledge the fashion in which modern business is conducted and the increasingly dominant role played in that conduct by mail and telephone communications is as much a return to the shibboleths of \textit{Pennoyer v. Neff} [citations omitted], long abandoned by the Court, . . . as would resurrection of the notion that a defendant must be present within the territorial jurisdiction of a court before its judgment will bind him. I therefore count the defendant's calls and mail communications to plaintiff as significant contacts with the State of New Jersey.
\end{quote}

\textit{Id.} at 1050.


\textsuperscript{87} Id. at 1046.
This notice of potential litigation was found to satisfy *World-Wide Volkswagen*’s concern for fairness to the defendant.

Applying some of the tests described above for minimum contacts, section 1130(b) of the FSIA could be broadened to encompass foreign sovereigns that contact United States citizens by mail, telephone, or telex. If the defendant initiates contacts within the United States, such that he purposefully enters into a contract and anticipates the receipt of economic benefits from that contact, jurisdiction in the United States courts would be appropriate. The circumstances of each case would have to be analyzed carefully in balancing the defendant’s burden and the concepts of national sovereignty against the United States interests invoked by the dispute. The United States does have an interest in providing its citizens with a forum and in holding foreign defendants to obligations purposefully made with United States citizens. Given the care with which *World-Wide Volkswagen* emphasized that the defendant must not be burdened unduly by litigation in a distant forum, cases involving foreign governments as defendants would be difficult. However, the interests of the United States are very important in these cases and in many instances the exercise of jurisdiction would be proper.

B. Minimum Contacts in FSIA Cases

The American judiciary has dealt with minimum contacts in domestic disputes since 1945, and the recent decisions of *Shafer v. Heitner*, *Kulko v. Superior Court*, *World-Wide Volkswagen v. Woodson*, and *Rush v. Savchuk* indicate a continuing commitment on the part of the Supreme Court to adapt that standard to a changing world. The Court has not had the opportunity to address the role of minimum contacts in international disputes under the FSIA. That task has been left to the lower federal courts. In most FSIA cases, minimum contacts has not been the dispositive issue upon which jurisdiction was decided; however, the decisions address-

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90 436 U.S. 84 (1978).
91 444 U.S. 256 (1980).
ing minimum contacts indicate that the courts are exercising caution in their new role as forums for international litigation.

In advocating judicial reliance on minimum contacts to determine jurisdiction, Congress allowed the courts great discretion in analyzing FSIA cases. Since the Act’s passage in 1976, the judiciary has interpreted its jurisdictional provisions in differing ways. As a result, there is not a well established standard available for determining whether jurisdiction can be exercised over the foreign defendant and plaintiffs are unsure as to how their case will be treated.

Most of the early FSIA decisions read the statute narrowly and required physical presence of the defendant in the United States before the exercise of jurisdiction was granted. In Carey v. National Petroleum Corp., the plaintiff corporation marketed petroleum products pursuant to an agreement with Libya. In 1973 Libya nationalized its oilfields, cutting off the oil supply to the plaintiff who was forced to breach contracts with United States utilities. Since the contact with the forum consisted only of oil shipments into the United States, the Federal District Court for the Southern District of New York dismissed the action against the Libyan oil company, noting that the embargo did not reach the "level" of minimum contacts.

That same court decided East Europe Domestic International Sales Corp. v. Terra, a 1979 case that followed the restrictive approach. The plaintiff, a New York corporation, negotiated a contract in Romania with the defendant. The parties negotiated changes in the agreement via overseas telex, but the defendant never physically entered the United States. The court determined that the Romanian corporation was not amenable to American jurisdiction because it had no continuous and systematic relationship with the forum and no physical presence within the forum.

In Waukesha Engine Division, Dresser Americas, Inc. v. Banco

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94 House Reports, supra note 22, at 6612.
95 "In structure, the F.S.I.A. is a marvel of compression . . . . [It purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant . . . . This economy of decision has come, however, at the price of considerable confusion in the district courts." Texas Trading v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).
96 453 F. Supp. 1097 (2d Cir. 1979).
97 Id. at 1101.
99 Id. at 387.
Nacional de Fomento Cooperativo, the contacts of the defendant Mexican banking institution with the forum were limited to a single inspection visit by bank officers. The District Court for the Eastern District of Wisconsin refused to exercise jurisdiction because the single visit was a “minor additional contact” which was not sufficient for minimum contacts. The court used the Wisconsin long arm statute rather than the FSIA to support its holding.

The Ninth Circuit Court of Appeals found no basis for jurisdiction in Thomas P. Gonzales Corp. v. Consejo Nacional de Producción de Costa Rica, a case involving a California plaintiff and a Costa Rican defendant. The court based its decision on the long arm statute of California, treating the Costa Rican corporation as if it were an American corporation. The defendant was found not to be amenable to suit even though it regularly entered into sales and purchase agreements with the plaintiff and made payment in California by confirmed letters of credit. The court noted that the defendant had no office, place of business, or property in the forum, and that this precluded California jurisdiction. The court's language concerning a contact without physical presence is especially interesting: “The Consejo validly argues that use of the mails, telephone, or other international communication simply do not qualify as purposeful activity invoking the benefits and protections of the state.”

The court for the Northern District of Illinois refused to exercise jurisdiction in Chicago Bridge and Iron Co. v. Islamic Republic of Iran, where the only communication between the contracting parties had been by telex messages and the defendant had never entered the forum. Chicago Bridge represented a slight departure from previous decisions in that it was decided solely by utilizing the FSIA rather than analogizing to state statute. In determining what constituted minimum contacts, the court noted that numerous visits by agents of a foreign instrumentality to the forum for inspection could establish prerequisite minimum contacts.

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100 485 F. Supp. 490 (E.D. Wis. 1980).
101 Id. at 493.
102 614 F.2d 1247 (9th Cir. 1980).
103 Id. at 1251.
104 Id. at 1253-54.
105 Id. at 1254.
107 Id. at 988.
108 Id. at 989.
In Insurance Co. of North America v. Marina Saline Cruz, the Ninth Circuit Court of Appeals again addressed the jurisdictional provision of the FSIA. This time the court had the guidance of World-Wide Volkswagen v. Woodson, and the reasoning of the decision reflects a more careful analysis than did the Thomas P. Gonzales decision of two years before. The case involved a Washington plaintiff who had bought a boat and had repairs made on it at the defendant's Mexican marina. When the boat sank off the coast of Alaska, the plaintiff filed suit.

The court looked to seven factors, taken from World-Wide Volkswagen v. Woodson, Hanson v. Denckla, and McGee v. International Life Insurance Co., to determine the "reasonableness" of exercising jurisdiction. These included:

- a) the extent of purposeful interjection into the forum state . . .;
- b) the burden of the defendant of defending in the forum . . .;
- c) the extent of conflict with the sovereignty of the defendants' state . . .;
- d) the forum state's interest in adjudicating the dispute . . .;
- e) the most efficient judicial resolution of the controversy . . .;
- f) the importance of the forum to the plaintiff's interest in convenient and effective relief . . .;
- g) the existence of an alternative forum.

After applying these factors to the facts of the case, the court refused to exercise jurisdiction.

In Texas Trading v. Federal Republic of Nigeria, the Second Circuit Court of Appeals faced the complicated aftermaths of Nigeria's port closing in 1975. The plaintiff brought the action against the government of Nigeria for anticipatory breach of a contract for the defendant's purchase of cement from the plaintiffs. The court used a four step approach to determine if jurisdiction could be exercised: first, to what extent did the defendant avail itself of the benefits and privileges of American laws; second, to what extent could the defendant have foreseen the instigation of litigation in the United States; third, how inconvenient would it be for the defendant to litigate in the United States; and fourth,
what interests would the United States have in hearing the case. The court concluded that the defendants had availed themselves sufficiently of the benefits of United States law by arranging to have the goods paid for in the United States.\textsuperscript{116} The very fact that they had made such arrangements indicated that the defendant could have foreseen a dispute leading to litigation in the United States.\textsuperscript{117} The court found that it would not necessarily be inconvenient to come to the United States for the suit, as the defendants had contracted with many nations for cement and had agreed to arbitration through the International Chamber of Commerce in Paris should a dispute arise.\textsuperscript{118} Finally, the court concluded that the United States had an interest in providing redress for her citizens and corporations when involved in disputes with foreign states.\textsuperscript{119} This fact was evidenced by the very existence of the FSIA.\textsuperscript{120}

Within three months after the expansive decision of \textit{Texas Trading}, the District Court for the District of Columbia decided \textit{Gilson v. Republic of Ireland}.\textsuperscript{121} The plaintiff was an American citizen who allegedly was induced by a private Irish corporation via mail, telex, and telephone to enter into a commercial venture in Ireland. After the plaintiff moved to Ireland, the corporation breached the contract and converted the plaintiff's patents and equipment to its own use. The plaintiff sued for damages against the corporation, another corporation which joined the conversion, the Republic of Ireland, and an Irish governmental agency that promoted Irish investment.

The focus of the pleadings dealt with the activities of the Irish corporation, the plaintiff basing his claim on the defendant's use of mail, telephone, and telegraph to negotiate for his employment.\textsuperscript{122} After \textit{Texas Trading} carefully evaluated the jurisdictional provisions of section 1330(b),\textsuperscript{123} \textit{Gibson} followed the reasoning of earlier courts and adhered to a restrictive interpretation of minimum contacts. Such a holding does not uphold the intent of Congress, and the ruling in \textit{Texas Trading}, that the FSIA be used

\textsuperscript{116} Id. at 314-15. Note the contrast between this and Thomas P. Gonzales Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980).
\textsuperscript{117} 647 F.2d at 315.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{122} Id. at 484.
\textsuperscript{123} 28 U.S.C. § 1330(b) (1976).
to give greater access to the federal court system to those wronged by foreign states.

IV. THE FUTURE OF MINIMUM CONTACTS AND THE REACH OF THE FSIA

The minimum contacts standard applied in the FSIA cases is more restrictive than that applied in domestic cases. Within the United States, the concept of minimum contacts has expanded beyond the requirement of physical presence in the forum. This seems to have been acknowledged by the federal appeals courts in *Marina Salina* and *Texas Trading*; yet the federal district courts continue to look to physical presence as a determinative factor in deciding whether to exercise jurisdiction. Jurisdiction based upon the physical presence standard severely restricts the plaintiff's access to United States courts. Such an interpretation is contrary to the purpose of the FSIA, given the increase in contractual relations between United States and foreign businesses made by mail, telephone, and telex.

One possible reason for the different standards in FSIA cases is that the court are making determinations that formerly were made by the executive branch. It is understandable that they might be cautious in their early decisions; however, this caution runs contrary to the broad congressional mandate given the judiciary to deal with FSIA disputes. This restrictive interpretation of minimum contacts is not reflective of domestic decisions, which are beginning to recognize the validity of contacts other than physical presence. In essence, the courts have created two minimum contacts tests: a domestic test, reflective of contemporary business practices, and an FSIA test.

There is no reason for this distinction between international and domestic defendants. The physical presence preference in international cases is reminiscent of *Pennoyer v. Neff*, a case that was put to rest in 1945. Domestic decisions have realized that electronic communication can be incorporated safely into our notions of "fair play and substantial justice" without diminishing the validity of the due process standards now employed. FSIA cases

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124 *See supra text* p. 211.
125 *House Reports, supra note* 22.
127 95 U.S. 714 (1877).
also should keep pace to ensure one uniform minimum contacts standard.

Just as our telecommunications technology has improved, the burden on a defendant to defend in a distant forum has been eased by improvements in transportation. The Marina Salina court noted that the burden was not as important as it once was, and that the court's decision would not turn on the difficulties of getting to a distant forum.\textsuperscript{130} Given the everyday usage of air travel, this is easily justified.

While judicial application of a restrictive standard poses problems for plaintiffs today, a more disturbing prospect is the possibility that the courts will continue to adhere to a conservative international standard while domestic standards progress. Unless the judiciary recognizes that FSIA minimum contacts should be treated exactly as domestic contacts, the minimum contacts test will no longer be useful in international litigation.

V. CONCLUSION

The FSIA has enabled United States citizens to utilize domestic courts as a forum in which to litigate disputes with foreign sovereigns. Congress has transferred the power to decide when foreign sovereigns are amenable to suit in United States courts from the executive branch to the judicial branch to give plaintiffs the benefit of legal expertise rather than changing administration policy. The legislative history of the Act indicates that the purpose of the Act is to give United States citizens at the very least a "day in court" when wronged.

Unfortunately, the courts have been unwilling to utilize the broad mandate given them. The bench has applied a much more restrictive minimum contacts standard to international cases than to domestic cases. This may be understandable, as the courts never before have been involved so greatly in international disputes; however, their caution has not benefitted those for whom the FSIA was designed.

The minimum contacts standard could be utilized successfully in FSIA cases. However, the courts must recognize that international contacts can be measured by the same yardstick as domestic contacts.

\textit{Eric Johnson}

\textit{Chrisanne Worthington}

\textsuperscript{130} 649 F.2d at 1271-72.