

BP Chemicals, Ltd. v. Jiangsu Sopo Corp.: Foreign Sovereign Immunity Act Makes Foreign States Immune from Due Process

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I. OVERVIEW

BP Chemicals, Ltd. (BP) purchased Monsanto Corporation’s methanol carbonylation process for making acetic acid in 1986.¹ The carbonylation process contains special design features, exotic metals, and other proprietary technology in a combination not found in texts or manuals; however, BP licensed this technology to other chemical companies, allowing them to build acetic acid production plants with the assistance of third-party engineering, procurement, and construction firms (EPC contractors).² BP discovered in the mid-1990s that an American EPC contractor had been contracted to supply the necessary equipment to build an acetic acid production plant in China.³ The product specifications bore a striking resemblance to BP’s proprietary technology, even replicating typographical errors in BP’s original documents.⁴

BP traced the disclosure to two Chinese government-owned businesses, Jiangsu Sopo Corporation (Sopo) and Shanghai Petrochemical Engineering Company (SPECO).⁵ BP claims that SPECO, as an agent of Sopo, procured contracts with several EPC contractors and disclosed BP’s trade secrets.⁶ BP sued Sopo, alleging violations of, inter

1. *BP Chems., Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 680 (8th Cir. 2002). Acetic acid is used in the production of paints, plastics, resins, and pharmaceutical and agrochemical products. *Id.*

2. *Id.* at 680-81.

3. *Id.* at 681.

4. *Id.*

5. *Id.*

6. *Id.*

alia, the Missouri Uniform Trade Secrets Act and Missouri common law.⁷ Sopo claimed it was entitled to immunity under the Foreign Sovereign Immunities Act (FSIA), as an instrumentality of a foreign sovereign.⁸ However, BP argued the commercial activities exception to the FSIA subjected Sopo to the court's jurisdiction.⁹

The United States District Court for the Eastern District of Missouri dismissed the case for lack of subject matter jurisdiction on the basis of sovereign immunity.¹⁰ BP appealed to the United States Court of Appeals for the Eighth Circuit.¹¹ The Eighth Circuit reversed and *held* the commercial activity exception to the FSIA applied to Sopo and thus the district court had subject matter jurisdiction. *BP Chemicals, Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 688 (8th Cir. 2002).

II. BACKGROUND

Congress enacted the FSIA to (1) put an end to the case-by-case diplomatic pressures faced by the Executive Branch, (2) clarify governing standards, and (3) ensure disputes with foreign nations are decided on purely legal grounds with the guarantee of due process.¹² Before Congress enacted the FSIA, courts typically granted immunity as an action of grace and comity.¹³ With the enactment of the FSIA, comprehensive legal standards governing civil actions where the defendant was a "foreign state or its political subdivisions, agencies, or instrumentalities" were set forth.¹⁴ Today, the FSIA is the sole basis for jurisdiction over a foreign state or an agent or instrumentality of a foreign state.¹⁵ The FSIA grants immunity to a foreign state unless it meets one of several exceptions.¹⁶ The burden of persuasion falls on the foreign state seeking immunity, and then shifts to the plaintiff to show that an exception applies.¹⁷

7. *Id.* at 679-80. In addition to suing Sopo, BP sued SPECO and an American vendor, Nooter Corporation. *Id.* at 681. BP settled its claims against Nooter and SPECO defaulted. *Id.*

8. *Id.* at 680.

9. *BP Chems., Ltd. v. Jiangsu Sopo Corp.*, 144 F. Supp. 2d 1140, 1142 (E.D. Mo. 2001).

10. *Id.* at 1141.

11. *See BP Chems.*, 285 F.3d at 677.

12. H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606; *see also* *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983) (discussing legislative history of FSIA).

13. *See Verlinden*, 461 U.S. at 486-88.

14. *Id.* at 488.

15. *See Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

16. *See* 28 U.S.C. §§ 1604-1607 (2000).

17. *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.*, 965 F.2d 1375, 1383 (5th Cir. 1992).

In *Verlinden v. Central Bank of Nigeria*, the United States Supreme Court upheld the constitutionality of the FSIA and recognized the Act codified the restrictive theory of immunity.¹⁸ In contrast to the absolute theory of sovereign immunity, which exempts a foreign state from jurisdiction in *all* actions, the restrictive theory excuses a state from the exercise of jurisdiction *as to its sovereign or public acts*, but not to acts that have private or commercial characteristics.¹⁹

A. *Commercial Activity Exception*

The commercial activity exception codifies this limitation on sovereign immunity.²⁰ However, the FSIA defines “commercial activity” somewhat vaguely.²¹ In *Republic of Argentina v. Weltover*, the United States Supreme Court sought to further define the term “commercial.”²² The Court recognized the FSIA’s dependence on the restrictive theory of sovereign immunity and held “commercial” meant what Congress understood the restrictive theory to mean at the time of enactment.²³ For the commercial activity exception to apply under the restrictive theory, a foreign state must act “in the manner of a private player.”²⁴ If a foreign government participated in the market, it would not be immune from U.S. jurisdiction if the cause of action arose out of “purely commercial transactions.”²⁵ The FSIA further instructs the courts not to look at the *purpose* of the foreign state’s activities, but the *nature* of the act.²⁶ If the

18. *Verlinden*, 461 U.S. at 488, 497.

19. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993).

20. *See* 28 U.S.C. § 1605(a)(2). The statute provides in pertinent part:

A foreign state shall not be immune . . . in any case . . .

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

Id.

21. *See id.* § 1603(d). The FSIA defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” *Id.*

22. 504 U.S. 607, 612-14 (1992).

23. *Id.* at 612-13.

24. *Id.* at 614.

25. *Id.* at 613.

26. 28 U.S.C. § 1603(d).

activity is the type an individual would engage in for profit, then it is commercial in nature.²⁷

The cases most commonly litigated are those where immunity is challenged due to commercial transactions. Section 1605(a)(2) provides for the commercial activity exception.²⁸ The commercial activity exception is triggered in cases “in which the action is based upon a commercial activity carried on in the United States by the foreign state.”²⁹ This should be read in conjunction with § 1603(e), which defines § 1605(a)(2) as meaning “commercial activity carried on by such state and having substantial contact with the United States.”³⁰ Furthermore, the Supreme Court has determined the phrase “based upon” requires something more than a mere connection.³¹

The FSIA leaves “substantial contact” largely undefined, and courts have not yet supplied a precise definition. Courts have decided, on a case by case basis, that “substantial contact” requires more than the minimum contacts sufficient to satisfy due process requirements in establishing personal jurisdiction.³² One contact is not enough.³³ Nor have two contacts been found sufficient.³⁴ In particular, a single recruitment effort in the United States for an employment contract abroad has been held insufficient.³⁵ However, some degree of solicitation in the United States might be enough.³⁶

In addition to a jurisdictional nexus between the United States and a foreign sovereign’s commercial acts, there must be a connection between the commercial acts and the plaintiff’s cause of action.³⁷ As a result, a foreign state will not have immunity when the action is “based upon” commercial acts having “substantial contact” with the United States.

27. *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.*, 965 F.2d 1375, 1384 (5th Cir. 1992).

28. 28 U.S.C. § 1605(a)(2).

29. *Id.*

30. *Id.* § 1603(e).

31. *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993).

32. *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1109 n.23 (D.C. Cir. 1983).

33. *See Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674 (5th Cir. 1999).

34. *See Mar. Int'l*, 693 F.2d at 1109.

35. *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1513 (D.C. Cir. 1988).

36. *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

37. *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.*, 965 F.2d 1375, 1384 (5th Cir. 1992).

B. Personal Jurisdiction

If an act of the defendant state falls within one of the provided exceptions and the state was properly served, a U.S. district court will automatically have personal jurisdiction over the defendant.³⁸ There need not be an independent analysis of “minimum contacts” traditionally applied to determine if personal jurisdiction meets the requirements of due process.³⁹ Regardless, courts generally engage in such an analysis.⁴⁰

In *Texas Trading v. Nigeria*, for example, the United States Court of Appeals for the Second Circuit determined the district court had subject matter jurisdiction over the defendant foreign state; but elected to proceed with a personal jurisdiction analysis, including a due process analysis.⁴¹ The court recognized a federal statute cannot create personal jurisdiction if the Constitution prohibits it.⁴² In addition to the statutory requirements of personal jurisdiction over foreign sovereigns, the Second Circuit stated it must consider principles of due process, scrutinizing the “power to exercise its authority over a particular defendant.”⁴³ The court conducted this analysis under the assumption that a foreign sovereign is a “person” for the purposes of the Due Process Clause.⁴⁴

The Supreme Court has indicated, however, a foreign state might not be a “person” for Fifth Amendment due process purposes.⁴⁵ In *Weltover*, the Court assumed, without deciding, a foreign state is a “person” for matters of due process (while, incidentally, citing *South*

38. See 28 U.S.C. § 1330(a)-(b) (2000). Subsection (b) reads: “Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [situations where exceptions to immunity apply] where service has been made under section 1608 of this title.” *Id.* § 1330(b).

39. See *World Wide Minerals Ltd. v. Republic of Kaz.*, 116 F. Supp. 2d 98, 103 (D.D.C. 2000), *aff’d in part*, 296 F.3d 1154 (D.C. Cir. 2002) (reversed on different grounds).

40. See, e.g., *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 308 (2d Cir. 1981).

41. *Id.*

42. *Id.*

43. *Id.* The Second Circuit said this requires asking five questions:

1) Does the conduct the action is based upon or related to qualify as “commercial activity”? 2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court’s exercise of subject matter jurisdiction under § 1330(a)? 3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the “judicial power” set forth in Article III? 4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)? 5) *Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?*

Id. (emphasis added).

44. See *id.* at 313.

45. See *Republic of Arg. v. Weltover*, 504 U.S. 607, 619 (1992).

Carolina v. Katzenbach as support for the opposite proposition).⁴⁶ In *Katzenbach*, the Supreme Court held the word “person,” as used in the Fifth Amendment, does not “by any reasonable mode of interpretation” include the States of the Union.⁴⁷

However, most courts have followed the position taken by the Supreme Court in *Weltover*, assuming without deciding that foreign states are persons, except for the one court which has been faced directly with the question.⁴⁸ In *Price v. Socialist People's Libyan Arab Jamahiriya*, the United States Court of Appeals for the District of Columbia Circuit held a foreign government did not qualify as a “person” for Due Process Clause purposes.⁴⁹ The court reasoned if States of the Union, which play an integral and active role in the infrastructure of the Constitution, are not “persons,” then foreign states, which are outside the structure of the Constitution, could not claim right to a protection not granted to the States.⁵⁰ The courts of the United States may therefore exercise personal jurisdiction over a foreign state even if it violates due process and traditional notions of fair play.⁵¹

III. THE NOTED CASE

In the noted case, the Eighth Circuit, reading § 1605(a)(2) in light of prior case law, decided the disclosure of trade secrets to an American corporation is a commercial activity with significant connection to the United States and, if proven, would entitle plaintiffs to relief.⁵² In determining whether the defendant was eligible for the commercial transaction exception, the court determined the plaintiff had to satisfy both elements of the FSIA exception.⁵³ First, the plaintiff's claim had to be “based upon a valid commercial activity.”⁵⁴ And second, the defendant's conduct had to be a “commercial activity carried on in the United States.”⁵⁵

The court began its discussion by deciding what the plaintiff's claim was “based upon.”⁵⁶ Relying on a Seventh Circuit decision, the court

46. *Id.*

47. *South Carolina v. Katzenbach*, 383 U.S. 301, 323 (1966).

48. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

49. *Id.* at 99-100.

50. *Id.* at 96-97.

51. *See id.* at 99-100.

52. *BP Chems., Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677, 682, 684, 686 (8th Cir. 2002).

53. *Id.* at 682.

54. *Id.*

55. *Id.* at 682, 686.

56. *Id.* at 682.

asked whether the events on which the claim was based occurred in the United States and whether they established a legal element of the claim.⁵⁷ The Eighth Circuit observed the district court would have jurisdiction if one of elements of the claim consisted of commercial activity within the United States.⁵⁸ While the entire case need not be based on the defendant's commercial activity, at least one element must be a commercial act.⁵⁹ To this end, the court focused on the state law claim alleging trade secret misappropriation.⁶⁰

BP contended that Sopo violated the Missouri Uniform Trade Secrets Act (MUTSA) when it improperly disclosed trade secrets.⁶¹ Under MUTSA, a defendant is liable for misappropriation for improperly acquiring, disclosing, *or* using trade secrets.⁶² Improper disclosure may occur when one discloses a trade secret without consent and knew or should have known that the secret had been “[a]cquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.”⁶³ According to the Eighth Circuit, MUTSA permitted a plaintiff to pursue both theft and disclosure claims for misappropriation; the two were not mutually exclusive.⁶⁴ With this understanding of MUTSA, the court found that BP's claim was clearly “based upon” Sopo's commercial activity in the United States.⁶⁵ In addition, a sufficient nexus existed between Sopo's actions and the United States, because BP's claim was linked to Sopo's procurement activities in the United States.⁶⁶

The court went on to address and discount the defendant's characterization of BP's claim.⁶⁷ Sopo contended BP's claim actually turned on whether Sopo's acquisition of trade secrets was tortious and disclosure of trade secrets was immaterial to the misappropriation claim.⁶⁸ However, this argument conflicted with the court's reading of

57. *Id.* (citing *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991)).

58. *Id.*

59. *Id.* (citing *Sun v. Taiwan*, 201 F.3d 1105, 1109 (9th Cir. 2000)).

60. *Id.* at 682-83.

61. *Id.* at 682.

62. *Id.* at 683. The statute defines “misappropriation” as: “(a) Acquisition of a trade secret of a person by another person who knows or has reason to know that the trade secret was acquired by improper means; or (b) Disclosure or use of a trade secret of a person without express or implied consent by another person.” MO. ANN. STAT. § 417.453(2) (West 2001).

63. MO. ANN. STAT. § 417.453(2)(b)(c)(ii).

64. *BP Chems.*, 285 F.3d at 683-84. In this case, BP elected only to pursue a misappropriation claim against Sopo. *Id.* at 683.

65. *Id.* at 684.

66. *Id.*

67. *Id.*

68. *Id.*

MUTSA, which provided for a misappropriation claim based solely on improper disclosure.⁶⁹

The Eighth Circuit remained equally unconvinced by the district court's reasoning.⁷⁰ While the district court acknowledged the improper disclosure claim under MUTSA, it determined that BP's reliance on such a theory was a "semantic ploy," an idea expressed in *Saudi Arabia v. Nelson*.⁷¹ In the noted case, the Eighth Circuit interpreted the *Nelson* decision as standing for the proposition that a plaintiff may not plead a legally untenable claim to demonstrate a foreign state's contacts with the United States in order to strip its immunity.⁷² BP's wrongful disclosure misappropriation claim arose under MUTSA, unlike the *Nelson* plaintiff, who based his claim on a facially invalid tort; thus, the court distinguished *Nelson* from the noted case and declared the "semantic ploy" doctrine inapplicable.⁷³ Consequently, the Eighth Circuit reversed the district court's holding and found that BP's claim met the first element of the commercial activity exception.⁷⁴

The court next discussed the second element of the exception—"a commercial activity carried on in the United States."⁷⁵ To meet this element BP had to show that (1) commercial activity took place and (2) the commercial activity had "substantial contact" with the United States.⁷⁶ Case law suggested that if a foreign state bought equipment from an American manufacturer, this activity fit with the meaning of "commercial activity."⁷⁷ Relying on this authority, the court readily concluded Sopo's activities were "commercial."⁷⁸

The court next looked at the second part of the definition and decided that Sopo's activities established substantial contact with the United States.⁷⁹ Taking guidance from the District of Columbia Circuit, the court noted that proving substantial contact required more than what

69. *Id.*

70. *Id.* at 684-85.

71. *Id.* The *Nelson* court rejected the plaintiff's attempt to recast an intentional tort claim as a negligent failure to warn claim. *Id.* (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 363 (1993)).

72. *Id.* at 685.

73. *Id.* at 686.

74. *Id.* at 686, 688.

75. *Id.* at 686.

76. *Id.*

77. *Id.* (citing *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 349 (8th Cir. 1985); *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phil.*, 965 F.2d 1375, 1384-85 (5th Cir. 1992); Restatement (Third) of the Foreign Relations Law of the United States § 453 cmt. b. (1987)).

78. *Id.*

79. *Id.*

would be necessary to satisfy due process for personal jurisdictional purposes.⁸⁰ While courts have determined that single or double visits do not create substantial contact, there is generally a sufficient nexus where the foreign state solicited business from an American corporation.⁸¹ BP alleged that Sopo, through its agent SPECO, solicited the business of American vendors; therefore, the court found the defendant satisfied this requirement.⁸²

Although Sopo argued that SPECO was not its agent and therefore BP's agency theory-based claim of substantial contacts must fail, the court disagreed.⁸³ In fact, the court found that BP presented sufficient evidence to treat SPECO as Sopo's agent for substantial contact purposes.⁸⁴ Sopo also claimed that BP must adhere to a heightened pleading standard, because it relied on an agency relationship to prove its claim.⁸⁵ However, the court dismissed this claim because, according to the Rules of Civil Procedure, such a requirement would only be necessary where the plaintiff alleged fraud.⁸⁶

Therefore, as BP established both elements of the commercial activity exception, Sopo could not invoke FSIA immunity from the jurisdiction of U.S. courts.⁸⁷ As a result, the Eighth Circuit reversed the district court's judgment and declined to consider Sopo's arguments regarding the lack of personal jurisdiction and *forum non conveniens* because both depended on facts not yet established by the district court.⁸⁸

IV. ANALYSIS

In the noted case, the Eighth Circuit followed the scant case law on the issue of substantial contact to reach a questionable outcome.⁸⁹ Due to the less than satisfactory definition of "substantial contact," the court made a swift decision regarding Sopo's connections to the United States.⁹⁰ In so doing, the court failed to discuss other factors helpful in

80. *Id.* (citing *Mar. Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1109 n.23 (D.C. Cir. 1983)).

81. *Id.* at 687.

82. *Id.*

83. *Id.* at 687-88.

84. *Id.* at 688.

85. *Id.* at 687.

86. *Id.* at 687-88.

87. *Id.* at 688.

88. *Id.*

89. *See id.* at 686-88.

90. *See id.* at 686-87.

determining the constitutionality of exercising jurisdiction over this instrumentality of a foreign state.⁹¹

This is not the first time BP had its methanol carbonylation technology improperly used by an Asian corporation, nor is it the first time BP proceeded with litigation in the United States.⁹² *BP Chemicals v. Formosa Chemical & Fibre Corp.* involved the British plaintiff suing a Taiwanese corporation for misappropriation of trade secrets.⁹³ In that case, the Third Circuit dismissed the action for lack of personal jurisdiction.⁹⁴ Although Formosa had considerable contacts in the United States, the court ruled that these contacts did not give rise to specific jurisdiction.⁹⁵ The Third Circuit emphasized the defendant must purposefully avail itself of the ability to conduct activities within the forum in order to prevent the exercise of jurisdiction on random, fortuitous, or attenuated contacts.⁹⁶ The Third Circuit additionally noted courts should weigh the minimum contacts against other factors to determine if the exercise of personal jurisdiction would be consistent with notions of “fair play and substantial justice.”⁹⁷ Therefore, the reasonableness of jurisdiction could be trumped by concepts of “fair play and substantial justice,” even when the defendant had established contacts with the forum.⁹⁸ Moreover, the court noted the United States had only a limited interest in the adjudication of this action between two noncitizens and accordingly dismissed the case for lack of personal jurisdiction.⁹⁹

On similar facts, the Eighth Circuit in the noted case found an instrumentality of a foreign state subject to the jurisdiction of a U.S.

91. *See id.* at 688.

92. *See* BP Chems., Ltd. v. Formosa Chem. & Fibre Corp., 229 F.3d 254 (3d Cir. 2000).

93. *Id.* at 257.

94. *Id.* at 268.

95. *Id.* at 258-59. Formosa had entered into four contracts with U.S. companies. *Id.* at 258. The Third Circuit found that Formosa had not purposefully directed its activities at residents of the forum. *See id.* at 259.

96. *Id.* at 259.

97. *Id.* at 260 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). These factors are: (1) “the burden on the defendant”; (2) “the forum State’s interest in adjudicating the dispute”; (3) “the plaintiff’s interest in obtaining convenient and effective relief”; (4) “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and (5) “the shared interest of the several States in furthering fundamental substantial social policies.” *Id.* (citing *Burger King Corp. v. Rudzewica*, 471 U.S. 462, 476-77 (1985)).

98. *Id.*

99. *Id.* at 268. The court had found that the conduct giving rise to the plaintiff’s claim was unrelated to the United States and that the defendant’s contacts with the United States did not establish purposeful availment of the forum before it moved on to the “fair play and substantial justice” analysis. *Id.* at 261-62.

court.¹⁰⁰ These opposite conclusions result in a double standard as far as due process protection is concerned. The problem originates in the FSIA and its corollary, 28 U.S.C. § 1330. Section 1604 provides foreign states “shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”¹⁰¹ The corollary, section 1330 of title 28, addresses actions against foreign states, stating courts may exercise personal jurisdiction as to every claim for relief where service has been made pursuant to § 1608 and “with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 of this title.”¹⁰² Personal jurisdiction is therefore automatic so long as there is subject matter jurisdiction and proper service; courts need not engage in a constitutional analysis. Generally this is not problematic, because the “substantial contacts” requirements entail due process elements; however, problems are foreseeable.

Because Congress intended to incorporate due process into the immunity exceptions, the exercise of subject matter jurisdiction should not typically violate due process.¹⁰³ For example, when analyzing a commercial activity exception claim, courts have construed “substantial contacts” to mean more than the minimum contacts for personal jurisdiction.¹⁰⁴ Obviously, if the higher standard is met, the lesser requirement will be as well. However, the constitutional due process inquiry does not end with the establishment of minimum contacts.¹⁰⁵ Thus, it is possible to imagine a situation where the substantial contacts test might be met and yet the exercise of personal jurisdiction would violate the Due Process Clause. The FSIA does not sufficiently take due process into account, and courts must therefore read it into the statute during the determination of subject matter jurisdiction. This is particularly necessary when evaluating subject matter jurisdiction under a commercial activity exception.

When engaging in this due process analysis, courts should treat foreign sovereigns as persons because the purpose and the language of the statute require such an interpretation. First, the purpose of the FSIA is consistent with the principles of due process. To avoid a case-by-case analysis of sovereign immunity and to end the political pressures

100. BP Chems., Ltd. v. Jiangsu Sopo Corp., 285 F.3d 677, 688 (8th Cir. 2002).

101. 28 U.S.C. § 1604 (2000).

102. *Id.* § 1330(a)-(b).

103. See H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

104. See, e.g., *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998).

105. See *Tex. Trading & Milling Corp. v. Fed. Republic of Nig.*, 647 F.2d 300, 314 (2d Cir. 1981).

involved in those determinations, Congress passed the FSIA to “assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.”¹⁰⁶ Rather than simply leave it to the courts to decide to apply immunity exceptions, which by their nature are politically charged, Congress intended to provide fair standards for the courts to follow.¹⁰⁷

Second, providing due process protections to sovereign nations who are not immune because of a commercial activity exception is a natural extension of the statute. The principle behind this exception is that if a foreign sovereign is acting like a private individual in the market, then it should be treated like a private individual with respect to its liability. If a foreign government executes a contract with an American company, then it cannot claim immunity based on its sovereign status. If the courts treat a foreign sovereign like a private individual regarding liability, they should also treat it like a private individual in terms of due process protections. It is entirely inconsistent to say that a government will not be immune because it is not *acting* as a foreign sovereign, but to deny it protection under the due process clause because it *is* a foreign sovereign.

The Second Circuit, in *Texas Trading*, noted the reason behind the commercial activity exception is to allow corporations to enter into contracts with foreign sovereigns without fear of an immunity defense in cases where the sovereign breaches the contract.¹⁰⁸ Conversely, foreign sovereigns can enter into contracts without fear they will be denied the same due process bestowed upon their private entity counterpart. This understanding is not inconsistent with the Supreme Court’s decision in *South Carolina v. Katzenbach*, which held a State of the Union is not a “person” within the meaning of the due process clause.¹⁰⁹ In *Katzenbach*, South Carolina claimed protection under the Fifth Amendment for actions taken within its governmental capacity.¹¹⁰ In contrast, foreign sovereigns need not be granted due process protection for their governmental acts, but should be afforded the same protection as a private individual when acting as one.

Equally unproblematic is the United States Court of Appeals for the District of Columbia’s recent decision in *Price*, although it relied heavily on *Katzenbach* to hold a foreign sovereign is not a person for due process

106. H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

107. *See id.*

108. *Tex. Trading*, 647 F.2d at 316.

109. 383 U.S. 301 (1966).

110. *Id.* at 323. South Carolina was attempting to invalidate portions of the Voting Rights Act of 1965 by claiming that it denied due process by barring judicial review of administrative findings. *Id.* Commercial activity was not an issue in the case. *See id.* at 301-37.

purposes.¹¹¹ In *Price*, the defendant government appealed from the district court's denial of its motion to dismiss.¹¹² On appeal, the defendant asserted that it violated the Due Process Clause for an American court to exercise jurisdiction over a foreign sovereign where the only connection to the United States was the plaintiff's nationality.¹¹³ The defendant government argued it should receive the same due process protection as did individuals and corporations.¹¹⁴ The appellate court, relying on *Katzenbach*, rejected that argument, finding a foreign sovereign cannot be a person within the meaning of the Fifth Amendment.¹¹⁵ The States of the Union, which play an integral role in the nation's constitutional scheme, are not "persons" and therefore do not receive the protection of the Fifth Amendment.¹¹⁶ It followed, then, that a foreign sovereign outside of the Constitution's infrastructure could not claim more protection than that a state receives.¹¹⁷

However, the noted case is distinguishable from *Price* because *Price* deals with the terrorism exception, not the commercial activity exception.¹¹⁸ The terrorism exception allows a U.S. district court to exercise jurisdiction over a foreign sovereign if it engaged in terrorist activity, even if that activity occurred outside of the United States.¹¹⁹ The conduct giving rise to the claim would be acts committed by a foreign sovereign and could very well include activities unique to a government.¹²⁰ On the other hand, the commercial activity exception is based on conduct in which a person or corporation could engage.¹²¹ The courts cannot, in fairness, obtain jurisdiction over a defendant because it acts like a person, but then deny the defendant the due process protection

111. *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99-100 (D.C. Cir. 2002) (holding that the Fifth Amendment is not an obstacle to holding defendant state subject to U.S. jurisdiction).

112. *Id.* at 86. Defendant Libya argued in its motion to dismiss that the exercise of both personal and subject matter jurisdiction by the court was unconstitutional and that plaintiffs failed to state a claim on which relief could be granted. *Id.*

113. *Id.* The Due Process Clause requires that a court not exercise jurisdiction over an absent defendant unless the defendant has certain minimum contacts with the forum so as not to offend "traditional notions of fair play and substantial justice." *Id.* at 95.

114. *Id.*

115. *Id.* at 96.

116. *Id.*

117. *Id.*

118. Compare *BP Chems., Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002), with *Price*, 294 F.3d at 82.

119. 28 U.S.C. § 1605(a)(7) (2000). This 1996 Amendment to the FSIA created a judicial forum for compensating victims of terrorism, punishing foreign sovereigns, and deterring the sponsorship and execution of terrorist acts. *Price*, 294 F.3d at 88-89.

120. See *Price*, 294 F.3d at 89.

121. See *Republic of Arg. v. Weltover*, 504 U.S. 607, 614 (1992).

to which a person is entitled under the Fifth Amendment. Thus, giving a foreign sovereign defendant less protection than a person or corporation is not only anomalous, but contrary to the purposes of the FSIA.

Therefore, to avoid the potential denial of due process, the court should engage in a two-part analysis: first, determine the existence of statutory authorization for jurisdiction and service of process, which is provided for in the FSIA; and second, determine the consistency of due process with the exercise of personal jurisdiction.¹²² In jurisdictional inquiries for cases not involving the FSIA, the courts have applied this dual determination.¹²³

Even within the context of the FSIA, some courts have performed a similar analysis. In *Vermeulen v. Renault*, a case involving the French government-owned automotive manufacturer, the Eleventh Circuit held a court will have specific jurisdiction if it possesses sufficient minimum contacts to satisfy due process requirements and it conforms with "traditional notions of fair play and substantial justice."¹²⁴ It is a natural assumption that a defendant is subject to the protections of due process, and therefore many courts have taken these considerations into account.¹²⁵ However, in the noted case, the Eighth Circuit failed to acknowledge the factors necessary for the constitutional exercise of jurisdiction over the instrumentality of a foreign sovereign.¹²⁶

V. CONCLUSION

In the noted case, the Eighth Circuit failed to take due process requirements into account. To avoid the peculiar result of giving greater due process protection to domestic and foreign nongovernmental corporations, courts must interpret the subject matter jurisdiction requirements of the FSIA to include principles of due process. These principles must be considered, especially when faced with the commercial transaction exception to sovereign immunity. Because the foreign state is acting as a private actor in the market, it must be guaranteed the protections that private actors receive. The present

122. See 28 U.S.C. § 1330; *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

123. See *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). In *Omni* the Supreme Court held before a court exercises personal jurisdiction, there must be a notice to the defendant, a constitutionally sufficient relationship between the defendant and the forum, and authorization for service. *Id.*

124. 985 F.2d 1534, 1545 (11th Cir. 1993) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

125. See, e.g., *Tex. Trading v. Fed. Republic of Nig.*, 647 F.2d 300, 314 (2d Cir. 1981).

126. See *BP Chems., Ltd. v. Jiangsu Sopo Corp.*, 285 F.3d 677 (8th Cir. 2002).

wording of the FSIA creates the potential for a double standard; to avoid it, courts must borrow notions of fair play from personal jurisdiction analyses, and read them into the requirements for subject matter jurisdiction. The FSIA grants foreign states immunity from U.S. jurisdiction, but under the Eighth Circuit's interpretation, it could also grant them immunity from due process.

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