RECENT DEVELOPMENTS

Adler v. Nigeria: What Congress Forgot to Say About Minimum Contacts and the Criminality of Commercial Activity

I. *ADLER V. NIGERIA*: THE CONTROVERSY

James E. Adler, a U.S. citizen and resident of California,[1] is the president and controlling shareholder of El Surtidor, a Mexican corporation with its principal place of business in Tijuana, Mexico.[2] In August of 1992, Adler received a letter from the Nigerian Chief Abba Ganna proposing an "investment opportunity"[3] between himself, Adler, and the Nigerian National Petroleum Corporation (NNPC).[4] The letter explained that, during the previous civilian regime in Nigeria, elected members of the ruling party formulated companies to award themselves "fantastically over-invoiced" governmental contracts.[5] A new military regime overthrew the elected government, but the new regime investigated this situation and endorsed the payment of partially or completely executed contracts.[6]

Ganna's letter suggested that if Adler allowed the assignment of a contract to El Surtidor, the Nigerian government would pay the complete value of the contract.[7] Adler would then receive a commission for the

1. *See* Adler v. Nigeria, 219 F.3d 869, 871 (9th Cir. 2000) [hereinafter *Adler II*].
2. *Id.*
3. *See* Adler v. Nigeria, 107 F.3d 720, 722 (9th Cir. 1997) [hereinafter *Adler I*].
4. *See Adler II*, 219 F.3d at 872.
5. *See id.*
6. *See id.*
7. *See Adler I*, 107 F.3d at 722.

Nigerians' use of El Surtidor.[8] Nigerian law would allow the assignment of such a contract, despite the fact that the work had been completed, to El Surtidor.[9] This is a common and notorious type of fraud practiced in Nigeria by "skilled confidence men."[10]

Adler agreed to the arrangement.[11] He was told the Nigerian government would assign El Surtidor the rights under a contract between the NNPC and another foreign company, Strabarg Company, for the computerization of certain oil fields in Nigeria.[12] The work was completed, but Strabarg had not yet received full payment.[13] Adler sent Ganna four signed and stamped copies of El Surtidor letterhead and pro forma invoices, as well as a bank account number in the Grand Cayman Islands where $130 million would be deposited.[14] Additionally, Adler purchased first-class airplane tickets to Mexico for Nigerian officials to collect their share of the money.[15] Adler's commission was to be 40%, with the remainder split between "miscellaneous expenses" (10%) and the Nigerian officials (50%).[16]

In September of 1992, Adler traveled to Nigeria to finalize the contract.[17] He met with John Olisa, Deputy Governor of the Central Bank of Nigeria, who showed Adler a bank draft for sixty million dollars made out to El Surtidor and Adler.[18] Olisa also gave him a contract, which Adler signed without reading.[19] Olisa informed Adler that the funds would not be transferred until Adler made a "shortfall deposit" of $570,000 to cover the difference in the exchange rate between the U.S. dollar and the Nigerian nira.[20] This payment was the first of several payments Adler would make over the next two years to people Adler believed to be officials of the Nigerian government.[21] These officials "described the payments variously as shortfall deposit funds, taxes, processing fees, confirmation fees, surcharges, legal fees, travel expenses, and gratification."[22] These "officials" assured Adler that the

8. *See id.*
9. *See id.*
10. *See Adler II*, 219 F.3d at 879 (Noonan, J., dissenting).
11. *See Adler I*, 107 F.3d at 722.
12. *See Adler II*, 219 F.3d at 872.
13. *See Adler I*, 107 F.3d at 722.
14. *See Adler II*, 219 F.3d at 872.
15. *See id.*
16. *See id.*
17. *See Adler I*, 107 F.3d at 722.
18. *See Adler II*, 219 F.3d at 872.
19. *See id.*
20. *See Adler I*, 107 F.3d at 722.
21. *See Adler II*, 219 F.3d at 872.
22. *Id.*

$60 million would be forthcoming with almost every request for a payment.[23]

In November of 1993, Adler borrowed $450,000 from Banca Serafin to make another payment.[24] The bank required Adler to reroute the $60 million from his Cayman Islands account to a Banca Serafin account in New York.[25] A Banca Serafin official directed a deputy governor of the Central Bank of Nigeria to send the $60 million to the New York account.[26] The money never arrived.[27] In February 1994, Adler enlisted the aid of former Congressmen Mervyn Dymally and Jim Bates to help him collect the money.[28] After traveling to Nigeria and investigating the situation, Dymally reported to Adler that the scheme had been a "scam."[29] Despite this warning, Adler continued making payments to Nigerian officials.[30]

Adler paid a total of $5,180,000 in anticipation of the $60 million.[31] In May 1994, he filed suit in U.S. District Court for the Southern District of California, naming the Federal Republic of Nigeria, the Central Bank of Nigeria, the Nigerian National Petroleum Corporation,[32] and seventeen Nigerian officials as defendants, alleging claims of fraud, conspiracy to commit fraud, and negligence.[33] The defendants moved to dismiss on the basis of sovereign immunity.[34] The district court held that the defendants were not immune under the Foreign Sovereign Immunities Act (FSIA) because their activities fell within its "commercial activity exception."[35] The defendants appealed the district court's denial.[36] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's exercise of jurisdiction over the defendants and remanded the case for trial.[37]

On remand, the district court held that it had jurisdiction, but the defendants ultimately prevailed on the merits. The court made a number of factual findings, among them that no contract had originally existed

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23. *See id.*
24. *See id.* at 873.
25. *See id.*
26. *See id.*
27. *See Adler I*, 107 F.3d 720, 723 (9th Cir. 1997).
28. *See Adler II*, 219 F.3d at 873.
29. *See id.*
30. *See id.*
31. *See id.* at 872.
32. The Nigerian National Petroleum Corporation was later dismissed from the suit by the district court. *See id.* at 873.
33. *See id.*
34. *See Adler I*, 107 F.3d 720, 723 (9th Cir. 1997).
35. *See id.*
36. *See id.*
37. *See id.* at 730.

for the computerization of the oil fields and thus the rights thereto could not have been assigned to El Surtidor.[38] Additionally, the court found that Adler knowingly and intentionally participated in the criminal activity proposed in Abba Ganna's letter and that Adler violated both California and federal bribery law through his payments to Nigerian officials.[39] As a result of these findings, the district court denied Adler recovery pursuant to the "unclean hands" doctrine.[40] The defendants appealed the district court's exercise of jurisdiction over them, and Adler cross-appealed the district court's application of the "unclean hands" doctrine.[41] The Ninth Circuit *held* that the district court properly exercised jurisdiction under the commercial activity exception to the FSIA, and that the district court had properly applied the "unclean hands" doctrine.[42] One judge dissented, arguing that the district court never had jurisdiction because the contract was illegal and unenforceable.[43] *Adler v. Nigeria*, 219 F.3d 869 (9th Cir. 2000).

II. *ADLER* IN CONTEXT: HISTORICAL BACKGROUND

A. The Development of Foreign Sovereign Immunity

The doctrine of foreign immunity protects a foreign state, its agents, and instrumentalities from jurisdiction in U.S. courts.[44] The doctrine is based on the notion that one sovereign cannot exercise dominion over another.[45] International issues during a country's infancy generally fell within the competency of the executive, not the judiciary.[46] However, as the role of government changed and states assumed increasingly economic roles, the issue gained importance.[47] As U.S. courts grappled with suits brought against foreign sovereigns, a constitutional conflict surfaced.[48] Article III confers on the federal judiciary the power to settle disputes between U.S. citizens and foreign governments.[49] The

38. *See Adler II*, 219 F.3d at 873.
39. *See id.*
40. The "unclean hands" doctrine allows a court to deny equitable relief when the person seeking that relief has acted in bad faith, no matter how improper the behavior of the defendant. *See id.* at 876-77 (citing Precision Instruments Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 814 (1945)).
41. *See id.* at 871.
42. *See id.* at 878.
43. *See id.* at 882 (Noonan, J., dissenting).
44. *See* BLACK'S LAW DICTIONARY 753 (7th ed. 1999).
45. *See* Tex. Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 302 n.1 (2d Cir. 1981).
46. *See* Danny A. Hoek, *Foreign Sovereign Immunity and Saudi Arabia v. Nelson: A Practical Guide*, 18 HASTINGS INT'L & COMP. L. REV. 617, 617 (1995).
47. *See id.*
48. *See id.*
49. U.S. CONST. art. III, § 2, cl. 1.

Constitution simultaneously gives the executive branch general authority over international relations.[50] This structure created tension over which branch of government should determine the application of sovereign immunity in the United States.[51]

Two types of sovereign immunity exist: absolute immunity and restrictive immunity. Absolute immunity, as the name implies, guarantees immunity to a sovereign regardless of the facts of the particular situation.[52] This concept first appeared in U.S. courts in the seminal case of *Schooner Exchange v. McFaddon*.[53] Chief Justice Marshall stated that the jurisdiction of a nation within its own borders is absolute.[54] However, common interests among sovereigns created a limited number of instances whereby a sovereign relaxes its absolute jurisdiction, such as cases involving another sovereign or its ministers.[55]

Schooner Exchange formed the basis of absolute sovereign immunity in the United States until the 1940s, when Chief Justice Stone declared that the judiciary should leave all decisions involving foreign sovereign immunity to the executive branch.[56] The State Department was eager to accept Stone's assignment.[57] It adopted the doctrine of restrictive immunity in 1952 and declared that a foreign state would be granted immunity from suit in the United States only with respect to its public or governmental actions and not with respect to its commercial or proprietary actions.[58] The application of restrictive immunity, however, was confusing and inconsistent because the State Department failed to define the exact circumstances under which immunity would be extended or denied.[59]

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50. *Id.* art. II, § 2, cl. 2.
51. Hoek, *supra* note 46, at 617.
52. *See id.* at 619.
53. Schooner Exch. v. McFaddon, 11 U.S. 116 (1812).
54. *See id.* at 136.
55. *See id.* at 137-38.
56. *See* Kevin Leung, Cicippio v. Iran*: Putting the Foreign Sovereign Immunity Act's Commercial Activities Exception in Context*, 17 LOY. L.A. INT'L & COMP. L. REV. 701, 705 (1995).
57. Nationalization of railroads and other industries in late nineteenth century Europe led to increased tort and contract claims with states to resolve questions of sovereign immunity. In these cases, European courts developed the doctrine of restrictive immunity which limited immunity to a state's "public" and not "private" activities. The State Department's actions were partially in response to this trend. *See* Hoek, *supra* note 46, at 620.
58. *See* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 698 (1976). The State Department adopted this doctrine with the issuance of the 1952 "Tate letter" from Jack Tate, Acting Legal Adviser to the Secretary of State, to Monroe Leigh, Legal Advisor to the State Department. The Tate letter observed that several (mostly European) jurisdictions had already adopted the restrictive theory of sovereign immunity by denying immunity in cases based on the private or commercial acts of a foreign state. The letter recognized that U.S. policy of absolute immunity was no longer practical given the realities of modern international commercial law.
59. *See* Hoek, *supra* note 46, at 620.

The legislative branch stepped into the fray in 1976 when Congress, wanting to eradicate persistent inconsistencies, passed the FSIA.[60] The Act establishes a presumption of immunity for foreign governments unless one of its specific exceptions applies.[61] The commercial activity exception is the most often litigated provision of the FSIA.[62] It codifies the distinction the State Department drew in 1952 between public and private behavior of a foreign sovereign.[63] If a foreign state engages in a commercial activity that affects the United States, it cannot claim sovereign immunity.[64] This exception exists to prevent foreign states from hiding behind their sovereignty when they act as market participants.[65]

B. The Holding in Adler

The Ninth Circuit began its consideration of *Adler* by looking to the FSIA's definition of commercial activity as "a regular course of commercial conduct or a particular commercial transaction or act."[66] Furthermore, the commerciality of an activity is determined by its nature and not by its purpose.[67] This definition, however, is too broad to provide substantial assistance to a court deciding what activity is commercial.[68]

The United States Supreme Court gave the FSIA's definition of commercial activity a factual perspective in *Argentina v. Weltover*.[69] The

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60. *See id.* at 621.

61. *See* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (West 2000) [hereinafter FSIA]. The FSIA also gives district courts jurisdiction over suits against foreign states where a state has implicitly or explicitly waived immunity where a state has engaged in tortious activity or state-sponsored terrorism causing injury to a person within the United States, or to enforce an arbitration agreement. *See id.* §§ 1605(a)(1), 1605(a)(5), 1605(a)(7), 1605(a)(6).

62. *See* Dean Brockbank, *The Sovereign Immunity Circle: An Economic Analysis of* Nelson v. Saudi Arabia *and the Foreign Sovereign Immunities Act*, 2 GEO. MASON L. REV. 1, 5 (1994).

63. *See* 28 U.S.C. § 1605(a)(2).

64. The full text of the commercial activity exception is as follows:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the 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 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.

65. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 368 (1993) (White, J., concurring).

66. *See* 28 U.S.C. § 1603(d).

67. *See id.*

68. *See* Brockbank, *supra* note 62, at 6.

69. *See* Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 2166 (1992).

court held that when a foreign state has exercised powers that can also be exercised by private citizens, then it has engaged in commercial activity and cannot assert immunity.[70] Furthermore, because the FSIA dictates that the nature rather than the purpose of the activity will determine its commerciality, it is irrelevant whether the foreign government is acting with a profit motive or has "uniquely sovereign objectives."[71]

The *Adler* court determined that the *Weltover* definition of commercial activity had been satisfied.[72] The Nigerian officials did what every private party does in the open market.[73] The court made two further observations to support its contention. First, a contract for services is commercial and "[t]he fact that the contract was for an illegal purpose, and therefore was unenforceable does nothing to destroy its commercial nature."[74] Second, if criminal activity contains some commercial component, then it falls within the FSIA's commercial activity exception.[75] The court cited examples of criminal activity which lack any sort of commercial component, such as murder, kidnapping, and assassination.[76]

Weltover also addressed the second requirement for triggering the commercial activity exception whereby the commercial activity must "[cause] a direct effect in the United States."[77] The Supreme Court examined the legislative history of the FSIA and determined that Congress intended a direct effect to be both "substantial" and "foreseeable."[78] However, the federal appellate court in Weltover rejected this test and the Supreme Court agreed with the lower court.[79] Under the *Weltover* court's definition, an effect is direct if it is "an immediate consequence of the defendant's activity."[80]

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70. *See id.* at 614.
71. *See id.*
72. *See Adler II*, 219 F.3d 869, 875 (9th Cir. 2000).
73. *See id.*
74. *Id.*
75. *See id.*
76. *See id.* (citing Berkovitz v. Iran, 735 F.2d 329, 331 (9th Cir. 1984); Cicippio v. Iran, 30 F.3d 164, 167-68 (D.C. Cir. 1994); Letelier v. Chile, 748 F.2d 790, 797 (2d Cir. 1984)).
77. *See* 28 U.S.C. § 1605(a)(2).
78. *See* Argentina v. Weltover, Inc., 504 U.S. 607, 617 (1992).
79. The Court in *Weltover* observed that the Second Circuit's rejection of this test contradicted several circuits' previous definitions of "direct effect." *See, e.g.*, Am. W. Airlines v. GPA Group, Ltd., 877 F.2d 793, 798-800 (9th Cir. 1989); Zernicek v. Brown & Root, Ltd., 826 F.2d 415, 417-19 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); Mar. Int'l Nominees Establishment v. Guinea, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983); Ohntrup v. Firearms Ctr., Inc., 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985). The Supreme Court's decision in *Weltover* presented a solution to this disagreement. *See Weltover*, 504 U.S. at 617.
80. *See id.* at 618 (citing Weltover, Inc. v. Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

With the *Weltover* definition in mind, the district court turned to the facts of *Adler*. It found that Adler's payment of bribes violated both California's bribery law and the federal Foreign Corrupt Practices Act (FCPA).[81] The Ninth Circuit further found that Adler's use of U.S. mail and telephones to violate the FCPA was an immediate consequence of the defendants' activity.[82] Therefore, Adler's violation of federal law[83] is a direct effect in the United States within the meaning of *Weltover*'s immediate consequence requirement.[84] Unfortunately for Adler, the very fact which allowed him to maintain his action also prevented him from recovering the lost money because he intentionally "dirtied his hands" by conspiring with the Nigerians.[85]

The dissent, however, opined that *Adler* does not belong in U.S. courts at all. It pointed to the district court's factual finding that no contract ever existed for the computerization of the oil fields in question, and therefore such a contract could not have been assigned to El Surtidor.[86] The dissent maintains that once the district court determined there was no contract, federal jurisdiction disappeared and the trial should have stopped.[87] Jurisdiction failed because "[a] criminal conspiracy in violation of the laws of Nigeria and of the United States does not constitute commercial activity by Nigeria."[88] Furthermore, California law does not recognize the agreement between Adler and the Nigerian officials as a valid contract.[89] An invalid contract could not serve as the basis of a lawsuit because it is a legal nonentity.[90]

Even if jurisdiction would survive such a finding, the dissent disagreed entirely with the majority's rationale for construing criminal acts as commercial activity.[91] The dissent returned to the nature/purpose distinction relating to commercial activity inherent in the FSIA.[92] It

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81. *See Adler II*, 219 F.3d at 873.

82. *See id.* at 876.

83. Pursuant to California law, the Ninth Circuit reviewed the district court's determination for an abuse of discretion in the application of the unclean hands doctrine and found that it had been proper. *See id.* at 877.

84. *See id.* at 876.

85. *See id.* at 877.

86. In fact, the oil fields did not actually exist. *See id.* at 879 (Noonan, J., dissenting).

87. *See id.* at 878 (Noonan, J., dissenting).

88. *Id.*

89. *See id.* at 881 (Noonan, J., dissenting).

90. *See id.* at 882 (Noonan, J., dissenting).

91. *See id.* at 878 (Noonan, J., dissenting).

92. The dissent called the majority's test for determining commerciality to be "entirely novel and without foundation in any precedent." The majority looked to *Weltover* for the correct test, and stated that when a foreign government acts in the manner of a private player in the market, then those acts are commercial. Furthermore, the pertinent question is whether the nature of those acts, irrespective of motivation, are the type in which a private party could engage. The

characterized the majority's drawing a difference between an illegal contract and a contract with an illegal objective as an "exercise in hairsplitting."[93] The district court found that both the nature and purpose of the alleged contract were illegal.[94] It especially viewed contracting to defraud the government as alien to the marketplace and "inherently evil."[95] Furthermore, the majority's holding is insulting to the Nigerian government because a contract which defrauds it should not be sufficient to destroy its normal immunity to suits in the United States.[96] The majority's classification is somewhat paradoxical because "[t]he government is not in business to defraud itself."[97]

III. THE COURTS DEVIATE FROM THE CONGRESSIONAL PATH

The significance of the noted case stems from its dissent. The question of whether such a transnational scheme to defraud a sovereign government can qualify as commercial activity is fundamental to the FSIA. Another potentially important question is whether a contract ever existed, given the fact that both Chief Abba Ganna and the oil fields he referred to are fictitious. The resolution of these questions would have directly affected Adler's ability to maintain his suit against the Nigerian defendants. Had the district court considered these issues, this controversy might have been dismissed in its infancy. The majority's opinion is also flawed in that it did not perform the complete commercial activity exception analysis. The majority engaged in a two-pronged test; there is a third prong which is not apparent on the face of the statute but is present in the FSIA's legislative history and most of the case law applying the commercial activity exception. Neither the district court nor the Ninth Circuit addressed this third prong. Even assuming that denying immunity under the commercial activity exception is proper, Nigeria's lack of minimum contacts with the United States might have prevented this suit.

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dissent mistakenly stated that the implication of the majority's test, which is entirely derived from the controlling Supreme Court precedent on the issue, is that only what is "uniquely sovereign" will be immune. This is a misunderstanding on the part of the dissent. Had the majority actually said what the dissent heard, then its attack on the lack of precedent for the majority's test would have been entirely appropriate. *See id.* at 882 (Noonan, J. dissenting).

93. *See id.* at 880 (Noonan, J. dissenting).
94. *See id.*
95. *See id.*
96. *See id.* at 881 (Noonan, J. dissenting).
97. *Id.*

A. The Forgotten Third Prong: Minimum Contacts Analysis

On June 2, 1976, the House of Representatives Subcommittee on Administrative Law and Governmental Relations held hearings to discuss the bill which would later be passed as the FSIA.[98] At the hearings, Bruno A. Ristau, then-Chief of the Foreign Litigation Section of the Civil Division within the Department of Justice, likened the bill to a "federal long-arm statute" which would allow the courts to exercise personal jurisdiction over foreign states where the requisite contacts with the United States are present.[99] Without these contacts, however, a plaintiff could not maintain the action because minimum contacts with the forum are necessary to preserve the constitutional protections of due process.[100]

The exceptions to the FSIA are designed to provide a method of legal redress for plaintiffs in the United States against foreign sovereigns. However, it is clear from its history that Congress intended for a foreign sovereign to be nonetheless afforded due process protections consistent with the Fifth Amendment to the Constitution when its immunity did not apply.[101] This notion of due process inherent in the statute also ensures that only suits which directly implicate the interests in the United States will be allowed to proceed.[102] Neither "due process" nor "minimum contacts" is expressly mentioned in the text as requirements for invoking the commercial activity exception, yet this concept is crucial for the law to function as Congress intended. This question was never addressed at any point in *Adler*'s journey through the courts.

The courts reported this "hidden third prong" to the commercial activity exception soon after the FSIA's passage. A defendant over whom jurisdiction is asserted under the commercial activity exception must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantive justice.'"[103] Minimum contacts analysis begins with the question of whether a foreign state is a "person" for the purposes of the Fifth Amendment's due process clause.[104] The *Weltover* Court

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98. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the Comm. on the Judiciary of the House of Representatives*, 94th Cong. 31 (1976) [hereinafter *Hearings on H.R. 11315*].

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. Carey v. Nat'l Oil Co., 592 F.2d 673, 676 (2d Cir. 1979) (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, (1945)).

104. *See* Tex. Trading & Milling Corp. v. Nigeria, 647 F.2d 300, 313 (2d Cir. 1981).

assumed that it was.[105] However, the Court simultaneously acknowledged its previous contradictory conclusion in *South Carolina v. Katzenbach*, which held that a U.S. state is not a person for these purposes.[106] Nevertheless, the Court proceeded with a minimum contacts analysis despite its circumvention of the exact determination of personhood.[107] The modern trend among courts is to follow *Weltover*'s assumption of personhood, to forego an exact determination, and to focus on the nature of the defendants' activities within the United States.[108]

The Second Circuit[109] engaged in what is probably the most comprehensive consideration of the minimum contacts question within the commercial activity exception. Like the noted case, it considered the Nigerian government's claim of immunity after a contractual dispute with a U.S. corporation.[110] In *Texas Trading*, the government of Nigeria ordered over sixteen million metric tons of cement.[111] Nigeria grossly misjudged its needs, and its ports became overwhelmed by cement-laden ships.[112] The government ultimately asked its suppliers to cancel the contracts.[113] Four suppliers who did not settle brought this action against the Nigerian government and the Central Bank of Nigeria in the Southern District of New York.[114]

The *Texas Trading* court put forth four inquiries to determine if the maintenance of the suit against Nigeria would violate notions of fair play and justice:

> [T]he court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to

105. Argentina v. Weltover, 504 U.S. 607, 619 (1992).

106. *See id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966)).

107. One might expect *Weltover*, which was meant to impose uniformity on the application of the commercial activity exception, to be instructive in minimum contacts analysis as well. Conversely, the Supreme Court mentioned it only briefly while refuting the Argentine government's argument that exercising jurisdiction would violate its Fifth Amendment right to due process of law. *See Weltover*, 504 U.S. at 619.

108. *See, e.g.*, Hanil Bank v. PT. Bank Negara Indonesia (Persero), 148 F.3d 127, 134 (2d Cir. 1998) (holding the Indonesian State bank is a "foreign state" for FSIA purposes but not addressing the issue of whether it is a person for due process purposes); Wasserstein Perella Emerging Mkts. Fin., LP v. Formosa, 2000 WL 573231, at *10-*11 (S.D.N.Y. 2000).

109. *Tex. Trading*, 647 F.2d at 303.

110. *See id.*

111. *See id.*

112. *See id.* at 305.

113. *See id.* at 302.

114. *See id.* at 306.

> defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.[115]

The court observed that the Central Bank kept large amounts of money in New York City.[116] This was enough for the Central Bank to have benefited from the protection of U.S. law, because it could have resorted to U.S. law if withdrawals were made on its accounts after the contracts were cancelled.[117] Litigation in U.S. courts was reasonably foreseeable to the bank due to this legal protection.[118] The *Texas Trading* court looked to *Shaffer v. Heitner* when it stated that the Central Bank had "every reason to expect to be haled before a court [in the United States.]"[119]

Although Nigeria and the United States are far away from each other, every transnational contract includes associated costs such as traveling expenses.[120] Finally, U.S. interest in hearing the suit is inherent in the FSIA's purpose of providing plaintiffs a venue in which to maintain suits against foreign sovereigns.[121] If the United States had no interest in hearing the case, Congress would not have passed the FSIA. Its interest in hearing the suit notwithstanding, a court must be reasonable in its treatment of foreign defendants. The legislative history also suggests a congressional awareness that the United States be treated with great deference when litigating in foreign courts.[122] The FSIA's drafters were cognizant of the need to reciprocate this deference.[123]

Applying *Texas Trading*'s analysis to the noted case illustrates the *Adler* decision's shortcomings. The Nigerian officials in *Adler* did everything but avail themselves of the protection afforded by U.S. law. Furthermore, their actions spawned violations of both state and federal law. It would be illogical to conclude that the defendants in *Adler*

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115. *Id.* at 314 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 297 (1980); Kulko v. Cal. Super. Ct., 436 U.S. 84, 97-98 (1978); Hanson v. Denckla, 357 U.S. 235, 253 (1953); McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223 (1957); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

116. *See id.*

117. *See id.*

118. *See id.* at 315.

119. *Id.* (quoting Shaffer v. Heitner, 433 U.S. 186, 216 (1977) (internal quotations omitted)).

120. *See id.*

121. *See id.*

122. Ristau explained to the House subcommittee that "our experience has been that we are treated very respectfully. We are certainly getting our day in court; extensions of time have often been granted very liberally. . . . [T]he United States does frequently invoke the aid of foreign courts to enforce its own rights." *See Hearings on H.R. 11315*, *supra* note 98, at 36.

123. *See id.*

somehow benefited from U.S. law.[124] Contrary to *Texas Trading*, litigation in the United States over the *Adler* decision was unforeseeable to the Nigerian government and its Central Bank. However, litigation was foreseeable to them in the sense that they had been brought into court in the United States on extremely similar grounds several times before.[125] It could be argued that the number of times the government and bank were named as defendants in U.S. courts created the foreseeability of being sued there again.

The dissent in *Adler* underscores the problem of foreseeability in the facts of the case. The defendants committed fraud through the acts of high-ranking governmental officials and officials in the Central Bank. Judge Noonan might argue that it is illogical to impose upon the named defendants, (i.e., the government and the bank) the foreseeability of being sued in the United States. The mere fact that several of their representatives committed fraud may not be enough to constitute foreseeability.

Factors other than foreseeability would weigh in favor of jurisdiction. The defendants would suffer a minimum of inconvenience by litigating in the United States. As the *Texas Trading* court observed, such is the nature of modern international business.[126] Finally, the United States does have an interest in hearing the suit. The FSIA's commercial activity exception is designed to provide a plaintiff with access to the courts in commercial disputes with foreign governments. The U.S.'s interest in entertaining the suit is not diminished by lingering questions as to whether the exchange between Adler and the Nigerian defendants was more criminal or commercial.

Even so, *Adler* probably would not have passed minimum contacts analysis because the agreement between the Nigerian officials and Adler was fraudulent. Nigeria's foreseeability of being named as a defendant

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124. The only possible argument that the Nigerian defendants benefited from U.S. law is that Adler was ultimately barred from recovering his lost bribery payments pursuant to the unclean hands doctrine. Had Adler's own behavior not barred his recovery, the defendants would have been far more susceptible to an adverse judgment because both the district court and the Ninth Circuit held that jurisdiction was proper. This argument fails, however, because minimum contacts analysis implicates the ability to "hale" a defendant into court. This hinges on whether a defendant has availed himself of U.S. law *prior* to being sued, not whether he benefited from U.S. law *after* trial and judgment.

125. Nigeria has frequently attempted to assert sovereign immunity under the FSIA while plaintiffs have argued that the commercial activity exception applies. The government of Nigeria and the Central Bank are frequent visitors in the U.S. court system. *See, e.g.*, Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 103 S. Ct. 1962, 76 L.Ed.2d 81 (1983); Antares Aircraft, LP v. Nigeria, 999 F.2d 33 (2d Cir. 1993); Southway v. Cent. Bank of Nig., 198 F.3d 1210 (10th Cir. 1999); Hester Intern Corp. v. Nigeria, 879 F.2d 170 (5th Cir. 1989); Joseph v. Office of Consulate Gen. of Nig., 830 F.2d 1018 (9th Cir. 1987).

126. *See Tex. Trading*, 647 F.2d at 315.

in a U.S. court is thus destroyed. Furthermore, the defendants did not derive any benefit from the protection of U.S. law. If they derived anything, it was the chance to extort sixty million dollars from their own government by convincing a U.S. citizen to break U.S. law. These two factors, even considered in tandem, are far too tenuous to satisfy *Shaffer*'s requirement of "expect[ing] to be haled before a court."[127] The maintenance of this suit against the Nigerian government and the bank did not comport with due process, and the exercise of jurisdiction over the defendants in *Adler* was therefore improper.

B. The Commerciality of Criminal Activity

The minimum contacts analysis above falls apart when the nature of the transaction in *Adler* is examined. Committing fraud against the government and the bank by its own representatives creates a domino effect which makes the two requirements of foreseeability and deriving protection from U.S. law a practical impossibility. This conundrum presents another question that should have been considered by the majority in *Adler*.[128] How commercial is criminal activity? Furthermore, how commercial is criminal activity based on an illegal contract?

The majority spins its rationale with authority: the Nigerian officials contracted for Adler's services; a contract for services is commercial in nature; and the illegality and unenforceability of that contract does not destroy its commerciality.[129] It cites as support the Supreme Court's opinion in *Saudi Arabia v. Nelson*,[130] specifically, the concurring opinion of Justice White.[131] Nelson was a U.S. citizen employed by a corporation which ran a hospital in Saudi Arabia.[132] Both the corporation and the hospital were owned by the Saudi government.[133] Nelson sued for personal injuries resulting from governmental detention

127. Shaffer v. Heitner, 433 U.S. 186, 216 (1977).

128. The importance of resolving this question properly is not limited merely to the holding in the noted case. Other federal statutes regarding the rights and obligations of foreign sovereigns in the United States specifically defer to the FSIA for a definition of "commercial activity." Thus, judicial interpretation of commercial activity within the FSIA has the potential to impact several areas of law. *See, e.g.*, 15 U.S.C. § 15 (West 2000) (limiting a foreign sovereign's ability to recover for antitrust violations in the United States due to its commercial activity); Cuban Liberty and Democratic Solidarity Act of 1996, 22 U.S.C. § 6023(3) (West 2000) (detailing protection of Cuban nationals' property and continued sanctions against communist Cuba).

129. *See Adler II*, 219 F.3d 869, 875 (9th Cir. 2000).

130. 507 U.S. 349 (1993) (White, J., concurring).

131. *See Adler II*, 219 F.3d at 875.

132. *See Nelson*, 507 U.S. at 352.

133. *See id.* at 351.

and torture, and the corporation's negligent failure to warn of retaliatory action if he reported on-the-job hazards in the hospital.[134] The district court held the Saudi government to be immune from suit and the Eleventh Circuit Court of Appeals reversed.[135] The Supreme Court reversed once again, holding that the hospital's recruitment and hiring of Nelson were not sufficiently commercial[136] to support jurisdiction under the FSIA.[137]

Justice White disagreed with the majority's conclusion[138] that the Saudi government's mistreatment of Nelson was, in its empirical form, an abuse of the police power inherently and peculiarly sovereign.[139] To illustrate his point, he drew an analogy to U.S. labor law, where private parties might retaliate for "whistle-blowing."[140] To deal with this problem which plagues the marketplace, Congress and several state legislatures have passed statutes prohibiting such retaliation.[141] White observed that because this is private (and thus, according to the world of *Weltover*, commercial) behavior, the majority concentrated on the fact that the hospital relied upon government security personnel.[142] This is not enough to be "sovereign" in White's option.[143] In fact, this is exactly the type of situation that the commercial activity exception was meant to avoid.[144] The majority allowed the hospital to escape liability purely because they called upon public rather than private security personnel.[145]

The majority in *Adler* completely misunderstood *Nelson*. First, it relied upon White's concurrence to support the proposition that an illegal contract is still commercial.[146] White never considered this issue because *Nelson* did not involve a contract. Second, the majority in *Adler* did not read the opinion correctly: "[White] stat[ed] that torture of plaintiff by

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134. *See id.* at 353-54.

135. *See id.* at 354-55.

136. Nelson argued that the first clause of § 1605(a)(2) deprived the Saudi government of immunity. *See id.* at 356. Adler, on the other hand, argued that the third clause deprived the Nigerian defendants of immunity. The difference between the two clauses lies in where the foreign state acts (in the United States or outside the United States). Therefore, *Nelson* and *Adler* overlap only as far as the definition of "commercial activity." *See* 28 U.S.C. § 1605(a)(2) (West 2000).

137. *See Nelson*, 507 U.S. at 361.

138. Justice White nonetheless concurred in the judgment because the Saudi government's commercial activity was not "carried on in the United States" within the meaning of § 1605(a)(2). *See id.* at 370 (White, J., concurring).

139. *See id.* at 367 (White, J., concurring).

140. *See id.* at 366 (White J., concurring).

141. *See id.* at 365-66 (White J., concurring)

142. *See id.* at 367 (White J., concurring).

143. *See id.*

144. *See id.* at 368.

145. *See id.*

146. *See Adler II*, 219 F.3d 869, 875 (9th Cir. 2000).

police was not commercial activity, but torture of plaintiff by government *hired* thugs would be commercial activity."[147] White actually stated that the torture of Nelson by the Saudi police *was* commercial activity.[148] His "hired thugs" comment was a facetious speculation of the circumstances under which the majority would be persuaded that the activity was commercial.[149]

C. The Blind Leading the Blind

Adler's plain errors aside, the supporting case law indicates that the decision was nonetheless correct. The Ninth Circuit's decision, however, is incomplete without an examination of the Tenth Circuit's decision in *Southway v. Central Bank of Nigeria*.[150] The factual situation in *Southway* is eerily familiar; the action arose from a scheme between officials of the Nigerian government and the Central Bank and a group of Colorado investors.[151] Persons claiming to be members of the NNPC solicited the investors' assistance in collecting $21.3 million from an "over-invoiced" contract for oil drilling machinery.[152] The investors lost over $500,000 in the "up-front costs" demanded by the Nigerian defendants prior to payment.[153] The one significant difference between *Southway* and *Adler* is that the investors in *Southway* filed suit pursuant to the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).[154] Their civil RICO claims were based on a "pattern of racketeering activity" as defined by the Act.[155] The court affirmed the district court's holding that the FSIA conferred jurisdiction over RICO claims, and that the defendants were not immune to suit because the commercial activity exception applied to the claims.[156]

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147. *See id.*
148. *See* Saudi Arabia v. Nelson, 507 U.S. 349, 369-70 (1993).
149. White stated that

> had the hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority—no longer able to describe this conduct as 'a foreign state's exercise of the power of its police'—would consent to calling it 'commercial.' For, in such circumstances, the state-run hospital would be operating as any private participant in the marketplace and respondents' action would be based on the operation by Saudi Arabia's agents of a commercial business.

See id. at 366. The dissent in *Adler* recognizes that the majority has relied upon dictum. *See Adler II*, 219 F.3d at 881.
150. Southway v. Cent. Bank of Nig., 198 F.3d 1210 (10th Cir. 1999).
151. *See id.* at 1212.
152. *See id.* at 1212-13.
153. *See id.* at 1213.
154. *See id.*
155. *See id.* at 1214.
156. *See id.* at 1213-14.

Adler only hints at what *Southway* addressed directly. The suit in *Southway* contained explicit allegations of the Nigerians' criminal conduct because it was asserted pursuant to RICO.[157] This forced the Tenth Circuit to address the precise question of whether the FSIA provides foreign governments with immunity from criminal indictment in the United States.[158] The court observed that, although the FSIA specifically gives the district courts jurisdiction over a "civil action," Congress did not specifically state that a foreign defendant is immune from criminal indictment.[159] If Congress had intended for the defendants in *Southway* to be immune from civil RICO charges, it would have so stated.[160] *Southway* is excellent authority for the noted case because, in nearly identical factual circumstances, it demonstrates that the criminal nature of a foreign state's actions will not defeat jurisdiction under the FSIA.[161]

The *Southway* court based its jurisdiction on the third clause of the commercial activity exception.[162] The court returned to the *Weltover* benchmark and emphasized the nature of the transaction rather than its purpose.[163] According to this standard, the mere fact that a foreign state's activities are illegal (or, as the district court expressed it, "nefarious") does not imply that those activities can never be commercial.[164] Furthermore, there is nothing uniquely sovereign in the defendants' behavior.[165] As support for this conclusion, the *Southway* court cited the Ninth Circuit's decision in *Adler I*.[166] This reliance was misplaced because the criminal nature of the defendants' activity was not addressed until the dissent in *Adler II*.[167]

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157. Civil damages under RICO are provided by 18 U.S.C. § 1964 (West 2000). Obtaining these damages requires a violation of section 1962, which prohibits activities based upon "a pattern of racketeering activity." 18 U.S.C. § 1962. Section 1961, in turn, defines "racketeering activity." *Id.* § 1962. The criminality in *Southway* springs from section 1962's requirement of racketeering activity. *See Southway*, 198 F.3d at 1214. The pleading of RICO violations—thus tainting defendants' scheme with a shroud of criminality in legal terms, expressly states what was observed by the dissent in *Adler*.

158. *See Southway*, 198 F.3d at 1214.

159. *See id.*

160. *See id.* at 1215.

161. The Tenth Circuit's decision in *Southway* merely allowed the suit to continue; the action was remanded to the district court for trial. The case is currently pending in the U.S. District Court for the District of Colorado. *See id.* at 1219.

162. *See id.* at 1216.

163. *See id.* at 1217.

164. *See id.*

165. *See id.* at 1218.

166. *See id.* (citing *Adler I*, 107 F.3d 720 (9th Cir. 1997)).

167. *See Adler II*, 219 F.3d 869, 878 (9th Cir. 2000) (Noonan, J., dissenting).

Southway's ultimate conclusion is still valid, however, because the court also looked to the FSIA's legislative history for support: "Congress intended the FSIA's commercial activity exception to encompass a 'broad spectrum of endeavor.' Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed."[168] This definition makes the defendants' activity in *Adler* just commercial enough. It is self-evident that the Nigerian officials proposed the scheme to Adler for their mutual profit—to the tune of $70 million. Although it seems to defy all logic, the fraudulent scheme undertaken by the defendants in *Adler* is, according to the FSIA's legislative history and subsequent case law, unmistakably commercial.

IV. CONCLUSION: A CALL FOR ACTION

Adler illustrates an inherent weakness within the FSIA's commercial activity exception and the body of case law interpreting and applying it. The law is not equipped to deal with a transaction where there is only a slight suggestion of criminality. The nature of the contract in *Adler* defeated minimum contacts analysis, which is probably why the Ninth Circuit ignored the legislative history and did not address it. The simple fact that members of the Nigerian government and its Central Bank were engaged in an illegal scheme to defraud both entities prevented Nigeria from having sufficient minimum contacts within the United States to support the courts' jurisdiction. Regardless of whether Nigeria can be considered a person for Fifth Amendment purposes, the maintenance of this action violated the notion of constitutional due process which is fundamental to the U.S. legal system.

The law on this precise point, however, is less than clear. The Ninth Circuit itself encountered difficulty in understanding and articulating its application. The *Southway* court allowed the suit to go forward under similar circumstances, which is persuasive evidence that the *Adler* court's affirmation of the district court was correct.[169] However, the court might have taken the slightly braver route of finding the defendants immune and vacating the district court's decision, given that Adler was barred from recovery by the unclean hands doctrine in any event. Had this happened, the only option left open to Adler would have been filing suit in the Nigerian courts—which most likely would have been an exercise in futility. Thus, the practical result would have been the same.

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168. *Southway*, 198 F.3d at 1217.

169. It should be noted that *Southway* is similar to *Adler* in yet one more respect: The *Southway* court also failed to perform minimum contacts analysis. *See id.*

Furthermore, even if a U.S. court had rendered a judgment in favor of Adler, that judgment would have been unenforceable both in the United States and in Nigeria. The Nigerian courts would likely not be receptive to ordering its governmental and banking officials to pay an American $5 million as reparations for a plot which is illegal under both Nigerian and U.S. law. Similarly, the only method of enforcement in the United States would be the attachment of Nigerian assets. The probability of this happening is also slim, because the U.S. government has no motivation for angering the Nigerian government in the name of vindicating a wealthy and corrupt California businessman. Adler's quest to recoup his money was destined for failure because it kept running into the nature of the contract. The illegality of transnational fraud prevented the commercial activity exception from functioning as it was meant to within the world of modern international commerce.

This question is now ripe for resolution. The government and Central Bank of Nigeria have twice found themselves in U.S. courts as a result of the same scheme. Barring a change in the Nigerian law regarding the assignation of completed work contracts, this issue will be left to the mechanisms of the U.S. legal system. If an appeal is taken of the Ninth Circuit's decision in *Adler*, the United States Supreme Court should grant certiorari and resolve this logical gap in FSIA analysis with finality. This seems unlikely, however, given the size of the Court's docket and the fact that it has already given the FSIA considerable attention in the past decade with *Weltover* and *Nelson*. A legislative rescue seems much more likely. Congress must amend the FSIA to address situations such as these lest they appear more frequently. Judicial ambiguity resulting from congressional silence has no place in the law controlling whether a suit in the United States can be maintained against a foreign state.

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