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## "State Sponsors of Terrorism" Are Entitled to Due Process Too: The Amended Foreign Sovereign Immunities Act is Unconstitutional

Keith E. Sealing

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# “STATE SPONSORS OF TERRORISM” ARE ENTITLED TO DUE PROCESS TOO: THE AMENDED FOREIGN SOVEREIGN IMMUNITIES ACT IS UNCONSTITUTIONAL

KEITH E. SEALING\*

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## INTRODUCTION

In 1996, Congress, as part of the Antiterrorism and Effective Death Penalty Act of 1996,<sup>1</sup> amended the list of noncommercial tort exceptions to sovereign immunity<sup>2</sup> in the Foreign Sovereign Immunities Act ("FSIA").<sup>3</sup> This legislative action came in response to a federal court's determination that it lacked subject matter jurisdiction over Libya and alleged Libyan terrorists in *Smith v. Socialist People's Libyan Arab Jamahiriya*,<sup>4</sup> one of many cases resulting from the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland.<sup>5</sup>

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1. Pub. L. No. 104-32, 110 Stat. 1214 (1996).

2. See *infra* notes 237-244 and accompanying text (listing the exceptions to sovereign immunity).

3. Jurisdictional Immunities of Foreign States, 28 U.S.C. secs. 1602-1611 (1994).

4. 101 F.3d 239 (1996), *cert. denied*, 117 S. Ct. 1569 (1997).

5. See *infra* note 265 and accompanying text (discussing the factual background of the bombing of Pan Am Flight 103). The event also resulted in two other significant lawsuits. See also *In re Air Disaster*, 37 F.3d 804 (2d Cir. 1994) (recounting how the families of the victims won a massive \$500 million lawsuit against Pan Am in 1994 for allowing the bomb to be slipped aboard the plane); see Leslie McKay, Note, *A New Take On Antiterrorism: Smith v. Socialist People's Libyan Arab Jamahiriya*, 13 AM. U. INT'L L. REV. 439, 440-41 (1997) (discussing the monetary rewards of Flight 103). The second lawsuit involved the two Libyan suspects, Abdel Basset Ali Megrahi and Lamen Khalifa Fhimah, both former Libyan intelligence agents who surrendered in April 1999, thereby ending seven years

The ambiguously worded<sup>6</sup> amendment appears to give federal courts both subject matter jurisdiction, which Congress clearly intended, and personal jurisdiction over the seven nations currently listed by the Executive Branch as "state sponsors of terrorism."<sup>7</sup> The United States District Court for the Southern District of New York, the only court to address the amended FSIA, unconstitutionally interpreted it as according the court personal jurisdiction over Libya in the refiled suit by the survivors, executors, administrators, and personal representatives of those killed over Lockerbie.<sup>8</sup>

This Article will demonstrate that giving the court personal jurisdiction over a foreign sovereign simply because the Executive Branch has concluded that it is a "state sponsor of terrorism" or because an offshore terrorist act had some "effect" in the United States would violate the Due Process Clause of the Fifth Amendment" ab-

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of United Nations sanctions against Libya. The two are currently being held in the Netherlands, where they will be tried under Scottish law for human rights violations. See Aphrodite Thevos Tsairis, *Lessons of Lockerbie*, 22 SYRACUSE J. INT'L L. & COM. 31 (1996) (describing the efforts of the families of the victims).

6. See 45 AM. JUR. 2D INT'L LAW sec. 83 (1999), citing *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982) (noting that the FSIA has been characterized as obtuse, creating numerous interpretive questions due to its bizarre structure and its many deliberately vague provisions). Perhaps those responsible for drafting the FSIA can be partially excused since "[p]rior to the enactment of the FSIA in 1976, United States law on sovereign immunity bordered on the incoherent." See McKay, *supra* note 5, at 445 (quoting Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception for Immunity for Violation of Preemptory Norms of International Law*, 77 CAL. L. REV. 365, 368 (1989). See also Hugel v. McNeil, 886 F.2d 1, 14 (1st Cir. 1989) (stating that "[p]ersonal jurisdiction, and specifically the constitutionality of State application of long-arm statutes, is a topic which over the years has puzzled first year students and learned jurists alike.").

7. Those states are Cuba, Iraq, Iran, Libya, North Korea, Sudan and Syria.

8. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325 (E.D.N.Y. 1998) (granting the court jurisdiction over the defendants).

9. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983) (discussing how the FSIA creates federal question jurisdiction invoking the Due Process Clause of the Fifth, rather than the Fourteenth, Amendment). The analysis of personal jurisdiction under *International Shoe Co. v. Washington* and its progeny is the same under the Fifth and Fourteenth Amendments, other than the fact that under the Fifth Amendment one need not "address concerns of interstate federalism." See *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114 (S.D.N.Y. 1988) (quoting *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290, 293-95 (3d Cir. 1985)).

sent the performance of traditional "minimum contacts" analysis under both the specific and general personal jurisdiction tests.

## I. CONCEPTS OF PERSONAL JURISDICTION

This section of the Article briefly examines concepts of personal jurisdiction under international law<sup>10</sup> and then addresses the central issue of the concept of personal jurisdiction under the Due Process Clauses of the Fifth and Fourteenth Amendments. First, this Section reviews the general idea of personal jurisdiction as articulated in such cases as *International Shoe Co. v. Washington*,<sup>11</sup> *McGee v. International Life Ins. Co.*,<sup>12</sup> *Hanson v. Denckla*,<sup>13</sup> *Kulko v. Superior Court of Cal.*,<sup>14</sup> *World-Wide Volkswagen Corp. v. Woodson*,<sup>15</sup> *Burger King Corp. v. Rudzewicz*,<sup>16</sup> and *Asahi Metal Indus. Co. v. Superior Court of Cal.*<sup>17</sup> Next, this Section focuses on the *Calder v. Jones*<sup>18</sup> line of "effects" cases, upon which the government<sup>19</sup> and the plaintiffs<sup>20</sup> rely heavily in arguing personal jurisdiction in *Rein v. Socialist People's Libyan Arab Jamahiriya*.<sup>21</sup> Finally, it looks at the concept of general personal jurisdiction first articulated in *Helicopteros Nacionales de Colombia v. Hall*.<sup>22</sup>

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10. Because this Article focuses on the constitutionality of the FSIA as applied, discussion of the applicable international norms is purposefully truncated.

11. 326 U.S. 310 (1945).

12. 355 U.S. 220 (1957).

13. 357 U.S. 235 (1958).

14. 436 U.S. 84 (1978).

15. 444 U.S. 286 (1979).

16. 471 U.S. 462 (1985).

17. 480 U.S. 102 (1987).

18. 465 U.S. 783 (1983).

19. Government Brief in *Rein* [hereinafter "Government Brief"].

20. Plaintiff's Brief in *Rein* [hereinafter "Plaintiff's Brief"].

21. 995 F. Supp. 325 (E.D.N.Y. 1998).

22. 466 U.S. 408 (1984).

## A. PERSONAL JURISDICTION UNDER INTERNATIONAL LAW

Federal courts have noted five bases for jurisdiction under international law:<sup>23</sup> territorial;<sup>24</sup> nationality;<sup>25</sup> protective;<sup>26</sup> universality;<sup>27</sup> and passive personality. According to the passive personality principle, a state has jurisdiction over anyone who injures one of its nationals, notwithstanding location.<sup>28</sup>

Whether the theory that an act of airplane bombing over Scotland or the high seas is an act that terrorizes persons in the United States or seeks to alter United States foreign policy is a valid extension of *Calder*, personal jurisdiction can be invoked under both the national and protective bases of international personal jurisdiction.<sup>29</sup> Moreo-

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23. See *United States v. Yunis*, 681 F. Supp. 896, 899-900 (D.C. 1988) (discussing and explaining the five principles, while concentrating on universality and passive personality). The five principles were first articulated by a Harvard Research Project in 1935 and have been followed by a number of federal courts. *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) (creating principles for finding jurisdiction under international law); see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (discussing how federal courts have a history of finding liability based on international law); *Chua Han Mo v. United States*, 730 F.2d 1308 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) (denying lack of jurisdiction solely because criminal acts were committed abroad); *Rivard v. United States*, 375 F.2d 882 (5th Cir.), *cert. denied*, 389 U.S. 884 (1967) (finding that the court had jurisdiction to try aliens for conspiracy to smuggle heroin into the United States).

24. See *Yunis*, 681 F. Supp. at 899 (explaining how, under the territorial principle, jurisdiction is proper in the nation where the offense is committed).

25. See *id.* (explaining how, under the nationality principle jurisdiction is based upon the nationality of the defendant).

26. See *id.* at 900 (discussing how, under the protective principle, jurisdiction is proper in a nation whose national interest is injured).

27. See *id.* (discussing how, under the universality principle, jurisdiction is proper in any nation that gains physical custody over the perpetrator "of certain offenses considered particularly heinous and harmful to humanity").

28. See *id.* (stating how, under the passive personality principle, jurisdiction is proper in any nation whose nationals have been injured, regardless of the location of the crime or tort).

29. See *Yunis*, 681 F. Supp. at 900-01 (discussing the universality principle in the context of aircraft piracy and hostage-taking). Were the defendants in physical custody in the United States, they would arguably be subject to jurisdiction for both the civil tort case and the criminal case under the universality principle.

ver, the passive personality theory is an appropriate basis for jurisdiction under either the extended the *Calder* theory or, more simply, based on the fact that more than one hundred United States nationals were killed in the bombing. The passive personality principle, although the least favored by international scholars of the five principles of jurisdiction,<sup>30</sup> is internationally recognized as legitimate and is accepted by United States courts.<sup>31</sup>

## B. SPECIFIC PERSONAL JURISDICTION

This section addresses the modern personal jurisdiction cases, from *International Shoe* to *Asahi Metal*. As this is a component of Civil Procedure, the material is presented as briefly as possible, commensurate with setting the stage for analysis of its application to the FSIA.<sup>32</sup>

In *International Shoe Co. v. Washington*,<sup>33</sup> the Court stated:

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30. See, e.g., Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. OF INT'L L. 191 (1983) (arguing that, "U.S. federal courts should decline jurisdiction where it rests solely on the passive personality principle").

31. See *Yunis*, 681 F. Supp. at 901-03 (noting that the government also invoked the passive personality principle in seeking to extradite the leader of the terrorists who hijacked the Achille Lauro cruise ship and killed American tourist Leon Klinghoffer); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (stating that "[t]he nationality of the victims, who are United States government agents, clearly supports jurisdiction."); Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 712-13 (1985) (discussing how changing circumstances have strengthened the principle as a basis for jurisdiction). But see *United States v. Layton*, 509 F. Supp. 212, 215 (N.D. Cal. 1981) (criticizing the personality principle but not reaching the question of whether it was valid because jurisdiction was established under three other principles). The United States did reject the principle, as applied by Mexico, against an American author of an article which was published in a Texas newspaper and which was critical of a Mexican citizen. *The Cutting Case*, 1887 FOR. REL. 751 (1888) (reported in *J.B. Moore Digest of International Law* 232-40 (1906)).

32. See generally David C. Tunick, *Up Close and Personal: A Close-Up Look at Personal Jurisdiction*, 29 CREIGHTON L. REV. 1157 (1996) (providing an exhaustive explication of the personal jurisdiction cases).

33. 326 U.S. 310 (1945). The International Shoe Company was a Delaware corporation with headquarters in Missouri. It had no offices in Washington state. Washington state enacted an unemployment compensation scheme that included

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he not be present within the territory of the forum, he have certain *minimum contacts* with it such that the maintenance of the suit does not offend *traditional notions of fair play and substantial justice*.<sup>34</sup>

After reviewing the various factors favoring<sup>35</sup> and opposing jurisdiction,<sup>36</sup> the Court stated that where the activities have been continuous and systematic and have given rise to the liabilities sued upon, personal jurisdiction will be constitutionally permissible.<sup>37</sup> Casual presence, however, or single or isolated activities are not enough for causes of action unconnected to the activities.<sup>38</sup> The Court held that personal jurisdiction must be based upon certain "minimum contacts" which cannot be judged simply in a mechanical or quantitative way.<sup>39</sup> Rather, the court must look at the quality and nature of the activity in relation to the fair and orderly administration of laws.<sup>40</sup> The Court also noted that the corporation enjoyed the benefits and

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employer contributions based on a percentage of wages paid for employee services performed in the state. In the case of delinquent payments, notice was given by service upon the employer. Alternatively, notice was given to absent employers by registered mail to the last known address. International Shoe received service by personal service upon a sales solicitor employee in Washington and by registered mail to the correct address. There was a Commission hearing at which International Shoe put in a special appearance. The Commissioner, the trial court and state Supreme Court all upheld the validity of the service of process. *See id.* at 311-13 (summarizing the material facts).

34. *See International Shoe*, 326 U.S. at 316 (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (emphasis added)).

35. *See id.* at 313-15 (noting that the corporation designated an attorney for the State Unemployment Commissioner; it employed 11-13 salesmen under its direct supervision and control and paid them \$31,000 a year and paid for permanent sample rooms in the state, thereby availing itself of privileges in the state).

36. *See id.* at 313 (realizing that the company was incorporated in Delaware; its principal place of business was Missouri; it had no sales units or branches inside the state; it apparently had no actual agent designated for service of process; it maintained no inventory in the state; it made no contracts in the state and its salesmen had no authority to make contracts on its behalf in the state).

37. *See id.* at 317 (stating that there needs to be a "presence" within the state as measured by the corporation's actions and dealings in the state).

38. *See id.* at 318.

39. *See International Shoe*, 326 U.S. at 319 (stating that the test is not whether the activity was a little more or less, rather the test is more qualitative than quantitative).

40. *See id.*



protections of the state's laws when conducting activities within the state.<sup>41</sup> The Court concluded that in the present case the activities were neither irregular nor casual, but were systematic and continuous.<sup>42</sup> Further, the obligation sued upon arose out of the activities used to establish the necessary "minimum contacts."<sup>43</sup>

In *McGee*,<sup>44</sup> California claimed jurisdiction based upon its Unauthorized Insurer's Process Act.<sup>45</sup> The plaintiff obtained a default judgment in California and tried to enforce it in Texas, but the Texas court held that the judgment was unenforceable.<sup>46</sup> Even though a number of factors argued against personal jurisdiction,<sup>47</sup> the Supreme Court applied the *International Shoe* test and found the contacts were systematic and continuous, not merely irregular and casual.<sup>48</sup> The Supreme Court explained that its holding was based upon the trend toward expanding the scope of states' jurisdiction because of the internationalization of commerce.<sup>49</sup> The Supreme Court held it was sufficient that the suit was based on a contract that had a substantial

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41. *See id.* (emphasizing that the exercise of receiving benefits and protections may give rise to obligations on corporations to respond to suits brought against it).

42. *See id.* at 320 (noting that *International Shoe*'s activities resulted in a large volume of interstate business through which the appellant received benefits and protections of state laws, which included their right to resort to the courts to enforce their rights).

43. *See id.* (finding that the corporation's benefits established sufficient contacts and it was only "fair play" and "substantial justice" for the state to enforce its obligations to protect the rights of its residents).

44. 355 U.S. 220 (1957).

45. CAL. INS. CODE secs. 1610-1620 (1953).

46. *See McGee v. International Life Ins. Co.*, 288 S.W.2d 579 (Tex. Civ. App. 1957) (stating that the California state court did not have jurisdiction because the corporation did not do business in California).

47. *See McGee*, 355 U.S. at 221-22 (realizing that the company had no office or agent in California; it engaged in no other soliciting or insurance business in California and it was actually a prior corporation from Arizona that issued the policy).

48. *See id.* at 222 (stating that due process only requires an out-of-state defendant to have "minimum contacts" with the state to be subject to judgment in personam).

49. *See id.* (discussing the expanding power states have over foreign companies and non-residents in transforming the national economy).

connection with California.<sup>50</sup> Finally, the Court considered it important that California had an interest in the outcome, there were defense witnesses in California, and there was no significant inconvenience to the insurer.<sup>51</sup>

In *Hanson*,<sup>52</sup> Dora Donner of Pennsylvania created a trust with a Delaware bank as the trustee.<sup>53</sup> The trust assets were kept in Delaware.<sup>54</sup> Donner then moved to Florida.<sup>55</sup> There was an unrelated lawsuit in Florida in which the defendants raised the issue that the trustee was an indispensable party and that suit could not go forward because Florida had no jurisdiction over Hanson.<sup>56</sup> The Florida court held that it had jurisdiction and found for the plaintiff.<sup>57</sup> The Delaware court refused to give full faith and credit<sup>58</sup> to the Florida action because it believed that Florida did not have personal jurisdiction over the trustee.<sup>59</sup> The Supreme Court was called upon to review the trustee's contacts with Florida, namely that for eight years while Donner lived in Florida she regularly communicated with the trustee

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50. *See id.* at 223 (explaining that a California resident delivered the contract and mailed the premiums).

51. *See id.* (recognizing that residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant state to bring an action, especially if they could not afford to pay travel and lodging expenses).

52. 357 U.S. 235 (1958).

53. *See Hanson*, 357 U.S. at 238 (stating that under the trust agreement, Mrs. Donner could change the trustee and could also revoke, alter or amend the agreement at any time).

54. *See id.* (noting that the trust assets were in Delaware because the Delaware bank was incorporated there).

55. *See id.* at 239 (explaining that Donner remained in Florida until her death).

56. *See id.* at 238 (affirming that Florida could not get jurisdiction over the Delaware trustee, Donner's daughter, an indispensable party).

57. *See id.* at 241-42 (recognizing the Chancellor's ruling that he lacked jurisdiction over a non-resident defendant because there was no personal service and the trust corpus was outside the territorial jurisdiction of the court).

58. *See* U.S. CONST. art. IV, sec. 1 (defining how full faith and credit should be given in each state to public acts, records and judicial proceedings of every other state).

59. *See id.*, 357 U.S. at 243 (providing the court's reasoning).

and paid him for his efforts.<sup>60</sup> As this was the only contact asserted, the Court held that it was an insufficient basis for personal jurisdiction.<sup>61</sup> The Court focused on Donner's unilateral activity of moving to Florida after establishing the arrangement with the trustee.<sup>62</sup> The Court stated that the defendant must "purposefully avail" itself of the privilege of conducting business in the state.<sup>63</sup>

In *Kulko*,<sup>64</sup> although Mr. Kulko's only contact with California was buying his daughter a one-way plane ticket there, the California state court held that it had jurisdiction.<sup>65</sup> The California Supreme Court upheld the appellate court's reasoning that by consenting to his children's living in California, Mr. Kulko had "caused an effect in th[e] state."<sup>66</sup> In reversing, however, the Supreme Court reiterated its requirement of purposeful availment.<sup>67</sup> The Court also discussed fairness in its finding of a lack of personal jurisdiction.<sup>68</sup>

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60. See *Hanson*, 357 U.S. at 250-51 (emphasizing that in order for a state to obtain jurisdiction over non-residents, the non-resident must have "minimum contacts" with that state).

61. See *id.* at 251 (explaining how the defendant trust company had no offices in Florida nor did they transact any business there).

62. See *id.* at 262 (showing that none of the trust assets had ever been held or administered in Florida).

63. See *id.* at 243 (imposing the "purposeful availment" standard); *cf. id.* at 256-64 (Black, J., dissenting) (maintaining that the mere business relationship established when Donner moved to Florida was enough to create personal jurisdiction).

64. 436 U.S. 84 (1978).

65. See *Kulko v. Superior Court*, 564 P.2d 353 (Cal. 1977) (arguing that the holding is reasonable because Mr. Kulko "purposely availed" himself of the benefits and protections of California by sending his daughter there).

66. See *Kulko*, 436 U.S. at 89, *citing* 133 Cal. Rptr. 627, 628 (1976) (asserting that causing an effect in California was sufficient grounds for the state to obtain personal jurisdiction over Mr. Kulko).

67. See *Kulko*, 436 U.S. at 94 (holding that Mr. Kulko did not purposefully avail himself by sending his daughter to California and consenting for her to live there). The Court explained that Mr. Kulko acted in the best interest of his children and family. *Id.* Furthermore, the Court contending that all child support issues pertaining to the divorce would best be handled by New York courts).

68. See *id.* at 97 (stating that the action against Mr. Kulko did not arise out of a benefit of interstate commerce, but from domestic relations).

In *World-Wide Volkswagen Corp. v. Woodson*,<sup>69</sup> the Robinsons first bought an Audi from Seaway Volkswagen ("Seaway") in New York, and subsequently decided to move to Arizona.<sup>70</sup> They were involved in a car accident in Oklahoma, in which their car caught on fire and three family members were burned.<sup>71</sup> The Robinsons filed suit<sup>72</sup> under products liability claiming defective design.<sup>73</sup> World-Wide Volkswagen ("World-Wide") was incorporated in and had its business office in New York.<sup>74</sup> There was no evidence of any business relationship with Oklahoma, as this multi-state enterprise included only the states of Connecticut, New Jersey, and New York.<sup>75</sup> Likewise, there was no evidence that Seaway had any business relationship with Oklahoma, since it was a local retailer, incorporated in and with its principal place of business in New York.<sup>76</sup> The Oklahoma Supreme Court, nevertheless, held there was jurisdiction over both Seaway and World-Wide.<sup>77</sup> The court reasoned that the product was by its very design and purpose so mobile that World-Wide could foresee its possible use in Oklahoma.<sup>78</sup>

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69. 444 U.S. 286 (1979).

70. See *World-Wide Volkswagen Corp.*, 444 U.S. at 288 (discussing the facts of the case).

71. See *id.* (explaining that the Robinsons' car was hit in the rear).

72. See *id.* (naming the defendants in the suit: Audi, the German manufacturer, Volkswagen of America, the importer, World-Wide Volkswagen, the regional distributor, and Seaway, the retailer). Audi and Volkswagen of America do business in every state, including Oklahoma, but World-Wide and Seaway put in special appearances to argue lack of jurisdiction. See *id.*

73. See *id.* at 288 (explaining the theory of liability).

74. See *id.* at 288-89 (discussing the residency of the corporation).

75. See *World-Wide Volkswagen*, 444 U.S. at 289 (explaining there was no showing that any "automobile sold by World-Wide or Seaway entered Oklahoma, except for the car involved in this case").

76. See *id.* at 289 (noting that neither World-Wide nor Seaway ship or sell any products to Oklahoma, have any agents there or advertise there).

77. See *id.* at 289-90, citing 585 P.2d 351 (1978) (holding that Oklahoma's "long arm statute" allowed the court to have personal jurisdiction over World-Wide and Seaway).

78. See *id.* at 294 (contending that Seaway and World-Wide could foresee the car possibly being used in Oklahoma because cars are used to engage in the flow of commerce, which includes interstate commerce and travel).

The Supreme Court reversed as to both parties.<sup>79</sup> First, it reaffirmed the “minimum contacts” test set forth in *International Shoe*.<sup>80</sup> It then stated that the test had two functions: (1) protecting the defendant from an inconvenient forum; and (2) setting the limits of state sovereignty in the federal system.<sup>81</sup> The phrase “traditional notions of fair play and substantial justice,” addressed the fairness prong.<sup>82</sup> Citing *McGee*, the Court noted how this branch had been “substantially relaxed over the years” due to changes in the American economy.<sup>83</sup> As in *Hanson*, however, the Court stated that even if the forum is not inconvenient, sovereignty provides a boundary to the growth of a state’s reach.<sup>84</sup> Consequently, the Court found nothing that would convey personal jurisdiction.<sup>85</sup>

The Supreme Court rejected the foreseeability analysis of the state court.<sup>86</sup> The issue, the Court said, was purposeful availment.<sup>87</sup> Jurisdiction may be proper if a corporation places products in the stream of commerce with the expectation that they will be purchased by consumers in the forum state.<sup>88</sup>

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79. See *World-Wide Volkswagen*, 444 U.S. at 291 (reversing the decision of the appellate court).

80. See *id.* (determining that a state may only assert jurisdiction over a non-resident defendant if “minimum contacts” exist).

81. See *id.* at 292 (discussing the purposes of the “minimum contacts” requirement).

82. See *id.* (requiring the defendant’s contacts with the forum state be substantial enough to maintain the suit).

83. See *id.* at 292-93 (citing *McGee*, 355 U.S. at 222-23) (attributing the relaxation of the fairness branch largely to the fundamental changes in the economy).

84. See *World-Wide Volkswagen*, 444 U.S. at 293 (stating the sovereignty of each state implies a limitation on the sovereignty of other states).

85. See *id.* at 295 (finding no circumstances which would justify state-court jurisdiction).

86. See *id.* (holding that foreseeability alone has never been a benchmark for personal jurisdiction).

87. See *id.* at 297 (noting that when a corporation purposefully avails itself of activities in the forum state, it has notice it is subject to suit there and can act to alleviate the risk of litigation).

88. See *id.* at 297-98, (citing *Gray v. American Radiator & Standard Sanitary Corp.*, 176 N.E. 2d 761 (1961)) (finding that a forum state is within its Due Process Clause powers if it asserts jurisdiction over a corporation that delivers its prod-

*World-Wide Volkswagen* created a two-tier analysis.<sup>89</sup> First is the sovereignty tier, which grew out of *Hanson* and which was rooted in *Pennoyer v. Neff*.<sup>90</sup> Second is the convenience tier, which grew out of *McGee*.<sup>91</sup> The sovereignty tier, representing the line from *International Shoe* to *Hanson*, requires determining whether the defendant purposely brought itself into contact with the forum state.<sup>92</sup> The Court implied that if this test is met, the next steps involve looking at the convenience to the plaintiff, the convenience to the defendant, the interests of the state and other factors.<sup>93</sup> If there is serious inconvenience, there can be no jurisdiction.<sup>94</sup> Since the sovereignty test was not met in *World-Wide*, however, no analysis of the convenience branch took place on those facts.<sup>95</sup>

In *Burger King v. Rudzewicz*,<sup>96</sup> Justice Brennan provided a more clear-cut articulation of the two-part test that had evolved in previous cases.<sup>97</sup> In this case, the plaintiff, Burger King, was a Florida corpo-

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ucts into the stream of commerce of that jurisdiction).

89. See generally *World Wide Volkswagen*, 444 U.S. at 294, citing *International Shoe*, 326 U.S. at 319 (emphasizing that the reasonableness of asserting jurisdiction must be assessed using the context of the federal system and in the orderly administration of laws).

90. See *Pennoyer v. Neff*, 95 U.S. 714, 732-33 (1878) (distinguishing federal from state courts).

91. See generally *McGee*, 355 U.S. at 223-24 (using convenience as a factor in finding jurisdiction in a contested state forum).

92. See *World-Wide Volkswagen*, 444 U.S. at 294 (quoting *Hanson*, 357 U.S. 250-51) (determining that the "minimum contacts" test is not an immunity from inconvenience, but rather a consequence of limitations on states).

93. See *id.* (stating that even if the defendant would not be inconvenienced by being brought into the forum, due process may remove the state's ability to render a valid judgment).

94. See *id.* (providing examples of when a state may not have jurisdiction over an out-of-state defendant).

95. See *id.* at 295-99 (applying the minimum contacts test and finding that the required contacts did not exist).

96. 471 U.S. 462 (1985).

97. See *Burger King*, 471 U.S. at 471-78 (discussing the Supreme Court decisions establishing the "minimum contacts" and convenience tests for determining whether to assert personal jurisdiction over an out-of-state defendant).

ration with its principal office in Miami.<sup>98</sup> The contract awarding the two defendants a Burger King franchise in Michigan contained a choice of law provision that stated that Florida law governed.<sup>99</sup> Franchise payments and notices were mailed to Florida.<sup>100</sup> One partner even went to seminars in Florida.<sup>101</sup> Both defendants, however, were from Michigan.<sup>102</sup>

The dispute arose when, after several disagreements and protracted negotiations, Burger King terminated the defendants' franchise and ordered Rudzewicz and MacShara to vacate the building.<sup>103</sup> They refused and continued to operate as a Burger King.<sup>104</sup> Burger King filed suit in the United States District Court for the Southern District of Florida.<sup>105</sup>

In analyzing the Court's decision, Justice Brennan made six major points. First, the defendants purposefully directed their actions toward Florida.<sup>106</sup> Second, Florida had a manifest interest in protecting its residents.<sup>107</sup> Third, modern transportation made it more convenient for the defendants to defend themselves in Florida.<sup>108</sup> Fourth, the

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98. *See id.* at 464-66 (providing relevant information about Burger King Corporation).

99. *See id.* at 480 (providing the text of the provision and discussing the relative weight such provisions should be afforded).

100. *See id.* (asserting that the contract documents directed all relevant payments and notices be sent to Miami).

101. *See id.* at 466 (noting that the defendant MacShara attended the required management courses in Miami).

102. *See Burger King*, 471 U.S. at 464-67 (summarizing the defendants' claim that because they were residents of Michigan, the United States District Court for the Southern District of Florida could not assert personal jurisdiction).

103. *See id.* at 468 (describing the events that led to the suit).

104. *See id.* (noting the defendant's refusal to cooperate with Burger King's request).

105. *See id.* (basing jurisdiction on diversity, 28 U.S.C. sec. 1332(a), and the fact that the case involved a federal trademark dispute, 28 U.S.C. sec. 1328(a)).

106. *See id.* at 473 (noting that a court may legitimately exercise jurisdiction only when the defendant directs his activities toward residents of the forum).

107. *See id.* (providing for protection in the form of a convenient forum).

108. *See Burger King*, 471 U.S. at 476 (noting modern transportation and communication have eased the burden of litigation in another forum).

“constitutional touchstone” remained “minimum contacts.”<sup>109</sup> Fifth, foreseeability alone was not a “sufficient benchmark.”<sup>110</sup> Finally, the defendant must “purposefully avail” himself through contacts that create a substantial connection; benefits and protections of state’s laws.<sup>111</sup>

Then Justice Brennan clearly stated the new two-tier test implicit in *World-Wide*: first, the “minimum contacts” or sovereignty test, second, the “fair play and substantial justice” test.<sup>112</sup> The factors include: the burden on the defendant; the forum state’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief; the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and the shared interest in the several states in furthering fundamental substantive social policies.<sup>113</sup>

Justice Brennan then stated that an individual’s contract with an out of state individual alone could not create jurisdiction in the other party’s home state,<sup>114</sup> but found sufficient other factors to find juris-

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109. *See id.* 474 (noting that a “minimum contacts” analysis is fundamental to establish jurisdiction).

110. *See id.* (citing *World-Wide Volkswagen*, 444 U.S. at 295) (noting that foreseeability of injury in the forum state is insufficient to exercise personal jurisdiction).

111. *See id.* at 474-75 (requiring “purposeful availment” to ensure jurisdiction is not based on “random”, “fortuitous”, or “attenuated” contacts). The Court cited *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), but not *Calder*. *See id.* *Calder* is cited only for the proposition that lack of physical presence in the state does not prevent jurisdiction where the actor’s efforts are “purposefully directed” toward the state’s residents. *See Burger King*, 471 U.S. at 476 (discussing the criteria for personal jurisdiction).

112. *See Burger King*, 471 U.S. at 476 (citing *International Shoe*, 326 U.S. at 320) (noting that once minimum contacts have been established, other factors should be considered to ensure the exercise of jurisdiction is fair).

113. *See id.* at 476-77, citing *World-Wide Volkswagen*, 444 U.S. at 292.

114. *See Burger King*, 471 U.S. at 478-79 (rejecting a “mechanical” test and emphasizing a “highly realistic approach” that realized a contract as the culmination of business negotiations). *Cf. McGee*, 355 U.S. at 233 (holding that jurisdiction existed based on a single contract that had a substantial connection with the forum state). *Burger King* did not overrule, but rather, as the First Circuit explained, it created a “contact-plus” analysis. *See Ganis Corp. of Cal. v. Jackson*, 822 F.2d 194, 197-98 (1st Cir. 1987) (noting that under the “contract plus” analy-



diction.<sup>115</sup>

In *Asahi Metal*,<sup>116</sup> Zurcher was injured as a result of his motorcycle tire's sudden loss of air.<sup>117</sup> The tire tube was manufactured by Cheng Shin in Taiwan.<sup>118</sup> The tube's valve was made in Japan by Asahi, a Japanese corporation, and shipped to Taiwan.<sup>119</sup> Zurcher sued Cheng Shin and Cheng Shin cross-complained against Asahi.<sup>120</sup>

Cheng Shin sold tires throughout the world, but twenty percent of its United States sales were in California.<sup>121</sup> It also bought valves from other suppliers.<sup>122</sup> Though there was no written contract available,<sup>123</sup> Cheng Shin's sales to the United States were discussed with Asahi.<sup>124</sup> Nonetheless, Asahi stated that it did not contemplate jurisdiction by California when it entered into the contract.<sup>125</sup>

The United States Supreme Court ultimately held, in a plurality

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sis, the court should examine communications before, during and after the contract's consummation).

115. *See Burger King*, 471 U.S. at 479-82 (noting the defendants rejected the idea of a local enterprise; they had negotiated with a Florida franchiser; there were manifold benefits of affiliation with a nationwide organization; they had planned a twenty-year relationship; they had wide-reaching contacts with Florida; there were foreseeable injuries to Burger King in Florida; the franchises' supervision was from Florida, not from the Michigan branch office; and there was a Florida choice of law provision in the contract).

116. 480 U.S. 102 (1987).

117. *See id.* at 106 (noting the cause of Zurcher's injury).

118. *See id.* (noting Cheng Shin of Taiwan was named in the complaint as the manufacturer of the tube).

119. *See id.* (explaining Asahi's role in the tire manufacturing process). This sale to Cheng Shin represented 1.24% to 0.44% of Asahi's global income.

120. *See id.* (explaining that Cheng Shin sought indemnification from Asahi and its co-defendants).

121. *See id.* (providing Cheng Shin's relevant corporate information).

122. *See Asahi Metal*, 480 U.S. at 106 (noting Asahi was not Cheng Shin's sole supplier).

123. *See id.* (noting the absence of a contract between Asahi and Cheng Shin).

124. *See id.* at 107 (quoting the affidavit of Cheng Shin's manager who stated his belief that Asahi was aware that its valve stem assemblies would be sold in California).

125. *See id.* (quoting Asahi's president, who declared that due to its limited sales to Cheng Shin, Asahi never contemplated being subject to lawsuits in California).

opinion, that California did not have jurisdiction over Asahi.<sup>126</sup> Writing for the Court, but not for the majority,<sup>127</sup> Justice O'Connor stated that *Burger King* reaffirmed that the "minimum contacts" analysis requires "purposeful availment."<sup>128</sup> The consumer's unilateral behavior of bringing products into the state was insufficient.<sup>129</sup> Justice O'Connor stated that the Court rejected the idea that foreseeability alone was enough.<sup>130</sup> She then articulated her rule, which did not receive majority support, that merely placing a product in the stream of commerce is not purposeful direction toward the forum state.<sup>131</sup> Accordingly, Justice O'Connor found that personal jurisdiction was lacking.<sup>132</sup>

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126. *See id.* at 116 (holding that "minimum contacts" existed). The California Superior Court held there was personal jurisdiction because of the international scale of Asahi's business). The Court of Appeals reversed holding that it was unreasonable to base jurisdiction solely on foreseeability. *See id.* The California Supreme Court reversed, finding jurisdiction because Asahi benefited from sales in California, intentionally placed its components in the stream of commerce and was aware of Cheng Shin's California sales. *See id.* at 107 (providing a synopsis of the lower courts' rulings).

127. *See Asahi Metal*, 480 U.S. at 105 (summarizing which Justices agreed, concurred and dissented from the judgment). Eight Justices agreed with Section I, essentially a recitation of the facts. *See id.* Only four Justices, however, agreed with Section II.A, where Justice O'Connor explicated her "stream of commerce plus" ideas while tentatively finding personal jurisdiction under the first tier "minimum contacts" analysis. *Id.* Finally, in Section II.B, eight Justices agreed that there was no personal jurisdiction under the fairness tier analysis. *See id.*

128. *See id.* at 109 (citing *Hanson*, 357 U.S. at 253) (holding that "minimum contacts" could only be established by a defendant's actions that result in the privilege of conducting activity in the forum).

129. *See Asahi Metal*, 480 U.S. at 109, citing *World-Wide Volkswagen*, 444 U.S. at 286 (emphasizing that the defendant's, and not the consumer's, acts establish "minimum contacts").

130. *See Asahi Metal*, 480 U.S. at 106, citing *World-Wide Volkswagen*, 444 U.S. at 295-96 (noting that foreseeability alone was insufficient to establish jurisdiction under the Due Process Clause).

131. *See Asahi Metal*, 480 U.S. at 112 (noting the similarity between this analysis and what has been previously described as "contacts plus"). Additional factors that Justice O'Connor would consider are: designing the product for the forum's market; advertising in the forum state; establishing channels for advice to consumers in the forum state; and marketing through a distributor who is state sales agent. *See id.* (listing some other factors).

132. *See id.*

Justice O'Connor then turned to the second tier of the test, the "convenience" or "fairness" analysis.<sup>133</sup> The necessary factors to be considered are the burden on the defendant, the forum state's interests, the plaintiff's interests, the interests of the interstate judicial system, and the states' shared interests in social policies.<sup>134</sup> She stated that the defendant's burden was severe here, particularly because defending oneself in a foreign legal system is an additional burden.<sup>135</sup> Justice O'Connor then stated that both the plaintiff's interests and California's interests were comparatively slight.<sup>136</sup>

The principles discussed in *Asahi* were extended to *quasi in rem* jurisdiction in *Shaffer v. Heitner*,<sup>137</sup> where the Court also looked at whether the nonresident defendants "purposefully avail[ed themselves] of the privilege of conducting activities in the forum state"<sup>138</sup> and "whether the nonresident defendants had reason to expect to be haled before a . . . court" in the forum state.<sup>139</sup>

### C. THE "EFFECTS" TEST

Central to the argument that terrorist acts abroad subject the perpetrators to personal jurisdiction in the United States is the so-called "effects" test. This section discusses the origin of the test and its subsequent, primarily restrictive, application.

#### 1. *Calder and Company*

In *Calder v. Jones*,<sup>140</sup> actress Shirley Jones sued the *National En-*

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133. See *id.* at 113 (writing for a unanimous court in this portion of her analysis).

134. See *Asahi Metal*, 480 U.S. at 113 (citing the factors first stated in *World-Wide Volkswagen*).

135. See *id.* at 114 (discussing one of the factors considered in the analysis).

136. See *id.* at 114-15 (noting that Zurcher, a California resident, had already been compensated for his loss by Cheng Shin; the remaining issue was whether *Asahi Metal* would be required to indemnify Cheng Shin for the payment).

137. 433 U.S. 186 (1977).

138. See *id.* at 216 (quoting *Hanson*, 357 U.S. at 253).

139. See *id.* (quoting *Hanson*, 357 U.S. at 253).

140. 465 U.S. 783 (1984).

*quirer* for libel, invasion of privacy and intentional infliction of emotional distress over an article alleging that she drank too much to fulfill her acting obligations.<sup>141</sup> Then-Associate Justice Rehnquist, writing for a unanimous Court, held that California's long-arm statute<sup>142</sup> enabled it to assert personal jurisdiction over a *National Enquirer* reporter as well as the editor and president.<sup>143</sup> Justice Rehnquist's opinion upheld the California Court of Appeals' opinion subjecting the defendants to personal jurisdiction, even though their tortious acts originated in Florida and were aimed at a plaintiff in California.<sup>144</sup>

Justice Rehnquist appeared to adopt the California court's novel "effects" theory of personal jurisdiction, but he not only failed to support the theory, he discussed facts that were irrelevant if the theory was the only basis for jurisdiction.<sup>145</sup> First, Justice Rehnquist stated that plaintiff's contacts "may be so manifold as to permit jurisdiction when it would not exist in their absence."<sup>146</sup> Second, Justice Rehnquist stated that because California is both the focal point of the story and the place where the harm was suffered, personal jurisdiction is proper "based on the 'effects' of their Florida conduct in Cali-

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141. See *Calder*, 465 U.S. at 785, 788 n.9 (discussing how Jones resided in California and did most of her acting there).

142. See *Calder*, 465 U.S. at 786 n.5, citing CAL. CIV. PROC. CODE sec. 410.10 (West 1973) (affirming that California's long-arm statute allows personal jurisdiction to the full extent allowed by the federal Constitution).

143. See *id.* at 785-86 (noting that the *Enquirer* itself, and its California distributor, were also named as defendants but did not contest personal jurisdiction).

144. See *Calder*, 187 Cal. Rptr. 825 (1982) (establishing that the Superior Court granted South and Calder's motions to quash service of process, even though personal jurisdiction existed, because it concluded that First Amendment concerns outweighed the jurisdictional analysis). The California Court of Appeals rejected the First Amendment analysis and reversed. See *id.* at 828 (discussing the court's holding). See also *Calder*, 465 U.S. at 790 (holding that infusing First Amendment issues would only serve to complicate an already imprecise analysis). The Supreme Court agreed that First Amendment concerns had no place in personal jurisdiction analysis. See *id.*

145. See *Calder*, 465 U.S. at 788-89.

146. See *id.* at 788 (citing *McGee*). In *McGee*, however, the defendant was found to have "systematic and continuous" contacts with California and the suit was based on a contract which had substantial connection to California. See *supra* notes 43-50 and accompanying text (discussing *McGee*).

fornia.”<sup>147</sup> More pointedly, the Court later stated, “[p]etitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California.”<sup>148</sup>

Despite the apparent justification for its holding, the Court spent a significant portion of the opinion delineating the various defendants’ contacts with the forum that would have been considered in a more traditional “minimum contacts” analysis, while denying the significance of those contacts.<sup>149</sup> In the case, the reporter, South, had traveled to California many times;<sup>150</sup> Calder, president and editor, had

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147. See *Calder*, 465 U.S. at 789, citing *World-Wide Volkswagen*, 444 U.S. at 292 and the RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS sec. 37. The RESTATEMENT is hardly an unequivocal endorsement of the Court’s holding. It states:

Causing Effects in State by Act Done Elsewhere:

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from those effects *unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable*.

RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS sec. 37 (emphasis added). The RESTATEMENT later makes it clear that this reasonableness is viewed “from the standpoint of the international and interstate systems.” *Id.* This would suggest that the Restatement requires, at a minimum, consideration of the second tier of the two-tiered *Burger King* test, which was adopted the year after *Calder* was decided (although the “minimum contacts” test was firmly in place). But see *Kulko*, 436 U.S. at 96-97 (noting that the RESTATEMENT recognized that there might be circumstances where jurisdiction might be unreasonable despite an “effect” in state, and that the section was inapplicable because “[t]here is no claim that appellant has visited physical injury on either property or persons within the State of California”).

148. *Calder*, 465 U.S. at 789.

149. See *id.* at 785 n.4 (discussing a refusal to delve into the disputed contention that South had made one trip to California in connection with the Jones article because “we do not rely for our holding on the alleged visit”). Further, the Court did not consider the California court’s conclusion that the visit and phone calls to California constituted an independent basis for jurisdiction for the same reason. See *id.* at 787 n.6 (denying jurisdiction).

150. See *id.* at 785-86 n.3 (recounting how South had been to California more than twenty times in the prior four years and had called sources in California for the story and had also called Jones’ husband in California).

been to California twice,<sup>151</sup> and the *National Enquirer* sold about 600,000 copies of each issue in California, almost twice as many as were sold in the next highest sales volume state.<sup>152</sup> The relevance of these facts is unclear if traditional "minimum contacts" analysis was no longer necessary where the intentional tort, wherever originated, was aimed at a plaintiff in the forum jurisdiction.

In *Keeton v. Hustler Magazine, Inc.*,<sup>153</sup> the companion case to *Calder*, the Court held that the State of New Hampshire had personal jurisdiction over *Hustler Magazine* via its long-arm statute.<sup>154</sup> The Court reached this conclusion based on the fact that 10,000 to 15,000 copies of the magazine were sold in the state each month, despite the fact that the plaintiff, a New York resident, had virtually no connection with the state.<sup>155</sup> In fact, she only selected New Hampshire as the forum because, due to its unusually long six-year statute of limitations for libel, it was the only state where she could file suit.<sup>156</sup> Interestingly, the Court stated that, "[f]alse statements of fact harm both the subject of the falsehood and the readers of the statement."<sup>157</sup> Consequently, despite the fact that the direct target of the injury, Keeton, was not in New Hampshire, the collateral injury to New Hampshire residents, caused by receiving false information about Keeton, was apparently a "contact" to be weighed in the minimum contacts analysis.<sup>158</sup>

In *Nelson v. R. Greenspan & Co.*,<sup>159</sup> the plaintiff claimed negligent or intentional misrepresentation and breach of contract by the defen-

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151. See *id.* at 786 (stating that once was for pleasure and the other was to testify in a trial unrelated to the article).

152. See *id.* at 785 (providing sales information).

153. 465 U.S. 770 (1984).

154. See *Keeton*, 465 U.S. at 774 n.4 (citing N.H. REV. STAT. ANN. sec. 300:14 (1977)) (noting the similarity to *Calder* where the state long-arm statute was held to reach as far as the Due Process Clause).

155. See *id.* at 772 (discussing how the magazine she helped produce, which listed her name in several places, was sold in New Hampshire).

156. See *id.* (explaining Keeton's reason for choosing New Hampshire).

157. *Id.* at 776.

158. See *id.* (explaining the Court's reasoning in reaching its judgment).

159. 613 F. Supp. 342 (E.D. Mo 1985).

dant, a New York corporation.<sup>160</sup> In finding personal jurisdiction, the court noted that the offer was apparently accepted in Missouri,<sup>161</sup> that the defendants knew their actions would harm the plaintiff in Missouri and that their conduct was "directed at" the plaintiff in Missouri.<sup>162</sup>

In *Hugel v. McNell*,<sup>163</sup> the First Circuit followed *Calder* and found that New Hampshire's long-arm statute properly gained personal jurisdiction over the McNells, when false information they provided to *The Washington Post* injured Hugel in New Hampshire.<sup>164</sup> The court found direct injuries to the plaintiff in New Hampshire.<sup>165</sup> Further, the court found that the defendants "intended the brunt of the injury to be felt in New Hampshire."<sup>166</sup> The court interpreted *Calder* as requiring a contacts analysis: "[t]he knowledge that the major impact of the injury would be felt in the forum State constitutes a purposeful contact or substantial connection whereby the intentional tortfeasor could reasonably expect to be haled into the forum State's courts to

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160. See *Nelson*, 613 F. Supp. at 344 (recalling how the defendants allegedly asked the plaintiff to move from Missouri to New York to take a job).

161. See *id.* (recounting the facts of the case).

162. See *id.* at 346 (demonstrating knowledge of the consequences of the defendant's actions).

163. 886 F.2d 1 (1st Cir. 1989).

164. See *Hugel*, 886 F.2d at 2-3 (discussing the facts of the case). Sam McNell and Max Hugel entered into a business relationship and Hugel loaned Sam \$377,000. The business and the personal relationship turned sour and the loan was never repaid. Sam's brother Tom then told *The Washington Post* that Hugel was involved in illegal securities transactions. The allegations were false and Tom knew them to be false. Publication of the article forced Hugel to resign as Deputy Director of the Central Intelligence Agency. On the day the story was released the McNells disappeared. Hugel filed in New Hampshire for libel and slander. With the McNells still in hiding, the court entered a default judgment against them. After their capture in California (and conviction on criminal fraud and conspiracy charges) the McNells moved for relief of the default judgment under Federal Rules of Civil Procedure sec. 60(b)(6). The district court denied the motion and the McNell's appealed, arguing, *inter alia*, that the court lacked personal jurisdiction over them. See *Hugel*, 886 F.2d at 2-3.

165. See *id.* at 3 (finding that "McNells' defamation of Hugel resulted in injury to his business reputation in New Hampshire.").

166. *Id.* at 4.

defend his actions.”<sup>167</sup> For reasons not explained, the court did not engage in a fairness tier analysis.<sup>168</sup>

In *Sinatra v. National Enquirer Inc.*,<sup>169</sup> the court had the opportunity to consider the interaction of the *Calder* “effects” test and the “reasonableness” component of *Asahi*.<sup>170</sup> The case arose when employees of a Swiss clinic, in the hopes of attracting American clients, falsely told a Florida-based reporter for a nationally circulated publication that entertainer and California resident Frank Sinatra had undergone age-reversing treatments at their clinic.<sup>171</sup> The court stated that the Ninth Circuit had interpreted the cases of *Burger King* and *Calder* together to modify the “purposeful availment” standard “to allow ‘the exercise of jurisdiction over a defendant whose only ‘contact’ with the forum is the ‘purposeful direction’ of a foreign act having effect in the forum state.’”<sup>172</sup> The court found a substantial number of activities aimed at California.<sup>173</sup> In addition, the court found that the clinic should have reasonably anticipated being haled into court in California.<sup>174</sup> Finally, the court found jurisdiction to be reasonable under a “reasonableness” inquiry.<sup>175</sup>

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167. *Id.* (citing *Calder*, 465 U.S. at 789-90).

168. *See Hugel*, 886 F.2d at (deciding to forego the fairness analysis).

169. 854 F.2d 1191 (9th Cir. 1987).

170. *See Sinatra*, 854 F.2d at 1192 (considering whether statements by a Swiss clinic were sufficient “minimum contacts” to establish personal jurisdiction).

171. *See id.* at 1192-93 (noting that Sinatra first filed suit in California Superior Court, but the suit was removed to federal court based on diversity of citizenship).

172. *Id.* at 1195 (citing *Haisten v. Grass Valley Med. Reimbursement Fund Ltd.*, 784 F.2d 1392, 1397 (9th Cir. 1986)).

173. *See id.* at 1195-96 (reporting that the clinic used Californian Sinatra’s name; the clinic advertised in California; the situs of Sinatra’s reputational injury was California; the clinic treated many California residents and a substantial percentage of the clinic’s United States patients were from California).

174. *See id.* at 1197 (citing *World-Wide Volkswagen*, 444 U.S. at 297) (considering that the clinic had a relative amount of commercial activity in the forum state).

175. *See Sinatra*, 854 F.2d at 1201 (finding that the clinic was unable to rebut the presumption of reasonableness established by its commercial activity).



## 2. Questioning and Narrowly Construing *Calder*

A number of courts have subsequently questioned the teachings of *Calder* or have interpreted it narrowly.<sup>176</sup> In *Denmark v. Tzimas*,<sup>177</sup> the court dismissed malicious prosecution, libel, and slander charges against a British citizen for lack of personal jurisdiction.<sup>178</sup> The court described the appropriate test as “remarkably straightforward”: whether the foreign defendant had “minimum contacts with the state resulting from affirmative or purposeful conduct of the defendant,” and whether it was “unfair or unreasonable” to require the defendant to defend in the forum.<sup>179</sup> The court noted that the plaintiff had evoked the *Calder* “effects” doctrine in arguing personal jurisdiction for the libel and slander claims,<sup>180</sup> but concluded that “plaintiffs’ reliance on those cases is misplaced.”<sup>181</sup> The court stated that, “[t]he tort of libel . . . [is a] unique tort which courts have . . . held to have occurred simultaneously in the locales of transmission and receipt.”<sup>182</sup>

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176. See *infra* notes 177-215 and accompanying text (discussing the cases).

177. 871 F. Supp. 261, 264 (E.D. La. 1994). The case arose when criminal charges were filed against Gillian Denmark, a United States citizen, in England for the theft and handling of stolen goods belonging to Aris Tzimas, a British citizen. See *id.* In 1993, Ms. Denmark was acquitted of the criminal charges. However, when the instant case was decided, an English civil case by Tzimas against Denmark was still pending. See *id.* In 1994, Ms. Denmark filed suit in federal court in Louisiana against Tzimas for malicious prosecution, and for libel and slander. See *id.* The later complaints were based on the fact that Tzimas had allegedly caused an article about Ms. Denmark’s arrest to be published in a British magazine and because Tzimas had allegedly told Ms. Denmark’s customers, potential customers and fellow dealers that Ms. Denmark was a thief. See *id.*

178. See *Sinatra*, 854 F.2d at 265 (dismissing the claim for lack of personal jurisdiction and forum non conveniens).

179. See *id.* (providing the two-step analysis for determining jurisdiction).

180. See *id.* at 267 (citing *Calder*, *supra* text accompanying notes 140-52, *Sinatra*, *supra* text accompanying notes 169-175, and *Coreil* as cases applying the “effects” doctrine). The court dismissed the malicious prosecution with minimal discussion because all of the events occurred in England. See *id.* (providing the court’s explanation for dismissal).

181. See *id.* at 267 (noting that both *Calder* and *Coreil* involved defendants who regularly published and distributed their work in the forum states, and that in *Sinatra* the defendant intended to actively solicit United States clients through the publication of the article about Sinatra).

182. *Id.* at 268, citing *Paul v. International Precious Metals Corp.*, 613 F. Supp.

The court held that “minimum contacts” were established because the defendant had called the plaintiff in Louisiana and had published allegedly defamatory remarks about her in Louisiana.<sup>183</sup> Nonetheless, the court found that the “fairness” tier required dismissal of the claims, particularly since the burden on the defendant would be significant if forced to litigate in Louisiana.<sup>184</sup>

In *Laykin v. McFall*,<sup>185</sup> a Texas case involving a complaint of conversion, fraud, and deceptive business practices,<sup>186</sup> the court stated that: “[t]o hold that the requisite minimum contacts are automatically established when an intentional tortfeasor knowingly causes injury in the forum state would practically reduce due process to a mechanical test which fails to examine the quality and nature of the nonresident’s actions.”<sup>187</sup> Warning that *Calder* “should not be interpreted beyond the facts of the case,”<sup>188</sup> the court reasoned that a holding that “minimum contacts” are always established when an intentional tortfeasor knowingly causes injury in the state would be “too broad an interpretation of *Calder*.”<sup>189</sup>

Writing in dissent, Justice Poff gave a broad interpretation to *Calder*, noting correctly that the Court had “explicitly stated that its

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174, 176 (S.D. Miss. 1985) (citing *Keeton*, *supra* text accompanying notes 154-158).

183. See *Denmark*, 871 F. Supp. at 269 (following precedent cases, which liberally construe Louisiana’s long-arm statute).

184. See *id.* at 268 (finding that the burden on the defendant to litigate in the United States would be significant, especially since all of his witnesses were in England).

185. 830 S.W.2d 266 (Tex. Ct. App. 1992).

186. See *Laykin*, 830 S.W.2d at 268 (discussing the facts of the case) In *Laykin*, Livermore, a Texas resident, contacted California resident Laykin by telephone and asked her to sell a ring for her. See *id.* The parties agreed and the ring was sent to California. However, before Laykin could sell the ring Livermore found a buyer in Texas. See *id.* Livermore demanded the return of the ring and Laykin refused. Livermore sued Laykin in Texas, and Laykin filed a special appearance contesting the Texas court’s personal jurisdiction over him. See *id.* The trial judge, McFall, overruled the special appearance, and Laykin sought a writ of mandamus against McFall. See *id.*

187. *Id.* at 271 (citing *Burger King*, 471 U.S. at 468).

188. See *Laykin*, 830 S.W.2d at 270 n.3.

189. *Id.* at 271.

holding did not depend on the alleged fact that [one of the defendants] visited California in connection with the article."<sup>190</sup>

In *Wallace v. Herron*,<sup>191</sup> a case involving malicious prosecution,<sup>192</sup> the court dismissed the suit, despite the plaintiffs' reliance on *Calder*.<sup>193</sup> The court stated: "[w]e do not believe that the Supreme Court,

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190. *Id.* at 276 (Poff, J., dissenting). Justice Poff cited cases broadly interpreting *Calder*. See *Hugel v. McNell*, 886 F.2d 1, 4 (1st Cir. 1989) (establishing the tortfeasor's knowledge that the injury would be felt in the forum state constitutes a purposeful act in that state); *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990) (allowing jurisdiction over a defendant whose only contact with the state is purposefully directing an act with an effect in that state); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988) (holding that when a defendant purposefully directs an act toward a state and knows that the acts effects will be felt in that state, the defendant can anticipate being brought to court there); *Davilla-Fermin v. Southeast Bank, N.A.*, 738 F. Supp. 45 (D.P.R. 1990) (involving incorrect credit card records); *Coblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364 (M.D. Ala. 1989) (involving termination of a truck dealership for manufacturer's trucks); *Nelson v. R. Greenspan & Co.*, 613 F. Supp. 342 (E.D. Mo. 1985) (alleging that the corporation falsely induced plaintiff to move to New York for employment); see also W. Frank Newton & Jeremy C. Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 535-36 (1986) (asserting that a forum state has personal jurisdiction over a defendant who intentionally inflicts injury on one of its residents).

191. 778 F.2d 391 (7th Cir. 1985).

192. See *Wallace*, 778 F.2d at 393, 393 n.1, 396 (recounting the lower courts holdings). Indiana residents Donna and Willis Seeley, wanted to start a log home franchise so they consulted with the plaintiff, Rod Wallace, also an Indiana resident and independent contractor in the field, but did not contract with him. Instead, they contracted with Real Log Homes, Inc. ("Real"). See *id.* at 392. The Seeleys moved their territory to California, and when the relationship with Real turned sour, they hired the defendants, several lawyers including named defendant Wayne Herron, to sue Real in California state court. See *id.* Even though Wallace was not related to Real and had not participated in the negotiations to obtain the franchise, Herron added Wallace as a defendant to the California suit. See *id.* The Seeleys later dismissed the case against Wallace and Wallace then sued Herron in Indiana state court for malicious prosecution. See *id.* Wallace also sued the Seeleys but this case was dismissed by mutual stipulation and played no part in the federal suit. See *id.* at 392. The state court held that it had personal jurisdiction over Herron. See *id.* Herron removed the case to the federal district court and then moved for dismissal on the grounds that the court lacked personal jurisdiction over the defendants. See *id.* The district court agreed and dismissed the case and the Seventh Circuit affirmed. See *id.*

193. See *Wallace*, 778 F.2d. at 395 (stating that, "[t]he Supreme Court did not

in *Calder*, was saying that any plaintiff may hale a defendant into court, in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff."<sup>194</sup> The court noted that *Burger King* was decided after *Calder* and that under *Burger King* the purposeful establishment of "minimum contacts" and "foreseeability" remained the constitutional touchstones of the personal jurisdiction analysis.<sup>195</sup> Further, the court noted that the *Calder* defendants had significant "minimum contacts" with the forum state under the traditional test.<sup>196</sup>

In *Casualty Assurance Risk Ins. Brokerage v. Dillon*,<sup>197</sup> the Ninth Circuit narrowly interpreted *Calder* and *Keeton* to stand for the proposition that the circulation of allegedly libelous material in the forum was "an important factor in the minimum contacts analysis for a defamation action."<sup>198</sup> Thus, the court found that *Calder* and *Keeton* had not modified the traditional test for personal jurisdiction.<sup>199</sup>

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intend the *Calder* "effects" test to apply only to libel cases.").

194. *Id.* at 394.

195. *See id.* at 395 (declaring that the Supreme Court in *Burger King* and *World-Wide Volkswagen* found "minimum contacts" and "foreseeability" to be the determining factors for personal jurisdiction).

196. *See id.* (noting that in *Calder* the defendants used California sources to write an article about the activities of a California resident in that state).

197. 976 F.2d 596, 598 (9th Cir. 1992). The Casualty Assurance Risk Insurance Brokerage ("CARIB"), which was incorporated under the laws of Guam, attempted to qualify to sell medical malpractice insurance in Indiana through a closely related entity, Medical Liability Purchasing Group ("MLPG"). *See id.* Dillon, Indiana's Attorney General, denied the application because neither CARIB nor MLPG was licensed in Indiana. Shortly thereafter Guam revoked CARIB's Certificate of Authority. *See id.* Dillon sent a letter to all healthcare providers that had been solicited by MLPG informing them of these events. *See id.* CARIB alleged that the letter was intentionally drafted to be misleading and to harm CARIB, so CARIB sued, *inter alia*, for libel. CARIB sued Dillon in Guam on the *Calder* theory that the foreseeable effect of the letter was to harm a Guam entity. *See id.* The Superior Court of Guam dismissed for lack of personal jurisdiction and the United States District Court for the District of Guam affirmed. *See id.*

198. *Dillon*, 976 F.2d at 599.

199. *See id.* at 600 (outlining the traditional three-prong analysis: whether the defendant purposefully availed himself of the privilege of conducting activities in the forum state; whether the claim arose from defendant's forum-related activities; and whether exercise of jurisdiction would be reasonable).

In *Reynolds v. International Amateur Athletic Federation*,<sup>200</sup> in the aftermath of a convoluted fact pattern of arbitration and litigation,<sup>201</sup> the Sixth Circuit was faced with a *Calder*-style “effect” when the International Amateur Athletic Federation’s (“IAAF”) allegedly tortiously issued a press release from London in Ohio.<sup>202</sup> After applying Ohio’s long-arm statute,<sup>203</sup> the court distinguished *Calder* because therein the “intentional actions were aimed at California and the brunt of the harm was felt in there.”<sup>204</sup> Consequently, the court found no personal jurisdiction.<sup>205</sup>

In *Far West Capital, Inc. v. Towne*,<sup>206</sup> the court had the opportunity to consider the *Calder* “effects” test in the context of the intentional torts of breach of contract, intentional interference with a contractual relationship, economic duress and bad faith.<sup>207</sup> Although first stating

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200. 23 F.3d 1110 (6th Cir. 1994).

201. See *Reynolds*, 23 F.3d at 1112-13 (detailing the history of the arbitration and legal actions involved in the case). World class sprinter Butch Reynolds tested positive for steroids after a race in Monte Carlo, Monaco. See *id.* The drug was banned by regulations promulgated by the International Amateur Athletic Federation (“IAAF”), an unincorporated, London-based association of more than two hundred countries’ national athletic associations, including The Athletic Conference (“TAC”) of the United States. See *id.* Reynolds was banned from international competitions for two years by the IAAF and it issued a press release to that effect. The press release was picked up and printed by United States media, including media in Johnson’s native Ohio. See *id.* Johnson was later completely exonerated by TAC, based on questions as to the validity of the drug tests. See *id.* The IAAF reversed and upheld the suspensions. See *id.* After administrative remedies were exhausted, and following extensive maneuverings among the IAAF, TAC and Johnson, Johnson filed suit in the Southern District of Ohio, alleging, *inter alia*, defamation, based upon the press release. See *id.*

202. See *Reynolds*, 23 F.3d at 1119 (finding that Reynolds’ argument that the press release was aimed at him in Ohio was distinguishable from *Calder*).

203. See *id.* (citing O.R.C. sec. 2307.328(A)(6) which provides for personal jurisdiction for anyone, “causing tortious injury in this state . . . by an act outside this state”).

204. See *id.* at 1120. The IAAF had argued that a suit in Ohio “would offend principles of international comity and put international cooperation at risk,” and further, that defending the suit would be “inconvenient.” See *id.* at 1117.

205. See *id.* at 1114 (concluding that the district court lacked personal jurisdiction over the IAAF).

206. 46 F.3d 1071 (10th Cir. 1995).

207. See *Far West Capital*, 46 F.3d at 1073-74. Defendant Towne, a Nevada

that Far West Capital's ("FWC") "strongest arguments" derived from *Calder*,<sup>208</sup> the court concluded that the courts applying *Calder* to intentional business torts, "[h]ave not created a per se rule that an allegation of an intentional tort creates personal jurisdiction. Instead, courts have emphasized that the defendant has additional contacts with the forum."<sup>209</sup> The Court then proceeded to apply *Burger King*, and found that the necessary minimum contacts with Utah were lacking.<sup>210</sup>

Finally, in *Allred v. Moore & Peterson*,<sup>211</sup> the Fifth Circuit considered the effects on a Mississippi lawyer, in Mississippi, of an alleg-

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resident, owned Nevada real property rich in geothermal resources. *See id.* Defendant Fleetwood was an Oregon corporation associated with Towne. *See id.* Plaintiff Far West Capital, Inc. ("FWC") and Towne engaged in lengthy negotiations before finally entering into geothermal and mineral leases. *See id.* The leases had choice of law provisions selecting Nevada law. *See id.* When FWC began negotiating with General Electric to obtain financing for two geothermal power plants, Towne and Fleetwood made additional monetary demands for consents that, FWC claimed, should have been freely given. *See id.* FWC brought suit in Utah's Federal District Court in a diversity action claiming breach of contract, intentional interference with a contractual relationship, economic duress and bad faith. *See id.* The lower court granted the defendants' motions to dismiss for lack of personal jurisdiction. *See id.*

208. *See id.* at 1077 (suggesting that FWC's strongest argument is that the defendants are subject to personal jurisdiction because they committed torts against FWC in Utah).

209. *See Far West Capital*, 46 F.3d at 1078; *see also* *Goblentz GMC/Freightliner, Inc. v. General Motors Corp.*, 724 F. Supp. 1364 (M.D. Ala. 1989) (finding Volvo amenable to suit in Alabama for intentional torts involving termination of a dealership where Volvo had established a litigation fund to defend such suits and could anticipate being haled into Alabama court); *Borshow Hosp. & Medical Supplies, Inc. v. Burdick-Siemens Corp.*, 143 F.R.D. 472, 485 (D.P.R. 1992) (finding that the defendant mailed letters to and traveled to the jurisdiction); *But see Southmark Corp. v. Life Investors Inc.*, 851 F.2d 763, 772-73 (5th Cir. 1988) (finding no jurisdiction in Texas based on a contract negotiated in Atlanta or New York, the alleged breach of which had effects on a Texas corporation); *Wallace*, 778 F.2d at 395 (holding that jurisdiction in the plaintiff's home forum is not created under *Calder* by the mere allegation of an intentional tort).

210. *See Far West Capital*, 46 F.3d at 1079-80 (applying the *Burger King* standard of examining "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" and any other contracts resulting from the out-of-state defendant committing the alleged tort).

211. 117 F.3d 278 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 691 (1998).

edly frivolous third-party lawsuit brought by Texas and Louisiana attorneys.<sup>212</sup> Personal jurisdiction was gained under Mississippi's long-arm statute, which supports the traditional choice of law idea that a tort is completed where the last act necessary to make it a tort (the injury) occurs.<sup>213</sup> Considering *Calder*, the court stated, "[t]he effects test is not a substitute for a nonresident's minimum contacts, which demonstrate purposeful availment of the benefits of the forum state."<sup>214</sup> The court concluded that insufficient contacts existed to establish jurisdiction.<sup>215</sup>

#### D. GENERAL PERSONAL JURISDICTION

Although general personal jurisdiction can be said to have its genesis in *Perkins v. Benguet Consol. Mining Co.*,<sup>216</sup> the case universally cited is *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>217</sup> which arose as a result of a helicopter crash in Peru in which four United States citizens died.<sup>218</sup> *Helicopteros Nacionales de Colombia* ("Helicopteros") was a Colombian corporation and the decedents

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212. See *Allred*, 117 F.3d 280 (describing the nature of the case and source of controversy between the parties). Plaintiff Allred was a lawyer for the Louisiana Insurance Commissioner in a lawsuit against Rush in the United States District Court for the Middle District of Louisiana. See *id.* During the suit Rush's lawyers instituted a third-party suit against Allred. See *id.* Allred filed suit in state court; the defendants removed the case to federal court and then moved for dismissal for lack of personal jurisdiction. See *id.*

213. See *id.* at 282 (interpreting MISS. CODE ANN. sec. 13-3-57 (1996 Supp.)).

214. *Id.* at 286 (citing *Wallace*, *supra* notes 190-95).

215. See *id.* at 287 (holding that the District Court properly decided that it lacked personal jurisdiction under Mississippi's long-arm statute).

216. *Perkins*, 342 U.S. 437 (1952). In *Perkins* a state court had exercised personal jurisdiction, pursuant to Ohio's long-arm statute, over a Philippine mining corporation that maintained an active office in Ohio, held directors' meetings in Ohio, kept files in Ohio, distributed salary checks from Ohio banks and otherwise carried on systematic and continuous activities within Ohio. See *id.* Thus, even though the cause of action was unrelated to these activities, the Court held that there was general personal jurisdiction. See *id.* at 438, 447-48 (listing the contacts between the defendant and the state of Ohio that the state court found to grant it jurisdiction over the defendant).

217. 466 U.S. 408 (1984).

218. 466 U.S. at 410 (describing the respondents as the survivors of four Americans who died in a helicopter crash).

were employed by Consorcio, an international Peruvian joint venture headquartered in Texas.<sup>219</sup> Helicopteros performed under a contract signed in Peru, written in Spanish, and conveying Peruvian jurisdiction on controversies arising out of the contract.<sup>220</sup> In addition, Helicopteros had a number of contacts with Texas.<sup>221</sup>

Confronted with the issue of whether it was consistent with due process to allow Texas to assert jurisdiction over Helicopteros,<sup>222</sup> the Supreme Court began by first discussing the conventional minimum contacts analysis,<sup>223</sup> and suggested that personal jurisdiction may, nonetheless, exist if there are "sufficient contacts."<sup>224</sup> The Court, however, concluded that there were not sufficient contacts for general jurisdiction.<sup>225</sup>

In *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*,<sup>226</sup> the Second Circuit found that there were sufficient contacts for general ju-

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219. *See id.* (identifying Consorcio as the alter ego of a Houston-based, joint venture named Williams-Sedco-Horn).

220. *See id.* at 410-11 (describing the contract under which Helicopteros performed).

221. *See id.* (listing those contacts as: Helicopteros' purchase of approximately 80 percent of its helicopter fleet, valued at \$4 million, from Bell Helicopter in Texas; the training of its pilots in Texas; and the deposit of more than \$5 million in payments into its bank accounts through a Texas bank).

222. A wrongful death action was filed in a Texas trial court. Helicopteros made a special appearance to deny jurisdiction. The trial court denied Helicopteros' motion. The appellate court reversed, holding that there was no personal jurisdiction. The Supreme Court of Texas reversed, finding there was personal jurisdiction. *See id.* at 412-13.

223. *See Helicopteros*, 466 U.S. at 414 (finding that *International Shoe* allows for the assertion of personal jurisdiction over a non-resident, corporate defendant, in accordance with the due process requirement when "certain minimum contacts" exist between the defendant and the forum state).

224. *See id.* (concluding that even when the cause of action does not arise from or relate to contacts between the defendant foreign corporation and the forum state, due process still allows a state to assert personal jurisdiction if "sufficient contacts" exist).

225. *See id.* at 416 (holding that Helicopteros' contacts with Texas were not the continuous and systematic business contacts required for general jurisdiction under *Perkins*).

226. 84 F.3d 560 (2d Cir. 1996).



risdiction but that the fairness test was not met.<sup>227</sup> In so doing, the court assumed what the Supreme Court never made explicit: that the "fairness" tier of the two-tiered *Asahi* test applies in general jurisdiction cases.<sup>228</sup>

## II. THE FSIA AND FLIGHT 103

This section discusses the concept of sovereign immunity, the original commercial exception to sovereign immunity contained in the FSIA, the judicial determination that the FSIA did not give American courts jurisdiction over Libya in the original civil suit against Libya for the bombing of Flight 103, and the legislative response of the "state sponsors of terrorism" exception to the amended FSIA.

### A. SOVEREIGN IMMUNITY

The concept of sovereign immunity is covered extensively elsewhere<sup>229</sup> and will be reviewed only briefly here. The classic or absolute theory holds that states are equal sovereigns and one state cannot exercise jurisdiction over another state or its agents in domestic courts.<sup>230</sup> The theory was made the law of the land in the United

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227. In order to benefit from Vermont's long statute of limitations, the Metropolitan Life Insurance Company ("Met Life") filed suit against the Robertson-Ceco Company ("Robertson") for breach of contract and negligence in the design, manufacture and installation of glass and metal walls of a Met Life office building in Florida. Although the instant suit had nothing to do with Vermont, Met Life argued that personal jurisdiction was proper in Vermont because Robertson's general business contacts with Vermont were sufficiently "continuous and systematic" to subject it to general personal jurisdiction. *See id.* at 564-65, *citing Helicopteros*, 466 U.S. at 414-16 n.9 (recounting the nature of the controversy).

228. *See id.* at 573 (implying that the "fairness" tier of the two-tiered *Asahi* test applies to general and specific personal jurisdiction cases). The court stated that every circuit that had considered the issue had agreed that the fairness tier applied to general jurisdiction cases. *See id.*, *citing Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.2 (9th Cir. 1993).

229. *See, e.g.,* M. Scott Bucci, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293 (1997).

230. *See id.*, *citing* Louis Henken et al., INT'L LAW CASES & MATERIALS 891 (2d ed. 1987) (explaining sovereign immunity).

States by Justice Marshall in *The Schooner Exchange v. McFaddon*.<sup>231</sup> The weakness of the absolute theory was exposed in *Berizzi Bros. v. Steamship Pesaro*<sup>232</sup> and was exacerbated by the fact that states were engaging in an increased amount of commercial activity. As the Supreme Court shifted away from absolute immunity by deferring to the executive branch,<sup>233</sup> the "Tate Letter" affirmed that the State Department would thereafter apply a restrictive form of sovereign immunity which would be recognized "with regard to sovereign or public acts (*juri imperii*) of state, but not with respect to private acts (*juri gestionis*)."<sup>234</sup> There followed a period of confusion over the placement of the line between *juri imperii* and *juri gestionis*.<sup>235</sup>

## B. THE COMMERCIAL EXCEPTION AND THE ORIGINAL FSIA

Congress enacted the FSIA to codify and clarify the restrictive theory and to shift the burden of deciding whether or not it applied from the executive to the judicial branch.<sup>236</sup> The FSIA provided six<sup>237</sup> exceptions to sovereign immunity: (1) international agreements to which the United States was a party as of October 21, 1976;<sup>238</sup> (2) explicit or implicit waiver;<sup>239</sup> (3) commercial activities;<sup>240</sup> (4) rights in

231. 11 U.S. (7 Cranch) 116 (1812).

232. 271 U.S. 562 (1926) (upholding sovereign immunity in the case of a ship owned by Italy, even though it was a merchant, not a ship of war).

233. See *Ex parte Republic of Peru*, 318 U.S. 578 (1943) (deferring to the Executive Branch on questions of sovereign immunity); see also *Mexico v. Hoffman*, 324 U.S. 30 (1945) (reaffirming the holding in *Ex parte Republic of Peru*).

234. See *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, May 19, 1952, 26 Dep't State Bull., at 984 (explaining that the letter was authored by the legal advisor to the State Department, Jack Tate).

235. See Bucci, *supra* note 229, at 299-301 (discussing the subsequent confusion).

236. Act of Oct. 21, 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. secs. 1330; 1332(a)(2)-(4); 1391(f); 1441(d); and 1602-1611).

237. See 28 U.S.C. secs. 1604-1605 (listing the six exceptions that grant sovereign immunity).

238. 28 U.S.C. sec. 1604.

239. 28 U.S.C. sec. 1605(a)(1).

240. 28 U.S.C. sec. 1605(a)(2).

property taken in violation of international law;<sup>241</sup> (5) injuries to person or property caused by certain tortious activities "occurring in the United States"<sup>242</sup>; and (6) enforcement of arbitration agreements entered into by the parties capable of settlement within the United States.<sup>243</sup>

Of particular interest to the instant analysis is the commercial activity exception, because its "direct effects" clause<sup>244</sup> is relevant to the argument presented in *Rein*, i.e. that Libya's alleged bombing in Scotland had a direct effect in the United States.<sup>245</sup> The "direct effects" clause was carefully explored in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*<sup>246</sup> and, although its language was misconstrued by the plaintiffs,<sup>247</sup> the government,<sup>248</sup> and the District Court<sup>249</sup> in *Rein*, the *Texas Trading* supports the argument that the FSIA cannot confer personal jurisdiction over a sovereign without meeting the requirements of the Due Process Clause of the Fifth

241. See 28 U.S.C. sec. 1605(a)(3) (listing issues of property rights as an exception to sovereign immunity).

242. 28 U.S.C. sec. 1605(a)(4).

243. 28 U.S.C. sec. 1605(a)(5).

244. 28 U.S.C. sec. 1605(a)(2). The commercial activity exception states that a foreign sovereign will not be immune from suit in a case where:

[t]he 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*.

28 U.S.C. sec. 1605(a)(2) (emphasis added).

245. See *Rein*, 995 F. Supp. at 530 (summarizing the arguments in the case).

246. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). The case arose "out of one of the most enormous commercial disputes in history, and present[ed] questions which strike to the very heart of the modern international order." *Id.*

247. See Plaintiff's Brief, *supra* note 20, at 35 (citing *Texas Trading* to determine personal jurisdiction).

248. See Statement of Interest of the United States at 17-18 (citing *Texas Trading* to determine personal jurisdiction).

249. See *Rein*, 995 F. Supp. at 330 (using *Texas Trading* to determine personal jurisdiction).

Amendment to the United States Constitution, even where an act outside the United States has a direct effect in the United States.<sup>250</sup>

The *Texas Trading* litigation<sup>251</sup> arose when Nigeria and its Central Bank unilaterally altered letters of credit and anticipatorily breached some 109 contracts with 68 suppliers who had contracted to supply Nigeria with sixteen million metric tons of cement at a purchase price of almost one billion dollars.<sup>252</sup> In the four New York lawsuits Nigeria did not “seriously dispute” that its actions constituted anticipatory breaches of contract but rather argued that there was no jurisdiction under the FSIA.<sup>253</sup>

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250. See *Texas Trading*, 647 F.2d at 308 (requiring the Fifth Amendment’s Due Process Clause to be met before personal jurisdiction can be established).

251. The case captioned *Texas Trading* was the consolidated appeal of four cases heard in the United States District Court for the Southern District of New York. The four corporations, all trading companies incorporated in New York, were Texas Trading, Decor by Nikkei International, Inc., East Europe Import-Export, Inc. and Chenax Majesty, Inc. See *Texas Trading*, 647 F.2d at 303 (providing a history of the suit). Forty potential claimants settled. See *id.* at 306, citing *National Am. Corp. v. Federal Republic of Nigeria*, 597 F.2d 314, 316 (2d Cir. 1979) (discussing the disposition of part of the suit). Others filed suit in, *inter alia*, the United Kingdom or Germany, or pursued arbitration through the International Chamber of Commerce. See *Texas Trading*, 647 F.2d at 306 n.15 (discussing the disposition of part of the suit).

252. The cement was to be shipped from primarily Spanish ports to Lagos/Apapa, Nigeria. To finance the deals, Nigeria established irrevocable letters of credit with the Central Bank of Nigeria (“Central Bank”), a government entity. The advising bank was the Morgan Guaranty Trust Company (“Morgan”) of New York. Nigeria had apparently expected something less than full and prompt delivery of the cement, because the port of Lagos/Apapa could handle between one and five million tons of cement a year and full compliance with the contracts would have required the port to handle sixteen million tons in eighteen months. When ships began piling up, unable to unload at the dock, Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted an additional document proving that the ship had obtained permission to dock two months before its arrival at Nigeria. “Nigeria’s unilateral alteration of the letters of credit took place on a scale previously unknown to international commerce.” Nigeria took these actions despite Morgan’s warning to Central Bank that, “We believe that there is an increasing possibility that litigation against you may be instituted in New York.” See *Texas Trading*, 647 F.2d at 304, 305 (recounting the facts of the case).

253. See *Texas Trading*, 647 F.2d at 306 (noting that jurisdiction rather than breach of contract was at issue).

The First Circuit first observed that the FSIA purported to provide answers to three questions: the availability of the defense of sovereign immunity; the presence of subject matter jurisdiction; and the propriety of personal jurisdiction.<sup>254</sup> The court then stated that “the FSIA seems *at first glance* to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three.”<sup>255</sup> The court, however, concluded that “Congress has only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause.”<sup>256</sup> The court then turned directly to the “direct effect” clause, finding that there was subject matter jurisdiction in this case.<sup>257</sup> As for personal jurisdiction, the court stated:

The Act, therefore, makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction.<sup>258</sup> But, the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court’s

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254. *See id.* (listing the questions the FSIA purported to answer). 28 U.S.C. sec. 1330 states:

Section. 1330 Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) *Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.*

For purposes of subsection (b) an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. sec. 1330 (1994) (emphasis added).

255. *Texas Trading*, 647 F.2d at 306 (emphasis added).

256. *Id.* at 307.

257. *See id.* at 310-11 (finding statutory subject matter jurisdiction based on 28 U.S.C. sec. 1605(a)(2)).

258. *See* House Report, at 6622.

power to exercise its authority over a particular defendant.<sup>259</sup>

Thus, it seemed clear to the court that, while the FSIA can strip away sovereign immunity from a foreign state defendant and at the same time grant subject matter jurisdiction to a federal court, it cannot trump the Due Process Clause and grant that court personal jurisdiction where the traditional requirements imposed by *International Shoe* are not met.<sup>260</sup> Personal jurisdiction, therefore, under the FSIA cannot extend beyond the bounds established by the Due Process Clause, *i.e.* minimum contacts, as that term has been construed by the Supreme Court, unless and until the Court holds otherwise.<sup>261</sup> Of necessity then, the court performed the "minimum contacts" analysis, first finding that Nigeria, through the Central Bank and its relationship with Morgan, purposefully availed itself of the privileges of American law and could have expected to be haled into an American forum, and, thus, the court concluded that such contacts existed.<sup>262</sup>

With some exceptions,<sup>263</sup> most courts have agreed that where subject matter jurisdiction is predicated upon section 1605(a)(2) of the FSIA, personal jurisdiction must be determined by reference to *International Shoe* and its progeny.<sup>264</sup>

259. *Id.* at 308.

260. *See id.* at 314 (identifying the minimum contacts requirement).

261. *See Texas Trading*, 647 F.2d at 310-11 (emphasizing the importance of constitutional limitations).

262. *See id.* at 314-15 (outlining the ways by which Nigeria summoned the protections and benefits of American laws).

263. *See, e.g., Shapiro v. Republic of Bolivia*, 930 F.2d 1013 (2d Cir. 1991) (holding that the FSIA is the exclusive source of subject matter jurisdiction in suits including foreign states and using a "substantial contacts" standard rather than a "minimum contacts" standard); *Callejo v. Bancomer*, 764 F.2d 1101 (5th Cir. 1985) (failing to conduct a constitutional analysis based on *International Shoe*); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534 (11th Cir. 1993), *cert. denied*, 508 U.S. 907 (1993) (embracing the "stream of commerce" standard for "minimum contacts").

264. *See Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992) (holding that the defendants were subject to jurisdiction under the commercial activity exception of FSIA and that creditors did have sufficient contacts with the United States to warrant personal jurisdiction over the defendants); *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989) (citing *International Shoe* and denying personal jurisdiction over claims against state-owned corporations); *Gregorian v. Izvestia*, 871

## C. SMITH V. SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA

A bomb, which apparently had been placed on the airplane in Germany or England, exploded while Pan Am Flight 103 was over Lockerbie, Scotland, en route from Frankfurt, Germany to Detroit, Michigan.<sup>265</sup> It is assumed that the bomb was timed to explode while the plane was over the Atlantic Ocean, but because of a delay in the

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F.2d 1515 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989) (using *International Shoe*'s "minimum contacts" standard after holding the libel action against a Soviet newspaper did not fall within the commercial activity exception of the FSIA); *Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs*, 647 F.2d 317 (2d Cir. 1981) (invoking *International Shoe*'s "minimum contacts" standard and finding jurisdiction over defendant corporation); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (citing *International Shoe* as the prevailing personal jurisdiction case); *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979) (stating that the FSIA embodies *International Shoe*'s "minimum contacts" standard); *Ampac Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973 (S.D. Fla. 1992), *aff'd*, 40 F.3d 389 (11th Cir. 1994) (finding personal jurisdiction over Honduras); *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*, 712 F. Supp. 383 (S.D.N.Y. 1989) (relying on *International Shoe* and its progeny); *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 1340, *reconsideration denied*, 722 F. Supp. (S.D.N.Y. 1989) (holding that the FSIA incorporates due process notions of "minimum contacts"); *Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu*, 660 F. Supp. 1536 (S.D. Tex. 1987) (invoking *International Shoe*); *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393 (S.D. Fla. 1986) (holding that litigation in the United States would not be unduly inconvenient to the bank, and that the bank should have foreseen that its actions would result in litigation in the United States); *Unidyne Corp. v. Aerolineas Argentinas*, 640 F. Supp. 354 (E.D. Va. 1985) (adopting *International Shoe*'s "minimum contacts" standard and holding no such contacts were established by the airline); *Crimson Semiconductor, Inc. v. Electronum*, 629 F. Supp. 903 (S.D.N.Y. 1986) (ruling that the breach of contract had a "direct effect" in the United States and gave the District Court subject matter jurisdiction and that that seller's contract with the United States satisfied the constitutional requirements of due process); *Continental Graphic Div. of Republic Corp. v. Hiller*, 614 F. Supp. 1125 (D.C. Utah 1985) (holding that the court had personal jurisdiction over the agency); *Decor by Nikkei Int'l v. Federal Republic of Nigeria*, 497 F. Supp. 893 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 300 (2d Cir. 1981); *cert. denied*, 454 U.S. 1148 (1982) (using *International Shoe* and finding personal jurisdiction over the defendants); *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383 (S.D.N.Y. 1979), *aff'd*, 610 F.2d 806 (2d Cir. 1979) (holding that the District Court did not have personal jurisdiction over foreign corporations under FSIA); *Ruiz v. Transportes Aeros Militares Ecuatorianos*, 103 F.R.D. 458 (D.D.C. 1984) (citing *International Shoe*).

265. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 307 (E.D.N.Y. 1995) (describing the circumstances surrounding the bombing).

flight the plane was still over land when the explosion occurred.<sup>266</sup> Two hundred and seventy people were killed, of which one hundred and eighty-nine were Americans, including airline employees and thirty-nine Syracuse University students returning home from a semester abroad.<sup>267</sup>

The two Libyan suspects, Abdel Basset Ali Megrahi and Lamén Khalifa Fhimah, both former Libyan intelligence agents, surrendered in April 1999, thereby ending seven years of United Nations sanctions against Libya.<sup>268</sup> The two are currently being held in the Netherlands, where they will be tried under Scottish law.<sup>269</sup> Although the trial could have gotten underway as early as August, lawyers for the two men have sought extensions, which may push the start date back as much as a year.<sup>270</sup> The trial is also expected to last up to a year.<sup>271</sup> The suspects face a maximum sentence of life imprisonment, as Scotland has no death penalty.<sup>272</sup>

Two individuals who lost their wives on the flight brought suit in the Federal District Court for the Eastern District of New York.<sup>273</sup> The court held that the plaintiffs lacked jurisdiction under the FSIA and dismissed the case.<sup>274</sup> On appeal, the Second Circuit affirmed, noting in particular that violation of a *jus cogens* norm did not constitute an implied waiver of sovereign immunity.<sup>275</sup>

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266. See *id.* (providing background information).

267. See McKay, *supra* note 5, at 440 and accompanying text (discussing the bombing's deadly consequences).

268. See Anthony Deutsch, *Libya Delivers Bomb Suspects; Sanctions Off*, ATLANTA J. & CONST., Apr. 6, 1999, at A3 (reporting on the suspension of sanctions against Libya after the country handed over the two bombing suspects).

269. See Anthony Deutsch, *Lockerbie Bombing Suspects Arraigned*, ATLANTA J. & CONST., Apr. 7, 1999, at A3 (describing the trial).

270. See Deutsch, *supra* note 268, at A3 (speculating on the commencement of the trial).

271. See *id.* (reporting on the expected length of the trial).

272. See Deutsch, *supra* note 268, at A3 (remarking on Scottish criminal law).

273. See Smith, 886 F. Supp. at 306 (identifying the plaintiffs).

274. See *id.* at 315 (reasoning that it did not have authority *sua sponte* to assume jurisdiction based upon a violation of *jus cogens*).

275. See Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239,



## D. THE AMENDED FSIA

In response to the court's decision in *Smith*, the terrorism exception was added to the FSIA as part of the Anti-Terrorism and Effective Death Penalty Act of 1996, signed into law by President Clinton on April 23, 1996.<sup>276</sup> The pertinent section of the amendment adds a new section (7) to section 1605, providing that a foreign state shall not be immune from jurisdiction in a suit.<sup>277</sup>

### 1. Terrorism

The United States Code defines terrorism as an activity that:

involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and appears to be intended:

(i) to intimidate or coerce a civilian population. . . ;

(iii) to affect the conduct of a government by assassination or kidnapping....<sup>278</sup>

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242-47 (2d Cir. 1996) (rejecting the claim that a *jus cogens* violation constitutes an implied waiver of sovereign immunity under the FSIA).

276. 28 U.S.C. sec. 1605(a)(7) (Supp. II 1996); see also David Mackusisick, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741 (1996) (identifying the amendment to the FSIA).

277. 28 U.S.C. sec. 1605(a)(7) (Supp. II 1996).

278. 18 U.S.C. sec. 3077. An exact definition of terrorism is difficult to obtain. See McKay, *supra* note 5, at 464-66 and accompanying text (noting the ambiguity inherent in providing definitions for "international terrorism"); Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 192-93 (1983) (defining terrorism). Paust states that terrorism is

a process that involves the intentional use of violence, or threat of violence, against an instrumental target in order to communicate to a primary target a threat of future violence so as both to coerce the primary target into behavior or attitudes through intense fear or anxiety and to serve a particular political end.

*Id.*

For purposes of this discussion, the key aspect of terrorism is that the act can take place completely outside the boundaries of the United States and be intended to have an effect on persons within the United States or to have an effect on United States foreign policy, presumably a change in favor of the state sponsor of that terrorism.

## 2. *State Sponsors of Terrorism*

States may be denominated as state sponsors of terrorism by the Secretary of State under the Export Administration Act of 1979<sup>279</sup> or the Foreign Assistance Act of 1961.<sup>280</sup> In both cases the same phrase, "repeatedly provided support for acts of international terrorism," is the Secretary's benchmark.<sup>281</sup> Currently Cuba, Iraq, Iran, Libya, North Korea, Sudan, and Syria are included; however, there are some obvious political omissions to this list, such as Chile and Saudi Arabia.<sup>282</sup> Thus, the *Rein* court's interpretation of the FSIA equates the decision to deny agricultural assistance or refusing to send Peace Corps volunteers to a country with the creation of constitutionally supportable personal jurisdiction in the United States.<sup>283</sup>

Also problematic is the fact that under either the Export Administration Act or the Foreign Assistance Act, the Secretary may denominate a state as a state sponsor of terrorism for international ter-

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279. 50 U.S.C. sec. 2405(j). The Act requires United States exporters to obtain a validated license to export goods or technology to a country if the Secretary of State has determined, *inter alia*, that "such country has repeatedly provided support for acts of international terrorism." 50 U.S.C. App. sec. 2405(j)(1)(A).

280. 22 U.S.C. sec. 2371. The Act states that the United States shall not provide assistance under the Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. sec. 1691 *et seq.*, The Peace Corps Act, 22 U.S.C. sec. 2501 *et seq.* or the Export-Import Bank Act, 12 U.S.C. sec. 635 *et seq.*, to any country if the Secretary has determined that "such country has repeatedly provided support for acts of international terrorism." 22 U.S.C. sec. 2371(a).

281. *See supra* notes 279-280.

282. *See* Mackusisck, *supra* note 276, at 770 (noting that the plaintiff, De Letelier, would have benefited in *De Letelier v. Republic of Chile*, 748 F.2d. 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) and the plaintiff Nelson would have benefited in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993) had their countries been on the list).

283. *Cf. supra* notes 279-280 (claiming the decision in *Rein* analogous to the statutory provisions).

rorist activities aimed at countries other than the United States.<sup>284</sup> For example, an Arab state might receive the denomination for what the Secretary might characterize as repeated terrorist attacks against Israel.<sup>285</sup> Here the “effects” on the United States would be even further removed from the requirements of “minimum contacts.”<sup>286</sup> Certainly such a terrorist state has not purposely availed itself of the privileges and protections of United States laws, nor would it anticipate being haled into a United States court.<sup>287</sup>

E. *REIN V. SOCIALIST PEOPLE’S LIBYAN ARAB JAMAHIRIYA*

The plaintiffs subsequently refiled in *Rein*, naming as defendants the state of Libya, the Libyan External Security Organization, Libyan Arab Airlines, and Abdel Basset Ali Megrahi, and Lamén Khalifa Fhimah.<sup>288</sup>

The District Court, after first concluding that subject matter jurisdiction was appropriately obtained under the amended FSIA,<sup>289</sup> next turned to the question of personal jurisdiction. The District Court relied improperly on *Texas Trading* as the sole support for the proposition that under the FSIA the question of whether or not there is personal jurisdiction over an absent defendant is governed, not by the Constitution, but rather by the simple formula: “subject-matter jurisdiction together with proper service of process gives the court personal jurisdiction.”<sup>290</sup>

The District Court also relied improperly on *Burger King* for the proposition that the question was “whether the effects of a foreign

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284. See *supra* notes 279-280 (noting the ambiguity inherent in the Acts).

285. See *id.*

286. See *id.*

287. See *id.*

288. See *Rein*, 995 F. Supp. at 325 (listing the defendants). In discussing *Rein* the term “defendants” or “Libya” will hereinafter be used to represent all of the defendants.

289. See *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 96-CV-2077 (TCP) at 7-8 (E.D.N.Y. 1998) (mem.) [hereinafter Memorandum and Order] (noting that the FSIA simply “recognizes and prescribes” subject matter jurisdiction).

290. See Memorandum and Order, *supra* note 289, at 8 (citing *Texas Trading*, 647 F.2d at 308 and failing to conduct a constitutional analysis).

state's actions upon the United States are sufficient to provide a 'fair warning' such that the foreign state may be subject to the jurisdiction of courts in the United States."<sup>291</sup> Finally, and central to this analysis, the court chose to extend *Calder* from the interstate tort of libel to the international tort of terrorism, quoting *Calder*'s "expressly aimed at" language as dispositive.<sup>292</sup>

The Second Circuit affirmed,<sup>293</sup> finding that the court had subject matter jurisdiction, but dismissed all other issues raised for lack of jurisdiction on the appeal because it was interlocutory in nature.<sup>294</sup> Thus, the court did not reach the question, which is the focus of this analysis, of whether due process allows a court to assert personal jurisdiction over a state sponsor of terrorism without the requisite "minimum contacts" analysis.

### III. THE AMENDED FSIA VIOLATES DUE PROCESS

This section argues first, that a foreign sovereign is entitled to the protections of due process, second, that a foreign sovereign is entitled to heightened deference in the personal jurisdiction calculus and

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291. See *Rein*, 995 F. Supp. at 330, citing *Burger King*, 471 U.S. at 472 (noting that the teaching of *World-Wide Volkswagen* is that foreseeability alone is not enough to confer personal jurisdiction). Unlike *Rein*, the Court in *Burger King* was presented with an array of contacts between the foreign defendant and the state, including, *inter alia*, the fact that the contract had a Florida choice of law provision, one defendant went to seminars in Florida, payments went to Florida, supervision was from Florida and a twenty-year relationship with the Florida corporation was planned. See generally *id.* at 464-68 (discussing the contacts). In addition, there were foreseeable injuries to Burger King in Florida, but these were not remote or secondary, but rather a direct economic impact on Burger King. See *supra* text accompanying notes 96-115 (discussing the injuries). Finally, in *Rein*, there was no foreseeability, as the state sponsor of terrorism exception did not exist when the bombing took place.

292. See *id.* at 330, citing *Calder*, 465 U.S. at 789 (noting that Libya is charged with intentional rather than negligent tortious acts).

293. 162 F.3d 748 (2d Cir.), *aff'g* 995 F. Supp. 325 (E.D.N.Y. 1998), *cert. denied*, 119 S. Ct. 2337 (1999).

294. See *Rein*, 162 F.3d at 753-54 (dismissing Libya's claim for lack of personal jurisdiction and Libya's motion to dismiss for failure to state a claim, pursuant to failure of its jurisdictional challenges).

third, that the two-tiered analysis is applicable to specific personal jurisdiction cases. The section also explains why the amended FSIA, as interpreted in *Rein*, actually attempts to create general personal jurisdiction, and shows why this interpretation does not yield constitutionally permissible personal jurisdiction.

#### A. A FOREIGN SOVEREIGN IS ENTITLED TO DUE PROCESS

The Supreme Court has assumed that foreign sovereigns are protected by due process in American courts but has not decided the issue.<sup>295</sup> The cases on point are few because prior to *Shaffer v. Heitner*, most suits against foreign sovereigns were brought quasi in rem and it was not until *Shaffer* that quasi in rem cases received “minimum contacts” scrutiny.<sup>296</sup> The Second Circuit, where the *Rein* battle was set, squarely held in *Texas Trading* that foreign states are entitled to the protections of the Due Process Clause, specifically those protections that the Supreme Court has articulated in the area of personal jurisdiction.<sup>297</sup>

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295. See *Republic of Argentina v. Weltover*, 504 U.S. 607, 619 (1992) (assuming, but not deciding, that for purposes of Due Process, a foreign state is a “person”).

296. See *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977); *Texas Trading*, 647 F.2d at 313 (noting that the due process clause was applied to quasi in rem suits one year after FSIA was passed).

297. *Texas Trading*, 647 F.2d at 308, 313, citing *Amoco Overseas Oil Co. v. Compagnie Nat'l Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979) (noting that the court applied constitutional due process analysis in *Amoco*, a quasi in rem suit filed before the enactment of the FSIA and decided after *Shaffer*); see also *Shapiro v. Republic of Bolivia*, 930 F.2d 648 (2d Cir. 1979) (holding that United States district courts could exercise personal jurisdiction over the Republic of Bolivia consistent with due process, in an action brought against Bolivia arising out of Bolivia's issuance of negotiable promissory notes to its United States agents and their subsequent delivery involved the requisite contact); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (concluding that the district court did not have personal jurisdiction over an autonomous institution of the Republic of Costa Rica, which regularly engaged in business agreements with the plaintiff, a California resident, for purchases of grain); *Purdy Co. v. Argentina*, 333 F.2d 95, 98 (7th Cir. 1964) (holding that consistent with *Hanson*, an Argentinean company engaging in business transactions in the United States, did nothing to purposefully avail itself of the privilege of engaging in business in the forum state); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975) (concluding that a foreign

## B. A FOREIGN SOVEREIGN IS ENTITLED TO HEIGHTENED DEFERENCE IN PERSONAL JURISDICTION CLAIMS

Regarding personal jurisdiction over foreign entities, one court warned that “[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field,”<sup>298</sup> and that “a foreign nation presents a higher sovereignty barrier [to the exercise of personal jurisdiction] than that between two states.”<sup>299</sup> Further, when dealing with personal jurisdiction under the FSIA, the Second Circuit has held that a “closer nexus than the ‘minimum contacts’ is necessary for due process.”<sup>300</sup> The Court observed in *Asahi* that the interests of other nations as well the Federal Government’s interest in its foreign relations policies will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state.<sup>301</sup>

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country and its agents and agencies were subject to the jurisdiction of Illinois by way of their transaction of business in the forum state and the commission of tortious acts there which were characterized as breach of a wine distributorship agreement and failure to deliver wines); *T.J. Stevenson & Co. v. 81,193 Bags of Wheat Flour*, 399 F. Supp. 936, 938 (S.D. Ala. 1975) (holding that contacts of Bolivia with the state of Alabama are sufficient to create personal jurisdiction pursuant to the state long-arm statute and the “minimum contacts” standard).

298. *L’Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 125 (S.D.N.Y. 1988), *quoting Asahi Metal*, 480 U.S. at 115, *quoting United States v. First Nat’l City Bank*, 379 U.S. 378 (1965) (Harlan, J., dissenting).

299. *L’Europeenne de Banque*, 700 F. Supp. at 125, *quoting Bellante, Clauss, Miller & Partners v. Alireza*, 634 F. Supp. 519, 527 (M.D. Pa. 1985).

300. *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991); *see also Texas Trading*, 647 F.2d at 315 n.37, *citing Leasco Data Processing v. Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972), *citing Arthur T. von Mehren & Donald T. Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127 (1996) (noting that personal jurisdiction, in an international context, must be applied with caution); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 1000 (2d Cir. 1975) (suggesting that the effect within the state must occur “as a direct and foreseeable result of the conduct outside the territory”).

301. *Asahi Metal*, 480 U.S. at 115.

### C. MINIMUM CONTACTS TIER ANALYSIS

Prior to the state sponsors of terrorism amendment to the FSIA, a majority of courts construing section 1330 of the FSIA concluded that Due Process requirements needed to be met.<sup>302</sup> As a threshold matter, a court needs to determine whether the "minimum contacts" analysis is performed separately for each defendant or collectively for all of the defendants as a group.<sup>303</sup> In addition, it is noteworthy that the more contacts that are found, the less likely it is that the fairness tier will weigh against jurisdiction, and conversely, the weaker the contacts, the greater the likelihood that fairness will dictate against jurisdiction.<sup>304</sup>

The Supreme Court has noted, but has not reached, the question of whether, in the case of a foreign entity, "minimum contacts" are measured by reference to that entity's contacts with the United States as a whole or rather those solely with the forum state.<sup>305</sup> In a separate case, Justice Stewart argued, in dissent, that the "minimum contacts" standard should be evaluated by contact with each individual state.<sup>306</sup> The majority view, however, seems to be that the contacts to be considered are national in scope, not merely those with the state in

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302. See *Texas Trading*, 647 F.2d at 300 (determining that section 1330 of the FSIA required a due process reasonableness analysis); see also *Weltover*, 753 F. Supp. at 1201 (discussing the constitutional requisites for personal jurisdiction). But see *Shapiro*, 930 F.2d at 1013 (concluding that Bolivia was subject to the jurisdiction of the United States under the "commercial activity" exception to FSIA); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (determining that the cause of action arose as a result of "commercial activity" within the meaning of that exception to FSIA).

303. See *Calder*, 465 U.S. at 79 (discussing the proper way to handle the analysis).

304. See *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 568-69 (2d Cir. 1996) (adding that, depending on the strength of a defendant's contacts, the reasonableness component of the Due Process test will have greater or lesser effect).

305. See *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987) (noting that, similar to *Asahi Metals*, the court did not decide the issue).

306. See *Stafford v. Briggs*, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting) (arguing that "minimum contacts" between the defendant and the forum state are all that is needed for due process).

which the federal court sits.<sup>307</sup>

Finally, the court must have personal jurisdiction over each defendant individually, not all defendants collectively.<sup>308</sup> The FSIA cannot, consistent with the Due Process Clause, change black letter rules of law regarding the personal jurisdiction of the courts.<sup>309</sup> Nonetheless, the ambiguously worded amendment has caused a great deal of confusion. For example, American Jurisprudence on International Law (Second) is wrong when it concludes that:

Inquiry into personal jurisdiction over a foreign state need not consider the rubric of "minimum contacts;" the concept of "minimum contacts" is inherently subsumed within the exceptions to immunity defined by the Federal Sovereign Immunities Act. Thus, the minimum contacts test is inapplicable to foreign sovereigns because Congress intended the courts to apply a more strict standard under the FSIA when exercising personal jurisdiction over a foreign sovereign.<sup>310</sup>

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307. See *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 124 n.10 (S.D.N.Y. 1988), citing *Max Daetwyler Corp.*, 762 F.2d at 293 (stating that personal jurisdiction requires an inquiry only into the totality of a defendant's contacts throughout the United States); see also *Graham E. Lilly, Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 130 (1983) (noting that the FSIA makes it reasonably clear that national, as opposed to state, contacts are decisive for personal jurisdiction, thus illustrating Congress' intent for conferring personal jurisdiction). But see *Pioneer Properties, Inc. v. Martin*, 557 F. Supp. 1354, 1358-61 (D. Kan. 1983) (undertaking a comprehensive due process inquiry in determining whether the defendant was subject to personal jurisdiction, specifically addressing the defendant's contacts in Kansas rather than the defendant's national contacts).

308. See *Calder*, 465 U.S. at 790, citing *Rush v. Sauvchuk*, 444 U.S. 320, 332 (1980) (maintaining the due process requirement as it relates to each defendant set forth in *International Shoe* when addressing whether or not the defendant's status as employees insulates them from jurisdiction).

309. See *L'Europeenne de Banque*, 700 F. Supp. at 122, quoting *Texas Trading*, 647 F.2d at 308 (stating that the FSIA cannot create personal jurisdiction where the Constitution forbids it); see also *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028-29 (D.C. Cir. 1982), citing H.R. REP. NO. 94-1487, art. 6 (1976) (stressing that Congress passed FSIA to ensure that residents of a state have access to the courts in order to resolve "ordinary legal issues").

310. 45 AM. JUR. 2D INT'L LAW sec. 97 (1999), citing *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998); see *Southway v. Central Bank of Nigeria*, 994 F. Supp. 1299 (D. Colo. 1998)



Moreover, the victims' American nationality alone cannot furnish the requisite "minimum contacts" with the United States, permitting the prosecution of the instant action.<sup>311</sup> While nationality does frequently have dispositive significance in dealing with legal claims on an international level, for example, it is a prerequisite for the diplomatic espousal of claims between states, it has no bearing on a court's personal jurisdiction over a nonresident defendant. Similarly, in *Callejo v. Bancomer, S.A.*,<sup>312</sup> the court held that jurisdictional contacts with the United States were purely fortuitous "where they depend solely on the fact that the injured person happened to be American."

Using Libya as an example, the fact that it is denominated as a state sponsor of terrorism and ostracized by the United States limits its ability to acquire "minimum contacts" with the United States. Libya is denied the opportunity to purposefully avail itself of the privileges and protections of United States laws.<sup>313</sup> Libya has been precluded from entering into the stream of commerce of the United States.<sup>314</sup> Accordingly, Libya could not, at least prior to the adoption of the "state sponsor of terrorism" exception to the FSIA adopted after the bombing of Flight 103, foresee being haled into a United States court.<sup>315</sup> Thus, the only contact is a *Calder*-style "effect" based on the alleged terrorist incident.

#### D. CALDER ALONE DOES NOT SUPPORT JURISDICTION

The Lockerbie plaintiffs, and anyone else seeking to gain personal jurisdiction by reference solely to the FSIA, therefore, are left with

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311. See *Thos. P. Gonzalez Corp.*, 614 F.2d, at 1253-55 (noting that the "minimum contacts" standard is not satisfied when the only link to the United States forum is the nationality or residence of the plaintiff).

312. 764 F.2d at 1111.

313. See *supra* note 111 and accompanying text (noting that the *Calder* court held that lack of physical presence in the state does not prevent jurisdiction where the actor's efforts are purposefully directed toward the state's residents).

314. See *supra* notes 114, 115 and accompanying text (discussing the "contacts plus" analysis).

315. See *supra* note 130 and accompanying text (noting that *Asahi Metal* stands for the proposition that foreseeability alone cannot offer jurisdiction).

just the support of *Calder*, for the proposition, entirely novel in international law, that a tortious act of physical violence outside a nation nevertheless gives rise to personal jurisdiction over absent defendants within that nation because the aim of the act was to somehow create effects within the nation. *Calder*, however, cannot bear this burden alone.

In *Rein*, the District Court cited *Calder* for the proposition that Libya is charged “not ‘with mere untargeted negligence,’ but rather intentional, tortious actions that ‘were expressly aimed at’ the United States.”<sup>316</sup> But *Calder* is not similar to the Lockerbie case. First, and most obviously, *Calder* does not involve international defendants, a fact which, as discussed above, changes the “minimum contacts” calculus.<sup>317</sup>

Second, although the so-called “effects test” employed by the California court was apparently cited with approval by the Supreme Court in *Calder*, the Supreme Court did so only after it stated that the defendant *National Enquirer*, sold more than 600,000 papers a week in California, almost twice the number of the next highest state, and that defendant South, a *National Enquirer* reporter, traveled to California more than twenty times in the previous four years and relied on phone calls to sources in California for the story.<sup>318</sup> If the California court’s “effects test” had alone satisfied due process, the Supreme Court would not have needed to address the kinds of contacts it addressed, namely those that are measured in a traditional minimum contacts analysis.<sup>319</sup>

Third, *Calder* involved a direct injury to an individual living in the forum state, specifically, the injury was to a Californian, because the tortious act affected her ability to successfully work in California, as a direct result of potential in-state employers reading the California-based article.<sup>320</sup> The Court concluded that “[t]he brunt of the harm, in

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316. *Rein*, 995 F. Supp. at 330, citing *Calder*, 465 U.S. at 789.

317. See *Calder*, 465 U.S. at 785-86 (discussing the parties to the action).

318. See *id.* at 785 (discussing the background of the alleged tortious acts).

319. See *id.* (listing the contacts addressed by the court).

320. See *id.* at 788-89 (holding that jurisdiction is proper over the defendants because their intentional conduct in California was alleged to have caused injury).

terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and the harm suffered."<sup>321</sup>

Finally, it is significant that the tort responsible for the suit in *Calder* was one that traditionally sounded in case, whereas Libya's alleged actions would have traditionally sounded in trespass.<sup>322</sup> The distinction is more than academic. Libya's alleged actions were direct and forcible injuries to the passengers of Pan Am Flight 103 as a result of the direct and immediate application of force to them.<sup>323</sup> Injuries suffered by the passengers were quite clearly suffered in Scotland and thus do not in any way constitute "contacts" with New York or the United States.<sup>324</sup> Any injuries suffered by anyone in the United States were secondary. By contrast, an injury resulting from any of the actions which evolved from case, including the libel action brought in *Calder*, did not result from the direct and immediate application of force. An entirely different issue is presented when an attempt is made to determine the situs of a tort that involves no physical contact.<sup>325</sup> Tellingly, every one of the cases cited by the Lockerbie plaintiffs to demonstrate that *Calder* has been followed "many times," involved torts that sound in case rather than trespass.<sup>326</sup> Similar defects are found in the United States' citations to

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321. *Calder*, 465 U.S. at 789. But see *id.* at 789, citing *World Wide Volkswagen*, 444 U.S. at 279-80 (suggesting that jurisdiction is proper by reference to the "effects" of petitioners' Florida conduct in California, but then cites to the analysis of *World-Wide Volkswagen* for support).

322. See *Leame v. Bray*, 102 Eng. Rep. 724 (1802) (noting that at English common law, trespass, originally criminal in nature, would sound for direct and forcible injuries only, all other injuries sounded in case). See generally George E. Woodbine, *The Origin of Action of Trespass*, 33 YALE L.J. 799 (1923) (discussing the origins of trespass); Statute of 5-6 W. & M., c.12 (abolishing the criminal aspect of trespass).

323. See *Smith*, 886 F. Supp. at 397 (recounting the bombing incident).

324. See *id.* (providing the location of the bombing).

325. See, e.g., *Keeton*, 465 U.S. at 776 (involving the tort of libel).

326. See Plaintiffs' Steering Committee's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 31 (citing cases with facts similar to those presented in *Rein*); see also *United States Sec. & Exch. Comm'n v. Carillo*, 115 F.3d 1540 (11th Cir. 1997) (finding that a Costa Rican corporation and two of its officers had sufficient minimum contacts with the United States when they en-

cases relying on *Calder*.<sup>327</sup>

gaged in fraudulent sales of unregistered securities to United States citizens); *Brainerd v. University of Alta*, 873 F.2d 1257 (9th Cir. 1989) (finding jurisdiction over Canadian academics who allegedly defamed and breached an agreement with a former professor); *Lake v. Lake*, 817 F.2d 1416 (9th Cir. 1987) (determining that Idaho had jurisdiction over a California attorney who, through misrepresentation to a California court, secured an *ex parte* child custody order); *Brown v. Flowers Indust., Inc.*, 688 F.2d 328 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) (establishing personal jurisdiction by one allegedly defamatory phone call by the out-of-state defendants to the forum state where the plaintiff resided); *Moellers N. Am., Inc. v. MSK Covertech, Inc.*, 870 F. Supp. 187 (W.D. Mich. 1994) (holding that jurisdiction was improper); *Perez-Rubio v. Wyckoff*, 718 F. Supp. 217 (S.D.N.Y. 1989) (giving the United States jurisdiction over foreign residents who engaged in securities fraud); *Sluys v. Hand*, 831 F. Supp. 321 (S.D.N.Y. 1993) (subjecting defendants to jurisdiction in New York because a threatening letter physically arrived in the forum); *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820 (N.D. Cal. 1992) (determining that there was valid personal jurisdiction over the president of an insurer who authored a fraudulent letter to California policyholders); *Cleopatra Kohlique, Inc. v. New High Glass, Inc.*, 652 F. Supp. 1254 (E.D.N.Y. 1987) (determining that the manufacturers' alleged fraud, which caused injury within the forum state, was sufficient to subject them to jurisdiction under New York's long arm statute); *Stuart v. Federal Energy Sys.*, 596 F. Supp. 458 (D. Vt. 1984) (holding that the plaintiff, who alleged that he was defrauded in the purchase of a franchise to sell energy management technology in Vermont and who alleged that individual defendants personally participated in the transaction causing his injury, made a *prima facie* showing of valid personal jurisdiction over the defendants under Vermont's long arm statute).

327. See Statement of Interest of the United States at 20 n.22, 23, citing *Hugel v. McNeill*, 886 F.2d 1, 4-5 (1st Cir. 1989). Most peculiar is its citation to *Far West Capital v. Towne*, 46 F.3d 1071, 1077-78 (10th Cir. 1995). See *id.* In *Far West Capital*, the alleged torts of breach of contract, intentional interference with contractual relationships and economic duress were insufficient to establish minimum contacts despite the fact that *Calder* represented the plaintiff's strongest argument. See *Far West Capital*, 46 F.3d at 1077. The Court noted that in *Calder* "most of the harm or 'effects' to the plaintiff's reputation and career occurred in California," and noted that the Tenth Circuit had applied *Calder* in a libel claim. See *id.* at 1077 (citing *Burt v. Board of Regents*, 757 F.2d 242 (10th Cir. 1985)). Finally, the court noted that in a pre-*Calder* case, the Second Circuit argued that a finding of jurisdiction in a state based on an injury outside the state that had some effect on a domiciliary of the state, "would open a veritable Pandora's Box of litigation subjecting every conceivable prospective defendant involved in an accident with a New York domiciliary to defend actions brought against them in the State of New York." See *id.* at 1078 (quoting *Am. Eutectic Welding Alloys Sales Co. v. Dytron Alloys Corp.*, 439 F.2d 428, 434 (2d Cir. 1971) and *Black v. Oberle Rentals, Inc.*, 55 Misc. 2d 398, 285 N.Y.S.2d 226, 229 (1967)). Finally, the United States cites to *Retail Software Servs. v. Lashlee*, 854 F.2d 18, 24 (2d Cir. 1988), which provides no insight whatsoever into the instant case. See *Retail Software Servs.*, 854 F.2d at

In sum, because the *Rein* court declined to do so, no federal court has applied the minimum contacts test to the alleged supporting nation in a civil suit for an international terrorist act. The Supreme Court will ultimately be given the opportunity to determine if the *Calder* "effects test" provides the appropriate contacts. Plainly, there was no purposeful availment by Libya.<sup>328</sup> Certainly Libya could not foresee being haled into a federal court,<sup>329</sup> since at the time of the Flight 103 bombing, the state sponsors of terrorism exception to sovereign immunity did not exist and the "stream of commerce" analysis is inapposite.<sup>330</sup> Finally, there was no direct effect aimed at the plaintiffs. By its own definition of terrorism, the direct effect, if any, was on the United States government, and any effects on the individual plaintiffs were indirect.

#### E. FAIRNESS TIER ANALYSIS

The Circuits are divided on how to weigh fairness to the defendants when considering jurisdiction.<sup>331</sup> The Second Circuit consid-

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24 (providing that franchise sales from outside the state to franchisees inside the state were factors that may be considered in assessing minimum contacts).

328. See *supra* note 111 (noting that the *Calder* court held that lack of physical presence in the state does not prevent jurisdiction where the actor's efforts are purposefully directed toward the state's residents).

329. See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) (standing for the proposition that foreseeability alone cannot offer jurisdiction).

330. See *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985) (applying the "contacts plus" analysis).

331. See *Nelson v. R. Greenspan & Co., Inc.*, 613 F. Supp. 342, 345 (E.D. Mo. 1985), citing *Aaron Ferer & Sons Co. v. Diversified Metals Corp.*, 564 F.2d 1211, 1215 (8th Cir. 1977) (discussing the Eighth Circuit's five-factor fairness test, which weighs the first three facts as of primary importance and the last two factors as of secondary importance). Cf. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 577 (Walker, J., dissenting) (noting that the proliferation of fairness tests in the circuits has left the state of the law regarding reasonableness inquiries in disarray). Judge Walker noted that the Ninth Circuit employs a seven-factor test. See *id.* (citing *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851-53 (9th Cir. 1993)). The Sixth Circuit employs a three-pronged balancing test in which the third factor contains a five-factor reasonableness test. See *id.* at 578 (citing *Theunissen v. Matthews*, 935 F.2d 1454, 1460-61 (6th Cir. 1991)). The First Circuit employs a test which considers a "Gestalt" of reasonableness factors. See *id.* (citing *Donatelli v. National Hockey League*, 893 F.2d 459, 465 (1st Cir.

ered seven factors to determine reasonableness: the extent of purposeful injection; the burden on the defendant; the extent of the conflict of sovereignty of the defendant's state; the forum state's interest in the suit; the most efficient judicial resolution of the suit; the convenience and effectiveness of relief to the plaintiff, and the existence of an alternative forum.<sup>332</sup>

Turning to the first factor, the extent of purposeful injection, the Ninth Circuit at least, would hold that once the court has concluded that a defendant has purposefully directed its activities at the forum state for "minimum contacts" purposes there is no need to further consider purposeful injection.<sup>333</sup> However, this seems to make the factor superfluous, since the fairness tier is never reached unless "minimum contacts" are found in the first tier.<sup>334</sup>

In discussing the second factor, the burden on the defendant, courts routinely note that "modern advances in communications and transportation have significantly reduced the burden of litigating in another country."<sup>335</sup> However, the *Sinatra* court noted:

The Supreme Court recently reiterated its concern with the burdens of defending a suit in a foreign country. The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in asserting the reasonableness of stretching the long arm of personal jurisdiction over national borders.<sup>336</sup>

Regarding the third factor, the extent of the conflict of sovereignty

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1990)). The Fifth Circuit considers a four-factor test. *See id.* (citing *Beary v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987)).

332. *See Sinatra v. National Enquirer, Inc.*, 854 F.2d 1191, 1198-99 (9th Cir. 1987), citing *Burger King*, 471 U.S. at 477 (providing multiple factors to consider when determining reasonableness in the context of personal jurisdiction).

333. *See Sinatra*, 854 F.2d at 1199 (asserting that the "purposeful injectment" receives no weight once the plaintiff demonstrates that the defendant directed its activities to the forum state).

334. *See World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295-99 (1979) (stating "minimum contacts" were a necessary first step in a two-tiered analysis).

335. *See Sinatra*, 854 F.2d at 1199 (discussing the changes that have taken place in terms of litigation in other countries); *see also Metropolitan Life*, 84 F.3d at 574.

336. *See Sinatra*, 854 F.2d at 1199 quoting *Asahi Metals*, 107 S. Ct. at 1034 (discussing the burdens of defending a suit on foreign soil).

of the defendant's state, the *Sinatra* court again noted that the Supreme Court has "cautioned against extending state long-arm statutes in an international context."<sup>337</sup> The fourth factor is the forum state's interest in the suit.<sup>338</sup> The forum state's interest is minimal where it has been chosen merely because of its longer statute of limitations, therefore, by analogy, the same reasoning applies where the choice is based on the potential size of the jury award.<sup>339</sup> The fifth factor, the most efficient judicial resolution of the suit, weighs against a United States forum because witnesses and evidence are primarily located outside of the United States, and, arguably at least, United States law would not apply.<sup>340</sup> The sixth factor, the convenience and effectiveness of relief of the plaintiff obviously weighs in favor of an American forum.<sup>341</sup> Finally, regarding the seventh factor, the availability of an alternative forum, such a forum obviously exists in, *inter alia*, Scotland.<sup>342</sup> Further, it could be argued that international efforts should be used to combat terrorism and to provide for the victims.

#### F. GENERAL JURISDICTION IS LACKING

The amended FSIA apparently attempts to create general jurisdiction because prior acts of terrorism that caused a state to be designated as a "state sponsor of terrorism" create the jurisdiction rather than the actual act being sued upon.<sup>343</sup> In other words, the commis-

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337. *Id.* The Court stated, "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal*, 107 S. Ct. at 1035, *quoting* *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) (expressing the Court's concern for the use of care when attempting to utilize personal jurisdiction internationally).

338. *See Sinatra*, 854 F. 2d at 1198-99.

339. *See Metropolitan Life*, 84 F.3d at 574 (noting that the statute of limitations is not a permissible consideration when determining jurisdiction).

340. *Cf. Sinatra*, 854 F.2d at 1200 (stating that California would be the most efficient place for a suit against a Swiss defendant because witnesses and evidence were in California).

341. *See id.* at 1198-99 (classifying relief for the plaintiff as a factor to consider when assessing reasonableness).

342. Albeit one where the damage award, if any, would be much smaller, and the assets available to attach to it would be less valuable.

343. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. sec.

sion of “sufficient acts”<sup>344</sup> of terrorism such as to prompt the Secretary of State to denominate the state as a state sponsor of terrorism<sup>345</sup> creates general jurisdiction such that the next act of terrorism, even if it alone would not have prompted the Secretary to act, subjects the state to general personal jurisdiction.<sup>346</sup> In fact, to the extent that the acts of terrorism cited for the decision to name the state a state sponsor of terrorism were not at least directed against the United States (under the government’s *Calder* approach) or done in the United States, they do not constitute “minimum contacts” under the traditional formulation.

Though it is questionable whether the fairness prong is applicable to a general jurisdiction case where “substantial contacts” have been found, the Second Circuit has answered the question affirmatively.<sup>347</sup> Assuming this answer is correct, the same fairness analysis from before would apply.<sup>348</sup>

#### G. ANALOGY TO THE DISTRICT OF COLUMBIA’S LONG-ARM STATUTE

Construing the FSIA’s long-arm statute yields the same result as does the Due Process analysis since section 1330(b) of the FSIA creates, in effect, a Federal long-arm statute over foreign states, (including political subdivisions, agencies, and instrumentalities of for-

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1605(a)(7)(A) (Supp. 1999) (establishing that the United States’ courts shall decline to hear a claim if the foreign state is not considered a state sponsor of terrorism).

344. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 416 (1984) (determining whether or not contacts were systematic and continuous so as to establish general jurisdiction).

345. See Foreign Assistance Act of 1961, 22 U.S.C. sec. 2371(a) (1990) (providing that the Secretary of State will determine if a country has supported acts of international terrorism).

346. See 28 U.S.C. sec. 1605(a)(7)(A) (suggesting that the classification as a state sponsor of terrorism enables a country to gain jurisdiction over the defendant).

347. See *Metropolitan Life*, 84 F.3d at 573 (concluding that the reasonableness inquiry is applicable to all personal jurisdiction cases, whether general or specific).

348. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985) (listing the factors of the fairness analysis).



eign states).<sup>349</sup> It is patterned after the long-arm statute Congress enacted for the District of Columbia.<sup>350</sup> The Statute provides that a District of Columbia court may exercise personal jurisdiction where a tortious injury in the District is caused by a tortious act (or omission) within the District.<sup>351</sup> However, where a tortious injury within the District is caused by an act (or omission) *outside* the District there is no personal jurisdiction unless the tortfeasor “regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia.”<sup>352</sup> The statute has been held to be co-extensive with the Due Process Clause of the United States Constitution.<sup>353</sup> Under the statute, the “minimum contacts” analysis requires that the alleged tortfeasor be found to be regularly doing or soliciting business within the District, engaging in any other persistent course of conduct or deriving substantial revenue from goods used or consumed or services rendered within the District,<sup>354</sup> thus, “filter[ing] out cases in which the in-forum impact is an isolated event and the defendant otherwise has no, or scant, affiliations with the forum.”<sup>355</sup> The contacts must be continual in character.<sup>356</sup>

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349. See 28 U.S.C. sec. 1330(b) (1993) (extending personal jurisdiction over states based on their contacts with the United States).

350. See D.C. Court Reform Act, Pub. L. No. 91-358, sec. 132(a) title I, 84 Stat. 473, 549 (1970) (establishing the D.C. long-arm statute).

351. See *id.* sec. 132(a), sec. 13-423(a)(3), 84 Stat. at 549 (providing the standard for personal jurisdiction in the District of Columbia).

352. See *id.* sec. 132(a), sec. 13-423(a)(4), 84 Stat. at 549 (setting forth the way in which personal jurisdiction can be established when the act or omission occurs outside of the District of Columbia).

353. See *Environmental Research, Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.*, App. D.C., 355 A.2d 808, 810-11 (D.C. 1976) (concluding that the exercise of personal jurisdiction should be extended to the limits of the Due Process Clause).

354. See *Trager v. Wallace Berrie & Co.*, 593 F. Supp. 223 (D.D.C. 1984) (providing three types of “minimum contacts” for the Court to acquire personal jurisdiction over the defendant).

355. See *Crane v. Carr*, 814 F.2d 758, 763 (D.C. Cir. 1987) (explaining how the additional analysis in the statute impacts the number of cases in court).

356. See *Security Bank, N.A. v. Tauber*, 347 F. Supp. 511, 515 (D.D.C. 1984) (asserting the use of the words “persistent” and “regularly” suggests that Congress was concerned with continuous contacts).

In *Upton v. Empire of Iran*,<sup>357</sup> two Americans were killed and one was injured when the Mehrabad International Airport's terminal roof collapsed.<sup>358</sup> Plaintiffs first sued Iran and Iran's Department of Civil Aviation in the Southern District of New York on the theory that the defendants were doing business in New York.<sup>359</sup> The District Court dismissed for lack of jurisdiction and the Second Circuit affirmed in an unpublished opinion, allowing plaintiffs to refile under the FSIA.<sup>360</sup>

Upon refile in the United States District Court for the District of Columbia, the defendants argued both lack of subject matter jurisdiction and lack of personal jurisdiction.<sup>361</sup> Citing the House Report referenced above, the court stated that section 1330(b) of the FSIA created a long-arm statute patterned after the District of Columbia's long-arm statute and that the requirements of minimum contacts, as articulated in *International Shoe* and *Shaffer*, were embodied in it.<sup>362</sup> Thus, a finding of subject matter jurisdiction under the FSIA did not guarantee personal jurisdiction absent a finding of minimum contacts.<sup>363</sup> The court concluded, "causing an injury to American citizens abroad is insufficient to satisfy the requirements of the District of Columbia's long-arm statute."<sup>364</sup>

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357. 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

358. *See id.* at 264 (stating how the plaintiffs in the case were injured and killed).

359. *See id.* (discussing the fact that the plaintiffs originally brought their action in New York in 1976, before the enactment of the FSIA).

360. *See Upton v. Department of Civil Aviation*, 76 Civ. 2914 (S.D.N.Y. 1976), *aff'd*, F.2d 1206 (2d Cir. 1977).

361. *See Upton v. Iran*, 459 F. Supp. at 265 (setting forth the grounds for the defendant's motion to dismiss).

362. *See id.* at 266 (discussing the FSIA in terms of the drafter's intent and its legislative history).

363. *See id.* (stating that "minimum contacts" are required in order to obtain personal jurisdiction).

364. *See id.*, citing *Leaks v. Ex-Lax, Inc.*, 424 F. Supp. 413 (D.D.C. 1976) (asserting that suffering pain in the District, caused by an injury outside the District, does satisfy "minimum contacts"); *Norair Engineering Assocs., Inc. v. Noland*, 365 F. Supp. 740, 743 (D.D.C. 1973) (holding that an injury outside the District that required expenditures within the District did not create personal jurisdiction); *see also El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 672 (D.C. Cir. 1996) (as-

#### H. *TEXAS TRADING* DOES NOT SUPPORT JURISDICTION

The Lockerbie plaintiffs were clearly erroneous when they asserted that *Texas Trading* supports the case for personal jurisdiction and the District Court was wrong to follow their lead. Perhaps the court below was misled by plaintiffs' grossly erroneous misquotation from *Texas Trading*.<sup>365</sup> The plaintiffs quoted the Second Circuit as stating, "[t]he Act . . . makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction."<sup>366</sup> The plaintiffs, however, failed to continue the quote, which, after a citation to the House Report, continues with the very next sentence: "but, the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant."<sup>367</sup> The FSIA assures that where there is subject matter jurisdiction and proper service of process, the Act itself will provide no further impediment to personal jurisdiction.<sup>368</sup> In other words, the provision means that where there is subject matter jurisdiction over the defendant under the Act, the requirements of the state's long-arm statute need not be met.<sup>369</sup> Re-

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serting that there was no personal jurisdiction where a person living and working in Jordan was injured there and the only contact with the District was the fact that his employer's principal place of business was there, even though the defendant's conduct was not directed at the District).

365. See *supra* notes 245-60 and accompanying text (discussing the requirements of the Due Process Clause under *Texas Trading*).

366. Plaintiffs Steering Committee's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 27, citing *Texas Trading*, 647 F.2d at 306 (defining personal jurisdiction under the FSIA).

367. See Statement of Interest of the United States, *supra* note 248 at 17-18 (recognizing that the legislative history indicates a desire to utilize a "minimum contacts" analysis).

368. See 28 U.S.C. sec. 1330(b) (establishing that "personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have subject matter jurisdiction . . . where service has been made under 28 U.S.C. sec. 1608").

369. See *Vermeulen v. Renault*, 985 F.2d 1534, 1552 (11th Cir. 1993) (opining that "minimum contacts" with the forum state, as opposed to the United States as a whole, are not necessarily required to comport with due process).

ardless, the Act cannot create personal jurisdiction where the Constitution forbids it.<sup>370</sup>

*Texas Trading*, although alone sufficient to demonstrate that the FSIA requires a "minimum contacts" analysis before personal jurisdiction will be found, has substantial support in the lower courts.<sup>371</sup>

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370. See *Texas Trading & Milling Corp. v. Federal Republic of Nig.*, 647 F.2d 300, 313, n.36 (2d Cir. 1981) (noting that the requirements of the FSIA are subject to the constitutional limitations of due process).

371. See *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 n.5 (5th Cir. 1985), citing *Texas Trading*, 647 F.2d at 308 (stating that personal jurisdiction must comport with the due process clause); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247, 1255 (9th Cir. 1980) (concluding that personal jurisdiction under the FSIA requires the traditional "minimum contacts"); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1545 (11th Cir. 1993) *cert. denied*, 508 U.S. 907 (1999), citing *Texas Trading*, 647 F.2d at 314 (affirming the "minimum contacts" requirement); *Waukesha Engine Div., Dresser Americas, Inc., v. Banco Nacional de Fomento Cooperativo*, 485 F. Supp. 492-93 (E.D. Wisc. 1980) (applying a "minimum contacts" analysis in order to assess personal jurisdiction under the Act); *Ruiz v. Transportes Aereos Militares Ecuatorianos*, 103 F.R.D. 458, 459 (D.D.C. 1984) (framing the defendant's assertions that due process is not altered when jurisdiction is asserted under the Act); see also *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991), citing *Texas Trading*, 647 F.2d at 314 (affirming the "minimum contacts" requirement); *Geveke & Co. Int'l, Inc. v. Kompania Di Awa I Elektrisdat Di Korsou N.V.*, 482 F. Supp. 660, 663 (S.D.N.Y. 1979) (stating that in personam jurisdiction can be obtained if there are sufficient commercial contacts to satisfy the requirements of due process); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (asserting that a defendant must have minimum contacts with the forum state in order to satisfy the requirements of Due Process); *Maritime Ventures Int'l, Inc. v. Caribbean Trading & Fidelity, Ltd.*, 689 F. Supp. 1340, 1350 (S.D.N.Y. 1988), *reconsideration denied*, 722 F. Supp. 1032 (S.D.N.Y. 1989) (asserting that any exercise of jurisdiction under the Act must satisfy the requirement of due process); *Welterover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1207-08 (S.D.N.Y. 1991), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992) (applying a four part test to assess the defendant's contacts with the United States). In *Welterover*, even though it had concluded that Argentina's commercial activities had a direct effect on the United States and, thus there was subject matter jurisdiction under the FSIA, the United States Supreme Court nevertheless felt itself compelled to perform the minimum contacts test to determine if Argentina was subject to personal jurisdiction. See *Welterover*, 504 U.S. at 619-20 (concluding that the defendant "purposefully availed" himself to the forum and thus, possessed the requisite "minimum contacts" with the United States).

## I. OTHER DEFECTS AS APPLIED TO LIBYA

Libya has preserved the issues that the FSIA, as amended, is both an *ex post facto* law and a bill of attainder.<sup>372</sup> The Court of Appeals noted the two arguments but held that “those issues are not properly before us at this stage of the case,”<sup>373</sup> for similar reasons. Accordingly, the court of appeals has not yet determined if Libya will be held to owe punitive damages under section 1605(a)(7) of the FSIA, and both the bill of attainder and *ex post facto* law analysis is only germane to punitive laws.<sup>374</sup> Finally, *forum non conveniens* arguments may also be germane if personal jurisdiction is held to have been established.

## CONCLUSION

There can be no debate that the perpetrators who bombed Flight 103 should be brought to justice. Even though it took years of United Nations legal sanctions against Libya to bring the two individual defendants to trial, their criminal trial is at last imminent. Likewise, the victims are entitled to monetary compensation and they are, therefore, entitled to a forum in which to press their civil claims. The same is true of all American victims of international terrorism and their survivors, regardless of whether the terrorist act was perpetrated by an individual, one of the six states designated as “state sponsors of terrorism” or by some other state or quasi-state. Perhaps the best way to battle terrorism is through international efforts and agreements. Perhaps the worst way is to tamper with the test for the constitutional assertion of personal jurisdiction, which has developed in the decades between *International Shoe*<sup>375</sup> and *Asahi*.<sup>376</sup> Congress

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372. See U.S. CONST. Art. I, sec. 9, cl. 3 (stating Congress shall pass no *ex post facto* laws or bills of attainder); U.S. CONST. Art. I, sec. 10, cl. 1 (stating states shall pass no *ex post facto* laws or bills of attainder).

373. See *Rein*, 162 F.3d at 762 (stating that due to the fact that there has been no trial on the merits and no finding of liability, the question of a bill of attainder or an *ex post facto* law cannot yet be determined).

374. See *id.* at 761-62 (noting that Libya’s argument for lack of jurisdiction is only applicable on the context of punitive damages).

375. See *supra* text accompanying notes 33-43 (discussing the jurisdiction requirements put forth in *International Shoe*).

simply cannot award the federal district courts personal jurisdiction by enacting a new law. Instead, "minimum contacts" must be found via the traditional test. Neither should the court extend the *Calder* "effects" test,<sup>377</sup> which has been applied almost exclusively to defamation torts and has been narrowly construed and questioned since it was announced, into the area of international terrorist activity. Unfortunately, state sponsors of terrorism are entitled to due process too and should not be haled into United States federal courts absent the necessary contacts.

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376. See *supra* text accompanying notes 116-36 (providing Justice O'Connor's assessment of the "minimum contacts" analysis in *Asahi Metal*).

377. See *supra* text accompanying notes 140-52 (discussing the Supreme Court's analysis of the defendant's contacts with the forum state in *Calder*).