Fordham International Law Journal

Volume 4, *Issue* 1 1980 *Article* 5

The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act

J. Blair Richardson, Jr.*

*

The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act

J. Blair Richardson, Jr.

Abstract

This Note will first examine the general purpose of the Foreign Sovereign Immunities Act and attempt to ascertain the intended meaning of the direct effect clause. It will then compare and contrast the Nikkei court's interpretation of the clause with the interpretations used in the other recent cases in the Southern District involving Nigerian cement contract disputes. Finally, this Note will suggest that the approach used in Nikkei is both correct and consistent with congressional intent as manifested in the legislative history of the Act.

NOTES

THE *NIKKEI* CASE: TOWARD A MORE UNIFORM APPLICATION OF THE DIRECT EFFECT CLAUSE OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

INTRODUCTION

In *Decor by Nikkei International, Inc. v. Federal Republic of Nigeria*,[1] the district court for the Southern District of New York held that its jurisdiction extended to the Federal Republic of Nigeria (Nigeria) and the Central Bank of Nigeria (CBN) under the Foreign Sovereign Immunities Act of 1976 (Act).[2] This holding contradicts two recent decisions in the same district[3] which denied jurisdiction under the same provisions of the Act in nearly identical factual situations.[4]

In *Nikkei*, three New York corporations[5] entered into separate contracts[6] with Nigeria in early 1975[7] for the sale and delivery of cement. Under the terms of each contract, payment[8] for cement delivered[9] was to be made by Nigeria[10] through a commercial let-

---

1. 497 F. Supp. 893 (S.D.N.Y. 1980).

2. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2), (4), 1391(f), 1441(d), 1602-1611 (1976).

3. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, No. 78-2395, slip op. (S.D.N.Y. July 16, 1980).

4. N.Y.L.J., Aug. 25, 1980, at 1, col. 2. *See* note 75 *infra*.

5. These are: Decor by Nikkei International, Inc. (Nikkei), East Europe Import-Export Company, Inc. (East Europe) and Chenax Majesty, Inc. (Chenax).

6. 497 F. Supp. at 895. Both the Nikkei and East Europe contracts were to be governed by United States law. *Id.* at 897. The Chenax contract was to be governed by Swiss law. *Id.* All disputes arising under the contracts were to be submitted to arbitration by the International Chamber of Commerce, Paris, France. *Id. Nikkei* defendants, however, waived their right to such arbitration. *Id.* at 897 n.2.

7. The Nikkei contract was entered into on Apr. 21, 1975, the East Europe contract on Jan. 28, 1975, and the Chenax contract on Mar. 20, 1975. *Id.* at 896-97.

8. As a condition for payment, each supplier was required to furnish a performance bond. *Id.*

9. The Nikkei and Chenax contracts were for 240,000 metric tons of cement, plus or minus 10% at seller's option, at $60 per metric ton, for a total purchase price of $14.4 million, plus or minus 10%. *Id.* East Europe's contract was similar, but did

ter of credit.[11] The letter of credit was to be established and made payable, upon presentation of specified documents,[12] at a bank designated[13] by the seller beneficiary.[14] Instead of establishing the

---

not contain the option clause and was for a price of $59.50 per metric ton. *Id.* at 897. Each corporation was to commence shipment within 45 days of receipt of its letters of credit. *Id.* at 896-97. *See* note 11 *infra* and accompanying text.

10. The contracts also provided for demurrage payments (penalties imposed when loading or unloading a vessel is delayed). These payments were to be made on the condition that Nigeria be given due notice by cable of the departure from the port of loading. 497 F. Supp. at 897.

11. Article 5 [of the Uniform Commercial Code] permits of two major types of letters of credit transactions—*sales letters of credit* and *standby letters of credit*.

The traditional "commercial" or "sales" letter of credit is a device used to finance or pay for the sale of goods. In this letter of credit transaction, the "bank or other person issuing the credit" is known as the "issuer"; the "buyer or other person who cause [sic] an issuer to issue a credit" is known as the "customer"; and the seller, for whose benefit the letter of credit is issued, is known as the "beneficiary."

Most commonly, the sales letter of credit authorizes the seller to make a demand for payment or draw a draft against the issuer upon presentation of certain documents related to the goods referred to in the sales contract. In general, the documents will include any required import, export, or inspection certificates, an invoice prepared by the seller, and a negotiable bill of lading covering the goods shipped by the seller-beneficiary and made out in favor of the issuer. If the documents presented by the seller-beneficiary comply with those called for in the letter of credit, the issuer is obligated to honor the beneficiary's draft or demand for payment. Provided that the documents do conform, the issuer will present them to its customer, the buyer in the underlying sales contract, and will be reimbursed. If the documents do not conform, the issuer must dishonor the seller's draft or demand and return it together with the documents; a wrongful honor does not entitle the issuer to reimbursement.

T. QUINN, UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST, § 5-102 [A][2] (1978) (emphasis in original). *See also* Note, *Letters of Credit: Exploring the Boundaries of Injunction Against Honor*, 4 FORDHAM INT'L L.J. 161, 161-62 n.1 (1980). Each letter of credit was to be subject to the Uniform Customs and Practice Documentary Credits as set forth the International Chamber of Commerce Brochure No. 222 (1962 Revision). 497 F. Supp. at 898.

12. "A 'documentary draft' or a 'documentary demand for payment' is one honor of which is conditioned upon the presentation of a document or documents. 'Document' means any paper including document of title, security, invoice, certificate, notice of default and the like." U.C.C. § 5-103(1)(b). In *Nikkei*, each seller was to present invoices, clean on board bills of lading, and insurance certificates. *See* 497 F. Supp. at 896-97.

13. Nikkei and East Europe selected Citibank (then First National City Bank) in New York City. *Id.* The Chenax letter of credit was to be established with Schroeder, Muenchmeyer, Hengst and Co. in Hamburg, West Germany. *Id.* at 897.

14. *Id.* at 896-97. "A 'beneficiary' of a credit is a person who is entitled under its terms to draw or demand payment." U.C.C. § 5-103(1)(d).

letters of credit at the designated banks, however, Nigeria established individual letters of credit with CBN.[15] Nigeria then advised[16] plaintiffs of this change through Morgan Guaranty Trust Company of New York (Morgan), which was also designated by Nigeria as the new place of payment.[17] Nigeria's actions caused plaintiffs no immediate difficulty, and each accepted its letter of credit with CBN despite the non-conformity with the original contract.[18]

In August 1975, the Nigerian government placed an embargo on all shipping into the port of Lagos-Apapa, where delivery of the cement was to be made.[19] Later, in the fall of that year, Nigeria committed an anticipatory breach[20] of each of the contracts and letters of credit by unilaterally amending each letter to provide that all commercial invoices presented for payment "must be certified by the beneficiaries or their agents."[21]

---

15. 497 F. Supp. 898.

16. "An 'advising bank' is a bank which gives notification of the issuance of a credit by another bank." U.C.C. § 5-103(1)(e).

17. 497 F. Supp. at 898. Morgan was not, however, a "confirming" bank (one which "engages either that it will itself honor a credit already issued by another bank or that such a credit will be honored by the issuer or a third bank." U.C.C. § 5-103(1)(f).

18. *Id.*

19. *Id.* at 896. The *Nikkei* contracts were among the more than seventy agreements entered into by Nigeria in 1975 through the Nigerian Ministry of Defense, as part of a program to purchase 16 to 18 million metric tons of cement. *Id.* As a result, by August 1975, Nigerian ports had become severely congested with ships seeking to discharge their cargoes. Faced with imminent national economic disaster, and deeming the presence of hundreds of cement-carrying vessels to be a threat to the supply of vital consumer goods, the Nigerian government ordered the embargo. *Id.* Thereafter, the government of Nigeria "established a negotiating committee which was responsible for renegotiating the foreign cement contracts and related letters of credit on behalf of the government and CBN." *Id.* At least 43 of the more than 70 who met with the committee accepted settlement agreements. Nikkei, East Europe, and Chenax all declined to renegotiate their contracts. *Id.*

20. In the *Nikkei* case:

> [d]efendants do not dispute that the suspension of the importation of cement and the failure to issue certificates to plaintiffs which authorized the commencement of shipping of cement into Nigeria pursuant to these contracts are sufficient to constitute anticipatory breaches of the three contracts under section 2-610 [of the Uniform Commercial Code].

Id. at 908.

21. *Id.* at 899, quoting letters from Morgan to Nikkei. (Sept. 30, 1975). "CBN had also informed Morgan that it should not make payments for demurrage under any letter of credit which had been issued regarding any cement contract unless the documents submitted to Morgan were certified by CBN." *Id.*

Early in 1977 plaintiffs' individual causes of action for anticipatory breach of each contract[22] and letter of credit[23] were consolidated in the Southern District of New York.[24] Nigeria and CBN, in their answer to plaintiffs' complaint, raised the defense of sovereign immunity[25] to the jurisdiction of the United States courts.[26] Contrary to the earlier decisions in the Southern District involving similar Nigerian cement contract disputes,[27] Judge Lawrence W. Pierce held that the actions of the defendants fell within the scope

---

22. "Each plaintiff seeks to recover the profits it contends it would have earned in the performance of its contract had the alleged breach not occurred." *Id.* at 896.

23. *Id.* Although the Uniform Custom and Practice Documentary Credits (UCPDC) was to apply to the letters of credit, James Simms, attorney for defendants, indicated at trial that the UCPDC contained no provision for anticipatory breach of an irrevocable letter of credit. Instead, U.C.C. § 5-115(2) governed the alleged breach. Trial minutes at 9-16, 536-41; 497 F. Supp. at 898, 906-07.

24. The three actions were constructively, rather than formally, consolidated. In the fall of 1977 defendants requested that the claims of East Europe and Chenax be first transferred to Judge Lawrence W. Pierce, and then consolidated with Nikkei's claim, which was already before Judge Pierce. By an order dated February 27, 1978 the motion to transfer was granted and the motion to consolidate was referred to Magistrate Sol Schreiber. Magistrate Schreiber's subsequent recommendation concerned itself with the jurisdictional question and the merits of the case, but did not address the request for consolidation. The claims of all three plaintiffs were tried to the court of Judge Pierce, commencing September 10, 1979, without objection by either side concerning the lack of formal consolidation. Telephone conversation with Lewis Sandler, counsel for plaintiffs Nikkei and Chenax (Nov. 4, 1980).

25. "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6606 [hereinafter cited as House Report, with page numbers as reprinted]. The British courts express the rule in broad terms:

> As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign . . . .

Sweeney, *The International Law of Sovereign Immunity*, 20 FORDHAM L. REV. 888, 888 (1963) (quoting the Parlement Belge, 5 P.D. 197, 217 (1880)). *See generally* Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 545 (1977) [hereinafter cited as *Plaintiff's Day in Court*].

26. 497 F. Supp. at 902. Generally, in international law a sovereign is immune from the jurisdiction of foreign courts. *See* note 25 *supra*. In the United States, however, certain exceptions to the general rule of immunity were codified with the passage of the Act in 1976. *See* note 41 *infra*. Among these exceptions is the provision that a foreign sovereign may be subject to jurisdiction if its activities outside the United States are of a commercial nature and cause a direct effect in the United States. *See* notes 46-47 *infra* and accompanying text.

27. *See* note 3 *supra*.

of the "direct effect"[28] clause of the Act,[29] thereby subjecting defendants to the jurisdiction of the courts of the United States.[30]

This Note will first examine the general purpose of the Foreign Sovereign Immunities Act and attempt to ascertain the intended meaning of the direct effect clause. It will then compare and contrast the *Nikkei* court's interpretation of the clause with the interpretations used in the other recent cases in the Southern District involving Nigerian cement contract disputes. Finally, this Note will suggest that the approach used in *Nikkei* is both correct and consistent with congressional intent as manifested in the legislative history of the Act.

I. THE PURPOSE OF THE ACT

Prior to the passage of the Act in 1976 there were "no comprehensive provisions in our law available to inform parties when they [could] have recourse to the courts to assert a legal claim against a foreign state."[31] By 1976, such provisions had become a legal and moral necessity[32] because large numbers of United States citizens were increasingly coming into contact with foreign states and entities owned by foreign states.[33]

Adopting the Act in response to this need, Congress codified the "restrictive"[34] principle of sovereign immunity as it was generally recognized in international law.[35] Under this principle, a foreign state is immune to suits in other countries involving only its public acts (*jure imperii*),[36] but not its private or commercial acts (*jure gestionis*).[37] The restrictive principle was codified both to en-

---

28. *See* notes 46-71 *infra* and accompanying text.

29. 497 F. Supp. at 905-06.

30. *Id.* at 906.

31. House Report, *supra* note 25, at 6605.

32. *See Plaintiff's Day in Court*, *supra* note 25, at 571. *See also* Reeves, *The Foreign Sovereign Before United States Courts*, 38 FORDHAM L. REV. 455, 496 (1970).

33. House Report, *supra* note 25, at 6605.

34. *Id.* at 6606. "[T]he Department of State adopted the restrictive principle of sovereign immunity in its 'Tate Letter' of 1952." *Id.* at 6607 (footnote omitted). *See* note 37 *infra*.

35. *Id.* at 6605.

36. *Id.*

37. *Id.* For a discussion of this distinction between the public and private acts of a foreign sovereign, see Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952).

sure its application in sovereign immunity disputes arising before United States courts and to transfer the responsibility of determining sovereign immunity from the Department of State[38] to the judiciary.[39]

It appears that Congress intended to integrate the existing rules on subject matter and personal jurisdiction into the Act's provisions. Subject matter jurisdiction exists under 28 U.S.C. § 1330(a)[40] in the presence of one of the exceptions to the jurisdictional immunity of a foreign state. The exceptions to sovereign immunity are codified in 28 U.S.C. §§ 1605-1607.[41] Interestingly, satisfaction of the personal jurisdiction standard of section 1330(b)[42] depends upon satisfaction of the requirements of section 1330(a), provided that proper service has been made.[43] The interconnection of these

---

38. House Report, *supra* note 25, at 6606. "In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943) and *Mexico v. Hoffman*, 324 U.S. 30 (1945)." *Id.*

39. *Id.* "The Department of State would [therefore] be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." *Id.*

40. 28 U.S.C. § 1330 (1976). Section 1330 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 the Foreign Sovereign Immunities Act] 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 the Act] 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 [the Act].

41. 28 U.S.C. §§ 1605-1607 (1976). Section 1605 is entitled "General exceptions to the jurisdictional immunity of a foreign state." Section 1605(a) provides exceptions to immunity for cases involving: 1) implied or express waivers of immunity, 2) a foreign state's commercial activity which satisfies specified jurisdictional requirements, 3) claims concerning foreign expropriations, 4) rights in immovable property in the United States or rights in property in the United States obtained by gift or succession, 5) certain types of non-commercial tort claims, and 6) certain admiralty claims. "Only one exception need be applicable in order for immunity to be denied. If none is applicable, the foreign state is entitled to dismissal of the action under section 1604." Kahale & Vega, *Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 224-25 (1979). Section 1606 covers extent of liability. Section 1607 is concerned with counterclaims. *See generally id.*

42. *See* note 40 *supra*.

43. *Id.*

sections[44] blurs the traditional distinction between subject matter and personal jurisdiction, with the result that both bases of jurisdiction may be obtained whenever any one of the exceptions to immunity provided in the Act is present.[45]

II. THE DIRECT EFFECT CLAUSE

Among the general exceptions to sovereign immunity provided in the Act are three which allow the commercial activity of a foreign state to establish a nexus in the United States sufficient to satisfy jurisdictional requirements.[46] Two exceptions concern activities of a foreign state in the United States. The third, covering activities of a foreign state outside the United States which cause a "direct effect" in the United States,[47] is the controlling provision in

---

44. The interconnection of the immunity and jurisdictional provisions is explained in the House Report:

> For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(b), 1608, and 1605-1607 are all carefully interconnected.

House Report, *supra* note 25, at 6612.

45. 28 U.S.C. § 1604 (1976). Section 1604, entitled "Immunity of a foreign state from jurisdiction," states:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

See note 40 *supra*.

46. 28 U.S.C. § 1605(a)(2) (1976). This section states:

> (a) A *foreign state* shall not be immune from the jurisdiction of courts of the United States or of the States in any case
>
> . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .*" (emphasis added).

47. *Id.* This controversial third clause is, however, based upon customary international law:

the instant case.[48]

There are two conditions to the application of the direct effect clause. First, the injurious act must be performed "outside the territory of the United States."[49] This requirement is satisfied in the *Nikkei* case by the unilateral amendments, from Nigeria, of the letters of credit.[50] Second, the act must be performed in connection with the foreign state's "commercial activity"[51] outside the United States.[52] Clearly, the contracts in *Nikkei*[53] were of a commercial nature,[54] thus making the amendments of the letters of credit re-

---

> [I]t is certain that the courts of many countries, . . . which have given their . . . legislation a strictly territorial character, interpret [their] law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there.

The S.S. Lotus, [1927] P.C.I.J., ser. A., No. 10, at 23, *quoted in* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18, at 52-53 (1965).

48. *See* 497 F. Supp. at 903-05. Section 1605(a) indicates that the subsequent provisions of the exceptions for commercial activity become operative for the purpose of determining jurisdiction if the action is brought against a "foreign state," *see* note 46 *supra*, which is defined to include "an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (1976). In turn, an "agency or instrumentality of a foreign state" is defined in § 1603(b) as:

> any entity—(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Clearly, the statute is applicable to Nigeria since it is a foreign state. In addition, the legislative history of the Act indicates the CBN would satisfy the definition of an agency or instrumentality of a foreign state. "As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including . . . a central bank . . . which acts and is suable in its own name." House Report, *supra* note 25, at 6614.

49. 28 U.S.C. § 1605(a)(2) (1976).

50. 497 F. Supp. at 898.

51. 28 U.S.C. § 1605(a)(2) (1976).

52. *Id.*

53. *See* notes 6-11 *supra*.

54. 28 U.S.C. § 1603(d) (1976). Section 1603 defines "commercial activity" broadly as "either a regular course of commercial conduct, or a particular commercial transaction or act." *Id.* It also indicates that the "commercial character of the activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.*

"This would mean, for example, that a foreign state's purchase of grain from a private dealer would always be regarded as commercial, even if the grain were to

lated to Nigeria's commercial activity outside the United States.[55]

With these two conditions satisfied, what remains to be determined is whether the defendants' actions caused a direct effect in the United States. Because the statute does not define the term, an examination of both the legislative history and prior judicial interpretation of the direct effect clause is required.

A. *The Legislative History*

Although the Act itself provides no guidance as to the proper judicial test for finding a "direct effect," the Act's legislative history provides necessary assistance. In general, the House Report indicates that each of the exceptions to immunity in the Act requires "some connection between the lawsuit and the United States."[56] It is clear, however, that "[i]n view of the interdependence of the world's economies, most major international transactions are

---

serve some important government purpose, such as replenishing government stores or feeding an army." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 27 (1976) (testimony of Monroe Leigh); *Plaintiff's Day in Court*, *supra* note 25, at 551 n.61.

55. The acts of defendant Nigeria which plaintiffs allege constitute anticipatory breaches of their individual contracts took place outside the United States and relate to Nigeria's commercial transactions with plaintiffs. The suspension of the importation of cement and the refusal to issue documents to plaintiffs allowing them to commence shipment of cement into Nigeria took place in that country. Similarly, the conduct of defendant CBN which is in dispute relates to its commercial banking activities in Nigeria. The unilateral amendments of the three letters of credit occurred in Nigeria. *See Verlinden B.V. v. Central Bank of Nigeria*, [488 F. Supp. at 1298] ("the 'repudiation' was issued in Nigeria (an act outside the United States)").

Therefore, the requirement under the "direct effect" exception under section 1605(a)(2) that each defendant commit an act outside the United States in connection with their [sic] commercial activities elsewhere is satisfied.

497 F. Supp. at 905. Noteworthy is Magistrate Schreiber's recommendation to Judge Pierce: "The cement contracts are clearly commercial in nature and Nigeria's unilateral amendment of the letters of credit established pursuant to those contracts constitutes 'an act outside the territory of the United States in connection with commercial activity elsewhere.' " Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, No. 77-2348 (S.D.N.Y. Sept. 19, 1978) (Magistrate's Recommendation 9-10). For the Proposition that the courts generally predetermine what would be a just result and then define "commercial activity" accordingly, see Note, *Ixtoc I: International and Domestic Remedies for Transboundary Pollution Injury*, 49 FORDHAM L. REV. 404 (1980).

56. House Report, *supra* note 25, at 6612.

likely to have some effect in the United States."[57] Therefore, to determine whether there is a direct effect, the legislative history suggests that the factors to be considered are the locus and degree of the injury,[58] its causal relation to the allegedly injurious conduct,[59] and the contacts between the activity and the forum.[60]

1. The Locus of Injury Test

The legislative history indicates that the intent of the "direct effect" clause is to "embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement (Second) of the Foreign Relations Law of the United States . . . ." (Restatement).[61] The language of section 18 of the Restatement[62] indicates that to qualify as a direct effect under the Act, the plaintiff's alleged injury must be "substantial" and must occur "within the [United States] as a foreseeable [and] 'immediate causal result' of an act of the defendant outside the United States in connection with defendant's commercial activity elsewhere."[63] The jurisdictional test which is based primarily upon section 18 has been referred to as the "locus of injury" approach.[64]

---

57. Kahale & Vega, *supra* note 41, at 247.

58. *See* notes 61-64 *infra* and accompanying text.

59. *Id.*

60. *See* notes 65-69 *infra* and accompanying text.

61. House Report, *supra* note 25, at 6618. Section 18 of the Restatement reads:

> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effects are constituent elements of activity to which the rule applies; (ii) *the effect within the territory is substantial*; (iii) *it occurs as a direct and foreseeable result of the conduct outside the territory*; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965) (emphasis added) [hereinafter cited as RESTATEMENT]. *See also* 497 F. Supp. at 904.

62. *See also* RESTATEMENT § 18, comment f, at 50 (1965).

63. 497 F. Supp. at 904.

64. *See id.* at 905. The "locus of injury" test based on RESTATEMENT § 18 is

2. The Minimum Contacts Requirement

There is no suggestion in the legislative history that satisfaction of the locus of injury test is by itself dispositive of the question of jurisdiction. Originally, the Act was created because of the need for a method of informing parties when they could have access to the courts of the United States while seeking legal redress against a foreign state.[65] It was necessary, however, that the method selected not undermine the theory of minimum contacts needed to ensure the constitutional requirement of due process.[66] To achieve this goal, Congress simply incorporated the broad minimum contacts standard of *International Shoe Co. v. Washington*[67] and its progeny[68] directly into the Act.[69] It can reasonably be inferred, then, that in order to trigger application of the direct effect clause, both the locus of injury test from section 18 of the Restatement[70] and the minimum contacts test evolving from and including *International Shoe*[71] must be satisfied.

---

not to be confused with the actual locus of injury. The test requires that four criteria be satisfied. The injury is to be: 1) substantial, 2) a foreseeable consequence of defendants' actions, 3) an immediate causal result of defendants' conduct, and 4) felt within the territory of the United States. The locus of injury itself refers to this fourth criterion, the forum in which the injury is received by the plaintiff.

65. *See* House Report, *supra* note 25, at 6605.

66. "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court of the United States has stated:

> Historically the jurisdiction of courts to render judgments in personam is grounded on their de facto power over the defendant's person. . . . But now . . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not 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.'

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

67. 326 U.S. 310 (1945). *See* note 66 *supra*.

68. *See e.g.*, note 69 *infra*.

69. "b) *Personal Jurisdiction.*—Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states. . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. *Cf. International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957)." House Report, *supra* note 25, at 6612. The minimum contacts requirement is not specifically mentioned in the legislative history's explanation of the "direct effect" clause. It explicitly applies, however, to all sections incorporated by reference into § 1330(b), including the "direct effect" provision of § 1605, as noted earlier. *See* notes 39-45 *supra* and accompanying text.

70. *See* notes 61-64 *supra* and accompanying text.

71. *See* notes 66 & 69 *supra* and accompanying text.

III. *APPLICATION OF THE DIRECT EFFECT CLAUSE IN THE NIGERIAN CEMENT CASES*

The *Nikkei* case, *Verlinden B.V. v. Central Bank of Nigeria*,[72] and *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[73] all concerned similar disputes over 1975 cement contracts with Nigeria.[74] All involved identical requests by the sellers for letters of credit to be established at their respective banks and subsequent unilateral amendments by Nigeria of letters of credit established, contrary to the terms of the contract, at Morgan in New York.[75] The court in each case, however, used a distinctly different approach in deciding the jurisdictional issue.

In *Verlinden*, where the plaintiff was a foreign corporation, the court found that the locus of injury test was not satisfied, never reaching the question of minimum contacts.[76] In *Texas Trading*, where jurisdiction was also denied, the court found that the dispositive element was the issue of minimum contacts.[77] The court in *Nikkei*, however, did find jurisdiction, holding that the standards of both the locus of injury test and the minimum contacts test had been independently satisfied.[78] The following sections will examine the rationale of each decision, focusing on a comparison of the specific elements of the different tests used in the three cases.

A. *The* Verlinden *Approach: Finding the Locus of Injury*

In determining the standard for a direct effect in *Verlinden*, Judge Edward Weinfeld noted: "In applying this section [section 18 of the Restatement] courts have uniformly held that the locus of

---

72. 488 F. Supp. 1284 (S.D.N.Y. 1980).

73. No. 78-2395, slip op. (S.D.N.Y. July 16, 1980).

74. *See* note 19 *supra*.

75. 488 F. Supp. at 1287; No. 78-2395, slip op. at 3. In both *Verlinden* and *Texas Trading* plaintiffs had contracted in 1975 to sell cement to Nigeria. The Nigerian government had agreed to establish individual letters of credit with Verlinden and with Texas Trading Co. through the Slavensburg Bank in Amsterdam and the Fidelity International Bank in New York, respectively. Nigeria unilaterally advised the unconfirmed letters of credit through Morgan instead, and then unilaterally amended the letters of credit to provide as they had in *Nikkei*. *See* note 21 *supra* and accompanying text. The only material differences were that Verlinden was a foreign plaintiff and that it restricted its claim to one for anticipatory breach of the letter of credit. 488 F. Supp. at 1285-87.

76. *See* notes 79-90 *infra* and accompanying text.

77. *See* notes 91-112 *infra* and accompanying text.

78. 497 F. Supp. at 905-06.

injury is dispositive of jurisdiction."[79] Placing greatest emphasis upon determining the forum in which the plaintiff, a Dutch corporation, felt the economic effect of defendants' conduct,[80] the court in *Verlinden* held that receipt of the repudiation by Morgan in New York did not constitute injury in the United States.[81] Consequently, jurisdiction over defendant was denied for failure to satisfy the locus of injury requirement.[82]

Since Judge Weinfeld did not enumerate the factors used in determining that the locus of injury was outside the United States, some speculation is required in order to identify the factors considered by the court in reaching its conclusion. For this purpose, the dictum of the court is instructive.[83] Citing Judge Goettel's dictum

---

79. 488 F. Supp. at 1298. The *Nikkei* court saw this as implying "that both the minimum contacts standard and the requirement of a substantial, foreseeable and immediate causal effect are satisfied when the locus of injury is in the United States." 497 F. Supp. at 905.

For its proposition that the locus of injury is dispositive of jurisdiction, the *Verlinden* court cited, among others, *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (effect on parent corporation of injury to its foreign subsidiary deemed "indirect"). *Carey* indicated that to find a "direct effect" it was necessary that there be a causal result of defendants' conduct in the United States. The court found that such a causal relation between the defendants' conduct and the plaintiff's injury was lacking, so that there would be no "direct effect." There was no specific mention of the "locus of injury" test of RESTATEMENT § 18, or of the forum in which the plaintiff sustained the injury (the actual locus of injury). Without a "causal effect," the locus of injury was not only not dispositive of the question of jurisdiction in *Carey*, it was irrelevant. Also contrary to *Verlinden*'s implication, the *Carey* court placed equal emphasis on the lack of minimum contacts needed to satisfy the standard of *International Shoe*. The court declared that for this additional reason, the level of "direct effect" could not be reached. 592 F.2d at 676-77.

80. 488 F. Supp. at 1298. The court stated: "In applying this section courts have uniformly held that the locus of injury is dispositive of jurisdiction—*indeed, that factor takes precedence over the citizenship of the victim.*" *Id.* (emphasis added) (footnote omitted).

81. *Id.* Presumably, the court reasoned that the plaintiff was injured not where its bank received news of the repudiation, but rather where it actually sustained the economic injury (in Amsterdam, where the corporation was located). The actual locus of injury, however, was never explicitly determined in *Verlinden*.

82. For support of his reasoning, Judge Weinfeld cited *Harris v. VAO, Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979), a case in which a Moscow hotel's tortious conduct caused injury to an American citizen in Moscow. *See* notes 99-102 *infra* and accompanying text. Because *Harris* denied jurisdiction on the ground that the "indirect effect" of the defendants' conduct was in the United States, so that, conversely, the direct effect was impliedly outside the United States, the case lends itself to Judge Weinfeld's analogous reasoning in *Verlinden*. *See* 481 F. Supp. at 1062.

83. 488 F. Supp. at 1299.

in *National American Corp. v. Federal Republic of Nigeria*,[84] the *Verlinden* court noted that in a hypothetical situation involving the breach of a letter of credit which 1) had a New York beneficiary, and 2) was advised and payable through a New York bank,[85] "the act of anticipatory repudiation [would have] a direct effect in New York."[86] The facts in this example differ from *Verlinden* only in that the letter of credit in this hypothetical situation had a New York, rather than a foreign, beneficiary.[87] Since the court suggested that this change would be sufficient to warrant assertion of jurisdiction over defendants, it appears that the citizenship, domicile, or residence of the plaintiff must be an important factor in determining the locus of injury.[88]

The conclusion, therefore, that can be drawn from analysis of the holding and the hypothetical example in *Verlinden* is that the factors determinative of whether the direct effect of defendants' conduct reached the forum are: 1) the relation between the place where plaintiff claims to have sustained its alleged injury and the citizenship, domicile, or residence of the plaintiff,[89] and 2) the place of payment under the letter of credit.[90] Because receipt of the repudiation by Morgan in New York, when plaintiff was in the Netherlands, was not deemed sufficient in itself to satisfy the locus of injury requirement, there was no further jurisdictional inquiry in *Verlinden*. As a result, it remains unclear whether the locus of injury approach of *Verlinden* incorporates in its analysis the minimum contacts standard of *International Shoe* and its progeny.

---

84. National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979). In *National*, jurisdiction was granted in a similar Nigerian cement contract dispute, but on the basis of quasi in rem attachment which was available in federal courts by virtue of FED. R. CIV. P. 64, levied against funds at Morgan held in CBN's name.

85. 488 F. Supp. at 1299, citing 448 F. Supp. at 639 (dictum).

86. 488 F. Supp. at 1299.

87. *See id.*

88. This dictum seems to contradict the downplaying in *Verlinden* of the importance of the plaintiff's citizenship. *See* note 80 *supra*. Since in commercial activity, the plaintiff's domicile, place of citizenship, or residence will almost always be the place of the receipt of economic injury, the factors seem inextricably linked in commercial situations.

89. *See* note 88 *supra*.

90. This factor is important because it represents the place of the actual receipt of the repudiation.

B. Texas Trading *and the Minimum Contacts Approach*

In *Texas Trading*, the court denied jurisdiction in a case presenting the precise fact pattern envisioned in the *Verlinden* dictum[91] and stated that an examination of the contacts between the defendants and the specific transaction at issue was required.[92] Although mentioning the test of section 18 of the Restatement,[93] the court emphasized that the direct effect requirement "is fulfilled only when there are significant contacts between the transaction underlying the cause of action and the United States."[94] The *Texas Trading* court thus minimized the importance of the locus of injury test, placing much greater emphasis on the minimum contacts test than was intended by Congress.[95]

Curiously, in denying jurisdiction for lack of sufficient contacts, Judge John Cannella asserted that he was relying on the broad standard of *International Shoe*,[96] although he actually applied a

---

91. *See* notes 84-88 *supra* and accompanying text.

92. No. 78-2395, slip op. at 9 (S.D.N.Y. July 16, 1980). In *Texas Trading*, the court stated:

> Even if the defendants' embargo, unilateral amendment of the letter of credit, and alleged breach of the settlement agreement, are commercial activities, the language of the statute still requires that such conduct occurring outside the United States have a "direct effect" in the United States. While the meaning of "direct effect" in this context is less than clear, it does indicate that an examination of the defendants' contacts with the United States in connection with the specific transaction at issue is required.

Id. See also East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 303, 388 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979).

93. No. 78-2395, slip op. at 10 (S.D.N.Y. July 16, 1980). The *Texas Trading* court quoted the text of § 18 of the RESTATEMENT, but did not deal with any of its specific elements. *Id. See* note 94 *infra*.

94. No. 78-2395, slip op. at 12 (S.D.N.Y. July 16, 1980). The court stated, "[A]s difficult as analogies are in this context, the import of both § 18 and comparisons to the District of Columbia's long-arm statute is that the 'direct effect' requirement of § 1605(a)(2) is fulfilled only where there are significant contacts between the transaction underlying the cause of action and the United States." *Id.*; *see* note 97 *infra*. This is apparently the converse of the implication in *Verlinden*, *see* note 79 *supra* and accompanying text, for this last phrase suggests that satisfaction of the minimum contacts standard also satisfies the test of § 18 of the RESTATEMENT.

95. *See* notes 56-71 *supra* and accompanying text.

96. No. 78-2395, slip op. at 16 (S.D.N.Y. July 16, 1980). In its conclusion, the court stated: "Since the allegations of plaintiff's complaint do not fulfill the 'minimum contacts' requirements of *International Shoe* and its progeny, they cannot reach the level of 'direct effect' described in section 1605(a)(2)." *Id.* The *Texas Trading* court never acknowledged the fact that the legislative history designates *Interna-*

minimum contacts test based on the stricter standard of the District of Columbia long arm statute.[97] In support of its approach, the court cited not only the Act's legislative history,[98] but also portions of *Harris v. VAO Intourist, Moscow*,[99] a wrongful death

---

tional Shoe and its progeny as the minimum contacts standard for the Act. Instead, the court cited *Carey v. National Oil Corp.* as the authority for using *International Shoe. Id.*

97. *Id.* at 10. After mentioning the legislative history's reference to § 18 of the RESTATEMENT and neglecting to mention the legislative history's reference to *International Shoe, see* note 96 *supra*, the court stated that "further guidance is provided by the District of Columbia's long arm statute." *Id.*, citing House Report, *supra* note 25, at 6612. The court was referring to the legislative history's indication that § 1330(b), *see* note 40 *supra*, was intended to operate as "a Federal long-arm statute over foreign states," and for this purpose was "patterned after the long-arm statute Congress enacted for the District Columbia." House Report, *supra* note 25, at 6612.

The District of Columbia long-arm statute provides in pertinent part:

> A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's—
>
> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) *causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he 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*;
>
> (5) having an interest in, using, or possessing real property in the District of Columbia; or
>
> (6) contracting to insure or act as surety for or on any person, property, or risk, contract, obligation, or agreement located, executed, or to be performed within the District of Columbia at the time of contracting, unless the parties otherwise provide in writing.

D.C. CODE ANN. § 13-423(a) (1973) (emphasis added).

98. *See* note 97 *supra*.

99. 481 F. Supp. 1056 (E.D.N.Y. 1979). The court in *Texas Trading* quoted *Harris*, in an effort to justify selection of the D.C. statute's standard as the standard for a "direct effect":

> This interpretation and the legislative history already adverted to would suggest that section 13-423(a)(4) of the District of Columbia statute dealing with tortious acts or omissions outside the District causing tortious injury within the District provides the strongest analogy to the direct effect clause of section 1605(a)(2) in a factual situation such as the one before us.

Id. at 1064, *quoted in* No. 78-2395, slip op. at 12 (S.D.N.Y. July 16, 1980).

Similarly, the *Texas Trading* court was quoting *Harris* when it declared that "the Act, however, 'authorize[s] the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process,' " thereby enunciating a jurisdictional standard

action brought by the estate of a United States citizen killed in a Moscow hotel fire.[100] The *Harris* court employed what it referred to as a "minimum contacts" analysis, based on the District of Columbia statute's standard.[101] This analysis, however, was in fact only a

---

more strict than that of *International Shoe*. 481 F. Supp. at 1059, *quoted in* No. 78-2395, slip op. at 7-8 (S.D.N.Y. July 16, 1980). It is interesting to note that the *Harris* court actually went further than this and suggested that the bases of jurisdiction for the Act were even "less comprehensive than those found in the usual jurisdictional statutes of the states and the District of Columbia." 481 F. Supp. at 1059. This indicates that an extremely strict standard was used in *Harris*, thus making *Texas Trading*'s claimed reliance upon both *Harris* and *International Shoe* paradoxical.

100. 481 F. Supp. at 1057-58.

101. *Id.* at 1061 & 1063-64. *See* note 99 *supra*.

Because the legislative history does mention both the District of Columbia statute and *International Shoe* in the same breath, there could initially appear to be an inconsistency as to which minimum contacts standard Congress intended to be applied to actions under the Act. *See* House Report, *supra* note 25, at 6612. The confusion which has arisen concerning this point centers on interpretation of the phrase "patterned after." *See* note 97 *supra*. *Texas Trading* and *Harris* have held it to mean that the District of Columbia long-arm statute may be relied upon for its jurisdictional standard in cases under the Act. *See* No. 78-2395, slip op. at 10-12 (S.D.N.Y. July 16, 1980); 481 F. Supp. at 1061 & 1063-64. Comparison of selected portions of the Act and the D.C. statute reveals that there is in fact a close correspondence between the areas of activity considered in the provisions of each, and suggests that Congress did rely upon the D.C. statute at least for the scope of the subject matter considered of importance in formulating a comprehensive federal long-arm statute. Provisions (1) and (2) of the D.C. long-argm statute (D.C. CODE ANN. § 13-423 (1973)) refer to *commercial activity in the District of Columbia*, while the first two clauses of 1605(a)(2) refer to *commercial activity in the United States*. Provision (3) of the D.C. statute deals with *tortious injury by act or omission in the United States*, while 1605(a)(5) is concerned with *personal injury by act or omission occurring in the United States*. Provision (4) of the D.C. statute applies to *an act outside the District of Columbia causing injury in the District*, while the third clause of § 1605(a)(2) deals with *injurious conduct outside the United States having a direct effect in the United States*. *See* notes 46-47 *supra*. A reasonable inference may be made that this structural modeling is the only "patterning" to which the legislative history refers, particularly in light of the specific designation of *International Shoe* and its progeny as the minimum contacts standard for the Act. *See* note 69 *supra*. There is no evidence either in the Act or in its legislative history which indicates that the phrase "patterned after" was intended to suggest any more than this superficial resemblance between the provisions of each statute.

The *Texas Trading* and *Harris* courts demonstrated an instinctive understanding of the difficulty and inappropriateness of applying the standard of the D.C. statute, which makes distinctions based on classifications such as "commercial" and "tort," to cases arising under the Act, which makes its basic distinctions between "governmental" and "commercial" activity. No. 78-2395, slip op. at 10-11 (S.D.N.Y. July 16, 1980), quoting 481 F. Supp. at 1063-64; *see* Note, *The Virginia "Long Arm" Statute*, VA. L. REV. 719, 732 (1965). In both cases, however, the courts never realized that,

rearranged version of the locus of injury test from section 18 of the Restatement.[102] The failure of the *Texas Trading* court to recognize

---

according to the legislative history, the difficulty need never have arisen. *See* notes 67-69 *supra* and accompanying text. It should be noted that the *Nikkei* court followed the legislative history and avoided the unnecessary dilemma by relying solely upon the broad standard of *International Shoe* and its progeny for determining the question of minimum contacts. 497 F. Supp. at 902-06.

102. 481 F. Supp. at 1062-63. In essence, under Judge Weinstein's analysis in *Harris*, satisfaction of all of the elements of the locus of injury test of § 18 of the RESTATEMENT will result in a finding of jurisdiction under § 1605(a)(2). The structure of Judge Weinstein's analysis, however, obscures this fact. In *Harris*, a new definition for "direct effect" was fashioned: "Thus, as derived from section 18 of the Restatement (Second) of the Foreign Relations Laws of the United States, *direct effect refers to an effect which is both substantial and the direct and foreseeable result of conduct outside the jurisdiction.*" *Id.* at 1063 (emphasis added). This definition of "direct effect" comprises all of the criteria of the "locus of injury" test of the RESTATEMENT § 18, with the exception of the locus of injury factor itself. *See* note 64 *supra*.

The relationship between the minimum contacts test and a "direct effect" (as defined above) is described in *Harris* as one in which *"the 'direct effect' requirement* in the third clause of section 1605(a)(2), like the tortious injury requirements of the District of Columbia long-arm section, *exists to partially satisfy the requirement that a non-resident have sufficient contacts with the forum* before the courts can exercise in personam jurisdiction." 481 F. Supp. at 1062 (emphasis added). It is not immediately clear in *Harris* what additional factor(s) must be present in order to complete the "partially" satisfied requirement of sufficient contacts. *Harris* indicates that the forum in which the injury is received is not important if the injury is not direct. Therefore, the court demands satisfaction of the "direct effect" requirement (with emphasis on "direct," *id.* at 1063) before it will consider the question of where the effect occurred. Clearly the actual locus of injury is not considered relevant under the *Harris* definition of "direct effect" as it is applied to the specific facts of that case:

> Obviously the negligent operation of a hotel in Moscow causing the death of a United States resident has effects in the United States; here it leaves aggrieved relatives in this country. *But the precise issue is not whether the fire had any effect here, but whether it had a "direct effect" in the United States* within the meaning of the statutory language. Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the direct effect requirements of section 1605(a)(2).

Id. at 1062 (emphasis added). Here the *Harris* court grants that the injury complained of by the plaintiff occurred within this country. Because the injury was not "substantial," however, there could be no "direct effect" under the *Harris* definition, and hence, there could be no extension of jurisdiction. *Id.* at 1065. For confirmation of this reasoning, *Harris* relies on *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), a case presenting facts similar to those in *Harris*. In *Upton*, the court found that suffering pain within the United States as a consequence of personal injuries incurred outside the jurisdiction was insufficient to invoke jurisdiction. *See* 481 F. Supp. at 1065. The *Harris* reliance on *Upton* indicates that there is a great deal of importance attached to determination of the locus of injury. It is reasonable, in fact, to infer that the locus of injury is the additional factor needed to completely satisfy

the true nature of the *Harris* test helped lead to *Texas Trading*'s complete omission of a locus of injury analysis, and to its anomalous application of the D.C. statute's standard to determine whether the standard of *International Shoe* had been satisfied.[103]

Despite this oversight,[104] the *Texas Trading* court's application of reasoning analogous to that used to deny jurisdiction in *Harris* would still have been justified were there greater similarity between the cases. *Harris*, however, involved a claim of tortious personal injury whose direct effect, the death of a United States citizen, occurred outside the United States. In that case the only link with the forum was the United States citizenship of the plaintiff. *Texas Trading*, in contrast, was a contract action involving a New York plaintiff, a letter of credit payable in New York, and the receipt in New York of the repudiation (the alleged injury) of that letter of credit.[105] The *Texas Trading* facts appear to reflect significantly more contacts with the territory of the forum than were present in *Harris*, thereby casting doubt on the propriety of employing reasoning by analogy from *Harris* to *Texas Trading*.[106]

---

the requirements of sufficient contacts. Although the emphasis in *Harris* is on the degree of the injury, it does seem that failure to determine the forum in which the injury allegedly occurred would preclude any finding of an effect as either direct or indirect. It may be patently obvious, but it would be impossible to measure a tangible effect without knowing the point of spatial reference at which it is to be measured.

One might speculate that, in *Harris*, had there been a "substantial" effect occurring within the United States, then the locus of injury in the United States would have completed the requirement of sufficient contacts which had been partially satisfied by a finding of a "direct effect," as it was defined in that case. Although the *Harris* court purported to use a minimum contacts analysis, the result of the redefinition of "direct effect" is apparently only an unnecessarily complicated application of the "locus of injury" test of RESTATEMENT § 18.

103. *See* notes 99-101 *supra*; text accompanying note 97 *supra*.

104. It should be noted that Judge Cannella's decision on the jurisdictional issue, in answer to defendants' motion to dismiss on grounds of sovereign immunity, was rendered without the benefit of any substantial evidence on the question having been submitted to him by the plaintiff's attorneys. *See, e.g.*, No. 78-2395, slip op. (S.D.N.Y. July 16, 1980) (Affadavits for Plaintiff—no mention of the jurisdictional problem).

105. *See* note 75 *supra*.

106. The *Texas Trading* court justified its denial of jurisdiction, stating:

> [I]n *Harris*, Judge Weinstein concluded that defendants' alleged acts of negligence in causing the death of plaintiff's American decedent in a Moscow hotel fire did not cause a 'direct effect' in the United States within the meaning of the third exception to section 1605(a)(2), since the only contact with the forum was an 'injurious consequence' of conduct occurring out-

Although the basis for the selection of the jurisdictional standard and for the reasoning used in *Texas Trading* is suspect, the decision cannot be fully understood without examining the factors considered by the court in denying jurisdiction for lack of sufficient contacts. The court held that (1) "the only effect in the United States asserted by the plaintiff was that the letter of credit was payable in New York to the plaintiff, a New York corporation, through a New York correspondent bank of the Central Bank";[107] (2) the letter of credit was payable in New York as an accommodation to the plaintiff, so that the purported injury caused by the breach of contract took place "only because the plaintiff [was] domiciled or doing business here, [which] is an insufficient contact for due process purposes";[108] (3) while "the defendants' alleged breach of the contract and letter of credit may have had foreseeable effects in the United States, 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause";[109] (4) Congress intended to bestow jurisdiction only in cases in which there is a "degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff";[110] and (5) "there is no indication in the present case that the defendants purposefully availed themselves of the privilege of conducting

---

side the United States.

No. 78-2395, slip op. at 12-13 (S.D.N.Y. July 16, 1980). This analysis of the *Harris* decision is not quite accurate, however. Judge Weinstein in *Harris* did not deny jurisdiction because "the only contact with the forum was an 'injurious consequence.' " The *Harris* court denied jurisdiction because the contact with the forum was an *"indirect"* injurious consequence. 481 F. Supp. at 1062 (emphasis added). That is, there was no "direct" contact, within the *Harris* court's definition of the "direct effect" requirement. The concern in *Harris* was not with the number of contacts with the forum, as *Texas Trading* suggests. Instead, it was a concern with regard to causality. *Texas Trading*'s reliance on the *Harris* court's denial of jurisdiction is therefore more unjustifiable in light of this additional distinction between the two cases.

107. No. 78-2395, slip op. at 13 (S.D.N.Y. July 16, 1980).

108. *Id.* at 13-14, quoting *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 390 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979).

109. No. 78-2395, slip op. at 14 (S.D.N.Y. July 16, 1980), quoting World-Wide Volkswagen v. Woodson, 444 U.S. 286, 295 (1980).

110. No. 78-2395, slip op. at 14 (S.D.N.Y. July 16, 1980), quoting House Report, *supra* note 25, at 6616. Judge Cannella acknowledged that this language is taken from the legislative history's section on "commercial activity carried on in the United States" (the first exception of §1605(a)(2)), rather than from Congress' analysis of the "direct effect" clause itself. The application of the language quoted, therefore, is somewhat inappropriate.

business in the United States . . . ."[111] In short, the court held that the citizenship of the plaintiff and the site of payment of the letter of credit, being the only connections with the forum, were not in themselves sufficient to satisfy the minimum contacts test. Accordingly, jurisdiction over Nigeria and CBN was denied.[112]

C. *The* Nikkei *Decision*

Relying heavily on the legislative history of the Act, the *Nikkei* court determined that the direct effect exception required not only that the substantial, foreseeable, and immediate causal result of defendants' actions be an injury in the United States,[113] but also that there be sufficient minimum contacts between the matter in controversy and the United States to support jurisdiction under *International Shoe*.[114] Deciding that the two tests were separate, and of equal importance, the court acknowledged that it was taking a different approach, and reaching different conclusions, from those of the courts in *Verlinden* and *Texas Trading*.[115]

1. The Locus of Injury Test in *Nikkei*

In determining that all of the criteria of the locus of injury test were satisfied,[116] the *Nikkei* court first found that the anticipatory

---

111. No. 78-2395, slip op. at 16 (S.D.N.Y. July 16, 1980), citing Carey v. National Oil Corp., 592 F.2d 673, 677 (2d Cir. 1979). *See also* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

112. No. 78-2395, slip op. at 16-17 (S.D.N.Y. July 16, 1980).

113. *See* notes 61-64 *supra* and accompanying text.

114. 497 F. Supp. at 904. *See* notes 65-71 *supra* and accompanying text. The Second Circuit provided support for this two-tiered approach in *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979). *See* note 79 *supra*.

115. 497 F. Supp. at 905-06; *see* notes 76-78 *supra* and accompanying text.

116. The court held:

> The alleged breaches of each of the three cement contracts and three letters of credit by the defendants caused substantial, foreseeable, and immediate injury to plaintiffs in New York. Each plaintiff is a New York corporation and payment was to be made to each plaintiff in New York through Morgan Guaranty Trust Company under the letters of credit. Similarly, the three cement contracts were effectively amended to provide for payment thereunder in New York by Nigeria's unilateral establishment of the letters of credit with CBN, all of which were payable in New York. Under these circumstances, the locus of injury was in New York.

497 F. Supp. at 906; *see* notes 61-64 *supra* and accompanying text. It appears that the second to last sentence of Judge Pierce's statement is superfluous. There is clearly no relation between the "locus of injury" test and the fact that the letters of credit were amended unilaterally by Nigeria.

breaches of the contracts and letters of credit directly caused significant injury to the plaintiffs.[117] The court did not separately consider the "substantial, "foreseeable," and "immediate causal effect" requirements of the locus of injury test, but such an analysis was undertaken in the Magistrate's Recommendation to the *Nikkei* court,[118] upon which, presumably, Judge Pierce relied. In deciding that the direct effect of this injury was *in New York* the *Nikkei* court considered the determinative factors to be: 1) the citizenship and domicile of the plaintiffs,[119] and 2) the actual site of payment under the contracts and letters of credit.[120]

---

117. 497 F. Supp. at 906; note 116 *supra*.

118. Magistrate Schreiber states:

> [T]he pivotal question for this court to determine is whether there has been a direct, foreseeable and substantial effect within the United States as a result of the amendment of the letters of credit.
>
> All of the beneficiaries of the letters of credit were incorporated in New York and the letters were payable at Morgan Guaranty Bank in New York. Nigeria's amendment of the letters *directly affected* the beneficiaries in New York, for after the amendment none could collect the debts owed to it without the appropriate documents newly demanded by Nigeria. This effect was *foreseeable* by that nation, because it had entered contracts with New York corporations, made payable at a New York bank and expressly instructed Morgan Guaranty Bank in New York to dishonor letters of credit not complying with the amended payment procedures. Finally, the effects of the attempted amendment of the contracts are *substantial*, for over $42,000,000 worth of credit owed to the three plaintiffs has been cancelled.

Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, No. 77-2348 (S.D.N.Y. Sept. 19, 1978) (Magistrate's Recommendation 10) (emphasis added). It is interesting to note that Magistrate Schreiber concluded the analysis with rationale similar to that used in *Harris*. *See* note 102 *supra*. He stated:

> Accordingly, this court has *subject matter* jurisdiction prusuant to 28 U.S.C. § 1605(a)(2).
>
> *Personal* jurisdiction also exists over defendant Nigeria pursuant to § 1330(b) of the Immunities Act. The legislative history of that section of the statute supports such a finding on the ground that Nigeria's conduct in connection with contracts having foreseeable and substantial effects in New York provides in and of itself, sufficient contact with this state for due process purposes.

Id. at 10-11 (emphasis added). Judge Pierce did not follow Magistrate Schreiber's finding that a direct, foreseeable and substantial effect, such as he had just described, would by itself satisfy the minimum contacts requirement. 497 F. Supp. at 906.

119. 497 F. Supp. at 906. *See* note 116 *supra*.

120. 497 F. Supp. at 906. From these two factors it appears that the *Nikkei* locus of injury test would not have been satisfied in *Verlinden*, because the plaintiff in that case was a foreign citizen. By the same token, this locus of injury test would be satisfied in *Texas Trading* by virtue of a fact pattern nearly identical to that of *Nikkei*. *See* note 75 *supra*.

2. The Minimum Contacts Test in *Nikkei*

The minimum contacts test used in *Nikkei* considers "not merely whether there are sufficient contacts with respect to the contract in dispute, but more broadly, whether maintenance of the suit offends 'traditional notions of fair play and substantial justice . . . .' "[121] Indicating that "[t]he contacts between the defendant and the forum must be such that it is reasonable to require the defendant to litigate the dispute in that forum,"[122] the court selected the test of *World-Wide Volkswagen v. Woodson*,[123] *International Shoe*'s most recent offspring, for its list of the factors used in determining whether reasonable contacts are present. The factors enumerated were: 1) the burden on the defendant of litigating in that forum, 2) the interest of the forum in adjudicating the dispute, and 3) the plaintiff's interest in obtaining convenient and effective resolution of its claim.[124]

In principle, the *Nikkei* decision is in accord with *Texas Trading*'s finding that the citizenship of the plaintiff and the site of payment are not in themselves sufficient to support a finding of jurisdiction.[125] The *Nikkei* court, however, disagreed with *Texas Trading*'s assertion that these two factors represented the only contacts between defendants and the forum.[126]

The conflict between the two cases involves the first part of the *World-Wide Volkswagen* test: the determination of the burden on the defendants of litigating in New York.[127] The major point of

---

121. 497 F. Supp. at 905, quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). *See* note 66 *supra*.

122. 497 F. Supp. at 905.

123. 444 U.S. 286 (1980).

124. *Id.*; 497 F. Supp. at 905.

125. *See* note 112 *supra* and accompanying text.

126. On the subject of the "foreseeabilty" factor not being "a benchmark for personal jurisdiction," Judge Pierce took no exception. *See* note 109 *supra* and accompanying text. Instead, he used "foreseeability" as one of the factors in deciding if the "locus of injury" was satisfied, but even there it was by no means solely determinative. *See* notes 116-20 *supra* and accompanying text.

127. *See* text accompanying note 124 *supra*. There is no significant disagreement concerning satisfaction of the second and third criteria of the minimum contacts test of *World-Wide Volkswagen*. In deciding the interest of the forum in adjudicating the dispute (the second factor), the court noted, "Congress has indicated that in enacting the Foreign Sovereign Immunities Act it intended to insure that 'our citizens will have access to the courts in order to resolve ordinary legal disputes.' " 497 F. Supp. at 906, quoting House Report, *supra* note 25, at 6605. This places great

contention concerns the assertion in *Texas Trading* that Nigeria established the letter of credit, payable in New York, as an "accommodation to plaintiff."[128] This determination supported the findings in that case that the place of payment was occasioned only by the fortuity of the plaintiff's citizenship, and that there was no indication that the defendants had purposefully availed themselves of the privilege of doing business in the United States. Based on these findings, the *Texas Trading* court held that it would be unreasonably burdensome on defendants to require that they litigate in New York.[129] In contrast is the finding in *Nikkei* that New York was not selected as the place for payment solely because of the citizenship of the plaintiffs.[130] Instead, the court found that defendants had advised the letters of credit through Morgan and had designated Morgan as the sole place of payment entirely for their own convenience.[131]

Although the *Nikkei* court did not specify its reasons for these findings, there is a great deal of support for the argument that the burden on defendants of litigating in New York was not unreasonable,[132] particularly in view of the corresponding banking relationship which existed between CBN and Morgan.[133] Not only had CBN established letters of credit for at least fourteen of Nigeria's cement contracts through Morgan's New York branch,[134] but also

---

weight on the factor of the plaintiff's citizenship. *Cf.* Verlinden, B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1298 (S.D.N.Y. 1980) ("the locus of injury is dispositive of jurisdiction—indeed, that factor takes precedence over the citizenship of the victim."). *See* note 80 *supra* and accompanying text.

The court also determined that the third criterion was satisfied, finding that plaintiffs clearly had a "substantial interest in a convenient and effective resolution of their individual claims which they may not, under the circumstances, otherwise obtain elsewhere." 497 F. Supp. at 906.

128. No. 78-2345 slip op. at 13 (S.D.N.Y. July 16, 1980). *See* note 108 *supra* and accompanying text.

129. *Id. See* notes 107-12 *supra* and accompanying text.

130. 497 F. Supp. at 906.

131. *Id.*

132. See notes 133-43 *infra* and accompanying text.

133. *See* notes 134-37 *infra* and accompanying text. It was held in *Verlinden* that maintaining a correspondent banking relationship is not by itself sufficient to constitute "substantial contact." 488 F. Supp. at 1296. There is nothing, however, to suggest that it would be improper to use this existing relationship as one of the factors in determining whether defendants' actions were self-serving, or merely accommodations to plaintiffs, for the purpose of satisfying a part of the "burden on the defendant" test of *World-Wide Volkswagen. See* text accompanying note 124 *supra.*

134. Decor by Nikkei Int'l, Inc. v. Federal Republic of Nigeria, No. 77-2348 (S.D.N.Y. Apr. 11, 1978) (Pretrial Deposition of Alfred Koelbel 36).

CBN had further availed itself of the protection of United States laws[135] by keeping between 100 million and one billion dollars[136] in its account at Morgan. This in itself indicates the convenience to Nigeria of having Morgan as the place of payment. Moreover, if the defendants had wished to accommodate plaintiffs, they could simply have instructed Morgan to advise the letters of credit through the banks originally requested by plaintiffs.[137] It is difficult to see how Nigeria accommodated plaintiffs by disregarding their requests.

Finally, the *Texas Trading* court's finding that New York was selected as the location for payment of the letters of credit merely by the fortuity of the plaintiffs' citizenship and as an accommodation to plaintiff[138] is not wholly supported by the implications of certain instances of defendants' past conduct. In *Verlinden*, for example, CBN ignored both Verlinden's Dutch citizenship and its request for payment at the Slavensburg Bank in Amsterdam.[139] Instead, CBN advised the letter of credit through Morgan in New York,[140] as evidence suggests was its custom.[141] In that case, with the plaintiff in Amsterdam, no argument can rationalize the unilateral establishment of the letter of credit at Morgan as having been performed for any purpose other than that of convenience to defendants. The facts of *Verlinden* demonstrate a past failure of defendants to accommodate their cement supplier when establishing a letter of credit for payment, and might support an inference in the *Nikkei* case that defendants had again considered only their own convenience when choosing Morgan in New York as the situs for payment. Accordingly, the *Nikkei* court determined that the burden on defendants of litigating in New York was not unreasonable, thus satisfying the remaining criterion of the *World-Wide Volkswagen* test and supporting a finding that minimum contacts were present for due process purposes.[142]

---

135. *See* note 111 *supra* and accompanying text.

136. National Am. Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978) (Trial Minutes at 311-13) (testimony of George W. Ryan, official at the Federal Reserve Bank).

137. *See* note 13 *supra*.

138. No. 78-2395, slip op. at 13-15 (S.D.N.Y. July 16, 1980). *See* notes 107-11 *supra* and accompanying text.

139. 488 F. Supp. at 1287. *See* note 75 *supra*.

140. *See* note 75 *supra*.

141. *See* notes 133-37 *supra* and accompanying text.

142. 497 F. Supp. at 906.

Satisfaction of the minimum contacts test, together with the determination that New York was the locus of a substantial and foreseeable injury, justified the invoking of jurisdiction over Nigeria and CBN in *Nikkei* through application of the "direct effect" exception to sovereign immunity as it was interpreted by Judge Pierce. Clearly, the *Nikkei* decision not only comports with congressional intent as expressed in the legislative history of the Foreign Sovereign Immunities Act and satisfies all constitutional due process requirements, but it also sets a valuable precedent for achieving just resolutions of many jurisdictional disputes.[143]

CONCLUSION

The *Nikkei* decision should lead to disposition of the jurisdictional question in most of the current Nigerian cement contract actions. Furthermore, by requiring independent satisfaction of the locus of injury test and the minimum contacts test, and by designating the criteria to be satisfied within each, this case provides a fair and uniformly applicable method of determining jurisdiction in any "direct effect" case.[144] Consequently, the two-pronged *Nikkei* test should stand as a touchstone for future cases involving application of the direct effect clause of the Foreign Sovereign Immunities Act.

J. Blair Richardson, Jr.

---

143. Because of the comprehensive nature of Judge Pierce's analysis, it is also clear that the principles set forth in *Nikkei* need not be limited to contract actions, but might be applied with equal facility in cases involving tortious conduct.

144. It is possible that courts adopting this more systematic approach to defining "direct effect" will have to determine the weight that is to be accorded each criterion of the two tests in cases where all of the criteria are not satisfied. In *Nikkei* this balancing is not required since all the criteria are satisfied. Were the *Nikkei* test to be applied in *Texas Trading*, again no balancing would be necessary since the facts in that case are virtually identical to those in *Nikkei*. In *Verlinden*, however, or other similar cases involving a foreign plaintiff, the court could give more weight to the interest of the plaintiff in obtaining effective relief than, for example, to the interest of the forum in protecting its citizens and adjudicating the dispute when determining minimum contacts. *See* note 124 *supra* and accompanying text. In such a case, there would still remain the problem of satisfying the locus of injury test. *See* note 120 and accompanying text. Likewise, in situations similar to *Nikkei*, but without the unilateral amendment of the letter of credit to provide for payment in the forum, when applying the *World-Wide Volkswagen* test the court might choose to place very little emphasis upon the burden on the defendant of litigating in the forum. The balancing of these factors, in any event, should be left to judicial discretion.