THE CEMENT ARMADA CASES AND THE DEFENCE OF SOVEREIGN IMMUNITY

by Alex Wodi[1], Oct. 2022.

A. Introductory Notes

The defence of sovereign immunity has been criticised as a clog in the realisation of the fruits of a judgment. Same has been used to avoid lawsuits and attachment of assets belonging to Government or its instrumentalities in satisfaction of a judgment debt. The cement armada cases, in which the CBN repudiated letters of credit issued in respect of payments for large quantities of cement ordered by the Nigerian Ministry of Defence, is a very good example of the concept of sovereign immunity which evolved from the theory of absolute immunity enunciated in the *[Schooner] Exchange* case and restricted immunity[2] advocated by Lord Denning, M.R., in *Trendtex v. CBN*. The cement armada saga began with an ambitious post-civil war reconstruction and development program involving immense cement. Nigeria executed 109 contracts, with 68 suppliers. It purchased, in all, over sixteen million[3]

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[2] This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*.
[3] Some estimates say twenty million tons, and between 300 to 400 ships, see per Lord Denning, MR in *Trendtex v. CBN* (1977) 2 W.L.R. 356.

metric tons of cement.[4] The price was close to one billion dollars.[5] Some have argued that the legacy and ripple effects of that unfortunate affair on subsequent collapsed buildings, abandoned projects, corruption, socio-political history, and the Nigerian economy as a whole are virtually unquantifiable and still being felt till this day by the inherently rich Nation nestled on the bent elbow of the bight of Benin and bight of Biafra.

B. Points to Note about Sovereign Immunity

Simple Definition: Judicial doctrine that prevents a foreign state, or its political subdivisions, departments, agencies, and instrumentalities, from being sued without their consent. The doctrine stems from the English principle that "the monarch can do no wrong".

- First recognition in the United States, early case law: *The [Schooner] Exchange v. McFaddon* 11 U.S. (7 Cranch) 116 (1812)
- First recognition in the United Kingdom, early case law: *Twycross v. Dreyfus*, (1877) 2 C.P. 469.
- Codification in Foreign Sovereign Immunities Act 1976 and the State Immunity Act 1978
- FSIA – first statutory codification: The United States was the first nation to codify the law of foreign sovereign immunity by statute. In 1952, the U.S. State Department, noting changes in international practice, adopted the Restrictive Theory of Sovereign Immunity according to which the Public Acts (*Jure Imperii*) of a Foreign State are entitled to immunity, while the

[4] Nigeria's port facilities could accept only one to five million tons of cement per year at the time. Perhaps, the contracts were motivated more by greed rather than need.
[5] Almost $5 Billion US Dollar (About ₦ 4 trillion Naira in 2022).

Private Acts (*Jure Gestionis*) are not. Letter dated 19 May 1952, from the U.S. State Department's Acting Legal Adviser Jack B. Tate to the Acting Attorney-General (26 State Dept. Bull. 984 (1952).

- Cases under FSIA introducing principles/clarifications:

i. *Verlinden BV v. Central Bank of Nigeria* (1983) – extraterritoriality.
ii. *Republic of Argentina v. Weltover* (1992) – Breach of contract IRO bonds ("commercial activity") issued by Govt of Argentina actionable.
iii. *Rep of Austria v. Altmann* (2004) – retroactivity in respect of conduct that took place prior to 1976.
iii. *Yousuf v. Samantar* (2010)– no immunity for Government officials.
iv *Opati v. Republic of Sudan* (2020) – Punitive damages for pre-enactment conduct recoverable.
iv. *Cassirer v. TBC, U.S.* (2022). – In a Foreign Sovereign Immunities Act suit raising non-federal claims against a foreign state or instrumentality, a court should determine the substantive law by using the same choice-of-law rule applicable in a similar suit against a private party.

- Applicability – Foreign States and "agency or instrumentality of a foreign state" or an "organ of a foreign state".
- Theories of Sovereign immunity:

1. **The Absolute Immunity** Confers immunity on all actions of a State or State agency regardless of the purpose or nature of the transaction from which the dispute arose;

2. **The Restrictive immunity** Confers immunity only on sovereign acts of a State – *acta jure imperii*, while acts of a State in respect to commercial transactions - *acta jure gestionis* - are not covered by immunity but governed by private law in the same way as a private person would not enjoy immunity.

- Immunity may be waived expressly or impliedly. Immunity may be waived by express "consent" in an agreement. Immunity may also be waived by a foreign state, or its instrumentality engaged in commercial activities irrespective of its purpose. The concept of the "*sovereign in the marketplace*".[6] The rules of the marketplace ought to be adhered to.[7] It would be unfair and unconscionable for a sovereign to enter into a commercial transaction that is *in the nature of a private contract*[8] and be allowed to renege on his contractual obligations and plead sovereign immunity as a defence in an action for breach of contract.[9]

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[6] Lord Denning, M.R., writing in *Trendtex Trading Corp. v. Central Bank of Nigeria,* (1977) 2 W.L.R. 356, 369, 1 All E.R. 881, with his usual erudition and clarity, stated: "*If a government department goes into the marketplaces of the world and buys boots or cement as a commercial transaction that government department should be subject to all the rules of the marketplace. The seller is not concerned with the purpose to which the purchaser intends to put the goods. "* See also *Texas Trading v. FRN and CBN* 647 F.2d 300 (2d Cir. 1981), *infra*.

[7] Per Lord Denning, M.R., in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, @1491:

"... a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the marketplaces of the world: and international comity requires that it should abide by the rules of the market."

[8] *"Commercial activity"*- As was uniformly held by various courts, in varied jurisdictions, in different cases denying the defense of sovereign immunity regarding Nigeria's 1975 cement purchase program and the appurtenant "letters of credit" *Ibid.*

[9] This has been the position of a swath of cases affirming the recognition of the restrictive theory of sovereign immunity in international law. Beginning with the cement armada cases and subsequent others. See - *Hispano Americana Mercantile S.A. v. Central Bank of Nigeria*, (1979) 2 Lloyd's L.R. 277 (same); *Ipitrade International S.A. v. Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), enforced 465 F. Supp, 824 (D.D.C. 1978); *Youssef M. Nada Establishment v. Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany); *Verlinden B. V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981); *Reale International, Inc. v. Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981); and *Gemini*

Thus, sovereign immunity is not absolute rather it is restrictive because it can be waived by consent or by conduct, specifically, a sovereign engaging in commercial activities. It must however be pointed out that some governmental acts would require entering into commercial activities in order to implement a governmental function. For example, provision of social amenities and public infrastructure like schools, electricity, portable water, public transport & mass transit. These projects would involve negotiating and executing multiple contracts and underlying sub-contracts between MDAs (Ministries, Departments and Agencies of Govt.), public officials and private consultants and contractors. International law looks more at the "nature" of the transaction rather than the "purpose."[10]

We have reproduced three of the Cement Armada cases, here, to help contextualize the principles highlighted above and record same for posterity. It is hoped that leaders and those that come after them would learn from the mistakes that culminated in that unsavoury saga going forward. Infrastructure development is a good thing for any nation but not when it comes in the form of an uncontrollable ague resulting in the award of copious and not well thought out or vetted contracts.

Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs, 647 F.2d 317 (2d Cir. 1981). See also *Azuka v. CBN* (unreported)*; Ted Edwards v. CBN* (2018) [Civil Action No. 18-11133-FDS] USDC Mass.

[10] *Trendtex v. CBN, ibid, supra,* See ss.1603 – 1607 FSIA.

C. The Cement Armada Cases:

i. CBN v. Trendtex

COURT OF APPEAL

TRENDTEX TRADING CORPORATION v. CENTRAL RANK OF NIGERIA

[1977] 2 W.L.R. 356

[See also [1977] Q.B. 529 (this opinion) and [1982] A.C. 679 (H.L.) and [1980] Q.B. 629 (C.A.) (*Trendtex Trading Corp. v. Credit Suisse*)]

COUNSEL: F. P. Neill, Q.C., M. A. Pickering and D. P. O'Connell (and Christopher French Q.C. and David Hunt on the delivery of judgments) for Trendtex. T. H. Bingham Q.C. and A. G. Guest for the Central Bank.

SOLICITORS: Theodore Goddard & Co.; Hedleys, Botterell. Roche & Temperley.

JUDGES: Lord Denning M.R., Stephenson and Shaw L.JJ.

DATES: 1976 Oct. 6, 7, 8, 11, 12, 13, 14, 15, 18; 1977 Jan. 13

Conflict of Laws – Sovereign immunity – Bank – Commercial transaction for supply of cement to Nigerian state – Central bank issuing irrevocable letter of credit – Action to enforce payment – Status of bank – Whether department of state – Whether immunity in respect of commercial transactions exists

International Law – Recognition – Effect – Whether incorporated into English law – Whether rule of stare decisis applicable in England – Central Bank of Nigeria's claim to sovereign immunity

The Central Bank of Nigeria was incorporated in 1958 by a Nigerian statute as a central bank modelled on the Bank of England. It issued legal tender and acted as banker and financial adviser to the Government of Nigeria. It also acted as banker for other banks and its affairs were under considerable governmental control.

In July 1975 the Central Bank issued an irrevocable letter of credit for over $14,000,000 in favour of the plaintiff, a Swiss company, to pay for 240,000 tons of cement which the plaintiff had sold to an English company. The cement was to be shipped to Nigeria where it was to be used to build government barracks. The plaintiff shipped the cement to Nigeria but there was congestion in the port of discharge and the Central Bank declined to make payments claimed to be due for the price and for demurrage.

By writ of November 1975 the plaintiff claimed against the Central Bank for payments due in respect of the bank's breaches and repudiation of the letter of credit. Mocatta J. granted the plaintiff an injunction ordering the bank to retain $13,968,190 within the jurisdiction until the trial of the action or further order. Donaldson J., on the bank's application, set aside the writ and stayed further proceedings in the action on the ground that the bank was a department of the State of Nigeria and was therefore immune from suit.

On the plaintiff's appeal: —

Held, allowing the appeal, (1) that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status,

was not an emanation, arm, *alter* ego, or department of the State of Nigeria and was therefore not entitled to immunity from suit (post, pp. 371, 373-374, 375-376, 382, 385B).[11]

Baccus S.R.L. v. Servicio Nacional Del Trigo [1957] 1 Q.B. 438, C.A. and *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, C.A. distinguished.

Krajina v. Tass Agency [1949] W.N. 309; [1949] 2 All E.R. 274, C.A. considered.

(2) That (per Lord Denning M.R. and Shaw L.J.) even if the bank were part of the Government of Nigeria, since international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it was not immune from suit on the plaintiff's claim in respect of the letter of credit (post, pp. 369, 371, 386, 389).

Per curiam. The modern principle of restrictive sovereign immunity in international law giving no immunity to acts of a commercial nature is consonant with justice, comity, and good sense (post, pp. 367, 380, 385, 386B).

Per Lord Denning M.R. and Shaw L.J. International law knows no rule of stare decisis (post, pp. 365, 388).

[11] It should be noted that this case was decided under the 1958 CBN Act so it is doubtful that a court today would hold that the CBN is not an organ of the Nigerian Government and therefore not entitled to immunity, rather it is an arm, alter ego or department of Government but not entitled to immunity when engaged in commercial/ non-governmental activities. The CBN is indeed, and agency or instrumentality of Government as seen in subsequent cases decided under subsequent Acts including the extant CBN Act, 2007. CBN is 100% owned by the Federal Government of Nigeria. All its authorised capital are fully subscribed and held by the Government. See s 4 CBN Act.

Per Stephenson L.J. The Court of Appeal is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or Parliament declares to the contrary (post, p. 381).

Dicta of Lord Mansfield C.J. in *Triquet v. Bath* (1764) 3 Burr. 1478, 1481 applied.

Reg. v. Keyn (1876) 2 Ex. 63; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W. L.R. 1485, C.A. and *The Philippine Admiral* [1976] 2. W.L.R. 214, P.C. considered.

(3) That since the bank was not entitled to immunity from suit the injunction preserving funds within the jurisdiction to satisfy the plaintiff's claim should be continued (post, pp. 371, 382, 389).

Decision of Donaldson J. [1976] 1 W.L.R. 868; [1976] 3 All E.R. 437 reversed.

APPEAL from Donaldson J.

On November 4, 1975, the plaintiff, Trendtex Trading Corporation, issued a writ against the Central Bank of Nigeria, the defendant, in respect of payments due to the plaintiff from the bank under a letter of credit dated July 24, 1975, relating to a contract of the same date for the purchase of cement from the plaintiff by Pan-African Export and Import Co. Ltd. The plaintiff claimed that by reason of the defendant's breaches and repudiation of the letter of credit (which repudiation the plaintiff had accepted) the plaintiff had suffered loss and damage. On November 4, Mocatta J. ordered that the plaintiff should have leave to serve a concurrent writ of summons against the bank and to serve notice thereof on the bank at its registered office in Nigeria and he granted the plaintiff an injunction that the bank should retain $13,968,190, or its equivalent in sterling, within the jurisdiction against the

plaintiff's claim until the hearing of a summons returnable on November 11, 1975. On December 9, 1975, following an order on November 11, Mocatta J. ordered that the injunction be continued until the trial of the action or further order.

On March 26, 1976, on the bank's application by summons for the writ to be set aside on the ground that it was a department of the Federal Republic of Nigeria and was thereby immune from suit, Donaldson J. [1976] 1 W.L.R. 868, 877, held that the bank was "an emanation, an arm, an alter ego and a department of the State of Nigeria" and ordered (p. 879) that "the injunctions be discharged, the proceedings set aside and all further proceedings … stayed."

The plaintiff appealed on the grounds that (1) the judge erred in fact or law in holding (a) that the bank was entitled to sovereign immunity; (b) that the bank was an emanation, an arm, an alter ego, and a department of the State of Nigeria; (c) that it was established or sufficiently established that all funds held or deposited in the United Kingdom in the name of the bank were funds held or deposited for and on behalf of the Nigerian state; (d) that the bank was not estopped from reliance upon a plea of sovereign immunity by the terms of its letter of April 28, 1975, to Credit Suisse of Lausanne; and (e) that the principles of sovereign immunity to be applied were not affected by community law. (2) The judge erred in fact or law in failing to hold (a) that the acts and functions of the bank which were relied on for the purposes of the plaintiff's claim in the proceedings should not be accorded sovereign immunity; (b) that the funds of the bank within the jurisdiction which were subject to the injunction were not funds lodged or available for the payment of its creditors; and (c) that the bank was not entitled to the benefit of sovereign immunity in the proceedings; and (3) that it would be contended that the plea of sovereign immunity by the bank should be rejected for the additional reasons: (i) that on the facts the bank waived any right to rely thereon; and (ii) the commercial nature of the

transactions which were relied upon for the purposes of the plaintiff's claim in the proceedings.

The facts are stated in the judgment of Lord Denning M.R. January 13, 1977. The following judgments were read:

LORD DENNING M.R.

In July 1975 the port of Lagos/Apapa was congested with shipping. All the berths were occupied. There were 300 to 400 ships outside waiting. More ships were arriving daily. Most of them were carrying cement. All of those waiting were on demurrage. It was because the government departments had ordered far too much. No doubt Nigeria needed cement. It was a country which was developing fast. They were building houses, factories, barracks, and so forth. All of the work required cement. Previously the average rate of import through all ports had been two million tons of cement a year. Yet early in 1975 the government departments then in charge in Nigeria had ordered 10 times that quantity, 20 million tons, to be delivered over the next 12 months. The ports were utterly unable to cope with it. Even for all commodities together, the discharging capacity at Lagos/Apapa did not amount to two million tons a year. Yet here was 10 times that amount arriving – of cement alone – leaving nothing for other vital imports of food and materials. The crisis was one of the reasons for a change of government in Nigeria. On July 29, 1975, a new military administration took over the reins. One of its first tasks was to find out the root cause of the congestion. It found that the previous administration had made contracts for cement which were "unorthodox, imprudent or inequitable." Not only were the quantities far too large, but there were no proper safeguards in regard to payment of the price or demurrage. As a first step the new military administration issued a notice suspending the import of cement into Nigeria. It told suppliers not to

load any more cement for the time being. It warned them that it would not pay demurrage unless it was certified as proper. In addition, the new administration launched a "crash programme" to increase the rate of discharge from the waiting vessels. It set up a committee to negotiate fresh terms with the suppliers. The object was to reduce the quantities on order and to spread the deliveries over a longer time. Most of the suppliers have appreciated the difficulties and fresh terms have been arranged. The steps thus taken have proved successful. The congestion of vessels has been cleared. But there is an aftermath. It is a large number of legal proceedings.

This case is one of them. It is a claim on a letter of credit issued by the Central Bank of Nigeria, the defendant. We are not concerned with the rights or wrongs of the claim: but only with a preliminary point. The Central Bank of Nigeria claim that they cannot be sued in this country on the letter of credit: because they are entitled to sovereign immunity. The plaintiff, Trendtex Trading Corporation, disputes this on the ground that this is an ordinary commercial transaction to which sovereign immunity does not apply. So, I must describe the nature of the transaction.

The story starts with a contract which was made on April 25, 1975, before the crisis broke. The Ministry of Defence in Nigeria agreed to buy 240,000 tons of Portland cement from an English company, the Pan-African Export, and Import Co. Ltd. The price was U.S. $60.00 per ton c.i.f. Lagos/Apapa ports. Shipment at the rate of 20,000 tons a month, plus or minus 10 per cent., all to be delivered not later than August 15, 1976.

In pursuance of that contract the Ministry of Defence instructed the Central Bank of Nigeria to open a letter of credit in favour of Pan-African to the extent of U.S. $14,400,000 to be valid for payment against shipping documents conformable to the contract of purchase.

The Central Bank of Nigeria duly issued a letter of credit in favour of Pan-African. It was numbered 83035. It was issued in London through their correspondent bank, the Midland Bank Ltd., 60, Gracechurch Street, London. It was transferable abroad once only and was subject to the uniform customs rules of the International Chamber of Commerce relating to documentary credits (1962 revision). It covered not only the price of $14, 400,000, but also demurrage of $4,100 a day.

It is important to notice that the Midland Bank Ltd. were only correspondents acting as agents for the Central Bank of Nigeria. The Midland Bank Ltd. did not confirm the credit so as to make themselves liable on it. They only advised the seller of its terms. On the credit itself, they said:

"We are requested to advise you of the terms of a credit which is irrevocable on the part of our principals but does not bear our confirmation."

The responsibility of the Central Bank of Nigeria

The point about confirmation had been expressly raised by suppliers: and the Central Bank of Nigeria had said that confirmation was unnecessary. They wrote an important letter on April 28, 1975, to the suppliers' bank in these words:

"I write to inform you that no confirmation is required for credits opened by us direct with our correspondent banks, of which the Midland Bank Ltd., London, is one. We are irrevocably committed to honour our engagements under this credit. Moreover, our correspondent, the Midland Bank Ltd., has our authority to pay the beneficiary the full value of this letter of credit through your bank on presentation of relevant shipping documents to them in London, provided the documents are in order. (See our letter of authority dated March 11, 1975, to our correspondent bank attached.) As a government bank and a prime bank, no supplier should have any cause to doubt

our ability to pay our bills promptly. The question of our correspondents confirming our letters of credit should, therefore, not arise."

The transfer to Trendtex

In order to fulfil their contract to supply the cement, Pan-African entered into a contract with the Trendtex Trading Corporation of Zurich, Switzerland. The contract was dated July 24, 1975. By it Pan-African agreed to buy 240,000 tons of Portland cement from Trendtex. The price was U.S.$59.50 per ton, c.i.f. Lagos/Apapa, thus showing a small profit of U.S.$00.50 a ton to Pan-African. All other terms were to be as expressed in the Central Bank of Nigeria letter of credit (Midland Bank advice no. 83035) as transferred to the seller by the buyer.

On the same day, July 24, 1975, the credit was transferred to Trendtex. It was done by means of a new irrevocable letter of credit issued by the Central Bank of Nigeria through its correspondent the Midland Bank, London. It was numbered (83035A) and was for U.S.$14,280,000, the price of the cement and again demurrage at U.S.$4,100 a day.

In order to fulfil this contract to supply cement, Trendtex agreed to buy 240,000 tons of cement from *Alsen-Breitenburg* of Hamburg and established a letter of credit issued by a Swiss bank for the price.

The shipments

During August and September 1975, Trendtex shipped four consignments of cement under their contract with Pan-African. In August they shipped 9,000 tons on The Gempita and 13,000 tons on The Sugar Importer. In September 10,600 tons on The Newport and 9,000 tons on The Constantinos. For those shipments Trendtex

presented shipping documents to the Midland Bank Ltd., London, and were paid the price. In October 1975, Trendtex made two further shipments: 10,560 tons on The Leodamas and 10,900 on The Dinos Methanitis. They presented the shipping documents for these last two to the Midland Bank but were not paid the price. When each of those six vessels arrived off Lagos, the port was congested with hundreds of vessels loaded with cement, all waiting to discharge. Each waited its turn. The Gempita came on demurrage on September 5. The Sugar Importer on September 26. The Newporton October 25. The Constantinos on October 26. The Leodamas on October 31, and The Dinos Methanitis on November 20, 1971. Trendtex claimed payment of this demurrage under the letter of credit. They presented documents, all in order, to the Midland Bank, London, in support of their claim for demurrage. But the Midland Bank declined to pay. This was because of a telex message sent on September 24, from the Midland Bank to the bankers of Trendtex:

"Please inform Trendtex Trading Corporation Ltd., Zurich, beneficiaries of our account 83035A that we have received the following authenticated message from our principals, Central Bank of Nigeria, Lagos, reading as follows: 'Please stop demurrage payments against specified documents unless such documents have been certified for payment by the Central Bank of Nigeria.' Please request beneficiaries to be guided, accordingly."

Trendtex also wanted payment of the price for the October shipments, but the bank refused to pay. This was because of a message on October 8, 1975, from the Central Bank of Nigeria to the Midland Bank and relayed to Trendtex:

"The Nigerian Federal Military Government has directed that in view of our port situation, shipping companies must give two months' notice to the Nigerian Ports Authority before sailing. In view of this, you are requested not to pay against

documents presented in respect of letters of credit we have opened unless such documents are accompanied by certificates confirming that clearance has been obtained for the ships to sail to Nigeria. Thus, when documents are presented, no payment should be made until we confirm to you that the ship has obtained necessary clearance to sail to Nigeria."

On October 8, 1975, representatives of Trendtex went to Lagos and made representations to the Nigerian government. They were told that no payment whatever would be made on the last two vessels: and demurrage would only be paid on the first four vessels if certified by the Central Bank of Nigeria for payment.

The action

On November 4, 1975, Trendtex issued a writ in the High Court of Justice in London against the Central Bank of Nigeria. They claimed demurrage on all six vessels. They claimed the price of the cement shipped on the last two vessels. They claimed damages for non-acceptance of the balance of 175,340 tons still outstanding (out of the 240,000 tons ordered). They claimed damages on account of their obligations to their suppliers, *Alsen-Breitenburg*.

The Central Bank of Nigeria applied to set aside the writ on the ground that the Central Bank of Nigeria is a department of the Federal Republic of Nigeria and, therefore, immune from suit.

On March 26, 1976, Donaldson J. [1976] 1 W.L.R. 868 set aside the writ. Trendtex appeal to this court. Trendtex also applied for an order that the bank do retain $14 million in London to meet the claim. Mocatta J. made that order. It is effective because the bank have that sum to their credit with the Midland Bank. The money is being retained here pending the appeal.

One thing I would mention at the outset. There was a string of contracts for the purchase of cement – by the Ministry of Defence at Lagos from the Pan-African company in London – by the Pan-African company from Trendtex – and by Trendtex from *Alsen-Breitenburg*. Those contracts are altogether distinct from the contracts contained in the letter of credits. The contract sued upon in this action is the contract contained in the letter of credit issued by the Central Bank of Nigeria in favour of Pan-African and transferred to Trendtex. Trendtex can sue upon that contract as a distinct contract completely separate from the contract of sale. In the provisions of Uniform Customs issued by the International Chamber of Commerce it is said:

"Credits, by their nature, are separate transactions from the sales or other contracts on which they may be based, and banks are in no way concerned with or bound by such contracts."

See Gutteridge and Megrah, The Law of Bankers' Commercial Credits, 5th ed. (1976), p. 205 (and p. 59).

Another point I would mention is that many people must have suspicions about the validity of the contracts made by the previous administration. There must have been some mismanagement somewhere to lead to this pile-up of vessels off Lagos. This may give rise in some of these claims to defences on the merits. But no considerations of that kind arise at this stage. The only question now is whether the action should be allowed to proceed at all. Is it to be stayed or struck out on the ground of sovereign immunity?

The case has been presented to us by both sides in a manner to which I would pay sincere tribute. The documents have been prepared admirably with all the relevant material and authorities collected, photographed, and arranged for convenient study.

The arguments have been put forward convincingly by two of the most able and persuasive advocates of the day. We cannot hope to do full justice to them, but we are much indebted to them.

The general picture

The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. All nations agree upon it. So, it is part of the law of nations.

To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in *The Philippine Admiral* [1976] 2 W.L.R. 214: see especially at pp. 232-233; and we may properly do the same.

The two schools of thought

A fundamental question arises for decision. What is the place of international law in our English law? One school of thought holds to the doctrine of incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long-established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops.

(i) The doctrine of incorporation. The doctrine of incorporation goes back to 1737 in *Buvot v. Barbut* (1736) 3 Burr. 1481; 4 Burr. 2016; sub nom. *Barbuit's Case in Chancery* (1737) Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C.J. in *Triquet v. Bath* (1764) 3 Burr. 1478:

"Lord Talbot declared a clear opinion – 'That the law of nations in its full extent was part of the law of England, … that the law of nations was to be collected from the practice of different nations and the authority of writers.' Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac,

Binkershoek, Wiquefort, etc., there being no English writer of eminence on the subject."

That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that … "the law of nations, according to the decision of our greatest judges, is part of the law of England": see Sir George Cornewall Lewis's book, Lewis on Foreign Jurisdiction (1859), pp. 66-67.

(ii) The doctrine of transformation. The doctrine of transformation only goes back to 1876 in the judgment of Cockburn C.J. in *Reg. v. Keyn* (1876), 202-203:

"For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it… Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature."

To this I may add the saying of Lord Atkin in *Chung Chi Cheung v. The King* [1939] A.C. 160, 167-168:

"So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law."

And I myself accepted this without question in *Reg. v. Secretary of State for the Home Department, Ex parte Thakrar* [1974] 1 Q.B. 684, 701.

(iii) Which is correct? As between these two schools of thought, I now believe that the doctrine of incorporation is correct. Otherwise, I do not see that our courts could ever recognise a change in the rules of international law. It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change, and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law: see the "Statement of Opinion" by Sir R. Phillimore, Mr. M. Bernard and Sir H. S. Maine appended to the Report of the Royal Commission on Fugitive Slaves (1876), p. XXV, paras. 4 and 5. Again, the extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly: see *Reg. v. Kent Justices, Ex parte Lye* [1967] 2 Q.B. 153, 173, 189. The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognised in many countries, and the courts – of our country and of theirs – have given effect to them, without any legislation for the purpose. Notably in the decision of the Privy Council in *The Philippine Admiral* [1976] 2 W.L.R. 214.

(iv) Conclusion on this point. Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of

stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it.

Has there been a change?

(i) The doctrine of absolute immunity. A century ago, no sovereign state engaged in commercial activities. It kept to the traditional functions of a sovereign – to maintain law and order – to conduct foreign affairs – and to see to the defence of the country. It was in those days that England – with most other countries – adopted the rule of absolute immunity. It was adopted because it was considered to be the rule of international law at that time. In *The Parlement Belge* (1880) 5 P.D. 197, 205, Brett L.J. said:

"The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations … [so also] of some property … The universal agreement which has made these propositions part of the law of nations has been an implied agreement."

The rule was stated by Dicey in his work on Conflict of Laws and repeated religiously by the judges thereafter. The classic restatement of it was made by Lord Atkin in *Compania Naviera Vascongado v. S.S. Cristina (The Cristina)* [1938] A.C. 485, 490:

"The courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."

That doctrine was repeated by Viscount Simonds in *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379, 394. He treated it as if it was a rule of English law, fixed and immutable, not to be departed from, even by the House of Lords itself.

(ii) The doctrine of restrictive immunity. In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state – or creates its own legal entities – which go into the marketplaces of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*. In 1951 Sir Hersch Lauterpacht showed that, even at that date, many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity – see his important article, "The Problem of Jurisdictional Immunities of Foreign States" in The British Yearbook of International Law, 1951, vol. 28, pp. 220-272. Since that date there have been important conversions to the same view. Great impetus was given to it in 1952 in the famous "Tate letter" in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German Federal Republic, the United States of America, and others have abandoned absolute immunity and granted only restrictive immunity. Most authoritative of all is the opinion of the Supreme Court of the United States in *Alfred Dunhill of London Inc. v. Republic of Cuba*. It was delivered on May 24,

1976, by White J. with the concurrence of the Chief Justice, Powell J. and Rehnquist J.:

"Although it had other views in years gone by, in 1952, as evidenced by … (the Tate letter) … the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our government since that time, as the attached letter of November 25, 1975, confirms … 'Such adjudications are consistent with international law on sovereign immunity'."

To this I would add the European Convention on State Immunity (Basle, 1972), article 4, paragraph 1, which has been signed by most of the European countries.

Are we to follow likewise?

Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What is more needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, someone sometime has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. "… We must take the current when it serves, or lose our ventures.": Julius Caesar, Act IV, sc. III.

In one respect already the Privy Council have abandoned the absolute theory and accepted the restrictive theory. It is in respect of actions *in rem*: see *The Philippine Admiral* [1976] 2 W.L.R. 214, 232. But unfortunately, the Privy Council seem to

have thought that the absolute theory still applied to actions *in personam*. They said, at p. 233:

"… it is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so."

That is a dismal forecast. It is out of line with the good sense shown in the rest of the judgment of the Privy Council. This is how they put it, at pp. 232-233:

"… the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions … Their Lordships themselves think that it is wrong that it should be so applied … Thinking as they do that the restrictive theory is more consonant with justice, they do not think that they should be deterred from applying it."

Such reasoning is of general application. It covers actions *in personam*. In those action, too, the restrictive theory is more consonant with justice. So, it should be applied to them. It should not be retained as an indefensible anomaly.

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.

The modern rule

What then is the modem rule of international law? I tried to state it nearly 20 years ago in *Rahimtoola v. Nizam of Hyderabad* [1958] A.C. 379, 422:

"If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but, if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

I recently re-stated it in *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, 1491:

"… a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the marketplaces of the world: and international comity requires that it should abide by the rules of the market."

Since those cases, there have been two very recent cases on the subject: *The Philippine Admiral* [1976] 2 W.L.R. 214 in November 1975, in the Privy Council; and *Alfred Dunhill of London Inc. v. Republic of Cuba* on May 24, 1976, in the Supreme Court of the United States. There is a Bill also before the House of Representatives of the United States reported on September 9, 1976 (now passed into law, Foreign Sovereign Immunities Act of 1976) which is very much on the lines I suggested. All this confirms me in the view which I have expressed.

The law of the European Community

Even if there were no settled rule of international law on the subject, there should at least be one settled rule for the nine countries of the European Economic Community. The Treaty of Rome is part of the law of England. One of the objectives contained in article 3 (h) [see Cmnd. 5179] is to ensure "the approximation of the laws of member states to the extent required for the proper functioning of the common market."

It is one of the functions of the Commission and the Council to issue directives to achieve this approximation: see articles 100, 101 and 102. I regard the word "approximation" in the treaty to mean "harmonisation."

In view of those provisions, it seems to me that it is the duty of each of the member states – and of the national courts in those states – to bring the law as to sovereign immunity into harmony throughout the community. The rules applied by each member state on the subject should be the same as the rules applied by the others. There is only one acceptable way of doing it. That is by adopting the doctrine of restrictive immunity on the lines I have suggested.

The application to this case

So, I turn to see whether the transaction here was such as to attract sovereign immunity, or not. It was suggested that the original contracts for cement were made by the Ministry of Defence of Nigeria: and that the cement was for the building of barracks for the army. On this account it was said that the contracts of purchase were acts of a governmental nature, *jure imperii*, and not of a commercial nature, *jure gestionis*. They were like a contract of purchase of boots for the army. But I do not think this should affect the question of immunity. If a government department goes

into the marketplaces of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the marketplace. The seller is not concerned with the purpose to which the purchaser intends to put the goods.

There is another answer. Trendtex here are not suing on the contracts of purchase. They are claiming on the letter of credit which is an entirely separate contract. It was a straightforward commercial transaction. The letter of credit was issued in London through a London bank in the ordinary course of commercial dealings. It is completely within the territorial jurisdiction of our courts. I do not think it is open to the Government of Nigeria to claim sovereign immunity in respect of it.

The German decision

It is interesting to find that the German courts have had to deal with a precisely similar point. In February 1975, the Ministry of Defence in Nigeria agreed to purchase 240,000 tons of cement from a firm in Liechtenstein. The Central Bank of Nigeria issued letters of credit through its correspondent the Deutsche Bank in Frankfurt. The goods were shipped. The price paid. The vessel arrived at Lagos but, owing to the congestion, had to wait. The holders of the letters of credit claimed demurrage. They levied distress on the assets of the Central Bank of Nigeria then in Germany. The Central Bank claimed the release of these assets on the ground of sovereign immunity. On December 2, 1975, the Commercial Court of Frankfurt in *Y.M.N. Establishment v. Central Bank of Nigeria* rejected the plea. Their reasons were as follows:

"According to the decisions of the Federal Constitutional Court of 1962 and 1963 … a foreign state may be granted immunity from German jurisdiction only in respect

of its sovereign activity (*acta jure imperii*) but not in respect of its non-sovereign activity (*acta jure gestionis*), because no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign state in relation to its non-sovereign activity is precluded."

We are told that that decision is subject to appeal. So be it. But it affords strong support for the view I have expressed, seeing that the German court decided in just the same way for just the same reasons.

Alter ego or organ of government

If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it. The doctrine grants immunity to a foreign government or its department of state, or anybody which can be regarded as an "alter ego or organ" of the government. But how are we to discover whether a body is an "alter ego or organ" of the government?

The cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law for all of them. It is particularly difficult because different countries have different ways of arranging internal affairs. In some countries the government departments conduct all their business through their own offices – even ordinary commercial dealings – without setting up separate corporations or legal entities. In other countries they set up separate corporations or legal entities which are under the complete control of the department, but which enter into commercial transactions, buying and selling goods, owning, and chartering ships, just like any ordinary trading concern. This difference in internal arrangements ought not to affect the availability of immunity in international law. A foreign department of state ought not to lose its immunity

simply because it conducts some of its activities by means of a separate legal entity. It was so held by this court in *Baccus S.R.L. v. Servicio Nacional Del Trigo* [1957] 1 Q.B. 438.

Another problem arises because of the internal laws of many countries which grant immunities and privileges to its own organisations. Some organisations can sue, or be sued, in their courts. Others cannot. In England we have had for centuries special immunities and privileges for "the Crown" – a phrase which has been held to cover many governmental departments and many emanations of government departments – but not nationalised commercial undertakings: see *Tamlin v. Hannaford* [1950] 1 K.B. 18. The phrase "the Crown" is so elastic that under the Crown Proceedings Act 1947 the Treasury have issued a list of government departments covered by the Act. It includes even the Forestry Commission. It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally. I would pot on one side, therefore, our cases about the privileges, prerogatives, and exceptions of the "Crown."

It is often said that a certificate by the ambassador, saying whether or not an organisation is a department of state, is of much weight, though not decisive: see *Krajina v. Tass Agency* [1949] 2 All E.R. 274. But even this is not to my mind satisfactory. What is the test which the ambassador is to apply? In the absence of any test, an ambassador may apply the test of control, asking himself: is the organisation under the control of a minister of state? On such a test, he might certify any nationalised undertaking to be a department of state. He might certify that a press agency or an agricultural corporation (which carried out ordinary commercial dealings) was a department of state, simply because it was under the complete control of the government.

I confess that I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do nat think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions. That is the way in which we looked at it in *Mellenger v. New Brunswick Development Corporation* [1971] 1 W.L.R. 604, when I said, at p. 609:

"The corporation … has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way that a government department does."

With these considerations in mind, I turn to our problem.

Central Bank of Nigeria

At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to it by later decrees. All the relevant provisions were closely examined: and we had the benefit of expert evidence on affidavit which was most helpful. The upshot of it all may be summarised as follows. (i) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (ii) It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banker and financial adviser to the government. (ii) Its affairs are under a great deal of government control in that the Federal Executive Council may overrule the board on monetary and banking policy and on internal administrative policy. (iv) It acts as banker for other banks in Nigeria and abroad and maintains accounts with other banks. It acts as banker for the states within the federation: but has few, if any, private customers.

In these circumstances I have found it difficult to decide whether or no the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.

This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department.

Waiver or estoppel

It was submitted that, by the letter of April 28, 1975, the Central Bank of Nigeria waived any claim to sovereign immunity or is estopped from claiming it. But the point was not pressed in this court because of previous decisions, such as *Kahan v. Pakistan Federation* [1951] 2 K.B. 1003. It was reserved for the House of Lords.

Injunction

It was said that the money standing to the credit in the books of the Midland Bank was money belonging to the Federation of Nigeria: and that it was not subject to seizure or to an injunction. This point seems to me to depend on precisely the same grounds as those considered earlier. If the Central Bank is entitled to immunity from being sued, so also can the funds be immune from being seized. Otherwise not.

Conclusion

In my opinion the plea of sovereign immunity, does not avail the Central Bank of Nigeria. I would allow the appeal, accordingly. STEPHENSON L.J. The Central Bank of Nigeria issued a letter of credit drawn on the Midland Bank in London in favour of Trendtex Trading Corporation, a Swiss company. It was to pay for a large

quantity of cement sold by Trendtex to an English company. The bank assured Trendtex by letter that there was no need to get the letter of credit confirmed by another bank: the money would be available. So Trendtex went ahead, bought the cement from a German company, sold it to the English company, and shipped it to Nigeria. Now the bank refuses to pay and treats the letter of credit as a scrap of paper. The cement was bought by the English company to build barracks for the Ministry of Defence of the Government of Nigeria, which had agreed to buy it from the English company. The bank claims to be an arm or department of that government and to have performed an act of government in granting Trendtex this letter of credit. Whether the grant was a public act of government or a private commercial transaction, it would offend against the dignity of the sovereign state of Nigeria and the comity of civilised nations if the bank had to defend Trendtex's, claim to payment in accordance with the letter of credit in the courts of this country against the Nigerian Government's will; and it would be a breach of international law if the High Court of Justice in England were to compel the bank to defend the claim. The court ought therefore to act in accordance with international law, to give effect to the plea of sovereign immunity and to stay all further proceedings in the action. This the judge has done. We have to consider whether that was rightly done or whether he should have held that he was not required by international law to uphold the plea of sovereign immunity in respect of an act done by the bank in the ordinary course of banking business in connection with an ordinary commercial transaction and should have allowed the action to go on.

There is apparently no answer to the claim except the plea of sovereign immunity, and I would have to be satisfied that the law of nations plainly requires the courts of this country to prevent Trendtex from pursuing its claim before I could agree with the judge that in spite of what the bank wrote in their letter of April 28, 1975, which

Lord Denning M.R. has read, its promise to pay was in effect a mere obligation of honour not enforceable in an English court of law.

In 1958 when the bank was incorporated by the Central Bank of Nigeria Act, there were other central banks in existence, notably the Bank of England, on which the Central Bank of Nigeria was modelled. In 1958 the functions of central banks were well known to be partly governmental and partly private. In 1958 the law of nations relating to sovereign immunity was on the move. It was uncertain how far it was going or how far it had gone in its development; but a body declared to be constitutionally a government department was certainly entitled to sovereign immunity for some of its acts and perhaps still for all its acts. Yet this bank was not declared to be so. Was it nevertheless a government department, and if not has it become one?

ii. US Supreme Court

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983)

Argued January 11, 1983, and Decided May 23, 1983

Facts

A contract between the Federal Republic of Nigeria and petitioner Dutch corporation for the purchase of cement by Nigeria provided that Nigeria was to establish a confirmed letter of credit for the purchase price. Subsequently, petitioner sued respondent bank, an instrumentality of Nigeria, in Federal District Court, alleging that certain actions by respondent constituted an anticipatory breach of the letter of credit. Petitioner alleged jurisdiction under the provision of the Foreign Sovereign Immunities Act of 1976 (Act), 28 U.S.C. § 1330(a), granting federal district courts jurisdiction without regard to the amount in controversy of

"any nonjury civil action against a foreign state . . . 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."

The District Court, while holding that the Act permitted actions by foreign plaintiffs, dismissed the action on the ground that none of the exceptions to sovereign immunity specified in the Act applied. The Court of Appeals affirmed, but on the ground that the Act exceeded the scope of Art. III of the Constitution, which provides, in part, that the judicial power of the United States shall extend to "all Cases . . . arising under [the] Constitution, the Laws of the United States, and Treaties made . . . under their Authority," and to "Controversies . . . between a State,

or the Citizens thereof, and foreign States, Citizens, or Subjects." The court held that neither the Diversity Clause nor the "Arising Under" Clause of Art. III is broad enough to support jurisdiction over actions by foreign plaintiffs against foreign sovereigns.

BURGER, C.J., delivered the opinion for a unanimous Court.[12]

Held:

1. For the most part, the Act codifies, as a matter of federal law, the restrictive theory of foreign sovereign immunity under which immunity is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of its strictly commercial acts. If one of the specified exceptions to sovereign immunity applies, a federal district court may exercise subject matter jurisdiction under § 1330(a), but if the claim does not fall within one of the exceptions, the court lacks such jurisdiction.[13]

2. On its face, § 1330(a) allows a foreign plaintiff to sue a foreign sovereign in federal court provided the substantive requirements of the Act are satisfied. The Act contains no indication of any limitation based on the plaintiff's citizenship. And, when considered as a whole, the legislative history reveals an intent not to limit jurisdiction under the Act to actions brought by American citizens.[14]

3. Congress did not exceed the scope of Art. III by granting federal district courts subject matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision may be provided by state law. While

[12] 461 U. S. 482
[13] 461 U.S. 486-489
[14] 461 U.S. 489-491

the Diversity Clause of Art. III is not broad enough to support such subject matter jurisdiction, the "Arising Under" Clause is an appropriate basis for the statutory grant of jurisdiction. In enacting the Act, Congress expressly exercised its power to regulate foreign commerce, along with other specified Art. I powers. The Act does not merely concern access to the federal courts, but rather governs the types of actions for which foreign sovereigns may be held liable in a federal court and codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law. Thus, a suit against a foreign state under the Act necessarily involves application of a comprehensive body of substantive federal law, and hence "arises under" federal law within the meaning of Art. III.[15]

4. Since the Court of Appeal, in affirming the District Court, did not find it necessary to address the statutory question of whether the present action fell within any specified exception to foreign sovereign immunity, the court on remand must consider whether jurisdiction exists under the Act itself. [16]

647 F.2d 320, reversed and remanded.

[15] 461 U.S. 491-497
[16] 461 U.S. 497-498

(iii) Texas Trading v FRN and CBN

Nos. 644 to 647 and 1369 to 1371, Dockets 80-7703, 80-7771, 80-7773, 80-7783, 80-7803, 80-7811 and 80-7813

United States Court Of Appeals, Second Circuit

647 F.2d 300 (2d Cir. 1981)

Decided Apr 16, 1981

Between

1. **Texas Trading & Milling Corp.,} Plaintiff-Appellant,**
2. **Nikkei International, Inc., }**
3. **Chenax Majesty, Inc., }**
4. **Europe Import-Export, Inc. }**

Vs.

1. **Federal Republic Of Nigeria } Defendants- Appellants**

And

2. **Central Bank Of Nigeria}**

US Court of Appeals for the Second Circuit - 647 F.2d 300 (2d Cir. 1981) Argued March 6, 1981and Decided April 16, 1981

Abram Chayes, Cambridge, Mass., for all plaintiffs.

Richard H. Webber, New York City (Peter W. Flanagan, Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, New York City, of counsel), for plaintiff-appellant **Texas Trading & Milling Corp.**

Lewis S. Sandler, New York City, for plaintiff-appellee-cross-appellant Decor by **Nikkei International, Inc.**

Robert Layton, New York City (Daniel J. Brooks, Thomas L. Abrams, Layton & Sherman, New York City, of counsel), for plaintiff-appellant-cross-appellee **Chenax Majesty, Inc**.

Berthold H. Hoeniger, New York City, for plaintiff-appellee-cross-appellant **East Europe Import-Export, Inc.**

James G. Simms, New York City (Craig P. Murphy, Peter J. Dranginis, Jr., Kissam, Halpin & Genovese, New York City, of counsel), for defendants-appellees. **FRN** and **CBN**

Before KAUFMAN and TIMBERS, Circuit Judges, and WARD, District Judge.[17]

IRVING R. KAUFMAN, Circuit Judge:

These four appeals grow out of one of the most enormous commercial disputes in history, and present questions which strike to the very heart of the modern international economic order. An African nation, developing at breakneck speed by virtue of huge exports of high-grade oil, contracted to buy huge quantities of Portland cement, a commodity crucial to the construction of its infrastructure. It

[17] Of the United States District Court for the Southern District of New York, sitting by designation.

overbought, and the country's docks and harbors became clogged with ships waiting to unload. Imports of other goods ground to a halt. More vessels carrying cement arrived daily; still others were steaming toward the port. Unable to accept delivery of the cement it had bought; the nation repudiated its contracts. In response to suits brought by disgruntled suppliers, it now seeks to invoke an ancient maxim of sovereign immunity *par in parem imperium non habet*[18] to insulate itself from liability. But Latin phrases speak with a hoary simplicity inappropriate to the modern financial world. For the ruling principles here, we must look instead to a new and vaguely worded statute, the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "Act")[19] a law described by its draftsmen as providing only "very modest guidance" on issues of preeminent importance.[20] For answers to those most difficult questions, the authors of the law "decided to put (their) faith in the U.S. courts."[21] Guided by reason, precedent, and equity, we have attempted to give form and substance to the legislative intent. Accordingly, we find that the defense of sovereign immunity is not available in any of these four cases.[22]

The facts of the four appeals are remarkably parallel and can be stated in somewhat consolidated form.[23] Early in 1975, the Federal Military Government of the Federal Republic of Nigeria ("Nigeria") embarked on an ambitious program to purchase immense amounts of cement. We have already had occasion in another case to call

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[18] An equal has no dominion over an equal.

[19] Act of October 21, 1976, Pub. L. 94-583, 90 Stat. 2891, codified at 28 U.S.C. §§ 1330; 1332(a) (2)-1332(a) (4); 1391(f); 1441(d); and 1602-1611

[20] Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 53 (1976) ("1976 Hearings ") (testimony of Monroe Leigh, Legal Adviser, Dept of State).

[21] *Id.*

[22] These four appeals are part of a group of seven, heard together on appeal and decided in concert today. The other three are *Verlinden B. V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981); *Reale International, Inc. v. Federal Republic of Nigeria*, 647 F.2d 330 (2d Cir. 1981); and *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981).

[23] Since Texas Trading was dismissed below on jurisdictional grounds, its facts arrive before us as mere allegations, assumed for purposes of this opinion to be true. The other three cases have gone to trial and contain formal findings. The facts of all four cases are set forth in greater detail in the opinions of the district court.

the program "incredible," see National American Corp. v. Federal Republic of Nigeria, 597 F.2d 314, 316 (2d Cir. 1979), but the statistics speak for themselves. Nigeria executed 109 contracts, with 68 suppliers. It purchased, in all, over sixteen million metric tons of cement. The price was close to one billion dollars.

Four of the 109 contracts were made with American companies that were plaintiffs below in the cases now before us: Texas Trading & Milling Corp. ("Texas Trading"), Decor by Nikkei International, Inc. ("Nikkei"), East Europe Import-Export, Inc. ("East Europe"), and Chenax Majesty, Inc. ("Chenax"). The four plaintiffs are not industrial corporations; they are, instead, "trading companies," which buy from one person and sell to another in hopes of making a profit on the differential. Each of the plaintiffs is a New York corporation.

The contracts at issue were signed early in 1975. Each is substantially similar; indeed, Nigeria seems to have mimeographed them in blank, and filled in details with individual suppliers. Overall, each contract called for the sale by the supplier to Nigeria of 240,000 metric tons of Portland cement.[24] Specifically, the contracts required Nigeria, within a time certain after execution,[25] to establish in the seller's favor "an Irrevocable, Transferable abroad, Divisible and Confirmed letter of credit" for the total amount due under the particular contract, slightly over $14 million in each case.[26] The contract also named the bank through which the letter of credit was to be made payable. Nikkei and East Europe named First National City Bank in New York, and Texas Trading specified Fidelity International Bank, also in New York. Chenax denominated Schroeder, Muenchmeyer, Hengst & Co. of Hamburg, West

[24] The Texas Trading, Nikkei, and Chenax contracts provided for the sale of 240,000 tons, "plus or minus 10% at seller's option." The East Europe contract was for 240,000 tons, simpliciter.

[25] Twenty-one days in the Texas Trading, Nikkei, and Chenax contracts; fourteen days in the East Europe contract

[26] The Texas Trading, Nikkei, and Chenax contracts set the price of the cement at $60 per ton, so each plaintiff was promised a letter of credit for $14.4 million. The cement price in the East Europe contract was $59.50 per ton; accordingly, the East Europe letter of credit was to be for $14.28 million.

Germany. Drafts under the letters of credit were to be "payable at sight, on presentation" of certain documents to the specified bank.

Within a time, certain after establishment and receipt of the letter of credit,[27] each seller was to start shipping cement to Nigeria. The cement was to be bagged and was to meet certain chemical specifications. Shipments were to be from ports named in the contracts, mostly Spanish, and were to proceed at approximately 20,000 tons per month. Delivery was to the port of Lagos/Apapa, Nigeria, and the seller was obligated to insure the freight to the Nigerian quay. Each contract also provided for demurrage.[28] The Nikkei and East Europe contracts provided they were to be governed by the laws of the United States. The Chenax contract specified the law of Switzerland, and the Texas Trading contract named the law of Nigeria.

In short, performance under the contracts was to proceed as follows. Nigeria was to establish letters of credit. The suppliers were to ship cement. Each time a supplier had loaded a ship and insured its cargo to Lagos/Apapa, the supplier could take documents so proving to the bank named in the contract and, "at sight," be paid for the amount of cement it shipped. The ship might sink on the way to Nigeria, or it might never leave the Spanish port at all, but on presentation of proper documents showing a loaded ship and an insured cargo the supplier had a right to be paid. Demurrage was to operate in the same manner: if a ship was detained in Nigerian waters, the supplier would receive certain documents. It could present the documents to the bank and receive payment.

The actual financial arrangements differed from those set forth in the cement contracts. Instead of establishing "confirmed" letters of credit with the banks named,

[27] The Texas Trading contract provided for thirty days, the East Europe contract for six weeks, and the Nikkei and Chenax contracts for forty-five days.

[28] The Nikkei and East Europe contracts provided for demurrage at a rate "not exceeding $4100 per diem," and the Chenax contract set a flat rate of $4100 per day. The Texas Trading contract required Nigeria to pay demurrage "not exceeding $4000 per diem."

Nigeria established what it called "irrevocable" letters of credit with the Central Bank of Nigeria ("Central Bank"), an instrumentality of the Nigerian government,[29] and advised those letters of credit through the Morgan Guaranty Trust Company ("Morgan") of New York. That is, under the letters of credit as established, each seller was to present appropriate documents not to the named bank, but to Morgan. And, since the letters were not "confirmed," Morgan did not promise to pay "on sight"; it assumed no independent liability.[30] Each of the letters of credit provided it was to be governed by the Uniform Customs and Practice for Documentary Credits ("UCP") (1962 Revision), as set forth in Brochure No. 222 of the International Chamber of Commerce.

Nigeria's choice of Morgan as the bank to which suppliers presented documents and from which suppliers secured payments came in the course of a longstanding relationship between Nigeria and Morgan. Central Bank used Morgan as its correspondent bank in the United States, and Morgan conducted myriad transactions on Nigeria's behalf. Employees of Central Bank regularly came to Morgan for training seminars. On Nigeria's request, Morgan made payments to Nigerian students in the United States, to American corporations to which Nigeria owed money, and to the Nigerian embassy and consulates in the United States. Indeed, Nigeria used Morgan to make payments (for salaries, operating expenses, and the like) to Nigerian embassies in other countries as well. Until 1974, Morgan had the right to draw up to $1 million per day from Nigeria's account at the Federal Reserve Bank of New York to satisfy Nigeria's obligations. Nigeria raised the limit to $3

[29] Central Bank was established in 1958 under the Central Bank of Nigeria Act 1958. Section 4(1) of the Act provides: The principal objects of the Bank shall be to issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government.

[30] The letters of credit as established varied from the contracts in other respects, but the discrepancies were cured by amendments to the letters of credit to which both parties agreed.

million per day in 1974, and Morgan enjoyed unlimited drawing rights on Nigeria's funds beginning in November 1975. Central Bank kept over $200 million of securities in a custody account at Morgan. Morgan advised as much as $200 million in letters of credit established by Nigeria, and confirmed, in addition, letters of credit totalling at least $70 million more.

After receiving notice that the letters of credit had been established, the suppliers set out to secure subcontracts to procure the cement, and shipping contracts to transport it.[31] They, through their subcontractors, began to bag the cement and load it on ships, as suppliers across the globe were doing the same. Hundreds of ships arrived in Lagos/Apapa in the summer of 1975, and most were carrying cement. Nigeria's port facilities could accept only one to five million tons of cement per year; at any rate, they could not begin to unload the over sixteen million tons Nigeria had slated for delivery in eighteen short months. Based on prior experience, Nigeria had made the contracts expecting only twenty percent of the suppliers to be able to perform. By July, when the harbor held over 400 ships waiting to unload 260 of them carrying cement Nigeria realized it had misjudged the market considerably.

With demurrage piling up at astronomical rates, and suppliers, hiring, loading, and dispatching more ships daily, Nigeria decided to act. On August 9, 1975, Nigeria caused its Ports Authority to issue Government Notice No. 1434, a regulation which stated that, effective August 18, all ships destined for Lagos/Apapa would be required to convey to the Ports Authority, two months before sailing, certain

[31] Nikkei contracted with Productos Fontanet, a Spanish corporation with an interest in a cement plant and a shipping company, for the purchase and delivery of 120,000 tons of cement with an option for 120,000 tons more. The price was $54 per ton for the first 8500 tons, and $52 per ton for the rest. East Europe secured a contract for 120,000 tons with Intrafinsa, another Spanish supplier, at $51.25 per ton, and the district court found East Europe would have been able to fulfill the rest of its contract at the same price. Texas Trading contracted with yet another Spanish company, at $53.10 per ton. Chenax searched for a subcontractor, but never found one; its efforts never rose above the level of oral negotiations.

information concerning their time of arrival in the port. The regulation also stated vaguely that the Ports Authority would "co-ordinate all sailing," and that it would "refus(e) service" to vessels which did not comply with the regulation. Then, on August 18, Nigeria cabled its suppliers and asked them to stop sending cement, and to cease loading or even chartering ships. In late September, Nigeria took the crucial step: Central Bank instructed Morgan not to pay under the letters of credit unless the supplier submitted in addition to the documents required by the letter of credit as written a statement from Central Bank that payment ought to be made. Morgan notified each supplier of Nigeria's instructions, and Morgan commenced refusing to make payment under the letters of credit as written. Almost three months later, on December 19, 1975, Nigeria promulgated Decree No. 40, a law prohibiting entry into a Nigerian port to any ship which had not secured two months' prior approval and imposing criminal penalties for unauthorized entry.

Nigeria's unilateral alteration of the letters of credit took place on a scale previously unknown to international commerce. Officers of Morgan explained the potential consequences of Nigeria's action to representatives of Central Bank; Central Bank was adamant that Morgan does not pay. After a meeting with Central Bank personnel, one Morgan officer stated that Central Bank's Deputy Governor "responded that the (Nigerian) Government was willing to go to court if we did pay." Within weeks of Nigeria's instructions to Morgan not to pay without the additional documentation, Morgan warned Central Bank in a telex: "We believe that there is an increasing possibility that litigation against you may be instituted in New York."

Nigeria's next step was to invite its suppliers to cancel the contracts. As part of the program, Nigeria convened a meeting at Morgan's offices in New York, to discuss Nigeria's position with members of the American financial community. Over forty suppliers eventually did settle. See *National American Corp. v. Federal Republic of*

Nigeria, supra, 597 F.2d at 316. Nigeria asked Morgan to effect several of the settlement payments; some were for settling suppliers not located in the United States.

Cement suppliers who did not settle sued in courts all over the world.[32] The four suppliers at issue here Texas Trading, Nikkei, East Europe, and Chenax sued in the Southern District of New York. Named as defendants were both Nigeria and Central Bank. The complaints alleged that Central Bank's September instructions to Morgan, changing the terms of payment under the letters of credit, constituted anticipatory breaches of both the cement contracts (requiring Nigeria to establish "Irrevocable" letters of credit with certain terms of payment) and the letters of credit (requiring Central Bank to authorize payment when certain documents were presented to Morgan). Defendants do not seriously dispute that their actions constitute such anticipatory breaches;[33] their defense go more to the propriety of jurisdiction under the FSIA. Judge Cannella in Texas Trading, D.C., 500 F. Supp. 320, found jurisdiction lacking; Judge Pierce in the consolidated Nikkei, East Europe, and Chenax actions, D.C., 497 F. Supp. 893, held it present. Judge Pierce proceeded to a trial on the merits, and awarded $1.857 million to Nikkei, $1.986 million to East Europe, and nothing to Chenax. These appeals followed.[34]

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[32] E. g., *Trendtex Trading Corp. v. Central Bank of Nigeria*, (1977) 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana Mercantile S.A. v. Central Bank of Nigeria*, (1979) 2 Lloyd's L.R. 277 (same); *Ipitrade International, S.A. v. Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), enforced 465 F. Supp. 824 (D.D.C. 1978); *Youssef M. Nada Establishment v. Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist.Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany).

[33] Article 3 of the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce (Brochure No. 222) provides that letters of credit "can neither be modified nor cancelled without the agreement of all concerned."

[34] Defendants appeal from both the jurisdictional rulings and the awards on the merits in Nikkei and East Europe; plaintiffs cross-appeal from the partial denial of damages. In Chenax, plaintiffs appeal from the total denial of damages, and defendants cross-appeal from the finding of jurisdiction. In Texas Trading, plaintiffs appeal from the jurisdictional ruling. All appeals are taken formally from the judgment below except in Texas Trading. That appeal is taken from Judge Cannella's order, but the error is harmless. See *Poss v. Lieberman*, 299 F.2d 358 (2d Cir.), cert. denied, 370 U.S. 944, 82 S. Ct. 1585, 8 L. Ed. 2d 810 (1962)

The law before us is complex and largely unconstrued and has introduced sweeping changes in some areas of prior law. See House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 7-8, reprinted in (1976) U.S. Code Cong. & Admin. News 6605, 6604-6 ("House Report ").[35] In structure, the FSIA is a marvel of compression. Within the bounds of a few tersely worded sections, it purports to provide answers to three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction over the claim, and the propriety of personal jurisdiction over the defendant. See House Report at 6611-12. Through a series of intricately coordinated provisions, the FSIA seems at first glance to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three. See Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 28 (1976) ("1976 Hearings ") (testimony of Monroe Leigh, Legal Adviser, Department of State).[36] This economy of decision has come, however, at the price of considerable confusion in the district courts. In fact, Congress intended the sovereign immunity and subject matter jurisdiction decisions to remain slightly distinct, and it drafted the Act accordingly. Moreover, Congress has only an incomplete power to tie personal jurisdiction to subject matter jurisdiction; its prerogatives are constrained by the due process clause. These cases

[35] See also Senate Judiciary Committee, Define Jurisdiction of U. S. Courts in Suits Against Foreign States, S.Rep. No. 1310, 94th Cong., 2d Sess. 8-9. The House and Senate Committees filed identical reports, and references infra to the House Report may be deemed to represent the views of the Senate Committee as well.

[36] Leigh stated:

Section 1330 provides that if service is made under section 1608 and if the foreign state is not entitled to immunity, then personal jurisdiction over the foreign state would exist. This is a subtle point. To determine whether it has personal jurisdiction over the foreign state, the court must look not only at whether proper service has been made; the court must also look at the sovereign immunity provisions in sections 1605 through 1607 to determine whether the foreign state is amendable (sic) to jurisdiction.

In short, the jurisdiction section at the beginning of the bill, the immunity provisions, and the service provisions are all carefully interconnected.

present an opportunity to untie the FSIA's Gordian knot, and to vindicate the Congressional purposes behind the Act.

Turning to the specific provisions of the law, a description of the FSIA's analytic structure is helpful. The jurisdiction-conferring provision of the Act, 28 U.S.C. § 1330(a), creates in the district courts:

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.

Although § 1330(a) refers to sections 1605-1607, the section most frequently relevant,[37] and the one applicable here, is § 1605. It provides, in part:

(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.

Crucial to each of the three clauses of § 1605(a) (2) is the phrase "commercial activity." In it is lodged centuries of Anglo-American and civil law precedent construing the term "sovereign immunity." If the activity is not "commercial," but,

[37] The House Report calls § 1605(a) (2) "probably the most important instance in which foreign states are denied immunity." See House Judiciary Committee, Jurisdiction of United States Courts in Suits Against Foreign States, H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, reprinted in (1976) U.S. Code Cong. & Admin.News 6604, 6617 ("House Report ")

rather, is "governmental," then the foreign state is entitled to immunity under section 1605, and "original jurisdiction" is not present under § 1330(a).[38]

For the definition of "commercial activity," we turn to subsection 1603(d), which provides:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

If "commercial activity" under § 1603(d) is present, and if it bears the relation to the United States required by § 1605(a) (2), then the foreign state is "not entitled to immunity," and the district court has statutory subject matter jurisdiction over the claim through § 1330(a). And, if the exercise of that jurisdiction falls within the judicial power set forth by Article III of the Constitution, subject matter jurisdiction over the claim exists.[39]

Our analysis next proceeds to the question of personal jurisdiction; we come again to § 1330. Subsection (b) of section 1330 provides: "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." The Act, therefore, makes the statutory aspect of personal jurisdiction simple: subject matter jurisdiction plus service of process equals personal jurisdiction. See House Report at 6622. But the Act cannot create personal jurisdiction where the Constitution forbids it. Accordingly, each finding of personal

[38] Jurisdiction will be absent unless some other provision of the Act, such as § 1607 or other subsections of § 1605, intervenes. Section 1607 concerns counterclaims, and is not relevant here

[39] See *Verlinden B. V. v. Central Bank of Nigeria*, supra note 5 (suit by an alien against a foreign state for breach of a contract not governed by federal law is not within federal judicial power)

jurisdiction under the FSIA requires, in addition, a due process scrutiny of the court's power to exercise its authority over a particular defendant.

In short, a " § 1605(a) (2) case" calls for the resolution of a series of five questions:

1) Does the conduct the action is based upon or related to qualify as "commercial activity"?

2) Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a) (2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)?

3) Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III?

4) Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?

5) Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?

It is to those questions we now turn.

Before undertaking the threshold "commercial activity" analysis, our first task is to identify what particular conduct in this case is relevant. Subsection 1603(d) states that "commercial activity" might consist of either "a regular course of commercial conduct" or "a particular commercial transaction or act." The words "regular course of conduct" seem to authorize courts to cast the net wide, and to identify a broad series of acts as the relevant set of activities. See House Report at 6615. Here, the relevant "course of conduct" is undoubtedly Nigeria's massive cement purchase program. Alternatively, each of its contracts or letters of credit with these four plaintiffs would qualify as "a particular transaction."

The determination of whether particular behavior is "commercial" is perhaps the most important decision a court faces in an FSIA suit. This problem is significant because the primary purpose of the Act is to "restrict" the immunity of a foreign state to suits involving a foreign state's public acts. House Report at 6605. If the activity is not "commercial," it satisfies none of the three clauses of § 1605(a) (2), and the foreign state is (at least under that subsection) immune from suit. Unfortunately, the definition of "commercial" is the one issue on which the Act provides almost no guidance at all. Subsection 1603(d) advances the inquiry somewhat, for it provides: "The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." No provision of the Act, however, defines "commercial." Congress deliberately left the meaning open and as noted above, "put (its) faith in the U.S. courts to work out progressively, on a case-by-case basis the distinction between commercial and governmental." 1976 Hearings at 53 (testimony of Monroe Leigh). Accord, House Report at 6615; Hearings on H.R. 3493 Before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong., 1st Sess. 16 (1973) ("1973 Hearings") (testimony of Charles N. Brower, Legal Adviser, Department of State).[40] See also Kahale & Vega, Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States, 18 Colum.J. Transnat'l L. 211, 236 (1979). We are referred to no less than three separate sources of authority to resolve this fundamental definitional question.

[40] The 1973 bill was introduced as S. 566, 93d Cong., 1st Sess., see 119 Cong. Rec. 2204 (1973), and H.R. 3493, 93d Cong., 1st Sess., see id. at 2880. The language of § 2 of those bills is identical in material respects to the text of the present 28 U.S.C. § 1330(a). See, e. g., 119 Cong. Rec. 2213-15 (1973) (reprinting S. 566). The 1973 bills were withdrawn by their sponsors, and introduced as revised in H.R. 11315, 94th Cong., 1st Sess., see 121 Cong. Rec. 42017 (1975), and S. 3553, 94th Cong., 2d Sess., see 122 Cong. Rec. 17454 (1976). H.R. 11315 became the FSIA.

The first source is statements contained in the legislative history itself. Perhaps the clearest of them was made by Bruno Ristau, then Chief of the Foreign Litigation Section of the Civil Division, Department of Justice. Ristau stated: "(I)f a government enters into a contract to purchase goods and services, that is considered a commercial activity. It avails itself of the ordinary contract machinery. It bargains and negotiates. It accepts an offer. It enters into a written contract and the contract is to be performed." 1976 Hearings at 51. The House Report seems to conclude that a contract or series of contracts for the purchase of goods would be per se a "commercial activity," see House Report at 6615, and the illustrations cited by experts who testified on the bill contracts, for example, for the sale of army boots[41] or grain[42] support such a rule. Or, put another way, if the activity is one in which a private person could engage, it is not entitled to immunity. See 1976 Hearings at 24 (testimony of Monroe Leigh), 53 (same); 1973 Hearings at 15 (testimony of Charles N. Brower).

The second source for interpreting the phrase "commercial activity" is the "very large body of case law which exist(ed)" in American law upon passage of the Act in 1976. See 1976 Hearings at 53 (testimony of Monroe Leigh). See also id. at 94 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States). Testifying on an earlier version of the bill, Charles N. Brower, then Legal Adviser of the Department of State, stated:

(T)he restrictive theory of sovereign immunity from jurisdiction, which has been followed by the Department of State and the courts since it was articulated in the familiar letter of Acting Legal Adviser Jack B. Tate of May 29, 1952, would be

[41] Hearings on H.R. 3493 before Subcommittee on Claims and Governmental Relations of the House Committee on the Judiciary, 93d Cong., 1st Sess. 16 (1973) ("1973 Hearings") (testimony of Charles N. Brower, Legal Adviser, Dept. of State), 40 (State Dept. Section-by-Section Analysis of 1973 bill). See also House Report at 6615.
[42] 1976 Hearings at 27 (testimony of Monroe Leigh).

incorporated into statutory law. This theory limits immunity to public acts, leaving so-called private acts subject to suit. The proposed legislation would make it clear that immunity cannot be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.

1973 Hearings at 15.[43] See generally *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931, 87 S. Ct. 291, 17 L. Ed. 2d 213 (1966); *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934, 85 S. Ct. 1763, 14 L. Ed. 2d 698 (1965).[44] But see *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.) (State Dept. suggestion of immunity supersedes application of restrictive theory), cert. denied, 404 U.S. 985, 92 S. Ct. 452, 30 L. Ed. 2d 369 (1971).

Finally, current standards of international law concerning sovereign immunity add content to the "commercial activity" phrase of the FSIA. Section 1602 of the Act, entitled "Findings and declaration of purpose," contains a cryptic reference to international law, but fails wholly to adopt it.[45] The legislative history states that the Act "incorporates standards recognized under international law," House Report at 6613, and the drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations. See 1976 Hearings

[43] The "Tate Letter" is set forth at 26 State Dept. Bull. 984 (1952)

[44] Dictum in Victory Transport, supra, 336 F.2d at 359, and *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971), states that a contract made by a government for a public purpose, e. g., bullets for the army, is not "commercial activity." This aspect of prior American law has been overruled by the FSIA, and the definition of "commercial activity" has been concomitantly expanded to include such contracts. See 28 U.S.C. § 1603(d); see also 1976 Hearings at 95 (testimony of Michael M. Cohen, Chairman, Committee on Maritime Legislation, Maritime Law Association of the United States)

[45] Section 1602 provides in part:

Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

In the 1973 version of the bill, the word "chapter" was followed by "and other principles of international law."

at 25 (testimony of Monroe Leigh), 32 (testimony of Bruno A. Ristau); 1973 Hearings at 18 (testimony of Charles N. Brower). At this point, there can be little doubt that international law follows the restrictive theory of sovereign immunity. House Report at 6613. See, e. g., State Immunity Act, 1978, s. 3 (United Kingdom); Council of Europe, European Convention on State Immunity, art. 4 (1972), reprinted in 1976 Hearings at 37, 38; Empire of Iran, 45 I.L.R. 57 (1963) (West Germany).

Under each of these three standards, Nigeria's cement contracts and letters of credit qualify as "commercial activity." Lord Denning, writing in Trendtex Trading Corp. v. Central Bank of Nigeria, (1977) 2 W.L.R. 356, 369, 1 All E.R. 881, with his usual erudition and clarity, stated: "If a government department goes into the marketplaces of the world and buys boots or cement as a commercial transaction that government department should be subject to all the rules of the marketplace." Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose to build roads, army barracks, whatever is irrelevant. Accordingly, courts in other nations have uniformly held Nigeria's 1975 cement purchase program and appurtenant letters of credit to be "commercial activity," and have denied the defense of sovereign immunity.[46] We find defendants' activity here to constitute "commercial activity," and we move on to the next step of analysis.

C. 1.

We need look no further than the third clause of § 1605(a) (2) to find statutory subject matter jurisdiction here. That clause provides: "A foreign state shall not be immune in any case in which the action is based upon an act outside the territory of

[46] E. g., *Trendtex Trading Corp. v. Central Bank of Nigeria*, (1977) 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Hispano Americana Mercantile S.A. v. Central Bank of Nigeria*, (1979) 2 Lloyd's L.R. 277 (same); *Ipitrade International S.A. v. Federal Republic of Nigeria* (Int'l Chamber of Commerce Arbitration Award, April 25, 1978), enforced 465 F. Supp. 824 (D.D.C. 1978); *Youssef M. Nada Establishment v. Central Bank of Nigeria*, 16 Int'l Legal Mat. 501 (1977) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany). See also 1976 Hearings at 76 & n.13 (statement of Committee on International Law, Assoc. of the Bar of the City of New York)

the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

The focus of our analysis is to determine whether "the act cause(d) a direct effect in the United States" within the meaning of the FSIA.[47] The "direct effect" clause has been the subject of considerable commentary,[48] but remains somewhat abstruse. The House Report, for example, states only that the direct effect clause "would subject (commercial) conduct (abroad) to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)." House Report at 6618. The reference is a bit of a non sequitur, since § 18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts n'importe quelle substantive law.[49] Nor is the House Report's vague reference to the District of Columbia's long-

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[47] We need not belabor the point that the specific act or acts upon which these suits are based the anticipatory repudiation of the cement contracts and letters of credit took place at least in part "outside the territory of the United States." It was from Nigeria that Central Bank sent the instructions amending the letters of credit; it was in Nigeria that Nigeria instructed Central Bank to do so. Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning "where" an act or omission occurs. Conduct crucial to modern commerce telephone calls, telexes, electronic transfers of intangible debits and credits can take place in several jurisdictions. Outmoded rules placing such activity "in" one jurisdiction, or another are not helpful here

Moreover, should defendants establish that the "act" or "commercial activity" the action is "based upon" took place not "outside the territory of the United States" but inside it, then the first or second clauses of § 1605(a) (2) might become relevant. We need not decide the question. Given Congress's broad approach in the language of § 1605(a) (2), it is not at all improbable that a suit could be brought under more than one clause. See House Report at 6618 (stating that all cases covered by second clause might also come within first clause), 1973 Hearings at 42 (State Dept. Section-by-Section Analysis) (stating that § 1605(a) (2) covers all cases with an act or direct effect in United States). See generally Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs, supra note 5.

Moving to the second phrase of the clause, we have little doubt that the acts these actions are "based upon" were "in connection" with defendants' commercial activity. Breach of an agreement is necessarily performed "in connection with" that agreement, or with a series of similar agreements.

[48] E. g., Note, Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976, 13 N.Y.U.J. Int'l L. & Pol. 571 (1981); Note, Effects Jurisdiction under the Foreign Sovereign Immunities Act and the Due Process Clause, 55 N.Y.U. L. Rev. 474 (1980) ("NYU Note"); Note, The Nikkei Case: Toward a More Uniform Application of the Direct Effect Clause of the Foreign Sovereign Immunities Act, 4 Ford. Int'l L.J. 109 (1980).

[49] As a result, certain limitations built into the text of § 18, such as the requirement that the "direct effect" be "substantial" or "foreseeable," are not necessarily apposite to the direct effect clause of § 1605(a) (2). To the extent the substantiality and foreseeability requirements of the legislative reach cases are designed to minimize unnecessary conflict between United States and foreign substantive law, 28 U.S.C. § 1606 renders the requirements irrelevant, since it implies that federal substantive law will not always govern in FSIA cases. See generally *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 988, 991 (2d Cir.), cert. denied, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975)

arm statute, D.C. Code Ann. § 13-423(a), especially helpful; that provision looks to personal jurisdiction, not subject matter jurisdiction, and in any event is concerned in its "effects" provision only with torts. We are left with the words, "direct effect in the United States," and with Congress's broad mandate in passing the FSIA: "Under section 1605(a) (2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States." 1973 Hearings at 42 (State Department Section-by-Section Analysis of 1973 bill).

Fortunately, a certain amount of case law interprets both components of the problematic phrase: "direct" and "in the United States." For a paradigm of "direct," we look to the vivid examples of *Harris v. VAO Intourist, Moscow,* 481 F. Supp. 1056 (E.D.N.Y. 1979), and Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), aff'd mem., 607 F.2d 494 (D.C. Cir. 1979). In Harris, a man lost his life in a hotel fire; in Upton, a man was injured when the roof of a building collapsed on him. Both men undoubtedly suffered "direct" effects.

Applying the term to a corporation is not so simple. Unlike a natural person, a corporate entity is intangible; it cannot be burned or crushed. It can only suffer financial loss. Accordingly, the relevant inquiry under the direct effect clause when plaintiff is a corporation is whether the corporation has suffered a "direct" financial loss. To discover whether breach of a contract causes this type of loss, we look to *Carey v. National Oil Corp.*, 592 F.2d 673, 676-77 (2d Cir. 1979) (*per curiam).* In Carey, we decided that a direct effect can arise not only from a tort, e. g., Harris and Upton, supra, but from cancellation of a contract for the sale of oil as well. Here, under either theory of recovery, breach of the cement contracts or breach of the letters of credit, the effect of the suppliers was "direct." They were beneficiaries of

the contracts that were breached. See Note, Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause, 55 N.Y.U. L. Rev. 474, 500-10 & n.192 (1980) ("NYU Note").

Finally, the most difficult aspect of the direct effect clause concerns its phrase, "in the United States." State law abounds with decisions locating "effects" for personal jurisdiction purposes. But those cases are not precisely on point, for they are concerned more with federalism, and less with international relations, than was Congress in passing the FSIA.[50] Reliance on state cases is not necessary here because the financial loss in these cases occurred "in the United States" for two much simpler reasons. First, the cement suppliers were to present documents and collect money in the United States, and the breaches precluded their doing so. Second, each of the plaintiffs is an American corporation. Whether a failure to pay a foreign corporation in the United States[51] or to pay an American corporation overseas[52] creates an effect "in the United States" under § 1605(a) (2) is not before us. Both factors are present here, and the subsection is clearly satisfied. See NYU Note at 510-13.

The foregoing analysis demonstrates that neither "direct" nor "in the United States" is a term susceptible of easy definition. A corporation is no more than a series of conduits, filtering profit or loss through each stage from the company's customers to its shareholders, who may themselves be fictional entities as well. Harm to any

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[50] It is, therefore, less than determinative here that New York law holds that the repudiation by a Ugandan bank of a letter of credit payable in New York creates a cause of action which "arises in New York" under the New York Business Corporations Law. See J. Zeevi & Sons, Ltd. v. Grindlay's Bank (Uganda), Ltd., 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168, cert. denied, 423 U.S. 866, 96 S. Ct. 126, 46 L. Ed. 2d 95 (1976). Compare Friedr. Zoellner (N.Y.) Corp. v. Tex Metals Co., 396 F.2d 300, 302 (2d Cir. 1968) (injury located at place of performance), with Spectacular Promotions, Inc. v. Radio Station WING, 272 F. Supp. 734, 737 (E.D.N.Y. 1967) (injury located where defendant acts).

[51] Constitutional obstacles prevent our deciding the question in *Verlinden B. V. v. Central Bank of Nigeria*, supra note 5, decided this day.

[52] Harris and Upton involved Americans injured overseas, but since the injured parties there were natural persons, not corporations, it is easy to locate the "effect" outside the United States. Whether an American corporation injured overseas incurs a direct effect in the United States remains an open question.

component is somewhat "indirect," and locating the site of the injury, especially when the harm consists in an omission, is an enterprise fraught with artifice. Courts construing either term should be mindful more of Congress's concern with providing "access to the courts" to those aggrieved by the commercial acts of a foreign sovereign, House Report at 6605, than with cases defining "direct" or locating effects under state statutes passed for dissimilar purposes. Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it. See House Report at 6605-06. The question is, was the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to hear the case? No rigid parsing of § 1605(a) (2) should lose sight of that purpose. We have no doubt that Congress intended to bring suits like these into American courts, see House Report at 6618, and we hold that statutory subject matter jurisdiction here exists.

The final step in establishing the court's right to hear the claim is to find a constitutional basis for the statutory exercise of subject matter jurisdiction. See Kline v. Burke Construction Co., 260 U.S. 226, 234, 43 S. Ct. 79, 82, 67 L. Ed. 226 (1922). Each of these four suits is "between a State, or the Citizens thereof, and foreign States," U.S. Const., art. III, § 2, cl. 1, and therefore comes within the judicial power by way of the diversity grant. Indeed, it is to that clause that the drafters of the FSIA looked in securing a constitutional basis for FSIA suits generally. See House Report at 6611, 6632. Cf. Verlinden B. V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981) (suit by alien against foreign state not supported by constitutional diversity grant). The district court, we conclude, had the power to hear these claims.

D. 1.

Subsequent to the determination of subject matter jurisdiction is the issue of personal jurisdiction. The statutory aspects of the analysis are quite simple. Subsection 1330(b) provides for personal jurisdiction over the foreign state as to any claim the district court has power to hear under § 1330(a), so long as service has been made under § 1608.[53] Service here has been made, or at least not objected to. See Fed. R. Civ. P. 12(h) (1). Subject matter jurisdiction exists, so statutory personal jurisdiction exists as well.

Turning to the constitutional constraints on personal jurisdiction, our first inquiry must be whether the safeguards of due process, which otherwise regulate every exercise of personal jurisdiction, apply to FSIA cases at all. Specifically, is a foreign state a "person" within the meaning of the due process clause? Cases on the point are rare, since pre-FSIA suits against foreign states were generally brought quasi in rem, and the due process clause was not uniformly applied to quasi in rem suits until 1977, a year after the FSIA was passed. See *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977). Nonetheless, in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979), a quasi in rem suit filed before the FSIA and decided after Shaffer, we applied constitutional due process analysis to a suit against a foreign state. We affirm that holding today. *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica*, 614 F.2d 1247 (9th Cir. 1980) (applying due process clause in suit against foreign state in personam) ; *Petrol Shipping Corp. v. Kingdom of Greece*, supra, 360 F.2d at 110 (same); *Purdy Co. v. Argentina*, 333 F.2d 95, 98 (7th Cir. 1964) (same);

[53] The House Report seems to require more, in its statement that, "The requirements of minimum jurisdictional contacts and adequate notice are embodied" in § 1330(b). House Report at 6612. Accord, 1976 Hearings at 96 (testimony of Michael M. Cohen). These statements are not in the Act itself, and are not by themselves sufficiently authoritative to introduce, ipsissimis verbis, the Fifth Amendment standard of due process into § 1330(b). Rather, the drafters in these words are merely confirming what they have no power to deny: that any exercise of personal jurisdiction under § 1330(b) is subject to the constitutional limitation of due process. See 1976 Hearings at 31 (testimony of Bruno A. Ristau)

Rovin Sales Co. v. Socialist Republic of Romania, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975) (same); T.J. Stevenson & Co. v. 81,193 Bags of Wheat Flour, 399 F. Supp. 936, 938 (S.D. Ala. 1975) (same) (counterclaim).

Since the constitutional constraints apply here, our next concern must be to delineate the contacts that are relevant. The inquiry has two aspects: whose contacts, and with what? To bring any defendant before the court, of course, the due process analysis must be satisfied as to him. Nonetheless, it is not only defendant's activities in the forum, but also actions relevant to the transaction by an agent on defendant's behalf, which support personal jurisdiction. *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967), cert. denied, 390 U.S. 996, 88 S. Ct. 1198, 20 L. Ed. 2d 95 (1968); *Frummer v. Hilton Hotels International, Inc.,* 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 44-45, 227 N.E.2d 851, 854, cert. denied, 389 U.S. 923, 88 S. Ct. 241, 19 L. Ed. 2d 266 (1967). Under the Gelfand standard, Central Bank's activities with respect to the "commercial activity" are chargeable to Nigeria, and Morgan's activities are chargeable to both. If Morgan had not performed for Central Bank, and Central Bank for Nigeria, the entire payment mechanism supporting the cement contracts, Nigeria would have been required to make the payments directly. See Gelfand, supra, 385 F.2d at 121. Since service was made under § 1608, the relevant area in delineating contacts is the entire United States, not merely New York. Compare 28 U.S.C. § 1608 (service of process provision for FSIA) with 15 U.S.C. §§ 21(f) (service of process provision for antitrust laws), 77v (same for securities laws). See *Bersch v. Drexel Firestone,* Inc., 519 F.2d 974, 998-1000 (2d Cir.), cert. denied, 423 U.S. 1018, 96 S. Ct. 453, 46 L. Ed. 2d 389 (1975); *Mariash v. Morrill*, 496 F.2d 1138, 1143 (2d Cir. 1974); Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326, 1340 (2d Cir. 1972).

Whether a defendant's contacts with the forum are so numerous that they reach the "minimum contacts" required by *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), depends broadly on whether "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " Id. at 316, 66 S. Ct. at 158, citing *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278 (1940). That standard, in turn, involves at least four separate inquiries. Under the cases from *International Shoe* to *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980), the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit. See *World-Wide Volkswagen Corp. v. Woodson*, supra, 444 U.S. at 292, 297, 100 S. Ct. at 564, 567; *Kulko v. California Superior Court*, 436 U.S. 84, 97-98, 98 S. Ct. 1690, 1699-1700, 56 L. Ed. 2d 132 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1239, 2 L. Ed. 2d 1283 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223 (1957); *International Shoe Co*., supra, 326 U.S. at 316, 66 S. Ct. at 158.

The facts of these cases establish that Central Bank, and through Central Bank Nigeria, repeatedly and "purposefully avail(ed themselves)" of the privilege of conducting activities in the United States. Hanson v. Denckla, supra, 357 U.S. at 253, 78 S. Ct. at 1240, citing International Shoe Co., supra, 326 U.S. at 319, 66 S. Ct. at 159. Central Bank alone sent its employees to New York for training, kept large cash balances here, and maintained a custody account as well. If Morgan had converted Central Bank's funds from either account, New York law would have protected Central Bank, and allowed it to sue. Central Bank made it a regular practice

to advise letters of credit through Morgan, and to use Morgan as its means of paying bills throughout the world. New York law protected Central Bank in each of its instructions, transfers, and withdrawals. Central Bank's activities with respect to the cement contracts and the letters of credit, directly chargeable to Nigeria under Gelfand, show the same pattern. In Nigeria's behalf and on Nigeria's instructions, Central Bank advised each of the letters of credit through Morgan, in the United States, regardless of the individual supplier's wishes. Having chosen American law and process as their protectors, Nigeria and Central Bank were not hesitant to invoke them; at the mere hint Morgan was reluctant to honor defendants' amendments to the letters of credit, an officer of Central Bank threatened to "go to court" to enforce them.

Having so thoroughly "invok(ed) the benefits and protections of (American) laws," *Hanson v. Denckla*, supra, 357 U.S. at 253, 78 S. Ct. at 1240, Nigeria and Central Bank would have every "reason to expect to be haled before a court" here. *Shaffer v. Heitner*, supra, 433 U.S. at 216, 97 S. Ct. at 2586. Having threatened litigation on their own, and having been notified of its likelihood by Morgan, defendants cannot now assert they could not have expected it. Moreover, the very function of the due process clause is to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, supra, 444 U.S. at 297, 100 S. Ct. at 567. In light of defendants' intentional activities in the United States, litigation was clearly foreseeable here.

Although the United States is certainly distant from Nigeria, litigation here is not unduly inconvenient for defendants. Every modern transnational commercial contract presents problems of adjudicatory cost; in the cement purchase program,

where Nigeria bargained with corporations from a plethora of nations, required in the contracts that the goods came mostly from Europe, and provided in some letters of credit that payment was to be made in the United States, the inconvenience was at least expected. Moreover, Nigeria in the cement contracts agreed to submit to arbitration by the International Chamber of Commerce ("ICC"). The ICC's headquarters are in Paris, but its arbitrations can take place anywhere in the world. See ICC, ICC Arbitration The International Solution to Business Disputes, art. 12 (undated). Further, any assertion of inconvenience here is belied by defendants' constant resort to the United States for a myriad of services, and by the frequent visits of Central Bank officials to Morgan in New York. Cf. World-Wide Volkswagen Corp. v. Woodson, supra, 444 U.S. at 297, 100 S. Ct. at 567.

In *McGee v. International Life Insurance Co*., the Supreme Court depended in part on the forum's "manifest interest in providing effective means of redress for its residents " 355 U.S. at 223, 78 S. Ct. at 201. Here, we should not be unmindful that Congress has passed the FSIA specifically to provide "access to the courts." House Report at 6605. Similarly, the plaintiff has an "interest in obtaining convenient and effective relief." *World-Wide Volkswagen Corp. v. Woodson*, supra, 444 U.S. at 292, 100 S. Ct. at 564, citing *Kulko v. California Superior Court*, supra, 436 U.S. at 92, 98 S. Ct. at 1696. See generally Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F.2d 155, 158-60 (9th Cir. 1980); Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933, 936-38 (10th Cir. 1977); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 494-98 (5th Cir. 1974). Accordingly, we hold that defendants' relation to the forum here satisfies the "minimum contacts" requirement of *International Shoe Sterling National Bank & Trust Co. of New York v. Fidelity Mortgage Investors*, 510 F.2d 870 (2d Cir. 1975).[54] **37**

[54] We recognize that International Shoe and its progeny were decided under the due process clause of the Fourteenth Amendment, while this case falls within the purview of the similar clause in the Fifth Amendment. In Leasco Data

Our rulings today vindicate more than Congressional intent. They affirm the right of all participants in the marketplace of the world to be treated as equals, and to ascribe to principles of trade which found their birth in the law merchant, centuries ago. Corporations can enter contracts without fear that the defense of sovereign immunity will be inequitably interposed, and foreign states can bargain without paying a premium required by a trader in anticipation of a judgment-proof client. Commerce is fostered, and all interests are advanced.

In Nikkei, East Europe, and Chenax, the district court held jurisdiction to be present, and proceeded to the trial of plaintiffs' claims. We find no error in its rulings on the merits and affirm those three judgments in full.[55] In Texas Trading, the district court

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Processing, *supra*, a Fifth Amendment case, we applied the Fourteenth Amendment analysis, see 468 F.2d at 1340, but we added that the assertion of personal jurisdiction "must be applied with caution, particularly in an international context," id. at 1341, citing von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L. Rev. 1121, 1127 (1966). See also Bersch v. Drexel Firestone, Inc., supra, 519 F.2d at 1000. See generally Romero v. International Terminal Operating Co., 358 U.S. 354, 383, 79 S. Ct. 468, 486, 3 L. Ed. 2d 368 (1959). While circumspection is appropriate in transnational disputes, certain other factors which might limit the exercise of personal jurisdiction are not present in such suits. The concerns of federalism discussed at length by the Supreme Court in *Shaffer*, supra, 433 U.S. at 216-17, 97 S. Ct. at 2586-87, and *World-Wide Volkswagen Corp.*, supra, 444 U.S. at 292, 100 S. Ct. at 564, for example, would not be relevant in an FSIA suit since states within a federal system, strictly speaking, are not involved. Further, more, or less solicitude might be in order because defendant is a government, not a natural person or corporation

We find neither distinction dispositive here. Like the states of our nation, the United States is a member of an international community. While it has not formally renounced part of its long-arm power by signing an international constitution, considerations of fairness nonetheless regulate every exercise of the federal judicial machinery. See Restatement of the Law, Second, Foreign Relations Law of the United States § 37 (1965); von Mehren & Trautman, supra, 79 Harv. L. Rev. at 1125 n.8. The analogy between the national and international systems may not be sufficiently exact to lead to the same result in every case, but here we see no reason to stray from our former adherence to the analysis developed under the Fourteenth Amendment. Similarly, "we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation." Victory Transport, Inc., supra, 336 F.2d at 363.

[55] Having lost the sovereign immunity decision and the jurisdictional questions, defendants attempt to place a further obstacle in the way of the speedy adjudication of the claims against them: the act of state doctrine. We decline to apply it here. Our decision does not depend on a determination that this case falls within one of the several purported "exceptions" to the rule. Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court. *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 728, 96 S. Ct. 1854, 1877, 48 L. Ed. 2d 301 (1976) (Marshall, J., dissenting) ; see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 84 S. Ct. 923, 940, 11 L. Ed. 2d 804 (1964). Here, adjudication of the legality of Nigeria's and Central Bank's challenged conduct does not threaten to embarrass the executive branch in its conduct of United States foreign relations, and hence does not seriously implicate the relevant policy considerations. These cases contain none of the elements that other courts have viewed to contain the seeds of such embarrassment. We are not being asked, as the Court was in *Sabbatino*, to judge a foreign government's conduct under ambiguous principles of international law. These are not cases where the challenged governmental conduct is public rather than commercial in nature, see *Alfred Dunhill of London, Inc. v. Republic of Cuba*, supra, or where its purpose was to serve an integral governmental function, cf. Hunt v. Mobil Oil Corp., 550

ordered the complaint dismissed for lack of jurisdiction. That order is reversed, and the case is remanded for proceedings consistent with this opinion.

F.2d 68, 78 (2d Cir.), cert. denied, 434 U.S. 984, 98 S. Ct. 608, 54 L. Ed. 2d 477 (1977) (applying act of state doctrine where governmental conduct in question was part of "a continuing and broadened confrontation between the East and West in an oil crisis which has implications and complications far transcending those suggested by appellants"). Finally, the executive branch has not stated its views in these cases regarding either the propriety of applying the act of state doctrine, as in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S. Ct. 1808, 32 L. Ed. 2d 466 (1972), or the validity of the very governmental act sub judice, as in *Hunt v. Mobil Oil Corp.*, supra, 550 F.2d at 77

D. POSTSCRIPT

The Nigerian cement armada cases were a watershed moment for Nigeria's economic growth and the development of the doctrine of sovereign immunity in International law. Thanks to the intellectual prowess and dynamism of Lord Denning M.R. and other legal minds[56] that have followed in his shoes the restrictive theory of sovereign immunity is well settled and widely accepted globally. The principles and the frontiers of the doctrine[57] continue to expand in accordance with the exigencies and demands of justice, equity, and fair play.

A.A. Wodi

Oct. 2022

[56] Burger, C.J., and Kaufman
[57] See Introductory Notes & Points to Note about Sovereign Immunity, *supra.*