JURISDICTIONAL DISCOVERY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

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INTRODUCTION

Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA or "Act") to clarify when U.S. courts may compel a foreign state to appear in a civil action. The Act provides for both personal and subject matter jurisdiction over certain suits against foreign governmental entities and is the only way a U.S. court can obtain subject matter jurisdiction over a claim against a foreign sovereign. Under the FSIA, a foreign state is generally immune from suit unless the claim arises out of the Act’s list of exceptions. If the defendant is a foreign state, the suit will be dismissed unless the claimant can meet the burden of establishing the application of an exception.

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2 The FSIA applies with equal force to a foreign state’s political subdivisions, agencies, or instrumentalities. See 28 U.S.C. § 1603(a). For simplicities sake, references to “foreign state” or “foreign sovereign” should be understood to include such entities.


In many cases (particularly ones involving the commercial exception), the defendant uniquely controls the facts establishing the exception, seriously disadvantaging the plaintiff unless effective discovery is available. Unfortunately, the FSIA does not mention any role for discovery in the jurisdictional determination. This vacuum has left the courts in the uncomfortable position of trying to construct standards specifically tuned to issues surrounding jurisdictional discovery against a foreign sovereign. As a result, the principal decisions have independently created fact-specific rules to deal with the problems created by FSIA jurisdictional discovery. Although these decisions have tried to show appropriate sensitivity to the special concerns created by FSIA discovery in an individual case, they have failed to create a unified approach to jurisdictional discovery that recognizes the policy goals of the Act.

Because the FSIA's purpose is to protect foreign states by providing immunity from the burden of suit, courts need to be more attentive to the dangers of imposing discovery requests upon a foreign state. At the same time, courts must balance the crucial need for information that can only be obtained through such discovery before the jurisdictional determination can appropriately be made. In determining whether jurisdictional discovery should be ordered, the court should first require that the plaintiff clearly articulate a particular FSIA exception theory and how discovery will assist in establishing the exception. If necessary, the court should determine whether there are other threshold

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9 See Phaneuf v. Republic of Indonesia, 106 F.3d 302, 305 (9th Cir. 1996) (reversing district court's denial of defendant's motion to dismiss on the basis of FSIA); Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 449 (D.C. Cir. 1990).
10 See infra text accompanying note 176.
issues that might dispose of the case while requiring less or no discovery.\textsuperscript{11} Next the court should narrowly tailor its discovery order. In determining the scope of discovery, the court should balance the needs of the plaintiff for the information against the burden that production will place on the foreign state.\textsuperscript{12} Finally, because of the special interests at stake, the district court’s discovery determinations should be subject to immediate appellate review.\textsuperscript{13}

This Article begins with a review of foreign sovereign immunity law in the United States to clarify the policies that should underlie a court’s analysis of the discovery issue. It then examines how U.S. courts have approached jurisdictional discovery in cases involving foreign sovereigns. Finally, this Article suggests a meaningful synthesis of the current judicial approaches, urging a move away from fact-specific adjudication towards a more comprehensive, uniform, and predictable approach to the issue.

I. HISTORY OF FOREIGN SOVEREIGN IMMUNITY
IN THE UNITED STATES

In order to appreciate the sensitive nature of jurisdictional discovery in foreign sovereign immunities litigation, an understanding of the U.S. history of foreign sovereign immunity is instructive. Although the doctrine’s origins can be found in the ancient notion that the “King can do no wrong,”\textsuperscript{14} three major events have shaped the

\textsuperscript{11} See infra text accompanying note 177.
\textsuperscript{12} See infra text accompanying notes 180-89.
\textsuperscript{13} See infra text accompanying note 195.
development of immunity in U.S. law. The first came from the judicial branch, the second from the executive branch, and the third from the legislative branch.

A. Schooner Exchange and Its Progeny

The seminal case on foreign sovereign immunity was Chief Justice Marshall's opinion in *The Schooner Exchange v. McFadden*. Justice Marshall decided that the Emperor of France's ship was not subject to the jurisdiction of U.S. courts because of the public international law concept of "perfect equality and independence of sovereigns." Under this doctrine, one sovereign could in no way be subject to another sovereign's jurisdiction, unless the sovereign waived its exclusive territorial jurisdiction, by, for example, allowing another state's public ship to enter its territory. Absent waiver, the doctrine presumes that the political process, not the judicial forum, should resolve disputes with a foreign sovereign. Courts followed Justice Marshall's common law sovereign immunity doctrine through the late 19th and early 20th centuries. In *Berizzi Brothers Co. v. The Pesaro*, the Supreme Court applied Justice Marshall's

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The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself..... One sovereign being on no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign country only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

*Id.* at 136.

16 *Id.* at 137.

17 *Id.* at 146.

18 271 U.S. 562 (1926) (holding an Italian state-owned merchant vessel immune).
reasoning from *Schooner Exchange* and found no jurisdiction over a foreign sovereign's merchant vessel.

In some cases, the executive branch was involved in the immunity determination. In *Ex parte Republic of Peru*, Peru requested immunity in a case relating to the failure of its vessel to carry certain cargo. Peru sought a suggestion of immunity from the Department of State, which informed the lower court that it recognized the foreign state's immunity. The district court found instead that Peru had waived its immunity, and Peru sought a writ from the Supreme Court. The Supreme Court addressed the executive branch's role in the Court's decision-making process, concluding that the Court would follow the State Department's immunity suggestion rather than risk embarrassment in the conduct of U.S. foreign relations. When a claim is made against a foreign sovereign, it may choose to appear in court and allow the judiciary to make the immunity decision, or it may first request immunity from the U.S. Department of State. When the foreign sovereign pursues this latter route, the executive branch's determination is conclusive.

In *Republic of Mexico v. Hoffman*, the Supreme Court once again looked at the executive's role in the immunity determination. The case involved a libel against the *Baja California*, a vessel the Mexican government owned, but did not possess. The Department of State made no suggestion of immunity to the courts. Instead, the Department of State said that it accepted Mexico's ownership claim and referred the Court to earlier decisions relating to similar issues. One of those cases, *Ervin v. Quintanilla*, had allowed immunity where the Mexican government owned

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19 318 U.S. 578 (1943).
20 Id. at 581.
21 Id. at 588.
22 Id. at 589.
23 324 U.S. 30 (1945).
24 99 F.2d 935 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939).
and possessed the vessel in question. In the other, The Navemar, the Court had rejected an immunity claim in a case in which the Department of State had refused a suggestion of immunity, and the vessel was not in the possession of the foreign government or being used for a public purpose. In light of this precedent, the Supreme Court in Republic of Mexico found that, in the absence of the executive branch's immunity suggestion, courts are required to make the sovereign immunity determination. In doing so, however, the courts should rely on the principles propounded by the Department of State, otherwise, immunity decisions might embarrass the executive branch in its dealings with foreign governments. Here, practice showed that immunity was appropriate only where a vessel was in the possession and service of a foreign government. Because U.S. policy had not otherwise recognized immunity, the Court denied it in this case. Thus, the Court chose a posture of deference to the Department of State's position.

B. The Tate Letter: The Executive Branch Adopts the Restrictive Approach

In the 20th century, many states became involved in activities that had traditionally been the domain of the private actor. State trading companies and manufacturing

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25 303 U.S. 68 (1938).
26 Republic of Mexico, 324 U.S. at 35. The Court concluded, "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." Id. In fact, the Court noted in a footnote that it had violated this principle in Berizzi Brothers Co. v. The Pesaro, 271 U.S. 562 (1926), in which the Court recognized the immunity of a vessel owned and in the possession of a foreign government, despite the fact that the Department of State had refused to recognize that immunity. See Republic of Mexico, 324 U.S. at 35 n.1.
27 Republic of Mexico, 324 U.S. at 38. In concurring, Justice Frankfurter argued that the courts should not grant immunity except when one of the political branches explicitly requests that the courts defer. Id. at 41-42 (Frankfurter, J., concurring).
interests became common. This trend naturally resulted in a corresponding movement towards the restrictive theory of sovereign immunity, under which a state remains immune for its public acts, but becomes subject to suit when acting like a private party.\textsuperscript{29} In 1952, the Department of State adopted the restrictive theory in determining whether to suggest immunity. In a letter to the Attorney General of the United States, Jack Tate, the Acting Legal Adviser for the Department of State, explained the reasons for the policy change.\textsuperscript{30} Of particular importance to Tate was the number of states that had already adopted the restrictive theory; excluding the United Kingdom and Soviet Bloc members, international support for the absolute theory was virtually nonexistent.\textsuperscript{31} Additionally, the United States’ position abroad had been not to assert immunity in foreign actions against it. Finally, given the increased number of states involved in commercial transactions, citizens dealing with such entities deserved access to the courts.\textsuperscript{32} Tate recognized that the State Department’s change in policy would not bind the courts, but noted that courts were unlikely to allow an immunity claim that the executive branch would not permit.\textsuperscript{33} Indeed, the courts subsequently followed the restrictive theory even in cases in which the executive had failed to make a suggestion of immunity.\textsuperscript{34} If the State Department did suggest immunity, the courts continued to honor it even if a court would likely have


\textsuperscript{30} Jack B. Tate, Letter to Acting Attorney General Philip B. Perlman, in 26 DEPT ST. BULL. 984, 984 (1952).

\textsuperscript{31} \textit{Id.} at 985.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} See, \textit{e.g.}, Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358-60 (2d Cir. 1964) (stating that because the Department of State had adopted the restrictive theory, “we must apply it to the facts of this case.”), \textit{cert. denied}, 381 U.S. 934 (1965).
asserted jurisdiction after a neutral application of the restrictive theory.\textsuperscript{35}

The Tate approach created numerous problems. In some cases, the Department of State failed to notify private litigants that it had considered and rejected a foreign state’s request for immunity, thereby requiring the private claimant to litigate an issue already addressed by the executive branch.\textsuperscript{36} When litigants were informed that a request for an immunity suggestion had been made, the Department of State generally allowed informal hearings, either with or without witnesses, to help determine whether the suggestion was appropriate.\textsuperscript{37} Both sides were generally allowed to file briefs and make oral argument, but nothing prevented the foreign state involved from attempting to pressure the Department of State in ways unrelated to the merits of the immunity determination.\textsuperscript{38} The Department of State essentially became a political department attempting to apply what appeared to be a legal standard.\textsuperscript{39} Yet, the State Department’s inability to compel sworn testimony handicapped its effectiveness in this role.\textsuperscript{40} In cases where the U.S. interest did not support the restrictive theory’s application, the Department of State found itself uncomfortably ignoring the very law that it attempted to further around the world.\textsuperscript{41}

\textsuperscript{35} See, e.g., Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971) (dismissing action against India after a suggestion of immunity from the State department), cert. denied, 404 U.S. 985 (1971).
\textsuperscript{36} See 1976 Hearings, supra note 14, at 94 (testimony of Michael Cohen).
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 95.
\textsuperscript{39} Monroe Leigh, the Legal Adviser for the Department of State, said that the general purpose of the Act was, “[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions or who otherwise act as a private party would.” See id. at 24 (testimony of Monroe Leigh, Legal Adviser, Department of State).
\textsuperscript{40} Id. at 34 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice).
\textsuperscript{41} Id.
C. **Congress Speaks: The Foreign Sovereign Immunities Act of 1976**

Congress attempted to codify and clarify U.S. law on foreign sovereign immunities in the FSIA. The legislative history indicates four goals. First, to codify the restrictive theory of sovereign immunities. Second, the FSIA would remove the political branches from sovereign immunity determinations; instead, the judicial branch alone would apply the restrictive principle without the foreign relations pressures that could occur from Department of State intervention. This would bring U.S. law into conformity with international practice. Third, the Act provided procedures for service and establishing jurisdiction over a foreign state. Finally, the FSIA created procedures for executing any judgment that was obtained against a foreign state.

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45 Id.
46 Id.
47 Id. Professor Dellapenna has suggested that there were actually six policy goals, some of them at cross purposes, behind the adoption of the FSIA:

[T]o make the U.S. practice of restrictive immunity for foreign states (including foreign government-owned corporations) consistent with international practice, to depoliticize immunity decisions by vesting them in courts, rather than the Department of State, to provide more definite, appropriate rules of competence, jurisdiction, mode of trial, rules of decision, service of process, and venue, to assure uniform treatment of foreign states in American courts, to cause the treatment of foreign states in American courts to be consistent with the treatment of the United States in American courts, and to provide a balanced possibility for execution of a judgment against a foreign state. Last, of course is the problem of international fit.

The Act's overall structure seems, at first glance, to be relatively simple.\textsuperscript{46} The FSIA provides that foreign states\textsuperscript{49} are generally immune from the jurisdiction of U.S. courts.\textsuperscript{50} It then provides exceptions to immunity, including waiver by the foreign state,\textsuperscript{51} actions involving commercial activities,\textsuperscript{52} takings of property in violation of international

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(1) which is a separate legal person, corporate or otherwise; (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and; (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.
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\textsuperscript{50} Section 1604 provides:

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


28 U.S.C. § 1605(a)(2). The Act provides the following exception for commercial activities:

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.

\textit{Id.} Section 1603(d) cryptically adds a definition of commercial activity: "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." 28 U.S.C. § 1603(d).
law,\textsuperscript{53} actions relating to immovable property located in the United States or gratuitous property transactions in the United States,\textsuperscript{54} certain tort actions,\textsuperscript{55} actions to enforce arbitration agreements,\textsuperscript{56} suits relating to maritime liens and preferred mortgages,\textsuperscript{57} and suits arising from torture, extrajudicial killing, aircraft sabotage, or hostage taking.\textsuperscript{58}

Applying the Act has been far from simple. In particular, the commercial exception has proved to be troublesome.\textsuperscript{59} Congress left the commercial exception's development to the courts,\textsuperscript{60} and the courts immediately faced difficulties in determining under what circumstances the commercial exception applied.\textsuperscript{61} The FSIA does not define the key term "commercial"; instead it provides only that the decision should be based on the conduct's nature rather than its purpose.\textsuperscript{62} Thus, the courts were left with a case-by-case

\textsuperscript{53} 28 U.S.C. § 1605(a)(3).
\textsuperscript{54} 28 U.S.C. § 1605(a)(4).
\textsuperscript{55} 28 U.S.C. § 1605(a)(5).
\textsuperscript{56} 28 U.S.C. § 1605(a)(6).
\textsuperscript{57} 28 U.S.C. § 1605(b).
\textsuperscript{58} 28 U.S.C.A. § 1605(a)(7) (Supp. 1998). Interestingly, the statute provides for a stay of discovery in cases arising under this section when the Attorney General certifies that such discovery would interfere with national security or an ongoing criminal investigation. 28 U.S.C.A. § 1605(g) (Supp. 1998.).
\textsuperscript{59} Judge Higginbotham has referred to the FSIA as a "peculiarly twisted exercise in statutory draftsanship." Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., concurring in part and dissenting in part).
\textsuperscript{62} See GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 236 (3d ed. 1996). This nature/purpose distinction is an attempt to clarify the classification of the kind of transaction in which a state purchases boots for its army. If one looks to the purpose of the transaction, it appears to be a public act. On the other hand, the nature of the purchase is such that any entity, private or public, could make the same deal. Congress clearly wanted such transactions to be denied immunity under the Act. See id. at 236-37.
analysis, requiring a close look at the facts of each disputed transaction.63

The FSIA’s passage increased the need for jurisdictional discovery before making a judicial determination of

63 Examples of the difficulties in defining the commercial exception can be seen in two Supreme Court decisions. In Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992), the Supreme Court had to determine whether Argentina’s default on the payment of certain bonds, issued as part of a currency stabilization program, “was an act taken ‘in connection with a commercial activity’ that had a ‘direct effect in the United States’ so as to subject Argentina to suit in an American court under the” FSIA. Weltover, 504 U.S. at 609. Despite the fact that these bonds were issued as part of a plan to regulate the nation’s currency, the Court concluded that these bonds were “garden variety debt instruments.” Id. at 615. The direct effect in the United States was based on the fact that the bonds were payable in the United States. Id. at 617-18. For a full discussion of the Weltover case, see Mark B. Baker, Whither Weltover: Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act?, 9 TEMP. INT’L & COMP. L.J. 1 (1995); Avi Lew, Comment, Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act’s Commercial Activity Exception to Jurisdictional Immunity, 17 FORDHAM INT’L L.J. 726 (1994); Sean J. Cleary, Jurisdiction-Foreign Sovereign Immunities Act-Foreign Sovereign Subject to United States Jurisdiction for Causing “Direct Effect” in United States, Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992), 17 SUFFOLK TRANSNAT’L L. REV. 278 (1994); Sarah K. Schano, The Scattered Remains of Sovereign Immunity for Foreign States After Republic of Argentina v. Weltover, Inc.: Due Process Protection or Nothing, 27 VAND. J. TRANSNAT’L L. 673 (1994).

whether an immunity exception existed. The Act makes no mention, however, of discovery in cases against foreign sovereigns; although the legislative history shows that Congress felt that existing discovery law was adequate.\textsuperscript{64} Nevertheless, it seems clear that one of the congressional policies was to provide for an expeditious process when determining immunity. Since the modern goal of sovereign immunity is to relieve national governments of the difficulties of defending suits around the world based on public acts,\textsuperscript{65} while at the same time allowing litigants a forum where the foreign sovereign's acts are private, the need for a set of meaningful discovery standards is apparent.

II. JURISDICTIONAL DISCOVERY

A. FSIA Jurisdictional Discovery in the Supreme Court

Although the Federal Rules of Civil Procedure (FRCP) provide for discovery of any matter "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party,"\textsuperscript{66} it has not always

\textsuperscript{64} See H.R. REP. NO. 94-1487, at 23 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6621. The legislative history of the Act shows that Congress was aware that other nations facing the same issue had included provisions relating to discovery. The European Convention on State Immunity, for example, provides:

A contracting State party to proceedings before a court of another Contracting State may not be subjected to any measure of coercion, or any penalty, by reason of its failure or refusal to disclose any documents or other evidence. However, the court may draw any conclusion it thinks fit from such failure or refusal.


\textsuperscript{65} See 1976 Hearings, supra note 14, at 27 (testimony of Monroe Leigh).

\textsuperscript{66} Federal Rule of Civil Procedure 26(b)(1) provides in full:
been clear whether the FRCP permit jurisdictional discovery. After all, before jurisdiction has been established a court technically lacks power to order discovery.

The Supreme Court addressed this issue in *Oppenheimer Fund, Inc. v. Sanders.* Starting with an analysis of FRCP 26(b)(1)'s requirement that the material sought be "relevant to the subject matter involved in the pending action," the Court favored a broad construction to include "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." This would include not only the merits of the case, but other "fact-oriented" questions that relate to the suit. In fact, the Court specifically noted that discovery could be used to determine factual questions relating to jurisdiction or venue. Of course, such discovery could not amount to a

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Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.


437 U.S. 340 (1978) (holding that the district court had abused its discretion in ordering class action defendant to assist in compiling a class list and bearing the cost of such production).

Id. at 351 (citing Hickman v. Taylor, 329 U.S. 495, 501 (1947)).

Id.

Id. at 351 n.13 (citing 4 J. MOORE, FEDERAL PRACTICE, para. 26.07(b) (2d ed. 1976)).
fishing expedition; it had to be relevant to the issue in question.\textsuperscript{72}

The Supreme Court addressed the issue even more directly in \textit{Insurance Corporation of Ireland, Ltd. v. Compagnie des Bauxites de Guinee}.\textsuperscript{73} In that case, the defendants appealed the district court's sanction, which deemed certain jurisdictional facts established when defendants refused to comply with discovery.\textsuperscript{74} Defendants argued that the court could not impose sanctions under FRCP 37(b) because jurisdiction had not been established. The Court found that this argument failed to recognize the distinction between subject matter jurisdiction and personal jurisdiction. When the court lacks subject matter jurisdiction, it cannot exercise any authority over the claim, even when the parties agree.\textsuperscript{75} On the other hand, personal jurisdiction relates to an individual liberty interest, requiring that certain minimum contacts exist between the sovereign and the defendant before it can be required to appear.\textsuperscript{76} These rights can be waived. Where the defendant appears to defend and fails to follow the rules (including discovery rules) for determining jurisdiction, the defendant may waive her right to complain that the court lacks jurisdiction.\textsuperscript{77} Thus, courts generally allow narrowly tailored discovery to resolve jurisdictional disputes.

\textbf{B. FSIA Jurisdictional Discovery in the Courts of Appeals}

Although it is now well established that federal courts allow jurisdictional discovery,\textsuperscript{78} such discovery in FSIA

\begin{itemize}
  \item \textsuperscript{72} \begin{it}Id.\end{it} at 352.
  \item \textsuperscript{73} 456 U.S. 694 (1982).
  \item \textsuperscript{74} \begin{it}Id.\end{it} at 695.
  \item \textsuperscript{75} \begin{it}Id.\end{it} at 702.
  \item \textsuperscript{76} \begin{it}Id.\end{it} at 702-03.
  \item \textsuperscript{77} \begin{it}Id.\end{it} at 704-05.
  \item \textsuperscript{78} \textit{See} Warren Christopher \& Louis B. Kimmelman, 2 Business and Commercial Litigation in Federal Courts § 17.4 (Robert L. Haig ed., 1998); Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723
\end{itemize}
cases creates unique problems. Sensitive issues revolving around discovery from a foreign sovereign are brought into play. The FSIA is different from other jurisdictional provisions in that it provides the federal courts with both personal and subject matter jurisdiction. Although this might appear to undercut the Supreme Court’s reasoning in *Insurance Corporation of Ireland*, the FSIA’s mix of subject matter and personal jurisdiction has not caused courts any pause in ordering jurisdictional discovery; instead, the judicial focus has been the discovery’s scope. A number of cases decided by the federal courts of appeals in the last decade have highlighted the important issues presented by jurisdictional discovery under the FSIA.


In *Gould, Inc. v. Pechiney Ugine Kuhlmann*, plaintiff Gould argued that the defendants, French businesses largely owned by the French government, had competed unfairly, interfered with contractual relationships, stolen proprietary information, become unjustly enriched, and committed RICO violations. The defendants moved to dismiss, arguing, among other things, that the court lacked subject matter jurisdiction under the FSIA. Gould sought jurisdictional discovery, but the defendants declined to provide the requested information. When Gould moved to compel, the defendants sought a protective order to preclude discovery until the court had ruled on defendants’ dismissal motions relating to forum non conveniens and

F.2d 357, 362 (3d Cir. 1983) (jurisdictional discovery allowed unless claim is frivolous).


81 *Id.* at 447.
failure to state a claim,\textsuperscript{82} contending that no discovery was required to decide these issues. Gould responded with affidavits detailing defendants' jurisdictional and commercial contacts with the United States. Defendants replied that the affidavits contained inaccuracies and were inadmissible. The district court denied the motion to dismiss.\textsuperscript{83}

The defendants appealed the denial of the dismissal motion to the Sixth Circuit. The Sixth Circuit began with a general discussion of the FSIA, pointing out that the Act's immunity is from suit, not liability.\textsuperscript{84} This makes it incumbent on the district court to determine subject matter jurisdiction at the action's outset. Given the importance of this decision, each side must have:

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[A] fair opportunity, to define issues of fact and law, and to submit evidence necessary to the resolution of the issues. Yet, extensive discovery and other extended proceedings at this stage may frustrate the significance and benefit of entitlement to immunity from suit. Accordingly, discovery and fact-finding should be limited to the essentials necessary to determining the preliminary question of jurisdiction. In this context, the importance of the court having precisely defined the procedures which will permit it and the parties to adequately address the issues is manifest, especially since the district court's determination concerning jurisdiction is immediately subject to appeal.\textsuperscript{85}
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The Sixth Circuit noted the importance of the burden of proof in deciding FSIA jurisdictional issues.\textsuperscript{86} Although in

\begin{footnotesize}
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\item[82] Id. at 448.
\item[83] Id. at 449.
\item[84] Id. at 451.
\item[85] Id.
\item[86] Id. The court quoted from the legislative history:

[T]he burden will remain on the foreign state to produce evidence in support
\end{itemize}
\end{footnotesize}
normal cases the party pressing for jurisdiction has the burden, the FSIA works differently. In order to trigger the Act’s protection, the defendant has the burden of establishing its status as a foreign sovereign acting in its public capacity. In this case, the defendants argued that their actions were public, not fitting within the FSIA commercial activity exception. Next, the plaintiff would be required to demonstrate the application of an exception. Gould attempted to do this by filing affidavits establishing the defendants’ commercial activities in the United States. At this point, the district court denied defendants’ motion.

The Sixth Circuit was concerned about the quality of the evidence used by the district court in deciding to deny defendants’ motion. Although the court of appeals recognized the disadvantage under which the district court was operating because the defendants refused to comply with discovery requests unless they were made pursuant to the Hague Evidence Convention, the Sixth Circuit felt that the district court should have obtained evidence that was “more probative and reliable.” Providing no guidance on what efforts the district court should have made to obtain such evidence, the Sixth Circuit merely cited the Supreme Court’s decision in Société Nationale Industrielle of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff’s claim relates to a public act of the foreign state that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.


87 See id. at 452.

88 See id.


90 See Gould, 853 F.2d at 452.
Aerospatiale v. United States District Court, which directed courts to apply a case-by-case comity analysis to determine whether resort to the Hague Evidence Convention is required. The Sixth Circuit accordingly remanded the case for additional discovery.

2. Filus v. Lot Polish Airlines

In Filus v. Lot Polish Airlines, survivors of a passenger killed in an airplane crash sued the Union of Soviet Socialist Republics (USSR) for negligent design, manufacture, and servicing of the plane and its engines. Plaintiff argued that the district court had jurisdiction over the action under the FSIA’s commercial exception to immunity. The USSR moved to dismiss, contending that the court lacked personal or subject matter jurisdiction and that the plaintiff had failed to properly serve process. In response, the plaintiff produced interrogatories relating to the jurisdictional issues. The Soviet Union argued that it was not required to answer these discovery requests until its immunity under the FSIA had been determined. The magistrate ordered that the USSR respond, but the USSR objected. This objection was consolidated with its pending

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91 482 U.S. 522 (1987). In a case involving similar issues, a federal bankruptcy court refused to require utilization of the Hague Evidence Convention in a turnover action in the bankruptcy court in which the defendant argued that the court lacked jurisdiction under the FSIA. In re Bedford Computer Corp. v. Israel Aircraft Indus., Inc., 114 B.R. 2, 5-6 (Bankr. D.N.H. 1990). Citing Societe Nationale, the court found use of the federal rules to be adequate provided that the scope of discovery was limited. Id.

92 Societe Nationale defined comity as "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." 482 U.S. at 543 n.27. For additional discussion of the comity doctrine, see Steven R. Swanson, Comity, International Dispute Resolution Agreements, and the Supreme Court, 21 LAW & POL’Y INT’L BUS. 333, 355-58 (1990); Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 AM. J. INT’L L. 260 (1982); Note, Comity, 12 VA. L. REV. 353 (1926).

93 907 F.2d 1328 (2d Cir. 1990).

94 Id. at 1331.
motion to dismiss. The district court found that the commercial exception did not apply and dismissed the case, and the plaintiff appealed.\textsuperscript{95}

The Second Circuit pointed out that the FSIA gives the district court personal and subject matter jurisdiction over "(1) a foreign state that has been (2) served with lawful process and (3) whose commercial activity has a nexus with the United States and plaintiff's cause of action sufficient to constitute an exception to foreign sovereign immunity."\textsuperscript{96} The court of appeals found that the district court had erred by deciding only the third issue because the first two issues were more likely to easily dispose of the action. In regards to the USSR's argument that discovery could not be allowed until the court determined that it had jurisdiction under the FSIA, the court disagreed. The court held that the plaintiffs should be allowed "limited discovery" relating to jurisdiction, but no other discovery would be permitted until the plaintiff had made a reasonable showing that jurisdiction was present.\textsuperscript{97} Thus, the Second Circuit remanded so that the lower court could address the first two issues and, if satisfied, could then determine what discovery would be necessary.

3. Foremost-McKesson, Inc. v. Islamic Republic of Iran

In one of the more exhaustive treatments of the FSIA jurisdictional discovery issue, the D.C. Circuit provided an example of discovery highly tailored to assist the court's jurisdictional determination. \textit{Foremost-McKesson, Inc. v. Islamic Republic of Iran},\textsuperscript{98} evolved from the complex events

\textsuperscript{95} Id. at 1332.
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 1333.
\textsuperscript{98} 905 F.2d 438 (D.C. Cir. 1990) (remanding case to district court for further development of the factual record on sovereign immunity issue). For an in-depth investigation of all the issues involved in this case, see Lisa D. Goekjian, \textit{Jurisdiction over Iran under the FSIA and the Algiers Accord, A Loose Application}}:
surrounding the Iranian Revolution. The U.S. plaintiff, Foremost, had become involved in the development of a dairy in Iran in the late 1950s. For twenty years, Foremost controlled management and held a thirty-one percent stake in the operation, known as Sherkat Sahami Labaniat Pak ("Pak Dairy"). In 1982, Foremost brought an action in the United States District Court for the District of Columbia alleging that Iran and its agencies or instrumentalities had divested Foremost of its interest in Pak Dairy. Iran's codefendants included the Financial Organization for the Expansion of Ownership of Productive Units, the National Investment Company of Iran, Industrial and Mining Development Bank of Iran, the Foundation for the Oppressed, and Pak Dairy.\(^9\) Iran argued that the complaint was barred by the Algiers Accords\(^10\) and the President's executive order implementing the agreement.\(^11\) The district court suspended action pursuant to that order, and Foremost presented its claim to the Iran-United States Claims Tribunal. Foremost was only partially successful in that venue and decided to revive its case in the district court.\(^12\) The district court allowed Iran to amend its

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\(^12\) The Claims Tribunal determined that the interference with Foremost's interest did not amount to an expropriation, but that certain cash dividends owed to Foremost had not been paid. See Foremost-McKesson, 905 F.2d at 441. The Tribunal awarded $900,000 plus interest. Id.
answer to include certain jurisdictional defenses, most importantly that the FSIA barred the action. The district court denied the motion, and Iran sought interlocutory appeal to the D.C. Circuit.

The core of the D.C. Circuit’s analysis went to the issue of whether Iran was entitled to sovereign immunity under the FSIA. In order to make this determination, it was necessary to determine first whether the actions of Iran’s codefendants were fairly attributable to Iran.\footnote{103} Iran argued that the district court, apparently relying on the Claims Tribunal’s finding, had wrongly held Iran responsible for the actions of Pak Dairy and others owning shares therein. The court of appeals found that the district court had erred in relying on the Claims Tribunal’s decision because the FSIA’s standard was more “rigorous.”\footnote{104} The appellate court agreed that the proper standard was “whether the government of Iran exercised the necessary degree of control over the other defendants to create a principal/agent relationship and thus permit this court to deem Iran responsible for their actions . . . .”\footnote{105} The court found it important to recognize the FSIA’s presumption that foreign agencies or instrumentalities have an independent legal status. This presumption is based on a concern that any U.S. reluctance to recognize the separateness of distinct legal entities might inspire foreign courts to do the same in cases involving U.S. entities.\footnote{106} When the requisite level of control is lacking, the suit should be against only the responsible agency or instrumentality, not against the state itself.

The Claims Tribunal had only required that state-controlled parties hold a majority of Pak Dairy’s shares and

\footnote{103} The court also discussed whether interlocutory appeal was appropriate, whether the district court had erred in allowing Iran to amend its 1982 answer, and whether Iran’s act fit under the commercial exception to the FSIA. \textit{Id.} at 443-52.\footnote{104} \textit{Id.} at 446.\footnote{105} \textit{Id.} at 445.\footnote{106} \textit{Id.} at 446.
elect most of the Board of Directors. The court of appeals admitted that although these factors were relevant in making an FSIA determination, they alone did not adequately establish the principal/agent relationship. Citing FSIA cases where one-hundred percent stock ownership did not create an agency relationship, the court rejected the district court’s reliance on the Claims Tribunal’s decision.107

The district court justified jurisdiction based on the allegations found in the plaintiff’s complaint. The court of appeals rejected this basis, finding that when a sovereign defendant challenges such allegations, the plaintiff clearly bears the burden of overcoming the presumption of separateness.108 The immunity determination, which amounts to avoidance of the lawsuit altogether, must be made with particular care.109 The trial court must ensure that the parties have an opportunity to develop evidence for careful judicial consideration beyond the bare facts appearing in the pleadings.110 The court of appeals noted that the district court has “considerable latitude in devising the procedures it will follow to ferret out the facts pertinent to jurisdiction,” but that the “District Court should closely control and limit the discovery and fact-finding so as to avoid ‘frustrating the significance and benefit of... immunity from suit.’”111

Back in the district court, Foremost sought discovery from the defendants on the attribution issue.112 Iran refused to respond to the discovery, even after the plaintiff narrowed its requests. Foremost sought to compel discovery. The district court discussed plaintiff’s “heavy burden” in

107 Id. at 448.
108 Id.
109 Id.
110 Id. at 449.
111 Id.
establishing subject matter jurisdiction under the FSIA. In order to meet this burden, the plaintiff must be allowed limited discovery. Citing the court of appeal’s directive that such discovery should “avoid frustrating the significance and benefit of immunity from suit,” the district court sought to balance the plaintiff’s need for discovery with the defendant’s sovereign interests.

In balancing these interests, the court again looked to the Supreme Court’s decision in Société National. Applying the case-by-case comity analysis, the court required that all plaintiff’s document requests be limited to those in the defendant’s possession. As for the relevant time frame, it determined that it would be oppressive to require disclosure of information over ten years old and that discovery should be limited to documents created prior to the complaint’s filing.

The plaintiffs also requested that Iran provide documents within its possession, custody, and control that were created in compliance with Iranian law. The court required production to the extent that the foreign sovereign possessed such documents. Plaintiffs also requested that the defendants provide copies of all Iranian laws and regulations affecting Pak Dairy. The court rejected this request, at least as to rules that were part of the public

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113 Id. at 2-3.
114 Id. at 3.
115 Id. at 7.
116 Id. at 4. The court was willing to admit that where oral communications can be identified with adequate specificity, the defendant might be required to provide discovery. Id. In this case, however, such specificity was lacking. See id.
117 Id. The court felt that documents establishing jurisdiction as of the date of the complaint would, in all likelihood, have been produced prior to that date. Id. Again, the court noted that if the plaintiff was aware of a specific document after this date that tended to show jurisdiction, the court might order its discovery. Id. Here, however, the court was dealing with rather generalized requests for materials, which puts a much greater burden on the defendant. Id.
118 Id. at 4.
record, requiring the plaintiff to do its own research to determine the foreign law.\footnote{Id.}

Plaintiffs requested that defendants provide copies of documents transmitted between co-defendants relating to Pak Dairies. When defendants argued that this request was unduly burdensome, the court found otherwise, viewing the documents as relevant to the control issue and unlikely to be found in a less burdensome fashion. Finally, there was no showing that these requests would offend Iranian sovereignty.\footnote{Id.}

The court took a comparable approach in analyzing the plaintiff’s interrogatories. In one case, the interrogatories sought information concerning what Iranian agencies and officials “controlled” Pak Dairies. The court refused to compel discovery, finding such questions to be ambiguous or duplicative.\footnote{Id.} The court ordered that Iran comply with the discovery requests as modified by its opinion.

About a month later, both sides asked the district court to reconsider its discovery order.\footnote{Id.} At the request of the plaintiff, the court allowed the cut-off date for discovery to be extended from January 22, 1982 (the date of the alleged expropriation) to December 31, 1982, because of the “normal time-lag in recording information.”\footnote{Id.} The court refused to require Iran to produce all responsive documents in its control, again limiting the required response to documents in its custody or possession.\footnote{Id.} The earlier order had not required discovery of information in the public domain. Plaintiff’s amended document requests asked for

\footnote{Id.} \footnote{Id.} \footnote{Id. The court stated that if the word “control” was used in its legal sense, the information had already been requested in other discovery, which the court would not require Iran to duplicate. \textit{Id.} at 6.} \footnote{McKesson, Inc. v. Islamic Republic of Iran, Civ. A. No. 82-0220, 1991 WL 178105 (D.D.C. Aug. 30, 1991).} \footnote{Id. at 1.} \footnote{Id. at 2.}
information that was a matter of public record in Iran. The court took judicial notice of the anti-American attitude in Iran and recognized that the plaintiffs had made a good faith effort to obtain the information. The court therefore reinstated these document requests, thereby ordering Iran to supply them.\textsuperscript{125} Iran also objected to a number of requests as being too broad. The court rejected these arguments, and ordered Iran to comply with the discovery order.\textsuperscript{126}

4. Arriba Ltd. v. Petroleos Mexicanos

The Fifth Circuit addressed FSIA jurisdictional discovery in \textit{Arriba Ltd. v. Petroleos Mexicanos}.\textsuperscript{127} The case involved Arriba's suit against Petroleos Mexicanos ("Pemex") arising out of an allegedly corrupt scheme to purchase oil indirectly from Pemex through two other entities.\textsuperscript{128} Although Pemex was not officially involved in the transaction, plaintiff argued that the other entities were the alter egos of Pemex, providing a jurisdictional basis over Pemex under the FSIA. In the district court, Pemex moved to dismiss, but the court found that Pemex had failed to show that it was entitled to immunity under the FSIA.\textsuperscript{129} The Fifth Circuit reversed and dismissed the case with prejudice, finding no evidence that these entities had been authorized to act for Pemex and expressing particular concern about the comity implications of allowing vague conspiracy notions as a basis for exercising jurisdiction over a foreign sovereign.\textsuperscript{130}

\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.}
\textsuperscript{127} 962 F.2d 528 (5th Cir. 1992), \textit{cert. denied}, 506 U.S. 956 (1992).
\textsuperscript{128} \textit{Id.} The entities were the Petroleum Workers Union of Mexico, its private contracting arm, Comision de Contratos del Sinicato de Trabajarores Petroleos de las Republica Mexicana, and former officials of the Union. \textit{Id.} at 530.
\textsuperscript{129} \textit{Id.} at 532.
\textsuperscript{130} \textit{Id.} at 537. The court stated that, "judicial comity among nations has become increasingly important in today's global economy. Flouting comity, Arriba's JFK-like charges against the defendants, if pursued in American courts, could seriously
Since the plaintiffs had not presented any evidence directly implicating Pemex, jurisdictional discovery was not appropriate:

Several courts have observed the tension between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery. The potential conflict is not unlike that attendant to claims that challenge domestic government officials' qualified immunity from suit. At the very least, discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to the immunity determination. A necessary prerequisite to an order for limited discovery is a district court's clear understanding of the plaintiff's claim against a sovereign entity.\footnote{Id. at 534. Similarly, in Goodman Holdings v. Rafidian Bank, 26 F.3d 1143 (D.C. Cir. 1994), cert. denied, 513 U.S. 1079 (1995), the D.C. Circuit stated that although the federal courts allow for liberal discovery, whenever such discovery would do little to change the jurisdictional analysis, it should not be allowed. Id. at 1147. See also Greenpeace, Inc. (U.S.A.) v. State of France, 946 F. Supp. 773, 789 (C.D. Cal. 1996) (refusing to allow discovery when it would not establish jurisdiction); Millicom Int'l Cellular, S.A. v. Republic of Costa Rica, No. CIV.A.96-315(RMU), 1997 WL 527340 (D.D.C. Aug. 18, 1997) (holding that when plaintiff makes a showing that would support jurisdiction under the FSIA if supported by additional facts, the court should allow limited discovery in order to allow the plaintiff to establish those facts); Crist v. Republic of Turkey, 995 F. Supp. 5 (D.D.C. 1998) (finding discovery not available when plaintiffs jurisdictional theory is based on theory and surmise).}

In the instant case, the district court had not demanded this requisite showing. The Fifth Circuit found that the court lacked subject matter jurisdiction over the claim.\footnote{Arriba, 962 F.2d at 537.}
5. Taiwan v. United States District Court

Another recent case shows how closely immunity issues are related to public international law concerns. In *Taiwan v. United States District Court for the Northern District of California*, Taiwan asked the Ninth Circuit to issue a writ of mandamus against a discovery order in a wrongful death action against Taiwan and its Taipei Economic and Cultural Representative Office (TECRO). When the United States chose to recognize the People’s Republic of China and break off diplomatic relations with Taiwan, Congress enacted the Taiwan Relations Act (TRO), continuing the United States’ traditional close ties with the Taiwan government. Under the Act, TECRO was analogous to an embassy of a recognized country in Taiwan’s relations with the United States. The TRO permitted the President to grant TECRO and its personnel necessary immunities to fulfil its functions. Indeed, the United States entered into the Agreement on Privileges, Exemptions, and Immunities Between the American Institute in Taiwan and the Coordination Council for North American Affairs in 1980 (“1980 Agreement”). The 1980 Agreement provided for the inviolability of TECRO archives and documents as well as immunity for certain employees for “acts performed by them within the scope of their authorized functions . . . .”

The case stemmed from Peter Sun’s participation in the Overseas Chinese Youth Language Training and Study Tour, sponsored by the Taiwan government and two of its agencies, the Overseas Chinese Affairs Commission (OCAC) and the China Youth Corps (CYC). While on a swimming trip, Sun drowned, and plaintiffs brought an action against TECRO, CYC, and OCAC for wrongful death and Sun’s

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133 128 F.3d 712 (9th Cir. 1997).
135 *Taiwan*, 128 F.3d at 714.
136 *Id.*
137 *Id.* The agreement also provided for immunity “equivalent to those enjoyed by public international organizations in the United States.” *Id.*
pain and suffering.\textsuperscript{138} The Taiwan defendants moved to
dismiss, arguing that the court lacked subject matter
jurisdiction under the FSIA. A set of declarations from
Kang Seng Tsai, a TECRO Deputy Director, regarding
TECRO’s activities in the United States, TECRO’s
involvement in the study tour, and Taiwan law on TECRO’s
immunity supported the motion.\textsuperscript{139} When plaintiffs sought
to depose Tsai, the Taiwan defendants objected, arguing
that Tsai had diplomatic immunity. The district court
ordered Tsai to appear for a deposition, but limited
questioning to the information provided by Tsai’s
declaration and areas bearing on the relationships among
TECRO, the Center for Cultural Education, OCAC, and the
Study Tour.\textsuperscript{140} The Taiwan defendants sought

\textsuperscript{138} Id. at 715.
\textsuperscript{139} Id. at 715-16.
\textsuperscript{140} The court listed the seven areas:

(1) The structure and responsibilities of the Chinese Cultural Center (CCC),
also called the Center for Culture and Education (CCE), from 1990-present.
The relationships of CCC/CCE to defendants OCAC, Taiwan, and TECRO.
(2) The functions of the Service Division of TECRO in regard to the Study
tour, especially relating to documents received in discovery. The
relationship of the TECRO Service Division to OCAC. The regular course of
business between TECRO, CCC/CCE, and OCAC, including written
communications, reports, and accountings. The financial transactions
between those entities from 1990-present. (3) Whether there are shared
facilities utilized by TECRO, CCC/CCE, and OCAC, shared employees, or
shared officers. Whether any of these employees, facilities, or officers have
been participants in the Study Tour organization or management from 1990-
present. (4) Tsai’s knowledge of any counseling and training received by the
Service Division, TECRO, CCC/CCE, and OCAC from anyone with regard to
the organization and implementation of the Study Tour. (5) The function of
TECRO in coordinating other CCC/CCE officers from 1990-present. The
functions of TECRO in hiring, recruiting, assisting, or advising participants
from 1990-present. The involvement of TECRO in handling complaints
regarding incidents surrounding conduct of the Tour from 1990-present. (6)
Investigation into matter specifically referred to in each and every one of the
declarations filed on behalf of any of the defendants by Mr. Tsai. (7)
Investigation into any matter specifically referred to by this Court in its
October 3, 1995 Order.

\textit{Id.} at 716.
reconsideration, which was denied, and then went to the Ninth Circuit for a writ of mandamus.

The Ninth Circuit granted the writ, finding Tsai imbued with testimonial immunity for all areas covered by the district court's discovery order except those relating to his declaration. The district court had argued that Tsai should be forced to testify because his immunity under the 1980 Agreement was limited to acts performed within the scope of official duties and none of the deposition areas required such testimony. The Ninth Circuit disagreed with that narrow interpretation of the agreement's testimonial immunity as ignoring the provision that TECRO's archives and documents were inviolable. This provision would be meaningless if a TECRO employee could be forced to testify about those documents because they did not concern her acts. In this case, many of the questions allowed by the district court would have dealt with information in TECRO archives.

The Ninth Circuit also noted that the 1980 Agreement incorporated the immunities of public international organizations and, consequently, the International Organizations Immunities Act (IOIA). Like the 1980 Agreement, the IOIA contains language safeguarding the inviolability of archives and documents. The Department of State had argued for broad construction "to provide testimonial immunity for all information that a covered individual possesses solely by virtue of his official position." Given the deference owed the executive branch in foreign affairs matters, the court followed the Department of State's interpretation.

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141 Id. at 717.
142 Id. at 718.
143 Id.
145 Taiwan, 128 F.3d at 718.
The Ninth Circuit was willing, however, to allow a deposition relating to the matters contained in Tsai’s declaration. After all, the Taiwan defendants voluntarily submitted this information, making no such choice regarding the other subjects addressed by the district court’s order.\textsuperscript{146} In addition, the court found a “compelling reason” to require Tsai to testify because of the need to determine FSIA immunity, a process requiring consideration of the factual matters addressed in the declaration.\textsuperscript{147} Tsai would, however, be allowed to refuse to provide answers that would reveal information known to him because of his official duties. If he should refuse to answer, the district court would then strike from the record the declaration portions that related to the refusal, potentially eliminating the entire declaration.\textsuperscript{148} Once again, the court attempted a delicate balance of the various interests involved to satisfy the policies behind both immunities involved in the need for jurisdictional precision.

6. In re Papandreou

Another decision involving the proposed witness’s special status came in the D.C. Circuit’s opinion in \textit{In re Papandreou}.\textsuperscript{149} The case involved the defendant’s attempt to obtain a writ of mandamus ordering the district court to vacate its discovery order in an action stemming from a proposed casino development in Athens, Greece. The plaintiffs, Rosemarie Marra and Marecon Enterprises,\textsuperscript{150} were shareholders in a consortium that paid $44 million for a casino license, and Greece sought to revoke the agreement and return the license fee. The plaintiffs sought damages

\begin{footnotes}
\item[146] \textit{Id.} at 719.
\item[147] \textit{Id.}
\item[148] \textit{Id.}
\item[149] 139 F.3d 247 (D.C. Cir. 1998).
\item[150] Marecon Enterprises is a Liberian corporation. Marra is its president and sole shareholder. \textit{Id.} at 249.
\end{footnotes}
for breach of contract and wrongful confiscation of property. The defendants, the Greek Minister of Tourism and various other Greek governmental instrumentalities, sought dismissal based on lack of standing, the act of state doctrine, lack of personal jurisdiction, forum non conveniens, and the FSIA's jurisdictional provisions.

At issue was the plaintiffs' discovery relating to FSIA jurisdiction. Plaintiff sought to depose the Greek Ministers of Tourism and the Economy for information on Greek attempts to obtain casino investments in the United States. When the district court allowed such depositions, the defendants sought a writ of mandamus from the D.C. Circuit.\(^{151}\)

The court of appeals discussed the appropriate occasion for granting a writ of mandamus. Although the appellate court ordinarily lacks jurisdiction to hear interlocutory appeals, the court will grant this remedy in extraordinary circumstances, when the interests of the petitioner are "clear and indisputable" and there is "no other adequate means to attain the relief."\(^{152}\) Often, the way to test the legality of a discovery order is to refuse compliance. The district court can then hold the litigant in contempt, and that final order can be appealed. In some cases, however, requiring the litigant to go through the contempt process can be "problematic." As one example, the court cited the case involving President Nixon, in which it was seen as "unseemly" to create a constitutional crisis by requiring the President to violate the district court's subpoena.\(^{153}\) The court also discussed the use of mandamus actions to protect discovery privileges, which are not adequately protected

\(^{151}\) Id. at 249-50.
\(^{152}\) Id. at 250 (citing Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).
despite a successful appeal once there has been disclosure.\textsuperscript{154}

In contrast, the D.C. Circuit felt that the instant case raised very different issues because it involved immunity rather than privilege. In a privilege case, the party opposing discovery may refuse to comply and then appeal the resulting contempt citation; if the appeal is successful, the privilege is protected. Foreign sovereign immunity provides a unique protection from litigation itself, rather than a defense to the merits of the suit.\textsuperscript{155} Because of this, courts have allowed an immediate appeal of the immunity decision.\textsuperscript{156} Correspondingly, the court felt that jurisdictional discovery on the immunity issue raises the same policy concerns and should be subject to immediate appeal. The fact that the United States had filed an \textit{amicus} brief supporting the defendants gave additional support for the court's decision.\textsuperscript{157}

Having determined that mandamus was appropriate here, the court next considered whether the district court had committed a "clear abuse of discretion" in ordering discovery.\textsuperscript{158} The court first examined the FSIA's jurisdictional provisions. Focusing on the commercial exceptions to the Act's general immunity grant, the court noted that an immunity decision often requires more than investigating the parties' pleadings,\textsuperscript{159} and that a grant of narrowly tailored discovery is appropriate in such cases.

Petitioners argued that the discovery order required the production of irrelevant information, but the court of appeals disagreed. After all, the case involved an alleged

\textsuperscript{154} Papandreou, 139 F.3d at 251.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 251-52. The court noted that the opinion of the Department of State is not authoritative, but that its views on diplomatic protocol should be given great weight. Id.
\textsuperscript{158} Id. at 252.
\textsuperscript{159} Id.
breach of contract, and the parties agreed that both the contract and the attempted revocation took place in Greece. If an exception to immunity were to exist, it would have to be "based upon a commercial activity carried on . . . by a foreign state [and having substantial contact with the United States]."\textsuperscript{160} Exactly what constitutes "substantial contact" is somewhat unclear, but discovery relating to the defendants solicitation of investors in the United States could be relevant.\textsuperscript{161} A finding of relevance, however, is not enough when the issue involves foreign sovereign immunity. In such cases, courts must be particularly cautious to avoid undermining the very values that immunity was meant to protect.\textsuperscript{162} In the instant case, the court of appeals found that the district court's discovery order was inappropriate in two respects.

First, relying on domestic decisions, the D.C. Circuit found that oral depositions of cabinet level officials should be rare events.\textsuperscript{163} The doctrine of international comity requires that similar deference be shown for foreign government officials of equal rank.\textsuperscript{164} In order to overcome this presumption against oral testimony, the party seeking discovery must establish a special need. The court held that the plaintiffs had failed to make the requisite showing. The desired information relating to solicitation in the United States could likely be obtained through other, less intrusive methods, such as deposing U.S. citizens who had been solicited or lower Greek officials, or by serving Greek cabinet-level officials with interrogatories.\textsuperscript{165}

\footnotesize{\textsuperscript{160} The court formulated this exception by combining the requirement of 28 U.S.C. § 1605(a)(2) (1994) with the definition in 28 U.S.C. § 1603(e) (1994). Id.\textsuperscript{161} Id. at 253.\textsuperscript{162} Id.\textsuperscript{163} Id. at 254 (citing Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985) (finding that top executive department officials should not, absent extraordinary circumstances, be called to testify)).\textsuperscript{164} Id. 139 F.2d at 254.\textsuperscript{165} Id. The court was particularly puzzled why the plaintiff sought to depose Minister Papandreou concerning solicitation, given that she was not in office at the}
The district court's second error was its failure to consider whether certain other jurisdictional defenses might make the FSIA jurisdictional discovery unnecessary. The district court had refused to do this because of a desire not to undercut the FSIA immunity. The court of appeals agreed that the immunity value was of primary importance, but that this did not require an immunity determination before considering other similarly dispositive jurisdictional issues. In this case, the purpose of immunity was to "reduce the expenses, in time and inconvenience, imposed on foreign sovereigns by litigation in U.S. courts." When a different jurisdictional defense could be more easily decided with the defendant's approval, the court should do so first, before allowing FSIA jurisdictional discovery. Any other result might yield greater expense and inconvenience.

In determining which issues should be decided first, the court of appeals conceded that such matters are normally well within the trial court's discretion. Still, when exercising this discretion, the lower court should apply the following formula:

A sample decision procedure, which captures the relevant concerns but may overstate their arithmetic tractability, would be to eyeball each jurisdictional defense and, for each, divide the estimated burdens of evaluation by the estimated chance of success, and then evaluate the defenses in increasing order of the corresponding quotient.

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165 Id.
166 Id.
167 Id.
168 Id. The court further explained in a footnote:

For example, where defendant raises defense A, with a burden of 10 and a likelihood of success of .5, and defense B, with a burden of 15 and a likelihood of success of .8, the quotients are 10/.5 or 20 for A and 15/.8 or 18.75 for B, and the court would start with B.
Here the defendants had urged four possible defenses that might make a FSIA determination unnecessary: standing, forum non conveniens, personal jurisdiction, and the act of state doctrine. With regard to these, the court must first determine whether each is jurisdictional or relates to the merits, because the court cannot decide merit-related issues if it lacks jurisdiction.\textsuperscript{169} Thus, the court examined the Greek defenses one-by-one to determine whether each was jurisdictional and subject to an expedited decision.

Starting with the standing issue, the court admitted that it could be jurisdictional. In this case the defendants merely argued that the plaintiffs could not sue because such rights belonged to the injured joint venture. The court seemed unconvinced by this standing argument, stating that it sounded more like a merits-based defense.\textsuperscript{170} The court refused, however, to determine whether this was an appropriate standing argument.

The court next addressed the forum non conveniens argument. It pointed out that forum non conveniens is not a jurisdictional question, but a discretionary doctrine of judicial abstention.\textsuperscript{171} Despite this, the court felt that the court's exercise of this discretion was "as merits-free as a finding of no jurisdiction," making it appropriate for the court to dismiss on this basis without reaching the FSIA issue. Similarly, the defendants' personal jurisdiction argument could be considered because it did not go to the court's subject matter jurisdiction or require any decision on the merits.\textsuperscript{172}

The court was quickly able to dispose of the act of state argument due to the Supreme Court's decision in \textit{W.S. Kirkpatrick \& Company, Inc. v. Environmental Tectonics...}

\textsuperscript{169} Id. at 254 n.5.
\textsuperscript{170} Id. at 254-55.
\textsuperscript{171} Id.
\textsuperscript{172} Id. at 255-56.
Corporation International,\textsuperscript{173} which characterized the act of state doctrine as a substantive rule of law. Because it is substantive, the district court lacked the power to decide the issue without first assuring itself of appropriate subject matter jurisdiction.

Ultimately, the court of appeals left the determination and order of these defenses to the district court, granting the writ of mandamus and vacating the district court's discovery order.\textsuperscript{174}

III. CREATING A UNIFIED APPROACH FOR JURISDICTIONAL DISCOVERY UNDER THE FSIA

The circuit courts that have addressed jurisdictional discovery under the FSIA have struggled with fact-specific inquiries without the benefit of a meaningful, unified approach to handle the panoply of significant issues necessarily implicated by such decisions. The construction of a thoughtful, predictable and singular standard would more consistently advance the FSIA policy goals than can the current, less certain, case-by-case analysis.

Undeniably, courts addressing discovery requests in the FSIA context face a daunting task. Providing citizens with their day in court, while at the same time protecting vital U.S. comity concerns, is a difficult tightrope to walk. The FSIA's passage, however, shows that Congress wanted more stability in the legal standards surrounding immunity decisions. Given that foreign sovereign immunity is supposed to provide protection from the burdens of defending a lawsuit, the caution should naturally extend to jurisdictional discovery. So far, the circuit courts' case-by-case determinations have reflected this caution, resisting


\textsuperscript{174} Papandreou, 139 F.3d at 256.
the temptation to flex judicial muscles in cases involving foreign sovereign defendants. On the other hand, courts’ inability to formulate clearly articulated principles to guide jurisdictional discovery under the FSIA creates dangerous vulnerability in this sensitive area.

Nevertheless, a close reading of the key cases provides a useful starting point for constructing a unified approach. In any judicial consideration of whether to grant jurisdictional discovery, the first step for the court is to clearly understand the plaintiff’s jurisdictional claim. In most instances, the plaintiff would first assert its initial claim, the defendant would then claim immunity as a foreign state, and it would then be the plaintiff’s burden to establish an applicable exception to immunity. At this point, the court should require that the plaintiff cleanly set forth the theoretical basis for the exception. Allowing a vague, unformed argument would undercut FSIA goals. Although the Act was designed to give the plaintiff her day in court, it was certainly not meant to encourage jurisdictional fishing expeditions. Thus, before discovery begins, the district court should understand precisely how the plaintiff delineates the exception and, correspondingly, specifically how discovery would buttress the theory. Absent this clarity and precision, the case should be dismissed.

At this early stage, the court should also determine whether any other threshold-level defenses exist that might cause the case to be dismissed with less discovery or no discovery at all. This inquiry, of course, would not allow the court to look at any issue implicating the merits; after all, the court lacks the power to examine the merits until subject matter jurisdiction has been ascertained. On the other hand, arguments that the court lacks personal jurisdiction, that venue is improper, that service was

175 See supra text accompanying notes 85-86, 131-33.
176 See supra text accompanying notes 97-98, 167-75.
incomplete or improper, or that the court should exercise its discretion under the forum non conveniens doctrine might trigger a dismissal with less burden on the foreign sovereign defendant. As In re Papandreou showed, the court should compare the likelihood of success for each defense with the overall burden of evaluating that defense. In this way, the court minimizes interference with the foreign sovereign. Of course, if none of the defenses is successful, the foreign governmental entity may become subject to the U.S. court's jurisdiction.

If the first two steps are unsuccessful in eliminating the need for additional jurisdictional discovery, the court should carefully consider the issuance of a narrowly tailored discovery order. This consideration involves evaluating the need for jurisdictional facts and the relative burden that discovery would place on the foreign sovereign. The district court enjoys considerable latitude when fashioning a discovery order tailored to the individual case's needs, always keeping in mind the important comity concerns inherent in FSIA matters. Although the court should narrowly define the discovery's scope and closely supervise the process, precedent provides virtually no significant guidance.

The courts of appeals have suggested the approach to foreign discovery outlined in the Société Nationale case and the Restatement (Third) of Foreign Relations Law. In Société Nationale, the Court suggested that the appropriate discovery determination in an international case required looking to the "particular facts, sovereign interests, and likelihood that resort to those procedures would prove

\footnotesize{177 See supra text accompanying note 168.
178 See supra text accompanying note 169.
179 See supra text accompanying notes 110-12.
180 See id.
181 See supra text accompanying note 112.
182 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (1986).}
effective." Unfortunately, neither Société Nationale nor the Restatement deals with the special circumstances surrounding a governmental entity as defendant. Although one defendant was wholly owned by the French government, Société's focus was whether the Hague Convention on the Taking of Evidence in Civil or Commercial Matters\textsuperscript{184} should be the exclusive method for obtaining discovery from signatory countries. The Court determined that the Convention was not exclusive, applying the FRCP under an amorphous comity test and standards found in Restatement section 442. It is likely that the Restatement section 442 was never meant to apply to jurisdictional discovery under the FSIA. Comment c to Restatement section 451,\textsuperscript{185} which provides the basic rule for foreign sovereign immunity, addresses FSIA discovery. It merely states that the normal procedures for discovery should be followed in determining whether immunity exists, making no mention of the section 442 analysis.

Nevertheless, section 442 balancing may prove helpful in designing an approach to jurisdictional discovery under the

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\item The comment provides in part:
\begin{quote}
Neither the Foreign Sovereign immunities Act of the United States nor corresponding legislation in other states addresses the issue of discovery against foreign states. When a state is party to an action in a court of another state-whether as a plaintiff or as defendant-all the normal procedures associated with adjudication in that court, including discovery and requirements for posting security, are applicable, except as expressly excluded. A state subject to suit under the restrictive theory, then, is subject to discovery in connection with such suit.
\end{quote}
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See Restatement (Third) of Foreign Relations Law of the United States § 442 cmt. c (1986). Of course this assumes that the court has jurisdiction. It does not address discovery to determine whether the restrictive theory applies.
FSIA. The Restatement attempts to balance relevant concerns,\textsuperscript{166} including sovereign interests:

In deciding whether to issue an order directing production of information located abroad, and in framing such an order, a court or agency in the United States should take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; whether the information originated in the United States; and the availability of alternative means of securing the information; the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.\textsuperscript{187}

The Restatement provisions, by their very terms, assume that the information is abroad, which is not the case in many FSIA jurisdictional discovery actions. Although the information’s location has some bearing, it is not the key. Far more meaningful are the defendant’s sovereign status and the claim’s nexus to private activity; these issues may bring different policy concerns into play. Nevertheless, this interest balancing provides helpful guidance for a jurisdictional discovery standard in the FSIA context. It is entirely appropriate for a court to consider the information’s importance to the jurisdictional determination; after all, the court’s very power to adjudicate the case depends upon that determination. Indeed, the first two steps suggested by this article go to this very issue. The information’s relative importance will partly depend upon the plaintiff’s clarity in explaining its jurisdictional theory. The need for specific discovery disclosure will be compelling when required to establish an FSIA exception. When another dispositive defense is at

\textsuperscript{166} Id. § 442(1)(c).
\textsuperscript{187} Id.
issue, the need for jurisdictional information may be lessened or even eliminated under section 442’s balancing approach.

Restatement section 442’s specificity consideration is quite significant in an FSIA jurisdictional discovery case. Generally, the courts considering the issue have been careful to tailor discovery narrowly so that it will be as unobtrusive as possible. The breadth of the required discovery is one key element in the court’s evaluation. Of course, if the issues have been appropriately defined, the court can focus discovery directly on those matters. If the issues have not been adequately defined, the court should pursue more specificity or reject plaintiff’s discovery request altogether. The information’s location and availability of alternative sources may also prove relevant. When the information is not easily accessible or is available from another source, the court may defer to foreign sovereign immunity interests and refuse to allow discovery.

Perhaps the most difficult, and most important, consideration under the Restatement standard is the last one: whether noncompliance with discovery would undermine U.S. interests or whether compliance would injure significant interests of the state where the information is located. Although these factors go to the basic policy premise underlying these cases—the tension between domestic and foreign state interests—the consideration is not explicitly designed to apply to FSIA jurisdictional discovery problems. In the FSIA context, Congress has already specifically resolved these thorny issues, deciding that U.S. interests require access for litigants to U.S. courts whenever the foreign state defendant behaves as a private party. The FSIA similarly concludes that the foreign state should escape litigation burdens when it acts in its public capacity. Since these dueling interests are at the core of jurisdictional discovery, courts should defer to the congressional purpose provided in the FSIA. Application of section 442’s more general
standard could inappropriately divert the court's focus to other, substantive, foreign interests rather than the issue that Congress intended the court to consider. In jurisdictional discovery cases, the court needs to focus instead on the U.S. interest in providing a forum for litigation against a foreign state when it acts in a private capacity as opposed to the foreign state's interest in avoiding the burdens of litigation when it is acting in its public capacity. The judicial inquiry should be whether the requested information is likely to resolve the foreign state's role.

So how should foreign sovereign interests be weighed in making the jurisdictional discovery determination? When evaluating the concerns of the country attempting to avoid discovery, it is important to understand that some interests, like the diplomatic immunity claim in the Taiwan case, would trump any discovery claim. After all, the importance of diplomatic immunity to a functioning international system is far more significant than the application of individual civil and criminal liabilities. Absent waiver, the court should never violate a foreign state's diplomatic immunity.

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188 The Restatement's comment c. to § 442 explains the interests to be considered:

In making the necessary determination of foreign interests under Subsection (1)(c), a court or agency in the United States should take into account not merely a general policy of the foreign state to resist intrusion upon its sovereign interests, or to prefer its own system of litigation, but whether producing the requested information would affect important substantive policies or interests of the foreign state. In making this determination, the court or agency will look, inter alia, to expressions of interest by the foreign state, as contrasted with expression by the parties; to the significance of disclosure in the regulation by the foreign state of the activity in question; and to indications of the foreign state's concern for confidentiality prior to the controversy in connection with which the information is sought. (emphasis added).

Id. § 442 cmt. c.

189 See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 663-64 (2d ed. 1995).
Other comity concerns are also important in the balance. A good example can be seen in the Papandreou case, where the court refused to require the depositions of foreign cabinet-level officials. Only the highest showing of need would overcome the enormous burden associated with compelling such testimony. Although Congress has placed great emphasis on the plaintiff's need for an adequate forum, it would usually be possible—and far preferable—to obtain the desired information from a different source. It would be rare indeed that a foreign official's testimony would be so unique and critical to the plaintiff's case that such discovery would be ordered.

Balancing less heavily, but still of concern, are the foreign government's claims that the requests are intrusive or a nuisance. Like in the Foremost case, the court should not force the state claiming immunity to provide information that the claimant can easily obtain as a matter of public record. The court should also not force the immunity-claiming state to throw open all its records to the claimant in clear violation of the comity doctrine. In these cases, the court's approach should usually allow discovery if it is truly needed, but tailor it very carefully to avoid unnecessary intrusiveness.\(^{190}\)

Finally, the foreign state's generalized complaints that it is not subject to discovery should be granted the least weight in the balancing process. Congress has determined that foreign sovereigns are subject to discovery in U.S. courts, and weak, nonspecific arguments by foreign governments to the contrary are not persuasive. Of course, the courts should still consider comity concerns and craft any discovery to prevent offending a foreign nation, but in this context the plaintiff enjoys a favored position.

\(^{190}\) For an example of a court's careful plan to tailor discovery, see Gabay v. Mostazafan Found. of Iran, 151 F.R.D. 250, 257 (S.D.N.Y. 1993) (court requiring plaintiff to submit a detailed limited discovery plan plus a memorandum of law in support of the plan).
Having struck the appropriate balance, what judicial sanctions can coerce the foreign government to comply? FRCP 37 presents the normal discovery sanctions.\textsuperscript{191} This includes the possibility of the court drawing inferences that are adverse to those of the foreign state.\textsuperscript{192} The court may also strike jurisdictional defenses, such as the entire foreign sovereign immunity claim.\textsuperscript{193} In addition, FRCP 37 provides the possibility of holding the unwilling foreign state in contempt of court.\textsuperscript{194} This last approach seems the least appropriate, given the intrusive and punitive nature of such relief.

Finally, the courts of appeal should liberally grant review of district court decisions on FSIA jurisdictional discovery.\textsuperscript{195} The underlying need for recognizing comity concerns, predictability, and uniformity makes an expeditious review process essential to a foreign sovereign trying to avoid suit. If no appeal were available until after the suit’s completion, the state would de facto face the burdens of litigation regardless of the appeal’s ultimate outcome. This would undercut the FSIA’s policies and could unnecessarily create friction between the United States and other states.

Although courts’ decisions on FSIA jurisdictional discovery have shown proper solicitude for the goals of the

\footnotesize{\textsuperscript{191} For a discussion of Rule 37(b) sanctions in jurisdictional discovery cases, see Sarah C. Murphy, Note, The Use of Rule 37(b) Sanctions to Enforce Jurisdictional Discovery, 50 FORDHAM L. REV. 814 (1984). But see Note, Sanctions to Enforce Jurisdictional Discovery: Constitutional and Prudential Limitations, 68 VA. L. REV. 921 (1982) (arguing that the court must use its civil contempt power to enforce jurisdictional discovery).

\textsuperscript{192} FED. R. CIV. P. 37(b)(2)(A).

\textsuperscript{193} FED. R. CIV. P. 37(b)(2)(B-C). Of course there may be cases where it is not appropriate to strike the defendant’s argument. For example in Société Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958), the Supreme Court refused to dismiss the plaintiff’s complaint when it was unable to comply with discovery because compliance would violate Swiss law. It would seem that this argument would be less convincing when the party arguing that compliance would violate foreign law is the foreign government itself.

\textsuperscript{194} FED. R. CIV. P. 37(b)(2)(D).

\textsuperscript{195} See supra text accompanying notes 152-58.}
FSIA, the adoption of the approach outlined above should regularize the process, making it more uniform and predictable. By beginning every analysis with a consideration of issues that could eliminate the need for jurisdictional discovery entirely, the suggested approach shows proper recognition of the interest of the foreign state in avoiding litigation in a U.S. court. When the court is forced to require discovery, the balancing test reflects the policy goals of the FSIA by comparing the need for the information to determine jurisdiction against the burden on the foreign state. This approach better reflects the true conflict presented in FSIA cases than does the Restatement test, which provides an overly broad consideration of state interests. Adoption of the proposed balancing test would give the courts the opportunity to develop predictable standards and to improve the uniformity of FSIA jurisdictional determinations.

CONCLUSION

Early U.S. cases provided for absolute immunity for foreign sovereigns from suit in United States courts. With foreign governments’ greater involvement in the private sector in the 20th century, the private claimant’s increasing need to resolve disputes with government entities using the legal system became apparent. Accordingly, the restrictive theory of sovereign immunity emerged to allow access to the legal system when a foreign government enters the market as a private player. The United States adopted this approach in the 1950s and codified it in the Foreign Sovereign Immunities Act of 1976. The Act generally provides immunity for foreign sovereigns, but creates a number of exceptions. Once a suit is brought, the defendant must first establish the Act’s facial application, and then the plaintiff can answer by establishing an exception. The latter often requires the production of facts that are only found in the sovereign defendant’s hands.
Several important cases have addressed issues relating to FSIA jurisdictional discovery, but the results have been rather haphazard and case specific. It is time for the courts to develop a fulsome, predictable approach that carefully considers and incorporates the FSIA policies. This article suggests such an approach. After the foreign state has established its public status under the FSIA, the plaintiff must specifically articulate the applicable exception theory and explain how the information sought would buttress its argument. Next, the court should determine whether any other threshold defenses might make discovery unnecessary, or at least less onerous. Should discovery become unavoidable, the court must carefully balance the plaintiff's need for her day in court with the foreign defendant's interest in avoiding the burden of defending the lawsuit. In evaluating the defendant's burden, the court should consider the information's source, as well as the difficulty in obtaining it. Any subsequent discovery order must be narrowly crafted to obtain only that information necessary to determine whether the Act's exception is applicable. Finally, a ready avenue of appeal should be available to resolve disputes before the foreign sovereign is forced to shoulder additional burdens in defending a lawsuit.

This approach reflects FSIA policies by providing the litigant a fair opportunity for his claim to be heard in a U.S. court while protecting a foreign state from baseless litigation and the nuisance of unrestricted discovery. By focusing on a consideration of the needs of claimants against the important concerns of foreign states, the approach appropriately advances FSIA policies. Unless the courts adopt such a uniform approach, these policies are likely to be disregarded.