5. The definition of "commercial activity" and the meaning of "direct effect in the United States" came before the U.S. Supreme Court in 1992. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992).

(a) In 1981, the government of Argentina and its central bank had begun a foreign exchange insurance program under which private Argentine persons with foreign currency debts could pay to the central bank an amount of pesos equivalent to the outstanding dollar obligation, in return for a promise by the central bank to supply the necessary foreign exchange when the debt matured. Thus the government in effect protected Argentine debtors against the effects of devaluation, and it was hoped, induced foreign lenders to continue to make credit available even in the face of persistent high inflation and devaluations in Argentina. In 1982, amid the world-wide crisis of developing-country debt, Argentina, like Mexico and Brazil,[14] was unable to meet its foreign exchange obligations, including those under the foreign exchange insurance program. The Government adopted an emergency program, one element of which was issuance by the central bank of so-called *Bonods* to foreign holders of debt subject to the foreign exchange insurance program. The Bonods were denominated in dollars, bore interest linked to the London Interbank rate, and were stated to be payable in Frankfurt, London, Zurich, or New York. The Bonods contained no jurisdiction clause or waiver of immunity; they recited that they had been issued pursuant to Argentine Government Decree 1334/82, but had no express choice of law clause.

When the Bonods began to mature in 1986, the Argentine government still lacked sufficient foreign exchange. In consultation with the International Monetary Fund and the U.S. Treasury department, Argentina proposed a rescheduling of its obligations, including deferral of the maturity date of the Bonods. Most holders of Argentine debt participated in the program of refinancing and rescheduling, but plaintiffs, two Panamanian corporations and a private Swiss bank, refused to go along with the plan, and instead brought suit in federal court in New York.

Argentina and Banco Central moved to dismiss on grounds of sovereign immunity. Argentina argued:

(i) that issuance of the Bonods was part of a governmental activity related to managing of a foreign exchange crisis, and thus not a commercial activity within the meaning of the FSIA; and

(ii) that failure to pay off the Bonods when due did not constitute a direct effect in the United States within the meaning of the third clause of § 1605(a)(2) of the FSIA when the holders of the Bonods had no relation to the United States.[15]

How should this case be decided? Note that plaintiffs need to prevail on both issues; if defendants prevail on either issue, the action must be dismissed.

14. See, e.g., A. Lowenfeld, The International Monetary System, pp. 279–321 (2d ed. 1984).

15. Recall that this situation—failure to pay a foreign corporation in the United States—was expressly left open by Judge Kaufman in *Texas Trading*, p. ___ supra. See also question 1(d), p. ___ infra, commenting on *Verlinden v. Central Bank of Nigeria*, p. ___, infra.

N (b) The district court rejected the motion to dismiss,[16] and the Court of Appeals affirmed.[17] Both courts held that the activity in question was issuance of debt instruments, "clearly the type of activity that private persons can, and often do, engage in for profit."[18] As to "direct effect in the United States," the Court of Appeals rejected a rule looking to the domicile of plaintiffs. "Public policy considerations compel the conclusion," the Court of Appeals wrote, "that Congress would have wanted an American court to entertain this action. New York, as a preeminent commercial center, has an interest in protecting those who rely upon that reputation to do business, whether through the banking industry or otherwise [citing *Allied Bank*, p. ___ supra.]"[19]

N (c) The Supreme Court granted certiorari, but affirmed unanimously, in an opinion by Justice Scalia. On the issue of commercial activity, the Court wrote:

N21 We conclude that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce." Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity, because private companies can similarly use sales contracts to acquire goods....

N21 The commercial character of the Bonods is confirmed by the fact that they are in almost all respects garden-variety debt instruments: they may be held by private parties; they are negotiable and may be traded on the international market (except in Argentina); and they promise a future stream of cash income. We recognize that, prior to the enactment of the FSIA, there was authority suggesting that the issuance of public debt instruments did not constitute a commercial activity. *Victory Transport*, [p. ___ supra] (dicta). There is, however, nothing distinctive about the state's assumption of debt (other than perhaps its purpose) that would cause it always to be classified as *jure imperii*, and in this regard it is significant that *Victory Transport* expressed confusion as to whether the "nature" or the "purpose" of a transaction was controlling in determining commerciality. Because the FSIA has now clearly established that the "nature" governs, we perceive no basis for

FN 16. Weltover, Inc. v. Republic of Argentina, 753 F.Supp. 1201 (S.D.N.Y.1991).

FN 17. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145 (2d Cir.1991).

18. 941 F.2d at 151. FN

19. Id. at 153. FN

concluding that the issuance of debt should be treated as categorically different from other activities of foreign states.[20]

On the issue of "direct effect in the United States," Justice Scalia was sarcastic about the invocation of New York's interest by the Court of Appeals but still found sufficient effect in the United States to satisfy the statute.

> Although we are happy to endorse the Second Circuit's recognition of "New York's status as a world financial leader," the effect of Argentina's rescheduling in diminishing that status (assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the "direct effect" requirement of the FSIA.
>
> We nonetheless have little difficulty concluding that Argentina's unilateral rescheduling of the maturity dates on the Bonods had a "direct effect" in the United States. Respondents had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. Because New York was thus the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a "direct effect" in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming. We reject Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States. We expressly stated in Verlinden that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied," [p. ___ supra].[21]

6. (a) Turning to the constitutional question addressed in the *Verlinden case, the details of "arising under" jurisprudence are well beyond the scope of this volume. The basic question, however, is not hard to understand and goes to the heart of the role of the Foreign Sovereign Immunities Act within the three branches of the American government.* In Sabbatino, the Supreme Court wrote:

> . . . we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationship with other members of the international community must be treated exclusively as an aspect of federal law.[22]

The same was true with respect to the immunity of foreign states under *Ex parte Peru* and *Mexico v. Hoffman*, as well as under the Tate Letter. When Congress took the executive branch out of the decision-making process, it did not at the same time de-nationalize the issue of how claims against foreign states are treated in the courts of the United States.

(b) One trouble with the above reasoning was that the federal question often did not appear on the face of the complaint, and it has long been held

20. 504 U.S. at 614–15, 112 S.Ct. at 2166–67.

21. Id. at 618–19, 112 S.Ct. at 2168–69.

22. See Chapter VI, p. ___ supra.

N that the plaintiff's expectation that the defendant would raise a federal question is not enough to support federal jurisdiction.[23] Immunity, though prescribed by federal statute, is a defense, not a cause of action. Chief Justice Burger, however, points out that in a suit against a foreign state, the court must satisfy itself under § 1330 that one of the exceptions to immunity applies; since it is § 1330 that confers jurisdiction on the Court, the case "arises under" federal law. Is that not persuasive?

N (c) Judge Kaufman, in the Court of Appeals, wrote that § 1606 of the FSIA precludes a finding that federal law creates the cause of action, because that section provides that the foreign state shall be liable "in the same manner and to the same extent as a private individual in like circumstances,"—i.e., typically (as in *Verlinden*) under state law. "The purpose of the Act," Judge Kaufman wrote, borrowing from the House Report, is to provide *access* to the courts in order to resolve ordinary legal disputes, not to create new federal causes of action.[24] Chief Justice Burger replies (p. ___):

N21 > The Act ... does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state. The Act codifies the standards governing foreign sovereign immunity as an aspect of federal law....

NF Is this persuasive?

GCA

III. SPECIAL PROBLEMS IN SUING FOREIGN GOVERNMENTS AND INSTRUMENTALITIES

SNL

A. ATTACHMENT AND EXECUTION[1]

T The drafters of the Foreign Sovereign Immunities Act were clear that they wanted to avoid the practice of attachment of the property of foreign states that had grown up at the time when service of process on foreign states was not possible.[2] Though the purpose of attachment had, in the first instance, been to obtain jurisdiction *quasi in rem*, attachment had also been used to tie up ships or bank accounts with a view to pushing states into settlements on terms that might not have been justified. As with uses of attachment in ordinary civil actions not involving sovereign defendants, jurisdiction, pressure, and security tended to blend together in actions against foreign states, with the added element of foreign relations problems.

T On the other hand, execution against property of foreign states after final judgment, had not been permitted prior to the FSIA. The Tate Letter had said nothing about execution, and, as we saw, in the few cases when the issue arose, the State Department had advised the courts that

FN 23. *Louisville & Nashville* R. Co. v. Mottley, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908).

FN 24. *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 326 (2d Cir.1981). (Emphasis by the court).

FN 1. This section is written in the present tense, reflecting the FSIA as enacted and still in effect for most actions. Special provisions concerning claims arising out of terrorism and hostage taking were enacted in the 1990s, as described in section IV.

FN 2. See p. ___ supra.

it "recognized and allowed" immunity of sovereign property from execution, even when there was no immunity with respect to the underlying claim.[3] The drafters of the FSIA set out to cure this problem as well, thus reversing the pre-FSIA situation. *Quasi in rem* jurisdiction against foreign states would be abolished: All actions must be commenced as prescribed under § 1608; even suits in admiralty to enforce a maritime lien could not be brought by the traditional arrest of a vessel.[4] Prejudgment attachment would be prohibited even for security purposes, § 1609, except if it were permitted by existing international agreements, or if the state had explicitly waived its immunity from prejudgment attachment, and then only for security, § 1610(d). The first two cases in this section turn on the question of whether an alleged waiver is specific enough to qualify under § 1610(d), and whether the object of a security attachment may be achieved by other means.

As to execution after final judgment, the FSIA distinguishes between claims against foreign states and claims against state instrumentalities. Attachment for purposes of execution against a foreign state is permitted pursuant to court order after a reasonable interval, § 1610(c), but only for property used for a commercial activity, and absent a waiver, only for property used for the commercial activity upon which the claim is based, § 1610(a)(2).[5] Execution after judgment against a state instrumentality such as an airline, shipping company, or bank is possible also against property of the instrumentality unrelated to the activity upon which the claim was based. But the property of one state instrumentality of the foreign state—say the Patrian Coffee Bureau—may not be attached for purposes of execution on a judgment against another state instrumentality—say Patrian Shipping Lines, though both entities are wholly owned by the Republic of Patria. How these provisions work is illustrated in the final two cases in this section.

1. *Prejudgment Attachment*

LIBRA BANK LTD. v. BANCO NACIONAL DE COSTA RICA, S.A.

United States Court of Appeals, Second Circuit, 1982.
676 F.2d 47.

Before TIMBERS, NEWMAN and WINTER, CIRCUIT JUDGES.

TIMBERS, CIRCUIT JUDGE:

3. See, e.g., the *Weilamann* and *Zivnostenska Banka* cases cited at p. ___, note 15.

4. See § 1605(b). If the plaintiff (libellant) attempted to arrest a vessel or cargo owned by a state, the arrest would be dissolved and the defendant would be entitled to immunity, unless plaintiff proved it did not know that the vessel was state-owned, in which case the claim would be permitted to survive, but as an *in personam* action without attachment.

5. In addition, execution may be had on property when the action on which the judgment was based involved rights in that property, § 1610(a)(3) and (4), and on proceeds of automobile or similar liability insurance policies by a person in respect of whose claim the insurance policy was invoked.