SC92405

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. AIRSERVICES AUSTRALIA,

Relator,

v.

THE HONORABLE J. DAN CONKLIN, CIRCUIT JUDGE, CIRCUIT COURT OF GREENE COUNTY,

Respondent.

Proceeding in Prohibition from the Circuit Court of Greene County, Missouri
The Honorable J. Dan Conklin
Case No. 0831-CV05866

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This writ proceeding relates to 14 wrongful death claims filed on behalf of 54 plaintiffs in Greene County, Missouri arising out of the May 7, 2005 crash in Australia of a Fairchild Aircraft Metro 23 commuter aircraft ("Metro 23"). (Third-Party Petition, attached as Exhibit A to ASA's Petition for Writ of Prohibition or Mandamus (hereafter Exhibit A) ¶1). All thirteen passengers and both crew members were killed. All 15 decedents were Australian nationals and residents. (Ex. A, ¶4).

The accident was investigated by the Australian Transport Safety Bureau ("ATSB"), which issued a final report concluding the crash was the result of pilot error. (Lambert Leasing's Motion to Dismiss, attached as Exhibit K to ASA's Petition for Writ of Prohibition or Mandamus, (hereafter Exhibit K) at p. 3). The Australian investigation also revealed the subject aircraft was operated by an Australian operator, Transair, when it crashed in inclement weather into a mountain ridge during an approach to land at Lockhart River, Australia. (Ex. K, p. 4). Relevant here, the aircraft navigation map for this airport was produced from data compiled specifically for such purpose by Relator, Airservices Australia ("ASA"). ASA supplied the data to Jeppesen Sanderson, Inc. in the United States for the purpose of generating the map for sale. (Ex. A, p. 9). Lambert Leasing, Inc. ("Lambert"), responding on behalf of Respondent, was a prior owner of the Metro 23, had never operated it, and had sold it two years prior to the crash on an as-is/where-is basis to co-defendant Partnership 818, an affiliate of Transair. (Ex. K, p. 582). Lambert had arranged for a service provider to temporarily store the aircraft in a

hangar in Springfield, Greene County, Missouri prior to the sale to Partnership 818. (Ex. K, p. 582).

Procedural Posture

No plaintiff or defendant in this case is a resident of Missouri. Nonetheless, plaintiffs filed suit in Greene County against Lambert, Partnership 818, and Australian citizen and resident Les Wright, alleging *inter alia* the Metro 23 was defective and the defendants acted negligently. (Ex. K, p. 576). The plaintiffs had also filed actions in Illinois against Jeppesen, certain avionics manufacturers, and the corporate successor of the Metro 23 manufacturer. (Ex. K, p. 577). Lambert moved to dismiss the Missouri matter based on the doctrine of *forum non conveniens* in favor of the action proceeding in Australia; this motion was denied. (Ex. K). The defendants in Illinois moved to dismiss that matter in favor of proceeding in Australia, and their motion was also denied. (Ex. K, p. 577). Lambert was previously dismissed from the Illinois action based on a lack of personal jurisdiction. After denial of the *forum non conveniens* motion in Missouri, Lambert filed and served a third-party action for contribution and indemnity against ASA, the Illinois defendants and one other component manufacturer. (Ex. A). The Illinois defendants have also brought similar third party proceedings against ASA in Illinois. In Illinois, ASA relied on its status as a foreign sovereign to remove the action to federal court without asserting any lack of jurisdiction. (ASA Remand Opposition, attached as Exhibit 2 to Lambert's Answer/Return to ASA's Preliminary Writ of Prohibition (hereafter Exhibit 2), p. 4).

ASA Moves to Dismiss

In Missouri, ASA moved to dismiss based on a lack of personal jurisdiction, not as a foreign sovereign, but rather as an individual or corporate party would do. (Motion to Dismiss for Lack of Personal Jurisdiction, attached as Exhibit B to ASA's Petition for Writ of Prohibition or Mandamus (hereafter Exhibit B)). ASA did not object to service, but asserted it did not have sufficient minimum contacts with Missouri to warrant a Missouri court exercising personal jurisdiction over it. (Ex. B, ¶4). ASA now admits it is a foreign sovereign. (Ex. 2, p. 4). Thus, ASA is not a "person" entitled to due process protections.

ASA's Commercial Activity and Contacts with the United States as a Whole

As a foreign sovereign, ASA correctly sets forth basic information in its Statement of Facts about ASA's operations and statutory functions as authorized by the Australian Parliament. (Brief of Relator Airservices Australia (hereafter "ASA Brief"), pp. 6-7). But, ASA's statement omits much of its commercial activity and particularly its ongoing activity in the United States. To the extent some courts have considered whether a foreign sovereign is entitled to constitutional due process protections (it is not), the relevant forum used for the resulting minimum contacts analysis is the United States as a whole not any particular state.

ASA's Statement fails to disclose that it maintains continual and systematic connections to the United States with at least fellow Third-Party Defendants, Jeppesen Sanderson, Inc. and Honeywell International, Inc. Jeppesen, located in Colorado, received data from ASA used to create the aeronautical maps relied on by the pilots for

the flight at issue. (See "Declaration of Richard H. Fosnot, Jr." attached as Exhibit 3 to Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition or Mandamus at ¶¶6-9 (hereafter "Ex. 3"); "Responses to Plaintiffs' Interrogatories to Defendant Jeppesen Sanderson, Inc." attached as Exhibit 4 to Respondent's Suggestions in Opposition to Relator's Petition for Writ of Prohibition or Mandamus at Ans. 3-4 (hereafter "Ex. 4")). Lambert's claims against ASA arise out of that commercial transaction. Furthermore, the relationship between Jeppesen and ASA was more than one transaction and appears to continue to this day. For example, the Jeppesen "JeppView Flite Deck User's Guide" discloses that "[m]aterial from the Australian Aeronautical information [sic] Publication has been used by agreement with Airservices Australia." (2010 JeppView Flite Deck User's Guide at p. 3 (attached as Exhibit G to ASA's Petition for Writ of Prohibition or Mandamus) at p. 441). ASA is also currently teaming with Honeywell, a Delaware corporation, and funding efforts to market an advanced instrument landing system for airports, including locations in the United States. (2005 and 2008 Development and Commercialization Agreements (attached as Exhibit D to ASA's Petition for Writ of Prohibition or Mandamus) at p. 67). The foregoing commercial activity and contacts with the United States as a whole are undisputed.

ASA bases its argument on the fact that the record reflects ASA has few, if any, contacts with Missouri. But the applicable test under the FSIA is ASA's activity and contacts in the United States as a whole. The stubborn fact for ASA is that its activities and contacts in the United States as a whole make it subject to jurisdiction in this case.

ARGUMENT

The issue presented to the Court is whether ASA, a foreign sovereign, is entitled to due process protections. The clear answer is that it is not. Just like a United States state, a foreign sovereign is not a "person;" it has no liberty interest to protect.

The federal courts that have addressed this issue directly have confirmed a foreign state is not a person. *See e.g. Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 398-400 (2nd Cir. 2009) *analyzing Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96-97 (D.C. Cir. 2002). Lambert is unaware of any state court decision addressing this particular issue other than this case.

The United States Supreme Court has also held that the Foreign Sovereign Immunities Act ("FSIA") provides the "sole basis" for federal or state court jurisdiction over "foreign states." *Weltover, Inc.*, 504 U.S. at 611 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also In re Tamimi*, 176 F.3d 274, 277 (4th Cir. 1999). The FSIA and not Missouri's long-arm statute controls the issues in ASA's motion.

The FSIA has a number of requirements that must be met before a court may properly assert jurisdiction over a sovereign. Some courts have therefore avoided directly addressing whether a sovereign is afforded due process protections. Instead, these courts have found that satisfying the FSIA is equivalent to satisfying any due process protections that might be afforded the sovereign and that the relevant territory for assessing minimum contacts is the United States as a whole and not a particular state.

Thus, even if ASA were considered a "person," which it is not, ASA's arguments before Respondent, the Court of Appeals, and now this Court focus on the entirely wrong issue and an inapplicable body of law. ASA admits it is wholly-owned by the Government of Australia (ASA Brief, p. 6); it is thus a "foreign state" under the FSIA. 28 U.S.C. §1603 *et seq.* The FSIA controls jurisdiction over ASA in this matter; the Missouri long-arm statute does not.

The Missouri long-arm statute is simply inapplicable to the issue of whether a foreign state is required to answer in state or federal court for its negligent conduct. Foreign states are not "persons" and are treated differently.

Permitting suits against other foreign states necessarily implicates international relations. The United States has established a uniform approach through the FSIA to test the fairness of permitting a particular suit to proceed. The straightforward analysis of the Act is that subject matter jurisdiction plus proper service equates to personal jurisdiction. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2nd Cir. 1981), *cert. denied,* 454 U.S. 1148, 102 S. Ct. 1012 (1982) (citing H.R. Rep. 94-1487, 1976 U.S.C.C.A.N. 6604, 6622). Because a foreign sovereign is not a "person," it is not entitled to due process considerations.

Respondent properly denied ASA's motion to dismiss. ASA is a foreign sovereign, not a person, and has significant commercial contacts with the United States.

There are only three facts of consequence to resolving whether ASA's personal jurisdiction motion was correctly denied and they are not in dispute. First, ASA is a foreign state as defined in 28 U.S.C. 1603(b). Second, ASA does business in the United

States with United States companies out of which the allegations against ASA arise. Third, ASA was properly served. These facts establish under the FSIA that ASA is not immune from the jurisdiction of state and federal courts.

As noted, the pertinent question for this Court's consideration is: "Does a foreign sovereign have the same due process rights as individual or corporate parties?" This issue was extensively argued before Respondent; Respondent rightly rejected ASA's arguments. This Court should do the same for either of two reasons:

- A foreign sovereign is not a "person" entitled to due process protections. Personal jurisdiction under the FSIA exists when there is subject matter jurisdiction and proper service. ASA has conceded the FSIA confers subject matter jurisdiction. (Petition for Writ of Mandamus, p. 13). Additionally, ASA has never raised an objection to its receipt of process in this matter. Having admitted subject matter jurisdiction under the FSIA and waived any objection to service of process, personal jurisdiction over ASA exists under the FSIA.
- Even if ASA were entitled to some form of due process protection, Respondent's exercise of personal jurisdiction over ASA pursuant to the FSIA comports with traditional notions of fair play and substantial justice. The Act's long-arm analysis incorporates the considerations of the *International Shoe* "minimum contacts" analysis on a nationwide, not individual state, basis. Should the Court adopt this approach, the result is

the same. Respondent properly denied Relator's motion due to its contacts with the United States.

Finally, ASA's assertions in its Brief that application of the FSIA implicates federalism concerns are misplaced. The dispute does not involve competing jurisdictional concerns among states of the United States, but between the United States and Australia. The constitutional issue is whether a foreign state is a "person" entitled to due process protections. This does not involve federalism concerns. ASA effectively urges this Court to find that a foreign sovereign is a "person" when the United States Supreme Court has not and has implied the contrary. (See Section II, *infra*, pp. 13-14). ASA's related argument, that application of the FSIA analysis will result in forum shopping, has been rejected by other courts as without merit and particularly in view of the enhanced protections afforded in the FSIA including a liberal removal provision.

I. ASA'S SECOND POINT RELIED ON AND SUPPORTING ARGUMENT THAT THE FSIA IS INAPPLICABLE IS CONTRARY TO THE CLEAR LANGUAGE OF THE ACT ITSELF AND FEDERAL CASE LAW

A. The FSIA by its Own Terms Exclusively Controls the Exercise of State Court Jurisdiction in Cases Involving Foreign Sovereigns.

ASA presents a brief history of the FSIA, but stops well short of any discussion of what constitutes personal jurisdiction under the Act. ASA claims without any authority that the FSIA "statutory language does not permit an interpretation that the FSIA is the 'sole basis' for state personal jurisdiction analysis" (ASA Brief, p. 21). Even a cursory review of the FSIA language shows Relator's argument lacks all merit.

The FSIA presumes that all foreign sovereigns are immune from jurisdiction in federal and state courts, then establishes exceptions: "[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. §1604. The Act by its express wording applies equally to both federal and state courts. The language of §1604 establishes its application to all jurisdictional issues, subject matter and personal, in all courts in the United State and the states. Congress chose not to limit the FSIA to one type of jurisdiction. Under ASA's line of reasoning, a state court could contravene the clear wording of §1604 by reading some additional exception into the Act based solely on the application of state personal jurisdiction considerations. That approach violates Congressional intent to provide uniform treatment of foreign sovereigns. It would result in a balkanization of the FSIA immunity analysis.

B. Federal Case Law Interpreting the Act Confirms its Applicability.

ASA ignores longstanding United States Supreme Court precedent to the contrary. The United States Supreme Court has held the FSIA "establishes a comprehensive framework for determining whether a court in this country, **state or federal**, may exercise **jurisdiction** over a foreign state." *Weltover, Inc.*, 504 U.S. at 610 (emphasis added). The Court further stated the Act "provides the '**sole basis**' for obtaining **jurisdiction** over a foreign sovereign in the United States." *Id.* at 611 (*citing Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-439, 109 S. Ct. 683 (1989)) (emphasis added); *see also In re Tamimi*, 176 F.3d 274, 277 (4th Cir. 1999) ("The FSIA sets forth the sole and exclusive standard to be used to resolve sovereign

immunity issues raised by a foreign state in federal and state courts"); *Community Finance Group, Inc. v. Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 586-87 (9th Cir.1983), *cert. denied*, 469 U.S. 880, 105 S. Ct. 243, 83 L.Ed.2d 182 (1984); *Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 563 (11th Cir.1987); *Reed v. Republic of Iran*, 2012 WL 639139 at *3 (D.D.C. Feb 28, 2012) (FSIA "exclusive legal vehicle by which a plaintiff may bring suit against a foreign state").

In explaining why the FSIA is the "sole basis" for exercising jurisdiction over a foreign state, the United States District Court for the District of Columbia stated the Act "envisions a process for litigating against foreign powers that respects the independence and dignity of every foreign state as a matter of international law while providing a forum for legitimate grievances." *Murphy v. Islamic Republic of Iran*, 778 F.Supp.2d 70, 71 (D.D.C. 2011). Notably, the United States Supreme Court's decision in *Weltover* does not limit the Act's application to subject matter jurisdiction as ASA claims (ASA Brief, pp. 28-30). It is ASA which makes unsupported arguments the statutory language does not permit. Respondent was right to deny ASA's motion to dismiss as the FSIA vested the trial court with jurisdiction over this matter.

C. The Authorities Cited by ASA Under its Second Point are Inapposite to This Case.

While ignoring United States Supreme Court precedent directly on point, Relator relies exclusively on non-FSIA cases to support its arguments as to why the FSIA does not apply to considerations of personal jurisdiction in this case. For example, ASA cites

Eubank v. Kansas City Power & Light Co., 626 F.3d 424 (8th Cir. 2010) to support its position that questions of sovereign immunity address only subject matter jurisdiction. (ASA Brief, p. 18). The *Eubank* case had nothing to do with claims against a foreign sovereign. Instead, the case involved claims against the United States under the Federal Tort Claims Act, a statute unrelated to the FSIA. *Id.* at 427. The Federal Tort Claims Act, found at 28 U.S.C. §§1346, 2671-2680, addresses when the United States waives its sovereign immunity to permit private parties to bring tort suits against the federal government. The United States is not a party to this action so the Federal Tort Claims Act does not apply to the matters before the Court. The other cases cited by ASA are similarly inapplicable. *See also Hart v. United States*, 630 F.3d 1085 (8th Cir. 2011) (Wrongful death action filed against the United States based on the Federal Tort Claims Act; no involvement of foreign sovereign and the FSIA is not addressed). *J.C.W. ex. rel. Webb v. Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009) (Paternity lawsuit; no involvement of a foreign sovereign).

Relator also cites *In re Marriage of Hendrix*, 183 S.W.3d 582 (Mo. banc 2006) for the unremarkable proposition that subject matter and personal jurisdiction are distinct concepts in the law. *Hendrix* is a divorce case that does not include a foreign sovereign as a party or involve the FSIA. This typifies Relator's refusal to address the FSIA head-on, knowing full well its arguments do not apply. Respondent was correct in denying ASA's motion.

D. The FSIA Confers Subject Matter Jurisdiction Over This Matter.

The stated purpose of the FSIA is to vest state and federal courts with jurisdiction to decide claims against foreign sovereigns. 28 U.S.C. §1602. ASA admits that 28 U.S.C. §1605(a) confers subject matter jurisdiction on federal and state courts for claims arising out of one of the enumerated subsections. There is no dispute that subject matter jurisdiction exists here under §1605(a)(2) based on ASA's commercial activities as a "foreign state" (ASA Brief, pp. 22-23). Accordingly, Respondent properly denied ASA's motion to dismiss.

II. THE STATE LAW-BASED LONG-ARM JURISDICTION ANALYSIS CHAMPIONED BY ASA UNDER ITS FIRST POINT RELIED ON IS INAPPLICABLE AND SUPPLANTED BY THE PERSONAL JURISDICTION FRAMEWORK SET OUT IN THE FSIA AND FEDERAL CASES APPLYING THE ACT.

ASA presents a complex argument that the FSIA confers subject matter jurisdiction, but not personal jurisdiction, on state courts. (ASA Brief, pp. 18-24).[1] This argument directly contradicts the United States Supreme Court's language in *Weltover* that the Act confers "jurisdiction" on federal and state courts. ASA's tortured analysis

[1] Incredibly, ASA continues to make the bald assertion that Lambert's arguments address only FSIA subject matter jurisdiction. (ASA Brief, p. 22). This position reflects a critical misunderstanding of the FSIA and ignores the plethora of cases Lambert cites which find §1605 addresses personal jurisdiction considerations. *See* Section III, *below*.

(which cites no supporting case law) is unnecessary. This is clear when one considers the straightforward analysis established by the Second Circuit Court of Appeals.

In a widely-cited decision, the Second Circuit succinctly assessed personal jurisdiction in FSIA: "subject matter jurisdiction plus service of process equals personal jurisdiction." *Texas Trading,* 647 F.2d at 308; s*ee also Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1025 (9th Cir. 2010); *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 817 (3d Cir. 1981), *cert. dismissed*, 415 U.S. 929, 102 S. Ct. 1297, 71 L.Ed.2d 474 (1982); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 252 (7th Cir. 1983); *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 n. 11 (D.C. Cir. 1987) (R.B. Ginsburg, J); *Seetransport Wiking Trader Schiffarhtsgesellschaft Mbh & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 579 (2nd Cir. 1993); *Reiss v. Société Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2nd Cir. 2000).

For a time, courts were not clear whether the *Texas Trading* analysis should also include considerations of due process, i.e., *International Shoe*'s "minimum contacts." *See, e.g., Velidor*, 653 F.2d at 819 n. 12. But, that uncertainty ended when the United States Court of Appeals for the D.C. and Second Circuits, following prompting by the United States Supreme Court, held that a foreign sovereign is not a "person" and thus not entitled to due process protections. *See, e.g., Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 398-400 (2nd Cir. 2009) *analyzing Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96-97 (D.C. Cir. 2002). No

state court has opined on this issue but given the Constitutional basis of the issue, the same reasoning must hold.

In *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 299 (D.C. Cir. 2005) the D.C. Circuit considered the argument whether, under *International Shoe,* the Due Process Clause of the Fifth Amendment[2] required a nexus between the foreign sovereign and the forum in order for the court to exercise personal jurisdiction over a foreign state's instrumentality. The D.C. Circuit held a "foreign state is not a 'person' as that term is used in the due process clause." *Id.* at 300. "In short, it is not to the due process clause but to international law and to the comity among nations, as codified in part by the FSIA, that a foreign state must look for protection in the American legal system." *Id.* (*citing Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002)) ("Given this fundamental dichotomy between the constitutional status of foreign states and states within the United States, we cannot perceive why the former should be permitted to avail themselves of the fundamental safeguards of the Due Process Clause if the latter may not."). *See also Frontera,* 582 F.3d at 399 ("the district court erred…by holding that foreign states and their instrumentalities are entitled to the jurisdictional protections of the Due Process Clause"); *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 2011 WL 3516154 (S.D.

[2] There is no meaningful difference in this instance between the due process clauses of the 5th and 14th Amendments. Both apply only to a "person" to protect that person's life, liberty, and property.

N.Y. Aug 03, 2011) ("[A] foreign state (and its instrumentalities) is not entitled to the jurisdictional protections of the Due Process Clause, such as protection against being sued where it lacks minimum contacts."); *IT Consultants v. Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003) ("no constitutional matter" raised as foreign state not a "person"); *Southway v. Central Bank of Nigeria*, 994 F. Supp. 1299, 1312 (D. Colo. 1998) ("[M]inimum contacts test inapplicable."); *Cruz v. United States*, 387 F.Supp.2d 1057, 1067 (N.D. Cal. 2005); *GSS Group Ltd v. National Port Authority*, 680 F.3d 805, 814 (D.C. Cir. 2012) (No due process analysis if foreign "corporate entity is so extensively controlled by its owner" that a relationship of principal and agent is created).[3]

ASA admits it is a "foreign sovereign" under the FSIA. Therefore, it is not a "person" for due process purposes and is not entitled to the minimum contacts analysis it

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[3] Even if ASA were to argue that the *GSS Group*'s control standard should be applied, ASA still does not constitute a "person" for purposes of a due process analysis. ASA admits the Commonwealth of Australia established the Relator in the Air Services Act 1995 to perform "statutory" and "commercial activities" for the Australian government's benefit. (ASA Brief, p. 6). ASA lists various "services… for the purpose of giving effect to international agreement…. and other statutory functions." ASA thus describes itself performing, as part of its duties, governmental functions for the benefit of the Commonwealth of Australia. ASA by its own words acknowledges that the Australian government exerts substantial control over it. ASA, however examined, is not a "person" for due process purposes.

seeks through the Missouri Long Arm Statute.[4] The personal jurisdiction determination in this case does not proceed beyond the Second Circuit's test, so that ASA's admission that the FSIA confers subject matter jurisdiction, plus its failure to challenge service of process equals personal jurisdiction. Respondent properly denied ASA's motion to dismiss.

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[4] Missouri courts are indisputably courts of general jurisdiction with authority that extends to the bounds of the Constitution. Missouri may, of course, choose to limit its Courts from exercising this authority in certain instances in an effort to ensure it does not exceed the bounds of the Constitution. This is not a limitation on the authority itself, but is merely the exercising of it to avoid creating Constitutional due process issues in cases that do not otherwise involve the Constitution. One familiar instance in which Missouri, and the other United States states, have self-limited is through long-arm statutes seeking to address the due process issues that arise when a Court exercises personal jurisdiction over a particular defendant. This case does not concern the validity of the Missouri long arm statute. Indeed, the long-arm statute simply does not address foreign sovereigns; it addresses only a "person or firm." This is entirely consistent with the precedent that a foreign sovereign is not considered a "person" for purposes of due process and consistent with the fact the FSIA, as the sole and exclusive basis upon which to proceed against a foreign sovereign, has its own service of process provisions that expressly apply in state courts. 28 U.S.C. §1608. The service of process in this case was valid and ASA has not disputed that.

III. TO THE EXTENT ANY DUE PROCESS ANALYSIS IS REQUIRED, THE FSIA PROVIDES FOR A NATIONWIDE "MINIMUM CONTACTS" ANALYSIS IN LIEU OF THE TRADITIONAL COMMON LAW ANALYSIS ASA INSISTS, UNDER ITS FIRST POINT, IS EXCLUSIVELY APPLICABLE.

As set out below, courts have now adopted the D.C. and Second Circuit's analysis set forth in *Price, TMR Energy, Frontera* and *Texas Trading,* finding that subject matter jurisdiction plus proper service equals personal jurisdiction. There are some decisions reflecting the prior uncertainties as to whether a foreign sovereign is a "person," and thus include a minimum contacts analysis. Even under such an analysis, ASA is subject to jurisdiction in this case.

A. FSIA's Long-Arm Type Provisions Control Any "Minimum Contacts" Analysis.

As noted above, the relevant case law indicates there is a historical uncertainty as to whether a due process analysis is required in cases involving foreign states. The cases that have directly addressed the status of a foreign sovereign as a "person" have held that no due process analysis is required. Among those courts that have not directly addressed the issue, the widely-held view is that the FSIA has its own long-arm provisions and those provisions control the minimum contacts analysis. As such, even if this Court conducts a due process review, Respondent was right to deny ASA's motion.

"The legislative history of [§1605(a)(2)] makes clear that it embodies the standard set out in *International Shoe v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L.

Ed. 95 (1945) that in order to satisfy due process requirements, a defendant… must have 'certain minimum contacts with (the forum state) such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2nd Cir. 1979). *Int'l Ins. Co. v. Caja Nacional de Ahorro y Seguro*, 293 F.3d 392, 397 (7th Cir. 2002) (the FSIA "exceptions allow the court to obtain subject matter jurisdiction over the case and provide the minimum contacts with the United States required by due process before a court can acquire personal jurisdiction") (internal quotation marks omitted) (emphasis added); *BP Chemicals Ltd. v. Jiangsu SOPO Corp. (Group) Ltd.*, 420 F.3d 810, 818, n. 6 (8th Cir. 2005); *Altmann v. Republic of Austria*, 317 F.3d 954, 970 (9th Cir. 2002), *aff'd,* 451 U.S. 677 (2004) (holding a minimum contacts due process analysis is required but "the relevant area in delineating contacts is the entire United States, not merely the forum state") (internal quotation marks omitted) (emphasis added); *Vermeulen*, 985 F.2d at 1553; *Waukesha Engine Div. v. Banco Nacional de Fomento Cooperativo*, 485 F. Supp. 490, 492-293 (E.D. Wis. 1980) (FSIA incorporates "notions of minimum contacts"); *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 387 (S.D. N.Y. 1979) (FSIA is "intended to be a long-arm statute" and "Section 1605's itemization of non-immune transactions is a prescription of the 'necessary contacts which must exist before our courts can exercise personal jurisdiction.'").

The relevant evaluation under the FSIA focuses on ASA's contact with the entire United States and not only the State of Missouri. *Bankers Trust Co. v. Worldwide Transp. Services, Inc.*, 537 F. Supp. 1101, 1108 (E.D. Ark. 1982) ("The Court finds that

to limit the forum to any particular state would clearly not be in keeping with the intents and purposes of the FSIA"); *Altmann*, 317 F.3d at 970. The record presented to Respondent showed ASA's multiple, continuing contacts with the United States. While those contacts were outside this state, they were of a continuous and repeated nature such that Respondent properly found ASA subject to its jurisdiction pursuant to FSIA's nationwide contacts analysis.

There are few federal FSIA decisions in which a federal court applied a traditional state personal jurisdiction analysis and none of those were decided within the past 15 years.[5] When such an analysis is conducted here, ASA's numerous contacts with the United States warrant a finding of personal jurisdiction under the FSIA.

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[5] ASA relies heavily on *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 533-537 (S.D. Tex. 1994), a poorly-reasoned case applying without explanation a traditional state law approach to personal jurisdiction in a FSIA case. The *Kern* decision failed to cite *Arriba Ltd.,* a 5th Circuit decision issued two years prior to *Kern*, which applied a nationwide contacts analysis under the FSIA. *Arriba Ltd. v. Petroleos Mexicanos,* 962 F.2d 528, 530 (5th Cir. 1992). *Arriba Ltd.* was followed by a 5th Circuit decision which again rejected the state law analysis in *Kern*. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845-846 (5th Cir. 2000) (Applying *Texas Trading*). The *Kern* decision cited by ASA is not good law and is not even precedence within its own circuit.

ASA's efforts to portray the FSIA as not including a minimum contacts analysis falls flat. ASA fails to provide one case which supports its argument that a personal jurisdiction analysis under the FSIA fails to comport with *International Shoe*'s requirements. ASA's argument ignores ample case law holding to the contrary in matters involving foreign sovereigns under the FSIA. Further, ASA's entire argument is based on cases involving non-sovereign defendants.[6] Respondent properly rejected ASA's argument.

ASA's arguments also contradict the FSIA's legislative history. The history shows that in enacting the statute, Congress specifically understood that:

> [O]ne of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and **the United States**. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(b) of the bill confers **personal jurisdiction** over a foreign state in **Federal and State** courts as to every claim for which the foreign state is not entitled to immunity.

H.R. REP. 94-1487 (Sept. 9, 1976) (emphasis added).

Congress clearly intended in the FSIA that any minimum contacts analysis would be raised to the national level due to the implications to international relations. ASA's

[6] See discussion above, 10-12.

call for this Court to apply Missouri's long-arm statute would subvert this intent. *Cf. supra note 4*.

B. The First Step in the FSIA Minimum Contacts Analysis is to Confirm the Applicability of One of the "Commercial Activities" Exceptions to Immunity.

The FSIA states that a foreign sovereign is immune from jurisdiction subject to the exceptions in 28 U.S.C. §§1605-1607. The exception at issue here is when the foreign sovereign engages in a "commercial activity." A "commercial activity" by a foreign state is defined as "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. §1603(e). Relying on *International Shoe*, the Act includes in the "commercial activity" definition "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). "[A]n activity has a commercial nature for purposes of FSIA immunity if it is of a type that a private person would customarily engage in for profit." *MCI Telecommunications Corp. v. Alhadhood*, 82 F.3d 658, 663 (5th Cir. 1996) (internal quotation marks omitted).

C. ASA's Past and Current Activities in the United States are Sufficient to Defeat Any Sovereign Immunity Argument by ASA.

Here, ASA is engaged in commercial activities in the United States, thereby subjecting itself to personal jurisdiction. In other court proceedings, ASA has effectively admitted that the gathering and maintenance of data concerning airport approaches and

routes, and the sale or provision of that data to private entities, is commercial in nature.[7] Moreover, this type of commercial activity is performed by public and private companies across the globe, including Third-Party Defendant Jeppesen, a commercial entity which competes with Relator in the sale of aeronautical charts. (*See* Ex. 3 at ¶¶7-8). The provision of data in this manner is similar to the provision of any other type of good, service or data and such activities have been widely recognized as commercial in nature. *See SerVaas Inc. v. Republic of Iraq*, 2011 U.S. App. LEXIS 2709, at *3 (2d Cir. Feb. 16, 2011) ("the underlying conduct—contracting for the purchase of goods, services and technology—is quintessentially commercial"); *see also Weltover, Inc.*, 504 U.S. at 614 ("when a foreign government acts, not as a 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").

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[7] In *Airservices Australia v. Jeppesen Sanderson Inc.*, [2006] FCA 906, at ¶36 (14 July 2006) (Attached to "Respondent Lambert Leasing Inc.'s Suggestions in Opposition to Relator's Petition for Writ of Prohibition or Mandamus" as Exhibit 2), the Federal Court of Australia commented that "whilst [ASA] is firm in its resolve to secure a commercial outcome which ensures that it is rewarded for its efforts in relation to the aeronautical publications in which it claims that copyright exists of which it is the owner, it does not want to, if I may use the vernacular, kick its bedfellows, [Jeppesen], with whom it almost certainly will have an ongoing business relationship."

ASA's provision of allegedly faulty data concerning the Lockhart River Aerodrome (the location of the subject accident) to Jeppesen caused Jeppesen to produce an allegedly faulty map leading to the subject accident. As the Australian Federal Court held, this activity was of a commercial nature for which ASA expected to receive financial benefits.[8] ASA's activities in both preparing and selling the mapping data to Jeppesen as well as ASA's ongoing business relationship with Jeppesen and third-party defendant Honeywell International (discussed below) constitute "commercial activities" under 28 U.S.C. §1603(d).

D. Section 1605(a)(2) Encompasses a Minimum Contacts Analysis for a Foreign Sovereign.

Among those courts which considered a due process analysis, the uniform view is that Section 1605(a) of the FSIA sets forth the statute's minimum contacts analysis. Here, §1605(a)(2) applies to the evaluation of whether ASA's many United States-based commercial activities constitute sufficient minimum contacts for Respondent to exercise personal jurisdiction over Relator. Personal jurisdiction under the FSIA is present when one of the following minimum contacts requirements is met: "the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. §1605(a)(2). The applicability of any one of these

[8] See footnote 7.

three clauses subjects the foreign state to jurisdiction in any state or federal court in the United States. *Id.*; *see also Can-Am Int'l, LLC v. The Republic of Trin. & Tobago*, 169 Fed. Appx. 396, 405 (5th Cir. 2006) (any of the three commercial activity clauses "if met, provides a sufficient basis for jurisdiction") (emphasis added).

The minimum contacts analysis under the FSIA focuses on the foreign state's contacts with the United States as a whole and not a particular state within the United States. *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir. 1987) (*citing Texas Trading*); *BP Chemicals Ltd.*, 420 F.3d at 818; *Vermeulen*, 985 F.2d at 1545; *Texas Trading*, 647 F.2d at 314; *Ruiz v. Transportes Aereos Militares Ecuadorianos*, 103 F.R.D. 458, 460 (D.D.C. 1984); *Southway*, 994 F. Supp. at 1312. *Compare BP Chemicals Ltd.*, 420 F.3d 810 at 818 (foreign state "had sufficient contacts with the United States to fit within the commercial activity exception of the FSIA. We believe this is dispositive of the related issue whether SOPO had sufficient minimum contracts with an American forum that it could be expected to be haled into court there") with *Altmann*, 317 F.3d at 970 (Employing minimum contacts analysis which looks to contacts with the entire United States and not merely the forum state).

The three exceptions set forth in § 1605(a)(2) reflect Congress' clear intent to ensure any FSIA minimum contacts analysis comports with Constitutional standards. Each clause incorporates *International Shoe*'s contacts analysis into the statute to address any concerns of international relations and comity. Respondent properly denied ASA's motion because the Relator's commercial activities, discussed below, satisfy the FSIA minimum contacts requirements.

E. ASA's Specific Contacts With the United States Satisfy All Three of the Requirements Set Forth in §1605(a)(2).

The first clause of §1605(a)(2) provides that jurisdiction lies if the commercial activity has substantial contact with the United States. While the contact must be substantial, a single transaction suffices. *See World Wide Demil, L.L.C. v. Nammo, A.S.*, 51 Fed. Appx. 403, 406 (4th Cir. 2002) (two days of negotiations in Virginia, which culminated in an oral contract, constituted sufficient commercial activities in the United States).

ASA provided data to Jeppesen, in Colorado, which Jeppesen then used to create charts used on the subject flight. The data in question contained significant amounts of detailed navigational and topographical information and was designed to provide the basis for sophisticated maps used to assist pilots. (See Ex. 3 at ¶¶7-8; Ex. 4 at No. 4). ASA's agreement to transfer this data to Jeppesen in the United States constitutes a commercial transaction with substantial contacts with the United States. *See Robert Bosch Corp. v. Air France*, 712 F. Supp. 688, 690 (N.D. Ill. 1989) ("Defendant's commercial activity in the United States was its contractual relations with an American corporation to deliver products to the United States from Germany and receive payment for that delivery"). The first clause of the commercial activity exception in §1605(a)(2) thus applies.

The second commercial activity clause requires an act performed in the United States in connection with commercial activity elsewhere. "Acts are in connection with such commercial activity so long as there is a substantive connection or a causal link

between them and the commercial activity." *Falcon Investments, Inc. v. Republic of Venezuela*, 2001 U.S. Dist. LEXIS 6941, at *7-8 (D. Kan. May 22, 2001). In this case, ASA collected data in Australia and provided it to Jeppesen in the United States. Jeppesen then produced the approach chart in the United States. (*See* Ex. 3 at ¶¶6-9). Thus, the act from which liability potentially arises, the creation of the allegedly faulty approach chart, took place in the United States. But the broader commercial activity, ASA's collection of the underlying data for sale, took place in Australia. The collecting of data satisfies the second clause of the commercial activity exception in §1605(a)(2).

The third clause of the commercial activity exception requires that the claim arise from an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere that causes a direct effect in the United States. The United States Supreme Court has held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's…activity." *Weltover, Inc.*, 504 U.S. at 618 (internal quotation marks omitted). The "direct effect" does not need to be substantial or foreseeable. *Id*. ("we reject the suggestion that §1605(a)(2) contained any unexpressed requirement of 'substantiality' or 'foreseeability'"); *see also SerVass Inc. v. Republic of Iraq*, 2011 U.S. App. LEXIS 2709, at *4 ("There is no requirement that the effect be substantial").

There can be no dispute that ASA conducted acts outside the United States in connection with commercial activity outside of the United States ASA, with its principal place of business in Australia, gathered the data in question concerning topography and geography in Australia. (*See* Ex. 3 at ¶¶7-9, Ex. 4 at No. 4). ASA also used that data to

create its own maps for commercial sale. (*See* Ex. 4 at No. 4 and Ex. B thereto). The provision of the allegedly flawed data had the direct effect of causing Jeppesen, a United States entity, to create an allegedly flawed chart for Lockhart River. (*See* Ex. 3 at ¶6). That effect happened in the United States, where the chart was created. *See SerVass Inc.*, 2011 U.S. App LEXIS 2709, at *4 ("the Ministry bought goods and services from SerVass, an American corporation, shipped shell casings for testing to the United States, and made payments using a bank headquartered in Atlanta. Any of these activities alone might have been sufficient to satisfy the [direct effect exception]; taken together they clearly do so"). As such, ASA's commercial acts in Australia had a direct effect in the United States and the third clause of the commercial activity exception applies.

F. State Court FSIA Decisions Also Apply a Nationwide Minimum Contacts Analysis.

There are far fewer published state court FSIA decisions than federal decisions and they have not directly addressed whether a sovereign is a "person" for purposes of due process. They do, however, follow the same approach to personal jurisdiction and due process as the federal courts which avoid the "person" issue. There are no cases to support ASA's bald assertion that "[a]ny personal jurisdiction analysis performed under the FSIA does not apply in actions pending in state court…." (ASA Brief, p. 18). To the contrary, state court decisions recognize the FSIA does apply to jurisdictional

determinations when a foreign sovereign is a defendant[9] and have conducted that analysis on a nationwide basis.

For example, in *New Hampshire Ins. Co. v Wellesley Capital Partners*, 200 A.D.2d 143, 149 (N.Y. App. Div. 1994), Wellesley Capital Partners filed a third-party action against the Dominican Republic and its state-owned electric utility for breach of an agreement to pay a sum of money in settlement of a debt. The foreign defendants asserted they were immune from jurisdiction and challenged the court's finding of personal jurisdiction. In evaluating the foreign sovereigns' jurisdictional contacts, the New York appellate court focused on "the foreign defendants' contacts with the United States" as a whole rather than the contacts with the individual state. *Id.* at 149. *See also Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 494 N.E.2d 1055, 1060 (N.Y. 1986) ("Gulf is engaged in substantial activity in the United States with offices and personnel in New York, Los Angeles and four other cities.… There are, therefore, sufficient contacts to meet both the requirements of international law and of due process"); *Nigerian Air Force v. Van Hise*, 443 So. 2d 273, 275 (Fla. Dist. Ct. App. 1983) ("The federal congress with the adoption of Section 1602… has established a uniform procedure for bringing actions against foreign sovereigns which are exceptions to general immunity from civil processes that are enjoyed by foreign sovereigns in this country. Only when a domestic

[9] The relative dearth of FSIA state court decisions is attributable to the FSIA's liberal removal rights conferred on foreign sovereigns. *See* Section VI, below.

litigant can meet the conditions set forth in the federal statutes may he proceed with civil litigation in either the state or federal courts").

These state court decisions refute Relator's argument that the FSIA does not apply to a state court's determination as to whether personal jurisdiction over a foreign sovereign exists. Each of these cases applied the FSIA in making such an analysis.

IV. ASA'S CONTENTION UNDER POINT II THAT §506.500 RSMO. SHOULD BE APPLIED IN TANDEM WITH A FSIA SUBJECT MATTER JURISDICTION ANALYSIS IS UNTENABLE AS IT WOULD DEFEAT THE UNIFORMITY SOUGHT AND PROVIDED FOR BY THE FSIA.

ASA suggests this Court apply §506.500 RSMo even if the FSIA confers subject matter jurisdiction. ASA's interpretation of the FSIA would undermine one of the primary purposes of the Act which is maintenance of uniform nationwide procedures in cases involving foreign states. *See In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 909 F. Supp. 1083, 1100 (N.D. Ill. 1995) ("[A] central purpose of the FSIA was 'to establish uniform procedures for litigation against foreign States, their agencies and instrumentalities in the United States'") (internal citation omitted); *see also Nigerian Air Force*, 443 So. 2d at 275.

If ASA's position prevails, the goal of uniformity in the treatment of foreign sovereigns will be greatly compromised. Two identically situated foreign sovereigns would face completely different personal jurisdiction standards depending on whether they were in state or federal court or depending on which state court they happened to be in. ASA is asking this Court to apply a completely different approach to determining

personal jurisdiction than a federal court would have taken had ASA removed this case as it was entitled to do under the Act.

The reason uniformity is vital is because foreign sovereign immunity is a national issue often involving delicate questions of national interest. Given the national interests involved, Congress was concerned about the impact of divergent state rules on international relations. The Third Circuit, for instance, has noted that:

> [E]nactment of the FSIA was in response to unique policy considerations touching on the international relations of the United States, considerations not apropos to the federal diversity statute. Indeed, the Supreme Court has acknowledged Congress' deliberate intent to circumvent much of the potential for interference with the federal government's foreign relations caused by lack of uniformity and local bias in civil caselaw involving foreign states as defendants by channeling private actions against foreign sovereigns away from state forums and into federal courts to be adjudicated in nonjury trials.

In re Texas E. Transmission Corp., 15 F.3d 1230, 1239 (3d Cir. 1994) (citing *Verlinden B.V. v. Cen. Bank of Nigeria*, 461 U.S. 480, 497 (1983) and H.R. REP. 94-1487).

To date, the FSIA has proven remarkably effective in funneling FSIA cases into the federal system and avoiding a patchwork of divergent approaches to foreign sovereign matters in the few cases that do stay in the state system. The approach ASA asks the Court to adopt here would require state courts to apply state personal jurisdiction rules (arising from inapplicable state long-arm statutes), which in turn, would encourage

foreign sovereigns to remain in state court. Under ASA's approach, a non-immune foreign sovereign could be dismissed from a state court action on personal jurisdiction grounds if it lacked minimum contacts with that state, even if it had contacts with the United States as a whole. If that same foreign state were in federal court, its contacts with the United States as a whole would satisfy the due process clause. This would undermine the central purpose of the FSIA to provide uniformity. *Cf. supra note* 4.

V. ASA'S "FEDERALISM" ARGUMENT UNDER POINT II IS UNFOUNDED AND THIS COURT'S ACCEPTANCE OF IT WOULD FRUSTRATE THE FSIA'S INTENDED EFFECT ON EXCLUSIVELY FEDERAL CONCERNS WITH FOREIGN POLICY.

ASA argues interpreting the FSIA to be the sole basis for assessing a state's personal jurisdiction violates federalism principles. (ASA Brief, pp. 26-27). As noted, above, Relator's "sole basis" argument conflicts with the United States Supreme Court's pronouncement in *Weltover*, which found to the contrary.

In addition, cases which have considered the federalism issue in the context of the FSIA have rejected ASA's argument about alleged Constitutional violations. The very case ASA relies on to support its federalism argument, *World-Wide Volkswagen,* (ASA Brief, pp. 25-28) has been found to have no application in the FSIA context, as the Act concerns international relations and not issues addressing jurisdiction between the states of the United States. "The concerns of federalism discussed at length by the [U.S.] Supreme Court in … *World-Wide Volkswagen* [ ] would not be relevant in an FSIA suit since states within a federal system, strictly speaking, are not involved." *Texas Trading*,

647 F.2d at 315 n. 37. *See also Bankers Trust Co*., 537 F. Supp. at 1108 (State court personal jurisdiction cases are "not precisely on point, for they are concerned more with federalism, and less with international relations than was Congress in passing the FSIA."); *Meadows v. Dominican Republic*, 628 F. Supp. 599, 606, n.5 (N.D. Cal. 1986), *aff'd,* 817 F.2d 517 (9th Cir. 1987).

State courts have reached the same conclusion that federalism concerns do not factor into the FSIA analysis. In *Estate of Weinstein*, 184 Misc.2d 781,784 (N.Y. Sup. Ct. 2000), the New York lower court (considering the state-sponsored terrorism exception under the FSIA) found that the entire United States is the proper forum for actions brought under the FSIA. The court noted that "[s]tate laws contain many statutes limiting their jurisdiction but those statutes and cases interpreting them are not controlling 'for they are concerned more with federalism, and less with international relations, than was Congress in passing the FSIA' (quoting *Texas Trading*). The FSIA affects international relations and 'in respect of our foreign relations generally, state lines disappear.'" *Id.*

ASA's federalism arguments would result in a disruption of international relations by adopting the provincial view that only a particular state has a sufficient interest in the resolution of a particular dispute. Relator's views contravene Congressional intent to harmonize the treatment of foreign sovereigns by avoiding potentially disparate treatment depending on the variations of differing state statutes. At its heart, this is not a case involving a question as to jurisdiction in Missouri versus some other state in the United States; this case is about jurisdiction in the United States versus Australia. The

federalism cases cited by ASA have no bearing in this case, as the dispute is not in relation to the possible extension of Missouri's boundaries into another state's territory. Likewise, the state is not intruding on a federal domain as the FSIA expressly provides for state jurisdiction. As such, this Court should reject ASA's federalism argument.

VI. THE "FORUM SHOPPING" CONCERNS SET OUT UNDER ASA'S POINT II HAVE NO SUPPORT IN THE LAW.

In enacting the FSIA, which expressly recognized and provided concurrent state court jurisdiction, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497. As part of the overall statutory scheme, Congress amended the removal statute, 28 U.S.C. Sec. 1441 (1982), to enable a foreign state to remove "[a]ny civil action brought in a State court against a foreign state." *Id*. Sec. 1441(d). Moreover, in cases involving foreign sovereigns, the time limitations for filing a petition for removal under Sec. 1446(b) "may be enlarged at any time for cause shown." *Id*. Sec. 1441(d). Congress' intent to create a broad removal right is further substantiated by reference to the legislative history of the Act:

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.

House Report, supra, at 32, reprinted in 1976 U.S. Code Cong. & Ad. News at 6631, *Verlinden*, 461 U.S. at 490.

The United States Supreme Court observed that Congress was aware of the concern that "our courts [might be] turned into small 'international courts of claims[,]' ... open ... to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Id.* (*citing* Testimony of Bruno A. Ristau, Hearings on H.R. 11315, at 31.). The Supreme Court stated that the FSIA protects against forum shopping "not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." *Id.*

The FSIA addresses ASA's professed concern about potential forum shopping. In fact, the forum shopping problem in this case arises when the foreign sovereign seeks to ignore its status to try to gain the benefit of its alleged lack of contact with an individual state, thus defeating the uniformity purpose of the FSIA (uniformity that is an intended benefit for the sovereign). The Act incorporates multiple protections for the foreign state's benefit, including liberal removal jurisdiction, non-jury trials, and the ability to seek dismissal on other grounds. ASA's generalized concerns about potential forum shopping are without merit and do not warrant a reversal of Respondent's order denying Relator's motion to dismiss.

CONCLUSION

ASA is a foreign state pursuant to the FSIA and admits the Act confers subject matter jurisdiction in federal and state courts to address claims against foreign

sovereigns. The FSIA provides the sole and exclusive basis for jurisdiction over a foreign state. Relator chose not to challenge the sufficiency of service of process. As the Second Circuit first established in *Texas Trading,* subject matter jurisdiction plus service equals personal jurisdiction. As subsequently addressed in *Price* and *Frontera*, a foreign sovereign is not a "person" entitled to any due process protections. ASA is not entitled to any minimum contacts analysis in this case.

The commercial activity exception to immunity in the FSIA applies because ASA has conducted significant commercial activities in, and having a direct effect on, the United States; this suit arises from those activities. Even if considered, ASA's contacts with the United States as a whole are sufficient to meet any minimum contacts requirement of the due process clause as incorporated in the FSIA. Nothing about the application of the FSIA to Lambert's claims against ASA implicates federalism concerns or will result in opening the door to forum shopping against foreign states.

For the foregoing reasons, Respondent properly denied ASA's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

The brief includes the information required by Rule 55.03;

The brief complies with the limitations contained in Rule 84.06(b); and

According to the word count function of counsel's word processing software (Microsoft® Word 2007) and excluding those portions of the brief as permitted by Rule 84.06(b), the brief contains 9,818 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2012, I electronically filed the foregoing with the Clerk of the Missouri Supreme Court using the electronic filing system which sent notification of such filing to local counsel, an electronic version was forwarded to all counsel of record via e-mail, and a complete copy was forwarded via United States Mail, postage prepaid, to The Honorable J. Dan Conklin, all as follows:

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