

# The FSIA's Direct Effects Problem

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When a foreign sovereign breaches a commercial contract with a private entity, what recourse does the wronged party have? In the United States, the Foreign Sovereign Immunities Act (FSIA) governs such disputes, providing an exception for commercial activity that causes a “direct effect” in the U.S. Yet, the definition of “direct effect” has remained elusive, leading to decades of judicial inconsistency and a deepening circuit split.

At the heart of this legal uncertainty is the Supreme Court’s decision in *Republic of Argentina v. Weltover* (1992), which sought to clarify the issue but instead left room for widely divergent interpretations. Some circuits have adopted a flexible, causation-based approach, analyzing whether a foreign state’s breach had an immediate consequence in the U.S. Others, like the recent D.C. Circuit decision in *Wye Oak Tech., Inc. v. Republic of Iraq*, have imposed rigid bright-line rules—specifically requiring that the contract contemplate the U.S. as a place of performance. This formalistic approach creates a dangerous loophole, allowing foreign states to structure agreements in a way that insulates them from jurisdiction. As a result, a U.S. business may suffer substantial financial harm from a foreign sovereign’s breach but find itself without legal recourse simply because the contract was silent on where payments were to be made.

This restrictive interpretation undermines the FSIA’s core purpose: to hold foreign sovereigns accountable when their commercial activities impact U.S. businesses. By prioritizing contractual language over economic reality, decisions like *Wye Oak* erode the ability of American companies to seek redress, making sovereign breaches effectively consequence-free. A proper interpretation of the FSIA should align with *Weltover*’s focus on causation, ensuring that foreign states cannot exploit technicalities to evade liability. If left uncorrected, the current trend risks turning the FSIA into little more than a paper shield—one that protects sovereigns rather than those they harm.

The *Wye Oak* decision exacerbates both intra- and inter-circuit inconsistencies, further complicating the FSIA’s application and weakening the commercial

activity exception in breach-of-contract cases. By imposing a rigid bright-line rule, it unduly narrows the scope of what qualifies as a “direct effect,” creating uncertainty for U.S. businesses engaged in international commerce. With *Wye Oak*’s attorneys petitioning for certiorari in January 2025, the case presents a critical opportunity for the Supreme Court to resolve the longstanding circuit split on the FSIA’s direct effects clause.