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The Flexible Approach to the Foreign Sovereign Immunities Act in *Weltover, Inc. v. Republic of Argentina*

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NOTES

THE FLEXIBLE APPROACH TO THE FOREIGN SOVEREIGN IMMUNITIES ACT IN *WELTOVER, INC. v. REPUBLIC OF ARGENTINA*

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I. INTRODUCTION

When Argentina's central bank, Banco Central de la Argentina, attempted to unilaterally reschedule \$1.3 billion of dollar-denominated bonds,¹ three bond holders, a Swiss bank, and two Pan-

1. In 1986, Argentina's President issued a decree empowering the Ministry of Economy

amanian corporations, rejected the rescheduling and sued for specific performance in the United States District Court for the Southern District of New York.² The foreign plaintiffs asserted that the federal district court had subject matter jurisdiction based on their election to receive payment in New York under a place of payment option in the debenture.³

Argentina and Banco Central⁴ moved to dismiss for lack of subject matter jurisdiction, seeking refuge under the Foreign Sovereign Immunities Act of 1976 ("FSIA").⁵ The district court denied the motion, applying the "direct effect" clause of the FSIA "commercial activity" exception⁶ to Banco Central's bond issuance and failure to pay.⁷

Argentina and Banco Central appealed, arguing the public necessity of their actions in view of Argentina's economic crisis.⁸ The

to direct Banco Central to establish alternative means of debt repayment:

Whereas the country continues to have insufficient currency reserves to handle all the maturities of principal and interest of the Public Sector, including those corresponding to [dollar bonds referred to as] "Bonods" and "Promissory Notes" and therefore it has become necessary to continue implementing an ordered system of allocating scarce currencies giving equal and impartial treatment to all creditors within the general framework of negotiations of the foreign debt.

Presidential Decree No. 772 cited in Brief for Defendants-Appellants at 16, *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), cert. granted, 60 U.S.L.W. 3388 (U.S. Jan. 10, 1992) (No. 91-763).

2. The three bond holders held \$1,330,000 in bonds. *Weltover, Inc. v. Republic of Argentina*, 753 F. Supp. 1201, 1203 n.1 (S.D.N.Y. 1991), *aff'd* 941 F.2d 145 (2d Cir. 1991).

3. *Weltover*, 941 F.2d at 147. The option provision gave the holder of the bond the choice of New York, London, Frankfurt, or Zurich as the place of payment. *Weltover*, 753 F. Supp. at 1203.

4. For a criticism of the *Weltover* district court's treatment of Argentina as the alter ego of Banco Central, see Joseph D. Pizzurro, *Sovereign Immunity—Commercial Activity of Foreign State Having Direct Effect in the United States—Forum Non Conveniens*, 85 AM. J. INT'L L. 560, 563-64 (1991).

5. 28 U.S.C.A. §§ 1330, 1332(a)(2)-(a)(4), 1391(f), 1441(d), 1602-1611 (West 1973 & Supp. 1991).

6. 28 U.S.C. § 1605(a)(2). The Act provides, in pertinent part that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

....

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state and that act causes a direct effect in the United States.

Id. (emphasis added).

7. *Weltover*, 753 F. Supp. at 1206-07.

8. *Weltover*, 941 F.2d at 147-48. Argentina was unable to service its debt without con-

United States Court of Appeals for the Second Circuit *held*, affirmed: The district court correctly applied the commercial activity exception to find jurisdiction where Argentina and Banco Central entered the marketplace as commercial actors and breached a commercial contract directly affecting foreign corporate plaintiffs in the United States by depriving them of their contractual rights to receive dollar payments in New York. *Weltover v. Republic of Argentina*, 941 F.2d 145 (2d Cir. 1991), *cert. granted*, 60 U.S.L.W. 3388 (U.S. Jan. 10, 1992) (No. 91-763).

In stripping Argentina of its foreign sovereign immunity, the *Weltover* court engaged in a two-step inquiry. First, it had to determine "whether the act of a foreign sovereign in issuing debt instruments to foreign creditors for the stated purpose of controlling the nation's stock of foreign currency is 'commercial activity'" under the FSIA.⁹ To do so, the court isolated the bond issuance as a clearly commercial activity, rejecting its characterization as a purely sovereign function involving currency controls.¹⁰ The court reasoned that when Argentina and Banco Central embarked in the "stream of international commerce," they irrevocably established themselves as commercial actors.¹¹ Hence, Argentina's subsequent failure to fulfill its contractual obligations retained its commercial character for the purposes of the FSIA.¹²

For the sovereign immunity exception to apply to commercial activity that did not actually occur in the United States, the FSIA requires that the activity have a "direct effect in the United States."¹³ Therefore, the second step in the *Weltover* analysis was to determine whether Argentina's commercial activity had "a sufficient nexus with the United States to justify the exercise of subject matter jurisdiction over the foreign sovereign in an American court."¹⁴ The court easily found that Argentina's breach of contract caused a "direct financial loss" to the plaintiffs—a "direct effect."¹⁵ Placing that effect "in the United States"¹⁶ to satisfy sub-

stant currency devaluations; however, these devaluations created further problems for private companies requiring hard currencies to pay their foreign debt. Argentina then created a program promising to allocate precious hard currency reserves to these private companies, but was later unable to fulfill the promises. *Id.*

9. *Id.* at 146.

10. *Id.* at 150-51. *See infra* part III.

11. *Weltover*, 941 F.2d at 151.

12. *Id.*

13. 28 U.S.C. § 1605(a)(2).

14. *Weltover*, 941 F.2d at 147.

15. *Id.* at 152.

ject matter jurisdiction under the FSIA was, however, more difficult. The corporate plaintiffs lacked any contacts with the United States forum other than the contractual place of payment option.¹⁷ Nonetheless, the *Weltover* court found that Argentina's failure to perform its contractual obligation to make payments in New York caused a direct effect sufficiently in the United States to establish the "statutorily mandated nexus."¹⁸

This Note argues that *Weltover* clarifies the law of foreign sovereign immunity as it pertains to government borrowing. This clarification should allow the courts to adapt the FSIA to increasing global economic interdependence without altering the Act's intended purposes: uniformity of application and certainty in judicial application of the restrictive doctrine of foreign sovereign immunity.

Part II examines the broad Congressional objectives in codifying the restrictive doctrine of sovereign immunity and introduces the relevant portions of the Act. Part III considers the "commercial activity" component of the FSIA. It looks at where the courts have strayed in this area and at *Weltover*'s reaffirmation of the statutory mandate to look to the nature, not the purpose of the activity to determine its commercial nature.

Part IV then discusses the second component, the "direct effect" clause of section 1605(a)(2). It demonstrates that *Weltover*'s approach to direct effect analysis finds useful analogues in traditional contract and choice-of-law principles as well as in public policy. It argues that this flexible approach is more closely in line with congressional goals of uniformity and certainty than the subjective "substantial and foreseeable" test used by other courts. Finally, Part V suggests a means of reconciling the circuits through the "legally significant act" standard of *Zedan v. Kingdom of Saudi Arabia*.¹⁹

16. *Id.*

17. *Id.*

18. *Weltover*, 941 F.2d at 151 (citing *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

19. 849 F.2d 1511 (D.C. Cir. 1988).

II. BACKGROUND

A. Congressional Intent

The *House Report* states four objectives of the FSIA.²⁰ The first was to codify the "restrictive" theory of sovereign immunity.²¹ The "restrictive" theory first made the distinction between suits involving a foreign sovereign's public acts (*jure imperii*) where immunity would be granted, and those involving a foreign sovereign's commercial or private acts (*jure gestionis*) where it would not.²²

The second objective was to "insure that this restrictive principle of immunity is applied in litigation before U.S. courts."²³ This relates to one of the primary purposes of the FSIA, which was to transfer sovereign immunity determinations from the State Department to the judiciary with the goal of making uniform and consistent decisions based on "purely legal grounds"²⁴ without political pressure from foreign governments.²⁵ The third and fourth objectives do not relate directly to the direct effect determination itself. But they do demonstrate congressional intent to liberalize the previously hardlined refusal to assist injured or contractually deprived plaintiffs.²⁶

The FSIA's third objective was to "provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state."²⁷ The FSIA meets this objective by merging personal jurisdiction with subject matter jurisdiction upon proper service of process.²⁸ Congress intended this "broad jurisdiction"²⁹ to lead to "uniformity in decision, which is desirable since the disparate treatment of cases involving foreign governments

20. H.R. REP. NO. 1487, 94th Cong., 2d Sess. at 19 (1976), *reprinted in* 1976 U.S.C.A.N. 6604 [hereinafter HOUSE REPORT].

21. *Id.* at 7.

22. Letter from Jack B. Tate, Acting Legal Advisor to the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952). See HOUSE REPORT, *supra* note 20, at 7-8.

23. HOUSE REPORT, *supra* note 20, at 7.

24. *Id.*

25. *Id.*

26. See *id.* at 8 (discussing the evolution from the absolute doctrine of sovereign immunity of the first half of the century, under which a sovereign was completely immune from suit).

27. *Id.*

28. 28 U.S.C. §§ 1330(b), 1605(b), 1608.

29. HOUSE REPORT, *supra* note 20, at 13.

may have adverse foreign relations consequences."³⁰

The FSIA's fourth objective was to "provide judgment creditors some remedy, if, after a reasonable period, a foreign state or enterprise failed to satisfy a final judgment."³¹ The FSIA provides several exceptions to the previously absolute immunity of foreign sovereigns from attachment or execution.³² Thus, not only did Congress "encourage the bringing of actions against foreign states,"³³ but it also sought to ensure that foreign sovereigns not escape liability through political means.

Taken together, the broad objectives reveal an overall design with a common theme of liberality in applying the FSIA to foreign sovereigns dealing in the commercial realm. By de-politicizing the authority to grant sovereign immunity, Congress attempted to open up the courts to injured plaintiffs in need of relief.³⁴

B. *Commercial Activity Exception*

The FSIA provides three possible exceptions to sovereign immunity within the category of commercial activity. A sovereign loses its immunity when:

the action is based upon [i] a *commercial activity* carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a *commercial activity* of the foreign state elsewhere; or [iii] 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.³⁵

The threshold inquiry in determining the applicability of these three exceptions is thus whether the sovereign has conducted a commercial activity.³⁶ If the court does not find a commercial activity, the inquiry ends; the sovereign is immune from suit in U.S.

30. *Id.*

31. *Id.* at 8.

32. 28 U.S.C. §§ 1610, 1611.

33. HOUSE REPORT, *supra* note 20, at 13.

34. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) *cert. denied*, 454 U.S. 1148 (1982) (the goal of Congress was to open the courthouse door to parties wronged by the commercial acts of a sovereign state); see also *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1982).

35. 28 U.S.C. § 1605(a)(2) (emphasis added).

36. See *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981).

courts. If, however, the court finds that the sovereign has engaged in commercial activity, it goes on to determine if that activity falls within one of the section 1605(a)(2) exceptions.

III. THE THRESHOLD: COMMERCIAL ACTIVITY

The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."³⁷ As if to remove any ambiguity, the FSIA adds that "[t]he 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."³⁸ Congress prefaced these definitions with a declaration of purpose, explaining that the FSIA is based on the principle of reciprocity of international law under which no state is "immune from the jurisdiction of foreign courts insofar as [its] *commercial activities* are concerned."³⁹ This principle suggests that once the court finds a commercial activity to exist, the FSIA should be interpreted liberally⁴⁰ to grant subject matter jurisdiction.

Of utmost importance to Congress was consistency in the law of foreign sovereign immunity.⁴¹ Although avoiding an "excessively precise definition of the term,"⁴² the FSIA congressional guidelines

37. 28 U.S.C. § 1603(d).

38. *Id.*

39. 28 U.S.C. § 1602 (emphasis added). Even before the FSIA was enacted, legal scholars argued that the increasing involvement of governments in international trade and economics required adjustments to "[t]he basic principles and concepts of international law, including the rules of sovereign immunity." THEODORE R. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY: AN ANALYSIS OF LEGAL INTERPRETATION* 276 (1970).

Prior to 1952, the U.S. granted complete immunity to foreign sovereigns unless the State Department approved the claim against the foreign sovereign. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). In 1952, the State Department restricted this immunity to public acts and excluded commercial acts. *Id.* at 487.

Argentina follows the U.S. pre-FSIA procedure in Article 24 of the Argentine Code of Civil and Commercial Procedure. Claims against foreign sovereigns are adjudicated only if the foreign sovereign consents to submit to proceedings or the executive branch of the Argentine government declares that there is no reciprocity with that foreign sovereign. GAMAL M. BADR, *STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW* 162 n.62 (1984).

40. See *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622, 638 (S.D.N.Y.) (noting that "liberal standards for acquiring *in personam* jurisdiction . . . find their *quid pro quo* in elimination of jurisdictional attachments"), *aff'd*, 597 F.2d 314 (2d Cir. 1978).

41. HOUSE REPORT, *supra* note 20, at 32-33 (explaining the reason for the right of removal to a federal court). See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1982).

42. *House Report*, *supra* note 20, at 16 (discussing § 1603(d)).

do list several examples of foreign governmental acts constituting "commercial activity." Among them are government sales of services or products, leasing property, *borrowing money*, and investing in securities of U.S. corporations.⁴³

The circuits uniformly agree on the "private person" test, which labels sovereign activity as commercial "if the activity is one in which a private person could engage."⁴⁴ However, this test may lead to inconsistencies when the courts encounter situations in which foreign sovereigns engage in "private" acts that appear inextricably interwoven with "public" or governmental functions. Philosophically, the problem is definitional, for "[o]ften the essence of an act is defined by its purpose."⁴⁵

For example, a foreign government or its central bank that expropriates property, issues currency controls, and seeks private foreign investment may have as a unified goal the economic recovery of the country, but the issuance of commercial paper in pursuit of that goal is a commercial activity.⁴⁶ An economic recovery plan is governmental in nature, but the implementation of that plan may involve commercial activity.⁴⁷

If strictly applied, the congressional directive to look to the nature, not the purpose of an activity to determine whether it is "commercial activity," is a reliable guide in "mixed" public-private activities. In the seminal case, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,⁴⁸ the court applied this directive to the Nigerian government's contract to purchase cement from a U.S. trading company. The court found that entering into a con-

43. *Id.* In its discussion of the direct effect clause of § 1605(a)(2), the House Report provides no specific examples of activity abroad that might have a direct effect in the U.S. However, nothing indicates that such activity would not also include public debt issuance. *Id.* at 19. And as *Weltover* notes, the *House Report* expressly states that the courts have "a great deal of latitude" in determining commercial activity. *Id.* at 16.

44. *Texas Trading*, 647 F.2d at 309. The Seventh Circuit claims that the Second Circuit has inappropriately added the requirement that the foreign sovereign have a profit motive. *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 n.4 (7th Cir. 1989), *cert. denied* 493 U.S. 937 (1989) (interpreting *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985)). The *Weltover* court set the record straight, stating that the inquiry as to "whether the activity is of the type an individual would customarily carry on for profit . . . did not go so far as to require a profit motive on the part of the foreign sovereign." *Weltover*, 941 F.2d at 150.

45. *De Sanchez v. Republic of Nicaragua*, 770 F.2d 1385, 1393 (5th Cir. 1985).

46. *See West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 825 (9th Cir.) *cert. denied*, 482 U.S. 906 (1987).

47. *Segni v. Commercial Office of Spain*, 835 F.2d 160, 165 (7th Cir. 1987).

48. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

tract to procure cement was a commercial activity falling within the FSIA, even though the governmental purpose—to build army barracks or roads—was easily characterized as sovereign in nature.⁴⁹ Just four months before *Weltover*, in *Shapiro v. Republic of Bolivia*,⁵⁰ the Second Circuit applied the nature/purpose directive to the issuance of public debt by a foreign sovereign.⁵¹

In *Shapiro*, the Bolivian government sought the return of nearly \$81 million in bearer notes issued to its previously appointed agent in the United States.⁵² The notes represented payment for fifty-two Starfighter jets.⁵³ Because the U.S. Department of State refused to grant the necessary transfer license, the transaction was never consummated. The agent failed to return the notes to the Bolivian government as agreed.⁵⁴ Through a series of questionable transactions,⁵⁵ Mr. David Shapiro obtained one of the notes and sued Bolivia, its air force, and its central bank, in the southern district of New York to collect on the note.⁵⁶ The district court dismissed Shapiro's suit for lack of subject matter jurisdiction.⁵⁷

The Second Circuit reversed, holding that the court had subject matter jurisdiction under the first clause of section 1605(a)(2).⁵⁸ On the initial question of what constituted a commer-

49. *Texas Trading*, 647 F.2d at 310.

50. 930 F.2d 1013 (2d Cir. 1991).

51. *Id.* at 1018.

52. Nineteen of the 40 notes were returned to Bolivia voluntarily and Bolivia received a judgment in the southern district of New York for return of the other 21 notes. *Comptroller General v. Int'l Promotions and Ventures, Ltd.*, 618 F. Supp. 202 (S.D.N.Y. 1985).

53. *Shapiro*, 930 F.2d at 1015.

54. *Id.*

55. The Second Circuit, although not addressing the merits, hinted that "Shapiro [must] surmount the formidable hurdle presented by the claim that he is not a bona fide purchaser" *Id.* at 1016.

56. *Shapiro*, 1990 WL 100908, at *2.

57. Shapiro successfully argued to the appointed magistrate that Bolivia's previous suit created an implied waiver of sovereign immunity under 28 U.S.C. 1605(a)(1), but the district court disagreed with the recommendation due to the lack of privity between Shapiro's acquisition of the note and Bolivia's issuance of the note. *Shapiro v. Republic of Bolivia*, No. 86 CIV. 9935, 1990 WL 100908, at *5 (S.D.N.Y. July 13, 1990). The district court further held that because the note was issued in Bolivia and could only be presented there for payment, Shapiro's action was not "clearly based upon commercial activity of Bolivia in the United States." *Id.*

58. "[I]n which the action is based upon a commercial activity carried on in the United States by a foreign state" 28 U.S.C. § 1605(a)(2). The *Shapiro* court upheld the district court's ruling on the waiver issue, but reversed on the "substantial contact" language of § 1603(e). 930 F.2d at 1016, 1018. Because the case turned on the commercial activity of the Bolivian agents in the United States, *Shapiro* did address direct effect under the third

cial activity, the *Shapiro* court declared that "[i]t is self-evident that issuing public debt is a commercial activity within the meaning of Section 1605(a)(2)."⁵⁹ Because the statute expressly requires that only the nature of the transaction be considered and not the purpose,⁶⁰ the court looked to the act of issuing the notes rather than its purpose—supporting Bolivia's national defense.⁶¹

The difficulty that results from ignoring the statutory directive is illustrated by *De Sanchez v. Banco Central de Nicaragua*,⁶² on which the *Weltover* defendants relied to support the theory that the administration of Argentina's money supply was a "quintessentially sovereign" activity.⁶³ In *De Sanchez*, the wife of President Somoza's close friend and former Minister of Defense, cashed in a certificate of deposit three years before its maturity date.⁶⁴ She received a check for \$150,000 from the central bank just before the victory of the Sandinista revolutionaries.⁶⁵ Not surprisingly, the central bank, controlled by the not-yet-official Sandinista regime, placed a stop-payment order on the check.⁶⁶ Mrs. Sanchez sued the central bank to collect on the check.⁶⁷

The *De Sanchez* court faced a quandary: it could treat the central bank's issuance of the check as a sale of foreign currency—a commercial activity; or it could treat it as the regulation of Nicaragua's foreign exchange reserves—a sovereign activity.⁶⁸ The court refused to separate the "nature" from the "purpose":

Indeed, we do not believe that an absolute separation is always possible between the ontology and the teleology of an act. Often, the essence of an act is defined by its purpose—*gift-giving*, for

clause of § 1605(a)(2).

59. *Shapiro*, 930 F.2d at 1018.

60. 28 U.S.C. 1603(d).

61. *Shapiro*, 930 F.2d at 1019.

62. 770 F.2d 1385 (5th Cir. 1985).

63. Brief for Defendants-Appellants at 21, *Weltover* (No. 91-7119).

64. Mrs. Sanchez purchased the CD, payable in U.S. dollars, from a privately-owned bank in Nicaragua. *De Sanchez*, 770 F.2d at 1387.

Just prior to *De Sanchez*, both the Second Circuit and the Fifth Circuit had refused to allow the exchange control regulations of Mexico to de-commercialize the issuance of CDs by Mexican banks, which while privately-owned at the time of the issuance were later nationalized due to the decline in world oil prices. *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1470 (S.D.N.Y.), *aff'd on other grounds*, 762 F.2d 222 (2d Cir. 1984); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985).

65. *De Sanchez*, 770 F.2d at 1387-88.

66. *Id.* at 1388.

67. *Id.* at 1389.

68. *Id.* at 1397.

example. Unless we can inquire into the purposes of such acts, we cannot determine their nature. Indeed commercial acts themselves are defined largely by reference to their purpose.⁶⁹

The court held that the central bank's actions were sovereign activity because the government did not enter the marketplace as a commercial actor when issuing the check.⁷⁰ Thus, the subsequent breach, the failure to honor the check, retained its sovereign character, immunizing the central bank from suit.⁷¹ The *De Sanchez* court's failure to follow the statutory mandate removed an otherwise facially commercial CD redemption from the realm of commercial activity.

Weltover's "commercial activity" analysis is straightforward. Reiterating the congressional mandate to look to the "nature" of commercial activity, rather than its "purpose,"⁷² *Weltover* establishes a bright-line rule: A foreign sovereign who issues public debt instruments is engaged in a commercial activity for the purposes of the FSIA.⁷³ This perfectly sensible approach⁷⁴ finds support in the language of the FSIA,⁷⁵ its legislative history,⁷⁶ and most decisional law on the issue.

Weltover avoids the ontological dilemma perpetuated by *De Sanchez*⁷⁷ with a rule of exclusion: "When the nature of an act is transparent by reference merely to the type of activity, the purpose should not bear on the outcome."⁷⁸ The nature of selling securities in the international public market to private parties is patently commercial activity. Hence, Argentina's purpose in selling the securities was irrelevant to the commercial nature of its activity.⁷⁹

69. *Id.* at 1393 (emphasis added). The early redemption of a certificate of deposit in a country depleted of dollar reserves is "indeed" a gift of the government.

70. *Id.* at 1394.

71. *Id.*

72. 28 U.S.C. § 1603(d).

73. *Weltover*, 941 F.2d at 151.

74. The *Weltover* court calls its "commercial activity" approach "pragmatic." *Weltover*, 941 F.2d at 149.

75. "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) (emphasis added).

76. HOUSE REPORT, *supra* note 20, at 19.

77. See *supra* note 68 and accompanying text.

78. *Weltover*, 941 F.2d at 150.

79. *Weltover's* rule of exclusion does not necessarily collide with *De Sanchez*. The *Weltover* court admits that a government may contract in its "sovereign capacity." *Weltover*, 941 F.2d at 151. Arguably, the Nicaraguan government, in the throes of a revolu-

Like maintenance of an air force in *Shapiro*, or building infrastructure in *Texas Trading*, fiscal management, including currency control regulations, is of a sovereign nature. However, "the implementation of that policy through the issuance of commercial paper is not" sovereign activity.⁸⁰ *Weltover* clearly establishes that, for FSIA purposes, when a sovereign issues commercial paper to finance its governmental objectives, the activity is commercial regardless of the ultimate use or regulation of the funds obtained.

By adhering to the language of the statute, *Weltover* furthers congressional goals of uniformity and certainty by ensuring consistent judicial application of the FSIA in the area of public debt issuance. It follows *Texas Trading* and most other courts that have faced similar cases.⁸¹ Possibly, however, its most important virtue is simplicity. If *De Sanchez* demonstrated anything, it was the futility of trying to make any principled distinction by defining ac-

tion, acted in its sovereign capacity in *De Sanchez* when it permitted the wife of a highly-placed government official to redeem a CD years prior to its maturity: unusual government action under extraordinary circumstances.

One could, of course, argue that, like the political situation in Nicaragua which gave rise to the *De Sanchez* case, the debt crisis in Argentina could also be characterized as an extreme circumstance. See Affidavit of Argentine Financial Representative Daniel Marx, *Weltover* (No. 91-7119) (from which *Weltover* takes its statement of facts describing the financial crisis in Argentina); *Weltover*, 941 F.2d at 147-48. But the commercial nature of the *Weltover* transactions is far more palpable than the occurrence in *De Sanchez*. In *Weltover*, the foreign sovereign specifically designed a plan to raise dollar reserves by inducing private parties outside its sphere of governmental control to rely on a clause providing for repayment in New York.

80. *Weltover*, 753 F. Supp. at 1206 (citing *West v. Multibanco Comermer, S.A.*, 807 F.2d 820, 825 (9th Cir.), cert. denied, 482 U.S. 906 (1987); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109-10 (5th Cir. 1985); *Braka v. Bancomer, S.A.*, 589 F. Supp. 1465, 1470 (S.D.N.Y. 1984)).

81. *Weltover*, 941 F.2d at 150. See, e.g., *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp. 1393, 1400 (S.D. Fla. 1986). See also *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1550 (D.C. Cir. 1987) (refusing to consider the public purpose of improving Bolivia's rural areas where the government hired a private company for program design and implementation); *Callejo*, 764 F.2d at 1108-09 (issuing certificates of deposit in compliance with a decree of the Mexican government was commercial in nature).

In 1986, the International Law Commission of the United Nations drafted a proposed international codification of sovereign immunity containing several variations from the United States statute. *Report of the International Law Commission on the Work of Its Thirty-Eighth Session*, 41 U.N. GAOR Supp. (No. 10) at 9-23, U.N. Doc. A/41/10 (1986). Article 3(2) attempted to moderate the nature-purpose dichotomy by conceding that "the purpose of the contract should also be taken into account if in the practice of that State that purpose is relevant to determining the non-commercial character of the contract." *Id.* For a detailed comparison of the Commission draft and the FSIA, see L. Weatherly Lowe, *The International Law Commission's Draft Articles on the Jurisdictional Immunities of States and Their Property: The Commercial Contract Exception*, 27 COLUM. J. TRANSNAT'L L. 657 (1989).

tivity according to its purpose. *Weltover's* rule of exclusion presents the only way to avoid the danger of falling into the *De Sanchez* trap.

IV. DIRECT EFFECT

The commercial activity exception applies to sovereign activity outside the United States only if that activity has a direct effect in the United States.⁸² Consequently, if it determines that a sovereign act was commercial in nature, the court must next determine whether the activity had a "direct effect in the United States."⁸³ It is on this point that the circuits' analyses to direct effect diverge.

The majority of the circuits apply some version of a "substantial and foreseeable" test.⁸⁴ Under this approach, the court looks to see whether the sovereign activity had a substantial impact in the United States and whether this impact was the directly foreseeable result of the activity in question. The Second Circuit has a different approach. It requires a direct causal connection between the sovereign's foreign commercial activity and the loss to the plaintiff, together with minimum contacts sufficient for personal jurisdiction.⁸⁵

A. *The Substantial and Foreseeable Approach*

Section 1603(c) is a clear statutory command: the commercial

82. 28 U.S.C. § 1605(a)(2). See *supra* note 6.

83. 28 U.S.C. § 1605(a)(2)

84. Thus far, the Third, Fifth, Sixth, Seventh, Ninth, Eleventh, and D.C. Circuits have followed the "substantial" and "foreseeable" approach: *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd mem.*, 760 F.2d 259 (3rd Cir. 1985); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 417-18 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 453 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 581-82 (7th Cir. 1989), *cert. denied*, 493 U.S. 937 (1989); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 798-99 (9th Cir. 1989); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982).

85. *Texas Trading & Milling Corp. v. Republic of Nigeria*, 647 F.2d 300, 314 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). On the minimum contacts requirement, *Texas Trading* derived four inquiries from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The court must examine: (1) the extent to which defendants availed themselves of the privileges of U.S. law; (2) the extent to which litigation in the U.S. would be foreseeable to the defendants; (3) the inconvenience to the defendants of litigating in the U.S. forum; and (4) the countervailing U.S. interest in hearing the suit. *Texas Trading*, 647 F.2d at 314.

character of an activity is to be determined "by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."⁸⁶ In contrast, the direct effect clause of section 1605(a)(2) is rather vague: it denies immunity if a foreign sovereign's "act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . . causes a direct effect in the United States."⁸⁷ As a result, while the courts have easily defined commercial activity, they have encountered difficulties in the direct effect determination.

The *House Report*, unfortunately, offers little help on the application of the direct effect clause other than a rather ambiguous reference to *Restatement (Second) of Foreign Relations Law*. The *Report* simply suggests that the third clause of section 1605(a)(2) "would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in Section 18, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965)."⁸⁸ Section 18 employs the terms "substantial" and "foreseeable" to determine whether American law should apply to extraterritorial conduct.⁸⁹ While the purpose and context of section 18 are quite different from that of section 1605(a)(2), most courts understood the *House Report* as equating the two. Consequently, most courts adopted the "substantial" and "foreseeable" language as a two-prong test in the determination of the direct effect required by 1605(a)(2).

86. 28 U.S.C. § 1603(d).

87. 28 U.S.C. § 1605(a)(2).

88. HOUSE REPORT, *supra* note 20, at 19.

89. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

Section 18 of the *Restatement (Second)* provides, in pertinent part:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if

....

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965)(emphasis added). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401-403 (1987) (adopting the substantial, direct, and foreseeable factors).

Framed in this language, the direct effect determination essentially turns on whether there is a *substantial impact* in the United States that occurred as a *directly foreseeable* result of the foreign conduct in question.

This traditional section 18 approach was used in *America West Airlines, Inc. v. GPA Group, Ltd.*⁹⁰ In that case, the Ninth Circuit took great pains to re-establish the "substantial" and "foreseeable" direct effect test after that same circuit had arguably ignored this approach two years earlier.⁹¹ In *America West*, two corporations owned by the Republic of Ireland participated in an engine maintenance job performed in Ireland on a Boeing 737 later sold to America West Airlines.⁹² During subsequent operation, the engine stalled, caught fire, and was destroyed. America West Airlines sued the two corporations alleging its loss of the engine was a direct effect of their negligent maintenance.⁹³ Ireland asserted sovereign immunity. The Ninth Circuit agreed that sovereign immunity applied. The court held that the maintenance activities in Ireland could not have a foreseeable effect in the United States because the defendants were not aware that the engine would be used in the United States.⁹⁴

In *Zedan v. Kingdom of Saudi Arabia*,⁹⁵ the D.C. Circuit refused to find a direct effect where a U.S. engineer working in Saudi Arabia for a Saudi corporation, returned to the United States to sue the corporation for salary still owing. Zedan was employed by the Saudi corporation to work on the Riyadh Outer Ring Road Project.⁹⁶ When the corporation faltered, the Saudi Arabian Ministry of Communication took over the project, guaranteed Zedan's salary, and placed him in charge of the project's completion.

At the time he left Saudi Arabia to return home, Zedan had not yet received the totality of his salary, but he was "assured"

90. 877 F.2d 793 (9th Cir. 1989).

91. See *Meadows v. Dominican Republic*, 817 F.2d 517 (9th Cir. 1987), which applied the commercial activity exception where two American loan brokers were not paid the 2% commission owed to them by the Dominican Republic for arranging a \$12 million loan. The *Meadows* court applied the commercial activity exception without even mentioning the words "substantial" or "foreseeable."

92. *America West Airlines*, 877 F.2d at 795 n.2, 800.

93. *Id.* at 797.

94. *Id.* at 800. The court also held that the first clause of § 1605(a)(2) did not apply because no nexus existed between the plaintiff's cause of action and the commercial activities of Ireland in the United States. *Id.* at 797.

95. 849 F.2d 1511 (D.C. Cir. 1988).

96. *Id.* at 1512.

that the money would be forwarded to him.⁹⁷ When Saudi Arabia failed to pay, Zedan brought suit. He claimed that he suffered a direct loss in the United States from the defendant's failure to pay. The court applied the section 18 "substantial" and "foreseeable" test to reject the claim. It reasoned that the action involved a Saudi contract to be performed in Saudi Arabia and that the engineer did not have to return to the U.S. upon leaving Saudi Arabia. Therefore, any financial hardship he suffered *in the U.S.* was merely fortuitous and not a direct effect of Saudi Arabia's failure to honor a contract in Saudi Arabia.⁹⁸ As the court observed: "The jurisdiction of our courts cannot turn upon the happenstance of [plaintiff's] travel arrangements."⁹⁹

B. *The Second Circuit Approach*

The Second Circuit methodology stands in sharp contrast to the other circuits' adherence to the "substantial" and "foreseeable" test. In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,¹⁰⁰ for example, U.S. corporations brought an action for an anticipatory breach of contract by a foreign sovereign. The court held that where the foreign sovereign met the constitutional minimum contacts requirements to permit the court to exercise personal jurisdiction over it, a breach or default that caused a direct financial loss to a U.S. company fulfilled the "in the United States" requirement of the direct effect clause.¹⁰¹ The court did not use the "substantial and foreseeable test," in fact, it viewed the *House Report's* reference to section 18 as "a bit of a *non sequitur*."¹⁰² Since the *Restatement* concerns the extent to which U.S. law applies to overseas acts rather than the jurisdiction of U.S. courts, the court concluded that "the requirement[s] [of section 18] that the 'direct effect' be 'substantial' or 'foreseeable,' are not necessarily apposite to the direct effect clause of § 1605(a)(2)."¹⁰³ Thus, rather than using an unsuitable test, the court instead focused on "Congress's concern with providing 'access to the courts' to those aggrieved by the commercial acts of a

97. *Id.*

98. *Id.* at 1514.

99. *Id.*

100. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

101. *Id.* 28 U.S.C. § 1605(a)(2).

102. *Texas Trading*, 647 F.2d at 311.

103. *Id.* at 311 n.32.

foreign sovereign.”¹⁰⁴

Since plaintiff in *Texas Trading* was a U.S. corporation, the court expressly left unanswered the question “whether the failure to pay a foreign corporation in the United States . . . creates an effect ‘in the United States’ under § 1605(a)(2).”¹⁰⁵ This is the issue addressed in *Weltover*.

C. *Weltover* Direct Effect Analysis

Weltover focuses on the legal significance of the place of payment option as the primary consideration in the direct effect determination. The foreign plaintiffs were holders in due course of the bonds, which specified that payment would be made, at the creditor’s option, into the holder’s account in either New York, London, Frankfurt, or Zurich.¹⁰⁶ Each plaintiff elected to receive payment in New York.¹⁰⁷ The court reasoned that Banco Central’s failure to make payment pursuant to the parties’ contractual arrangement caused a direct financial loss to the plaintiffs by depriving them of capital to which they were legally entitled.¹⁰⁸

Unlike the plaintiffs in *Texas Trading*, the *Weltover* plaintiffs were all foreign corporations with no other significant contacts to the U.S. forum. The *Weltover* court thus squarely faced *Texas Trading*’s unanswered question: Does the direct effect exception give the court jurisdiction in a case involving a defaulting foreign sovereign and an injured foreign corporation?

Because the financial injury to the plaintiffs met the “direct effect” requirement of section 1605(a)(2), the logical next step was to determine where to locate the effect.¹⁰⁹ The court drew on ear-

104. *Id.* at 312.

105. *Id.* (citations omitted). In a companion case, *Verlinden B. V. v. Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981), *rev’d*, 461 U.S. 480 (1982), the Second Circuit held that it lacked subject matter jurisdiction under the FSIA to entertain a foreign corporation’s claim against the foreign sovereign on the same transaction. *Id.* The Second Circuit deemed the scope of Article III of the United States Constitution, particularly the “arising under” clause, too narrow to authorize a congressional grant of jurisdiction to the court over a suit between an alien and a foreign sovereign. The United States Supreme Court reversed the Second Circuit’s constitutional ruling, holding that if an action satisfies the substantive standards of the FSIA, a foreign defendant could bring it in federal court. *Verlinden*, 461 U.S. at 490-91.

106. *Weltover*, 753 F. Supp. at 1203.

107. 941 F.2d at 147.

108. *Id.* at 152.

109. *Texas Trading* did not find it necessary to make this distinction since its facts

lier Second Circuit decisions¹¹⁰ indicating that "[a]n injury to a corporation occurs in some legally significant *situs*, for instance, . . . the place designated for performance of a contract."¹¹¹ *Weltover's* placement of the effect at the designated place of performance finds support in other circuits as well. In dictum, the court in *Zedan* suggested that the breach of a contract involving activity carried on entirely outside the United States might have a direct effect in the United States if the contract specified "a particular location in the United States, even perhaps the particular bank through which payment was to be made"¹¹²

Although not citing to *Zedan* on that point, the *Weltover* court used the same reasoning and focused on the legal significance of the breach of contract. It determined that the failure to pay in *New York* made New York the situs of the injury in the first instance.¹¹³ Thus, a breach causing a direct deprivation of a contractual right is a legally significant act causing a direct effect in the expected place of performance.¹¹⁴

included American corporations with loss incurred in the United States. See *Texas Trading*, 647 F.2d at 312.

110. *International Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 11 n.3 (2d Cir. 1989) (involving a housing construction contract between a Cayman Islands corporation and the government of Iraq in which there were partial payments to a New York bank account despite the absence of a New York payment provision).

111. *Id.* (citing *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 121-22 (S.D.N.Y. 1988) (involving a consortium of banks, including one U.S. bank, where the only reference to payment in the agreement was to the account of the foreign agent bank in U.S. dollars)).

112. *Zedan*, 849 F.2d at 1515 n.2. Courts have interpreted *Zedan* to stand for the proposition that the absence of a legally significant act in the United States prevents the invocation of the direct effect clause of the commercial activity exception. See, e.g., *Weltover*, 941 F.2d at 152; *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989); *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

113. *Weltover*, 941 F.2d at 153.

114. *Id.* at 152. Shortly after *Weltover*, the Second Circuit refused to broaden the legally significant situs consideration in a breach of contract to a tort application. In *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, No. 90-7342, 1991 WL 219088 (2d Cir. Oct. 28, 1991), an American plaintiff incurred a financial loss in the United States as a result of the legally significant detention and alleged conversion of an aircraft. The Nigerian Airports Authority ("NAA") demanded that Antares Aircraft, a Delaware limited partnership, pay airport parking and landing fees left unpaid by Antares' former lessee. *Id.* at *2. Antares wired the funds from its New York bank to Nigeria. *Id.* Although Antares claimed that the NAA directed one of several payments to a California bank account, the court rejected the attempt to characterize this payment as the place of performance. *Id.* at *5. The legally significant detention and alleged conversion of the aircraft occurred in Nigeria, and there was no contractual right to payment in the United States even if the NAA was suing. Financial loss in the United States is a direct effect, but as *Weltover* made clear, the situs of the effect is the location of the legally significant act. *Weltover*, 941 F.2d at 152.

1. Contract and Choice-of-Law Principles

By isolating the payment option in the bonds, *Weltover* focuses the direct effect analysis on the deprivation of the plaintiffs' contractual rights.¹¹⁵ Implicit in the court's emphasis on the contractual right to receive payment in New York is the notion that Argentina obtained a benefit from the investors' reliance on the ability to collect in that city.¹¹⁶ Argentina's contract offered bond holders four cities known as international banking centers. It would be fanciful to presume that sophisticated debtors in a complex international refinancing arrangement,¹¹⁷ like Argentina and Banco Central, were ignorant of the intrinsic value of the New York place of payment option. The place of payment option was therefore part of the consideration for extending credit.

Weltover implicates international legal principles of freedom of contract and *pacta sunt servanda*¹¹⁸ by upholding the ability to enforce the bond provision according to the parties' expectations. This is especially true in the absence of a choice of forum clause in the "Bonods." Combining these principles with the FSIA exceptions results in the advancement of an autonomous international commercial law.¹¹⁹

That both the D.C. Circuit in *Zedan* and the Second Circuit in *Weltover* intuitively looked to the place of performance suggests that a comparison in a different context may prove valuable in resolving at least part of the section 1605(a)(2) riddle. Although neither *Weltover* nor *Zedan* dealt with conflict of laws issues, the result in *Weltover*—and the tentative statement of *Zedan*—look surprisingly like the traditional choice-of-law rule that applies the law of the place of performance to determine questions involving breach of contract.¹²⁰

The suggestion is not that the courts would necessarily apply

115. *Weltover*, 941 F.2d at 152.

116. The provision for payment in New York "was not so much an enhancement of the Bonods as it was necessary to give the transaction the air of authenticity." Brief for Plaintiffs-Appellees at 16, *Weltover* (No. 91-7119).

117. *Weltover*, 941 F.2d at 147.

118. It is a basic, universally accepted principle of contract law that parties' contracted agreements must be observed. 1 F.V. GARCIA-AMADOR, *THE CHANGING LAW OF INTERNATIONAL CLAIMS* 385 (1984).

119. Aleksander Goldstajn, *Reflections on the Structure of the Modern Law of International Trade*, in *INTERNATIONAL CONTRACTS AND CONFLICTS OF LAWS* 14, 27 (Petar Sarcevic ed., 1990).

120. *RESTATEMENT OF CONFLICT OF LAWS* § 370 (1934).

the substantive law of the place of performance; the sole issue in both cases was plainly subject matter jurisdiction.¹²¹ Rather, the significance of the original place of performance rule lies in the values which support it and how those values neatly parallel both the objectives of the FSIA and the needs of the international marketplace.

The pragmatic reason for the rule, especially in contracts involving the repayment of money is, obviously, that "[r]epayment is the ultimate aim and objective of the contract, and the place where the contract requires that payment be made will naturally loom large in the minds of the parties."¹²² Argentina was certainly deliberate in its choice of New York as a possible place of payment. Likewise, the plaintiffs' election of New York is a strong indication that they envisioned recourse to New York courts in the event of default by the debtor.¹²³ As the quotation above suggests, the New York option "naturally loomed large" in security-sensitive investors' decisions to purchase Bonods rather than lend elsewhere. To deny them the implicit benefit of their bargain could indeed undermine the confidence of the international financial community in New York as a world financial leader.¹²⁴

The *Zedan* plaintiff, in contrast, went to Saudi Arabia, performed services there, and expected to be paid there.¹²⁵ Aside from a vague "assurance" that his salary would be forwarded to him, every aspect of *Zedan's* employment contract pointed to Saudi Arabia as the place of performance. Payment in the U.S. was not part of the original bargain. It is unlikely that, as an additional inducement to work overseas, the Saudi government promised to forward payment in the U.S., or wherever *Zedan* went.¹²⁶ Thus, any financial hardship in the U.S. resulted not from Saudi Arabia's breach of contract but from *Zedan's* unilateral choice to return to

121. Apparently the contracts in both *Weltover* and *Zedan* lacked choice-of-forum clauses. And while the case is silent on the question, the *Weltover* debenture bonds may very well contain choice-of-law provisions.

122. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 195 cmt. b (1971).

123. This is especially true in the absence of a choice of forum clause in the debt instrument. It would explain in part why a Swiss bank chose New York rather than Zurich as the place of payment.

124. 941 F.2d at 153.

125. *Zedan*, 849 F.2d at 1514.

126. *Id.* at 1514. On the contrary, the plaintiff in *Zedan* attempted, unsuccessfully, to establish a subsequent modification of the original agreement to receive payment in Saudi Arabia. This modification was purportedly made just prior to his departure from Saudi Arabia.

the States. Unlike the situation in *Zedan*, nothing in *Weltover* suggests the parties were litigating in the U.S. by mere happenstance.¹²⁷ By all appearances, New York's financial reputation and the expertise of its courts were inextricably wrapped up in the underlying transactions giving rise to the action from beginning to end.

The traditional values of certainty, predictability, and uniformity of result which are advanced by the place of performance rule,¹²⁸ are the very same values Congress sought to promote in enacting the FSIA. They are also of paramount importance to business planning. Argentina's status as a foreign sovereign presents no compelling reason to depart from those core values. Allowing foreign sovereigns to enter the market as commercial actors, only to raise a cloak of immunity to avoid their contractual obligations in U.S. courts, would introduce a high degree of uncertainty in the already rapidly changing world of international commerce. The effect of a loss of international investor confidence is difficult to predict. But the potential effect on U.S. banking reserves could be drastic.

2. Public Policy

A final consideration in the direct effect determination is "the ultimate FSIA question: Would Congress have wanted an American court to entertain an action such as the present one?"¹²⁹ In answering this question, the *Weltover* court considered the United States' interest in preserving or enhancing New York's status as a world financial leader.¹³⁰ The court cites *Allied Bank Int'l v. Banco Credito Agricola de Cartago*¹³¹ as support for the statement "that public policy should make American courts available to foreign plaintiffs if this will preserve or even enhance New York's status as a world financial leader."¹³²

127. One could argue that it was mere chance (one in four) that the *Weltover* plaintiffs picked New York, rather than London, Frankfurt, or Zurich as the place of payment. After all, had they picked another of the option cities, this case would not be in U.S. courts at all. However, the defendants would also have to concede that they gave the plaintiffs that choice as part of the bargain. The defendants' breach of the contract led to the action in the first place.

128. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 195 cmt. b (1971).

129. *Weltover*, 941 F.2d at 153.

130. *Id.*

131. 757 F.2d 516 (2d Cir.), cert. dismissed, 473 U.S. 934 (1985).

132. *Weltover*, 941 F.2d at 153.

Even though *Allied Bank* primarily addresses the act of state doctrine, the facts of the case are very similar to those of *Weltover*. In *Allied Bank*, a syndicate of thirty-nine banks received promissory notes from the Central Bank of Costa Rica as a rollover of the debt owed by a failed bank undergoing reorganization.¹³³ Just like Banco Central de la Argentina in *Weltover*, the Central Bank of Costa Rica, "in response to escalating national economic problems,"¹³⁴ established debt regulations and the Costa Rican government issued a decree establishing the authority of the Central Bank to control all payments of external debt. The United States District Court for the Southern District of New York found that the commercial activity exception applied, but that the act of state doctrine prevented recovery.¹³⁵ The Second Circuit affirmed, but later reversed itself on rehearing when the United States filed an *amicus* brief criticizing "Costa Rica's attempted unilateral restructuring of private obligations."¹³⁶ The potential embarrassment to U.S.-Costa Rican relations¹³⁷ resulting from a United States court passing judgment on Costa Rica's action was not sufficient justification to prevent the syndicate from obtaining jurisdiction, especially where the notes designated New York as the place of payment and forum for suit.¹³⁸

In *Weltover*, the debentures did not specify New York as the

133. *Allied Bank*, 757 F.2d at 518 n.1.

134. *Id.* at 519.

135. *Allied Bank Int'l v. Banco Credito Agricola*, 566 F. Supp. 1440, 1442-43 (S.D.N.Y. 1983), *rev'd*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985).

A flood of commentary on the relationship between the act of state doctrine and the FSIA followed the *Allied* decision. See, e.g., Ifeanyi Achebe, *The Act of State Doctrine and Foreign Sovereign Immunities Act of 1976: Can They Coexist?*, 13 MD. J. INT'L L. & TRADE 247 (1989); Jane K. Cristal, *The ABA's Proposed Amendment to the FSIA-Another Futile Attempt to Limit U.S. Court Application of the Act of State Doctrine?*, 3 INT'L PROP. INVESTMENT J. 279 (1987); Robert S. Rendell, *The Allied Bank Case and Its Aftermath*, 20 INT'L LAW. 819 (1986); Carsten T. Ebenroth & Louise E. Teitz, *Winning (or Losing) by Default: The Act of State Doctrine, Sovereign Immunity and Comity in International Business Transactions*, 19 INT'L LAW. 225 (1985).

136. *Allied Bank*, 757 F.2d at 519. See also Rendell, *supra* note 135, at 824 ("the intervention of the U.S. government in this litigation effectively turned the tide in favor of the plaintiff.").

137. *Allied Bank*, 566 F. Supp. at 1442. Would the same embarrassment standard apply to an action against the United States? The Third Circuit has pointed out the one-sidedness of the FSIA, referencing Article I, § 9 of the United States Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The United States Treasury appears to be absolutely immune from foreign judgments without an act of Congress declaring its liability. *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 71 (3rd Cir. 1981).

138. 757 F.2d at 521.

forum for suit,¹³⁹ solely as the place of payment. This was, however, sufficient cause for the *Weltover* court to invoke the interest of the United States in maintaining New York's global financial leadership.¹⁴⁰ The court reasoned that the concerns enunciated in *Allied* in relation to the act of state doctrine remained just as valid in the context of the FSIA. They "have an equally direct bearing on the interest of New York in encouraging foreign debtors to pay their debts that are due in New York even though the plaintiffs are not domiciled in New York."¹⁴¹

The Justice Department *amicus* brief in *Allied* emphasized that "[t]he confidence of lenders in the enforceability of their loan agreements payable in New York is critical to their willingness to extend international credit."¹⁴² The *Weltover* court bolstered its direct effect analysis with the same policy concerns. Yet, the policy in favor of protecting the confidence of lenders is not nearly so one-sided as it may first appear. Loss of investor confidence carries a concomitant risk of devastating consequences, particularly for Latin American countries where, despite recent economic improvement, the debt burden remains at crisis levels.¹⁴³ Without a means

139. The absence of a choice of forum clause does not localize the contract when Argentina is aware that, in the absence of such a clause, foreign courts might accept jurisdiction. INTERNATIONAL CONTRACTS § 7.01[1] (Hans Smit et al. eds., 1981). Argentina exhibited its awareness by including a clause waiving immunity in the issuance of promissory notes.

140. See Brief for the United States as Amicus Curiae in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc at 1-2 *Allied Bank* (No. 83-7714) ("The United States has a strong interest in . . . the legal framework applicable to the payment of billions of dollars of loans contracted by foreign governments and foreign private parties for which New York is the place of payment under the contract.")

Since most of the debt in default is owed by Latin America, this policy argument would be very useful in an action to enforce such debt in Miami. See e.g., Dian Vujovich, *Latin America May Be Next Stop for Investors*, MIAMI HERALD, Sept. 23, 1991, *Business Monday* section, at 50; Gail De George et al., *Latin America's Newest Capital City: Miami*, BUS. WEEK, Sept. 30, 1991, at 120.

141. *Weltover*, 941 F.2d at 153. The *Weltover* defendants asserted that the act of state doctrine is concerned with the impact on international relations while direct effect analysis involves the "particular and tangible harm to the plaintiff"). Reply Brief for Defendants-Appellants at 15, *Weltover* (No. 91-7119). Even assuming the validity of the distinction for the moment, given the potential market failure that closing the doors of U.S. courts in this case might cause, it offers little comfort to Argentina or other similarly situated nations.

142. Brief for the United States as Amicus Curiae in Support of the Petition for Rehearing and Suggestion for Rehearing En Banc at 5-6, *Allied Bank Int'l v. Bank Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985) (No. 83-7714).

143. Cf. *Debt Crisis in Latin America Under Control*, Bankers Say, MIAMI HERALD, Oct. 1, 1991, at 5B (Latin America is still burdened with \$425 billion in debt but the net capital flow was positive for the first time since 1982); *A Gateway for Latin Trade*, MIAMI HERALD, Sept. 16, 1991, *Business Monday* section, at 24 (Latin America rebounding from previous financial crisis).

of enforcement, the risk rating of the bond would soar and the foreign governments, particularly that of Argentina, would be unable to afford the interest premium demands of foreign investors.

V. *WELTOVER* AS A MEANS OF RECONCILIATION

While other circuits may adopt *Weltover's* bright-line rule concerning the determination of commercial activity, it is uncertain that they will do the same with respect to the direct effect test. This divergence stems primarily from the circuits' disparate interpretation of the *House Report's* reference to section 18 of the *Restatement of Foreign Relations Law*.

As previously noted,¹⁴⁴ the Second Circuit has long considered the *House Report's* reference to section 18 a "*non sequitur*"¹⁴⁵ because the direct effect requirement concerns jurisdiction, whereas section 18 concerns the right to prescribe American law to foreign matters.¹⁴⁶ This criticism, however, is unwarranted because it overstates the significance, and thereby the intent, of the *House Report's* reference to section 18. The *Report* urges only that the direct effect determination be "consistent with principles set forth in section 18."¹⁴⁷ It does not incorporate the *substantive* law of foreign relations in its guidelines. The principles of section 18 of the *Restatement* are simply guidelines; not statutory commands.

It follows, therefore, that a direct effect analysis *not inconsistent* with the general principles of section 18 will meet the admittedly slight guidance the *House Report* gives courts in applying the third clause of section 1605(a)(2). This position comports with Congressional intent to leave sovereign immunity determinations to the courts.

If reference to section 18 is merely broad guidance, the courts should be able to conform with congressional intent without strict application of the "substantial" and "foreseeable" language. *Weltover* cautioned that "rather than getting steeped in the metaphysics of such amorphous terms . . . courts must be concerned with Congress's goal of opening the courthouse doors 'to those ag-

144. See *supra* notes 102-04 and accompanying text.

145. *Id.* *Texas Trading*, 647 F.2d at 311. Accord *Weltover*, 941 F.2d at 152.

146. But cf. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) ("Congress . . . enact[ed] substantive provisions [in the commercial activity exception] requiring some form of substantial contact with the United States").

147. HOUSE REPORT, *supra* note 20, at 19 (emphasis added).

grieved by the commercial acts of a foreign sovereign.’”¹⁴⁸ In other words, the question was not whether the facts fit neatly within a certain test, but whether Congress’s intent in enacting the FSIA would be served if the court decided to hear the case. Hence, in reaching its decision, the *Weltover* court looked not to a narrow rule of law but rather to the whole transaction. It focused on the expectations of the parties as well as on the public policy concerns of both the forum state and the international business community.

The key to reconciling the “substantial and foreseeable” jurisdictions with the Second Circuit’s more flexible approach can be found in *Zedan v. Kingdom of Saudi Arabia*.¹⁴⁹ While *Zedan* applied the “substantial and foreseeable test,” it did so by interpreting it to mean that “something legally significant actually happened in the United States.”¹⁵⁰ Although some commentators have interpreted *Zedan* as adding a third requirement to the substantial and foreseeable approach,¹⁵¹ the commentators are not necessarily correct. Rather than adding a third requirement, *Zedan* provides a more precise substitute for the unsatisfactory “substantial and foreseeable” test: “Something legally significant actually happened in the United States [T]herefore, the foreign sovereign caused a ‘substantial’ and ‘direct and foreseeable’ effect in the United States.”¹⁵²

Unlike the vague “substantial and foreseeable” formula, the “legally significant act” is better suited to fulfill Congress’s intent in enacting the FSIA. A legally significant act is identifiable by its occurrence; it has a specific place and time. In *Weltover* the failure to credit the plaintiffs’ New York bank accounts had legal significance for the purposes of the FSIA because the parties specifically contracted that payment would be made in New York. Had they

148. *Weltover*, 941 F.2d at 151 (citing *Texas Trading*, 647 F.2d at 312).

149. 849 F.2d 1511 (D.C. Cir. 1988).

150. *Id.* at 1515.

151. See Renana B. Abrams, Comment, *The Foreign Sovereign Immunities Act: Inconsistencies in Application of the Commercial Activity Direct Effect Exception*, 5 EMORY INT’L L. REV. 211, 234-40 (1991); Lori E. Corwin, *Jurisdiction-Foreign Sovereign Immunities Act-Commercial Activity/Direct Effect Exception*, *Zedan v. Kingdom of Saudi Arabia*, 13 SUFFOLK TRANSNAT’L L.J. 899, 909 n.48 (1990) (criticizes court for not following other cases finding legally significant, substantial, and foreseeable occurrences).

152. *Zedan*, 849 F.2d at 1515. See *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1004 (D.C. Cir. 1985) (“a significant transaction was effectuated in the United States”). Cf. *America West Airlines*, 877 F.2d at 799 (interprets *Zedan* as a narrow application of *Texas Trading*, thereby preserving the substantial and foreseeable approach).

instead agreed that payment would be made in London or Zurich the defendants' breach would have lacked legal significance under the Act, just as the Saudi government's "assurance" in *Zedan* lacked legal significance.¹⁵³

Thus, the "legally significant act" avoids the court's subjective interpretation of the "substantial" and "foreseeable" language and yields the certainty, predictability, and uniformity of result that Congress sought to achieve.¹⁵⁴ The "substantial and foreseeable" test provides no foundation for direct effect analysis. Instead, it is an epistemological exercise that inevitably yields inconsistent results.

Weltover simply suggests that the other circuits' approach is too narrow to achieve liberality in direct effect analysis. The *Weltover* court was concerned with "the interests of the forum . . . in controlling conduct within its borders."¹⁵⁵ Coupled with these domestic "interests" is a general concern for the rapidly changing structure of the global financial market. To maintain the economic status of the United States and to ensure the continued trust of international investors,¹⁵⁶ the law requires a more dynamic and flexible model than the "substantial and foreseeable" test.¹⁵⁷ *Weltover* is such a model.

153. See *supra* notes 95-99 and accompanying text. Of course, both approaches must first satisfy due process. However, when the constitutional minimum due process requirements for personal jurisdiction are met, either approach will already have most, if not all the contacts necessary to fulfill the commercial activity direct effect exception. For *Weltover*'s minimum contacts analysis see *Weltover*, 753 F. Supp. at 1208. See also *supra* note 85 (addressing *Texas Trading*'s minimum contacts inquiry).

Several commentators would use *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) to satisfy the "direct effect" requirement of the FSIA. See, e.g., Christopher J. Papajohn, Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act: How Far Does the Long Arm Reach?*, 20 N.Y.U. J. INT'L L. & POL. 463 (1988); Lorna J. Schofield, Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980); Philip D. Wheeler, Note, *Direct Effect Jurisdiction Under the FSIA of 1976*, 13 N.Y.U. J. INT'L L. & POL. 571 (1981).

154. See *supra* notes 20-34 and accompanying text.

155. *Weltover*, 941 F.2d at 152.

156. See *Weltover*, 941 F.2d at 153 (position that the U.S. has an interest in protecting the foreign plaintiff from breach "has been building in the district courts for several years") (citing *Int'l Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8, 13 (2d Cir. 1989) (Kaufman, J., dissenting)).

157. *Contra* Charles D. Day, Note, *L'Europeenne de Banque v. La Republica de Venezuela: Unnecessarily Permitting Foreign Plaintiffs to Sue Foreign Governments Under the Foreign Sovereign Immunities Act*, 17 BROOKLYN J. INT'L L. 165, 167 (1991) (suggesting that courts should strictly adhere to the section 18 reference).

VI. CONCLUSION

Debt issuance by a foreign sovereign in the commercial marketplace is a commercial activity regardless of the end-use of the funds or the occurrence of intervening governmental acts such as currency controls. *Weltover* reinforces the commercial nature of the debt issuance by adhering to the statutory determination requirements and by distinguishing prior case law which appears to waiver from these requirements.

In contrast to the commercial activity determination, *Weltover* urges a more flexible approach for finding a direct effect in the United States. *Weltover* rejects the narrow "substantial" and "foreseeable" formula, and instead emphasizes the need to include a variety of considerations in the direct effect determination depending on the circumstances. For breach of sovereign debt instruments, *Weltover* suggests that these considerations include congressional goals in enacting the FSIA, contract theory and the principles embedded in traditional choice-of-law rules, as well as public policy considerations. This model provides a foundation for a comprehensive and judicially flexible approach to direct effects analysis. Circumstances may justify judicially developed flexibility as long as the application of the FSIA remains neutral and consistent.

The Second Circuit recognizes the need for greater judicial adaptation in the changing context of the FSIA. While the Second Circuit arguably has the most at stake in the judicial management of the global financial leader of New York, several other circuits would be wise to prepare for their jurisdiction's increasing global influence—the Third, Eleventh, and D.C. Circuits perhaps.

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