Fordham International Law Journal

Volume 17, *Issue* 3 1993 *Article* 8

Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity

Avi Lew*

*

Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity

Avi Lew

Abstract

This Comment discusses the ramifications that Weltover has had on the decisions of federal circuit and district courts. Part I examines the Foreign Sovereign Immunities Act, its history, and its "commercial activity exception." Part I then proceeds to describe Argentina's commercial activity at issue in Weltover, and the events in Argentina that created the conflict that led to the Weltover decision. Part II traces Weltover's procedural history, first describing the decisions by both the district court and the court of appeals, and then presenting the decision by the Supreme Court. In addition, Part II reviews a sampling of the federal circuit and district court cases that have followed Weltover's holding. Part III argues that the Weltover decision is significant because it provides lower courts with a standard to follow for defining the "direct effect" requirement of the commercial activity exception. Part III also notes that, despite the guidance that the Supreme Court has given through Weltover, the issue of a sovereign's protection under the FSIA remains unresolved. This Comment concludes that Weltover presents an important decision in the law of sovereign immunity, however, the question of the scope of the Weltover holding remains unsettled.

REPUBLIC OF ARGENTINA V. WELTOVER, INC.: INTERPRETING THE FOREIGN SOVEREIGN IMMUNITY ACT'S COMMERCIAL ACTIVITY EXCEPTION TO JURISDICTIONAL IMMUNITY

INTRODUCTION

The Foreign Sovereign Immunities Act (the "FSIA") provides the exclusive statutory method for U.S. courts to obtain jurisdiction over a non-U.S. sovereign.[1] The FSIA also offers a domestic forum for disputes arising from business transactions between non-U.S. sovereigns and persons in the United States.[2] More significantly, the FSIA immunizes non-U.S. states, their political subdivisions, and their agencies and instrumentalities from jurisdiction of U.S. courts unless one of several listed exceptions applies.[3] The U.S. Supreme Court has characterized

---

1. The Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891, (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d) (1988), 1602-1611 (1988 & Supp. IV 1992). The FSIA was enacted on October 21, 1976 and became effective 90 days thereafter. Richard W. Cutler, *Commercial Exception to Foreign Sovereign Immunity*, N.Y. L.J., May 3, 1993, at 1 [hereinafter *Commercial Exception*]. Richard W. Cutler, a solo practitioner in New York, was the attorney who represented the plaintiffs in Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992), the subject of this Comment.

2. Lorna G. Schofield, Note, *Effects Jurisdiction Under Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474, 474 (1980) [hereinafter *Effects Jurisdiction*].

3. 28 U.S.C. § 1605. Section 1605(a) reads as follows:

> General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
>
> (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 elsewhere and that act causes a direct effect in the United States;
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumen-

the "commercial activity" exception as the most significant one.[4] This exception provides the framework in which a party can maintain a lawsuit against a non-U.S. sovereign or its entities in a U.S. court.[5]

On June 12, 1992, the U.S. Supreme Court decided *Republic of Argentina v. Weltover, Inc.*,[6] and interpreted the "commercial activity" exception in an effort to resolve what, in fact, constitutes a "commercial activity."[7] In *Weltover*, the Court held that a sover-

---

tality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damages to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the Unites States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise inapplicable.

28 U.S.C. § 1605. Section 1605(b)-(d) involves suits in admiralty and is therefore irrelevant to this Comment. The most significant portion of the above section vis-a-vis this Comment is 1605(a)(2), the "commercial activity" section.

4. *See*, Republic of Argentina v. Weltover, Inc., __ U.S. __, 112 S. Ct. 2160, 2164 (1992) ("The most significant of the FSIA's exceptions . . . is the 'commercial' exception . . . .").

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

6. 112 S. Ct. 2160 (1992).

7. *See, e.g.*, Antares Aircraft v. Federal Republic of Nigeria, __ U.S. __, 112 S. Ct. 3020 (1992) (vacating judgment and remanding to United States Court of Appeals for Second Circuit for further consideration in light of *Weltover*; Chuidian v. Philippine

eign's issuance of bonds[8] was an act taken "in connection with a commercial activity."[9] In addition, the Court held that a non-U.S. sovereign's unilateral rescheduling of the bonds had a "direct effect in the United States" so as to subject it to suit in a U.S. court pursuant to the FSIA.[10]

Previously, lower courts lacked uniformity in their decisions on whether a sovereign's actions constituted "commercial activity."[11] As a result, courts were unable to develop a single inter-

---

Nat'l Bank, 976 F.2d 561, 566 (9th Cir. 1992) (dissenting opinion) (following *Weltover* by saying that "the place of payment is usually considered the place of performance in analogous situations."); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387, (5th Cir. 1992) (noting that "*Weltover* strengthens our conclusion. . . ."); Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. 92-4177, 1993 U.S. Dist. LEXIS 784, at *24 (E.D. Pa. Jan. 26, 1993) (concluding that the court could exercise subject matter jurisdiction based upon the commercial activity exception of the FSIA); Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1385-86 (S.D.N.Y. 1993) (relying on *Weltover* for its interpretation of FSIA's commercial activity exception); AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 976-77 (S.D. Fla. 1992) (noting that the "very recent Supreme Court decision of Republic of Argentina v. Weltover, Inc. . . . disposes of the issue [and]. . . provides guidance"); First City, Texas-Houston, N.A. v. Rafidian Bank, No. 90 Civ. 7360, 1992 U.S. Dist. LEXIS 15235, at *10 (S.D.N.Y. Sept. 28, 1992) (relying on *Weltover* for its statement that "Rafidian Bank's actions were purely commercial in nature. As such, it cannot claim sovereign immunity for its acts.").

8. Republic of Argentina v. Weltover, Inc., 753 F. Supp. 1201, 1203. These bonds, known as "Bonods," provided that the Argentinean government would pay the bondholders in U.S. dollars. *Id.*

9. *Weltover*, 112 S. Ct. at 2168.

10. *Id.*; 28 U.S.C. §§ 1602-1611.

11. *See, e.g.*, CHARLES J. LEWIS, STATE AND DIPLOMATIC IMMUNITY 44-46, 86-87 (3d ed. 1990) (giving examples of various cases in which courts ambiguously reached decisions as to commerciality). It was not uncommon for courts to reach different conclusions as to an act's commerciality on fact patterns which did not possess any factors to merit logical distinction. *Id.* at 44-46. For example, in de Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900 (E.D. La. 1981), the Eastern Louisiana Federal District Court held that the issuance of checks by a central bank on behalf of a commercial bank constituted a governmental and not a commercial activity and therefore the court allowed immunity. *Id.* at 914. On appeal, the Fifth Circuit affirmed, holding that the commercial activity exception did not apply because the purpose of the act was governmental. 770 F.2d 1385 (5th Cir. 1985). Conversely, a court reached the opposite conclusion when an agency of the Mexican government contracted for collating, printing and binding a two-volume treatise about Mexico, and the court characterized it as commercial activity. Continental Graphics, Div. of Republic Corp. v. Hiller Indus., Inc., 614 F. Supp. 1125 (D.C. Utah 1985). In State Bank of India v. National Labor Relations Board, 808 F.2d 526 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the National Labor Relations Board ("NLRB") alleged that the State Bank of India had violated U.S. labor laws by refusing to bargain with a certain U.S. labor union. *Id.* The court held that despite the fact that the bank had engaged in this activity for the benefit of a government shareholder, the acts were commercial activity and thus rendered the bank

pretation of "commercial activity."[12] Courts had employed considerable latitude in evaluating what types of activity constituted commercial activity.[13] The inconsistent application of the commercial activity exception thwarted efforts by plaintiffs to obtain jurisdiction over non-U.S. parties.[14]

This Comment discusses the ramifications that *Weltover* has had on the decisions of federal circuit and district courts. Part I examines the Foreign Sovereign Immunities Act, its history, and its "commercial activity exception." Part I then proceeds to describe Argentina's commercial activity at issue in *Weltover*, and the events in Argentina that created the conflict that led to the *Weltover* decision. Part II traces *Weltover's* procedural history, first describing the decisions by both the district court and the court of appeals, and then presenting the decision by the Supreme Court. In addition, Part II reviews a sampling of the federal circuit and district court cases that have followed *Weltover*'s holding. Part III argues that the *Weltover* decision is significant because it provides lower courts with a standard to follow for defining the "direct effect" requirement of the commercial activity exception. Part III also notes that, despite the guidance that the Supreme Court has given through *Weltover*, the issue of a sovereign's protection under the FSIA remains unresolved. This Comment concludes that *Weltover* presents an important decision in the law of sovereign immunity, however, the question of the scope of the *Weltover* holding remains unsettled.

---

subject to suit. *Id.* at 537. However, in another case of a bank owned by a government, the Court for the Southern District of New York denied immunity. Hatzlachh Supply Inc. v. Savannah Bank of Nigeria, 649 F. Supp. 688 (S.D.N.Y. 1986). In *Hatzlachh*, the Nigerian Government owned 51% of the bank, and the plaintiff alleged that the bank had released bills of lading for photographic supplies exported by the plaintiff without the plaintiff's authority. *Id.* at 689.

12. *See supra* note 11 and accompanying text (listing examples of cases in which courts have employed latitude in determining commerciality).

13. *See, e.g.*, Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. 92-4177, 1993 U.S. Dist. LEXIS 784, at *17 (E.D. Pa. Jan. 26, 1993) *citing* H.R. REP. No. 1487, 94th Cong., 2d Sess. 16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 (holding that court's would have a great deal of latitude in determining what is a 'commercial activity exception' for purposes of FSIA bill). The term "commercial activity exception" of the FSIA refers to the section of the FSIA which states that non-U.S. sovereigns are not immune from suit in any case that involves commercial activities carried on in the United States that have a direct effect in the United States. 28 U.S.C. § 1605(a)(2).

14. *See supra* note 11 (giving examples of court's inconsistency in reaching decisions on commerciality).

I. *THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976*

The doctrine of sovereign immunity is premised on the principle that sovereigns, being equal, may not exercise control over one another.[15] In the United States, sovereign immunity has developed greatly over the last century,[16] and is rooted in a 1952 letter, known as the Tate letter, written by the U.S. State Department legal advisor.[17] The letter discussed the sovereign immunity exception and conveyed the State Department's view that sovereigns lose their immunity from suit once they actively participate in the commercial marketplace.[18] The commercial activity exception was subsequently adopted by the U.S. Supreme Court in *Alfred Dunhill of London*,[19] which contributed to the birth of the exception in the FSIA.[20] In enacting the FSIA, Congress codified the "restrictive" theory of sovereign immunity espoused in the Tate letter.[21] In applying the "commercial activity" exception, however, federal courts, varied in their interpretation of the exception.[22]

A. *Origins of Sovereign Immunity and the FSIA*

Sovereign immunity, a judicial doctrine founded on the ancient principle that "the King can do no wrong," precludes bringing suit against a government without its consent.[23] The immunity of sovereigns is rooted in the notion that it is inconsis-

---

15. The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812). In *McFaddon*, the Supreme Court held that "[t]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." *Id.* at 137; *Effects Jurisdiction*, *supra* note 2, at 476.

16. *See, e.g.*, HOUSE REPORT, *supra* note 5, at 8, 1976 U.S.C.C.A.N. at 6606-07 (discussing evolution of doctrine of sovereign immunity).

17. HOUSE REPORT, *supra* note 5, at 9, 1976 U.S.C.C.A.N. 6604, 6607.

18. *Id.*; Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 (1976).

19. *Dunhill*, 425 U.S. at 682.

20. Republic of Argentina v. Weltover, Inc., ___ U.S. ___, 112 S. Ct. 2160, 2165 (1992).

21. HOUSE REPORT, *supra* note 5, at 7, 1976 U.S.C.C.A.N. at 6605; *Effects Jurisdiction*, *supra* note 2, at 478.

22. *See supra* notes 12-14 and accompanying text (discussing lack of uniform standard for courts).

23. *See* Owen v. City of Independence, Missouri, 445 U.S. 622, 647 n.28 (1980) (discussing limitations on immunity); Maryland Port Admin. v. I.T.O. Corp. of Baltimore, 395 A.2d 145, 149 (Md. Ct. Spec. App. 1978) (discussing origin of sovereign immunity).

tent with the dignity and independence of sovereigns if they were to be subjected to the laws of other jurisdictions.[24] The earliest manifestations of this doctrine were evident in the protection from suit afforded to diplomatic agents.[25] In the eighteenth and nineteenth centuries, most States were ruled by individual sovereigns who, virtually, personified the State.[26]

In the United States, the immunity of a non-U.S. defendant from a federal court's assertion of jurisdiction over it, is limited to claims falling within one of the enumerated exceptions in the FSIA.[27] Prior to the twentieth century, U.S. courts either granted non-U.S. sovereigns complete immunity or deferred the issue of whether immunity should be granted to the Executive Branch.[28] Historically, courts in the United States viewed sovereign immunity as being absolute.[29] As a result, sovereigns were insulated from suit.[30] In the twentieth century, courts realized that the international community had changed.[31] As sovereigns

---

24. LEWIS, *supra* note 11, at 1.

25. *Id.* at 15.

26. *Id.*

27. 28 U.S.C. § 1605.

28. Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1379 (S.D.N.Y. 1993); *see Effects Jurisdiction, supra* note 2, at 476-77. The Note *Effects Jurisdiction, supra* note 2, at 476-77 explains that "[a]lthough application of the doctrine need not implicate foreign policy considerations, before adoption of the Act, the executive branch, through the State Department, played an important role in determining whether United States courts should hear particular claims against foreign states." *Id.*

29. *See* The Schooner Exchange v. McFaddon, 11 U.S. 116, 125 (1812). The Supreme Court in *McFaddon* noted that "the law of nations . . . requires the consent of the sovereign, either express or implied, before he can be subjected to a foreign jurisdiction." *Id.; see, also,* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976). In *Dunhill,* the Court stated:

> Although it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or propriety actions.

Id.; see, e.g., Commercial Exception, supra note 1, at 1 ("Originally, the U.S. recognized absolute sovereign immunity as an element of international law.").

30. *See supra* note 11 and accompanying text (explaining problem that plaintiffs had when attempting to assert jurisdiction over non-U.S. sovereign in U.S. court).

31. *Commercial Exception, supra* note 1, at 1; *Dunhill,* 425 U.S. at 703. In *Dunhill* the Court noted that "[p]articipation by foreign sovereigns in the international commercial market has increased substantially in recent years." *Id.*; *Effects Jurisdiction, supra* note 2, at 501.

increased their participation in the world market, there was an increase in the possibility that nations could invoke the sovereign immunity defense.[32] Sovereigns had the ability to protect themselves from litigants suing them in a different country than the one in which they were located.[33] Therefore, the potential for non-U.S. sovereigns to abuse sovereign immunity had increased.[34] As a result, courts limited the unrestricted notion of absolute sovereignty,[35] declining to extend sovereign immunity in cases arising out of purely commercial transactions.[36]

B. *The Tate Letter*

The metamorphosis of foreign sovereign immunity jurisprudence, from a traditional absolute application[37] to its current,

---

32. *Commercial Exception, supra* note 1, at 1; *Effects Jurisdiction supra* note 2, at 501.

33. *Effects Jurisdiction, supra* note 2, at 501.

34. *See Commercial Exception, supra* note 1, at 1; *Dunhill*, 425 U.S. at 703. In *Dunhill*, the Supreme Court noted that "[t]he potential injury to private businessmen and ultimately to international trade itself from a system in which some of the participants in the international market are not subject to the rule has therefore increased correspondingly." *Id.*

35. *Id.*; HOUSE REPORT, *supra* note 5, at 7, 1976 U.S.C.C.A.N. 6604, 6605. The report remarked that "[i]n a modern world where foreign state enterprises are every day participants in commercial activities . . . [the House Report] is urgently needed legislation." *Id.*; *see* Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1378 (S.D.N.Y. 1993) (commenting that for more than one hundred and fifty years prior to enactment of the FSIA, courts in United States had generally granted complete immunity to foreign sovereigns); *Effects Jurisdiction, supra* note 2, at 501. The author of the *Effects Jurisdiction supra* note 2, at 501 stated that the "change in policy was implemented in recognition of the marked increase in trade activities between American nationals and foreign states." *Id.*

36. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703 (1976); Jeffrey N. Martin, Note, *Sovereign Immunity - Limits of Judicial Control - the Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 435 (1977).

37. *Dunhill*, 425 U.S. at 698. The Court in *Dunhill* wrote the following about the change from the inflexible "absolute" view of sovereign immunity to the current flexible "restrictive" view of sovereign immunity:

> Although it had other views in years gone by, in 1952, as evidenced by Appendix 2 (the Tate letter) attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time as the attached letter of November 26, 1975, confirms.

Commercial Exception, supra note 1, at 1. Mr. Cutler explains the concept of restrictive immunity in the following manner:

> In 1952 the State Department formally adopted the emerging view of 'restric-

more flexible approach, has its roots in a 1952 letter written by Jack Tate, the State Department's legal advisor, to convey the State Department's views on sovereign immunity to the U.S. Attorney General.[38] In the letter, Tate explained that States are not immune from suit once they participated in the commercial marketplace.[39] Thus, the Tate letter indicated that the State Department would adopt the "restrictive" doctrine, which provides that sovereign immunity in the United States should be granted only with respect to causes of action arising out of a sovereign's governmental actions, but not those arising out of its commercial actions.[40] The contents of this letter eventually developed into the commercial exception of the FSIA.[41]

---

tive' sovereign immunity in a letter from Jack Tate, the department's legal advisor. Under this doctrine, foreign states are not immune when they enter the commercial marketplace, and the Tate Letter states that this principle will be the basis of the department's future advice on actions against foreign sovereigns. The courts then began to adopt this position on a case by case basis.

Id.

38. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984-85 (1952), *and in* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (app. to opinion of White, J.) [hereinafter Tate Letter]. The Tate Letter to the Attorney General began with the following introduction:

> My Dear Mr. Attorney General:
>
> The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases.

The letter concluded with the following summation:

> In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.
>
> Sincerely yours,
>
> For the Secretary of State:
>
> JACK B. TATE
>
> Acting Legal Adviser

Id.

39. *Id.* at 984; *Dunhill*, 425 U.S. at 714-15.

40. 26 DEP'T ST. BULL. at 984; *see Effects Jurisdiction, supra* note 2, at 477 (discussing Tate Letter).

41. *See supra* note 3 and accompanying text (citing 28 U.S.C. § 1605(a)(2), commercial activity exception).

C. Alfred Dunhill of London, Inc. v. Republic of Cuba: *Recognition of a Commercial Activity Exception to Foreign Sovereign Immunity*

In *Alfred Dunhill of London Inc. v. Republic of Cuba*,[42] decided a few months before the passage of the FSIA, the U.S. Supreme Court explicitly adopted the commercial activity exception of sovereign immunity.[43] In *Dunhill*, the Cuban government confiscated the businesses of certain Cuban cigar manufacturers and named managing agents, known as "interventors," to operate the seized businesses.[44] Alfred Dunhill of London ("Dunhill"), paid the Cuban government for cigars that Dunhill had purchased from one of the expropriated Cuban businesses.[45] Subsequently, the former owners of the expropriated Cuban cigar companies brought an action against U.S. importers to recover payments for cigar shipments.[46] In *Dunhill*, the Court considered whether Cuba's failure to return funds to Dunhill constituted an "act of state"[47] by Cuba, thus precluding jurisdiction

---

42. 425 U.S. 682 (1976).

43. *Id.*

44. *Id.* at 685.

45. *Id.*

46. *Id.*

47. *Id.* at 684. The act of state doctrine's established formulation is given in Underhill v. Hernandez, 168 U.S. 250 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Id. at 252.

Almost eighty years later, the essence of the act of state doctrine accompanied by the Court's opinion of its application was reiterated in *Dunhill* as the following:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. . . . But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary . . . we fear that embarrassment and conflict would most likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

Dunhill, 425 U.S. at 697 *citing* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28, 431-33 (1964). Currently, the Supreme Court restricts the use of the act of state doctrine even further. In W.S. Kirkpatrick v. Environmental Tectonics Corp. Intern.,

over Cuba.[48] The Court in *Dunhill* held that the act of state doctrine did not apply because the case involved acts that were commercial rather than public in nature.[49] The Court noted that nothing in the record of the case revealed an act of state with respect to the defendant's obligation[50] to return the sums Dunhill mistakenly paid to Cuba.[51]

1. Foreign Sovereign Immunity Act: Codification of the "Restrictive" View of Sovereign Immunity

The FSIA, which was enacted a few months after the

---

493 U.S. 400 (1990), Justice Scalia, writing for a unanimous Court noted that previously the act of state doctrine had "'the highest considerations of international comity and expediency'" however, presently it is a "consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.* at 404 *quoting* Oetjen v. Central Leather Co., 246 U.S. 297, 303-04 (1918) & Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); *see* AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 978 (S.D. Fla. 1992) (remarking that "the act of state doctrine either does not apply — or is at its weakest — for acts of state that consist of purely commercial transactions, and for cases in which no foreign policy goal of the Executive Branch is impeded").

48. *Dunhill*, 425 U.S. at 694.

49. *Id.* (holding facts sufficient to demonstrate that conduct in question was public act of those with authority to exercise sovereign powers). This issue resulted in a four-to-four Court split. The Solicitor General appeared as *amicus curiae* arguing in favor of the application of this additional commercial exception. Coincidentally, the case was argued by Justice Antonin Scalia, then Deputy Solicitor General, who sixteen years later authored the unanimous opinion in *Weltover*, expanding the commercial exception. *Id.* at 684; *see Commercial Exception*, *supra*, note 1, at 1 (stating that "*Dunhill* also included the question of a commercial exception to the 'act of state' doctrine, on which the court split four-to-four. The Solicitor General appeared as *amicus curiae* arguing in favor of that additional commercial exception. The case was argued by the Deputy Solicitor General, Antonin Scalia.").

50. *Dunhill*, 425 U.S. at 695. The Court expressed its agreement with Dunhill's arguments by stating that it was "persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Id.* at 695.

51. *Id.* at 691-93. The Court revealed its rejection of Cuba's sovereign immunity argument with the following exclamation:

> Neither does it demonstrate that in addition to authority to operate commercial businesses, to pay their bills and to collect their accounts receivable, [Cuban] interventors had been invested with sovereign authority to repudiate all or any part of the debts incurred by those businesses. Indeed it is difficult to believe that they had the power selectively to refuse payment of legitimate debts arising from the operation of those commercial enterprises.

Id.

Supreme Court's decision in *Dunhill*,[52] requires that courts determine "commercial activity" by referring to the "nature" of the course of conduct or particular transaction or act, rather than reference a transaction's "purpose."[53] The FSIA's legislative history provided additional guidance as to the type of transactions that the U.S. Congress contemplated would qualify as a commercial activity.[54] Thus, the statute requires courts to focus on the type of transaction involved, rather than what entity is a party to it, or the transaction's ultimate purpose.[55]

Congress passed the FSIA in 1976 to satisfy several objectives.[56] These goals included facilitating the method whereby

---

52. *See* Republic of Argentina v. Weltover, Inc., __ U.S. —, 112 S. Ct. 2160, 2166 (1992) (commenting on significance of short period of time between *Alfred Dunhill* decision and enactment of FSIA by noting that "[g]iven that the FSIA was enacted less than six months after our decision in *Alfred Dunhill* was announced, we think the plurality's contemporaneous description of the then-prevailing restrictive theory of sovereign immunity is of significant assistance in construing the scope of the Act.") *Id.*

53. 28 U.S.C. § 1603(d). Section 1603(d) defines the term "commercial activity":

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Id.

54. HOUSE REPORT, *supra* note 5, at 16, 1976 U.S.C.C.A.N. at 6615. It gives the following examples:

> Activities such as a foreign government's sale of a service or a product, its leasing of property, *its borrowing of money*, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition [of commercial activity].

Id. (emphasis added).

55. Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1384 (5th Cir. 1992). The Fifth Circuit in *Walter Fuller* noted that "Congress provided some guidance in the second sentence of § 1603(d), which directs us to look at the 'nature' of an activity rather than its 'purpose' in determining whether it is commercial." *Id.*; *see* AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 976 (S.D. Fla. 1992) ("By statute, the Court must focus on the type of transaction, rather than what entity is a party to it, or its ultimate objective.").

56. HOUSE REPORT, *supra* note 5, at 7, 1976 U.S.C.C.A.N. at 6605. The House Report enumerates four of these objectives:

> The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:
>
> First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial

plaintiffs could institute suits in U.S. courts against non-U.S. governments for acts arising out of commercial activity,[57] and providing a uniform statutory procedure for establishing subject matter and personal jurisdiction over non-U.S. sovereigns.[58] Congress also intended to transform sovereign immunity into a purely judicial matter,[59] reduce diplomatic pressure on the Exec-

---

or private acts (jure gestionis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from any unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country - where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Id. at 7-8, U.S.C.C.A.N. 6605-06.

57. Velidor v. L/P/G Benghazi, 653 F.2d 812, 816-17 (3d Cir. 1981).

58. Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. 92-4177, 1993 U.S. Dist. LEXIS 784, at *17 (E.D. Pa. Jan. 26, 1993).

59. Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1379 (S.D.N.Y. 1993). Congress passed the FSIA in order to free the Government from the case-by-case diplomatic pressures of Executive Branch directed determinations, to clarify the applicable standards, and to ensure due process in matters involving foreign

utive Branch, and clarify the vague jurisdictional standards.[60] Moreover, in enacting the FSIA, Congress created a standard[61] for the judicial treatment of non-U.S. sovereigns and their agencies.[62]

Congress adopted a "restrictive view"[63] of sovereign immunity via passage of the FSIA.[64] The FSIA's declaration of purpose, citing international law, notes that commercial activities of sovereigns are not immune from the jurisdiction of other sovereigns' courts.[65] Thus, Congress restricted the immunity of a

---

sovereigns. *Id.*; *see Commercial Exception*, *supra* note 1, at 1 ("The FSIA was passed in 1976 to regularize procedure by making sovereign immunity a purely judicial matter.").

60. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983). The Supreme Court in *Galadari* commented that "as a result, the case-by-case application of the restrictive theory in matters involving foreign sovereign immunity lacked uniformity and equity." *Galadari*, 810 F. Supp. at 1379.

61. *See* 28 U.S.C. § 1330. This statute provides in relevant part:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.
>
> (b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

28 U.S.C. § 1330(a),(b).

62. *Id.*

63. *See* Tate Letter, *supra* note 38, 26 DEP'T ST. BULL. at 984, 425 U.S. at 711 (1976) (app. 2 to opinion of White, J.) which states the following:

> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).

26 DEP'T ST. BULL. at 984, 425 U.S. at 711; *Galadari*, 810 F. Supp. at 1379. In 1952, the State Department adopted the Tate Letter, which called for the application of a 'restrictive' theory of foreign sovereign immunity. *Id.* The restrictive theory of sovereign immunity allows immunity for the public acts of a foreign sovereign, and does not immunize the commercial acts or private acts of a foreign sovereign. *Id.*

64. HOUSE REPORT, *supra* note 5, at 1, 1976 U.S.C.C.A.N. at 6604-35. The FSIA set forth specific "standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." *Id.* at 12, 1976 U.S.C.C.A.N. at 6610; *see* Greene v. Mt. Adams Furniture, 980 F.2d 590, 594 (9th Cir. 1992). The court in *Greene* remarked that "Congress reflected the restrictive view of sovereign immunity when it adopted the Foreign Immunities Act of 1976 . . . [it] specifically eliminated the sovereign immunity of foreign states involved in commercial activity within the United States." *Id.*

65. 28 U.S.C. § 1602. The declaration of purpose provides: "Under international

State to its public acts (*jure imperii*), but not to its private acts (*jure gestionis*) or commercial activity.[66] Therefore, under the FSIA, some exceptions render non-U.S. governments vulnerable to suit in U.S. courts.[67] The "commercial activity" exception is the primary example of this.[68]

2. Judicial Interpretation of the FSIA's Commercial Activity Exception

Courts have used various standards to interpret what constitutes "commercial activity" under the FSIA. In *Zernicek v. Brown & Root, Inc.*,[69] Michael Zernicek, a U.S. employee of a U.S. subcontractor, brought an action against Petroleos Mexicanos ("Pemex"), the Mexican national petroleum company, for personal injuries that he sustained at the job site in Mexico as a result of exposure to radiation.[70] Zernicek argued that the court should deny the defendant's assertion of sovereign immunity based on the commercial activity exception to the FSIA.[71] The defendant, however, alleged that its activities did not have a "direct effect in the United States."[72]

In deciding the "direct effect" issue, the Court of Appeals for the Fifth Circuit considered the legislative history of the FSIA.[73] The House Report on the FSIA relied on section 18 of

---

law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned." *Id.*

66. HOUSE REPORT, *supra* note 5, at 7, 1976 U.S.C.C.A.N. at 6605.

67. *Id.*; *see supra* note 3 (detailing exceptions to jurisdictional immunity).

68. 28 U.S.C. § 1605(a)(2). A foreign state shall not be entitled to immunity from U.S. courts' jurisdiction if the action

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

Id.

69. 826 F.2d 415 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

70. *Id.* Zernicek contended that he became exposed to excessive doses of radiation as a result of Pemex's negligence. *Id.* at 416.

71. *Id.* at 417.

72. *Id.*

73. *Id.* According to the legislative history, "[t]he House Report on the Act stated that the direct-effects clause would subject the foreign sovereign to United States jurisdiction consistent with principles set forth in § 18 of the Restatement (Second) of Foreign Relations Law of the United States." *Id.*

the *Restatement (Second) of Foreign Relations Law of the United States*[74] to require that the conduct abroad be "substantial," and occur as a "direct and foreseeable result of the conduct outside the territory" in order to constitute an effect.[75] Applying this standard to the case before it, the Fifth Circuit held that the eventual effect of the personal injury was not "direct" so as to constitute an exception to sovereign immunity.[76] In doing so, the court followed the lead of many other earlier decisions, which had adopted the *Restatement*'s standard and applied it to the FSIA's commercial activity exception.[77]

For example, in *Ohntrup v. Firearms Center Inc.*,[78] the Eastern District for the District of Pennsylvania, adopted the *Restatement*'s standard for "commercial activity."[79] *Ohntrup* involved gun buyers who brought suit against sellers under theories of warranty, product liability, and negligence, seeking recovery for injuries sustained when a gun malfunctioned.[80] The defendants impleaded a Turkish gun manufacturer, whose stock was wholly owned by the Turkish government, and the plaintiffs subsequently amended their complaint to include claims against the Turkish gun manufacturer.[81] The manufacturer attempted to

---

74. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 cmt. f (1965).

75. HOUSE REPORT, *supra* note 5, at 19, 1976 U.S.C.C.A.N. at 6618. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 cmt. f (1965).

76. *Zernicek*, 826 F.2d at 418-19.

77. *See, e.g.*, Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1003 (D.C. Cir. 1985) (discussing how defendant's claim that an action lacked foreseeability was disingenuous); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 n.9 (5th Cir. 1985); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 332 (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984) (using foreseeability to determine "direct effect"); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1110-11 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1982); Ohntrup v. Firearms Ctr. Inc., 516 F. Supp. 1281, 1286 (E.D. Pa. 1981). The court in *Ohntrup* noted that section 28 U.S.C. § 1605 (a)(2) was to be applied in a manner consistent with RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 cmt. f. *Ohntrup*, 516 F. Supp. at 1286.

78. 516 F. Supp. 1281 (E.D. Pa. 1981).

79. *Id.* at 1286. The court held the standard for 28 U.S.C. § 1605(a)(2), the "commercial activity exception," to be the following:

> This section is to be applied in a manner consistent with both the principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965) . . . Thus, the 'direct effect' within this country must be substantial, and a foreseeable consequence of the actions performed elsewhere.

Id.

80. *Id.* at 1283.

81. *Id.*

deprive the district court of jurisdiction by moving to dismiss all claims against it on sovereign immunity grounds.[82] Plaintiffs argued that their action fell within two of the commercial activity exceptions in the FSIA.[83] The district court agreed that the defendant was not immune from suit because the action was based upon a commercial activity carried on in the United States.[84] Furthermore, the court agreed with plaintiffs' contention that the action had a direct effect in the United States, and thus, satisfied a second exception of the commercial activity exception.[85] The court applied the *Restatement* standard of foreseeability to the FSIA's commercial activity exception.[86] The court denied the defendant's motion to dismiss plaintiffs' complaint because it held that the defendant's actions of supplying pistols for sale in the United States placed it squarely within the commercial activity exception.[87]

II. REPUBLIC OF ARGENTINA v. WELTOVER, INC.

In *Republic of Argentina v. Weltover, Inc.*,[88] the U.S. Supreme Court considered whether Argentina's issuance and rescheduling of bonds were acts taken in connection with a commercial activity that had a direct effect in the United States.[89] In affirming the decision of the district and circuit court, the

82. *Id.*

83. *Id.* at 1285. The plaintiffs argued that it was an action "based upon a commercial activity carried on in the United States by the foreign state" and it was also "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [which caused] a direct effect in the United States." *Id.*; *see supra* note 3 (citing commercial activity exception in § 1605(a)(2)).

84. 516 F. Supp. at 1286.

85. *Id.*

86. *Id.* Section 18 of the *Restatement* states the following:

> Jurisdiction to Prescribe With Respect to Effect Within Territory.
>
> 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 cmt. f (1965) (emphasis added); *see supra* note 79 and accompanying text (discussing the *Ohntrup* court's view on using the *Restatement* standard).

87. 516 F. Supp. at 1286-87.

88. ___ U.S. ___, 112 S. Ct. 2160 (1992).

89. *Id.* at ___, 112 S. Ct. at 2163.

Supreme Court concluded that the issuance of bonds constituted "commercial activity" because Argentina, in issuing the bonds, acted in the same manner as a private citizen would act.[90] The Court found Argentina's issuance of bonds to have a "direct effect" in the United States because Argentina had designated its accounts in New York as the place of payment.[91] The Court's finding of a "direct effect" permitted plaintiffs to assert jurisdiction over the non-U.S. defendant.[92]

A. *Argentina's History Leading up to* Weltover

Prior to 1985, the international financial market did not accept the Argentine peso as a valid medium of exchange.[93] As a result, Argentina used its reserves of U.S. dollars and other commonly accepted currencies to pay its international debts.[94] Argentina's use of these funds depleted its currency reserves.[95] The exchange crisis[96] resulted in Argentine debtors failing to repay their debts.[97]

In 1982, the Argentine Government, in an attempt to remedy this financial crisis, instituted the Foreign Exchange Insurance Contract program (the "FEIC").[98] Prior to the 1980's, Argentine businessmen found it difficult to obtain U.S. dollars to engage in international transactions due to the instability of the Argentine currency.[99] The plan to stabilize Argentina's currency by having the government assume the risk of cross-border trans-

---

90. *Id.* at __, 112 S. Ct. at 2166-68.

91. *Id.* at __, 112 S. Ct. at 2168.

92. *Id.* at __, 112 S. Ct. at 2169.

93. Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 147 (2d Cir. 1991), *aff'd*, __ U.S. __, 112 S. Ct. 2160 (1992).

94. *Id.*

95. *Id.*

96. Republic of Argentina v. Weltover, Inc., 753 F. Supp. at 1203, *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, __ U.S. __, 112 S. Ct. 2160 (1992); *Weltover*, 941 F.2d at 147. jArgentina was forced to take extreme measures in order to cope with its economic woes. *Id.* Argentina's Ministry of Economy charged Banco Central, as the Central bank of the republic, with the task of implementing these crisis-management measures. *Id.* In 1981, Banco Central began adjusting the prevailing foreign exchange rates, which caused a severe devaluation of Argentine's local currency. *Id.* It was due to this devaluation that Argentine debtors were unable to obtain the requisite currency exchange to satisfy their debts. *Id.*

97. *Weltover*, 753 F. Supp. at 1203; *Weltover*, 941 F.2d at 147.

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

99. *Weltover*, 941 F.2d at 147; Joseph D. Pizzuro, *Republic of Argentina v. Weltover, Inc.* 86 AM. J. INT'L L. 820, 820 (1992).

actions involving Argentine borrowers included the FEIC program.[100] The government provided domestic borrowers with U.S. dollars to pay their international debts for a predetermined amount of local currency in an attempt to prevent intervening currency devaluation.[101]

By 1982, Argentina lacked sufficient funds to cover the FEIC contracts.[102] As an emergency measure, the Argentine government refinanced the debts with, *inter alia*,[103] "Registered Bonds Denominated in United States Dollars," (the "Bonods").[104] When the Bonods matured in May of 1986, Argentina again lacked sufficient dollar reserves to retire them, and, pursuant to a presidential decree, unilaterally rescheduled the Bonods repayment.[105] Some bondholders refused the substitute instruments as a means of rescheduling the debt[106] and brought an action to compel defendants to honor their obligations.[107]

B. *Factual Background of* Weltover

The controversy in *Weltover* began when two Panamanian corporations, Weltover, Inc. ("Weltover") and Springdale Enterprises, Inc. ("Springdale"), along with a Swiss banking corporation, Bank Cantrade, A.G. ("Bank Cantrade"), declined to accept

---

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

101. *Id.* This concept refers to the problem that Argentine businessmen faced when Argentine currency lowered in price with relation to other currencies on the world market. *See id.* (discussing Argentina's currency devaluation problem).

102. *Id.*

103. *Id.* When maturation of the exchange insurance contracts occurred in 1982, and Banco Central realized it was unable to retire the Argentine debtors' original loans, it decided to issue two new types of instruments to refinance those debts: Bonods and promissory notes. *Id.*

104. *Id.*

105. *Id.* at 1204. The Bonods provided that on certain scheduled dates in 1986 and 1987, payment would be made in United States dollars. They further provided that the Bonods would bear interest at the prevailing London Interbank market rate for 180-day Eurodollar deposits. *Id.* at 1203. Finally, the money was to be paid into a holder's account at either New York, London, Frankfurt, or Zurich, at election of the creditor. *Id.* at 1204. On or about May 23, 1986 defendants notified plaintiffs that payment would not be made on the Bonods when due and offered defendants an alternative of a roll-over of those obligations. *Id.* Plaintiffs refusal of this alternative was the impetus for the action in *Weltover*. *See id.* The court remarked that "[p]laintiffs refused to participate in that roll-over and now assert that Banco Central is in default on its obligations under the Bonods." *Id.*

106. *Id.*

107. *Id.* at 1203.

Republic of Argentina's rescheduling of the Bonods.[108] Weltover, Springdale, and Bank Cantrade (the "plaintiffs") insisted on full repayment in New York, in accordance with the instruments' original terms.[109] Plaintiffs asserted that Banco Central, Argentina's Central Bank, was in default of its obligations under the Bonods and had breached its obligations.[110]

C. *Opinion of the U.S. District Court for the Southern District of New York*

In *Weltover*,[111] the defendants[112] contended that the U.S. District Court for the Southern District of New York lacked juris-

---

108. *Id.* The parties held collectively U.S.$1.3 million of Bonods. *Id.* The party that held the greatest number of Bonods was Weltover, who held title to Bonods totalling U.S.$900,000; Springdale's Bonods totalled U.S.$200,000, and Bank Cantrade held title to U.S.$230,000 worth of Bonods. *Id.* at 1203 n.1. These creditors were given the option, as were other Bonod holder creditors, of maintaining their relationship with the original Argentine debtors, with the Bonods given as a guarantee, or to accept the Bonods as payment of the original debt. *Id.* at 1203-04. The drawbacks of this included the facts that only Banco Central had the ability to pay the creditors in United States dollars, and furthermore, Banco Central charged a commission of one-tenth percent (0.1%) for performing these transactions. *Id.*

109. *Id.* at 1204. The method by which the Bonods were to assist Argentina in refinancing its debt was set forth in detail in Banco Central's Communication "A" 251, dated November 17, 1982. It provided in relevant part:

> The instrumentation of the transactions shall be optional for the foreign creditor and may be done in any of the following forms:
> (a) Obligations ("Promissory Notes") of the National Government issued in U.S. dollars to the name of the creditor, for the corresponding amounts.
> (b) Registered Bonds of the National Government, issued in U.S. dollars in increments of U.S.$5,000 and larger denominations.
> (c) Since it is not the purpose of these measures to interfere in the loan contract between the debtor and creditor, if they prefer to maintain their relationship directly and instrument it in any form other than the two forms indicated above, the Central Bank is willing to examine such proposals and conditions, provided that they respect the terms of maturity indicated in Section 1.1.

Id. at 1204 n.3.

110. *Id.* These indentures denoted as "Registered Bonds Denominated in United States Dollars," are referred to in the *Weltover* cases as "Bonods." *Id.* at 1203. Banco Central issued these indentures, acting as financial agent for the Republic of Argentina. *Id.*

111. *Id.* at 1201.

112. *Id.* at 1203. There were actually two defendants in the *Weltover* case: Republic of Argentina and Banco Central. *Id.* Banco Central's involvement in this suit stemmed from its issuing of the indentures, known as "Bonods," to the plaintiffs. *Id.* This Comment, and the Supreme Court, treat the two defendants as a single defendant because Banco Central acted as the financial agent for the Republic of Argentina pursuant to Argentina's Foreign Exchange Insurance Contract ("FEIC") program. *See id.* The court explains that "[t]hese indentures [the Bonods] were issued by Banco Central, which is

diction over them under the FSIA, that the exercise of personal jurisdiction over the defendants violated due process, and, alternatively, that the court should dismiss the complaint based on the doctrine of *forum non conveniens*.[113] The Southern District, in denying defendant's motion,[114] explained that Argentina's transactions bore similarity to transactions conducted by private commercial entities.[115] The court reasoned that the plaintiffs' basis for bringing the action stemmed from the defendant's breach of its original obligation for a fee, and therefore the suit lacked a basis in sovereign activity by the Argentine government.[116] Noting that the plain language of the FSIA required that courts look to the nature of the act, and not its purpose,[117] the court rejected Argentina's argument that sovereign activity existed because the Argentina's financial crisis caused the issuance of the Bonods. The court noted that Banco Central[118] charged creditors a 0.1% commission for the privilege of being paid their debts in U.S. dollars.[119] The court, however, did not reach the issue of whether the currency regulations that resulted in the

---

the financial agent for the Republic of Argentina, pursuant to Argentina's Foreign Exchange Insurance Contract ("FEIC") program." *Id.*

113. *Id.* at 1204. The doctrine of *forum non conveniens* refers to the discretionary power that a court has to decline asserting jurisdiction when the litigation could be brought in a more appropriate forum. JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.2, at 10 (2d ed. 1993).

114. *Weltover*, 753 F. Supp. at 1209. The district court denied the motion to dismiss finding that, notwithstanding defendant's contention, the act of refinancing the Bonods was a "quintessentially commercial act" and that there existed the necessary "direct effect" in the United States due to defendant's failure to pay in New York as promised. *Id.* at 1205.

115. *Id.* The Court in *Weltover* explained that "[t]he transactions at issue here fall squarely within the parameters of what private commercial entities do and have the capacity to do." *Id.*

116. *Id.* at 1205 n.6.

117. *Id.* at 1205.

118. *See supra* note 96 (explaining Banco Central's involvement in *Weltover* case).

119. *Weltover*, 753 F. Supp. at 1205. Judge John E. Sprizzo presided over the *Weltover* case. *Id.* at 1203. Judge Sprizzo noted that the existence of a profit motive was a factor, although not dispositive, in his decision to deny defendants' motion to dismiss. *Id.* Judge Sprizzo used the following rationale:

> In permitting creditors to substitute Banco Central's obligation to pay them in dollars for that of the original debtors in exchange for a 0.1% commission, Banco Central was performing a quintessentially commercial act. This is especially true since the existence of a profit motive, although not dispositive, is a factor the Court may properly consider in deciding what is a commercial as opposed to a sovereign act.

Id. at 1205.

issuance of the Bonods, and the modification of the original schedule of payments, constituted "commercial activity" under the FSIA.[120]

After concluding that defendant's activity constituted commercial activity, the court considered whether the defendant's commercial activity had a direct effect in the United States.[121] The court concluded that defendant's default on its debt had a direct effect within the meaning of the FSIA.[122] The court reached that conclusion by applying the principle espoused by the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria.*[123] The district court in *Weltover* extended the *Texas Trading* rule to the case of nonpayment of a debt payable in the United States to a non-U.S. plaintiff.[124] Additionally, the district court reasoned that public policy supported its finding of a "direct effect" in the United States.[125] It explained that this result guarded the United States' interest in maintaining New York's status as an international business center.[126] Businesses will choose to have payments made to them in New York's finan-

120. *Id.* at 1205 n.6 ("Insofar as the Currency Regulations . . . the Government of Argentina may not have been engaged in commercial activity.")

121. *Id.* at 1206. The court did not have to address the first two factors which possess the ability to create the requisite nexus under 28 U.S.C. § 1605(a)(2) because it was obvious that the case did not involve either "commercial activity carried on in the United States" by the defendants or "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," therefore, the only issue the court had to resolve was the third factor, namely, "whether defendants' commercial activity had a direct effect in the United States." *Id.*; *see supra* note 3 (citing 28 U.S.C. § 1605(a)(2)).

122. *Weltover*, 753 F. Supp. at 1207. This holding expanded the court's previous holding that nonpayment of a debt payable in the United States to a *United States* company constituted a direct effect in the United States for purposes of the FSIA, to hold that this even applies when, as here, a non-U.S. plaintiff sued. *Id.* (emphasis added)(citing Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, and International Housing Ltd. v. Rafidian Bank Iraq, 893 F.2d 8, 11 n.3 (2d Cir. 1989)).

123. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). In *Texas Trading*, the plaintiffs, a group of "trading companies," instituted a breach of contract action against the Federal Republic of Nigeria and its central bank for their non-compliance with a cement contract. *Id.* at 302-06. The U.S. Court of Appeals for the Second Circuit held that for purposes of the FSIA, nonpayment of a debt payable in the United States to a U.S. company constituted a direct effect in the United States, thus warranting jurisdiction. *Id.* at 312.

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

125. *Id.* at 1207. "Public policy considerations also lend support to this conclusion." *Id.*

126. *Id.*

cial centers knowing that, if necessary, they can utilize U.S. courts to protect their legal rights.[127] Therefore, a party's choice to accept payment in New York implicated the United States' interest in protecting its citizens.[128]

1. The District Court Addressed the Personal Jurisdiction Issue

District Judge John E. Sprizzo denied the defendant's request that the court dismiss the plaintiffs' complaints for lack of personal jurisdiction,[129] explaining that under the FSIA, the concepts of personal and subject matter jurisdiction[130] merge.[131] According to the district court, whenever the FSIA grants a court subject matter jurisdiction, that court automatically has personal jurisdiction as well.[132] The Southern District reiterated the rule that a court's exercise of personal jurisdiction satisfies the due process requirement if the defendant has sufficient contacts with the United States such that the exercise of jurisdiction would not offend "traditional notions of fair play and substantial justice."[133]

Judge Sprizzo rejected the defendant's argument that the FSIA permitted personal jurisdiction only where a plaintiff's action related to a defendant's contacts with the United States noting that such an interpretation lacked consistency with the language and the legislative history of the FSIA.[134] The court em-

127. *Id.*

128. *Id.* (noting that "choice to accept payment in New York therefore 'sufficiently implicates' the United States' interest in protecting people within its territories").

129. *Id.*

130. *Id.* "Personal jurisdiction" refers to the ability of a court to bind a particular party to its judgment. DAVID D. SIEGEL, NEW YORK PRACTICE 9 (2d ed. 1991). "Subject matter jurisdiction" refers to the competence of a court to entertain a certain type of case. *Id.* at 9-10.

131. *Weltover*, 753 F. Supp. at 1207.

132. *Id.* The court previously had established the fact that it had subject matter jurisdiction because Argentina's activities placed it in the commercial activity exception of the FSIA. *Id.* at 1204-08. The court qualified its words, by noting that the rule which states that under the FSIA, a finding of subject matter jurisdiction necessitates the existence of personal jurisdiction as well, is subject to the two conditions that there was both proper service and due process. *Id.* Therefore, since the issue of proper service was not in dispute here, the court addressed the issue of due process. *Id.*

133. *Id.* at 1207 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). Within the FSIA, the personal jurisdiction requirement of sufficient contacts looks toward the defendant's contacts with the entire United States, not just the relevant state or forum. *See id.* at 1207 n.9 (explaining that personal jurisdiction analysis includes consideration on defendant's contacts with entire United States).

134. *Weltover*, 753 F. Supp. at 1207 n.10. The court explained that its assessment of defendants' contacts with the United States was made in order to determine four issues:

phasized that the plaintiffs had properly alleged the contacts that the defendants had with the United States in order to exercise personal jurisdiction over them.[135] The court added that the defendant's maintenance of bank accounts in the United States indicated that the defendant had availed itself of U.S. laws.[136] The court noted that the fact that the defendant had agreed to pay the Bonods in U.S. dollars pointed to the foreseeability of an action in the United States for breach of that obligation.[137]

2. The District Court Addressed the *Forum Non Conveniens* Issue

The District Court for the Southern District of New York also addressed the defendant's motion to dismiss the action pursuant to the doctrine of *forum non conveniens*.[138] This doctrine

---

(1) the extent to which defendants availed themselves of American law; (2) the extent to which litigation in the United States was foreseeable to them; (3) the inconvenience to defendants of litigating in the United States; and (4) the countervailing interest of the United States in hearing the suit.

Id. at 1207 *citing Texas Trading*, 647 F.2d at 312. The court noted that a defendant can be subject to personal jurisdiction, consistent with due process, even in the absence of the plaintiff's action arising out of or being related to the defendant's contacts with the forum state. *Id.* However, such an absence would necessitate more substantial contacts with the forum to support the exercise of personal jurisdiction. *Id.* at 1208. The court explained that defendants' interpretation of the FSIA rendered the "direct effect" provision of 28 U.S.C. § 1605(a)(2) superfluous because that section specifically deals with the exercise of jurisdiction in situations where all the relevant contacts exist *outside* the United States. *Id.* at 1207 n.10. Furthermore, in previous FSIA cases, courts had even considered contacts that were unrelated to the plaintiff's cause of action. *Id.*

135. *Id.* at 1208. The court provided several of plaintiffs' allegations which justified the exercise of personal jurisdiction over them. *Id.* Quoting from the Complaint and Affidavit of Richard Cutler, the attorney for Weltover, Inc., the court delineated the following allegations of contact with the United States: (1) that Banco Central had promised to pay plaintiffs in New York, a location in the United States; (2) the Argentine government maintained consulates throughout the United States; (3) Banco Central had commercial activities in the United States; and (4) that both the Republic of Argentina and Banco Central maintained bank accounts in the United States. *Id.* The court also explained that due to the lack of jurisdictional discovery, plaintiffs were only required to allege in good faith legally sufficient allegations of jurisdiction. *Id.* at n.11.

136. *Id.* This was true because the banking and insurance industries which protected the accounts were governed by U.S. laws. *Id.*

137. *Id.* at 1208.

138. *Id.* The doctrine of *forum non conveniens* gives authority to a district court to dismiss an action in the event that there exists other public or private interests which outweigh the ordinary consideration given to the plaintiff's desired forum. *Id.* The determination of private interests includes weighing such factors as the ease of access to proof and the availability of witnesses. *Id.* Public interests determination include the

refers to the discretionary power that a court has to decline exercising jurisdiction when courts believe that the convenience of the parties and the ends of justice would be better served if the action were to be brought in another forum.[139] The district court in *Weltover* agreed that the *forum non conveniens* doctrine applied to actions governed by the FSIA.[140] The court explained, however, that it must determine whether an alternative forum to resolve the dispute exists.[141] The court reasoned that the defendant failed to show how Argentina qualified as an adequate alternative forum.[142] The court noted that the defendant failed to provide a list of witnesses it would call at trial, which is a prerequisite for a court dismissing an action pursuant to *forum non conveniens*.[143] Consequently, the district court rejected the defendant's motion.[144]

D. *The Opinion of the U.S. Court of Appeals for the Second Circuit*

The defendant appealed the district court order denying its motion to dismiss to the U.S. Court of Appeals for the Second Circuit.[145] The Second Circuit held[146] that the district court properly asserted jurisdiction under the FSIA.[147] Mentioning its

---

evaluation of the administrative burden on the court, the burden that jury duty imposes upon the community when the action bears no relationship with the community and the considerations raised by the potential need of an application of foreign law. *Id.*

139. *E.g.*, Johnson v. Spider Staging Corp., 555 P.2d 997, 999-1000 (Wash. 1976) (*en banc*); Leet v. Union Pac. R.R. Co., 155 P.2d 42, 44 (Cal. 1944).

140. *Weltover*, 753 F. Supp. at 1208 *citing* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 n.15 (1983).

141. *Id.* at 1209.

142. *Id.* The court stated that defendants had not submitted affidavits to indicate where they wanted the forum to be, however, the court considered it "obvious" that defendants wanted Argentina as their forum. *Id.* The court explained that there lacked information in the record which would have allowed the court to assess whether plaintiffs could even sue the Republic of Argentina in an Argentine court, whether plaintiffs would have been able to enforce a judgment and receive U.S. dollars in satisfaction of such a judgment, whether the action would be barred by the statute of limitations, or whether plaintiffs would have had the ability to compel the testimony of witnesses. *Id.*

143. *Id.*

144. *Id.* The court bolstered this decision by noting that public interest factors would oppose the dismissal under *forum non conveniens*, the need to apply Argentine law does not justify dismissal under *forum non conveniens* and finally, as this was a non-jury trial case, a local jury would not have had the onus of resolving the dispute. *Id.*

145. 941 F.2d 145 (2d Cir. 1991).

146. *Id.*

147. 28 U.S.C. §§ 1602-1611. These sections of FSIA subject States to suit in U.S.

previous difficulty in interpreting Congress' definition of "commercial activity" in the FSIA,[148] the Second Circuit rejected treating transactions as being sovereign in character merely because they were a part of a "broader governmental scheme."[149] According to the Second Circuit, to find immunity in such situations would violate the FSIA's intent of codifying the restrictive theory of sovereign immunity.[150]

The court also rejected the defendant's characterization of the issuance and unilateral rescheduling of Bonods as a governmental effort to conserve scarce resources.[151] The Second Circuit noted that despite the defendant's attempts at casting Argentina's actions as a response to its failing economy, the case centered on Argentina's issuance of the Bonods, and its subsequent failure to repay that debt upon maturity.[152] The Second Circuit reasoned that issuing bonds exemplified activity that private people engaged in.[153] Focusing on the "nature" of the transaction in issue, not the general "purpose," the court further reasoned that the acts of issuing the Bonods placed Argentina in the "stream of international commerce in foreign currency."[154]

The Second Circuit further analyzed whether the relevant acts caused a "direct effect" in the United States.[155] In determining whether the effect was both sufficiently "direct" and "in the United States," the Second Circuit queried whether Congress would have wanted a U.S. court to hear the case.[156] The court established that an effect is direct if it follows as an immediate

---

courts for, *inter alia*, acts taken "in connection with a commercial activity" that have "a direct effect in the United States." *Id.* § 1605(a)(2).

148. *Weltover*, 941 F.2d at 150. The court had confronted this problem earlier in Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308-09 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982), where it construed the FSIA to mean that "if the activity is one in which a private person could engage, [the foreign sovereign] is not entitled to immunity." *Id.* at 309.

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

150. *Id.*

151. *Id.* at 151.

152. *Id.* at 150-51.

153. *Id.* at 151.

154. *Id.*

155. *Id.*; *see* 28 U.S.C. § 1605(a)(2) (stating that one way act can be "commercial" is if it is act that is committed outside territory of United States in connection with non-U.S. sovereign elsewhere and it causes direct effects in United States).

156. *Weltover*, 941 F.2d at 152 *citing* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d. Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

consequence of a sovereign's activity.[157] The court found that the effects of the acts were "direct."[158] It noted that the defendant's acts caused a direct effect on the plaintiffs because the defendant's breach of the Bonod agreement deprived the plaintiffs of their contractual rights.[159] The court found the issue of the effect existing "in the United States" more complicated to resolve.[160] In determining whether the effect was "in the United States," the court focused upon whether legally significant acts giving rise to the claim occurred in the United States.[161] The court found that legally significant acts occurred in the United States because the contract gave the plaintiffs the option to request payment in New York, and the defendant neglected to make payment in New York.[162]

Finally, the Second Circuit cited public policy reasons to support its holding.[163] It argued that the Congressional objective in enacting the "direct effects" clause was intended to permit U.S. courts to hear actions that promote the interests of forum jurisdictions in controlling the conduct that occurs within their borders.[164] Thus, the court held that the defendant's issuance of the Bonods, followed by the subsequent breach of its agreements, constituted "commercial activity" within the meaning of the FSIA, and that the defendant's acts had caused a direct effect in the United States, so that the defendant was not entitled to sovereign immunity.[165]

---

157. *Weltover*, 941 F.2d at 152. The Second Circuit explained that in order for the financial loss to be considered 'direct,' "the corporate entity must itself be placed in financial peril as an immediate consequence of the defendant's unlawful activity." *Id.*

158. *Id.* (noting that it "need not tarry long over whether the effect, in this case, was direct").

159. *Id.*

160. *Id.* (noting that "[a] more troublesome inquiry is whether the effect was sufficiently 'in the United States' to warrant our exercise of subject matter jurisdiction").

161. *Id.*

162. *Id.* at 153; *see supra* notes 121-28 and accompanying text (discussing trial court's determination of "direct effect").

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

164. *Id.* The court explained that New York was a preeminent commercial center which had an interest in protecting those who do business there. *Id.* This interest stemmed from the knowledge that if corporate entities cannot rely upon New York's ability to protect their rights in business transactions in New York they would look for other locations to take their business to. *Id.*

165. *Id.*

E. *Decision of the U.S. Supreme Court*

The U.S. Supreme Court granted Argentina's petition for certiorari on the following two issues.[166] First, the Court considered whether the transaction between plaintiffs and defendant could be classified as a "commercial activity" within the meaning given in the FSIA.[167] Second, the Court analyzed whether there was a sufficient nexus between Argentina's act of issuing Bonods and the United States, in order to determine whether the plaintiffs' claim of nonpayment in New York satisfied the "direct effect" needed for the statutorily required[168] jurisdictional purpose.[169]

1. "Commercial Activity" Analysis

Justice Antonin Scalia, writing for a unanimous Court, affirmed the judgment of the Second Circuit.[170] The Court first analyzed the FSIA's definition of "commercial activity."[171] The Court noted that the "commercial activity" exception was the most significant of the FSIA's exceptions.[172] The Court observed that FSIA inadequately, and to some extent ambiguously, defined "commercial activity."[173] For this reason, the Court found it necessary to analyze the history of the enactment of the FSIA in order to resolve the ambiguous definition of "commercial activity."[174]

---

166. Republic of Argentina v. Weltover, Inc., __ U.S. __, 112 S. Ct. 2160 (1992). There was a third issue raised by one of the arguments made by Argentina that went unresolved. *Id.* at 2169. Defendant argued that a finding of jurisdiction would violate the constitutional standard of due process. *Id.* The Court did ponder the issue of its ability to classify a non-U.S. state as a "person" for purposes of the due process clause. *Id.* The Court was able to avoid resolving this question by finding that Argentina's conduct did not violate constitutional standards. *Id.*; *see* Georges R. Delaume, *United States: Supreme Court Opinion in Republic of Argentina v. Weltover, Inc.*, 31 I.L.M. 1220, 1221 (1992) (discussing Supreme Court's opinion in *Weltover*).

167. *Weltover*, __ U.S. at __, 112 S. Ct. at 2162.

168. 28 U.S.C. § 1605(a)(2)(iii).

169. Delaume, *supra* note 166, at 1220.

170. *Weltover*, __ U.S. at __, 112 S. Ct. at 2169.

171. *Id.* at __, 112 S. Ct. at 2165. The FSIA defines "commercial activity" as "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).

172. *Weltover*, __ U.S. __, 112 S. Ct. at 2164.

173. *Id.* at __, 112 S. Ct. at 2165.

174. *Id.* The FSIA's definition merely stated that the commercial nature of an

The Court noted that in enacting the FSIA, Congress attempted to codify the emerging "restrictive" theory of foreign sovereign immunity endorsed by the State Department as early as 1952.[175] The Court stated that the first instance in which it addressed the issue of the validity of the restrictive theory occurred in the case of *Alfred Dunhill of London, Inc. v. Republic of Cuba*.[176] In *Alfred Dunhill*, a plurality of the Court noted that after the 1952 endorsement of the restrictive theory, federal courts consistently held that U.S. courts had the authority to assert jurisdiction over non-U.S. sovereigns in cases "arising out of purely commercial transactions."[177] Additionally, considering that Congress enacted the FSIA less than six months following the plurality decision in *Alfred Dunhill*, the Court in *Weltover* reasoned that the restrictive theory formed the basis for determining the scope of the FSIA.[178] Thus, the Supreme Court in *Weltover* concluded that when a government acts in the manner of a private citizen, the government's actions constitute "commercial activity" within the meaning of the FSIA.[179]

The Court next clarified the FSIA's provision that the "nature," rather than the "purpose," of an act determines the commercial character of an act.[180] The Court explained that an act is commercial if the act is one that a private party engages in

---

activity does not depend upon whether the activity consists of a single act or a regular course of conduct. In addition, the Court acknowledged that the FSIA states that the "nature" of the act, rather than the "purpose," determined "commercial" under the FSIA. *Id.*

175. *Id.* The Supreme Court noted that "the FSIA was not written on a clean slate . . . the Act (and the commercial exception in particular) largely codifies the so-called 'restrictive' theory of foreign sovereign immunity." *Id.*; *see supra* notes 37-41 and accompanying text (discussing Tate Letter).

176. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 703 (1976); *see supra* notes 42-51 and accompanying text (discussing *Alfred Dunhill*).

177. *Alfred Dunhill*, 425 U.S. at 703; *see supra* notes 42-51 and accompanying text (discussing *Alfred Dunhill*).

178. *Weltover*, __ U.S. at __, 112 S. Ct. at 2166. The Court noted that given "that the FSIA was enacted less than six months after our decision in *Alfred Dunhill* was announced, we think the plurality's contemporaneous description of the then-prevailing restrictive theory of sovereign immunity is of significant assistance in construing the scope of the Act." *Id.*

179. *Id.* The Court concluded "that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Id.*

180. *See supra* note 171 (setting forth text of 28 U.S.C. § 1603(d), FSIA's definition of commercial activity).

during "trade and traffic or commerce."[181] The Court distinguished sovereign activity from commercial activity by explaining that sovereign activity is activity that a private party cannot exercise.[182] Commercial activity, conversely, includes entering into contracts because private companies can use sales contracts to acquire goods.[183] The Court cited examples of how applying the test of "nature" versus "purpose" yielded different results.[184] The Court noted that if a foreign government were to issue regulations limiting foreign currency exchange it would constitute a sovereign activity because such authoritative control of commerce cannot be exercised by a private party.[185] On the other hand, if a sovereign were to contract to buy army boots or even bullets, it would be a "commercial" activity, because private companies can similarly contract to acquire goods.[186]

In deciding *Weltover*, the Court noted that the Bonods contained many commercial characteristics.[187] For example, private parties could hold them and they could be negotiated with and traded on the international market.[188] The Court rejected the defendant's contention that the Bonods differed from ordinary bonds because they did not have the ordinary commercial consequence of raising capital or financing acquisitions.[189] Argentina used the Bonods to restructure its preexisting obligations as private parties use bonds to refinance debt.[190] The Court concluded that in spite of the difficulties in distinguishing "purpose" from "nature," courts must make this distinction due to the explicitness of the FSIA.[191] Thus, the Court found no basis for distinguishing Argentina's assumption of debt from other commer-

181. *Weltover*, __ U.S. at __, 112 S. Ct. at 2166 *quoting* BLACK'S LAW DICTIONARY 270 (6th ed. 1990).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* The Court explained that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a 'commercial' activity, because private companies can similarly use sales contracts to acquire goods." *Id.*

187. *Id.* at __, 112 S. Ct. at 2166.

188. *Id.*

189. *Id.* at __, 112 S. Ct. at 2167.

190. *Id.*

191. *Id.* The Court explained that "[h]owever difficult it may be in some cases to separate 'purpose' . . . from 'nature' . . . the statute unmistakably commands that to be

cial activities taken by a sovereign.[192]

The Court rejected Argentina's contention that a court must fully consider the context of a transaction to determine whether the conduct should be deemed "commercial."[193] The Court reasoned that since the FSIA established that the "nature" of an activity governs, no reason existed to treat the issuance of debt different from other activities of sovereigns.[194] The Court noted that even if it were to view the transaction in such a manner, there was nothing unique about the issuance of the Bonods that set it apart from private commercial transactions.[195]

Argentina also argued that the Second Circuit erred in its adoption of a per se rule[196] that deemed all issuance of debt instruments as commercial activity. The Supreme Court, however, declined to reach the merits of the propriety of such a per-se determination because it argued that even if it were to view the issuance of the Bonods in the full context, the issuance would be analogous to a private commercial transaction.[197] The Court proceeded to analyze other arguments offered by Argentina to distinguish the Bonods from other commercial activity in order to avoid having jurisdiction asserted over them.[198] As a result of the Court's conclusion that Argentina's reason for issuing the Bonods was irrelevant, the Court found that Argentina's

---

done." *Id. citing* De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).

192. *Id.* at __, 112 S. Ct. at 2167-68.

193. *Id.* at __, 112 S. Ct. at 2166-67.

194. *Id.* The Court reasoned that "[b]ecause the FSIA has now clearly established that the 'nature' governs, we perceive no basis for concluding that the issuance of debt should be treated as categorically different from other activities of foreign states." *Id.* at 2167.

195. *Id.* The Court, in considering defendant's argument, noted that "even in full context, there is nothing about the issuance of these Bonods (except perhaps its purpose) that is not analogous to a private commercial transaction." *Id.*

196. *See* Republic of Argentina v. Weltover, Inc., 941 F.2d 145, 151 (2d Cir. 1991), *aff'd*, __ U.S. __, 112 S. Ct. 2160 (1992) *quoting* Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1018 (2d Cir. 1991) (holding that it "is self-evident that issuing public debt is a commercial activity within the meaning of [the FSIA]").

197. *Weltover*, __ U.S. at __, 112 S. Ct. at 2167.

198. *Id.* Defendants' arguments included an attempt to distinguish the Bonods from commercial bonds by the fact that they did not have the ordinary commercial consequence of raising capital of financing acquisitions. *Id.* The Court's response was that private parties issue bonds, not just to raise capital or to finance purchases, but also to refinance debt. This was the same reason that Argentina had for issuing the Bonods. *Id.*

act had constituted "commercial activity" under the FSIA.[199]

2. The Direct Effect Test

After holding that Argentina's issuance of Bonods constituted "commercial activity" within the meaning of the FSIA, the Court concluded that Argentina's unilateral rescheduling of the Bonods had a "direct effect"[200] in the United States under the FSIA.[201] The Supreme Court agreed[202] with the Second Circuit that for an effect to be "direct" it must be an "immediate consequence" of the defendant's activity.[203] The Court noted that the legislative history of the FSIA did not require an effect to be both "substantial" and "foreseeable" for the effect to constitute a "direct effect."[204] The Court found that Argentina's unilateral rescheduling of the maturity dates had a "direct effect" on respondents and occurred "in the United States."[205] The Court reasoned that because the defendant had designated its accounts in New York as the place of payment and had made some interest payments into those accounts, there existed a "direct effect" in the United States.[206] The Court did not agree with the Second Circuit's reason that the rescheduling had a "direct effect" merely because Congress would not have wanted New York's status as a world financial leader to be jeopardized.[207] The Supreme Court emphasized that the FSIA permits a non-

---

199. *Id.* at __, 112 S. Ct. at 2167-68.

200. 28 U.S.C. § 1605(a)(2); *see supra* notes 73-77 and accompanying text (discussing FSIA's requirement of "direct effect").

201. *Weltover*, __ U.S. at __, 112 S. Ct. at 2168.

202. *Id.*

203. Republic of Argentina v. Weltover, Inc., 941 F.2d 145, 152 (2d Cir. 1991), *aff'd*, __ U.S. __, 112 S. Ct. 2160 (1992).

204. *Weltover*, __ U.S. at __, 112 S. Ct. at 2168.

205. *Id.*

206. *Id.*

207. *See supra* note 157 (giving Second Circuit's logic for its conclusion as to "direct effect"); *Weltover*, __ U.S. at __, 112 S. Ct. at 2168. The Supreme Court explained their rejection of the Court of Appeal's logic as follows:

> The Court of Appeals concluded that the rescheduling of the maturity dates obviously had a "direct effect" on respondents. It further concluded that that [sic] effect was sufficiently "in the United States" for purposes of the FSIA, in part because "Congress would have wanted an American court to entertain this action" in order to preserve New York City's status as "a preeminent commercial center." . . . The question, however, is not what Congress "would have wanted" but what Congress enacted in the FSIA. Although we are happy to endorse the Second Circuit's recognition of "New York's status as a world financial leader," the effect of Argentina's rescheduling in diminishing that sta-

U.S. plaintiff to sue a non-U.S. sovereign in a U.S. court.[208]

Alternatively, Argentina argued that finding jurisdiction violated the Due Process Clause[209] of the Fifth Amendment.[210] To avoid violating the Fifth Amendment, Argentina insisted that the "direct effect" must satisfy the "minimum contacts" test of *International Shoe Co. v. Washington.*[211] Adhering to the "minimum contacts" test set forth in *International Shoe,* the Supreme Court in *Weltover,* assuming arguendo that a government is a "person" for purposes of the Due Process Clause, found that Argentina possessed the "minimum contacts" needed to satisfy the constitutional test.[212] By issuing negotiable debt instruments denominated in U.S. dollars and payable in New York, all in conjunction with the defendant's appointment of a financial agent in New York, the Court concluded that Argentina purposely availed itself of the privilege of conducting activities within the United States.[213]

F. *Implications of* Weltover *on Subsequent Interpretations of the Commercial Activity Exception*

As a result of the *Weltover* decision, subsequent courts have

---

tus (assuming it is not too speculative to be considered an effect at all) is too remote and attenuated to satisfy the "direct effect" requirement of the FSIA.

Id.

208. *Weltover,* __ U.S. at __, 112 S. Ct. at 2169 *citing* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983).

209. U.S. CONST. amend. V. The concept of "due process" includes the notion that a person is guaranteed fair procedures which protect a person's property from unfair governmental interference or taking. This concept as it is embodied in the Fifth Amendment requires that a law not be unreasonable, and that the methods of suit used should have a reasonable and substantial relation to the object being sought. *Id.*

210. *Weltover,* __ U.S. at __, 112 S. Ct. at 2169.

211. 326 U.S. 310, 316 (1945). In *International Shoe,* the U.S. Supreme Court suggested the following pragmatic analysis to determine the existence of "minimum contacts":

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. (citations omitted). It was conceded by Argentina that the issue of whether a constitutional basis for personal jurisdiction existed was not before the Court as an independent question, but was merely to assist in interpreting the "direct effect" requirement of the FSIA. *Weltover,* __ U.S. at __, 112 S. Ct. at 2169 n.2.

212. *Weltover,* __ U.S. at __, 112 S. Ct. at 2169.

213. *Id., quoting* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985).

dealt with the commercial activity issue with greater precision.[214] The courts have adopted *Weltover's* standards in determining what constitutes "commercial activity" and "direct effect."[215] By utilizing *Weltover*, the courts have asserted jurisdiction over non-U.S. defendants in a greater number of cases than they did prior to *Weltover*.[216] In addition, subsequent courts have been able to justify declining jurisdiction by referring to the *Weltover* rules.[217]

1. *Saudi Arabia v. Nelson*: The U.S. Supreme Court's Approach to the FSIA's Commercial Exception in the Shadow of *Weltover*

The U.S. Supreme Court revisited the issue of defining the FSIA's commercial activity exception in *Saudi Arabia v. Nelson*.[218] In *Nelson*, a married couple (Mr. and Mrs. Nelson), filed a tort action against the Kingdom of Saudi Arabia, the King Faisal Specialist Hospital, and Royspec, the hospital's purchasing agent in the United States.[219] The complaint alleged that the hospital hired Mr. Nelson after he had read its recruitment advertisement in a U.S. publication.[220] Mr. Nelson started working in the hospital in December of 1983, monitoring facilities, equipment, utilities, and maintenance systems to ensure the safety of patients and staff.[221] Four months later, he allegedly found defects in the hospital's oxygen and nitrous oxide lines that he believed posed a safety hazard.[222] Mr. Nelson subsequently reported the defects to hospital officials and a Saudi commission.[223] He alleged that the hospital officials advised him to ignore the defects, and that certain hospital employees summoned him to the hospital's security office where agents of the Saudi government

214. *See supra* note 7 (listing some opinions which cited *Weltover* to assist in resolving a commercial activity case).

215. *Id.*

216. *See id.* (listing cases which have used *Weltover* as support for finding jurisdiction).

217. *Id.* (giving examples of courts which have used Supreme Court's decision in *Weltover* to decline jurisdiction).

218. __ U.S. __, 113 S. Ct. 1471 (1993).

219. *Id.* at __, 113 S. Ct. at 1474; *Commercial Exception*, *supra* note 1, at 1; *Jurisdiction*, N.J. L.J., Mar. 29, 1993, at 58; *Supreme Court Bars Tort Claim in Saudi Recruitment Case*, 8 LIABILITY WEEK, Mar. 29, 1993, § 13, Vol. 8, Mar. 29, 1993, at § 13.

220. *Nelson*, __ U.S. at __, 113 S. Ct. at 1474-75.

221. *Id.* at __, 113 S. Ct. at 1475.

222. *Id.*

223. *Id.*

wrongfully arrested, beat, and tortured him after transporting him to a jail cell.[224]

In *Nelson*, the U.S. Supreme Court analyzed the commerciality of defendant's acts.[225] Justice David Souter, delivering the opinion of the Court,[226] held that the district court lacked jurisdiction because the Nelsons' action was not "based upon a commercial activity" within the meaning of the FSIA's commercial activity exception.[227] Justice Souter explained that even if the Court were to accept the Nelsons' allegations about Mr. Nelson's recruitment and employment as true, the petitioners' tortious conduct failed to qualify as "commercial activity" within the meaning of the FSIA.[228] Citing *Weltover*, the Court emphasized that the FSIA codified the "restrictive" theory of foreign sovereign immunity.[229] It explained that the Nelsons cannot use the "purpose" of defendants' actions to characterize the alleged abuse of police power in order to have it qualify as a "commercial activity."[230]

Justice Byron White and Justice Harry Blackmun concurred in the judgment, noting that the commercial conduct upon which the Nelsons based their complaint had not been carried on in the United States.[231] Justices White and Blackmun, however, disagreed with the majority that the Nelsons' action was not "based upon a commercial activity."[232] Justice White explained

---

224. *Id.*

225. *Id.* at __, 113 S. Ct. at 1476-77. The issue of whether defendant's acts had a direct effect in the United States was not before the Court because the first clause requires the action to be one "based upon a commercial activity," and "carried on in the United States." *Id.*; *see supra* note 3 (citing commercial activity exception); *see also Commercial Exception*, *supra* note 1, at 1; *Jurisdiction*, N.J. L.J., Mar. 29, 1993, at 58; *Supreme Court Bars Tort Claim in Saudi Recruitment Case*, 8 LIABILITY WEEK, Mar. 29, 1993, § 13.

226. *Nelson*, __ U.S. at __, 113 S. Ct. at 1473. Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia and Clarence Thomas joined the majority. *Id.*

227. *Id.* at __, 113 S. Ct. at 1481.

228. *Id.* at __, 113 S. Ct. at 1480. The Court noted that "[w]hatever may have been the Saudi Government's motivation for its allegedly abusive treatment of Nelson, it remains the case that the Nelsons' action is based upon a sovereign activity immune from the subject-matter jurisdiction of United States courts under the Act." *Id.*

229. *Id.* at __, 113 S. Ct. at 1478.

230. *Id.* at __, 113 S. Ct. at 1479. The Court concluded that "where a claim rests entirely upon activities sovereign in character, as here . . . jurisdiction will not exist under that clause regardless of any connection the sovereign acts may have with commercial activity." *Id.* at __, 113 S. Ct. at 1478 n.4.

231. *Id.* at __, at 113 S. Ct. at 148.

232. *Id.*

that the relevant inquiry should not focus on the manner in which private parties *ought to engage* in commerce, but whether it was the method in which private parties occasionally *do engage* in commerce.[233] He indicated that the operation of a hospital is a commercial enterprise, and taking retaliatory action against whistleblowing is within the scope of commercial activity.[234] As support for this contention, Justice White cited the House and Senate Reports that accompanied the FSIA's legislation.[235] These reports explain that a foreign government's employment or engagement of laborers, clerical staff or marketing agents would be among those included within the definition of "commercial activity."[236] Justice White applied the *Weltover* rule to emphasize that when a government acts, not as a regulator of a market, but as a private player within it, the government's actions are "commercial" within the meaning of the FSIA.[237]

Justice John Paul Stevens, in his dissent, agreed with Justice White that the operation of the hospital and its employment practices and disciplinary procedures were "commercial activities" within the meaning of the FSIA.[238] He disagreed, however, with Justice White's contention that the hospital lacked sufficient contact with the United States to justify the exercise of federal jurisdiction.[239] Justice Stevens stated that he would affirm the judgment of the Eleventh Circuit Court of Appeals, which declared that the operation of the hospital constituted a commercial activity with "sufficient contact with the United States to justify the exercise of federal jurisdiction."[240]

2. The Ninth Circuit's Attempt to Determine the Scope of the Supreme Court's Decision in *Weltover*

The U.S. Court of Appeals for the Ninth Circuit lacked unanimity when it addressed the issue of determining the scope of

---

233. *Id.* at __, 113 S. Ct. at 1481. Justice White argued that "the question we must ask is whether it is the manner in which private parties at times do engage in commerce." *Id.*

234. *Id.*

235. *Id.* at __, 113 S. Ct. at 1481-82.

236. *Id.*, *quoting* HOUSE REPORT, *supra* note 5, at 16.

237. *Id.* at __, 113 S. Ct. at 1484, *citing Weltover*, __ U.S. at __, 112 S. Ct. at 2162.

238. *Id.* at __, 113 S. Ct. at 1487-88 (Stevens, J., dissenting).

239. *Id.* at __, 113 S. Ct. at 1488-89.

240. *Id.* at __, 113 S. Ct. at 1488.

Weltover in *Chuidian v. Philippine National Bank.*[241] The Ninth Circuit was split on the question of whether the Supreme Court in *Weltover* decided more than the fact that Argentina's issuance of bonds was a commercial activity having a direct effect in the United States.[242] In *Chuidian*, the plaintiff relied upon *Weltover* to support his contention that the district court erred in dismissing his complaint for lack of jurisdiction.[243] Vincente B. Chuidian held interests in various businesses within California.[244] In 1985, the Philippine Export and Foreign Loan Guarantee Corporation (the "Exporter"), an instrumentality of the Republic of the Philippine's government, sued several of Chuidian's businesses in Santa Clara Superior Court.[245] Following a counterclaim by Chuidian, the parties settled the Santa Clara County litigation.[246] The settlement consisted of, inter alia, Philippine's issuance of an irrevocable letter of credit to Chuidian payable at the counters of the Exporter's Los Angeles Branch.[247]

Approximately one year later, the Philippine Presidential Commission on Good Government (the "Commission"),[248] an executive agency established to recover "ill-gotten wealth" accumulated by President Ferdinand Marcos and his confederates,[249] instructed the Exporter to refrain from making payment on the letter of credit that had been issued to Chuidian.[250] The Ex-

241. 976 F.2d 561 (9th Cir. 1992).

242. *Id.* The majority held that the "Weltover Court decided only that Argentina's issuance of bonds was a commercial activity with a direct effect in the United States for purposes of asserting jurisdiction under the Foreign Sovereign Immunities Act." *Id.* at 564.

243. *Id.*

244. *Id.* at 562.

245. *Id.* The underlying facts explaining why Philippine sued Chuidian are set forth in Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990).

246. *Chuidian*, 976 F.2d at 562.

247. *Id.*

248. *Id.* The February 26, 1986, overthrow of President Marcos led to his replacement with President Corazon Aquino and her new government. *Id.*

249. *Id.*

250. *Id.* The Commission suspected that the Santa Clara County litigation settlement was a fraudulent agreement between Marcos and Chuidian. *Id.* The motive that was suspected for the fraudulent agreement was that it was to pay off Chuidian for his cooperation in suppressing information regarding Marcos' involvement in Chuidian's commercial enterprises. *Id.* This suspicion prompted the Commission to prevent Philippine's payment under the letter of credit to secure payment in the event that its examination of the settlement revealed impropriety. *Id.*

porter followed the Commission's order.[251]

Chuidian brought suit against the Exporter in Los Angeles County Superior Court.[252] The defendant removed the action to the California federal district court, which determined that the terms of the letter of credit could not be enforced.[253] The district court agreed with the merits of the Exporter's defense of illegality of performance and found that both the doctrines of international comity[254] and act of state required the court to abide with the Commission's sequestration order.[255]

The trustee in bankruptcy for Chuidian appealed the decision to the Ninth Circuit Court of Appeals.[256] The trustee argued that the district court erred in excusing performance under the letter of credit because of supervening illegality.[257] He relied upon *Weltover* to support his position that the illegality defense did not apply because the "place of performance" of the letter of credit was Los Angeles and not Manila, and therefore,

---

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* Chuidian v. Philippine Nat'l Bank, 734 F. Supp. 415 (C.D. Cal. 1990), *aff'd*, 976 F.2d 561 (1990) (giving district court opinion). The concept of comity was first articulated in Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). The Supreme Court in *Hilton* defined the principle of comity:

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations."

Id. at 163. The concept of comity has been defined more recently in Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972), as the following:

> Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.

Id.; *see* Gregory T. Walters, Comment, *Bachchan v. India Abroad Publications Inc.: The Clash Between Protection of Free Speech in the United States and Great Britain*, 16 FORDHAM INT'L L.J. 895, 914-19 (1992-93) (providing overview of doctrine of comity).

255. *Chuidian*, 734 F. Supp. 415 (C.D. Cal.), *aff'd*, 976 F.2d 561 (1990).

256. *Chuidian*, 976 F.2d at 561.

257. *Id.* at 562.

the execution of the contract should not be excused.[258] He contended that *Weltover*'s holding supported a rule that the place of performance of a letter of credit included the expected location of payment.[259] The Ninth Circuit distinguished *Weltover*, indicating that the Court in *Weltover* did not articulate any jurisdictional guidelines for identifying the place of performance of letters of credit.[260] According to Judge Jerome Farris, *Weltover* held that Argentina's issuance of bonds for purposes of asserting jurisdiction under the FSIA constituted "commercial activity" which had a "direct effect" in the United States.[261]

The dissent argued that the majority read *Weltover* too narrowly.[262] According to the dissent, the better rule was that the "place of performance" of a letter of credit was the intended location (or locations) in which it was to be paid.[263] The dissent emphasized that Chuidian's letter of credit specifically stated a Los Angeles location, and no other location, as its site of payment.[264] It noted that in both *Weltover* and the case at hand, liability for payment remained with the entity in the non-U.S. jurisdiction, the beneficiaries of the obligations were non-U.S. nationals, and both the issuer and purchaser of the bonds were non-U.S. nationals.[265] The dissent further noted that the Republic of Argentina had even fewer contacts with the forum than the Exporter had with its forum.[266] The dissent agreed with Chuidian that a letter of credit should be enforced when the performance was legal at the place designated for payment but illegal at the place where the credit was issued.[267]

---

258. *Id.* Chuidian's argument was that the court's conclusion was based on the premise that the letter of credit was to be performed in the Philippines, and that Philippine law prohibited the bank from performing. *Id.* at 563. Chuidian therefore argued that the place for performance was Los Angeles and thus the Commission's order was insufficient to excuse Philippine's performance. *Id.*

259. *Id.* at 563.

260. *Id.* at 564.

261. *Id.* The narrow interpretation of *Weltover*'s holding which the majority adopted was that "Argentina's issuance of bonds was a commercial activity with a direct effect in the United States for purposes of asserting jurisdiction under the Foreign Sovereign Immunities Act." *Id.*

262. *Id.* at 566-67 (Fernandez, J., dissenting).

263. *Id.* at 565.

264. *Id.* The dissent analyzed that "[n]o other place of payment was designated. Moreover, Los Angeles is the place where prior payments had been made." *Id.*

265. *Id.* at 566-67.

266. *Id.* at 567.

267. *Id.* at 568.

3. The Second Circuit's Application of the U.S. Supreme Court's *Weltover* Standard for Commercial Activity Lead to Inconsistent Conclusions

The U.S Court of Appeals for the Second Circuit recently attempted to apply the standard for "commercial activity" set out in *Weltover*.[268] The issue in *Antares Aircraft v. Federal Republic of Nigeria* concerned the application of the FSIA's commercial activity exception to the detention of the plaintiff's aircraft at a Nigerian airport.[269] Judge Ralph Winter, writing for the majority, held that no "direct effect" in the United States existed, and thus, the "commercial activity" exception did not apply.[270] The majority noted that all legally significant acts had taken place in Nigeria.[271] The majority equated the *Antares* case with *Weltover* by remarking that the payment of funds to the Nigerian authorities had to be in Nigeria, just as the Bonods in *Weltover* were required to be paid in New York.[272]

Judge Frank X. Altimari, dissenting, reached the opposite conclusion based on *Weltover*.[273] Judge Altimari reasoned that the plaintiff, being an U.S. partnership, suffered a "direct effect" in the United States in view of the fact that its plane had been expropriated by a non-U.S. sovereign.[274] He inferred from *Weltover* that a sovereign's improper commercial acts, similar to the situation in *Weltover*, caused a "direct effect" to the plaintiff in that plaintiff's principal place of business.[275] According to the dissent, if a U.S. firm wanted to recover its plane, which was seized by a non-U.S. sovereign, it could assert jurisdiction over that sovereign using the FSIA.[276] Therefore, Judge Altimari opined that the plaintiff should be permitted to use the FSIA's commercial activity exception in order to be able to sue the Federal Republic of Nigeria.[277]

---

268. Antares Aircraft v. Federal Republic of Nigeria, 999 F.2d 33 (2d Cir. 1993).

269. *Id.* at 34.

270. *Id.*

271. *Id.* at 36.

272. *Id.* The court explained that "[w]herever the source of the money, payment had to be in Nigeria, just as the payment in *Weltover* had to be in New York." *Id.*

273. *Id.* at 37 (Altimari, J., dissenting).

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

4. The Fifth Circuit Reached a Decision by Applying the U.S. Supreme Court's *Weltover* Standard for Commercial Activity

The U.S. Court of Appeals for the Fifth Circuit recently adjudicated a case resulting from President Corazon Aquino's Presidential Commission on Good Government (the "Commission.")[278] In *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, the Commission sequestered a Falcon 50 jet aircraft ("Falcon") that had been leased by a Philippine corporation suspected of having ties to the former Marcos regime.[279] The Commission sold the Falcon to Walter Fuller Aircraft Sales, Inc. ("Fuller"), a U.S. corporation, which subsequently brought the jet into the United States.[280] The original owner, Faysound, Ltd. ("Faysound"), a Hong Kong corporation, successfully brought suit against Fuller in federal district court in Arkansas to gain good title.[281]

Fuller sued the Commission in the U.S. District Court for the Northern District of Texas to recover the cost of defending Faysound's lawsuit, claiming that the Commission had promised to defend any action brought by an adverse claimant to the Falcon.[282] The Commission moved to dismiss on the ground that it was entitled to immunity under the FSIA.[283] The district court disagreed holding that it had subject matter jurisdiction over the suit under the commercial activities exception of the FSIA.[284]

On appeal, the Fifth Circuit held that the district court properly asserted jurisdiction against the Commission under the "commercial activities" exception to the FSIA.[285] Citing *Weltover*, the Fifth Circuit held that an activity is commercial in nature if it was of the type that a private person would customarily engage in for profit.[286] The court used *Weltover* to support its finding that the Commission's commercial act caused a "direct effect" in the

278. Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375 (5th Cir. 1992).

279. *Id.* at 1377.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at 1384 *citing* Republic of Argentina v. Weltover, Inc., ___ U.S. ___, 112 S. Ct. 2160, 2165-67 (1992).

United States and therefore the Commission could not be immune from suit.[287] The Fifth Circuit employed this standard to reach its finding of commercial activity.[288] The court noted that by utilizing the lenient standard in *Weltover* for determining "direct effect," it "strengthen[ed]" its holding in the case.[289]

III. WELTOVER: *LOOKING TOWARD THE FUTURE*

The greatest achievement of the U.S. Supreme Court in *Republic of Argentina v. Weltover, Inc.* has been its ability to assist courts in settling the ambiguous meaning of the FSIA's commercial exception.[290] However, as recent decisions demonstrate, utilizing the Court's holding in *Weltover* as a guide is often a formidable task for courts.[291] The Supreme Court has not completely settled all the confusion due to the ambiguity of the term "commercial activity."[292] Nevertheless, the impact that *Weltover* has had on courts has been influential.

A. *The Primary Consequence of the* Weltover *Decision Has Been to Assist Courts in Determining Whether the FSIA Protects a Sovereign's Actions*

The consequence of the Supreme Court's holding in *Weltover* on subsequent case law has been significant. In the first year following the U.S. Supreme Court holding in *Weltover*, over fifteen cases have referred to this decision in their opinions.[293]

---

287. *Walter Fuller*, 965 F.2d at 1384. The Fifth Circuit noted that the Supreme Court in *Weltover* had recently approved of the approach that the Fifth Circuit had adopted which held that an activity had a commercial nature for purposes of FSIA immunity if it was of the type that a private person would customarily engage in for profit. *Id.*

288. *Id.* at 1385. The Fifth Circuit observed that if it employed the *Texas Trading* test which was adopted in *Weltover*, there would be little doubt that the sale of the Falcon would qualify as commercial activity. *Id.*

289. *Id.* at 1387. The court recognized that the decision in *Weltover* strengthened its conclusion in the case. *Id.*

290. *See supra* notes 69-87 and accompanying text (analyzing judicial interpretations of commercial activity exception).

291. *See supra* notes 214-68 and accompanying text (reviewing courts' attempts to apply *Weltover*).

292. *See* Tubular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180, 180 (5th Cir. 1992) (lamenting fact that "the task of interpreting the FSIA is no easier now than it has been before").

293. *See, e.g.*, Antares Aircraft v. Federal Republic of Nigeria, __ U.S. __, 112 S. Ct. 3020 (1992) (vacating judgment and remanding to United States Court of Appeals for Second Circuit for further consideration in light of Republic of Argentina v. Weltover,

The reaction of the courts to *Weltover* has generally been one acknowledging the U.S. Supreme Court for its assistance in interpreting a statute that had previously confounded them.[294]

In *Weltover*, the Court prudently rejected a "purpose" analysis, and adopted instead a "nature" analysis, in order to characterize a sovereign's action.[295] The Court's shifting of the focus from "purpose" to "nature" precluded non-U.S. States from arguing that their activities should be immune based on their non-commercial objectives.[296] One commentator has criticized the holding in *Weltover* for failing to focus on Argentina's presidential decree, which extended the time for paying back the Bonods.[297] By neglecting to emphasize the presidential decree, however, the Court acted consistently with its rejection of a per-

---

Inc.); Chuidian v. Philippine Nat'l Bank, 976 F.2d 561, 566 (9th Cir. 1992) (dissenting opinion) (following *Weltover* by saying that "the place of payment is usually considered the place of performance in analogous situations."); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387, (5th Cir. 1992) (noting that "*Weltover* strengthens our conclusion. . . ."); Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. 92-4177, 1993 U.S. Dist. LEXIS 784, at *24 (E.D. Pa. Jan. 26, 1993) (concluding that it could exercise subject matter jurisdiction based upon the commercial activity exception of the FSIA); Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1385-86 (S.D.N.Y. 1993) (relying on *Weltover* for its interpretation of FSIA's commercial activity exception); AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 976-77 (S.D. Fla. 1992) (noting that the "very recent Supreme Court decision of Republic of Argentina v. Weltover, Inc. . . . disposes of the issue [and]. . . provides guidance."); First City, Texas-Houston, N.A. v. Rafidian Bank, No. 90 Civ. 7360, 1992 U.S. Dist. LEXIS 15235, at *10 (S.D.N.Y. Sept. 28, 1992) (relying on *Weltover* for its statement that "Rafidian Bank's actions were purely commercial in nature. As such, it cannot claim sovereign immunity for its acts.")

294. *See Weltover*, __ U.S. at __, 112 S. Ct. at 2164. The Supreme Court remarked that the FSIA's definition "leaves the critical term 'commercial' largely undefined." *Id.* at __, 112 S. Ct. at 2165; *see also* Drexel Burnham Lambert Group Inc. v. A.W. Galadari, 810 F. Supp. 1375, 1385 n.15 (S.D.N.Y. 1993) (noting that "the FSIA provides almost no guidance as to the meaning and scope of 'commercial.'"). The court in AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973 (S.D. Fla. 1992), had to decide whether defendant's privatizing a national cement industry was an action that was commercial activity. *Id.* at 975-78. That court held that the *Weltover* decision disposed of the issue. *Id.* It said that just as in *Weltover*, the Supreme Court emphasized the "nature" over the "purpose," so too it would disregard Honduras' motivations and look at the fact that selling a company is a routine commercial transaction. *Id.* at 976.

295. *See Weltover*, __ U.S. at __, 112 S. Ct. at 2166; Pizzuro, *supra* note 99, at 823 (commenting that the Supreme Court's rejection of "purpose" analysis in characterizing foreign state's actions was "clearly correct"); *supra* notes 180-95 and accompanying text (describing Court's reasoning in using nature as opposed to purpose in characterizing commerciality).

296. *See supra* note 7 (listing cases which *Weltover* affected).

297. Pizzuro, *supra* note 99, at 823. Mr. Pizzuro remarked that the Supreme Court "neglected to focus on the nature of at least one of the acts giving rise to the claim, i.e.,

se rule that would render the issuance of debt instruments automatically "commercial."[298] The Court did not intend to broaden the definition of "commercial activity" to encompass every sovereign activity, but to include only those acts performed by a sovereign that were of the type that a private party engages in when engaging in commerce.[299]

The U.S. Supreme Court, however, has broadened the scope of the FSIA's commercial activity exception by interpreting the effect of an act as being "direct" under the FSIA if it was an immediate consequence of the State's activity.[300] The Court refused to adopt a stricter standard of "substantial" or "foreseeable" in deciding the "direct effect" issue.[301] Instead, it adopted the more lenient standard articulated by the U.S. Court of Ap-

---

the presidential decree extending the time for repayment of the Bonods." *Id.*; *see also supra* note 105 and accompanying text (discussing Argentina's presidential decree).

298. *See Weltover*, __ U.S. at __, 112 S. Ct. at 2167 ("We have no occasion to consider such a per se rule. . . ."); Pizzuro, *supra* note 99, at 823. Mr. Pizzuro commented that "although the Court was careful to characterize a state's issuance of regulations limiting foreign currency exchange as sovereign activity, it did not attempt to distinguish that case from the presidential decree, which had a similar impact upon otherwise commercial obligations"; Pizzuro, *supra* note 99, at 823; *see supra* notes 196-99 and accompanying text (discussing Court's handling of Argentina's contention that a "per-se rule" had been used against them).

299. *See Weltover*, __ U.S. at __, 112 S. Ct. at 2166 (concluding that a government's acts which are in manner of private individual are commercial within meaning of FSIA); *see also* testimony of Bruno A. Ristau, Chief of the Foreign Litigation Committee of the Department of Justice's Civil Division, *in Jurisdiction of U.S. Courts in Suits against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 31 (1976) (remarking that FSIA "is not designed to open up our courts to all corners to litigate any dispute which any private party may have with a foreign state anywhere in the world").

300. *Weltover*, __ U.S. at __, 112 S. Ct. at 2168; *see supra* note 203 and accompanying text (discussing Court's adoption of the Second Circuit's "immediate consequence" test); Pizzuro, *supra* note 99, at 823 observing that:

> The Court's holding that an effect in the United States is "direct" within the meaning of the FSIA as long as it is an immediate consequence of the foreign state's activity elsewhere could lead to a considerable broadening of the commercial activity exception to sovereign immunity. Arguably, any breach by a foreign state of a contractual obligation to be performed in the United States, regardless of the lack of any other contract between the foreign state or the transaction and the United States, will support an assertion of jurisdiction under the FSIA.

Pizzuro, *supra* note 99, at 823.

301. *Weltover*, __ U.S. at __, 112 S. Ct. at 2168. The Supreme Court, in analyzing the "direct effect" analysis, remarked that it rejects "the suggestion that § 1605(a)(2) contains any unexpressed requirement of 'substantiality' or 'foreseeability.' As the Court of Appeals recognized, an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'" *Id.* (citing *Weltover*, 941 F.2d at 152). The

peals for the Second Circuit in *Weltover*, which focused on whether the plaintiff has sustained any loss.[302] In doing so, the Supreme Court in *Weltover* manifested its desire to remove some of the barriers that might prevent the United States from asserting jurisdiction over foreign sovereigns.[303]

In *Weltover*, the Court focused on the concept that the "direct effect," which is required by the FSIA, need only have a slight effect in the United States.[304] By adopting a liberal standard for determining subject matter jurisdiction over U.S. lawsuits brought against non-U.S. governments, the Court indicated a desire to assert jurisdiction over a greater number of non-U.S. governments.[305] The ultimate effect of *Weltover* has been to permit U.S. courts to assert jurisdiction over a greater number of cases involving non-U.S. defendants.[306] Consequently, non-U.S. States cannot easily transgress U.S. laws and shield themselves

---

Court's refusal of these standards indicated its disapproval of the stricter *Zernicek* standard. *See supra* notes 69-72 and accompanying text (discussing *Zernicek*).

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

303. Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1387 (5th Cir. 1992).

304. *Weltover*, __ U.S. at __, 112 S. Ct. at 2168; The court in AMPAC Group Inc. v. Republic of Honduras, 797 F. Supp. 973, 977 (S.D. Fla. 1992) mentioned the *Weltover* decision's effect on its decision by explaining that "*Weltover* therefore teaches that the effect in the United States need only be slight. Although the effect cannot be speculative, the contact with the United States may indeed be only a tangential one to support jurisdiction under the FSIA." *Id.*

305. *See, e.g.*, Neil E. McDonell, *Collecting on Iraqi Claims*, MIDDLE EAST EXEC. REP., June, 1993, at 8 (stating that Supreme Court's *Weltover* decision adopted lenient standard for determining subject matter jurisdiction over U.S. lawsuits brought against non-U.S. governments).

306. *See, e.g., Walter Fuller*, 965 F.2d 1375. The court in *Walter Fuller* found that the defendant's activity caused a direct effect in the United States, and the court commented that *Weltover* strengthened its holding. *Id.* at 1387. The court in First City, Texas-Houston, N.A. v. Rafidian Bank, No. 90 Civ. 7360, 1992 U.S. Dist. LEXIS 15235 (S.D. N.Y. Sept. 28, 1992) held that based on *Weltover*, the defendant could not claim sovereign immunity because its actions were purely commercial in nature. *Id.* at *10; *see* Pizzuro, *supra* note 99, at 823-24 remarking that the:

> Court's definition of direct effect raises the question whether any breach of a commercial obligation owed by a foreign state to a U.S. corporation could result in an assertion of jurisdiction over the foreign state in the United States, regardless of the place of performance, on the theory that a corporation experiences the effects of a financial injury at its domicile or place of incorporation.

Pizzuro, *supra* note 99, at 823-24. Similarly, the court in *Rubin* held that under the *Weltover* standard, their defendant's conduct must have constituted a "direct effect in the United States." Federal Ins. Co. v. Richard I. Rubin & Co., Inc., No. 92-4177, 1993 U.S. Dist. LEXIS 784, at *24 (E.D. Pa. Jan. 26, 1993).

from suit via the FSIA.[307]

The Supreme Court's decision in *Weltover* was a crucial factor in assisting the Court of Appeals for the Fifth Circuit in *Walter Fuller* with interpreting the "commercial activity" exception of the FSIA.[308] In *Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines*, the Fifth Circuit examined the FSIA and its "commercial activity" exception in detail.[309] The Fifth Circuit analyzed the method of using "nature" over "purpose" to characterize the commerciality of activities.[310] In approving this test, the Fifth Circuit noted that it was the accepted approach and relied on the fact that the Supreme Court in *Weltover* had similarly approved of the "nature" standard.[311] Absent the FSIA's requirement that courts focus on the type of transaction rather than its parties, the commercial activity exception would be rendered ineffective, because every government would conjure a sovereign "purpose" for conduct that is commercial in nature.[312] Furthermore, the Fifth Circuit, confronting the "direct effect" test, rejected the *Zernicek v. Brown & Root, Inc.* standard of "foreseeability."[313] The Fifth Circuit implied that it chose to reject the *Zernicek* standard because the Court in *Weltover* also rejected it.[314] The Fifth Circuit in *Walter Fuller* alluded to the significance of the Supreme Court's decision in *Weltover* by completing its "di-

---

307. *See supra* note 3 (enumerating exceptions to FSIA that preclude a State's defense of sovereign immunity). The Court's holding in *Weltover* is important for yet another reason. By expanding the definition of "commercial activity," the Court has made the American rule concerning public debt litigation consistent with rules in other financial centers such as those in the United Kingdom and Switzerland. Delaume, *supra* note 166, at 1221. These countries regard financial transactions involving other sovereigns as commercial acts. *Id.* Some differences do, however, exist. For example, in the United Kingdom, there need not be a nexus of the commercial activity to the property claim that the suit is based upon. LEWIS, *supra* note 11, at 86. This element contrasts with the standard set forth by the FSIA that requires that the property claim be used for the commercial activity upon which the claim is based. *See* 28 U.S.C. § 1610(a)(2) (stating that a sovereign's exception to immunity would be if "the property is or was used for the commercial activity upon which the claim is based").

308. *See supra* notes 278-89 and accompanying text (discussing *Walter Fuller* case).

309. *Walter Fuller*, 965 F.2d at 1375-90.

310. *Id.* at 1384.

311. *Id.*

312. *See, e.g.*, *Commercial Exception*, *supra* note 1, at 1 ("The importance of this distinction cannot be overemphasized. Otherwise every government could find an ultimate public or 'sovereign' purpose for even the most clearly commercial conduct.").

313. *Walter Fuller*, 965 F.2d at 1386-87; *see supra* notes 69-77 and accompanying text (discussing *Zernicek* and foreseeability standard).

314. *Walter Fuller*, 965 F.2d at 1387.

rect effect" analysis with the remark that *Weltover* had reinforced its conclusion.[315] The Fifth Circuit's decision in *Walter Fuller* provides further evidence for the notion that the decision in *Weltover* has had a significant impact on the ability of lower courts to determine the existence of "commercial activity."[316]

B. *The* Weltover *Decision Does Not Completely Resolve the Scope of the Commercial Activity Exception to the FSIA*

The holding by the Supreme Court in *Weltover* was intended to resolve two issues.[317] First, it attempted to provide a standard for commercial activity.[318] Second, it dealt with the issue of interpreting the "direct effect" requirement of the FSIA.[319] Despite the Supreme Court's attempt to resolve these issues, subsequent cases have indicated that these two issues still present difficulty for federal courts and even for the Supreme Court.[320]

One good example of the lack of specific directive in *Weltover* became manifest in the U.S. Court of Appeals for the Ninth Circuit's split in *Chuidian v. Philippine National Bank*.[321] In *Chuidian*, Judge Jerome Farris, writing for the majority, distinguished *Weltover* from *Chuidian* by noting that *Weltover* did not articulate a rule to identify the place of performance of letters of credit, and therefore was inapplicable to its case.[322] Judge Ferdinand F. Fernandez' dissent, however, did not agree with this distinction.[323] The dissent concluded from *Weltover* that the place

---

315. *Id.* ("If anything, *Weltover* strengthens our conclusion in this case.").

316. *Id.*

317. Republic of Argentina v. Weltover, Inc., __ U.S. __, 112 S. Ct. 2160, 2167.

318. *See supra* notes 170-99 and accompanying text (discussing Supreme Court's handling of commerciality question in *Weltover* decision).

319. *See supra* notes 200-08 and accompanying text (discussing *Weltover* Court's interpretation of "direct effect").

320. *See, e.g.*, Saudi Arabia v. Nelson, __ U.S. __, 113 S. Ct. 1471 (1993); Chuidian v. Philippine Nat. Bank, 976 F.2d 561 (9th Cir. 1992).

321. 976 F.2d 561. For a discussion of *Chuidian*, *see supra* notes 241-67 and accompanying text. For another example of *Weltover's* inability to completely resolve the commercial activity issue, *see* Intercontinental Dictionary Series v. De Gruyter, 822 F. Supp. 662, 676 (C.D. Cal. 1993) ("The facts of the present matter offer no simple resolution of the 'commercial activity' analysis and render the identification of the nature of the activity more problematic than the examples [*Weltover* and *Nelson*] presented to the Court.").

322. *Chuidian*, 976 F.2d at 564; *see supra* notes 260-62 and accompanying text (discussing how the majority distinguishes *Weltover*).

323. *Chuidian*, 976 F.2d at 565.

of payment did constitute the place of performance.[324] The dissent reached this conclusion by comparing the facts of *Weltover* to those of *Chuidian*.[325] The inability of the Ninth Circuit to reach a unanimous opinion in this case indicates that the scope of *Weltover* lacks clarity.[326]

Similarly, in *Antares Aircraft v. Federal Republic of Nigeria*,[327] the Court of Appeals for the Second Circuit adjudicated a case that manifested the lack of clarity in the Supreme Court's *Weltover* decision. In *Antares* the Second Circuit considered a case that had been remanded to it by the Supreme Court for further consideration in light of the *Weltover* holding.[328] The issue in *Antares* concerned specifically the application of the "direct effect" prong of the FSIA's commercial activity exception to the detention of the plaintiff's aircraft at a Nigerian airport.[329] The majority opinion in *Antares* held that no "direct effect" in the United States existed, and thus, the "commercial activity" exception did not apply.[330] The majority noted that all legally significant acts had taken place in Nigeria.[331] The majority relied on the Supreme Court's opinion in *Weltover* for its finding of a lack of the requisite "direct effect."[332] It equated the *Antares* case with *Weltover* by remarking that the payment of funds to the Nigerian authorities had to be in Nigeria, just as the Bonods in *Weltover* were required to be paid in New York.[333]

Judge Altimari, dissenting, reached the opposite conclusion based on *Weltover*.[334] He found that the plaintiff had suffered a "direct effect" in the United States.[335] The dissent's reasoning

---

324. *Id.* at 566.

325. *Id.*; *see supra* notes 263-68 and accompanying text (discussing reasons for dissenting opinion in *Chuidian*).

326. *See supra* notes 241-67 (discussing majority and dissenting opinions in *Chuidian*).

327. 999 F.2d 33 (2d Cir. 1993); *see supra* notes 268-77 and accompanying text (discussing Second Circuit's opinion in *Antares*).

328. *Antares*, 999 F.2d at 33; *see supra* note 7 (mentioning Supreme Court's decision to remand).

329. *Antares*, 999 F.2d at 34.

330. *Id.*

331. *Id.* at 36.

332. *Id.*

333. *Id.* ("Wherever the source of the money, payment had to be in Nigeria, just as the payment in *Weltover* had to be in New York.").

334. *Id.* at 37 (Altimari, J., dissenting).

335. *Id.*

focused on the fact that the plaintiff, a U.S. company, had its plane expropriated by a non-U.S. sovereign.[336] Like the majority, the dissent compared the case to the facts in *Weltover*.[337] He implied from *Weltover* that a sovereign's improper commercial acts, similar to the situation in *Weltover*, caused a "direct effect" to the plaintiff in that plaintiff's principal place of business.[338] The dissent, unlike the majority, focused on whether the plaintiff was being injured in the United States in order to determine the existence of a "direct effect" in the United States.[339] Therefore, according to the dissent, if a U.S. firm wanted to recover its plane which was seized by a non-U.S. sovereign, it suffered a "direct effect" in the United States, and thus, it could assert jurisdiction over that sovereign using the FSIA.[340] Consequently, the dissent held that the plaintiff should be permitted to use the FSIA's commercial activity exception in order to be able to sue the Federal Republic of Nigeria.[341]

The splintered verdict in *Saudi Arabia v. Nelson*,[342] a recent U.S. Supreme Court case that followed *Weltover*, is indicative of the magnitude of remaining ambiguity that exists regarding the commercial exception of the FSIA. In *Nelson*, the Court once again confronted the enigmatic commercial exception of the FSIA.[343] Its split opinion indicates the trouble that the Court has with its earlier definition of the FSIA's commercial exception.[344] The Court could not agree on whether an action brought by a U.S. plaintiff, who had suffered personal injuries as a result of

336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*
341. *Id.*
342. __ U.S. __, 113 S. Ct. 1471 (1993); *see supra* notes 214-40 and accompanying text (discussing *Nelson*). Justice Souter delivered the opinion of the Court, in which Chief Justice Rehnquist, and Justices O'Connor, Scalia and Thomas joined, and in which Justice Kennedy joined except for the last paragraph of Part II. __ U.S. at __, 113 S. Ct. at 1473. Justice White filed an opinion concurring in the judgment, in which Justice Blackmun joined. *Id.* Justice Blackmun filed an opinion concurring in part and dissenting in part. *Id.* Justice Kennedy filed an opinion concurring in part and dissenting in part, in which Justices Blackmun and Stevens joined as to Parts I-B and II. *Id.* Justice Stevens filed a dissenting opinion. *Id.* Contrast this highly splintered argument with the unanimous opinion handed down in *Weltover* some nine months earlier. *Weltover*, __ U.S. at __, 112 S. Ct. at 2160.
343. *Nelson*, __ U.S. at __, 113 S. Ct. at 1471.
344. *Id.* at __, 113 S. Ct. at 1471-88.

the Saudi Government's unlawful detention and torture, was based upon a commercial activity within the meaning of the FSIA.[345] The majority held that unlike Argentina's activities in *Weltover*, the Saudi Government's wrongful arrest, imprisonment and torture of Nelson did not constitute "commercial activity."[346] Justice Stevens dissent, however, opined that the Saudi Government's operation of the hospital did constitute "commercial activity."[347] This manifestation of *Weltover's* lack of a crystalline solution to all questions of existence of "commercial activity" is further bolstered in light of the fact that Justices Stevens, White and Blackmun, who all held in *Nelson* that the Saudi Government's actions did not constitute commercial activity, unanimously agreed with the other five justices in *Weltover* that Argentina's actions did constitute "commercial activity."[348]

C. *The* Weltover *Decision Provides Lower Courts with the Most Useful Standard Possible*

The Supreme Court's holding in *Weltover* attempted to clarify the long standing ambiguity that accompanied the commercial activity exception. Unfortunately, due to the myriad of possible scenarios that can present issues of the existence of "commercial activity" within the meaning of the FSIA, it does not lend itself to simple explanation. Therefore, the Supreme Court lacked the ability to formulate a solution that would provide easy answers for every "commercial activity" question that would arise in the future.

The Court's valiant attempt to clarify the definition of "commerciality" within the meaning of the FSIA deserves recognition for the clearer alternative that it has provided for lower courts to follow.[349] Due to the nature of the issue which the Supreme Court set out to resolve, namely that of providing a standard for

---

345. *Id.*

346. *Id.* at __, 113 S. Ct. at 1479 ("Unlike Argentina's activities that we considered in *Weltover*, the intentional conduct alleged here . . .could not qualify as commercial under the restrictive theory.).

347. *Id.* at __, 113 S. Ct. at 1488 (Stevens, J. dissenting) ("[P]etitioner's operation of the hospital and its employment practices and disciplinary procedures are 'commercial activities' within the meaning of the statute. . . .").

348. *See supra* notes 218-40 (discussing various opinions in *Nelson*); *Weltover*, __ U.S. at __, 112 S. Ct. at 2160.

349. *See supra* note 7 (giving examples of cases that have used the *Weltover* decision as support for their holdings).

determining commerciality within the meaning of the FSIA, it was inevitable that it would fail to provide the perfect solution. It would not have been possible to define "commercial activity" with such precision that debate on the issue would cease.

CONCLUSION

The U.S. Supreme Court's holding in *Republic of Argentina v. Weltover, Inc.* attempted to resolve the interpretation of the FSIA's commercial exception due to the lack of clarity and directive within the FSIA. The Court's liberal interpretation of what constitutes a "direct effect" in the U.S. has simplified matters for the judiciary. Although the consequence of the decision has been to provide some degree of guidance to courts, decisions following *Weltover,* such as those of *Chuidian v. Philippine National Bank,* and the Supreme Court's split in *Saudi Arabia v. Nelson,* indicate the absence of absolute directive for future court opinions, especially in cases which contain both elements of commerciality and those concerning sovereign functions. The Supreme Court's attempt at solving the "commercial activity" exception ambiguity was the clearest standard that it could have provided for lower courts to follow.

*Avi Lew**

* J.D. Candidate, 1994, Fordham University.