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The Scattered Remains of Sovereign Immunity for Foreign States After Republic of Argentina v. Weltover,Inc.

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The Scattered Remains of Sovereign Immunity for Foreign States After *Republic of Argentina v. Weltover, Inc.*—Due Process Protection or Nothing

ABSTRACT

The globalization of the United States economy in the latter half of the twentieth century has fostered greater interaction between the United States and foreign states and their instrumentalities. As a result, the likelihood of legal disputes arising between United States entities and foreign states has increased. Traditionally, foreign states have been immune from suit in United States courts. However, the Foreign Sovereign Immunities Act (FSIA), enacted in 1976, specifies instances in which United States courts may deny immunity to foreign states and exercise jurisdiction over them. Under one provision of the FSIA, a foreign state may forfeit its immunity if it engages in a commercial activity outside of the United States that has a direct effect within the United States. The United States Supreme Court recently interpreted the direct effect clause of this commercial activity exception in Republic of Argentina v. Weltover, Inc. *The Court broadly defined the terms "commercial activity" and "direct effect," thereby making foreign states and their state-owned enterprises more vulnerable to suit in the United States. Arguably, then, the Due Process Clause of the United States Constitution may provide foreign states the only protection against the jurisdiction of United States courts; however, the* Weltover *Court refused to determine whether such protection extends to foreign states and their instrumentalities. This Note analyzes the Supreme Court's decision in* Weltover. *It addresses the issues unresolved by the Court and surveys the problems encountered by lower courts applying* Weltover's *holdings. The author concludes that practical concerns and principles of international law weigh in favor of extending constitutional due process protection to foreign states.*

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I. INTRODUCTION

Since the early nineteenth century, United States jurisprudence has recognized that foreign states may be immune from the jurisdiction of United States courts.[1] In 1976, Congress passed the Foreign Sovereign Immunities Act[2] (FSIA or the Act), which provides the sole basis for obtaining jurisdiction over foreign states and their instrumentalities in United States courts.[3] The Act presumes the immunity of foreign states from

1. *See infra* note 18 (tracing the origin of the United States doctrine of sovereign immunity to The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)).

2. 28 U.S.C. §§ 1330, 1332(a)(2)(3)(4), 1391(f), 1441(d), 1602-11 (1988).

3. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 443 (1989).

the jurisdiction of United States courts[4] and then lists circumstances in which sovereign immunity should be denied.[5]

Under the Act, a United States court may deny immunity when a foreign state engages in a commercial activity that has some nexus to the United States. This commercial activity exception is codified at Section 1605(a)(2) of the FSIA.[6] The exception provides that a United States court may adjudicate a claim against a foreign sovereign if the foreign state (1) engages in a commercial activity in the United States, (2) acts in the United States in connection with a commercial activity elsewhere, or (3) engages in a commercial activity outside the United States that has a direct effect in the United States.[7]

According to Congress, the commercial activity exception is the most important exception to foreign sovereign immunity.[8] In

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4. "Subject to existing international agreements . . . a foreign state shall be immune from the jurisdiction of the courts of the United States . . . ." 28 U.S.C. §1604 (1988).

5. Section 1605 lists the five primary exceptions to jurisdictional immunity:

> (1) express or implied waiver;
> (2) actions based upon a commercial activity having some nexus to the United States;
> (3) actions involving property taken in violation of international law;
> (4) actions involving property in the United States acquired by succession or gift;
> (5) actions comprising a non-commercial tort occurring in the United States.

28 U.S.C. §1605(a)(1-5) (1988).

6. Section 1605 (a)(2) defines the commercial activity exception as follows:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
> (2) (i) in which the action is based upon a commercial activity carried on in the United States by a foreign state; or
> (ii) upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
> (iii) upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2) (1988) (paragraph structure not present in the original).

7. *Id.*

8. In the legislative history of the FSIA, Congress stated that Section 1605(a)(2) of the FSIA, which involves commercial activities of a foreign state that have a nexus to the United States, "is probably the most important instance in which foreign states are denied immunity." H.R. REP. NO. 94-1487, 94th Cong.,

the second half of the twentieth century, United States citizens and corporations increasingly have come into contact with both foreign states and entities owned by foreign states.[9] Today, state-owned trading enterprises account for over fifteen percent of international trade.[10] Because of the large number of commercial transactions involving foreign states, and because the FSIA exceptions provide the only means of obtaining jurisdiction over foreign states, the commercial activity exception of the Act has become very important in the resolution of disputes arising out of international business transactions.

This Note focuses on the third prong of the commercial activity exception, the direct effect clause. This clause provides that a foreign state is not immune from suit in a case based on the foreign state's commercial activity outside the United States if that activity causes a direct effect in the United States.[11] The United States Supreme Court recently interpreted the direct effect clause in *Republic of Argentina v. Weltover, Inc.*[12]

In *Weltover*, the Supreme Court broadly defined the terms "commercial activity"[13] and "direct effect."[14] In light of the Court's expansive definition of the direct effect clause of the commercial activity exception, arguably the only protection left to foreign states is due process protection.[15] The Court, however, expressly refused to determine[16] whether a foreign state is entitled to the protection of the Due Process Clause of the United States Constitution.[17]

This Note analyzes the *Weltover* Court's interpretation of the direct effect clause of the commercial activity exception. Part II

2d Sess. 18 (1976), *reprinted in* U.S.C.C.A.N. 6604, 6617 [hereinafter HOUSE REPORT]. Because the House and Senate Committees filed identical reports, references below to the House Report represent the views of the Senate Committee as well.

9. HOUSE REPORT, *supra* note 8, at 6605.

10. NATIONAL ASSOCIATION OF MANUFACTURERS, ANNUAL REPORT (1986).

11. 28 U.S.C. § 1605(a)(2) (1988).

12. 112 S. Ct. 2160 (1992).

13. *Id.* at 2165-66. *See infra* text accompanying notes 133-38.

14. *Id.* at 2168. *See infra* text accompanying notes 143-48.

15. *See* discussion *infra* Part V.

16. The Court assumed, "without deciding, that a foreign state is a 'person' for purposes of the Due Process Clause," but did not address whether this status entitled a foreign state to due process protection. *Weltover*, 112 S. Ct. at 2169 (citations omitted). Nevertheless, the court summarily concluded that minimum contacts sufficient to satisfy the constitutional test existed in the case at hand. *Id.*

17. U.S. CONST. amend. V, XIV, § 1.

sets forth the legal background and a framework of analysis. Part III summarizes the *Weltover* facts and the Supreme Court's opinion. Part IV first analyzes the Court's decision in light of the language of the FSIA and the legislative history of the Act. Part IV then addresses issues unresolved by *Weltover* and discusses the problems encountered by lower courts applying *Weltover*'s holdings and reasoning. This Note concludes that foreign states should be given due process protection for pragmatic reasons as well as to avoid a breach of international law.

II. LEGAL BACKGROUND

A. *The Foreign Sovereign Immunities Act*

Between 1812[18] and 1952 the United States followed a theory of absolute sovereign immunity,[19] granting foreign nations absolute immunity from suit in United States courts.[20] In response to developments in international law[21] and an increase

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18. The United States doctrine of sovereign immunity can be traced to The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). *See generally* Joan E. Donoghue, *Taking the "Sovereign" Out of the Foreign Sovereign Immunities Act: A Functional Approach to the Commercial Activity Exception*, 17 YALE J. INT'L L. 489, 495 (1992).

19. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (noting that courts interpreted The Schooner Exchange v. McFaddon as extending absolute immunity to foreign states); *see also* Steven A. Torres, Comment, *Foreign Sovereign Immunities Act—Argentina's Default on Bonds Payable in New York Found Sufficient to Deny Immunity*, Weltover, Inc. v. Republic of Argentina, 941 F.2d 145 (2d Cir. 1991), 16 SUFFOLK TRANSNAT'L L.J. 761, 764-65 (1993) (stating that under the absolute theory of sovereign immunity, a foreign state could not, without its consent, be held to answer in the courts of another state).

20. *See, e.g., Ex Parte* Republic of Peru, 318 U.S. 578, 588 (1943) (holding that a court may not exercise jurisdiction over a foreign sovereign's property contrary to the will of the executive branch).

21. HOUSE REPORT, *supra* note 8, at 6607. *See also* Donoghue, *supra* note 18, at notes 31-33 and accompanying text. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 5, Immunity of States from Jurisdiction, introductory note (1986) (even before the Second World War other states such as Belgium and Italy began to apply the restrictive theory; the principle spread rapidly after the Second World War). *Id.* § 451, reporter's note 1 (listing countries that have adopted the restrictive theory of foreign sovereign immunity).

in commercial activity by foreign governments,[22] the Department of State adopted a restrictive principle of foreign sovereign immunity in the 1952 Tate Letter.[23] The restrictive theory limits foreign state immunity to suits based on the state's public acts; the theory does not extend immunity to suits involving the state's commercial or private activities.[24]

The FSIA, enacted in 1976, codified the restrictive principle of foreign sovereign immunity.[25] Congress' objectives[26] in passing the Act included: providing a forum for aggrieved plaintiffs;[27] providing comprehensive procedures for informing a party when it can assert a legal claim against a foreign state in a United States court;[28] transferring the determination of sovereign immunity from the executive branch[29] to the judicial branch to assure litigants that immunity determinations are made on legal grounds and to ensure due process;[30] and providing a statutory procedure for obtaining jurisdiction over a foreign state.[31]

Under the FSIA, immunity does not extend to a foreign state when the state engages in a commercial activity.[32] The FSIA defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act."[33]

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22. Letter from Jack B. Tate, Acting Legal Advisor to the Secretary of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984, 985 (1952).

23. *Id.*

24. HOUSE REPORT, *supra* note 8, at 6605.

25. *Id.* (stating that Congress' first enumerated objective was to codify the restrictive theory of foreign sovereign immunity).

26. An additional congressional objective was to provide the judgment creditor a remedy if a foreign state failed to satisfy a final judgment after a reasonable period of time. HOUSE REPORT, *supra* note 8, at 6606.

27. *See id.* at 6605. Congress stated that "American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions . . . call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *Id.*

28. *Id.*

29. Prior to the FSIA, courts deferred to decisions of the executive branch regarding immunity. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (holding that courts cannot deny immunity allowed by the executive branch); *see also* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (stating that the Court has consistently deferred immunity decisions to the political branches).

30. HOUSE REPORT, *supra* note 8, at 6606.

31. *Id.* at 6608.

32. 28 U.S.C. § 1605(a)(2) (1988); *see supra* note 6 (setting forth the text of Section 1605(a)(2)).

33. 28 U.S.C. § 1603(d) (1988).

The Act directs courts to determine the "commercial character" of an activity by reference to its "nature," not its "purpose."[34] In the legislative history of the FSIA, Congress stated that the term "commercial activity" includes a "broad spectrum of endeavor,"[35] and that courts have a great deal of leeway in determining what constitutes a commercial activity.[36]

If a commercial activity is extraterritorial to the United States, immunity may be denied only if the commercial activity has a direct effect in the United States.[37] Congress did not define direct effect in the text of the FSIA.[38] The legislative history provides some guidance about the meaning of direct effect, stating that the exercise of jurisdiction should be consistent with the principles set forth in Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States.[39] Section 18 essentially requires that the effect of the activity within the territory be substantial and foreseeable.[40]

If a state is subject to suit in a United States district court under the FSIA, subject matter jurisdiction automatically exists.[41] The Act further provides that if subject matter jurisdiction exists, personal jurisdiction also exists[42] as long as proper service of

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34. *Id.*
35. HOUSE REPORT, *supra* note 8, at 6614.
36. *Id.* at 6615.
37. 28 U.S.C. § 1605(a)(2) (1988).
38. *See id.*; *see also* 28 U.S.C. § 1603 (1988) (definitions used in the Act).
39. HOUSE REPORT, *supra* note 8, at 6618. Section 18 states:

> 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 either . . .
>
> (b)(i) the conduct and its effect are constituent elements of an 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 . . . .

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

40. *See supra* note 39.
41. 28 U.S.C. § 1330(a) (1988). Section 1330(a) states: "The district courts shall have original jurisdiction without regard to the amount in controversy of any . . . civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 of this title . . . ." *Id.*
42. 28 U.S.C. § 1330(b) (1988). Section 1330(b) states: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which

process is made.[43] Thus, lack of immunity plus service of process appear sufficient to establish subject matter jurisdiction *and* personal jurisdiction.[44]

In the legislative history of the FSIA,[45] Congress stated that the required minimum contacts[46] are embodied in the personal jurisdiction provision of the Act.[47] Congress explained that because each immunity provision in the Act requires some connection between the lawsuit in question and the United States,[48] the immunity provisions themselves prescribe the necessary contacts that must exist before a United States court can exercise jurisdiction over a foreign state.[49]

B. *Pre*-Weltover *Chaos in the Circuits*

Before the *Weltover* decision, federal courts that applied the direct effect clause of the commercial activity exception were divided over three main issues. First, courts used a variety of approaches to determine what constitutes a commercial activity for purposes of the FSIA. Second, courts disagreed over whether a direct effect must be substantial and foreseeable. Finally, some courts required that a foreign state have minimum contacts with the United States before exercising personal jurisdiction over the state, whereas other courts did not explicitly require minimum contacts.

1. Commercial Activity

One United States court of appeals has lamented that the FSIA provides almost "no guidance at all" in defining commercial

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the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title." *Id.*

43. *Id.; see also* 28 U.S.C. § 1608 (1988) (defining proper service of process under the Act).

44. *See* Nicolas J. Evanoff, Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts*, 28 HOUS. L. REV. 629, 638 & n.61 (1991) (citing testimony at House hearings on the FSIA).

45. HOUSE REPORT, *supra* note 8, at 6612.

46. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (stating that due process requires that an absent defendant must have certain minimum contacts with the forum to be subject to a judgment).

47. 28 U.S.C. § 1330(b) (1988).

48. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (1988); *see also supra* note 6 (setting forth the text of Section 1605(a)(2) of the Act).

49. HOUSE REPORT, *supra* note 8, at 6612.

activity.[50] Many courts have struggled with the issue of whether an act by a foreign state should be considered commercial under the FSIA.[51]

To determine if an activity is commercial for purposes of the FSIA, courts have primarily used two approaches, and in some instances, courts have combined these approaches.[52] The private person test, which most courts use, consists of a two-part inquiry. The court must first identify the relevant activity, and then determine whether a private person could engage in the activity. If a private person could engage in the relevant activity, the act is commercial for the purposes of the FSIA.[53]

The second approach courts have used to ascertain whether an act is commercial under the FSIA is the sovereign act test.[54] Under this test, courts consider whether the activity is a sovereign or governmental act and therefore not commercial.[55] Some courts, after applying the private person test and concluding that foreign sovereign immunity applies, further support their conclusion by stating that the immune activity is sovereign.[56] Other courts simply label an activity sovereign to justify a finding of immunity.[57]

A small minority[58] of courts have used yet another approach to determine if an act is commercial for purposes of the FSIA. Despite the FSIA's mandate that the commercial character of an activity must be determined by considering the nature rather than the purpose of the activity,[59] some courts have decided that an act is commercial by analyzing the foreign state's purpose for engaging in the activity.[60] For instance, the United States Court

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

51. *See* Donoghue, *supra* note 18, at 494-95 & n.19 (listing a number of decisions criticizing the commercial activity exception).

52. *Id.* at 499-500.

53. *Id.*

54. *Id.* at 500.

55. *Id.*

56. *Id.* at 512; *see also* Millen Industries, Inc. v. Coordination Council for N.A. Affairs, 855 F.2d 879, 884-85 (D.C. Cir. 1988).

57. Donoghue, *supra* note 18, at 512; *see also* Gregorian v. Izvestia, 871 F.2d 1515, 1522 (9th Cir.), *cert. denied*, 493 U.S. 891 (1989).

58. *See* Donoghue, *supra* note 18, at 514 (stating that most courts recite the ban on consideration of purpose contained in § 1603(d) of the Act).

59. *See* 28 U.S.C. § 1603(d) (1988).

60. One commentator has suggested that purpose may also enter a commercial activity analysis when a court identifies the relevant activity so

of Appeals for the Fifth Circuit reasoned that the essence of an act is often defined by its purpose, and that without determining the purpose behind a foreign state's act, a court cannot determine the true nature of the activity.[61] The court stated that it would have reached a conclusion contrary to the policies of the FSIA if it considered only the nature of the transaction.[62]

2. Direct Effect

A controversy involving a commercial activity that occurred outside the United States may be adjudicated in United States courts only if the activity had a direct effect in the United States.[63] Courts have been sharply divided on the question of what constitutes a direct effect for purposes of the FSIA.

Two competing interpretations of the Act's "direct effect in the United States"[64] language have emerged in the circuits. A majority of the circuits have used Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States,[65] cited by Congress in the legislative history of the FSIA,[66] for guidance. In fact, six circuit courts of appeals[67]—the Fifth,[68] Sixth,[69] Seventh,[70] Ninth,[71] Eleventh,[72] and District of Columbia Cir-

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broadly that the purpose of the activity is considered. This commentator cites MOL, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326, 1329 (9th Cir. 1984), in which the Ninth Circuit defined the relevant activity as the regulation of natural resources rather than the breach of an agreement. Donoghue, *supra* note 18, at 514.

61. De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1393 (5th Cir. 1985).

62. *Id.* at 1394.

63. 28 U.S.C. § 1605(a)(2) (1988).

64. *Id.*

65. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). *See supra* note 39 (setting forth the full text of Section 18).

66. HOUSE REPORT, *supra* note 8, at 6618.

67. *See generally* Evanoff, *supra* note 44, at 641-45 (summarizing facts and holdings of each case listed *infra* notes 68-73).

68. Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985).

69. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988).

70. Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989).

71. Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, (9th Cir.), *cert. denied*, 469 U.S. 1035 (1984).

72. Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982).

cuits,[73]—have incorporated Section 18 of the Restatement (Second)[74] into the direct effect analysis. One commentator summarized this line of cases as requiring an effect that is direct; substantial; foreseeable, not fortuitous; and legally significant in the United States, beyond mere financial loss.[75]

Declining to follow the reference to Section 18 of the Restatement (Second) in the legislative history of the FSIA,[76] the Second Circuit Court of Appeals instead looked to the statutory language and broad purposes of the FSIA to determine whether a commercial activity had a direct effect in the United States.[77] In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[78] the Second Circuit denounced Congress' reference to Section 18 of the Restatement (Second) as "a bit of non sequitur since [it] concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial reach of American courts . . . ." [79] The court of appeals concluded that the substantial and foreseeable requirements of Section 18 of the Restatement (Second)[80] are not relevant to the direct effect clause of the FSIA because the Act pertains to a United States court's jurisdiction to adjudicate controversies that took place extraterritorially.[81]

Accordingly, the Second Circuit formulated its own direct effect test. The court reasoned that in accordance with the plain language and the broad purposes of the FSIA,[82] the true test should be whether the effect was sufficiently direct and sufficiently within the United States that Congress would have wanted a United States court to adjudicate the controversy.[83]

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73. Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094 (D.C. Cir. 1982).

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

75. Evanoff, *supra* note 44, at 645.

76. HOUSE REPORT, *supra* note 8, at 6618.

77. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir.), *cert. denied*, 454 U.S. 1148 (1982).

78. *Id.*

79. *Id.* at 311.

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

81. 647 F.2d at 311 & n.32.

82. *See* 28 U.S.C. § 1605(a)(2) (1988).

83. 647 F.2d at 313.

3. Personal Jurisdiction

In addition to disagreement about the proper definition of commercial activity and direct effect, there has been considerable controversy about the contacts a foreign state must have with the United States before a United States court may exercise personal jurisdiction over the foreign state. Constitutionally required "minimum contacts"[84] are relevant in a traditional personal jurisdiction analysis.[85] On the other hand, exceptions to foreign sovereign immunity, such as the direct effect clause of the commercial activity exception,[86] are relevant in a subject matter jurisdiction analysis.[87] Courts interpreting the direct effect clause of the commercial activity exception[88] must decide whether to combine a minimum contacts due process test[89] with the direct effect analysis.[90]

Two approaches to personal jurisdiction have developed in the circuit courts. Some courts have interpreted the language of the direct effect clause[91] and the legislative history[92] of the FSIA as incorporating a minimum contacts requirement.[93] The Act

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84. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the United States Supreme Court stated that due process requires that an absent defendant must have certain minimum contacts with the forum to be subject to personal jurisdiction. *Id.* at 516. This statement was clarified in a subsequent line of cases which delineated the permissable reach of courts to adjudicate claims against nonresident defendants. *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Hanson v. Denckla, 357 U.S. 235 (1958); Shaffer v. Heitner, 433 U.S. 186 (1977); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

85. Hadwin A. Card, Note, *Interpreting the Direct Effects Clause of the FSIA's Commercial Activity Exception*, 59 FORDHAM L. REV. 91, 92 (1990).

86. 28 U.S.C. § 1605(a)(2) (1988).

87. Card, *supra* note 85, at 92.

88. 28 U.S.C. § 1605(a)(2) (1988).

89. One of the Reporter's Notes to the Restatement (Third) of the Foreign Relations Law of the United States provides that although a foreign state has not been held to be a person for purposes of the due process clause, it was Congress' intention that under the FSIA, foreign states would be treated like private entities for the purpose of determining the necessary contacts with the forum. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 453 reporter's note 3 (1986).

90. Card, *supra* note 85, at 91-92.

91. 28 U.S.C. § 1605(a)(2) (1988).

92. HOUSE REPORT, *supra* note 8.

93. Card, *supra* note 85, at 97 & n.37. In note 37, the author cites Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980) and Carey v. National Oil Corp., 592 F.2d 673,

itself provides that if any of the exceptions to foreign sovereign immunity apply, subject matter jurisdiction exists.[94] Furthermore, the FSIA provides that if subject matter jurisdiction exists, personal jurisdiction automatically lies when proper service of process is made.[95] The legislative history of the FSIA states that the exceptions to sovereign immunity prescribe the necessary contacts with the United States required for personal jurisdiction.[96] Because the direct effect clause is a statutorily defined exception to immunity, some courts have concluded that the direct effect provision itself embodies requisite minimum contacts, rendering a separate due process analysis unnecessary.[97]

In recent years, courts have increasingly followed a second approach to personal jurisdiction in a direct effect analysis.[98] This approach involves a separate analysis of the exceptions to foreign sovereign immunity under the rubric of subject matter jurisdiction and a distinct minimum contacts analysis under the rubric of personal jurisdiction.[99] The United States Court of Appeals for the Second Circuit was the first court to clearly articulate this separate analysis approach to personal juris-

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676 (2d Cir. 1979), both of which held that the direct effect exception to foreign sovereign immunity embodies the minimum contacts standard.

94. *See* 28 U.S.C. § 1330(a) (1988).

95. *See* 28 U.S.C. § 1330(b) (1988).

96. Regarding personal jurisdiction under the FSIA, the legislative history of the Act states:

> Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states . . . . The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). For personal jurisdiction to exist under section 1330(b), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(a), meaning a claim for which the foreign state is not entitled to immunity.
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> Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States . . . . These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction.

HOUSE REPORT, *supra* note 8, at 6612 (footnotes omitted).

97. *See* Thomas P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980).

98. *See* Card, *supra* note 85, at 92 (stating that the current trend in federal courts is to separate minimum contacts analysis from the subject matter jurisdiction inquiry of sovereign immunity exceptions).

99. *See id.* at 98-99.

diction.[100] In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,[101] the Second Circuit required a test separate from the FSIA's immunity exceptions, which provide subject matter jurisdiction,[102] to determine whether an exercise of personal jurisdiction under the FSIA complies with the Due Process Clause.[103]

The *Texas Trading* due process test first examines whether the foreign defendant's contacts with the United States are so numerous that adjudication of the suit in a United States court "does not offend traditional notions of fair play and substantial justice."[104] This standard, in turn, requires four additional inquiries: the extent to which defendants availed themselves of the privileges of conducting business in the United States; the extent to which litigation in the United States would be foreseeable to defendants; the inconvenience to defendants of litigating in the United States; and the countervailing interest of the United States in hearing the case.[105]

Several other courts have adopted the Second Circuit's approach and have used a separate personal jurisdiction analysis to ensure that a foreign state has the requisite minimum contacts with the United States before adjudicating a claim against the foreign sovereign.[106] However, despite this recent trend,[107] a number of courts still contend that the sovereign immunity

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100. *See id.* at 99 & n.43 (stating that the need for a separate analysis of the sovereign immunity exceptions and due process had been previously recognized in Decor by Nikkei Int'l v. Federal Republic of Nigeria, 497 F. Supp. 893, 905 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

101. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

102. *See* 28 U.S.C. § 1330(a) (1988).

103. 647 F.2d at 308.

104. *Id.* at 314 (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

105. 647 F.2d at 314 (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292, 297 (1980); Kulko v. California Superior Court, 436 U.S. 84, 97 (1978); Hanson v. Denckla, 357 U.S. 235, 253 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957); *International Shoe*, 326 U.S. at 316).

106. Card, *supra* note 85, at 98 & n.49 (citing Gregorian v. Izvestia, 871 F.2d 1515, 1530 (9th Cir.), *cert. denied*, 110 S. Ct. 237 (1989); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1352-53 (11th Cir. 1982); Falcoal, Inc. v. Turkiye Komur Isletmeleri Kurumu, 660 F. Supp. 1536, 1541 (S.D. Tex. 1987); Transamerican S.S. Corp. v. Somali Democratic Republic, 590 F. Supp. 968, 975-77 (D.D.C. 1984), *aff'd in part, rev'd in part*, 767 F.2d 998 (D.C. Cir. 1985)).

107. Card, *supra* note 85, at 92.

exceptions of the FSIA alone embody the requisite minimum contacts for personal jurisdiction.[108]

In summary, United States courts have had difficulty applying the direct effect clause of the FSIA's commercial activity exception since the Act's inception in 1976. Courts have used multiple approaches to determine whether an act is commercial. In addition, courts have defined direct effect two different ways. Finally, courts have taken dramatically contrasting approaches to personal jurisdiction.

III. THE *WELTOVER* DECISION

In 1992, the Supreme Court granted *certiorari*[109] in a case involving the direct effect clause of FSIA's commercial activity exception to foreign sovereign immunity. In *Republic of Argentina v. Weltover, Inc.*,[110] the Court had the opportunity to resolve the statutory interpretation problems that had plagued lower courts since the Act was passed in 1976. However, Justice Scalia, writing for a unanimous Court, laconically disposed of the controversy, perhaps raising as many questions as he sought to answer.

A. *The Facts*

Because Argentina's currency is not a medium of exchange on the international market,[111] Argentine borrowers traditionally have had considerable difficulty in obtaining funds for foreign transactions. To address this problem, the Republic of Argentina and its central bank (collectively Argentina), instituted a foreign exchange contract program (the FEIC) in 1981.[112] Under the FEIC, Argentina agreed to assume the risk of currency depre-

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108. *Id.* at 98 & n.48 (citing Callejo v. Bancomer, S.A., 764 F.2d 1101, 1110-12 (5th Cir. 1985) (discussing only direct effect clause, not due process); Chisholm & Co. v. Bank of Jamaica, 643 F. Supp. 1393, 1401-02 (S.D. Fla. 1986) (combining direct effect clause analysis with due process analysis)).

109. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 858 (1992).

110. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992).

111. Republic of Argentina v. Weltover, Inc., 941 F.2d 145, 147 (2d Cir. 1991) (stating that Argentina's currency, denominated in australs, is not accepted on the international market and that since the 1970s, Argentina has accumulated a very large foreign debt).

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

ciation in cross-border transactions involving Argentine borrowers.[113] The FEIC permitted Argentine debtors to pay Argentina a fixed, predetermined amount of local currency upon maturity of the foreign debt. Argentina would then give the Argentine debtor the amount of United States dollars needed to repay the foreign debt.[114]

Argentina did not possess sufficient reserves to cover the FEIC contracts when they became due in 1982,[115] and thus the Argentine debtors could not repay their foreign debts.[116] Therefore, as an emergency measure, the Argentine government refinanced the FEIC-backed debts by issuing government bonds called "Bonods."[117] The Bonods gave the foreign creditor the option of either accepting the Bonods in satisfaction of the debt, thereby releasing the original debtor and substituting Argentina as the debtor, or maintaining the original debtor/creditor relationship with the private Argentine debtor and accepting the Argentine government as guarantor.[118] The Bonods provided for payment of principal and interest in United States dollars. A creditor could elect to receive payment on the London, Frankfurt, Zurich, or New York market.[119]

When the Bonods began to mature in 1986, Argentina again concluded that it lacked sufficient foreign exchange and was unable to retire the Bonods.[120] Pursuant to a presidential decree, Argentina extended the time for payment, offering bondholders another substitute instrument.[121]

The plaintiffs in *Weltover*, two Panamanian corporations and a Swiss bank,[122] refused to accept the rescheduling and demanded full payment of the debt in New York.[123] When Argentina failed to pay, the plaintiffs brought a breach of contract action in the United States District Court for the Southern District of New

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113. *Id.*
114. *Weltover*, 941 F.2d at 147.
115. *Weltover*, 112 S. Ct. at 2163.
116. *Weltover*, 941 F.2d at 147-48.
117. *Weltover*, 112 S. Ct. at 2163-64.
118. *Weltover*, 941 F.2d at 148.
119. *Weltover*, 112 S. Ct. at 2164.
120. *Id.*
121. *Id.* The substitute instruments were offered as a means of rescheduling the debts. *Id.*
122. The plaintiffs collectively held $1.3 million of Bonods. *Id.*
123. *Id.*

York, relying on the FSIA for jurisdiction.[124] The defendants moved to dismiss for lack of subject matter jurisdiction.[125] The district court denied the defendant's motion,[126] and the United States Court of Appeals for the Second Circuit affirmed.[127] The defendants appealed.[128]

B. *The Court's Opinion*

A unanimous Supreme Court affirmed the Second Circuit, finding that under the FSIA, Argentina was not immune from the jurisdiction of United States courts.[129] The Court first stated that unless one of the statutorily defined exceptions of the Act applies, sovereign immunity protects a foreign state from the adjudication of a case in United States courts.[130] The Court then stated that the direct effect clause of the commercial activity exception of the FSIA was the applicable provision in the case before it.[131] The issues, wrote Justice Scalia, were whether the unilateral refinancing of the Bonods by Argentina constituted a commercial activity under the FSIA and whether the refinancing had a direct effect in the United States.[132]

After setting forth the statutory definition of commercial activity,[133] the Court conceded that the FSIA's definition leaves the term commercial "largely undefined."[134] Therefore, to define the term, the Court looked to the restrictive theory of foreign sovereign immunity.[135] After discussing a Supreme Court

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124. *Id.*

125. *Id.* In addition, defendants moved to dismiss for *forum non conveniens.* This motion was also denied. *Id.*

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

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

128. Republic of Argentina v. Weltover, Inc., 112 S. Ct. at 2164 (1992).

129. *Id.* at 2164.

130. *Id.* (citing 28 U.S.C. § 1604 (1988) and Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-439 (1989)).

131. *Id.* (quoting 28 U.S.C. § 1605(a)(2) (1988)).

132. *Id.* at 2165.

133. *Id.* (quoting 28 U.S.C. § 1603(d) (1988)).

134. *Id.*

135. *Id.* (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-89 (1983) and McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807, 811 (1991) ("[W]e assume that when a statute uses [a term of art], Congress intended it to have its established meaning.")).

decision issued shortly after the FSIA was enacted,[136] the Court held that when a foreign government acts as a private player in the market, the foreign state's actions are commercial for purposes of the FSIA.[137] The Court articulated its new commercial activity test, stating that "the issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a private party engages in 'trade and traffic or commerce.' "[138]

Despite Argentina's claim that the Court should consider the purpose behind the rescheduling of the debts,[139] the Court deemed this assertion expressly foreclosed by the language of the FSIA.[140] According to the Court, "it is irrelevant *why* Argentina participated in the . . . market [as a] private actor; it matters only that it did so."[141] Justice Scalia determined that the Bonods were "garden-variety debt instruments" and concluded that the rescheduling of the Bonods was analogous to a private commercial transaction. Therefore, the Court held that the rescheduling constituted a commercial activity under the FSIA.[142]

Next, the Court considered whether Argentina's unilateral rescheduling of the Bonods had a direct effect in the United States.[143] The Supreme Court rejected the suggestion lower

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136. *Id.* at 2165-66 (discussing Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 704 (1976) (a foreign state engaging in commercial activities "do[es] not exercise power peculiar to sovereigns . . . . [it] exercise[s] only those powers that can also be exercised by private citizens.")).

137. *Id.* at 2166.

138. *Id.* (emphasis in original) (quoting BLACK'S LAW DICTIONARY 270 (6th ed. 1990)). The Supreme Court gave the following examples: "a foreign government's issuance of *regulations* limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party . . . a contract to buy army boots . . . is a "commercial" activity because private companies can similarly use sales contracts to acquire goods." *Id.* (emphasis added).

139. *Id.* at 2167 (setting forth Argentina's argument that the Bonods are different than ordinary debt instruments because they were created by the government of Argentina to fulfill its obligations under a foreign exchange program that was designed to address a domestic credit crisis and to control the state's urgent shortage of foreign exchange). Argentina's argument that the Court should consider the purpose of the act as opposed to solely analyzing its nature relied heavily upon De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385 (5th Cir. 1985). *Weltover*, 112 S. Ct. at 2167.

140. *Weltover*, 112 S. Ct. at 2167 (citing 28 U.S.C. § 1603(d) (1988)).

141. *Id.* (emphasis in original).

142. *Id.* at 2166-67.

143. *Id.* at 2168.

courts had gleaned from Congress' reference to Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States[144] that an effect is not direct unless it is both substantial and foreseeable.[145] The Court decided that Section 18 of the Restatement (Second), cited by Congress in the legislative history of the FSIA, is inapplicable to a direct effect analysis because Section 18 deals with jurisdiction to legislate, whereas the FSIA involves jurisdiction to adjudicate.[146]

Before formulating a new direct effect test, the Court cautioned that jurisdiction may not be based on purely trivial effects in the United States.[147] Then, using the language of the Court of Appeals for the Second Circuit, the Supreme Court held that a direct effect is an effect that follows as an immediate consequence of the defendant's commercial activity.[148]

Applying this test to Argentina's actions, Justice Scalia determined that the rescheduling of the maturity dates of the debt instruments had a direct effect in the United States.[149] The Bonod holders had designated New York as the place of payment of the debt.[150] Furthermore, Argentina had made some interest payments into the plaintiffs' New York accounts prior to announcing that it was rescheduling payments.[151] Therefore, the

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144. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). Section 18 of the Restatement (Second) is cited in the legislative history of the FSIA. HOUSE REPORT, *supra* note 8, at 6618.

145. *Weltover*, 112 S. Ct. at 2168. The Court cited a list of cases that employed the substantial and foreseeable test in a FSIA direct effect analysis: American West Airline, Inc. v. GPA Group, Ltd., 877 F.2d 793, 798-800 (9th Cir. 1989); Zernicek v. Brown & Root, Inc., 826 F.2d 415, 417-19 (5th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988); 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 (1983); Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1286 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985).

146. *Weltover*, 112 S. Ct. at 2168. The Court stated that the passage of the House Report suggesting the application of Section 18 to a direct effect analysis has "been charitably described as 'a bit of a *non sequitur*.'" *Id.* (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

147. *Id.* The Court stated that the "principle *de minimis non curat lex* ensures that jurisdiction may not be predicated upon purely trivial effects in the United States." *Id.*

148. *Id.* (quoting Republic of Argentina v. Weltover, Inc., 941 F.2d 145, 152 (2d Cir. 1991)).

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

150. *Id.*

151. *Id.*

Court concluded that because New York was the place of performance of Argentina's contractual obligations, and because money that was supposed to be delivered to a New York bank was not forthcoming, the rescheduling of the obligation had a direct effect in the United States.[152]

Finally, the *Weltover* Court considered whether finding jurisdiction in the case at hand would violate the Due Process Clause of the Fifth Amendment.[153] Argentina asserted that the Court must construe the direct effect clause as requiring the minimum contacts test of *International Shoe Co. v. Washington.*[154] In response, the Supreme Court assumed—without deciding—that a foreign state is a person for purposes of the Due Process Clause.[155] Paradoxically, as if to cast doubt on this assumption, the Court parenthetically cited *South Carolina v. Katzenbach*[156] for the proposition that individual states of the United States are *not* persons for purposes of the Due Process Clause.[157] Justice Scalia determined that in any event, Argentina had sufficient minimum contacts with the United States to satisfy the constitutional test.[158] Because Argentina had purposely availed itself of the privilege of conducting business in the United

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152. *Id.* The Supreme Court set forth the court of appeals' direct effect analysis. The lower court had concluded that the effect of rescheduling the debts was sufficiently in the United States because Congress would have wanted a United States court to hear the case in order to preserve New York City's status as a major commercial center. Republic of Argentina v. Weltover, 941 F.2d 145, 153 (2d Cir. 1991). The Supreme Court stated that the question is not what Congress would have wanted but what was enacted in the FSIA. Although the Court concluded that a direct effect existed in the case at hand, the Court found that diminishing New York's status as a world financial leader was too remote and attenuated an effect to satisfy the direct effect requirement of the FSIA. *Weltover*, 112 S. Ct. at 2168.

In addition, the Supreme Court rejected Argentina's argument that the direct effect requirement was not satisfied because the plaintiffs were foreign companies with no other connection to the United States. The Court stated that the FSIA permits a foreign plaintiff to sue a foreign sovereign in United States courts as long as the requirements of the FSIA are satisfied. *Weltover*, 112 S. Ct. at 2168 (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 489 (1983)).

153. *Weltover*, 112 S. Ct. at 2169.

154. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

155. *Weltover*, 112 S. Ct. at 2169.

156. 383 U.S. 301 (1966).

157. *Weltover*, 112 S. Ct. at 2169. The Court seemed to be implying that if states of the Union are not persons entitled to due process protection, then foreign states are not entitled to due process either. *See infra* text accompanying notes 315-16.

158. *Id.*

States[159] by issuing debt instruments payable in New York and denominated in United States dollars and by appointing a financial agent in New York, the Court concluded that the district court had properly exercised jurisdiction over Argentina.[160]

IV. ANALYSIS

A. Weltover *and the FSIA*

Republic of Argentina v. Weltover, Inc. represents the only major recent Supreme Court decision focusing on the direct effect clause of the commercial activity exception.[161] Prior to *Weltover*, lower courts had great difficulty applying the direct effect clause.[162] By narrowly reading the legislative history and the text of the FSIA, the Supreme Court in *Weltover* resolved some issues that had long divided the lower courts. However, the Court declined to determine whether foreign states are entitled to due process protection, thereby leaving a significant constitutional question unanswered.

1. Commercial Activity

Like the majority of lower courts that had considered the issue,[163] the Supreme Court adopted the private person test for determining whether a foreign sovereign's act is commercial for purposes of the FSIA. The private person test is aligned with the restrictive theory of foreign sovereign immunity, which limits the immunity of a foreign state to cases based on its public acts and

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159. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).

160. *Id.*

161. The *Weltover* decision is the first foreign sovereign immunity case decided by the Supreme Court since the 1980s. In the 1980s, the Court decided two major FSIA cases, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) and Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989). The Court decided an FSIA case the term after the *Weltover* decision, but at issue in the case was the first clause of the commercial activity exception. Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).

162. *See supra* Part II.B.

163. *See supra* text accompanying note 53 (defining the private person test and stating that most courts use this test).

does not extend immunity to controversies involving the state's private commercial activities.[164] In the legislative history of the FSIA, Congress stated that the Act codifies this widely accepted theory of foreign sovereign immunity.[165] Moreover, because the FSIA provides only a tautological definition of the term "commercial,"[166] the restrictive theory is a logical place to turn for guidance.

Although the Court's private person test is extremely broad, the legislative history of the FSIA appears to sanction this expansive test. In the Act's legislative history, Congress stated that the term "commercial activity" includes a broad spectrum of endeavor and that courts should have wide latitude to determine what acts are commercial.[167] As one court wrote, the language and legislative history of the Act "authorize[] courts to cast the net wide."[168]

Notably, the Supreme Court placed a significant check on the private person test. The Court confined the commercial activity inquiry to the nature of the act and expressly refused to consider the foreign state's purpose for engaging in the activity.[169] This holding forecloses the consideration of purpose in a commercial activity analysis,[170] an approach used by a small minority of courts prior to the *Weltover* decision.[171] The Supreme Court's result fits squarely within the language of the FSIA, which

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164. HOUSE REPORT, *supra* note 8, at 6605.

165. Congress' first objective was to codify the restrictive theory of foreign sovereign immunity. Congress noted that it is the theory "presently recognized in international law." *Id.*

166. Donoghue, *supra* note 18, at 499 (stating that the FSIA definition of commercial activity, under which either a regular course of conduct or a particular transaction may be considered commercial by reference to the nature of the activity, not its purpose, is tautological).

167. HOUSE REPORT, *supra* note 8, at 6614-15.

168. Goodman Holdings v. Rafidain Bank, No. 91-2530, 1992 U.S. Dist. LEXIS 21643, at *7 (D.D.C. Dec. 15, 1992) (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981)).

169. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2167 (1992).

170. In Djordjevich v. Bundesminister der Finanzen, 827 F. Supp. 814 (D.D.C. 1993), the district court considered whether a commercial activity had occurred in the case before it by referring to the purpose of the act. *Id.* at 817. Although this language is dicta because the court based its holding on the fact that the activity caused no direct effect in the United States, *Djordjevich* suggests that some courts may still consider the purpose of the foreign state's activity.

171. *See supra* text accompanying notes 58-62.

provides that courts should not consider the purpose behind a foreign state's act.[172]

2. Direct Effect

Although the FSIA does not define the direct effect language used in Section 1605(a)(2) of the Act,[173] the legislative history does state that jurisdiction based on the direct effect clause should be consistent with Section 18 of the Restatement (Second) of the Foreign Relations Law of the United States.[174] Prior to the *Weltover* decision, a majority of the circuits required a substantial and foreseeable direct effect in the United States in accordance with Section 18 of the Restatement (Second).[175] The Second Circuit, on the other hand, repudiated the notion that an effect must be substantial and foreseeable to be direct.[176]

The Supreme Court ended this debate, holding that the direct effect clause does not contain an unexpressed requirement of substantiality or foreseeability.[177] The *Weltover* Court echoed the Second Circuit's characterization of Section 18 of the Restatement (Second), stating that Congress' reference to Section 18 is a "*non sequitur*"[178] because Section 18 involves jurisdiction to legislate, whereas the FSIA pertains to jurisdiction to adjudicate.[179]

Disregarding the reference to Section 18, the Supreme Court formulated its own definition of direct effect. The Court stated that a direct effect is one that flows as an immediate consequence of a foreign state's commercial activity.[180] Because direct effect is not defined in the FSIA, the prudence of disregarding Congress' citation to Section 18 of the Restatement (Second) in the legislative history is questionable. A significant concern is that

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172. 28 U.S.C. § 1603(d) (1988).

173. *See supra* note 38 and accompanying text.

174. *See supra* notes 37-40 and accompanying text.

175. *See supra* notes 65-75 and accompanying text.

176. *See supra* notes 76-83 and accompanying text.

177. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2168 (1992).

178. *Id.* (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311 (2d Cir. 1981)).

179. One commentator has stated that labeling Congress' reference to Section 18 of the Restatement (Second) a *non sequitur* ignores that under both international and domestic law, specific jurisdiction to adjudicate (at issue in FSIA cases) *depends* on jurisdiction to prescribe (at issue in Section 18). JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 91 (1988).

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

the Supreme Court did not give effect to Congress' intent as expressed in the legislative history of the Act and instead substituted its own meaning of direct effect. One commentator has suggested that Congress' intent was not to incorporate the substantive law of Section 18, but merely to provide general guidance to lower courts.[181] This theory is bolstered by the language of the legislative history,[182] which states only that the exercise of jurisdiction should be "*consistent* with the principles set forth in Section 18."[183] Arguably, then, the Supreme Court's hasty dismissal of Section 18 of the Restatement (Second) does not effectuate Congress' intent.

On the other hand, *Weltover*'s broad reading of direct effect may in fact comport with Congress' intent. Perhaps in formulating its liberal direct effect test the Supreme Court sought to carry out Congress' objective to provide a forum for aggrieved plaintiffs.[184] However, the wisdom of such a rationale is dubious because Congress may well have included the reference to Section 18 as a limiting factor. Although Congress wanted to afford United States plaintiffs the option of litigating a commercial dispute against a foreign sovereign in the United States, it is unlikely that Congress wanted United States courts to become a clearing house for commercial disputes only marginally connected to the United States.[185] In sum, the motivation behind the Supreme Court's dismissal of Congress' reference to Section 18 of the Restatement (Second) in the Act's legislative history is unclear. The Court may have attempted to fill a statutory gap with a judicially fashioned definition of direct effect. Alternatively, the Court may have attempted to give effect to the broad objectives of the FSIA.

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181. Lawrence V. Ashe, *The Flexible Approach to the Foreign Sovereign Immunities Act in Weltover, Inc. v. Republic of Argentina*, 23 INTER AM. L. REV. 465, 488 (1991).

182. *Id.* at 488.

183. HOUSE REPORT, *supra* note 8, at 6618 (emphasis added).

184. *See supra* note 27 and accompanying text.

185. *See* United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, No. 93-1193, 1994 U.S. App. LEXIS 23684, at *16 (10th Cir. Aug. 29, 1994) (stating that "Congress was concerned our courts [might be] turned into small international courts of claims[,] . . . open . . . to all comers to litigate any dispute which any private party might have with a foreign state anywhere in the world") (quoting Verlinden B.V. v. Central Bank of Nigeria, 461 U.S 480 (1983)). *See also* Matthew P. McGuire, Note, *Direct Effect Jurisdiction in the 90's: Weltover, Inc. v. Republic of Argentina and a Broad Interpretation of the Foreign Sovereign Immunities Act of 1976*, 17 N.C. J. INT'L L. & COM. REG. 383, 394 (1992).

3. Personal Jurisdiction

In *Weltover*, the Supreme Court did not clarify a particularly troublesome issue that divided lower courts faced with an immunity determination under the direct effect clause of the commercial activity exception of the FSIA. The Court refused to decide whether a foreign state is entitled to due process protection,[186] leaving unresolved the issue of whether the direct effect provision of the Act incorporates a minimum contacts analysis, or whether a separate due process analysis is necessary. Nevertheless, the Court held that the constitutional requirement of minimum contacts was satisfied in the case at hand because Argentina had purposely availed itself of the privileges of United States law.[187]

The origin of the dichotomy in the Court's due process analysis may be traced to the legislative history and language of the FSIA. On the one hand, Congress stated in the legislative history that the purpose of the Act includes both providing a statutory procedure for obtaining personal jurisdiction over a foreign state and ensuring due process.[188] Taken together, these objectives arguably suggest that Section 1330(b), which provides that personal jurisdiction exists if subject matter jurisdiction lies and proper service of process has been made,[189] sets forth only the statutory requirements of personal jurisdiction, and that a separate due process analysis must be undertaken to satisfy constitutional requirements.[190] On the other hand, the plain language[191] and legislative history[192] accompanying Section 1330(b) seem to suggest that minimum contacts are embodied in the Act, making a separate due process analysis superfluous.[193] The *Weltover* Court shied away from this quagmire, leaving lower

186. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2169 (1992).

187. *Id.* (stating that Argentina had purposely availed itself of the privilege of conducting business in the United States by issuing debt instruments payable in the United States in United States currency and by appointing a financial agent in New York).

188. HOUSE REPORT, *supra* note 8, at 6606.

189. 28 U.S.C. § 1330(b) (1988).

190. Several lower courts have used this approach when applying the direct effect clause of the FSIA. *See supra* notes 98-106 and accompanying text.

191. *See supra* note 42.

192. *See supra* note 96.

193. Several lower courts have followed this approach to personal jurisdiction when applying the direct effect clause of the Act. *See supra* notes 91-97 and accompanying text.

courts without even a foothold on the issue of personal jurisdiction.

B. *The Aftermath: Issues Unresolved by* Weltover

Soon after the *Weltover* decision, one court facing a commercial activity exception determination commented that the task of interpreting the FSIA is no easier now than it was in the past.[194] Although *Weltover* comports with the language and legislative history of the FSIA for the most part, it offers little guidance to lower courts. Indeed, the Court's cursory resolution of vital FSIA issues has left many questions unanswered, perhaps creating more confusion than it resolved.

1. Commercial Activity

The *Weltover* Court criticized Congress' definition of commercial activity in the FSIA, noting that Congress' language essentially leaves the key term commercial undefined.[195] Admittedly, the FSIA provides only that a commercial act can be either a regular course of conduct or a specific transaction, and that the commercial character of the activity must be determined by considering the nature, not the purpose, of the act.[196] The Court attempted to add to this diffident definition[197] by adopting the private person test used by many lower courts, holding that when a foreign sovereign acts like a private player in the marketplace, the foreign state's acts are commercial for purposes of the FSIA.[198]

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194. Tubular Inspectors, Inc. v. Petroleos Mexicanos, 977 F.2d 180, 181-82 (5th Cir. 1992) (quoting Stena Rederi AB v. Comision de Contratos, 923 F.2d 380, 382 (5th Cir. 1991)).

195. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2165 (1992). The Court quoted the FSIA definition of commercial activity: "[E]ither a regular course of commercial conduct or a particular transaction or act. The commercial character of an activity shall be determined by reference to the nature of the . . . act, rather than by reference to its purpose." *Id.* (quoting 28 U.S.C. § 1603(d) (1988)).

196. 28 U.S.C. § 1603(d) (1988).

197. The Supreme Court itself characterized the FSIA definition of commercial as diffident in Saudi Arabi v. Nelson, 113 S. Ct. 1471, 1478 (1993). After setting forth the definition of commercial in Section 1603(d) of the Act, the Court stated, "If this is a definition, it is one distinguished only by its diffidence . . . ." *Id.*

198. *Weltover*, 112 S. Ct. at 2166 ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign

Although the private person test may appear to clarify Congress' definition of commercial, it opens a Pandora's box of its own. One commentator has articulated two major flaws in the private person test.[199] First, the relevant activity is often very difficult to identify in a complex case.[200] Second, whether or not a foreign state's act is analogous to a private commercial transaction turns on how the court defines the relevant activity, which often may be subject to more than one interpretation.[201]

In the factually complex case of *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*,[202] the

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sovereign's actions are 'commercial' within the meaning of the FSIA."); *see also supra* text accompanying note 53.

199. Donoghue, *supra* note 18, at 500-12.

200. *Id.* at 501. The author notes that some courts have failed to identify a relevant activity at all. *Id.* at 503-04; *see, e.g.*, State Bank of India v. NLRB, 808 F.2d 526 (7th Cir. 1986).

201. Donoghue, *supra* note 18, at 511. The author laments that *Weltover*'s private person test does not suggest what features would transform a transaction that is otherwise commercial into a sovereign action. She writes, "[C]ourts are still left with a private person test that is unduly formalistic and easily manipulated." *Id.* at 510.

202. 12 F.3d 317 (2d Cir. 1993) (*Drexel VIII*). The procedural history of the *Drexel* case is very complicated as well. The court of appeals issued one prior opinion, and the district court issued several. *See* Drexel Burnham Lambert Group, Inc. v. Galadari, 777 F.2d 877 (2d Cir. 1985) (*Drexel II*), *aff'g in part and vacating in part*, 610 F. Supp. 114 (S.D.N.Y. 1985) (*Drexel I*); Drexel Burnham Lambert Group, Inc. v. Galadari, No. 84 Civ. 2602 (S.D.N.Y. Apr. 17, 1986) (*Drexel III*); Drexel Burnham Lambert Group, Inc. v. Galadari, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) (*Drexel IV*); Drexel Burnham Lambert Group, Inc. v. Galadari, 134 B.R. 719 (S.D.N.Y. 1991) (*Drexel V*); Drexel Burnham Lambert Group, Inc. v. Galadari, 127 B.R. 87 (S.D.N.Y. 1991) (*Drexel VI*). The district court decision from which this appeal was taken is Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 810 F. Supp. 1375 (S.D.N.Y. 1993) (*Drexel VII*).

Initially, Drexel sued Galadari to recover the past due debt. Then, a committee was established by royal decree to wind up the affairs of Galadari, who was insolvent. Therefore, the committee answered Drexel's complaint, setting forth various affirmative defenses (but not asserting the defense of foreign sovereign immunity). Drexel moved for summary judgment, but the United States District Court for the Southern District of New York dismissed the complaint based on international comity. *Drexel I*, 610 F. Supp. at 118-19. Drexel appealed, and the Second Circuit Court of Appeals affirmed, but vacated the dismissal and remanded for a hearing on the question of whether comity called for deference to the committee's proceedings in Dubai. *Drexel II*, 777 F.2d at 881-82.

Drexel then moved to enjoin the committee from adjudicating the claim in Dubai. The United States District Court for the Southern District of New York initially denied Drexel's application for a preliminary injunction, *Drexel III*, *slip op.*

district court and the court of appeals disagreed about how to apply *Weltover*'s private person test. In *Drexel*, the sovereign of Dubai issued a decree establishing a committee to wind up the business affairs and liquidate the assets of Galadari, an insolvent citizen of Dubai.[203] Dubai issued the decree in response to a financial crisis in the state precipitated by the potential collapse of the Union Bank of the Middle East (UBME), which the insolvent Galadari controlled.[204] The committee, comprised of four prominent citizens of Dubai, had the authority to liquidate Galadari's remaining assets, pay his creditors, and bring and defend actions on behalf of the Galadari "estate."[205] Dissatisfied claimants could appeal decisions of the committee to a special three-member judicial committee.[206]

The Drexel action, initiated in 1985,[207] stemmed from large trading losses incurred by Galadari and covered by Drexel. Galadari gave Drexel a promissory note secured by a pledge of UBME stock.[208] When Galadari defaulted on payments of the note, plaintiff Drexel participated in proceedings before the committee seeking recovery of the debt owed by Galadari.[209] Payment of the debt did not follow, so Drexel commenced suit

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available in LEXIS, GENFED Library, 2 Dist. File, at *1-2, but later found the committee proceedings fair and stayed the United States action pending the resolution of Drexel's complaint in Dubai in *Drexel IV*, 1987 U.S. Dist. LEXIS 5030 at *49.

In June 1991, the United States District Court for the Southern District of New York lifted the stay on the United States proceedings. In *Drexel VII*, the district court denied motions by Dubai and the committee to dismiss the Drexel complaint on the basis that the defendants were entitled to foreign sovereign immunity. *Drexel VII*, 810 F. Supp. at 1377, 1381-88. A timely appeal followed, and a divided panel of the Second Circuit Court of Appeals reversed, concluding that Dubai and the committee were entitled to foreign sovereign immunity. *Drexel VIII*, 12 F.3d at 317.

203. *Drexel VIII*, 12 F.3d at 319.

204. *Id.* Galadari had severe financial problems traceable to mismanagement of the Union Bank of the Middle East (UBME). Earlier decrees had established a provisional board of directors of the UBME to manage the bank, vest the assets of Galadari and his companies in the board, freeze all of his liabilities, and begin the liquidation of his assets. *Drexel VII*, 810 F. Supp. at 1377-78.

205. *Drexel VIII*, 12 F.3d at 319-20 (quotations in original).

206. *Id.*

207. *See Drexel I*, 610 F. Supp. at 114.

208. *Drexel VIII*, 12 F.3d at 320. The promissory note owed by Galadari was in the amount of $19,465,000 and secured by 6,068,640 shares of UBME stock. *Id.*

209. *Drexel VII*, 810 F. Supp. at 1378.

against Dubai and the committee in the United States District Court for the Southern District of New York, claiming that Dubai and the committee confiscated Drexel's claim.[210]

The district court found that the committee and Dubai were not immune from jurisdiction because they engaged in a commercial activity which had a direct effect in the United States.[211] After noting that the FSIA definition of commercial activity "should be interpreted broadly to encompass a wide range of acts as the relevant activity in a given matter," [212] the court recited the private person test espoused by the Supreme Court in *Weltover*.[213]

The district court then determined that the relevant activities in the case before it were the marshalling, liquidating, and winding up of Galadari's remaining assets.[214] In essence, Dubai, through the committee, took over and managed UBME, a private bank.[215] The court recognized that the committee exercised quasi-judicial functions as well, but concluded that the committee engaged in a commercial act because it managed UBME, an activity previously conducted by a private person, Galadari.[216]

In contrast to the district court, a majority of the Second Circuit panel that decided *Drexel* conceded that the activities discussed by the district court might be commercial[217] but did not

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210. *Id.*

211. *Id.* at 1385-88.

212. *Id.* at 1385 (citing Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981)).

213. *Drexel VII*, 810 F. Supp. at 1385-86 (quoting Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2166 (1992)).

214. *Drexel VII*, 810 F. Supp. at 1386.

215. *Id.*

216. *Id.* at 1386-87. The court stated: "While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction is based on the latter." *Id.* at 1391.

The district court went on to find that the commercial acts had a direct effect in the United States. The court wrote, "When Dubai and the Committee took over the control and management of Galadari's assets and refused to pay debts owed Drexel . . . and payable in the United States, Dubai and the Committee produced a 'direct effect' in the United States." *Id.* at 1388. Because the acts of the committee and Dubai satisfied the direct effect clause of the commercial activity exception of the FSIA, the district court refused to dismiss Drexel's complaint. *Id.* at 1393.

217. Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317, 329 & n.3 (2d Cir. 1993) (noting that the characterization of these activities as commercial is suspect). The court cited *In re* Beck Industries, 725 F.2d 880, 887 (2d Cir. 1984) for the proposition that

agree that the management and liquidation of Galadari's assets were the relevant activities. The court of appeals stated that Drexel's complaint claimed that (1) the committee and Dubai were responsible as successors-in-interest for Galadari's liabilities, (2) the committee and Dubai breached a promise to Drexel that its claim would be adjudicated fairly in Dubai, and (3) the committee's wrongful refusal to pay Drexel's claim was an illegal taking of property without just compensation.[218] The court of appeals decided that the gravamen of Drexel's claim involved the judicial role of the committee, not any related commercial conduct of the committee or Dubai.[219]

The court of appeals concluded that the committee's resolution of competing claims for Galadari's assets was not an act that could have been performed by a private party.[220] Accordingly, it found that the commercial activity exception did not strip the defendants of foreign sovereign immunity.[221]

Chief Judge Newman, one of the three presiding judges on the Second Circuit panel reviewing *Drexel*, dissented. He concluded that a decision about the nature of the challenged acts could not be made on the face of the complaint because the acts of Dubai and the committee blended adjudicative and commercial activities.[222] Chief Judge Newman characterized the actions of the committee as both similar to those of a United States bankruptcy court (because the committee determined the rights of Galadari's creditors) and similar to a new corporation emerging from a Chapter 11 reorganization (because the committee took over and operated Galadari's ventures).[223] Chief Judge Newman found that only upon a development of the facts would it be possible to determine whether the committee's role was "essentially judicial" as the majority stated.[224]

"merely to attempt to collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term." *Drexel VIII*, 12 F.3d at 329 n.3.

218. *Drexel VIII*, 12 F.3d at 329 n.3.

219. *Id.* at 329.

220. *Id.* at 331.

221. *Id.*

222. *Id.* at 330.

223. *Id.*

224. *Id.* at 332. Chief Judge Newman suggested that it is possible that the committee, in a role similar to a successor corporation, used cash from its "parent entity" to give preferential treatment to certain creditors and simply reneged on the obligation to discharge liabilities to Drexel. *Id.*

The differences in the opinions of the district court, the Second Circuit *Drexel* majority, and the Second Circuit *Drexel* dissent aptly illustrate the difficulty of determining the relevant activity in a factually complex case. While some of the activities of the committee had judicial characteristics, other activities had commercial attributes, and still others shared both judicial and commercial traits. The district court focused on the commercial aspects of the committee's acts—the management and liquidation of Galadari's assets.[225] The majority of the court of appeals focused on the judicial portion of the committee's acts—the resolution of competing claims to Galadari's assets.[226] Chief Judge Newman, in dissent, acknowledged that both judicial and commercial activities were involved and that it was unclear which type of act was the predominant or relevant one.[227]

The *Drexel* case also demonstrates the importance of determining the relevant act. Whether the committee's acts were analogous to private commercial transactions, and therefore not entitled to immunity, turned on how the court defined the relevant activity. The district court concluded that the commercial acts of the committee could have been carried on by a private party and based its finding of jurisdiction under the FSIA on these acts.[228] The majority of the court of appeals, however, determined that the judicial activities of the committee could not have been carried on by a private party[229] and granted sovereign immunity to Dubai and the committee.[230] Each court focused on a different relevant activity, and each made a different immunity determination.

Thus, *Drexel* illustrates the magnitude of a fundamental flaw of the *Weltover* private person test: The test offers no guidance as to how courts should ascertain the relevant activity, and focusing on one activity may permit the court to adjudicate a matter, while focusing on another may lead to the dismissal of the case. With no definition of relevant activity, *Weltover*'s private person test is easily manipulated in complex cases.[231]

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225. *See supra* text accompanying notes 214-15.
226. *See supra* text accompanying notes 218-19.
227. *See supra* notes 222-24 and accompanying text.
228. *See supra* text accompanying notes 214-15.
229. *See supra* text accompanying notes 219-20.
230. *See supra* text accompanying note 221.
231. The flaws of the private person test are also illustrated by a Supreme Court case decided the term after *Weltover*. In Saudi Arabia v. Nelson, 113 S. Ct.

2. Direct Effect

At first glance, *Weltover* appears to have settled the question of what constitutes a direct effect for purposes of the third clause

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1471 (1993), the Supreme Court applied the first clause of the commercial activity exception. *Nelson* involved the alleged detention and torture of a United States employee who was recruited in the United States. Three separate opinions were written in which the justices disagreed about what the relevant act was and whether the act was a commercial activity for purposes of the FSIA.

Writing for the majority, Justice Souter recited the private person test articulated in *Weltover*, stating that "whether a state acts 'in the manner of' a private party is a question of behavior, not motivation." *Id.* at 1479. The majority held that the alleged wrongful arrest, imprisonment, and torture of Nelson by Saudi Arabian authorities was an abuse of police power, a power which is sovereign in nature. *Id.* Therefore, the majority concluded that Nelson's action was not based on a commercial activity within the meaning of the FSIA and accordingly dismissed the case for lack of jurisdiction. *Id.* at 1481.

Justice White and Justice Blackmun disagreed with the majority's characterization of the alleged misconduct as a sovereign, non-commercial act. *Id.* at 1481. Nelson was allegedly detained and tortured because he reported safety hazards. *Id.* Justice White noted that retaliation for whistle blowing is not an unknown practice in the marketplace, and that in the past private employers have retaliated, with the help of the police force, by falsely arresting employees. *Id.* at 1481-82. Justice White and Justice Blackmun concluded that in the case at hand, "the state-owned hospital was engaged in ordinary commercial business." *Id.* at 1484.

Justices Kennedy, Blackmun, and Stevens disagreed with the majority about what the relevant activity was. Nelson claimed that the hospital and Saudi Arabia were negligent in failing to warn Nelson of foreseeable dangers during his recruitment. *Id.* at 1485. Justice Kennedy, writing for the other two justices, found that the omission of important information during recruitment is a commercial activity under the FSIA because recruiting employees is an activity routinely engaged in by private hospitals: "Locating and hiring employees implicates no power unique to the sovereign." *Id.* at 1485.

Like *Drexel*, *Nelson* illustrates the fatal flaw of *Weltover*'s private person test: *Weltover* offers no guidance in determining the relevant activity, and how a relevant activity is defined is often determined by whether a private party could engage in the act. The significance of ascertaining the relevant act is apparent once again: In *Nelson*, different relevant acts led to different determinations of immunity. The majority targeted the relevant act as the alleged false imprisonment and torture of *Nelson*. Concluding that this act was a sovereign activity involving the police power, the majority held that Saudi Arabia and the hospital were immune from the jurisdiction of United States courts. On the other hand, Justice Kennedy pinpointed the relevant activity as the failure, during recruitment, to warn of employment-related dangers, which he determined is not a commercial activity. Accordingly, Justice Kennedy would have remanded the case to the district court for further consideration. The separate opinion of Justice White illustrates that even when the Court can agree on the relevant act, the Justices still might differ as to whether a private party could engage in the activity.

of the commercial activity exception of the FSIA. The Court did resolve a circuit split[232] by rejecting the notion that the direct effect clause contains a requirement of substantiality or foreseeability. However, the Court's definition of direct effect—"an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity'"[233]—still leaves room for a variety of interpretations.

Like the Court's commercial activity definition, *Weltover*'s spartan direct effect test has already caused disagreement among lower courts. In *Ampac Group, Inc. v. Republic of Honduras*,[234] the United States District Court for the Southern District of Florida expansively interpreted *Weltover*'s already broad definition of direct effect. *Ampac* involved a dispute over a contract between Ampac and the Republic of Honduras for the purchase of a cement company owned by Honduras. After signing a contract of sale,[235] Ampac allegedly tendered 2.7 million dollars in Honduran foreign debt for the cement company.[236] The Honduran legislature did not approve the sale, a prerequisite for the sale of a company owned by the Honduran government.[237] Honduras never transferred the cement company to Ampac.[238] Therefore, Ampac instituted proceedings alleging breach of contract and fraud.[239] Honduras moved to dismiss the action on the ground that the court lacked subject matter jurisdiction under the FSIA.[240]

To establish subject matter jurisdiction, Ampac invoked the direct effect clause of the commercial activity exception.[241] To refute the applicability of this FSIA provision, the Republic of Honduras asserted that the cited activities did not cause a direct effect in the United States.[242] The district court began its

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232. *See supra* notes 64-83 and accompanying text.

233. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2169 (1992) (quoting Weltover, Inc. v. Republic of Argentina, 941 F.2d 145, 152 (2d Cir. 1991)).

234. 797 F. Supp. 973 (S.D. Fla. 1992).

235. *Id.* at 975. Defendant denied that the document was an enforceable, binding contract and claimed instead that it was an agreement in principle. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 977.

240. *Id.* at 975.

241. *Id.* at 976.

242. *Id.* at 977.

analysis by reciting the *Weltover* direct effect test.[243] The court interpreted the *Weltover* language to mean that the effect in the United States need only be slight, and the contact with the United States may be only tangential to support FSIA jurisdiction.[244] The court concluded that Ampac's allegations of breach of contract and fraud clearly supported jurisdiction under the FSIA because Ampac, an American corporation, suffered a financial loss as a direct effect of the Republic of Honduras's commercial activities.[245]

In *United World Trade, Inc. v. Mangyshlakneft Oil Production Association*,[246] the United States District Court for the District of Colorado squarely rejected the *Ampac* direct effect test, choosing instead to interpret *Weltover*'s direct effect language narrowly.[247] *United World Trade* involved an alleged breach of a contract for crude oil between plaintiff United World Trade (UWT) and defendants Mangyshlakneft Oil Production Association[248] and Kazakhstan Commerce Foreign Economic Association (the defendants).[249] After making one delivery of oil, the defendants allegedly refused to supply the additional oil to UWT in breach of the parties' preliminary agreement.[250]

UWT asserted that the defendants were not protected from suit in a United States court by the doctrine of foreign sovereign immunity because the defendants engaged in a commercial activity which had a direct effect in the United States.[251] Relying on *Ampac*, UWT argued that the effect in the United States of a commercial act need only be slight to warrant the exercise of jurisdiction.[252] The district court flatly rejected *Ampac*'s interpretation of *Weltover*'s direct effect test in favor of a more rigid

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243. *Id.*

244. *Id.*

245. *Id.* The court also looked to Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981), to support its conclusion that a financial loss of a United States corporation is a direct effect. *Id.*

246. 821 F. Supp. 1405 (D. Colo. 1993), *affirmed*, United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n, No. 93-1193, 1994 U.S. App. LEXIS 23684 (10th Cir. Aug. 29, 1994).

247. *United World Trade*, 821 F. Supp. at 1408.

248. MOP is an organization of industrial enterprises and is wholly owned by the Republic of Kazakhstan. *Id.* at 1407.

249. *Id.*

250. *Id.*

251. *Id.* at 1408.

252. *Id.* (citing Ampac Group, Inc. v. Republic of Honduras, 797 F. Supp. 973, 977 (S.D. Fla. 1992)).

standard.[253] Instead, the *United World Trade* court held that something "legally significant" must happen in the United States for FSIA jurisdiction to attach.[254]

The district court found that the activities of the defendants did not cause a direct effect in the United States. First, the court rejected the notion that mere financial loss suffered by a corporation in the United States as a result of a foreign state's acts abroad constitutes a direct effect alone sufficient to create subject matter jurisdiction.[255] Then, the court concluded that the terms of the contract caused no direct effect in the United States.[256] The only references to the United States in the crude oil contract were the mention of a "first class European/USA bank" and procedures to be followed if a payment was due on a New York banking holiday.[257] Although a New York bank performed the currency exchange, the terms of the contract did not require this monetary conversion.. Furthermore, the district court noted that except for a transfer of funds that occurred after the oil transaction, all of the commercial activity in this case took place outside the United States.[258] The court determined that the purchase, sale, and delivery of the oil, as well as the payment for the oil, had no connection with the United States.[259] The court concluded that the losses allegedly suffered by UWT as a result of the defendants' actions abroad were not "legally significant" and, hence, did not constitute a direct effect in the United States.[260] Because the allegedly illegal activity did not have a sufficient nexus with the United States to pierce the shield of foreign sovereign immunity, the *United World Trade* court held that it did not have subject matter jurisdiction over the defendants.[261]

The *Ampac* and *United World Trade* cases illustrate two dramatically different twists lower courts have put on *Weltover*'s direct effect test. The *Ampac* approach, requiring that an effect

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253. *Id.*

254. *United World Trade*, 821 F. Supp. at 1409 (quoting Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988)).

255. *Id.* (quoting Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989)).

256. *United World Trade*, 821 F. Supp. at 1409.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* (quoting Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1515 (D.C. Cir. 1988) and citing Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989)).

261. *United World Trade*, 821 F. Supp. at 1409-10.

need only be slight or tangential to be direct, may appear to be an extreme reading of *Weltover*. However, *Weltover* broadly defined direct effect as an "immediate consequence;"[262] nothing in *Weltover* expressly forecloses the *Ampac* Court's interpretation of this language. The *Weltover* opinion limited the direct effect test only by providing that jurisdiction may not be based on "purely trivial effects in the United States."[263] Likewise, nothing in *Weltover* prohibits *United World Trade*'s additional requirement of a "legally significant act" before a sufficient direct effect in the United States is found.

Although *Weltover*'s direct effect test resolved a circuit split by rejecting the notion that a direct effect must be both substantial and foreseeable, it offered little guidance beyond this narrow issue. The Court's barren definition of direct effect requires lower courts to rely on prior case law to determine exactly what constitutes a direct effect. The contrasting treatment of financial loss in the *Ampac* and *United World Trade* cases aptly illustrates this forced reliance. In *Ampac*, the court cited *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*[264] for the proposition that when a corporation is involved, the proper inquiry under the direct effect clause is whether the corporation has suffered a direct financial loss.[265] On the other hand, the *United World Trade* Court quoted *Gregorian v. Izvestia*[266] in support of its conclusion that mere financial loss suffered by a plaintiff in the United States because of acts by a foreign state abroad does not create a direct effect.[267] Because

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262. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2168 (1992).

263. *Id.* As if to illustrate this point, the Court held that the effect of Argentina rescheduling the repayment of the Bonods upon New York's status as a world financial leader is "too remote and attenuated to satisfy the 'direct effect' requirement of the FSIA." *Id.*

264. 647 F.2d 300 (2d Cir. 1981).

265. Ampac Group, Inc. v. Republic of Honduras, 797 F. Supp. 973, 977 (S.D. Fla. 1992) (quoting Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981)).

266. 871 F.2d 1515 (9th Cir. 1989).

267. United World Trade v. Mangyshlakneft Oil Prod. Ass'n, 821 F. Supp. 1405, 1409 (D. Colo. 1993); *see also* Chu v. Taiwan Tobacco & Wine Monopoly Bureau, Nos. 93-15537, 93-15562, 1994 U.S. App. LEXIS 20209 (9th Cir. July 29, 1994) (holding that financial loss alone is not enough to constitute a direct effect).

Weltover's direct effect language is so obfuscatory, conflicting results involving similar facts will not be unusual.[268]

3. Personal Jurisdiction

Unlike the terms commercial activity and direct effect, which the Supreme Court addressed, the *Weltover* Court flatly refused to determine whether a foreign state is entitled to due process protection. The Supreme Court gave several conflicting signals regarding the personal jurisdiction requirements in an FSIA direct effect analysis. These conflicting signals have resulted in a convoluted opinion that has proved very difficult for lower courts to apply.

First, the Court assumed—without deciding—that a foreign state is a person for purposes of the Due Process Clause.[269] Immediately thereafter, the Court cited *South Carolina v. Katzenbach*[270] to support the proposition that a state of the Union is *not* a person for purposes of the Due Process Clause.[271] With this parenthetical citation, the Court seemed to imply that if a state of the Union is not entitled to due process protection, neither is a foreign state. Despite this implication, the Court used an abbreviated minimum contacts analysis. It concluded that "by issuing negotiable debt instruments denominated in United States currency and payable in New York and by appointing a

268. Despite the *Weltover* Court's clear statement that the direct effect clause does not contain a requirement of substantiality or foreseeability, some lower courts have continued to walk through the substantial and foreseeable test for want of further guidance on what constitutes a direct effect. *See, e.g.*, Walter Fuller Aircraft Sales, Inc. v. The Republic of the Phillipines, 965 F.2d 1375, 1386-87 (5th Cir. 1992) (applying substantial and foreseeable requirements, then acknowledging that *Weltover* rejects these requirements and concluding that if anything, *Weltover*'s more lenient standard strengthens the court's finding that the defendant's commercial activity had a direct effect in the United States); *see also* Maizus v. Weldor Trust Reg., 820 F. Supp. 101, 104 (S.D.N.Y. 1993) ("[C]ourts have consistently held that the FSIA's enumerated exceptions to sovereign immunity 'requir[e] some form of substantial contact with the United States.'") (citations omitted).

269. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2169 (1992).

270. 383 U.S. 301, 323-24 (1966).

271. *See Weltover*, 112 S. Ct. at 2169 (citing South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966)).

financial agent in New York, Argentina purposely availed itself of the privilege of conducting activities in the United States."[272]

The Court's cursory treatment of personal jurisdiction leaves open the question of whether a full "fair play and substantial justice" analysis, the traditional due process test, is required before a United States court can exercise jurisdiction over a foreign state, or whether, as the FSIA seems to suggest, the direct effect clause embodies any applicable constitutional requirement of due process.[273] Much like before *Weltover*, courts that have faced this dilemma have continued to use a variety of approaches to determine whether they have jurisdiction over a foreign state.[274]

When plaintiffs have asserted that a foreign state is not protected by immunity under the direct effect clause of the commercial activity exception, several courts have used a complete fair play and substantial justice test to determine whether they have personal jurisdiction over the foreign state. The Eleventh Circuit case *Vermeulen v. Renault, U.S.A., Inc.*[275] illustrates this approach. In *Vermeulen*, the court began by stating that subject matter jurisdiction over a foreign state exists under the FSIA if one of the statutory exceptions to immunity applies.[276] The *Vermeulen* court next addressed the issue of whether the direct effect provision of the commercial activity exception was satisfied in the case before it.

After analyzing the facts, the court concluded that defendant Renault's acts easily satisfied the *Weltover* definition of commercial.[277] Noting that the Supreme Court did not decide whether the direct effect clause incorporates the minimum contacts test,[278] the *Vermeulen* court proceeded to intertwine the direct effect requirement of the FSIA with a personal jurisdiction[279] minimum contacts analysis. The court set forth three criteria necessary to constitute minimum contacts: First, the

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272. *Id.* (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958))).

273. *See* 28 U.S.C. § 1330 (1988); *see also supra* note 96 (setting forth legislative history of Section 1330(b)).

274. *See* notes 91-108 and accompanying text (discussing various approaches to personal jurisdiction used by courts prior to *Weltover*).

275. 985 F.2d 1534 (11th Cir. 1993).

276. *Id.*

277. *Id.* at 1544.

278. *Id.* at 1545.

279. *See id.* at 1548 (labeling its analysis a personal jurisdiction analysis).

contacts must be related to the cause of action;[280] second, the contacts must involve an act by which the defendant purposefully avails itself of the privilege of conducting business in the United States, thereby invoking the benefits and protections of the forum's laws;[281] and third, the contacts must be such that the defendant reasonably anticipates being haled into court in the forum.[282] The court used these three criteria to determine whether Renault's commercial activities had a direct effect in the United States.[283]

After determining that Renault had sufficient contacts with the forum to satisfy the minimum contacts test, the *Vermeulen* court decided that even if a foreign state has the requisite minimum contacts with a forum, exercise of personal jurisdiction still violates due process unless it comports with traditional notions of fair play and substantial justice.[284] The court went on to state that courts must consider "the burden on the defendant, the interest[] of the forum . . . , and the plaintiff's interest in obtaining relief" in determining whether an exercise of jurisdiction is fair and reasonable.[285]

In *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari*,[286] the United States District Court for the Southern District of New York took a slightly different approach to personal jurisdiction. In contrast to the *Vermeulen* approach, which blended both a minimum contacts and a fair play and substantial justice analysis with the issue of direct effect, the *Drexel* Court treated personal jurisdiction as a distinct analysis, separate from the direct effect analysis.[287]

First, under the rubric of subject matter jurisdiction,[288] the district court considered whether the defendant's commercial

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280. *Id.* at 1546 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985) and Madara v. Hall, 916 F.2d 1510, 1516 (11th Cir. 1990)).

281. *Vermeulen*, 985 F.2d at 1546 (citing Hanson v. Denckla, 357 U.S. 235, 253 (1958) and *Burger King*, 471 U.S. at 474-75).

282. *Id.* (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

283. *Id.*

284. *Id.* at 1551.

285. *Id.* (quoting Asahi Metal Industry Co. v. Superior Court of Cal., 480 U.S. 102, 113 (1987)).

286. *Drexel VII*, 810 F. Supp. 1375 (S.D.N.Y. 1993), *rev'd on other grounds*, Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A.W. Galadari, 12 F.3d 317 (2d Cir. 1993).

287. *Drexel VII*, 810 F. Supp. at 1388.

288. *See id.* at 1378.

activity had a direct effect in the United States.[289] After concluding that it did,[290] the court went on to address personal jurisdiction. The *Drexel* court stated that personal jurisdiction under the FSIA is both statutorily defined and governed by constitutional due process requirements.[291] The court found the statutory requirement for personal jurisdiction, Section 1330(b) of the Act, satisfied in the case at hand because subject matter jurisdiction existed—the defendant's activities fell within the direct effect clause of the Act's commercial activity exception—and the defendant had been properly served with process.[292] Then, the court proceeded to determine whether sufficient minimum contacts existed between the foreign state and the forum so that maintaining the suit comported with traditional notions of fair play and substantial justice.[293]

In sharp contrast to both *Drexel* and *Vermeulen*, other courts have declined to utilize a minimum contacts/fair play and substantial justice standard in the analysis of personal jurisdiction under the direct effect clause of the FSIA.[294] For example, in *Federal Insurance Co. v. Rubin*,[295] the District Court for the

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289. *Id.* at 1385-88.

290. *Id.* at 1387-88.

291. *Id.* at 1388.

292. *See supra* notes 41-44 and accompanying text (setting forth Section 1330 of the Act and explaining the statutory requirements of subject matter and personal jurisdiction).

293. *Drexel VII*, 810 F. Supp. at 1389 (citing Shapiro v. Republic of Bolivia, 930 F.2d 1013, 1020 (2d Cir. 1991) (citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)))).

294. Although the United States District Court for the Southern District of New York, like the *Drexel* and *Vermeulen* courts, has applied a minimum contacts test when analyzing personal jurisdiction under the direct effect clause of the commercial activity exception to foreign state immunity, *see, e.g.*, Maizus v. Weldor Trust Reg., 820 F. Supp. 101, 105 & n.9 (S.D.N.Y. 1993); Djordjevich v. Bundesminister der Finanzen, 827 F. Supp. 814, 818 (D.D.C. 1993), other courts have not. In Ampac Group, Inc. v. Republic of Honduras, 797 F. Supp. 973, 979 (S.D. Fla. 1992), the United States District Court for the Southern District of Florida listed the facts alleged in plaintiff's complaint and concluded that the defendant's contacts with the United States "far exceed the slight contacts that supported personal jurisdiction in *Weltover*." The court did not go through a minimum contacts or fair play and substantial justice analysis. *Id. See also* Dibrell Bros. Tobacco Co., Inc. v. Rafidain Bank, No. 93-0993, 1994 U.S. Dist. LEXIS 8271 (D.D.C. June 15, 1994) (stating that the FSIA provides that personal jurisdiction and subject matter jurisdiction both exist in a case in which the foreign state is exempt from immunity and proper service has been made).

295. No. 92-4177, 1993 U.S. Dist. LEXIS 784 (E.D. Pa. Jan. 26, 1993); *rev'd on other grounds*, 12 F.3d 1270 (3d Cir. 1993).

Eastern District of Pennsylvania based its finding of personal jurisdiction exclusively on Section 1330(b) of the FSIA. The *Federal Insurance* court did not analyze constitutional issues separately, implicitly concluding that foreign states are not entitled to due process protection[296] or that constitutional protections are already built into the direct effect clause of the FSIA commercial activity exception.

Despite the dramatically different ways in which lower courts have analyzed personal jurisdiction, neither the *Vermeulen/Drexel* nor the *Federal Insurance* approach to personal jurisdiction is foreclosed or mandated by *Weltover*. The Supreme Court in *Weltover* refused to determine whether a foreign state is entitled to due process protection. Although the Court hinted that a foreign state is not entitled to due process protection, the Court applied an abbreviated purposeful availment analysis, which is part of a traditional minimum contacts test. In light of the Supreme Court's confusing discussion, conflicting approaches to personal jurisdiction in the lower courts should be expected. The *Weltover* Court declined to decide a constitutional issue of great significance to foreign states. The import of the personal jurisdiction analysis is twofold: lack of personal jurisdiction will result in the dismissal of the case,[297] and absence of basic due process protections may require foreign states to defend an increasing number of suits in United States courts.

V. CONCLUSION

Foreign sovereign immunity is universally accepted by states in the international community.[298] The concept of foreign sovereign immunity reflects the widely recognized principle of international law that one sovereign has limited freedom to

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296. *Weltover* hints that foreign states might not even be entitled to constitutional protections. *See supra* text accompanying notes 269-72.

297. *See, e.g.*, Concord Reinsurance Co., Ltd. v. Caja Nacional de Ahorro y Seguro, No. 94-2218, 1994 U.S. Dist. LEXIS 7532 (S.D.N.Y. June 7, 1994). In *Concord Reinsurance*, the court dismissed the action for lack of personal jurisdiction. In response to the plaintiff's argument that personal jurisdiction automatically exists if subject matter jurisdiction exists and proper service of process has been made, the court stated that "more recent law makes it clear that personal jurisdiction over a foreign sovereign defendant also must be supported by constitutionally required minimum contacts." *Id.*

298. Donoghue, *supra* note 18, at 518 & n.155.

exercise its adjudicatory power over another.[299] A state which casually exercises jurisdiction over a foreign sovereign may be in breach of international law. To avoid this undesirable possibility, United States courts must not have unfettered discretion to exercise jurisdiction over foreign states.

Despite the apparent flaws of *Weltover*'s private person commercial activity test and direct effect test, the Supreme Court has mandated that lower courts use these tests when faced with a direct effect commercial activity exception case. However, by broadly framing the definition of both commercial activity and direct effect, these tests give lower courts almost free reign to exercise jurisdiction over foreign states. Therefore, to avoid offending norms of international law, courts must turn to the issue of personal jurisdiction, the only major issue the Court left undecided.

In *Weltover*, the Court refused to determine whether the direct effect clause of the FSIA incorporates due process requirements or whether a separate minimum contacts analysis is necessary.[300] Several important considerations suggest that a United States court should conduct a separate due process analysis. First, as one commentator has asserted, because a direct effect analysis relates to subject matter jurisdiction and a minimum contacts analysis relates to personal jurisdiction, the two analyses are separate and may lead to different results.[301] For example, the activities at issue may not have caused a sufficient direct effect in the United States to warrant the exercise of jurisdiction under the FSIA, but a court may still be able to assert jurisdiction over the foreign state using the doctrine of general jurisdiction.[302] Conversely, a foreign state's commercial acts may have produced a direct effect in the United States, but the foreign state may not have sufficient minimum contacts with the forum, under a traditional due process analysis, to justify an exercise of jurisdiction.[303] Therefore, because a subject matter jurisdiction analysis tests a different type of contact with a forum than does a

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299. *Id.* at 518 & n.156.

300. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2169 (1992); *see also* text accompanying notes 91-108 (explaining the two approaches taken by lower courts prior to the *Weltover* decision).

301. Card, *supra* note 85, at 97.

302. *Id.* at 97 & n.39.

303. *Id.* at 97 & n.40.

personal jurisdiction analysis, a separate due process analysis is necessary to avoid unfairness[304] to the foreign state.

Second, a minimum contacts analysis may be necessary to effectuate Congress' intent. Indeed, Section 1330(b) of the FSIA provides that personal jurisdiction exists when an exception to immunity applies and proper service of process has been made.[305] Moreover, in the legislative history of the Act, Congress stated that the minimum contacts requirement is embodied in the exceptions to immunity.[306] Together, the language and legislative history of the Act arguably may imply that a separate due process analysis under the direct effect clause is unnecessary. However, Congress wrote, "[s]ignificantly, each of the immunity provisions . . . requires some connection between the law suit and the United States . . . ."[307] The *Weltover* Court held that an effect does not have to be substantial or foreseeable to be direct,[308] in essence deleting Congress' reference to Section 18 of the Restatement (Second) in the legislative history of direct effect clause.[309] Arguably, this exception to immunity no longer requires a sufficient nexus with the United States to conform with Congress' intent. Therefore, to give effect to Congress' intent, courts should determine whether the foreign state has sufficient minimum contacts with the forum before adjudicating the claim.[310]

Third, due process protections for foreign states will help ensure that United States courts' dockets do not become overcrowded with lawsuits involving activities that occurred outside the United States. Thousands of cases have been brought under

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304. A foreign state has a legitimate right to manage its own affairs. DELLAPENNA, *supra* note 179, at 163. This interest of the foreign state suggests that due process protections are necessary to ensure that it is fair for a United States court to adjudicate a claim against a foreign state or a foreign state-owned entity.

305. 28 U.S.C. § 1330(b) (1988).

306. HOUSE REPORT, *supra* note 8, at 6612.

307. *Id.*

308. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2168 (1992).

309. HOUSE REPORT, *supra* note 8, at 6618.

310. It is important to note that Congress does not have the authority to determine when constitutional standards apply and whether a statute comports with constitutional requirements. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). These matters are uniquely the province of the courts. Regardless of Congress' position on the issue, foreign states engaging in a commercial activity may in fact be entitled to due process protection.

the FSIA since it was enacted in 1976.[311] Significantly, the direct effect clause of the commercial activity exception has been litigated more than any other provision of the Act.[312] Requiring that foreign states have sufficient minimum contacts with the United States before adjudicating a claim against a foreign state will serve the pragmatic purpose of eliminating suits that are only marginally connected to the United States.[313]

Fourth, due process protections for foreign states will help ensure that a judicial determination of jurisdiction does not embarrass the executive branch. Indeed, the judicial branch was traditionally hesitant to exercise jurisdiction over foreign states because this area was almost exclusively the province of the executive branch.[314] If a foreign state has minimum contacts with the United States, it is less likely that adjudication by a United States court will conflict with the executive department's conduct of foreign affairs. On the other hand, adjudicating a claim against a foreign state merely because the state's commercial acts had a direct effect in the United States may offend the foreign state.

Fifth, United States courts should conduct a due process analysis before exercising jurisdiction over a foreign state because a foreign state that engages in commercial activities is functioning like a private corporation. The *Weltover* Court gave one clue on the issue of whether a foreign state is entitled to due process protection. In a parenthetical citation, the Court referred to an earlier decision which held that states of the United States are not persons entitled to due process protection.[315] With this citation, the Court seemed to imply that foreign states are not entitled to due process protection either. If the Court sought to make an analogy between states of the United States and foreign states engaging in commercial activities, the Court's analogy is faulty. In a direct effect clause analysis, the commercial acts of a foreign state or a state-owned entity are at issue. When a foreign state

311. DELLAPENNA, *supra* note 179, at vi (stating that over 2,000 cases were brought under the Act in the first ten years after the FSIA was enacted).

312. *See id.* at 90.

313. Indeed, the Supreme Court has recognized that in enacting the FSIA, Congress was concerned that United States courts would become international courts of claims in which anyone could litigate any dispute against a foreign state. *See* Verlinden S.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983).

314. DELLAPENNA, *supra* note 179, at 82.

315. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160, 2169 (1992) (citing South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966)).

acts in a commercial capacity, rather than in a public, sovereign capacity, the foreign state is functioning more like a private corporation than a state of the Union. Corporations have long been entitled to due process protection.[316] Therefore, a foreign state functioning effectively like a corporation should be afforded due process protection as well.

Finally, and most importantly, foreign states should be given due process protections to satisfy the international law principal which requires that jurisdiction over a foreign sovereign must be reasonable. The Restatement (Third) of Foreign Relations Law provides that a state may exercise jurisdiction to adjudicate over a person or thing if the jurisdiction is reasonable.[317] Indeed, the minimum contacts analysis was developed to ensure that the exercise of jurisdiction over absent defendants would be reasonable. A minimum contacts analysis would best effectuate the Restatement (Third) goal of reasonableness, with the added advantage of offering courts a familiar framework to use. More importantly, a minimum contacts test would comply with universal principles of international law by limiting the power of United States courts to adjudicate claims against a foreign state.

To conclude, a number of reasons suggest that a foreign state is entitled to due process protection. Because the *Weltover* decision eviscerates other safeguards which could have prevented United States courts from unreasonably exercising jurisdiction over a foreign state, United States courts should use a minimum contacts analysis to ensure that the interests of the foreign state are considered. United States courts would be wise to take this cautious approach to jurisdiction over foreign states to avoid the unwelcome potential result of placing the United States in breach of international law.

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316. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945) (due process requires that an absent corporate defendant must have certain minimum contacts to be subject to a judgment).

317. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1986).