RECENT DEVELOPMENTS

"Toto, I Have a Feeling We're Not in Kansas Anymore": *Voest-Alpine Trading USA Corp. v. Bank of China*

I. INTRODUCTION

In June of 1995, Voest-Alpine Trading USA Corporation (Voest-Alpine) entered into an agreement with the Jiangyin Foreign Trade Corporation (JFTC) for the sale of styrene monomer, a raw material used in the production of automobiles, computers, home appliances, plastic toys, and packaging materials.[1] To secure the performance of JFTC under the agreement, the Jiangyin sub-branch of the Bank of China, an instrumentality of the People's Republic of China, issued an irrevocable letter of credit for $1.2 million.[2] The letter of credit provided that upon proper presentment of all documents and drafts to the Jiangyin sub-branch, the Bank of China would pay Voest-Alpine the appropriate amount.[3] The letter of credit did not designate a place of payment, but stated that it would be governed by the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500 (UCP 500).[4] The Jiangyin sub-branch telexed the letter of credit to the New York branch of the Bank of China, which advised Voest-Alpine of the issuance of the letter of credit upon the request of the Jiangyin sub-branch.[5] Voest-Alpine delivered the goods to China in accordance with the sale agreement, where shortly after delivery the goods were seized by Chinese customs officials pending payment of a tariff by

1. *See* Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 890 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 591 (1998).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*

JFTC.[6] Voest-Alpine immediately provided its bank in Houston, Texas, with the documents necessary for presentment, and the documents were forwarded to the Jiangyin sub-branch with a cover letter stating that payment was to be sent to Voest-Alpine's bank account in Houston.[7] The Bank of China and JFTC ultimately disputed the adequacy of the documents and refused payment.[8] Voest-Alpine sued the Bank of China in the United States District Court for the Southern District of Texas, seeking damages for breach of the letter of credit.[9] The Bank of China filed a motion for judgment on the pleadings, asserting sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).[10] The district court rejected the Bank of China's claims, concluding that Voest-Alpine had alleged facts sufficient to demonstrate that the Bank of China fell within the commercial activity exception to the FSIA because Voest-Alpine's action was based upon an act outside the United States, in connection with the Bank of China's commercial activity outside the United States, that caused a direct effect in the United States.[11] The Bank of China appealed.[12] The Fifth Circuit *held* that because (1) the letter of credit did not designate a place of payment, (2) the Bank of China's customary practice was to send payment on a letter of credit wherever the presenting party requested, and (3) Voest-Alpine requested payment to be made in Houston, breach of the letter of credit resulted in the nonreceipt of funds by Voest-Alpine in Houston which followed as an immediate consequence of the Bank of China's actions and therefore caused a direct effect in the United States under the FSIA. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 890 (5th Cir. 1998), *cert. denied* 119 S. Ct. 591 (1998).

II. HISTORICAL BACKGROUND AND ANALYSIS

In *The Schooner Exchange v. McFaddon*, the Supreme Court addressed foreign sovereign immunity for the first time.[13] In the absence of any statutory or constitutional provision granting immunity to foreign states, Chief Justice Marshall relied on principles of international law and territorial sovereignty to conclude that U.S.

6. *See Voest-Alpine*, 142 F.3d at 890 n.1.
7. *See id.* at 890.
8. *See id.*
9. *See id.*
10. *See id.* at 890-91.
11. *See Voest-Alpine*, 142 F.3d at 891.
12. *See id.*
13. *See generally* The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812).

courts could not exercise jurisdiction over foreign states.[14] Chief Justice Marshall called the question of sovereign immunity a "delicate and important inquiry" and found that sovereign immunity is "exclusive and absolute," the only exception being by the consent of the foreign state.[15] Chief Justice Marshall stated that the usage of nations evinced an understanding of immunity among sovereignties "possessing equal rights and equal independence" such that the exercise of jurisdiction over a foreign state would "violate [the] faith" of the civilized world.[16]

In 1952, in opposition to the common law rule of absolute sovereign immunity embodied in *The Schooner Exchange*, the Department of State adopted the restrictive theory of sovereign immunity according to a letter by the State Department's Legal Adviser, Jack Tate (Tate Letter).[17] The Tate Letter stated that, in contrast to the absolute theory of sovereign immunity, according to which "a sovereign cannot, without his consent, be made respondent in the courts of another sovereign," "the newer or restrictive theory of sovereign immunity [recognizes] the immunity of the sovereign . . . with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[18] The Tate Letter provided as justification that "the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[19]

In 1976, the FSIA codified the restrictive theory of sovereign immunity, adhering to the general rule that foreign states are immune from suit in the United States, but making a broad exception with respect to foreign states engaged in commercial activity with a jurisdictional nexus to the United States.[20] When engaged in commercial activity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."[21]

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14. *See id.* at 136-37.
15. *Id.* at 135-36.
16. *Id.* at 136.
17. *See* Letter of Jack B. Tate, Acting Legal Adviser, State Department, to Acting Attorney General, Department of Justice (May 19, 1952), *reprinted in* Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 711 (1976).
18. *Id.*
19. *Id.* at 714.
20. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1994).
21. *Id.* § 1606.

Section 1605(a)(2) of the FSIA provides for jurisdiction in cases in which the action is based:

> [1] upon a commercial activity carried on in the United States by a foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[22]

With respect to the first clause of section 1605(a)(2), section 1603(e) of the FSIA defines "commercial activity carried on in the United States by a foreign state" as "commercial activity carried on by such state and having substantial contact with the United States."[23] With respect to the third, or direct effect, clause of section 1605(a)(2), the House Report states that:

> [t]he third situation . . . would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).[24]

Section 18(b), *Restatement* (*Second*) *of the Foreign Relations Law of the United States* sets forth principles for jurisdiction to prescribe a rule of law, and 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 . . . (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; (iv) and the rule is not inconsistent with the principles generally recognized by states that have reasonably developed legal systems.[25]

Comment f to section 18(b) states that subsection (b) requires "more than a mere casual relationship."[26] If subject matter jurisdiction exists under section 1605(a)(2) of the FSIA, section 1330(b) provides that personal jurisdiction exists once proper service of process has been made.[27]

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22. *Id.* § 1605(a)(2).
23. *Id.* § 1603(e).
24. H.R. REP. NO. 94-1487, at 19 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618.
25. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) (1965) [hereinafter SECOND RESTATEMENT].
26. *Id.* § 18(b) cmt. f.
27. See 28 U.S.C. § 1330(b).

In 1980, in *Verlinden B.V. v. Central Bank of Nigeria*, a Dutch corporation sued the Central Bank of Nigeria for anticipatory breach of a letter of credit which was advised and payable by a New York bank.[28] The District Court for the Southern District of New York found that the legislative history of the direct effect clause evidenced congressional intent to create a substantial and foreseeable standard for direct effect analysis under section 1605(a)(2) of the FSIA.[29] The court held that because the plaintiff was a foreign corporation, there was no direct effect in the United States, but the court remarked that a direct effect would be found if the United States were the final destination of payment, the locus of the injury occasioned by the breach, and the home of the beneficiary.[30]

In 1981, in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, the Second Circuit rejected the substantial and foreseeable requirement suggested by the legislative history, dismissing the reference to section 18 of the *Second Restatement* as "a bit of a non sequitur" because it concerned jurisdiction to prescribe rather than jurisdiction to adjudicate.[31] In *Texas Trading*, American trading companies contracted to sell cement to Nigeria.[32] Nigeria was to pay by letters of credit which designated a New York bank as the advising bank to accept presentment and make payment, but which did not designate the bank as the confirming bank.[33] Thus, technically New York was not the place of performance.[34] The court reasoned that because a corporation, as an intangible entity, can only suffer financial loss, "the relevant inquiry under the direct effect clause when the plaintiff is a corporation is whether the corporation has suffered a 'direct' financial loss."[35]

The Second Circuit noted that under the letters of credit the plaintiffs "were to present documents and collect money in the United States" and held as a result that breach of the obligation to pay American beneficiaries of the letters of credit caused a direct effect in

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28. *See* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1286 (S.D.N.Y. 1980).

29. *See id.* at 1297-98 n.66.

30. *See id.* at 1299-1300.

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

32. *See id.* at 303.

33. *See id.* at 304.

34. *See id.* An advising bank gives notification to the beneficiary that a letter of credit has been issued by another bank and the terms of the letter, but does not incur a direct obligation on the letter, while a confirming bank "promises itself to perform the obligation of the issuer." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 704 (4th ed. 1995).

35. *Texas Trading*, 647 F.2d at 312.

the United States.[36] The court reflected that locating the situs of an injury for purposes of determining whether a direct effect has occurred in the United States, particularly when the injury consists of an omission, is "an enterprise fraught with artifice,"[37] and commented:

> Congress in writing the FSIA did not intend to incorporate into modern law every ancient sophistry concerning "where" an act or omission occurs. Conduct crucial to modern commerce—telephone calls, telexes, electronic transfers of intangible debits and credits—can take place in several jurisdictions. Outmoded rules placing such activity "in" one jurisdiction or another are not helpful here.[38]

The court specifically noted that "[w]hether a failure to pay . . . an American corporation overseas creates an effect 'in the United States' under § 1605(a)(2) is not before us."[39]

A majority of the circuits, in contrast to the Second Circuit, followed the approach taken in *Verlinden*, applying the substantial and foreseeable requirement to direct effect analysis as suggested by the legislative history.[40] In 1985, the Fifth Circuit applied the substantial and foreseeable requirement in *Callejo v. Bancomer, S.A.*, a case involving exchange control regulations implemented by Mexico during its financial crisis in the early 1980s which mandated that all deposits in Mexican banks, however denominated, be repaid in pesos at a below market rate of exchange.[41] The court held that a Mexican bank's issuance of certificates of deposit and failure to pay them caused a direct effect in the United States when the bank called the purchasers in the United States, mailed the certificates to them in the United States, and remitted payments through an American bank.[42] The court found that "[the defendant bank] had engaged in a longstanding business relationship with residents of the United States which caused them substantial financial harm" and rejected the argument that because the certificates of deposit designated Mexico as the place of performance the breach did not occur in the United

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36. *Id.*
37. *Id.*
38. *Id.* at 311 n.30.
39. *Id.* at 312.
40. *See* Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988); Callejo v. Bancomer, S.A., 764 F.2d 1101, 1111 (5th Cir. 1985); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329, 332 (9th Cir. 1984); Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1110 (D.C. Cir. 1982); Harris Corp. v. National Iranian Radio & Television, 691 F.2d 1344, 1351 (11th Cir. 1982).
41. *See Callejo*, 764 F.2d at 1104, 1111 n.9.
42. *See id.* at 1112.

States.[43] The court declared that "arcane doctrines regarding the place of payment are largely irrelevant."[44]

In 1988, in *Gould, Inc. v. Pechiney Ugine Kuhlmann*, the plaintiff sued a foreign corporation, in which the Republic of France held majority ownership, for racketeering and misappropriation of trade secrets surrounding the use of the plaintiff's manufacturing technique in a joint venture in France.[45] The Sixth Circuit, applying the substantial and foreseeable requirement, held that economic injury to a U.S. corporation, as a result of a foreign state's commercial activity outside the United States, satisfies the direct effect clause "if the corporation was the primary direct, rather than indirect, victim of the conduct, and if injurious and significant financial consequences to that corporation were the foreseeable, rather than fortuitous, result of the conduct."[46] In rejecting the defendants' contention that corporate domicile in the United States provided an insufficient basis for finding a direct effect when the plaintiff claimed a financial loss due to competition in foreign markets, the court stated that "it is unlikely that Congress intended to create havens abroad for thieves of this country's industrial secrets."[47]

In 1991, in *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, a Swedish corporation, as successor to the rights of a Mexican subcontractor to whom it had chartered equipment for use in offshore drilling, sued the contractor and employer, which were instrumentalities of the Mexican government, for wrongful breach of the subcharter agreement.[48] Applying the substantial and foreseeable requirement, the Fifth Circuit held that because the plaintiff was a Swedish corporation, any loss it had suffered affected Sweden rather than the United States; that the confiscation in the United States and sale of the chartered equipment to the plaintiff's sister corporation, who then removed it from the United States, was insufficient to constitute a substantial direct effect; and that the unilateral action of the plaintiff to guarantee a loan at a New York bank as a result of the foreign state's commercial actions was insufficient to constitute a substantial and

43. *Id.*
44. *Id.*
45. *See Gould*, 853 F.2d at 447-48.
46. *Id.* at 453 (citing *Callejo*, 764 F.2d at 1111-12).
47. *Id.*
48. *See* Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 382-84 (5th Cir. 1991).

foreseeable direct effect.[49] The court noted its agreement with the District of Columbia Circuit that principles of personal jurisdiction properly guide interpretation of the FSIA[50] and cited the principle that "'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.'"[51]

In 1992, in *Siderman de Blake v. Republic of Argentina*, the plaintiffs claimed damages arising from the torture of one plaintiff and expropriation of the plaintiffs' corporation by the Argentine military following the overthrow of the government in March of 1976.[52] The lower court dismissed the expropriation claim based on the act of state doctrine without reaching the issue of subject matter jurisdiction under the FSIA.[53] The Ninth Circuit reversed and remanded for further proceedings, finding that the threshold determination of jurisdiction must be made before the act of state doctrine is applicable.[54] Applying the substantial and foreseeable requirement to the expropriation claim, the court declared that "'[m]ere financial loss' suffered by a person, whether individual or corporate, in the United States is not, in itself, sufficient to constitute a 'direct effect.'"[55] The court added that "in cases where a plaintiff's claim is for breach of a contract providing that payment or performance must be made in the United States, the 'direct effect' requirement has been deemed satisfied."[56] The court determined that

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49. *See id.* at 390.

50. *See id.* at 390-91 (citing *Maritime Int'l Nominees Establishment*, 693 F.2d at 1108). In *Maritime Int'l Nominees Establishment*, the District of Columbia Circuit held that the Republic of Guinea did not purposefully avail itself of the privilege of conducting activity within the forum by its participation in a joint venture with a Liechtenstein corporation that involved a market study and meetings between the parties in the United States. *See* 693 F.2d at 1095, 1107. The court stated that a finding of personal jurisdiction under the FSIA, which would depend in part on finding that an exception to immunity applied, must comport with the demands of due process. *See id.* at 1105 n.18. Applying the substantial and foreseeable requirement, the court stated, "we think that an effect cannot be deemed direct if it occurs solely because of conduct not reasonably contemplated by the commercial activity." *Id.* at 1111.

51. *Stena Rederi*, 923 F.2d at 391 n.15 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

52. *See* Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 703-04 (9th Cir. 1992).

53. *See id.* at 704. The act of state doctrine provides that U.S. courts will not pass judgment on the validity of the public acts of a recognized foreign sovereign within its own territory. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964).

54. *See Siderman de Blake*, 965 F.2d at 706.

55. *Id.* at 710.

56. *Id.* (citing Meadows v. Dominican Republic, 817 F.2d 517, 523 (9th Cir. 1987); Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989); L'Europeenne de Banque v. Republica de Venezuela, 700 F. Supp. 114, 121 (S.D.N.Y. 1988)).

if the corporation's articles of incorporation or by-laws required corporate dividends to be paid at the shareholder's place of residence, the United States, then the direct effect requirement would be satisfied.[57] The court noted that the exercise of jurisdiction under the FSIA must comport with the constitutional requirements of due process.[58]

The same year, in *Republic of Argentina v. Weltover, Inc.*, Argentina asserted sovereign immunity in a suit arising out of Argentina's unilateral rescheduling of payments on dollar-denominated bonds it had issued to the plaintiffs.[59] Addressing the direct effect clause of the commercial activity exception to the FSIA for the first time, the Supreme Court found that the direct effect clause contains no requirement that the effect be "substantial" or "foreseeable," but held that an effect is direct if it follows "'as an immediate consequence of the defendant's . . . activity.'"[60]

The Supreme Court rejected the Second Circuit's statement that Congress would not have wanted New York's financial preeminence to be diminished by the failure to pay bonds, stating that "the question . . . is not what Congress 'would have wanted' but what Congress enacted in the FSIA."[61] The Court concluded that "[b]ecause New York was . . . the place of performance for Argentina's ultimate contractual obligations, the rescheduling of those obligations necessarily had a 'direct effect' in the United States: Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming."[62]

The Supreme Court entertained Argentina's contention that the minimum contacts test of *International Shoe Co. v. Washington* operates as an aid in interpreting the direct effect clause,[63] expressly declining to decide the issue of whether Argentina was a person for purposes of the Due Process Clause of the Fifth Amendment, but so assuming for purposes of interpretation.[64] The Court found that Argentina had "purposefully availed" itself of the privilege of

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57. *See id.* at 711.
58. *Id.* at 704 n.4.
59. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 609-10 (1992).
60. *Id.* at 618 (quoting Republic of Argentina v. Weltover, Inc. 941 F.2d 145, 152 (2d Cir. 1991)).
61. *Id.* (quoting *Weltover*, 941 F.2d at 153).
62. *Id.* at 619.
63. *See id.* at 619 n.2 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
64. *See Weltover*, 504 U.S. at 316 (citing South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966)).

conducting activities within the United States under a minimum contacts analysis.[65]

Immediately after deciding *Weltover*, the Supreme Court vacated and remanded for further consideration the Second Circuit's decision in *Antares Aircraft, L.P. v. Federal Republic of Nigeria*.[66] In *Antares Aircraft*, an aircraft owned by the plaintiff was detained in Nigeria pending the payment of airport landing and parking fees allegedly incurred by a foreign corporation which had leased the aircraft from the plaintiff.[67] The plaintiff alleged that it subsequently sent payment for the airport fees from its New York bank account to Nigeria and payment for Nigeria's legal expenses to California before securing the release of the aircraft.[68] By the time the aircraft was released, it had suffered physical damage from exposure to the elements.[69] The plaintiff sued for damages.[70] The Second Circuit rejected jurisdiction under the direct effect clause, finding that all of the legally significant acts had taken place in Nigeria.[71]

Upon reconsideration in light of the *Weltover* decision, the Second Circuit determined that the Supreme Court had not overruled the requirement that a legally significant act must occur in the United States in order for an effect to be sufficiently "direct" and sufficiently "in the United States" for purposes of section 1605(a)(2) of the FSIA.[72] The court held that mere financial loss as a result of commercial activity abroad is insufficient to cause a direct effect in the United States under section 1605(a)(2) and affirmed its prior judgment.[73] Although Judge Altimari, the author of the Second Circuit's original decision in *Antares Aircraft*, stated in dissent that the Supreme Court had remanded the case for a contrary decision,[74] the Supreme Court subsequently denied certiorari.[75]

Several months after *Weltover* was decided, the District Court for the Southern District of Florida, in *Ampac Group, Ltd. v. Republic of Honduras*, held that after *Weltover* an effect need only be "slight," and the contact only "tangential," to fall within the direct effect clause of

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65. *See id.* at 619-20 n.2 (quoting Burger King v. Rudzewicz, 471 U.S. 462, 475 (1985)).
66. *See* Antares Aircraft, L.P. v. Federal Republic of Nigeria, 505 U.S. 1215 (1992).
67. *See* Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 34 (2d Cir. 1993).
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.*
72. *See Antares Aircraft*, 999 F.2d at 35-36.
73. *See id.* at 36.
74. *See id.* at 37 (Altimari, J., dissenting).
75. *See* Antares Aircraft, L.P. v. Federal Republic of Nigeria, 510 U.S. 1071 (1994).

section 1605(a)(2).[76] In *Ampac*, an American corporation sued the Republic of Honduras for breach of a sales contract for a Honduran cement company.[77] The court held that the expenditure of substantial sums of money, injury to an American corporation's business reputation, and lost profits constituted a direct effect under section 1605(a)(2).[78] The court also applied a minimum contacts analysis and concluded that the exercise of personal jurisdiction would not offend the constitutional requirements of due process.[79] The Eleventh Circuit affirmed.[80]

In *Chuidian v. Philippine National Bank*, also decided shortly after *Weltover*, the plaintiff held interests in California businesses that had obtained a settlement agreement from an instrumentality of the Republic of the Philippines secured by a letter of credit issued by the Philippine National Bank in Manila.[81] Shortly after obtaining the settlement, a Philippine commission, established to recover the "ill-gotten wealth" accumulated by President Ferdinand Marcos and his associates, prohibited payment of the letter of credit.[82] The lower court dismissed the plaintiff's suit after the Philippine National Bank refused payment, determining that the place of performance of the letter of credit was the Philippines and that Philippine law applied, rendering the letter of credit unenforceable by reason of supervening illegality.[83] The trustee in bankruptcy for the plaintiff appealed, arguing that because the letter of credit was payable "at the counters of" the Philippine National Bank's Los Angeles branch, which was nominated as an advising bank, U.S. law should apply, citing *Weltover* in support of the argument that the place of performance includes the expected location of payment.[84] The Ninth Circuit affirmed the dismissal, holding that designation of place of payment under a letter of credit does not alter the rule that place of performance is the place of issuance of the letter of credit, unless the payor bank is the confirming and not merely advising bank, and stated that *Weltover* had not articulated a rule identifying the place of performance of

76. Ampac Group, Ltd. v. Republic of Honduras, 797 F. Supp. 973, 975 (S.D. Fla. 1992).
77. *See id.*
78. *See id.* at 977.
79. See *id.* at 979.
80. *See* Ampac Group, Ltd. v. Republic of Honduras, 40 F.3d 389 (11th Cir. 1994).
81. *See* Chuidian v. Philippine Nat'l Bank, 976 F.2d 561, 562 (9th Cir. 1992).
82. *Id.*
83. *See id.* The illegality defense is based upon the refusal of courts to enforce an agreement that purports to bind parties to engage in conduct prohibited by law. *See* E. ALLAN FARNSWORTH, CONTRACTS § 5.5 (2d ed. 1990).
84. *See Chuidian*, 976 F.2d at 562-64.

letters of credit.[85] Judge Fernandez dissented, stating that *Weltover* had concluded that the place of payment was the place of performance in an analogous situation.[86]

In 1994, in *Commercial Bank of Kuwait v. Rafidain Bank*, the plaintiff bank was a member of a lending syndicate which had loaned money to defendant Rafidain Bank, an Iraqi government agency.[87] After Iraq invaded Kuwait in 1990, Iraq suspended payments under the loan agreements.[88] Asserting that its actions did not fall under the direct effect clause of section 1605(a)(2), Rafidain Bank argued that "because the payments were to be made not directly to [the plaintiff] but to New York bank accounts held by the lead banks of the various lending syndicates[,] . . . the United States [was] not the place of performance of any contractual obligations owed to [the plaintiff]."[89] The Second Circuit held that despite defendants' reliance on an agent to collect payment, the agreement at issue required the Iraqi bank defendants to remit funds in New York and their failure to do so caused a direct effect in the United States.[90]

In *Goodman Holdings v. Rafidain Bank*, decided shortly after *Commercial Bank*, the District of Columbia Circuit held that failure to honor letters of credit did not have a direct effect within the meaning of the FSIA when the United States was not designated as the place of performance under the letters of credit, but was merely the voluntary place of performance for earlier installment payments.[91] The court distinguished *Weltover* on the basis that the defendant in *Weltover* was contractually required to make payment into a designated New York bank account.[92] Judge Wald issued a concurring opinion indicating that he would have found a direct effect if a long-standing and consistent practice between the parties had established a place of payment in the United States.[93]

In *United World Trade, Inc. v. Mangyshlakneft Oil Production Ass'n*, decided later the same year, the plaintiff buyer's agreement with the defendant seller required payment "in U.S. Dollars" by a

85. *See id.* at 563.
86. *See id.* at 566.
87. *See* Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 239 (2d Cir. 1994).
88. *See id.*
89. *Id.* at 241.
90. *See id.*
91. *See* Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146-47 (D.C. Cir. 1994).
92. *See id.* at 1146.
93. *See id.* at 1147.

letter of credit issued by a "European/USA Bank."[94] The plaintiff contended that as a result, a U.S. bank necessarily had to be involved in the payment process for purposes of currency conversion.[95] The lower court explicitly rejected the "slight and tangential" analysis of *Ampac* and dismissed for lack of jurisdiction.[96] The Tenth Circuit applied the legally significant act requirement to affirm the lower court's decision, holding that the temporary presence of funds in the United States for currency conversion did not create a direct effect under the FSIA because "no part of the contract . . . was to be performed in the United States" and the "defendants' performance of their contractual obligations had no connection at all with the United States."[97] The court distinguished *Weltover* in that the contract in *Weltover* called for payments to be made in the United States and the unilateral act of rescheduling those payments caused a direct effect in the United States.[98] In responding to the plaintiff's additional argument that it had suffered financial harm in the United States in the form of lost profits, the court stated that such an effect, although perhaps direct, could not be characterized as occurring "in the United States."[99] The court commented that "Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage to reach the shores of the United States."[100]

In 1997, the Ninth Circuit noted its agreement with the Second, Eighth, and Tenth Circuits that *Weltover* had not overruled the legally significant act requirement.[101] In *Adler v. Federal Republic of Nigeria*, the plaintiff sued the Republic of Nigeria for breach of an agreement according to which the plaintiff was to provide banking services in exchange for a commission that would be paid into a non-Nigerian bank account designated by the plaintiff.[102] The Ninth Circuit applied the legally significant act requirement to hold that because the agreement required that payment would be made into a non-Nigerian bank account designated by the plaintiff, when the

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94. *See* United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232, 1237 (10th Cir. 1994).

95. *See id.* at 1237.

96. *See* United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 821 F. Supp. 1405, 1408-09 (D. Colo. 1993).

97. *See United World Trade*, 33 F.3d at 1237.

98. *See id.*

99. *Id.* at 1238-39.

100. *Id.* at 1238.

101. *See* Adler v. Federal Republic of Nigeria, 107 F.3d 720, 727 n.4 (9th Cir. 1997) (citing *Antares Aircraft*, 999 F.3d at 36; General Elec. Capital Corp. v. Grossman, 991 F.2d 1376, 1385 (8th Cir. 1993); *United World Trade*, 33 F.3d at 1239).

102. *See id.* at 722.

plaintiff chose a bank account in New York, the foreign state was contractually obligated to make payment in New York and failure to do so caused a direct effect in the United States.[103] The fact that the plaintiff originally had chosen a bank account in the Cayman Islands did not change this result, because nothing in the agreement prevented the plaintiff from amending his choice of bank accounts.[104]

The UCP 500 states that:

> Credits, by their nature, are separate transactions from the sales or other contract(s) on which they may be based and banks are in no way concerned with or bound by such contract(s), even if any reference whatsoever to such contract(s) is included in the Credit. Consequently, the undertaking of a bank to pay, accept and pay Draft(s) or negotiate and/or to fulfil any other obligation under the Credit, is not subject to claims or defenses by the Applicant resulting from his relationships with the Issuing Bank or the Beneficiary.[105]

The UCP 500 continues that "[a] Beneficiary can in no case avail himself of the contractual relationships existing between the . . . Applicant and the Issuing Bank."[106]

III. THE NOTED DECISION

The court in the noted case began its discussion with a broad analysis of the FSIA and its commercial activity exception, noting that because the parties did not dispute that the Bank of China was a foreign state engaged in commercial activity, the sole question for appeal was whether Voest-Alpine's cause of action was based on any of the Bank of China's actions falling under the first or third clause of section 1605(a)(2).[107] The court noted that Voest-Alpine's cause of action was based upon issuance of the letter of credit, presentment in accordance with the terms of the letter of credit, and the Bank of China's breach of the letter of credit by failing to pay.[108] The court then narrowed its analysis by asking whether the Bank of China's failure to pay constituted commercial activity carried on in the United States, falling under the first clause of section 1605(a)(2), or whether the bank's failure to pay constituted an act outside the United States in

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103. *See id.* at 727.

104. *See id.* at 729.

105. *Uniform Customs and Practice for Documentary Credits*, International Chamber of Commerce Publication No. 500, art. 3(a) (Jan. 1, 1994) [hereinafter UCP 500].

106. *Id.* art. 3(b).

107. *See* Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 889-90 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 591 (1998).

108. *See id.* at 892.

connection with commercial activity elsewhere and that act caused a direct effect in the United States, falling under the third clause of section 1605(a)(2).[109] Because the court found jurisdiction under the third, or direct effect, clause, it did not reach an analysis of jurisdiction under the first clause.[110]

The court stated that "[w]hether any given commercial activity abroad has a direct effect in the United States is a question that generally admits of no easy, clear-cut answer."[111] The court noted the Supreme Court's test announced in *Weltover* that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity," as well as the Supreme Court's rejection in *Weltover* of the requirement that a direct effect be substantial and foreseeable.[112] The court stated that, consistent with *Weltover*, its precedent in *Callejo* held that a financial loss incurred in the United States by an American plaintiff, if an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the direct effect clause.[113] The court also cited *Stena Rederi, Gould, and Texas Trading* in support of this proposition.[114]

The court then addressed the Bank of China's argument that the foreign state must have engaged in a legally significant act in the United States to warrant a finding of direct effect in the United States.[115] The court stated that the direct effect clause of section 1605(a)(2) does not require a legally significant act in the United States in order to support jurisdiction.[116] The court reasoned that nothing in the text of the direct effect clause supports such a requirement.[117] The court noted that in *Weltover*, the Supreme Court rejected the idea that an effect must be substantial and foreseeable to be a direct effect and expressly admonished the circuit courts not to add "any unexpressed requirements" to the direct effect clause.[118] The court concluded that because the legally significant act requirement is unexpressed in section 1605(a)(2), it was renounced by *Weltover*.[119]

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109. *See id.*
110. *See id.* at 892-93 n.8.
111. *Id.* at 893.
112. *Voest-Alpine*, 142 F.3d at 893 (quoting *Weltover*, 504 U.S. at 618).
113. *See id.*
114 *See id.*
115. *See id.* at 894.
116. *See id.*
117. *See id.*
118. *Voest-Alpine*, 142 F.3d at 894 (quoting *Weltover*, 504 U.S. at 618).
119. *See id.*

The decision of the court in the noted case criticized courts still holding that, because the Supreme Court found a legally significant act in *Weltover*, it had not overruled the legally significant act requirement.[120] The court asserted that the existence of a legally significant act was not essential to the holding in *Weltover* and added that the Second Circuit's decision in *Commercial Bank* appeared to abandon the requirement, because the legally significant act in that case was not the basis of the cause of action.[121] The court found that because *Weltover* held that the threat to New York's financial preeminence posed by the failure to pay bonds was "too remote and attenuated" to support jurisdiction under the direct effect clause, *Weltover* does preclude jurisdiction under the direct effect clause when "only speculative, generalized, immeasurable, and ultimately unverifiable effects occur in the United States," but does not support the legally significant act requirement.[122] The court concluded by reasoning that requiring a legally significant act in the United States merged the direct effect clause with the second clause of section 1605(a)(2), which provides for jurisdiction over causes of action based upon an act "performed in the United States in connection with a commercial activity of the foreign state elsewhere."[123] Under the legally significant act requirement, plaintiffs "would always opt to seek jurisdiction under the 'lesser included' second clause," obviating the need for basing the action on both an act inside the United States and an act outside the United States, which the court interpreted the legally significant act analysis to require.[124] The court asserted that Congress did not intend "such a meaningless construction of the commercial activity exception."[125]

The court in the noted case then turned to the Bank of China's argument that the Fifth Circuit's precedent in *Callejo* was distinguishable on its facts because in *Callejo* a continuous series of transactions formed the basis for finding a direct effect and the place of payment was in the United States.[126] The court declared that its holding in *Callejo* did not turn on whether the place of payment was in the United States.[127] The court quoted portions of the *Callejo* decision that rejected "arcane doctrines regarding the place of

120. *See id.*
121. *See id.* at 894 n.9.
122. *Id.* at 894-95 n.10.
123. *Voest-Alpine*, 142 F.3d at 895 (quoting 28 U.S.C. § 1605(a)(2)).
124. *Id.*
125. *Id.*
126. *See id.*
127. *See id.*

payment" and that stated that the court did not "perceive any material difference whether the legal place of payment was Mexico or the United States."[128] The court stated that *Callejo* instead focused on whether the effects of the defendant's activity were felt in the United States.[129] The court also stated that the viability of its decision in *Callejo* did not depend on the continuous nature of the foreign state's activity in the United States.[130] The court equated such a requirement with the substantiality requirement rejected by *Weltover* and stated that the Supreme Court's rejection of the substantiality and foreseeability requirements in *Weltover* simply lowered the standard for finding jurisdiction under the direct effect clause.[131] The court opined that after *Weltover*, "a nontrivial effect in the United States need only be an immediate consequence of the foreign state's activity to support jurisdiction under the [direct effect] clause."[132]

Applying *Callejo* to the noted case, the court held that because it was the "customary practice" of the Bank of China to send payments on letters of credit wherever the presenting party instructed and because Voest-Alpine had requested payment in a Houston bank account, a nonreceipt of funds resulted as an "immediate consequence" of the Bank of China's failure to pay Voest-Alpine and caused a direct effect in the United States.[133] The court noted that the Bank of China provided no evidence that there was any bank account outside the United States into which Voest-Alpine might have received payment under the letter of credit.[134] The court characterized the direct effect by stating that "[Voest-Alpine did] not recover payment under the letter of credit for goods it shipped from the United States to China."[135] The court concluded that "a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect sufficient to support jurisdiction under the third clause of the commercial activity exception to the FSIA."[136]

Judge Reavley concurred in the judgment, asserting that the decision was consistent with Fifth Circuit precedent that had not been

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128. *Voest-Alpine*, 142 F.3d at 895 (quoting Callejo v. Bancomer, S.A., 764 F.2d 1101, 1112 (5th Cir. 1985)).
129. *See id.*
130. *See id.*
131. *See id.* at 896.
132. *Id.*
133. *Voest-Alpine*, 142 F.3d at 895; *see also Callejo*, 764 F.2d at 1112.
134. *See Voest-Alpine*, 142 F.3d at 896.
135. *Id.*
136. *Id.* at 897.

overruled by *Weltover*.[137] Judge Reavley cited *Callejo*'s express assertion that it gave no decisive relevance to place of payment.[138] Judge Reavley added, however, that he would not consider a consequential loss, "the result and not an element of the claim itself," to be a "direct" effect.[139] Judge Reavley reasoned that if mere financial loss satisfied the statute, an American plaintiff would only have to prove commercial activity.[140] Judge Reavley quoted the Tenth Circuit's reasoning in *United World Trade* that such an interpretation "would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state."[141] Judge Reavley cited the decisions in *Antares Aircraft* and *Goodman Holdings* as being in accord with this reasoning.[142] He added that the Second Circuit in *Antares Aircraft* had reached this conclusion by applying a legally significant act requirement.[143] Judge Reavley also noted Judge Wald's concurrence in *Goodman Holdings*, which stated that contravention of a long-standing and consistent practice between the parties might rise to the level of a direct effect.[144]

IV. ANALYSIS AND CRITICISM

The decision in the noted case applies an expansive interpretation of the FSIA, highlighting a number of unresolved issues surrounding interpretation of the direct effect clause of section 1605(a)(2) of the FSIA. The Supreme Court's decision in *Weltover* has done little to clarify what courts have called "problematic,"[145] "'obtuse,'"[146] "labyrinthine,"[147] "vague,"[148] "hopelessly ambiguous,"[149] "hardly a model of statutory clarity,"[150] "a constant

137. *See id.* (Reavley, J., concurring).
138. *See id.*
139. *Voest-Alpine*, 142 F.3d at 897 (Reavley, J., concurring).
140. *See id.*
141. *Id.* (quoting United World Trade v. Mangyshlakneft Oil, 33 F.3d 1232, 1239 (10th Cir. 1994)).
142. *Id.*
143. *See id.*
144. *See Voest-Alpine*, 142 F.3d at 897.
145. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 311-12 (2d Cir. 1981).
146. *Callejo*, 764 F.2d at 1107 (5th Cir. 1985).
147. Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo del Sindicato Revolutionario de Trabajadores Petroleros de la Republica Mexicana, S.C., 923 F.2d 380, 382 (5th Cir. 1991).
148. *Id.* at 385.
149. *United World Trade*, 33 F.3d at 1237.
150. *Stena Rederi*, 923 F.2d at 385.

bane of the federal judiciary,"[151] and "an enterprise fraught with artifice."[152] Following *Weltover*'s decision to deny effect to the congressional intent suggested by the legislative history of the FSIA, courts have encountered considerable difficulty in applying the "immediate consequence" test announced in *Weltover*.[153]

The Supreme Court's rejection of the suggestion by the legislative history that the direct effect clause should be interpreted consistently with section 18 of the *Second Restatement*, because section 18 relates to jurisdiction to prescribe rather than jurisdiction to adjudicate,[154] renders the FSIA inconsistent with federal antitrust law. The Foreign Trade Antitrust Improvements Act of 1982 resolved a similar conflict among the circuits regarding the scope of the Sherman Antitrust Act's "direct effect" clause.[155] The Foreign Trade Antitrust Improvements Act amended the Sherman Antitrust Act to require a "direct, substantial, and reasonably foreseeable effect" in the United States in order for jurisdiction to be exercised.[156] Further complicating matters is the *Restatement (Third) of the Foreign Relations Law of the United States* (*Third Restatement*), which explicitly addresses a state's jurisdiction to adjudicate and states that exercise of jurisdiction is reasonable if "the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity."[157]

The Supreme Court's decision to disregard the legislative history is sound insofar as the language of the FSIA does not explicitly contain a substantiality and foreseeability requirement, and thus the requirement does not carry legislative force. Courts following *Weltover*, however, have interpreted the Supreme Court's holding to reject outright the validity of any substantiality or foreseeability

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151. *Callejo*, 764 F.2d at 1107.

152. *Texas Trading*, 647 F.2d at 312.

153. *See United World Trade*, 33 F.3d at 1237 (acknowledging that absent the "guideposts" of substantiality and foreseeability, the court "struggled to identify objective standards that would aid in determining what does and does not qualify as a 'direct effect in the United States'"). *See generally* David E. Gohlke, *Clearing the Air or Muddying the Waters? Defining "a Direct Effect in the United States" Under the Foreign Sovereign Immunities Act after* Republic of Argentina v. Weltover, 18 HOUS. J. INT'L L. 261 (1995).

154. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992).

155. *See* Sharon D. Ruccolo, *The Foreign Sovereign Immunities Act: Encouraging Foreign Plaintiffs to Sue Foreign Sovereigns in American Courts*, 25 RUTGERS L.J. 517, 546 (1994).

156. Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1998).

157. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (1986) [hereinafter THIRD RESTATEMENT].

requirement in making jurisdictional determinations under the FSIA.[158] This construction conflicts with general principles of jurisdiction to adjudicate as set forth in the *Third Restatement* and creates an extraordinary jurisdictional basis over foreign states which conflicts with the principles of comity and harmony that the sovereign immunity rule and the FSIA are designed to embody.[159] Judge Reavley's concurrence in the noted case emphasizes the danger of rendering mere commercial activity sufficient to support jurisdiction,[160] and *United World Trade* echoes this concern by stating that "Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage to reach the shores of the United States."[161]

The reasoning of the court in the noted case that *Weltover* renounced the legally significant act requirement is inconsistent. The court reasons that because *Weltover* "admonished" the circuit courts not to add "any unexpressed requirements" to the direct effect clause and because the legally significant act requirement is unexpressed in the statute, the Supreme Court renounced the legally significant act requirement, along with the substantial and foreseeable requirement and any inquiry into what Congress "would have wanted."[162] However, this renunciation is itself unexpressed in the *Weltover* decision. *Weltover* does not expressly "admonish" the circuit courts not to add unexpressed requirements to the statute, but rather states that "we reject the suggestion that [the direct effect clause] contains any unexpressed requirement of 'substantiality' or 'foreseeability.'"[163] The Court's failure to expressly reject the legally significant act analysis used by the Second Circuit in *Weltover*, in light of the Court's

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158. *See, e.g.*, Ampac Group, Ltd. v. Republic of Honduras, 797 F. Supp. 973, 977 (S.D. Fla. 1992); *cf.* Nicolas J. Evanoff, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976: Ending the Chaos in the Circuit Courts*, 28 HOUS. L. REV. 629, 652 (1991) (noting that foreseeability is insured by a narrow construction of "direct" in section 1605(a)(2) and diminished by a broad construction).

159. *See* Colonial Bank v. Compagnie Generala Maritime et Financiere, 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986), in which the court stated:

> Given the proclivity of the United States population to devise lawsuits for every contemps, the harassment of foreign sovereigns by exposure to the jurisdiction of United States courts would no doubt be considerable. Thus the statutory clause limiting jurisdiction over foreign sovereignties to instances of "direct" effect serves a valuable goal of foreign relations and should not be nullified by freehanded court interpretation.

160. *See* Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 897 (5th Cir. 1998) (Reavley, J., concurring).

161. *United World Trade*, 33 F.3d 1232 at 1238.

162. *See Voest-Alpine*, 142 F.3d at 894.

163. *Weltover*, 504 U.S. at 618.

express rejection of the substantiality and foreseeability requirement and of the Second Circuit's focus on what "Congress would have wanted," actually lends itself to the conclusion that the Court accepted the legally significant act requirement.[164] The Court in fact quoted its "immediate consequence" test from the Second Circuit's decision.

Further, the Second Circuit did not abandon the legally significant act requirement in *Commercial Bank* as the court in the noted case suggested, but merely found that the legally significant act need not directly affect the plaintiff as long as it has a direct effect in the United States upon which the claim is based in whole or in part.[165] In any event, the Second Circuit clearly affirmed the legally significant act requirement in *Hanil Bank v. PT. Bank Negara Indonesia* shortly after the noted case was decided under circumstances closely paralleling the facts in the noted case.[166]

The court in the noted case argued that if a legally significant act requirement applied, the second clause of section 1605(a)(2), providing for jurisdiction over acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere," would become a "lesser included" clause requiring less proof than the direct effect clause and rendering the direct effect clause inconsequential.[167] The court referred to this as a "meaningless" construction which Congress did not intend.[168] Once again, the strict constructionist logic applied to the direct effect clause renders the court's reasoning inconsistent on this point, because the Supreme Court in *Weltover* expressly rejected the validity of congressional intent, stating that the issue was not what Congress would have wanted, but what it enacted in the FSIA.[169]

The legally significant act requirement is a function of the requirement that the effect be "direct" and "in the United States." Requiring a legally significant act in the United States insures that the act is sufficiently "direct" and sufficiently "in the United States" to

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164. *See id.*

165. *See* Commercial Bank of Kuwait v. Rafidain Bank, 15 F.3d 238, 241 (2d Cir. 1994).

166. *See* Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127, 132 (2d Cir. 1998) (holding that defendant bank's actions outside the United States in failing to pay on a letter of credit caused a direct effect in the United States because the plaintiff bank was entitled under the letter of credit to indicate how it would be reimbursed, and it designated payment to its New York bank account).

167. *Voest-Alpine*, 142 F.3d at 895.

168. *See id.*

169. *See also* H.R. REP. NO. 94-583, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (acknowledging that all of the cases covered by the second clause might also be covered by the first clause).

support the exercise of jurisdiction under the FSIA.[170] Although such a requirement is not expressed in the statute, it is nonetheless an interpretation of "direct" and "in the United States," and not an additional requirement.

The court relied heavily upon *Callejo* as precedent which mandated the result in the noted case.[171] Contrary to the conclusion of the court in the noted case, however, *Callejo* merely held that the place of payment is "largely irrelevant," not that the place of payment is entirely irrelevant.[172] Further, the court in *Callejo* found that "a longstanding business relationship with residents of the United States which caused them substantial financial harm" caused a direct effect in the United States.[173] This echoes Judge Wald's concurrence in *Goodman Holdings* that a long-standing and consistent practice between the parties might establish a direct effect in the United States.[174] The court in the noted case went further, however, finding that a customary practice of the defendant alone established a direct effect in the United States when the plaintiff requested payment into a bank account in the United States.[175]

The legally significant act requirement protects the direct effect clause from reaching every action, including torts, which causes financial loss to a party whose domicile or principal place of business is in the United States. The holding in the noted case supports the principle that courts must exercise jurisdiction under the FSIA over any instrumentality of a foreign government that breaches a contract made anywhere in the world with an American corporation.[176] This would be a truly extraordinary jurisdictional basis and would violate international law by embodying the passive personality principle with respect to corporations in their relationships with foreign states.[177] As

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170. *See* Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 35-36 (2d Cir. 1993).

171. *See Voest-Alpine*, 142 F.3d at 893-97.

172. *See Callejo*, 764 F.2d at 1112.

173. *Id.*

174. *See* Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1147 (D.C. Cir. 1994) (Wald, F., concurring).

175. *See Voest-Alpine*, 142 F.3d at 896.

176. *See id.* at 893. In *Callejo*, the Fifth Circuit carefully distinguished cases in which an American plaintiff was injured overseas, because the effects in such cases were not "'direct and foreseeable.'" 764 F.2d at 1111 (citing Australian Gov't Aircraft Factories v. Lynne, 743 F.2d 672, 674-75 (9th Cir. 1984); Harris v. VAO Intourist, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979); Upton v. Empire of Iran, 459 F. Supp. 264, 266 (D.C. 1978)). Perhaps after *Weltover* the Fifth Circuit would find a direct effect under such circumstances. *But see Voest-Alpine*, 142 F.3d at 895, n.11.

177. The *Third Restatement* addresses the passive personality principle in a comment:

the Second Circuit in *Texas Trading* noted, a corporation can only be injured financially, and since this injury occurs most logically at its principal place of business, finding a direct effect based upon financial loss alone results in exercising jurisdiction based wholly upon the nationality of corporations.[178]

The reasoning of the court in the noted case is flawed because it confuses the connection between the underlying sale agreement and the letter of credit and thus misconstrues the connection between the legal basis for the claim and the United States. The claim is based, as a matter of law, upon the Bank of China's failure to pay the amount due on the letter of credit after proper presentment.[179] The Bank of China, however, had no contractual obligation to pay the letter of credit in the United States.[180] Therefore, lack of payment had no legal relationship to the United States other than that the plaintiff was an American corporation that suffered an economic loss due to the breach. The letter of credit was issued in China, the seller's performance took place in China, and presentment was made in China.[181] The court seems to conclude that while a corporation can

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> The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality.

THIRD RESTATEMENT § 421 cmt. g. Compare the Second Circuit's remarks in *Antares Aircraft*:

> If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states. Many commercial disputes . . . can be pled as the torts of conversion or fraud and would . . . result in litigation concerning events with no connection with the United States other than the citizenship or place of incorporation of the plaintiff. Similarly, personal injury actions based on torts with no connection with this country, except for the plaintiff's citizenship, might be brought . . . . For example, an American citizen injured in a foreign city by a government-owned bus company might sue here if the commercial activity exception is triggered solely by the fact that the citizen's wealth is diminished by the accident. We find it difficult to characterize such an effect, standing alone, as "direct" or to read into this otherwise somewhat restrictive legislation an all-encompassing jurisdiction for foreign torts.

Antares Aircraft, 999 F.2d at 36-37.

178. Compare Article 14 of the French Civil Code, which provides, "[a]n alien, even if not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him . . . in a foreign country toward French persons," C. CIV. art. 14, rejected as an extraordinary jurisdictional basis among Member States of the European Union by the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, art. 3, 1978, O.J. (L 304) 77.

179. *See Voest-Alpine*, 142 F.3d at 892.

180. *See Goodman Holdings*, 26 F.3d at 1145-46.

181. *See Voest-Alpine*, 142 F.3d at 890.

conduct business throughout the world, it suffers economic loss only at its principal place of business.[182] This is clearly fictional, however, and absent some legally significant act in the United States, the economic loss felt in the United States is more properly construed as an indirect effect, rather than a direct effect.[183] Voest-Alpine suffered a direct effect at the place of performance when that performance was not forthcoming and a secondary effect at its principle place of business. Although conclusive weight should not be given the place of payment, there is nothing "arcane" about construing an agreement that states no place of payment as not requiring payment in a particular place or about protecting the voluntary policy of a bank to make payment wherever convenient for its beneficiaries without incurring exposure to foreign lawsuits as a result. An explanation for the court's reasoning can perhaps be found in its statement of the actual direct effect it found in the noted case, that "[Voest-Alpine did] not recover payment under the letter of credit for goods it shipped from the United States to China."[184] This passage suggests that the court found that the letter of credit had induced the plaintiff to ship goods out of the United States and that this constituted part of the direct effect. This ignores the principle that the letter of credit and the underlying sale agreement are separate obligations, indicated in the letter of credit agreement itself by reference to the UCP 500.[185]

The court's reasoning in effect allows the unilateral act of the plaintiff, in combination with the merely fortuitous practice of the Bank of China, to expose the Bank of China to the jurisdiction of the United States. This raises the issue of whether a foreign state is a person within the meaning of the Due Process Clause of the Fifth Amendment, requiring a court to conduct an analysis in each case of whether the defendant had such minimum contacts with the forum that the exercise of jurisdiction would comport with notions of fair play and substantial justice.[186] The FSIA states that when engaged in commercial activity, a foreign state is liable "in the same manner and

182. *See id.* at 893, 895-97.

183. *Cf.* Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1514-15 (D.D.C. 1988) (holding that the financial effect of a contractual breach is not directly felt in the United States when a contract is made in a foreign state and the plaintiff subsequently travels to the United States). *See generally* Evanoff, *supra* note 158, at 652 (noting that the narrower the construction of "direct," the more foreseeability is insured, and vice versa).

184. *Voest-Alpine*, 142 F.3d at 896.

185. *See* UCP 500, *supra* note 105; *see also* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1301 (S.D.N.Y. 1980) (finding that "[b]y its very definition, the letter of credit is a separate and distinct obligation [from the underlying sales agreement]," and "[t]his is not a hypertechnical distinction").

186. *See* International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

to the same extent as a private individual under like circumstances."[187] This suggests that foreign states should be given protection under the Due Process Clause of the Fifth Amendment equivalent to that given a private individual.[188]

The court in the noted case fails to consider its precedent in *Stena Rederi*, as well as language in *Weltover*, indicating that personal jurisdiction principles properly guide interpretation of the FSIA.[189] The court fails to apply a minimum contacts analysis, and there is considerable doubt as to whether the Bank of China had the minimum contacts necessary for the exercise of jurisdiction to satisfy the constitutional requirements of due process.[190] The decision in the noted case allows jurisdiction to be founded upon the unilateral act of the plaintiff choosing the bank account into which payment is desired and wrongly relies upon the customary practice of the defendant to find a direct effect in the United States, rather than upon a legal undertaking of the defendant.

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187. 28 U.S.C. § 1606.

188. *See also* H.R. REP. NO. 94-583, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (stating among the purposes of the FSIA to "assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process"); Sarah K. Schano, *The Scattered Remains of Sovereign Immunity for Foreign States After* Republic of Argentina v. Weltover, Inc.*—Due Process Protection or Nothing*, 27 VAND. J. TRANSNAT'L L. 673, 714 (1994) (concluding that "important considerations suggest that a United States court should conduct a separate due process analysis").

189. *See Weltover*, 504 U.S. at 619; *see also* Ruccolo, *supra* note 155, at 536.

190. The Supreme Court commented in *Burger King v. Rudzewicz*, 471 U.S. 462, 478 (1985), that jurisdiction is not measured according to "conceptualistic theories of the place of contracting or of performance," but nonetheless found that the mere existence of a contractual relationship between a nonresident defendant and a resident of the forum is insufficient to support jurisdiction. In accord with this is the Tenth Circuit holding in *Leney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1982) that the mere issuance of a letter of credit by an Illinois bank, which the issuing bank reasonably should have known would be used by a Colorado beneficiary, was insufficient as a basis for jurisdiction. The *Leney* court reasoned:

> [I]t is unfair to burden an issuing bank with having to defend litigation over a letter of credit in any state in which the bank could reasonably expect the credit to be used. A letter of credit is "an engagement by a bank or other person made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit." U.C.C. § 5-103. By issuing the letter of credit the bank substitutes its credit for that of its customer. The bank's obligation under the letter of credit is independent of the underlying sales contract. . . . If we were to hold that jurisdiction is proper in Colorado on the facts of the instant case we would have to subject any bank that issues a letter of credit to suit in any state in which the bank could expect the credit to be used.

Id.; *accord* Chandler v. Barclays Bank PLC, 898 F.2d 1148 (6th Cir. 1990) (holding that the mere issuance of a letter of credit in favor of a forum resident was insufficient to support personal jurisdiction). *But see* Van Schaack & Co. v. District Court, 538 P.2d 425 (Colo. 1975) (holding that the issuance of a letter of credit by a Kansas bank to a Colorado company in connection with a Colorado real estate transaction was sufficient to support personal jurisdiction).

Internationally, the extent of nexus required for the exercise of jurisdiction under the restrictive theory of sovereign immunity is controversial.[191] Although the Netherlands and Germany have found that international law does not require a specific connection with the forum state in order for the exercise of jurisdiction to be appropriate,[192] the British rule requires that, in cases involving contracts, the contract be "at least partly performed in the [forum]."[193] Switzerland's courts have required "a sufficient domestic relationship" as a necessary protection against forum shopping from all over the world.[194] Many codifications of sovereign immunity that require no special nexus requirement for the exercise of jurisdiction over a foreign state engaged in commercial activity allow the ordinary rules of jurisdiction to be applied to foreign states.[195]

V. CONCLUSION

From a policy standpoint, the holding in the noted case may alter the customary practice of foreign state banks such as the Bank of China to pay letters of credit wherever the beneficiaries desire payment to be made and thereby distort commercial practice surrounding letters of credit. Such a holding lends itself to more formal, and restrictive, payment arrangements, and could act as a hindrance to international trade. The expansive interpretation of the direct effect clause of the commercial activity exception to the FSIA established in the noted case is also contrary to current efforts to stimulate economic growth in troubled markets and to avert a global recession.[196] Many of the cases discussed involve high debt nations in Africa, Latin America, the Middle East, and now Asia. Given the current global economic situation, policy considerations favor protecting foreign state banks from suit during times of financial

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191. *See* CHRISTOPH H. SCHREUR, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 35 (1988).

192. *See id.*

193. State Immunity Act of 1978, ch. 3(1) (Eng.), *reprinted in* 17 I.L.M. 1123, 1124 (1978); *see also* SCHREUR, *supra* note 191, at 11 n.4, 37 (noting that the sovereign immunity statutes of South Africa, Pakistan, and Singapore, as well as the European Convention on State Immunity, contain nearly identical provisions).

194. SCHREUR, *supra* note 191, at 36.

195. *See id.* at 35.

196. In a recent speech at the Council on Foreign Relations, President Clinton outlined actions designed to stimulate growth in troubled markets, stating that "the industrial world's chief priority today, plainly, is to spur growth." *Clinton Urges Aid for World Economic 'Emergency' Call for Rate Cut Seen in Remarks*, CLEVELAND PLAIN DEALER, Sept. 15, 1998, at 1A. Included among President Clinton's ideas were new policies to help ease the pressure on Asian debt. *See id.*

turmoil and weigh against extending the jurisdiction of federal courts over every financial loss felt in the United States.[197] The Fifth Circuit's appeal to the customary practice of the Bank of China in paying beneficiaries of letters of credit wherever they desire has turned what was once a "delicate and important inquiry"[198] into "an enterprise fraught with artifice"[199] and illustrates the need for reform in the area of sovereign immunity and application of the FSIA.

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197. In a global economy, the impact of economic events is immediate and widespread. *See Dollar's Drop Makes Loan Rates Soar*, PORTLAND OREGONIAN, Oct. 13, 1998 (noting the drastic effect of falling Asian currencies on mortgage rates and home buying in the United States).

198. The Schooner Exchange v. McFaddon, 11 U.S. 116, 135 (1812).

199. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 312 (2d Cir. 1981).