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Voest-Alpine Trading v. Bank of China: Can a Uniform Interpretation of a "Direct Effect" Be Attained Under the Foreign Sovereign Immunities Act (FSIA) of 1976?

Heidi L. Frostestad

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VOEST-ALPINE TRADING V. BANK OF CHINA: CAN A UNIFORM INTERPRETATION OF A "DIRECT EFFECT" BE ATTAINED UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA) OF 1976?

The FSIA is a particularly enigmatic legislative creation, called by one court "remarkably obtuse" and a "statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre provisions and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane of the federal judiciary.¹

I. INTRODUCTION

A. Hypothetical Case #1

Imagine a United States citizen and majority shareholder of the Mexican corporation El Surtidor receiving a letter from the head of the corporation describing an investment opportunity from which the shareholder could obtain a substantial commission.² This letter also explains that former members of the Nigerian party had used their positions to create companies and over-invoiced contracts, and that the new Nigerian government had allowed the payment of these contracts. Further, the shareholder could receive a commission by arranging for the payment of one of these contracts. The shareholder must provide blank copies of El Surtidor's letterhead and invoice statements, as well as form a non-Nigerian bank account into which 130 million dollars would be transferred. After this transfer, nearly half of the funds would go to the shareholder and the rest would go to the Nigerian government officials.

Assume that the shareholder accepts this agreement and two months later agrees to the assignment of a Nigerian government contract. The shareholder realizes that the underlying contract is between a foreign company and the Nigerian National Petroleum Corporation for the

¹ *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105-06 (S.D.N.Y. 1982), *quoted in Callejo v. Bancamer*, 764 F.2d 1101, 1107 (5th Cir. 1985). For the legislative history of the FSIA of 1976, see also *infra* notes 32-47 and accompanying text.

² This hypothetical case is loosely based on the facts of *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997).

computerization of certain Nigerian oil fields. In addition, the foreign company has apparently finished the work, but has not received full payment. The shareholder recognizes that Nigerian law permits the contract with a foreign company. After receiving this information, the shareholder provides the Federal Republic of Nigeria with copies of El Surtidor's invoices and letterhead, and requests that the funds are transferred to El Surtidor's bank account in the Cayman Islands.

The shareholder travels to Nigeria to finalize the agreement. After signing the contract, Nigerian officials inform him that the funds cannot be transferred until he pays a deposit of \$570,000 to insure against a loss in currency value during the transaction. The shareholder refuses to pay and leaves the country; however, negotiations continue. The shareholder takes two more trips to Nigeria where he meets various government officials, including Nigeria's Minister of Finance, and both the Governor and Deputy Governor of the Central Bank of Nigeria. In order to expedite the transaction, the shareholder eventually pays the deposit amount, transfer fees, cable charges, taxes, surcharges, and stamp duties that total over five million dollars.

Finally, the shareholder writes the Central Bank, instructing it to transfer the funds to El Surtidor's bank account in New York, rather than the account in the Cayman Islands. The money, however, is never paid to the shareholder. As a result, the shareholder files a lawsuit against Nigeria, the Central Bank of Nigeria, the Nigerian National Petroleum Corporation, and eighteen Nigerian citizens in a U.S. District Court. The defendants claim that they are immune from the jurisdiction of the United States court and move for dismissal. Does this transaction directly affect the United States under the Foreign Sovereign Immunities Act³ in such a way that jurisdiction is warranted in a U.S. court?

B. Hypothetical Case #2

United World Trade, Inc. ("UWT") is a corporation organized under the laws of Colorado with its principal place of business in Denver, Colorado.⁴ Mangyshlakneft Oil Production Association ("MOP") is an enterprise under the laws of the Republic of Kazakhstan and has

³ See 28 U.S.C. § 1605 (a)(2) (1994 & Supp. III 1997) (commonly known as the "direct effect" test of the Foreign Sovereign Immunities Act of 1976). See also *infra* notes 8-16 and accompanying text.

⁴ This second hypothetical case is based on the fact in *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1234 (10th Cir. 1994).

authority to produce oil by the Republic. The Kazakhstan Commerce Foreign Economic Association ("Kazcom") is an entity under the laws of Kazakhstan and acts as an agent for MOP in all transactions. After a protocol⁵ agreement in 1991 and a later preliminary agreement, UWT successfully completed its obligation to present a refinery specializing in "Buzachi" oil that was acceptable to MOP. This refinery was an Italian company in Sicily named "ISAB." Therefore, on January 23, 1992, UWT, MOP, and Kazcom entered into an agreement in Moscow entitled "Contract for Sale of Crude Oil." Under the contract, MOP supplied UWT with 200,000 metric tons of oil during January, February, and March of 1992. The method of payment to MOP was set forth in the contract.⁶ Basically, ISAB (Italy) received oil shipments from MOP, and then forwarded payments to a London bank which later transferred the funds to Citibank of New York to be converted into U.S. dollars.

Pursuant to the contract, the first two shipments of oil went smoothly. The bill of lading⁷ for the third shipment, however, was apparently stolen from a Kazcom representative. This missing bill of lading created potential liability for ISAB, the ultimate buyer of the oil, and ISAB initially refused to release payment to UWT for the third shipment. UWT secured release of payment from ISAB by issuing a guaranty to indemnify ISAB against third party claims. After the third shipment, MOP refused to supply any additional oil to UWT and began selling oil directly to ISAB. Thereafter, United World Trade, Inc. files an action in the U.S. District Court for the District of Colorado, asserting four claims: breach of contract, anticipatory repudiation of the contract, fraud and misrepresentation, and consequential damages. Does the

⁵ "Protocol" is defined as "[t]he rules of diplomatic etiquette; the practices that nations observe in the course of their contacts with one another." BLACK'S LAW DICTIONARY 1240 (7th ed. 1999).

⁶ According to the contract, the payment was scheduled as follows:

In U.S. Dollars by irrevocable documentary credit opened by a first class European/USA bank and notified through advising bank, with payment for Seller's account at thirty (30) calendar days from B/L date against presentation of commercial invoice and other usual shipping documents at bank counters. Letter of credit to be opened before loading.

Latest day for documents/LOI presentation 10.00 hrs A.M. Italian time of three (3) working days prior to payment date, otherwise payment will be effected three (3) working days after the presentation of documents/LOI.

Mangyshlakneft Oil Prod. Ass'n, 33 F.3d at 1235.

⁷ "Bill of lading" is defined as "[a] document of title acknowledging the receipt of goods by a carrier or by the shipper's agent" BLACK'S LAW DICTIONARY 159 (7th ed. 1999).

absence of a transfer and conversion of currency in the United States, as well as the loss of profits and other harms to UWT directly affect the United States in such a way that jurisdiction is warranted in a U.S. court?

C. *Framework of Sovereign Immunity*

Under the traditional framework of sovereign immunity,⁸ federal courts may exercise jurisdiction over a foreign state in actions based “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.”⁹ Further, some courts interpret that U.S. law only applies to overseas state action whose conduct has a “substantial” effect in the U.S. as a direct and foreseeable result of this conduct outside the territory of the United States.¹⁰ The doctrine of sovereign immunity is one of a number of doctrines that attempts to regulate the relations between states.¹¹ Consequently, the “direct effect” test set forth by Congress in the Foreign Sovereign Immunities Act (“FSIA”) of 1976¹² has not been interpreted uniformly since its

⁸ “Foreign Sovereign Immunity” is the immunity of a foreign sovereign, its agents, or its instrumentalities from litigation in U.S. courts. BLACK’S LAW DICTIONARY 297 (6th ed. 1996). For a more complete explanation of the evolution of foreign sovereign immunity in the United States, see also *infra* notes 27-43 and accompanying text.

⁹ 28 U.S.C. § 1605 (a)(2) (1994 & Supp. III 1997).

¹⁰ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE U.S. § 18(b)(ii-iii) (1965) (stating that the FSIA interpretation of the “direct effect” test should be that an effect is direct when it is substantial and foreseeable).

¹¹ See also Sherman Antitrust Act, 15 U.S.C.A. § 1 (West 1997 & Supp. 1999); Foreign Trade Antitrust Improvements Act, 15 U.S.C.A. § 6A (West Supp. 1990); Clayton Antitrust Act, 15 U.S.C. § 22 (1994). These statutes also attempt to regulate the extraterritorial application of U.S. law over foreign defendant’s through an “effects” doctrine. See also *infra* notes 113-135 and accompanying text.

¹² See 28 U.S.C. § 1605 (a)(2) (1994 & Supp. III 1997). The “direct test” states:

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

...

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

Id.

For the legislative history of the FSIA and restrictive theory of Foreign Sovereign Immunity in the United States, see also *infra* notes 36-43 and accompanying text.

inception.¹³ Some courts apply a broad view of “direct effect” by literally interpreting the statute,¹⁴ while other courts embrace a more narrow view of “direct effect” that adds additional requirements such as substantiality, foreseeability, and a legally significant act that determine whether an act is direct.¹⁵ Accordingly, one court aptly summarized “that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.”¹⁶

D. The “Direct Effect” Test of the FSIA of 1976 and Voest-Alpine vs. the “Direct Effect” Test of the Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”) & Sherman Act.

This Note identifies a significant concern with the application of the “direct effect” test in light of the Circuit split caused by *Voest-Alpine Trading v. Bank of China*¹⁷ and introduces a proposed statute to provide

¹³ See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (applying an “immediate consequence” test for direct effect); *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (stating that the foreign state’s activities had a “significant, foreseeable” effect, constituting a “direct effect”, in the U.S.).

¹⁴ See, e.g., *Voest-Alpine v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998) (stating that a “direct effect” is all a plaintiff needs to establish jurisdiction in the U.S., without explaining what the language “direct effect” means besides citing *Weltover*); see also *Weltover*, 504 U.S. at 618 (applying a broad view of jurisdiction by stating that any act with an immediate consequence in the United States is a “direct effect”).

¹⁵ See, e.g., *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 n.4 (9th Cir. 1997) (stating that the Second Circuit often recognizes that something legally significant must actually happen in the United States to satisfy jurisdiction under the FSIA “direct effect” test); *Antares v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2nd Cir. 1993) (adopting a legally significant act analysis and stating that *Weltover* implied a similar analysis); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993) (stating that courts often look to the place where legally significant acts occurred); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 918 (S.D.N.Y. 1993) (holding that, in determining where the effect of a defendant’s conduct is felt directly, courts often look to the place where legally significant acts giving rise to the claim occurred).

¹⁶ *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1238 (10th Cir. 1994); See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490 (1983) (stating that courts must interpret 28 U.S.C. § 1605(a)(2) in light of the Congressional purpose of ensuring access of U.S. citizens to the courts). While it is true that the FSIA was passed with such a purpose of ensuring access to U.S. courts, Congress was also concerned that “our courts [might be] turned into small ‘international courts of claims’ . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.” *Id.* See generally *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981) (stating that finding the site of financial harm to a plaintiff under the FSIA is “an enterprise fraught with artifice”).

¹⁷ 142 F.3d 887 (5th Cir. 1998) (causing a significant Circuit split (1-5) by discarding the “legally significant” act standard from its analysis of direct effect under the FSIA).

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future courts with a more narrowly tailored test for "direct effect" under the FSIA.¹⁸ This Note advocates that the courts should use new language in the statutory "direct effect" test of the FSIA in order to promote uniformity among the Circuit Courts and prevent confusion with the Foreign Trade Antitrust Improvements Act¹⁹ and the Sherman Act's "direct effect" test.²⁰ Section II will provide background on the development of sovereign immunity, the enactment of the FSIA, and the application of the "direct effect" exception in courts until the present.²¹ Section III of this Note will reveal the recent split in the Circuit Court's application of the FSIA "direct effect" test through detailed analysis of the *Voest-Alpine* decision and discussion of problems with that interpretation.²² Section IV will detail the history of the "effects" test of the Sherman Act²³ and the Foreign Trade Antitrust Improvements Act of 1982²⁴ and provide insights for the interpretation of the *Voest-Alpine* "effects" test.²⁵ Finally, Section V will propose a model statute that will provide the courts with a more specific test that will prevent U.S. courts from becoming small international courts of claims and prevent confusion with the "effects" test of the Sherman Act and the Foreign Trade Antitrust Improvements Act (FTAIA).²⁶ Through a narrowly tailored test that more clearly articulates the "direct effect" exception,

¹⁸ See *infra* notes 145-72 and accompanying text. Specifically, this Note suggests an incorporation of the "legally significant" act standard into the language of the Foreign Sovereign Immunities "direct effect" test in the statute. See *infra* notes 173-84 and accompanying text. See also 28 U.S.C. § 1605(a)(2).

¹⁹ For a discussion of the similarity between the FSIA's effects test requirements of "substantiality" and "foreseeability" and the effects test of the FTAIA and Sherman Act's "direct effect" test that may be confusing courts today, see *infra* notes 133-35 and accompanying text.

²⁰ For a description of the Sherman Act's "direct effects" test that may be confusing the court's analysis of "direct effect" under the FSIA, see *infra* notes 113-32 and accompanying text.

²¹ For a discussion of the various interpretations of direct effect in courts today and the development of the theory of sovereign immunity that is codified in the Foreign Sovereign Immunities Act of 1976, see *infra* notes 27-85 and accompanying text.

²² For an analysis of the Fifth Circuit's confusion in the application of "direct effect" under the FSIA, see *infra* notes 86-113 and accompanying text. This return to a *Weltover* "immediate consequences" analysis caused a split among Circuits about how to correctly apply the phrase "direct effect" to establish jurisdiction under the FSIA of 1976.

²³ Sherman Antitrust Act, 15 U.S.C. § 1 (1982).

²⁴ Foreign Trade Antitrust Improvements Act, 15 U.S.C.A. § 6A (West Supp. 1990).

²⁵ For a discussion of the "direct effects" test of the Sherman Act and FTAIA that includes elements of "substantiality" and "foreseeability," see *infra* notes 114-36 and accompanying text.

²⁶ See *infra* notes 137-89 and accompanying text. This revised statute includes the "legally significant" act interpretation of the FSIA. *Id.*

U.S. courts will not become subject to foreign suits with tenuous causal connections.

II. HISTORICAL BACKGROUND OF VOEST-ALPINE

Before analyzing the problems of a recent court's interpretation of the Foreign Sovereign Immunity Act in *Voest-Alpine*, a brief overview of the evolution of sovereign immunity, including the theories of absolute immunity and restrictive immunity, is necessary in order to understand the complexity of this historic doctrine. In addition, the various interpretations of “direct effect” under the FSIA reveal a stark lack of uniformity among Circuit Courts in the past, as well as today.

A. *The Theory of Absolute Immunity*

The origin of the American doctrine of sovereign immunity dates to several ancient doctrines. For example, some legal scholars date sovereign immunity to medieval domestic doctrines of “the king can do no wrong” and “the sovereign cannot be a defendant in its own courts.”²⁷ Others scholars trace sovereign immunity to Roman legal concepts such as “equals do not have jurisdiction of [sic] each other.”²⁸ The theory of absolute immunity for foreign sovereigns provides that a state enjoys complete immunity from the adjudicatory jurisdiction of other states.²⁹ Courts in the United States first implemented this theory in the famous case of *Schooner v. McFadden*.³⁰ In *Schooner*, Chief Justice Marshall stated that a nation has exclusive jurisdiction over its own

²⁷ See *Foreign Sovereign Immunities Act of 1976—Judicial Predominance*, 4 BROOKLYN J. INT'L LAW 146, 147 (1977); Jeffrey N. Martin, *Sovereign Immunity – Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 431 n.11 (1977) (“Sovereign immunity appears to have been derived from the rule *par in parem non habet imperium* – no State can claim jurisdiction over another. The phrase was most likely coined in the 14th century by Bartolus, one of the first writers on international law.”).

²⁸ See, e.g., Stella Havkin, Note, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua*, 10 HASTINGS INT'L & COMP. L. REV. 455 n.1 (1987).

²⁹ 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, 490 (1992).

³⁰ 11 U.S. (7 Cranch) 116 (1812) (involving jurisdiction over a foreign vessel coming into U.S. ports).

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territory, subject to no limitations.³¹ The purpose of sovereign immunity is to provide protection to public officials who conduct business negotiations abroad.³² This rule applied in the British and American courts throughout the nineteenth century.³³ Meanwhile, continental Europe developed a restrictive theory of sovereign immunity because absolute immunity inhibited business and other commercial relations with foreign sovereigns by not providing any sort of legal recourse.³⁴ In subsequent years, especially the first half of the twentieth century, the absolute theory came under severe attack in the United States and Britain, resulting in the adoption of a restrictive theory of foreign sovereign immunity in the United States.³⁵

B. The Restrictive Theory of Sovereign Immunity

The restrictive theory of sovereign immunity emerged because of the increased participation of governments in commercial activities after World War II.³⁶ It recognizes that governments often act in a commercial rather than governmental capacity.³⁷ When acting in such a commercial capacity, the foreign government of one nation should be in no better

³¹ *Id.* at 136 (“The jurisdiction of a nation within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation, not imposed by its self.”). This is the first case that establishes sovereign immunity for foreign sovereigns in U.S. courts. *Id.* Marshall also stated:

The perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Id. at 137.

³² *Id.* at 137 (stating that foreign officials should not have to worry about being subject to foreign law, especially if a majority of their conduct occurs in their own state).

³³ Donoghue, *supra* note 29, at 496 n.26.

³⁴ Havkin, *supra* note 28, at 459 (“[Absolute immunity] deprived private citizens conducting business with foreign governments of a legal remedy in any court.”). See generally Donoghue, *supra* note 29, at 496.

³⁵ See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 25, 54 (1976)* [hereinafter “*Hearings*”] (testimony of Monroe Leigh, Legal Advisor, Department of State) (stating that this shift to the restrictive theory may have been motivated because of an animosity toward the Soviet Union in the post-World War I period); see generally H.R. REP. NO. 94-1487 (1976).

³⁶ See H.R. REP. NO. 94-1487, at 6607 (1976).

³⁷ See generally Donoghue, *supra* note 29, at 496; Havkin, *supra* note 28, at 459.

position than any other nation in the international marketplace.³⁸ According to the Hearings Before the Subcommittee on Administrative Law and Governmental Relations in 1976, "[w]hen a foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause."³⁹ In 1952, the State Department announced its acceptance of the restrictive theory of sovereign immunity in what is labeled as the Tate Letter.⁴⁰ Under the provisions of the Tate Letter, the State Department, not the courts, decided disputes involving sovereign immunity.⁴¹ The letter also accorded foreign sovereign officials immunity for claims resulting from sovereign or public acts but refused immunity for any claims arising from private or commercial activities.⁴² The State Department often yielded to diplomatic and political pressure from foreign states and recommended immunity where, under the

³⁸ Havkin, *supra* note 28, at 459-60. This is also in accordance with notions of comity. See *infra* note 130.

³⁹ See H.R. REP. NO. 94-1487, at 6605 (1976) (stating that under the restrictive theory, immunity is granted only with respect to causes of action arising out of a foreign state's governmental acts—called activities *jure imperii*—and not with respect to those arising out of its commercial or proprietary acts, or other acts which are governed by private law, so-called activities *jure gestionis*); see also Letter from Jack B. Tate, Acting Legal Advisor to the Secretary of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), in H.R. REP. NO. 94-1487, at 6607 (1976) [hereinafter "Tate Letter"], which announces a change in U.S. policy from the absolute to the restrictive theory.

⁴⁰ Tate Letter, *supra* note 39, at 6607.

⁴¹ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6607 (stating that the State Department undertook to decide future sovereign immunity questions by asking the Department of Justice to make suggestions of immunity to the courts in appropriate cases that caused the courts "a number of difficulties"). The most significant problem with the application of the restrictive theory was that the foreign state could elect to raise its immunity defense either in the court in which it had been sued, or by making a formal diplomatic request to have the State Department decide the issue, and if appropriate, to make a suggestion of immunity to the court. *Id.* This process placed the State Department in the "awkward position of a political institution trying to apply a legal standard to litigation already before the courts." *Id.* Whenever the State Department requested immunity on behalf of a foreign state, the request was granted in favor of immunity. *Id.* This reflects the rule of *Ex Parte Peru*, 318 U.S. 578 (1943), in which U.S. courts automatically deferred to suggestions of immunity from the executive branch without making separate determinations of law or fact. See also 1976 U.S.C.C.A.N. 6604, 6606.

⁴² H.R. REP. NO. 1487, at 6607 (stating that such a private party could not be certain that jurisdiction over the foreign governmental entity would not "be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State"). See also *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703 (1976).

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restrictive principle, immunity should have been denied.⁴³ As a result, these inconsistencies of the State Department and the ensuing chaotic state of affairs led to the enactment of the FSIA in 1976.

C. *The Foreign Sovereign Immunities Act of 1976*

Congress codified the law of sovereign immunity in 1976 with the passage of the Foreign Sovereign Immunities Act.⁴⁴ Congress stated its goals in enacting the FSIA as: (a) codifying the principle of restrictive sovereign immunity; (b) insuring that sovereign immunity decisions were judicial rather than executive; (c) providing a method for service of process on foreign state defendants; and (d) establishing a method for satisfying *in personam* judgments.⁴⁵ Even though the general rule of the FSIA is that foreign officials are immune from the jurisdiction of U.S. federal courts, the statute contains several important exceptions that codify the restrictive theory of sovereign immunity.⁴⁶ Thus, in certain matters, the judiciary denies sovereign immunity based on the criteria stated in the statute.⁴⁷ Accordingly, the FSIA is the only vehicle for asserting jurisdiction by a U.S. federal court over a foreign state.⁴⁸

The restrictive theory is codified in the FSIA at section 1605(a)(2).⁴⁹ The focus of this Note is the third clause of section 1605(a)(2) that reveals

⁴³ Case Digest, *Gibbons v. Udaras na Gaeltachta and the IDA of Ireland*, 10 BROOKLYN J. INT'L L. 255, 261 (1984).

⁴⁴ H.R. 11315 was passed by the House of Representatives on September 29, 1976. 122 CONG. REC., in H.R. REP. NO. 94-1487 (1976); see also Martin, *supra* note 27, at 429 n.2 (revealing that the FSIA was originally introduced in 1973 at the urging of the State and Justice Departments, then withdrawn for reconsideration). A revised bill was reintroduced in 1975, passed by the House and Senate in 1976, and became effective on January 19, 1977, 90 days after it was signed by President Ford. Martin, *supra* note 27, at 429 n.1-2.

⁴⁵ H.R. REP. NO. 1487, *supra* note 36, at 6605-06; see also Havkin, *supra* note 28, at 462.

⁴⁶ See 28 U.S.C. § 1605(a)(2) (1994); see also 28 U.S.C. § 1604 (1994) ("A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). The FSIA starts from a premise of immunity and then creates exceptions to the general principle. H.R. REP. NO. 94-1487, at 6616. Immunity is generally obtained for acts *jure imperii*, but not for activities *jure gestionis*. Martin, *supra* note 27, at 437-38.

⁴⁷ 28 U.S.C. § 1605 (1994). The courts, however, have not been able to attain a uniform interpretation as to what constitutes a "direct effect" in the United States. See *infra* notes 52-85 and accompanying text.

⁴⁸ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Foreign Sovereign Immunities Act provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (1994).

⁴⁹ 28 U.S.C. § 1605(a)(2) (1988) states:

United States jurisdiction: "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."⁵⁰ Often referred to as the commercial activities exception, the United States Supreme Court has referred to section 1605(a)(2) as an important exception because it promotes business relations and commercial activity abroad.⁵¹ Courts, however, after the 1976 enactment, interpreted the "direct effect" clause in varying ways. The Second Circuit stated the central issue of the statute in this way, "[W]as the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to hear the case?", and concluded that the direct effect portion of the FSIA was hard to interpret consistently.⁵²

D. Interpretation of the "Direct Effect" Clause Until *Weltover*

1. Examining the Legislative History of the "Direct Effect" Clause

The legislative history recognizes the meaning of clause three of section 1605(a)(2) as limited in scope and also reveals that clause three should be consistent with the principles of Section 18 of the *Restatement (Second) of Foreign Relations Law*.⁵³ Even though this is a brief statement

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

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

Id.

⁵⁰ *Id.*

⁵¹ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992) (referring to section 1605 (a)(2) as "[t]he most significant of the FSIA's exceptions").

⁵² *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311-13 (2d Cir. 1981).

⁵³ House Report 94-1487 explains:

The third situation—"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"—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 the principles set forth in section 18, *Restatement of the Law, Second, Foreign Relations Law of the United States* (1965).

of Congressional intent, it seems clear that the interpretation of the "direct effect" test in the FSIA should be consistent with the principles articulated in Section 18 of the *Restatement (Second) of Foreign Relations*.⁵⁴ By looking to this section of the *Restatement*, the judiciary may find principles that are capable of assisting courts in determining when an effect is "sufficiently direct" such that the assertion of jurisdiction coincides with the intent of Congress. For example, section 18, *Jurisdiction to Prescribe with Respect to Effect within Territory*, provides:

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

- (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
- (ii) the effect within the territory is substantial;
- (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
- (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.⁵⁵

The principles that are evident in section 18 require that an effect, which is felt in the United States as the result of extraterritorial conduct, is substantial, direct, and foreseeable. Further, these principles are supported by comment f in the *Restatement* which states that conduct must be substantial and foreseeable as a causal relationship before jurisdiction can be asserted.⁵⁶ Because there is a clear statement of Congressional intent on the interpretation of the "direct effect" clause, it is difficult to imagine that a court could interpret "direct effect" without

Id. at 6618.

⁵⁴ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

⁵⁵ *Id.* at § 18(b).

⁵⁶ *Id.* at cmt. f (explaining that subsection b is "more than a mere causal relationship: the effect within the territory must be substantial and occur as a direct and foreseeable result of the conduct outside the territory" and "exercise of jurisdiction under the rule stated in clause (b) of this Section generally involves matters of an economic nature"). It could be inferred that "matters of an economic nature" is equivalent with "commercial activity" which is the concept that is essential in FSIA jurisdiction over states whose activities occur outside the territory but have effects within another territory. See 28 U.S.C. § 1605 (a)(2) (1988).

including the elements of substantiality and foreseeability as required in the *Restatement*.⁵⁷ In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,⁵⁸ however, the court did not think that the relationship between the FSIA “effects” test and the *Restatement* should be validated because the FSIA concerns the application of substantive American law to conduct abroad.⁵⁹ Therefore, many courts have been confused on the application of the “direct effect” exception of the FSIA and its relationship to the principles set forth in the *Restatement of Foreign Relations*.⁶⁰ This confusion is evident in the court decisions after the enactment of the FSIA and its commercial exceptions.

2. The Substantial and Foreseeable Test—A Pre-*Weltover* Case Analysis

After the 1976 enactment of the FSIA, most Circuit Courts adopted a “substantial and foreseeable” test. The two views adopted by the Circuits have been described as the “broad view,” adopted by the Second Circuit in *Texas Trading* and the “narrow view,” developed by the remaining five Circuits that considered foreign sovereign immunity cases brought under clause three of the commercial activities exception.⁶¹ The “narrow view,” adopting the “substantiality” and “foreseeability” requirements, was first adopted by a court in the eastern district of New York in *Harris v. VAO Intourist, Moscow*,⁶² which many other Circuits followed.⁶³ By contrast, the Second Circuit, beginning with *Texas*

⁵⁷ For an explanation why additional clauses such as “substantiality”, “foreseeability”, or a “legally significant act” are necessary in the interpretation of the vague articulation of “direct effect” under the FSIA, see *infra* notes 62-65 and accompanying text and 71-85 and accompanying text.

⁵⁸ 647 F.2d 300, 311 (2d Cir. 1981).

⁵⁹ *Id.* The *Texas Trading* court defined the relationship as “a bit of a non sequitur, since [it] concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts . . .” *Id.* This interpretation, though, is difficult to imagine because the statute states that it should adhere to the terms of the *Restatement* that includes the elements of “substantiality” and “foreseeability” to determine “direct effect”.

⁶⁰ See *infra* notes 60-85 and accompanying text.

⁶¹ See Nicholas 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, 639 (1991). The rejection by the Second Circuit of the requirements of substantiality and foreseeability is the “broad view” and the “narrow view” refers to those Circuits which retain the requirements of substantiality and foreseeability. *Id.* at 639-40.

⁶² 481 F. Supp. 1056, 1063 (E.D.N.Y. 1979) (stating that “direct effect” requires a substantial impact in the United States that is a directly foreseeable result of the extraterritorial act).

⁶³ See *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989) (stating that “a foreign sovereign’s activities must cause an effect in the United States that is substantial and foreseeable in order to abrogate sovereign immunity”); *Gould, Inc. v.*

Trading, declined to consider the substantiality or foreseeability of the effect when deciding if the effect was sufficiently "direct" to support jurisdiction under the FSIA.⁶⁴ Thus, the *Texas Trading* court expressly rejected the "substantial and foreseeable" test, which was adopted in a majority of other Circuit Courts, and created a Circuit split that was reconciled by the United States Supreme Court in *Republic of Argentina v. Weltover*.⁶⁵ The Court in *Weltover* created a new standard that clearly departed from past decisions.

3. The "Direct Effect" Test Applied in *Republic of Argentina v. Weltover*⁶⁶

From 1979 until 1991, the Circuits struggled with the meaning of the language, "direct effect in the United States" under the FSIA.⁶⁷ In 1992, the U.S. Supreme Court issued the highly criticized opinion of *Weltover*. The Court determined in *Weltover* that "an effect is 'direct' if it follows

Pechiney Ugine Kuhlmann, 853 F.2d 445, 453 (6th Cir. 1988) (revealing that economic injury to a U.S. corporation is "direct" if the corporation is the injury is a significant financial consequence and if the result of the conduct is foreseeable); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (applying section 18's "substantial" and "foreseeable" test to reject the claim); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415, 418 (5th Cir. 1987) (stating that "(t)he substantial and direct and foreseeable" standards set forth in section 18 of the Restatement are likewise intended to apply in commercial contexts"); *Callejo v. Bancomer*, 764 F.2d 1101, 1111 (5th Cir. 1985) (stating that conduct must have a 'substantial' effect in the United States as a direct and foreseeable result of the conduct outside the United States according to the court); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329, 332 (9th Cir. 1984) (finding that effects of murder of wife and children on plaintiff in Iran was "not sufficiently direct or substantial" to support Federal jurisdiction); *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1111 (D.C. Cir. 1982) (holding that anticipated lost profits caused by a contract breach were not foreseeable and did not constitute a "direct effect in the United States"; the court also adopted the substantiality and foreseeability requirements by looking to section 18 of the Restatement); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (affirming jurisdiction over Iran under the "direct effect" clause of the FSIA and holding that the foreign state's activities had "significant, foreseeable . . . consequences in the United States").

⁶⁴ See *Texas Trading*, 647 F.2d at 311 n.32 (referring to Congress's reference to section 18 as "a bit of a non sequitur"). "Non sequitur" means "it does not follow." BLACK'S LAW DICTIONARY 442 (6th ed. 1996).

⁶⁵ 753 F. Supp. 1201 (S.D.N.Y. 1991), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

⁶⁶ 504 U.S. 607 (1992).

⁶⁷ See *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1063 (E.D.N.Y. 1979) (holding that the Restatement's elements of "substantiality" and "foreseeability" should be applied when interpreting "direct effect" under the FSIA); See also *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, 390 (5th Cir. 1991) (stating that some courts have equated 'direct effect' with a corporate plaintiff's financial loss).

'as an immediate consequence of the defendant's... activity'" and specifically rejected the suggestion in legislative history that an effect must be both "substantial" and "foreseeable" to be "direct."⁶⁸ According to some critics, this decision muddled the decision of other Circuits and ignored the intent of Congress.⁶⁹ By declining to apply the substantiality and foreseeability requirements, the Supreme Court established a significantly more lenient test for plaintiffs. This new "immediate consequences" test from *Weltover* leaned towards granting jurisdiction rather than preserving sovereign immunity.⁷⁰ Certainly, the Court's interpretation of the "direct effect" exception under the FSIA as an "immediate consequences" analysis confused the Circuits after its issuance and still confuses courts today.

4. "Direct Effect" Application in Circuit Courts After *Weltover*

The application of the direct effect clause of the commercial activities exception of the FSIA has been varied and unpredictable and, in many court decisions, courts have implied that the "immediate consequences" test is a failure.⁷¹ For example, the Tenth Circuit in *United World Trade*,

⁶⁸ *Weltover*, 504 U.S. at 616. See also H.R. REP. NO. 1487, *supra* note 37, reprinted in 1976 U.S.C.C.A.N. 6604, 6618 for legislative history.

⁶⁹ See David E. Gohlke, Comment, *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, 283 (1995) (criticizing *Weltover* because of the new "immediate consequences" test that grants broad jurisdiction over foreign officials in U.S. courts).

⁷⁰ Keith Highet et al., *Foreign Sovereign Immunity - Commercial Activity of a Foreign State Having a Direct Effect in the United States*, 86 AM. J. INT'L L. 820, 823 (1992) (arguing that the Supreme Court's acceptance in *Weltover* of an "immediate consequences" test will result in "a considerable broadening of the commercial activity exception..."); see also Steven Anthony Torres, *International Law - 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. REV. 761, 771 (1993) (arguing that the immediate consequences test "will perpetuate both inconsistency and misunderstanding in future interpretations of the FSIA's direct effect clause").

⁷¹ Gohlke, *supra* note 69, at 285. See *Janini v. Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C. Cir. 1995) (stating that loss of employment contract because of the Gulf War was in connection with a commercial activity outside the U.S. which had a direct effect in the U.S.); *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) (applying broad interpretation of *Weltover* and concluding that the bank's obligation to remit funds to other New York accounts is a direct effect in the U.S.); *Antares Aircraft v. Federal Rep. of Nigeria*, 999 F.2d 33, 35-36 (2d Cir. 1993) (applying a "legally significant act" analysis to determine direct effect); *Ampac Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973, 977 (S.D. Fla. 1992) (applying the broad *Weltover* view of "direct effect", but stating that the effect only needs to be "slight" or "tangential"); *United World Trade v. Mangyshlakneft Oil Prod. Ass'n*, 821 F. Supp. 1405 (D. Colo. 1993), *aff'd* 33 F.3d 1232, 1238 (10th Cir. 1994)

*Inc. v. Mangyshlakneft Oil Production Ass'n*⁷² commented on the vagueness of the "direct effect" test and added the "legally significant act" requirement to its analysis.⁷³ This "legally significant act" analysis requires a plaintiff to show that some legally significant act occurred in the United States which causes a direct effect in order to qualify for jurisdiction in the U.S. courts.⁷⁴ By requiring a "legally significant act" standard in the interpretation of the FSIA, the *Mangyshlakneft* court hoped to prevent tenuous claims against foreign defendants and encourage business and contractual relations overseas.⁷⁵ Further, the Second Circuit added a "legally significant act" requirement in *Antares Aircraft v. Federal Republic of Nigeria*,⁷⁶ followed by the Circuit thereafter, that is more restrictive than the "immediate consequence" standard.⁷⁷ Similarly, the Ninth Circuit and Eighth Circuit added the legally significant act requirement to the direct effect interpretation in *Adler v. Federal Republic of Nigeria*⁷⁸ and *General Electric Capital Corp. v. Grossman*.⁷⁹

Overall, other district and Circuit courts have had difficulty applying the broad standard of "immediate consequences" in the context of the FSIA's "direct effect" exception and embraced the "legally significant act" requirement as a more coherent standard.⁸⁰ In order to

(rejecting the "slight and tangential" test of *Ampac* and noting that the phrase "direct effect" is very ambiguous).

⁷² 33 F.3d 1232 (10th Cir. 1994).

⁷³ *Id.* at 1238 (revealing no direct effect by applying legally significant act standard even though domestic corporation did not receive funds).

⁷⁴ *Id.*

⁷⁵ *Id.* For a discussion of the application of the "legally significant act" test, see *infra* notes 166-77 and accompanying text. Overall, this test produces the most cogent results in its "narrow" grant of jurisdiction.

⁷⁶ 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).

⁷⁷ *Id.* (stating that the legally significant act requirement is similar to the *Weltover* analysis); See also Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction under the Commercial Activity Exception*, 13 REV. LITIG. 143, 166 (1993) (arguing that the Second Circuit's "legally significant acts" methodology is more restrictive than an "immediate consequences" standard).

⁷⁸ 107 F.3d 720, 727 (9th Cir. 1997) (stating that Nigeria's nonpayment of government contract assigned to plaintiff had a direct effect in the U.S. based on a legally significant act).

⁷⁹ 991 F.2d 1376, 1385 (8th Cir. 1993) (holding that G.E.'s claim was too speculative based on a legally significant act analysis).

⁸⁰ For Circuits that have applied the legally significant act requirement, see *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (holding that something "legally significant" must occur in the United States for a grant of jurisdiction under the FSIA); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) (stating that there must be sufficient contact in the United States for jurisdiction); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1146 (D.C. Cir. 1994) (denying jurisdiction because of a lack of

establish direct effect under this analysis, the plaintiff must show that something legally significant actually happened in the United States,⁸¹ instead of the “immediate consequence” standard of *Weltover*⁸² that is quite ambiguous.⁸³ From such consistent analysis since *Antares Aircraft* of adding a “legally significant act” requirement to the direct effect test, it is difficult to imagine that a court would again reject this analysis and return to a broad *Weltover* view of the direct effect test under the FSIA.⁸⁴ However, a significant departure from the analysis of a majority of the

direct effect); *Princz v. F. R. G.*, 26 F.3d 1166, 1183 (D.C. Cir. 1994) (applying notions of *jus cogens* with the interpretation of a legally significant act under the FSIA’s “direct effect” analysis); *Federal Ins. Co. v. Richard Rubin*, 12 F.3d 1270, 1286 (3rd Cir. 1993) (stating that the plaintiff’s actions were not based upon legally significant acts in the United States); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993) (stating that courts often look to the place where legally significant acts occurred); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 710 (9th Cir. 1992) (stating that actions must cause a substantial and foreseeable effect in the United States); *Walter Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375, 1386 (5th Cir. 1992) (applying the *Zernicek* test which requires substantial contact with the United States); *WMW Machinery v. Werkzeugmaschinenhandd*, 960 F. Supp. 734, 741 (S.D.N.Y. 1997) (applying the “legally significant act” test to determine sufficient contact with the United States); *Granville Gold Trust v. Commissione del Fullimento/Interchange Bank*, 924 F. Supp. 397, 407 (E.D.N.Y. 1996) (revealing that a commercial act must have substantial contact with the United States under the FSIA); *Coleman v. Alcolac*, 888 F. Supp. 1388, 1402 (S.D. Tex. 1995) (holding that plaintiff’s injuries didn’t have a significant connection with the United States); *Reed v. Donau Bank*, 866 F. Supp. 750, 754 (S.D.N.Y. 1994) (holding that the legally significant act standard applies in FSIA cases); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F.Supp. 910, 917 (S.D.N.Y. 1993) (determining direct effect based upon the place of legally significant acts); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101, 104 (S.D.N.Y. 1993) (adopting a *Texas Trading* standard for direct effect and denying jurisdiction).

⁸¹ For example, many courts interpret that a legally significant act in the United States cannot include contracts that only have performance in a New York bank like the case of *Weltover*. In addition, under a legally significant act standard, a majority of the contractual acts must occur in the United States. This is a more narrow view of granting jurisdiction than that employed in *Weltover*’s immediate consequence standard.

⁸² For example, the *Weltover* court crafted a test of “direct effect” that relied upon an “immediate consequence” within the United States. This “immediate consequences” analysis grants jurisdiction in cases that may have a majority of acts occurring outside the United States if the act has an effect in the United States. For instance, in *Weltover*, the performance of a contract at a New York bank was enough to grant jurisdiction over the defendant in the United States even though a majority of the contractual acts occurred outside the United States. Therefore, this approach grants broad jurisdiction over foreign defendants in the United States and will subject our court system to many claims, no matter how distant the acts involved.

⁸³ See *Adler*, 107 F.3d at 726-27 (showing direct effect through a legally significant act); see also *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (establishing direct effect by first showing that something legally significant occurred in the United States).

⁸⁴ For a discussion of the legally significant act standard, see *supra* notes 73-83 and accompanying text.

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Circuits occurred recently in *Voest-Alpine Trading USA Corp. v. Bank of China*.⁸⁵ The Fifth Circuit again confused the interpretation of the FSIA and discarded the “legally significant act” test.

III. VOEST-ALPINE TRADING – ANOTHER CIRCUIT SPLIT ON “DIRECT EFFECT”

In June of 1998, in *Voest-Alpine* the Fifth Circuit held that the “direct effect” exception to the FSIA does not require the defendant to have engaged in a “legally significant act” in the U.S.⁸⁶ Thus, the court rejected prior decisions of the Second, Eighth, Ninth, and Tenth Circuits on this issue of the exceptions to sovereign immunity by foreign states which have a direct effect on the United States.⁸⁷ This new broad interpretation, rejecting the narrower interpretations of other Circuits, further signifies the vagueness of the FSIA and causes our courts to become international courts of claims. In addition, this Circuit split is likely to further confuse courts in the future until a uniform interpretation is attained.

A. Discussion of *Voest-Alpine*

In June 1995, *Voest-Alpine USA Corporation* (“*Voest-Alpine*”), a New York corporation with its principal place of business in Houston, Texas, agreed to sell many tons of styrene monomer to the Jiangyin Foreign Trade Corporation (JFTC) for \$1,000 USD per metric ton.⁸⁸ As security for performance of JFTC’s payment, the Bank of China issued an irrevocable letter of credit.⁸⁹ The letter of credit referred to JFTC as the

⁸⁵ 142 F.3d 887 (5th Cir. 1998).

⁸⁶ *Id.* at 894. The *Voest-Alpine* court held that a financial loss occurred in the United States through a non-payment of funds to New York. *Id.* at 896. The court applied an “immediate consequences” test that is similar to *Weltover*. *Id.* at 897.

⁸⁷ See *Adler*, 107 F.3d at 720; *United World Trade v. Mangyshlakneft Oil Prod.*, 33 F.3d 1232, 1239 (10th Cir. 1994) (concluding no direct effect because the domestic corporation did not receive funds); *Antares Aircraft v. Federal Republic of Nigeria* 999 F.2d 33, 36 (2d Cir. 1993) (declining jurisdiction under FSIA because all legally significant acts occurred outside the U.S.); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993) (applying legally significant act test). See also *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910 (S.D.N.Y. 1993); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101 (S.D.N.Y. 1993); and *WMW Machinery v. Werkzeugmaschinenhandd*, 960 F. Supp. 734 (S.D.N.Y. 1997). These three decisions apply the legally significant act standard in association with the “direct effect” test under FSIA.

⁸⁸ *Id.* The shipment was to be delivered by July 1995 to China. *Id.*

⁸⁹ *Id.* An “irrevocable letter of credit” is a letter of credit that is “unalterable; committed beyond recall.” BLACK’S LAW DICTIONARY 340 (6th ed. 1996).

applicant and Voest-Alpine as the beneficiary.⁹⁰ It did not specify a particular place of payment, but the Bank of China promised to pay Voest-Alpine the appropriate amount.⁹¹ After many communications between TCB and Voest-Alpine to maintain the conformity of the documents, the Bank of China informed TCB that JFTC refused payment and the documents would be returned.⁹² Then, the present legal dispute ensued.⁹³

Voest-Alpine brought action against the Bank of China for a breach of letter of credit issued as security for performance of a Chinese payment obligation.⁹⁴ The Bank of China alleged that it was immune from the action under the FSIA.⁹⁵ The District Court, however, held that the Bank of China's failure to remit funds into the corporation's bank account in the United States caused a direct effect in the United States; therefore, jurisdiction over the action pursuant to the FSIA was proper.⁹⁶

B. *The Fifth Circuit's Analysis of Voest-Alpine.*

By looking to the FSIA which sets forth the exclusive standards by which all disputes should be settled, the court determined that the analysis turned on the third prong, namely the "direct effect" test.⁹⁷ The Bank of China contended that the district court erred in finding jurisdiction through the "direct effect" test because the United States was neither the place of payment nor the place of any other "legally significant act," as required by *Weltover* and subsequent cases.⁹⁸

⁹⁰ *Voest-Alpine*, 142 F.3d at 890. Although this agreement did not designate a specific place of payment, it was to be governed by the Uniform Customs and Practice for Documentary Credits of the International Chamber of Commerce. *Id.*

⁹¹ *Id.* The agreement was adequately negotiated by both parties through letters of credit. *Id.*

⁹² *Id.*

⁹³ *Id.* Voest-Alpine filed the action seeking damages for the breach of the letter of credit. *Id.*

⁹⁴ *Voest-Alpine*, 142 F.2d at 890.

⁹⁵ *Id.* at 891. The district court denied the defendant's claim of immunity and granted jurisdiction under the "direct effect" test of the FSIA. *Id.*

⁹⁶ *Id.* The Fifth Circuit Court of Appeals affirmed this holding. *Id.* at 890.

⁹⁷ *Id.* at 892; see also *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 532 (5th Cir. 1992) (stating that the FSIA sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues raised in federal and state courts); see also 28 U.S.C. § 1605(a)(2) (1988) which articulates that the exception must be related to a foreign state's commercial activity.

⁹⁸ *Voest-Alpine*, 142 F.3d at 893. According to the *Voest-Alpine* court, though, the legally significant act requirement was renounced by *Weltover*. *Id.* This interpretation, however, does not explain why many courts adopted a "legally significant act" interpretation of

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However, the Fifth Circuit Court of Appeals affirmed the district court's reasoning by stating that an effect is sufficient to support jurisdiction under the commercial activity exception so long as it is "direct," without any other modifying adjectives such as foreseeability, substantiality, or legal significance.⁹⁹ The court further reasoned that a financial loss sustained in the United States by an American plaintiff may constitute a direct effect which supports jurisdiction under the commercial activity exception of the FSIA.¹⁰⁰ The Bank of China urged the court, however, to interpret the third clause of the FSIA to include the requirement that a foreign state engage in some "legally significant act" in the United States.¹⁰¹ This narrower interpretation of jurisdiction prevents foreign corporations from being drawn into tenuous lawsuits in the United States. In addition, this prevention of unnecessary lawsuits is better for foreign business relations. Further, the court decided that the *Weltover* court's reliance on an immediate consequence test was a result of the type of case and concluded that this requirement should not be some sort of threshold requirement for the third clause of the FSIA.¹⁰² Finally, the court rejected the legally significant act requirement because it thought

'direct effect' after *Weltover*. For the interpretation of "direct effect" after *Weltover*, see *supra* notes 71-85 and accompanying text.

⁹⁹ *Id.*; see also *Weltover*, 504 U.S. at 618, (rejecting the "foreseeable" or "substantial" tests). *Weltover* announced that an effect was direct "if it follows as an immediate consequence of the defendant's . . . activity." *Id.* But see *supra* notes 71-85 and accompanying text for the addition of a "legally significant act" standard after *Weltover*.

¹⁰⁰ *Voest-Alpine*, 142 F.3d at 893-94; see also *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1387 (5th Cir. 1992) (finding a direct effect because a breach of contractual obligation to provide legal defense resulted in a depletion of funds from an American corporation in Arkansas); *Grass v. Credito Mexicano, S.A.*, 797 F.2d 220, 221-22 (5th Cir. 1986); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir. 1985); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982) (demanding payment on a letter of credit issued by American bank causes direct effect in the United States because it depletes that bank's funds); see also *Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 390 (5th Cir. 1991) (stating that the direct effect test was not satisfied because the plaintiff was a Swedish corporation and all financial loss it had suffered affected Sweden, not the United States).

¹⁰¹ *Voest-Alpine*, 142 F.3d at 893-94; see also *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (defining a "legally significant act" as an act "giving rise" to the cause of action); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 35 (2nd Cir. 1993); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993). For an analyzes of the legally significant act test, see *supra* notes 71-85 and accompanying text.

¹⁰² *Voest-Alpine*, 142 F.3d at 893-94; see also, e.g., *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994); see also *Weltover*, 504 U.S. at 618 (stating that an effect is direct if it follows as an immediate consequence of the defendant's activity and this need not be "foreseeable" or "substantial").

that adding such a clause would merge the third clause into the second clause of the commercial activity exception.¹⁰³ Therefore, the *Voest-Alpine* court concluded that jurisdiction was present over the defendant's activity because it constituted a "direct effect" under the exact language of the third clause of the FSIA.¹⁰⁴ This interpretation is a complete departure from all other Circuits and prior decisions that will likely cause many confusing interpretations of the FSIA in the future and also thwarts the goals of the statute. Thus, there is a need for Congress to address the problem of vagueness in the "direct effect" clause and the problems created by the *Voest-Alpine* decision.

C. Problems with the *Voest-Alpine* Interpretation of "Direct Effect"

The ultimate question that courts seem to consider when analyzing a case under the FSIA is: Would Congress have wanted an American court to entertain an action such as the present one?¹⁰⁵ Given the willingness of American corporations to devise lawsuits out of every dispute, the harassment of foreign sovereign states would be considerable by exposure to such a "direct effect" test designed by *Waltover* that grants jurisdiction in almost every situation.¹⁰⁶ Therefore, statutory clauses limiting jurisdiction such as substantiality, foreseeability, or a legally significant act requirement serve the valuable goal of limiting jurisdiction over foreign defendants.¹⁰⁷ The overall

¹⁰³ See 28 U.S.C. § 1605(a)(2) (1994 & Supp. III 1997) (requiring that the cause of action be based upon (1) an act in the United States (2) in connection with commercial activity outside the United States). Under the second clause, the act must give rise to the cause of action or be legally significant and, therefore, becomes indistinguishable from the third clause except, perhaps "that the third clause would also require proof of an act outside the United States upon which the action is also based and which caused a direct effect in the United States." *Voest-Alpine*, 142 F.3d at 895.

¹⁰⁴ *Voest-Alpine*, 142 F.3d at 896. For a discussion of the direct effect test which the court in *Voest-Alpine* is affirming, see generally *Waltover*, *supra* notes 66-70 and accompanying text.

¹⁰⁵ See generally *Waltover*, 504 U.S. at 607.

¹⁰⁶ *Id.* For example, if a "broad" grant of jurisdiction was allowed under the FSIA, a corporation could sue a foreign defendant for any slight monetary loss that affects the American plaintiff even though a majority of the negotiations and business relations took place in another country. This would anger foreign businesses and discourage further business relations with the United States. By contrast, however, under a "narrow" interpretation of the FSIA, jurisdiction of a suit involving an American plaintiff is granted when there are "legally significant" acts in the United States during the business relations of the parties involved. Overall, this approach prevents tenuous suits based on minor effects in the United States.

¹⁰⁷ For an explanation of the "substantiality", "foreseeability", and "legally significant act" requirements, see *infra* notes 146-54, 166-89 and accompanying text.

consistent interpretations by the Circuit Courts after *Weltover* should not be nullified by such cursory interpretations as the *Voest-Alpine* analysis.

The Supreme Court, when it abandoned the language that Congress intended to limit the "direct effect" clause, failed to appreciate the fragile balance required in sovereign immunity cases such as *Colonial Bank v. Compagnie Generale Maritime et Financiere*.¹⁰⁸ In *Colonial Bank*, the court applied the "legally significant" act requirement to best preserve notions of comity and compensate those claimants who were injured by international acts that produced substantial and foreseeable effects in the United States.¹⁰⁹ In addition, the complete departure from the "legally significant" act requirement in *Voest-Alpine* may also cause confusion among courts in the future. By looking at the plain language of the statute, the FSIA states that only a "direct effect" is necessary and provides little guidance to the courts in its interpretation of cases.¹¹⁰ The *Restatement (Second) of Foreign Relations*, however, provides the additional language of substantiality and foreseeability that Congress intended when drafting the FSIA.¹¹¹ This language, though, was later discarded by the Supreme Court in *Weltover*.¹¹² Thereafter, the interpretation of a "legally significant" act evolved into a common interpretation of the FSIA by several Circuits.¹¹³ Therefore, the need for a new, revised statute with unambiguous language is essential for a uniform and consistent interpretation of the third clause of the FSIA by all courts in the future. This will also prevent our courts from becoming small international courts of claims as a result of the broad grant of jurisdiction provided by the *Weltover* court's analysis. Then, future courts that encounter the "direct effects" test of the FSIA must think of an interpretation of the language "direct effect" that adheres to the congressional intent of the statute and does not grant jurisdiction to tenuous claims of U.S. plaintiffs. Further, courts must also consider the possible confusion of

¹⁰⁸ 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986) ("[The FSIA] seeks a balance between the provision of a convenient forum for claimants aggrieved in commercial dealings with foreign states and the promotion of comity and harmony between the United States and other nations.").

¹⁰⁹ *Id.*

¹¹⁰ See 28 U.S.C. §§ 1602-1611 (1994 & Supp. III 1997). The statutory language does not expressly state what a "direct effect" is, and is quite vague. See *id.*

¹¹¹ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18(b) (1965).

¹¹² *Weltover*, 504 U.S. at 618.

¹¹³ For a discussion of the legally significant act analysis after *Weltover*, see *supra* notes 71-85 and accompanying text.

the FSIA’s “direct effect” language with the “effects” test of the Sherman Act that has very similar statutory language.¹¹⁴

IV. HISTORY OF THE “EFFECTS” TEST OF THE SHERMAN ACT AND INSIGHTS FOR THE VOEST-ALPINE “EFFECTS” TEST

Both the Sherman Act¹¹⁵ and the FTAIA¹¹⁶ have “effects” doctrines that are strikingly similar to the FSIA. When applying these laws to extraterritorial conduct, U.S. courts consider elements such as “substantiality” and “foreseeability” to discern a direct effect in the United States.¹¹⁷ Because the interpretation of the language of these acts is substantially similar to the FSIA, Circuit Courts may be confusing jurisdictional tests under the Sherman Act and FTAIA with the “direct effect” analysis of the FSIA. Therefore, this Section discusses the evolution of the “effects” doctrine under the Sherman Act and proposes ways to avoid confusion between the “effects” doctrine under the Sherman Act and the FSIA.

A. Evolution of the “Effects” Doctrine in the Sherman Act & its Extraterritorial Application

Enacted by Congress in 1890, the Sherman Act is the United States’ principal antitrust statute.¹¹⁸ In 1909, in *America Banana Co. v. United Fruit Co.*,¹¹⁹ the Supreme Court held that U.S. antitrust laws could not reach conduct outside the United States.¹²⁰ This is known as the

¹¹⁴ See H.R. REP. NO. 94-1487, at 19 (1976) (revealing that the ‘direct effect’ test under the FSIA is similar to the application of the Sherman Act).

¹¹⁵ Sherman Antitrust Act, 15 U.S.C. § 1 (1994).

¹¹⁶ Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (1994).

¹¹⁷ For a discussion of the necessity of “substantiality” and “foreseeability” in the interpretation of a “direct effect” under the Sherman Act and the FTAIA, see *infra* notes 123-25.

¹¹⁸ Sherman Antitrust Act, 15 U.S.C. § 1 (1994). Other statutes that address the extraterritorial application of U.S. law under the Sherman Act include: Foreign Trade Antitrust Improvements Act, 15 U.S.C.A. § 6a (West 1994); Clayton Antitrust Act, 15 U.S.C. § 22 (1994); Federal Trade Commission Act, 15 U.S.C. § 45(f) (1982); Money Laundering Control Act, 18 U.S.C. § 1956 (f) (1994).

¹¹⁹ 213 U.S. 347, 356-59 (1909) (Holmes, J.) (stating that a country has exclusive jurisdiction over all persons, objects, and property within its territory).

¹²⁰ *Id.* at 359. *But see* 15 U.S.C. §§ 1 (1994) (stating that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations” is illegal); 15 U.S.C. § 2 (1994) (stating that any monopolization, attempt to monopolize, or combination or conspiracy with another to monopolize “any part of the trade or commerce among the several States, or with foreign nations” is felonious); 15 U.S.C. § 6(a) (1994) (“Sections 1 to 7 of this title shall not apply to conduct involving trade

"territorial principle" by most scholars.¹²¹ Although a monumental case for early antitrust law, the territorial principle established in *America Banana* has been gradually overruled by subsequent case law.¹²² Thirty-six years after *America Banana*, the Second Circuit in *United States v. Aluminum Co. of America* ("ALCOA")¹²³ established the "effects" doctrine as the foundation for extraterritorial jurisdiction, interpreting the Sherman Act. The ALCOA decision marked a significant advancement in the extraterritorial application of United States antitrust law.¹²⁴ The ALCOA "effects" test, as stated by Judge Learned Hand, must include both intent and actual effects.¹²⁵ Because some problems occurred as a result of the different interpretations of the intent portion of the ALCOA

or commerce with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect.").

¹²¹ *American Banana Co.*, 213 U.S. at 357; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9, cmt. f (1971); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 20 (1965); see generally Marina Lao, *Jurisdictional Reach of the U.S. Antitrust Laws: Yokosuka and Yokota, and 'Footnote 159' Scenarios*, 46 RUTGERS L. REV. 821, 826 (1994).

¹²² See *United States v. Aluminum Co. of America* ("ALCOA"), 148 F.2d 416 (2d Cir. 1945) (allowing for the first time an extraterritorial reach of the Sherman Act and establishing the "effects test"); *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949) (holding that a violation of the Sherman Act requires a "direct and substantial effect" on U.S. commerce and that more than a trivial effect must be shown); see also *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *Mc Glinchy v. Shell Chem. Co.*, 845 F.2d 802 (9th Cir. 1988); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155 (1st Cir. 1983); *Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982); *National Bank of Canada v. Interbank Card Assoc.*, 666 F.2d 6 (2d Cir. 1981); *Westinghouse Elec. Corp. v. Rio Algom, Ltd.*, 617 F.2d 1248 (7th Cir. 1980); *Mannington Mills v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir. 1979); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161 (E.D. Pa. 1980), *aff'd* 723 F.2d 319 (3d Cir. 1983); *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221 (S.D.N.Y. 1975); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586 (E.D. Pa. 1974); *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd* (9th Cir. 1972); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960); *United States v. Imperial Chem. Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

¹²³ 148 F.2d 416 (2d Cir. 1945) (per Hand, J.) (ruling that the Sherman Act may be applied to conduct outside the United States where there is both an intent to affect and an actual effect on U.S. commerce, even if such conduct is undertaken by foreign nationals).

¹²⁴ *Fortenberry, Jurisdiction Over Extraterritorial Antitrust Violations—Paths Through the Great Grimpen Mire*, 32 OHIO ST. L.J. 519, 529 (1971).

¹²⁵ ALCOA, 148 F.2d at 444 (emphasizing that both elements of the test must be met before jurisdiction can attach). The "effects" doctrine, as a basis for jurisdiction, is not controversial regarding acts such as shooting across a border. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402, cmt. d and reporters' note 2 (1987). Controversy generally arises when one country uses the principle to regulate trade and economic activities outside its territory on the basis of their harmful economic effects within its territory. *Id.*

test,¹²⁶ Congress attempted to address the problems of arbitrary court decisions under the Sherman Act by enacting the FTAIA.¹²⁷ Overall, the courts have not been consistent in their application of the “effects” test and have often applied it incorrectly.¹²⁸ Courts that ignore the “substantial and foreseeable” effects test of the FTAIA and the “direct” effects test articulated in such cases as *ALCOA* and *General Electric*,

¹²⁶ See, e.g., *Fleischmann Distilling Corp. v. Distillers Co.*, 395 F. Supp. 221, 226 (S.D.N.Y. 1975) (stating that the required intent could “be satisfied by the rule that a person is presumed to intend the natural consequences of his actions”); *Sabre Shipping Co. v. American President Lines, Ltd.*, 285 F. Supp. 949, 953 (S.D.N.Y. 1968) (holding that the district court has subject matter jurisdiction over the foreign defendants because United States antitrust laws extend to any conduct “which affects the trade and commerce of the United States.”); *United States v. General Electric Co.*, 82 F. Supp. 753 (D.N.J. 1949) (holding that a violation of the Sherman Act requires a “direct and substantial” effect on United States).

¹²⁷ 15 U.S.C. §§ 6a, 45(a)(3) (1994). The act mandates use of a jurisdictional test which requires a finding of “direct, substantial and reasonably foreseeable effect[s]” before jurisdiction may be asserted in cases affecting the export trade of the United States. In order to qualify under the act, the plaintiff must have personal jurisdiction as a prerequisite in fairness to foreign industry. See generally *Burnham v. Superior Ct. of Cal.*, 495 U.S. 604 (1990) (requiring that the defendant have “minimum contacts” with the forum to meet due process requirements); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) (requiring “purposeful availment” and jurisdiction must be “reasonable”). The FTAIA specifically provides:

[The Sherman Act] shall not apply to conduct involving trade or commerce (other than Import trade or import commerce) with foreign nationals unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce w/ foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the U.S.; and

(2) such effect gives rise to a claim under the provisions of [the Sherman Act], other than this section. If [this Act applies] to such conduct only because of the operation of paragraph (1)(B); then [this Act] shall apply to such conduct only for injury to export business in the United States.

15 U.S.C.A. § 6a (1994).

¹²⁸ See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962); *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc.*, 383 F. Supp. 586, 587 (E.D. Pa. 1974); *United States v. Watchmakers of Switz. Info. Ctr., Inc.*, 134 F. Supp. 710 (S.D.N.Y. 1962); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504, 592 (S.D.N.Y. 1951); *United States v. General Elec. Co.*, 82 F. Supp. 753, 891 (D.N.J. 1949); and *United States v. Timken Roller Bearing Co.*, 83 F. Supp. 284, 309 (N.D. Ohio 1949), *modified and aff'd*, 341 U.S. 593 (1951). These cases provide examples of the confusion in applying the “effects” test of the Sherman Act. *Id.*

however, are certain to render decisions that will both anger foreign businesses and embarrass the United States.¹²⁹

With the enactment of the FTAIA in 1982, Congress enacted a much more narrow requirement of "direct, substantial, and reasonably foreseeable" effects for jurisdiction over extraterritorial conduct.¹³⁰ Further, many courts also consider issues of comity when deciding whether to grant jurisdiction over a foreign defendant.¹³¹ After the enactment of the FTAIA in 1982, the court in *Eurim-Pharm v. Prizer, Inc.*¹³² applied the new "direct, substantial, and reasonably foreseeable" effects which reveals that the new Congressional standard is much more clearly articulated.¹³³ Overall, through this new test, the courts can apply a

¹²⁹ See, e.g., *In re Uranium Antitrust Litig.*, 473 F. Supp. 382 (N.D. Ill. 1979), *remanded*, 617 F.2d 1248, 1255 (7th Cir. 1980) (asserting jurisdiction without considering either intent or effects).

¹³⁰ See Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a) (1988). For the text of the Act, see *supra* note 125. See also H.R. COMM. ON THE JUDICIARY, H.R. REP. NO. 686, 97th Cong., 2d Sess. (1982), *reprinted in* 43 Antitrust And Trade Reg. Rep. (BNA) No. 1076, at 306-07 (Aug. 5, 1982) (recognizing the lack of a jurisdictional standard and proposing that the purpose of the amendment was to promote American exports). See generally RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 18 (1965).

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

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

Id.

¹³¹ See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens." *Id.* See also *In re Insurance Antitrust Litig.*, 723 F. Supp. 464, 490 (N.D. Cal. 1989), *rev'd & remanded*, 938 F.2d 919, 933-34 (9th Cir. 1991) (applying the "direct, substantial, and reasonably foreseeable" effects test to litigation over foreign individuals and considering notions of comity).

¹³² 593 F. Supp. 1102 (S.D.N.Y. 1984).

¹³³ See *id.* at 1106 n.4 (stating that the "reasonable foreseeability" test examines "whether the effect would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown"). In *Pfizer*, the act lacked a direct, substantial, and reasonably foreseeable effect on either U.S. imports and

uniform standard and, if the interests are substantial, then comity interests cannot quash jurisdiction.¹³⁴ This standard of “substantiality” and “foreseeability” of direct effects to invoke jurisdiction under the Sherman Act and FTAIA may be used in comparison to the FSIA’s “direct effect” test, which is causing confusion in Circuit Courts today, in order to glean unambiguous language that should be applied after *Voest-Alpine* under the FSIA.

B. Possible Confusion: “Direct, Substantial, and Reasonably Foreseeable” Test under Both Doctrines and Future Application

Both the “substantiality” and “foreseeability” direct effect test that establishes extraterritorial jurisdiction under the Sherman Act and the FSIA’s direct effect test have similar interpretations and intents; both tests wish to preserve comity and prevent tenuous claims against foreign defendants that threaten foreign business and commercial relations.¹³⁵ In addition, the inclusion of more specific terms such as “substantiality” and “foreseeability” in order to determine whether an effect is direct enough to establish jurisdiction is similar in both instances and has similar results for plaintiffs and defendants.¹³⁶ Because the two doctrines

exports, but the plaintiffs argued that the act had a spillover effect on US domestic commerce through the effect of higher prices for the drug in the US. *Id.* at 1106. The term “reasonably foreseeable” is defined in case law, which cites the legislative history of the amendment. *Id.* The terms “direct” and “substantial”, however, are not explicitly defined. *Id.* Overall, the ALCOA test is probably less restrictive than the FTAIA standard requiring a “direct, substantial, and reasonably foreseeable” anti-competitive effect on commerce. See also Lao, *supra* note 120, at 827-28.

¹³⁴ See, e.g., *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 922-25 (D.C. Cir. 1984) (analyzing foreign interest and policy concerns only if the “direct, substantial, and reasonably foreseeable” effects test of the Sherman Act is met in order to ensure that all market participants are subject to the same rules); see also U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations, reprinted in 55 Antitrust & Trade Reg. Rep. (BNA) No. 1391 (Nov. 17, 1988). Footnote 159 to this Guideline states that although the Sherman Act extends to foreign “conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged in such commerce in the U.S., the Department is concerned only with the adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.” Lao, *supra* note 120, at 826.

¹³⁵ For a discussion of the elements of “substantial” and “foreseeable” effects under the FSIA, see *supra* notes 60-65 and accompanying text. For the most recent articulation of the “substantial” and “foreseeable” requirements under the Sherman Act and FTAIA, see, for example, *supra* notes 113-23.

¹³⁶ For a discussion of the “narrow” view of “direct” effect analysis after *Weltover* versus the more “broad” view of jurisdiction under the FSIA applied by courts such as *Weltover* and *Voest-Alpine*, see *supra* notes 87-113 and accompanying text. Under a “narrow” view, courts are more likely to deny jurisdiction and prevent our courts from becoming

are so similar and have overlapped throughout history, Circuit Courts may have confused the language of both statutes in their applications. Additionally, both doctrines (FSIA "effects" test and "effects" test of Sherman Act) have nearly identical tests and goals, a new statute that provides a new test for future courts should be drafted only after close analysis of the language and development of both tests. Finally, a new statute should be drafted in light of the effects that different language and interpretations have on the outcome of the jurisdiction under the FSIA because it severely affects plaintiffs, defendants, and the U.S. court system.¹³⁷

V. PROPOSED STATUTE: A UNIFORM INTERPRETATION OF THE FSIA'S "EFFECTS" TEST

After *Voest-Alpine*,¹³⁸ the Circuit Courts' interpretations of the FSIA's "effects" test conflict because of various other interpretations of a necessary "legally significant act" in other Circuit Courts.¹³⁹ This return to the broad interpretation of *Weltover* received much criticism because it allows plaintiffs to bring many international claims in U.S. courts, no matter how distant the "effect."¹⁴⁰ The existing commercial activity

international courts of claims which anger foreign litigants. *Id.* Under a "broad" view, courts are more likely to grant jurisdiction to most plaintiffs who feel that they have been harmed by a foreign defendant. *Id.* This view most often ignores issues of comity and jeopardizes further business conduct abroad by angering foreign officials. See *supra* notes 117-33 and accompanying text for a discussion of the extraterritorial application of the "effects" doctrine under the Sherman Act. The Courts, beginning with the *Banana* case, established a "narrow" view that denied jurisdiction to any foreign litigants. *Id.* Then, the courts began to overrule this standard with more "broad" standards of jurisdiction which confused the courts. *Id.* Finally, another more "narrow" view of jurisdiction was formed through the enactment of the FTAIA. *Id.*

¹³⁷ For example, a broad grant of jurisdiction like the "immediate consequences" test of *Weltover* grants jurisdiction in almost every case and causes our courts to become international courts of claims which is costly. For a discussion of *Weltover's* "immediate consequences" test, see *supra* notes 66-70 and accompanying text.

¹³⁸ 142 F.3d 887 (5th Cir. 1998).

¹³⁹ For a discussion of a "legally significant" act requirement for direct effect, see *supra* notes 71-85 and accompanying text.

¹⁴⁰ For a discussion of the "immediate consequences" test of *Weltover* that grants "broad" jurisdiction to plaintiffs, see *supra* notes 66-70 and accompanying text. See also Steven Anthony Torres, Comment, *International Law – Foreign Sovereign Immunities Act – Argentina's Default on Bonds Payable in New York Found Sufficient To Deny Immunity*, 16 SUFFOLK TRANSNAT'L L. REV. 761 (1993) (identifying the "immediate consequences" standard as "less precise" and reasoning that the "substantial and foreseeable" test would promote uniformity among the Circuit Courts); Avi Lew, *Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception To Jurisdictional Immunity*, 17 FORDHAM INT'L L.J. 726, 764 (1994) (stating that the Second

exception combines the questions of immunity and personal jurisdiction to determine whether the foreign defendant meets one of the FSIA's three standards for personal jurisdiction.¹⁴¹ However, many courts find this approach to jurisdiction and immunity for commercial activities creating a “direct effect” confusing.¹⁴² The third clause of the FSIA states that the United States should have jurisdiction over acts that cause a

Circuit's application of the U.S. Supreme Court's *Weltover* standard for commercial activity leads to inconsistent conclusions); 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 (1991); Donoghue, *supra* note 29; Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look At Jurisdiction Under the Commercial Activity Exception*, 13 REV. LITIG. 143 (1993) (concluding that under the “direct” effect test of the FSIA a court will not find subject matter jurisdiction unless the activity has some “legally significant” contact with the United States that is usually contractual).

¹⁴¹ See, e.g., *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981) (creating three questions for jurisdiction: (1) Is the action “based upon a commercial activity carried on in the United States by [a] foreign state?” (2) Is the action based upon an “act performed in the United States in connection with a commercial activity of [a] foreign state elsewhere?” (3) Is the action based upon an act outside the territory of the United States, in connection with a commercial activity of the foreign state elsewhere, yet “caus[ing] a direct effect in the United States?”); see also 28 U.S.C. § 1603(e) (1994) (defining “commercial activity carried on in the United States” as “commercial activity . . . having substantial contact with the United States”).

¹⁴² See Donoghue, *supra* note 29, at 524-25 (stating that courts may unnecessarily reach complex immunity questions by deciding immunity before determining personal jurisdiction). The discussion of *Weltover*, *supra* Section II.D.3, illustrates the difficulty that courts face in attempting to apply the FSIA's minimum contacts requirement. For example, the court held for the first time that failure to make payment on bonds that called for payment in New York constituted a “direct effect” in the United States. See *supra* notes 66-70 and accompanying text. This established jurisdiction under the third (“direct effects”) clause of § 1605 (a)(2). *Id.* According to Professor Carlos Vazquez, this two-step approach improperly bifurcates the inquiry: “The courts should be interpreting the direct-effect clause in light of the due process clause's minimum contacts requirements and should find the commercial-activities exception satisfied only if the forum-related activities on which the action is based are sufficient in themselves to satisfy due process.” Carlos M. Vazquez, *The Relationship Between the FSIA's Commercial-Activities Exception and the Due-Process Clause*, 85 PROC. AM. SOC. INT'L L. 257, 259 (1991). See also *Stena Rederi AB v. Comision de Contratos del Comité Ejecutivo General del Sindicato Revolucionario de Trabajadores Petroleros de la Republica Mexicana, S.C.*, 923 F.2d 380, 387-88 (5th Cir. 1991) (holding that the only relevant acts for purposes of jurisdiction under the FSIA are those acts that form the basis of the plaintiff's complaint); *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (holding that the commercial activity relied upon by the plaintiff must also be the activity upon which the lawsuit is based); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1514 (D.C. Cir. 1988) (refusing to grant jurisdiction over the breach of contract for work performed in Saudi Arabia because “[j]urisdiction would extend to any and all disputes between Zedan and Saudi Arabia subsequent to the phone call, merely because but for that call Zedan would not have traveled to Saudi Arabia”).

“direct effect” in the United States.¹⁴³ However, the courts have interpreted the “direct” effect language three different ways throughout the history of the FSIA: (1) “substantial and foreseeable” acts;¹⁴⁴ (2) acts that cause an “immediate consequence” in the U.S.;¹⁴⁵ and (3) “legally significant” acts.¹⁴⁶ Therefore, these tests must be analyzed based upon the effects they have on jurisdiction, notions of comity, congressional intent, and immunity before a new statute is crafted.

A. Examining the Tests and Application to Hypothetical

By analyzing the “substantial and foreseeable” acts test, the “immediate consequences” test, and the “legally significant” acts test and comparing their effects on jurisdiction, scholars may critique each outcome and decide which test is better based on notions of comity, congressional intent, and the goals of sovereign immunity. This Section provides analysis and critique of these tests by applying the tests to the hypotheticals proposed at the beginning of the Note.

1. “Substantial and Foreseeable” Acts

After the 1976 enactment of the FSIA until the *Weltover* case in 1991, most courts adopted a “substantial and foreseeable” test to determine a “direct effect” for jurisdiction.¹⁴⁷ In addition, the “substantial and

¹⁴³ See 28 U.S.C. § 1605 (a)(2) (1994 & Supp. 1997). This codifies the restrictive theory of sovereign immunity by providing:

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

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

Id. (emphasis added)

¹⁴⁴ See *supra* notes 61-65 and accompanying text.

¹⁴⁵ See *supra* notes 66-70 and accompanying text.

¹⁴⁶ See *supra* notes 71-85 and accompanying text.

¹⁴⁷ See *supra* notes 61-65 and accompanying text; see also *America W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445 (6th Cir. 1988); *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987); *Callejo v. Bancomer*, 764 F.2d 1101 (5th Cir. 1985); *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir. 1984); *Harris Corp. v. National Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982);

foreseeable" test is in accordance with the legislative history of the FSIA and section 18 of the *Restatement (Second) of Foreign Relations*.¹⁴⁸ According to numerous courts, this standard is persuasive authority.¹⁴⁹ By applying this standard to cases, many scholars have revealed that this test grants a "narrow jurisdiction" to plaintiffs in most scenarios and preserves the sovereign immunity of defendants most correctly under the commercial activity exception of the FSIA.¹⁵⁰ For example, in the case of the shareholder who has a contract with Nigeria in Section I.A. of this Note, the shareholder would not be able to bring a lawsuit against the foreign defendants in the United States under a "narrow" interpretation with the requirements of "substantiality" and "foreseeability" because the transfer of funds into the bank account in New York was a limited, last minute transaction.¹⁵¹

In addition, in the case of United World Trade who had a contract for oil with the MOP in Section I.B of this Note, it was not a foreseeable or substantial harm in the United States for MOP to deny payment. Therefore, jurisdiction would not be granted in either hypothetical because the elements of "substantiality" and "foreseeability" are not met. Overall, this analysis is better for the United States because the U.S. plaintiff in this suit has quite tenuous claims against the foreign defendant. Moreover, such claims would violate notions of comity and

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

¹⁴⁸ See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965); see also *supra* note 53-60 and accompanying text. The House Report 94-1487 specifically states that the third clause of the FSIA ("direct effects" test) should be consistent with the principles of the Restatement. H.R. REP. NO. 94-1487, at 6618. Therefore, Courts, after the enactment of the statute, most often applied the "substantial and foreseeable" analysis to determine "direct effect" in order to create uniformity among Circuits. The Second Circuit, however, did not adhere to this analysis. See *supra* notes 66-70 and accompanying text.

¹⁴⁹ See *supra* notes 57-58.

¹⁵⁰ See Evanoff, *supra* note 61 (defining the "broad" and "narrow" views of interpretation of "direct effect" under the FSIA). A more "narrow" interpretation is more likely to promote extraterritorial business relations because foreign individuals will not have to worry about being subject to many lawsuits outside their country unless there is a just reason and substantial, direct act in the United States. *Id.*

¹⁵¹ In the facts stated in Section I, the transfer of the funds to El Surtidor's bank account in New York, rather than the Cayman Islands, was not a "foreseeable" or "substantial" part of the contractual relationship. Therefore, it is better for business relationships and notions of comity if the lawsuit is brought somewhere else with "substantial" effects on the contractual arrangement such as Nigeria or Mexico (headquarters of the Mexican corporation, El Surtidor del Hogar). See *supra* notes 2-3 and accompanying text.

discourage foreign business relations with U.S. citizens in the future.¹⁵² A statutory requirement of “substantiality” and “foreseeability” should not be adopted, however, except as a secondary consideration under the “direct effect” analysis of the FSIA because it can be easily confused with the “direct, substantial, and foreseeable” analysis of sufficient effects under the Sherman Act and FTAIA.¹⁵³

2. Acts that Cause “Immediate Consequences” in the U.S.

In 1992, the United States Supreme Court established an “immediate consequences” analysis for the “direct effects” test of the FSIA.¹⁵⁴ This

¹⁵² See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403(1) (1987) (articulating a “reasonableness” inquiry for jurisdiction). The “reasonableness” inquiry turns on a number of factors including the extent to which the activity takes place within the territory of the country wishing to assert jurisdiction or has a substantial, direct, and foreseeable effect upon or in the territory. § 403 (2)(a) (1987). See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 37 (1971). “‘Judicial Jurisdiction’ may be exercised by a state over conduct outside its borders with effects in the state unless the nature of the effects and of the individual’s relationship to the state make the exercise of such jurisdiction unreasonable.” *Id.* See also *Hilton v. Guyot*, 159 U.S. 113, 164 (1895) (stating that “comity” is “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens”). If most of the acts or contractual relations take place outside the U.S. in a given claim, then it would not make sense to assert jurisdiction over that foreign defendant. This, in a sense, is the “narrow” interpretation of the “direct effect” analysis of the FSIA until *Weltover*. See *supra* notes 61-65 and accompanying text.

¹⁵³ For a complete discussion of the “effects” test under the Sherman Act and the FTAIA of 1982 which both require “substantial and foreseeable” acts in order to qualify under the “direct effect” analysis, see *supra* notes 113-35 and accompanying text. This language dealing with the extraterritorial jurisdiction of claims based on the Sherman Act is so similar to the “direct effect” analysis of the FSIA that it may be confusing Circuit Courts. See *supra* notes 113-35 and accompanying text.

¹⁵⁴ See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); this “immediate consequences” standard was criticized by many scholars. See, e.g., David E. Gohlke, Comment, *Clearing the Air or Muddying the Waters? Defining a “Direct Effect in the United States” Under the Foreign Sovereign Immunities Act After the Republic of Argentina v. Weltover*, 18 HOUS. J. INT’L L. 261 (1995) (criticizing *Weltover* because it grants broad jurisdiction over foreign officials in U.S. courts); Keith Highet, *Foreign Sovereign Immunity—Commercial Activity of a Foreign State Having a Direct Effect in the United States*, 86 AM. J. INT’L L. 820, 823 (1992) (arguing that the Supreme Court’s acceptance of the “immediate consequences” test will broaden jurisdiction under the FSIA); Steven Anthony Torres, *International Law – 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. REV. 761, 770-71 (1993) (arguing that the “immediate consequences” analysis causes inconsistency and constitutes a misinterpretation of legislative intent); Avi Lew, Comment, *Republic of Argentina v. Weltover, Inc.: Interpreting the Foreign Sovereign Immunity Act’s Commercial Activity Exception to Jurisdictional Immunity*, 17

decision departed from the interpretations of all Circuit Courts, in addition to a departure from the elements of "substantiality" and "foreseeability" required by Section 18 of the *Restatement (Second) of Foreign Relations*.¹⁵⁵ Further, at least one scholar has labeled this "immediate consequences" test as the "broad" interpretation of the "direct effects" test under the FSIA.¹⁵⁶ By applying this test to cases after *Weltover*,¹⁵⁷ courts have realized that this test grants jurisdiction to plaintiffs in almost every case and, consequently, does not preserve sovereign immunity.¹⁵⁸ For example, in the case of the shareholder who did not receive funds in New York as anticipated,¹⁵⁹ a court which has adopted the "broad view" of the FSIA's "direct effect" analysis, like *Weltover*, will grant jurisdiction because it has the "immediate consequence" of depriving a U.S. citizen of funds in the United States.¹⁶⁰

Similarly, in the case of United World Trade who did not receive funds in New York from the oil company in the second hypothetical,¹⁶¹ the U.S. court that applies the "immediate consequences" analysis will grant jurisdiction because of the lost funds in a New York bank. However, such a "broad" interpretation of jurisdiction violates notions

FORDHAM INT'L L. J. 726 (1994) (recognizing that the *Weltover* standard leads to inconsistent conclusions).

¹⁵⁵ For a discussion of the requirements of "substantiality" and "foreseeability" in the legislative history of the FSIA and the courts before *Weltover*, see *supra* notes 53-65 and accompanying text.

¹⁵⁶ See Evanoff, *supra* note 61, at 639-40 (describing the Second Circuit's rejection of the substantiality and foreseeability requirements as the "broad view" of jurisdiction). This is labeled as the "broad view" because it grants broad jurisdiction to plaintiffs in their claims against foreign defendants, based on whether the act has any sort of "immediate consequence" in the U.S. *Id.* This grants jurisdiction over any effect, no matter how small or tenuous the claim in most cases. *Id.*

¹⁵⁷ See *Commercial Bank v. Rafidain Bank*, 15 F.3d 238, 241 (2d Cir. 1994) (holding that bank's obligation to pay in New York for accounts is a "direct effect" under the broad interpretation of *Weltover*); *Antares Aircraft v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) (applying a "legally significant" act analysis to determine direct effect instead of an "immediate consequences" analysis); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 821 F. Supp. 1405 (D. Colo. 1993), *aff'd*, 33 F.3d 1232, 1237 (10th Cir. 1994) (recognizing that the phrase "direct effect" is very ambiguous); *Ampac Group, Inc. v. Republic of Honduras*, 797 F. Supp. 973, 977 (S.D. Fla. 1992), *aff'd*, 40 F.3d 389 (11th Cir. 1994) (holding that an effect need only be "slight/tangential" to qualify under the FSIA's "direct effect" analysis).

¹⁵⁸ See *Gohlke*, *supra* note 155 (criticizing *Weltover* because the new "immediate consequences" test grants such broad jurisdiction over foreign officials in U.S. courts and violates notions of comity).

¹⁵⁹ For the facts of this hypothetical, see *supra* notes 2-3 and accompanying text.

¹⁶⁰ See *supra* note 135.

¹⁶¹ For specific facts of the case, see *supra* notes 4-7 and accompanying text.

of comity by exercising jurisdiction over almost any foreign defendant and will likely turn our courts into international courts of claims.¹⁶² Therefore, this ambiguous language of "immediate consequence" should not be adopted in the future because of the negative effect it has of granting plaintiffs jurisdiction over foreign defendants in almost every suit. This, in turn, angers foreign businesses and prevents them from engaging in business with the United States, which was not Congress's intent when drafting the commercial exceptions of the FSIA.¹⁶³ Finally, this approach violates notions of comity.¹⁶⁴

3. "Legally Significant Acts"

Because of the ambiguity and unpredictability of the "immediate consequence" test of *Weltover*, the Tenth Circuit in *Mangyshlakneft* adopted a more narrowly tailored test of "direct effect" through the addition of a "legally significant act" to the FSIA analysis.¹⁶⁵ Then, in 1994, the United States Supreme Court added a "legally significant act" requirement in *Antares Aircraft* that is much more restrictive than the "immediate consequence" standard.¹⁶⁶ After these decisions, many other Circuit Courts adopted the "legally significant act" as a more reasonable standard.¹⁶⁷ In order to establish jurisdiction and a direct effect under

¹⁶² For a discussion of the varied and unpredictable application of the "immediate consequence" analysis of *Weltover*, see *supra* notes 66-85 and accompanying text. Overall, U.S. courts are not meant to resolve every dispute that has a foreign defendant and has an effect in the United States. If this were the case, then U.S. courts would become overwhelmed with international cases and, in effect, would become international courts of claims.

¹⁶³ For a discussion of legislative intent of the "direct effect" clause, see *supra* Section II.D.1.

¹⁶⁴ See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (defining the meaning of comity and emphasizing the importance of not overburdening other nation's citizens through extraterritorial lawsuits). See also *supra* note 130.

¹⁶⁵ *United World Trade v. Mangyshlakneft*, 33 F.3d 1232 (10th Cir. 1994) (denying jurisdiction to the plaintiff by applying the legally significant act standard even though domestic corporation did not receive funds). See also *supra* notes 71-85 and accompanying text.

¹⁶⁶ 999 F.2d 33 (2d Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) (adding the legally significant act to replace the *Weltover* analysis). See also Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction under the Commercial Activity Exception*, 13 REV. LITIG. 143, 166 (stating that the "legally significant" act approach in *Antares* is more restrictive than an "immediate consequences" standard). See also *supra* notes 71-85 and accompanying text.

¹⁶⁷ See, e.g., *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997); *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 307 (D.C. Cir. 1995); *Princz v. F.R.G.*, 26 F.3d 1166, 307 (D.C. Cir. 1994); *Federal Ins. Co. v. Richard Rubin*, 12 F.3d 1270 (3d Cir. 1993); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992); *Walter Fuller Aircraft Sales v. Republic*

this test, the plaintiff must show that something “legally significant” actually happened in the United States.¹⁶⁸ This analysis is much more narrowly defined than the “immediate consequences” standard for direct effect established in *Weltover*, which is quite broad and grants unlimited jurisdiction.¹⁶⁹ Because the “legally significant act” test is more narrowly defined, it compliments the goals of Congress of respecting the autonomy of other nations and not subjecting foreign defendants to unsubstantiated lawsuits in the United States.¹⁷⁰

Further, by applying the “legally significant act” analysis to the U.S. shareholder in the hypothetical at the beginning of this Note,¹⁷¹ a court would likely rule that Nigeria’s lack of payment of five million dollars to El Surtidor’s bank account in New York constitutes a “legally significant” act that has a “direct effect” in the United States. However, the court would likely rule that a conversion of foreign currency at a New York bank in the second hypothetical would not constitute a “legally significant act” in the course of the party’s contractual relations.¹⁷² Thus, the court ensures that the plaintiff states a significant claim against a foreign defendant by clearly stating a “legally significant act” that requires the jurisdiction of U.S. courts (*i.e.*, lack of payment in a negotiated and substantial contract). The specific language of the “legally significant act” analysis to determine direct effect also preserves notions of comity because it is narrowly tailored and foreign defendants should be responsible for commercial activity which directly affects the United States through legally significant acts.¹⁷³ Overall, the “legally significant act” test best preserves the goals of Congress in the enactment

of the Philippines, 965 F.2d 1375 (5th Cir. 1992); *WMW Machinery v. Werkzeugmaschinenhandd*, 960 F. Supp. 734 (S.D.N.Y. 1997); *Granville Gold Trust v. Commissione del Fullimento/Interchange Bank*, 924 F. Supp. 397 (E.D.N.Y. 1996); *Coleman v. Alcolac*, 888 F. Supp. 1388 (S.D. Tex. 1995); *Reed v. Donau Bank*, 866 F. Supp. 750 (S.D.N.Y. 1994); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910 (S.D.N.Y. 1993); *Maizus v. Weldor Trust Reg.*, 820 F. Supp. 101 (S.D.N.Y. 1993).

¹⁶⁸ See, e.g., *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (holding that a direct effect is established only if the plaintiff shows that something “legally significant” occurred in the United States). See also *supra* notes 71-85 and accompanying text.

¹⁶⁹ See *Wydeven*, *supra* note 77, at 166 (stating that the “legally significant act” is much more restrictive). It was a test that was also more uniformly and universally applied among the Circuit Courts after *Weltover*. *Id.* See also *supra* notes 71-85 and accompanying text.

¹⁷⁰ See *supra* notes 27-85 and accompanying text.

¹⁷¹ For specific facts in this case, see *supra* notes 2-3 and accompanying text.

¹⁷² For a description of the contract between United World Trade and MOP, see *supra* notes 4-7 and accompanying text.

¹⁷³ See *supra* note 152 and accompanying text.

of the FSIA and notions of international comity. Therefore, it should be adopted in statutory form in order to prevent further confusion among the Circuit Courts such as *Voest-Alpine*.¹⁷⁴

B. *Drafting a New Statute For "Direct Effect"*

The current "direct" effect clause of the FSIA states that jurisdiction is granted 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."¹⁷⁵ This Note proposes to add the "legally significant act" requirement in the statute as the best interpretation of what constitutes "direct effect."¹⁷⁶ As a result, this new language should extinguish the Circuit Court's confusion of the "direct effect" test by explicitly stating what "direct effect" means in the FSIA.¹⁷⁷ The amended statute would state the following:

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

...
(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign State elsewhere; or upon a *legally significant act* outside the territory of the United States in connection with a commercial activity of the foreign State elsewhere and that *legally significant act* causes a direct legally significant effect in the United States.¹⁷⁸ (new language is italicized).

Courts will also likely use the "substantiality of conduct" and "foreseeability" of conduct¹⁷⁹ to determine whether the act was "legally

¹⁷⁴ For a discussion of the Circuit split caused by *Voest-Alpine*, see *supra* notes 86-112 and accompanying text.

¹⁷⁵ For the complete text of the FSIA, see *supra* notes 27-85 and accompanying text.

¹⁷⁶ For an explanation of why the application of "legally significant act" analysis is the most coherent, see *supra* notes 163-72 and accompanying text.

¹⁷⁷ For identification of Circuit Court confusion, see *supra* notes 53-85 and accompanying text.

¹⁷⁸ See 28 U.S.C. § 1605 (a)(2) (1988).

¹⁷⁹ For a discussion of the "substantiality" and "foreseeability" test, see *supra* notes 145-51 and accompanying text.

significant," but this language should not be articulated in the statute and should be a secondary inquiry for courts because it is easily confused with the Sherman Act and FTAIA.¹⁸⁰ Overall, the "legally significant" act requirement clarifies the ambiguity of the "direct effect" clause of the FSIA by providing a uniform test for all courts to apply that specifically states that a "legally significant" act causes a "direct effect" in the United States.

C. *Effects of New Statute on Interpretation.*

This new requirement of a "legally significant" act provided in the revised statute clarifies the FSIA which will lead to more uniform interpretations of direct effect in the Circuit Courts in the future.¹⁸¹ In addition, the inclusion of a "legally significant" act is a more "narrow" view of "direct effect" analysis than the interpretations in *Weltover* and *Voest-Alpine* that is better for preserving international business relationships abroad and respecting notions of international comity.¹⁸² Because of this more clarified statute, plaintiffs are also discouraged from bringing unsubstantiated claims under the FSIA against foreign defendants that often harass foreign businesses and discourage further extraterritorial conduct.

Thus, this interpretation is better for foreign business and does not overload U.S. courts with international claims because the "legally significant" act analysis limits jurisdiction in U.S. courts.¹⁸³ If the new "legally significant" act requirement is applied to the shareholder mentioned in the illustration at the beginning of this Note,¹⁸⁴ the court would likely grant jurisdiction and determine that Nigeria caused a "direct effect" in the United States because of the "legally significant" act of never paying the plaintiff five million dollars in the New York bank

¹⁸⁰ For an explanation of the "substantiality" and "foreseeability" requirements determining effects sufficient for jurisdiction under the Sherman Act and FTAIA, see *supra* notes 113-35 and accompanying text.

¹⁸¹ For a discussion of the "legally significant" act analysis and its effects in case law and application to hypotheticals, see *supra* notes 163-72 and accompanying text.

¹⁸² See *supra* notes 163-72 and accompanying text.

¹⁸³ By requiring the "legally significant act" to show direct effect, a plaintiff must actually prove in his/her complaint that something legally significant occurred in the United States which is a more difficult standard than the "immediate consequences" standard of *Weltover* that granted jurisdiction to almost all plaintiffs. For differences between the two analyses, see *supra* notes 145-72 and accompanying text.

¹⁸⁴ For specific facts of this hypothetical, see *supra* notes 2-3 and accompanying text.

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account.¹⁸⁵ Overall, this revised statute incorporating the language of a “legally significant” act constituting “direct effect” will create more uniform results in the Circuits, promote international business relations, preserve notions of comity, and prevent our courts from becoming international courts of claims. Further, there will be less confusion between the “effects” test of the FSIA and the “effects” test of the Sherman Act and FTAIA after this revision.¹⁸⁶

VI. CONCLUSION

Until the Fifth Circuit’s decision in *Voest-Alpine*, courts interpreted the “direct effect” exception of the FSIA to include a “legally significant” act in the United States that constitutes “direct effect.”¹⁸⁷ By retaining the standard of “immediate consequences” of *Weltover*, the Fifth Circuit created a split among Circuits and confused the meaning of “direct effect” under the FSIA.¹⁸⁸ Throughout the history of the FSIA, this confusion resulted from the ambiguous language of “direct effect” in the statute.¹⁸⁹ Therefore, legislators and courts must adopt a uniform test or form a revised statute of the “direct effects” test under the FSIA such as the “legally significant act” analysis presented in this Note in order to prevent further confusion in the future.¹⁹⁰ For example, such revision is necessary in order to prevent “broad” interpretations like the *Weltover* analysis that anger foreign businesses and prevent further extraterritorial negotiations. In addition, the “legally significant act” language causes less confusion with the “substantiality” and “foreseeability” requirements of the Sherman Act and FTAIA while preserving the goal of limited jurisdiction under the “direct effects” test of the FSIA. Finally, this limited grant of jurisdiction under the “legally significant act” revision also prevents our courts from becoming overloaded with

¹⁸⁵ This is the most just result because the plaintiff expected a “legally significant” act to occur in the United States; therefore, the plaintiff should be entitled to jurisdiction in the United States and recovery under the “legally significant” act test that determines a “direct effect.”

¹⁸⁶ See *supra* Section IV. The revision, which does not include elements of “substantiality” or “foreseeability” except as secondary inquiries under the *Restatement*, prevents confusion with the Sherman Act and the FTAIA.

¹⁸⁷ For a discussion of the *Voest-Alpine*, see *supra* notes 86-114.

¹⁸⁸ For a discussion of the *Voest-Alpine*, see *supra* notes 86-114.

¹⁸⁹ See *supra* Section II. See also *supra* note 1.

¹⁹⁰ For the revised statute articulated in this Note, see *supra* Section V.

tenuous claims by plaintiffs. Thus, this approach preserves America’s judicial efficiency.

Heidi L. Frostedstad

