

“Direct Effect in the United States” under the Foreign Sovereign Immunities Act after *Cruise Connections v. Attorney General of Canada*

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Introduction

In the global marketplace, private parties often transact with foreign nations or their instrumentalities. When disputes arise, under what circumstances can a private party sue a foreign nation in U.S. court for the breach of a contract relating to commercial activity occurring outside U.S. territory? How much connection between the foreign commercial activity and the U.S. is necessary for jurisdiction?

The Foreign Sovereign Immunities Act¹ (FSIA) of 1976 was intended to address these questions. The FSIA is the codification of the “restrictive” view of sovereign immunity that aims to balance traditional absolute foreign sovereign immunity with practical interests of private domestic parties dealing with foreign nations.² By default, the FSIA provides immunity by denying jurisdiction over a foreign sovereign in U.S. federal or state court.³ However, the statute also provides exceptions that form the sole mechanisms for obtaining jurisdiction over a foreign sovereign.⁴ One set of exceptions is known as the “commercial activity exception,”⁵ codified at § 1605(a)(2). Under § 1605(a)(2), if the action is

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1 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-11 (2006).

2 *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 148 (2d Cir. 1991), *aff'd*, 504 U.S. 607 (1992).

3 28 U.S.C. § 1604 (“Subject to existing international agreements . . . 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”).

4 *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610-11 (1992); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

5 *See, e.g.*, 1 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 3:12 (2d ed. 2011).

based upon an act outside the territory of the United States in connection with commercial activity of the foreign sovereign, jurisdiction over the foreign sovereign can be obtained if the act “causes a direct effect in the United States.” But what constitutes a “direct effect in the United States”? With little statutory or legislative guidance,⁶ courts have struggled to interpret the meaning of “direct effect,” a seemingly simple phrase that has proven to be very troublesome in legal analysis.

The Supreme Court’s 1992 *Republic of Argentina v. Weltover, Inc.*⁷ decision only added additional problems to “direct effect” jurisprudence. The Court rejected foreseeability and substantiality of the alleged effect as requirements and, instead, stated that an effect is “direct” if it follows as “immediate consequence” of the foreign sovereign’s actions.⁸ Stripped of the useful guideposts of foreseeability and substantiality, courts have had much trouble using the immediacy standard, which did very little to clarify the term “direct.” For breach of contract cases, modern “direct effect” jurisprudence contains at least two major issues, neither of which is straightforward. One issue, a subject of circuit splits, relates to how a foreign government’s scope of contractual obligation should play a role in determining the types of “effects” that may qualify. Another issue is the application of the “immediate consequence” rule in determining whether an effect was “direct,” a term that can be overly abstract, as the case of this note illustrates.

The 2010 D.C. Circuit case *Cruise Connections Charter Management I, LP v. Attorney General of Canada*⁹ creates additional ambiguity in “direct effect” jurisprudence. In *Cruise Connections*, the Royal Canadian Mounted Police’s alleged breach of a contract was found to have had a direct effect because it resulted in the “loss of revenue” under the plaintiff party’s third-party agreements, even though the Royal Canadian Mounted Police contracted with the plaintiff only and had no performance obligations in the United States.¹⁰ This holding departs from traditional case

⁶ NANDA & PANSIUS, *supra* note 5, § 3:12.

⁷ *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

⁸ *Id.*

⁹ 600 F.3d 661 (D.C. Cir. 2010), *en banc reh’g denied*, 2010 U.S. App. LEXIS 16743 (D.C. Cir., June 21, 2010).

¹⁰ *Id.* Judge Tatel wrote the opinion for a unanimous panel including Judge Silberman and Judge Williams.

law in the circuit, which found direct effect in breach of contract cases only when the foreign government had agreed to render payment at a U.S. location. Furthermore, although established principles require a direct effect to have no intervening cause, the court found the third-party agreement losses to be “immediate consequences” of the alleged breach, even though such losses were one or more steps removed from the alleged breach, as they were tied to third-party obligations.

This note will argue that the D.C. Circuit’s departure from earlier case law is based on flawed reasoning, and that as a result, direct effect jurisprudence has been made even more ambiguous. Part I provides an overview of sovereign immunity, the 1976 Foreign Sovereign Immunities Act, and subsequent case law. Part II provides an overview and summary of *Cruise Connections*. Part III analyzes the D.C. Circuit’s reasoning, concluding that its finding of direct effect in third-party agreement losses is illogical, inconsistent with earlier case law, and based on flawed legal reasoning. Part IV discusses the implications of the case, including a broadening of a court’s discretion in finding direct effect, and possible future emphasis on generalized economic effect in the U.S. and disappointed expectation of economic gain as factors for finding direct effect. Part IV also provides possible approaches toward more uniformity and clarity in view of the ambiguities resulting from this decision.

I. Background

This section begins with a description of the restrictive theory of sovereign immunity which formed the basis of the FSIA. The section then describes the ambiguity of the “direct effect” element, and proceeds by highlighting case law interpretations of this element.

A. The FSIA’s Codification of the Restrictive Theory of Sovereign Immunity

In common law courts, the plea of sovereign immunity was originally recognized as an absolute bar to any lawsuit, based on the theory of implied consent among sovereigns to withhold jurisdiction.¹¹ The drawback of absolute sovereign immunity is the outright denial of recovery against foreign governments in U.S. courts. Over time, increase in trade activity gradually eroded absolute immunity in favor of a more practical,

11 HAZEL FOX, *THE LAW OF STATE IMMUNITY* 35 (2d ed., Oxford Univ. Press 2008); see also NANDA & PANSIUS, *supra* note 5, § 3:12.

balanced approach known as the “restrictive theory of sovereign immunity.”¹² This later theory is based on a dichotomy that a foreign sovereign should be immune for its public acts, but not immune for its private acts.¹³ Private acts include those of commercial or private law nature, while public acts are those performed in the exercise of sovereign power, such as military deployment.¹⁴ Justice Marshall laid out this public-private dichotomy in the seminal 1812 case *Schooner Exchange v. McFaddon*,¹⁵ which inaugurated foreign sovereign immunity jurisprudence in the United States.¹⁶

The restrictive theory developed on a case-by-case basis until the need for a more definite and reliable doctrine led to codification under the Foreign Sovereign Immunities Act (FSIA) of 1976.¹⁷ The major portion of the FSIA was codified at 28 U.S.C. §§ 1602-11, which forms chapter 97 of the title.¹⁸ One court wrote, “The statute 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.”¹⁹

Section 1604 provides that subject to preexisting international agreements, “a foreign state shall be immune from the jurisdiction of the

¹² FOX, *supra* note 11, at 35.

¹³ *Id.*

¹⁴ *Id.*; NANDA & PANSIUS, *supra* note 5, § 3:12 (citing Republic of Austria v. Altmann, 541 U.S. 677, (2004)) (explaining that the restrictive theory still protects “the sovereign’s right to act in a governmental manner free from suit.”); The Schooner Exch. v. McFaddon, 11 U.S. 116 (1812) (“[t]here is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation”).

¹⁵ The Schooner Exch. v. McFaddon, 11 U.S. 116, 137 (1812) (laying out the public-private dichotomy in dicta).

¹⁶ NANDA & PANSIUS, *supra* note 5, § 3:12 (citing Republic of Austria v. Altmann, 541 U.S. 677, (2004)).

¹⁷ *Id.*

¹⁸ Foreign Sovereign Immunities Act of 1976, Pub.L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2), (3), (4), 1391(f), 1441(d), 1602-1611).

¹⁹ Colonial Bank v. Compagnie Generale Maritime et Financiere, 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986).

courts of the United States and of the States,” unless an exception given in §§ 1605-07 applies. Procedurally, sovereign immunity is an affirmative defense which must be pled in the defendant’s answer.²⁰

However, the statute provides exceptions that destroy immunity. Section 1605(a)(2), known as the commercial activity exception, provides jurisdiction if the action is “based upon”²¹ (1) the foreign state’s commercial activity carried on in the United States; (2) “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere”; or (3) “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.” Thus, for commercial activity outside the United States, the third prong must be used to gain jurisdiction over the foreign sovereign. Of course, if the foreign sovereign conducted activity inside the United States, the “direct effect” element is absent in the corresponding first and second prongs. The statute provides definitions for “foreign states” (which includes the foreign state’s “agency or instrumentality”), the geographical meaning of “United States,” and the term “commercial activity,” but it contains no definition of “direct effect.”

B. Interpreting “Direct Effect:” *Weltover’s* Rejection of Foreseeability in Favor of an “Immediate Consequence” Standard, and Emphasis on Payment location

The lack of statutory definition meant that courts had to supply their own definition of “direct effect.” One approach was to interpret “direct effect” as “one that is substantial and foreseeable,”²² a view shared by many courts at the time.²³ This view had some asserted basis in legislative history, but later authority rejected this view and deemed legislative history to be

²⁰ FOX, *supra* note 11, at 319.

²¹ See *Saudi Arabia v. Nelson*, 507 U.S. 349, 357 (1993) (“‘based upon’ . . . is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case”).

²² *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988); *Transamerican S.S. v. Somali Democratic Republic*, 247 U.S. App. D.C. 208, 767 F.2d 998, 1004 (D.C. Cir. 1985).

²³ Heidi L. Frostestad, Note, *Voest-Alpine Trading v. Bank of China: Can a Uniform Interpretation of a “Direct Effect” be Attained Under the Foreign Sovereign Immunities Act of 1976?*, 34 VAL U.L. REV 515, 527 (2000) (“After the 1976 enactment of the FSIA, most Circuit Courts adopted a ‘substantial and foreseeable’ test”).

inconclusive as to the meaning of “direct effect.”²⁴ However, the Supreme Court expressly rejected both the “substantial” and “foreseeable” criteria in *Weltover, Inc. v. Republic of Argentina*.²⁵ In *Weltover*, two Panamanian corporations and a Swiss bank brought a breach of contract suit against Argentina in New York federal court, alleging that Argentina unilaterally rescheduled the maturity dates for certain bonds.²⁶ The contract allowed the plaintiffs to choose the location of payment, and before the breach occurred, the plaintiffs chose a New York bank.²⁷ The court rejected the contention that § 1605(a)(2) “contains any unexpressed requirement of substantiality or foreseeability.” It instead held that an effect is “direct” if it follows “as an immediate consequence of the defendant’s . . . activity.”²⁸ Note that, although “immediate” commonly refers to nearness in time, federal courts have interpreted “immediate” in the direct effect context to mean the lack of an *intermediate* event or the lack of intervention,²⁹ which is the other definition of “immediate.”

In *Weltover*, the Court found direct effect, reasoning that because Argentina was contractually obligated to pay the plaintiffs in a New York bank, “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.”³⁰ Thus, besides the endorsement of

24 NANDA & PANSIUS, *supra* note 5, § 3:12. The House Report reference stated that “direct effect” should be consistent with section 18 of the Restatement (Second) of Foreign Relations Law, which uses the terms “foreseeable” and “substantial.” *Id.* However, this restatement section was later deemed to be irrelevant to direct effect. *See, e.g., Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 311 (2d Cir. 1981) (“[Section]18 concerns the extent to which substantive American law may be applied to conduct overseas, not the proper extraterritorial jurisdictional reach of American courts . . .”). Regardless, the Supreme Court later rejected the criteria of foreseeability and substantiality in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). The ultimate result is that legislative history of the FSIA contains no conclusive explicit or inferable definition of this phrase

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

26 *Id.* at 617.

27 *Id.*

28 *Id.* at 618 (internal quotations omitted).

29 *Lyon v. Augusta S.P.A.*, 252 F.3d 1078, 1083 (9th Cir. 2001) (“While one meaning of immediate is ‘occurring, acting, or accomplished without loss of time,’ the more relevant meaning in this context is ‘acting or being without the intervention of another object, cause, or agency’”).

30 *Weltover*, 504 U.S. at 617-19 (1992) (the contract allowed the plaintiffs to choose the

the “immediate consequence” test and the rejection of foreseeability and substantiality, *Weltover*’s analysis of the specific facts had the effect of fixating subsequent cases on a payment location test.

C. Cases after *Weltover*: “Legally Significant Acts” and the Focus on Payment Location Obligations

Weltover’s “immediate consequence” test was not met well. The Tenth Circuit remarked that *Weltover*’s rejection of foreseeability and substantiality eliminated useful “guideposts” to a statutory phrase that was already “hopelessly ambiguous when applied to any particular transaction.”³¹

The rejection of foreseeability and substantiality was seen as allowing immunity to be destroyed too easily.³² One commentator humorously summarized the development of sovereign immunity jurisprudence through *Weltover* as moving from “the king can do no wrong” to “your king can be sued here.”³³ In light of this potential problem, one circuit split in “direct effect” jurisprudence revolves around an additional, judicially created requirement for direct effect. In adding more substance to *Weltover*’s immediacy test while also preserving the decisiveness of the U.S. place of payment in *Weltover*,³⁴ the Second, Eighth, and Ninth Circuits³⁵ have imposed a judicially created requirement that a foreign

location of payment, and before the breach, the plaintiffs chose a New York bank).

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

32 *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 Republic of Argentina v. Weltover*, 18 HOUS. J. INT’L L. 261, 296 (1995) (in addressing an argument that *Weltover* simplified direct effect analysis, the comment responded, “[M]atters are simplified only because the standard against which to judge the directness of an “effect in the United States” has been set so low that virtually any determination will not be a manifest abuse of discretion.”).

33 *Id.* at 264.

34 *NANDA & PANSIUS*, *supra* note 5, § 3:12.

35 *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 727 (9th Cir. 1997) (in adopting the legally significant act test, the Ninth Circuit noted that the Second, Eighth and Tenth Circuits also apply this test). The Tenth Circuit later expressly rejected this test. *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007) (expressly rejecting the legally significant act test in the Tenth Circuit).

sovereign's act or omission having a direct effect in the United States must be legally significant (a formulation known as the "legally significant act" rule).³⁶ In the breach of contract context, a legally significant act is the failure to render performance (such as making payment) contractually obligated to be performed in the United States (such as payment at a U.S. bank).³⁷ Under this rule, if the foreign sovereign had a contractual obligation to make payment to a U.S. party, but the payment location is either never specified or is specified at a foreign location, there can be no direct effect following a breach. Thus, for breach of payment cases, while a U.S. payment location is a *sufficient* condition to find direct effect under

36 *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2d Cir. 2010) (equating acts with omissions); *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) ("This test requires that the conduct having a direct effect in the United States be legally significant conduct").

37 *Adler*, 107 F.3d at 727 (the Ninth Circuit stating that because Nigeria was obligated to make payment in New York, "failure to satisfy that obligation necessarily had a direct effect in the United States"); *United World Trade v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1237 (10th Cir. 1994) (finding no legally significant act when "no part of the contract in this case was to be performed in the United States").

There has been some confusion regarding whether the "legally significant act" has to occur in the U.S. under the "legally significant act" test. The Second Circuit once used the phrase "legally significant conduct in the United States." *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 34 (2d Cir. 1993). Such formulation has led some authorities and commentators to recognize the test, at least in one variation, to require that the foreign sovereign must actually perform some activity in the United States. *See Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007); Matthew Bensen, Comment, *The All New (International) "People's Court": The Future of the Direct Effect Clause After Voest-Alpine Trading USA Corp. v. Bank of China*, 83 MINN L. REV. 997 (1999) ("an act has 'legal significance' only if . . . the foreign government engaged in some activity in the United States"). This formulation naturally leads to confusion in breach of contract situations, because the actual breach of a contract is not itself a physical act tied to a location. In light of this, the Second Circuit has recently provided explicit clarification that in its version of the "legally significant acts" test, only the "direct effect" needs to be in the United States. *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75-77 (2d Cir. 2010).

In the breach of contract context, *Guirlando* stated that the foreign sovereign's decision to breach occurs abroad, but the direct effect, if any, would be in the United States. *Id.* at 77. *Guirlando* did not expressly address whether a U.S. payment location is required to satisfy the "legally significant act" test. However, *Guirlando* suggests that a U.S. payment location is still required because (1) it recounts that a direct effect occurred in *Weltover* because "a foreign state's failure to make payment in the United States as required by contract," *id.* at 75; (2) it recounts *Antares*, 999 F.2d 33, in which the circuit found no direct effect because the contract had no provisions for obligations in the United States, *id.* at 77; and (3) it restates the rule that mere injury to a U.S. citizen is insufficient to find a direct effect, *id.*

Weltover, the legally significant act rule makes it also a *necessary* condition.

The Fifth, Sixth, and Tenth Circuits expressly reject this test.³⁸ For example, in *Voest-Alpine Trading USA Corp. v. Bank of China*³⁹ the Tenth Circuit found direct effect in a banking transaction, even though the Bank of China was not obligated to pay the plaintiff in the United States.⁴⁰ *Voest-Alpine* broadly and expressly held that “financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant's activity, constitutes a direct effect.”⁴¹ Circuits requiring a legally significant act can connect contractual obligations with the geographical United States to find direct effect, while in circuits adopting *Voest-Alpine*'s view, the analysis becomes more open-ended and unpredictable, as there are no guidelines other than “direct.”⁴² However, commentators have also argued that the legally significant act requirement is not ideal because contractual clauses specifying performance in the United States by the foreign sovereign essentially become waivers of immunity.⁴³ Because neither side in this circuit split has an ideal method for finding direct effect, commentators have criticized the *Weltover* decision for causing the split and eliminating useful guideposts for evaluating a foreign sovereign's degree of involvement with parties in the U.S.⁴⁴

38 *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007); *Am. Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534, 540 (6th Cir. 2007) (“the Fifth and Sixth Circuits have renounced any legally-significant-act test”); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998).

39 142 F.3d 887 (5th Cir. 1998).

40 *Id.* at 893.

41 *Id.* at 893, 897.

42 See *NANDA & PANSIUS*, *supra* note 5, § 3:12 (stating that due to *Weltover*'s rejection of foreseeability, either ‘immediate’ effect is interpreted as providing jurisdiction in almost every instance where a U.S. person is injured; or “immediate” is interpreted as engrafting requirements of conduct or performance that is or was to be performed in the United States”).

43 *Id.*

44 See generally *id.*; 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 (1995).

The D.C. Circuit has not explicitly adopted the legally significant act test. However, it has required something similar,⁴⁵ at least prior to *Cruise Connections*. For payment situations, the traditional D.C. Circuit rule is that “there is no direct effect unless payment was ‘supposed’ to have been made in the United States.”⁴⁶ This rule is based on the D.C. Circuit’s emphasis of the payment obligation in *Weltover*,⁴⁷ which used the term “money supposed to have been delivered.”⁴⁸ This rule has also been formulated to require either an express agreement of a U.S. payment location or an implied agreement of the same based on customary practice between the parties.⁴⁹ Thus, within the payment context, this requirement is similar to what a legally significant act test would require, except that the U.S. payment location agreement may be customary rather than express.⁵⁰

45 *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (“While other circuits have expressly adopted or rejected the ‘legally significant act’ test, the D.C. Circuit follows the . . . more general approach set forth in *Weltover*”).

Interestingly, the D.C. Circuit used the “legally significant act” analysis in *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (noting that in cases where courts have found direct effect “something legally significant actually happened in the United States”). However, this analysis was interwoven with the concept of foreseeability. *Id.* After *Weltover*, the D.C. Circuit has not mentioned a legally significant act test.

46 *Global Index*, 290 F. Supp. 2d at 113; *See also* *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (finding no direct effect where “neither New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid” to the plaintiffs).

47 *See Agrocomplect AD v. Republic of Iraq*, 304 Fed. Appx. 872, 873 (D.C. Cir. 2008) (no direct effect where plaintiff failed to show that “payments under its contract with Iraq were supposed to pass through an American bank, as *Weltover* requires”); *Global Index*, 290 F. Supp. 2d at 113 (“the D.C. Circuit follows the same, more general approach set forth in *Weltover*”)

48 *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (“Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming”).

49 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 88-89 (D.D.C. 2010) (“In short, before the breach occurs, the parties must have agreed – either expressly or impliedly – that payment would occur in the United States”), *rev’d*, 600 F.3d 661 (D.C. Cir. 2010).

50 Regarding the technical differences between the two standards, the D.C. District Court has stated that “the Second Circuit’s ‘legally significant act’ test requires express provision of payment in the U.S.,” while the “D.C. Circuit follows the same, more general approach set forth in *Weltover*” where “[t]here is no direct effect unless payment was ‘supposed’ to have been made in the United States.” *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 112 (D.D.C. 2003). As mentioned, “supposed” has been interpreted to require either an implied or express agreement. Whether an implied agreement in this sense is actually broader than the type of obligations required by the “legally significant act” test is not

However, as will be discussed, the D.C. Circuit found direct effect in *Cruise Connections* even though there was no agreement for the defendant to render payment in the United States and the payment (at a bank not necessarily in the U.S.) was the defendant's only obligation to the plaintiff.

D. Intervening Act Analysis

Courts have also used alternative definitions of direct effect consistent with *Weltover's* immediacy definition. The D.C. Circuit has stated that a direct effect is "one which has no intervening element, but, rather, flows in a straight line without deviation or interruption," a definition recited in *Cruise Connections*.⁵¹ Some courts in other circuits have recited this same definition in whole,⁵² while others do so while omitting "straight line without deviation."⁵³ *Zedan v. Kingdom of Saudi Arabia*⁵⁴ provides one example of an intervening act analysis.

dispositive to *Cruise Connections*, and is beyond the scope of this note.

Although the holding in *Voest-Alpine*, described earlier, was rather sweeping in adopting a bare-minimum immediacy test, the D.C. Circuit probably would have arrived at the same result given the particular facts in *Voest-Alpine* because of the D.C. Circuit's recognition of customary agreements. The *Voest-Alpine* court found direct effect because the Chinese bank customarily sent payment to a payment location requested by the U.S. party, and the U.S. party requested the payment to be sent to be a bank in the United States. *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 896 (5th Cir. 1998).

51 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 664 (D.C. Cir. 2010) (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994)).

52 *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 74 (2d Cir. 2010) (citing *Martin v. Republic of South Africa*, 836 F.2d 91, 95 (2d Cir. 1987) which recited this same definition).

53 *Morris v. People's Republic of China*, 478 F. Supp. 2d 561, 568 (S.D.N.Y. 2007) (noting that "A line of cases interpreting "direct effect" in the context of tort liability has found that an intervening act, or an extended causal chain, can keep an effect from being characterized as direct," citing *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 237 (2d Cir. 2002); *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1084, n. 3 (9th Cir. 2001) (using an intervening act analysis for a tort case, but not expressly adopting the "flows in a straight line" definition)); see also *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n*, 33 F.3d 1232, 1238 (10th Cir. 1994) ("We agree with the district court that UWT's efforts to provide a guarantee to ISAB were dependent on an intervening factor").

54 849 F.2d 1511 (D.C. Cir. 1988).

In *Zedan*, a U.S. citizen entered into a contract with Saudi Arabia whereby he would perform construction services in Saudi Arabia.⁵⁵ Saudi Arabia breached the contract, but because the plaintiff was in Saudi Arabia at the time, an intervening act—the plaintiff's return to the United States—stood between the breach and a “direct effect in the United States.”⁵⁶

Thus, the question is not whether the intermediate step was foreseeable (as it was arguably quite foreseeable that the plaintiff would eventually return to the U.S.), but whether there was an intervening act at all. In *Upton v. Empire of Iran*,⁵⁷ the roof of an Iranian airport collapsed, causing injury to American citizens.⁵⁸ The survivors charged that Iran's acts “caused the deaths and injuries to Americans *which caused* direct effects in the United States” (emphasis added).⁵⁹ However, the court found no direct effect, stating that the very way the events are phrased “attenuates the connection between the act and the effect.”⁶⁰

Causation in direct effect analysis differs from the concept of proximate cause. In proximate causation, a reasonably foreseeable intervening act does not break the chain of causation.⁶¹ In contrast, foreseeable is not a requirement or a part of the formal analysis after *Waltover*. Cases like *Zedan* suggest that even a very foreseeable intervening cause would still violate the “no intervening element” definition of “direct effect.” After all, the definition of “direct effect” is “no intervening element,” not “no *unforeseen* intervening element.” The district court in *Cruise Connections* implied that foreseeability has no role in direct effect analysis, stating that the plaintiff's arguments in favor of finding direct effect were flawed because “there was an intervening element between the defendants' actions and [plaintiff's] losses, not that those losses were

55 *Id.* at 1512.

56 *Id.*

57 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979).

58 *Id.* at 265.

59 *Id.* at 266.

60 *Id.*

61 *See, e.g.,* *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1555 (10th Cir. 1989) (“If an intervening act or cause is one which is reasonably foreseeable, the intervening act does not break the chain of causation”).

unforeseeable to the defendant.”⁶² On reversal, the D.C. Circuit did not explicitly apply the concept of foreseeability to the facts, but its analysis of intervening acts suggests that foreseeability might have played some role in qualifying what constitutes an intervening act. The issue of foreseeability is explored in depth in Part III.E.

II. Statement of the Case

In most “direct effect” cases, the presence or absence of a designated payment location is decisive.⁶³ Unlike these typical cases, *Cruise Connections* was decided on how the foreign sovereign’s actions affected the plaintiff’s third-party contracts.⁶⁴

A. The Facts

The adverse parties were Cruise Connections Charter Management 1 (“Cruise Connections”), a U.S. corporation, and the Royal Canadian Mounted Police (RCMP), a Canadian national police service.⁶⁵ In July of 2008, the two parties contracted for Cruise Connections to provide cruise ships to house RCMP personnel on ships berthed in Vancouver Harbor so that RCMP could coordinate security for the 2010 Winter Olympics.⁶⁶ The contract price was approximately \$54 million (CAD).⁶⁷ Cruise Connections had no ships of its own, so it was required to negotiate subcontracts, called

62 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 90 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

63 *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003) (“As a factual matter, however, in almost every case, in this circuit and others, involving the direct effect exception, the existence or absence of an expressly designated place of payment has been decisive.”).

64 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 665 (D.C. Cir. 2010) (“In both instances, then, RCMP’s termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient.”).

65 Complaint at 3, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054).

66 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 87 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

67 *Id.* The contract price was initially set at approximately \$54 million (CAD) when the parties reached agreement in July, but was increased to approximately \$55 million (CAD) in August. Complaint, *supra* note 65, at 4.

charter party agreements, with two American cruise lines: Royal Caribbean International and Holland America Line.⁶⁸ Under the charter party agreements, the two cruise lines would supply three ships for approximately \$39 million (USD). The agreements also provided that Cruise Connections would guarantee the cruise lines a certain amount of onboard sales revenue, but if the sales revenue exceeded that amount, the excess proceeds, estimated at \$4.5 million (USD), would go to Cruise Connections.⁶⁹

As requested by the cruise lines, Cruise Connections asked RCMP to assure that RCMP would pay Canadian taxes incurred by the cruise lines.⁷⁰ RCMP initially complied, but just before the cruise lines were set to sign the charter party agreements with Cruise Connections, RCMP reversed its tax commitments and additionally required a 90% letter of credit.⁷¹ As a result, Cruise Connections was unable to secure financing to obtain the ships.⁷² RCMP then terminated the contract, citing Cruise Connections' failure to secure financing in a timely manner.⁷³ Before RCMP terminated the contract, Cruise Connections had also agreed to lease one of the ships to a U.S. travel agency for \$1.25 million (USD) during the ship's transit from San Diego to Vancouver.⁷⁴ The transactions thus consist of three components summarized as follows:

68 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 662 (D.C. Cir. 2010). ("The contract required Cruise Connections to subcontract with two U.S.-based cruise lines"). The contract also stated that "The contractor [Cruise Connections] shall provide 5037 berths, utilizing 4092 berths on two Carnival Cruise Line ships [later changed to Royal Caribbean] and 1248 berths on one "S" Class Holland America Cruise Line ship." Exhibit 5 at 3, Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054).

69 *Id.* at 663-64.

70 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663-64 (D.C. Cir. 2010).

71 *Id.*

72 *Cruise Connections*, 634 F. Supp. 2d 86, 87 (D.D.C. 2010); *see also* Complaint, *supra* note 65, at 6.

73 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663 (D.C. Cir. 2010).

74 *Id.* at 663-64.

1. The main contract between Cruise Connections and RCMP, allegedly breached by the latter, whereby RCMP would pay Cruise Connections approximately \$54 million (CAD);
2. The charter party agreements, thwarted by the cancellation of the main contract, whereby: (2a) Cruise Connections would pay \$39 million (USD) to the cruise lines for three ships, and (2b) earn an estimated \$4.5 million (USD) from onboard sales revenue;
3. The travel agency agreements, whereby Cruise Connections would receive \$1.25 million (USD) to lease a ship in transit to Vancouver, also thwarted by RCMP's termination of the main contract.

During litigation, RCMP claimed that the main contract entailed no performance taking place in the U.S.⁷⁵ Eventually, the D.C. Circuit found direct effect based on the charter party and travel agency agreements, even though they were third party in nature.

Cruise Connections filed suit in the United States District Court for the District of Columbia alleging breach of contract by RCMP, represented in name by the Attorney General of Canada.⁷⁶ RCMP moved to dismiss for the lack of subject matter jurisdiction, arguing that the alleged breach did not cause a "direct effect in the United States."⁷⁷ Since RCMP conceded that the action was based upon an alleged breach of contract in connection with Canadian commercial activity,⁷⁸ jurisdiction thus hinged on the "direct effect" element of § 1605(a)(2).

⁷⁵ *Id.* at 665 (citing Brief of Appellees at 23, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 665 (D.C. Cir. 2010) (No. 08-2054)). This point was also advanced at the district court. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss at 25, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054) ("Plaintiffs have not alleged a single aspect of the underlying transaction that was to take place in the United States").

⁷⁶ *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 663 (D.C. Cir. 2010).

⁷⁷ *Id.* at 663.

⁷⁸ *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 88 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

B. The District Court's Finding of No Direct Effect

The district court first examined the loss of payment by RCMP due to its alleged breach of the main contract. Based on *Weltover* and D.C. Circuit precedent, the district court observed that to find direct effect, the parties must have agreed expressly (such as by a contractual provision) or implicitly (by longstanding custom between the parties) that payment would occur in the United States.⁷⁹ Although Cruise Connections alleged that RCMP agreed to make payment in the U.S., the district court disagreed and found no such agreement, express or implied.⁸⁰

Next, the district court found no direct effect in Cruise Connections' inability to perform the travel agency contract and its inability to secure the cruise line charter party agreements.⁸¹ The district court recited the "straight line" definition, quoting *Princz v. Federal Republic of Germany*,⁸² wherein the D.C. Circuit wrote, "A direct effect . . . has no intervening element, but, rather, flows in a straight line without deviation or interruption."⁸³ The district court reasoned that because the travel agency and cruise line charter party agreements were not part of the main contract, Cruise Connections' inability to perform contractual obligations to the travel agency and cruise lines constituted an "intervening element" between RCMP's actions and Cruise Connections' financial loss.⁸⁴

⁷⁹ *Id.* at 88-89. The district court observed that under *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), and subsequent D.C. Circuit cases, a direct effect requires one of four situations occur before the breach, a list implied by the court to be exhaustive at least for payments scenarios: (1) the contract expressly designated an American payment location; (2) the contract allowed the payee to designate a payment location and the payee designates an American location (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992)); (3) the contract is silent on payment location, but both parties subsequently agree to an American location (citing *I.T. Consultants, Inc. v. The Islamic Republic of Pakistan*, 351 F.3d 1184 (D.C. Cir. 2003)); and (4) the contract is silent on payment location, the parties had a longstanding and consistent customary practice to use an American payment location (citing *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994)).

⁸⁰ *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 89-90 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

⁸¹ *Id.* at 90.

⁸² 26 F.3d 1166 (D.C. Cir. 1994).

⁸³ *Cruise Connections*, 634 F. Supp. 2d at 90 (quoting *Princz*, 26 F.3d at 1172).

⁸⁴ *Id.*

C. Reversal by the D.C. Circuit

In a unanimous panel decision by Judge Tatel, the D.C. Circuit reversed, finding direct effect because RCMP's termination led to loss of revenues under the third-party agreements.⁸⁵ First, the court acknowledged the dispute regarding an alleged U.S. payment location (designated in Part II.A, *supra*, as "item 1"), but it surprisingly declined to decide the case on this issue. To the court, it made "no difference where RCMP would have paid Cruise Connections," as there were links to the U.S. other than mere payment by RCMP sufficient for direct effect.⁸⁶ Importantly, by taking its direct effect analysis outside of payment location analysis, the court expanded the category of "effects" that could constitute direct effect.

Next, the court examined Cruise Connections' loss of potential onboard revenue (item 2b), the subsidiary component of the charter party agreement.⁸⁷ The court cited the same *Princz* rule cited by the district court.⁸⁸ It then acknowledged that because onboard revenue would have depended on specific choices of security personnel to purchase drinks or gifts, there might be "merit" to an argument that such dependence created an "intervening event" between RCMP's alleged breach and onboard revenue, according to the court. But the court also declined to rule on whether the onboard revenue was sufficient for direct effect.⁸⁹

However, because "RCMP's termination of the Cruise Connections contract led inexorably to the loss of revenue under the third-party agreements" (in addition to the loss of potential on-board revenue), the

85 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010), *en banc reh'g denied*, 2010 U.S. App. LEXIS 16743 (D.C. Cir., June 21, 2010).

86 *Id.* at 663-65.

87 *Id.* The court analyzed the charter party agreement as two separate components: the onboard revenue, and the general charter party agreement. In contrast, the district court analyzed the charter party agreements as a whole, rather than separating out the issue of the onboard revenues. *See* Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 89-90 (D.D.C. 2010).

88 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 663 (D.C. Cir. 2010).

89 *Id.*

court found direct effect.⁹⁰ The “loss of revenue” under *either* the travel agency contract (item 3) *or* the main component of charter party agreements (item 2a) was sufficient.⁹¹ The court’s reasoning is as follows.

First, it reasoned that “no intervening event stood between RCMP’s termination of the contract and the lost revenues from the travel agency contract and the charter party agreements.” The travel agency agreement was a “done deal,” with nothing left to negotiate, and Cruise Connections would have received a flat fee but for RCMP’s termination.⁹² Thus, to the court, the loss of the travel agency agreement followed as “an immediate consequence” of RCMP’s termination of the main contract.⁹³ Likewise, although the charter party agreements were not formally complete between Cruise Connections and the cruise lines, they would have been completed if not for RCMP’s termination of the main contract with Cruise Connections.⁹⁴

The court then addressed the effect itself, apparently finding that generalized economic effect in the U.S. was sufficient. It pointed out that *Weltover* found direct effect because money supposed to have been delivered to a U.S. bank “was not forthcoming.”⁹⁵ In a questionable analogy, the court then reasoned that because of RCMP’s cancellation, “revenues that would otherwise have been generated in the United States were not forthcoming.”⁹⁶ The court then rejected RCMP’s contention that there can be no effect because Cruise Connections was not harmed by the termination.⁹⁷ It reasoned that only a “direct effect” is necessary, and

90 *Id.* at 664.

91 *See Id.* at 665. The sufficiency of either is suggested by the court’s use of the terms “likewise” and “in both instances” in comparing the charter party agreements and the travel agency agreements (“Likewise, all that remained for the Charter Party Agreements to be formally consummated” and “In both instances, then, RCMP’s termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient.”) (internal quotations and brackets omitted).

92 *Id.* at 644.

93 *Id.* at 664-65.

94 *Id.*

95 *Id.* at 665 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992)).

96 *Id.*

97 *Id.*

“nothing in the FSIA requires that the direct effect in the United States harm the plaintiff.” Here, the thwarting of “revenues that would otherwise have been generated in the United States,” was sufficient to find direct effect.⁹⁸ “Revenue” here refers to revenue under the third-party agreements, not the loss of RCMP’s payment to the plaintiff Cruise Connections.

Finally, the court cited additional ties to the United States to justify its decision. Although acknowledging that mere harm to a U.S. party is insufficient for direct effect, it found more than mere citizenship: Cruise Connections’ efforts in negotiating the charter party agreements occurred in the United States; at least one of the ships would have moved through U.S. waters to Vancouver; RCMP’s contract termination “thwarted over \$40 million (U.S.) worth of cruise-related business in the United States”; and “the travel agency agreement was negotiated in and called for performance in the United States.”⁹⁹ To the court, these factors distinguished the situations from cases like *United World Trade* where all the work covered by the contract, including the plaintiff’s obligations, was to be done outside the United States.¹⁰⁰

RCMP also argued that it made no agreements effectuating the third party travel agency and charter party agreements, as its contract with Cruise Connections did not even contain provisions of performance outside of Canada. The court responded by stating that the effect only needs to be “direct, [and] not that the foreign sovereign agree that the effect would occur.”¹⁰¹ In responding to the argument that RCMP could not foresee the effects in the United States, the court also recited *Weltover*’s rejection of a foreseeability criterion.¹⁰² Thus, RCMP’s rebuttals were rejected.

III. Analysis of the D.C. Circuit’s Reasoning

In finding direct effect from the “loss of revenue under third-party agreements,” a ruling in tension with established case law, the court attempted to nominally adhere to established rules, but overruled or at least modified them implicitly, while setting forth few clear rules. As a result,

⁹⁸ *Id.* at 666 (internal quotations omitted).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Cruise Connections is best characterized not as a straightforward opinion but as a conglomerate of thoughts that lack consistency when closely scrutinized.

This part of the note first provides a useful frame of reference to examine the case by discussing the significance of the third parties. The analysis then proceeds to explain the flaws in the court's analysis of the two main facets of direct effect jurisprudence: (1) the contractual obligations of the foreign sovereign, based on the factual circumstances of *Weltover*; and (2) the "immediate consequence" test, the legal standard established by *Weltover*. The analysis then examines the remaining parts of the court's rationale.

A. The Significance of Third Parties in *Cruise Connections*

Because the finding of direct effect centered on the "loss of revenue under the third-party agreements,"¹⁰³ this analysis should begin by examining the legal consequence of the third parties. Two questions are particularly relevant: What if there were only two parties involved such that there could be no third party agreements? In this case, would the court still have found direct effect? For the reasons below, the answer appears to be no, at least not under the same reasoning. This observation, that direct effect was found *only* because of third party agreements, leads to a strange conclusion that the foreign sovereignty's immunity is compromised because it happened to be dealing with a U.S. entity that was in turn dealing with additional U.S. third parties.

Assume that *Cruise Connections* and the third parties were a single entity that entirely operated its own cruise ships, instead of having to subcontract for ships, and one that could sell its own cruise tickets for a transit trip from San Diego to Vancouver as the travel agency did.¹⁰⁴ Here, the scenario in *Cruise Connections* is reduced to a simple payment transaction and, as the district court recognized, D.C. Circuit case law required agreement of an American payment location for there to be direct effect.¹⁰⁵ The district court found no express or implied agreement between

103 *Id.*

104 In the actual case, *Cruise Connections* was to obtain ships from subcontracts (charter party agreements) with third party cruise lines, and had leased one of those ships to a third party travel agency during its transit from San Diego to Vancouver. *Cruise Connections*, 600 F.3d 661, 663-64 (D.C. Cir. 2010).

105 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d

Cruise Connections and RCMP for an American payment location, and this finding was not ruled on during appeal.¹⁰⁶ Assuming that the district court was correct, then there would have been no direct effect if Cruise Connections and the third parties were a single entity. This hypothetical scenario illustrates that RCMP lost immunity only because it was dealing with a group of entities connected by subcontracts rather than a single entity.

This leads to another question. What difference does it make between dealing with a single party and a middleman party that then subcontracts its obligations? The D.C. Circuit's opinion offers some starting points. Notably, RCMP alleged that the only connection between the plaintiff and the U.S. was citizenship.¹⁰⁷ (This argument is relevant to our single-entity hypothetical, wherein citizenship would probably be the only connection with the U.S.) In response to RCMP's argument, the court said that more than citizenship was involved: negotiation of the third party agreements occurred in the United States, one of the third party agreements was to be performed in the United States, the ships would have sailed through U.S. waters, and the thwarting of \$40 million (USD) of cruise-related business in the United States occurred.¹⁰⁸ These factors relate to dealings between Cruise Connections and the third parties. For example, the \$40 million figure is the amount that Cruise Connections would have paid the cruise lines. In our single-entity hypothetical, these factors concerning third party dealing would become irrelevant, as they become internal transactions within the single entity, and thus would not lend additional support to finding direct effect. Similarly, the "loss of revenue under the third-party agreements," considered sufficient to find direct effect in the actual case, would also be irrelevant as there are no third parties.

86, 88-89 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010); *See supra* note 79 (the district court's list of four situations required to find direct effect).

106 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661,663-65 (D.C. Cir. 2010) (acknowledging the finding by the district court, but declining to review, as it "made no difference where RCMP would have paid Cruise Connections); Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86, 89-90 (D.D.C. 2010), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

107 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 665 (D.C. Cir. 2010).

108 *Id.* at 665 (D.C. Cir. 2010).

Thus, if Cruise Connections and the third parties had been a single entity, the court probably would not have found direct effect. This observation is underpinned by the court's statement that "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff."¹⁰⁹ This statement essentially endorses the finding of sufficient direct effect through third-party relationships. The sufficiency of third-party effects puts the result of the case in a strange light because RCMP's primary goal was obtaining ships, not dealing with a middleman that would compromise its sovereign immunity. But because RCMP did deal with a middleman rather than a cruise line that had ships of its own, it lost immunity in U.S. courts.

B. The Court's Standard of Revenue Generation "Not Forthcoming" is Based on an Unwarranted Analogy With *Weltover*

Having underlined the significance of the third parties in the case, this note examines the court's legal analysis. Here, the court questionably analogized *Weltover* to support a proposition that the thwarting of revenue generation in the United States is a "direct effect." It observed that, in *Weltover*, "money supposed to have been delivered to a New York bank for deposit was not forthcoming."¹¹⁰ It then reasoned that similarly, because RCMP terminated the contract, "revenues that would otherwise have been generated in the United States were not forthcoming."¹¹¹

As an initial matter, it is important to emphasize that "revenues" refer to payments among Cruise Connections and the third parties."¹¹² That is, part of RCMP's payment to Cruise Connection under the main contract would have then been passed onto the cruise lines, thereby generating "revenue" for the cruise lines. Cruise Connections would also obtain "revenue" from the travel agency agreement by using the ships leased from the cruise lines.

Turning to the analogy, several flaws are apparent. First, the court improperly compares payment with generation of revenue. In *Weltover*, the

¹⁰⁹ *Id.* at 666.

¹¹⁰ *Id.* (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619 (1992)).

¹¹¹ *Id.*

¹¹² The overall context here is "loss of *revenues* under third party agreements." *Id.* (emphasis added).

defendant was contractually obligated to make payment in a U.S. bank.¹¹³ Such payment can be described as a cash flow into the United States. If, *arguendo*, there are only two parties to a transaction, a cash flow necessarily results in revenue to one party. However, the revenue described here is not between the party sending and the party receiving payment, but is among the receiving party and third parties. Thus, “revenues that would otherwise have been generated in the United States” do not describe a cash flow from the foreign sovereign to the private party. Instead, they describe a local economic activity within the United States unrelated (or perhaps, not “directly” related) to the foreign sovereign.

Second, the analogy effectively deprives the scope of contractual obligation of legal consequence. In *Weltover*, the payment was part of the defendant’s obligation. In contrast, the described revenue generation in *Cruise Connections* contains no such obligations. RCMP may have had an obligation to pay Cruise Connections, but it had no obligations to any of the third parties.¹¹⁴ Like the circuits that have placed weight on *Weltover*’s emphasis on contractual obligation apparent from its facts (i.e., those expressly endorsing the legally significant act test),¹¹⁵ the D.C. Circuit has traditionally adhered to these same principles.¹¹⁶ As some circuits have done,¹¹⁷ the D.C. Circuit could have expressly abandoned this stance in favor of a broad reading of *Weltover*, where the facts regarding contractual obligation are ignored and only a bare “immediate” direct effect, in an unrestricted, abstract sense is required. However, the D.C. Circuit tried to remain faithful to its narrow, factual reading of *Weltover*, even though only a broad reading of *Weltover* could have reasonably supported its holding.

113 *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617 (1992).

114 The D.C. Circuit’s opinion states that “the contract itself required the ships to come from Holland America and Royal Caribbean cruise lines,” *Cruise Connections*, 600 F.3d 661, 665 (D.C. Cir. 2010), and in its Brief, Cruise Connections emphasized that negotiating the charter party agreements was a “a substantial portion of Cruise Connections’ performance of the contract up to the point that the RCMP breached.” Plaintiffs’ Memorandum of Points and Authorities in Response to Defendants’ Motion to Dismiss at 5, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054). However, none of these statements refer to are obligations to be performed by RCMP.

115 *NANDA & PANSIUS*, *supra* note 5, § 3:12; *See supra* Part I.C.

116 *See supra* Part I.C.

117 *See, e.g.*, *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 998 (10th Cir. 2007); *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887 (5th Cir. 1998).

The facts of the case cannot reasonably be compared to *Weltover* because the third party “revenues” were not payments from RCMP and were outside of RCMP’s contractual obligations.

Therefore, the holding of the case is built on flawed reasoning. Because the court endorses a factual comparison with *Weltover*, and yet performs a flawed and implausible comparison, the case only muddles the already confusing area of direct effect jurisprudence. A possible consequence of the court’s reasoning is that if direct effect in the D.C. Circuit still revolves around whether “payment was ‘supposed’ to have been made in the United States,”¹¹⁸ the “payment” need not be payment from the foreign sovereign and what qualifies as something “supposed to be made” is not limited to the foreign sovereign’s obligations from express or implied agreement.¹¹⁹ Due to the court’s focus on terms like “forthcoming” while generalizing the concept of “payment” to include general economic revenue, *Cruise Connections* may be read to stand for the proposition that a disappointed expectation of economic gain can qualify as an “effect” in the context of “direct effect.”

C. The D.C. Circuit Improperly Found that the Losses Under the Third-party Agreements were “Immediate Consequences” of RCMP’s Actions

Cruise Connections turned out to be a logically inconsistent opinion because the court unreasonably analogized the facts with *Weltover*’s facts. But the court did not have to even discuss *Weltover*’s facts in the first place. As mentioned earlier, some circuits broadly read *Weltover* as to merely require an immediate direct effect and nothing else regarding contractual obligations.¹²⁰ The D.C. Circuit could have expressly adopted such a stance and directly proceeded to the bare minimum immediacy analysis without analogizing *Weltover*’s facts at all. Regardless, its “immediacy” analysis was similarly flawed.

118 *Global Index, Inc. v. Mkaapa*, 290 F. Supp. 2d 108, 113 (D.D.C. 2003); *See also Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994) (finding no direct effect “neither New York nor any other United States location was designated as the ‘place of performance’ where money was ‘supposed’ to have been paid” to the plaintiffs”).

119 *See supra* note 79 (the district court’s list of four situations required to find direct effect).

120 *See supra* Part I.C.

As mentioned, the rule in the D.C. Circuit, consistent with the meaning of “immediate,” is that a “direct effect . . . has no intervening element, but, rather, flows in a straight line without deviation or interruption.”¹²¹ To the district court, Cruise Connection’s inability to perform those obligations stood as an “intervening element” between RCMP’s conduct and the third party losses because the cruise line and travel agency agreements were not part of RCMP’s contract with Cruise Connections.¹²² In reversing, the D.C. Circuit instead focused on the “done deal” aspect of those agreements to find no intervening element.¹²³ Since either of the charter party agreements or the travel agency agreement was alone sufficient for direct effect,¹²⁴ each will be discussed in turn.

1. The Travel Agency Agreement

It is hard to justify the court’s finding that Cruise Connections’ loss from the travel agency agreement followed immediately from RCMP’s termination of the main contract. Even though the agreement was a “done deal” in the sense that Cruise Connections was set to receive the payment, it still could have received the payment even if RCMP terminated the contract. The lack of an immediate effect is illustrated by the multiple-steps from RCMP’s termination to Cruise Connections’ loss: (1) RCMP terminates the main contract; (2) Cruise Connections is unable to fulfill its intended agreement with the cruise lines; (3) the cruise lines withdraw from their nearly-complete agreement with Cruise Connections; (4) Cruise Connections is unable to supply the cruise ships to perform the travel agency agreement; and (5) Cruise Connections is unable to obtain the payment from the travel agency. Here, steps 2, 3, and 4 are intervening factors, i.e., factors standing in between steps 1 and 5. When there are intervening factors, the loss should not be deemed to follow as an immediate consequence.

121 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 664 (D.C. Cir. 2010) (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994)).

122 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 634 F. Supp. 2d 86, 90 (D.D.C. 2010), *rev’d*, 600 F.3d 661 (D.C. Cir. 2010).

123 Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can., 600 F.3d 661, 66-65 (D.C. Cir. 2010).

124 *See supra* note 91.

Furthermore, the loss did not flow in a “straight line without deviation or interruption” from step 1 to step 5 because the events could have unfolded differently. For example, Cruise Connections could potentially have found a substitute deal with the cruise lines. Furthermore, even without a substitute deal, the cruise lines might not have actually pulled out, given that their decision to do so was based on their own independent assessment of the situation. More importantly, Cruise Connections could have found another way to supply a ship before performance was due.¹²⁵ The D.C. Circuit’s “done deal” argument only shows that Cruise Connections would have made revenue if RCMP *had not* breached. It does not necessarily mean that Cruise Connections would have lost revenue if RCMP *had* breached. Although this distinction might not be meaningful if causation is determined by foreseeability, it is significant in the context of intervening factor analysis in determining immediacy. Here, whether the travel agency agreement would have been fulfilled depended on Cruise Connections’ ability to perform, which stands as an intervening factor dependent on factors other than RCMP’s breach.

When faced with circumstances involving third-party agreements, including “done deal” agreements, federal courts have not been favorable to third-party losses in finding direct effect. In *Millicom International Cellular, S.A. v. Republic of Costa Rica*,¹²⁶ the defendants’ conduct allegedly caused the plaintiffs to default on a third party investment agreement.¹²⁷ Regarding losses under the third-party agreement, the D.C. District Court held that “any consequences of the defendants’ conduct affected only the plaintiffs’ obligations to third parties and therefore cannot . . . cause a ‘direct effect’ in the United States.”¹²⁸

Similarly, in *Corzo v. Banco Central de Reserva del Peru*,¹²⁹ the defendant’s conduct allegedly caused the plaintiff to breach contracts with

125 RCMP solicited bids in April 2008, and allegedly breached in September of that year, still well before the Olympics. Complaint, *supra* note 65, at 4-7.

126 *Millicom Int’l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14 (D.D.C. 1998).

127 *Id.* at 17.

128 *Id.* at 22. Likewise, repercussion felt by their shareholders and creditors also failed to establish direct effects because they were “derivative harm . . . too indirect to qualify as an ‘immediate consequence’ of the defendants’ conduct.”

129 *Corzo v. Banco Cent. De Reserva Del Peru*, 243 F.3d 519 (9th Cir. 2001).

computer companies in the United States.¹³⁰ However, the Ninth Circuit held that the losses from third party contracts did not follow as immediate consequences, but were rather, “at best secondary or incidental results” of the defendant’s actions.¹³¹ These cases illustrate a general principle that a resulting failure to fulfill third-party obligations, as in Cruise Connections’ inability to fulfill the travel agency agreement, is insufficient to constitute direct effect.

2. The Charter Party Agreements

It is similarly difficult to justify the court’s reasoning that the loss of the charter party agreements followed immediately from RCMP’s termination of the main contract. Here, we have a potential series of events as follows: (1) RCMP terminates the main contract; (2) Cruise Connections is unable to fulfill its intended agreement with the cruise lines; (3) the cruise lines withdraw from their nearly-complete agreement with Cruise Connections, thereby resulting in (4) the “loss of revenues.”¹³² The same analysis used for the travel agency agreement applies. Here, the chain involves the intervening step of Cruise Connections’ ability to fulfill a third-party obligation, and the intervening step of the cruise lines’ withdrawal from contract negotiations. Because of the intervening steps, the loss did not occur immediately.

Two additional factors support the lack of immediacy in the loss that effectively weakens the link from event 3 (withdrawal from the nearly-complete agreement) to event 4 (the “loss of revenues”). First, unlike the “done deal” travel agency agreement, the cruise lines never actually completed their contract with Cruise Connections.¹³³ Because there were no actual obligations, it is unreasonable to state that the cruise lines lost something when they did not have the revenue secured in the first place. The situation is perhaps better described as a loss of opportunity for revenue, rather than a direct loss of revenue. In a chain of events, actual loss of revenue is at least one step removed from a loss of opportunity for revenue.

¹³⁰ *Id.* at 522.

¹³¹ *Id.*

¹³² *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 665 (D.C. Cir. 2010).

¹³³ *Id.* at 663.

Secondly, the particular loss of potential revenue recognized by the court was suffered not by Cruise Connections but by the cruise lines, who would have received \$39 million (USD) from Cruise Connections for the lease of the ships.¹³⁴ RCMP was contracting only with Cruise Connections, not with the cruise lines. Tying RCMP's dealings with the cruise lines' losses requires a leap from one course of dealing to another course of dealing, as well as two leaps among parties—from defendant to plaintiff and from plaintiff to third party.

For all of the above reasons indicating intervening events before the losses in revenue, the court's finding of direct effect is therefore questionable.

D. Traveling Through U.S. Waters and the Place of Negotiations

A central principle among some circuits is that mere harm to a U.S. citizen is insufficient to find direct effect.¹³⁵ The D.C. Circuit acknowledged the validity of this principle¹³⁶ but then went on to list multiple factors showing that "Cruise Connections relies far more than its U.S. citizenship" because the contract encompassed work to be done in the United States: (1) Cruise Connections negotiated the charter party agreements in the United States; (2) "at least one of the ships would have moved through U.S. waters to Vancouver"; (3) "the termination of the contract thwarted over \$ 40 million (U.S.) worth of cruise-related business in the United States"; and (4) "the travel agency agreement was negotiated in and called for performance in the United States."¹³⁷ The third factor (economic harm) and the performance portion of the fourth factor are probably the most important and the merits of which have already been discussed in detail. This leaves us with the factors of the ship's travelling through U.S. waters (factor 2) and negotiation of the third party agreements in the U.S (factor 1 and part of factor 3).

¹³⁴ *Id.*

¹³⁵ *See, e.g.,* Guirlando v. T.C. Ziraat Bankasi A.S., 602 F.3d 69, 78 (2d Cir. 2010) ("The mere fact that a foreign state's commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States").

¹³⁶ *Cruise Connections*, 600 F.3d at 665 ("RCMP next argues that harm to a U.S. citizen, in and of itself, cannot satisfy the direct effect requirement. True enough . . .").

¹³⁷ *Id.*

Although these factors show that the contract implicated obligations (on the part of the Cruise Connections¹³⁸) that resulted in performance in the U.S., the court does not articulate their relevance to direct effect analysis. Indeed, there are problems with using these factors in direct effect analysis. It is unclear how the place of negotiation of the third party agreement is relevant, because it is not an effect resulting from any action of RCMP, but a precursor event. The factor of the ship's moving through U.S. waters is also unsatisfactory. In *Zedan v. Kingdom of Saudi Arabia*, a U.S. citizen was hired on the phone to perform road construction work for Saudi Arabia.¹³⁹ Therefore, the contract effectively required that he travel through U.S. territory to reach Saudi Arabia, but this traveling did not prevent the court from denying direct effect.¹⁴⁰ Although there's a factual difference between one person traveling by plane and an entire crew traveling on a boat, no clear legal distinction based on established rules is offered by the court.¹⁴¹

Nevertheless, the court distinguished *Zedan* on the basis that the work in *Zedan* was to be done "entirely" abroad.¹⁴² Although the court did not expressly state that Cruise Connection's contract with RCMP required work to be done in the U.S., the court implies that there is significance in how Cruise Connections was required to negotiate with the specific American cruise lines.¹⁴³ This resulted in negotiations actually occurring in

138 Cruise Connections emphasized that negotiating the charter party agreements was a "a substantial portion of Cruise Connections' performance of the contract up to the point that the RCMP breached." Plaintiffs' Memorandum of Points and Authorities in Response to Defendants' Motion to Dismiss at 5, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054).

139 *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511 (D.C. Cir. 1988).

140 *Id.*

141 Another flaw with the ship argument is that movement through U.S. water is due to the travel agency agreement, wherein the ship would move from San Diego to Vancouver. The D.C. Circuit's opinion noted that "the contract itself required the ships to come from Holland America and Royal Caribbean cruise lines," citing to Exhibit 6, *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86 (D.D.C. 2010) (No. 08-2054), showing that the main contract identified and recognized the origin of the ships from the specific cruise lines. But if the travel agency agreement was not in place, the ships could have arrived from a foreign port without entering U.S. waters.

142 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 665 (D.C. Cir. 2010).

143 *Id.* at 662 ("The contract required Cruise Connections to subcontract with two U.S.-based cruise lines").

the United States and the further involvement of American third parties. Yet, the court gives no express rule as to how to evaluate the plaintiff's fulfillment of its obligations, or even a clear statement that it's relevant. Confusingly, the court stated that the FSIA "requires only that [the] effect be 'direct,' not that the foreign sovereign agree that the effect would occur."¹⁴⁴ RCMP had argued that it never agreed to a "single aspect of the underlying transaction" to take place in the United States.¹⁴⁵ Perhaps the court is suggesting that as long as Cruise Connections did *something* in the United States to obtain the ships required by the contract, there would be direct effect even if the negotiations with the American cruise lines could have been held outside the U.S., and even if the ships could have sailed in from a foreign port without crossing U.S. waters.

If the court intended to make the plaintiff's performance in the United States (whether it was actually obligated by the contract or reasonably followed) a substantial factor in direct effect analysis, such a rule would also lack basis in established case law, which has focused on the foreign sovereign's obligations rather than the plaintiff's obligations. While some opinions have commented on the plaintiff's obligations generally, such opinions did not find them decisive.¹⁴⁶ The commercial activities exception, where it implicates direct effect analysis, deals with acts "in connection with a commercial activity of the foreign state."¹⁴⁷ Placing emphasis on plaintiff obligations entails the possibility of straying too far from the purpose of the statute. In the end, *Cruise Connections* offers no clear guidelines to analyze plaintiff obligations of a contract breached by the foreign state, if such obligations are relevant at all.

144 *Id.* at 665.

145 *See supra* note 75 and accompanying text.

146 *See, e.g.,* Am. Telecom Co., LLC v. Republic of Lebanon, 501 F.3d 534, 541 (6th Cir. 2007) (holding that its situation "where *both* parties' performance is to occur entirely in a foreign locale, does not, standing alone, produce an immediate consequence in the United States, and therefore, does not "cause a direct effect in the United States") (emphasis added); UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210 (5th Cir. 2009) (holding that "[a]n effect of a contract is also direct when it is to be primarily performed in the United States" but the contract also specified a U.S. payment location, which the court acknowledged to be dispositive). Thus, in both of these cases, the plaintiff's obligations in the U.S. (or lack thereof) were not dispositive.

147 28 U.S.C. § 1605(2) (2010).

E. Did Foreseeability and Substantiality, Supported by Policy Considerations, Play a Role in the Decision?

Despite the numerous problems in the court's reasoning, the result itself is perhaps not unfair. After all, if the allegations are correct, RCMP did cause commercial disruption, even if the disruption was not properly immediate under the above analysis.¹⁴⁸ Furthermore, RCMP understood that it was dealing with a middleman and that the middleman (Cruise Connections) was dealing with American cruise lines. Cast in this light, it is not unreasonable to say that RCMP could have foreseen the consequences relating to the third party contracts. Was the court strained to find direct effect because the third party effects were foreseeable?

Some commentators have observed that even though *Weltover* rejected foreseeability as a required condition, certain opinions have used foreseeability as an implicit standard to finding direct effect (or lack thereof).¹⁴⁹ Regarding one Second Circuit case, *Antares Aircraft*,¹⁵⁰ which

148 And furthermore, foreign immunity is only a matter of jurisdiction, and even then, only one possible method of denying jurisdiction; nothing on the merits was decided in this case.

149 See NANDA & PANSIUS, *supra* note 5, § 3:12 (commenting that one could argue that the Supreme Court did not abandon foreseeability, as the facts in *Weltover* “probably satisfied a foreseeability test of direct effect”; and that in cases such as *Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127 (2d Cir. 1998), and *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993) essentially employed a foreseeability standard).

Regarding *Cruise Connections*, Nanda and Pansius write that “Judge Tatel’s opinion in *Cruise Connections* lends some support to a foreseeability analysis” and that in view of decisions such as this one, “foreseeability remains the easiest means to distinguish situations where a defendant knowingly invokes legally significant activity in the United States from those where the only real connection to the United States is that plaintiff is a U.S. person.” *Id.*

The Second Circuit has recently stated that “To be a ‘direct’ effect within the meaning of the third clause of the commercial activity exception, the impact need not be either substantial or foreseeable.” *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, (2d Cir. 2010). The use of the terms “need not be” implies that foreseeability (and substantiality) may sometimes be a sufficient condition.

The Second Circuit has also propagated the rule that in *Weltover*’s immediacy test, “the requisite immediacy’ is lacking where the alleged effect ‘depend[s] crucially on variables independent of’ the conduct of the foreign state.” *Guirlando*, 602 F.3d at 75 (citing *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230 (2d Cir. 2002), wherein the court denied direct effect for a suit alleging that South Africa’s announcement of intentions to challenge the plaintiff’s ownership “southafrica.com,” impaired the

involved a tort injury to a particular individual, a commentator observed that it was fortuitous (i.e. unforeseeable) that the individual happened to be a U.S. citizen, and the court did not find direct effect.¹⁵¹ Contrast this with *Cruise Connections*, wherein RCMP knew its actions were affecting multiple American parties. Did the D.C. Circuit implicitly require intervening event analysis to be qualified such that only unforeseen intervening events are intervening, or that foreseeable events are not considered intervening? Note that the district court considered intervening events and foreseeability to be *unrelated* concepts in direct effect analysis: “Cruise Connections’ problem is that there was an intervening element between the defendants’ actions and its losses, not that those losses were unforeseeable to the defendant.”¹⁵²

The D.C. Circuit did not address the above statement made by the district court, and in the end provides no clear rules. The court only recites *Weltover*’s explicit rejection of foreseeability to support its statement that direct effect does not require that “the foreign sovereign agree that the effect would occur.”¹⁵³ If foreseeability is an appropriate standard, then what is it that must be foreseeable—the plaintiff’s harm, the third parties’ harm, or the substantiality of the harm? Regardless, no further discussion of foreseeability is provided, and no form of the word “foreseeability” or “foreseeable” appears anywhere else in the opinion. Thus, while the court appears to acknowledge that foreseeability is not a *required* condition, it declined to comment on whether foreseeability can be a *sufficient* condition. Thus, the role of foreseeability in direct effect jurisprudence remains enigmatic. However, one can also argue that the lack of discussion on foreseeability is not because the court does not consider foreseeability to be relevant, but that the court does not want to be *limited* by foreseeability.

plaintiff’s potential business alliance with a South African firm). Although not explicitly containing the term “foreseeability,” its flexible terms like “crucially” might make this rule more conducive to foreseeability analysis than D.C. Circuit’s usual definition which contains less flexible phrases such as “no intervening event” and “*straight line* without deviation.” Interestingly, this latter definition was cited along with the former definition in *Guirlando*, but no explanation as to how “intervening” and “depends crucially on . . . independent” are related is provided.

150 *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33 (2d Cir. 1993).

151 *NANDA & PANSIUS*, *supra* note 5, § 3:12.

152 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 90 (D.D.C. 2010), *rev’d*, 600 F.3d 661 (D.C. Cir. 2010).

153 *Id.* at 666.

Foreseeability is not often a clear-cut issue, and a court would probably prefer not to have to rely on foreseeability.

On the other hand, *Weltover*'s explicit rejection of substantiality was not cited, and for a good reason. There is a clear, reoccurring tone in the court's opinion, exemplified by statements such as "the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States."¹⁵⁴ It appears that the court felt the need to protect the economic interest of domestic parties, which it probably felt was substantially impaired. But, again, there is no explicit endorsement of substantiality, and we are left to speculate the role it might play in future opinions.

IV. Direct Effect Jurisprudence After Cruise Connections

A. Implications of *Cruise Connections*

The following six points highlight the case's potential impact on direct effect jurisprudence. Notably, the common thread is the lack of certainty and definiteness in this area of the law. *Cruise Connections* offers very little in express rules. Its departure from D.C. Circuit precedent, when compounded with the lack of clear rules, probably only increases the ambiguity of direct effect jurisprudence.

1. **Even if the foreign sovereign's only obligation was to make a payment, an express or implied agreement for a U.S. payment location is no longer necessary to find "direct effect," even though it is sufficient to find "direct effect"**

Prior to *Cruise Connections*, a finding of direct effect based on an alleged failure to render payment required that the parties expressly or implicitly (i.e., by custom) agreed to a U.S. payment location.¹⁵⁵ In *Cruise Connections*, although the district court focused on whether a U.S. payment location was designated,¹⁵⁶ the D.C. Circuit declined to rule on this issue

¹⁵⁴ *Id.* at 666.

¹⁵⁵ *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 88-89 (D.D.C. 2010). ("In short, before the breach occurs, the parties must have agreed – either expressly or impliedly – that payment would occur in the United States").

¹⁵⁶ *Id.* at 88-90.

altogether and instead decided the case on third party agreement losses.¹⁵⁷ *Cruise Connections* therefore establishes that a U.S. payment location is not required to find direct effect. The effect of the holding, read broadly, is that, although an express or implied agreement for a U.S. payment location is sufficient for direct effect, it is not required. Thus, when there is no such agreement, in the D.C. Circuit, it is now necessary to look beyond the geographical elements of the foreign sovereign's contractual obligations. The next point pertains to where we should actually look to find direct effect in such circumstances.

2. Harm to the plaintiff is not necessary (or sufficient) for "direct effect"

One of the few explicit rules in the case is that "[n]othing in the FSIA requires that the 'direct effect in the United States' harm the plaintiff."¹⁵⁸ This statement, combined with the court's acknowledgement that mere harm to a U.S. citizen is insufficient,¹⁵⁹ results in the rule that harm to the plaintiff party is neither necessary nor sufficient for direct effect. Of course, although this rule is explicit in language, it is anything but a useful guideline because it answers only what does *not* always constitute direct effect. If interpreted broadly, this statement may open the floodgates to pleading third-party effects as a way of defeating immunity or designing contracts with immunity-destroying third-party effects in mind.

3. "Direct effect" may be found where (1) the overall scope of the breached contract entails substantial commercial activity in the U.S. and (2) breach of the contract caused general economic disruption across an industry

Cruise Connections does emphasize two factors that may be important to find direct effect: (1) the fact that RCMP's contract with Cruise Connections necessarily or naturally entailed commercial activity, including commercial transactions, inside the United States; and (2) that the

157 *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 663-65 (D.C. Cir. 2010) (in deciding the case on other grounds, the court remarked, "It thus makes no difference where RCMP would have paid Cruise Connections.>").

158 *Id.* at 666.

159 *Id.* at 665.

breach of the contract caused generalized economic disruption of the cruise ship industry.

The first factor is based on the court's emphasis on a U.S. place of performance and place of negotiation of the third party.¹⁶⁰ Inquiry into this factor would focus not on RCMP's own contractual obligations, but the larger overall scope of activity related to the transaction, or perhaps foreseen or implied in the transaction. The court noted that the contract "required" the ships to come from American cruise lines.¹⁶¹ In this context, "require" does not refer to RCMP's contractual obligations, but the act necessary to fulfill (by non-defendant parties) in order to complete the contract. Of course, as suggested earlier, a contract between a U.S. and a foreign party could very easily require *some* activity in the United States, such as operational work in the U.S. party's American headquarters needed to carry out a contract, or for in the case of a single person, traveling through U.S. airspace to perform the contract abroad. Thus, it is difficult to draw a line as to what type of activity in the U.S. would be substantial enough to give rise to direct effect, or how closely tied the U.S. activity must be to the defendant's contract.

The second factor is based on the court's emphasis that RCMP's conduct caused revenue under the third-party agreements to be "not forthcoming."¹⁶² But because mere harm to a U.S. citizen is not sufficient for direct effect, the case also suggests that the key factor is the multitude of U.S. parties. Such a view is supported by the court's remark that RCMP's conduct "thwarted over \$40 million (U.S.) worth of cruise-related business in the United States,"¹⁶³ where the phrase "cruise-related business" implies interaction among parties, particularly of a related industry. Therefore, this second factor is very similar to the first factor (extent of activity in the United States) in that emphasis is placed on U.S. activity related to the defendant's contract. The case suggests that a knowing use of a third party in a deal raises the likelihood of direct effects. However, other than the facts of *Cruise Connections*, there are no standards to determining how many third parties, and how involved those third parties must be, to sustain

¹⁶⁰ See *supra* Part II.D.

¹⁶¹ *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 600 F.3d 661, 662 (D.C. Cir. 2010).

¹⁶² *Id.* at 665.

¹⁶³ *Id.*

industry-wide economic effect. In other words, it is not clear how much more is needed beyond mere harm to a U.S. business entity.

Because the factors suggested above are not accompanied by explicit rules, their implications will depend on whether *Cruise Connections* will be read broadly or be limited to its particular facts. It remains to be seen how federal courts, including those outside the D.C. Circuit, will use *Cruise Connections* in future cases.

4. *Weltover's* standard that an effect is "direct" if it follows as an "immediate consequence of the defendant's activity" remains devoid of substance and thus gives the court a large amount of discretion

The inefficacy of *Weltover's* immediacy is, of course, an old critique, but *Cruise Connections* highlights the problem once again. As discussed, the court's intervening act analysis (where the presence of an intervening act eliminates immediate consequence) contains numerous flaws. However, the D.C. Circuit was able to take advantage of the absence of a clear standard governing "intervening act" or "immediate consequences" to effectively rule that the intermediate steps in the causal chain leading to the third-party losses were not intervening. Part of the problem with intervening act analysis is that it is unclear as to what constitutes an "act." Since there is no precise standard, a court can easily collapse all the third-party mechanisms into a simplified timeline, something like: "RCMP breached the contract, thus causing lost revenue," as it did here (as opposed to a chain-of-events description like: RCMP breached the contract, causing the cruise lines to balk, causing Cruise Connections to be unable to obtain ships for the travel agency agreement, causing Cruise Connections to breach its agreement with the travel agency). Thus the case underlines the lack of substance in the "immediate consequence" standard in *Weltover*, the same concern that led to much criticism and additional judicial requirements such as the Second Circuit's legally significant acts test and the D.C. Circuit's apparent "express or implied agreement" standard (which *Cruise Connections* has qualified as not absolute). It is quite easy to see that either statutory or additional Supreme Court clarification is needed in this area. Until then, under the unduly vague "immediate consequence" standard, courts like the D.C. Circuit in *Cruise Connections* have utmost discretion in declaring what is considered a direct effect.

5. Substantiality, and possibly also foreseeability, may still be part of direct effect analysis to some informal

extent, even though they were rejected as requirements in *Weltover*

Although *Weltover* rejected foreseeability and substantiality as requirements, cases such as *Cruise Connections* show that they might still serve an informal role. It is not unreasonable to say that RCMP could have foreseen the third-party effects, given its knowledge of circumstances, and this consideration might have influenced the court's decision. But in the end, we have no clear guidelines as to how foreseeability affects "intervening" or "straight line" in the D.C. Circuit's definition of "direct effect,"¹⁶⁴ particularly when the Court expressly cited *Weltover*'s rejection of a foreseeability requirement. However, given that federal courts are currently endowed with vast discretion under *Weltover*'s immediacy standard, one can argue that they would prefer not to expressly bring foreseeability into play as it could restrain that discretion if it were to become a more formal part of the analysis.

While *Weltover*'s similarly rejected substantiality, the theme of substantiality permeates the *Cruise Connections* opinion, as seen by the court's emphasis on disruption of economic activity that could easily be described as substantial. Still, with no explicit endorsement of substantiality, which we can infer only by the tone of the opinion, the exact role of substantiality is ultimately left unclear. If substantiality is an implicit standard, we are left with no guidelines as to how substantial the effect must be. Would it make a difference if the amount in question is \$40,000 rather than \$40 million?

6. *Cruise Connections* may stand for the proposition that a breach of a contract between a foreign nation and a U.S. business entity will generally result in destruction of foreign sovereign immunity

The court's focus on terms like "forthcoming" while generalizing *Weltover*'s concept of "payment" to include general economic revenue suggests that any disappointed expectation of economic gain relating to a contract can qualify as an "effect" in "direct effect" analysis. Although "effect" might be potentially qualified by factors such as whether the scope of the contract entailed U.S. commercial activity, and whether a breach

164 "A direct effect has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Can.*, 634 F. Supp. 2d 86, 90 (D.D.C. 2010) (quoting *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994)), *rev'd*, 600 F.3d 661 (D.C. Cir. 2010).

would cause disruption across an industry, these factors aren't clear standards or rules. If *Cruise Connections* is read broadly, these factors are not difficult barriers to finding direct effect, since a contract between a U.S. party, particularly a business entity, and a foreign nation could easily have at least some economic effect on U.S. commercial activity. The non-requirement of harm to the plaintiff further expands the potential "effects" that can destroy immunity.

As for whether an effect is "direct," this case has shown that the intervening act analysis is very malleable, at least in the D.C. Circuit, and it is not too difficult to find something that is "direct." These observations, when combined, leads to a reasonable conclusion that if *Cruise Connections* is read broadly, an alleged breach of a contract between a foreign nation and a U.S. business entity will usually result in destruction of foreign sovereign immunity. Stated another way, if the contract envisions significant U.S. commercial activity, direct effect is likely found, under a broad interpretation of *Cruise Connections*.

Accordingly, the sovereign immunity defense is weaker under this rule than under a rule that requires the agreement to include payment in the U.S. Of course, it remains to be seen how broadly the case will be read by later opinions.

B. Potential Solutions to Current Problems

Cruise Connections touches on two broad issues. The first issue is that given the purpose of the FSIA to balance the convenience of aggrieved private claimants with the "promotion of comity and harmony between the United States and other nations,"¹⁶⁵ has *Cruise Connections* upset the balance by making it too easy for immunity to be destroyed? Possibly, if not probably—but a precise inquiry into this question would require determination of the ideal amount of immunity, a question beyond the scope of this note.

The second issue is the lack of uniformity and consistency in direct effect jurisprudence, as illustrated by this case. A lack of uniformity and consistency can operate as a barrier to efficient commercial transaction between parties because it creates uncertainty. The challenge, of course, is finding a nexus to the United States between § 1602(a)(2)'s "commercial

165 *Colonial Bank v. Compagnie Generale Maritime et Financiere*, 645 F. Supp. 1457, 1465 (S.D.N.Y. 1986).

activity of the foreign state elsewhere” (i.e., *outside* the U.S.) and some harm or “effect” *inside* the United States. If the statutory language of “direct” is kept, it will be necessary for the Supreme Court to provide more clarification, particularly regarding intervening act analysis and place of performance provisions. Another possibility is to firmly insert foreseeability into the analysis. Foreseeability is advantageous in that it is commonly used in causation analysis.¹⁶⁶ On the other hand, if foreseeability becomes the main criterion (such as if “direct effect in the United States” is amended to something like “loss in the United States that the foreign state had reason to foresee as a probable result of its activity”), direct effect may be too easily found in breach of contract cases between sophisticated parties, wherein any breach would likely be foreseen to have an adverse effect on the other party. Congress would have to determine if such a relaxation of immunity is appropriate.

Yet another possibility, one that would offer a higher degree of immunity, is to examine the geographical scope of the contract to see if the foreign state bargained for the plaintiff to perform substantial act to take place in the United States. This approach would follow one possible reading of *Cruise Connections*, based on its emphasis of the negotiation of the third party agreements in the United States as pertinent to direct effect. However, further clarification would be needed as to what counts as sufficient acts to be performed by the plaintiff, and this approach would also alter the current framework (albeit a vague framework) by focusing on the contractual context of the breach rather than the effects of the breach and by treating contract cases as inherently different from tort cases.

Finally, further revision of direct effect jurisprudence should revisit the issue of third-party effects. A simple statutory amendment of “effect” to be “loss to the plaintiff” would resolve this particular ambiguity.

Conclusion

By finding that lost revenue under the plaintiff’s third party agreements constituted direct effect, under a rationale that lacks soundness in legal reasoning as well as basis in established case law, *Cruise Connections* has decreased the efficacy of immunity under the Foreign Sovereign Immunities Act. More importantly, the case’s departure from

¹⁶⁶ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981) (“Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made”).

established principles regarding intervening act analysis and contractual or customary payment at a U.S. payment location, while setting forth few clear standards, adds more uncertainty to an already disjointed area of the law that is very much in need of legislative or Supreme Court guidance.