OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: REPUBLIC OF ARGENTINA AND BANCO CENTRAL de la REPUBLIC ARGENTINA, Petitioners V. WELTOVER, INC., ET AL.

CASE NO: 91-763

PLACE: Washington, D.C.

DATE: April 1, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

- X

REPUBLIC OF ARGENTINA AND :

BANCO CENTRAL de la :

REPUBLICA ARGENTINA, :

Petitioners :

v. : No. 91-763

WELTOVER, INC., ET AL. :

- X

Washington, D.C.

Wednesday, April 1, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

RICHARD J. DAVIS, ESQ., New York, New York; on behalf of the Petitioners.

RICHARD W. CUTLER, ESQ., New York, New York; on behalf of the Respondents.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting Respondents.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 91-763, Republic of Argentina and Banco Central v. Weltover, Inc., et al. Spectators are admonished to refrain from talking while you're in the courtroom. The Court remains in session.

Mr. Davis, you may proceed.

ORAL ARGUMENT OF RICHARD J. DAVIS

ON BEHALF OF THE PETITIONERS

MR. DAVIS: Mr. Chief Justice, and may it please the Court:

The question we are addressing today involves the availability of U.S. courts to dispute between two Panamanian and one Swiss entity on the one hand, and the Government of Argentina and its Central Bank on the other hand. For this exception to apply two requirements must be satisfied.

First it must be demonstrated that when the Central Bank financed its own obligations to provide dollars under a foreign exchange rate assurance program through the issuance of bonds instead of supplying the promised foreign exchange, that the Central Bank committed a commercial as opposed to a sovereign act.

Second, it must be demonstrated that there is a

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direct effect in the United States from failure to pay these non-U.S. entities when no United States person suffered any financial loss and the United States' connection with the transaction is that under the bonds New York became the place of payment after being selected by these plaintiffs from four possible choices.

QUESTION: Mr. Davis, what is a Bonod? Is that an acronym for something?

MR. DAVIS: It is the actual name that was given to the instrument, Bonod as opposed to bond. For our purposes it is a bond, it is just the official name of the bond.

QUESTION: They just made up a whole new word? It doesn't stand for anything, Bonod?

MR. DAVIS: It does not. It does not. It was delivered by the Central Bank as one of two alternative instruments. They had a Bonod and a promissory note in 1982 when the Central Bank's obligation had matured under a program that it had implemented in 1981 to provide foreign exchange at a fixed exchange rate.

This was part of the Central Bank's primary functions because when we talk about the Argentine Central Bank we are talking about a classic central bank in the sense that it's explicitly prohibited from participating in commercial enterprises, and one of its primary

responsibilities is the issuance, regulating the foreign exchange markets, determining how foreign exchange should be allocated, establishing foreign exchange rates and policies, and providing counsel in those areas to the Republic.

In 1981 the government, the Central Bank created a program where for new and renewed loans it fixed through a, use of a specified formula the exchange rate that would be used when these various debts matured. It did this to provide a cut off of credit to, foreign credit to Argentina because of the rapid and unpredictable devaluation of the Argentine currency.

When the Central Bank's obligation under this 1981 program matured and it was obligated to provide dollars to, as the foreign exchange in connection with its functioning as the government's responsible agent for foreign exchange, it didn't have the necessary reserves and thus what the Central Bank did is it issued two types of instruments, the promissory note and the issue, the instrument at issue in this case, the Bonod.

In considering the first issue, therefore, whether the Central Bank's issuance of the Bonod was commercial or sovereign, we have an instrument with the following characteristics. One, it was issued by the Central Bank. It did not finance the acquisition of any

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goods. It in of itself raised no money. It financed, as I said before, the Central Bank's own obligation under the 1981 foreign exchange rate program. And unlike the promissory note which I referred to as the other instrument that was issued roughly contemporaneously with the Bonod, it contained no language purporting to submit to jurisdiction anyplace.

QUESTION: If we're going to look that far behind the surface of the Bonod, don't -- that its ultimate objective was to finance foreign commercial exchange in trading relationships between Argentina and other parts of the world?

MR. DAVIS: But it was doing it not as -- you know, sometimes some of the legislative history talks to in terms of entering the commercial marketplace. It was doing it by --

QUESTION: It was doing it so somebody else could stay in the commercial marketplace.

MR. DAVIS: Yes, but it was doing it in implementing a basic sovereign function, that is exchange rate policy. The United States Government or other governments may do, undertake a variety of actions which facilitate on a broad base their citizens to participate in markets.

QUESTION: Is anything that would fall within

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that broad base therefore non-commercial in your view?

MR. DAVIS: Not, not anything, but I do think that a kind of program that goes to where the courts have, in looking at foreign exchange have recognized that the regulation of foreign exchange markets are one of the core official responsibilities that -- and if you look at this transaction, what it was doing is it was obligated to, as one of its responsibilities, to provide foreign exchange. It came the time to provide the foreign exchange, it lacked the necessary reserves, and what it did is it just substituted the Bonod for the foreign exchange.

We would say if the government had issued the foreign exchange that would be doing what the government does, issuing the foreign exchange, provide the foreign exchange. It couldn't do that. It issued the Bonod. We think that the nature of that activity is still the same.

QUESTION: But it had issued the Bonod because in effect it was trying to find a means, or it had originally been trying to find a means of standing behind, as it were, the private trading entities of the country, and therefore it was, it had a rather more specific purpose in a more specific temporal period of the market than merely creating a foreign exchange structure in the general sense.

MR. DAVIS: Well, no, I think it was, Justice

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Souter, creating a foreign exchange structure. It wasn't, as a private party might do, picking and choosing transactions, valuating transactions. It was in a sense in 1981 created an entitlement, if loans met certain criteria you would get this future, this exchange rate at a promised rate in the future. So I think it's that kind of program which is really more what a sovereign would do than what a private party would do.

QUESTION: Mr. Davis, it seems to me that all you're saying is that its purpose was a governmental purpose. You're describing the reason it was doing it and so forth. But the statute explicitly says that the character of the activity under the act, whether it is commercial or not, will not be determined by reference to its purpose. It seems to me you have a commercial instrument here and we don't care what purpose it was issued for.

MR. DAVIS: Well, we think that the reason we think we are looking at the nature is because what we're saying is that when the statute, as you point out, says you should look at the nature of the activity, it's not saying that you should look at the nature of some abstract activity. It's saying you should look at the nature of the specific activity. For us that doesn't mean that the beginning and the end of the inquiry where you say it's

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debt and therefore all debt is by nature commercial.

This debt was issued in terms of without receiving any money in return. It was issued, you know, not for raising money. It was issued without financing goods, and it was issued for purpose of financing the own obligation.

QUESTION: The question is whether it's a commercial act, and you don't think it's a commercial act to in effect guarantee to someone else the payment by someone who is purchasing goods? If I come in for whatever motive, for the government and I want my businesses to flourish, I come in and act as a guarantor in a commercial transaction, that is not a commercial act?

MR. DAVIS: I think it could be considered a commercial act if it was guaranteeing. Under this program it was not guaranteeing, because the normal credit responsibility remained upon the private sector borrower. What I mean by that is the private sector borrower was still required to provide the pesos. All that the government did was assume the responsibility for what its sovereign function was, which was to issue the foreign exchange.

QUESTION: Making the pesos worth something.

MR. DAVIS: Well, in terms --

QUESTION: I consider that guaranteeing.

MR. DAVIS: I consider it fulfilling the foreign exchange responsibility. I also say --

QUESTION: You can call it that, but in fact they are guaranteeing that these pesos are going to be worth something in the international exchange.

MR. DAVIS: Through doing what the Central Bank does. I also think that in addition to the fact that the definition when it says look at the nature of activity we believe doesn't require or support looking at the nature of an abstract activity.

I think there are two other things that are relevant in the legislative history. One is that there's a lot of reference in the various briefs and some of the cases is that the criteria is whether a private party could do something. And when you read some of the cases in the other briefs, if it could do something it is automatically considered commercial. If you actually go back to the legislative history that is cited, however, is what it says is if a private party might do something, then it could be considered commercial, not would automatically. I think the language in the legislative history in the House report would say in that circumstances it could be, not automatic.

The other reference that is often used in terms of the legislative history is borrowing money would be an

example of a commercial activity, and what we would say is that the commercial activity, excuse me, that here that's why we look not to some broad based rule, because we understand that in the overwhelming percentage of the cases the issuance of debt is going to be a commercial act. We also understand that in a gray area you're going to have a circumstance where parties can and do secure waivers of sovereign immunity. That's going to be the circumstances in reality.

What we're saying, however, is where you have an instrument in which the Central Bank through the issuance of the Bonods raised no money, financed no goods, no acquisition of goods, and at the same time was financing its own obligation to provide foreign exchange, that the nature of that is a sovereign act and not a commercial act.

QUESTION: Well, Mr. Davis, if we were to disagree with you and conclude that jurisdiction was appropriate here, do you suppose Argentina can still assert on the merits an act of state defense in the litigation?

MR. DAVIS: There would be an issue, and I think there is some learning in the Second Circuit which we do not necessarily subscribe to which would make it difficult in the Allied Bank case. We do think that this was an

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official act, this was an act of the state by the government of Argentina. That could be one of the defenses raised, but it would be, we would, at least in terms of the Second Circuit, be faced with the Allied Bank decision which would foreclose that in terms of our argument until we got to this Court.

Before leaving the commercial activity aspect and going to the second point, I just want to point out sort of our analysis that I think is consistent with what the courts have done when they have looked for example at the contract cases, where they have said a contract of employment, yes, that is something private parties do, but if it's the employment of a diplomat in the United States, that would be sovereign. If it's employment of somebody else to perform a commercial function, then that would be commercial. And they just don't look at the last act, they look to see what the real nature is.

And we think that that's also the position the Government took not in this case, the U.S. Government took not in this case but took in the Izvestia case in the Ninth Circuit in which it argued that you had to look beyond the fact that Izvestia was a newspaper and look to that its nature as the official organ.

But the second leg is also important in this dispute because in enacting the Foreign Sovereign

Immunities Act it is also clear that the Congress didn't want to convert our courts into international courts of claims and allow disputes to be heard here by people with no, where the plaintiffs had no meaningful connection with the United States. It did this by creating the direct effect nexus requirement which required some direct effect in the United States from the sovereign's commercial act even if it is determined to be commercial.

Now, the Government, the U.S. Government and the respondents urge a test essentially which says that anytime place of payment is in the United States and it's a dollar transaction, that is sufficient. They essentially urge a test which would say that if an Algerian state enterprise purchased machinery from a private Tunisian company next door, that, and they happened to have dollar payment, therefore it provided for a promissory note to be paid in the United States, that U.S. courts should hear that dispute.

We believe that you need go no further than the language of the statute which requires that the direct effect be in the United States in order to determine that this proposition is erroneous and that the proper approach would require that the place of payment be in the United States and that the plaintiff be a U.S. person. Because where there's a great weight attributed by the amicus and

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the respondents to this sole connection which is the place of payment, and while they have built it, tried to build it up in their briefs by talking in terms of that you actually paid there, I think that is the attributes of a place of payment is that you do pay there.

QUESTION: Well, Mr. Davis, I take it you take the position that a foreign corporation can never sue under the direct effects provision in the U.S.

MR. DAVIS: Well, I think that it would require --

QUESTION: Is that right?

MR. DAVIS: I think it would require that the transaction have many more connections with the United States than mere place of payment, perhaps if --

QUESTION: Well, place of payment can be vitally important, can it not?

MR. DAVIS: I think the place of payment an be vitally important, but place of payment really is a characteristic of the transaction. We don't think it creates the effect. The effect is really some tangible consequence, and the tangible consequence that I think exists is somebody lost money in this circumstance. And what was, the money was here lost by the two Panamanian and the Swiss entities, and that that's just simply not a direct effect in the United States.

We do think that perhaps if there had been some additional activity, some negotiations in the United States, that perhaps you might be in a closer case where the direct effect could be satisfied, although obviously if you reached a point where the loan agreement was executed in the United States you probably would be dealing with a different provision and not the direct effect provision.

QUESTION: Mr. Davis, doesn't your argument sort of make light of the fact that when there are transactions between parties with governments whose currency is not accepted as foreign exchange that the very fact of the transactions taking place requires in effect an enforceable term, such as the place of payment term, and a means of enforcing that place of payment term where the parties designate? In other words this isn't merely a kind of incidental side issue in these transactions. I would suppose that it is central to the very possibility of a great many of these transactions.

And if you accept that as a premise, then do you not find a much more substantial dimension to the effect, i.e. the refusal of payment or the refusal of credit, in the place designated?

MR. DAVIS: Well, I think that, Justice Souter, you refer to two aspects of the place of payment. In one

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you talked about the means of enforcing a right, and I think those are two different things. That they're -- yes, place of payment is one provision and that is considered important, and I think that that is done for the convenience of the parties. I think when parties focus on the means of enforcement they focus on provisions that are very common in international instruments, that is actual submissions to jurisdiction.

And indeed in this case you had two different instruments that were issued. One is the promissory note which is not the instrument which is, which these parties held. That contained a submission to jurisdiction. You have on the other hand the Bonod which contained no such provision.

So I think that when the parties in international lending transactions do want to focus on how to enforce their rights and enforce their remedies, they focus on choice of law provisions, which is not present in this instrument, they focus on submissions to jurisdiction. They don't focus on -- the place of payment I think is more for commercial convenience.

QUESTION: Well, I'll grant you that up to a point, but you're not claiming that the terms of the Bonod are governed somehow by the terms of the note, are you?

MR. DAVIS: No, I'm just using that --

QUESTION: All right. So that the holder of the Bonod is not, presumably, unless we were to come up with a rule which you're not even asking for, the holders of the Bonod would not look to the note in order to determine what, what they may enforce and where they may enforce it. And if the Bonod itself contains no submission to jurisdiction, if it contains no term even governing the point, isn't the most reasonable expectation commercially that in fact it will be enforceable in the place designated for payment?

MR. DAVIS: I don't necessarily think that's correct, because if you look at the Bonod, I mean, it references, you know, Argentine decrees and Argentine law, and while the promissory note does not, you don't use it to interpret the language of the Bonod, the fact of the matter is that the instruments were made available at the same time and that therefore parties could know that there was another instrument which contained explicit submissions. And I think also that it is just not unusual in international lending transactions for parties to understand that the vehicles for protection when they're looking to where they can sue is, involves the submission to jurisdiction.

QUESTION: If they can't sue in New York, where do they have to go to sue?

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MR. DAVIS: Well --

QUESTION: They go to Argentina, don't they?

MR. DAVIS: One possibility is Argentina. And it may be, and I think this Court has frankly recognized in the sovereign immunity context in the Argentine v. Hess case, that there may be circumstances where they have no remedy because they dealt with a sovereign and didn't negotiate appropriate clauses --

QUESTION: Well you, in that case I take it you would agree that there wouldn't be a very bustling market in Bonods if everybody understood that you had to go to Argentina to collect.

MR. DAVIS: Well, I think that in terms of the market in Bonods it was, you know, an instrument that at the time it was issued it was issued as, to go back to the first point, really in substitute for foreign exchange. I don't think --

QUESTION: Well, if we, if -- assume for the sake of argument that we do not accept that point, so that we are going to treat this essentially as a commercial transaction. Wouldn't it then be true, as I said, that there wouldn't be much of a market if one had to go to Argentina for it, and therefore we ought to look to some commercial expectation in determining whether in fact it should be enforceable in the place designated for payment?

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MR. DAVIS: Well, I think that whether there would or would not be a commercial market in fact for an instrument that doesn't contain submissions to jurisdiction, I think doesn't determine the expectations of the party.

QUESTION: It's a pretty good pointer, isn't it?

MR. DAVIS: Well, it's in terms of yes, I think it makes it a less attractive instrument and which it is the reason why there was much, a smaller percentage of people took the Bonods than took the promissory notes. But in terms of the Foreign Sovereign Immunities Act and going back to the statute, I still don't think that it would satisfy the direct effect requirement which is still the issue. The issue is whether the direct effect requirement is satisfied when a non-U.S. plaintiff, because we --

QUESTION: Oh, well, I grant you that. Maybe I have lost my point in my questions, but I mean my point was in determining what should be treated as sufficiently direct it seems to me we do have to look to these commercial realities, if once we accept the proposition that the transaction should be treated as a commercial one rather than as an act of sovereignty.

MR. DAVIS: And we think, with respect, that the commercial reality is that the parties seeking to secure

the protection of assured places to bring a lawsuit in fact demand that as part of a transaction. And that was, and in this circumstance that's not present in this instrument.

QUESTION: They took their chances.

MR. DAVIS: They took, they took their chances when the Bonod was accepted. I think that also that in terms of the legislative history of this provision points to the fact that it intended these nexus requirements, which were designed again to prevent the United States courts from becoming international courts of claims --

QUESTION: Mr. Davis, let me ask you a provision, about a provision of the Bonods. They were not in terms payable in New York, I take it?

MR. DAVIS: The Bonods?

QUESTION: Yes.

MR. DAVIS: They were payable in --

QUESTION: Payable in dollars.

MR. DAVIS: Payable in dollars.

QUESTION: Through transfer on the New York, Frankfurt, London, or Zurich markets. Is that correct?

MR. DAVIS: Yes. And I think that that --

QUESTION: Does that amount to saying they are payable in New York?

MR. DAVIS: I think for practical purposes, Mr.

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Chief Justice, it does. And I think it was understood that when it was payable on the New York market that there would be some mechanism for payment. If you designated a, meaning if the holder of the Bonod designated a bank in New York or Zurich, that you would have an ability to receive the funds in New York or Zurich.

QUESTION: And that was at the option of the bond holder where the funds would be received?

MR. DAVIS: Yes, it was an option of the bond holder.

With the Court's permission I would like to reserve my remaining time.

QUESTION: Very well, Mr. Davis.

Mr. Cutler.

ORAL ARGUMENT OF RICHARD W. CUTLER

ON BEHALF OF THE RESPONDENTS

MR. CUTLER: Mr. Chief Justice, and may it please the Court:

Our argument is the plain meaning of the Foreign Sovereign Immunities Act. The statute says that a commercial activity is to be judged by its nature, not its purpose. In this case the petitioners issued negotiable certificates of debt, and there is nothing uniquely sovereign about going into debt. Private corporations do it all the time, private parties do it all the time.

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In this case the petitioners decided, for whatever reason, to take the step into the commercial marketplace and they gave up some of their sovereign immunity. The petitioners' argument on that does raise some rather troubling points. The first is, of course, that it violates the plain language of the act.

The second is that petitioners talk about the context of the Bonods. That is their word, that is not mine. The context is really just a code word for purpose. And one of the difficulties is that it wholly obliterates the idea of restrictive sovereign immunity because every sovereign is going to find some public purpose ultimately to justify whatever acts it takes.

There is another possibility that is even more disturbing, and that is once purpose becomes an issue the petitioners' position is essentially mandating that U.S. courts become evaluators of the authenticity and the efficacy of foreign sovereigns' internal purposes. The act says don't do it. Just look at the nature of the activity. The nature of the, this activity was just like anybody else issuing a promissory note, if you will, or any kind of certificate of debt.

QUESTION: Every certificate of debt? What if, what if the United States decides to give substantial foreign aid to another country and we issue them, that

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foreign country, a negotiable instrument?

MR. CUTLER: Your Honor, the answer to that is --

QUESTION: That a commercial act?

MR. CUTLER: No, I would say that that is a sovereign transaction. The distinction I was trying to make was that the certificate of debt that Argentina and its Central Bank were issuing here was just like an ordinary commercial certificate of debt. It is not --

QUESTION: So you do look just beyond the face of it to see whether it's a negotiable instrument however. An instrument of debt you do look to what it's being given for.

MR. CUTLER: Oh, yes, Your Honor. Our argument has never been that because it is a contract it is commercial. Our argument has been that it's a contract for the repayment of borrowed money which can be held by any private individual, and since it's negotiable the only restriction Argentina put on it, that it would be that it wasn't held by an Argentine citizen or by someone living in Argentina.

The question of direct effect, Your Honor, is simply a matter of the same analysis. What did the petitioners do. Well, here they promised to pay in New York. And if I may assist the Chief Justice in the

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interest payments that the petitioners did make before they defaulted on the bonds, they did wire funds to a New York bank who then deposited them in the accounts of the respondents. In at least one payment each of the respondents was paid in the United States.

In this case payment, of course, was not just a part of performance. It was all of performance. It was 100 percent of the executory performance of the instruments, as a matter of fact. And the suggestion that somehow our people have to get a waiver before there is a connection with the United States again is simply an idea that goes beyond restrictive foreign sovereign immunity. The idea of sovereign immunity is that a sovereign may be brought to U.S. court against its will because of the nature of the instrument it issues, because of its conduct, and of course because of the direct effect in the United States.

The direct effect, we have said right from the beginning, Your Honor, right from the district court on up to here, was that there was a expectation of payment in the United States, in New York City. The petitioners promised that they'd do it. They didn't do it, and the effect was felt right here. The example I believe that we gave in our brief was that of a shipment of grain that had to be delivered to New York City. In this case the cargo

was dollars, and the respondent -- and the petitioners just didn't do it.

That effect in New York, I would make very clear to the Court, was not a fortuitous effect. The petitioners were the ones who named New York as a potential place of payment at the option of the particular bond holder. The petitioners keep reminding the Court in the brief that the Bonods were not negotiated, that is the terms of the Bonods were not negotiated, so that the designation of New York as a place of payment was petitioners' unilateral choice to make those Bonods look as if they were worth something.

The effect was certainly foreseeable. In this case the effect was exactly the petitioners' act. The petitioners didn't want to pay the respondents in New York and they didn't, and that's exactly what happened. The respondents didn't get their money in New York. The effect and the act are virtually identical.

And if there be any reason to have to repeat it once more, the idea of the act to the effect, that line is as straight as an arrow. And as far as we can see, Your Honor, that's subject matter jurisdiction.

I would --

QUESTION: You know, that provision of the act that refers to it being based upon an act outside the

territory of the United States in connection with a commercial act -- and that act causes a direct effect in the United States, that's what you're relying on there? It doesn't seem to me that -- there's a whole line of conflict of law cases that involve jurisdiction based upon the effect of a statement. You'll find something more than what you're describing --

MR. CUTLER: I don't know, Your Honor. I must respectfully disagree, because in this case again it's not as if Argentina just picked New York out of the blue. There was a real purpose to New York, and there was a real purpose to making the Bonods an acceptable method of going on with debt. The purpose of naming New York, as Justice O'Connor mentioned earlier, had to do in great part I am sure with the act of state. Nobody was going to give up the control of that debt to Argentina so that any kind of currency regulation or any kind of exchange regulation could make the bonds worthless with one stroke of the pen.

QUESTION: I wonder why you don't rely upon the middle of the three bases for jurisdiction, that is on an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. The act of default occurred in New York, is what you told me?

MR. CUTLER: Yes, Your Honor.

QUESTION: Isn't the word act there broad enough

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to include the act of default?

MR. CUTLER: I think it may be. As --

QUESTION: You don't ordinarily speak of a default as having been performed, do you? I mean it seems somehow more positive.

MR. CUTLER: I think, if I may answer Justice Scalia's question first, I think, Your Honor, as an advocate I may not be able to make that argument, although we have thought of it. And that is I have not raised it below and have not argued it below. On reflection I think it is probably a very good argument, but I am not sure that it would be appropriate for me to make it in this Court at this time.

In response to the Chief Justice's question --

QUESTION: Well, my question becomes moot if you --

(Laughter.)

MR. CUTLER: But I would say, Your Honor, in terms of an act, because it does regard an act outside the United States with a direct effect in the United States, I think if you require a breach of contract to be some kind of positive act that pretty much takes away all breaches of contract. I mean, rarely I know -- I mean, someone can deliver, I suppose, shoes, and there is an argument about whether the shoes are up to the quality that was

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originally in the agreement. But most of the time I think breaches of contract are in fact somebody not doing something, and it's the not doing something that's the act.

And if there are no further questions from the bench, I will retire at this time.

QUESTION: Very well, Mr. Cutler.

Mr. Minear, we'll hear from you.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING RESPONDENTS

MR. MINEAR: Mr. Chief Justice, and may it please the Court:

We submit that Argentina is subject to suit based on its failure to honor debt instruments that it issued to private creditors and that are payable in the United States. The initial question here is whether Argentina has engaged in a commercial activity, and we think there is little room to dispute that Argentina's issuance of Bonods is just such an activity.

As Argentina acknowledges, a Bonod is a debt instrument issued to private creditors that entitles the holder to repayment of principal with interest. It does not differ in its essential terms from a bond or debt instrument that a business corporation might issue.

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When Argentina issued its Bonods it borrowed money in the international debt market and it thereby engaged in a commercial activity. That conclusion is especially compelling here where Argentina issued its Bonods as substitutes for payment of preexisting private commercial obligations.

At bottom Argentina really does not challenge the commercial character of the debt instruments. Rather it simply argues that it had a public purpose in issuing them. As the lower courts correctly pointed out, however, the Foreign Sovereign Immunity Act instructs that the commercial character of an activity must be judged on the basis of its nature rather than its purpose.

QUESTION: Mr. Minear, do you agree with, accept the answer that Justice Scalia got that, to his question, that if a Bonod or any instrument had been issued for purposes of foreign aid that that could be considered when we decide whether the act applies or not?

MR. MINEAR: We think that might well be a commercial activity if it was, if the payment was made in the form of a commercial debt instrument that obligated the United States to pay money to a private creditor.

QUESTION: In other words you're saying that that would be looking behind the instrument to the purpose.

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MR. MINEAR: No, I --

QUESTION: I'm sorry.

MR. MINEAR: I think I was saying that we look to, instead to whether the United States issued a debt instrument that is payable to a private party and that requires payment of money. If the United States is --

QUESTION: But if it was payable --

MR. MINEAR: -- acting in the same manner as a business corporation in issuing the debt instrument, we think that we would be liable to suit.

QUESTION: So that you, in effect you don't look to the purpose because you're answering the question based on the identity of the payee.

MR. MINEAR: No, we're looking to the character of the instrument in which the transaction takes place. We're looking to the character of the activity.

QUESTION: Well, if I go out on the market and I decide I want to buy a foreign debt instrument, do I know that? Can I find that out without looking behind it?

MR. MINEAR: Well, you can look to the instrument itself. And here, as I said, this instrument was issued in the form of a bond, a traditional debt instrument. And to the extent that Argentina went to the commercial marketplace to obtain its funds, or in this case actually to delay payment of funds, it's subject to

the rules of the commercial marketplace.

QUESTION: So you're saying if the government of Argentina or any government wants to take advantage of the Foreign Sovereign Immunities Act all it has got to do really is to indicate on the face of the instrument the context, if you will, in which the instrument is issued and that will suffice. If they don't want to indicate that, then it's going to be treated essentially as a commercial instrument.

MR. MINEAR: Essentially that's -- I agree with that.

QUESTION: Okay.

QUESTION: I'm not sure I understand your distinction. Say -- I thought you were distinguishing the foreign aid example on the basis of it depends who the payee is. You said a private payee. But what if the payee is the foreign government?

MR. MINEAR: Oh, in the case of a foreign government, in that situation I should be clear that if it's a, a sovereign to sovereign transaction, and I am thinking in particular of currency swaps between --

QUESTION: Suppose I'm buying potatoes from the Russian government and I pay them with a debt instrument. Would that be a commercial transaction?

MR. MINEAR: That's likely to be a commercial

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transaction there.

QUESTION: So it doesn't depend on whether it's the government --

MR. MINEAR: No, I would say that we would draw an exception, however, in a case -- for instance, the central banks of various countries will engage in currency swaps to maintain liquidity between their two central banks. This transaction never takes place in the market. It's simply a transaction that is conducted between two sovereigns. It's more of the character of a treaty rather than a commercial contract, and that is the example.

QUESTION: I'm not sure we all aren't getting into purpose to some extent. I mean, it's a very well put statute to say that it doesn't depend upon the purpose, but I really wonder whether you don't have to get involved somewhat in the purpose.

MR. MINEAR: In some situations --

QUESTION: The purpose here is commercial, but --

MR. MINEAR: With all respect, Justice Scalia, I think that in some cases it's true that it's difficult to determine the nature and activity without some resort to purpose, but I don't think that that is this case here. In this case --

QUESTION: You're -- if I may interrupt you,

you're saying that the way to solve this problem that Justice Scalia and I both seem to have is to say at least don't look beyond the instrument itself.

MR. MINEAR: That's correct. That's correct.

QUESTION: If it says this is a potato note, that's one thing. If it's payable to a foreign sovereign and this is a foreign aid note, that's another thing. We just stop at that point is what you're saying.

MR. MINEAR: With respect to debt instruments I think that provides a very workable rule and it also provides certainty in the marketplace.

Now once the Court has asserted that the complaint here identifies a commercial activity the next question is whether the commercial activity has a sufficient nexus with the United States. The lower courts concluded that Argentina's unilateral rescheduling of its debt payments caused a direct effect in the United States because the rescheduling resulted in Argentina breaching its obligation to repay a debt that was legally obligated to pay in this country.

QUESTION: Do you think nexus is the same as a direct effect?

MR. MINEAR: No, I am using the word nexus in a more general term of connection. There are actually three types of connections that would subject a commercial

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activity to suit. One, if it takes place in the United States, two, if an act in connection with the activity takes place in the United States, or three, if there is an act outside the territory of the United States that has a direct effect in the United States.

Now in this case the way that the respondents have structured their complaint, and they are masters of their complaint in this context, is that the commercial activity is the issuance of the Bonods. The act outside the territory of the United States is the rescheduling of the debt payments. The direct effect in the United States is the breach of the obligation to pay here.

Now, as the Justices alluded to earlier, this could also conceivably fit into the second clause of the provision, particularly if you're willing to look to the legislative history and the House report that notes that an omission can be treated as an act for purposes of the second clause.

QUESTION: I promise you I didn't get it from there.

(Laughter.)

MR. MINEAR: But in any event it's true that these three clauses do overlap to some extent, and that's true. But we think that this case fits squarely in the third clause, without regard to whether it fits in the

first or second clause. Now -- and I think the reason for this should be quite clear, that creditors lend money in the expectation that they're going to be repaid, and the choice of the place of payment is central to their expectations. And simply put it is the place of performance of the debtor's contractual obligation.

Now, when a debtor breaches its repayment obligation it has a direct effect at the designated place of performance because that is where the breach of the contract takes place. Thus it is proper to conclude that Argentina's breach of its obligation or of the Bonods has a direct effect here in the United States, which was designated by Argentina as the place of performance.

Now this is also consistent with conflict of law principles if one were to look to the second restatement or the first restatement of conflicts. Both of those cases indicate that the applicable law would be determined on the basis of the place of performance in the case of a debt transaction. That would be section 195 of the second restatement, and section 370 of the first restatement. So it's hardly odd to suggest that the place of performance shouldn't also not be the significant legal effect for purposes of the FSIA and for purposes of determining jurisdiction.

Moreover, this conclusion reflects the realities

of the international debt market where the party's choice of place of payment determines the value and marketability of the debt. An international debt has increased risk and diminished value if it is payable at a location where there is political upheaval, currency exchange restrictions, or inadequate resources or mechanisms for settling the debt.

In that case of the example that Mr. Davis gave of a transaction between a Tunisian and Algerian businessmen, they might well decide that the place of payment should be in New York rather than in Tunis, Algiers, or perhaps Tripoli, because that is the one place where they can be certain that the rule of law would govern their transaction.

And that we think is central to the United States' interest in this case, the fact that the rule of law does apply to commercial transactions carried out in the United States.

Now, when a foreign state makes its debt instruments payable in the United States, United States currency, it is purposely availing itself of the stability of the United States as a commercial forum. It should therefore be subject to the forum's legal rules which preserve that stability and the value of the debts that are payable here.

QUESTION: But that too is kind of a nexus argument that we might expect in another context, I think, rather than its strictly an interpretation of this statute, isn't it?

MR. MINEAR: Your Honor, I think that in terms of the point that I am making here, that the, that this is the policy that underlies the direct effects test and underlies its application in this case.

QUESTION: Well, how do we know that?

MR. MINEAR: I think that we have to rely at some level on what Congress was trying to achieve here, which was to make sure that when a foreign nation enters the commercial market it's subject to the same rules as other parties would be. Now, other parties that made debts payable in New York would be subject to New York law.

QUESTION: Do you agree with the court of appeals' observation that one of the purposes of Congress in enacting this act was to make sure that New York City kept its importance in the financial world?

MR. MINEAR: I would -- no, Your Honor. I would not phrase it that way. But I would say that Congress here was concerned that, in the fact that the rule of law would apply to commercial transactions that have a substantial connection with the United States. And in the

case of a transaction of a debt that is payable in the United States that is a substantial connection. It is a direct effect in the United States when such a transaction is breached.

Now Argentina's approach, which would require a court to ascertain the effect of a foreign state's breach by examining where the creditor suffers its economic loss, would produce an unpredictable and we think unworkable standard for resolving the jurisdictional issue. That is particularly true in the case of negotiable instruments. Under Argentina's approach a foreign state would be unable to assess its own immunity or its own amenability to suits in this country at the time that it issued its debt instrument and thereafter, after it is exchanged to other persons hands.

In sum, we submit this case provides an opportunity to state a clear rule applicable to a broad category of cases, and the rule should be this. A foreign state is not immune from suits in the courts of this country if it breaches a contractual obligation to repay a debt instrument that can be held by a private creditor and is payable in the United States. That rule is not only consistent with the Foreign Sovereign Immunities Act, but it would also provide definitive guidance to foreign states in structuring their debt offerings and determining

their amenability to suit in this country.

Unless there are further questions, thank you.

QUESTION: Very well, Mr. Minear.

Mr. Davis, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF RICHARD J. DAVIS

ON BEHALF OF THE PETITIONERS

MR. DAVIS: Thank you, Mr. Chief Justice. I think in terms of the direct effect test that the position that has been articulated here in terms of the, by the U.S. amicus, really confuses jurisdiction with choice of law. This Court in a number of opinions has, when it considered whether there would be jurisdiction, has made a distinction and said that the fact that the operation of the center of gravity or other tests would produce a particular choice of law does not mean that there would be jurisdiction.

QUESTION: Well, I think the Government's point is sort of an a fortiori point. It's very rare that you would have enough contact with the transaction to impose your law upon it. That isn't have legislative jurisdiction. But not have enough contact is simply have adjudicated jurisdiction.

MR. DAVIS: Well, I think that, Justice Scalia, if you look though at the way the courts have dealt with place of payment cases, the general jurisdictional rule

under the long arm statutes and that Congress did reference that it intended essentially to be treating sovereigns similar to the way they would be treated under long arm statutes under this provision, would be the place of payment would not be sufficient to reach somebody under a long arm statute for jurisdictional purposes.

And I think that in the various decisions of this Court when it looked at the choice of law issue it really said the choice of law question becomes significant when the party, and this I think was referenced in the Burger King decision, when the party agrees in the contract to a choice of law, that's something that is when it is more significant.

QUESTION: You say that place of payment is usually not enough under long arm statutes?

MR. DAVIS: Yes.

QUESTION: If I make a contract that's payable in a certain state I couldn't sue in that state? I couldn't be sued in that state for failure --

MR. DAVIS: If that is the, if that's the only connection. We have cited a number of cases where they tend to require that there be some other action in the forum state, and the only cases that were cited contrary in the responsive briefs were cases where at least the plaintiff was in the forum state providing some interest

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for the forum state. But they generally require something more than just simply place of payment.

QUESTION: Mr. Davis, your cases were all domestic cases, were they not?

MR. DAVIS: Yes.

QUESTION: Do you think the analogy between domestic cases and, domestic cases dealing with domestic states and cases dealing with states and the international foreign states in the international community really are a good authority, because --

MR. DAVIS: Well -- excuse me.

QUESTION: Let me just tell you what I have in the back of my mind. The fact is, at least when we're dealing with a question of jurisdiction as between two domestic states, we can assume that there is in fact going to be a court somewhere that can deal with the issue, and in a way which we will assume would be commercially effective although you may have to travel to get there. And it seems to me that the point of this transaction indicates that that is an assumption that is not necessarily to be made when we're dealing with, in international transactions.

MR. DAVIS: Well, I think that in the international context I would think it actually, Justice Souter, would go the other way. Indeed in the majority

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opinion of this Court in Asahi, in a constitutional context when it felt there was a close case, the fact that it was a foreign national, albeit not a government, that would be brought into the United States was considered a factor against jurisdiction. And the fact that it was a foreign plaintiff, while maybe not decisive, was also referenced specifically in that opinion as being a factor against jurisdiction in the United States. So we think that --

QUESTION: I guess it's safe to say you certainly don't agree with the Second Circuit's reasoning that the point of all of this is to keep New York in the driver's seat?

MR. DAVIS: I certainly do not agree with that reasoning. We think that that's not the kind of effect -- it may, you know, we have a question whether that's really the effect anyway. But if, it certainly we would say is not a direct effect within the contemplation of the statute. And I think there's an opinion that was originally written by Judge Weinfeld in the Verlinden case when he, at the district court level, which I really think very effectively presented that position in much more articulate terms than I can.

Finally, in terms of the, just very briefly on the notion that our test is unpredictable. We don't think

that the test we proposed which says basically that you require that the place of payment and the party --

QUESTION: Thank you, Mr. Davis.

MR. DAVIS: Thank you, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 11:55 a.m., the case in the above-entitled matter was submitted.)

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NO. 91-763 - REPUBLIC OF ARGENTINA AND BANCO CENTRAL de la REPUBLIC ARGENTINA, Petitioners V. WELTOVER, INC., ET AL.

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BY Ann-Marie Federico

(REPORTER)