

# WANTED: A PRACTICAL APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT TO FOREIGN REWARD OFFERS

TIMOTHY E. DONAHUE\*

**Abstract:** In 1976, Congress sought to codify the application of sovereign immunity with the passing of the Foreign Sovereign Immunities Act (FSIA). As foreign governments began to routinely act as participants in international commerce, Congress intended that the FSIA waive sovereign immunity when a foreign government engages in commercial activity that has a “direct effect” in the United States. This exception permits suits against foreign governments in U.S. courts when there is a breach a commercial contract that directly affects economic interests in the United States. Under U.S. contract law, a binding unilateral contract may form when one party performs the acts requested in an open offer, such as providing the whereabouts of a wanted fugitive in return for a reward. A recent Eleventh Circuit case, *Guevara v. Republic of Peru*, displayed the court’s inconsistent application of the FSIA’s commercial activity exception to fugitive reward offers, and prohibits the judicial enforcement of these contracts, even when offered by a foreign government and entered into on U.S. soil. The *Guevara* decision illustrates the unsettled interpretation and application of the FSIA by U.S. courts, and may have very damaging effects on U.S. participation in the pursuit of international fugitives.

## INTRODUCTION

Perhaps best epitomized by the “wanted” posters of nineteenth Century America, large cash rewards have commonly been used to solicit public assistance in the capture of dangerous fugitives.<sup>1</sup> The legal concept of a fugitive reward as a contract is a relatively simple one, replete with the notions of offer, acceptance, and performance that are well rooted in contract law.<sup>2</sup> Nevertheless, when the pursuit of a fugitive

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\* Timothy E. Donahue is a Note Editor for the *Boston College International & Comparative Law Review*.

<sup>1</sup> See *Shuey v. United States*, 92 U.S. 73, 73 (1875) (describing the widely proclaimed \$25,000 reward offer for the arrest of John Wilkes Booth and his accomplices in the assassination of Abraham Lincoln).

<sup>2</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 29 (1981).

crosses international boundaries, such reward offers become subject to a more complicated legal framework.<sup>3</sup>

In a recent Eleventh Circuit case, *Guevara v. Republic of Peru*, the plaintiff sought to enforce a \$5 million reward offer from the government of Peru after he assisted in the capture of Vladimiro Lenin Montesinos Torres (Montesinos).<sup>4</sup> After a lengthy journey through the federal courts, the circuit court dismissed the suit for lack of jurisdiction under the Foreign Sovereign Immunities Act (FSIA).<sup>5</sup> The FSIA provides immunity to foreign governments from lawsuits in U.S. courts while codifying certain enumerated exceptions to immunity.<sup>6</sup> One such exception allows for suits against a foreign government that has engaged in “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.”<sup>7</sup> Although the court concluded in an earlier decision that Peru’s reward offer qualified as a “commercial activity” under the FSIA, it held that the offer did not have a sufficiently “direct effect” in the United States to merit the immunity exception.<sup>8</sup> The correct interpretation of this direct effect requirement, however, has puzzled district courts since the FSIA was signed into law in 1976.<sup>9</sup> The context of the *Guevara* case illustrates the inconsistent applications and interpretations of the “commercial activity” exception by federal courts.<sup>10</sup> In November 2010, the Supreme Court declined an opportunity to resolve this split amongst the circuits and denied the plaintiff’s petition for certiorari.<sup>11</sup>

The application of the FSIA has extended beyond simple international business disputes and now includes criminal acts, as well as the pursuit of criminals.<sup>12</sup> The Eleventh Circuit’s apparent reversal of its

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<sup>3</sup> See *Guevara v. Republic of Peru (Guevara II)*, 608 F.3d 1297, 1307–08 (11th Cir. 2010) (applying the Foreign Sovereign Immunities Act (FSIA) to a reward offered by a foreign state), *cert. denied*, 131 S. Ct. 651 (2010) (mem.).

<sup>4</sup> *Id.* at 1300.

<sup>5</sup> *Id.* at 1302, 1310.

<sup>6</sup> See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604–1611 (2006).

<sup>7</sup> *Id.* at § 1605(a)(2).

<sup>8</sup> *Guevara II*, 608 F.3d at 1306, 1310.

<sup>9</sup> Joseph F. Morrissey, *Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts Like a Private Party, Treat It Like One*, 5 CHI. J. INT’L L. 675, 677 (2005).

<sup>10</sup> Petition for Writ of Certiorari at 13, *Guevara II*, 608 F.3d 1297, (No. 10-389).

<sup>11</sup> See *Guevara v. Republic of Peru*, 131 S. Ct. 651 (2010) (mem.).

<sup>12</sup> Compare *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 620 (1992) (holding that the commercial activity of government-issued bonds had a direct effect in the United States that waives FSIA immunity), with *Guevara II*, 608 F.3d at 1302, 1310 (holding that a reward offered for the capture of a fugitive was a commercial activity, but did not have the required direct effect to waive FSIA immunity), and *Adler v. Fed. Republic of Nigeria*, 219

previous decision in *Guevara* illustrates the unpredictability of FSIA application and shows that a unilateral reward contract, performed in the United States, will not always be enforceable in U.S. courts.<sup>13</sup> The conflicting decisions in *Guevara* have made apparent the need for courts to interpret the direct effect requirement as Congress intended and waive immunity when foreign governments act as marketplace participants in international commerce.<sup>14</sup> By allowing the FSIA to prevent judicial guarantee of such unilateral contracts, a valuable tool of law enforcement may be significantly weakened and global security placed at risk.<sup>15</sup>

Part I of this Note examines the factual and procedural background of the *Guevara* case. Part II discusses the legal framework of the FSIA and the law of contract that governs reward offers. It also examines current international fugitive rewards and security partnerships between the United States and foreign states. Part III applies the facts of *Guevara* to other FSIA interpretations and argues that foreign reward offers, accepted through performance in the United States, should be enforceable in U.S. courts.

## I. BACKGROUND

During the 1990s, Montesinos served as Peru's intelligence chief, as well as an advisor to former Peruvian President Alberto Fujimori.<sup>16</sup> Dubbed "Peru's Rasputin" because of his substantial influence over the President, Montesinos allegedly used his powerful post to commit a myriad of crimes including arms and drug trafficking, extortion and "more than a few murders."<sup>17</sup> Although critics accused Montesinos of corruption for years, in September 2000, hundreds of videotapes surfaced that depicted him engaging in various criminal acts.<sup>18</sup> During the public outcry that followed, President Fujimori disbanded the National

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F.3d 869, 875 (9th Cir. 2000) (holding that an illegal contract can still qualify as a commercial activity, having a direct effect in the United States that waives FSIA immunity).

<sup>13</sup> See *Guevara II*, 608 F.3d at 1311 (Cox, J. dissenting) ("Most importantly, the *Guevara I* court explicitly decided that there was no immunity available to Peru under the FSIA.").

<sup>14</sup> See Morrisey, *supra* note 9, at 703.

<sup>15</sup> See *Guevara v. Republic of Peru (Guevara I)*, 468 F.3d 1289, 1304 (11th Cir. 2006) ("The holding Peru asks us to reach would jeopardize not only its vital interests but those of every country that offers rewards for information, including this country."); *Guevara v. Republica Del Peru*, No. 04-23223-CIV, 2008 WL 4194839 (S.D. Fla. Sept. 9, 2008), *rev'd*, 608 F.3d 1297 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 651 (2010) (mem.).

<sup>16</sup> *Guevara v. Republic of Peru (Guevara I)*, 468 F.3d 1289, 1292 (11th Cir. 2006).

<sup>17</sup> *Id.*; Opinion, *Peru's Spy Chief in Exile*, N.Y. TIMES, Sept. 27, 2000, at A22.

<sup>18</sup> *Guevara I*, 468 F.3d at 1292.

Intelligence Service and effectively resigned the presidency.<sup>19</sup> Before Montesinos could be brought to justice, however, he managed to escape Peru aboard his yacht, the *Karisma*, embarking to points unknown.<sup>20</sup> The hunt for the former spy chief garnered worldwide attention, with claims that he underwent facial reconstructive surgery and placed nearly \$800 million of illegally obtained funds in various offshore accounts.<sup>21</sup> In an effort to generate new leads, Peru's Interim President, Valentin Corazao, issued an Emergency Decree in April 2001, offering \$5 million to anyone providing "accurate information that will directly enable locating and capturing . . . Montesinos."<sup>22</sup>

After fleeing Peru, Montesinos eventually reached Venezuela, where he placed himself under the protection of José Guevara, a former Venezuelan intelligence officer.<sup>23</sup> Guevara provided a safe house for Montesinos and also served as his personal representative.<sup>24</sup> While seeking access to one of Montesinos' U.S. bank accounts, Guevara threatened to physically harm a Miami banker via email.<sup>25</sup> In June 2001, when Guevara traveled to Miami to meet the banker in person, the Federal Bureau of Investigation (FBI) arrested Guevara on federal charges stemming from those threats.<sup>26</sup> Aware of Guevara's connection to Montesinos, the FBI offered to drop the charges if Guevara would provide information on his whereabouts.<sup>27</sup> Additionally, the agents notified Guevara of Peru's \$5 million reward offer, which had been widely publicized.<sup>28</sup> Agreeing to the offer, Guevara then informed the FBI of Montesinos' location, and offered to have his associates deliver the fugitive to Venezuelan authorities.<sup>29</sup> The FBI relayed this information to Peruvian and Venezuelan officials, who successfully apprehended Montesinos after he spent nearly eight months on the run.<sup>30</sup>

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<sup>19</sup> James Brooke, *Peru's President Calls for an Election and Will Not Run*, N.Y. TIMES, Sept. 17, 2000, at A11.

<sup>20</sup> Larry Rother, *For Peru Ex-Spy Chief, on the Lam, a Trail of Intrigue*, N.Y. TIMES, Dec. 31, 2000, at A18.

<sup>21</sup> *Id.*

<sup>22</sup> *Guevara v. Republic of Peru (Guevara II)*, 608 F.3d 1297, 1301 n.4 (11th Cir. 2010) (applying the FSIA to a reward offered by a foreign state), *cert. denied*, 131 S. Ct. 651 (2010) (mem.).

<sup>23</sup> *Id.* at 1302–03.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1301.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Guevara II*, 608 F.3d at 1301.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1304; Clifford Krauss, *Former Spy Chief of Peru Captured in Venezuela Lair*, N.Y. TIMES, June 25, 2011, at A1.

Subsequent to this highly publicized arrest, both Peruvian and Venezuelan intelligence services claimed credit for its success; however, Peru also openly acknowledged the FBI's role in facilitating Montesinos' capture.<sup>31</sup> Following his release, Guevara submitted his claim for the reward to Peru's Special High Level Committee (SLHC), the governmental committee authorized to dispense it.<sup>32</sup> The SLHC, however, refused to pay him.<sup>33</sup>

After Peru refused payment, Guevara filed suit in Florida state court seeking enforcement of the reward offer.<sup>34</sup> After removing the suit to federal district court, Peru moved for dismissal under the FSIA.<sup>35</sup> The district court agreed, dismissing the case on the grounds that the reward offer did not qualify under any of the FSIA's exceptions.<sup>36</sup> On appeal, however, the Eleventh Circuit reversed, holding that Peru had "ventured into the market place" to buy the information needed to get its man.<sup>37</sup> On remand from the Eleventh Circuit, the district court granted summary judgment in favor of Guevara, and entered a final judgment in the amount of \$5 million plus interest.<sup>38</sup> In Peru's appeal, the Eleventh Circuit revisited Peru's FSIA claim, although this time on different grounds.<sup>39</sup>

Although the circuit court originally decided that Peru's reward offer constituted a commercial activity, its first decision remained silent on the applicability of the remaining language of the FSIA.<sup>40</sup> In the second appeal, the circuit court took up this inquiry and applied the three jurisdictional nexuses listed in § 1605(a)(2) to determine whether such commercial activity waived immunity.<sup>41</sup> For waiver to occur, § 1605(a)(2) requires that the case be based upon (1) a commercial activity carried on within the United States, (2) acts performed in the United States in connection with commercial activity elsewhere, or (3)

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<sup>31</sup> *How Montesinos Was Betrayed*, BBC NEWS (June 26, 2001), <http://news.bbc.co.uk/2/hi/americas/1408442.stm>.

<sup>32</sup> See *Guevara v. Republica Del Peru*, No. 04-23223-CIV, 2008 WL 4194839, at \*2-3 (S.D. Fla. Sept. 9, 2008), *rev'd*, 608 F.3d 1297 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 651 (2010) (mem.).

<sup>33</sup> *Guevara II*, 608 F.3d at 1301.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1302.

<sup>36</sup> *Id.*

<sup>37</sup> *Guevara I*, 468 F.3d at 1299 (quoting *Hond. Aircraft Registry, Ltd. v. Gov't of Hond.*, 129 F.3d 543, 547 (11th Cir. 1997)).

<sup>38</sup> See *Guevara II*, 608 F.3d at 1305.

<sup>39</sup> *Id.* at 1307.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

acts performed in the United States in connection with commercial activity elsewhere that causes a direct effect in the United States.<sup>42</sup> Although the district court assumed that the circuit court performed this analysis in its original opinion, the Eleventh Circuit found that the issue had been implicitly left open and performed the inquiry in its second decision.<sup>43</sup>

Applying the nexus analysis to *Guevara*, the circuit court concluded that under the first prong, the commercial activity of the reward offer did not take place within the United States.<sup>44</sup> It reasoned that because the reward offer was created and administered by the SHLC in Peru, the commercial activity itself had not occurred in the United States.<sup>45</sup> Analyzing the second prong of the nexus, the court held that Peru's telephone call to the FBI agents in Miami, in which Peru restated the availability of the reward, was not sufficiently "in connection with" the commercial activity of the reward offer.<sup>46</sup> It held that if such a phone call could meet the "in connection with" requirement of the second nexus, then almost any statement made in the United States regarding the commercial transaction would waive immunity.<sup>47</sup> Because such an interpretation would run counter to the principle that a foreign state may only waive immunity either explicitly or by implication, the circuit court declined to find that such a minor action met the requirements of the second prong.<sup>48</sup>

In its analysis of the third and final prong, that acts performed in connection with the commercial activity have a direct effect in the United States, the court applied the holding of *Harris Corp. v. National Iranian Radio & Television*, which required that the effect be "sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case."<sup>49</sup> The court also employed a minimum contacts analysis analogous to that used to determine personal jurisdiction.<sup>50</sup> Under this analysis, the Eleventh Circuit rejected Guevara's claim that his acceptance of the reward offer

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<sup>42</sup> 28 U.S.C. § 1605(a)(2).

<sup>43</sup> *Guevara II*, 608 F.3d at 1307.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1307–08.

<sup>46</sup> *Id.* at 1308.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See *Guevara II*, 608 F.3d at 1309 (quoting *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982)).

<sup>50</sup> See *id.* at 1310.

while in FBI custody satisfied the direct effect requirement.<sup>51</sup> Moreover, the court rejected Guevara's contention that Peru's non-payment of the reward caused a direct effect in the United States, declining to allow a "negative activity" to establish a direct effect waiver of the FSIA.<sup>52</sup> Finally, the court also held that Guevara's arrest in the United States was not a direct effect of Peru's reward offer, as the arrest was instead a consequence of his criminal behavior.<sup>53</sup> The majority reversed the district court's summary judgment decision and remanded the case with the instruction that it be dismissed.<sup>54</sup>

In a dissenting opinion, however, Judge Cox criticized the court's holding that the issue of sovereign immunity was not addressed in the Eleventh Circuit's first decision.<sup>55</sup> Judge Cox stated that when the Eleventh Circuit originally decided that Peru had engaged in a commercial activity, it also decided that the requisite "direct effect" nexus also existed.<sup>56</sup> Additionally, he cited the court's previous holding that the individual defendants named in the suits were not entitled to sovereign immunity, "because the sovereign itself is not."<sup>57</sup> Although critical of the Eleventh Circuit's apparent reversal of its own decision, Judge Cox also stated that rather than apply the FSIA, the court should have dismissed the suit under principles of international comity.<sup>58</sup> Under that doctrine, he felt that the court should have recognized and respected the decision of the SHLC to not pay the reward as the final determination of the matter.<sup>59</sup>

Following the Eleventh Circuit's dismissal of the claim, Guevara petitioned the Supreme Court for certiorari.<sup>60</sup> The petition asserted that the circuits are evenly split as to the correct application of the FSIA direct effect analysis.<sup>61</sup> Because of the various tests and interpretations, Guevara claimed that there is considerable uncertainty as to when courts should waive FSIA immunity.<sup>62</sup> Additionally, Guevara stated the need for judicial enforcement of a reward on policy grounds.<sup>63</sup> On No-

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<sup>51</sup> *See id.*

<sup>52</sup> *See id.*

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See Guevara II*, 608 F.3d at 1311 (Cox, J., dissenting).

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* (quoting *Guevara I*, 468 F.3d at 1305).

<sup>58</sup> *Id.* at 1313.

<sup>59</sup> *Id.*

<sup>60</sup> Petition for Writ of Certiorari, *supra* note 10, at 13.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 18.

vember 26, 2010, the Supreme Court denied the petition for certiorari.<sup>64</sup>

## II. DISCUSSION

### A. *The Foreign Sovereign Immunities Act*

The doctrine of foreign sovereign immunity is an ancient legal concept originally intended to protect foreign officials who conduct business abroad.<sup>65</sup> The Supreme Court first established the doctrine of sovereign immunity in landmark case of *Schooner Exchange v. McFaddon*.<sup>66</sup> In that case, Chief Justice Marshall held that no U.S. jurisdiction exists over a foreign sovereign absent the sovereign's express consent.<sup>67</sup> The dicta of that opinion, however, suggested that immunity may be waived if the foreign sovereign acts as a private party.<sup>68</sup> Many later courts applied the holding broadly and interpreted the decision "as extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'"<sup>69</sup>

Following *Schooner Exchange*, the courts developed a two-step system for making sovereign immunity determinations.<sup>70</sup> Under this system, a diplomatic representative from the foreign state could petition for a "suggestion of immunity" from the State Department, and upon such a suggestion the court would surrender jurisdiction.<sup>71</sup> In the absence of a State Department request, the district courts could also make such an immunity determination themselves.<sup>72</sup> As foreign states began to engage increasingly with private parties in international business, however, it became clear that the absolute application of immunity was no longer desirable.<sup>73</sup>

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<sup>64</sup> *Guevara v. Republic of Peru*, 131 S. Ct. 651 (2010) (mem.).

<sup>65</sup> Heidi L. Frostestad, *Voest-Alpine Trading v. Bank of China: Can a Uniform Interpretation of a "Direct Effect" Be Attained Under the Foreign Sovereign Immunities Act (FSIA) of 1976?*, 34 VAL. U. L. REV. 515, 520, 521 (2000).

<sup>66</sup> *See* 11 U.S. (7 Cranch) 116, 137 (1812).

<sup>67</sup> *Id.* at 136.

<sup>68</sup> Morrissey, *supra* note 9, at 680.

<sup>69</sup> *Samantar v. Yousef*, 130 S. Ct. 2278, 2284 (2010) (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1962)).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Frostestad, *supra* note 65, at 522–23.

In 1952, the State Department halted its general practice of requesting sovereign immunity for all friendly sovereigns.<sup>74</sup> That year, Jack Tate, the acting legal advisor to the State Department, announced that the department would adopt a “restrictive” theory of sovereign immunity.<sup>75</sup> The restrictive theory of immunity, which many other countries had already adopted by the 1950s, recognized the role of the foreign state in international commerce and stripped immunity from suits where a foreign government acted in a commercial capacity.<sup>76</sup> In recognizing the importance of the restrictive theory, Tate found that individuals engaged in business with foreign states needed the protection of a judicial remedy and therefore sovereign immunity must be waived in such instances.<sup>77</sup> In 1976, Congress sought to codify the restrictive theory of sovereign immunity by enacting the FSIA.<sup>78</sup>

The FSIA has been described as a “statutory labyrinth” with “numerous interpretative questions engendered by its bizarre structure and its many deliberately vague provisions.”<sup>79</sup> Although the FSIA operates under the traditional premise that foreign governments are immune from U.S. jurisdiction, it codifies specific exceptions, most significantly the commercial activity exception inherent in the restrictive theory of sovereign immunity.<sup>80</sup> The FSIA defines commercial activity as “either a regular course of commercial activity or a particular commercial transaction or act.”<sup>81</sup> In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court held that “when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.”<sup>82</sup> This interpretation has been extended to include acts seemingly sovereign in nature, such as the national registration of aircraft, if a foreign state contracts with a private company for assistance in such governmental functions.<sup>83</sup> The federal courts have even extended the definition of commercial activity to include illegal conduct.<sup>84</sup> This

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<sup>74</sup> *Samantar*, 130 S. Ct. at 2285.

<sup>75</sup> Morrissey, *supra* note 9, at 681–82.

<sup>76</sup> Frostestad, *supra* note 65, at 522–23.

<sup>77</sup> Morrissey, *supra* note 9, at 681–82.

<sup>78</sup> See Frostestad, *supra* note 65, at 524.

<sup>79</sup> *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

<sup>80</sup> Morrissey, *supra* note 9, at 675, 676; see James A. Beckman, *Citizens Without a Forum: The Lack of an Appropriate and Consistent Remedy for United States Citizens Injured or Killed as the Result of Activity Above the Territorial Air Space*, 22 B.C. INT’L & COMP. L. REV. 249, 265 (1999).

<sup>81</sup> 28 U.S.C. § 1603(d).

<sup>82</sup> 504 U.S. 607, 614 (1992).

<sup>83</sup> *Hond. Aircraft Registry, Ltd. v. Gov’t of Hond.*, 129 F.3d 543, 548 (11th Cir. 1997).

<sup>84</sup> See *Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 875 (9th Cir. 2000).

interpretation stemmed from Justice White's concurrence in *Saudi Arabia v. Nelson*, in which he posited that torture of a plaintiff by government hired thugs, rather than police, could be considered a commercial activity.<sup>85</sup> Not all circuits have been willing to follow such a broad interpretation of commercial activity, however, leaving the precise definition of the term uncertain.<sup>86</sup>

Section 1605(a)(2) of the FSIA establishes the commercial activity exception and provides three nexuses for waiver of immunity due to commercial activity.<sup>87</sup> First, immunity is waived when "the action is based upon a commercial activity carried on in the United States by the foreign state."<sup>88</sup> Second, waiver applies when the suit is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."<sup>89</sup> Finally, waiver occurs when a suit is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."<sup>90</sup> Although the first and second nexuses do not explicitly define the commercial activity or "in connection with" requirements, it is the interpretation of the third nexus's direct effect requirement that poses significant difficulty for the circuit courts.<sup>91</sup>

Almost immediately after the enactment of the FSIA, the circuit courts developed different interpretations of the direct effect clause.<sup>92</sup> Although most circuits required that a direct effect in the United States be "substantial and foreseeable," others expressly rejected such a requirement.<sup>93</sup> The Supreme Court sought to address this split when it decided *Weltover v. Argentina* in 1992.<sup>94</sup> In that case, bondholders sued the central bank of Argentina for altering a bond payment schedule outside of their preexisting contract.<sup>95</sup> The Court examined whether

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<sup>85</sup> See 507 U.S. 349, 366 (1993) (White, J., concurring).

<sup>86</sup> Compare *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1993) (rejecting a claim that Hezbollah kidnappers hired by Iran to kidnap Americans in Lebanon constituted a commercial activity under the FSIA), with *Adler*, 219 F.3d at 875 (holding that a contract to illegally obtain government funds and bribe officials constituted a commercial activity).

<sup>87</sup> See 28 U.S.C. § 1605(a)(2).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Morrissey*, *supra* note 9, at 676, 677.

<sup>92</sup> *Id.* at 683.

<sup>93</sup> *Frostestad*, *supra* note 65, at 527–28.

<sup>94</sup> *Morrissey*, *supra* note 9, at 684.

<sup>95</sup> *Weltover, Inc.*, 504 U.S. at 607.

the contractual breach that occurred in Argentina had a direct effect in the United States, thereby waiving Argentina's FSIA immunity.<sup>96</sup> The Court did not require any substantiality or foreseeability requirement and instead accepted the Second Circuit's holding that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's activity.'"<sup>97</sup> In applying this test, the Court held that because New York was the place of performance for Argentina's payment obligations, the rescheduling of those obligations had the necessary direct effect in the United States.<sup>98</sup> Finally, the Court also used the "minimum contacts" test<sup>99</sup> for personal jurisdiction as an aid in interpreting the direct effect requirement.<sup>100</sup> In that analysis, the Court found that because the bonds were payable in New York, Argentina had availed itself of the privilege of engaging in business in the United States and met the test's requirements.<sup>101</sup>

Although *Weltover* established the "immediate consequence" test for the direct effect inquiry, some circuit courts continued to apply additional means of analysis.<sup>102</sup> One such test requires that a direct effect must be a "legally significant act" in the United States.<sup>103</sup> Even after *Weltover* failed to include such a requirement in its holding, some circuit courts continued to apply it, as the Second Circuit did in *Antares Aircraft v. Federal Republic of Nigeria*.<sup>104</sup> The Fifth Circuit rejected such a test in *Voest-Alpine Trading USA Corp. v. Bank of China*, when it held that the Supreme Court's holding in *Weltover* represented an explicit rejection of any legally significant act requirement.<sup>105</sup> The Fifth Circuit also held that while a legally significant act could cause a direct effect in the United States, it was not the only means of doing so.<sup>106</sup> Although the Second Circuit eventually abandoned the test as well,<sup>107</sup> the Eighth and

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<sup>96</sup> *Id.* at 609.

<sup>97</sup> *Id.* at 618; *see Adler*, 219 F.3d at 876 (applying *Weltover* and holding that reliance on fraudulent statements made outside the United States was an immediate consequence of defendant's activity).

<sup>98</sup> *Weltover, Inc.*, 504 U.S. at 618–19.

<sup>99</sup> *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

<sup>100</sup> *Weltover, Inc.*, 504 U.S. at 619–20.

<sup>101</sup> *See id.* at 620.

<sup>102</sup> *See Frostestad*, *supra* note 65, at 529–30.

<sup>103</sup> *See Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988).

<sup>104</sup> *See* 999 F.2d 33, 36 (2d Cir. 1993).

<sup>105</sup> 142 F.3d 887, 894 (5th Cir. 1998).

<sup>106</sup> *Id.*

<sup>107</sup> *See Guirlando v. T.C. Ziraat Bankasi*, 602 F.3d 69, 76 (2d Cir. 2010).

Tenth Circuits still employ the legally significant act requirement in their direct effect inquiry.<sup>108</sup>

### B. *Unilateral Reward Contracts*

When some aspect of a contract for the purchase of goods or services occurs in the United States, and a foreign state is a party, it will likely meet the requirements for the waiver of immunity.<sup>109</sup> Under modern contract law, a party can be legally bound by an offer, even absent any formal bargaining with another party.<sup>110</sup> Such open offers are called unilateral contracts, and they represent an enforceable promise of consideration upon the performance of a requested act.<sup>111</sup> Open reward and prize offers, whether for information leading to the arrest of a fugitive or for a successful hole in one in a golf tournament, are considered unilateral contracts.<sup>112</sup> Unilateral contracts, and fugitive rewards in particular, can only be accepted through complete performance of the offer's specific terms, and the offeror may also revoke the offer any time before performance is complete.<sup>113</sup>

The law governing rewards for assistance in the capture or arrest of wanted fugitives has developed over the centuries in U.S. courts.<sup>114</sup> *Shuey v. United States* involved a \$25,000 reward offer for the arrest of John H. Suratt, an alleged conspirator in the assassination of Abraham Lincoln.<sup>115</sup> Although President Andrew Johnson publicly revoked the reward offer, that revocation was unbeknownst to Henri Beaumont de Sainte Marie, an associate of Suratt's.<sup>116</sup> When Sainte Marie discovered Suratt hiding in Vatican City, he alerted the authorities and even ac-

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<sup>108</sup> Compare *id.*, with *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Assoc.*, 33 F.3d 1232, 1239 (10th Cir. 1994), and *GE Capital Corp. v. Grossman*, 991 F.2d 1376, 1385 (8th Cir. 1993).

<sup>109</sup> See *Welltower, Inc.*, 504 U.S. at 620 (finding that a bond agreement with payment scheduled to a U.S. bank waived FSIA immunity); *Hond. Aircraft Registry, Ltd.*, 129 F.3d at 548, 549 (holding that a contract for assistance in aircraft registration, with parties based in the United States, met the requirements for the waiver of FSIA immunity).

<sup>110</sup> BLACK'S LAW DICTIONARY 374 (9th ed. 2009).

<sup>111</sup> *Id.*

<sup>112</sup> Peter Meijes Tiersma, *Reassessing Unilateral Contracts: The Role of Offer, Acceptance and Promise*, 26 U.C. DAVIS L. REV. 1, 80 & n.215 (1992).

<sup>113</sup> Mark B. Wessman, *Is "Contract" the Name of the Game? Promotional Games as Test Cases for Contract Theory*, 34 ARIZ. L. REV. 635, 646, 648 (1992).

<sup>114</sup> See, e.g., *Shuey v. United States*, 92 U.S. 73, 77 (1875); *Cornejo-Ortega v. United States*, 61 Fed. Cl. 371, 374 (Fed. Cl. 2004).

<sup>115</sup> *Shuey*, 92 U.S. at 73.

<sup>116</sup> Joseph M. Perillo, *Screed for a Film and Pillar of Classical Contract Law: Shuey v. United States*, 71 FORDHAM L. REV. 915, 915 (2002).

panied the U.S. Navy as it finally apprehended Suratt following his escape to Egypt.<sup>117</sup> When Sainte Marie petitioned Ulysses S. Grant, the interim Secretary of War, for the \$25,000 reward, he was denied on the grounds that the reward offer had been previously revoked.<sup>118</sup> In the litigation that followed, Sainte Marie's claim for the reward reached the Supreme Court.<sup>119</sup> The Court held that regardless of a party's reliance on such a reward offer, the offeror could validly revoke it any time before performance, even without the offeree's knowledge of such revocation.<sup>120</sup>

Some courts have come to understand the Supreme Court's opinion in *Shuey* as requiring the strict interpretation of the terms of a reward offer.<sup>121</sup> Under this view, if a reward is offered for the "arrest" of a fugitive, simply providing information leading to the arrest of that fugitive does not satisfy the requested performance of the offer.<sup>122</sup> Other courts have been more willing to interpret reward offers liberally, holding that providing information leading to an arrest is essentially the same as performing the act of arrest itself.<sup>123</sup>

Another unsettled area of the law governing reward offers is whether knowledge of the offer, prior to performance, is essential to recovery.<sup>124</sup> Although some courts have ruled that knowledge of a reward is essential to the formation of a unilateral contract, not every court has adhered to this principle.<sup>125</sup> In *Drummond v. United States*, a private detective who successfully facilitated the arrest of an escaped fugitive sought payment of a reward from both the U.S. Marshals and the Department of Justice (DOJ).<sup>126</sup> By examining both the purpose of a fugitive reward and other case law governing such offers, the Court of Federal Claims found that knowledge of a government reward offer is not necessary for recovery.<sup>127</sup> The Municipal Court of Appeals found differently in *Glover v. District of Columbia*, when it held that a plaintiff

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 955.

<sup>119</sup> *Shuey*, 92 U.S. at 73.

<sup>120</sup> *Id.* at 76.

<sup>121</sup> See Perillo, *supra* note 116, at 964.

<sup>122</sup> See *id.*

<sup>123</sup> *Id.*

<sup>124</sup> Compare *Glover v. D.C.*, 77 A.2d 788, 791 (D.C. 1951) (requiring prior knowledge of a reward before performance to create a binding obligation), with *Smith v. State*, 151 P. 512, 513 (Nev. 1915) (holding that prior knowledge of a reward is not necessary for entitlement).

<sup>125</sup> See *Glover*, 77 A.2d at 791; *Smith*, 151 P. at 513.

<sup>126</sup> *Drummond v. United States*, 35 Ct. Cl. 356, 370, 371 (Ct. Cl. 1900).

<sup>127</sup> *Id.* at 372-73.

must prove knowledge of a reward offered by a government to prove the existence of a binding contract.<sup>128</sup> Some courts have also acknowledged a possible distinction between governmental and private reward offers, with knowledge of such a reward only being required in the latter instance.<sup>129</sup>

The law governing fugitive reward offers also draws a distinction between rewards offered through a proclamation and those offered pursuant to a government official's statutory authorization.<sup>130</sup> When a government offers a reward pursuant to a statute, the offer is subject to the terms of the statute rather than contract law.<sup>131</sup> When a government official has the authority to make reward offers independently, however, that authority equates to the power to enter the government into a binding contract.<sup>132</sup> In *Cornejo-Ortega v. United States*, the Court of Federal Claims dismissed the claim of an individual who provided the whereabouts of a fugitive in Mexico who was wanted for kidnapping, robbery and the murder of a DEA agent.<sup>133</sup> Although federal agents showed the plaintiff a reward poster with the fugitive's name and picture, offering a "reward up to \$2,200,000," the court held that no valid unilateral contract existed because the agents did not have the authority to enter the federal government into such a contract.<sup>134</sup> Furthermore, the court found that the language used in the poster, which included the words "up to," provided no guarantee of any payment, since such phrasing may be interpreted "to include zero as its lower limit."<sup>135</sup>

Rewards offered by private individuals are subject to the same concepts of contract law that apply to rewards offered by governments or their agencies.<sup>136</sup> In *Norman v. Loomis Fargo & Co.*, the Western District of North Carolina held that when an armored car company publicized a \$500,000 reward for information "that result[ed] in the capture of the perpetrators" of the theft of several million dollars, it created a uni-

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<sup>128</sup> See *Glover*, 77 A.2d at 791.

<sup>129</sup> See *Broadnax v. Ledbetter*, 99 S.W. 1111, 1112 (Tex. 1907).

<sup>130</sup> See *State v. Malm*, 123 A.2d 276, 277 (Conn. 1956) (recognizing a difference between rewards offered pursuant to statute and those offered independently).

<sup>131</sup> See *In re Kelly*, 39 Conn. 159, 162 (1872).

<sup>132</sup> See *Cornejo-Ortega*, 61 Fed. Cl. at 372.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 372, 374.

<sup>135</sup> *Id.* at 375.

<sup>136</sup> See *Glover v. Jewish War Veterans of U.S.*, Post No. 58, 68 A.2d 233, 234 (D.C. 1949) ("So far as rewards offered by private individuals and organizations are concerned, there is little conflict on the rule that questions regarding such rewards are to be based upon the law of contracts.").

lateral contract.<sup>137</sup> The court further found that the plaintiff met the requirement of acceptance of the reward offer when she phoned in her information to the *America's Most Wanted* tip line.<sup>138</sup> In *Guevara*, the Eleventh Circuit also acknowledged the prevalence of private reward offers, such as an offer made by Oprah Winfrey's television show for information relating to child predators or O.J. Simpson's personal reward offer for information on the whereabouts of the "real killers."<sup>139</sup> In examining such private reward offers, the court found that such activity equated to the purchase of information on the open market by a private party.<sup>140</sup>

Law enforcement agencies all over the world commonly employ the use of rewards to encourage public assistance in locating fugitives.<sup>141</sup> In 1984, Congress approved the use of cash rewards under the Act to Combat International Terrorism.<sup>142</sup> This legislation led to the formation of the Rewards for Justice Program, which allows the Secretary of State to offer rewards in excess of \$25 million for information that prevents terrorist acts against U.S. persons or property worldwide.<sup>143</sup>

Other countries offer similar rewards for fugitives accused of various criminal acts, such as war crimes, drug offenses and murder.<sup>144</sup> Before his unassisted capture in May of 2011, the government of Serbia had offered a cash reward of €10 million for information leading to the arrest of accused war criminal Ratko Mladic, wanted for orchestrating the Srebrenica massacre in 1995.<sup>145</sup> As the Government of Mexico continues to battle with the drug cartels that operate in the country, it has

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<sup>137</sup> 123 F. Supp. 2d 985, 988 (W.D.N.C. 2000).

<sup>138</sup> *Id.* at 989.

<sup>139</sup> *Guevara v. Republic of Peru (Guevara I)*, 468 F.3d 1289, 1301 (11th Cir. 2006).

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., *Greece Puts €1m Bounty on Bank Robber Accused of Terrorism*, GUARDIAN (U.K.) (Feb. 9, 2011), <http://www.guardian.co.uk/world/2011/feb/09/greece-one-million-euro-reward>; *Mexico Offers \$2 Million for Top Drug Lords*, MSNBC FOCUS ON MEX. (Mar. 23, 2009), [http://www.msnbc.msn.com/id/29839838/ns/world\\_news-americas](http://www.msnbc.msn.com/id/29839838/ns/world_news-americas); *Program Overview*, REWARDS FOR JUSTICE, [http://www.rewardsforjustice.net/index.cfm?page=Rewards\\_program&language=english](http://www.rewardsforjustice.net/index.cfm?page=Rewards_program&language=english) (last visited Jan. 14, 2012).

<sup>142</sup> Act to Combat International Terrorism, 18 U.S.C. §§ 3071–3077 (1984).

<sup>143</sup> See *Program Overview*, *supra* note 141.

<sup>144</sup> See Aleksandar Vasovic, *Serbia Raises Reward for Mladic to 10 Million Euros*, REUTERS (Oct. 28, 2010), <http://www.reuters.com/article/2010/10/28/us-serbia-mladic-idUSTRE69R3C320101028>; Alexandra Olson, *Mexico Offers \$2 Million for Top Drug Lords*, HUFFINGTON POST (Mar. 23, 2009), [http://www.huffingtonpost.com/2009/03/23/mexico-offers-2-million-f\\_n\\_178096.html](http://www.huffingtonpost.com/2009/03/23/mexico-offers-2-million-f_n_178096.html).

<sup>145</sup> *Ratko Mladic Nabbed in Garden During Routine Raid*, CBS NEWS (May 27, 2011), <http://www.cbsnews.com/stories/2011/05/27/501364/main20066782.shtml>.

offered rewards of \$2 million dollars for information leading to the arrest of various high level drug lords.<sup>146</sup> In February of 2011, the Government of Greece offered a €1 million reward for assistance in the capture of kidnapper and suspected terrorist Vassilis Paleokostas, who recently escaped the same maximum security prison via helicopter for the second time.<sup>147</sup> While these lucrative reward offers are used to assist in the capture of the most notorious and dangerous fugitives, foreign governments also offer smaller rewards to solicit information on less notable criminals.<sup>148</sup> The Royal Canadian Mounted Police offers smaller rewards for information about its most wanted fugitives, such as the \$17,500 offered for assistance in the arrest of a triple murder suspect in British Columbia.<sup>149</sup>

### C. *Current Joint Law Enforcement and Security Operations Between the United States and Foreign States*

Increased global security concerns following the September 11th terrorist attacks have ushered in an era of formal partnerships between the United States and foreign governments.<sup>150</sup> In order to provide greater border security between the United States and Canada, both governments have established Integrated Border Enforcement Teams (IBETs).<sup>151</sup> These units, located at various border points of entry, are intended to combat national security threats and thwart organized crime through a partnership between various agencies such as the Royal Canadian Mounted Police and U.S. Bureau of Immigration and Customs Enforcement (ICE).<sup>152</sup>

A similar program, the Mérida Initiative, exists between the United States and Mexico.<sup>153</sup> Established by Congress in 2007, the Mérida Initiative has provided more than \$1 billion to assist the Mexican govern-

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<sup>146</sup> Olson, *supra* note 144.

<sup>147</sup> *Greece Puts €1m Bounty on Bank Robber Accused of Terrorism*, *supra* note 141.

<sup>148</sup> *Kevin Louis Vermette: Wanted for Triple Murder and Attempted Murder*, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/wanted-recherches/mur-meu/vermet-eng.htm> (last visited Jan. 14, 2012).

<sup>149</sup> *Id.*

<sup>150</sup> See THOMAS LUM, CONG. RESEARCH SERV., RL 33233, THE REPUBLIC OF THE PHILIPPINES AND U.S. INTERESTS 16 (2011); *Background Note: Canada*, U.S. DEP'T STATE (Dec. 22, 2011), <http://www.state.gov/r/pa/ci/bgn/2089.htm>.

<sup>151</sup> *Background Note: Canada*, *supra* note 150.

<sup>152</sup> *Integrated Border Enforcement Teams*, ROYAL CANADIAN MOUNTED POLICE, <http://www.rcmp-grc.gc.ca/ibet-cipf/index-eng.htm> (last visited Jan. 14, 2012).

<sup>153</sup> See *United States-Mexico Security Partnership: Progress and Impact*, U.S. DEP'T STATE (May 19, 2010), <http://www.state.gov/r/pa/prs/ps/2010/05/142019.htm>.

ment in combating the drug violence plaguing the border areas.<sup>154</sup> The stated purpose of the Mérida Initiative is to disrupt organized crime syndicates that operate between both countries, as well as strengthen the communities and institutions needed to improve security.<sup>155</sup> In addition to funding the Partnership, the United States also currently offers multi-million dollar rewards for information leading to the arrest of top cartel leaders.<sup>156</sup>

The United States also assists in security and anti-terrorist partnerships well beyond its North American borders.<sup>157</sup> In order to combat the various security threats operating in the Philippines, such as the Al Qaeda-linked Abu Sayyaf Group (ASG), the United States has provided non-combat military support to the region.<sup>158</sup> American advisors have also assisted in the training and development of the Philippine National Police.<sup>159</sup> After the kidnapping of two American missionaries by ASG operatives, the U.S. Department of Justice offered rewards of up to \$5 million for information leading to arrest or conviction of the members of the organization.<sup>160</sup> The reward offers proved effective, and in 2007 the U.S. government paid \$10 million to a group of Filipino citizens who provided information that resulted in the capture of two high-ranking ASG members.<sup>161</sup> The successes of the U.S. Rewards for Justice program have inspired the Philippine Congress to propose a bill establishing a similar rewards program under the Philippine Department of Justice.<sup>162</sup> Under this proposed legislation, the Secretary of Justice could offer rewards of up to 5 million pesos, roughly \$115,000, for information leading to the capture or arrest of wanted terror suspects.<sup>163</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> See *Narcotics Rewards Program: Joaquin Guzman-Loera*, U.S. DEP'T STATE, <http://www.state.gov/j/inl/narc/rewards/115366.htm> (last visited Jan. 14, 2012).

<sup>157</sup> See LUM, *supra* note 150, at 16.

<sup>158</sup> See *id.* at 16, 17.

<sup>159</sup> See *Background Note: Philippines*, U.S. DEP'T STATE (June 3, 2011), <http://www.state.gov/r/pa/ei/bgn/2794.htm>.

<sup>160</sup> See Carlos H. Conde, *Militant Accused of Kidnapping Americans Is Killed in the Philippines*, N.Y. TIMES, Sept. 20, 2010, at A6; *Kidnappers/Murderers—Reward for Information*, REWARDS FOR JUSTICE, <http://www.rewardsforjustice.net/english/index.cfm?page=Philippines> (last visited Jan. 14, 2012).

<sup>161</sup> *U.S. Pays Big Terror Reward in Philippines*, ABC NEWS INVESTIGATIVE BLOG (June 11, 2007, 2:17 PM), [http://blogs.abcnews.com/theblotter/2007/06/us\\_pays\\_big\\_ter.html](http://blogs.abcnews.com/theblotter/2007/06/us_pays_big_ter.html).

<sup>162</sup> An Act Establishing a Rewards for Information Concerning Terrorism Program, S. No. 2268 (2010) (Phil.) (pending) [hereinafter *Phil. Pending Act Establishing a Rewards Program*], available at <http://www.senate.gov.ph/lisdata/73136535!.pdf>.

<sup>163</sup> *Id.*

## III. ANALYSIS

A. *FSIA Immunity Should Not Allow the Contractual Obligations of Foreign States to Be Avoided*

While the Eleventh Circuit dismissed *Guevara* on the grounds of FSIA immunity, according to the facts of the case the plaintiff still met all of the requirements for a binding unilateral contract under U.S. contract law.<sup>164</sup> Unlike the federal agents in *Cornejo-Ortega*, the President of Peru was acting within the scope of his authority when he issued the decree establishing the reward.<sup>165</sup> Guevara, having learned of the reward while in F.B.I. custody, provided this information as a direct result of Peru's promise of compensation.<sup>166</sup> Finally, as the district court acknowledged in its summary judgment, Guevara's information directly resulted in Montesinos' capture, thereby fulfilling the requested performance of the Emergency Decree.<sup>167</sup> Because Guevara had met all of the requirements for formation of a binding unilateral contract, in the absence of FSIA immunity the reward offer would have been enforceable under American law.<sup>168</sup>

The willingness of U.S. courts to liberally interpret reward offers and enforce obligations to pay such rewards illustrates the need for judicial protection of such agreements.<sup>169</sup> The important policy considerations behind maintaining the integrity of a unilateral contract make it precisely the type of claim the commercial activity exception is supposed to make available against foreign states.<sup>170</sup> The FSIA was intended to maintain the enforceability of contracts between private parties and foreign states by providing a remedy in U.S. courts in the event of a breach.<sup>171</sup> Because of the personal risks assumed by an informant in

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<sup>164</sup> See *Guevara v. Republica Del Peru*, No. 04-23223-CIV, 2008 WL 4194839, at \*4 (S.D. Fla. Sept. 9, 2008), *rev'd*, 608 F.3d 1297 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 651 (2010) (mem.) (finding that Guevara provided the information requested by the reward offer that resulted in Montesinos' capture).

<sup>165</sup> Compare *Cornejo-Ortega v. United States*, 61 Fed. Cl. 371, 374 (Fed. Cl. 2004), with *Guevara v. Republic of Peru (Guevara I)*, 468 F.3d 1289, 1293 (11th Cir. 2006).

<sup>166</sup> *Guevara v. Republic of Peru (Guevara II)*, 608 F.3d 1297, 1304 (11th Cir. 2010).

<sup>167</sup> *Guevara*, 2008 WL 4194839, at \*4.

<sup>168</sup> See *id.*

<sup>169</sup> See *Norman v. Loomis Fargo & Co.*, 123 F. Supp. 2d 985, 989 (W.D.N.C. 2000) (interpreting the terms of the reward offer to include an accessory after the fact as a "perpetrator"); *Elkins v. Bd. of Comm'rs of Wyandotte Cnty.*, 120 P. 542, 544 (Kan. 1912) (allowing for substantial compliance of the terms of a reward offer to satisfy the requested performance).

<sup>170</sup> See *Guevara I*, 468 F.3d at 1303 (stating that enforcing a reward offer coincides with "good policy").

<sup>171</sup> See *Frostestad*, *supra* note 65, at 523.

providing information to law enforcement, the legally binding promise of compensation must be vigorously protected by courts, even against foreign states.<sup>172</sup> When a foreign state enters the market as a private party, it must be made subject to the same obligations of private individuals after the formation a contract.<sup>173</sup> In *Guevara*, the Emergency Decree was silent on jurisdiction and did not specify any forum for disputes arising from the offer.<sup>174</sup> Because of its role as the offeror, Peru was free to include an arbitration or forum selection clause if it wished to be free from the possibility of adjudication or enforcement of the offer in the U.S. courts.<sup>175</sup> Allowing a state to claim FSIA immunity, after it has failed to address jurisdictional concerns in its contract, goes beyond the defenses afforded to a private party and therefore runs counter to the purpose of the commercial activity exception.<sup>176</sup>

#### B. *Application of the FSIA Commercial Activity Exception to Reward Offers*

While the Eleventh Circuit found that the first two nexuses of the commercial activity exception did not apply to the reward offer in *Guevara*, that may not be true for every reward offered by a foreign state.<sup>177</sup> The first nexus, which waives immunity when a foreign state partakes in a commercial activity in the United States, could potentially be satisfied in the context of a fugitive reward offer.<sup>178</sup> In *Guevara*, the Eleventh Circuit held that because the Special High Level Committee which oversaw the offer was based in Peru, and the \$5 million of reward money lay in a Peruvian escrow account, no part of the commercial activity was carried on in the United States.<sup>179</sup> Under this holding, if Peru had sent its own law enforcement agents to Miami to evaluate Guevara's information or had arranged for payment of the reward through a U.S.

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<sup>172</sup> See *Guevara I*, 468 F.3d at 1304; *Elkins*, 120 P. at 554 (“If, for instance, great danger is from the known facts to be anticipated in making the arrest, the reward should be construed as intended for those who should brave the danger and effect the arrest.”).

<sup>173</sup> See Frostestad, *supra* note 65, at 523.

<sup>174</sup> See *Guevara II*, 648 F.3d at 1300–01 nn.3–4.

<sup>175</sup> See *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210, 219 (5th Cir. 2009) (recognizing the use of forum selection clauses to overcome waiver of FSIA immunity); *Kroeze v. Chloride Grp. Ltd.*, 572 F.2d 1099, 1105 (5th Cir. 1978) (“The offeror is the master of his offer. An offeror may prescribe as many conditions, terms or the like as he may wish . . .”).

<sup>176</sup> See Morrissey, *supra* note 9, at 682 (“[The] theory [of the FSIA] is based on the premise that . . . when a foreign state acts like a private party . . . it should be accountable for its actions the way a private party would be . . .”).

<sup>177</sup> See *Guevara II*, 608 F.3d at 1307, 1308.

<sup>178</sup> See *id.* at 1308.

<sup>179</sup> *Id.*

bank account, such commercial activity might be considered as having occurred in the United States, satisfying the first jurisdictional nexus.<sup>180</sup> Also, while the court found that publishing the reward through an official Peruvian website maintained the sovereign nature of the offer outside the United States, active promotion of a reward in a U.S. based publication or media outlet may also meet the requirements for waiver of immunity under the first nexus.<sup>181</sup>

While the offer in *Guevara* failed to meet the requirements of the second nexus, which waives immunity in suits based upon an act in the United States “in connection with a commercial activity elsewhere,” under different circumstances a foreign state’s actions might meet this requirement.<sup>182</sup> Reluctant to expand the scope of the second nexus, the Eleventh Circuit was unwilling to find that the single phone call by a Peruvian official to the FBI in Miami was sufficiently “in connection with” the commercial activity of the reward offer.<sup>183</sup> In doing so, the court noted that to allow for such a discrete act to constitute waiver of sovereign immunity would violate the principle that immunity may only be waived either by explicit or implicit waiver.<sup>184</sup> Although the court failed to articulate what types of acts would establish a proper waiver, it appears that greater communication between Peruvian and U.S. authorities, or greater direct contact with an informant in the United States, might be adequately “in connection with” the commercial activity.<sup>185</sup>

In a situation like *Guevara*, where most of the reward-related activity occurs within the offering country, the third nexus’s direct effect inquiry represents the most appropriate test for a FSIA determination.<sup>186</sup> Just as the Peruvian government independently administered and managed the Montesinos reward offer within their borders, so to do other countries seeking information on a wanted fugitive.<sup>187</sup> For instance, the proposed “Rewards for Information Concerning Terrorism Program” in the Philippines would grant the Philippine Depart-

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<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> 28 U.S.C. § 1605(a)(2) (2006); *see Guevara II*, 608 F.3d at 1308.

<sup>183</sup> *Guevara II*, 608 F.3d at 1308.

<sup>184</sup> *Id.*

<sup>185</sup> *See id.*

<sup>186</sup> *See id.* at 1308, 1309.

<sup>187</sup> *Compare Guevara II*, 608 F.3d at 1300 (stating that Peru’s reward offer was administered by the subcommittee of Ministry of the Interior), *with* Phil. Pending Act Establishing a Rewards Program, *supra* note 162 (proposing the establishment of a reward program under the supervision of the Philippine Department of Justice), *and* Vasovic, *supra* note 144 (stating that Serbia’s reward offer for an accused war criminal is funded through specially allocated government funds).

ment of Justice the discretion to authorize and administer rewards in a fashion similar to Peru's SHLC.<sup>188</sup> Similarly, the Serbian government allocated the €10 million reward for accused war criminal Ratko Mladic in much the same way Peru placed its reward funds in escrow.<sup>189</sup> Because the locus of the commercial activity, and any acts in connection with it, remain within the offering country in these instances, the direct effect nexus is the most applicable FSIA analysis for such reward offers.<sup>190</sup>

When a reward offer is subject to the direct effect analysis, it should also be subject to the various tests the courts use when applying the third nexus to other forms of contracts.<sup>191</sup> In *Weltover*, the Supreme Court interpreted a direct effect as one that follows "as an immediate consequence of the defendant's . . . activity."<sup>192</sup> The Court held that waiver of FSIA immunity occurred when the Argentinean government's failure to pay out its bonds in New York City had a direct effect in the United States.<sup>193</sup> While a reward offer is unlike the bond agreement at issue in *Weltover*, it still becomes a binding contract once the informant provides the information and the requested performance is completed.<sup>194</sup> Although a reward logically occurs as a direct result of the offer's existence, an informant provides information to the authorities as an immediate consequence of the offer.<sup>195</sup> Although the Eleventh Circuit failed to directly apply this test in *Guevara*, because a person provides the requested information as an immediate consequence of the promised compensation, acceptance of a reward offer should meet the requirements of a direct effect under *Weltover*.<sup>196</sup>

Rather than solely applying the language of the *Weltover* holding to *Guevara*, the Eleventh Circuit instead relied on the Second Circuit's

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<sup>188</sup> Phil. Pending Act Establishing a Rewards Program, *supra* note 162; *see Guevara II*, 608 F.3d at 1300.

<sup>189</sup> Vasovic, *supra* note 144; *see Guevara II*, 608 F.3d at 1308.

<sup>190</sup> *See Guevara II*, 608 F.3d at 1308–09.

<sup>191</sup> *See id.* at 1309 (applying the *Harris Corp.* interpretation of *Weltover* to the direct effect analysis); *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Assoc.*, 33 F.3d 1232, 1239 (10th Cir. 1994) (applying the legally significant act requirement to the direct effect analysis); *Am. W. Airlines, Inc. v. GPA Grp., Ltd.*, 877 F.2d 793, 799 (9th Cir. 1989) (applying the "substantial and foreseeable" test to the direct effect analysis).

<sup>192</sup> *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992).

<sup>193</sup> *See id.* at 620.

<sup>194</sup> *See Broadnax v. Ledbetter*, 99 S.W. 1111, 1112 (Tex. 1907) ("The [reward] offer is made to anyone who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it.").

<sup>195</sup> *See Weltover, Inc.*, 504 U.S. at 618.

<sup>196</sup> *See id.*; *Guevara II*, 608 F.3d at 1309 (applying the *Harris Corp.* interpretation of the *Weltover* test instead of the *Weltover* test directly).

interpretation of the test.<sup>197</sup> In *Harris Co. v. National Iranian Radio & Television*, the Second Circuit interpreted *Weltover* as requiring that a direct effect be “sufficiently” in the United States, as well as have “significant, foreseeable financial consequences [in the United States].”<sup>198</sup> In applying this interpretation to *Guevara*, the Eleventh Circuit found the plaintiff’s only “acceptance-related activity” was a single phone call between U.S. and Peruvian authorities to which Guevara was not a party.<sup>199</sup> This analysis of Guevara’s acceptance, however, does not consider the basic nature of a unilateral contract.<sup>200</sup> The Eleventh Circuit failed to recognize that under the law of unilateral contract, when Guevara provided the information to the FBI and completed performance of the requested task, he accepted the offer.<sup>201</sup> When the circuit court applied *Harris*’s financial consequence requirement, it also failed to consider the use of FBI resources for the capture of Montesinos as a “significant, foreseeable financial consequence” of the reward offer.<sup>202</sup> Because Peru’s reward offer resulted in the coordinated actions of several FBI agents over multiple days, the use of those agents likely represented a significant financial burden to the U.S. government.<sup>203</sup>

Although the Supreme Court in *Weltover* expressly renounced the addition of “unexpressed requirements” to the direct effect clause, some circuits apply additional tests, such as the legally significant act and the substantial and foreseeable tests.<sup>204</sup> Although these tests are intended to clarify and narrow the scope of the commercial activity exception, the Eleventh Circuit failed to apply them in *Guevara*, ignoring many of the other circuits’ means of FSIA analysis.<sup>205</sup>

The Ninth Circuit reaffirmed its use of a “substantial and foreseeable” requirement in *America West Airlines v. GPA Group*, where a U.S. based purchaser of aircraft sued the national airline of Ireland for

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<sup>197</sup> *Guevara II*, 608 F.3d at 1309.

<sup>198</sup> *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1351 (11th Cir. 1982).

<sup>199</sup> *Guevara II*, 608 F.3d at 1309–10.

<sup>200</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 50, cmt. b (1981) (“Where the offer requires acceptance by performance and does not invite a return promise, as in the ordinary case of an offer of a reward, a contract can be created only by the offeree’s performance.”).

<sup>201</sup> See *Guevara II*, 608 F.3d at 1309–10.

<sup>202</sup> *Harris Corp.*, 691 F.2d at 1344; see *Guevara II*, 608 F.3d at 1309.

<sup>203</sup> See *Guevara II*, 608 F.3d at 1304 & n.17 (describing the use of FBI agents in Miami and Latin America to assist with the apprehension of Montesinos).

<sup>204</sup> *Weltover, Inc.*, 504 U.S. at 618; *United World Trade, Inc.*, 33 F.3d at 1239 (employing the legally significant act test); *Am. W. Airlines, Inc.*, 877 F.2d at 799 (employing the “substantial and foreseeable” test).

<sup>205</sup> See *Guevara I*, 608 F.3d at 1309; Frostestad, *supra* note 66, at 527, 528–29.

damages sustained from the faulty service of a jet engine.<sup>206</sup> Because the repairs only occurred in Ireland at the direction of one of the contracting parties, the court found that U.S. contacts to the Irish government were “purely fortuitous” and were not substantial or foreseeable enough to create a direct effect.<sup>207</sup> That decision relied heavily on the fact that the Irish entity servicing the engine was unaware that the aircraft would be used in the United States.<sup>208</sup> In *Guevara*, however, the Peruvian government was in contact with the FBI during its pursuit of Montesinos and knew it was dealing with an informant in FBI custody in Miami.<sup>209</sup> Any time a foreign state knowingly forms a contract for information with a party located in the United States, and also coordinates apprehension efforts with U.S. authorities, there can be no claim that the U.S. connection was purely fortuitous.<sup>210</sup>

The application of the legally significant act test arose as a result of the apparent vagueness of *Weltover*'s immediate consequence test.<sup>211</sup> The Supreme Court seemingly affirmed its use when it followed the Second Circuit's decision in *Weltover* to “look to the place where legally significant acts giving rise to the claim occurred.”<sup>212</sup> Because some circuits feared that a liberal interpretation of the direct effect requirement might turn U.S. courts into “international court[s] of claims”, the legally significant act test provides a much narrower standard for waiver of immunity.<sup>213</sup> Under this standard, U.S. courts are able to enforce the contractual obligations of foreign states, while still requiring more than a tenuous connection to the United States to establish waiver of immunity.<sup>214</sup>

Pursuant to its holding in *United World Trade v. Mangyshlakneft Oil Production Ass'n.*, the Tenth Circuit still employs the legally significant act requirement in its direct effect analysis.<sup>215</sup> In that case, the circuit court found that a breach of contract had no direct effect in the United States because “no part of the contract . . . was to be performed in the

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<sup>206</sup> *Am. W. Airlines, Inc.*, 877 F.2d at 795.

<sup>207</sup> *Id.* at 800.

<sup>208</sup> *Id.*

<sup>209</sup> See *Guevara II*, 608 F.3d at 1304.

<sup>210</sup> See *Am. W. Airlines, Inc.*, 877 F.2d at 795.

<sup>211</sup> See Frostestad, *supra* note 66, at 548.

<sup>212</sup> See *United World Trade, Inc.*, 33 F.3d at 1239 (quoting *Weltover, Inc. v. Republic of Arg.*, 941 F.2d 145, 152 (2d Cir. 1991)).

<sup>213</sup> See Frostestad, *supra* note 66, at 547–48, 549.

<sup>214</sup> See *id.*

<sup>215</sup> *United World Trade, Inc.*, 33 F.3d at 1239.

United States.”<sup>216</sup> In *Guevara*, however, the plaintiff established performance of the unilateral contract in the United States when he provided the requested information to the FBI in Miami.<sup>217</sup> When acceptance of a reward offer in the United States creates a binding contract, it meets the requirements of the test because performance of a contract in the United States is a legally significant act.<sup>218</sup> Despite the fears of some courts, application of the legally significant act test to reward claims would do little to expand the scope of the direct effect exception, because it would be limited to instances like *Guevara*, where performance in the United States has created a binding contract between an informant and a foreign state.<sup>219</sup>

Some courts also employ a personal jurisdiction, minimum contacts analysis as an aid in determining the sufficiency of a direct effect.<sup>220</sup> In *Weltover*, the Supreme Court found the Government of Argentina “purposefully avail[ed] itself of the privilege of conducting activities within the [United States].”<sup>221</sup> When the court in *Guevara* performed a similar analysis, it found that a single telephone call was not sufficient to establish minimum contacts.<sup>222</sup> What the *Guevara* court failed to recognize, however, was that the Government of Peru purposefully availed itself of assistance from the FBI in the United States and abroad when it solicited the information from Guevara.<sup>223</sup> Although the record reflects that only one phone call occurred between Peruvian and U.S. agents in Miami, in that call Peru willingly accepted the assistance of federal law enforcement in obtaining and relaying the information regarding Montesinos’ whereabouts.<sup>224</sup> Peru openly acknowledged the assistance of the FBI in securing Montesinos’ capture and implicitly acknowledged that the reward would likely be granted to the FBI infor-

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<sup>216</sup> *Id.* at 1237.

<sup>217</sup> See *Guevara*, 2008 WL 4194839, at \*4 (order granting partial summary judgment).

<sup>218</sup> See *United World Trade, Inc.*, 33 F.3d at 1237; *Guevara*, 2008 WL 4194839, at \*4 (order granting partial summary judgment).

<sup>219</sup> See Frostestad, *supra* note 66, at 549 (“The specific language of the ‘legally significant act’ analysis to determine direct effect also preserves notions of comity because it is narrowly tailored and foreign defendants should be responsible for commercial activity which directly affects the United States through legally significant acts.”).

<sup>220</sup> *Weltover, Inc.*, 504 U.S. at 619 & n.2 (employing a “minimum contacts” test as an aid in determining FSIA waiver); *Guevara II*, 608 F.3d at 1310 (holding that one phone call cannot create minimum contacts under the “direct effect” analysis).

<sup>221</sup> See *Weltover, Inc.*, 504 U.S. at 620 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

<sup>222</sup> *Guevara II*, 608 F.3d at 1310.

<sup>223</sup> See *id.* at 1304.

<sup>224</sup> See *id.*

mant.<sup>225</sup> Such purposeful availment of U.S. resources goes far beyond any “random,” “fortuitous,” or “attenuated” contacts” with the United States.<sup>226</sup>

While courts have applied various tests and interpretations to the commercial activity exception of the FSIA, the core purpose of the provision remains the same: if a foreign sovereign participates in private commercial activity, it should not be granted foreign sovereign immunity.<sup>227</sup> The purchase of information, whether it is the location of a dangerous fugitive or a consumer’s credit report, remains a commercial exchange that occurs among private parties on a daily basis.<sup>228</sup> Just as the private company in *Loomis Fargo Co.* entered a contract with a private party for information regarding a robbery, so too did Peru engage with a private individual to locate the country’s most notorious fugitive.<sup>229</sup> Although courts apply numerous interpretations and tests to the direct effect clause of the FSIA, all are intended to ensure that waiver of immunity occurs only when a foreign sovereign performs a commercial activity that affects the United States.<sup>230</sup> Rather than simplify the already confusing doctrine, the final *Guevara* decision only further complicates the FSIA analysis by recognizing that Peru engaged in a commercial activity with a party in the United States, yet still failed to meet the requirements for waiver of immunity.<sup>231</sup>

### C. *The Inapplicability of the International Comity Doctrine to Reward Offers*

In his dissenting opinion in *Guevara*, Judge Cox recognized that the requirements of the commercial activity exception should have

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<sup>225</sup> See *supra* text accompanying note 31 (noting Peru’s acknowledgement of the FBI’s role in Montesinos’ capture and quoting Peru’s Minister of the Interior as stating that the \$5 million reward had not been paid “for the moment”).

<sup>226</sup> See *Burger King Corp. v. Rudzewics*, 471 U.S. 462, 475 (1985).

<sup>227</sup> See *Morrissey*, *supra* note 9, at 703.

<sup>228</sup> See *Guevara I*, 468 F.3d at 1302.

<sup>229</sup> See *Guevara II*, 608 F.3d at 1302; *Norman*, 123 F. Supp. 2d at 988–89 (W.D.N.C. 2000).

<sup>230</sup> See *Weltover, Inc.*, 504 U.S. at 618 (“Of course the generally applicable principle [is] that jurisdiction may not be predicated on purely trivial effects in the United States.”). In *United World Trade, Inc.*, the court employed the legally significant act test and refused to interpret the FSIA in a way that would “give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state.” 33 F.3d at 1239. In *America West Airlines, Inc.*, the court employed the “substantial and foreseeable” test and held that “[m]ere financial loss, incurred by a U.S. corporation does not . . . constitute a ‘direct effect’ . . .” 877 F.2d at 799.

<sup>231</sup> See *Guevara II*, 608 F.3d at 1312 (Cox, J. dissenting) (“*Guevara I*’s holding . . . is a holding that subject matter jurisdiction exists over this case pursuant to the FSIA.”).

waived FSIA immunity, but also suggested that the claim should be dismissed based on the “doctrine of international comity.”<sup>232</sup> In *Hilton v. Guyot*, the Supreme Court defined international comity as “the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.”<sup>233</sup> Judge Cox stated that the Peruvian Government’s decision to withhold the reward from Guevara should be respected on the grounds of international comity and not be questioned through litigation in the United States.<sup>234</sup> The use of the comity doctrine to abstain from hearing a case is based on the principle that a judgment issued by a foreign nation should be recognized in U.S. courts.<sup>235</sup> In *Guevara*, however, Peru’s decision to withhold the reward came only through the Department of the Interior’s SHLC, without any adjudication by a Peruvian court.<sup>236</sup> The abstention doctrine generally is applied only when a judgment has been rendered by a competent foreign court employing principles of civilized jurisprudence.<sup>237</sup> Invocation of the international comity doctrine is improper in cases such as *Guevara*, where a plaintiff seeks to enforce a contract with a foreign state and there has not been a parallel judicial proceeding in that state.<sup>238</sup>

Courts also invoke the international comity doctrine out of concern that litigation would strain the “amicable working relationships” between the United States and a foreign sovereign.<sup>239</sup> In the case of *Guevara*, concern over damaging relations with Peru is unwarranted given the amount of support the United States already provides in pursuing Peru’s most dangerous fugitives.<sup>240</sup> The State Department currently offers rewards of up to \$5 million, an amount identical to Peru’s offer for Montesinos, for information leading to the arrest of two

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<sup>232</sup> *Id.* at 1313.

<sup>233</sup> 159 U.S. 113, 143 (1895).

<sup>234</sup> See *Guevara II*, 608 F.3d at 1313 (Cox, J., dissenting).

<sup>235</sup> See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994).

<sup>236</sup> See Brief in Opposition to Petition for Writ of Certiorari at 5, *Guevara v. Republic of Peru*, No. 10-389 (Oct. 22, 2010).

<sup>237</sup> See *Turner Entm’t Co.*, 25 F.3d at 1519.

<sup>238</sup> See *id.*

<sup>239</sup> Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 14 (2010).

<sup>240</sup> See *Narcotics Rewards Program: Florindo Eleuterio Flores-Hala*, U.S. DEP’T STATE, <http://www.state.gov/j/inl/narc/rewards/144800.htm> (last visited Jan. 14, 2012); *Narcotics Rewards Program: Victor Quispe Palomino*, U.S. DEP’T STATE, <http://www.state.gov/j/inl/narc/rewards/144801.htm> (last visited Jan. 14, 2012).

members of the “Shining Path,” a Peruvian terrorist group.<sup>241</sup> Because the United States remains a leading provider of large cash rewards for information regarding the world’s most dangerous criminals, enforcement of another state’s reward offer would not strain the strong working relationships already in place between the United States and its partners in global security.<sup>242</sup>

D. *The Harm Resulting from Failing to Enforce Foreign Reward Offers*

At the most basic level, failure to find waiver of FSIA immunity in a reward offer would permit a foreign state to bargain for information but not pay for it, allowing for unjust enrichment.<sup>243</sup> In *Guevara*, Peru entered the market like any private party and sought to purchase information on Montesinos’ whereabouts through a unilateral contract.<sup>244</sup> Failure to enforce a foreign state’s obligation to pay such a reward allows that state to “shift to the [plaintiff] its ordinary marketplace obligations for the . . . services that plaintiff . . . furnish[ed].”<sup>245</sup> Just as the Supreme Court found that the FSIA direct effect clause protected the contractual interests of Swiss and Panamanian bondholders, so too should individuals, who undertake tremendous personal risk and assist in the capture of dangerous fugitives, have their contractual interests protected.<sup>246</sup> Failure to do so would simply allow a foreign government to contract for and receive a valuable service like any private party but leave it with no legal obligation to pay for it.<sup>247</sup>

The United States adopted the restrictive theory of sovereign immunity in part because it was no longer claiming immunity in contract or tort claims in foreign courts, and it was therefore unfair to allow other foreign states to do so.<sup>248</sup> This concept of reciprocity should also apply to the commercial activity of fugitive reward offers.<sup>249</sup> Since its inception, the Rewards for Justice Program has paid over \$100 million to sixty informants for information they provided to assist in the cap-

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<sup>241</sup> *Guevara II*, 608 F.3d at 1301 n.4; see *Narcotics Rewards Program: Florindo Eleuterio Flores-Hala*, *supra* note 240.

<sup>242</sup> See Childress, *supra* note 239, at 14; *Program Overview*, *supra* note 141; *United States-Mexico Security Partnership: Progress and Impact*, *supra* note 153.

<sup>243</sup> See *Hond. Aircraft Registry, Ltd. v. Gov’t of Hond.*, 129 F.3d 543, 549 (11th Cir. 1997).

<sup>244</sup> See *Guevara I*, 468 F.3d at 1301–02.

<sup>245</sup> See *Hond. Aircraft Registry, Ltd.*, 129 F.3d at 549.

<sup>246</sup> See *Welltower, Inc.*, 504 U.S. at 610, 619; *Guevara I*, 468 F.3d at 1304.

<sup>247</sup> See *Hond. Aircraft Registry, Ltd.*, 129 F.3d at 549.

<sup>248</sup> Morrissey, *supra* note 9, at 682.

<sup>249</sup> See *id.*

ture the world's most wanted criminals.<sup>250</sup> The intelligence procured by these substantial reward offers has resulted in the capture of actors posing serious threats to both U.S. and international security, such as Ramzi Yousef, mastermind of the 1993 World Trade Center bombing, and Edgar Navarro, the commander of the FARC rebels in Columbia.<sup>251</sup> In most of these cases the informants were located outside the United States and the Department of Justice readily delivered on its promise to provide millions of dollars to foreign nationals for their service.<sup>252</sup> To allow a foreign state to avoid payment of its obligations, while the United States honors its own, violates the FSIA's underlying principles of reciprocity.<sup>253</sup> While reward offers may be a unique form of contract, allowing a state to renege on a reward payment obligation "would jeopardize not only its vital interests but those of every country that offers rewards for information, including [the United States]."<sup>254</sup>

In addition to the fundamental unfairness of allowing an offering state to violate contract law while the United States meets the same obligations abroad, failure to provide legal protection to informants could have adverse effects on U.S. law enforcement.<sup>255</sup> Paid informants are a crucial tool used to infiltrate major criminal operations, and such reward offers provide the motivation for key witnesses to come forward.<sup>256</sup> In a situation like Guevara's, where a federal law enforcement agency deals directly with an informant, it is of paramount importance that the informant retain a level of trust in the government agency to ensure that further information will be provided.<sup>257</sup>

The existing partnerships between the United States and Mexico, Canada, and the Philippines create an opportunity for informants to come forward to U.S. authorities with information on serious criminal activity, in a situation similar to that in *Guevara*.<sup>258</sup> Because informants are quite often involved in illegal activity themselves, it seems quite

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<sup>250</sup> *Rewards Paid*, REWARDS FOR JUSTICE, [http://www.rewardsforjustice.net/index.cfm?page=success\\_stories&language=english](http://www.rewardsforjustice.net/index.cfm?page=success_stories&language=english) (last visited Jan. 14, 2012).

<sup>251</sup> Tim Kennedy, *RFJ Program Helps Capture Terrorists . . . and Save Lives*, ARAB NEWS (Feb. 27, 2011), <http://arabnews.com/world/article289520.ece>.

<sup>252</sup> See *id.*; *U.S. Pays Big Terror Reward in Philippines*, *supra* note 161.

<sup>253</sup> See Morrissey, *supra* note 9, at 682.

<sup>254</sup> *Guevara I*, 468 F.3d at 1304.

<sup>255</sup> See *id.*

<sup>256</sup> *United States v. Ihnatenko* 482 F.3d 1097, 1100 (9th Cir. 2007); *Guevara I*, 468 F.3d at 1304 (referencing the risks undertaken by informants in the case against Russian spy Robert Hanssen).

<sup>257</sup> See *Guevara I*, 468 F.3d at 1304.

<sup>258</sup> See LUM, *supra* note 150, at 16; *Background Note: Canada*, *supra* note 150; *United States-Mexico Security Partnership: Progress and Impact*, *supra* note 153.

likely that a suspect in U.S. custody could have valuable information regarding criminal activity abroad.<sup>259</sup> Under the collaborative police efforts currently in place, U.S. law enforcement is also likely to rely on foreign reward offers as a tool in soliciting information, just as the FBI did in *Guevara*.<sup>260</sup> If an informant in the United States was motivated to come forward to federal authorities because of a foreign state's lucrative reward offer and the offering state refused payment, the credibility of federal law enforcement among informants would be severely compromised.<sup>261</sup> Because "the promise of a reward means little or nothing to an informant if the country offering the reward cannot be made to pay it," continued participation of informants in our collaborative law enforcement operations requires that such rewards must be made enforceable in U.S. courts.<sup>262</sup> Given the vital role that informants play in the criminal justice system, especially those who provide information crucial to both U.S. and international security—the FSIA must be interpreted in a way that protects their interests.<sup>263</sup>

#### CONCLUSION

The Eleventh Circuit's recent decision in *Guevara* both muddied the waters of FSIA jurisprudence and undermined a valuable tool employed by law enforcement all over the world. Congress intended the FSIA to provide U.S. jurisdiction when a foreign state breaches its obligations in a commercial contract. Reward offers are a recognized form of contract that simply equates to the purchase of information through the promise of compensation. When a foreign state offers rewards for information regarding a wanted fugitive, an informant in the United States creates a binding contract when he or she provides that information. The creation of such a contract, especially when it is formed through the assistance of U.S. authorities, undoubtedly has the requisite direct effect on the United States to waive sovereign immunity. It is imperative that these contracts, when performed in the United States, receive the protection of U.S. courts as the FSIA intended. As a partner in global security, the United States must be able to rely on reward offers from other countries when it solicits information regarding dangerous international fugitives. Because rewards are only as effective as

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<sup>259</sup> See *Ihnatenko*, 482 F.3d at 1100.

<sup>260</sup> See *Guevara I*, 468 F.3d at 1293; *Mexico Offers \$2 Million for Top Drug Lords*, *supra* note 141; *United States-Mexico Security Partnership: Progress and Impact*, *supra* note 153.

<sup>261</sup> See *Guevara I*, 468 F.3d at 1304; *Hond. Aircraft Registry, Ltd.*, 129 F.3d at 549.

<sup>262</sup> See *Guevara I*, 468 F.3d at 1304.

<sup>263</sup> See *id.*

they are enforceable, allowing a foreign state to avoid its contractual obligations weakens this important law enforcement tool.