1983—1984 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT

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During 1983 and 1984, the United States Court of Appeals for the Second Circuit and the New York Court of Appeals decided significant cases raising issues of international law and of domestic law presented in international contexts.[1] Some of the issues were novel,[2] others were raised by novel circumstances.[3] All called upon the courts to continue the process of refining doctrines and principles of international law that have appeared with increasing frequency in American cases.[4]

I. THE ACT OF STATE DOCTRINE

A. SITUS OF THE DEBT IN FOREIGN EXPROPRIATION CASES: GARCIA V. CHASE MANHATTAN BANK AND PEREZ V. CHASE MANHATTAN BANK

In two Survey year cases, *Garcia v. Chase Manhattan Bank*,[5] and *Perez v. Chase Manhattan Bank*,[6] the Second Circuit Court of Appeals and the New York Court of Appeals reached opposite conclusions regarding the effect of a bank's payment of deposits represented by letters of credit to a foreign government pursuant to an expropriation decree, on the continued liability of the bank to the depositor. The conflict in the cases leaves United States banks unsure of the circumstances in which they may be required to pay

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1. Because of the number and significance of the cases decided by these two courts during the Survey years, the decisions of lower federal and state courts in New York are not examined as part of this Survey.

2. *See, e.g.*, Garcia v. Chase Manhattan Bank, 735 F.2d 645 (2d Cir. 1984); Perez v. Chase Manhattan Bank, 61 N.Y.2d 460, 463 N.E.2d 5, 474 N.Y.S.2d 684, *cert. denied*, 53 U.S.L.W. 3325 (1984), discussed *infra* at notes 5-54 and accompanying text.

3. *See, e.g.*, Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), discussed *infra* at notes 96-128 and accompanying text.

4. *See, e.g.*, the cases discussing the Foreign Sovereign Immunities Act, *infra* at notes 129-33, and the jurisdiction cases, *infra* at notes 211-89.

5. *Garcia*, 735 F.2d at 645.

6. *Perez*, 61 N.Y.2d at 460, 463 N.E.2d at 5, 474 N.Y.S.2d at 689.

the amount of the deposit twice and confused about the most effective way to ensure the safety of the depositor's funds while avoiding such double liability.

Perez and *Garcia* arose out of nearly identical factual backgrounds. Both had their genesis in the financial concerns of Cuban citizens immediately prior to the overthrow of the Batista regime in Cuba by the forces of Fidel Castro. Juanita Gonzalez Garcia and her husband, seeking to safeguard their assets in the event that Castro took power, visited the Vedado, Cuba branch of Chase Manhattan Bank in May, 1958.[7] They desired to make a fixed time deposit of 100,000 pesos and after Chase Manhattan officials allegedly confirmed Garcia and her husband's belief that this would be a proper method to secure their assets,[8] they deposited the funds and received a non-negotiable certificate of deposit (CD).[9] The CD did not specify where repayment was to be effectuated but Chase Manhattan officials allegedly represented to Garcia and her husband that repayment would be made in United States dollars in New York.[10] Four months later, the two returned to the Vedado branch and deposited 400,000 pesos in exchange for a CD. Again, they allegedly were told that this was an appropriate way to secure their money, and were informed that the CD's were payable in United States dollars at any Chase Manhattan Bank worldwide. The two sent the CD's to Spain for safekeeping in December, 1958.[11]

During the same six month period, Rosa Manas Y. Pineiro (Manas), wife of a cabinet member in the Batista government, visited Chase Manhattan's Mariano branch with the same financial concerns that had brought Garcia to the Vedado branch.[12] She deposited funds between May and December, 1958 and received five non-negotiable CDs.[12a] Again, no place of payment was specified in the CDs but Chase Manhattan allegedly told Manas that the CDs could be redeemed at any Chase Manhattan branch worldwide.[13]

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7. *Garcia*, 735 F.2d at 646.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 646-47.
12. *Perez*, 61 N.Y.2d at 465, 463 N.E.2d at 6, 474 N.Y.S.2d at 690. Perez is the administratrix of Manas' estate.
12a. The total amount on deposit was $227,336.47. *Id.*
13. *Id.*

On January 1, 1959 Fidel Castro's forces entered Havana. Garcia's husband fled to El Salvador[14] and Manas' husband to Colombia.[15] Manas left Cuba in June, 1959 to visit her husband, then returned for four months before emigrating to the United States in 1960.[16] Garcia was unable to leave Cuba until 1964, at which time she went to Spain.[17]

Castro's new government took varied steps to consolidate its power in the first few months of 1959.[18] One of these steps was the creation of the Cuban Ministry for the Recovery of Misappropriated Property.[19] It was empowered to freeze bank accounts as one means to recover misappropriated property.[20] The Ministry ordered Chase Manhattan to freeze the accounts of, among others, Garcia, her husband and Manas. In July, 1959, Chase was ordered to pay to the Ministry the proceeds of Garcia and her husband's accounts.[21] In September, 1959, the same order was given as to Manas' accounts.[22] Chase Manhattan complied with both orders by remitting to the Ministry a sum equal to the CD deposits.[23] During the next year, Cuba nationalized Chase Manhattan's branches and Banco Nacional de Cuba assumed its assets and liabilities.[24]

In 1976, Garcia brought suit against Chase Manhattan in the United States District Court for the District of Puerto Rico seeking the funds represented by the CDs.[25] Manas brought suit in the Supreme Court of New York in July 1974 after Chase Manhattan refused payment upon presentment of the CDs.[26]

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14. *Garcia*, 735 F.2d at 647.

15. *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 6, 474 N.Y.S.2d at 690.

16. *Id.*

17. *Garcia*, 735 F.2d at 647. According to Garcia, she gave the certificates to her husband in 1969 when he visited her in Spain. The certificates were found in his safety deposit box in Puerto Rico at his death in 1975. At that time he was a resident of Puerto Rico and a citizen of the United States. Garcia moved to Florida in 1974. Appellee's Joint Brief at 15, *Garcia*, 735 F.2d at 645.

18. *Garcia*, 735 F.2d at 647.

19. Cuban Law No. 78. The text of this law can be found in *Garcia*, 735 F.2d at 647 n.1.

20. *Id.*

21. *Garcia*, 735 F.2d at 647.

22. *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 7, 474 N.Y.S.2d at 691.

23. *Garcia*, 735 F.2d at 645; *Perez*, 61 N.Y.2d at 466, 463 N.E.2d at 7, 474 N.Y.S.2d at 691.

24. For an excellent discussion of legal issues arising from the expropriation and nationalization of foreign branches of United States banks, see Logan & Kantor, *Deposits at Expropriated Foreign Branches of U.S. Banks*, 1982 U. ILL. L. REV. 333 (1982).

25. Suit was transferred to the United States District Court for the Southern District of New York. The trial court held for Garcia. *Garcia*, 735 F.2d at 647-48.

26. The trial court held for Chase Manhattan Bank. Pinero v. Chase Manhattan Bank,

In both cases, Chase Manhattan defended that it had paid the deposits represented by the certificates upon order of the Cuban government and that the payment extinguished the debt.[27] United States courts, argued Chase Manhattan, could not, consistent with the act of state doctrine, question the validity and effect of the Cuban government's action.[28] The act of state doctrine's classic formulation is found in *Underhill v. Hernandez*:[29]

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[30]

This formulation speaks only to those acts done within the sovereign's territory. Acts of a sovereign done without its territory are respected only if they do not violate the law and policy of the United States.[31]

Because of the territorial limitation on the act of state doctrine, Cuba's act of expropriation of the debts at issue in the instant cases would be effective only if the debts were present in Cuba at the time Cuba ordered the freezing of the Garcia and Manas accounts. A debt is located, for act of state purposes, anywhere the debtor is present and the debt is payable.[32]

A divided Second Circuit, in *Garcia*, held that Cuba's expropriation of the proceeds of Garcia and her husband's account did not extinguish the obligation represented by the certificates of deposit.[33] Analogizing the Cuban expropriation to the act of an armed gunman demanding payment from the bank, the court would not allow

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106 Misc. 2d 660 (1980). The Appellate Division reversed unanimously. Perez v. Chase Manhattan Bank, 93 A.D.2d 402 (1st Dep't 1983).

27. *Garcia*, 735 F.2d at 649; *Perez*, 61 N.Y.2d at 462.

28. *Garcia*, 735 F.2d at 649.

29. 168 U.S. 250 (1897).

30. *Id.* at 252.

31. *See* Allied Bank International v. Banco Credito Agricola, discussed *infra* at notes 55-69; Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

32. Menedez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), *rev'd on other grounds sub nom.*; Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

33. *Garcia*, 735 F.2d at 650.

Chase Manhattan to rely on the expropriation to avoid payment to the depositors because Chase Manhattan had not offered any resistance to the Ministry's demand, had remitted the funds to the Ministry without requiring presentment of the CDs and had not given any notice to the depositors.[34] Because title to the funds vested in Chase Manhattan at the time the certificates were given in exchange for the deposits and the latter became part of the bank's general funds rather than funds specifically attributable to Garcia's account, Chase Manhattan's debt to Garcia was not extinguished by the payment of its general funds to the Cuban government.[35]

The court recognized the general rules regarding situs of debts for act of state doctrine purposes.[36] The court concluded, however, that the particular facts here, specifically Garcia's expressed reasons for seeking a CD and Chase Manhattan's representations, outweighed those facts siting the debt in Cuba that otherwise would suggest application of the act of state doctrine.[37] Chase, through its representations, accepted the risk by accepting the depositor's funds.[38]

Judge Kearse dissented based on her opinion that the act of state doctrine should be applied and should relieve Chase Manhattan of any liability to Garcia.[39] In her view, the situs of the debt was in Cuba and Cuba's expropriation "collected" the debt within its territory. Since a certificate of deposit is merely evidence of a debt and not the debt itself, she reasoned that Chase Manhattan's failure to require presentment of the certificate was immaterial, since Cuba impliedly did not require presentment of a debt in order to expropriate it.[40] Absent an express agreement to honor the certificate regardless of the Cuban government's action, Judge Kearse would not require Chase Manhattan to suffer double liability on its debt.[41]

In *Perez v. Chase Manhattan Bank*,[42] a majority of the New York

34. *Id.* at 649.
35. *Id.*
36. *Id.* at 650.
37. *Id.* at 650-51.
38. *Id.* at 650.
39. *Id.* at 651 (Kearse, J., dissenting).
40. *Id.*
41. *Id.* at 652-53.
42. *Perez*, 61 N.Y.2d at 473, 463 N.E.2d at 11, 474 N.Y.S.2d at 695.

Court of Appeals held that the act of state doctrine operated to shield Chase Manhattan from double liability. Manas had argued that because the certificates could be redeemed at any of Chase Manhattan's branches worldwide, the debt had multiple situses and therefore the normal debt situs rule should not apply to locate the debt in Cuba. The court disagreed. It concluded that the debt had multiple situses until the time of payment and that the act of payment, whether pursuant to depositor demand or government decree, extinguished the debt.[43]

Judge Wachtler dissented on two grounds. First, he questioned the appropriateness of traditional situs rules where, as here, the application of those rules gave the debt multiple situses worldwide.[44] Such rules would support confiscation of a debt by any government of a state in which the debtor was located, regardless of an connection among the creditor, the transaction and the confiscating state.[45] Rules locating the situs of a debt, according to Judge Wachtler, should reflect broad policy considerations.[46]

Judge Wachtler also questioned the relevance of the act of state doctrine in cases where the foreign sovereign is not a party.[47] The issue in the instant case was whether Manas or Chase Manhattan, both private litigants, should suffer the loss due to Cuba's acts.[48] Wachtler concluded that since Chase Manhattan accepted Manas' money fully aware of the political instability in Cuba and of her reasons for making a deposit with the bank, Chase Manhattan should suffer the loss.[49]

It is questionable whether the situs of the debt rules in act of state cases should have played a central role in either *Perez* or *Garcia*, involving, as they did, the rights and liabilities of private litigants. The act of state doctrine developed to shield the acts of foreign sovereigns within their territory from invalidation by United States courts.[50] It is, in essence, a federally-mandated choice of law rule that requires such acts be deemed valid and effective.[51] The

43. *Id.* at 470, 463 N.E.2d at 9, 474 N.Y.S.2d at 693.
44. *Id* at 473-74, 463 N.E.2d at 11, 474 N.Y.S.2d at 695 (Wachtler, J., dissenting).
45. *Id.*
46. *Id* at 477, 463 N.E.2d at 13, 474 N.Y.S.2d at 697 (Wachtler, J., dissenting).
47. *Id.* at 479, 463 N.E.2d at 14, 474 N.Y.S.2d at 698.
48. *Id.* at 473-74, 463 N.E.2d at 11, 474 N.Y.S.2d at 695.
49. *Id.* at 479-80, 463 N.E.2d at 14-15, 474 N.Y.S.2d at 688-89.
50. *See supra* notes 29-32 and accompanying text.
51. Seen as a choice of law rule, the act of state doctrine gives conclusive effect to

doctrine is based not only upon principles of sovereignty, but also upon a recognition of the separate functions of each branch of the United States government and the respective realm of state judicial power and the federal executive branch.[52] The judicial restraint mandated by the act of state doctrine reduces the chance that judicial decisions will embarass or hinder the executive branch in its relations with foreign sovereigns.[53] None of these concerns was in issue in *Perez* or *Garcia*, or implicated directly in either.

Use of the debt situs rules in these cases does, however, indicate problems with the rules themselves. The rules are based on a single inquiry: is the debtor located and subject to suit on the debt in the state that is seeking to confiscate the debt? If it is answered affirmatively, that state may confiscate the debt, regardless of the absence of any other factual connections between the debt-creating transaction and the confiscating state. Literally applied, this situs rule would allow any state where the CDs at issue in *Perez* and *Garcia* were payable, that is, any state in which Chase Manhattan has a branch, to seize the funds represented by the CDs. Whichever state seized the debt first would extinguish it. Cuba, in fact, had a much stronger claim to the funds because not only the debtor but the creditor and the transaction were located there. As one author has noted, the presence of the debtor, the creditor and the transaction in a single state gives that state the strongest

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one contact only, the situs of the debt in the nation seizing it, and mandates the recognition of American courts of the act of seizure. The doctrine thus denies to courts a choice of governing law as to the validity of the sovereign's act, regardless of other arguably significant contacts with the forum or another state and of important governmental interests created thereby. The U.S. Supreme Court in Allstate v. Hague, 449 U.S. 302 (1980), its most recent pronouncement on the constitutional limits imposed on a state's choice of law, rejected such a single factor inquiry and applied instead a standard that recognized the myriad factual contacts that create state interests in having their law applied. "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 312-13.

Certainly cases may arise compelling the conclusion that only one state has a constitutionally permissible claim to application of its laws. But *Allstate* clearly states that, where significant contacts creating state interests exist in more than one state, a constitutionally permissible choice exists. When the litigation is between private parties, as is the case in *Garcia* and *Perez*, the question of applicability of the act of state doctrine could turn on exactly this kind of analysis. *See* Note, *Debt Situs Standards in Cases of Foreign Expropriation*, 49 ALB. L. REV.—(1985) (unpublished).

52. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425-27 (1964).

53. *Id.* at 423.

expectation of dominion and offers the strongest claim for application of the act of state doctrine.[54] The result in *Perez* would have been more acceptable had the court recognized the multiple factors supporting the debt's situs in Cuba.

B. The Costa Rican Government's Temporary Prohibition on Repayment of External Debt and Subsequent Rescheduling and the Applicability of The Act of State Doctrine: Allied Bank International v. Banco Credito Agricola De Cartago

In a case of interest to United States banks, the Second Circuit Court of Appeals initially upheld[55] and later, on rehearing, reversed[56] the dismissal of an action brought by thirty-nine banks against three Costa Rican banks to recover over five billion dollars owed by the latter to the former.

Allied Bank International brought suit as an agent of the thirty-nine banks against the three banks, which are owned by the government of Costa Rica and subject to the control of the Central Bank of Costa Rica (Central Bank). Defendant banks assumed the obligations to the thirty-nine banks in 1976 and issued new promissory notes. In agreements negotiated with Allied Bank in that year, the three Costa Rican banks were to make "unconditionally" eleven semi-annual payments in United States dollars in New York City.[57] The agreements further provided that Allied Bank could demand full payment if defendants failed to pay within thirty days of the specified payment date, unless the failure "was due to the omission or refusal of the Central Bank to release United States currency,"[58] in which case default would be excused for an additional ten days.

Defendant banks met their obligations under the agreements until 1981. In August of that year, responding to a severe economic crisis in Costa Rica, the Central Bank refused to release foreign

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54. Note, *supra* note 51, at ____.

55. *Allied Bank International v. Banco Credito Agricola de Cartago*, No. 83-7714 (2d Cir. Mar. 18, 1985). 733 F.2d 23 (2d Cir. 1984).

56. *Allied Bank International v. Banco Credito Agricola de Cartago*, No. 83-7714 (2d Cir. Mar. 18, 1985).

57. *Allied Bank*, 733 F.2d at 24. These agreements recognized that the obligations were registered with the Central Bank of Costa Rica, since that bank would provide the United States currency required in the agreement.

58. *Id.*

currency for the payment of debts.[59] Three months later, the Costa Rican government allowed banks, including defendants, to pay external debts only with Central Bank's approval. The presidential decree so announcing stated that this measure was necessary because "presently the Government of Costa Rica is renegotiating its External Debt and for this purpose there should be harmony of decisions and centralization in the decision-making process."[60]

Upon suit in the Southern District of New York, defendants did not deny their failure to pay but rather moved to dismiss the action for lack of subject matter and in personam jurisdiction and for insufficiency of process and service. Allied Bank moved for summary judgment. In opposition to the latter motion, defendants argued that payment had been prevented by the Costa Rican government. The district court, in denying all of the motions, stated that the act of state doctrine barred entry of summary judgment against defendants. The action later was dismissed when the parties stipulated that no factual issues with respect to the act of state doctrine remained.[61]

During the pendency of the action before the lower court, negotiations for the rescheduling of defendants' obligations began. After the district court dismissed the action, defendants signed a refinancing agreement accepted by, *inter alia*, thirty-eight of the thirty-nine banks on whose behalf Allied Bank brought the action.[62]

The economic crisis that led to the default on loans by private lenders also caused default on payments of Costa Rica's intergovernmental obligations.[63] Both the United States government and other government creditors reacted sympathetically to Costa Rica's economic problems and her efforts to solve them.[64] As a result,

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59. *Id.*

60. *Id.*

61. *Id.* at 25.

62. *Id.* This agreement was signed by defendants, the Central Bank, the government of Costa Rica and a coordinating agent for Costa Rica's external creditors. As of the Second Circuit's opinion, defendants had made payments as required by the refinancing agreement.

63. *Id.*

64. *Id.* Pursuant to the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (1961), further aid to a country granted a loan by the United States Government requires that the President advise Congress that "assistance to such country is in the national interest." 22 U.S.C. § 2370(q) (1982). President Reagan so advised the Congress. *Allied Bank*, 733 F.2d at 25. The House of Representatives also expressed its support for Costa

several nations, including the United States, signed an agreement rescheduling the intergovernmental debt of Costa Rica. This agreement recommended the rescheduling of Costa Rica's commercial debt payments.

Thus, when Allied Bank appealed the dismissal of the action in the instant case to the Second Circuit, it represented the one bank that had refused to accept the refinanced obligation which the Second Circuit initially believed was not only acceptable in principle to the United States government, but had been urged by it. The act of state doctrine does not mandate dismissal of an action in an American court if the foreign state's actions affect contractual obligations or property located in the United States, *unless* such actions are consistent with the policy and law of the United States.[65] The appellate court, in its initial opinion,[66] analogized Costa Rica's prohibition of payment of its external debts to the reorganization of a business under Chapter 11 of the Bankruptcy Code.[67] As is true of Chapter 11 reorganizations domestically, "Costa Rica's prohibition of payment of debt was not a repudiation of the debt but rather was merely a deferral of payments while it attempted in good faith to renegotiate its obligations."[68]

A motion to rehear the case was granted and the original opinion withdrawn by the Second Circuit after publication of the opinion. On March 18, 1985 the Second Circuit Court of Appeals issued its new opinion, reaching an opposite conclusion and reversing the dismissal below.[69] The court explained that its earlier decision had been based primarily upon "our belief that the legislative and executive branches of our government fully supported Costa Rica's action and all of the economic ramifications."[69a] The *amicus curiae* brief filed by the government on rehearing indicated otherwise.[69b] Because it con-

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Rica. *Id.*; H. Con. Res. 423, 97th Cong., 2d Sess., CONG. REC. H.10206 (Dec. 17, 1982); H. Con. Res. 194, 98th Cong., 1st Sess., CONG. REC. H.10350 (Nov. 17, 1983).

65. *Allied Bank*, 733 F.2d at 26. United States v. Belmont, 301 U.S. 324 (1937); Canada Southern Railway Co. v. Gebhard, 109 U.S. 527 (1883); Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 658 F.2d 903 (2d Cir. 1981); United Bank, Ltd. v. Cosmic International Inc., 542 F.2d 868 (2d Cir. 1976); Republic of Iraq v. First National City Bank, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

66. *Allied Bank*, 733 F.2d at 26.

67. *Id.*; 11 U.S.C. §§ 1101-1174 (1982).

68. *Allied Bank*, 733 F.2d at 26.

69. *Allied Bank*, No. 83-7714 (2d Cir. Mar 18, 1985).

69a. Slip op. at 6.

69b. *Id.*

cluded its earlier interpretation of United States policy had been wrong, the court was required to examine whether the act of state doctrine nonetheless precluded examination of the Costa Rican decrees. Since the situs of the debt at issue was not in Costa Rica, the act of the Costa Rican government was not a taking within its own territory and the act of state doctrine was inapplicable.[69c] This opinion was issued in 1985 immediately before this Survey was to be published. The opinion will be analyzed in depth in the *1985 Survey of International Law in the Second Circuit*, which will be published by this journal next year.

C. THE ACT OF STATE DOCTRINE DOES NOT BAR ENFORCEMENT OF CIVIL INVESTIGATION DEMANDS BY JUSTICE DEPARTMENT IN ANTITRUST INVESTIGATION: ASSOCIATED CONTAINER TRANSPORTATION, LTD. V. UNITED STATES

In *Associated Container Transportation, Ltd. v. United States*,[70] the Second Circuit Court of Appeals faced an issue of first impression involving the scope of the act of state doctrine: whether the doctrine prohibited the courts from enforcing a Justice Department request for communications between three corporations and governmental bodies in Australia and New Zealand. The appellate court reversed the lower court and held that the doctrine did not bar such enforcement in the instant case.[71]

The case arose out of an investigation by the United States Department of Justice into possible antitrust violations by carriers of meat, livestock and wool to the United States from Australia and New Zealand. Appellees in the case were three of the companies targeted in the investigation.[72]

All three companies are members of various shipping conferences and agreements. As members, appellees enter into written agreements governing international shipping that are subject to approval by the United States Federal Maritime Commission (FMC), pursuant to the Shipping Act.[73] Agreements made lawful by the

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69c. *Id.* at 12.

70. 705 F.2d 53 (2d Cir. 1983).

71. *Id.* at 55.

72. *Id.* Associated Container Transportation, Ltd. is organized under the laws of the United Kingdom, Hamburg-Sudamerikanische Dampfschiffahrts-Gesellschaft, Eggert & Amsinck under the laws of the Federal Republic of Germany, and Farrell Lines, Inc. under the laws of the State of New York.

73. *Id.* at 55-56; 46 U.S.C. § 814.

Shipping Act are immune from antitrust laws.[74] The focus of the Justice Department's inquiry was activities of appellees and others outside this exemption.

In May and June, 1980, the Justice Department issued Civil Investigation Demands (CIDs) pursuant to the Antitrust Civil Process Act.[75] The government requested detailed information regarding, *inter alia*, communications between appellees and the Federal Maritime Commission, appellees and the Australian Meat and Livestock Corporation (AMLC) and between appellees and the New Zealand Wool Board (NZWB).[76] The latter entities are instrumentalities of their respective governments.[77]

Each of the appellees filed a petition to set aside the CIDs.[78] In most respects, the lower court ordered the CIDs enforced;[79] however, in two significant respects, one of which is relevant here, the district court denied enforcement.

First, the district judge accepted appellee's argument that their communications with the Federal Maritime Commission were beyond government scrutiny under the *Noerr-Pennington* doctrine, a judicially-created doctrine that immunizes joint efforts to influence passage of laws from antitrust prosecution.[80] Second, the district court refused to allow the government to investigate the appellees' communications with the AMLC and the NZWB, on the basis that such an investigation "would require the court to question the motives of foreign governmental bodies responsible for selecting the ocean carriers able to transport goods from their respective countries."[81]

The United States appealed. Recognizing that "the unmistakable purpose of the Antitrust Civil Practice Act was to facilitate the Justice Department's efforts to obtain evidence during the

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74. 46 U.S.C. § 814.

75. *Associated Container*, 705 F.2d at 56; 15 U.S.C. §§ 1311-1314 (1982). A CID is a form of pretrial discovery for the benefit of the Attorney General. 15 U.S.C. § 1312(a).

76. *Associated Container*, 705 F.2d at 56.

77. *Id.*

78. *Id.*; 15 U.S.C. § 1314(b).

79. *Associated Container*, 705 F.2d at 56.

80. *Id.*; Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

81. *Associated Container*, 705 F.2d at 57. The district court judge relied upon Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). In that case, the Second Circuit court interpreted the act of state doctrine to prohibit United States courts from probing the motives of foreign governments.

course of a civil investigation,"[82] the Second Circuit reversed both reasons for denying enforcement.[83]

The appellate court labeled appellees' invocation of the *Noerr-Pennington* doctrine premature. Recognizing that "[t]he mere fact that a lawsuit involves activities abroad . . . does not imply that American courts are without jurisdiction,"[84] the court held the act of state doctrine was not implicated by the government's attempts to enforce the CIDs.[85] The Antitrust Division was not asking the court to question the validity of a foreign government's actions or to evaluate the propriety of a foreign government's decision.[86] Appellees had argued that the investigation necessarily would involve an examination of the motives of the AMLC and the NZWB.[87] They cited as support a Second Circuit case, *Hunt v. Mobil Oil Corp.*,[88] in which the court had held that inquiry into the motives of a foreign government implicated the act of state doctrine. In *Hunt*, the appellate court upheld dismissal of a claim because the claim "is . . . not viable unless the judicial branch examines the motivation of the [foreign government's] action and that inevitably involves its invalidity."[89] The court easily distinguished *Associated Container* from *Hunt*. First, in *Hunt* the antitrust suit had been brought,

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82. *Associated Container*, 705 F.2d at 58.

83. *Id.* at 62. Regarding the *Noerr-Pennington* exemption, the court reasoned that, while the exemption might eventually be held to apply to appellee's actions, it did not apply at this investigatory stage.

> The House report accompanying the 1976 amendments to the Antitrust Civil Process Act does indicate that a CID recipient may refuse to comply with any CID "if the Division has no jurisdiction to conduct an investigation—which will be the case if the activities at issue enjoy a *clear exemption* from the antitrust laws." H. Rep. No. 1343, 94th Cong., 2d Sess. 1, 11 (1976) (emphasis added), *reprinted* in [1976] U.S. Code Cong. & Ad. News at 2606.
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> That discussion goes on to provide, however, that
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> the committee stresses that the *scope of many antitrust exemptions is not precisely clear*; and many others, especially those among the regulated industries and what were formally term[ed] "the learned professions" are currently being narrowed by statute or judicial [r]ulings. In these many cases, the applicability of an asserted exemption may well be a central issue in the case. *If so, the mere assertion of the exemption should not be allowed to halt the investigation. Id.* n.30 (emphasis added).

Id. at 59. The court believed the *Noerr-Pennington* immunity to be far from clear.

84. *Associated Container*, 705 F.2d at 61.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Hunt*, 550 F.2d at 68.

89. *Id.* at 77.

whereas in *Associated Container* the government had not yet determined whether to bring formal charges.[90] Second, in order to prove their case, plaintiffs in *Hunt* were required to show that the defendant's conspiracy had *caused* the foreign government to confisicate their property, thus motive was a central issue in the case.[91] In *Associated Container* the Justice Department could prove "that appellees attempted to monopolize the market for shipping certain commodities . . . without making any claims concerning the acts or motivations" of the foreign governments.[92] Thus, the court could not determine at such an early stage in the proceedings whether any court would be called upon to investigate the validity of the actions taken by the governments of Australia and New Zealand.[93]

In reversing the district court, the Court of Appeals made clear that its holding should not be read to indicate that the act of state doctrine might not properly be involved later in the proceedings.[94] What is equally clear from the opinions in *Perez v. Chase Manhattan*[95] and *Associated Container* is that the Second Circuit Court of Appeals views the act of state doctrine as limited in its scope to those cases in which the judicial branch is *required* to inquire into the validity of a foreign sovereign's action.

II. FORUM NON CONVENIENS DISMISSAL DOES NOT REQUIRE SHOWING OF AN ALTERNATIVE FORUM: ISLAMIC REPUBLIC OF IRAN V. PAHLAVI

The Iranian hostage crisis[96] and the agreement between the governments of the United States and Iran that ended it[97] continue to

90. *Associated Container*, 705 F.2d at 62.

91. *Hunt*, 550 F.2d at 76.

92. *Associated Container*, 705 F.2d at 62.

93. *Id.* Challenges to CIDs by other carriers were rejected by other courts on similar grounds. Pacific/Australia—New Zealand Conference v. United States, Nos. 80-3015, 3016-3382 (N.D. Cal. Mar. 26, 1982), *appeal dismissed*, Nos. 82-4205, 4218-4219 (9th Cir. May 17, 1982); Australia/Eastern U.S.A. Shipping Conference v. United States, 537 F. Supp. 807 (D.D.C. 1982), *appeal argued*, Nos. 82-1516, 1683 (D.C. Cir. Jan. 10, 1983).

94. *Associated Container*, 705 F.2d at 62.

95. *Perez*, 735 F.2d at 645. *See supra* notes 5-54 and accompanying text.

96. On November 4, 1979, the American Embassy in Tehran, Iran was seized and American diplomatic personnel were captured by militant Iranian students. Fifty-two of the hostages were held by the Iranian government for 444 days.

97. On January 20, 1981, the governments of Iran and the United States entered into the agreement under which the hostages were released. The agreement was embodied in two declarations: Declaration of the Government of the Democratic and Popular Republic of Algeria and Declaration of the Democratic and Popular Republic of Algeria Concerning

generate challenging legal questions for American courts. In *Islamic Republic of Iran v. Pahlavi*,[98] the New York Court of Appeals faced two issues, one involving the scope of the hostage release agreement between the United States and Iran, and the other involving the appropriateness of a *forum non conveniens* dismissal absent proof of the availability of an alternative forum.

Iran brought suit in New York state court against Mohammed Reza Pahlavi, the former Shah of Iran, and his wife, Farrah Diba Pahlavi. The complaint alleged that the Pahlavis had diverted to their own use, funds and property worth several billion dollars belonging to the people and government of Iran.[99] Based upon the Pahlavi's alleged breach of their fiduciary duties imposed by Iranian law, Iran sought both legal and injunctive relief.[100]

The case was commenced in November, 1979, while the Shah was receiving treatment for cancer at a New York hospital.[101] The defendants' motion to dismiss on grounds of *forum non conveniens* was granted by the Supreme Court sitting at Special Term in the County of New York.[102] That court found that New York was

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the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran. 20 I.L.M. 223-40 (1981).

98. Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984).

99. Islamic Republic of Iran v. Pahlavi, N.Y.L.J., Sept. 16, 1981, at 6, col. 3, (N.Y. Sup. Ct.).

100. Specifically, Iran sought the imposition of a constructive trust upon and an accounting of all assets held by the Pahlavis as individuals or in the family's foundations, corporations and associations; an injunction against any sale, transfer, removal, disposal or alteration of such assets; compensatory damages of $25 billion against the Pahlavis, and recovery of $30 billion allegedly converted by the Pahlavis. *See id.*

101. Substituted service on the Shah was accomplished at New York Hospital. The Empress was served personally. *Id.* In addition to their motion to dismiss on grounds of *forum non conveniens*, defendants moved to dismiss for lack of personal jurisdiction. The court denied the latter ground for dismissal, holding that defendants' physical presence in New York was a sufficient basis for jurisdiction and that the method of service on the Shah was reasonably calculated to give notice and an opportunity to be heard. *Id.* at 7, col. 1. Defendants' third ground for dismissal, that the action involved a non-justiciable political question, also was rejected by the court. At its core, the action sought a constructive trust, an accounting, an injunction and money damages, and thus was justiciable. *Id.* at 7 col. 2.

The Shah died in Egypt in July, 1980 while these motions were pending at Special Term. New York's Civil Practice Rules provide for substitution of a party who dies; no such substitution was made for the Shah. N.Y. CIV. PRAC. R. § 1015 (McKinney 1976).

102. Islamic Republic of Iran v. Pahlavi, N.Y.L.J., Sept. 16, 1981, at 7, col. 3. Iran brought a similar action against Ashraf Pahlavi, the Shah's sister. Defendant in that action moved to dismiss the complaint against her on grounds of lack of subject matter jurisdiction due to the presence of non-justiciable political questions, "unclean hands", and *forum non con-*

an inappropriate forum because the case "has no connection with New York and none is alleged. . . . An unneccessarily heavy burden would be placed on the courts of New York to accept jurisdiction of a suit between nonresident parties on a cause of action having no nexus with this State."[103]

The Appellate Division[104] and New York Court of Appeals[105] affirmed the lower court's decision. The precise issue before the high court in reviewing the *forum non conveniens* dismissal was whether the trial court had abused its discretion, as a matter of law, in granting the *forum non conveniens* motion in the absence of proof of an alternative forum.[106] The court held that no such abuse had been committed, stating "although the existence of a suitable alternative forum is a most important factor to be considered in applying the *forum non conveniens* doctrine, its alleged absence here

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veniens. Islamic Republic of Iran v. Pahlavi, 116 Misc. 2d 590, 455 N.Y.S.2d 287 (1982), *rev'd*, 99 A.D.2d 1009, 473 N.Y.S.2d 801 (1st Dep't 1984). Defendant argued that the action involved a non-justiciable political question because it involved the internal affairs of a foreign nation. Among other reasons, the court rejected this argument based upon the terms of the agreement entered into by Iran and the United States under which the American hostages were released. *Id.* at 596-97, 455 N.Y.S.2d at 991-92; *see supra*, note 99 and *infra* notes 117-22 and accompanying text.

Defendant further argued that the court should refuse to exercise jurisdiction due to the "unclean hands" of plaintiff. Specifically, she argued that the demands made by the plaintiff after seizure of the American hostages included transfer of the Shah's assets and that

> such self-help constituted conduct so immoral and unconscionable that plaintiff's action should be dismissed on the basis of the equitable doctrine that one who has 'unclean hands' will be denied relief by a court of equity.

Pahlavi, 116 Misc. 2d at 597, 455 N.Y.S.2d at 992. Applying the New York rule that "the unclean hands doctrine bars only causes of action *founded in* illegality or immorality," the court held that Iran's seizure of the hostages was not directly or indirectly concerned with the subject matter of the action, the conduct of the defendant and the Shah during the Shah's rule. *Id.* at 598-99, 455 N.Y.S.2d at 993 (*quoting* Seagirt Realty Corp. v. Chuzanof, 13 N.Y.2d 282, 285 (1964)). Denying the relief on this ground also would contravene the Iranian hostage agreement. 116 Misc. 2d at 599, 455 N.Y.S.2d at 993. *See supra* note 86 and *infra* notes 117-22 and accompanying text.

The court then turned to the third ground, *forum non conveniens*. Here the court respectfully disagreed with the *Pahlavi* trial court's resolution of the issue in Iran's suit against the Shah and his wife. Holding that a *forum non conveniens* dismissal presupposes the existence of an alternative forum, the court denied the motion, finding that no such other forum existed. *Id.* at 601, 455 N.Y.S.2d at 994. This finding was subsequently overturned on appeal. *Pahlavi*, 99 A.D.2d at 1010, 473 N.Y.S.2d at 802.

103. Islamic Republic of Iran v. Pahlavi, N.Y.L.J., Sept. 16, 1981, at 7, col. 2 (N.Y. Sup. Ct.).

104. Pahlavi, 94 A.D.2d at 374, 464 N.Y.S.2d at 487.

105. Pahlavi, 62 N.Y.2d at 474, 467 N.E.2d at 245, 478 N.Y.S.2d at 597 (1984).

106. *Id.* at 483-84; 467 N.E.2d at 250, 478 N.Y.S.2d at 602.

does not require the court to retain jurisdiction."[107] The lower court had appropriately concluded that Iran's interests in litigating the case in New York[108] were outweighed by the public interests of New York[109] and the private interest of the defendants.[110]

The doctrine of *forum non conveniens* allows a court to forego the exercise of otherwise appropriate jurisdiction where the court, in its discretion, determines that entertainment of the action in another forum is appropriate.[111] Prior to *Pahlavi*, cases decided by both New York[112] and fed-

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107. *Id.* at 483, 467 N.E.2d at 249, 478 N.Y.S.2d at 601.

108. The major interests of Iran in litigating in New York were the existence of personal jurisdiction over the defendant there and the lack of another forum. *Id.* at 482, 467 N.E.2d at 248, 249, 478 N.Y.S.2d at 600, 601.

109. Among the public interests of the State of New York in refusing jurisdiction were the financial and administrative burden on New York in litigating a case with no connection to the state and the fact that a judgment would likely be ineffectual because of difficulties in imposing a constructive trust on the Shah's assets. *Id.* at 482, 467 N.E.2d at 250, 478 N.Y.S.2d at 602.

110. The private interests of the defendants in avoiding suit in New York involved the probable problems of preparing a defense when witnesses and evidence were in Iran and beyond the mandate of a New York court. *Id.*

111. 62 N.Y.2d at 478-79, 467 N.E.2d at 247, 478 N.Y.S.2d at 599. Here jurisdiction over the defendants was accomplished by personal and substituted service upon them in New York. *See supra* note 101.

112. Early New York cases discussing *forum non conveniens* treat the doctrine as one grounded in the public interests of the state. An early example is Ferguson v. Neilson, 58 Hun. 604, 11 N.Y.S. 524 (1890) in which the New York court stated:

> It is the well-settled rule of this state that, unless special reasons are shown to exist which make it necessary or proper to do so, the courts will not retain jurisdiction of and determine actions between parties residing in another state for personal injuries received in that state .... Our courts are not supported by the people for any such purpose.

Id. at 604, 11 N.Y.S. at 524; *see also* Burdick v. Freeman, 46 Hun. 138, 120 N.Y. 420 (1890), Collard v. Beach, 81 A.D. 582, 81 N.Y.S. 619 (1903), Hoes v. N.Y.N.H. & H.R.R. Co., 173 N.Y. 435, 66 N.E. 119 (1903), Hatfield v. Sisson, 28 Misc. 255, 59 N.Y.S. 73 (Sup. Ct. 1899). Where either party was a resident of the state, however, the court was precluded from dismissing on *forum non conveniens* grounds. De la Bouillerie v. DeVienne, 300 N.Y. 60, 89 N.E.2d 15 (1949), *reargument denied*, 300 N.Y. 644, 90 N.E.2d 496 (1950).

Recently, the New York courts have applied a more flexible approach to *forum non conveniens* issues, considering both private and public interests. *See* Silver v. Great American Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972). Noting that the doctrine of *forum non conveniens* rests upon "considerations of justice, fairness, and convenience, and not solely on the residence of one of the parties," the court dismissed a suit by a nonresident against a New York corporation. *Id.* at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402. *See also*, Varkonyi v. S.A. Empresa de Viacao Airea Rio Grandense, 22 N.Y.2d 333, 239 N.E.2d 542, 292 N.Y.S.2d 670 (1968).

> This flexible approach was codified in Civil Practice Rule 327, which provides, When the court finds that in the interest of substantial justice the action should

eral[113] courts indicated confusion as to whether availability of an alternative forum is an absolute prerequisite to a *forum non conveniens* dismissal. What is surprising, in light of this confusion, is not the result reached by the *Pahlavi* court but the breadth of the holding when a narrower ground was available to the court. Clearly the court's rejection of a rule requiring proof of an alternative forum is supported by valid sovereign concerns. A state's judiciary ought not to be burdened by litigation that has neither party nor transaction contacts with the state. In *Pahlavi*, however, the absence of an alternative forum largely was due to the action of Iran, the party seeking to defeat the *forum non conveniens* motion. Thus, the court could have held that, where the lack of an alternative forum is attributable to the plaintiff, any argument that the absence of such a forum precludes a *forum non conveniens* dismissal will be unavailing. The Court of Appeals did recognize this factor:

> If the action cannot be maintained in Iran, however, under laws which result in judgments cognizable in the United States or other foreign jurisdictions where the Shah's assets may be found then that failure must be charged to plaintiff. . . .Any infirmity in plaintiff's legal system should weigh against its claim of venue, not impose disadvantage on defendant or the judicial system of this State.[114]

Regardless of the broad language of its holding, *Pahlavi* should be read as limited to its facts. The conclusion that New York courts

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be heard in another forum, the court on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

N.Y. CIV. PRAC. R. 327 (McKinney 1972). The recent cases do not mandate an alternative forum, but in each there was such a forum. Rule 327 does not expressly require an alternate forum, but the phrase "the action should be heard in another forum" suggests the necessity of an alternate forum.

113. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the United States Supreme Court expressly authorized *forum non conveniens* dismissals in federal courts, although lower federal courts had been dismissing on such grounds long before *Gilbert*.

In *Gilbert*, the Court stated what has been considered the general rule that *forum non conveniens* dismissals require two fora. *Id.* at 506. *See also*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981); North Branch Prods., Inc. v. Fisher, 284 F.2d 611 (D.C. Cir. 1960); Glicken v. Bradford, 204 F. Supp. 300 (S.D.N.Y. 1962); Odita v. Elder Dempster Lines, Ltd., 286 F. Supp. 547 (S.D.N.Y. 1968).

114. *Pahlavi*, 62 N.Y.2d at 482, 467 N.E.2d at 250, 478 N.Y.S.2d at 602.

will make *forum non conveniens* dismissals in the absence of alternative fora, even in suits between non-resident aliens, is premature.

Fortunately, *forum non conveniens* dismissals are discretionary with the trial courts and the presence or absence of an alternative forum will be only one of many considerations. Thus, in future cases, like *Filartiga v. Peña-Irala*,[115] involving many of the same litigational factors that underlay the *forum non conveniens* dismissal in *Pahlavi*, *forum non conveniens* motions are likely to be denied. Despite the fact that witnesses and evidence are present in another forum, that the laws of a foreign state may govern and that there is no relationship between New York and either the parties or the transaction, "where the basis of the suit is the violation of the law of nations, requiring, as it does, a severe personal wrong committed by a government official within the alternative forum, the court may be predisposed to retain jurisdiction."[116]

Having decided that the normally applicable rules regarding *forum non conveniens* dismissals did not require a reversal, the Court of Appeals turned to the issue of whether the terms of the hostage release agreement[117] compelled a reversal.[118] Iran argued that, in the agreement and in promises made by American officials prior to the hostages' release, the United States guaranteed to Iran an American forum for its claims against the Shah's family. Specifically, it argued that Point IV of the Declaration of the Government of the Democratic and Popular Republic of Algeria obliged the United States to provide a forum for Iran's claims.[119] Point IV, *inter alia*, obligates the United States to:

> make known, to all appropriate U.S. courts, that in any litigation [brought by Iran to recover property and assets of the former Shah and his family], the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine . . . ."[120]

The court had no difficulty interpreting the agreement and the extraneous evidence to determine that the United States did not

115. Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

116. Youngblood, *1980 Survey of International Law in the Second Circuit*, 8 SYR. J. INT'L L. & COM. 159, 203 (1980).

117. *See supra* note 97.

118. *Pahlavi*, 62 N.Y.2d at 484, 476 N.E.2d at 251, 478 N.Y.S.2d at 603.

119. *Id.*

120. I.L.M. 223, 228 (1981).

guarantee Iran a New York forum to litigate its claims:[121]

> The United States has met its commitment to "facilitate" this lawsuit by freezing the Shah's assets and by advising the courts that the act of state doctrine and sovereign immunity principles are not to apply to plaintiff's claim. Nothing in the record or in its communication to the trial court suggests that a promise was made that it or the courts would do more.[122]

Judge Meyer dissented. He would hold that the existence of an alternative forum is an absolute prerequisite to a *forum non conveniens* dismissal.[123] The majority, in Judge Meyer's opinion, ignored the most relevant section of the Restatement of Conflict of Laws Second,[124] ignored an important footnote in the most recent pronouncement of the United States Supreme Court on the subject of *forum non conveniens*,[125] ignored the language and legislative history of the statutory rule governing *forum non conveniens* dismissals in New York[126] and reached a conclusion inconsistent with that of the majority of jurisdictions.[127] Concluding, as he did, that

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121. *Pahlvai*, 62 N.Y.2d at 487, 467 N.E.2d at 252, 478 N.Y.S.2d at 604.

122. *Id.*

123. *Id.* at 487-88, 467 N.E.2d at 253, 478 N.Y.S.2d at 605 (Meyer, J., dissenting).

124. *Id.* According to Section 84 of the Restatement, "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." An interpretative comment to this section indicates that a state must entertain the suit, no matter how inappropriate the forum may be, if jurisdiction over the defendant cannot be obtained in another state. RESTATEMENT (SECOND) OF LAWS § 84, Comment C (1971).

125. Judge Meyer points to language in both *Gulf Oil Corp.*, 330 U.S. at 507, and *Piper Aircraft*, 454 U.S. at 254 n.22 indicating the need for an alternative forum. *Pahlavi*, 62 N.Y.2d at 487, 467 N.E.2d at 253, 478 N.Y.S.2d at 605 (Meyer, J., dissenting).

126. 62 N.Y.2d at 489-91, 467 N.E.2d at 254-55, 478 N.Y.S.2d 606-07. Here, Judge Meyer analyzes CPLR 327. He points out that the reference to "another forum" presupposes that there is another forum. *Id.* The report of the Judicial Conference recommending the addition of 327 to the CPLR stated that jurisdiction might be denied upon a finding "that the forum is seriously inconvenient for the trial of the action and that a more appropriate forum is available." 17 Ann. Rept. of N.Y. Jud. Con. A35 (1972). Judge Meyer finds further support for the proposition that an alternative forum is a prerequisite to a *forum non conveniens* motion in the relationship between CPLR 327 and the Uniform Interstate and International Procedure Act, which evidences "that the convenience of the court alone was never intended to have the importance which the majority opinion attributes to it." 62 N.Y.2d at 490, 467 N.E.2d at 254, 478 N.Y.S.2d at 606. In his opinion, the doctrine of *forum non conveniens* in New York is "not a technique for leaving unpopular litigants without a court to press their claims." *Id.* at 491, 467 N.E.2d at 255, 478 N.Y.S.2d at 608.

127. *Pahlavi*, 62 N.Y.2d at 493, 467 N.E.2d at 256, 478 N.Y.S.2d at 607 (Meyer, J., dissenting).

the trial court should be reversed on the issue of *forum non conveniens*, Judge Meyer was not required to discuss the issue of whether the hostage release agreement required New York to entertain this action. He noted, without discussion, that he dissented from the majority's conclusion on that issue as well.[128]

III. IMMUNITY

A. IMPLICIT WAIVER OF SOVEREIGN IMMUNITY DEFENSE UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT: CANADIAN OVERSEAS ORES, LTD. V. COMPAGNIA DE ACERO DEL PACIFICO

In *Canadian Overseas Ores, Ltd. v. Compagnia de Acero del Pacifico*,[129] the Second Circuit considered when the defense of sovereign immunity is waived as a matter of law under the Foreign Sovereign Immunities Act. The defendant, Compagnia de Acero del Pacifico (CAP), a government-owned[130] Chilean corporation, while expressing an intention to preserve its defense of sovereign immunity[131] filed a number of motions in federal court[132] and engaged in discovery[133] before formally raising, by motion, its defense of

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128. *Id.*

129. 727 F.2d 274 (2d Cir. 1984). This case originally was brought in New York State Supreme Court by an assignee of Canadian Overseas Ores, Limited [CANOVER] to recover damages for equipment, spare parts and loans delivered to defendant Compagnia de Acero del Pacifico [CAP] by CANOVER's predecessor. The case was removed to federal court upon defendant's motion. Canadian Overseas Ores v. Compagnia de Acero del Pacifico, 528 F. Supp. 1337 (S.D.N.Y. 1982).

130. A controlling interest in CAP was owned by the Chilean government. *Canadian Ores*, 727 F.2d at 275. The fact that a majority of shares or other ownership interest is owned by a foreign state renders a business enterprise an agency or instrumentality of a foreign state under the FSIA. 28 U.S.C. § 1603(b)(1) (1982). Such an agency or instrumentality is entitled to claim immunity to the same extent as the foreign state itself. *Id.* at §§ 1603(b)(1), 1604.

131. *Canadian Ores*, 727 F.2d at 275-76.

132. *Id.* First, CAP filed a motion to remove the case to federal court. In the motion to remove "CAP noted, however, that it might later be entitled to assert the defense of sovereign immunity." *Id.* at 275. Later, "CAP waived certain procedural defenses . . . pursuant to a stipulation in which CANOVER acknowledge CAP had not waived any procedural or substantive defenses not set forth in the stipulation. Sovereign immunity was not among the defenses set forth in the stipulation." *Id.* at 276. Two months later, CAP filed a motion to dismiss for failure to state a claim and a motion to dismiss on the basis of *forum non conveniens*. *Id.*; FED. R. CIV. P. 12(b)(6).

133. Before deciding CAP's motion to dismiss for failure to state a claim and for *forum non conveniens* the trial judge, having informally apprised the parties he would deny the *forum non conveniens* motion, directed the parties to go forward with discovery, which both parties did. *Canadian Ores*, 727 F.2d at 276.

sovereign immunity. The plaintiff, Canadian Overseas Ores, Limited (CANOVER), objected to the motion on the ground that CAP's conduct, specifically the filing of various motions, constituted an implicit waiver of the defense.[134] The trial court granted CAP's motion to dismiss on the ground of sovereign immunity, finding that the defense had not been waived.[135] The Second Circuit affirmed.[136]

Section 1605 of the FSIA provides in relevant part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication . . . .[137]

The defense of sovereign immunity is unique in that it is clearly conceived by the FSIA as a question of a court's subject matter jurisdiction[138] and yet, unlike defenses to subject matter jurisdiction generally,[139] this defense can be waived by the party entitled to assert it. This waivability of the immunity defense makes it more akin to a defense of lack of jurisdiction over the person than lack of jurisdiction over the subject matter.[140] The personal quality of the immunity defense, reflected in its waivability, makes it more difficult to determine when the defense is waived by implication.

Section 1608(d) of the FSIA requires that the foreign state serve an answer or other responsive pleading to the complaint within sixty days after service is effected.[141] The legislative history of § 1605 expressly states that the failure to raise the defense of sovereign immunity in a responsive pleading would constitute an implicit waiver of the defense.[142] Thus, under the FSIA, had CAP filed an answer or other responsive pleading to CANOVER's complaint, without raising the defense of sovereign immunity, that defense would have been lost to it. The issue before the court was whether the various motions filed by CAP constituted responsive

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134. *Canadian Ores*, 528 F. Supp. at 1343.
135. *Id.* at 1347.
136. *Canadian Ores*, 727 F.2d at 277.
137. 28 U.S.C. § 1605 (1982).
138. 28 U.S.C. § 1330 (1982).
139. FED. R. CIV. P. 12(h)(3).
140. *See supra* notes 137-39 and accompanying text.
141. 28 U.S.C. § 1608(d) (1976).
142. 1976 U.S. CODE CONG. & AD. NEWS 6604, 6617.

pleadings which, in failing to include the immunity defense, operated to waive it.

The court's task would have been simpler if the FSIA defined responsive pleading; it does not. Because it believed the FSIA is to be interpreted in harmony with the Federal Rules of Civil Procedure (FRCP),[143] the court examined how the waiver issue would be resolved under those rules.[144]

Federal Rule of Civil Procedure 12 governs what defenses can be made by either motion or pleading, how they are to be made, and when they must be made. Two subsections of Rule 12 are relevant to the waiver issue in *Canadian Overseas Ores*. Rule 12(b) indicates that, with the exception of enumerated defenses, including lack of subject matter and personal jurisdiction, that may be made by motion, all defenses to a claim for relief must be asserted in the responsive pleading.[145] The language and intent of Rule 12(b) indicate that a motion is not a responsive pleading.[146] FRCP 12(h)(1) provides that certain defenses, including jurisdiction over the person, are waived if a Rule 12 motion was made, and these defenses were not included in the motion[147] or no Rule 12 motion was made, and these defenses were not included in the responsive pleading.[148] FRCP 12(h)(3) provides: "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."[149] Thus, if *Canadian*

143. *Canadian Ores*, 727 F.2d at 278. Plaintiff contended that interpreting the FSIA in light of the federal rules was inappropriate. *Id.* at 277. The court looked to, and found, support for its conclusion in the legislative history of the FSIA. *Id.*

144. *Id.*

145. FED. R. CIV. P. 12(b). Also enumerated in this subsection are: improper venue (12(b)(3)); insufficiency of process (12(b)(4)); insufficiency of service of process (12(b)(5)); failure to state a claim upon which relief can be granted (12(b)(6)); and failure to join a party under Rule 19 (12(b)(7)).

146. Not only does Rule 12(b) suggest that motions are not subsumed under the label "responsive pleading," other sub-parts of Rule 12 distinguish the two. *See, e.g.* FED. R. CIV. P. 12(d) "whether made in a pleading or by motion;" 12(f) "if no responsive pleading is permitted by these rules, upon motion made by a party;" 12(h)(1) "neither made by motion in a responsive pleading."

147. FED. R. CIV. P. 12(h)(1); 12(g). The latter subsection provides in pertinent part:

> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted . . . .

148. FED. R. CIV. P. 12(h)(1).

149. *Id.* at 12(h)(3).

Overseas Ores were decided solely by reference to the Federal Rules of Civil Procedure, the question of waiver would turn on whether the sovereign immunity defense is truly addressed to the subject matter jurisdiction of the court or more akin to a defense directed to lack of jurisdiction over the person. If the former, then the defense was not waived by CAP; if the latter, then the failure of CAP to include the defense in its motion to dismiss for failure to state a claim[150] resulted in a waiver of the sovereign immunity defense.

The Second Circuit concluded that, despite its waivability, the defense of sovereign immunity is a subject matter defense,[151] which, if governed solely by the FRCP, would fall within Rule 12(h)(3):

> Rule 12(h)(3) explicitly indicates that objections to subject matter jurisdiction may be made at any time during trial or appeal. The exceptional waivability of sovereign immunity as a jurisdictional defense suggests that the FSIA should be read to modify Rule 12(h)(3) only to the extent that the FSIA automatically bars assertion of the defense only after a responsive pleading has been filed.[152]

FRCP 12 clearly distinguishes between motions and responsive pleadings, indicating that the former is not subsumed under the latter for purposes of the rule. *Canadian Overseas Ores* clearly establishes that motions are not responsive pleadings for purposes of § 1605.

B. Waiver of Immunity From Prejudgment Attachment: S & S Machinery Co. v. Masinexportimport and O'Connell v. M.V. Americana

Section 1610(d)(1) of the FSIA governs immunity from prejudgment attachment against the property of a foreign state. Unlike the section governing immunity from attachment in aid of execution,[153] this section requires an *explicit* waiver of immunity

150. *Canadian Ores*, 727 F.2d at 276.

151. *Id.* at 277.

152. *Id.* at 278.

153. 28 U.S.C. § 1610(a) (1976). This subsection in pertinent part provides:

(a) The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution. . . if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly *or by implication* . . . .

Id. (emphasis added).

by the foreign state.[154] The Second Circuit made clear in *Libra Bank, Ltd. v. Banco Nacional de Costa Rica*,[155] a 1982 FSIA case, that § 1610(d)(1) "does not require verbatim recitation or express enumeration of immunity from prejudgment attachment as one of the waived immunities."[156] In *Libra Bank*, Banco Nacional de Costa Rica, an instrumentality of the government of Costa Rica, signed promissory notes with Libra Bank and others in which Banco Nacional waived "any right or immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy."[157] The sole question was whether this language constituted an explicit waiver of immunity from prejudgment attachment of Banco Nacional's property. The court concluded that it did and upheld the attachment.[158] In so concluding, the court noted that the purpose of § 1610(d)(1) was "to preclude inadvertent, implied or constructive waiver [of immunity] where the intent of the foreign state is equivocal or ambiguous."[159] Banco Nacional's waiver was clear and unambiguous and was "intended to reserve no rights of immunity in any legal proceedings."[160]

In two cases, decided during the Survey years, the Second Circuit again was asked to determine whether foreign states had explicitly, waived their immunity from prejudgment attachment.[161] In *S & S Machinery Co. v. Masinexportimport*, Masinexportimport

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154. *Id.* at § 1610(d)(1).

155. 676 F.2d 47 (2d Cir. 1982). *Libra Bank* arose out of the making of a $40 million loan to defendant Banco Nacional de Costa Rica by sixteen banks. The complaint alleged that Banco Nacional defaulted in payment on the loan. After the New York Supreme Court issued an order to show cause why an order should not be granted attaching the property of Banco Nacional in New York State, the court ordered attachment on default in November 1981. After the sheriff levied on Banco Nacional's property, the bank removed the action to the federal court and at the same time moved to dismiss for lack of personal jurisdiction and to vacate the order of attachment. After a hearing on the motion to vacate the attachment order, the district court held that the defendant's waiver was not explicit within the meaning of § 1610(d)(1) and vacated the attachment. Plaintiffs appealed to the Second Circuit, which reversed. *Id.* at 48-49.

156. *Libra Bank*, 676 F.2d at 49.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. S & S Machinery Co. v. Masinexportimport, 706 F.2d 411 (2d Cir.), *cert. denied*, 104 S. Ct. 161 (1983); O'Connell v. M.V. Americana, 734 F.2d 115 (2d Cir. 1984).

(Masin) and the Romanian Bank for Foreign Trade, both instrumentalities of the Romanian Government,[162] argued that their immunity from prejudgment attachment had not been waived in a United States-Romania trade agreement.[163] The clause provided:

> Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and . . . they shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions . . . except as may be provided in other bilateral agreements.[164]

The court concluded that the waiver of immunity from suit or execution of judgment did not constitute a waiver of immunity from prejudgment attachment.[165] The only language that could be construed as an explicit waiver of immunity from prejudgment attachment was the phrase "other liability in the territory of the other Party."[166] The court noted that the United States-Romania Trade Agreement did not disclose the meaning of the category "other liability" but that an identical clause in the Treaty of Amity between the United States and Iran[167] had been interpreted in dicta in *Libra Bank* not to be an explicit waiver of immunity from prejudgment attachment.[168] While recognizing that its decision in *S & S Machinery* did not require a definition of the precise nature of prejudgment attachment, the court stated:

> The phrase "other liability" is ill-suited to encompass prejudgment attachments. As we pointed out in *Libra Bank*, it is by no means clear that prejudgment attachments are liabilities. The better view seems to be that such attachments, outside of their now-discredited

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162. *S & S Machinery*, 706 F.2d at 412. The plaintiffs had argued that Masinexportimport (Masin) and the Romanian Bank for Foreign Trade were not agencies or instrumentalities of the Romanian government. The essence of plaintiff's argument was that the proof offered at trial on the issue of foreign state status of both defendants failed to establish that they were organs of the Romanian state or that they were owned by Romania. The district court and the Court of Appeals disagreed. *Id.* at 414-15.

163. Agreement on Trade Relations, *signed at Bucharest*, April 2, 1975, United States—Romania, art. IV, para. 2, 26 U.S.T. 2305, T.I.A.S. No. 8159, at 2308 (effective Aug. 3, 1975).

164. *Id.* art. V., para 2.

165. *S & S Machinery*, 706 F.2d at 417.

166. Agreement on Trade Relations, *supra* note 163.

167. Treaty of Amity, *Signed at Tehran*, Aug. 15, 1955, United States-Iran, art. XI, para. 4, 8 U.S.T. 899, 909, T.I.A.S. No. 3853 at 909 (effective June 16, 1957).

168. *Libra Bank*, 676 F.2d 47, 50.

> use in *quasi-in-rem* jurisdiction, are provisional remedies authorized to assure that prevailing parties will have meaningful recoveries.[169]

The court held that the language at issue did not unequivocally express the will of the parties to waive immunity from prejudgment attachment.[170]

In *O'Connell Machinery Company v. M.V. Americana*,[171] the Second Circuit considered whether language contained in the Treaty of Friendship, Commerce and Navigation between the United States and Italy[172] explicitly waived the immunity of the Italian government and its instrumentalities.[173] Article XXIV(6) of the Treaty provides, in pertinent part, that Italy will not claim immunity "from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject."[174] Seeing no reason to depart from its holding in *S & S Machinery Co. v. Masinexportimport*, the court held that this language did not constitute an explicit waiver of immunity from prejudgment attachment.[175]

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169. *S & S Machinery*, 706 F.2d at 417.

170. *Id.* at 418.

171. *O'Connell*, 734 F.2d 115 (2d Cir. 1984). The plaintiff in *O'Connell* filed a complaint in federal district court demanding recovery in personam against Italia De Navigazione and recovery in rem against one of the Italia Di Navigazione's ships, the "M/V Americana," for damages to a generator shipped aboard the "Americana" from Italy to the United States in 1981.

172. Treaty of Friendship, Commerce and Navigation, February 2, 1984, United States—Italy, 63 Stat. 2255, T.I.A.S. No. 1965.

173. Italia Di Navigazione was held by both the district court and the Court of Appeals to be an agency or instrumentality of a foreign state under the definition provided in the FSIA. *O'Connell*, 734 F.2d at 116. Section 1603 of the FSIA defines foreign state to encompass any agency or instrumentality of a foreign state. Agency or instrumentality is defined to include an organ of a foreign state, a political subdivision of a foreign state, or any entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(3). A majority of Italia Di Navigazione's shares are owned by the Societa' Finanziaria Maritime (FINMARE). *O'Connell*, 734 F.2d at 116. FINMARE is under the direct control of the Instituto per la Ricostruzione Industriale which is a public financial entity coordinating the management of commercial enterprises of the Italian government. The fact that the Italian government chose to establish two-tiered administrative agencies did not affect the Second Circuit's conclusion that the defendant was a foreign state within the meaning of the FSIA despite plaintiff's argument that the Italian government's ownership was too remote to support an immunity claim under the FSIA. *Id.* at 116-17.

174. Treaty of Friendship, Commerce and Navigation, *supra* note 172, art. XXIV(6).

175. *O'Connell*, 734 F.2d at 117.

Plaintiffs in *O'Connell* further argued that the FSIA's curtailment of the right of in rem attachment against vessels of foreign states unconstitutionally limited the judicial admiralty jurisdiction of the United States.[176] The court rejected the argument on two grounds. First, it noted that, at the the time of adoption of the Constitution, "foreign governments played little or no role in the merchant marine."[177] As foreign governments developed such a role, immunity from arrest of foreign-owned and operated ships was recognized.[178] The gradual judicial recognition of exceptions to this immunity led to the enactment of the FSIA.[179] Thus, while the FSIA altered rights of litigants as they preexisted the act, it did not alter them as they preexisted the Constitution.[180] Second, the Supreme Court has rejected the idea that the framers of the Constitution intended to preserve inviolate the then existing substantive maritime rights.[181]

C. Foreign Sovereign Immunities Act: Cross-Claims Against Foreign State Not Automatically Barred by Immunity Assertion: Ministry of Supply, Cairo v. Universe Tankships, Inc.

In *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,[182] the Second Circuit Court of Appeals was asked to decide whether the defense of sovereign immunity is an absolute bar to the assertion of a cross-claim against a foreign state plaintiff. The court held that it is not.[183]

In 1979, defendant Universe Tankships, a Liberian corporation, chartered one of its ships to Babanaft, a Panamanian corporation, which in turn chartered the ship to defendant, Claybridge Shipping

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176. *Id.* Here plaintiff relied on Article III, Section 2, clause i of the United States Constitution which provides that "[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. i.

177. *O'Connell*, 734 F.2d at 117.

178. Berizzi Brothers Co. v. Steamship Pesaro, 271 F.2d 562 (1926).

179. *O'Connell*, 734 F.2d at 117.

180. *Id.*

181. *Id.* The Constitution merely adopted existing substantive maritime law, leaving Congress the power to modify or supplement it. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934). In the *O'Connell* court's view, "Congress did no more than exercise this power when it enacted section 1605(b)." *O'Connell*, 734 F.2d at 118.

182. Ministry of Supply, Cairo v. Universe Tankships, Inc., 708 F.2d 80 (2d Cir. 1983).

183. *Id.* at 87.

Co., another Panamanian corporation.[184] Claybridge entered into a charter with the Ministry of Supply, Cairo, an "agency or instrumentality" of Egypt and thus a foreign state under the FSIA.[185] Claybridge agreed to transport a cargo of grain from the Gulf of Mexico to Egypt. The Ministry, plaintiff in this action, filed suit in federal district court against Universe Tankships and Claybridge, alleging that the cargo was damaged to the extent of $2,000,000.[186] Babanaft successfully moved for leave to intervene[187] as plaintiff against the two defendants.[188] After opposing affidavits had been filed by all parties, Babanaft filed an amended complaint against the Ministry of Supply alleging that the Ministry had wrongfully halted discharge of the wheat, causing Babanaft to incur identified costs, among them the loss of the vessel's use during the eighty-one days that the discharge was halted by the Egyptian authorities.[189]

The district court held that the Ministry was immune from suit on the cross-claim.[190] The court rejected two possible exceptions to immunity identified in the FSIA. First, it focused on the third clause of the "commercial activity" exception, § 1605(a)(2). Immunity is denied under this clause where the claim against the foreign sovereign is based on an act outside the United States causing a

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184. *Id.* at 82.

185. 28 U.S.C. §§ 1330, 1602-1611 (1976).

186. *Universe Tankships*, 708 F.2d at 82.

187. Babanaft moved under Federal Rule of Civil Procedure 24(a) & (b). This rule, in pertinent part provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . (2) when an applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . .
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

FED. RULE CIV. P. 24(a), (b).

188. In its complaint annexed to the motion to intervene, Babanaft alleged that as the wheat was being unloaded at Port Said, Egypt, it was discovered that metal rust scale inside the vessel's cargo container had become intermixed with the grain. Egyptian consignees and port officials halted discharge of the grain for eighty-one days. Babanaft alleged that, as a result of this delay, it lost use of the vessel and incurred damages in the amount of $2,500,000. *Universe Tankships*, 708 F.2d at 82-83.

189. *Id.* at 83.

190. *Id.*

direct effect within the United States in connection with a commercial activity of the foreign state outside the United States.[191] The district court concluded that the eighty-one day delay in Port Said did not cause a direct effect in the United States.[192] Secondly, the district court considered whether § 1607(b)[193] provided an exception to immunity in this case. Section 1607(b) withdraws immunity as to any counterclaim against a foreign state "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state."[194] The court concluded that this exception did not apply to cross-claims.[195] All of Babanaft's claims against the Ministry of Supply were dismissed.[196]

The Second Circuit reversed, noting it had "no quarrel with the reasoning of the district court so far as it went. The trouble is that it did not go far enough."[197] The district court, in focusing on the third clause of § 1605(a)(2), failed to recognize the relevance of the first clause of that section. This clause withdraws immunity in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state."[198] Discussing this clause, the Second Circuit stated:

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191. 28 U.S.C. § 1605(a)(2) (1982). "This subsection denies immunity in any case: in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of a foreign state elsewhere and that act causes a direct effect in the United States." *Id.*

192. *Universe Tankships*, 708 F.2d at 83.

193. 28 U.S.C. § 1607 provides:

In any action brought by a foreign state, or in which a foreign state intervenes . . . the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state, or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

Id. § 1607.

194. *Id.*

195. *Universe Tankships*, 708 F.2d at 83.

196. *Id.*

197. *Id.* at 83-84.

198. 28 U.S.C. § 1605(a)(2).

> When a foreign state has carried on a commercial activity within the United States, the first clause of § 1605(a)(2) thus withdraws immunity with respect to claims based not only on acts within the United States but also with respect to acts outside the United States if they comprise an integral part of the state's "regular course of commercial conduct" or "particular commercial transaction" "having substantial contact with the United States."[199]

Since Babanaft's claim was based upon plaintiff's entire course of conduct, including the arrangement in the United States for the purchase and transportation of the wheat, rather than upon the isolated acts of the Ministry regarding the discharge of the cargo in Port Said, it is the first clause of § 1605(a)(2) that removes immunity in this case.

The Court of Appeals then considered whether § 1607's explicit withdrawal of the immunity defense for counterclaims "impliedly forecloses the application of § 1605 to cross-claims."[200] The court noted that, in enacting § 1607, Congress intended to reduce rather than enlarge the scope of sovereign immunity.[201] The Ministry argued that the specific focus on counterclaims in § 1607(b) indicated a congressional intent to exclude cross-claims from that section. The Court of Appeals agreed.[202] The Ministry further argued that Congress intended, by creating a separate exception for counterclaims, "to limit the other FSIA exceptions in §§ 1605 and 1607 to claims brought in separate actions against a foreign sovereign, thereby leaving sovereign immunity a bar to cross-claims of every stripe."[203] With this the court disagreed.[204] Section 1605(a)(2), in the court's view, provided language broad enough to cover cross-claims and the court could "think of no good reason" why Congress would

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199. *Universe Tankships*, 708 F.2d at 84. The course of commercial conduct of which the unloading of the wheat was only one part included the carriage of the wheat from a United States port under bills of lading executed pursuant to the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (1982). That act defines "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. § 1301(e) (1982).

200. *Universe Tankships*, 708 F.2d at 85.

201. *Id.* at 86.

202. *Id.*

203. *Id.*

204. *Id.*

preserve sovereign immunity when a foreign state's commercial activity is the subject of a cross-claim and withdraw immunity when that activity is the subject of a counterclaim.[205]

Nothing in the Second Circuit's 1982 opinion in *Kunstammlungen zu Weimar v. Elicofon*[206] compelled another conclusion. In *Kunstammlungen*, the court held that intervenor's cross-claim against a foreign state was barred by the Foreign Sovereign Immunities Act, "whose exception for counterclaims does not apply."[207] The distinguishing feature in *Kunstammlungen*[208] was that the cross-claim at issue there was not one for which immunity was withdrawn

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205. *Id.* The problem with this conclusion is that it renders § 1607(a) redundant since § 1605(a)(2) would withdraw immunity over any claims covered by § 1607(a). The court acknowledges this but finds a sufficient explanation in Congress's desire to deal comprehensively with counterclaims in § 1607 rather than omitting subsection (a) and creating doubt as to whether § 1605 applied to a counterclaim arising out of a commercial activity.

206. Kunstammlungen zu Weimar v. Elicofon, 678 F.2d 1150 (2d Cir. 1982). This case is a splendid example of how broad and comprehensive can be the task of the federal judge. The *Kunstammlungen* court characterized the case as follows:

> The search for an answer to the deceptively simple question, "who owns the paintings?," involves a labyrinthian journey through 19th century German dynastic law, contemporary German property law, allied Military law during the post-war occupation of Germany, New York State law, and intricate conceptions of succession and sovereignty in international law.

Id.

207. *Id.* at 1160.

208. *Kunstammlungen* involved an ownership dispute over two priceless Duerer paintings. Prior to 1943, the paintings had been displayed at the Staatliche Kunstammlungen zu Weimar, a museum in Thuringia, Germany. To protect the artworks from bombardment they were moved to a nearby castle in 1943. They disappeared in the summer of 1945 at a time which coincided with the departure of American occupation forces. An American, defendant Elicofon, purchased the unsigned Duerers from an American ex-serviceman in 1946. Defendant framed and displayed the paintings in his home. In 1966, he discovered the identity of the Duerers. The litigation in *Kunstammlungen* involved the efforts of four parties to establish ownership of the paintings. The Kunstammlungen zu Weimar [KZW] represented the interests of the German Democratic Republic, which claimed ownership under a 1921 agreement between the Grand Duke of Saxony Weimar and the Territory of Weimar, and a 1927 settlement with the Land of Thuringia, successor to the territory of Weimar. The Federal Republic of Germany, the original plaintiff, withdrew upon intervention of the German Democratic Republic. Since the latter was not recognized by the United States and thus was barred from suing in United States courts at the time the suit was initiated, the Federal Republic had brought suit seeking custody of the paintings in order to restore them to the rightful owner. *Id.* The Grand Duchess of Saxony-Weimar, intervenor, claimed that the paintings remained the private property of the successive Grand Dukes of Saxony-Weimar and that title to the paintings was assigned to her by her husband, the late Grand Duke. Mr. Elicofon, the defendant, claims ownership based upon uninterrupted possession of the paintings for twenty years after his good-faith purchase of them. *Id.*

by § 1605.[209] The *Kunstammlungen* court's reference to the counterclaim exception, according to the *Universe Tankships* court, was a recognition that the *only* argument, albeit a weak one, available to cross-claimant in *Kunstammlungen* was the "arising out of the same transaction or occurrence" language of § 1607(b), a section expressly limited to counterclaims.[210]

IV. JURISDICTION

A. GRAND JURY SUBPOENA POWER OVER NONRESIDENT ALIEN CORPORATION AFFIRMED: IN RE MARC RICH & CO. V. UNITED STATES

In *In re Marc Rich & Co. A.G. v. United States*,[211] the Second Circuit Court of Appeals affirmed a district court order holding a foreign corporation, which did not do business in the United States or have offices here, in civil contempt for failure to comply with a *subpoena duces tecum*.[212]

Marc Rich Company A.G. (Marc Rich) is a Swiss commodities trading corporation that does business internationally. Its wholly-owned subsidiary, Marc Rich & Co. International Limited (International), also incorporated in Switzerland, did business and had offices in New York.[213]

In March, 1982, a federal grand jury in the Southern District of New York began investigating an alleged tax evasion scheme involving the two companies. The United States Government alleged that, through less than arms-length transactions, International divested to Marc Rich over twenty million dollars of taxable income

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209. The cross-claim filed by the Grand Duchess against the KZW sought payment of past-due and future annuities allegedly owed under the 1921 Agreement between the Grand Duke and the territory of Weimar. *Id.* at 1156. Certainly, this claim arose out of the same transaction, the 1921 Agreement, but could not be characterized as involving a commercial activity as defined in § 1605(a)(2).

210. *Universe Tankships*, 708 F.2d at 87.

211. In re Marc Rich & Co. v. United States, 707 F.2d 663 (2d Cir.), *cert. denied*, 103 S. Ct. 3555 (1983). For an extended analysis of In re Marc Rich & Co. v. United States, see Note, *The Marc Rich Case: Extension of Grand Jury Subpoena Power to Nonresident Alien Corporations*, 18 GEO. WASH. J. INT'L L & ECON. 97 (1984).

212. A subpoena duces tecum is a means by which a court commands a witness to produce documents or papers in the witness's possession or control. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979).

213. *Marc Rich*, 707 F.2d at 665.

in 1980.[214] *Subpoenas duces tecum* were served on International in March 1982 and on Marc Rich in April 1982.[215]

Marc Rich moved to quash the subpoena, arguing that it was not subject to the court's jurisdiction and that, under Swiss law, the corporation was prohibited from providing the requested material.[216] The district court rejected both grounds in denying the motion.[217] Marc Rich thereafter failed to comply with the subpoena and was held in civil contempt by the court. A fine of $50,000 per day was imposed against the assets of International, the United States subsidiary.[218]

Marc Rich appealed and the Second Circuit affirmed the contempt order, although on a different legal basis than that employed by the district court.[219] The appeals court held that the United States could impose punishment on foreign corporations for the violation of federal income tax laws and that the United States Congress clearly intended to make the income tax laws applicable to such corporations.[220] This power implies the power to investigate whether a crime has taken place.[221] The power to conduct such an investigation in turn implies "the right to summon witnesses and to require the production of documentary evidence," a right essential to the grand jury's task.[222] Thus, in the Second Circuit's opinion, "[s]o long as the court which must enforce the grand jury process can obtain personal jurisdiction of the summoned witness, the witness may

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214. *Id.*

215. Both subpoenas ordered the companies to produce business records relating to crude oil transactions between the two in 1980 and 1981. *Id.*

216. *Id.*

217. *Marc Rich, In re* Grand Jury Subpoena, No. M-11-188, slip op. at 3 (S.D.N.Y. Aug. 25, 1982). In rejecting the jurisdictional challenge, the district court held that jurisdiction over Marc Rich was statutorily authorized by New York's long-arm statute, CPLR 302(a)(1) and was constitutional under the minimum contacts test of International Shoe Co. v. Washington, 326 U.S. 310 (1945). Slip op. at 16. Service on International was held to confer jurisdiction over Marc Rich. *Id.* at 17.

In deciding the issue of whether Swiss law prohibited disclosure of business secrets to foreign governments and therefore required quashing the subpoena, the district court employed a balancing test between the interests of the United States and Switzerland. It concluded that the interests of the former in investigating violations of its tax law were weightier than the interests of the latter in protecting business secrets. *Id.* at 18.

218. *Marc Rich*, 707 F.2d at 670.

219. *Id.* at 665.

220. *Id.* at 665-66.

221. *Id.* at 66-67.

222. *Id.* at 667.

not resist the summons on the sole ground that he is a non-resident alien."[223]

The court then turned to the issue of personal jurisdiction over Marc Rich. Rejecting the lower court's use of the New York long-arm statute,[224] the court identified as the appropriate inquiry the nature and extent of Marc Rich's contacts with the United States, rather than with the State of New York.[225] The contacts of Marc Rich with the United States were held to be sufficient to support the exercise of personal jurisdiction.[226] These contacts included adverse consequences in the United States resulting from Marc Rich's foreign activities[227] and the likely occurrence of conspiratorial acts in this country.[228]

Marc Rich argued that allowing the court to exercise jurisdiction over it was the equivalent of creating a federal long-arm statute without congressional authorization. Since the jurisdictional reach of grand jury subpoenas is defined in 28 U.S.C. § 1783(a), and that section does not provide for jurisdiction over non-nationals located abroad, Marc Rich was beyond the subpoena power regardless of where service was actually accomplished.[229] The Second Circuit rejected Marc Rich's argument. It noted that service had been accomplished in the United States and thus § 1783(a) was irrelevant.[230]

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223. *Id.*

224. N.Y. CIV. PRAC. LAW § 302(a) (McKinney 1972).

225. *Marc Rich*, 707 F.2d at 667.

226. *Id.* at 669.

227. *Id.* at 667. The effects test found expression in § 50 of the RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971).

> A state has the power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable.

Recognizing that the effects test must be applied with caution in cases with international complications, the court nonetheless found it applicable here.

228. *Id.* at 668. Two facts offered support for the conclusion that a conspiracy, if it existed, occurred at least in part in the United States. The tax law violation, if it occurred, occurred in cooperation with International which was doing business in New York. Further, two of the five members of Marc Rich's board of directors were also members of International's board and residents of the United States. At least one of these board members was alleged to have been directly involved in the tax diversion scheme. *Id.*

229. *Id.* Section 1783 provides for service upon a "national or resident of the United States who is in a foreign country" for the "production of a specified document or other thing by him." 28 U.S.C. § 1783(a) (1982).

230. *Marc Rich*, 707 F.2d at 669.

The all writs statute, 28 U.S.C. § 1651, conferred Congressional approval on judicial authority to issue subpoenas. However, the court "found it unnecessary to look at the all writs statute . . . in fashioning a method of serving process where none was specifically provided by statute."[231]

The crucial issue, in the court's view, was "how much of a jurisdictional showing the Government had to make in order to warrant the issuance of the subpoena."[232] The trial court had required the government to show a good faith basis for asserting jurisdiction. Once the government made such a showing,[233] the burden shifted to Marc Rich to show lack of jurisdiction. The court held that Marc Rich had not met its burden.[234] The Second Circuit held that this shift of the burden of proof was an error but that the error did not require reversal.[235] The court held, "if the government shows that there is a reasonable probability that ultimately it will succeed in establishing the facts necessary for the exercise of jurisdiction, compliance with the grand jury's subpoena may be directed."[236] The court was concerned that requiring more of the Government "might well invert the grand jury function requiring that body to furnish answers to its questions before it could ask them."[237] The Government, in the court's opinion, had made the necessary showing.

Marc Rich is one of numerous cases recently decided by federal courts recognizing the power of United States courts over foreign defendants.[238] Prior to *Marc Rich*, courts had held that parent corporations can be required to produce documents possessed by a

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231. *Id.* at 668; 28 U.S.C. § 1651 reads:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

232. *Marc Rich*, 707 F.2d at 669.

233. Slip op. *supra* note 217 at 16.

234. *Id.* at 17.

235. *Marc Rich*, 707 F.2d at 699.

236. *Id.* at 669, (quoting In re Harrisburg Grand Jury 79-1, 658 F.2d 211, 214 (3rd Cir. 1981).

237. *Id.* at 669, (quoting In re Harrisburg Grand Jury 79-1, 658 F.2d 211, 214 (3rd Cir. 1981)).

238. *See, e.g.*, Norfolk & W. Ry. Co. v. U.S., 639 F.2d 1096 (4th Cir. 1981); Bankers Trust Co. v. Worldwide Transp. Services, Inc., 537 F. Supp. 1101 (D.C. Ark. 1982).

foreign subsidiary.[239] The issue of power in the reverse situation is more complex, if only because of the nature of control between a parent and subsidiary company.

That the United States Government had an interest in obtaining the production of documents needed in connection with the investigation of a major tax fraud is apparent. What is not apparent is why the Government was so quick to reject other means of obtaining the documents that would have been less offensive to the Swiss government, which also had an interest in the issue.[240] Treaties, signed by both Switzerland and the United States, arguably provided means by which to seek the Swiss government's assistance in obtaining the documents.[241] Even if these treaties did not require Switzerland to assist United States efforts,[242] the fact that Switzerland is party to them suggests she might have provided assistance as a matter of comity in response to letters rogatory.[243]

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239. *See, e.g.*, United States v. Vetco, 644 F.2d 1324 (9th Cir. 1981), *cert. denied* 454 U.S. 1098 (1981); In re Grand Jury Subpoena Duces Tecum Addressed to Canadian International Paper Co., 72 F. Supp. 1013 (S.D.N.Y. 1974); In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum, 13 F.R.D. 280, 285 (D.D.C. 1952).

240. The Swiss government's interest was twofold. First, Marc Rich was incorporated under the laws of Switzerland. *Marc Rich*, 707 F.2d at 665. Second, Marc Rich had argued before the trial court that Swiss law forbad Marc Rich's production of the documents demanded in the subpoena. Slip op. *supra* note 217, at 17. Marc Rich waived this issue on appeal. For an extended disucssion of issues raised when United States courts seek to compel production of documents protected by foreign laws, see Note, *Compelling Production of Documents in Violation of Foreign Law: An Examination and Reevaluation of the American Position*, 50 FORDHAM L. REV. 877 (1982).

241. Convention on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302; Hague Convention for the Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, Convention on Taxation, *signed at Washington*, May 24, 1951, United States-Switzerland, 2 U.S.T. 1751, T.I.A.S. No. 2316 (effective Sept. 27, 1951).

242. The Justice Department argued that these treaties did not provide an affirmative means for obtaining the documents. The Convention on Mutual Assistance in Criminal Matters was unavailable because tax matters are expressly excluded from its application. Brief for the Government at 25, 707 F.2d at 663; Convention on Mutual Assistance in Criminal Matters, *supra* note 240, art. 2, para. 1(c)(5). The Convention on Double Taxation was unavailable because it does not apply to criminal enforcement efforts. Brief for the Government at 25, 707 F.2d at 663; Convention on Taxation, *supra* note 240. The Hague Convention for the Taking of Evidence Abroad was unavailable because *Marc Rich* involved criminal rather than civil or commercial matters. Hague Convention for the Taking of Evidence Abroad, *supra* note 240, art. 1.

243. Letters rogatory are simply a means by which a court of one country formally requests that a court of another country assist the former's judicial efforts. BLACK'S LAW DICTIONARY 815 (5th ed. 1979).

As one author commented: "[i]f nothing else, the use of letters rogatory in *Marc Rich* would have demonstrated respect for Swiss sovereignty and Swiss jurisdiction over one of its nationals."[244]

B. JURISDICTION OVER STATELESS VESSELS ON THE HIGH SEAS: UNITED STATES V. PINTO-MEJIA AND UNITED STATES V. HENRIQUEZ

In 1980, Congress amended the 1970 Comprehensive Drug Abuse Prevention and Control Act[245] by adding a new section, codified at 21 U.S.C. § 955a.[246] This section prohibits, *inter alia*, any person on board a vessel registered in the United States, or on board a vessel on the high seas subject to the jurisdiction of the United States, to knowingly or intentionally manufacture, distribute, or possess with intent to manufacture or distribute a controlled substance.[247] The section does not require proof that the destination of the substance be the United States. In effect, § 955a extends the penal jurisdiction of the United States to non-United States citizens aboard stateless vessels on the high seas without regard to whether drugs on such vessels are destined for the United States.

Section 995a greatly strengthened the hand of federal drug enforcement officers and federal prosecutors in their efforts to prevent vast quantities of drugs from being smuggled into the United States by sea.[248] One commentator described the problem for prosecutors prior to the enactment of § 955a:

> While the chief difficulty in prosecuting American citizens aboard United States vessels had been establishing beyond a

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244. Note, *supra* note 211, at 97.

245. Pub. L. No. 91-513, 84 Stat. 1287 (1970). This act repealed all prior federal drug legislation and consolidated federal drug abuse and control laws in a single act.

246. The Marijuana on the High Seas Act, Pub. L. No. 96-350, § 1, 94 Stat. 1159 (1980). This amendment closed a gap in the 1970 act with regard to drug smuggling on the high seas. Prior to the 1970 act, federal law criminalized possession of illegal drugs on board United States vessels on the high seas; the 1970 act did not. *See*, Anderson, *Jurisdiction Over Stateless Vessels on the High Seas: An Appraisal Under Domestic and International Law*, 13 J. MAR. L. & COMM. 323, 324 (1982). The 1980 amendment initially was addressed only to United States nationals and vessels registered in the United States. H.R. REP. No. 323, 96th Cong., 1st Sess. 2, 4-5 (1979). As a result of testimony at hearings on the proposed statute, the jurisdictional provisions of the statute were extended to cover stateless vessels on the high seas. See, Comment, *High Seas Narcotic Smuggling and Section 955a of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 FORDHAM L. REV. 688 (1982).

247. 21 U.S.C. § 955a(a) (1982).

248. For an excellent discussion of the ebb and flow of the United States Government's

> reasonable doubt their intent to smuggle the drugs into the United States, several new problems were presented by the participation of foreign crew members aboard foreign or stateless vessels. In addition to the question of proof of intent, Federal prosecutors soon found that motions to dismiss their cases for lack of jurisdiction were received very sympathetically by the courts. . . . A trend very quickly developed whereby smugglers began to use foreign or stateless vessels exclusively. Upon apprehension, their foreign crews were usually simply deported, while the vessels and their cargoes were forfeited . . . [w]ith little likelihood of imprisonment, the loss of an occasional cargo or vessel became just part of the cost of doing business to the drug smugglers.[249]

Two cases[250] decided by the Second Circuit Court of Appeals during the Survey years involve a new challenge to the prosecution of alleged drug smugglers: the possibility that the exercise of penal jurisdiction by the United States over persons aboard stateless vessels on the high seas, absent proof of a sufficient nexus between the vessel and the United States, violates international law.[251]

Most of the subject matter jurisdiction provisions of § 955a clearly are authorized by international law.[252] The section provides for jurisdiction over United States citizens regardless of the location or nationality of the vessel on which the citizen is

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efforts to stem the tide of drug smuggling, see, Anderson, *supra* note 246, at 323-27.

249. *Id.* at 325-26 (citations omitted).

250. United States v. Pinto-Mejia, 720 F.2d 248 (2d Cir. 1983); United States v. Henriguez, 731 F.2d 131 (2d Cir. 1984).

251. Although the issue is one involving the requirements of international law, the context in which this issue is presented in *Pinto-Mejia* and *Henriquez* actually involves a narrower question. The United States Congress may override international law, and United States courts are bound to follow congressional enactments that do so. *Pinto-Mejia*, 720 F.2d at 259; *Henriguez*, 731 F.2d at 134; Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 326, 1334 (2d Cir. 1972). Normally, however, courts will endeavor to interpret domestic legislation as consistent with the dictates of international law, unless the statute expressly provides that Congress intends to override international law. Spiess v. C. Itoh & Co., 643 F.2d 353, 356 (5th Cir. 1981), *cert. denied*, 454 U.S. 1130 (1982). Thus, if the Second Circuit were to determine that international law required a state to show a nexus between a stateless vessel on the high seas and the state in order to exercise jurisdiction, it would attempt to reconcile the express legislative intent to conform to international law with the language of § 955a(a). The court's holding in *Pinto-Mejia* and *Henriquez*, that international law imposed no nexus requirement, obviated the need for such a reconciliation.

252. It is a violation of international law for a state to prescribe or enforce a rule of law that it has no jurisdiction to prescribe or enforce. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 8 (1965).

apprehended.[253] Citizenship is a traditional basis of jurisdiction under international law.[254] The section establishes jurisdiction over foreign nationals aboard United States vessels wherever located.[255] Such jurisdiction is authorized by international law under the territoriality principle, allowing a state to exercise jurisdiction over all violations of its laws committed on its territory.[256] Vessels possess the nationality of their state of registry,[257] and offenses committed on board a vessel registered in the United States are deemed to be committed on United States territory.[258] Section 955a further provides for jurisdiction over persons on board any vessel inside the customs waters of the United States,[259] a basis also supported by international law and practice.[260]

The most controversial jurisdictional provision is that authorizing jurisdiction over persons on board stateless vessels on the high seas. Section 955a authorizes jurisdiction over persons on board vessels subject to the jurisdiction of the United States on the high seas[261] including vessels "without nationality or [vessels] assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958."[262]

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253. 21 U.S.C. § 955a(b).

254. Nationality or citizenship jurisdiction authorizes jurisdiction over all violations of a state's laws by its nationals regardless of where the violation occurs. C. HYDE, INTERNATIONAL LAW § 240 at 802-03 (2d rev. ed. 1947); J. MOORE, DIGEST OF INTERNATIONAL LAW § 202 at 255-56 (1906); L. OPPENHEIM, INTERNATIONAL LAW § 145 at 330 (8th ed. 1955).

255. 21 U.S.C. § 955a(a).

256. J. BRIERLY, THE LAW OF NATIONS 232 (5th ed. 1955), J. MOORE, *supra* note 254, § 200 at 225-26; Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116, 125 (1812).

257. Geneva Convention on the High Seas, art. 5 *done*, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (effective Sept. 30, 1962).

258. Lauritzen v. Larsen, 345 U.S. 571, 584-85 (1953); United States v. Flores, 289 U.S. 137, 155 (1933).

259. 21 U.S.C. § 955a(c). United States custom waters extend up to twelve miles from the United States coast, 19 U.S.C. § 1401(j) (1976). The United States possesses jurisdiction within this zone for the limited purpose of insuring compliance with customs, fiscal and sanitation laws. Geneva Convention on the Territorial Sea and the Contiguous Zone, art. 24, *done*, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (effective Sept. 10, 1964).

260. The precise theoretical basis for international legal recognition of this jurisdictional exercise does not seem to have been a matter upon which either jurists or scholars have agreed. *See* Lowe, *The Development of the Concept of the Contiguous Zone*, 52 BRIT. Y.B. INT'L L. 109 (1981); P. JESSUP, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION, 241-76 (1927).

261. 21 U.S.C. § 955b(a). The high seas are defined as "all waters beyond the territorial seas of the United States and beyond the territorial seas of any foreign nation." 21 U.S.C. § 955b(b).

262. 21 U.S.C. § 955a(d). Under the Convention a vessel assimilated to a vessel without

Defendants in *United States v. Pinto-Mejia*[263] and *United States v. Henriquez*[264] were crew members on vessels intercepted by the United States Coast Guard on the high seas. Neither vessel was flying a flag when sighted by the Coast Guard.[265] Both were headed on a course toward the United States mainland when sighted and both changed course away from the mainland after being sighted.[266] The Coast Guard boarded both vessels, discovered drugs and took defendants into custody.[267]

In both cases the defendants made a two-pronged attack on the district court's subject matter jurisdiction.[268] First, they argued that the trial courts' rulings on statelessness were based on insufficient evidence. Second, they argued that, even if the evidence supported a finding of statelessness, jurisdiction based on the mere fact of statelessness exceeded jurisdictional limits imposed by international law. Because the latter issue was identical in the two cases, it is discussed first.

There was no question that if either vessel could claim the nationality of a state, that state normally would have exclusive jurisdiction over offenses committed aboard that vessel on the high seas,[269] depriving United States courts of jurisdiction. Defendants argued that, even if the vessels were without nationality, that is, stateless, the United States could not exercise jurisdiction in conformity with international law over a vessel on the high seas absent the showing of a nexus between the vessel and the United States.[270] Since the government could not establish such a nexus, defendants argued, the indictments against them must be dismissed.

The Court of Appeals for the Second Circuit rejected defendants' argument and held that international law imposed no nexus requirement for the exercise of jurisdiction over stateless vessels.[271]

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nationality is a vessel that sails under the flags of more than one nation, using individual flags as a matter of convenience. Convention on the High Seas, *supra* note 257, art. 6, para. 2.

263. *Pinto-Mejia*, 720 F.2d at 248.

264. *Henriquez*, 731 F.2d at 131.

265. *Id.* at 135; *Pinto-Mejia*, 720 F.2d 248, 251.

266. *Pinto-Mejia*, 720 F.2d at 256; *Henriquez*, 731 F.2d at 133.

267. *Pinto-Mejia*, 720 F.2d at 256; *Henriquez*, 731 F.2d at 133.

268. *Pinto-Mejia*, 720 F.2d at 256; *Henriquez*, 731 F.2d at 134.

269. *Pinto-Mejia*, 720 F.2d at 260. Convention on the High Seas, *supra* note 257, arts. 5, 6. The rule establishing exclusive jurisdiction of the flag state applies unless otherwise provided in the Convention or other international treaties. *Id.* art 6, para. 1.

270. *Pinto-Mejia*, 720 F.2d at 258; *Henriquez*, 731 F.2d at 134.

271. *Pinto-Mejia*, 720 F.2d at 258; *Henriquez*, 731 F.2d at 134.

In the earlier of the two cases, *United States v. Pinto-Mejia*,[272] the court offered the more comprehensive analysis of the issue. The court noted that international law defines for all states both rights of navigation on the high seas and responsibilities associated with the exercise of those rights.[273] The grant of nationality of a state to a vessel serves to give the state exclusive jurisdiction over that vessel, offers protection of the laws of that state to those aboard such vessels, and assures a forum for the resolution of disputes involving such vessels. The principles governing the national and international status of flagships suggest "that a stateless vessel, which does not sail under the flag of one state to whose jurisdiction it has submitted, may not claim the protection of international law and does not have the right to travel the high seas with impunity."[274] The absence of such a right and the potential threat to the orderly use of international waters led the court to conclude that international law does not restrict the right of any nation to subject stateless vessels to its jurisdiction.[275]

While the conclusion that § 955a does not violate international law is undoubtedly correct, the court had available stronger support for the conclusion that it chose to construct. Other American courts have rejected any nexus requirement for the exercise of jurisdiction over stateless vessels,[276] as have courts of other nations,[277] international scholars,[278] and the community of nations itself in the Law of the Sea Treaty.[279] As one commentator has stated:

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272. *Pinto-Mejia*, 720 F.2d at 248.

273. *Id.* at 260. These responsibilities are general in definition. For example, the Convention on the High Seas provides that each state must exercise its right "with reasonable regard to the interests of other states in their exercise of freedom on the high seas." Convention on the High Seas, *supra* note 257, art. 2.

274. *Pinto-Mejia*, 720 F.2d at 260.

275. *Id.* at 261.

276. United States v. Martinez, 700 F.2d 1358 (11th Cir. 1983); United States v. Marino-Garcia, 679 F.2d 1373 (11th Cir. 1982), *cert. denied sub. nom.*, Pauth-Arzuza v. United States, 459 U.S. 1114 (1983); United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982).

277. *See, e.g.*, Molvan v. Attorney General for Palestine, (1948) A.C. 351, 367.

278. 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 21 (1968); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 212, 222 (1967); 26 HACKWORTH, DIGEST OF INTERNATIONAL LAW 725 (1941); M. MCDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 1084 (1962).

279. Third United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/Conf. 62/122 (1982), art. 110 *reprinted in* 21 I.L.M. 1261 (1982).

> The high seas are not *res nullius*, subject to the jurisdiction of no nation, but *res communis*, subject to the common jurisdiction of all nations. The protection that a registered vessel enjoys on the high seas is in the nature of an immunity . . . against interference from other states. The flag state does not gain its exclusive jurisdiction through the registration of the vessel. Rather, *but for* the registration, other states would have jurisdiction as well. Any other result would end in chaos and anarchy on the high seas. If only the country of registration could exercise jurisdiction at all, under any circumstances, then an unregistered vessel would be immune from interference by anyone. This result cannot and has never been tolerated by the nations of the world.[280]

Having decided that international law does not prohibit the exercise of jurisdiction over stateless vessels on the high seas, the court turned to important evidentiary questions raised by the government's efforts in both cases to establish the stateless status of each vessel. In *Pinto-Mejia*, the district court cited four factors in support of its finding of statelessness: when first sighted, the vessel was not flying a flag; the vessel changed course away from the United States coast upon being sighted; flags of several nations were found on board the vessel; and the vessel's Venezualan registration had expired.[281] The appellate court found the first two factors inadequate to support a finding of statelessness and the third factor inconclusive on the issue.[282] Evidence admitted on the fourth factor violated the rule against admission of hearsay evidence.[283] The court remanded to the district court, stating "[i]f the government adduces no new evidence sufficient to show that the [vessel] was stateless, the indictment must be dismissed."[284]

In *Henriquez*, the court first addressed the issue of whether the question of statelessness had been preserved on appeal. The government asserted that it had not because the question went to the merits rather than to the subject matter jurisdiction of the court.[285] The court rejected this assertion on the ground that the parties and the district court clearly intended the issue to be

280. Anderson, *supra* note 246, at 336.
281. *Pinto-Mejia*, 720 F.2d at 256.
282. *Id.*
283. *Id.* at 257-58.
284. *Id.* at 258.
285. *Henriquez*, 731 F.2d at 135.

preserved for review.[286] The evidence adduced by the government to show statelessness included: testimony that the vessel carried no flag, testimony that Honduras refuted registry and a Honduran certificate of non-registry.[287] The defendants supported their argument of Honduran registry with the testimony of a private investigator who suggested considerable confusion on the part of the Honduran government with regard to registry of this vessel, specifically whether the certificate of registration produced by the defendants or the certificate of non-registration produced by the government was invalid.[288] The appeals court remanded to the district court, first to consider the appropriate standard of proof on the issue of statelessness and second, to make appropriate findings based on proof related to the day on which the search and seizure had been made.[289]

V. UNITED STATES GOVERNMENT TAPING OF TELEPHONE CONVERSATIONS BETWEEN INFORMER IN NEW YORK AND ITALIAN CITIZEN IN ITALY DOES NOT VIOLATE INTERNATIONAL LAW: UNITED STATES V. ROMANO

Matteo Romano and Armando Glorioso, appellants, were convicted of conspiracy to possess, with intent to distribute, heroin, in violation of federal law[290] and were sentenced to ten years imprisonment.[291] Both challenged their convictions based upon due process violations[292] and prosecutorial misconduct.[293] Appellant Glorioso challenged his conviction on the additional grounds that evidence

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286. *Id.*

287. *Id.* at 135-36.

288. *Id.* at 136.

289. *Id.* at 136-37. The court noted that the evidence produced below was not narrowly focused on the status of the registration on January 6-7, 1983, the days on which the vessel was searched and seized; "[f]ar preferable would be a certificate of non-registry which satisfies the requirements of FED. R. EVID. 803(10) that speaks to the date of search and seizure, or a similarly valid showing of prior cancellation of the 1979 papers or non-registration in the first instance." *Id.* at 136.

290. 21 U.S.C. § 846 (1982).

291. United States v. Romano, 706 F.2d 370, 371 (2d Cir. 1983).

292. *Id.* at 372. Specifically, appellants argued that the government, by inciting them to come to New York and providing them with the heroin, conducted itself in a manner "so repugnant and excessive" as to shock the conscience. The court rejected this due process argument, holding that the government's conduct fell far short of the "demonstrable level of outrageousness" necessary to bar a conviction. *Id.*

293. *Id.* at 374. The court noted that "[i]n order to justify dismissing an indictment for

presented to the grand jury was obtained by means that violated international law, Italian law and United States-Italian treaty obligations.[294]

Armando Glorioso received telephone calls in Palermo, Italy from an informant for the United States Drug Enforcement Administration who previously had heroin dealings with Glorioso.[295] The informant called Glorioso from New York and allowed the government to tape the conversations. Glorioso introduced Romano during one of the calls as someone interested in purchasing the "merchandise" that the informant had for sale. After a number of phone calls, through which the details of a heroin purchase were arranged, Glorioso and Romano traveled to New York and while there negotiated in person with the informant and an undercover agent for the government. After Romano had taken samples of the heroin and left partial payment, Romano and Glorioso were arrested.[296]

In rejecting appellant Glorioso's argument that the actions of the United States Government violated international law, Italian law and the treaty obligations of the United States to Italy, the court noted that, in the instant case, no officer or agent entered Italian territory. Further, Italy had not alleged any violation of her sovereign rights in connection with the case. Citing the International Covenant of Civil and Political Rights[297] and international scholars,[298] the court noted that "[i]n international law an alien may assert a denial of justice only upon demonstration of grave or serious defects, such as refusal to grant rights reasonably to be expected by the accused in a criminal trial."[299] The court then concluded that the record could not be read to support a conclusion "that there has been such a manifest injustice as would violate any international standard of justice."[300] Since Glorioso did not suffer

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prosecutorial misconduct, the prosecutor must have knowingly withheld substantial evidence negating guilt . . . where it might reasonably be expected to lead the jury not to indict." *Id.* The prosecutor's alleged failure adequately to inform the grand jury on the legal ramifications of the entrapment defense did not rise to this level. *Id.*

294. *Id.* at 372.

295. *Id.*

296. *Id.*

297. *Id.* at 375. G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (1966).

298. J.L. BRIERLY, THE LAW OF NATIONS § 286 (6th ed. 1963); HENKIN, PUGH, SCHACHTER & SMIT, INTERNATIONAL LAW 742-43 (1980).

299. *Romano*, 706 F.2d at 375.

300. *Id.*

a denial of justice, no principle of international law was violated. Glorioso and Romano voluntarily entered the United States and committed a crime and thus, the United States had the power to punish them.

The court also rejected the appellant's argument that the Government's conduct in taping telephone conversations violated Italian law.[301] The Italian Penal Code prohibits the unauthorized installation of equipment for the purpose of intercepting telephone communications.[302] The installation in this case took place in New York. Italian law generally does not provide for its own extraterritorial application,[303] but even if it did, the United States is not required, by international law, to execute the penal laws of another country.[304] Thus, "[s]ince the recording of appellants' conversations took place within the United States, questions of illegality under Italian law are immaterial."[305]

Appellant's final argument, that recording of his conversations violated provisions of the United States-Italian Treaty of Friendship, Commerce and Navigation,[306] similarly was rejected by the court.[307] As to searches and seizures, that treaty simply requires that nationals of each state be treated by the other state no less favorably than its own nationals. The lower court measured the legality of the taping by the same standard that would govern the taping of conversations between American citizens and held that the Government's conduct met the standard.[308]

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301. *Id.* at 376.

302. *Id.*; Italian Penal Code (C.P.), art. 617.

303. *Romano*, 706 F.2d at 376.

304. The Antelope, 23 U.S. [10 Wheat] 66, 123 (1825); Huntington v. Attrill, 146 U.S. 657, 666 (1982).

305. *Romano*, 706 F.2d at 376.

306. Treaty of Friendship, Commerce and Navigation, *supra* note 172.

307. *Romano*, 706 F.2d at 376.

308. *Id.* at 377.