PRACTITIONER'S SURVEY

1990-91 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT*

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I. WARSAW CONVENTION

A. Victoria Sales Corp. v. Emery Air Freight Inc., 917 F.2d 705 (2d Cir. 1990); *Recovery of money damages afforded under article 18 of the Warsaw Convention does not extend to loss of cargo outside the physical boundaries of an airport.*

In *Victoria Sales Corp. v. Emery Air Freight*,[1] the United States Court of Appeals for the Second Circuit considered the scope of protection afforded air cargo under article 18 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air[2] (Warsaw Convention) and whether it extended to cargo held outside the physical perimeters of an airport. Under article 18(1), liability under the Warsaw Convention extends to casualty to cargo or baggage sustained "during transportation by air."[3] Article 18(2) defines transportation by air as "the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft."[4] Under article 18(3), however, "[t]he period of the transportation by air shall not extend to any transportation by land . . . performed outside an airport."[5] Because the damage to the goods at issue occurred at a warehouse outside the boundaries of Kennedy Airport, the court concluded that the loss was excluded from coverage under the Warsaw Convention.[6] Although article 18 may be interpreted as including damage incurred outside the physical perimeter of an airport while under a contract for air carriage, the court concluded that the plain language of the Warsaw Convention limits liability to the actual airport property.[7] Thus, although the cargo at issue remained in the custody of the air carrier at its warehouse less than a quarter mile off the airport property, article 18 liability did not apply.

1. 917 F.2d 705 (2d Cir. 1990).
2. *Id.* at 706 (citing Convention for the Unification of Certain Rules Relating to Int'l Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876)[hereinafter Warsaw Convention].
3. *Id.* at 706 - 07 (citing Warsaw Convention, *supra* note 2, art. 18(1)).
4. *Id.* at 707 (citing Warsaw Convention, *supra* note 2, art. 18(2)).
5. Victoria Sales Corp., 917 F.2d at 707 (citing Warsaw Convention, *supra* note 2, art. 18(3)).
6. *Id.*
7. *Id.*

B. *In re* Air Disaster At Lockerbie, Scotland (Rein v. Pan American World Airways, Inc.), 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991); *Punitive damages are not recoverable under article 17 of the Warsaw Convention even in the case of willful misconduct by an airline.*

In *In re Air Disaster At Lockerbie, Scotland*,[8] the Second Circuit Court of Appeals held that article 17 of the Warsaw Convention does not authorize punitive damages. This case consolidated two wrongful death actions brought by the relatives of passengers killed by terrorist attacks on commercial airlines.[9] The first case arose from the bombing of a Pan American World Airways, Inc. (Pan Am) aircraft over Lockerbie Scotland on December 21, 1988, in which all on board were killed;[10] the second case arose from the hijacking of a Pan Am aircraft on September 5, 1986 in Karachi, Pakistan.[11] In both actions, the plaintiffs sought punitive damages under article 17 of the Warsaw Convention and the Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol[12] (Montreal Accord). The court concluded that although the Warsaw Convention and the Montreal Accord are silent as to punitive damages, such damages are inconsistent with the purposes of either agreement.[13]

The overriding purpose of the Warsaw Convention, according to the court, was to limit air carriers' potential liability in the event of accidents.[14] The limitation was created to provide a more definite basis on which to calculate insurance premiums and to reduce the amount of disaster related litigation.[15] The court noted that, in effect, the liability limitation is a trade-off between the carriers and the passengers.[16] On the one hand, a carrier is per se liable for injuries or death incurred due to an accident on board an aircraft[17] unless the

8. 928 F.2d 1267 (2d Cir.), *cert. denied*, 112 S. Ct. 331 (1991).

9. *Id.* at 1269.

10. *Id.*

11. *Id.*

12. *In re* Air Disaster at Lockerbie, 928 F.2d at 1269 (citing Warsaw Convention, *supra* note 2, art. 17; Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement C.A.B. 18900, Approved by Exec. Order No. E-23680, May 13, 1966, *reprinted in* CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIAL 515 (1974)).

13. *Id.* at 1270.

14. *Id.* (citing Block v. Compagnie Nat'l Air France, 386 F.2d 1323, 1327 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 - 99 (1967)).

15. *Id.*

16. *In re* Air Disaster at Lockerbie, 928 F.2d at 1271.

17. *Id.* (citing Warsaw Convention, *supra* note 2, art. 17).

carrier proves it had taken all steps necessary to avoid injury.[18] In return, under article 22(1) of the Warsaw Convention and the Montreal Accord, recovery is limited to $75,000.[19] Despite the article 22 liability limitation, injured passengers may recover more if they show that the carrier engaged in willful misconduct or gross negligence.[20]

The court based its restriction of article 17 damages to compensatory damages, in part, on the legal significance of the phrase "dommage survenu."[21] Plaintiffs argued that "dommage survenu" translates broadly as "damage occurred" or "damage happened."[22] The court disagreed, finding that "dommage survenu" has been properly translated as "damage sustained."[23] This translation had been relied upon by the U.S. State Department and at subsequent conventions held to revise the Warsaw Convention, where English and French were official languages.[24] The court supported this interpretation with the later language of article 17 ("subie par un voyageur lorsque l'accident qui a caus [sic] le dommage") translated literally as "suffered by a traveler if the accident . . . caused the damage," because an accident could not "cause" purely legal punitive damages.[25] Similarly, previous U.S. cases have construed "dommage survenu" as pertaining to compensatory damages.[26] Because article 17 confers liability for damage actually sustained, only compensatory damages

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18. *Id.* (citing Warsaw Convention, *supra* note 2, art. 20(1)).

19. *Id.* at 1280.

20. *In re* Air Disaster at Lockerbie, 928 F.2d at 1285 (quoting Warsaw Convention, *supra* note 2, art. 25). Article 25 of the Warsaw Convention provides:

> The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be the equivalent to willful misconduct.

Id.

21. *Id.* at 1280 - 81.

The French text of article 17 provides:

> Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de debarquement.

Article 17 of the Warsaw Convention provides:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by the passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. at 1280.

22. *Id.*

23. *Id.* at 1281.

24. *In re* Air Disaster at Lockerbie, 928 F.2d at 1281.

25. *Id.*

26. *Id.* at 1281 (citing Floyd v. Eastern Airlines, Inc., 872 F.2d 1462 (11th Cir. 1989),

for actual harm caused by the accident, rather than general legal or punitive damages, were allowed under article 17.[27]

The court also acknowledged that punitive damages are contrary to the goals pursued by the liability scheme of the Warsaw Convention.[28] First, allowing punitive damages contravenes the goal of encouraging uniformity in the scope of liability and damages.[29] The availability of punitive damage awards under the Warsaw Convention based on national laws would defeat uniformity because national laws differ widely in their allowance of punitive damages.[30] Second, the availability of punitive damages could make airlines uninsurable.[31] Many jurisdictions proscribe insuring against punitive damages in fear that it would lessen the deterrent effect of punitive damages on willful misconduct.[32] Third, with the unpredictability of punitive awards, an uninsured airline faces exorbitant losses with each accident.[33] Even if the airline had insurance against punitive damages, ticket prices would escalate to compensate for premiums undoubtably difficult to calculate.[34] Finally, the allowance of punitive damages would create a stronger incentive for every plaintiff claiming willful misconduct to litigate.[35]

The court also disposed of plaintiffs' claim that punitive damages may be recovered under article 24(2) regardless of the translation of article 17.[36] Although plaintiffs contended that article 24(2) leaves the issue of recoverable damages to national laws, the drafting history and accompanying reports to the Warsaw Convention indicate that the primary concerns of article 24(2) were the rules of descent and

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cert. granted, 110 S. Ct. 2585 (1990); *In re* Air Disaster at Gander, Newfoundland, 684 F. Supp. 927 (W.D.Ky. 1987)).

27. *Id.*

28. *In re* Air Disaster at Lockerbie, 928 F.2d at 1287.

29. *Id.*

30. *Id.*

31. *Id.*

32. *In re* Air Disaster at Lockerbie, 928 F.2d at 1287.

33. *Id.* at 1288.

34. *Id.*

35. *Id.*

36. *In re* Air Disaster at Lockerbie, 928 F.2d at 1282 - 84. Article 24 of the Warsaw Convention provides:

> (1) In the cases covered by articles 18 and 19 [baggage claims] any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Id. at 1282 (quoting Warsaw Convention, *supra* note 2, art. 24).

distribution.[37] Because the national laws of descent regarding wrongful death actions vary widely, the drafters left the issue of wrongful death actions and recoverable damages to national law.[38] The fact that article 24(2) is silent as to punitive damages is further evidence that it is not a vehicle for their recovery under the Warsaw Convention.[39] Punitive damages are unique to common law systems and would have been controversial in multinational agreements.[40] If the issue had been raised, the drafters would have hotly debated it.[41]

The court also rejected plaintiffs' claim that punitive damages are recoverable under article 25 of the Warsaw Convention.[42] Plaintiffs argued that even if article 17 does not allow punitive damages, it does not apply when the carrier has engaged in willful misconduct.[43] The court concluded, however, that on its face, article 17 is not a provision affecting liability within the scope of article 25.[44] No authorities had interpreted it so.[45] The phrase "exclude or limit" liability has been extended to article 20(1) (due diligence and impossibility defenses),[46] article 22(1) (monetary limits)[47] and has been argued to extend to articles 21 (contributory negligence) and 26(4) (statute of limitations for baggage and cargo).[48] The court found, finally, that upon demonstration of willful misconduct, article 25 bars the application of certain provisions of the Warsaw Convention.[49] Because punitive damages are inconsistent with the goals of the remaining operative provisions of the Warsaw Convention, by implication they were not contemplated by the Warsaw Convention, even in the case of willful misconduct.[50]

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37. *Id.* at 1283.
38. *Id.*
39. *Id.* at 1284.
40. *In re* Air Disaster at Lockerbie, 928 F.2d at 1284.
41. *Id.*
42. *Id.* at 1285.
43. *Id.*
44. *In re* Air Disaster at Lockerbie, 928 F.2d at 1285 - 86.
45. *Id.* at 1286.
46. *Id.* (citing Molitch v. Irish Int'l Airlines, 436 F.2d 42, 44, n.1 (2d Cir. 1970)).
47. *Id.* (citing Grey v. American Airlines, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956)).
48. *In re* Air Disaster at Lockerbie, 928 F.2d at 1286 (citing 7 SHAWCROSS & BEAUMONT, AIR LAW 213 (4th ed. 1990)).
49. *Id.* at 1285 - 86.
50. *Id.* at 1285 (citing Warsaw Convention, *supra* note 2, art. 17).

C. Sulewski v. Federal Express Corp., 933 F.2d 180 (2d Cir. 1991); *For the purposes of article 17 of the Warsaw Convention a "passenger" is a person who is: 1) transported pursuant to a contract for carriage and 2) traveling for the simple pleasure of traveling or simply to get from one location to another.*

Sulewski v. Federal Express Corp.,[51] arose out of the crash of a Flying Tigers[52] cargo aircraft at the Kuala Lumpur airport in which plaintiff's husband was killed. The decedent had been employed by Flying Tigers as a mechanic assigned to travel on specified flights destined for locations where the carrier did not have mechanics stationed.[53] The demised flight had been scheduled to fly from Singapore to Kuala Lumpur, Malaysia and then to Hong Kong.[54] Although Flying Tigers had ground mechanics in Singapore and Hong Kong, they did not have one in Kuala Lumpur.[55] Although required to be present on their assigned flights, mechanics were responsible for transportation to and from the assigned flights.[56] Mechanics could either arrange for commercial air transportation or ride on scheduled Flying Tigers flights as off-duty "deadheads."[57]

Both the trial court and the Second Circuit Court of Appeals agreed that the decedent was not a "passenger" under article 17 of the Warsaw Convention.[58] In defining "passenger," the court looked first to the scope of article 1 of the Warsaw Convention.[59] The Second

51. 933 F.2d 180 (2d Cir. 1991).

52. Defendant Federal Express Corp. is Flying Tigers Corp.'s successor in interest. *Id.* at 182.

53. *Id.* at 181.

54. *Id.*

55. *Id.*

56. Sulewski, 933 F.2d at 181.

57. *Id.*

58. *Id.* Article 17 of the Warsaw Convention provides that:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a *passenger* or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Id. (quoting Warsaw Convention, *supra* note 2, art. 17)(emphasis added).

59. *Id.* Article 1 of the Warsaw Convention provides:

> (1) This convention shall apply *to all international transportation of persons*, baggage, or goods performed by aircraft for hire. It shall apply equally to *gratuitous transportation* by aircraft performed by an air transportation enterprise.
>
> (2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, *according to the contract made by the parties*, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party . . . .

Circuit noted that article 1 applies broadly "to all international transportation of persons."[60] A passenger within the meaning of the Warsaw Convention does not require the person to be a fare paying traveler because article 1(1) specifically includes gratuitous transportation.[61] Thus, employees of an air carrier receiving free transportation not related to work could be "passengers" within the meaning of article 17.[62]

The court further noted that article 1(2) contemplates that "passengers" be transported pursuant to a contract for carriage.[63] Contracts for carriage need be no more than "a promise, an undertaking, on the part of the carrier to transport the passenger, and the consent of the passenger."[64] Thus, the Warsaw Convention covers only those passengers transported pursuant to a contract.[65] The court also considered the common dictionary definition of "passenger": "one who travels either for the pleasure of traveling simpliciter or for the mundane purposes of getting from one point to another."[66] The court then distinguished the two requirements of "passengers" under article 17. First, the person must travel pursuant to a contract for carriage.[67] Second, they must travel either for the simple pleasure of traveling or simply for the purposes of getting from one location to another.[68]

According to the court, plaintiff's husband, the decedent, did not satisfy the two part test because he was traveling on the flight pursuant to his employment contract rather than pursuant to a contract for carriage.[69] Moreover, the decedent's purpose for flying was to fulfill his job requirements.[70] Decedent did not board the flight as someone merely traveling from one location to another.[71] Thus, the court held that as long as the decedent's presence on the flight was specifically required, the lack of in-flight duties did not provide him with the sta-

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Id. (quoting Warsaw Convention, *supra* note 2, art. 1(1))(emphasis added).

60. Sulewski, 933 F.2d at 183.

61. *Id.*

62. *Id.*

63. *Id.* at 183 - 84.

64. Sulewski, 933 F.2d at 183 - 84 (citing Block v. Compagnie Nationale Air France, 386 F.2d 323, 333 (5th Cir. 1967), *cert. denied*, 392 U.S. 905 (1968); GRONFORS, AIR CHARTER AND THE WARSAW CONVENTION 60 (1956)).

65. *Id.* at 184.

66. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1650 (1971)).

67. *Id.*

68. Sulewski, 933 F.2d at 184.

69. *Id.*

70. *Id.*

71. *Id.*

tus of a "passenger."[72] Therefore, there was no article 17 liability for the airline under the Warsaw Convention.

D. *In re* Air Crash Disaster Near Warsaw, Poland, 760 F. Supp. 30 (E.D.N.Y. 1991); *The "destination" of the passenger for the purposes of establishing subject matter jurisdiction under the Warsaw Convention can be other than that stated on the ticket, depending on the intended destination of the passenger.*

In *In re Air Crash Disaster Near Warsaw, Poland*,[73] the United States District Court for the Eastern District of New York held that the "destination" of passengers for the purposes of establishing subject matter jurisdiction under article 28 of the Warsaw Convention could be other than that stated on the passenger's ticket.[74] The District Court, therefore, had subject matter jurisdiction over an action brought by representatives of airline passengers killed in a crash of an airplane owned by defendant LOT Polish Airlines (LOT).[75] Although the deceased passengers intended only to fly from Poland to New York, they were required by the Polish government to purchase round-trip tickets.[76] At the outset of litigation, defendant LOT moved to dismiss for lack of subject matter jurisdiction under the Warsaw Convention. LOT argued that because the passengers' ultimate destination according to their tickets was Poland, article 28 of the Warsaw Convention would not permit litigation in the U.S.[77] The District Court disagreed.

Under article 28 of the Warsaw Convention, claims under the Warsaw Convention may be brought in four locations: (1) the domicile of the carrier; (2) the carrier's principal place of business; (3) the carrier's place of business through which the contract for carriage was made; and (4) the place of destination.[78] Although the Second Circuit had previously interpreted the "place of destination" under article 28 to mean the destination stated on the ticket,[79] the District Court held

72. *Cf.* Mexico City Aircrash, 708 F.2d 400 (9th Cir. 1983) ("Deadheading" stewardess aboard employer's aircraft in transport to origination point of flight to which she was assigned and having neither in-flight duties on demised flight nor contractual obligation to be aboard may have been a passenger under the Warsaw Convention)(*cited in* Sulewski, 933 F.2d at 186).

73. 760 F. Supp. 30 (E.D.N.Y. 1991).

74. *Id.* at 32.

75. *Id.* at 31.

76. *Id.* at 32.

77. *In re* Air Disaster Near Warsaw, Poland, 760 F. Supp. at 30.

78. *Id.* (citing Warsaw Convention, *supra* note 2, art. 28).

79. *Id.* at 31 (citing Petrire v. Spantax, S.A., 756 F.2d 263 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985)).

that the intended destination controlled even if different than that stated on the ticket.[80]

The policy of article 28, according to the District Court, was to allow litigation in countries that have an interest in the litigation or have unique competency to hear a case because of location.[81] The governmental interest in the place of destination stems from the passenger having an enduring relationship with that country.[82] That element of governmental interest, according to the District Court, would be no less where the passenger intended one country to be the ultimate destination and the ticket stated otherwise.[83] Under this interpretation of article 28, the District Court, therefore, had subject matter jurisdiction based on the destination intended by the ticket holders.[84]

E. Padilla v. Olympic Airways, 765 F. Supp. 835 (S.D.N.Y. 1991); *Plaintiff failed to show that injuries sustained due to voluntary intoxication in flight are within the scope of the term "accident" for purposes of airline liability under article 17 of the Warsaw Convention.*

In *Padilla v. Olympic Airways*,[85] the United States District Court for the Southern District of New York considered the scope of the term "accident" under article 17 of the Warsaw Convention and whether it applied to a passenger's loss of consciousness as a result of intoxication.[86] Article 17 provides that if a passenger proves that the alleged injuries were proximately caused by an "accident," the carrier will be liable without proof of fault.[87] In this case, plaintiff became intoxicated while in flight from Greece to the U.S., lost consciousness in the lavatory of defendant's aircraft and injured his left arm.[88] Plaintiff subsequently sought compensation for lost earnings and pain and suffering under the Warsaw Convention.[89] Plaintiff alleged that defendant caused the accident by allowing him to become intoxicated during the course of the flight.[90]

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80. *Id.*
81. *In re* Air Crash Disaster Near Warsaw, Poland, 760 F. Supp. at 32.
82. *Id.*
83. *Id.*
84. *Id.*
85. 765 F. Supp. 835 (S.D.N.Y. 1991).
86. *Id.* at 837.
87. *Id.* (citing Warsaw Convention, *supra* note 2, art. 17).
88. *Id.* at 836 - 37.
89. Padilla, 765 F. Supp. at 837.
90. *Id.* at 838.

The District Court entered judgment for the defendant holding that plaintiff failed to demonstrate that the injuries resulted from an "accident" within the meaning of article 17.[91] Although the Warsaw Convention does not define "accident," the U.S. Supreme Court has defined it to cover:

> an unexpected or unusual event or happening that is external to the passenger . . . . But when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.[92]

The District Court concluded that plaintiff had failed to show the injuries were sustained as a result of an unusual or unexpected event and that the injuries likely resulted from his own internal reaction to voluntary intoxication.[93]

II. JURISDICTION OVER FOREIGN DEFENDANTS

A. Landoil Resources Corp. v. Alexander & Alexander Serv., Inc., 918 F.2d 1039 (2d Cir. 1990); *Thirteen business trips to New York in an eighteen month period were not enough to confer personal jurisdiction over foreign defendants under the New York "solicitation plus" rule.*

In *Landoil Resources Corp. v. Alexander & Alexander Serv., Inc.*,[94] the Second Circuit Court of Appeals found that activity of defendant insurance and reinsurance brokers in New York was not sufficient to confer personal jurisdiction under the New York jurisdiction statutes. The applicability of New York Civil Practice Law & Rules § 301 for finding presence in New York turns on whether the contact with the state can be considered systematic and continuous "doing business" in New York.[95]

The Second Circuit had previously held that under New York law, solicitation of business alone will not justify a finding of corporate presence.[96] Applying a "solicitation plus" rule, jurisdiction may be found where the foreign defendant not only engages in substantial and continuous solicitation, but also engages in other activities of sub-

91. *Id.*
92. *Id.* at 837 (citing Air France v. Saks, 470 U.S. 392, 405 - 06 (1985)).
93. Padilla, 765 F. Supp. at 838.
94. 918 F.2d 1039 (2d Cir. 1990).
95. *Id.* at 1043.
96. *Id.* (citing Hoffritz For Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 57 (2d Cir. 1985)).

stance in New York.[97] In this case, although the insurance and reinsurance brokers had made thirteen trips to New York in an eighteen month period, the court did not construe these activities as satisfying the "solicitation plus" rule.[98]

B. Alexander & Alexander Serv., Inc. v. Lloyd's Syndicate 317, 925 F.2d 44 (2d Cir. 1991); *Maintaining a trust fund in a New York bank for purposes of underwriting in New York was not sufficient activity for a foreign defendant to fall within the "doing business" provision of New York jurisdiction statutes.*

The Second Circuit Court of Appeals reached the identical conclusion in *Alexander & Alexander Services, Inc. v. Lloyd's Syndicate 317*[99] as was reached in *Landoil Resources Corp. v. Alexander & Alexander Serv., Inc.*[100] After certifying the question regarding the applicability of the New York long arm statute to a foreign insurance underwriter,[101] the Second Circuit dismissed the action in federal court for lack of subject matter jurisdiction.[102] Maintaining a trust fund in a New York bank for the purposes of underwriting in New York was insufficient activity to fall within the § 301 "doing business" provision of New York Civil Practice Law and Rules.[103]

C. Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991); *The PLO is not a "state" under the F.S.I.A., therefore it is not immune from suit under the F.S.I.A. and, although politically charged, the suit did not involve non-justicable political questions. Additionally, choice of law analysis is required to determine whether Italian substantive law governs the dispute and thus whether U.S. federal or state service of process rules apply.*

In *Klinghoffer v. S.N.C. Achille Lauro*,[104] the Second Circuit held

97. *Id.* at 1043 - 44 (citing Beacon Enterprises, Inc. v. Menzies, 715 F.2d 757, 763 (2d Cir. 1983)).

98. Landoil Resources, 918 F.2d at 1045 - 46.

99. 925 F.2d 44 (2d Cir. 1991).

100. 918 F.2d 1039 (2d Cir. 1990) (discussed in text *supra* part II.A.).

101. Alexander & Alexander Serv., Inc. 925 F.2d at 45 (citing N.Y. CIV. PRAC. L. & R. § 301).

102. *Id.* at 47.

103. *Id.* at 46.

104. 937 F.2d 44 (2d Cir. 1991). The Second Circuit had previously granted the PLO's petition for leave to appeal after the district court had denied the PLO's motion to dismiss. *See* Klinghoffer v. S.N.C. Achille Lauro, 921 F.2d 21 (2d Cir. 1990). The Second Circuit held that because an interlocutory order denying defendant's immunity claims involved a controlling question of law and one on which there may be substantial grounds for difference of opinion, it was worthy of immediate appellate review.

that the Palestine Liberation Organization (PLO) is not a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (F.S.I.A.). The combined civil actions against the PLO stemmed from the hijacking of the Achille Lauro ship in the Mediterranean and the homicide of Leon Klinghoffer in October 1985.[105] Marilyn Klinghoffer and the estate of Leon Klinghoffer commenced the action in the District Court[106] against the owner and charterer of the Achille Lauro, two travel agencies, and additional defendants.[107] Other passengers subsequently initiated the companion actions.[108]

Defendants impleaded the PLO for indemnification and contribution, as well as for compensatory and punitive damages for tortious interference with business.[109] Service of process was attempted on the PLO through its Permanent Observer at the United Nations.[110] The PLO moved for dismissal on the grounds that it was immune under the F.S.I.A.,[111] that the case presented a non-justiciable political controversy,[112] that the court lacked personal jurisdiction[113] and that the service of process was deficient.[114] The District Court denied the motion and denied a subsequent motion for reargument.[115] Nevertheless, the court certified the question for interlocutory appeal.[116]

The Second Circuit first concluded that the PLO did not fall within the definition of "foreign state" under the F.S.I.A.[117] The court had previously held that states include "entit[ies] that ha[ve] a defined territory and a permanent population, [that are] under the control of [their] own government, and that engage[ ] in, or ha[ve] the

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105. *Id.* at 46.

106. Klinghoffer v. S.N.C. Achille Lauro, 739 F. Supp. 854 (S.D.N.Y. 1990).

107. Klinghoffer, 937 F.2d at 47.

108. *Id.* at 47.

109. *Id.* The court noted:

> [I]t remains unclear what role, if any, the PLO played in the events described above. According to some reports, the seizure was undertaken at the behest of Abdul Abbas, who is reportedly a member of the PLO. The PLO, however, denies any responsibility for the hijacking, and maintains that its involvement in the affair was limited to helping to secure the surrender of the hijackers and to ensure the safety of the ship and its passengers.

Id.

110. *Id.*

111. Klinghoffer, 937 F.2d at 47 (citing 28 U.S.C. §§ 1602 - 1611 (1988)).

112. *Id.* at 49.

113. *Id.* at 50.

114. *Id.* at 52.

115. Klinghoffer, 937 F.2d at 47.

116. *Id.*

117. *Id.*

capacity to engage in, formal relations with other such entities."[118] According to the court, the PLO possessed none of these characteristics.[119] Although the PLO Declaration of Statehood "contemplates" that the territory will consist of the West Bank, the Gaza Strip, and East Jerusalem, the mere hope of controlling that territory "does not establish that it has a defined territory now."[120] More importantly, the exiled PLO Government in no sense controlled its contemplated territory.[121] Finally, the PLO lacked capacity to implement the obligations that are necessary to any capacity to enter into formal international relations because it did not control any territory.[122] Thus, the fact that the PLO had Permanent Observer status at the U.N. did not avail it of the immunity afforded under the F.S.I.A.[123]

The court next concluded that the PLO's claim that the case presented a non-justiciable political question was without merit.[124] Although the court felt the issues surrounding the existence of an independent Palestinian state injected politics into the case, the fact that the case was politically charged did not, in and of itself, establish non-justiciable political questions.[125]

Political questions have been found under six conditions: (1) where there is constitutional assignment of the issue to one of the coordinate branches of government; (2) where there is a lack of standards for resolution of the issue; (3) where the issue is unresolvable without a policy determination outside judicial discretion; (4) where resolution requires judicial encroachment on one of the coordinate branches; (5) where there is need for adherence to a political decision already made; or (6) where multifarious pronouncements from the various branches on a single issue is likely.[126] The court concluded that the Klinghoffer action was, in substance, an ordinary tort claim and none of the circumstances typical of a political question were present.[127]

On the issues of personal jurisdiction and service of process, the

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118. *Id.* (citing National Petrochemical Co. v. M/T Stolt Sheaf, 860 F.2d 551, 553 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989) (quoting RESTATMENT (THIRD) FOREIGN RELATIONS LAW § 201 (1987)).

119. Klinghoffer, 937 F.2d at 48.

120. *Id.* at 47.

121. *Id.*

122. *Id.* at 48.

123. Klinghoffer, 937 F.2d at 48.

124. *Id.* at 49.

125. *Id.*

126. *Id.* (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

127. Klinghoffer, 937 F.2d at 49.

Second Circuit found that the evidence on the record was not sufficient to make a ruling.[128] Regarding personal jurisdiction, the court noted that because the action was under the court's admiralty jurisdiction, the law of the forum state (New York) governed.[129] The only plausible source of personal jurisdiction under New York law is found in New York Civil Practice Law & Rules § 301 which confers jurisdiction over entities "doing business" in New York.[130] Under § 301, an entity is doing business in New York when it is engaged in activity in New York of a continuous and substantial character so as to be present in the state.[131] The court held, however, that only PLO activities not conducted in furtherance of its status as Permanent Observer at the U.N. may be considered as a basis for jurisdiction.[132]

In determining whether jurisdiction would exist, consideration of the PLO's U.N. activities would conflict with prior judicial construction of the Anti-Terrorism Act[133] (A.T.A.) which bars transactions with or on behalf of the PLO.[134] Although the A.T.A. bars PLO activity in the U.S., the statute was held not to preclude maintenance of a mission to the U.N.[135] The PLO's participation in the U.N. is based on the legal fiction that the U.N. Headquarters is not on U.S. territory, but on neutral ground over which the U.S. has ceded control.[136] Moreover, conferring U.S. jurisdiction over individuals conducting business at the U.N. may put an undue burden on organizations participating in U.N. affairs.[137] The court remanded the case for determination of whether the PLO's non-U.N. activities would provide a jurisdictional basis.[138]

The PLO's complaint of defective service of process was based on process being served on the PLO's U.N. Observer in New York, naming the PLO only by its common name.[139] Under New York law, initiatory process served on unincorporated associations must name

128. *Id.* at 52.

129. *Id.* at 50 (citing Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963) (en banc)).

130. *Id.* (citing N.Y.Civ. Prac. L. & R. § 301).

131. Klinghoffer, 937 F.2d at 50.

132. *Id.* at 51.

133. *Id.* (citing Anti-Terrorism Act, 22 U.S.C. §§ 5201 - 5203 (1988)).

134. *Id.* (citing United States v. PLO, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988)).

135. Klinghoffer, 937 F.2d at 51 (citing United States v. PLO, 695 F. Supp. 1456, 1471 (S.D.N.Y. 1988)).

136. *Id.*

137. *Id.*

138. *Id.* at 52.

139. Klinghoffer, 937 F.2d. at 52.

and be served on the President or Treasurer of the association.[140] The service of process on the PLO in this case would therefore be deficient. Alternatively, under federal law, naming the PLO in its common name and serving papers on its agent in New York would be adequate service of process.[141] Under Rule 17(b) of the Federal Rules of Civil Procedure, the law of the forum state determines the appropriate manner in which process is to be served, unless the action arises under the U.S. Constitution or federal statutes.[142]

In cases where foreign law applies, federal law is supplanted and the choice of law rules of the forum state control the proper method of service of process.[143] The District Court erroneously reasoned, however, that because the action was brought under maritime and admiralty jurisdiction, U.S. federal law applied.[144] The District Court instead should have engaged in a choice of law analysis as to whether federal or New York service of process rules applied.[145] Under the Supreme Court's holding in *Lauritzen v. Larsen*,[146] even if jurisdiction has been asserted under U.S. admiralty law, another nation's contacts with a particular event may be so great as to warrant application of the law of that nation.[147] The Second Circuit remanded the case, holding that the District Court should have engaged in a choice of law analysis to determine whether Italian law applied because the ship involved was of Italian ownership and the events giving rise to the action took place in the Mediterranean.[148]

D. Posadas De Mexico, S.A. v. Dukes, 757 F. Supp. 297 (S.D.N.Y. 1991); *A foreign corporation is not required to file a certificate of authority to transact business in New York where its intrastate activities are merely incidental to its interstate and international activities.*

In *Posadas De Mexico, S.A. v. Dukes*,[149] the Federal District Court for the Southern District of New York held that the New York

140. *Id.* (citing N.Y. GEN. ASS'NS LAW § 13 (McKinney 1991)).
141. *Id.* at 53 (citing FED. R. CIV. P. 4(d)(3)).
142. *Id.*
143. Klinghoffer, 937 F.2d. at 54.
144. *Id.* at 53.
145. *Id.*
146. 345 U.S. 571 (1953) (*cited in* Klinghoffer, 937 F.2d at 53).
147. Klinghoffer, 937 F.2d at 53 (citing Bilyk v. Vessel Nair, 754 F.2d 1541 (9th Cir. 1985)).
148. *Id.* at 54.
149. 757 F. Supp. 297 (S.D.N.Y. 1991).

statute[150] requiring foreign corporations doing business in New York to file a certificate of authority to transact business in New York before bringing an action did not apply when plaintiff's intrastate activities were merely incidental to its interstate and international activities.[151] Plaintiff Posadas owned and operated hotels located exclusively in Mexico.[152] Plaintiff never maintained an office, employees or a telephone listing in New York, was not licensed to do business in New York and did not conduct intrastate business.[153] Plaintiff did, however, maintain a bank account in New York for the purposes of receiving deposits from travelers who made reservations at plaintiff's resorts.[154] Defendants were New York independent contractors who handled reservations, deposits and marketing services for plaintiff.[155] Plaintiff contended that in the course of its relationship with defendants, defendants converted deposits remitted to secure reservations at plaintiff's hotels and plaintiff sought $221,122.31 in compensatory and punitive damages.[156]

At trial, defendants moved to amend their answer[157] to assert an affirmative defense that plaintiff had not filed the required certificate of authority to transact business in New York[158] and moved for dismissal.[159] The court denied the motion, ruling that although plaintiff maintained bank accounts and engaged in relations with independent contractors in New York, it was not engaging in substantial intrastate activity in New York sufficient to trigger New York Business Corporation Law (B.C.L.) § 1312 which regulates foreign corporations doing business in New York.[160] Where, as in this case, the activity in New York was only incidental to interstate or international commerce, B.C.L. § 1312 did not apply.[161] The fact that plaintiff's activi-

150. *Id.* at 299 n.1 (quoting N.Y. BUS. CORP. LAW § 1312 (McKinney 1990)).
151. *Id.* at 301 - 02.
152. *Id.* at 298.
153. Posadas, 757 F. Supp. at 298.
154. *Id.*
155. *Id.*
156. *Id.*
157. Posadas, 757 F. Supp. at 300 (discussing FED. R. CIV. P. 15(a)).
158. *Id.* at 299. Section 1312 provides in part:

> A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state and it has paid to the state all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this state without authority.

Id. (quoting N.Y. BUS. CORP. LAW § 1312).
159. *Id.*
160. *Id.* at 300.
161. Posadas, 757 F. Supp. at 301.

ties may have constituted "doing business" for the purposes of personal jurisdiction had no bearing on the applicability of B.C.L. § 1312.[162] Whether the plaintiff had engaged in commerce elsewhere in the U.S. was similarly irrelevant to assessing the applicability of B.C.L. § 1312.[163]

E. Volkswagen De Mexico, S.A. v. Germanischer Lloyd, 768 F. Supp. 1023 (S.D.N.Y 1991); *Plaintiff did not satisfy New York C.P.L.R. § 301 or § 302(a)(1) and thus failed to establish personal jurisdiction over foreign defendants who had only slight contacts with New York.*

In *Volkswagen De Mexico, S.A. v. Germanischer Lloyd*,[164] the Federal District Court for the Southern District of New York held that it could not exercise personal jurisdiction over defendants who had only slight contact with New York.[165] This case arose out of the 1987 disappearance of the M/V Tuxpan en route to Mexico and the U.S. from West Germany.[166] Plaintiffs in the action were composed of 128 shippers, consignees, owners and insurers of cargo lost on the Tuxpan who brought an action for loss of cargo.[167] Defendant Sietas was the builder of the Tuxpan, defendant Krupp was the builder of the Tuxpan's engines and defendant Germanischer, a classification society, certified the Tuxpan.[168] Although Germanischer maintained an office in New York and conceded jurisdiction, Krupp and Sietas had no offices in the U.S. and contested jurisdiction.[169]

Plaintiffs alleged that jurisdiction over Krupp could be exercised based on activities of Krupp subsidiaries in Illinois and Ontario.[170] The Illinois subsidiary, however, had not effected a sale in New York since 1984.[171] Although the Illinois subsidiary had an agreement with a company located in Texas to service Krupp products, Krupp contended that the relationship was not an agency on which jurisdiction could be founded.[172] In addition, Krupp had contractual relations with a New York company, but no transactions with the company

162. *Id.* at 301 - 02.
163. *Id.* at 301 n.1.
164. 768 F. Supp 1023 (S.D.N.Y. 1991).
165. *Id.* at 1028.
166. *Id.* at 1026.
167. *Id.*
168. Volkswagen, 768 F. Supp. at 1025.
169. *Id.* at 1025 - 26.
170. *Id.* at 1026.
171. *Id.*
172. Volkswagen, 768 F. Supp. at 1026.

had occurred since 1982.[173] In the alternative, plaintiffs contended that jurisdiction over Sietas may have been based on its employees' presence in Texas during 1984 and 1985 in connection with repair and maintenance of the Tuxpan and another ship.[174]

Plaintiffs contended that personal jurisdiction may be exercised over Krupp and Sietas because both were "doing business" in New York within C.P.L.R. § 301[175] and had transacted business in New York within C.P.L.R. § 302(a)(1)[176] or that their contacts with New York warranted further discovery as to the extent of their contacts.[177] The District Court, however, rejected both bases of jurisdiction.[178] No evidence was produced suggesting that Krupp's contact with New York companies or the activities of its Illinois or Ontario subsidiaries resulted in any recent activities in New York.[179] Furthermore, evidence that was presented did not suggest that further discovery would reveal New York activities.[180] Krupp's only recent activities in New York were attributable to advertising in magazines distributed in New York.[181] The court held that solicitation of business alone will not justify a finding of corporate presence.[182] The court concluded that no evidence was adduced that Sietas had sufficient contacts with New York.[183]

There was similarly no jurisdiction over either Krupp or Sietas under C.P.L.R. § 302.[184] Plaintiffs conceded that jurisdiction may be found under C.P.L.R. § 302 only when the event or occurrence giving rise to the cause of action occurred in New York.[185] Because there was no allegation that the Tuxpan had ever been in New York, C.P.L.R. § 302 could not provide a basis of jurisdiction.[186] The District Court also refused to transfer the proceeding to Federal District Court in Texas since plaintiffs had failed to demonstrate that Krupp or Sietas would be subject to personal jurisdiction in Texas.[187]

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173. *Id.*
174. *Id.* at 1028.
175. *Id.* at 1027 (citing N.Y. CIV. PRAC. L. & R. § 301).
176. Volkswagen, 768 F. Supp. at 1028 (citing N.Y. CIV. PRAC. L. & R. § 302(a)(1)).
177. *Id.*
178. *Id.*
179. *Id.*
180. Volkswagen, 768 F. Supp. at 1028.
181. *Id.*
182. *Id.*
183. *Id.*
184. Volkswagen, 768 F. Supp. at 1028.
185. *Id.*
186. *Id.*
187. *Id.* (citing 28 U.S.C. §§ 1404(a), 1406(a)).

III. FOREIGN SOVEREIGN IMMUNITIES ACT

A. Barkanic v. General Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957 (2d Cir. 1991); *The F.S.I.A. requires that courts apply the choice of law rules of the forum state with respect to all issues governed by the state's substantive law despite the F.S.I.A. jurisidictional basis in federal court.*

In *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*,[188] the Second Circuit Court of Appeals considered whether choice of law rules apply to laws limiting liability in a wrongful death action arising out of an airplane crash and whether the District Court applied the correct choice of law rules. In this instance, the crash occurred in the People's Republic of China.[189] Two American citizens were killed in the crash.[190] Applying New York choice of law provisions, the District Court determined that Chinese law, including rules limiting liability to $20,000, should be applied.[191]

The Second Circuit affirmed the lower court decision. The court concluded that even though the F.S.I.A. is silent as to choice of law, it requires courts to apply the choice of law rules of the forum state to all issues governed by the forum state's substantive law.[192] The court noted that the goal of F.S.I.A. is to make sovereigns liable "in the same manner and to the same extent" as individuals.[193] Moreover, a court sitting in diversity jurisdiction is required to apply state choice of law rules when the issues before it are governed by state substantive law.[194] A federal court sitting in federal question jurisdiction may, but is not required to apply federal choice of law provisions.[195] The District Court was, therefore, not prohibited from applying the New York choice of law provisions.[196]

Under New York choice of law "interest analysis," the law of the

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188. 923 F.2d 957 (2d Cir. 1991).

189. *Id.* at 958.

190. *Id.*

191. *Id.*

192. Barkanic, 923 F.2d at 959 - 60. In *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, the Supreme Court held that "where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." 462 U.S. 611, 622 n.11 (1983) (*quoted in* Barkanic, 923 F.2d at 959).

193. *Id.* at 959 (citing 28 U.S.C. § 1606).

194. *Id.* at 960 (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)).

195. *Id.* at 961 (citing Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 795 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981)).

196. Barkanic, 923 F.2d at 961.

place with the greater interest in the dispute should be applied.[197] Typically, this is the law of the place where the accident occurs, unless the parties to the suit are domiciliaries of the same state.[198] Under the New York Court of Appeals ruling in *Schultz v. Boy Scouts of America, Inc.*, the New York choice of law provisions apply to loss distribution and limitation rules.[199] Applying the New York choice of law rules, the District Court correctly determined that the law of China controlled, including the rule limiting liability to $20,000.[200]

B. Morgan Guar. Trust Co. v. Republic of Palau, 924 F.2d 1237 (2d Cir. 1991); *United States trust territories do not satisfy the recognized international criteria for sovereign statehood and therefore are not "foreign states" under § 1441(d) of the F.S.I.A.*

In *Morgan Guar. Trust Co. v. Republic of Palau*,[201] plaintiffs initiated an action to recoup losses incurred as guarantors of defaulted loans made to defendant, the Republic of Palau.[202] The action previously had been removed from New York State Supreme Court under the removal jurisdiction of the F.S.I.A.[203] The Federal District Court entered judgment for the plaintiff.[204] The Second Circuit reversed, holding that the Republic of Palau, which was a trust territory of the U.S., was not a "foreign state" within the meaning of the F.S.I.A. and, therefore, there was no removal jurisdiction under § 1441(d) of the F.S.I.A.[205]

In 1947, the U.S. was granted a trusteeship of more than 2,100 islands formerly controlled by Japan.[206] Because the trust was designated a "strategic" trust, the U.S., under the supervision of the U.N. Security Council, was entitled to full administrative authority.[207] Under the Trusteeship Agreement for the Former Japanese Mandated

197. *Id.* at 962 (citing Babcock v. Jackson, 191 N.E.2d 279, 12 N.Y.2d 473, 240 N.Y.S.2d 743 (1963); Neumeier v. Kuehner, 286 N.E.2d 454, 31 N.Y.2d 121, 335 N.Y.S.2d 64 (1972)).

198. *Id.* (citing Neumeier, 286 N.E.2d at 457 - 58, 31 N.Y.2d at 128, 335 N.Y.S.2d at 70)).

199. *Id.* at 963 (citing Schultz v. Boy Scouts of America, Inc., 480 N.E.2d 679, 65 N.Y.2d 189, 491 N.Y.S.2d 90 (1985)).

200. Barkanic, 923 F.2d at 963.

201. 924 F.2d 1237 (2d Cir. 1991).

202. *Id.*

203. *Id.* (citing 28 U.S.C. §§ 1441(d), 1603(a)).

204. *Id.*

205. Morgan Guar. Trust Co., 924 F.2d at 1247.

206. *Id.* at 1239.

207. *Id.* (citing U.N. CHARTER art. 83). The supervisory functions over non-strategic trusts are conducted by the U.N. General Assembly with the Assistance of the U.N. Trusteeship Council. *Id.* (citing U.N. CHARTER art. 85).

Islands[208] (Trustee Agreement), the U.S. would provide for the trust territory's economic, political and social advancement, including development of independence and self-determination.[209] The Trusteeship Agreement conferred broad powers on the U.S.:

> The administering authority shall have full powers of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such laws of the U.S. as it may deem appropriate to local conditions and requirements.[210]

Over the years, various islands covered by the Trustee Agreement have become independent from the U.S.[211] The various islands have negotiated agreements with the U.S., changing their political status either to that of Commonwealth[212] or free association. The Compact of Free Association negotiated with Palau which would have shifted governmental administration to the Palauans had never been approved by the Palauan people.[213]

The Second Circuit concluded that Palau was not a foreign state within the meaning of F.S.I.A. § 1603(a).[214] In deciding this issue, the court relied on the attributes of "sovereign statehood" provided

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208. Trusteeship Agreement for the Former Japanese Mandated Islands, Approved by the Security Council on April 2, 1947, entered into force July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (1947) [hereinafter Trusteeship Agreement] (*cited in* Morgan Guar. Trust Co., 924 F.2d at 1239).

209. Morgan Guar. Trust Co., 924 F.2d at 1239.

210. *Id.* (quoting Trusteeship Agreement, *supra* note 208).

211. *Id.*

212. In 1986, the U.S. terminated the Trusteeship Agreement and acknowledged Commonwealth status with regard to the Northern Mariana Islands, the Republic of the Marshall Islands and the Federated States of Micronesia. *Id.* (citing Proclamation No. 5564, 3 C.F.R. § 146 (1986)).

213. The first two Compacts submitted to the Palauans included a provision that a separate agreement would be entered into to allow the U.S. to locate nuclear devices in Palau. Under the Paulauan Constitution, 75% of the voters must approve any agreement that authorizes use, testing or storage of nuclear weapons. The agreement did not receive the required 75% approval. The Compact was subsequently renegotiated to allow the U.S. to operate nuclear capable vessels and aircraft in Palauan territory without confirming or denying the presence of nuclear weapons. Although the agreement received 72% approval, the agreement was thought not to be subject to the 75% requirement. After approval by Congress and the President, however, the Palauan Supreme Court ruled that the revisions did not remove the agreement from the scope of the 75% requirement and that the Compact was therefore not approved. Morgan Guar. Trust Co., 924 F.2d at 1240 (citing Gibbons v. Salii, No. 8 - 86 (Sup. Ct. Palau, App. Div. 1986)).

214. Morgan Guar. Trust Co., 924 F.2d at 1244. Section 1603(a) of the F.S.I.A. provides that a " 'foreign state'. . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ." *Id.* at 1243 (quoting 28 U.S.C. § 1603(a)).

by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,[215] which include the power to declare and wage war, to conclude peace, to maintain diplomatic ties with other sovereigns, to acquire territory and to make international agreements.[216] In support of its determination that Palau was not a foreign state, the court also cited the Restatement (Third) of the Foreign Relations Law of the United States[217] (Restatement). The Restatement defines a state as an entity possessed of territory and permanent population, controlled by a government and capable of engaging in international relations.[218] These characteristics of statehood accord with generally accepted international law definitions referred to by the court.[219]

Under the terms of the Trusteeship Agreement, Palau does not possess the powers of statehood recognized in U.S. courts and under international law.[220] The full power of administration, legislation and foreign relations of Palau is still vested in the U.S. as trustee.[221] According to the Second Circuit, Palau will continue as a trust territory and not as a foreign sovereign until the trusteeship is terminated.[222] The court's ruling leaves Palau as being neither a part of the U.S.,[223] nor a foreign state for the purposes of removal jurisdiction under § 1603(a) of the F.S.I.A.[224] Since there was no basis for removal jurisdiction, the action was remanded to state court.

C. Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991); *Foreign states' issuance of a public debt instrument in the U.S. is an activity which falls within the meaning of the "commercial activity" exception of the F.S.I.A. and thus there is federal subject matter jurisdiction.*

Shapiro v. Republic of Bolivia,[225] arose out of a transaction initiated in 1981 in which defendant, the Bolivian government, sought to purchase fifty-two used NATO military aircraft through an agent in

215. 299 U.S. 304, 318 - 19 (1936) (*cited in* Morgan Guar. Trust Co., 924 F.2d at 1243).

216. *Id.*

217. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (*cited in* Morgan Guar. Trust Co., 924 F.2d at 1243).

218. *Id.* § 206 (*cited in* Morgan Guar. Trust Co., 924 F.2d at 1243 - 44).

219. Morgan Guar. Trust Co., 924 F.2d at 1243 - 44.

220. *Id.* at 1244.

221. *Id.*

222. *Id.* at 1246.

223. Morgan Guar. Trust Co., 924 F.2d at 1244 (citing U.S. CONST. art. IV, § 3, cl. 2).

224. *Id.*

225. 930 F.2d 1013 (2d Cir. 1991).

the U.S., International Promotions and Ventures, Ltd. (I.P.V.L.).[226] Pursuant to U.S. regulations the entire transaction was subject to approval of the U.S. government.[227] The contract between Bolivia and I.P.V.L. required that the purchase price of $81 million was to be paid by forty promissory notes guaranteed by the Central Bank of Bolivia.[228] But, if the approval of the U.S. government was not obtained, I.P.V.L. would return the notes.[229] Notes 1 through 10 were delivered to the Government of Belgium and notes 11 through 40 were delivered to I.P.V.L.[230] Subsequently, in 1983, the U.S. refused to approve the transaction and Bolivia requested that the notes be returned.[231] All of the notes were returned except for numbers 12 and 21 through 40 which I.P.V.L. refused to return.[232] Subsequently, Bolivia prevailed in litigation regarding the notes.[233]

In December 1986, Shapiro initiated an action in the Southern District of New York against Bolivia claiming that he was a rightful holder of the notes and seeking payment of their face value, $1,426,000.[234] Prior to any discovery, Bolivia moved for dismissal on the grounds of lack of subject matter jurisdiction.[235] The District Court granted the motion, ruling that Bolivia's activities did not constitute a waiver of their immunity granted under the F.S.I.A.,[236] nor did it come within the "commercial activity" exception to immunity.[237]

The Second Circuit disagreed. The court held that the F.S.I.A. is the exclusive source of federal jurisdiction in suits involving foreign sovereigns.[238] The general rule is that "a foreign state shall be immune from the jurisdiction of the courts of the United States . . .

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226. *Id.* at 1015.

227. *Id.* (citing Licenses for the Export of Defense Articles: Non-transfer and Use Assurances and Congressional Notification, 22 C.F.R. § 123.10 (1990)).

228. *Id.*

229. Shapiro, 930 F.2d at 1015.

230. *Id.*

231. *Id.*

232. *Id.*

233. Shapiro, 930 F.2d at 1015. The merits of the subsequent litigation between I.P.V.L. and the Republic of Bolivia are not relevant here. *See* Office of the Comptroller General v. Int'l Promotions and Ventures, Ltd., 618 F. Supp. 202 (S.D.N.Y. 1985). Bolivia prevailed in the subsequent litigation, however, with I.P.V.L. being ordered to return the notes or alternatively pay monetary damages.

234. *Id.*

235. *Id.* at 1016.

236. *Id.* (citing 28 U.S.C. §§ 1330, 1332(a)(2) - (4), 1441(d), 1602 - 11 (1988)).

237. Shapiro, 930 F.2d at 1016 (citing 28 U.S.C. § 1605(a)(2)).

238. *Id.* at 1017 (citing Morel de Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985)).

except as provided in sections 1605 to 1607 of this chapter."[239] Sections 1605(a)(1) and (2) of the F.S.I.A. codify the waiver and commercial activity exceptions to immunity:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case:
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication . . . [;]
>
> 2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.[240]

The Second Circuit agreed with the District Court that an implied waiver of immunity could not be found.[241] The court noted that federal courts have construed § 1605(a)(1) narrowly to include only circumstances where the waiver is unmistakable and unambiguous.[242] Such circumstances may include situations where a sovereign has agreed to arbitration in another country, where the sovereign has agreed that the law of another country should govern a contract or where the sovereign has filed a responsive pleading without raising sovereign immunity defense.[243] The court refused to extend the application of § 1605(a)(1) to situations where the foreign sovereign initiates an unrelated action.[244] Although Bolivia initiated the suit on the contract underlying the promissory note at issue, the court refused to hold that waiver of immunity in a particular action affects waiver of immunity in related, yet distinct actions.[245]

The Second Circuit found, however, that the issuance of a promissory note inside the U.S. is a sufficient commercial activity within the meaning of § 1605(a)(2) of the F.S.I.A. for jurisdiction.[246] The

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239. 28 U.S.C. § 1604 (*quoted in* Shapiro, 930 F.2d at 1017).

240. 28 U.S.C. § 1605(a) (*quoted in* Shapiro, 930 F.2d at 1017).

241. Shapiro, 930 F.2d at 1017.

242. *Id.* at 1017 (citing Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 444 (D.C. Cir. 1990); Joseph v. Office of the Consulate General, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1990); Frolova v. U.S.S.R., 761 F.2d 370, 377 (7th Cir. 1985); L'Europeenne de Banque v. La Republica de Venezuela, 700 F. Supp. 114, 123 (S.D.N.Y. 1988)).

243. *Id.* (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617).

244. *Id.* at 1018.

245. Shapiro, 930 F.2d at 1017 - 18.

246. *Id.* (citing 28 U.S.C. § 1605(a)(2)).

court stated that commercial activity under the F.S.I.A. includes "either a regular course of commercial conduct or a particular commercial transaction or act."[247] Commercial activity carried on in the U.S. includes "commercial activity carried on by such [sovereign] state and having substantial contact with the United States."[248] The court concluded that the issuance of debt instruments in the U.S. is a commercial activity constituting substantial contact with the U.S.[249] Undoubtably, issuance of commercial debt instruments is a commercial activity.[250] Whether or not the notes are actually discounted in the U.S., they are negotiable under U.S. laws.[251] The court reasoned that the U.S. has a strong interest in all capital raising activities within its borders.[252] Their issuance in the U.S. is, therefore, a commercial activity within the meaning of § 1605(a)(2) and federal courts have subject matter jurisdiction over actions for payment on the notes.[253]

D. Weltover, Inc. v. Republic of Argentina, 753 F. Supp. 1201 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *cert. granted*, 112 S. Ct. 858 (1992); *Subject matter jurisdiction exists where the issuance of debt obligations in the U.S. by Banco Central of Argentina fell within the "commercial activity" exception to the F.S.I.A. Furthermore, the exercise of personal jurisdiction did not violate the defendants' due process rights based on the minimum contacts test.*

In *Weltover v. Republic of Argentina*,[254] the District Court addressed the applicability of the commercial activity exception to the F.S.I.A. in the context of debt instruments issued by a foreign government in the U.S.[255] As part of a program to stabilize the devaluation of Argentinean currency on global, markets defendant Republic of Argentina, issued indentures through defendant Banco Central De La Republica Argentina (Banco Central) designated as "Registered Bonds Denominated in United States Dollars."[256] Argentina's For-

247. *Id.* at 1018 (citing 28 U.S.C. § 1603(d)).
248. *Id.* (citing 28 U.S.C. § 1603(e)).
249. Shapiro, 930 F.2d at 1019 - 20.
250. *Id.*
251. *Id.* at 1020.
252. *Id.*
253. Shapiro, 930 F.2d at 1020 (citing 28 U.S.C. § 1605(a)(2)).
254. 753 F. Supp. 1201 (S.D.N.Y.), *aff'd*, 941 F.2d 145 (2d Cir. 1991), *cert. granted*, 112 S. Ct. 858 (1992). The district court's ruling in *Weltover* of January 1991 was made prior to the Second Circuit's ruling in *Shapiro* of April 1991, *supra* text at III.C.
255. *Id.* at 1204 - 05.
256. *Id.* at 1203.

eign Exchange Insurance Contracts program allowed Argentinean debtors to repay foreign loans in U.S. dollars by exchanging local currency for dollars at specified exchange rates through Banco Central.[257] As Argentine debts came due, Banco Central had insufficient dollars to cover the loans and issued *bonods* and promissory notes to raise the necessary U.S. dollars.[258] The terms of the *bonods* provided that payment would be made in U.S. dollars on scheduled dates in 1986 and 1987 and would bear interest at the prevailing London Interbank rate for 180-day Eurodollar deposits.[259] Plaintiffs held more than $1,300,000 in *bonods*.[260]

As the *bonods* matured, however, the Argentine Ministry of the Economy notified plaintiffs that payment on the *bonods* would not be made when due and requested plaintiffs to participate in a "roll over" of those obligations.[261] Plaintiffs sued for enforcement of the terms of the *bonods*, contending that Banco Central was in default.[262] Defendants moved for dismissal alleging that the District Court lacked subject matter jurisdiction under the F.S.I.A.,[263] that exercise of personal jurisdiction over defendants violated due process[264] and that the complaint should have been dismissed under the doctrine of forum non conveniens.[265] The District Court denied defendants' motion on each claim.[266]

The District Court noted first that although a sovereign's actions relating to a currency stabilization program may be immune from suit under the F.S.I.A., the issuance of debt obligations in the U.S. by Banco Central fell within the commercial activity exception to the F.S.I.A.[267] The court reasoned that sovereigns do not enjoy immunity under F.S.I.A. when the cause of action arises out of a commercial activity in the U.S., when the act performed in the U.S. supports commercial activity elsewhere or when the act performed elsewhere has a direct effect in the U.S.[268] Applicability of the exception turns on the determination of whether the activities were "commercial" and

257. *Id.*
258. Weltover, 753 F. Supp. at 1203.
259. *Id.*
260. *Id.* at 1203 n.1.
261. *Id.* at 1204.
262. Weltover, 753 F. Supp. at 1204.
263. *Id.*
264. *Id.* at 1207.
265. *Id.* at 1208 - 09.
266. Weltover, 753 F. Supp. at 1209.
267. 28 U.S.C. § 1605(a)(2) (*cited in* Weltover, 730 F. Supp. at 1205 - 06).
268. Weltover, 753 F. Supp. at 1206.

whether they had sufficient nexus with the U.S.[269]

The commercial character of an activity is assessed according to the nature of the activity rather than its purpose.[270] Courts have construed activity as commercial in nature if the activity is ordinarily engaged in by private entities rather than sovereigns.[271] The court ruled that although currency stabilization is unique to sovereigns, Argentina's issuance of debt instruments through Banco Central was a commercial activity not unique to sovereigns.[272] Thus, the court concluded that the contract cause of action for enforcement of the debt instruments did not become imbued with immunity merely because they had been issued as part of a currency control policy.[273]

The District Court further concluded that Banco Central had sufficient nexus with the U.S. to fall within the exception to F.S.I.A. immunity.[274] The only possible basis under which the court could find an exception to F.S.I.A. immunity was by finding that the issuance of the debt instruments had a direct effect in the U.S., because the activity in question did not involve commercial activity carried on in the U.S. or an action performed in the U.S. in furtherance of commercial activity elsewhere.[275] The Second Circuit had previously concluded that nonpayment of debt payable in the U.S. to a U.S. company constitutes a direct effect for the purposes of the F.S.I.A.[276] Analogous to the situation where the payee is a U.S. company, when the payee is a foreign company, nonpayment in the U.S. is deemed to have effect in the U.S.[277] Nonpayment of debt in the U.S. has a direct effect in the U.S. regardless of the domicile of the payee.[278] The choice to make and accept payment in New York through New York financial centers sufficiently implicates U.S. interests.[279]

The District Court additionally rejected defendants' claims that the exercise of personal jurisdiction violates due process.[280] Applying

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269. *Id.*

270. *Id.* at 1205 (quoting 28 U.S.C. § 1603(d)).

271. *Id.* (citing H. Rep. No. 1487, 94th Cong., 2d Sess., at 16, 1976, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615 ("if an activity is customarily carried on for profit, its commercial nature could readily be assumed")).

272. Weltover, 753 F. Supp. at 1206.

273. *Id.*

274. *Id.* at 1207.

275. *Id.* at 1206.

276. Weltover, 753 F. Supp. at 1206 (citing Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982)).

277. *Id.*

278. *Id.* at 1207.

279. *Id.*

280. Weltover, 753 F. Supp. at 1208.

the "minimum contacts" test, the court concluded that plaintiffs' alleged facts demonstrated contacts sufficient to exercise personal jurisdiction.[281] For instance, Banco Central had promised to make payments in New York in U.S. dollars; the Argentine government maintains consulates throughout the country; Banco Central conducts other commercial activities in the U.S.; and both defendants maintain bank accounts in the U.S.[282]

Finally, the court rejected defendants' arguments for dismissal on grounds of forum non conveniens because defendants failed to produce evidence demonstrating that Argentina would be a more appropriate forum.[283] Additionally, the defendants did not provide the court with a list of witnesses they would call at a trial and the witnesses's addresses which have been held to be a prerequisite for a dismissal on forum non conviens grounds.[284] The District Court stated further that proof of plaintiffs' claims would be predominantly documentary in nature,[285] thus the continuation of the action in the U.S. would not prejudice defendants.[286]

IV. EXTRATERRITORIAL APPLICATION OF U.S. LAW

A. Alfadda v. Fenn, 935 F.2d 475 (2d Cir.), *cert. denied*, 112 S. Ct. 638 (1991); *Subject matter jurisdiction exists under RICO and under the Securities Exchange Act where uncontested allegations of fraud occurring in the U.S. were made by the defendants, giving rise to claims under both acts.*.

In *Alfadda v. Fenn*,[287] the Second Circuit concluded that U.S. courts have subject matter jurisdiction over securities fraud claims with a foreign nexus.[288] Specifically, U.S. courts have jurisdiction in cases which arise out of sales of stock negotiated and concluded in the U.S. even though such sales occurred notwithstanding a prospectus given to plaintiffs outside of the U.S. which stated that there would be

281. International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (*cited in* Weltover, 753 F. Supp. at 1208).

282. Weltover, 753 F. Supp. at 1208.

283. *Id.* at 1209.

284. *Id.*

285. *Id.*

286. Weltover, 753 F. Supp. at 1209.

287. 935 F.2d 475 (2d Cir.), *cert. denied*, 112 S. Ct. 638 (1991). In addition to common law claims, plaintiffs claim violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988), Rule 10b - 5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b - 5 (1990) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(a) - (d) (1988)[hereinafter RICO]. *Id.* at 476 n.1.

288. *Id.* at 478.

no sales inside the U.S.[289]

Plaintiffs' claims arose out of stock purchased by plaintiffs in defendant Saudi European Investment Corporation (S.E.I.C.) in 1979 and a subsequent S.E.I.C. stock offering in 1984.[290] Under the terms of the 1979 offering, plaintiffs were to be given a preference in subsequent offerings, in proportion to their holdings in order to maintain their relative voting strengths in S.E.I.C.[291] The prospectus for the 1984 offering stated that there would be a 30:1 split of the shares issued in the 1979 offering, thereby creating 600,000 S.E.I.C. shares.[292] An additional 600,000 voting shares would be issued at $100 per share, and in the event of an oversubscription, 1,800,000 non-voting shares would be issued.[293] The S.E.I.C. prospectus specifically provided that shares would not "be offered or sold directly or indirectly in the United States."[294]

Plaintiffs contended that despite the 1984 limitation on the number of voting shares to be issued, S.E.I.C. issued 1,200,000 new voting shares in the 1984 offering.[295] Because plaintiffs relied on the 1984 prospectus to determine what purchases would be necessary to preserve their voting strength in S.E.I.C., they claimed that the sale of voting shares in excess of 600,000 fraudulently diluted their voting interests.[296] In further contradiction to information contained in the 1984 prospectus, 180,000 voting shares were sold to Lincoln Savings and Loan Association (Lincoln), a subsidiary of American Continental[297] in the U.S. through an off-shore shell company in the Netherlands Antilles.[298] The District Court dismissed the plaintiffs' claims, holding that the fraudulent act was the passing of the 1984 prospectus which occurred outside the U.S.[299]

On appeal, the Second Circuit found that, among the relevant fraudulent acts, was the negotiation and sale of S.E.I.C. stock to Lincoln in the U.S.[300] The court noted that the Securities Exchange Act

289. *Id.*

290. *Id.* at 477.

291. Alfadda, 935 F.2d at 477.

292. *Id.*

293. *Id.*

294. *Id.*

295. Alfadda, 935 F.2d at 477.

296. *Id.*

297. Charles Keating was the chairman of American Continental and he was involved in the negotiation and purchase of SEIC stock. *Id.* at 477 - 78.

298. *Id.* at 477.

299. Alfadda v. Fenn, 751 F. Supp. 1114, 1118 (S.D.N.Y. 1990).

300. Alfadda, 935 F.2d at 479.

is silent as to extraterritorial application.[301] The courts, however, have defined two tests for determining whether a federal court has subject matter jurisdiction over a foreign plaintiff's claim under the antifraud provisions of the securities law.[302] First, under the "conduct" test, federal courts have subject matter jurisdiction if (1) the defendant's conduct in the U.S. was more than mere preparation for fraud and (2) specific acts within the U.S. directly caused losses to foreign investors abroad.[303] Second, under the "effects" test, the federal courts have jurisdiction if illegal activity abroad has a "substantial effect" within the U.S.[304] The Second Circuit found a basis for subject matter jurisdiction under the "conduct" test.[305] The defendants' conduct in negotiating the sale of S.E.I.C. stock to Lincoln, although not acknowledged by the District Court as acts more than merely preparatory for fraud, were considered by the Second Circuit to be conduct material to the consummation of fraud.[306]

The court further noted that although Lincoln purchased S.E.I.C. shares through Lincoln American Investments, N.V., a Netherlands Antilles company created by American Continental specifically for the purpose of purchasing and holding S.E.I.C. shares outside of the U.S., this fact did not diminish the federal court's subject matter jurisdiction.[307]

Similar to the Securities Exchange Act, the Racketeer Influenced and Corrupt Organizations Act (RICO) is silent as to extraterritorial application.[308] The Second Circuit has previously rejected arguments circumscribing the extraterritorial application of RICO:

> On its face the prescription [against acquiring an "enterprise"] is all inclusive. It permits no inference that the [RICO] Act was intended to have a parochial application. The legislative history, moreover, indicates the intent of Congress that this provision be broadly con-

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301. *Id.* at 478 (citing 15 U.S.C. § 78aa (1988)).

302. *Id.* (citing Psimenos v. E.F. Hutton & Co., 722 F.2d 1041 (2d Cir. 1983)(quoting Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975))).

303. *Id.* (citing Psimenos, 722 F.2d at 1046; Bersch, 519 F.2d at 993).

304. Alfadda, 935 F.2d at 479 (citing Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 - 62 (2d Cir. 1989)).

305. *Id.*

306. *Id.*

307. The Second Circuit quoted the Restatement (Second) of Foreign Relations Law of the United States § 416(d) (1987): "The United States may generally exercise jurisdiction to prescribe with respect to conduct occurring predominantly in the United States *that is related* to a transaction in securities, even if the transaction takes place outside the United States." *Id.* (emphasis added).

308. Alfadda, 935 F.2d at 479 (citing Racketeer Influenced and Corrupt Organizations, 18 U.S.C.A. §§ 1961 - 1968).

> strued. . . . In short, we find no indication that Congress intended to limit Title IX [RICO] to infiltration of domestic enterprises. On the contrary, the salutary purposes of the Act would be frustrated by such construction.[309]

The fact that defendants were foreign entities did not immunize them.[310] The Second Circuit recognized the negotiations and sale which occurred primarily in the U.S. as the pattern of activity giving rise to a RICO claim.[311] The federal courts, therefore, have a basis for subject matter jurisdiction over the RICO claim.[312]

V. ADMIRALTY AND SHIPPING

A. State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409 (2d Cir. 1990); *Federal courts sitting in an admiralty action must apply federal choice of law rules.*

In *State Trading Corp. of India v. Assuranceforeningen Skuld*,[313] the Second Circuit examined choice of law questions in admiralty cases and held that courts sitting in admiralty jurisdiction must apply federal choice of law rules.[314] Plaintiff State Trading Corporation had obtained in prior litigation a judgment against the owners of the M.V. Go-Go Runner to recoup for cargo lost when the Go-Go Runner sank.[315] Plaintiffs initiated this action against Assuranceforeningen, the insurer of the Go-Go Runner, for payment of a prior judgment pursuant to a Connecticut statute which allowed for a direct action suit against the insurer to recover on judgments obtained against an insured.[316] The District Court granted summary judgment for defendant, holding that the Connecticut statute was inapplicable in an admiralty action.[317] The Second Circuit affirmed the granting of summary judgment in favor of defendant.[318]

The Second Circuit reasoned that, unlike courts sitting in diversity jurisdiction, federal courts sitting in an admiralty action must apply federal choice of law rules.[319] Following *Lauritzen v. Larsen*,[320]

309. *Id.* (quoting United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975)).
310. *Id.*
311. *Id.* at 479 - 80.
312. Alfadda, 935 F.2d at 480.
313. 921 F.2d 409 (2d Cir. 1990).
314. *Id.* at 414.
315. *Id.* at 411.
316. *Id.* (citing CONN. GEN. STAT. § 38 - 175 (1989)).
317. State Trading Corp. of India, 921 F.2d at 411 - 12.
318. *Id.* at 418.
319. *Id.* at 414.

the court resolved the conflict of law issue by "ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved."[321] The court noted that although *Lauritzen* has been generally applied in tort contexts, emerging rules for choice of law in admiralty contract actions have been modeled on it.[322]

The contract was concluded in Norway; the vessel was Panamanian; it sank off the coast of Africa; the vessel was en route from South America to India.[323] The only connection with Connecticut was that defendant Skuld had an agent there.[324] Thus, under a *Lauritzen* analysis, the Second Circuit found Connecticut law inapplicable.[325]

B. Fednav, Ltd. v. Isoramar, S.A., 925 F.2d 599 (2d Cir. 1991); *Subject matter of a contract to make contribution for losses incurred during shipping was not itself a maritime contract over which federal courts have subject matter jurisdiction.*

In *Fednav, Ltd. v. Isoramar, S.A.*,[326] the Second Circuit held that an agreement to make contribution for losses incurred during shipping was not a maritime contract over which the federal courts have subject matter jurisdiction.[327] Plaintiff Fednav, a Canadian corporation, leased a ship to carry steel from West Germany to Chicago, Illinois from defendant Isoramar, a Panamanian corporation.[328] The cargo was damaged en route to Illinois.[329] The marine underwriter as subrogee subsequently sued Fednav and Isoramar for the amount of damages to the steel.[330] Fednav settled that suit and paid the underwriter $5,000.[331] Fednav sought contribution from Isoramar for half

320. 345 U.S. 571 (1953)(*cited in* State Trading Corp. of India, 921 F.2d at 417).

321. *Id.* at 582 (*cited in* State Trading Corp. of India, 921 F.2d at 417).

322. State Trading Corp. of India, 921 F.2d at 417 (citing Eagle Leasing Corp. v. Hartford Fire Ins. Co., 540 F.2d 1257, 1261 (5th Cir. 1975), *cert. denied*, 431 U.S. 967 (1977)(The law of the state where the contract was issued and delivered governs.); Healy Tibbitts Constr. Co. v. Foremost Ins. Co., 482 F. Supp. 830 (N.D. Cal. 1979)(The controlling law is the "law of the state with the most significant nexus with the contract.")).

323. *Id.*

324. *Id.*

325. *Id.*

326. 925 F.2d 599 (2d Cir. 1991).

327. *Id.* at 601 - 02.

328. *Id.* at 600.

329. *Id.*

330. Fednav, 925 F.2d at 600.

331. *Id.*

the principal settlement amount plus attorneys fees.[332] Fednav alleged that Isoramar, through its representative, agreed to pay the requested contribution.[333] Isoramar, however, never paid the amount.[334] As a result, Fednav brought suit against Isoramar alleging a breach of the agreement due to Isoramar's failure to pay contribution.[335]

Upon commencement of the action in the District Court, Fednav applied for, and received, a writ of maritime attachment and garnishment on Isoramar's bank account pursuant to admiralty law.[336] The District Court subsequently dismissed the action and vacated the attachment for want of subject matter jurisdiction.[337] The District Court held that the action, though sounding in admiralty, was merely a breach of contract claim arising under state law.[338]

The Second Circuit affirmed, holding that the agreement to make contribution was not a maritime contract over which the federal courts have subject matter jurisdiction.[339] The court stated that a maritime contract would exist if the direct subject matter of the contract related to the use of a ship, commerce or navigation of navigable waters, transportation by sea or maritime employment.[340] However, courts have previously held that entering into a contract as a surety, thereby agreeing to pay for another's breach of a maritime contract, is not itself a maritime contract.[341] The rationale for this rule is that a promise to pay contract damages involves neither maritime services nor maritime transportation.[342] Thus, the Fednav-Isoramar agreement allegedly breached in this case was a separate and distinct contract not involving maritime services.[343]

The court also declined to look to the subject matter of the underlying contract as a basis for jurisdiction.[344] The Second Circuit

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332. *Id.*

333. *Id.*

334. Fednav, 925 F.2d at 600.

335. *Id.*

336. *Id.* at 600 - 01. The writ was issued pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims, FED. R. CIV. P. B(1). *Id.*

337. *Id.* at 601.

338. Fednav, 925 F.2d at 601.

339. *Id.* at 601 - 02.

340. *Id.* at 601 (citing Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293, 302 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988)).

341. *Id.* (quoting Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961)).

342. Fednav, 925 F.2d at 601 (quoting Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co., 151 F. 440, 443 (7th Cir. 1907)).

343. *Id.* at 601 - 02.

344. *Id.* at 602.

stated that because Isoramar was not a party to the cargo action or the settlement, the Fednav-Isoramar agreement was collateral to the settlement agreement and "cannot serve as the basis for initiating an [independent] action in admiralty for specific performance."[345]

C. Seguros "Illimani" S.A. v. M/V POPI P, 929 F.2d 89 (2d Cir. 1991); *A stevedore is subject to the warranty of workmanlike service implied by admiralty law, based upon the stevedore's contract with the carrier. Furthermore, an ingot does not constitute a "package" under COGSA, but a bundle of ingots is a "package" under COGSA.*

In *Seguros "Illimani" S.A. v. M/V POPI P*,[346] the Second Circuit addressed the issue of whether a stevedore is subject to the warranty of workmanlike service implied by admiralty law[347] and what definition of "package" should be employed in applying the $500 per package liability limitation provision of the Carriage of Goods by Sea Act (COGSA).[348] The action arose out of the transport of 8996 ingots of tin from Bolivia to New York aboard the POPI P.[349] The ingots were organized into 600 steel strapped bundles, of which 599 bundles contained 15 ingots each, and 1 bundle contained 11 ingots.[350] Upon the POPI P's arrival in New York, the ingots were unloaded and stored by the stevedore, Universal Maritime Service Corporation (Universal), under the terms of several bills of lading.[351] After storage for three days, two containers holding 67 of the steel strapped bundles (1005 ingots) were discovered missing.[352]

In an action brought by the insurer of the shipment, the POPI P sought indemnification from the stevedore, Universal, based on an implied warranty of workmanlike conduct.[353] The trial court held that Universal must indemnify the POPI P, but given the COGSA liability limitation, only $500 for each of the 67 steel strapped bundles could be recovered.[354]

The Second Circuit affirmed the District Court's decision. The

345. *Id.* (quoting Pedersen v. M/V Ocean Leader, 578 F. Supp. 1534, 1535 (W.D. Wash. 1984)).

346. 929 F.2d 89 (2d Cir. 1991).

347. *Id.* at 92 - 93.

348. *Id.* at 93 - 95 (citing Carriage of Goods by Sea Act § 4(5), 46 U.S.C.A. § 1304(5)).

349. *Id.* at 91.

350. Seguros "Illimani" S.A., 929 F.2d at 91.

351. *Id.*

352. *Id.* at 91 - 92.

353. *See* Seguros "Illimani" S.A. v. M/V Popi P, 735 F. Supp. 108, 112 - 13 (S.D.N.Y. 1990).

354. *Id.* at 112.

Second Circuit reasoned that, under admiralty law, each contract for services between a carrier and a stevedore contains an implied warranty of workmanlike services upon which carriers may make a claim of indemnification.[355] The warranty imposes a broad range of obligations including the duty to provide proper storage[356] and safe equipment,[357] the duty to deliver goods to the right party[358] and the duty to account for the mysterious disappearance of cargo from the stevedore's custody.[359] The court held that stevedores may be liable under the implied warranty even in the absence of negligence.[360] It noted, however, that a stevedore can escape liability if the carrier's conduct hindered the stevedore's ability to perform in a workmanlike manner.[361] Because Universal only claimed that it was not negligent in the storage of the ingots, the court affirmed the District Court's ruling that Universal was in breach of the implied warranty.[362]

In determining to what grouping of ingots the COGSA § 1304(5) limitation of liability extended over, the court noted that the limitation applied as a matter of law only after the goods have been loaded and until they are removed from the ship.[363] In this case, however, the parties had specified as a contractual term in the bills of lading that the COGSA § 1304(5) limitation would apply to the post-discharge period and to Universal as the carrier's stevedore.[364] The construction of the term "package" was therefore a matter of contract interpretation, not statutory interpretation.[365]

The court construed the term by looking to the bills of lading as evidence of the parties' intent, i.e. whether the number of packages specified on each bill of lading referred to ingots, bundles or numbers of bundles.[366] If the number of packages specified on the bills of lading totaled 600, for example, then the court could conclude that the

355. Seguros "Illimani" S.A., 929 F.2d at 92 (citing Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132 - 34 (1956)).

356. *Id.* at 92 - 93 (citing Ryan, 350 U.S. at 133).

357. *Id.* at 93 (quoting Italia Societa Per Azioni Di Navagazione v. Oregon Stevedoring Co., 376 U.S. 315, 320 (1964)).

358. *Id.* at 92 (citing David Crystal, Inc. v. Cunard S.S. Co., 339 F.2d 295, 299 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965)).

359. Seguros "Illimani" S.A., 929 F.2d at 92 (citing Stein Hall & Co. v. S.S. Concordia Viking, 494 F.2d 287 (2d Cir. 1974)).

360. *Id.* at 93.

361. *Id.*

362. *Id.*

363. Seguros "Illimani" S.A., 929 F.2d at 93 (citing 46 U.S.C. § 1301(e)(1988)).

364. *Id.*

365. *Id.*

366. *Id.* at 94.

contract defined a "package" as a bundle of ingots.[367] The bills of lading, however, appeared to specify individual ingots as the number of packages.[368] Thus, although the bills of lading referred to individual ingots as packages, the Second Circuit rejected that interpretation and held that individual ingots could not constitute a package under COGSA.[369] The court had previously held that a package for COGSA purposes must be comprised of individual units wrapped, tied or bundled.[370] The Second Circuit proceeded to use the number of bundles reflected on the bills of lading as an indication of the parties' intent, since a bundle is a package under COGSA.[371] As a result, the Second Circuit affirmed the District Court's ruling which awarded $500 for each of the 67 missing bundles.[372]

D. National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240 (2d Cir. 1991); *An otherwise legal and enforceable contract for carriage is illegal and unenforceable if it is part of an overall scheme to violate a U.S. law imposing a trade embargo against Iran.*

In *National Petrochemical Company of Iran v. The M/T Stolt Sheaf*,[373] the Second Circuit held that a legal and enforceable contract for carriage was illegal and unenforceable because it was part of an overall scheme to violate a trade embargo against Iran.[374] In this case, plaintiff National Petrochemical Company (N.P.C.) sought to recover the proceeds from the sale of chemicals it owned and shipped on defendant carrier.[375] In April 1980, President Carter signed Executive Order 12205 proscribing the "sale, supply or other transfer, by any person subject to the jurisdiction of the United States, of any items, commodities or products . . . from the United States . . . either to or destined for Iran."[376] In June 1980, N.P.C. arranged to purchase industrial chemicals and supplies through a United Arab Emirates (U.A.E) middleman, Monnris Enterprises, from Rotex, a

367. Seguros "Illimani" S.A., 929 F.2d at 94.

368. *Id.* at 94 - 95.

369. *Id.* at 95.

370. *Id.* (quoting Mitsui & Co. v. American Export Lines, Inc., 636 F.2d 807, 822 (2d Cir. 1981)).

371. Seguros "Illimani" S.A., 929 F.2d at 95.

372. *Id.*

373. 930 F.2d 240 (2d Cir. 1991).

374. *Id.* at 243.

375. *Id.* at 242.

376. *Id.* at 241 (citing 45 Fed. Reg. 24,099 (1980)).

German interest.[377] Although all documents called for shipping from Western European or U.A.E. ports, the chemicals were purchased from U.S. sources and shipped from the U.S. on the M/T Stolt Sheaf.[378] The original charter party noted delivery was to have been in Barcelona, Spain, but did not specify N.P.C. or any Iranian nationals as the ultimate recipient of the cargo.[379] Instead, the charter party stated that the chemicals would be discharged to Monnris Enterprises.[380] A subsequent addendum to the charter party, however, specified a destination in Iran.[381]

After the Stolt Sheaf left the U.S. and approached Iran, the Iran-Iraq war broke out.[382] The owners of the Stolt Sheaf invoked the war risk clause of the charter party and requested that Rotex, the German agent which was acting through a Swiss affiliate due to West Germany's restrictions on trade with Iran, specify an alternate destination.[383] Rotex specified Taiwan where Rotex sold the chemicals.[384] N.P.C. sued to recover the proceeds of that sale, alleging that the defendants "negligently and conspiratorily allowed Rotex to divert and resell the chemicals."[385] The District Court granted defendants' motion for summary judgment holding that the contract was unenforceable under the Executive Order.[386]

The Second Circuit affirmed, holding that although the legality of the charter party was arguable, it was indisputably part of a larger "scheme to transport the cargoes for payment of monies between the U.S. and Iran, without detection in contravention of the then existing laws and trade embargoes between the two countries."[387] The fact that the original charter party governing carriage from the U.S. itself did not specify Iran as the destination or Iranians as purchasers did

377. National Petrochemical Co. of Iran, 930 F.2d at 241.

378. *Id.*

379. *Id.* at 241 - 42.

380. *Id.* at 242.

381. National Petrochemical Co. of Iran, 930 F.2d at 242.

382. *Id.*

383. *Id.*

384. *Id.*

385. National Petrochemical Co. of Iran, 930 F.2d at 242.

386. National Petrochemical Co. of Iran v. M/T Stolt Sheaf, 722 F. Supp. 54 (S.D.N.Y. 1989). The District Court originally held that due to N.P.C.'s status as a wholly-owned entity of the unrecognized Iranian government, it could not sue in a U.S. court and dismissed the action. National Petrochemical Co. of Iran, 930 F.2d at 242. On appeal, the Second Circuit, in response to an amicus curiae filed by the U.S., reversed the District Court decision and remanded the case. *Id.*

387. National Petrochemical Co. of Iran, 930 F.2d at 243.

not absolve it of illegality.[388] The Second Circuit had previously held that legitimate contracts may be rendered unenforceable by direct connection with illegal transactions.[389] Thus, although N.P.C. disputed the facial illegality of the shipping contract, the contract was unenforceable due to its inclusion as part of an overall scheme to violate the embargo on Iran.[390] N.P.C. claimed to have been unaware of the illegal origin of the cargo and argued that it was an issue of material fact.[391] N.P.C. also argued that such lack of knowledge would allow the contract to be enforced.[392] The Second Circuit rejected N.P.C.'s claims and held that since N.P.C.'s agent, Monriss Enterprises, knew the transaction was illegal, such knowledge may be imputed to N.P.C. as Monriss Enterprise's principal.[393]

VI. ENFORCEMENT OF ARBITRATION CLAUSES

A. David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245 (2d Cir.), *cert. denied*, 112 S. Ct. 17 (1991); *The Federal Arbitration Act preempts state law on enforcement of arbitral decisions in diversity actions involving international commerce.*

In *David L. Threlkeld & Co. v. Metallgesellschaft, Ltd.*,[394] the Second Circuit held that the Federal Arbitration Act[395] preempted a Vermont statute on enforcement of arbitral decisions in diversity actions dealing with interstate or international commerce.[396] Investor (Threlkeld) brought action against a British metal futures trader, Metallgesellschaft, Ltd. (M.G.), alleging breach of an agreement to accurately value the investor's metal futures.[397] Threlkeld and M.G. had an informal standing agreement under which M.G., a dealer on the London Metal Exchange, would enter into metals futures contracts on behalf of Threlkeld.[398] The arrangement was governed by a document titled "Terms of Business," which incorporated the rules and regulations of the London Metal Exchange by reference.[399] After

388. *Id.*
389. *Id.* (citing Bankers Trust Co. v. Litton Systems, 599 F.2d 488, 491 (2d Cir. 1979)).
390. National Petrochemical Co. of Iran, 930 F.2d at 243.
391. *Id.*
392. *Id.*
393. *Id.* at 244 (quoting Mallis v. Bankers Trust Co., 717 F.2d 683, 689 n.9 (2d Cir. 1983)).
394. 923 F.2d 245 (2d Cir.), *cert. denied*, 112 S. Ct. 17 (1991).
395. *Id.* at 248 (citing 9 U.S.C. §§ 1 - 15).
396. *Id.* at 250.
397. *Id.* at 246.
398. David L. Threlkeld & Co., 923 F.2d at 247.
399. *Id.*

three years, Threlkeld and M.G. entered another agreement under which M.G. would accurately ascertain the value of Threlkeld's futures contracts.[400] Upon being confronted with a $1.7 million margin call from M.G., Threlkeld sought an independent valuation of its futures contracts and discovered that M.G. had systematically overvalued Threlkeld's position.[401]

Threlkeld initiated the action in the Federal District Court for Vermont for losses allegedly incurred as a result of M.G.'s systematic overvaluation.[402] M.G. moved to stay proceedings and to compel arbitration pursuant to the "Terms of Business" which incorporated the London Metal Exchange Rules which contain two arbitration provisions.[403] The District Court treated it as a summary judgment motion and denied it.[404]

The Second Circuit held that the dispute was covered by the arbitration clause implicit in the Terms of Business document.[405] Although Vermont law[406] voids any arbitration clause not explicitly agreed to by the parties, the Federal Arbitration Act preempts state law.[407] Under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[408] the Federal Arbitration Act applies in federal courts sitting in diversity suits relating to interstate or international commerce.[409] Unlike the restrictive Vermont law, the Federal Arbitration Act requires only that the agreement to arbitrate be in writing.[410] Since the London Metal Exchange rules on arbitration were incorporated in the "Terms of Business," they are enforceable under the Federal Arbitration Act.[411] The Second Circuit, therefore, concluded that defendant M.G. was entitled to a stay of proceedings.

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400. *Id.*

401. *Id.*

402. David L. Threlkeld & Co., 923 F.2d at 248.

403. *Id.* at 247 (quoting The London Metal Exchange Rules, Part 4, Rule 10.1 and Part 8, Rule 1.1).

404. *Id.* at 246.

405. *Id.* at 249.

406. David L. Threlkeld & Co., 923 F.2d at 249 (citing VT. STAT. ANN. tit. 12 § 5652(b) (1989)).

407. *Id.* at 249 - 50.

408. 388 U.S. 395 (1967)(*cited in* David L. Threlkeld & Co., 923 F.2d at 249).

409. David L. Threlkeld & Co., 923 F.2d at 249 (citing Prima Paint Corp. v. Flood & Conklin Mfg., Co., 388 U.S. 395, 402 (1967)).

410. *Id.* at 249 - 50. Vermont law requires that any agreement to arbitrate be displayed prominently in the contract and be signed by the parties. *Id.* at 249 (citing VT. STAT. ANN. tit. 12 § 5652(b)).

411. *Id.* at 250.

B. International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990); *Under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, the court of the place of arbitration is the competent authority to set aside an arbitral award.*

The United States District Court for the Southern District of New York in *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*,[412] held that under the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards[413] (New York Convention), only the courts of the situs of the arbitration are competent to review the arbitration and thus the court lacked subject matter jurisdiction to review an arbitral decision rendered in Mexico City.[414] Petitioner International Standard Electric Corp. (I.S.E.C.) sought to vacate an arbitral award rendered against it and in favor of respondent Bridas, a shareholder in I.S.E.C.'s wholly-owned Argentine subsidiary, Compania Standard Electric Argentina S.A. (C.S.E.A.), by an arbitral panel in Mexico City under the arbitration rules of the International Chamber of Commerce (I.C.C.).[415] Bridas sought dismissal of I.S.E.C.'s action for lack of subject matter jurisdiction and sought enforcement of the arbitral award.[416]

Arbitration was held in Mexico pursuant to an arbitration clause in the shareholders agreement between I.S.E.C. and Bridas which required that all disputes be resolved through arbitration under the I.C.C. aegis.[417] Bridas had alleged fraud by I.S.E.C. in connection with the sale of C.S.E.A. stock to Bridas, claiming I.S.E.C. mismanaged C.S.E.A. and that I.S.E.C. had breached its fiduciary obligations to Bridas.[418] The arbitral panel found for Bridas on the breach of fiduciary obligations claims, and awarded damages of $6,793,000 with interest compounded annually at 12%, legal fees in the amount of $1,000,000 and costs in the amount of $400,000.[419]

412. 745 F. Supp. 172 (S.D.N.Y. 1990).

413. *Id.* at 173 (citing United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed New York City June 10, 1958, 3 U.S.T. 2517, T.I.A.S. No. 6997, United States ratification 9 U.S.C. §§ 201 - 208) [hereinafter New York Convention].

414. *Id.* at 178.

415. *Id.* at 173 - 75.

416. International Standard Elec. Corp., 745 F. Supp. at 175.

417. *Id.* at 174.

418. *Id.* at 175.

419. *Id.*

The court concluded that it lacked subject matter jurisdiction to vacate the arbitral decision under the New York Convention.[420] Under article V(1)(e) of the New York Convention, an application for review of an arbitral award can be made only to the courts or competent authority of the country in which or under whose laws the award was made.[421] Contrary to petitioner's argument that article V(1)(e) conferred jurisdiction on the courts of the country whose substantive law governs the dispute, the court held that it is the courts of the country whose procedural laws control that have jurisdiction to review the arbitral decision.[422] Although U.S. substantive law governed the arbitration, the suggestion that U.S. courts have jurisdiction defies the intent of the New York Convention to accommodate the procedurally diverse arbitral systems of the international community.[423] The District Court noted that decisions of foreign courts deciding cases which have arisen under the New York Convention support the view that article V(1)(e) confers jurisdiction on the country whose procedural laws apply.[424] The District Court concluded that article V(1)(e) confers jurisdiction to review the award on the courts of Mexico.[425] The court thus dismissed the motion to vacate the award for lack of subject matter jurisdiction and granted the petition to enforce the arbitral award.[426]

C. Corcoran v. Ardra Ins. Co., 567 N.E.2d 969, 77 N.Y.2d 225, 566 N.Y.S.2d 575 (1990), *cert. denied*, 111 S. Ct. 2260 (1991); *The New York Convention, a treaty, ratified by the U.S., preempts conflicting federal and state law.*

In *Corcoran v. Ardra Ins. Co.*,[427] the Court of Appeals of New York ruled that although the New York Convention preempts conflicting federal and state laws, New York Insurance Law article 74, authorizing the State Superintendent of Insurance to sue on behalf on

420. International Standard Elec. Corp., 745 F. Supp. at 178.
421. *Id.* at 176.
422. *Id.* at 177.
423. *Id.*
424. International Standard Elec. Corp., 745 F. Supp. at 177 - 78.
425. *Id.* at 178.
426. *Id.* at 182. After dismissing petitioner's action to dismiss the vacatur action, the court granted respondent's cross-motion to enforce the Mexican arbitral decision. The court concluded that because petitioner had failed to prove any of the defenses to enforcement under the New York Convention, the court was compelled to enforce the award under article V of the New York Convention. *Id.*
427. 567 N.E.2d 969, 77 N.Y.2d 225, 566 N.Y.S.2d 575 (1990), *cert. denied*, 111 S. Ct. 2260 (1991).

insolvent insurance companies, is not preempted by the New York Convention.[428]

Plaintiff Superintendent of Insurance sued the defendant reinsurer on behalf of the defunct Nassau Insurance Company.[429] Nassau was owned by defendants Jeanne and Richard DiLoreto who also owned defendant Ardra Insurance Co., a Bermuda corporation.[430] Nassau and Ardra had entered into three international reinsurance agreements, each of which contained an arbitration clause.[431] Nassau subsequently became defunct and plaintiff initiated liquidation under New York Insurance Law article 74.[432] Plaintiff sued on behalf of Nassau for recovery of reinsurance proceeds due under the reinsurance contracts after Ardra repudiated the agreements.[433] Defendants moved to dismiss and to compel arbitration pursuant to the arbitration clauses included in the agreements, arguing that the arbitration clauses were entitled to enforcement under the New York Convention.[434]

The New York Court of Appeals agreed that the New York Convention preempts conflicting state law, but held that the case came within one of the exceptions to enforcement of an arbitration clause.[435] Since the New York Convention was a treaty entered into by the U.S., it preempts conflicting state law pursuant to the Supremacy Clause of the U.S. Constitution.[436] The New York Convention requires enforcement of an arbitral agreement when it covers subject matter capable of settlement by arbitration.[437] Courts in signatory nations may refuse to submit disputes to arbitration if the arbitration agreement is null, void, inoperative or incapable of being performed.[438] Under the New York Insurance Law, however, the Superintendent had not been granted the power to arbitrate claims and

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428. Corcoran, 567 N.E.2d at 970, 77 N.Y.2d at 228, 566 N.Y.S.2d at 576 (citing New York Convention, *supra* note 413).

429. *Id.*, 77 N.Y.2d at 229, 566 N.Y.S.2d at 576.

430. *Id.*, 77 N.Y.2d at 228, 566 N.Y.S.2d at 576.

431. *Id.*, 77 N.Y.2d at 228, 566 N.Y.S.2d at 576.

432. Corcoran, 567 N.E.2d at 970, 77 N.Y.2d at 228 - 29, 566 N.Y.S.2d at 576.

433. *Id.*, 77 N.Y.2d at 229, 566 N.Y.S.2d at 576.

434. *Id.*, 77 N.Y.2d at 229, 566 N.Y.S.2d at 576.

435. *Id.* at 972 - 73, 77 N.Y.2d at 231 - 34, 566 N.Y.S.2d at 578 - 79.

436. Corcoran, 567 N.E.2d at 971, 77 N.Y.2d at 230, 566 N.Y.S.2d at 577 (citing U.S. CONST. art. VI, cl. 2).

437. *Id.* at 972, 77 N.Y.2d at 231, 566 N.Y.S.2d at 578 (citing New York Convention, *supra* note 413, art. II).

438. *Id.*, 77 N.Y.2d at 231, 566 N.Y.S.2d at 578 (citing New York Convention, *supra* note 413, art. II).

must resort to state court litigation.[439] As a result, the Court of Appeals concluded that claims by the Superintendent under New York Insurance Law article 74 are not arbitrable under the New York Convention because "the arbitration clause and the dispute alleged to be subject to it are not capable of performance and settlement under the law of New York."[440]

VII. CHOICE OF LAW

A. Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 756 F. Supp. 136 (S.D.N.Y.), *reargument denied*, No. 84 Civ. 4364 (PKL), 1991 WL 79464, 1991 US Dist LEXIS 6111 (S.D.N.Y. 1991); *Where the substantive issues of a claim do not arise under federal law, the F.S.I.A. requires choice of law rules of the forum state to be applied.*

In *Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos*,[441] the United States District Court for the Southern District of New York held: 1) that Bolivian contract law governed a dispute over a contract entered into by a Bolivian government procurement agency[442] and 2) that defendant failed to prove that under Bolivian law the absence of a forum selection clause, conferring exclusive jurisdiction on the Bolivian courts, made the contract unenforceable.[443] The court also refused to enforce an exclusive forum selection clause implied by Bolivian law.[444] Walpex Trading Co. (Walpex) is an American export company which allegedly had entered into a contract with defendant Yacimientos Petroliferos Fiscales Bolivianos (Y.F.P.B.), an agency of the Bolivian government, for the sale of piping to be used by the Bolivian oil industry.[445] Defendant, Y.P.F.B., had placed an invitation for bids in various Bolivian newspapers.[446] In addition to providing a general description of the piping sought, the invitation referred to specifications that would be provided by Y.F.P.B. upon request.[447] These specifications included statements that the bidding would be governed by Y.F.P.B. regulations and that

439. *Id.* at 972 - 73, 77 N.Y.2d at 232 - 233, 566 N.Y.S.2d at 578 - 79.

440. Corcoran, 567 N.E.2d at 973, 77 N.Y.2d at 234, 566 N.Y.S.2d at 579.

441. 756 F. Supp. 136 (S.D.N.Y.), *reargument denied*, No. 84 Civ. 4364 (PKL), 1991 WL 79464, 1991 US Dist. 6111 (S.D.N.Y. 1991).

442. *Id.* at 142.

443. *Id.* at 143.

444. *Id.*

445. Walpex Trading Co, 756 F. Supp. at 137 - 38.

446. *Id.* at 138.

447. *Id.*

presentation of a bid implies submission to the laws and jurisdiction of Bolivia.[448] The Y.F.P.B. regulations further provided that all contracts with foreign organizations must contain an express clause subjecting all issues emerging from the contract to the laws of Bolivia and the jurisdiction of its courts.[449] Walpex submitted a bid through its Bolivian sales agent, Compania de Representaciones Internacionales, S.R.L., and was eventually awarded the contract on April 7, 1982.[450] During the next 15 months, numerous extensions were requested by Y.F.P.B. regarding the deadline for full payment of the purchase price of the piping. On July 28, 1983, Y.F.P.B. formally repudiated the contract.[451]

Plaintiff Walpex initiated an action for breach of contract alleging that the acceptance of the bid formed an enforceable contract and additionally that it had entered supply contracts and had undertaken a performance bond as required by Y.F.P.B. in reliance on Y.F.P.B.'s acceptance of the bid.[452] Defendant moved for summary judgment and dismissal contending that no enforceable contract existed in the absence of a written agreement, and that even if an enforceable contract existed, by implication it included the choice of law and choice of forum clauses stating that Bolivian law controls and Bolivian courts have exclusive jurisdiction.[453] In the alternative, defendant argued that even in the absence of an enforceable choice of forum clause, Bolivian law required dismissal of the action since it was a contract with a foreign party that did not contain the required choice of forum clause.[454]

The District Court denied defendant's motions for summary judgment and dismissal, but held that Bolivian law governed the dispute.[455] When the substantive claim does not arise under federal law, the F.S.I.A. requires U.S. courts to apply the choice of law rules of the forum state.[456] Under New York choice of law analysis, the law of the jurisdiction with the greatest interest in the litigation controls

448. *Id.*

449. Walpex Trading Co., 756 F. Supp. at 138.

450. *Id.*

451. *Id.*

452. *Id.* The court had previously determined it had subject matter jurisdiction under the F.S.I.A. *Id.* (citing Walpex Trading Co. v. Yacimientos Petroliferos Fiscales Bolivianos, 712 F. Supp. 383 (S.D.N.Y. 1989)).

453. Walpex Trading Co., 756 F. Supp. at 139.

454. *Id.*

455. *Id.* at 139 - 42.

456. *Id.* at 140.

the dispute.[457] The court concluded that since Bolivia has greater contacts with the action and Bolivia has the paramount interest in having its law control, the law of Bolivia controls.[458] All of the events underlying formation of the contract took place in Bolivia and virtually all of its performance was to take place in Bolivia.[459] The only contacts with the forum state of the litigation, New York, were the plaintiff's residency and the performance bond, which was issued by a New York bank.[460]

However, the court declined to find that the contract included an enforceable forum selection clause.[461] Although the Supreme Court had previously held that forum selection clauses should be given effect when freely negotiated and where there are no signs of fraud, duress, undue influence or overwhelming bargaining power,[462] the District Court declined to pass on the validity of the forum selection clause alleged by defendants since it was not codified in a document.[463] In fact, the court noted that in the absence of any written document, the court could not pass on the validity of an exclusive forum clause that would have or should have been included in such a document.[464] The court thus denied defendant's motion on exclusive forum grounds.[465]

The court further denied the motions for summary judgment and dismissal on the grounds that Bolivian law would not give effect to the contract.[466] The court reasoned that although defendants presented an affidavit of a Bolivian law expert stating that Bolivian courts would not enforce a contract that did not include choice of forum and choice of law clauses, defendants did not provide evidence that the contract would be unenforceable under Bolivian law where there were allegations of bad faith which induced the plaintiff to rely on the acceptance of the bid.[467]

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457. Walpex Trading Co., 756 F. Supp. at 140 (citing Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 684, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 95 (1985)).

458. *Id.* at 142.

459. *Id.* at 140.

460. *Id.*

461. Walpex Trading Co., 756 F. Supp. at 143.

462. *Id.* at 142 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972)).

463. *Id.*

464. *Id.*

465. Walpex Trading Co., 756 F. Supp. at 142.

466. *Id.* at 143.

467. *Id.*

VIII. ASYLUM

A. Melendez v. United States Dep't of Justice, 926 F.2d 211 (2d Cir. 1991); *An INS factual determination of whether to grant asylum based on a claim of a "well founded fear" of persecution or to withhold deportation based on a showing of a "clear probability" of persecution is reviewable under the substantial evidence standard.*

The facts in *Melendez v. United States Dep't of Justice*,[468] concerned the controversial area of asylum for El Salvadoran aliens claiming persecution due to threats from death squads and the military. The Second Circuit considered the standard the U.S. Immigration and Naturalization Service's (INS) Board of Immigration Appeals (Board of Appeals) applies to an applicant's request for a grant of asylum.[469] Additionally, the Second Circuit elaborated on the standard of review for Board of Appeals determinations on withholding of deportation.[470]

Petitioner, the asylum applicant, was a forty year old native of El Salvador who has resided in the U.S. since 1984.[471] While in El Salvador, petitioner had been active in the *La Uno* party working for free elections in El Salvador and for the election of Salvadoran President Duarte.[472] From 1974 to 1982, petitioner alleges he was threatened repeatedly by government security forces, compelling him to leave his family and constantly move around El Salvador.[473] Many of his colleagues from *La Uno* were jailed, murdered or had disappeared.[474] Petitioner's brother and wife had both been murdered.[475] Members of church organizations familiar with the El Salvadoran death squads testified before an INS judge about these activities.[476] Petitioner came to the U.S. illegally in 1982 and was deported to El Salvador.[477] After more threats to his personal safety, petitioner returned to the U.S. in 1984.[478]

Both the INS judge and the Board of Appeals denied the petition for asylum and the request to withhold deportation.[479] The Board of

468. 926 F.2d 211 (2d Cir. 1991).
469. *Id.* at 214 - 16.
470. *Id.* at 218.
471. *Id.* at 213.
472. Melendez, 926 F.2d at 213.
473. *Id.*
474. *Id.*
475. *Id.*
476. Melendez, 926 F.2d at 213.
477. *Id.*
478. *Id.*
479. *Id.* at 213 - 214.

Appeals decided that under § 208(a) and § 243(h) of the Immigration and Nationality Act[480] (I.N.A.) petitioner had failed to demonstrate a "well founded fear" of persecution as required for a grant of asylum[481] or a "clear probability" of persecution required for withholding deportation.[482] In particular, the Board of Appeals found that petitioner had failed to demonstrate a connection between his brother and wife's deaths, on the one hand, and claimed threats of persecution against petitioner on the other.[483] The Board of Appeals also found that petitioner had failed to demonstrate that he was threatened or the nature of the alleged threats.[484] The Second Circuit reversed and granted the petition.[485]

Granting asylum under § 208(a) of the I.N.A. is two-step process.[486] First, the petitioner must demonstrate a "well founded fear" of persecution in his/her native land.[487] Second, the petitioner must seek asylum which may be granted at the discretion of the Attorney General.[488] The Supreme Court has held that the "well founded fear" standard might be satisfied upon a showing that persecution was a "reasonable possibility."[489] Similarly, the Second Circuit has previously held that the standard is satisfied upon demonstration that a reasonable person would fear persecution if returned to his or her native country.[490] This standard involves both subjective proof that the petitioner fears persecution and an objective showing that the fear is reasonable.[491] Proof of the objective component may include documentary evidence of future persecution[492] or credible oral testimony

480. Immigration and Naturalization Act, 8 U.S.C. §§ 1103 - 1525, § 1158(a), § 1253(h)(1) (1991) (*cited in* Melendez, 926 F.2d at 213 - 14).

481. Immigration and Nationality Act of 1952, § 208(a) (*cited in* Melendez, 926 F.2d at 213 - 14).

482. *Id.* at § 243(h) (*cited in* Melendez, 926 F.2d at 218).

483. Melendez, 926 F.2d at 214.

484. *Id.*

485. *Id.* at 219 - 20.

486. Section 208(a) confers discretion on the Attorney General to grant asylum to refugees. A refugee is:

> any person who is outside any country of such person's nationality . . . who is unable or unwilling to return to . . . that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A) (*cited in* Melendez, 926 F.2d at 214).

487. Melendez, 926 F.2d at 214 (citing Immigration and Nationality Act § 208(a)).

488. *Id.* at 215 (citing Carcamo - Flores v. INS, 805 F.2d 60, 65 (2d Cir. 1986)).

489. *Id.* (citing INS v. Stevic, 467 U.S. 407, 424 - 25 (1984)).

490. *Id.* (citing Carcamo - Flores, 805 F.2d at 68).

491. Melendez, 926 F.2d at 215.

492. *Id.* (citing Del Valle v. INS, 776 F.2d 1407, 1411 (9th Cir. 1985)).

that petitioner has good reason to fear being singled-out for persecution.[493] The court concluded that the Board of Appeals correctly applied the reasonable person standard in determining whether there was a "well founded fear" of persecution for which asylum may be granted.[494]

In the alternative to the § 208(a) claims, petitioner also raised an I.N.A. § 243(h)[495] claim that withholding of deportation was mandatory.[496] The standard of proof under § 243(h) is materially different than that under § 208(a).[497] Section 243(h) requires a demonstration that there is a "clear probability," or it is "more likely than not," that the alien would be subject to persecution.[498] The Board of Appeals in this case was therefore correct in applying the "more likely than not" standard to petitioner's claim under § 243(h) to withhold deportation.[499]

In addition to addressing whether the Board of Appeals applied the correct standards, the court also discussed the standard of review to which a Board of Appeals determination would be held. The Second Circuit's analysis of the standard of review applied to a Board of Appeals determination under § 208(a) differentiated between a fact finding component[500] and a discretionary component.[501] The purely factual determination of whether there is a "well founded fear" of persecution is reviewable under the substantial evidence standard articulated under § 106(a)(4) of the I.N.A.[502] The discretionary component is only reviewable for abuse of discretion.[503] Under § 243(h), however, the Board of Appeals only makes a factual determination of

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493. *Id.* at 215 (citing Del Valle, 776 F.2d at 1411 (quoting Cardozo - Fonseca v. INS, 767 F.2d 1448, 1453 (9th Cir. 1985), *aff'd*, 480 U.S. 421 (1987))).

494. *Id.*

495. Melendez, 926 F.2d at 215. Section 243(h) provides that:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1253(h)(1) (*cited in* Melendez, 926 F.2d at 214).

496. *Id.* at 215.

497. *Id.*

498. *Id.* (citing INS v. Stevic, 467 U.S. 407, 424 - 25 (1984)).

499. Melendez, 926 F.2d at 215.

500. *Id.* The fact component relates to the Board of Appeal's determination of whether the applicant is a refugee for asylum purposes.

501. *Id.* at 216. The discretionary component is associated with the ultimate grant or denial of asylum.

502. *Id.* at 216 (citing 8 U.S.C. § 1105a(a)(4)).

503. Melendez, 926 F.2d at 218.

whether there is a clear probability of persecution.[504] Its determination is therefore to be reviewed under the substantial evidence standard.[505] The court concluded that petitioner had sufficiently demonstrated probability of persecution to trigger the withholding of deportation under § 243(h).[506] The court specifically rejected the reasoning employed by the Board of Appeals that because threats by El Salvadoran death squads are common among members of political organizations in that country, petitioner's claim did not demonstrate a unique level of fear and did not warrant asylum or a stay of deportation.[507] Instead of undercutting a claim for asylum, objective evidence of violent conditions in a country is especially probative of a "well founded fear" of persecution.[508] Thus, the court remanded the case to INS for a new hearing to reevaluate whether petitioner could satisfy the "clear probability" of persecution standard for withholding deportation.[509]

IX. EXTRADITION

A. Spatola v. United States, 925 F.2d 615 (2d Cir. 1991); *When a foreign court has convicted a person to be extradited from the U.S., there is no need for independant determination of probable cause by a U.S. court. Extradition orders need only consider whether the magistrate had jurisdiction, whether the offenses charged are within the Treaty on Extradition and whether there was any evidence supporting the finding that there was reason to believe that the person to be extradited was guilty of the crimes charged.*

In *Spatola v. United States*,[510] the Second Circuit affirmed the District Court's ruling on an extradition request from Italy.[511] The party to be extradited, the relator, had been convicted in Italian courts for drug trafficking and related currency offenses in 1983.[512] Spatola, the relator in this action, had been imprisoned, but was released while his appeal in the Italian courts was pending.[513] While his appeal was pending on the earlier charges, Spatola was convicted by

504. *Id.*
505. *Id.*
506. *Id.* at 219.
507. Melendez, 926 F.2d at 219. The Attorney General has discretion with respect to whether grant asylum, but does not have discretion regarding the withholding of deportation.
508. *Id.* at 211.
509. *Id.* at 220.
510. 925 F.2d 615 (1991).
511. *Id.* at 618.
512. *Id.* at 617.
513. *Id.*

an Italian court of bribing a public official.[514] He then fled to the U.S.[515] Upon learning of his presence in the U.S., the Italian Government made a formal request for his extradition.[516] After a hearing, the U.S. Magistrate found that Spatola was extraditable under the Treaty on Extradition Between the Government of the United States and the Government of the Republic of Italy[517] (Treaty on Extradition). The Magistrate concluded that there was probable cause to believe Spatola committed the offenses in Italy for which he was charged, and that since the offenses were criminal in the U.S. as well, the dual criminality requirement of the Treaty on Extradition was satisfied.[518] Spatola subsequently brought an action for a writ of habeas corpus challenging the Magistrate's order to extradite. The District Court denied Spatola's request for habeas corpus relief.[519]

The Second Circuit affirmed the District Court's denial of habeas corpus relief.[520] First, the court noted that although orders certifying request for extradition are not final decisions of the court and hence non-appealable, a relator may obtain limited review of extradition orders by seeking a writ of habeas corpus.[521] The scope of review is confined to whether the magistrate had jurisdiction, whether the offenses charged are within the Treaty on Extradition and whether there was any evidence supporting the finding that there was reason to believe that the relator is guilty of the crimes charged.[522]

Spatola contended that the Magistrate erred in finding probable cause to believe he committed the offenses in Italy based on an analysis of the Italian appellate court order affirming his earlier convictions of drug trafficking.[523] The Second Circuit affirmed the District Court's holding that there need be no independent basis for finding probable cause.[524] To rule that a conviction, after a trial at which the relator was present and represented by counsel, does not constitute probable cause would require magistrates to substitute their judgment

514. Spatola, 925 F.2d at 617.

515. *Id.*

516. *Id.*

517. Treaty on Extradition Between the Government of the United States of America and the Government of the Republic of Italy, Oct. 13, 1983, T.I.A.S. No. 10837 [hereinafter Treaty on Extradition] (*cited in* Spatola, 925 F.2d at 617).

518. Spatola, 925 F.2d at 618 (citing Treaty on Extradition, *supra* note 517, art. II).

519. *Id.* at 617.

520. *Id.* at 619.

521. *Id.* (citing 28 U.S.C. § 2241).

522. Spatola, 925 F.2d at 619 (citing Fernandez v. Phillips, 268 U.S. 311 (1925)).

523. *Id.* at 618.

524. *Id.*

for that of the foreign court.[525] The interests of international comity require recognition of the foreign conviction as probable cause.[526] Moreover, the Second Circuit affirmed the District Court's finding that the drug smuggling and money laundering offenses for which Spatola was convicted satisfy the dual criminality requirement of the Treaty on Extradition.[527] Extradition was thus permissible under the Treaty on Extradition because the relator's offenses were criminal under the penal laws of both contracting parties, the U.S. and Italy.[528]

X. MISCELLANEOUS

A. International Judicial Assistance

1. *In re* Request For Int'l Judicial Assistance (Letter Rogatory) For the Federative Republic of Brazil (General Universal Trading Corp. v. Morgan Guar. Trust Co.), 936 F.2d 702 (2d Cir. 1991); *Evidence may be produced pursuant to a foreign government's letter rogatory in the absence of a pending adjudicative proceeding in the foreign state only if such a proceeding is very likely to occur within a brief interval from the time the request is made.*

The Second Circuit's only foray into international judicial assistance during the survey year was in *In re Request For International Judicial Assistance (Letter Rogatory) For the Federative Republic of Brazil*.[529] The case involved motions by Panamanian corporations to quash a subpoena duces tecum directed to the New York office of Morgan Guaranty Trust Company (Morgan) at the request of a Brazilian prosecutor to compel discovery of records pertaining to the corporations' accounts.[530] The subpoena arose out of a Brazilian investigation into the contents of the Panamanian accounts at Morgan and whether they were the proceeds of illegal activity in Brazil.[531] Congress has authorized the U.S. courts to aid foreign courts in production of evidence necessary to adjudicative proceedings.[532] Not clear, however, was whether that authorization includes situations where actual adjudicative proceedings have not yet been com-

525. *Id.*

526. Spatola, 925 F.2d at 618.

527. *Id.* at 619 (citing Treaty on Extradition, *supra* note 518, art. II). These offenses fall within the proscriptions under U.S. law against conspiring to traffic narcotics, 21 U.S.C. §§ 841(a)(1), 846, 953, 963, and against conspiring to launder money, 18 U.S.C. § 1956.

528. *Id.*

529. 936 F.2d 702 (2d Cir. 1991).

530. *Id.* at 703.

531. *Id.*

532. *Id.* (citing 28 U.S.C. § 1782).

menced.[533] The District Court concluded that assistance could be rendered so long as proceedings in the foreign tribunal were "possible."[534]

The Second Circuit reversed. The federal letters rogatory statute provides that, "[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ."[535] Prior to amendment in 1964, the statute required that the requested evidence be used in a "pending" judicial proceeding.[536] The Second Circuit had previously interpreted the amended version of the statute as not limited to proceedings in conventional courts or tribunals.[537] The authority could be exercised when the requesting sovereign is exercising an adjudicative function.[538] The deletion of the word "pending" from the statute in 1964 indicates that its application does not require the foreign adjudication to be pending.[539] The Second Circuit, however, concluded that the adjudicative proceeding nonetheless must be imminent, i.e. "very likely to occur and very soon to occur."[540] It is not sufficient that adjudicative proceedings are "probable" as the District Court had ruled. Because the Brazilian proceedings in this case were still investigatory with prosecution only "possible," the evidence in the record did not satisfy the standards of the statute authorizing judicial assistance.[541]

533. *In re* Request for Int'l Judicial Assitance, 936 F.2d at 705.

534. *Id.* at 704 (citing *In re* Request for Int'l Judicial Assistance, 687 F. Supp. 880 (S.D.N.Y. 1988)).

535. *Id.* (quoting 18 U.S.C. § 1782).

536. *Id.* (quoting Pub. L. No. 773, 62 Stat. 869, 949 (1948) as amended by Pub. L. No. 73, 63 Stat. 89, 103 (1949)).

537. *In re* Request for Int'l Judicial Assitance, 936 F.2d at 705 (citing *In re* Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1017, 1019 - 20 (2d Cir. 1967)).

538. *Id.*

539. *Id.* at 706.

540. *Id.*

541. *In re* Request for Int'l Judicial Assistance, 936 F.2d at 707.