1980 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT

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1980 brought considerable attention to one painful episode in modern international relations: the attack on the United States Embassy and the holding hostage of United States diplomatic and military personnel in Iran by militant students, an act ratified by the government of Iran. The hostage-taking violated one of the most cherished principles of international law: the inviolability of diplomatic and consular personnel and premises. The Carter Administration's response to the Embassy attack — the freezing of Iranian assets within this country, and the agreement between the United States and Iran that ended the crisis — unfreezing the assets and barring claims against Iran in United States courts, spawned significant litigation in 1980 and 1981.

As important and engaging as the hostage crisis was during 1980, it was not the only issue with international overtones confronting state and federal courts that year. The purpose of this article is to survey those cases decided in 1980 by the Second Circuit Court of Appeals and federal district courts in New York[1] that involved or impacted upon international law, international relations, or international commerce. A few of these cases presented what traditionally have been considered universal principles of international law. Most of the cases raised issues akin to those found in a survey of domestic law — jurisdictional questions, due process challenges, choice of law problems — which are appropriate for discussion in this survey because they arise in the international arena and thus implicate political and legal values foreign to our domestic law.

I. THE IRANIAN ASSETS LITIGATION[2]

On November 4, 1979, the American Embassy in Tehran, Iran

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1. In future years, this Survey will include significant cases involving international law decided by New York state courts. No such cases were decided in 1980.

2. The Iranian assets litigation discussed below spanned three calendar years,

was seized and American diplomatic personnel were captured by militant Iranian students. The seizure of the Embassy and the holding hostage of the personnel violated customary international law[3] and numerous treaties to which both the United States and Iran were signatories.[4]

On November 14, 1979, with relations between the United States and Iran already strained, Iran announced its intention to withdraw its funds from American banks and their overseas branches. The same day, President Carter, acting pursuant to the International Emergency Economic Power Act (IEEPA),[5] declared

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1979-1981. Because the events that spawned the litigation represented a single and unique chapter in our political and legal history, the litigation is treated as a whole in the 1980 Survey.

3. *See*, Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment of May 24, 1980, [1980] I.C.J. Rep. 3, 42-43. The Order and Judgment are reprinted at 74 AM. J. INT'L L. 266 (Order), 746 (Judgment) (1980).

4. Treaty of Amity, Economic Relations, and Consular Rights, United States-Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853; Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261.

5. 50 U.S.C. §§ 1701-1706 (Supp. 1978). The IEEPA is the most recent in a series of attempts by Congress to define the Executive's power in dealing with international emergencies. The first modern Congressional effort was the Trading With the Enemy Act (TWEA) (50 U.S.C. § 95a, currently codified as 50 U.S.C. § 1, app. *et seq*). TWEA gave the Executive broad emergency powers but contained no criteria for determining when a national emergency existed. A recent commentator on the Iranian assets litigation noted that the latitude provided by the Act:

> became increasingly apparent as successive Presidents declared "national emergencies" in all manner of difficult situations, domestic as well as international: e.g., President Truman, in 1950, declared a national emergency in connection with the Korean War; President Johnson, in 1968, cited President Truman's declaration of national emergency as precedent for wideranging measures to correct an ongoing balance of payments deficit; President Nixon, in 1970, invoked section 5(b) as authority for mobilizing National Guard units during a strike by Post Office employees and, in 1971, in order to implement a ten percent import duty surcharge.

Gordon, *Freeze, Thaw May Squeeze Law: What's Happening to Those Iranian Assets*, 12 Int'l Practitioner's Ntbk. 1, 2 (1980).

After the Watergate scandal and the "imperial presidency" of Richard Nixon, Congress passed two bills intended to limit and define the Executive's power in emergencies. First was the National Emergencies Act, 50 U.S.C. §§ 1601-1605 *et seq*. (Supp. 1980). It requires the President to indicate, once he declares a national emergency, the specific provisions of law under which he proposes to act in dealing with the emergency. 50 U.S.C. § 1631. The IEEPA, enacted a year later, requires that any emergency declared under the National Emergencies Act must constitute an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." 50 U.S.C. § 1701 (a) (Supp. 1980). For an expanded

a national emergency and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States. . . ."[6] On November 15, 1979, the Treasury Department, pursuant to presidential authorization, promulgated a regulation to implement the blocking order. The regulation contained two critical provisions which would underlie nearly all the subsequent Iranian assets litigation. First, it provided that "*[u]nless licensed or authorized* . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect" to property in which Iran had an interest on or after the blocking order.[7] Second, the regulation provided that any license or authorization issued could be "amended, modified, or revoked at any time."[7a]

The President granted a general license on November 26, 1979, authorizing certain judicial proceedings against Iran but prohibiting the entry of any judgment, decree, or order of similar effect.[8] Three weeks later, the Treasury Department issued a clarifying regulation stating "the general authorization for judicial proceedings . . . includes pre-judgment attachment."[9]

The effect of the President's authorization on the dockets of federal courts was immediate. In the first months after the authorization, over 100 lawsuits were filed by companies seeking attachment of Iranian assets under United States jurisdiction.[10] The claims asserted in these lawsuits were estimated to total over three billion dollars.[11] By September of 1980, ninety-six civil ac-

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analysis of the IEEPA and the history of Executive emergency powers generally, *see*, Gordon, *The Blocking of Iranian Assets*, 14 Int'l L. 659, 662-671 (1980).

6. Exec. Order No. 12,170, 44 Fed. Reg. 65729 (1979). The specific authority for the President's order is 50 U.S.C. § 1702 (a)(1)(B) (Supp. II 1978), which empowers the President to:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest. . . .

7. 31 CFR § 535.203(e) (1980) (emphasis added).

7a. 31 CFR § 535.805 (1980).

8. 31 CFR § 535.504(a)(c) (1980).

9. 31 CFR § 535.418 (1980).

10. Wall St. J., Feb. 6, 1980, at 18, col. 1.

11. *Id.*

tions against Iran or its instrumentalities were pending in the Southern District of New York alone.[12] It is therefore impossible to treat all, or even most, of the cases in a survey article. For this reason, three cases, raising the most common issues in the Iranian assets litigation, have been chosen for scrutiny here. The first is *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*,[13] which involved Iran's claim of immunity from prejudgment attachment of its assets. The second is *Marschalk v. Iran National Airlines Corp., et al*,[14] decided by Judge Kevin Duffy of the Southern District of New York. Third is *Dames & Moore v. Regan*,[15] recently decided by the United States Supreme Court. The latter two cases are perfectly suited for a survey article because, while each opinion is well-reasoned, the District Court and Supreme Court reached opposite conclusions in resolving identical legal issues. The reader thus has an opportunity to understand the competing arguments for and against the power, statutory and constitutional, of President Carter (and later, President Reagan) to deal with Iranian authorities as he did in the early and final stages of the hostage crisis.

A. *Initial Challenges: Immunity from Prejudgment Attachment*

The first issue raised in the litigation initiated after President Carter's issuance of a general license to sue was whether the State of Iran[16] was entitled to immunity from prejudgment attachment of its assets. In an effort to prevent the removal of Iranian assets from the jurisdiction of the court, the plaintiffs in *New England Merchants Nat'l Bank v. Iran Power* applied for and were granted orders of attachment.[17] Plaintiffs then moved to confirm

12. Marschalk v. Iran National Airlines Corp., *et al.*, 518 F. Supp. 69 (S.D.N.Y. 1981).

13. 502 F. Supp. 120 (S.D.N.Y. 1980).

14. 518 F. Supp. at 69.

15. ___ U.S. ___, 101 S. Ct. 2972.

16. Throughout the discussion of immunity, any reference to Iran includes not only the State of Iran but also its agencies and instrumentalities. *See*, Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (1980).

17. Plaintiffs in the ninety-six cases filed in the Southern District of New York were granted orders of attachment pursuant to article 62 of the Civil Practice Law and Rules. N. Y. Civ. Prac. Law §§ 6201 *et seq.* (McKinney 1980). Attachment in federal court is available "under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought." Fed. R. Civ. P. 64. Plaintiffs did not seek attachment as a jurisdictional predicate. They relied on 28 U.S.C.

and defendants moved to vacate these orders.[18] The cases in the Southern District of New York were consolidated before Judge Duffy for the sole purpose of determining the immunity question. Judge Duffy held that defendants could not claim immunity from prejudgment attachment.

Defendants claimed that, by virtue of the Foreign Sovereign Immunities Act (FSIA),[19] their assets were immune from prejudgment attachment. Four separate immunities — jurisdictional immunity, immunity from prejudgment attachment, immunity from postjudgment attachment, and immunity from execution upon a judgment — are covered by the FSIA. Prejudgment immunity is the subject of 28 U.S.C. Section 1610(d), which provides that the assets of a foreign state (or its agencies and instrumentalities) are immune from attachment before judgment unless such immunity is *explicitly* waived by the foreign state.[20] In contrast, the FSIA provides that waiver of immunity from postjudgment attachment may be *either* explicit or implicit.[21] The parties agreed that the only possible source of an explicit waiver of Iran's prejudgment attachment immunity would be the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran.[22] In that treaty, each party expressly waives "immunity . . . from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are

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§§ 1330 (a) and 1331 (1980) as a basis of subject matter jurisdiciton and 28 U.S.C. § 1330 (b) as the basis of personal jurisdiction. New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 123, n.4.

18. Many of the orders of attachment were sought prior to communication with defendants and thus prior to retention of counsel by defendants. These orders were granted *ex parte*. Other applications for orders were sought after counsel had been obtained by the various defendants and were issued only after notice to defendants. The New York Civil Practice Law and Rules distinguish between these two types of orders. Where an order of attachment is issued *ex parte*, the party requesting the order must move to confirm the attachment within five days. N.Y. CIV. PRAC. LAW § 6211 (b). Where the order is issued upon notice, the initial burden is on the defendant to move to vacate the attachment. N.Y. CIV. PRAC. LAW § 6223 (a). *See*, New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Company, 502 F. Supp. 120, 123, n.3.

19. 28 U.S.C. §§ 1602-1611 (1980).

20. 28 U.S.C. § 1610 (d) also requires that the purpose of the attachment be to secure a judgment that may be entered.

21. 28 U.S.C. § 1610 (a)(1), (b)(1).

22. Treaty of Amity, Economic Relations, and Consular Rights, United States - Iran, *done* Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853 (effective June 16, 1957).

subject therein . . . ."[23] This section clearly does not constitute an explicit waiver of immunity from prejudgment attachment. As the court noted:

> Congress recognized that pre-judgment attachment is an extraordinary and harsh remedy not to be lightly waived. Instead, only the clearest of waivers will subject a foreign state to this extraordinary remedy.[24]

The fact that the Treaty did not explicitly waive immunity from prejudgment attachment as required by the FSIA did not end the court's inquiry. The FSIA expressly provides that existing international agreements to which the United States was a party at the time of the FSIA's enactment would survive.[25] Thus, "insofar as a foreign state had previously waived its sovereign immunity from jurisdiction, attachment or execution of judgment, by agreement with the United States, these waivers still control on the question of immunity."[26] The court therefore had to resolve a further question: did Iran implicitly waive immunity from prejudgment attachment in the Treaty? Here the court parted company with at least two other courts faced with the question.[27] In considering the issue, the court put great emphasis on the nature of the remedy involved.

> [P]re-judgment attachment, as with the other provisional remedies, is unique in that it affords plaintiff a substantial measure of relief absent a final determination that plaintiff is entitled to any relief whatsoever. Moreover, the provisional remedies are too potentially harassing to be freely granted. For these reasons, the courts have long adopted the view that "owing to the statutory origin and harsh nature of [these remedies]," they are to be construed "in accordance with the general rule applicable to statutes in derogation of the common law, strictly in favor of those against whom [they] may be employed."[28]

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23. *Id.* art. XI, para. 4.

24. 502 F. Supp. 120, 126.

25. 28 U.S.C. §§ 1604, 1609 (1976).

26. 502 F. Supp. 120, 125.

27. *See*, American International Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980); Behring International v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979).

28. 502 F. Supp. 120, 126-127 (quoting Penoyar v. Kelsey, 150 N.Y. 77, 79-80 (1896)). The court emphasized that as a matter of contractual, rather than statutory, interpretation the consent to waive immunity must be express and strictly construed (citing United States v. New York Rayon Importing Co., 329 U.S. 654, 659 (1947)).

Applying the principle of strict construction, the court could not conclude that the parties to the Treaty contemplated waiving immunity from prejudgment attachment.[29]

Having so ruled, the court then turned to the question whether the President's actions in response to the hostage crisis affected Iran's sovereign immunity. The court noted that sovereign immunity is a privilege granted to foreign governments as a matter of comity.[30] As "[s]overeign immunity, at the bare minimum, means that the sovereign may do with its own property as it wishes,"[31] the court concluded that the President's order blocking transfer of all Iranian property was intended to and did suspend the sovereign immunity normally granted to Iran, at least as far as that property was concerned.[32]

After issuing his opinion, Judge Duffy, upon request by the parties, certified the issue of immunity from prejudgment attachment to the Second Circuit Court of Appeals.[33] On January 5, 1981, the Court of Appeals accepted interlocutory review of the certified question and stayed all proceedings in district courts pending its decision.[34]

At approximately the same time the Iranian assets cases were being filed in federal court in New York, Dames & Moore, a company whose wholly-owned subsidiary had contracted to render services for the Atomic Energy Organization of Iran (AEOI), filed suit in the United States District Court for the Central District of California against the AEOI, the government of Iran, and a number of Iranian banks for payments due under the contract.[35] Upon the request of plaintiff, the district court issued orders of attachment against the property of defendants.[36]

B. The United States-Iran Agreement and Subsequent Executive Orders

On January 20, 1981, Iran and the United States entered into

29. 502 F. Supp. 120, 127.
30. *Id.* at 129.
31. *Id.*
32. *Id.* at 130.
33. New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 508 F. Supp. 49 (S.D.N.Y. 1980).
34. New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 646 F.2d 779, 782 (2d Cir. 1981).
35. *See*, Dames & Moore v. Regan, ___ U.S. ___, 101 S. Ct. 2972, 2979 (1981).
36. *Id.*

an "Agreement" under which the hostages were released.[37] As part of the Agreement, the United States obligated itself

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[38]

The Agreement also provided that the United States would "act to bring about" the transfer to Iran by July 19, 1981 of all Iranian assets held in the domestic branches of American banks.[39] In addition, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claim not settled within six months.[40] President Carter sought to implement the Agreement through a series of Executive Orders.[41] These orders revoked all licenses permitting the exercise of

> "any right, power, or privilege" with regard to Iranian funds, securities, or deposits; "nullified" all non-Iranian interests in such assets acquired subsequent to the blocking order of November 14, 1979; and required those banks holding Iranian assets to transfer them "to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury."[42]

After taking office, President Reagan ratified these Executive Orders and "suspended [all] claims except as they may be presented to the [claims] tribunal."[43]

The effect of these orders on *New England Nat'l Bank v.*

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37. The Agreement is embodied in two Declarations: Declaration of the Government of the Democratic and Popular Republic of Algeria; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlements of Claims by the Governments of the United States of America and the Government of the Islamic Republic of Iran. [Hereinafter cited as "Agreement".]

38. Agreement cited in ___ U.S. ___, 101 S. Ct. 2972, 2979-2980 (1981).

39. Agreement cited in ___ U.S. ___, 101 S. Ct. at 2980.

40. *Id.*

41. Executive Orders No's. 12,276-12,285, 46 Fed. Reg. 7913-32 (1981).

42. Agreement, quoted at ___ U.S. ___, 101 St. Ct. at 2980 (1981).

43. Exec. Order No. 12,294, 42 Fed. Reg. 14111 (1981). The suspension of any such claim terminates if the Tribunal decides it has no jurisdiction over the claim. When the Tribunal awards a recovery which is paid or determines that no recovery is due, the claim is discharged for all purposes. *Id.*

Iran Power Generation and Transmission was uncomplicated. The Second Circuit Court of Appeals determined that a single question supplanted the questions that had been certified by Judge Duffy: "Were the actions of the President in suspending the lawsuits and nullifying the attachments consistent with constitutional power and any applicable statutory authority?"[44] The Second Circuit declined to rule on the question since the issue had not been presented to or decided by the lower court. Rather, the court remanded the cases to Judge Duffy with directions to select and decide one of the pending cases that squarely presented the issue. The judge was also directed to join the United States as a party.[45]

The *Dames & Moore* litigation in California took a more complicated path after the Agreement and Executive Orders were signed.[46] The District Court granted plaintiff's motion for summary judgment against two of the defendants in late January. Plaintiff immediately sought writs of garnishment and execution in Washington State against Iranian property located in that state. Concurrently, plaintiff filed a second suit in the California District Court against the United States and Secretary of the Treasury, Donald Regan, seeking to prevent the enforcement of the Executive Orders and Treasury regulations implementing the Agreement. The District Court denied the motion for a preliminary injunction, dismissed the claim, stayed the execution of its earlier summary judgment, and vacated all prejudgment attachments. The day after the appeal from these rulings was docketed in the Ninth Circuit, the Department of the Treasury amended its regulations to require the transfer of Iranian financial assets in the United States to the Federal Reserve Bank of New York by June 19, 1981.[47] The District Court then "entered an injunction pending appeal prohibiting the United States from requiring the transfer of Iranian property that is subject to any writ of attachment, garnishment, judgment, levy, or other judicial lien, issued by any court in favor of petitioner."[48] The petitioner sought a writ of *certiorari* before judgment[49] from the United States

44. New England Merchants Nat'l Bank v. Iran Power, 646 F.2d 779, 783 (2d Cir. 1981).

45. 646 F.2d 779, 784.

46. The procedural history of *Dames & Moore* is set out at ___ U.S. ___, 101 S. Ct. 2972, 2980 (1981).

47. *Id.* at 2981.

48. *Id.*

49. 28 U.S.C. § 2101 (e).

Supreme Court. The Court granted the petition for writ.[50]

The Supreme Court and Judge Duffy were presented with the same issues but reached opposite results. Although the Court's decision most likely wholly overruled Judge Duffy's, in the analysis of the issues that follows, the rationale behind each court's conclusions will be examined in order that the reader might understand the competing legal arguments and constitutional values at stake.

Both courts began their consideration of the major issues presented by the Presidents' actions by reviewing the scope of presidential power described by Justice Jackson in his concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*.[51] Justice Jackson's concurrence identified three relationships between Congress and the Executive, each of which demands a separate standard of review by the Judiciary in determining the authority of the President to act in a given case.[52] Recognizing, as Justice Jackson did, that it represents "a somewhat over-simplified grouping,"[53] the Court in *Dames & Moore v. Regan* paraphrased the trichotomy:

> When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation of powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or

50. ___ U.S. ___, 101 S. Ct. at 3132 (1981). One of the factors probably motivating the Court to grant the petition was the information conveyed to the Court by the Solicitor General that if the United States failed to act prior to July 19, 1981, Iran would consider the United States to be in breach of the Agreement.

51. 343 U.S. 579, 634-655 (1952). (Jackson, J., concurring.)

52. 343 U.S. at 635-638.

53. 343 U.S. at 635.

quiescence." Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."[54]

C. *Did the President Have Statutory or Constitutional Authority to Nullify the Attachments and Order the Transfer of Iranian Assets?*

1. DAMES & MOORE V. REGAN

The Supreme Court held that the President had authority under the IEEPA to issue both the order freezing and the order releasing and transferring the Iranian assets. This conclusion was based on the "plain language" of section 1702 of the IEEPA which authorizes the President to "nullify, void, prevent or prohibit, any acquisition . . . transfer . . . or [exercise of] any right, power or privilege" with respect to foreign property within the United States.[55] The Court rejected petitioner's assertion that under section 1702 the President, once having blocked the assets, was empowered only to continue or discontinue the block.[56]

Acknowledging that the IEEPA was intended to limit the President's emergency powers in peacetime under the Trading With the Enemy Act (TWEA),[57] the Court nonetheless concluded that these limitations did not affect the authority of the President to act as he did in regard to the Iranian assets.[58] Because the President's action was taken pursuant to specific congressional authorization, under Justice Jackson's trifurcated standard of judicial review, petitioner had a heavy burden to overcome the strongest of presumptions;[59] a burden, the Court held, petitioner failed to meet.[60]

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54. ___ U.S. ___, 101 S. Ct. 2972, 2981 (1981).

55. 50 U.S.C. § 1702 (a)(1)(B) (Supp. 1980); ___ U.S. ___, 101 S. Ct. 2972, 2982 (1981).

56. ___ U.S. ___, 101 S. Ct. 2972, 2983 (1981). *Accord*, Chas. T. Main Int'l, Inc. v. Khuzestan Water and Power Authority, 651 F.2d 800 (1st Cir. 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, ___ F.2d ___ (D.C. Cir. 1981).

57. 50 U.S.C. App. §§ 1-44 *et seq.* (1968 & Supp. 1980), originally codified as 50 U.S.C. § 95a (1917).

58. ___ U.S. ___, 101 S. Ct. at 2983. The Court pointed out that the petitioner proceeded against the blocked assets after the Treasury Department issued licenses authorizing such proceedings. Since the Treasury regulations expressly provided for the amendment, modification or revocation of such licenses, "[p]etitioner was on notice of the contingent nature of its interest in the frozen assets." *Id.*

59. 343 U.S. 579, 637.

60. ___ U.S. ___, 101 S. Ct. 2972, 2984 (1981).

2. MARSCHALK V. IRAN NAT'L AIRLINES CORP.

While acknowledging that on its face the language of IEEPA could be read to authorize the President's actions, Judge Duffy concluded, on the basis of the legislative history of IEEPA, that the powers conferred by that act do not include nullification of the rights plaintiff had in the attached Iranian property.[61] Although Congress did not make clear its purpose in including section 1702, the exact words of which were drawn from the Trading with the Enemy Act (TWEA),[62] in the IEEPA, Judge Duffy found significance in the IEEPA's general purpose, which was to revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies.[63] Even more significant was the legislative purpose behind the TWEA, which was to define, regulate, and punish *trading with the enemy*.[64] "Neither the legislative history of the [Trading With the Enemy Act] nor any case falling under it indicate [sic] a presidential power to nullify a citizen's court-conferred rights in foreign property."[65] Thus, in Judge Duffy's view, the President would have power under the IEEPA to nullify any interest an American citizen obtained in Iranian property through any transaction *with the Iranian owner* after the freeze order but not an interest in Iranian property conveyed by a federal court.[66]

D. *Did the President Have Statutory or Constitutional Authority to Suspend the Claims of American Citizens Pending in American Courts?*

1. DAMES & MOORE V. REGAN

The Government asserted the President's authority under the IEEPA and the "Hostages Act,"[67] to suspend[68] all claims pend-

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61. Marschalk v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981).

62. 50 U.S.C. § 95a, currently codified as 50 U.S.C. App. §§ 1-44 *et seq.*

63. 518 F. Supp. at 69, 96.

64. 10 H.R. REP. No. 4960, 65th Cong., 1st Sess., Ch. 106, Pub. L. No. 6591, 40 Stat. 411 (1917) (emphasis added).

65. 518 F. Supp. at 70, 96.

66. *Id.* at 97.

67. 22 U.S.C. § 1732 (1979), *see* note 71, *infra*.

68. One of the arguments made by the Government throughout the Iranian assets litigation was that the claims of the various plaintiffs had been suspended rather than terminated. The Agreement between the United States and Iran provided for the termination

ing in federal courts against the frozen Iranian assets. The Court concluded that the IEEPA did not authorize the suspension of claims since "claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property."[69] An *in personam* lawsuit is aimed simply at establishing liability and is not focused on any particular property in the jurisdiction.[70] While acknowledging that the broad language of the Hostages Act could be read to cover the President's action, the Court was "reluctant to conclude" that it gave specific authorization for the suspension of claims.[71] The legislative history did not suggest an intent on the part of Congress to cover a situation like the Iranian hostage crisis.[72]

Although the IEEPA and Hostages Act do not specifically authorize the suspension of claims in American courts, the Court did not find them "entirely irrelevant to the question of the validity of the President's actions."[73] Rather, they were highly relevant

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of legal proceedings. President Reagan, in Executive Order No. 12,294, suspended all claims. The distinction, while troubling to Judge Duffy, did not affect the resolution of any issue in either *Marschalk* or *Dames & Moore*.

69. ___ U.S. ___, 101 S. Ct. 2972, 2984-85 (1981).

70. *Id.* Every court considering this question in Iranian assets litigation has reached a Similar conclusion. Chas T. Main Int'l, Inc., v. Khuzestan Water and Power Authority, 651 F.2d 800 (1st Cir. 1981); American Int'l Group, Inc. v. Islamic Republic of Iran, ___ F.2d ___ n.15; Marschalk v. Iran National Airlines, 518 F. Supp. 69 (S.D.N.Y. 1981); Electronic Data System v. Social Security Organization of Iran, 508 F. Supp. 1350, 1363 (N.D. Tex. 1981).

71. ___ U.S. ___, 101 S. Ct. at 2985. The Hostages Act provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release, and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

22 U.S.C. § 1732.

72. ___ U.S. ___, 101 S. Ct. at 2985.

> Although the Iranian hostage-taking violated international law and common decency, the hostages were not seized out of any refusal to recognize their American citizenship—they were seized precisely *because of* their American citizenship. The legislative history is also somewhat ambiguous on the question whether Congress contemplated presidential action such as that involved here or rather simply reprisals directed against the offending foreign country and *its* citizens.

Id. See, e.g. CONG. GLOBE 4205, 40th Cong., 2d Sess. (1868).

73. ___ U.S. ___, 101 S. Ct. at 2986.

as an indication of "congressional acceptance of a broad scope for executive action in circumstances such as those presented in this case."[74] Citing *Haig v. Agee*,[75] the Court noted that, in the areas of foreign policy and national security, a lack of specific congressional authorization for an executive act does not indicate congressional disapproval of that act. "On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite measures of independent presidential authority.' "[76]

It has long been the practice of the United States to enter into agreements with other nations to settle claims of the parties' respective nationals.[77] The agreements sometimes take the form of treaties but often are executive agreements reached without the advice and consent of the Senate.[78] "Crucial to [the Court's opinion] is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement."[79] The Court found certain statutory enactments and continued congressional acquiescence in the practice to be evidence of such approval. First, the Congress in 1949 enacted the International Claims Settlement Act.[80] Through the Act, Congress created the International Claims Commission[81] and gave it jurisdiction to hear and decide claims by United States nationals against settlement funds established

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74. *Id.*

75. ___ U.S. ___, 101 S. Ct. 2777 (1981).

76. *Id.* (quoting in part Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952)).

77. ___ U.S. ___, 101 S. Ct. at 2986. *See also*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262 (1972); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 247 (1970). These agreements include: 30 U.S.T. 1957 (1979) (People's Republic of China); 27 U.S.T. 3993 (1976) (Peru); 27 U.S.T. 4214 (1976) (Egypt); 25 U.S.T. 227 (1974) (Peru); 24 U.S.T. 522 (1973) (Hungary); 20 U.S.T. 2654 (1969) (Japan); 16 U.S.T. 1 (1965) (Yugoslavia); 14 U.S.T. 969 (1963) (Bulgaria); 11 U.S.T. 1953 (1960) (Poland); 11 U.S.T. 317 (1960) (Rumania).

78. ___ U.S. ___, 101 S. Ct. at 2987. The Court acknowledged that many of the settlement agreements cited were consented to by the claimants but noted that the "'United States has sometimes disposed of the claims of citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole.'" *Id.* (quoting L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262, 263 (1972)). *Accord*, RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 2313 (1965).

79. ___ U.S. ___, 101 S. Ct. at 2987.

80. 22 U.S.C. §§ 1621-1644m (1979 & Supp. 1980).

81. The International Claims Commission is now the Foreign Claims Settlement Commission.

through settlement agreements.[82] The Court concluded that, by creating this procedure, Congress had given its approval to settlement agreements. The fact that Congress continued to accept the President's claim settlement authority, despite numerous amendments to the International Claims Settlement Act, further supported this conclusion. Additional support for congressional approval was found in the legislative history of the IEEPA which stated "nothing in this Act is intended to interfere with the authority of the President to continue blocking assets . . . or to impede the settlement of claims of United States citizens against foreign countries."[83]

Petitioner had raised two strong arguments against the conclusion that Congress acquiesced in the practice of claim settlement by executive agreement. First, petitioner contended that reliance on practice prior to 1952 was misplaced in light of changes in the doctrine of sovereign immunity subsequent to that date.[84] Acknowledging that this contention was "not wholly without merit," the Court nonetheless found it was refuted by the post-1952 practice of claim settlement through executive agreement.

Petitioner's second assertion was that Congress divested the President of authority in this area when it enacted the Foreign Sovereign Immunities Act (FSIA),[85] which gives federal district courts jurisdiction over commercial suits against foreign states that have waived immunity. Petitioner contended that by suspending claims against Iran, the President circumscribed the jurisdiction of the courts, thereby violating article III of the Constitution.[86] The Court rejected this contention stating that the effect of the President's order was to suspend claims, not divest the courts of jurisdiction. The President had simply changed the

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82. ___ U.S. ___, 101 S. Ct. 2987 (citing 22 U.S.C. § 1623(a)).

83. ___ U.S. ___, 101 S. Ct. at 2989 (citing S. REP. No. 95-466, 95th Cong., 2d Sess. 6 (1977)).

84. ___ U.S. ___, 101 S. Ct. at 2989. Prior to 1952, the United States adhered to the doctrine of absolute sovereign immunity. As a result, the only avenue for recourse against a foreign government was through a settlement agreement. In 1952, the United States adopted a restricted view of sovereign immunity. Thus, citizens had a judicial remedy, albeit limited, and therefore no longer had to rely exclusively on the Executive to pursue their claims.

85. ___ U.S. ___, 101 S. Ct. at 2989, (citing 28 U.S.C. §§ 1330, 1602 (Supp. 1980)).

86. ___ U.S. ___, 101 S. Ct. at 2989.

substantive law governing the lawsuit.[87] In addition, the Court noted that the FSIA was enacted to eliminate only one barrier to suit, that is sovereign immunity; it was not enacted to prohibit the President from settling claims against foreign governments.[88]

The Court concluded that the President was authorized to suspend pending claims.

> As Justice Frankfurter pointed out in *Youngstown*, "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . . ." Such practice is present here and such a presumption is also appropriate.[89]

Having so concluded, the Court cautioned against too broad a reading of its holding or analysis.

> We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities . . . . But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.[90]

2. MARSCHALK V. IRAN NAT'L AIRLINES CORP.

Judge Duffy not only refused to find express authority for the President's action suspending claims in the IEEPA but read that

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87. The Court used sovereign immunity to support its point. "No one would suggest that a determination of sovereign immunity divests the federal courts of 'jurisdiction.' Yet petitioner's argument, if accepted, would have required courts prior to the enactment of the FSIA to reject as an encroachment on their jurisdiction the President's determination of a foreign state's sovereign immunity." *Id.*

88. Indeed, in considering enactment of the FSIA, the court noted that Congress considered and rejected proposals to limit this executive power. *Id.* n. 11. *See* Congressional Oversight of Executive Agreements: Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 243-261, 302-311 (1975); Congressional Review of International Agreements, Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations, 94th Cong., 2d Sess. 167, 246 (1976).

89. ___ U.S. ___, 101 S. Ct. 2972, 2990 (citations omitted).

90. *Id.* at 2991.

act as indicating a legislative intent to prohibit such action.[91] Additionally, the FSIA was read by Judge Duffy to prohibit the suspension of claims.

This conclusion was drawn in large part from the legislative history of the FSIA. The original draft of the FSIA, proposed by the Departments of Justice and State, provided that the act would be "subject to existing and future international agreements."[92] The reference to future international agreements was deleted in committee. Judge Duffy reasoned "[i]t would be totally incongruous if Congress took away from the executive the power to dispose of certain lawsuits against foreign governments by 'suggestions of immunity' and yet intended to permit the same by international executive agreements."[93]

Unlike the Supreme Court in *Dames & Moore*, the district court engaged in an extensive analysis of the constitutionality of the President's suspension of claims in United States courts. Because Judge Duffy viewed the President's action not only as lacking congressional authorization, but also as incompatible with the will of Congress, the President's authority, according to Justice Jackson's analysis in *Youngstown*, could be based only upon his own constitutional powers minus any constitutional powers possessed by Congress in the matter.[94] "In this situation, the President's power is 'at its lowest ebb' and the assertion of such power 'must be scrutinized with caution. . . .'"[95]

Recognizing that the executive's powers in foreign affairs extend beyond those specifically enumerated in the Constitution,[96] Judge Duffy turned to the question of "whether the Executive Agreement and Presidential Orders terminating this litigation do in fact upset 'the equilibrium established by our constitutional system' by infringing upon the powers of Congress and the judiciary."[97] Judge Duffy concluded that the President's action infringed upon both. Article III, section 2 of the United States Constitution extends the judicial power of the federal courts to all

91. 518 F. Supp. at 79.

92. H.R. 11315, 94th Cong., 2d Sess. § 1604 (1976). 518 F. Supp. at 82.

93. 518 F. Supp. at 82.

94. *Id.* at 84. 343 U.S. 579, 637. (Jackson, J., concurring).

95. 518 F. Supp. at 84.

96. *Id.* at 85, (citing United States v. Curtiss-Wright Exporting Corp., 299 U.S. 304 (1936)).

97. *Id.* at 86.

cases between "a State, or the Citizens thereof, and foreign States, Citizens or Subjects." The Constitution additionally provides that the jurisdiction of the federal courts shall be defined by the Congress.[98] Despite the constitutional and congressional authority given the federal courts over the claims in the Iranian assets litigation, "[t]he government . . . contend[s] that the President has the authority to suspend litigation in United States courts and transfer claims to a tribunal under his broad and plenary authority to conduct foreign affairs."[99] The government's contention in the district court was based on the presidential power to settle claims of American nationals against foreigners. Judge Duffy was not as willing as the Supreme Court in *Dames & Moore*[100] to accept either the asserted scope of that power or its relevance to this case. First, Judge Duffy doubted that the President actually "settled" the claims of the plaintiffs against Iran.[101] Second, even if the claims were "settled", Congress in the FSIA had indicated disapproval of the practice.[102]

Judge Duffy concluded that,

> To find that a President, by virtue of his foreign affairs power, can dictate the jurisdictional bounds of United States courts violates both the words and the objectives of our Constitution. The Constitution is neither silent nor equivocal about who has the authority to legislate the jurisdiction of the courts. The Founders of this Nation entrusted that responsibility to the Congress. The Constitution does not subject this congressional power to presidential control in times of crisis.[103]

E. Did the President's Actions Suspending the Claims of American Citizens in Federal Courts Constitute a Taking of Property in Violation of the Fifth Amendment of the United States Constitution in the Absence of Just Compensation?

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98. U.S. CONST. art. I § 8. The congressional grant of jurisdiction in this case, according to Judge Duffy, is 28 U.S.C. §§ 1330 and 1332 (*but see* Rugeirro, *infra* at 221-26.) and the Treaty of Amity, Economic Relations, and Consular Rights, art. III § 2, United States-Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853.

99. 518 F. Supp. at 85.

100. See discussion *supra* at 173-74.

101. 518 F. Supp. at 88.

102. *Id.* at 91.

103. *Id.*

1. DAMES & MOORE V. REGAN

The Supreme Court refused to reach the merits of petitioner's contention that the President's suspension order effected an uncompensated taking of its claim in violation of the fifth amendment. Petitioner and the government conceded, and the Court held, that the issue was not yet ripe for review. The very possibility that the President's actions might effect a taking of property, however, made ripe the question whether petitioner will have a remedy in the Court of Claims under the Tucker Act[104] if the action does represent such a taking.[105] According to the Court's opinion in the *Regional Rail Reorganization Act Cases*,[106] Court of Claims jurisdiction under the Tucker Act is presumed over claims arising under the Constitution, congressional acts, or executive regulations. One exception to the general presumption of jurisdiction is contained in section 1502 of the Tucker Act.

> Except as otherwise provided by Act of Congress, the Court of Claims shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations.[107]

At oral argument in *Dames & Moore*, the government conceded this exception would not bar petitioner's action in the Court of Claims.[108] Without discussion, the Court agreed and held that "to the extent petitioner believes it has suffered an unconstitutional taking by the suspension of the claims, we see no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act."[109]

2. MARSCHALK V. IRAN NAT'L AIRLINES CORP.

Judge Duffy rejected numerous contentions by the government, holding that the President's order suspending claims effected an unconstitutional taking of plaintiff's property.[110] First, the Government asserted that President Reagan's Executive

104. 28 U.S.C. §§ 1491-1506 (1976 and Supp. 1979).
105. ___ U.S. ___, 101 S. Ct. at 2992.
106. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974).
107. 28 U.S.C. § 1502 (1976 and Supp. 1979).
108. ___ U.S. ___, 101 S. Ct. at 2992.
109. *Id.*
110. 518 F. Supp. at 94.

Order[111] did not terminate the lawsuit but rather suspended the claims. Labeling the practical distinction between terminating and suspending lawsuits as unclear, Judge Duffy concluded that contracts and contract rights are property within the meaning of the fifth amendment and that the extinguishing of plaintiff's right to enforce its contract claim constituted a taking.[112]

The Government argued that if the President's action effected a taking, plaintiff received value for it because he can bring the claim before an international tribunal with an increased chance of prevailing on the merits since Iran will not have available the defense of sovereign immunity or Act of State. Judge Duffy disagreed.

> Marschalk gains nothing by the alleged waiver by Iran of sovereign immunity or act of state defense. Under the FSIA and the Treaty of Amity, Iran is not entitled to those defenses in the United States courts when the proceedings involve a commercial claim. Furthermore, Marschalk must now pursue its claim in a foreign country which will undoubtedly increase the time and expense involved in the suit. More importantly, Marschalk must litigate its claim before an overtly political Tribunal without our constitutional guarantees of due process.[113]

F. Analysis

Whenever the Supreme Court is called upon to decide legal issues that arise from, and are closely related to, political events, troublesome questions are raised as to the proper role of the judiciary *vis-à-vis* the other branches of government. When the conduct of American foreign affairs is implicated in such cases, the Court's task is made more difficult. When, as here, the issues arise in a unique and dangerous political crisis, involving not only the prestige and reputation of the United States in the world community but the lives of American citizens as well, it is difficult not to be sympathetic to the position of the Court. Such sympathy, however, cannot give way to an uncritical acceptance of the Court's reasoning, for it is the essence of the Court's role to stand apart from political and national passions. Indeed, the purpose of

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111. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

112. 518 F. Supp. at 93, (citing Lynch v. United States, 292 U.S. 571 (1933); United States v. Northern Pacific Ry. Co., 256 U.S. 51 (1921)).

113. *Id.* at 93-94.

the Constitution, and thus of the Court sworn to interpret it, is to protect the individual from government not only in times of calm, but more importantly, in times of crisis.

The Court's decision in *Dames & Moore v. Regan* may be criticized on exactly this ground. The hostage crisis imperiled the lives of the Americans held captive, at times threatened the peace of the world, and shook the foundations of international law. It did not, and could not, change the nature or extent of the rights guaranteed by the Constitution. Yet the Constitution seems to have played a very small role in the Court's analysis of the President's actions. This is not a novel criticism of the Court's interpretation of the executive's power in foreign affairs. Yet this fact makes *Dames & Moore* more rather than less troubling. In the context of the its historical deference to the executive, the Court's cautionary language against reading its opinion too broadly cannot be reassuring absent a thorough articulation of precisely what constitutional provision mandates or justifies such deference. This is not to say that the balance need be struck against the exercise of executive power; only that one is more confident that a balance exists if the exercise of striking that balance is witnessed by those whose rights and interests are being weighed.

Despite the absence of a thorough constitutional analysis, the rationale employed by the Court in *Dames & Moore* to uphold the Executive Orders gives some comfort to those who fear an expansion of executive power. Since Justice Jackson's trichotomy formed the basis for the Court's analysis, the conclusion that the Executive Order represented a valid exercise of Presidential power is based largely on the supporting intent of Congress. Thus, if Congress acts to withdraw authorization for the kinds of action taken in response to the hostage crisis, the task of convincing the Court of the validity of such actions will be considerably more difficult.

The Supreme Court's decision in *Dames & Moore* is only one chapter of the Iranian assets litigation. Some cases will be decided by the Claims Tribunal. If the Tribunal's resolution of American claims is viewed as unacceptable by the claimants, suits will doubtlessly be filed against the United States in the Court of Claims. Those suits falling outside the jurisdiction of the Tribunal will be litigated in United States courts. The hostage crisis is over;

the legal problems caused by the severance of political and economic ties with Iran will continue for years.

II. OTHER SELECTED CASES

A. CRIMINAL MATTERS

1. CALTAGIRONE V. GRANT

Provisional Arrest of Foreign Nationals in United States Requires Showing of Probable Cause — Article XIII of the United States Extradition Treaty with Italy — Right of Party Requested to Enforce Foreign Arrest Warrant to Demand Additional Evidence and Information — Due Process Requirements in Provisional Arrest Cases

In *Caltagirone v. Grant*,[114] the Second Circuit Court of Appeals unanimously held that where the United States is asked as the "requested party" under the extradition treaty with Italy[115] to "provisionally arrest" an Italian national pending a formal request for extradition by the Italian government, a showing of probable cause to arrest is required. The holding, which reversed the lower court, was grounded in the language of the statute rather than on a constitutional requirement.

The Italian government learned in early 1980 that Francisco Caltagirone, an Italian national wanted in Italy on numerous charges arising out of his real estate dealings, was in the United States.[116] The Italian government notified the United States Department of State that arrest warrants had been issued for Caltagirone in Italy and applied for a "provisional arrest" of Caltagirone pursuant to article XIII of Italy's extradition treaty with the United States, pending a possible request for formal ex-

114. 629 F.2d 739 (2nd Cir. 1980).

115. Treaty on Extradition, *done* Jan. 18, 1973, United States-Italy, 26 U.S.T. 493, T.I.A.S. No. 8052 (effective March 11, 1975) [hereinafter cited as Treaty].

116. Caltagirone once operated the largest real estate development syndicate in Italy. The syndicate enjoyed the favor of Italian officials responsible for providing credit through a government lending institution. The corporations constituting the syndicate were heavily leveraged and thus the officials' support was critical to the fortunes of the syndicate. In 1976 the government of Italy changed and the syndicate lost its access to easy government credit. By the fall of 1979, nineteen of the syndicate's companies were declared bankrupt. In early 1980, warrants issued for Caltagirone's arrest for fraudulent bankruptcy and participation in embezzlement. Caltagirone left for the United States prior to the issuance of the warrants. Caltagirone v. Grant, 629 F.2d at 742.

tradition.[117] A United States attorney prepared a complaint alleging the existence of the Italian warrant and applied to a United States District Court judge in the Southern District of New York for a warrant of arrest. No showing of probable cause to believe Caltagirone had committed a crime in Italy was attempted. The judge issued a warrant and Caltagirone was arrested.[118]

Caltagirone unsuccessfully moved to quash the arrest warrant on the ground, *inter alia*, that it had been issued without probable cause.[119] Three days later, Caltagirone renewed his motion and petitioned for a writ of *habeas corpus*.[120] Both the motion and the petition were denied on the ground that his arrest in the United States was presumptively valid under Italian law.[121] Caltagirone immediately appealed to the Second Circuit Court of Appeals.

Prior to *Caltagirone*, the Second Circuit had consistently required a determination of probable cause in order to execute a formal extradition.[122] The writ of *habeas corpus* is available to test "whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."[123] In prior cases involving the validity of provisional arrest articles, the Second Circuit did not require a showing of probable cause.[124] A complaint charging the accused with an extraditable offense,

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117. *Id.* at 742-743.

118. *Id.* at 743.

119. *Id.*

120. The petition was made pursuant to 28 U.S.C. § 2241 (1976). Subsection (c) of that statute provides in pertinent part:

> (c) The writ of habeas corpus shall not extend to a prisoner unless-
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> (3) He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

121. *In re* Caltagirone, 80 Cr. Misc. No. 1 (S.D.N.Y. March 26, 1980).

122. Jhirad v. Ferrandina, 536 F.2d 478 (2d Cir. 1976); Shapiro v. Ferrandina, 478 F.2d 894 (2nd Cir. 1973); Fernandez v. Phillips, 268 U.S. 311 (1925).

123. Fernandez v. Phillips, 268 U.S. at 312.

The requirement that probable cause be shown in extradition proceedings is not unique to the Second Circuit. In Peroff v. Hylton, 542 F.2d 1247 (4th Cir. 1976), the court stated that "[t]he purpose of [an extradition hearing] is to inquire into the presence of probable cause to believe that there has been a violation of one or more of the criminal laws of the extraditing country, [and] that the alleged conduct, if committed in the United States, would have been a violation of our criminal law." *Id.* at 1249.

See also Jhirad v. Ferrandina, 536 F.2d at 482.

124. *Ex parte* Dinehart, 188 F. 858 (C.C.S.D.N.Y. 1911); United States v. Marasco, 325 F.2d 562 (2nd Cir. 1963).

coupled with a statement assuring the requested party that a formal extradition request was forthcoming, was deemed sufficient to support provisional arrest of that person pending production of the appropriate documents.[125]

Article XIII of the United States extradition treaty with Italy states that, "[i]n case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition. . . ." The article further provides that an application for provisional arrest must contain four elements: a description of the person sought; an indication of intention to request the extradition of the person sought; a statement of the existence of a warrant for arrest against that person; and "such further information, if any, as would be necessary to justify the issuance of a warrant of arrest had the offense been committed . . . in the territory of the requested Party."[126] The first three requirements were satisfied in the instant case.[127] Only the final requirement was seriously in issue in *Caltagirone*.

The Italian warrant was issued against Caltagirone on a charge of fraudulent bankruptcy. Such conduct is prohibited in the United States.[128] To justify issuance of a warrant in this country, a showing of probable cause would have been required.[129] Yet the government conceded and the record confirmed that no showing of probable cause was made prior to issuance of the warrant for petitioner's arrest. Italy's request for provisional arrest contained

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125. *Ex parte* Dinehart 188 F. at 859.

126. Treaty, *supra* note 115, at 502.

127. There was no doubt as to the identity of Caltagirone. According to the facts, upon learning of Caltagirone's presence in the U.S., Italy applied for his provisional arrest "pending a possible request for his extradition to Italy." Caltagirone v. Grant, 629 F.2d at 743. It is unclear whether the "possibility" of a formal extradition request satisfied the requirement of "intention to request formal extradition." Perhaps because Italy in fact made such a request upon expiration of the forty-five-day period of provisional detention, the court did not feel constrained to address the question. *Id.* at 749.

The third requirement—that of a statement of the existence of a warrant—simply requires a factual determination that such a warrant exists. *Id.* at 744. The court noted that the treaty does not contemplate review of the validity of the warrant under Italian law. On this issue, deference to foreign judicial determination is proper. Accordingly, the finding of the district court that a warrant had issued, which was based on the U.S. Attorney for the Southern District of New York's sworn complaint alleging its existence, was sufficient. *Id.* at 743, 744.

128. 18 U.S.C. §§ 152, 656, 1006.

129. U.S. CONST. amend. IV; FED. R. CRIM. P. 4.

no such "further information" as would support probable cause to believe that Caltagirone had committed an extraditable offense.

The language of article XIII closely parallels that of article XI, the formal extradition article, which requires "such evidence as, according to the laws of the requested Party, would justify his arrest and committal for trial if the offense had been committed there. . . ."[130] Construing the language of article XI as requiring a showing of probable cause, and noting the obvious parallel between it and the language of article XIII, the court concluded that the drafters of the extradition treaty contemplated a showing of probable cause under both articles in *all* cases where the United States is the "requested Party" whether the request is for provisional arrest or formal extradition.[131]

The government conceded that Italy must provide such "further information" as would establish probable cause, but maintained that the information must be provided only to the executive branch, and not to a court. The court found this argument unacceptable, both in the context of the extradition treaty and in the context of the diplomatic and statutory backdrop against which article XIII was drafted. As noted above, the language of article XIII parallels that of article XI, which does not expressly require presentation of evidence to a magistrate. But the court noted that 18 U.S.C. section 3184, requiring a judicial proceeding in all formal extradition requests, imposes a probable cause requirement as a precondition to formal extradition.[132] The government's contention that the section 3184 requirement of a hearing applies to article XI but not to article XIII, when their language is so similar, was labeled "untenable" by the court.[133]

The government's claim that the language in article XIII serves merely to create a power in the requested party to demand additional information was rejected on the ground that where the treaty authorizes intergovernmental communications it does so expressly, as in article XIV, which provides that the requested party may demand additional "evidence" and "information."[134] The

130. Caltagirone v. Grant, 629 F.2d at 745 (citing 26 U.S.T. 493, 501, T.I.A.S. No. 8052).
131. *Id.* at 745.
132. *Id.* at 745-46.
133. *Id.* at 746.
134. *Id.* (citing 26 U.S.T. 493, 502, T.I.A.S. No. 8052).

court reasoned that since an article XI request concerns "evidence" and an article XIII request concerns "information", article XIV encompasses both kinds of requests. Therefore, in light of article XIV, the government's contention that article XIII serves only to create a power to demand additional information would render that portion of article XIII "mere surplusage."[135]

The court's reasoning here is flawed, because article XIV specifically refers to "additional evidence or information to enable [the requested party] *to decide on the request for extradition*" (emphasis added). There is no reference to requests for provisional arrest, and it is possible to assume that "information" as well as "evidence" might be required in making the decision whether to extradite.

The court proceeded to note that other American treaties authorize provisional arrest in "urgent" cases without a "further information" requirement.[136] Therefore, provisional arrest provisions fall into one of two categories: those with and those without the informational requirement. The fact that, faced with such a choice, the drafters of the extradition treaty elected to include the requirement, buttresses the conclusion that presentation of "such futher information" as might be needed to justify arrest (*e.g.*, a showing of probable cause) is a necessary condition for provisional arrest under the United States-Italy treaty.[137]

Finally, the government contended that since article XI clearly requires a showing of probable cause, to infer the existence of such a requirement from the similar language of article XIII would eradicate the distinctions between the two procedures, thereby defeating the drafters' intention to provide a more "streamlined" mechanism for accommodating requests from foreign nations than "full-blown extradition proceedings."[138]

In response to this argument, the court noted that the contemplated proceedings do indeed differ in several crucial respects,[139] but that the draftsmen did not intend to streamline the

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135. *Id.* at 746 n.14.

136. *Id.*

137. *Id.*

138. *Id.* at 747.

139. The differences between provisional arrest and formal extradition proceedings are as follows:

(a) Article XIII requires "information," listing no formalities for its provisions. Since time is of the essence in an "urgent" case, the court found that applica-

article XI procedure at the expense of sacrificing the protection of the probable cause requirement.[140] It is the procedural differences between the provisional arrest proceeding and the formal extradition proceeding that make it unnecessary to sacrifice a probable cause requirement in the former in order to distinguish the two.

On the basis of "overwhelming evidence," the court held that article XIII prohibits provisional arrest without probable cause, disposing of the case on the ground that the treaty language seems "clearly to require [a showing of probable cause]."[141] By holding that article XIII prohibits provisional arrest without probable cause, the court avoided the question whether the Constitution mandates a probable cause determination before a provisional arrest. Nevertheless, the court commented on the constitutional question in dicta.[142]

The court was troubled by two features of the provisional arrest mechanism. First, the government had asserted that the United States could detain the petitioner under provisional arrest for forty-five days without a showing of probable cause, yet petitioner had no guarantee that his detention would end, either with release or formal extradition to Italy, when the forty-five day period expired. Extradition proceedings which end in the arrestee's release from custody do not bar subsequent extradition demands by the requesting state on the same charge.[143] Under the

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tion for provisional arrest may be made wholly by telecommunications. This conclusion is supported by 18 U.S.C. § 3187, which expressly provides for "telegraphic request" for provisional arrest.

Article XI, on the other hand, requires "evidence" and necessarily implies a greater procedural formality than provision of "information." Unlike article XIII, article XI requires certified depositions establishing probable cause and a copy of the actual arrest warrant issued by the magistrate in the requesting state.

(2) Article XIII allows direct communication between Italian and American law enforcement officials, whereas article XI calls for transmission of depositions and warrants through diplomatic channels prior to their relay to law enforcement officials.

(3) Under article XI, the requesting state must "prove," not allege (as under) article XIII), that the relator is the person named in the warrants, and must provide extensive documentation of its law regarding the particular offense, detailing "the law defining the offense, the law prescribing the punishment for the offense, and the law relating to the limitation of legal proceedings or the enforcement of the penalty for the offense." 26 U.S.T. 493, 501; T.I.A.S. No. 8052.

140. Caltagirone v. Grant, 629 F.2d 739, 797 (2nd Cir. 1980).

141. *Id.* at 742.

142. *Id.* at 748.

143. Treaty, art. XIV, 26 U.S.T. 493, 502; T.I.A.S. No. 8052.

government's view, a foreign state could request, and the government effectuate, the unlimited detention of the arrestee through a series of forty-five-day provisional arrests—without a judicial determination of probable cause and without any formal extradition request.[144] Second, any suggestion that aliens are accorded "lesser" rights under the Constitution is not determinative, as the treaty applies to American citizens and aliens alike. Acceptance of the government's interpretation of article XIII as not requiring a showing of probable cause would result in the government having the ability to arrest and indefinitely detain an American citizen simply upon the allegation by a foreign government that a warrant for the arrest of that citizen was outstanding.[145] These features "[raise] grave questions concerning the constitutional propriety of any interpretation of article XIII which does not require a showing of probable cause."[146]

Two months before deciding *Caltagirone*, the Second Circuit spoke in dictum about the constitutional requirements for extradition proceedings in *Rosado v. Civiletti*.[147] "[T]o the extent that the United States itself acts to detain [the arrestee] pending extradition, it is bound to accord him due process."[148] The court noted that although the United States Constitution does not limit the power of a foreign sovereign to prescribe the procedures for trial and punishment of crimes committed within its own territory, "it does govern the manner in which the United States may join the effort."[149] In this sense, *Rosado* and *Caltagirone* reflect a consistent view of the role of the United States Constitution and the federal judiciary in criminal cases which involve transnational institutions. While the extraterritorial reach of the Constitution is limited, certain constitutional guarantees inhere whenever United States courts or officials play a role in the apprehension or detention of an individual, whether citizen or alien.

2. *ROSADO V. CIVILETTI*

Rights of United States Citizens Under the United States-Mexico Prisoner Transfer Treaty — Voluntariness of Consent to Transfer

144. 629 F.2d at 747.
145. *Id.* at 748.
146. *Id.*
147. 621 F.2d 1179, discussed *infra* at pp. 186-97.
148. *Id.* at 1195.
149. *Id.* at 1195-96.

Agreements — Waiver of Prisoner's Right to Challenge Conviction — Balancing the Habeas Corpus Privilege Against the Threatened Viability of the Prisoner Transfer Treaty

The question of the scope of constitutional rights possessed by United States citizens who have been convicted of crimes, imprisoned in foreign countries and subsequently transferred to United States prisons pursuant to prisoner transfer treaties has been presented frequently to federal courts.[150] The Second Circuit Court of Appeals gave the most comprehensive consideration of the subject to date in *Rosado v. Civiletti*.[151]

Petitioners, three United States citizens, were arrested in Mexico, tortured, denied even the semblance of a fair trial, and incarcerated under inhumane conditions.[152] After petitioners had been imprisoned for two years, the United States and Mexico concluded and signed a prisoner transfer treaty.[153] Under the treaty, a prisoner transferred to prisons within his home country must waive any right to seek a modification or reversal of the sentence or conviction in his home nation's courts.[154] Stated another way,

150. Pfeifer v. United States Bureau of Prisons, 615 F.2d 873 (9th Cir. 1980); Mitchell v. United States, 483 F. Supp. 291 (E.D. Wis. 1980); Orozco v. United States Bureau of Prisons, No. CV78-2485 (C.D. Cal. Oct. 24, 1979); Isbell v. United States Bureau of Prisons, No. CV78-2400-LEWT (C.D. Cal. July 30, 1979); Ruiz v. Bell, No. 79-16 (M.C. Pa. June 29, 1979).

151. Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3248 (1980).

152. Petitioners testified at trial to the following events: Petitioners Caban and Velez were arrested in Mexico City while on a stopover *en route* to Acapulco. Six armed men in civilian clothes executed the arrest without a warrant, searched the two men and tortured them by beating and use of an electric cattle prod. Petitioner Rosado arrived in Mexico two days later and suffered similar treatment. Each petitioner was taken to a detention center and given a confession to sign, which all three refused to do. None of the petitioners were informed of the charges against them, nor were any allowed to obtain legal counsel. For months they were kept in prison, during which time they were subjected to torture, forced labor, and extortion. When the three were finally brought to trial, it lasted for less than fifteen minutes. There was neither a judge nor a jury present and only the arresting officers testified. Petitioners were not allowed to speak or to have counsel present. The trial violated numerous provisions of the Mexican Constitution. See CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANIS, tit. I, chap. I, art. 20 Mexico. Eight months after the trial, petitioners were informed they had been sentenced to nine years imprisonment for conspiring to import cocaine. The search conducted at the time of arrest did not reveal any narcotics.

Petitioners' testimony was uncontroverted by the government and the court found the testimony to be credible. Velez v. Nelson, 427 F. Supp. 865, 867, n.3 (D. Conn. 1979), *rev'd sub nom.* Rosado v. Civiletti, 621 F.2d 1179 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3248 (1980).

153. Treaty on the Execution of Penal Sentences, *done* Nov. 25, 1976, United States—Mexico 28 U.S.T. 7399, T.I.A.S. No. 8718 (effective Nov. 30, 1977) [hereinafter cited as U.S.—Mexico Treaty].

154. *Id.* at art. VI.

under the treaty, the receiving state has no jurisdiction to review the judicial process of the transferring state. Representatives of the United States embassy in Mexico visited petitioners and informed them of the possibility of transfer to a United States prison.[155] Petitioners expressed interest in transferring and later appeared before a United States magistrate who determined that petitioners voluntarily and knowledgeably consented to transfer.[156] The petitioners were then transferred to a federal prison in Connecticut.

Once their transfers were complete, petitioners sought writs of *habeas corpus* in federal district court.[157] The district court granted the writs on the ground that the consent to transfer given by the petitioners was involuntary.[158] On the basis of its reading of two relatively recent United States Supreme Court decisions,[159] the court held that only in light of "all the surrounding circumstances" could voluntariness be determined.[160] The uncontroverted facts of petitioners' mistreatment throughout their incarceration led the court to conclude that petitioners' consent to transfer and their resultant waiver of any right to challenge their convictions was invalid.[161] The United States, the court held, could not lawfully retain custody over petitioners.[162]

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155. Each petitioner was given a booklet prepared by the United States Department of Justice explaining the provisions of the treaty and the consequences of taking advantage of the transfer opportunity.

> The booklet specifically advised that because the Treaty gave Mexico exclusive jurisdiction over actions brought by transferees to challenge, modify, or set aside sentences imposed by its courts, a United States citizen who transferred to American custody would not have any legal remedies available in the United States to challenge, modify, or set aside his conviction or sentence. The booklet went on to state, however, that neither the Treaty nor its implementing legislation "seeks to prevent transferring offenders from bringing habeas corpus actions to challenge the constitutionality of the Treaty and/or the implementing legislation, or the manner of the execution of their confinement by United States authorities."

Rosado v. Civiletti, 621 F.2d at 1188 (citing U.S. DEP'T OF JUSTICE, INFORMATION BOOKLET FOR UNITED STATES CITIZENS INCARCERATED IN MEXICAN PRISONS 7 (1977)).

156. *Id.* at 1189.

157. *Id.* at 1182.

158. Velez v. Nelson, 475 F. Supp. at 874.

159. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Brown v. Illinois, 422 U.S. 590 (1975).

160. Velez v. Nelson, 475 F. Supp. at 873.

161. *Id.* at 874.

162. *Id.*

The district court's decision immediately threatened any future transfer of United States prisoners from Mexican jails.[163] The United States Government promptly appealed the decision and the Mexican government continued the transfer program pending an appellate decision in the case.[164]

In order that the reader understand the issues presented to the Second Circuit Court of Appeals and the rationale used by the court in resolving those issues, it is necessary to describe briefly the salient features of the United States-Mexico prisoner transfer treaty, which is the model for other similar treaties concluded between the United States and foreign nations.[165]

In 1976, the United States State Department began to negotiate bilateral prisoner transfer treaties. The treaty with Mexico was negotiated and signed in November, 1976 and went into force a year later.[166] Eligibility for transfer requires that the prisoner's offense not fall within an excluded category[167]; the offense must be punishable in the prisoner's home state[168]; there must be at least six months remaining in the prisoner's sentence[169]; and no appeal can be pending in the transferring state.[170] If these eligibility requirements are satisfied, the transfer procedure may be initiated by the transferring state.[171] The mechanics of prisoner transfers are set forth in the treaty. Free and informed consent by the prisoner to the terms of the transfer is required under the

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163. See interview with Salvador Compos, Minister, Mexican Embassy, in Washington, D.C. (March 11, 1980) *reported in* Note, "*The Impact of Rosado v. Civiletti on U.S. Prisoner Transfer Treaties*", 21 VA. J. INT'L L. 131, 151 (1980).

164. *Id.*

165. Treaty on the Execution of Penal Sentences, *done* March 2, 1977, United States -Canada, 30 U.S.T. 6263, T.I.A.S. No. 9552 (effective July 19, 1978); Treaty on the Execution of Penal Sentences, *done* Feb. 10, 1978, United States-Bolivia, 30 U.S.T. 796, T.I.A.S. No. 9219 (effective Aug. 17, 1978); Treaty on the Execution of Penal Sentences, *done* Jan. 11, 1979, United States - Panama, ___ U.S.T. ___, T.I.A.S. No. 9787 (effective June 27, 1980); Treaty on the Enforcement of Penal Judgments, *done* June 7, 1979, United States - Turkey, ___ U.S.T. ___, T.I.A.S. No. 9892 (effective Jan. 1, 1981); Treaty on the Execution of Penal Sentences, *done* July 6, 1979, United States - Peru, ___ U.S.T. ___, T.I.A.S. No. 9784 (effective July 21, 1980).

166. United States - Mexico Treaty, *supra*, note 153.

167. *Id.* at art. II(4): The exclusions include prisoners under a death sentence, military offenses, political offenses and immigration offenses.

168. *Id.* at art. II(1).

169. *Id.* at art. II(5).

170. *Id.* at art. II(6).

171. *Id.* at art. IV(1).

treaty.[172] If the prisoner consents and both states approve, the transfer is effectuated. The most controversial of the terms of the transfer treaties is illustrated by article VI of the United States-Mexico treaty:

> The Transferring State shall have exclusive jurisdiction over any proceedings, regardless of their form, intended to challenge, modify or set aside sentences handed down by its courts. The Receiving State shall, upon being advised by the Transferring State of action affecting the sentence, take the appropriate action in accordance with such advice.[173]

Although transferees must waive any right to challenge their sentences, they gain a significant advantage upon transfer by having the opportunity for early parole in the United States.[174]

While acknowledging that petitioners' convictions "manifested a shocking insensitivity to their dignity as human beings and were obtained under criminal process devoid of even a scintilla of rudimentary fairness and decency,"[175] the Second Circuit Court of Appeals nonetheless reversed the decision of the district court and denied relief. In a lengthy opinion, Judge Kaufman examined the constitutional issues of due process and consent.

The first issue considered by the court was the issue upon which the district court had disposed of the case: whether the petitioners' consents to transfer[176] had been voluntary. The district court, relying on *Schneckloth v. Bustamonte*,[177] held that the consents were not voluntary. The United States Supreme Court in *Schneckloth* rejected a static definition of voluntariness,

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172. *Id.* at art. IV(2).

173. *Id.* at art. VI.

174. United States - Mexico Treaty, *supra*, note 153, art. V(2) provides that "the completion of a transferred offender's sentence shall be carried out according to the laws and procedures of the Receiving State, including the application of any provisions for reduction of the term of confinement by parole, conditional release or otherwise."

175. Rosado v. Civiletti, 621 F.2d at 1182.

176. The first issue focused on the petitioners' consent to transfer only. This is significant to an understanding of the court's opinion for two reasons. First, the issue of the voluntariness of the consent to transfer should not be confused with the issue of the voluntariness of the waiver of any right to challenge the conviction and sentence in United States courts, treated later in the opinion. Second, the question of the voluntariness of the consent to transfer can be reviewed by the court under the terms of the treaty. U.S. DEPT. OF JUSTICE, INFORMATION BOOKLET FOR UNITED STATES CITIZENS INCARCERATED IN MEXICAN PRISONS 7 (1977).

177. 412 U.S. 218 (1973).

characterizing the question of voluntariness as one "of fact to be determined from all the circumstances."[178] The district court focused its attention not on compliance with the consent requirements of the transfer treaty, but on the treatment of petitioners during their pretrial and post trial incarceration in Mexico. The court held that the length of petitioners' detention, the nature of the questioning to which they were subjected, and the occurrence of physical punishment rendered petitioners' consent invalid.[179] Although the court held that the United States did not have lawful custody over petitioners, the United States made no effort to return petitioners to Mexico nor did Mexico seek such a return.[180]

The Second Circuit reversed. The court, rather than focusing on the circumstances of petitioners' convictions and incarceration, focused on compliance with the statutory procedures governing transfer of prisoners. These procedures "are carefully structured to ensure that each [petitioner] voluntarily and intelligently agreed to forego his right to challenge the validity of his Mexican conviction. . . ."[181] The court rejected the lower court's reliance on *Schneckloth*, pointing out that the policy considerations underlying the holding in that case were not apposite here. First, the rule in *Schneckloth* was designed to "define the degree to which overzealous law enforcement would be deterred, and individual rights vindicated."[182] Such a goal would be ineffective in the context of the transfer treaty, since United States courts cannot alter the methods of law enforcement in Mexico.[183]

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178. *Id.* at 248-49.

179. Velez v. Nelson, 475 F. Supp. at 873-74.

180. The treaty does not *require* the receiving country to return prisoners in the event of some defect in the transfer proceeding or for any other reason. However, 18 U.S.C. § 4114(a) (1976 Supp.) states that:

> Upon a final decision by the courts of the United States that the transfer of the offender to the United States was not in accordance with the treaty or the laws of the United States and ordering the offender released from serving the sentence in the United States the offender may be returned to the country from which he was transferred to complete the sentence if the country in which the sentence was imposed requests his return.

The treaty does not give the transferring state a legal right to demand return of such an offender.

181. Rosado v. Civiletti, 621 F.2d at 1182.

182. *Id.* at 1189.

183. *Id.* The United States Constitution does not protect American citizens from the governmental acts of foreign states. Neely v. Henkel, 180 U.S. 109, 122 (1901).

Second, the liberty interests involved in *Schneckloth* are in no way related to the liberty interests present in *Rosado*. According to the court, a more precise analogy exists between the interests of petitioners and those of accused defendants offered a choice between pleading guilty (where the sanction is guaranteed) and going to trial (where the precise nature of the sanction, if any, is unknown). The court analyzed cases involving guilty pleas in light of two issues. The first was whether the choice facing petitioners unconstitutionally conditioned a constitutional right.[184] The court concluded that the requirement of a waiver of the right to challenge the foreign conviction was "neither needless or arbitrary" and thus that the condition was permissible.[185] Second, the court considered whether the consent to transfer was an informed and intelligent act done with a full awareness of the situation.[186] The choice facing petitioners was between continued incarceration under brutal conditions in Mexico or transfer to the United States, conditioned upon waiver of any right to challenge the Mexican conviction in United States courts. Faced with this choice, "if the instant petitioners' consents to transfer are viewed

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184. One commentator has described the doctrine of unconstitutional conditions as follows:

> Generally, the doctrine states that while a government, state or federal, may not be obligated to provide its citizens with a certain benefit or privilege, it may not grant the benefit or privilege on conditions requiring the recipient in some manner to relinquish his constitutional rights. Furthermore, it cannot withhold or cancel the benefit as a price for the assertion of such rights.

Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. REV. 1, 37 (1978).

The court looked to United States v. Jackson, 390 U.S. 570 (1968), in considering whether the provisions of the prisoner transfer treaty impermissibly conditioned a constitutional right. In that case, the court invalidated a provision of the Federal Kidnapping Act allowing imposition of the death penalty only when recommended by a jury, holding that the provision "needlessly" induced defendants to waive the constitutional right to a jury trial. *Id.* at 583. In a later case, the court emphasized that a condition is impermissable only if it "needlessly penalize[d] the assertion of a constitutional right." Brady v. United States, 397 U.S. 742, 746 (1970) (citing United States v. Jackson).

185. Rosado v. Civiletti, 621 F.2d at 1200. The court identified three important interests of the government in requiring the waiver: acceptance of the treaty by Mexico required waiver of the right to challenge (*id.* at 1200); good relations between the United States and Mexico were supported by "honoring [Mexico's] criminal convictions and recognizing the integrity of its criminal justice system" (*id.* at 1190); and Americans held in Mexican prisons benefitted by the transfer treaty (*id.* at 1200).

186. *Id.* at 1191 (citing North Carolina v. Alford, 400 U.S. 25 (1970)). The situation as described by the court included circumstances surrounding the choice, the likely consequences of the choice, and all available alternatives.

in light of the alternatives legitimately available to them, it cannot be seriously doubted that their decisions were voluntarily and intelligently made."[187]

Having determined that petitioners' consents to transfer were voluntary, the court turned to the due process issue raised by petitioners. The challenge to the prisoner transfer treaty was thus posed by Judge Kaufman: whether the United States government may imprison a citizen in execution of a foreign criminal conviction and deny that citizen access to a United States court to challenge the fundamental fairness of the criminal process which led to his conviction.[188] After concluding that the prisoner transfer treaty was a valid exercise of the treaty-making power,[189] the court considered whether the treaty violated any procedural or substantive constitutional guarantees.[190] While it is well established that the government may punish citizens only in accordance with the due process guarantees of the Constitution,[191] the question whether those guarantees require that any person have a right of access to a United States court to test the basis for imposition of a sentence has never been fully resolved.[192] After reviewing

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187. *Id.*

188. *Id.* at 1192.

189. *Id.* at 1193. The court recognized that the courts of a country are not required to execute the penal laws of another country. The Antelope, 23 U.S. (10 Wheat.) 66, 123 (1825). However, a country may choose to extend recognition to such penal laws. Rosado v. Civiletti, 621 F.2d at 1192. The instant treaty does not call for United States enforcement of Mexico's penal laws but simply provides for execution of a Mexican criminal conviction. The treaty serves two purposes which render it a valid exercise of the treaty-making power under art. II § 2, cl.2 of the Constitution: the condition of Americans imprisoned in Mexican jails is ameliorated and relations between Mexico and America are improved by lessening the burden on the Mexican criminal system. *Id.* at 1193.

190. The court focused specifically on the fifth and sixth amendments. The fifth amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

U.S. CONST. amend. V. The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

191. *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 119 (1866).

192. Rosado v. Civiletti, 621 F.2d at 1194.

cases outlining the nature and extent of process due American citizens who have committed crimes abroad and foreigners sought to be extradited by their governments,[193] the court concluded that "[t]he right to a fair procedure reasonably calculated to produce a correct determination of the basis for the imposition of penal sanctions lies at the heart of the due process of law protected by the Fifth Amendment."[194] Therefore, petitioners here have the right to test in a United States court the basis for their continued confinement in a United States prison.[195]

Having determined that the petitioners had such a right, the court considered whether petitioners were estopped from asserting that right based upon their agreement to the conditions of the transfer, one of which was giving up any right to challenge the conviction in their national courts. The court pointed to Congress' effort to insure that prisoners seeking transfer would be fully informed of the treaty's provisions and would agree to abide by such provisions.[196] The treaty requires *express* agreement by the prisoner to challenge the conviction or sentence in Mexican courts only.[197] In light of the stringent consent requirement, the court points out, it is unlikely that either Mexico or the United States would have consented to petitioners' transfer had petitioners not consented to abide by the treaty's conditions.[198] The court did not find this fact alone determinative of the question whether petitioners should be estopped on the basis of this agreement from challenging their convictions in the United States. Rather, the government had to show that it relied to its detriment upon petitioners' agreement. Thus the court pursued a dual analysis: first, whether the petitioners voluntarily and intelligently agreed to challenge their convictions in Mexican courts only, and second,

193. *Id.* at 1194-97.

194. *Id.* at 1197.

195. *Id.* The court made clear that its holding did not imply that *every* element of due process "as known to American criminal law" must be met in a foreign criminal proceeding in order for Congress to give a conviction arising out of such proceeding a binding effect within the United States. *Id.* at 1198. Rather, the holding only applies where a petitioner is incarcerated under federal authority pursuant to a foreign conviction, in which case he "cannot be denied all access to a United States court when he presents a persuasive showing that his conviction was obtained without the benefit of any process whatsoever." *Id.*

196. *Id.*

197. S. 1682, 95th Cong., 1st Sess. 18 U.S.C. § 4108(b)(1) (1977).

198. Rosado v. Civiletti, 621 F.2d at 1199.

whether the United States advanced a sufficiently important interest to hold petitioners to their agreement.[199]

The court found petitioners' decision to agree to abide by the treaty's condition of a restricted right of review to be both informed and intelligent in light of the alternatives available to them,[200] and held that the choice presented petitioners did not "needlessly penalize" the constitutional right to a United States forum.[201] The congressional decision to require transferring prisoners to abide by the limitation on their right to a judicial review of their convictions in the United States was "neither needless nor arbitrary."[202] Two strong government interests flow from requiring that transferring prisoners so agree.[203] First, the treaty represented a lessening of tensions between the United States and Mexico.[204] Second was the interest of those Americans still incarcerated in Mexican prisons.[205] This factor may have been most compelling to the court.

> We refuse to scuttle the one certain opportunity open to Americans incarcerated abroad to return home, an opportunity, we note, the benefit of which [petitioners] have already received. In holding these petitioners to this bargain, we by no means condone the shockingly brutal treatment to which they fell prey. Rather, we hold open the door for others similarly victimized to escape their torment.[206]

In *Rosado*, the court was placed in the unenviable position of being called upon to reconcile two strong United States policies that appeared to clash. The United States Constitution provides, in clear and unambiguous language, "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety requires."[207] The prisoner transfer treaty between the United States and Mexico fashions a

199. *Id.*

200. At this point the court's discussion intersects with its treatment of the voluntariness of petitioners' consent to transfer. *See* note 176 *supra.*

201. *Id.* at 1200, applying the test set forth in *Jackson*. See note 184, *supra.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 1200-01.

207. U.S. CONST. art. I, § 9, cl. 2.

delicate balance of the interests of both nations — the United States interest in removing its citizens from inhumane treatment and harsh conditions in Mexican jails and the Mexican interest in assuring that Americans convicted of crimes within Mexican territory are punished. An essential feature of that balance is the requirement that prisoners transferred pursuant to the treaty waive any right to challenge their convictions or sentences in United States courts.

Constitutional questions regarding the prisoner transfer mechanism of the treaty were raised and debated even before the treaty entered into force. Indeed, such questions were raised during hearings on the treaty by members of the Senate Foreign Relations Committee.[208] Testimony before the Committee uniformly supported the constitutionality of the treaty.[209] These constitutional questions stimulated academic debate as well.[210]

The court's thoughtful consideration of the constitutional questions presented in *Rosado*, and particularly its careful reading of the relevent provisions of the treaty, may put the constitutional debate to rest or at least focus it more narrowly upon what the treaty actually allows and prohibits. In considering whether the petitioners' consent to transfer was voluntary, the court, unlike the district court, took a focused view of the circumstances under which prisoners face the choice available under the treaty. By the nature of the district court's definition of petitioners' situation, that court essentially reviewed the conviction and sentence of the Mexican court, an inquiry which is expressly prohibited by the treaty. By requiring that the petitioners' consent to the transfer procedure be intelligently and knowledgeably made *at the time transfer is being considered* without direct reference to or consideration of the acts of Mexican judicial or penal authorities, the

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208. *See Penal Treaties with Mexico and Canada: Hearings on Exec. D and Exec. H before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. (1977).

209. *Id.* at 46-50, 85, 86, 90-130.

210. *See, e.g.*, Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, 1980 WIS. L. REV. 25; Abramovsky and Eagle, *A Critical Evaluation of the Newly Ratified Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275, 302-16 (1979); Paust, *The Unconstitutional Detention of Mexican and Canadian Prisoners by the United States Government*, 12 VAND. J. TRANSNAT'L L. 67 (1979); Robbins, *A Constitutional Analysis of the Prohibition Against Collateral Attack in the Mexican-American Prisoner Exchange Treaty*, 26 U.C.L.A. L. REV. 1 (1978); Vagts, *A Reply to "A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty,"* 64 IOWA L. REV. 325 (1979).

circuit court honored the terms of the treaty. In addition, the court's holding avoided the absurd result that would have followed from the district court's analysis. According to that court's rationale, those who suffer the most by repressive treatment at the hands of the Mexican criminal justice system could never make a truly voluntary decision to accept transfer to United States prisons and thus those who would most benefit could not take advantage of the transfer mechanism. In fact, faced with the choice, a number of American prisoners in Mexican jails have chosen to remain in Mexico and challenge their convictions through that country's courts.[211]

The Second Circuit's disposition of the due process challenge is equally well-reasoned. By holding that any American incarcerated in United States prisons has a right to access to United States courts to challenge the basis of that incarceration, the court reinforced the fundamental right of *habeas* review preserved by the Constitution. It is a well established principle that constitutional rights may be waived.[212] By requiring that petitioners' consent to waive their *habeas* right to challenge the Mexican conviction meet basic requirements for voluntariness, the court was able, in a principled way, to preserve the prisoner transfer treaty. The humanitarian goal underlying the treaty was preserved without sacrificing constitutionally protected rights.

B. Civil Matters

1. FILARTIGA v. PEÑA-IRALA

Torture Violates the Law of Nations—Under the Alien Tort Claims Act, United States Federal District Courts Can Hear Tort Claims Based on Acts of Torture—Claims Based on Violations of the Law of Nations Arise Under the Laws of the United States*—Forum Non Conveniens—*Sovereign Immunity—The Act of State Doctrine—Choice of Law—The Scope of Plaintiffs' Rights Under the Alien Tort Claims Act

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211. Indeed, one man, convicted with petitioners, chose not to transfer and appealed his conviction, which was overturned for lack of evidence. Rosado v. Civiletti, 621 F.2d at 1189, n.29. For a discussion of reasons why a potential transferee might elect to remain in Mexican prisons, see Abramovsky and Eagle, *supra* note 210, at 298.

212. Faretta v. California, 422 U.S. 806 (1975) (waiver of right to counsel); Fay v. Noia, 372 U.S. 391 (1963) (waiver of right to *habeas* relief).

In one of the most important Survey-year cases involving principles of international law,[213] the Court of Appeals for the Second Circuit held that torture conducted by agents of a foreign government is violative of the law of nations, and that tort claims based upon such activity fall within the subject matter jurisdiction of the federal district courts, under provisions of the Alien Tort Claims Act.[214] In doing so, the court elevated the protection of human rights over principles of national sovereignty and outlined an expanded role for federal courts in the interpretation and application of international law.

A wrongful death claim was brought in federal district court by Dr. Joel Filartiga against the Inspector General of Police in Asuncion, Paraguay, Americo Norberto Peña-Irala, alleging that the claimant's son had died as a result of torture inflicted upon him in Paraguay by the defendant.[215] Subject matter jurisdiction

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

213a. *Id.* at 887.

214. 28 U.S.C. § 1350 (1976) [hereinafter referred to as § 1350 or the Act]. The Act was originally codified in 1789 as part of the First Judiciary Act. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 77 (1789).

215. The Filartiga litigation arose out of events alleged to have taken place in the Republic of Paraguay in 1976. Joelito Filartiga, a seventeen year old boy, was allegedly kidnapped and tortured to death by Americo Norberto Peña-Irala, who was then the Inspector General of Police in Asuncion, Paraguay. On the same day, Asuncion police officers brought Dolly Filartiga, Joelito's sister, to Peña's home to view the multilated body of her brother. Joelito's father, Dr. Joel Filartiga, had been an opponent of Alfredo Stroessner, president of Paraguay, and the Filartiga family believed Joelito was tortured and killed in retaliation against his father's political activities.

Shortly after the murder of his son, Dr. Filartiga commenced a criminal action against Peña and the police in Paraguayan courts. As a result, Filartiga's attorney was arrested by the police and threatened with death by Peña. As of March 1980, when the Court of Appeals decided *Filartiga*, the criminal proceeding was still pending in Paraguay. During the Paraguayan proceeding, another man, a member of the Peña household, confessed to the murder, claiming it was a crime of passion. The Filartigas produced pictures of the corpse to refute this claim. Despite the confession, the man evidently has never been convicted. Filartiga v. Peña-Irala, 630 F.2d at 878.

In 1978, Peña sold his home in Paraguay and gained admittance to the United States under a visitor's visa. He remained in the United States beyond the term of his visa, living in Brooklyn, New York with a companion. Dolly Filartiga, who was living in Washington, D.C. at the time, learned of his whereabouts and informed the Immigration and Naturalization Service of Peña's presence in New York. The Service arrested him and, after a hearing, ordered him deported.

While Peña was awaiting deportation at the Brooklyn Naval Yard, he was served with process and a civil complaint filed by the Filartigas. The complaint alleged that he had wrongfully caused Joelito Filartiga's death by torture and sought $10,000,000 in compen-

was averred upon a number of grounds, including the Alien Tort Claims Act, which grants original district court jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[216] Acknowledging that "official torture violates an emerging norm of international law,"[217] the trial court nevertheless dismissed the claim,[218] holding that under Second Circuit precedents the statute does not confer jurisdiction over claims based upon a foreign state's treatment of its own nationals.[219] Appeal was taken to the

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satory and punitive damages. In addition, the complaint sought to enjoin Peña's deportation. The cause of action was based upon:

> wrongful death statutes; the U.N. Charter; the Universal Declaration on Human Rights; the U.N. Declaration Against Torture; the American Declaration of the Rights and Duties of Man; and other pertinent declarations, documents and practices constituting the customary international law of human rights and the law of nations. . . ."

Id. at 879.

216. 28 U.S.C. § 1350 (1976). The Act has been invoked rarely. In those cases in which it was averred as a jurisdictional base, jurisdiction was sustained in only two. Bolchas v. Darrell, 3 F. Cas. 810 (D.S.C. 1796); Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961). Those courts denying jurisdiction have given the three elements of the act - alienage, a cause of action in tort only, and a violation of the law of nations or of a treaty - an extremely narrow construction. Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied* 429 U.S. 835 (1976); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Abiodun v. Martin Oil Service, Inc. 475 F.2d 142 (7th Cir. 1973); Damaskinos v. Societa Navigacion Interamericana, S.A., Panama, 255 F. Supp. 919 (S.D.N.Y. 1966); Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963); Khedivial Lines, S.A.E. v. Seafarers' International Union, 278 F.2d 49 (2d Cir. 1960).

The Filartigas' complaint also sought to base jurisdiction upon the presence of a federal question, 28 U.S.C. § 1331, and upon 28 U.S.C. §§ 1651, 2201 & 2202. Filartiga v. Peña-Irala, 630 F.2d at 878 n.3.

217. Filartiga v. Peña-Irala, No. 79-C-917, Memorandum & Order 4 (E.D.N.Y. May 15, 1979).

218. The dismissal was based upon lack of subject matter jurisdiction and thus the court did not reach the *forum non conveniens* challenge that was also raised by Peña. See p. 202 *infra*.

219. The precedent followed by the district court was Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir. 1976), *cert. denied*, 429 U.S. 835 (1976), and IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975). In *Vencap*, the court adopted dictum from an earlier § 1350 case to the effect that:

> [A] violation of the law of nations arises only when there has been "a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."

519 F.2d at 1015. In *Dreyfus*, the court stated in dictum that "violations of international law do not occur when the aggrieved parties are nationals of the acting state." 534 F.2d at 31. The effect of *Dreyfus* and *Vencap* was to restrict severely the scope of applicability of the Act and thus to render it virtually a dead letter for alien litigants.

Second Circuit Court of Appeals,[220] which, having heard oral argument and having received a joint opinion from the Departments of Justice and State in support of jurisdiction,[221] unanimously reversed and remanded the case for trial.[222]

The court recognized that, lest "the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law,"[223] section 1350 could not be invoked as the basis for jurisdiction unless the claimant had alleged a violation of some rule, within the current content of international law, which commanded "the general assent of civilized nations."[224] After discussing the principle that states' treatment of their nationals was a matter of international concern,[225] noting the "authoritative statements of the international community" specifically prohibiting torture,[226] and reviewing other documents evidencing the international consensus regarding the illegality of torture,[227] the court concluded that "there are few, if any, issues in international law today on which opinion seems to be so united as the limitations on a state's power to torture persons held in its custody."[228] Further, the court reasoned that the rule of international law prohibiting torture "admits of no distinction between treatment of aliens and the treatment of citizens."[229] Thus, the Alien Tort Claims Act conferred federal jurisdiction over the Filartiga's claim, unless the statute itself was found to be unconstitutional.

The relevant portion of the United States Constitution, limiting the congressional grant of jurisdiction to inferior federal courts, states that "the judicial power shall extend to all cases . . . arising under . . . the laws of the United States."[230] Defendant had

220. Plaintiffs' effort to stay Peña's deportation was successful prior to the district court decision. After the decision, plaintiffs were unsuccessful in obtaining further stays and with the failure of these efforts, Peña returned to Paraguay before the Second Circuit rendered its decision. Filartiga v. Peña-Irala, 630 F.2d at 880.

221. Memorandum for the United States as *Amicus Curiae*, *id.* at 876.

222. *Id.* The opinion was authored by Judge Irving Kaufman.

223. *Id.* at 881.

224. *Id.* (citing The Paquete Habana, 175 U.S. 677, 694 (1900)).

225. 630 F.2d at 881-84.

226. *Id.* at 883.

227. *Id.* at 881-84.

228. *Id.* at 881.

229. *Id.* at 884.

230. U.S. CONST., art. III, § 2.

argued that a claim alleging violation of international law is one "arising under" United States law only if Congress had acted to codify such international rule within its own legislative enactments.[231] Plaintiff had argued that section 1350 itself was such legislation, defining actionable offenses violative of the law of nations.[232] The court rejected defendant's contention and found it unnecessary to rule on plaintiff's suggested interpretation of congressional intent.[233]

The court held that a claim "arises under . . . the laws of the United States," if it is grounded upon *either* congressional enactments or upon the common law of the United States.[234] Because the law of nations became a part of the common law of the United States upon the adoption of the Constitution, a claim concerning a violation of international law "arises under" United States law, as required for the constitutional exercise of federal court jurisdiction. The premise was supported by the statement of Chief Justice Marshall that, in the absence of congressional enactment, courts of the United States are "bound by the law of nations which is a part of the law of the land."[235]

Having thus determined that the application of the Alien Tort Claims Act to the *Filartiga* claim was constitutionally valid, the court refrained from deciding whether the statute itself, aside from the transfusion of international law rules into the common law of the United States, supported a finding that the claim arose under United States law: "[W]e believe it is sufficient here to construe the Alien Tort Statute, not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law."[236]

a. *Future Problems*

Filartiga paved the way for suits brought in federal courts to redress violations of international law. Because the case presented the circuit court with a narrow jurisdictional issue only, there remain a number of questions left unanswered by the court's deci-

231. 630 F.2d at 884.
232. *Id.* at 887.
233. *Id.* at 886-87.
234. *Id.* at 886.
235. The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815).
236. Filartiga v. Peña-Irala, 630 F.2d at 887.

sion that will likely arise in future section 1350 suits. The discussion below focuses on a few of these questions. It would be impossible in a survey of this type to consider these questions in great depth. As a result, the following discussion is intended simply to identify legal problems likely to arise in section 1350 suits, to speculate on the resolution of such problems, and to identify ramifications of alternative resolutions.

b. Forum Non Conveniens

The district court dismissed the suit solely on the basis of lack of subject matter jurisdiction and therefore the *forum non conveniens* issue raised by Peña in the proceedings below was not before the circuit court. The appellate court spoke briefly to the issue in dictum, however:

> [W]e note that the foreign relations implications of this and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts. . . . Questions of this nature . . . should not be left to the potentially varying adjudications of the courts of the fifty states.[237]

It is not likely that in raising the *forum non conveniens* issue Peña was seeking a state, as opposed to a federal, forum in the United States. Rather, he probably contemplated dismissal of the suit in favor of a Paraguayan forum. However, a dismissal on *forum non conveniens* grounds requires not only an alternative forum, but an *effective* alternative forum.

> Dismissal on the basis of forum non conveniens requires that there be in fact an alternative forum in which the suit can be maintained. It must appear *to a certainty* that jurisdiction of all parties can be had and that *complete relief can be obtained in the supposedly more convenient court.*[238]

The Filartigas' unsuccessful efforts to bring the alleged murderer of their son to justice in Paraguay probably would have defeated Peña's *forum non conveniens* motion.

Courts faced with section 1350 claims in the future will doubtless have to rule on *forum non conveniens* motions. It seems

237. *Id.* at 890.

238. 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE, § 3828, at 179 (1976) (emphasis added).

probable that such motions will fail. By the very nature of section 1350 suits, most of the evidence and witnesses will be in another forum, and it is at least possible that the laws of a foreign state will provide the rule of decision for the case.[239] These factors weigh in favor of the foreign state being a more convenient forum. However, where the basis of the suit is the violation of the law of nations, requiring, as it does, a severe personal wrong committed by a governmental official within the alternative forum, the court may be predisposed to retain jurisdiction. Motions to dismiss on *forum non conveniens* grounds will have a better chance of success in those cases in which the violation arises out of an isolated incident in the foreign state, the plaintiff has not sought redress in the courts of that state, and officials of that state indicate a willingness to ensure that justice is available.

c. Sovereign Immunity

Another question, unanswered by *Filartiga*, is the extent to which the doctrine of sovereign immunity will protect a defendant from a suit under the act. Sovereign immunity is available, under certain circumstances, to shield a foreign state and its governmental officers from suit in United States courts. The doctrine, judicially recognized in 1812,[240] was codified by the Foreign Sovereign Immunities Act of 1976 (FSIA).[241] The FSIA was enacted in part to make the judiciary rather than the executive branch (in particular, the State Department) responsible for determining the validity of immunity claims.[242] The general rule under the FSIA is that a foreign state, its agents and instrumentalities are immune from the jurisdiction of state and federal courts.[243] Thus, an alien defendant in a suit brought under section 1350 may successfully avoid a trial on the merits if he falls within the coverage of the FSIA.[244]

Although the language of the FSIA suggests that defendants may be shielded from suit under section 1350, there are political reasons why claims of immunity by such defendants may not suc-

239. See p. 207-09 *infra*.

240. The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812).

241. 28 U.S.C. §§ 1330, 1332(a), (2)-(4), 1391(f), 1441(d), 1602-11 (1976).

242. *Id.* at § 1602.

243. *Id.* at §§ 1603-04.

244. The FSIA contains a number of exceptions to the immunity it otherwise offers. *See* 28 U.S.C. § 1605(a)(1)-(5) (1976).

ceed. Peña did not claim immunity and thus the application of the FSIA to him was not in issue. The nature of the case against him however, will amply illustrate the problem section 1350 defendants will have in seeking immunity from suit. Section 1603 of the FSIA extensively defines those entities that, for the purposes of the act, are characterized as agents or instrumentalities of the foreign state to which immunity is available.[245] Although that section does not expressly require authorization of defendant's conduct by the foreign state, the language of the section does suggest that an agency relationship between the state and individual is envisioned.[246] Torture is expressly prohibited under Paraguayan law and Peña could not point to any official government policy enabling him to violate that law.[247] Therefore, the strength of his immunity claim would depend upon some indication by the Paraguayan government that he was acting as its agent in performing the alleged act. In light of the heinous nature of the crime alleged to have been committed by Peña and the domestic and international censure likely to accompany any effort by the Paraguayan government to accept responsibility for his action, it is highly unlikely that the government would acknowledge authorization of the act or ratify the act once committed. In fact, in any case involving gross violations of human rights, the government whose official is sued is most likely to distance itself from that official and his actions. Far from accepting responsibility, the government can be expected to disclaim both authorization and knowledge of the action. As a result, a defendant's claim of immunity probably will fall on unsympathetic ears within his national government, thus obviating the court's resolution of the issue.

d. Act of State

Peña did argue before the Second Circuit court that "[i]f the conduct complained of is alleged to be the act of the Paraguayan government, the suit is barred by the Act of State doctrine."[248] Because the argument was not raised before the lower court, the circuit court did not decide the issue. However, the court noted in dictum that it doubted whether:

245. *Id.* at 1603(a).
246. *Id.*
247. *See* Filartigo v. Peña-Irala, 630 F.2d at 889.
248. *Id.*

> action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's government, could properly be characterized as an act of state. . . . Paraguay's renunciation of torture as a legitimate instrument of state policy, however, does not strip the tort of its character as an international law violation, if it in fact occurred under color of government authority.[249]

The Act of State doctrine, while not before the court in *Filartiga*, is likely to be raised in other suits against government officials under section 1350.

The classic statement of the Act of State doctrine is found in *Underhill v. Hernandez*:[250]

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[250a]

In essence, the doctrine aids both federal and state courts in determining under what circumstances they may properly adjudicate the validity of foreign acts of state. As the United States Supreme Court noted in *Banco Nacional de Cuba v. Sabbatino*,[251] the seminal case on the Act of State doctrine as currently applied, the doctrine is not compelled either by "the inherent nature of sovereign authority" or by principles of international law.[252] Rather, the doctrine has constitutional underpinnings. "It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[253] The genesis of and justification for the Act of State doctrine is important because it gives the courts flexibility in deciding when exercise of judicial power is appropriate in reviewing acts of foreign states. The court recognized this flexibility in *Sabbatino* when it suggested a

249. *Id.* at 889-90 (citations omitted).
250. 168 U.S. 250 (1897).
250a. *Id.* at 252.
251. 376 U.S. 398 (1964).
252. *Id.* at 421.
253. *Id.* at 423.

number of considerations to be balanced in evaluating whether the doctrine should be applied. Chief among these considerations are the degree of codification or consensus concerning a particular area of international law, and the extent to which judicial involvement would interfere with the executive's conduct of foreign relations.[254]

Application of both these factors in section 1350 suits should lead to the conclusion that the Act of State doctrine is not a bar to the exercise of judicial power. First, the plaintiff in section 1350 suits must establish that the tort violates the law of nations. As the court's opinion in *Filartiga* indicates,[255] the task of showing that an international norm can properly be labeled a "law of nations" is a difficult one. That is, plaintiff must show a substantial consensus, supported by at least some codification, that the norm is to be treated as a binding rule of law. Thus the very test for establishing subject matter jurisdiction under section 1350 similarly establishes one of the chief factors involved in the Act of State analysis. The second factor also would have been satisfied in *Filartiga*. The United States State Department has indicated that the likelihood of conflict between the executive and judicial branches is reduced when the court is called upon to apply principles of international law that have been widely accepted by the international community.[256] Where clear violations of human rights are alleged, it is likely that, in light of the increasing concern for human rights expressed by recent administrations,[257] inter-branch friction is averted by courts interpreting the Act of State doctrine narrowly rather than broadly. One of the interesting aspects of any increased use of section 1350 as a basis for subject matter jurisdiction over violations of human rights after *Filartiga* may be the position taken with regard to Act of State challenges to sec-

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254. *Id.* at 428. The court proceeds to explain that:

> It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle . . . rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. *Id.*

255. Filartiga v. Peña-Irala, 630 F.2d at 881.

256. Appendix 1 to the opinion of the court in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 709-11 (1976).

257. *See* remarks of President Carter reported in 14 WEEKLY COMP. OF PRES. DOC. 2161-65 (July 3, 1978).

tion 1350 suits by the Reagan administration. Since courts traditionally seek a statement from the State Department when faced with Act of State questions, the administration's conception of the relatively limited role to be played by the United States in international human rights issues[258] may be reflected in State Department responses more supportive of judicial deference to the validity of sovereign acts by foreign governments.

The availability of the Act of State doctrine to limit judicial inquiry into the acts of foreign officials may pose a problem for plaintiffs in section 1350 suits similar to that posed by the assertion of sovereign immunity by defendants.[259] In order for a violation of international law to occur, a state must be in some way implicated in the violation. However, if the defendant commits the section 1350 tort in his official capacity as an officer of the state, in some cases the Act of State doctrine will bar the suit. As commentators on the *Filartiga* decision have pointed out,[260] this dilemma is a superficial one. The court in *Filartiga* noted briefly that the dilemma is resolved by distinguishing the level of authorization required to characterize the violation as one implicating the state as well as the individual actor for the purpose of triggering the application of international law, from the kind of authorization that would raise the violation to an act of state.[261] This resolution has a parallel in United States domestic law in the "under color of state law" language of 42 U.S.C. sections 1981-83 as distinct from state action itself.[262]

e. Choice of Law

Perhaps the most immediate question left open by *Filartiga* is the choice of law to be applied by the lower court in deciding the merits of the case. The question is particularly difficult because of the language employed in section 1350. One element of that section requires a cause of action in tort only. If the court were to

258. *See* Reagan interview reported in 17 WEEKLY COMP. OF PRES. DOC. 234-368 (March 9, 1981).

259. See pp. 203-04 *supra*.

260. Blum & Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 108 (1981) [hereinafter cited as Blum & Steinhardt].

261. Filartiga v. Peña-Irala, 630 F.2d at 889-90. The exact language of the court is quoted in the introductory paragraph to this act of state discussion at p. 205 *supra*.

262. See Blum & Steinhardt, *supra* note 260 at 110 n.240.

focus on the fact that a tort action is presented, it might be likely to apply traditional choice of law rules and thus would choose the law of the situs or of any place where sufficient contacts were established.[263] In essence, a section 1350 claim would be treated like any other tort claim. But section 1350 is also directed against "violations of the law of nations".[263a] Focus on this element would suggest that international law is to be applied.

There are inherent problems in applying either state or international law as the rule of decision. The laws of the state where the violation occurred may not favor a tort action based on the underlying facts, particularly where the suit is against a government official. The other alternative, using general international law as the rule of decision, is problematic because international law is not yet sufficiently detailed and refined to provide the various elements of the cause of action or to identify clearly the defenses that might be available to the defendant. The federal court would be in the position of creating general federal common law supposedly grounded in international law. To the extent that other nations are suspicious of the treatment an alien will receive in the American courts or simply hostile to Western legal traditions and principles, a federal court fashioning rules of decision based on international law could inadvertently create international tension. International comity might suffer, with the foreseeable result that Americans find themselves tried abroad on the basis of an understanding of international law totally foreign to the Western legal mind.[264]

The court was not called upon to decide the choice of law issue in *Filartiga*. It did comment on the problem, however. First, in responding to Peña's argument that the customary law of nations is not self-executing and thus cannot provide the rule of decision, the court said:

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263. Restatement (Second) of Conflict of Laws employs a test which balances such factors as the situs of the injury, the predominant situs of the parties and the domicile of the parties in determining the law to be applied in tort actions. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). This choice of law rule represents a change from that articulated in the first Restatement which simply applied a "situs of the injury" test. RESTATEMENT OF CONFLICT OF LAWS §§ 377-83 (1934).

263a. 28 U.S.C. § 1350 (1976).

264. For a more detailed discussion of the choice of law problems presented by § 1350 *see* Blum & Steinhardt, *supra* note 260, at 97-103 (1981).

> [H]e confuses the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations, with the issue of the choice of law to be applied. . . . The two issues are distinct. Our holding on subject matter jurisdiction decides only whether Congress intended to confer judicial power, and whether it was authorized to do so by Article III. The choice of law inquiry is a much broader one, primarily concerned with fairness; consequently, it looks to wholly different considerations.[265]

The court clearly indicated that the "violation of the law of nations" language of section 1350 is jurisdictional only and does not require the application of a particular substantive law. Indeed, the court recognized that any one of three sources might be chosen: the law of the forum, the law of the situs, or the law of nations.[266] The court gave particular attention to the effect of choosing the law of Paraguay. This subject deserved the additional attention because of the potential conflict between applying the law of a particular *foreign state* and the court's resolution of the constitutionality of the federal courts applying *the law of nations* under article III. The court resolved the conflict by distinguishing between the jurisdictional question and the application of a particular source of law to the merits. Once it is determined that jurisdiction is established under section 1350, that is, that the tort alleged violates the law of nations, the case properly "arises under" the laws of the United States for the purposes of article III. A subsequent decision to use foreign law, although resulting in a cause of action not "created" by a law of the United States, does not retroactively deprive the district court of jurisdiction.[267]

f. Other Violations Under the Act

In *Filartiga*, official torture was held to violate the law of nations.[267a] The court was not called upon to and did not indicate what other kinds of conduct might violate the law of nations and thus fall within the scope of section 1350. However, the court recognized that the law of nations is continually evolving and that

265. Filartiga v. Peña-Irala, 630 F.2d at 889 (citations omitted).
266. *Id.*
267. *Id.* at n. 25.
267a. *Id.* at 884.

the types of violations encompassed by section 1350 "will be a subject for continuing refinement and elaboration."[268]

In reaching its conclusion that torture violated the law of nations, the court elucidated what is required to raise a general standard of conduct to a "law of nations". Both the language used by the court and the text of the international sources it cited suggest the parameters of what may be required to bring other types of conduct under the rubric of the "law of nations". First, "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute."[269] Thus, a plaintiff suing under the act must be able to point to international agreements. These agreements must be multilateral, rather than bilateral. Although the above quotation does not require it, the court elsewhere in its opinion indicated that the violation need not be recognized by every nation on earth. It is sufficient that the standard expressed represent the "general assent of civilized nations."[270] Thus, as the court pointed out, expropriation of foreign-owned property does not rise to the level required by section 1350.[271] Although expropriation without adequate compensation is recognized by many Western nations as a violation of international law, it is not so recognized by socialist nations or by many developing nations, and thus does not command sufficient international recognition to be labeled a law of nations. Although not expressed directly in either the statute or the opinion of the court, it is probable that section 1350 requires international agreements that are mandatory rather than recommendatory in nature. This requirement is supported by the types of international accords the court relied upon in concluding that torture violated the law of nations. The relevant sections of the United Nations Charter, the Universal Declaration of Human Rights, the Declaration on the Protection of all Persons from Being Subjected

268. *Id.* at 885.

269. *Id.* at 888.

270. *Id.* at 881. The court's use and discussion of the term "general assent of nations" suggests not only a substantial majority of nations but, within that majority, inclusion of nations representing the widely varied political, economic and social values that characterize modern international society.

271. 630 F.2d at 881. *See also*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

to Torture, the American Convention of Human Rights, the International Covenant of Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms, employ mandatory language in prohibiting torture.[272] The mandatory nature of such provisions stands in contrast to pronouncements in international instruments which speak of general obligations on the part of states or simply recommend standards of conduct to states.[273]

Applying the requirement of express international agreements, mandatory in nature, and generally consented to by nations, it would appear that only prohibitions against genocide and slavery, in addition to prohibitions against torture, rise to the level required by section 1350. Both genocide and slavery are prohibited by numerous international accords similar to those prohibiting torture.[274] Both are rejected by the principles and purposes of the United Nations.[275]

Perhaps the most significant feature of the court's decision in *Filartiga* is the recognition that international law is dynamic rather than static and that, therefore the coverage of section 1350 will not be static. "It is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[276] In light of the activity of the General Assembly and other international organizations directed toward the "progressive development of international law", the scope of international concern, and eventually of interna-

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272. U.N. CHARTER, art. 55, 59 Stat. 1033 (1945); Universal Declaration of Human Rights, art. 5, 30 U.N. GAOR, Annexes 535-41, U.N. Doc. A/777 (1948); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment, G.A. Res. 3452, 30 U.N. GAOR, Supp. (No. 34) 91, U.N. Doc. A/1034 (1975); American Convention on Human Rights, art. 5, OAS Treaty Series No. 36 at 1, OAS Off. Rec. OEA/Ser 4 v/11 23, doc. 21, rev. 2 (1975); International Covenant on Civil and Political Rights, G.A. Res. 220 (xxi)A, U.N. Doc. A/6316 (1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, Council of Europe, European Treaty Series No. 5 (1968), 213 U.N.T.S. 211.

273. *See e.g.*, Security Council resolutions "inviting" states to influence South Africa to end apartheid. S.C. Res. 190, 19 SCOR, U.N. Doc. S/INF/19/Rev. 1, at 12-13 (1964).

274. Genocide: Universal Declaration of Human Rights, *supra* note 272, art. 2; Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.
Slavery: Universal Declaration of Human Rights, *supra* note 272, art. 5; International Covenant on Civil and Political Rights, *supra* note 272, arts. 6, 7.

275. U.N. CHARTER, art. 1, para. 2 (to develop friendly relations among nations based on respect for the principle of . . . self-determination of peoples); art. 1, para. 3.

276. Filartiga v. Peña-Irala, 630 F.2d at 881.

tional law, is likely to expand continuously and perhaps exponentially. Where human rights are involved, the court in *Filartiga* has paved the way for those expanded rights to be redressed in the federal courts of the United States.

2. IIT v. CORNFELD

Federal Courts' Exercise of Subject Matter Jurisdiction Over Transnational Security Dealings — Defining the Scope of the Securities Exchange Act of 1934 — Historical Interpretation of the Securities Exchange Act — Balancing United States and Foreign Interests

Over the last decade, the Second Circuit has decided a number of important cases[277] involving the extraterritorial reach of the antifraud provision, Rule 10b-5[278], promulgated under section 10(b) of the Securities Exchange Act of 1934.[279] In one of the most complex Survey-year cases, *ITT v. Cornfeld*,[280] the court further articulated the guidelines to be used in determining when federal courts may assert subject matter jurisdiction over transnational security dealings.

The 1934 Act does not contain any provision defining its extraterritorial reach, and the legislative history of the act is devoid of any consideration of the question, probably because the current nature and extent of transnational securities dealings was not foreseen or contemplated by the Congress in 1934. Therefore, in determining the appropriate tests for exercising subject matter jurisdiction over alleged Rule 10b-5 violations involving parties or transactions outside the United States, federal courts turned to two principles of state jurisdiction set out in the *Restatement (Second) of the Foreign Relations Law of the United States*.[281] First is the "subjective territorial" or "conduct" principle which founds jurisdiction upon conduct within the state's territory.[282]

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277. Arthur Lipper Corp. v. SEC, 547 F.2d 171 (2d Cir. 1976), *cert. denied*, 434 U.S. 1009 (1978); IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); Leasco Data Processing Equipment v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

278. 17 C.F.R. § 240.10b-5 (1980).

279. 15 U.S. §§ 78a-78hh (1976).

280. IIT v. Cornfeld, 619 F.2d 909 (2d Cir. 1980).

281. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT].

282. *Id.* at § 17:

Jurisdiction to Prescribe with Respect to Conduct, Thing, Status, or Other

Second is the "objective territorial" or "effects" principle which bases jurisdiction upon conduct outside a state causing an effect within the state if:

> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
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> (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.[283]

The two principles support jurisdiction independently: that is, if either the subjective principle (conduct) *or* the objective principle (effects) applies, jurisdiction may properly be exercised. Both bases have been relied upon by the Second Circuit in pre-*Cornfeld* cases to give extraterritorial reach to Rule 10b-5 and section 10(b) of the 1934 Act.

a. Case Law Prior to Cornfeld

The "effects" (objective territorial) principle was first relied on to support jurisdiction over the subject matter of a 10b-5 suit in *Schoenbaum v. Firstbrook*.[284] In *Schoenbaum* the court held that Rule 10b-5 applies to transactions involving stock registered and listed on a national stock exchange which take place outside the United States, if such transactions are harmful to the interests of American investors.[285] A later opinion by the Second Circuit[286] sug-

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Interest within Territory

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory.

283. *Id.* at § 18.

284. 405 F.2d 200 (2d Cir.), *rev'd in part and remanded*, 405 F.2d 215 (2d Cir. 1968) (*en banc*), *cert. denied*, 395 U.S. 906 (1969).

285. 405 F.2d at 208. The language of the case indicating an "effects" analysis was drawn from the Supreme Court's opinion in Strassheim v. Daily, 221 U.S. 280, 285 (1911).

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if [the actor] had been present at the [time of] the effect. . . .

286. Leasco Data Processing Equipment Corp. v. Maxwell, 468 F.2d 1326 (2nd Cir. 1972).

gested that the holding in *Schoenbaum* should not be expansively applied. In *Leasco v. Maxwell*, the court refused to base jurisdiction solely on the fact that the injured party was an American corporation. The court was doubtful that "Congress meant to impose rules governing conduct throughout the world in every instance where an American company bought or sold a security."[287] *Leasco* severely weakened the authority of, but did not overrule, *Schoenbaum*. The only other case in which the "effects" principle provided the *exclusive* jurisdictional ground is *Des Brisay v. Goldfield Corp.*,[288] in which the court focused on the fact that the securities involved were listed on a national exchange and the American market was harmed.[289]

Employment of the "effects" principle as a basis for subject matter jurisdiction is problematic due in large part to the potential foreign relations implications of an expansive conception of "effects." This is particularly true in light of the incidence of multimillion dollar international transactions which are bound to have significant effects in a number of nations. Overuse of the "effects" principle might result in American corporations being forced to defend suits throughout the world should other nations, taking offense at intrusions in their economic affairs by federal courts, decide to employ a similar basis for the jurisdiction of their courts. As Chief Justice Burger recognized in *The Bremen v. Zapata Off-Shore Co.*[290]:

> [T]he expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our own terms, governed by our laws, and resolved in our courts.

Perhaps it is these effects of the objective principle that have led most courts ruling on the extraterritorial reach of Rule 10b-5 and

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287. 468 F.2d at 1334. *See also* Continental Grain Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979).

288. 549 F.2d 133 (9th Cir. 1977).

289. 549 F.2d at 136. It is significant to note that only one of the plaintiffs in *Des Brisay* was American.

290. 407 U.S. 1, 9 (1972). *See also*, Sandberg, *The Extraterritorial Reach of American Economic Regulation: The Case of Securities Law*, 17 HARV. INT'L L.J. 315, 326 (1976).

section 10(b) to employ the "conduct" principle wherever possible as a basis of jurisdiction.

The "conduct" or "subjective" territorial principle supports subject matter jurisdiction over a transnational security transaction if some conduct in relation to that dealing takes place within the Untied States.[291] The cases prior to *Cornfeld* applying the "conduct" test can best be understood by differentiating among three kinds of fact patterns in which it is employed: sales of securities to American residents in the United States, resulting from the conduct of foreigners in the United States; sales of securities to foreigners outside the United States; and sales of securities to Americans residing abroad.[292]

The Second Circuit in *Leasco* articulated what has been a uniform view of federal courts confronting the first factual situation of a resident American injured by the conduct of a foreigner in the United States:

> [W]e must ask ourselves whether, if Congress had thought about the point, it would not have wished to protect an American investor if a foreigner comes to the United States and fraudulently induces him to purchase foreign securities abroad—a purpose which its words can fairly be held to embrace.[293]

The second kind of factual pattern raising the question of the extraterritorial reach of Rule 10b-5 and section 10b involves conduct within the United States which causes loss to foreigners. Although a number of federal courts have dealt with this type of case,[294] the Second Circuit has given the most comprehensive con-

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291. RESTATEMENT at § 17 (1965).

292. *See*, Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 993 (2d Cir. 1975), *cert. denied*, 423 U.S. 1018 (1975).

293. 468 F.2d at 1337. *See also*, Travis v. Anthes Imperial Ltd., 473 F.2d 515 (8th Cir. 1973); Garner v. Pearson, 374 F. Supp. 580 (M.D. Fla. 1973). The court indicated in *Leasco* that conduct by a foreigner in the United States harming another foreigner might not support the exercise of jurisdiction: "The case is quite different from another hypothetical we posed at argument, namely, where a German and a Japanese businessman met in New York for convenience, and the latter fraudulently induced the former to make purchases of Japanese securities on the Tokyo Stock Exchange." 468 F.2d at 1338.

294. Continental Grain Pty. v. Pacific Oilseeds, Inc., 592 F.2d 409 (8th Cir. 1979); SEC v. Kasser, 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); United States v. Cook, 573 F.2d 281 (5th Cir.), *cert. denied*, 439 U.S. 836 (1978); Straub v. Vaisman & Co., Inc., 540 F.2d 591 (3d Cir. 1976); SEC v. United Financial Group, Inc., 475 F.2d 354 (9th Cir. 1973); SEC v. Gulf Intercontinental Finance Corp., 223 F. Supp. 987 (S.D. Fla. 1963).

sideration to the question.[295] In *IIT v. Vencap*, the court concluded that Congress had not "intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners."[296] The court held, however, that where the victim of a fraudulent security dealing is a foreigner, jurisdiction can only be exercised where the conduct within the United States is the perpetration of the fradulent act, not "mere preparatory activities or the failure to prevent fraudulent acts where the bulk of the activity was performed in foreign countries. . . ."[297]

In *Bersch v. Drexel Firestone, Inc.*,[298] the court reiterated this test for establishing jurisdiction where foreigners are victimized by securities fraud, but indicated that a different test is employed to determine the appropriate exercise of jurisdiction where the victims are Americans residing abroad. "While merely preparatory activities in the United States are not enough to trigger application of the securities laws for injury to foreigners located abroad, they are sufficient when the injury is to Americans so resident."[299] In order to exercise jurisdiction over section 10b and Rule 10b-5 suits arising from injury to Americans residing abroad, it is only necessary that the conduct within the United States materially contribute to the injury.[300]

Thus, prior to *Cornfeld*, the "conduct" test for the extraterritorial reach of the securities laws was a tripartite examination. *Cornfeld* eroded the distinction between two factual situations previously significant to the courts.

b. The Cornfeld Decision

Although the factual history of *Cornfeld* is complex, a general outline of the parties and major transactions involved in the suit is required to understand fully the legal conclusions reached by the court. The plaintiff is IIT, an international investment trust, which was organized under the laws of Luxembourg. IIT was controlled

295. IIT v. Vencap, Ltd., 519 F.2d 1001 (2d Cir. 1975); Bersch v. Drexel Firestone, Inc., 519 F.2d 974 (2d Cir.) *cert. denied*, 423 U.S. 1018 (1975).

296. IIT v. Vencap, Ltd., 519 F.2d at 1017.

297. *Id.* at 1018.

298. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

299. Bersch v. Drexel Firestone, Inc., 519 F.2d at 992.

300. *Id.* at 993.

and managed by IIT Management Company, S.A., a Luxembourg corporation, which was controlled by Investors Overseas Services, Ltd. (IOS), incorporated in Canada. The latter two companies were controlled by Bernard Cornfeld and were operated out of Switzerland. The suit arose out of three allegedly fraudulent acquisitions by IIT of securities issued by companies controlled by an American, John M. King. First, IIT acquired debentures, issued in Europe, of a Netherlands Antilles subsidiary of King Resources Company (KRC), a publicly owned Maine corporation. Second, IIT purchased King Resources Company common stock in the United States over-the-counter market. This purchase was made through the brokerage services of the Arthur Lipper Corporation. Third, IIT directly purchased a convertable note from The Colorado Corporation (TCC), which was privately owned by King. The gravamen of the complaint was that these acquisitions were part of a conspiracy to defraud IIT by those in control of IOS, Lipper and the King companies.[301]

Considering the jurisdictional question as to whether Rule 10b-5's extraterritorial reach encompassed these transactions, the district court first applied the "effects" or "objective territorial principle" and rejected that basis for jurisdiction.[302] The court noted that "an unparticularized deleterious effect on the American economy resulting from the IOS collapse—i.e., a damaged ability to attract offshore investment funds—is not sufficient."[303] The court also stated that a *de minimus* number of American citizen shareholders would not create a jurisdictionally sufficient effect in the United States.[304] The Second Circuit agreed that the effects within the United States were not sufficient to support the assertion of jurisdiction.[305]

The district court then turned to the "subjective territorial principle" and focused on whether there was sufficient conduct within the United States to support jurisdiction. The court began with the principle that "in the context of a suit by a foreign plaintiff . . . the jurisdictional significance of the defendants' allegedly

301. IIT v. Cornfeld, 619 F.2d 909, 914-15 (2d Cir. 1980).

302. IIT v. Cornfeld, 462 F. Supp. 209, 223 (S.D.N.Y. 1978) (citing *Bersch*, 519 F.2d at 998-99).

303. *Id.*

304. *Id.*

305. IIT v. Cornfeld, 619 F.2d at 917.

domestic fraudulent acts must be considered in the context of the plaintiffs' theory of the case."[306] Plaintiffs' theory, according to the court, was based upon alleged fraud upon foreign fundholders by foreign management, *aided and abetted* by actors within the United States (principally John M. King). The acts of the "aiders and abettors" were "preparatory or secondary" to the fraud perpetrated by foreign actors.

> When the scheme finds its genesis abroad, however, with a group of foreign managers of a foreign investment trust violating what would appear to be their fiduciary duties to their fundholders, and the foreign managers merely enlist the aid of American aiders and abettors, then the prospect of applying federal law to the transactions is drastically changed.[307]

Thus, having characterized the theory of the case as one primarily involving a fraud perpetrated by foreign managers of IIT who simply enlisted the aid of Americans, the district court rejected conduct within the United States as a basis for jurisdiction.[308]

The Second Circuit disagreed. The district court's characterization of defendants as "aiders and abbettors", while a fair description of the role of the accountant, the underwriter, and Lipper, was not an accurate description of members of the King complex and other defendants, who, plaintiffs claimed, were perpetrators of the fraud. Thus, the aiding and abetting related to a deception originating in the United States. According to the court, "[a]n actual participant in a fraud is no less a principal because someone else originated the plan."[309]

The court did not find it difficult to find a basis for the exercise of jurisdiction over IIT's purchase of KRC's common stock and the TCC convertable note, as both were essentially domestic transactions.[310] In fact, the only foreign element in these transactions was the transmission of orders from outside the United States by foreign purchasers. A more difficult question was presented by the debentures of the Netherlands Antilles subsidiary of KRC. The debentures were not registered under the

306. IIT v. Cornfeld, 462 F. Supp. at 220.
307. *Id.* at 225.
308. *Id.* at 226.
309. IIT v. Cornfeld, 619 F.2d at 918.
310. *Id.*

1934 Act and were purchased in the European market rather than in the United States.

The court began its analysis of the debenture transaction by restating its conclusion in *Bersch* that the anti-fraud provisions of the Securities Act "[d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses."[311] The facts in *Cornfeld* were then distinguished from those in *Bersch* on three principal grounds. First, the fact that KRC was a domestic corporation and the fact that the foreign subsidiary through which the debentures were sold was merely a shell for KRC weighed heavily in the court's analysis.[312] *Bersch* involved the stock of a Canadian corporation. The nationality of the issuer was significant to the court because "Congress would have been considerably more interested in assuring against the fraudulent issuance of securities constituting obligations of American rather than purely foreign business."[313] Second, the court emphasized that the European debenture offering was an integral part of an overall financing scheme for KRC centered in the United States,[314] whereas in *Bersch* the primary offering was exclusively in Europe and the secondary offering was exclusively in Canada.[315] Finally, the court emphasized that the prospectus for the European debenture offering in *Cornfeld* had been wholly prepared in the United States and concluded that "[d]etermination whether American activities 'directly' caused losses to foreigners depends not only on how much was done in the United States but also on how much (here how little) was done abroad."[316]

The nature of the court's analysis of the defendants' conduct suggests an erosion, or at least a blurring, of the distinction previously drawn by the Second Circuit between suits in which foreigners suffered as a result of fraudulent securities dealings (requiring an analysis of whether domestic activity *directly* caused

311. *Id.* at 919.

312. *Id.* The court pointed out that the Netherlands Antilles subsidiary of KRC was involved in the debenture sale only for tax purposes. The subsidiary had no operating assets and therefore the debentures were guaranteed by, and convertible into the common stock of, the parent company, KRC. *Id.* at 919-20.

313. *Id.* at 920.

314. *Id.*

315. Bersch v. Drexel Firestone, Inc., 519 F.2d at 979-80.

316. IIT v. Cornfeld, 619 F.2d at 920-21.

the loss) and suits in which nonresident Americans are injured by fraudulent securities dealings (requiring that acts of material importance in the United States significantly contribute to the loss). The court directed its attention to characterizing the Euromarket debenture transaction as "essentially American"[317] instead of focusing on whether the activities within the United States were "merely preparatory" rather than directly causal as required by *Bersch* and *Vencap*. In this sense, the court's analysis in *Cornfeld* is more closely akin to the standard previously articulated for use in suits involving Americans residing abroad. That standard requires a weighing of the conduct within the United States relative to foreign conduct and a determination of the materiality of the domestic activity to the fraudulent scheme. If the Second Circuit continues to apply the kind of analysis employed in *Cornfeld* to Rule 10b-5 and section 10b suits causing loss to foreigners, the different treatment accorded foreigners and Americans residing abroad by the tripartite test of *Bersch* will be eliminated.

Outlining the parameters of the extraterritorial reach of United States securities laws requires a balancing of a number of interests. Defining the reach of federal court jurisdiction to include suits arising out of any transaction having an effect on the American market or suits arising from some conduct in the United States may needlessly intrude in the affairs of other nations with consequent harm to the foreign commercial and diplomatic relations of the United States. Other nations, particularly industrialized nations, are as likely as the United States to be concerned with deterring fraudulent transnational securities dealings. Where a particular fraudulent scheme is essentially centered in another nation, federal courts are wise to refuse jurisdiction, not only as a matter of deference to the judicial function in other nations, but also to diminish the likelihood that other nations will expand the jurisdiction of their courts over fraudulent transactions which are essentially American.

Yet, as dangerous as a broad exercise of jurisdiction in transnational securities dealings would be, a narrowly defined extraterritorial reach would fail to serve both the domestic and international interests of the United States. If federal courts are too reticent to exercise jurisdiction, the United States might become,

317. *Id.* at 920.

in the words of one federal court, a "'Barbary Coast' . . . harboring international securities 'pirates'."[318] Additionally, a failure of the United States to open its courts to securities fraud suits involving activity in the United States might "induce reciprocal responses on the part of other nations" to "decline to act against individuals and corporations seeking to transport securities fraud to the United States."[319]

By carefully analyzing whether international transactions are "essentially American" in origin and direction, the court in *Cornfeld* avoided the rigid tricotomy established by *Bersch* and struck the balance between American and foreign interests in a sensible and principled manner.

3. RUGGIERO V. COMPANIE PERVANA DE VAPORES

Discussion of Jury Trials in Jones Act Cases—Impact of the Foreign Sovereign Immunities Act of 1976 on the Right to a Jury Trial—The Disallowance of Jury Trials in Jones Act Cases Does Not Violate the Seventh Amendment

In recent decisions, federal district courts have reached conflicting conclusions in resolving the question whether a United States plaintiff suing a foreign government-owned corporation is entitled to a jury trial. Most recently, the District Court for the Eastern District of New York held in consolidated Jones Act cases that plaintiffs were not entitled to a jury trial.[320]

The cases are personal injury suits brought under the Jones Act[321] by longshoremen. Defendant in each case is a shipping company wholly owned by a foreign government. Each plaintiff demanded a jury trial; each defendant moved to strike such demand. Defendants' motions were based on the assertion that a jury trial is banned by the Foreign Sovereign Immunities Act of 1976 (FSIA).[322] Plaintiffs contended that the Immunities Act does not bar jury trials and that if it does, the act is unconstitutional

318. SEC v. Kasser, 548 F.2d 109, 116 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

319. *Id.*

320. Ruggiero v. Companie Pervana De Vapores "Inca Capac Yupunqui," 498 F. Supp. 10 (E.D.N.Y. 1980).

321. 33 U.S.C. § 905(b) (1976).

322. 28 U.S.C. § 1330 (1976).

under the seventh amendment.[323] The district court granted defendants' motions to strike.

The issue before the court involved the proper construction of 28 U.S.C. section 1332(a)(2) in light of the FSIA. The FSIA amended section 1332(a)(2) by deleting reference to "foreign states." The section, as amended, provides jurisdiction over suits involving "citizens of a State and citizens or subjects of a foreign state."[324] In addition to amending section 1332(a)(2), the FSIA added to title 28 three new sections dealing with jurisdiction over "foreign states." Section 1330(a) gives the district courts original jurisdiction over any *nonjury* civil action against a foreign state as to any claim with respect to which the foreign state is not entitled to immunity. Section 1332(a)(4) provides jurisdiction over suits between a foreign state as plaintiff and citizens of a state or different states. Section 1603 defines "foreign states" for the purposes of both section 1330(a) and section 1332(a)(4).[325]

The court concluded that the effect of the FSIA revisions was to eliminate jurisdiction under section 1332(a)(2) in suits between American citizen plaintiffs and foreign state defendants.[326] The only jurisdictional base available to plaintiffs is section 1330(a), which does not provide a right to trial by jury.[327] Any other conclusion, according to the court, would be contrary to congressional intent.[328] Congress sought to promote uniformity between suits

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323. Because the constitutionality of the Immunities Act was put in issue the Attorney General was given notice pursuant to 28 U.S.C. 2403(a). The Attorney General chose not to intervene in the case. *Ruggiero*, 498 F. Supp. at 11.

324. Prior to enactment of the FSIA, 28 U.S.C. § 1332(a)(2) read:

"The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $10,000 . . . and is between . . . citizens of a State, and foreign states or citizens or subjects thereof. . . ."

325. Section 1603(b) of title 28 defines "foreign state" to include:

"any entity . . . which is a separate legal person, corporate or otherwise . . . a majority of whose shares . . . is owned by a foreign state . . . [and] which is neither a citizen of a State of the United States . . . nor created under the laws of any third country."

All defendants in *Ruggiero* are foreign states within this definition. 498 F. Supp. at 12.

326. *Id.*

327. *Id.*

328. *Id.* The court quoted a House Report which stated that "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous." H.R. REP. No. 1487, 94th Cong. 2d Sess. 14, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 6604, 6631.

against the United States Government in which jury trials are banned[329] and suits against foreign governments.[330]

The court found further evidence of congressional intent in the provision for removal jurisdiction under the FSIA. 28 U.S.C. section 1441(d), added by the FSIA, allows a foreign state to remove to federal district court any civil action brought against it in a state court. The section specifically states: "Upon removal the action shall be tried by the court without jury."[331] Allowing plaintiffs a jury trial in a suit originally brought in federal court while denying such a trial in identical suits removed from state courts would "thwart Congressional intent to promote uniformity in dealing with cases against foreign states."[332]

Having decided that plaintiffs were barred from a jury trial, the court faced the constitutional issue of whether such a bar denied the constitutional right to a jury trial protected by the seventh amendment, and held that Congress could constitutionally bar such trials. The court noted that, at the time of enactment of the seventh amendment, the doctrine of sovereign immunity would have barred plaintiffs' suits.[333] Therefore, "there appears [to be] no basis for concluding that they would have been considered 'suits at common law' within the meaning of the seventh amendment."[334] There was, therefore, no right to a jury trial in such suits to be affected by the FSIA.[335]

At least two federal district courts considering the same jurisdictional question that confronted the court in *Ruggiero* reached a conflicting result. In *Icenogle v. Olympic Airways S.A.*,[336] the court held that a government-owned corporation may be considered a "citizen of a foreign state" (section 1332(a)(2)) as

329. 28 U.S.C. § 2402 (1976).

330. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 13, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6611-12; *Ruggiero*, 498 F. Supp. at 13.

331. 28 U.S.C. § 1441(d). The question of whether a plaintiff has a statutory or constitutional right to a jury trial when an action commenced in state court against a foreign state is removed to federal court pursuant to § 1441(d) was presented in Herman v. El Al Israel Airlines, Ltd., 502 F. Supp. 277 (S.D.N.Y. 1980). The court held plaintiff had no such statutory or constitutional right. *Id.* at 280.

332. 498 F. Supp. at 13.

333. *Id.*

334. *Id.*

335. *Id.*

336. 82 F.R.D. 36 (D.D.C. 1979).

well as a "foreign state" (section 1332(a)(4)). Therefore, jurisdiction could be obtained under section 1332(a)(2) in suits between American citizens and government-owned foreign corporations. The court recognized that a different result would obtain if the case were removed from state court pursuant to section 1441(d), but reasoned that the absence of the "commanding language" against jury trials in section 1332(a)(2) justified the different treatment.[336a] Finally, the court reasoned that its holding would result in similar treatment of foreign government corporations and United States government-owned corporations.[336b]

In *Rex v. Cia. Pervana De Vapores S.A.*,[337] the court followed the *Icenogle* holding and stated in dicta that since the suit presented a traditional tort question, any attempt by Congress to deprive plaintiff of a jury trial would be unconstitutional.[337a] A constitutional issue was avoided by a holding that jurisdiction under section 1332(a)(2) was not barred.[337b]

The decisions in both *Ruggiero* and *Rex* were certified to the Court of Appeals for the Second and Third Circuits, respectively, for immediate interlocutory appeal.[338] Both circuit courts gave leave for the appeals.[339]

Characterizing the district court's opinion in *Ruggiero* as "well-considered," the Second Circuit affirmed.[340] Much of the appellate court's opinion simply reiterates the statutory analysis undertaken by the lower court. In two respects, however, the opinion is valuable as an amplification of the reasoning behind the lower court's holding. First, the Second Circuit more clearly identified the intent of Congress in revising, through the FSIA, the jursidictional basis for suit against foreign states and entities in

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336a. *Id.* at 39.

336b. *Id.* at 41.

337. 493 F. Supp. 459 (E.D. Pa. 1980).

337a. *Id.* at 465.

337b. *Id.* at 466.

338. 498 F. Supp. at 13-14, 493 F. Supp. at 469.

339. Ruggiero v. Compania Pervana de Vapores, 639 F.2d 872, 873 (2d Cir. 1981). As of this writing the Third Circuit Court of Appeals has not rendered an opinion in *Rex*. The Court of Appeals for the Fourth Circuit is considering the same question on appeal from Houston v. Murmansk Shipping Co., 87 F.R.D. 71 (D. Md. 1980) and Williams v. Shipping Corp. of India, 489 F. Supp. 526 (E.D. Va. 1980).

340. The United States intervened on appeal, by authority of 28 U.S.C. § 2403(a), and submitted a brief in support of the district court's resolution of the case. 639 F.2d at 873.

federal courts.[341] After reviewing House and Senate Reports on the proposed FSIA[342] the court concluded:

> The reports thus confirm what is patent from the statutory language—Congress wished to provide a single vehicle for actions against foreign states or entities controlled by them, to wit, § 1330 and § 1441(d), its equivalent on removal, and to bar jury trial in each. In return for conferring upon plaintiffs this clear basis of jurisdiction in actions against foreign states (even in suits for $10,000 or less), codifying the restrictive principle of sovereign immunity and vesting its determination in the courts, §§ 1602-05, providing a feasible method of service of process, § 1608, and authorizing execution of a judgment upon property of a foreign state, § 1610, Congress intended that the foreign state, defined broadly in § 1603, was not to be subjected to jury trial—a form of trial alien to most of them in civil cases and from which the United States, in granting consent to suit, has generally exempted itself.[343]

Second, the Second Circuit gave considerably more attention than the district court did to the plaintiffs' assertion that deprivation of a jury trial in these suits would violate the seventh amendment.[344] The court noted that the function of the seventh amendment was to preserve rather than to create a right to a jury trial. "[I]f the action is a common law suit or the particular issues arise in a common law suit, but no right of jury trial existed under the common law of England as to that type of action, then there is no right to jury trial by virtue of the Seventh Amendment."[345] Plaintiffs could not have sued defendants at common law in 1791 and thus could not have had a right to jury trial. The court then considered the wisdom of straining the definition of "suits at common law"[346] to recognize a constitutional right to a jury in these suits,

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341. 639 F.2d at 876-878.

342. H.R. REP. No. 94-1487, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604; S. REP. No. 1310, 94th Cong., 2d Sess. (1976).

343. 639 F.2d at 878.

344. *Id.* at 878-881.

345. *Id.* at 879 (quoting 5 MOORE, FEDERAL PRACTICE ¶ 38.-08[5] (2d ed. 1976)). *See also*, McElrath v. United States, 102 U.S. 426 (1880); Galloway v. United States, 319 U.S. 372 (1943); Glidden Co. v. Zdanok, 370 U.S. 530 (1962).

346. Plaintiffs' reply brief cited an article in which the author argued that in 1791 it was possible to sue the Crown in a common law action in which there was a trial by jury: Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right*, 58 TEX. L. REV. 549 (1980). The court summarizes Professor Kirst's argument at 639 F.2d at 880 n.10.

and concluded that "there are sufficient reasons why newly authorized suits against foreign sovereigns . . . are *sui generis* and should not be deemed to be within the scope of the Seventh Amendment's preservation of a jury trial."[347] These reasons relate to the foreign relations interests of the United States. Congress could legitimately be concerned that a withdrawal of sovereign immunity from foreign states in certain kinds of actions would interfere with the international relations of the United States "unless such States were accorded protection similar to what [the United States] had given itself."[348]

If the other courts of appeals considering the proper construction of the FSIA revisions reach a contrary result to that reached by the Second Circuit in *Ruggiero*, Supreme Court review of the question is likely. Given the clear language of the statutes involved, and the unequivocal nature of the legislative history behind the FSIA, the Second Circuit's analysis should prevail. As that court stated in *Ruggiero*,

> The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division—federal question cases, diversity cases and actions against foreign states. If a case falls within the third division, there is to be no jury trial even if it might also come within one of the other two.[349]

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347. 639 F.2d at 881.

348. *Id.* at 880.

Foreign countries can hardly object to the United States' subjecting them to trial by a judge in commercial cases when the United States itself is subject to the same sort of trial in its own courts and in theirs. Subjection to trial by jury, especially with the restraints on review of jury findings also imposed by the Seventh Amendment, would be a different matter, especially since the great majority of countries do not use a civil jury.

Id.

349. *Id.* at 876.