1981-82 SURVEY OF INTERNATIONAL LAW IN THE SECOND CIRCUIT

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1981 and 1982, the years on which this Survey article focuses, did not see the United States Court of Appeals for the Second Circuit presented with cases that commanded the attention of the world[1] or touched the hearts and minds of America's international lawyers.[2] The court did decide questions raising some of the most abiding issues of international law: foreign state immunity, the scope of the act of state doctrine, and the relation between treaty obligations and domestic law. Many of the cases also raised complicated domestic issues regarding the allocation of power and responsibility among the three branches of the United States government. The decisions reached by the Second Circuit on these international and domestic issues, and particularly the reasoning that supported these decisions, often raised more questions than they answered. The court approached the task of deciding difficult questions in international law with an appreciation not only of the complexities of that law, but also of the fragile nature of the relationship between the United States and the world community.

I. BANCO NACIONAL DE CUBA CASES: THE ACT OF STATE DOCTRINE AND FOREIGN EXPROPRIATIONS

The Second Circuit decided six cases[3] on one day involving

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1. *See* Youngblood, *1980 Survey of International Law in the Second Circuit*, 8 SYR. J. INT'L L. & COM. 159, 159-80 (1980) for a discussion of Dames & Moore v. Regan, 453 U.S. 654 (1981). *Dames & Moore* involved the statutory and constitutional power of a United States President to terminate all legal proceedings in United States courts involving claims of United States persons against Iran. President Carter had successfully won the release of the American hostages in Iran, in part, by agreeing to the termination of litigation.

2. *See* Youngblood, *supra* note 1, at 212, for a discussion of Filartiga v. Pena Irala, 630 F.2d 876 (2d Cir. 1980). *Filartiga* involved the issue of jurisdiction of federal courts under the Alien Tort Claims Act to hear and decide a claim based upon alleged torture conducted by an agent of the Paraguayan government.

3. Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Banco Para el Comercio Exterior de Cuba v. First National City Bank, 658 F.2d 913 (2d Cir. 1981), *cert. granted*, 445 U.S. 936 (1982), *rev'd*, 51 U.S.L.W. 4820 (U.S. June 17, 1983) (No.

foreign expropriations and the act of state doctrine.[4] All six cases, along with dozens before them,[5] arose out of the revolution in Cuba in the late 1950's and the subsequent expropriation of American-owned property in Cuba by the Cuban Government of Fidel Castro Ruz. Many of the events surrounding the revolution and expropriation form a common factual basis out of which each of the cases arose. Similarly, the judicial and political history of the act of state doctrine formed the foundation of the court's opinion in many of the cases. These two common elements are addressed before discussion of the individual cases.

The Cuban revolution resulted in the overthrow of the Batista regime and the installation of a new government on January 1, 1959. The new government enacted numerous statutes designed to accomplish two general goals: to centralize all means of production in Cuba in the hands of the new government, and to restrict and curtail the role of foreign enterprise in the Cuban economy.[6]

Within eighteen months after the installation of the new government, relations between the United States and Cuba had seriously deteriorated. On July 6, 1960, Cuba enacted Law No. 851 authorizing the President and Prime Minister of Cuba to order the forced expropriation of the assets or firms of United States citizens, both natural and juridical. On September 17, 1960, the Cuban government, pursuant to Law No. 851, ordered the expropriation and nationalization of the Cuban branches of the Chase Manhattan Bank, the First National Bank of Boston, and the First National City Bank of New York. On October 13, 1960, virtually all remaining private banks were nationalized.[7]

81-984); First National Bank of Boston (International) v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981); Banco Nacional de Cuba v. Chemical Bank New York Trust Co., 658 F.2d 903 (2d Cir. 1981), *cert. denied*, 103 S. Ct. 579 (1982); Banco Nacional de Cuba v. Manufactures Trust Co., 658 F.2d 903 (2d Cir. 1981); Banco Nacional de Cuba v. Irving Trust Co., 658 F.2d 903 (2d Cir. 1981). The last three cases were consolidated for argument and were decided in a single opinion.

4. *See infra* text accompanying notes 9-22.

5. *See, e.g.*, Banco Nacional de Cuba v. First National City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967), *rev'd*, 431 F.2d 394 (2d Cir. 1970), *vacated and remanded*, 400 U.S. 1019, *on remand*, 442 F.2d 530 (2d Cir. 1971), *rev'd* 406 U.S. 759 (1972), *on remand*, 478 F.2d 191 (2d Cir. 1973); Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), *aff'd*, 307 F.2d 845 (2d Cir. 1962), *rev'd*, 376 U.S. 398 (1964), *on remand sub nom.* Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 and 272 F. Supp. 836 (S.D.N.Y. 1965), *aff'd*, 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

6. *See* H.L. MATTHEWS, REVOLUTION IN CUBA 112-22 (1975).

7. *See* Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 878 (2d Cir. 1981).

Banco Nacional de Cuba, a party to most of these cases, has functioned as the central bank of Cuba since 1948.[8] Prior to the Revolution, the bank was fifty percent government owned. After the Revolution, the bank was extensively involved in the restructuring of the Cuban banking industry, including the expropriation and nationalization of the branches of United States banks. Sometime after being given control of all remaining private banks, Banco Nacional became wholly owned and operated by the Cuban government.

Because the expropriation and nationalization of these banks was by order of the Cuban government, the act of state doctrine is implicated in litigation arising out of those acts. The act of state doctrine's classic formulation is found in *Underhill v. Hernandez*.[9]

> 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.[10]

Underhill, and cases decided for decades after it,[11] treated the act of state doctrine as required by internationally accepted principles of law and comity between states. The first major dissatisfaction with the act of state doctrine as formulated in *Underhill* came in two opinions of the Second Circuit authored by Judge Learned Hand.[12] In the first case, *Bernstein v. Van Heyghen Frères Société Anonyme* (*Bernstein I*),[13] Judge Hand applied the act of state doctrine to foreclose judicial inquiry into the validity of expropriation of the plaintiff's property by the Nazis. In *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappy (Bernstein II)*,[14] Judge Hand refused to apply the act of state doctrine because the State Department had requested that the doctrine not

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8. *Id.*

9. 168 U.S. 250 (1897).

10. *Id.* at 252.

11. *See, e.g.*, Oetjen v. Central Leather Co., 246 U.S. 297, 303 (1918); American Banana Co. v. United Fruit Co., 213 U.S. 347, 349 (1909).

12. Bernstein v. Van Heyghen Frères Société Anonyme (Bernstein I), 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947); Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappy (Bernstein II), 210 F.2d 375 (2d Cir. 1954).

13. 163 F.2d 246 (2d Cir. 1947), *cert. denied*, 332 U.S. 772 (1947).

14. 210 F.2d 375 (2d Cir. 1954).

be applied in the case.[15] Thus, at least in the Second Circuit's view, application of the act of state doctrine was not compelled by international law but was at least partially linked to the foreign relations interests of the United States government as represented by the executive branch.

The notion that the act of state doctrine was founded on something other than the dictates of international law and comity was expressly adopted by the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.[16]

> We do not believe that [the act of state] doctrine is compelled either by the inherent nature of sovereign authority . . . or by some principle of international law. . . . The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.
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> The act of state doctrine does, however, have "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.[17]

Thus, the United States Supreme Court recognized that the application of the doctrine in an individual case was a matter of judicial discretion rather than legal mandate. Having recognized the source of the act of state doctrine, the Court further identified the appropriate focus in determining whether the doctrine ought to be applied. The relevant concern, the Court stated, is whether the judiciary's "engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[18]

Sabbatino, like the Second Circuit cases decided in 1981, arose out of the Cuban revolution and the expropriations that followed. Having stated that "the greater the degree of codification or consensus concerning a particular area of international law,

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15. *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers*, Dept. of State Press Release No. 296 (Apr. 27, 1949), 20 DEP'T ST. BULL. 592, 593 (1949).

16. 376 U.S. 398 (1964).

17. *Id.* at 421-23.

18. 376 U.S. at 423.

the more appropriate it is for the judiciary to render decisions regarding it,"[19] the Court concluded "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[20] The Court found it "difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations."[21] Thus, regardless of whether an expropriation, such as that undertaken by the Cuban government, was offensive to the public policy of this country, the Court concluded that "both the national interest and progress towards the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application."[22]

A. *BANCO NACIONAL DE CUBA V. CHASE MANHATTAN BANK*

In *Banco Nacional de Cuba v. Chase Manhattan Bank*,[23] the Second Circuit Court of Appeals decided two issues with major impact on the continuing evolution of the act of state doctrine and the role of United States courts in deciding cases arising out of foreign expropriation. Banco Nactional brought suit against Chase Manhattan in the district court for the Southern District of New York to recover in excess of $9.7 million. This amount represented deposits allegedly owed by Chase Manhattan and the proceeds Chase Manhattan had received from the sale of collateral that had secured a loan to the predecessor of Banco Nacional. Chase Manhattan did not contest the validity of the claim. Rather, Chase Manhattan counterclaimed, alleging *inter alia* that its branch banks, expropriated by the Cuban government in violation of international law, were valued at more than $8.6 million. Although the total value of Chase Manhattan's counterclaims exceeded Banco Nacional's claim, the former did not request affirmative relief but rather sought dismissal of Banco Nacional's claim.[24]

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19. *Id.* at 428.
20. *Id.*
21. *Id.* at 430.
22. *Id.* at 437.
23. 658 F.2d 875 (2d Cir. 1981).
24. *Id.* at 879. Chase Manhattan asserted a total of four counterclaims. In addition to its claim for the value of its branches based on the Cuban government's violation of international law, the bank stated an alternative counterclaim for the value of the branches based on an implied contract theory, and two counterclaims in its capacity as trustee for certain

The district court held that, for the purposes of Chase Manhattan's counterclaim, Banco Nacional was the alter ego of the Cuban government, that Chase Manhattan's counterclaim was justiciable, and that Chase Manhattan was entitled to a set off in the amount of $6.9 million.[25] Included in this amount was a damage award exceeding $1.4 million representing the "going concern" value of Chase Manhattan's Cuban branches. Because Chase Manhattan had not disputed the claims against it, judgment was entered against it for approximately $2.9 million.

Both parties appealed. Banco Nacional asserted that the district court had erred in adjudicating Chase Manhattan's counterclaim. Banco Nacional argued that this counterclaim was barred by the act of state doctrine. In addition, Banco Nacional argued that the amount of compensation was a nonjusticiable political question and that, in any event, the district court had overvalued Chase Manhattan's Cuban assets. Chase Manhattan argued that the "going concern" valuation of its branches by the district court was too low.[26]

The Second Circuit first considered the justiciability of Chase Manhattan's counterclaim and held that the counterclaim was justiciable.[27] While recognizing that the reasoning of *Sabbatino* would appear to require the opposite conclusion, the court found its holding of justiciability supported, and indeed compelled, by the Supreme Court's post-*Sabbatino* decision in *First National City Bank v. Banco Nacional de Cuba (Citibank)*.[28] In *Citibank*, the Supreme Court held that the act of state doctrine was not a bar to adjudication of the merits of Citibank's counterclaim for damages arising out of the expropriation of its Cuban branches. The Court's

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American investors. Only the first counterclaim is of significant interest, and thus only it is discussed in this Survey.

25. 505 F. Supp. 412, 428 (S.D.N.Y. 1980).

26. 658 F.2d at 880.

27. *Id.* at 881.

28. 406 U.S. 759 (1972). *Citibank* involved facts nearly identical to those in the instant case. Citibank sought a setoff for the expropriation of its Cuban branches up to the amounts sought by Banco Nacional for deposits and excess proceeds from the sale of collateral for a loan. The Second Circuit ruled that the act of state doctrine barred adjudication of Citibank's claim. 431 F.2d 394 (2d Cir. 1970). The United States Supreme Court directed that the Second Circuit reconsider in light of a State Department letter advising that the foreign relations interests of the United States would not be injured by adjudication of the counterclaim. 400 U.S. 1019 (1971). The Second Circuit adhered to its original holding. 442 F.2d 530 (2d Cir. 1971). The Supreme Court reversed in a five to four decision. 406 U.S. at 759.

vote was split five to four and the opinion is quite complex; thus it will not be treated in depth here.[29] Of those justices holding that the act of state doctrine was not a bar, three based their decision on the fact that the executive branch had represented to the Court that the application of the doctrine would not advance American foreign policy interests;[30] one justice opined that a foreign sovereign plaintiff should not be able to invoke the doctrine to bar a counterclaim,[31] and one justice indicated a dissatisfaction with *Sabbatino*, stating that the act of state doctrine should be applied only when failure to do so would interfere with "delicate foreign relations conducted by the political branches."[32] The dissenters believed that *Sabbatino* was correct in recognizing the proper distribution of functions between the branches on foreign affairs matters. In the dissenters' opinion, the determination of the legality of a foreign sovereign's act within its own territory, when that act involved an area of customary law upon which states had not reached a consensus, was a political question from which the judiciary should abstain.[33]

The Second Circuit, in *Banco Nacional v. Chase Manhattan*, interpreted the views of the *Citibank* majority and "arrived at the following phenomenological rule."[34]

> [W]here (1) the Executive Branch has provided a . . . letter advising the courts that it believes [the] act of state doctrine need not be applied, (2) there is no showing that an adjudication of the claim will interfere with delicate foreign relations, and (3) the claim against the foreign sovereign is asserted by way of counterclaim and does not exceed the value of the sovereign's claim, adjudication of the counterclaim for expropriation of the defendant's property is not barred by the act of state doctrine.[35]

The court found all three conditions satisfied in *Banco Nacional v. Chase Manhattan* and thus affirmed the district court's holding

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29. For an extended discussion of *Citibank*, see Lowenfeld, *Act of State and Department of State: First National City Bank v. Banco Nacional de Cuba*, 66 AM. J. INT'L L. 795 (1972); Note, *Act of State*, 14 HARV. INT'L L.J. 131 (1973); and Note, *Act of State Doctrine*, 6 VAND. J. TRANSNAT'L L. 272 (1972-73).

30. 406 U.S. at 764.

31. *Id.* at 772 (Douglas, J., concurring).

32. *Id.* at 775 (Powell, J., concurring).

33. *Id.* at 787-88 (Brennan, J., dissenting).

34. 658 F.2d at 884.

35. *Id.*

that the act of state doctrine was not a bar to the adjudication of the counterclaim.

The court also affirmed the district court's determination that the issue of damages arising out of the counterclaim was justiciable. While recognizing "that it is difficult to state precisely what international law requires regarding damages,"[36] the court found support in *Citibank* for its decision. In *Citibank* the Supreme Court had clearly implied that the amount of damages was to be used as a measure of the separate justiciability of the counterclaim itself.[36a] Thus, the Second Circuit argued, the justiciability of the damage issue necessarily followed because the rule for determining justiciability "necessarily contemplated that valuation issues were to be decided."[37]

The Court of Appeals then turned to the standard of compensation to be employed in valuing Chase Manhattan's counterclaim. "We begin with the recognition that our task in determining the standard . . . is to apply principles of international, not merely local, law. A review of this area convinces us that there are several strongly espoused views, and that international law is far from clear."[38] The court's focus was necessarily even more limited. There is no treaty recognized by both the United States and Cuba controlling the issue and therefore the court's only source was customary international law.[39]

> As a source of international law, custom refers to the habitual behavior of states acting under the conviction that such behavior is obligatory or proper under international law. Custom requires uniformity in the practice of states . . . . It establishes an international norm when such uniformity of practice becomes sufficiently widespread that it creates reasonable community-wide expectations associated with legal prescription.[40]

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36. *Id.* at 885.

36a. *Id.*

37. *Id.*

38. *Id.* at 887-88 (citations omitted).

39. The International Court of Justice has stated the requirements necessary to establish that a norm has reached the level of customary international law. "The Party which relies on custom . . . must prove that this custom . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right . . . ." Asylum Case (Colum. v. Peru), 1950 I.C.J. 266, 276 (Judgment of Nov. 20).

40. Note, *International Law: An "Appropriate" Compensation Standard for Nationalized Property: Banco Nacional de Cuba v. Chase Manhattan Bank*, 66 MINN. L. REV. 931, 933 (1982).

The Second Circuit focused on four standards of compensation that might reach the status of customary international law. First, the court discussed the "orthodox position," to which the United States has historically been committed, which requires "prompt, adequate, and effective" compensation.[41] The Restatement (Second) of Foreign Relations expanded on the requirements under this standard. Compensation must be paid within a reasonable time, must be in an amount equal to the full value of that which is taken, and must be paid in an exchange medium realizable by the victim State.[42] The court found "some international support" for the "orthodox position."[43]

The court next focused on the standard that departs most radically from the "orthodox position." This is in essence, a "nonstandard," espoused by the Soviet bloc,[44] which recognizes no legal obligation to pay any compensation whatsoever. The court also recognized the existence of intermediate views, particularly those calling for a measure of partial compensation.[45] These views developed in response to large-scale expropriations where the interests in providing compensation for expropriated property had to be balanced against the social and economic interests of the expropriating State, whose economy might be crippled by an overly burdensome expropriation debt.

The major discussion by the court concerned the efforts of the United Nations to reach a consensus on an appropriate standard of compensation. The discussion began with an analysis of the debate over, and resulting language of, Resolution 1803, entitled "Declaration on Permanent Sovereignty over Natural Resources."[46] Paragraph 4 of that resolution provides:

> Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases

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41. 658 F.2d at 888.

42. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 (1965).

43. 658 F.2d at 888.

44. *See, e.g.*, 17 U.N. GAOR C.2 (846th mtg.) at 297, U.N. Doc. A/C.2/SR. 846 (1962); Rafat, *Compensation for Expropriated Property in Recent International Law*, 14 VILL. L. REV. 199, 202 (1969).

45. 658 F.2d at 889.

46. G.A. Res. 1803, 17 U.N. GAOR Supp. (No. 17) at 15, U.N. Doc. A/5217 (1962).

> *the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law.* In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[46a]

Although the Soviet bloc countries and Cuba abstained, the vote in favor of Resolution 1803 was overwhelming.[47] The Court of Appeals briefly mentioned a problem of interpretation inherent in Resolution 1803. The resolution provides that "appropriate compensation" must be paid "in accordance with international law." The United States has consistently maintained that this requires "prompt, adequate, and effective compensation." It is clear, however, that this view was not shared by the General Assembly.[48] In 1973 and 1974 the General Assembly passed two resolutions containing language which suggested that the United States' view had been rejected by the General Assembly. Resolution 3281, the Charter of Economic Rights and Duties of States,[49] declared the right of States to nationalize or expropriate foreign property. Chapter II, Article 2, Paragraph 2(c) of that resolution provides that appropriate compensation *should*, rather than *shall*, be paid and omitted any reference to compensation requirements under international law.[50] The final vote on Resolution 3281 was 120 in favor, 6 against, with 10 abstentions.[51] Cuba voted in favor of the resolution; the United States voted against it.[51a]

Resolution 3171 was passed by the General Assembly in 1973.[52] It affirmed the principle of nationalization as an expression of sovereignty and stated that this principle "implies that each State is entitled to determine the amount of compensation and the mode of payment, and that any disputes which might arise should be settled in accordance with the national legislation of each State carry-

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46a. *Id.* para. 4 (emphasis added).

47. The vote was 87 in favor, 2 against, 12 abstentions. 17(3) U.N. GAOR (1194th plen. mtg.) at 1134, U.N. Doc. A/PV.1194 (1962).

48. *See* 658 F.2d at 889-90.

49. G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) at 50, U.N. Doc. A/9631 (1974).

50. *Id.* at 52.

51. 29 U.N. GAOR (2315th plen. mtg.) at 44-45, U.N. Doc. A/PV. 2315 (1974).

51a. *Id.*

52. G.A. Res. 3171, 28 U.N. GAOR Supp. (No. 30) at 52, U.N. Doc. A/9030 (1973).

ing out such measures."[53] This resolution was approved by the General Assembly by a vote of 108 in favor, 1 against, with 16 abstentions. Cuba voted in favor, the United States abstained.[54]

The Second Circuit summarized its discussion of these resolutions:

> This overview of the actions of members of the General Assembly presents at best a confused and confusing picture as to what the consensus may be as to the responsibilities of an expropriating nation to pay "appropriate compensation," and just what that term may mean. The resolutions, the view of commentators, and the positions taken by individual states or blocs are varied, diverse, and not easily reconciled.[55]

Having thoroughly articulated the available standards and the lack of an international consensus regarding them, the Second Circuit selected a standard with relative ease. "The instant case . . . presents fewer difficulties than some we might envision insofar as the selection of a standard of compensation is concerned."[56] The court had identified four alternatives and concluded that two of them, no compensation and partial compensation, did not reflect international law. The court concluded the other two, appropriate compensation and full compensation, were probably the same standard in the instant case.[57] Thus, while "[i]t may well be the consensus of nations that full compensation need not be paid 'in all circumstances',"[58] the possibility of full compensation is not foreclosed by the "appropriate compensation" standard. "Although the award we approve for Chase is less than it seeks and more than Banco Nacional would wish, we nevertheless view it as full compensation for Chase's loss, and neither more nor less than is appropriate in the circumstances."[59]

The only determination of the district court with which the Court of Appeals disagreed was the valuation of Chase Manhattan's branches as "going concerns."[60] A "going concern value" refers to "the proposition that the prospective buyer of a business will be

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53. *Id.* para. 3.
54. *Id.*
55. 658 F.2d at 891.
56. *Id.*
57. *Id.* at 892.
58. *Id.*
59. *Id.* at 892-93.
60. *Id.* at 893.

willing to pay a premium over the book value of the assets in the expectation that the earnings of the business will continue . . . ."[61] The court concluded that even if Chase Manhattan's branches had not been nationalized, there was very little possibility that they had the future earnings potential upon which "going concern" value is based.[62] Chase Manhattan was therefore entitled to an award excluding the "going concern" value.[63]

The Second Circuit faced two difficult problems in *Banco Nacional v. Chase Manhattan*, one flowing directly from the resolution of the other. The first problem was determining whether the act of state doctrine served to bar Chase Manhattan's counterclaim. *Sabbatino* suggested it did, not because of the procedural posture of the claim or because of the executive branch's response to the claim, but due to the nature of the claim itself. Because the international legal community had not reached a consensus regarding compensation for expropriation, nor agreed on the illegality or legitimacy of expropriation itself, claims arising out of expropriations of the kind carried out in Cuba were not justiciable in United States courts. *Citibank* seemed to change the focus of the doctrine, at least in expropriation cases. The right to expropriate seems to be clearly established by General Assembly Resolutions 1803 and 3281. The standard to be employed in measuring compensation, however, seems as unclear as it was in 1964. Despite this, the Second Circuit's tripartite rule, extrapolated from *Citibank*, results in a finding of justiciability even in the absence of a customary rule of law establishing an international legal standard. The court's molding of the majority and concurring opinions in *Citibank* allowed it to hold that the act of state doctrine was not a bar here. The court therefore was forced to face the compensation issue.

The court's resolution of the compensation issue can be criticized on at least two grounds. First, it gave precedence to Resolution 1803's "appropriate compensation" standard, which the United States had supported and from which Cuba had abstained, and gave little weight to Resolution 3281, for which Cuba voted and against which the United States voted. Customary rules of in-

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61. *Id.*

62. This was especially true in that one month after the taking of Chase Manhattan's branches, Law No. 891 prohibited any further banking transactions with private banks. 658 F.2d at 893.

63. *Id.* at 894. This reduced the amount of the setoff from $6,904,870 to $5,478,270.

ternational law generally are not binding on those who consistently object to them,[64] suggesting the United States is not bound by Resolution 3281. These rules, arguably, are binding on those who do not object, thus suggesting that Cuba is bound by Resolution 1803, yet this distinction seems too weak to support the court's holding. Second, the court's conclusion that the standards of full and appropriate compensation lead to essentially equivalent results, is troubling in the instant case in light of the court's failure to explain what features of the case led the court to this conclusion. Thus, *Banco Nacional v. Chase Manhattan* may not provide great precedential value for later cases raising issues of compensation for exporpriated property.

B. *Banco Para el Comercio Exterior de Cuba v. First National City Bank*

Banco Para el Comercio Exterior de Cuba v. First National City Bank (*Bancec*)[65] is not, strictly speaking, a case concerning the act of state doctrine. Nevertheless, because it concerns an issue that might be linked to future act of state cases, it is included in this part of the Survey.

Bancec was organized under the laws of Cuba in 1960 to act as an official autonomous credit institution for foreign trade. It was given juridical capacity and capital of its own.[66] On August 12, 1960 Bancec entered into written agreements to purchase sugar from the National Agrarian Reform Institute, an agency of the Cuban government, and to sell the sugar to the Cuban Canadian Sugar Company. The agreement between Bancec and the sugar company was supported by an irrevocable letter of credit in favor of Bancec issued by First National City Bank (Citibank), which Bancec assigned to Banco Nacional de Cuba for collection. Banco Nacional eventually called upon Citibank to pay nearly $200,000 on the letter of credit. Citibank, whose branches had been nationalized[67] days before Banco Nacional's call on the letter of credit, credited the amount to the account of Banco Nacional but refused to pay it. Instead, Citibank applied it against the amount Citibank

64. *See* Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 138-39 (Judgment of Dec. 18).

65. 658 F.2d 913 (2d Cir. 1981), *cert. granted*, 455 U.S. 936 (1982), *rev'd*, 51 U.S.L.W. 4820 (U.S. June 17, 1983) (No. 81-984).

66. *Id.* at 915.

67. *See supra* text accompanying note 7.

believed it had lost through the expropriation.[68] Bancec then brought the instant action against Citibank. Citibank did not dispute the validity of the claim but counterclaimed for losses resulting from the expropriation of its branches. Because Citibank's alleged losses far exceeded Bancec's claim, Citibank sought dismissal of the complaint. Citibank did not seek an affirmative award.

The trial court held that Citibank's counterclaim was justifiable and dismissed Bancec's complaint on the merits.[68a] Bancec appealed, arguing that Bancec was not the alter ego of the Cuban government for purposes of Citibank's counterclaim, and that even if it were, the counterclaims were nonjustifiable under the act of state doctrine. Bancec further argued that Citibank had already been compensated for its losses by setoffs in previous litigation.[69]

The district court rejected Bancec's assertion that it was not the alter ego of the Cuban government.[70] The trial judge reasoned that because Bancec's capital had been contributed by the Cuban government and because Bancec had no other function than to manage the export of commodities for that government, it was a creature of the Cuban government and was engaged in a state function.[71] The Second Circuit Court of Appeals agreed with the district court's description of Bancec's function but rejected its conclusion that Bancec was, by virtue of that function, the alter ego of the Cuban government.[72]

> As a general matter, we start with the proposition that an instrumentality of a government is not necessarily an alter ego of that government for all purposes. If the instrumentality has been created as a separate and distinct juridical entity under the law of the state that owns it, we will normally respect its independent identity for a number of purposes.[73]

The court then stated the crucial distinction between this case and earlier cases holding Banco Nacional to be the alter ego of the

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68. 658 F.2d at 915.

68a. Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412 (S.D.N.Y. 1980).

69. 658 F.2d at 917.

70. 505 F. Supp. 412, 428 (S.D.N.Y. 1980).

71. *Id.*

72. 658 F.2d at 917.

73. *Id.* at 918.

Cuban government:[74] "We will . . . ignore the statutory distinction between the state and its instrumentality *when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role*."[75] In its 1973 decision in *Banco Nacional de Cuba v. First National City Bank*,[76] the Second Circuit had held Banco Nacional to be the alter ego of the Cuban government. The court explained in *Bancec* that this holding was based upon the pivotal fact that the counterclaim in that case was based on the acts of expropriation which had been principally performed by the very instrumentality that was party to the case.[77] The issue, therefore, is not whether the state and its instrumentality could be considered alter egos in general, but whether they were alter egos in the specific act of expropriation.[78] The claim in *Bancec* was a purely commercial one, characterized by the court as having no connection with the revolution or expropriation.[79]

The United States Supreme Court reversed.[79a] Although the Court acknowledged that "government instrumentalities as juridical entities distinct and independent from their sovereign should normally be treated as such"[79b] it held that, under the instant circumstances, the separate juridical status of Bancec should be ignored.[79c] The Court reached this conclusion after describing in considerable detail the relationship among Bancec, the Government of Cuba, Banco Nacional, and other government-owned instrumentalities. Of particular importance to the Court was the fact that Bancec was dissolved shortly after it instituted this action in 1961.[79d] Its capital was divided between Banco Nacional and branches of the Ministry of Foreign Trade. Any claims "peculiar to the banking business" possessed by Bancec were vested in Banco Nacional and its trade functions were assigned to

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74. *See, e.g.*, Banco Nacional de Cuba v. First National City Bank, 478 F.2d 191 (2d Cir. 1973).

75. 658 F.2d at 918 (emphasis added).

76. 478 F.2d 191 (2d Cir. 1973).

77. 658 F.2d at 918.

78. *Id.*

79. *Id.* at 919.

79a. First National City Bank v. Banco Para el Commercio Exterior de Cuba, 51 U.S.L.W. 4820 (1983).

79b. *Id.* at 4824-25.

79c. *Id.* at 4826.

79d. *Id.* at 4821.

the Ministry of Foreign Trade. By a court-approved stipulation in July of 1961, the parties agreed to substitute, as plaintiff, the Republic of Cuba for Bancec. The complaint never was amended to reflect the change.[79e] The Court noted the district court's finding that Bancec's claim devolved to either the Ministry of Foreign Trade or Banco Nacional, two parties that might be held liable for the expropriations at issue here.[79f] Thus, the Court does not appear to reject the standard by which the Second Circuit decided in Bancec's favor[79g] but rather reaches a different conclusion based upon the application of that standard to the instant facts.

The Second Circuit's holding in *Bancec* and the Supreme Court's opinion reversing have a direct impact on the availability of counterclaim relief for United States defendants who lost property through the Cuban expropriations. Because the following case involves the same issue as was decided in *Bancec*, discussion of the precise effect of the court's holding appears after the discussion of that case.

C. *Banco Nacional de Cuba v. Chemical Bank New York Trust Company*

Banco Nacional de Cuba v. Chemical Bank New York Trust Co. (*Chemical Bank*),[80] decided three unconsolidated appeals arising out of the Cuban expropriation of the Cuban Electric Company.[81] Cuban Electric was a United States corporation, organized under the laws of Florida and owned by United States nationals. It operated an electric utility in Cuba, where substantially all of its assets were located. Each of the three defendants in the cases decided by *Chemical Bank* loaned money to Cuban Electric in 1958 and 1959.[82] In 1960, the Cuban assets of Cuban Electric were nationalized.[83] The loans made by the three defendant banks were never repaid.

79e. *Id.* at 4822.

79f. *Id.* at 4826.

79g. *Id.* n.22.

80. 658 F.2d 903 (2d Cir. 1981).

81. *Id.* at 905. The other cases decided in Chemical Bank were Banco Nacional de Cuba v. Manufacturers Trust Co. and Banco Nacional de Cuba v. Irving Trust Co. *Id.* at 903.

82. *Id.* at 907.

83. *Id.* The nationalization was ordered in Resolution No. 1, dated August 6, 1960, pursuant to Law No. 851 of July 6, 1960. Resolution 1 states in relevant part:

WE RESOLVE:

First: There is hereby ordered the nationalization through compulsory expropria-

At approximately the same time it nationalized Cuban Electric, Cuba nationalized all private banks within its territory. Some of these banks were foreign-owned; others, including those here relevant, were Cuban corporations, domiciled in Cuba, and apparently owned by Cubans.[84] Two months after the nationalization of these banks, Chemical Bank, Manufacturers Trust and Irving Trust, all defendants here, looked to the accounts of the previously privately-owned Cuban banks to offset the loans they had made to Cuban Electric. The three United States banks refused the requests of Banco Nacional to release these accounts.

Banco Nacional sued to recover the money that was withheld. One claim, asserted against Chemical Bank only, sought to recover Banco Nacional's own deposit accounts; the other claims, asserted against all three banks, sought recovery of the deposits of the nationalized private banks.[85] Each defendant counterclaimed asserting that the debt owed to it by Cuban Electric exceeded the amount of Banco Nacional's claim.[85a] Each also moved for summary judgment.[86]

The trial court dismissed on the merits Banco Nacional's claims asserted as successor-in-interest to the private banks. The court held that the expropriation of those banks by Cuba was ineffective to transfer title to assets in the United States.[87] As a result, the court dismissed as moot all counterclaims asserted in

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tion and, consequently, in appropriation in favor of the Cuban State, with absolute right of ownership, of all properties and entities in the national territory and the rights and interests attaching to the operation of said properties and entities, belonging to juridical persons who are nationals of the United States of America or who operate entities in which the majority interest is in the hands of Americans, as follows:

1. Compania Cubana de Electricidad [Cuban Electric].

* * * * *

Second: Consequently, it is hereby declared that the Cuban State is subrogated in the place and stead of the juridicial persons listed in the preceding paragraph with respect to the properties, rights and interests mentioned as well as the assets and liabilities comprising the capital of the entities referred to.

Third: It is hereby declared that these compulsory expropriations are effected because of necessity and public utility and in the national interest as set forth in the "Whereas" clauses of this Resolution.

658 F.2d at 907.

84. *Id.* at 906.

85. *Id.* at 905.

85a. *Id.*

86. *Id.* at 907.

87. *Id.*

response to Banco Nacional's claims. The court allowed Banco Nacional's claim made in its own right, and allowed Chemical Bank's counterclaim.[88]

Both parties appealed, and the Second Circuit reversed.[88a] The court first turned to the issue of Banco Nacional's right to sue as successor-in-interest to the private Cuban banks, an issue on which both parties had urged a reversal of the trial court's holding. The standard to be applied to such extraterritorial attempts to transfer title to assets located in the United States was articulated in *Republic of Iraq v. First National City Bank.*[89] In that case, the court held:

> Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applied only to a taking by a foreign sovereign of property within its own territory . . . ; when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state "only if they are consistent with the policy and law of the United States."[90]

The attempted expropriation of property located in the United States violates United States law or policy if the prior owner has not been fairly compensated and protests the taking.[91]

The court then turned to the justiciability of the counterclaims asserted against Banco Nacional. Banco Nacional argued that it was an improper defendant as to claims arising out of the expropriation of Cuban Electric since it had no role in that partic-

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88. *Id.* at 908.

88a. *Id.*

89. 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

90. *Id.* at 51 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW § 46 (Proposed Official Draft 1962) (citations omitted).

91. 658 F.2d at 908. "In the present case, there appears to be no reason at this late time to invoke the act of state doctrine to bar the court from recognizing Banco Nacional's right to sue as successor to the Private Banks. . . . [T]he former owners of the Private Banks have lodged no protest, either by bringing suit to recover their United States property, or by seeking to intervene in Banco Nacional's suits. . . . Thus we cannot say that the effect this case of recognizing the Cuban nationalization of the Private Banks would violate United States policy.

To the contrary, we conclude that allowing Banco Nacional to sue as successor here will further the goals of the United States because it will assist in providing funds in the United States from which American nationals who have valid claims against the government of Cuba may be compensated, at least in part, for their claims. . . . Were we not to recognize Banco Nacional's right to sue in the absence of any conflicting claims, the result apparently would be to cause the deposits to escheat to the State of New York, a result that cannot be said to further the established national policy." *Id.* at 909 (citations omitted).

ular expropriation. The Second Circuit agreed that Banco Nacional was not the alter ego of the Cuban government as to the particular expropriation of Cuban Electric and thus was not the proper defendant as to Chemical Bank's counterclaim. The court, however, reached the opposite conclusion as to those counterclaims filed in response to Banco Nacional's claims as successor-in-interest to the nationalized private banks.[92]

As to Banco Nacional's claim in its own right, the court pointed to the fact that Banco Nacional did not participate sufficiently in the expropriation of Cuban Electric to impute to Banco Nacional the acts of expropriation by the Cuban government. Similarly, there was no basis for imputing to the government the ownership interest of Banco Nacional in its deposits with Chemical Bank. These deposits had never been the property of the Cuban government. Thus, the court found no grounds for equating the Cuban government with Banco Nacional, on either Banco Nacional's claim, or Chemical Bank's counterclaim.[93] In light of the origin of Banco Nacional's claims as successor-in-interest to the private banks' accounts, the court concluded that Banco Nacional was pursuing those claims on behalf of the Cuban government, and therefore, counterclaims for the acts of the Cuban government were proper.[94]

Despite finding the Cuban government the real party in interest on these claims and counterclaims, the court refused to find these claims justiciable because the summary disposition of the claims by the court below did not provide a sufficient record to decide the issue of justiciability. The court reiterated the *Chase Manhattan* tripartite test[95] for determining whether the act of state doctrine barred consideration of the counterclaims. The court was unable to determine on the record whether the first part of that test, the requirement that the executive branch advise the court that the act of state doctrine need not be applied,

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92. *Id.* at 910.

93. *Id.*

94. "Each of the complaints here filed alleged that Banco Nacional had a right to sue pursuant to Law No. 891, which expropriated the Private Banks. . . . [That law] provided that the nationalization and consequent 'award to the government of Cuba' would be 'carried out *through* Banco Nacional.' Thus the law vested ownership of the expropriated banks in the Cuban government, and by declaring Banco Nacional the legal successor to the private banks, made Banco Nacional a tribute or agent for the Cuban government." *Id.*

95. *See supra* text accompanying notes 34, 35.

had been met. In both *Chase Manhattan* and *Bancec*,[96] the trial court relied on a 1970 State Department letter that had been before the court in *First National City Bank v. Banco Nacional.*[97] In that letter, the State Department supported adjudication of counterclaims against the Cuban government "in this or like cases."[98] The Second Circuit identified several differences between the case before it, and the *Chase*, *Bancec* and *Citibank* cases.

> First, unlike *Chase* and [*Bancec*], the claims pressed here by Banco Nacional as successor came to Banco Nacional as fruit of the Cuban expropriations; they are not claims developed in the ordinary course of its commercial activities, and they did not belong to Banco Nacional at the time of the expropriation of Cuban Electric. More important is the difference in the nature of the counterclaims. The *Chase* and [*Bancec*] cases involved counterclaims for expropriation of those defendants' own property. The present counterclaims are based on expropriation not of defendants' property but of the property of a corporation that simply owed money to the defendants; the defendants' legal premise is not that the expropriation violated their rights under international law, but that there was a breach of an agreement by the Cuban government to pay assumed liabilities. We are not sure that the Executive Branch would consider these cases to be "like" *Chase* and [*Bancec*] . . . .[99]

The case was remanded to the trial court for further proceedings.

In *Bancec* the Second Circuit held that Citibank could not assert its counterclaim against Bancec because that instrumentality of the Cuban government did not play a principal role in the expropriation giving rise to the counterclaim. Because Bancec was not the alter ego of the Cuban government as to that expropriation, it was not the proper defendant to answer the claim. Although the Supreme Court reached an opposite conclusion it clearly acknowledges the relevance of an inquiry into the precise role played by the instrumentality and the relationship of the instrumentality to the parent government. *Bancec* thus suggests a

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96. *Chase Manhattan*, 658 F.2d 875 (2d Cir. 1981), discussed *supra* notes 21-64; Banco Para el Comercio v. First Nat'l City Bank, 658 F.2d 913 (2d Cir. 1981), discussed *supra* notes 65-79.

97. 406 U.S. 759 (1972), discussed *supra* notes 28-33.

98. *Id.* at 781.

99. *Id.* at 912.

further obstacle, beyond that posed by the act of state doctrine, for American defendants asserting counterclaims against agencies or instrumentalities of a foreign state. While *Bancec* erects the obstacle, *Chemical Bank* offers one route around, if not over, that obstacle. Had the Second Circuit limited its analysis in *Chemical Bank*, as it did in *Bancec*, to an analysis of the counterclaims alone, those claims would have been dismissed because Banco Nacional did not play a principal role in the expropriation of Cuban Electric. It was not, therefore, the alter ego of the Cuban government as to that act, and as a result, was not the proper defendant against which to assert the counterclaims. The court did not limit its analysis to the plaintiff agency's role in the act underlying the counterclaim, however. Instead it analyzed the relationship of the instrumentality and the foreign state with regard to the acts out of which the plaintiff's claims arose. As to those direct claims that resulted from acts of the government in which the instrumentality played a key role (here the nationalization of the Cuban private banks) the plaintiff instrumentality is the alter ego of the foreign government. Since the instrumentality thus appears "as" the foreign state itself, counterclaims that would be appropriate if brought against the foreign state as plaintiff, may be brought against its alter ego appearing as plaintiff.

D. *First National Bank of Boston (International) v. Banco Nacional de Cuba*

First National Bank of Boston (International) v. Banco Nacional de Cuba (Boston)[100] differs essentially from those act of state cases previously discussed in that Banco Nacional de Cuba was the defendant in the action rather than the plaintiff. Plaintiff, First National Bank of Boston (International) ("BBI") brought suit, as the assignee of the First National Bank of Boston ("Boston"), against Banco Nacional to recover on letters of credit paid by Boston for which it had not been reimbursed. The letters of credit had been issued by Boston's Cuban branches ("Branches") before they were expropriated and nationalized by the Cuban government.[101] BBI offered two theories of recovery. First, it argued that the Branches

100. 658 F.2d 895 (2d Cir. 1981), *cert. denied*, 455 U.S. 936 (1982).

101. *Id.* at 896. Boston is a national banking association created under the laws of the United States. It established its first Cuban branch in 1923. By 1960 it had six branches in Cuba. Prior to their expropriation these branches regularly issued letters of credit to Cuban importers desiring to purchase foreign goods. The usual practice was for the importer to

were liable to Boston for the letters of credit and that Banco Nacional had assumed all liabilities of the Branches when they were nationalized. Second, BBI contended that the prior course of dealings with, and representation of, Banco Nacional had created an "implied in fact" contract which Banco had breached.[102] The trial court rejected both theories but ruled in favor of BBI on an unjust enrichment theory.[103] Banco Nacional denied that it had assumed the Branches' obligations and generally denied all liability. In addition, it asserted counterclaims against BBI for deposits which Boston had retained to offset its expropriation losses. Finally, Banco Nacional asserted that adjudication of BBI's claim was barred by the act of state doctrine. The trial court denied the counterclaim and found the act of state doctrine not a bar to BBI's claim.[104]

The Second Circuit Court of Appeals reversed, holding that recovery for unjust enrichment in this case was barred by the act of state doctrine. Neither authority nor sound reason supported the proposition that the act of state doctrine does not apply to a quasi-contract claim based on unjust enrichment.[105] The court noted that if there were such an exception, "we would expect the exception to swallow the rule, for virtually every taking will enrich the sovereign, and to the extent that compensation is not paid that enrichment will have been unjust."[106]

The court thus dismissed both BBI's claim, and Banco Nacional's counterclaims. In so doing, the court cited the rule that when a defendant asserts a counterclaim against an assignee based on a right of action against the assignor, any recovery on such

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deposit pesos with a branch, whereafter the branch would issue the letter of credit and send it to Boston, which would confirm the credit and send the letter of credit, along with the confirmation, to the seller. After shipment the seller would present the confirmed letter of credit to Boston and receive payment in United States dollars. Boston then would charge the amount paid against its branch's account. *Id.* at 897-98.

There were 324 such letters of credit sued upon in this litigation. Some had been paid by Boston before the expropriation of the branches, most were paid immediately after it. As to those paid after the expropriation, Boston sought, but did not receive, assurance from Banco Nacional that Boston would be reimbursed for these payments. *Id.* at 898.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 901 (quoting Mendendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973)) *rev'd on other grounds sub nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

106. 658 F.2d at 901 (citations omitted).

counterclaim is limited to the amount of the assignee's recovery.[107]

E. *Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co.*

Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co.,[108] decided two months before the six cases previously discussed, while significant in its own right, is particularly interesting when examined in conjunction with the other act of state doctrine cases. Lamborn & Co. is a corporation engaged in sugar brokerage services. In 1960, Lamborn contracted to buy, on behalf of Craig & Co., a quantity of sugar from Empresa Cubana Exportadora de Azucar y Sus Derivados (Cubazucar), an entity wholly-owned by the Cuban government. Lamborn paid 95 percent of the purchase price but the balance of $32,088 remained due and owing to Cubazucar. In December 1960, the Cuban government effectively nationalized the offices of Craig & Co. in Havana.[109] Although Cuban law provided for an accounting to owners of seized assets, no such accounting was made to Craig. Craig then assigned to Lamborn all claims it might have against the Cuban government arising from the taking of its offices.[110]

The Republic of Cuba brought suit against Lamborn to recover the debt owed on the sugar contract. Cuba was allowed to amend her complaint to substitute Cubazucar as plaintiff.[111] Lamborn asserted a counterclaim against Cubazucar and a third party claim against the original plaintiff, the Republic of Cuba. Both of these claims sought to recover an amount equal to the value of Craig's seized assets. The district court awarded Cubazucar the amount owing on the sugar contract and dismissed the counterclaim and third party claims.[112] The court dismissed the counterclaim because to hold otherwise would, in the court's opinion, simply encourage defendants to buy up claims against a foreign

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107. *Id.* at 902.

108. 652 F.2d 231 (2d Cir. 1981).

109. The Cuban government, pursuant to Resolution No. 25187, designated an "intervenor" to take over the management of Craig's Havana offices for one year. The announced reason for the intervention was the problem of potential displacement of workers if the firm completely discontinued operations. All the assets of Craig's offices were seized. 652 F.2d at 234.

110. *Id.*

111. Republic of Cuba v. Lamborn & Co., No. 61 Civ. 1847-CLB (S.D.N.Y. Nov. 1, 1979).

112. Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., No. 61 Civ. 1847-CLB (S.D.N.Y. July 31, 1980).

government plaintiff. The court dismissed the third party complaint on the ground that it was barred by the act of state doctrine. The Second Circuit affirmed on somewhat different grounds.[113]

First, the court did not agree that Lamborn was barred from bringing the counterclaim and third party claim because those claims had been assigned to it.[114] The court held, however, that Lamborn was not entitled to assert the counterclaim or the third party claim because the act of state doctrine barred judicial consideration of the claims. "The seizure of Craig's Havana office and accounts was a classic act of state. It was carried out pursuant to a formal resolution issued by the Minister of Labor, who was acting on behalf of the undisputedly sovereign Cuban government."[115] The court, therefore, found no grounds for refusing to apply the doctrine. First, there are no agreements to which Cuba and the United States are party that define the circumstances under which intervention without compensation is allowed. Second, the Hickenlooper Amendment[116] was found inapplicable because it has been interpreted in the Second Circuit to apply only in cases where the expropriated property reaches the United States.[117] Third, the executive branch had not expressed an opinion regarding the appropriateness of the doctrine's applicability in the case, and therefore, the court found no reason to believe the application would be inconsistent with United States policy toward Cuba.[118] Fourth, the commercial exception[119] to the act of state doctrine was not available because "there is no indication here that the

113. 652 F.2d at 233.

114. *Id.* at 236. The court distinguished earlier cases that had suggested the rationale used by the trial court. In the instant case the claims assigned by Craig were related to the claim brought by Cubazucar. Additionally, Craig and Lamborn were closely affiliated in the same sugar business and were linked by a formal agency relationship in the transaction underlying the litigation here. Thus, any fears of creating a "brisk trade in claims against foreign states" were not relevant. *Id.* at 235-36. *Cf.*, Banco Nacional de Cuba v. Chase Manhattan, 505 F. Supp. 412 (S.D.N.Y. 1980), *aff'd*, 658 F.2d 875 (2d Cir. 1981).

115. 652 F.2d at 237.

116. 22 U.S.C. § 2370(e)(2) (1979). The Hickenlooper Amendment was passed by the United States Congress in response to *Sabbatino*. It, in essence, bars the use of the act of state doctrine in cases where confiscation has been carried out in violation of international law, unless the executive branch expressly requests that the doctrine apply. 652 F.2d at 237.

117. Banco Nacional de Cuba v. First National City Bank, 431 F.2d 394, 402 (2d Cir. 1970), *rev'd on other grounds*, 406 U.S. 759 (1972).

118. 652 F.2d at 237-38.

119. *See* Alfred Dunhill of London, Ltd. v. Republic of Cuba, 425 U.S. 682, 690-95 (1976).

seizure of Craig's Havana assets was anything but the governmental action of a sovereign which it purported to be."[120]

One of the most interesting aspects of the Second Circuit's opinion is its discussion of the difference between the act of state doctrine, and sovereign immunity, with regard to the assertion of a counterclaim against a foreign state. The court explained:

> [Sovereign] immunity relates to the prerogative right not to have sovereign property subject to suit; fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it. The act of state doctrine, however, although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law.[121]

The act of state doctrine mandates the rule to be applied as a matter of domestic substantive law. A foreign state plaintiff may invoke the doctrine as it may invoke any other rule of the forum.[122] "Depriving a sovereign plaintiff of its acts of state defense to counterclaims would be just as arbitrary and unfair as stripping it of its right to invoke any other affirmative defense, such as the statute of limitations or res judicata."[123]

The court recognized that the application of the act of state doctrine in certain cases obtained an inequitable result. Nonetheless, abandoning the doctrine each time the foreign state appears as a plaintiff would "inevitably force us to examine the validity of each property seizure made abroad by a foreign sovereign, which is something the Supreme Court has forbidden us to do."[124]

Lamborn's approach to the issue of the applicability of the act of state doctrine is essentially different from the approach taken in *Chase Manhattan* and the act of state cases decided with it. In *Lamborn*, the Second Circuit applied a *Sabbatino* analysis, focusing, at least in part, on the absence of an internationally agreed upon standard by which to judge the legality of Cuba's act of expropriation. *Chase Manhattan's* tripartite test, however, focusing as it does on the procedural posture of the claim and foreign policy

120. 652 F.2d at 238.
121. *Id.* (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438 (1964)).
122. 652 F.2d at 239.
123. *Id.*
124. *Id.*

concerns, avoids consideration of the availability of an internationally accepted standard. In *Chase Manhattan* the court stated that its decision in *Lamborn* did not contradict the tripartite formulation:

> In *Lamborn*, we held that the act of state doctrine was applicable to bar recovery, by way of either complaint or counterclaim, for assets seized by the Cuban government. The party seeking to recover from the Cuban government in *Lamborn* had no [State Department] letter, and the Executive Branch had expressed no view as to the applicability of the act of state doctrine in that case.[125]

The problem of reconciling *Lamborn* and *Chase Manhattan*, however, lies not with the result in the two cases, but rather with the rationale used in each to reach the result. A strict tripartite test analysis in *Lamborn* would have compelled the same result as was reached by the court in that case. Instead of applying such a test, the court chose to approach the act of state question with *Sabbatino's* cautions regarding the role of the judiciary in expropriation cases clearly in mind. Thus, although *Chase Manhattan* was decided after *Lamborn*, those arguing the act of state doctrine before the Second Circuit Court of Appeals would do well to advocate the desired result by reference to both *Chase Manhattan's* "phenomenological rule" and the more traditional concerns reflected by *Sabbatino*.

II. EXTRADITION: DEFINING THE ROLE AND RESPONSIBILITY OF THE JUDICIARY

A. IN RE MACKIN

In *In re Mackin*,[126] the Second Circuit Court of Appeals was presented with complicated questions regarding not only the respective roles of the executive and judicial branches in extradition proceedings, but also the power of an appellate court to review a magistrate's decision denying extradition. Desmond Mackin, a native of Northern Ireland, was arrested in New York City on October 6, 1980, pursuant to a provisional arrest warrant issued under the terms of a Treaty of Extradition to which the

125. 658 F.2d at 884 n.12.
126. 668 F.2d 122 (2d Cir. 1981).

United States and the United Kingdom are party.[127] On November 19, 1980, the British Government filed a formal complaint[128] requesting Mackin's extradition and a warrant of arrest was issued the same day by a district judge of the Southern District of New York.[129]

Magistrate Naomi Reice Buchwald presided over the extradition hearing. She concluded that the United Kingdom had satisfied its burden of producing sufficient evidence to support extradition on two of the three charges. She refused to certify[130] Mackin to the

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127. Treaty on Extradition, June 8, 1972, United States-United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468 [hereinafter cited as U.S.-U.K. Extradition Treaty]. Article VIII of the Treaty provides for the issuance of provisional arrest warrants:

> (1) In urgent cases the person sought may, in accordance with the law of the requested Party, be provisionally arrested on application through the diplomatic channel by the competent authorities of the requesting Party. The application shall contain an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a conviction against that person, and if available, a description of the person sought, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

128. *In re* Mackin, No. 80 Cr. Misc. 1, 54, slip op. at 2 (S.D.N.Y. Aug. 13, 1981), *habeas corpus denied*, 668 F.2d 122 (2d Cir. 1981). The United Kingdom sought Mackin on charges arising from a shooting incident in Andersonstown, Belfast, Northern Ireland, between Mackin, a member of the Provisional Irish Republican Army and Stephen Wooten, a British soldier. Mackin was indicted on charges of attempted murder, wounding with intent to do grievous bodily harm, and possession of firearms and ammunition with intent to endanger life. After his release on bail, Mackin failed to appear for trial, entered the United States illegally and was apprehended by the Immigration and Naturalization Service. *Id.* at 124.

129. Extradition proceedings are governed by 18 U.S.C. § 3184 (1976). The proceedings are initiated when the requesting state files a verified complaint with the court having jurisdiction over the accused. The complaint must charge the fugitive with the commission of an extraditable offense set forth in the relevant extradition treaty. A federal magistrate issues the arrest warrant and, in the presence of the accused, determines whether the requesting state has offered sufficient evidence to establish probable cause to believe that the accused has committed the extraditable offense. If the federal magistrate determines that the evidence supports such probable cause, he orders the accused incarcerated and certifies the record of the hearing to the Secretary of State. 18 U.S.C. § 3184 (1976).

The scope of *judicial* review of this determination was one of the issues before the Second Circuit in *In re* Mackin. *See infra* text accompanying notes 136-142.

The Secretary of State must independently determine whether to extradite the accused to the requesting Party. 18 U.S.C. § 3186 (1976). The Secretary may deny extradition on humanitarian grounds. *See* Peroff v. Hylton, 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *In re* Sindona, 450 F. Supp 672, 694 (S.D.N.Y. 1978), *habeas corpus denied sub nom.* Sindona v. Grant, 461 F. Supp. 199 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980).

130. *See supra* note 129.

Secretary of State on the ground that the offenses for which Mackin was charged fell within Article V(1)(c)(i) of the U.S.-U.K. Extradition Treaty.[131] That Article provides in relevant part:

> (1) Extradition will not be granted if:
> (c)(i) the offense for which extradition is requested is regarded by the requested Party as one of a political character . . . .

The United States[132] appealed from the Magistrate's decision denying extradition and, in the alternative, sought mandamus to require her to grant the request.[133] The United States not only challenged the Magistrate's determination that Mackin's alleged crime was a political offense, but also challenged the power of the judiciary to make such a determination, arguing that a determination under Article V(1)(c)(i) of the Treaty lies exclusively with the executive branch.[134] Mackin argued that the Magistrate's order was not appealable, that the circuit court lacked power to issue a writ of mandamus and that the determination of a political offense under Article V(1)(c)(i) is a question for the judicial branch, correctly resolved by the Magistrate.[135]

The Second Circuit turned first to the issue of appealability of orders granting or denying extradition requests. Judge Friendly, writing for the court, pursued an historical analysis of the issue. The doctrine of non-appealability of extradition decisions was first established in *In re Metzger*.[136] Review of a district judge's determination on extradition was sought in the United States Supreme Court. In rejecting the review, the Supreme Court stated that the executive had acted "very properly"[137] in seeking a hearing before a judicial officer. However, the Supreme Court concluded that the case "was heard and decided by the district judge at his chambers, and not in the court . . . ."[138] In that role the district

131. U.S.-U.K. Extradition Treaty, *supra* note 127.

132. The requesting Party is represented by the requested Party in extradition hearings. *See, e.g.*, U.S.-U.K. Extradition Treaty, *supra* note 127, art. XIV(1).

133. *In re* Mackin, 668 F.2d at 122, 125.

134. *Id.*

135. *Id.*

136. 46 U.S. (5 How.) 176 (1847). This case involved extradition under a treaty with France which made no provision for the appearance of the accused before a judge or magistrate. Convention for the Surrender of Criminals, Nov. 9, 1843, United States-France, 8 Stat. 580 T.S. No. 103. President Polk and his Secretary of State nonetheless determined to submit the French government's extradition request to a district judge for a hearing. *See In re* Metzger, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9511).

137. *In re* Metzger, 46 U.S. (5 How.) at 189.

138. *Id.* at 191.

judge was exercising "a special authority, and the law has made no provision for revision of his judgment."[138a] Judge Friendly found nothin in the case law since *In re Metzger* to indicate any retreat from the doctrine of non-appealability.[139] Further support for this doctrine lay in the opinions of two United States Attorneys General.[140] The opinion of Attorney General Coffey in 1983 was unequivocal:

> In cases of this kind, the judge or magistrate acts under special authority conferred by treaties and acts of Congress; and though his action be in form and effect judicial, it is yet not an exercise of any part of what is technically considered the judicial power of the United States. No appeal from his decision is given by the law under which he acts, and therefore no right of appeal exists.[141]

Finally, the court turned to recent State and Justice Department views on the subject.[142] These views were issued in response to a bill introduced in the Senate in 1981 which would, *inter alia*, provide for appeal of extradition findings to the appropriate court of appeals.[143]

According to Judge Friendly, the "only conceivable basis for appellate jurisdiction"[144] over extradition orders was 28 U.S.C. § 1291 "which authorizes appeals to the court of appeals from 'final decisions of the district *courts* of the United States.'"[145] Recognizing that 28 U.S.C. § 3184, the statute governing extradition proceedings, authorizes such proceedings by any judge or justice of the United States, or any magistrate authorized to conduct such proceedings, or any judge of a court of record of general jurisdiction of any state, Judge Friendly concluded that extradition proceedings could not be decisions of district *courts*.[146]

138a. *Id.*

139. *In re* Mackin, 668 F.2d at 126; *In re* Kaine, 55 U.S. (14 How.) 103 (1852); Collins v. Miller, 252 U.S. 364 (1920); Caplan v. Vokes, 649 F.2d 1336 (9th Cir. 1981); Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

140. 668 F.2d at 127. The Court cited an 1853 opinion of Attorney General Cushing, 6 Op. Atty. Gen. 91, 96 (1853) and 1863 opinion of Attorney General Coffey, 10 Op. Atty. Gen. 501, 506 (1863).

141. 10 Op. Atty. Gen. 501, 506.

142. 668 F.2d at 128-29.

143. 127 CONG. REC. S9952 (daily ed. Sept. 18, 1981). The relevant portions of the testimony before the Senate Judiciary Committee by representatives of the two Departments are quoted in the Second Circuit opinion. 668 F.2d at 129.

144. 668 F.2d at 129.

145. *Id.*

146. *Id.*

The Second Circuit held that no appeal lay from the Magistrate's decision.[147] The preclusion of a right of appeal in this case, and in numerous other extradition cases,[148] however, does not leave the parties without other means of relief. A person determined extraditable under section 3184 may seek a writ of habeas corpus, the denial or grant of which is appealable.[149] The requesting State, nonetheless, is entitled to refile the extradition request.[150]

The Court of Appeals then turned to the question of whether the court had power to hear the Government's petition for a writ of mandamus.[151] The court articulated the standard applied to determine when courts have power to hear such petitions, where, as here, appellate jurisdiction is lacking. "[M]andamus is reserved for 'exceptional cases' . . . and . . . the touchstones are usurpation of power, clear abuse of discretion and the presence of an issue of first impression."[152] The only issue in *Mackin* which met this standard was whether the Magistrate had exceeded her jurisdiction by deciding whether the offenses for which Mackin's extradition was sought came within the political exception provision of the Treaty, rather than leaving that determination to the executive branch. The Second Circuit thus turned to the most controversial issue in the case.

The court began its analysis by focusing on the language of the Treaty and the specific language of Article V(1)(c)(i) which speaks of offenses that are "regarded by the requested Party as . . . of a political character."[153] Unfortunately, the Treaty does not define what is meant by "requested Party." The Government argued that "requested Party" refers to the executive branch.[154] The Magistrate and the Second Circuit interpreted the language to refer to the government in general.[155]

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147. *Id.* at 130.

148. *See id.* at 127.

149. *Id.* at 128; 28 U.S.C. § 2253 (1976).

150. 668 F.2d at 128.

151. *Id.* at 130.

152. *Id.* at 131 (citations omitted).

153. *Id.* at 132.

154. Brief of the United States of America at 28, *In re* Mackin, 668 F.2d 122 (2d Cir. 1981).

155. *In re* Mackin, No. 80 Cr. Misc. 1, p. 54, slip op. at 39-40; 668 F.2d at 133. The Second Circuit cited numerous other articles in the Extradition Treaty, as well as other extradition treaties, to buttress its interpretation of the "requested Party" language in Article V(1)(c)(i). For a thorough discussion of the language used in articles on the political of-

The Government argued that support for its interpretation of the language could be found in judicial decisions interpreting the exception covered by Article V(1)(c)(ii) of the Extradition Treaty. The latter article provides an exception to extradition when "[t]he person sought proves that the request for his extradition has in fact been made with a view to try or punish him for an offense of a political character."[155a] It is well-settled that the applicability of this article is a determination which lies solely in the discretion of the executive branch.[156] The court rejected this argument by adopting the reasoning of the Seventh Circuit Court of Appeals when faced with the identical argument.[157] The Seventh Circuit reasoned that a different approach to the two parts of the political offense exception was not contradictory.[158] The determination of whether a person had been charged with a political offense (an Article V(1)(c)(i) inquiry) required the court to evaluate past facts with regard to violent political activity at the time the act in question took place and determine the person's connection with that violence and activity.[159] The determination of the requesting Party's purpose for seeking extradition (an Article V(1)(c)(ii) inquiry) requires an evaluation of the motives of foreign governments, which touches on the foreign relations and foreign policy of the United States, and therefore, is better left to the executive branch.[160]

Additionally, the Second Circuit noted that it was not "writing on a clean slate" in this matter, citing the "long standing recognition that courts shall determine whether an offense comes within the political offense exception."[161] The court cited numerous cases

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fense exception in recent extradition treaties, see Note, *In re Mackin: Is the Application of the Political Offense Exception an Extradition Issue for the Judicial or Executive Branch?*, 5 FORDHAM INTL L.J. 565, 582-3 (1982).

155a. U.S.-U.K. Extradition Treaty, *supra* note 127, at V(1)(c)(ii).

156. *In re* Lincoln, 228 F. 70, 74 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); Garcia-Gullern v. United States, 450 F.2d 1189, 1192 (5th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972); Laubenheimer v. Factor, 61 F.2d 626, 628 (7th Cir. 1932); *In re* Locatelli, 468 F. Supp. 568, 575 (S.D.N.Y. 1979); *In re* Sindona, 450 F. Supp. 672, 694 (S.D.N.Y. 1978), *habeas corpus denied sub nom.* Sindona v. Grant, 461 F. Supp. 199, 207 (S.D.N.Y. 1978), *aff'd*, 619 F.2d 167 (2d Cir. 1980).

157. 668 F.2d at 133; Eain v. Wilkes, 641 F.2d 504 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981). *Eain* is discussed *infra* at note 164.

158. 641 F.2d at 516.

159. *Id.*

160. *Id.*

161. 662 F.2d at 134.

discussing the role of the judiciary in extradition proceedings in general, but not directly involving the political offense exception. One of the problems for the parties in *Mackin* was the paucity of judicial decisions on point. The precise question of whether a court has jurisdiction to apply the political offense exception has arisen twice in United States courts. In both cases, one decided in 1894,[162] the other in 1981,[163] the court exercised jurisdiction to determine whether a political offense had been committed.[164] *Eain v. Wilkes* and *In re Ezeta*, as well as *Mackin*, closely examined the language of the statute establishing United States extradition procedures, now codified as 18 U.S.C. § 3184,[165] to determine whether the statute assigned the determination of a political offense exception exclusively to the executive branch. In *Mackin*, the Government argued that section 3184 limited the court's jurisdiction to a determination of whether there was probable cause to believe an extraditable offense had been committed.

The language of the extradition statute provides that a magistrate has authority to conduct an extradition proceeding to hear and consider "evidence of criminality" to determine if such evidence is sufficient "to sustain the charge under the provisions of the proper treaty."[166] Focusing on this language, the *Eain* court held that a magistrate has jurisdiction to apply the political of-

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162. *In re* Ezeta, 62 F. Supp. 972 (N.D. Cal. 1894).

163. Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981).

164. *Eain* involved the extradition to Israel of a suspected Palestinean Liberation Organization (PLO) member accused of committing a terrorist bombing which resulted in the death and injury of Israeli citizens. 641 F.2d at 507. A federal magistrate found probable cause to believe that Eain had committed the crime, held that the political offense exception had not been proven, and certified Eain's extradition to the Secretary of State. *Id.* at 507, 520. The United States District Court for the Northern District of Illinois denied Eain's petition for a writ of habeas corpus. *In re* Abu Eain, No. 79 M. 175 (N.D. Ill. Dec. 18, 1979). The Seventh Circuit held on appeal that Eain had failed to prove his offense was a political one. 641 F.2d at 520.

Ezeta was the first judicial opinion in the United States which considered the political offense exception. *See* Hannay, *International Terrorism and the Political Offense Exception to Extradition*, 18 COLUM. J. TRANSNAT'L L. 381, 391 (1980). The Salvadoran government sought the extradition of General Ezeta, a former president of Salvador, on charges of murder and robbery, crimes allegedly committed during a revolution in which Ezeta sought to maintain his existing government in power. 62 F. Supp. at 975. The Salvadoran government argued in *Ezeta* that the court did not have jurisdiction to determine whether Ezeta's was a political offense. *Id.* at 995. The court disagreed, holding that the delegation of authority to the President to make a determination regarding the political nature of the offense did not deprive the magistrate of such authority. *Id.* at 996-7.

165. 18 U.S.C. § 3184 (1976); *See supra* note 129.

166. *Id.*

fense exception because the exception itself is a provision of the extradition treaty.[167] *Ezeta* suggested that the phrase "evidence of criminality" does not compel a conclusion that the magistrate's decision is limited to determining probable cause.[168] Similarly, the Second Circuit in *Mackin* concluded that the Magistrate had jurisdiction to determine the political offense question.[169]

The Second Circuit Court of Appeals was faced with issues in *Mackin* which were difficult of determination and politically significant in their resolution. The conclusion that a magistrate has jurisdiction to determine the applicability of the political offense exception in the U.S.-U.K. Extradition Treaty, and the determination that the magistrate's certification decision is not appealable gives considerable power to a single individual, power that may be exercised to an end that potentially affects United States foreign relations. The court's conclusion on the appealability issue is well supported by history and judicial precedent. The court can fairly be criticized, however, for its reasoning, if not its resolution, of the political offense exception issue. The court recognized the paucity of judicial precedents directly on point, yet seemed to bind itself unnecessarily to those precedents. The choice between assignment of exclusive power to apply the exception to the executive branch, and a finding of concurrent jurisdiction in the judicial branch, implies important policy considerations regarding the respective roles of the two branches in issues of a political nature, particularly issues implicating foreign policy. Despite this fact, the court gave scant attention to such policy concerns.

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167. 641 F.2d at 513. The magistrate in *Mackin* made reference to this interpretation of the statute but refused to pass on the merits of such an interpretation. *In re* Mackin, No. 80, Cr. Misc. 1, 54, Slip Op. at 38, n* (S.D.N.Y. Aug. 13, 1981).

168. 62 F. Supp. at 995-96.

169. It follows that, as the law now stands, both the judicial and the executive branches have recognized that, under § 3184, decision whether a case falls within the political offense exception is for the judicial officer. The Government cites us to no overriding principle which dictates a contrary result. . . . While the policy arguments made by the Government are not without force, particularly in an age of spreading terrrorism, they are not so overwhelming as to justify us in concluding that the 1848 statute and its successors did not mean that the judicial officer should decide whether the offense for which extradition is sought is political. Whether the national interests would be better served by the position here advocated by the executive branch, which it has asked Congress to adopt in S. 1639, is for that body to determine. We therefore conclude that the Magistrate correctly sustained her own power to decide the political offense question and thus, for reasons heretofore explained, there is no basis for our issuing mandamus.

668 F.2d at 137.

The court's resolution of the political offense exception issue, and the failure to explicitly address policy considerations raised by that issue, may have been motivated, at least in part, by cognizance of the proposed Senate bill granting to the executive branch exclusive jurisdiction over political offense determinations.[170] Read with the Seventh Circuit's opinion in *Eain, Mackin* indicates to Congress that federal courts are inclined to read section 3184 in a non-restrictive fashion. Thus it is clearly up to Congress to act if it believes the determination that an offense falls within the political offense exception, barring an otherwise appropriate extradition, more properly lies with the executive branch than with the judicial branch.

B. *HU YAU-LEUNG V. SOSCIA*

In *Hu Yau-Leung v. Soscia*,[171] the Second Circuit Court of Appeals was presented with another question regarding the United States-United Kingdom Extradition Treaty.[172] *Hu Yau-Leung* involved the interpretation of the double criminality article[173] in the Extradition Treaty. This article provides that a person is extraditable if the facts presented at the extradition hearing[174] disclose an offense listed in the Extradition Treaty's schedule of offenses and:

> (a) the offense is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year or by the death penalty;
> (b) the offense is extraditable under the relevant law, being the law of the United Kingdom or other territory to which this Treaty applies . . . ; and
> (c) the offense constitutes a felony under the law of the United States of America.[174a]

Hong Kong authorities sought the extradition of Hu Yau-

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170. CONG. REC. S9952 (daily ed. Sept. 18, 1981). *See supra* note 143.

171. 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981).

172. Treaty on Extradition, June 8, 1972, United States-United Kingdom, *supra* note 127 [hereinafter cited as U.S.-U.K. Extradition Treaty]. Questions regarding the political offense exception of this Treaty, Article V(1)(c)(i), were raised in *In re* Mackin, 668 F.2d 122 (2d Cir. 1981), *supra* notes 126-170.

173. U.S.-U.K. Extradition Treaty, *supra* note 127, art. III (1).

174. Extradition proceedings are governed by 18 U.S.C. § 3184 (1976). *See supra* note 129.

174a. 649 F.2d at 916; U.S.-U.K. Extradition Treaty, *supra* note 127.

Leung to stand trial on robbery charges.[175] Hu was sixteen years old when he allegedly committed the crime. After Hu's arrest in New York, a United States magistrate conducted a hearing and determined that Hu was extraditable.[176] Hu sought a writ of habeas corpus[177] alleging that, because the Extradition Treaty required that the offense charged constitute a felony under the law of the United States,[178] he was being held in violation of the Treaty. He argued that his age at the time of the alleged crime qualified him for treatment as a juvenile under the Federal Juvenile Delinquency Act (FJDA).[179] Pursuant to the FJDA, a determination of guilt results in an adjudication of status, rather than a conviction.[180] Since the FJDA represented a law of the United States with regard to a particular class of offenders, Hu argued that his act was not felonious and, therefore, that he was not extraditable.[181]

The district court agreed with Hu that the FJDA was applicable in this case, and conducted a hearing to determine if Hu would be proceeded against as a juvenile if he committed the acts in the United States.[182] The district court concluded that he would indeed be proceeded against as a juvenile and granted the petition.[182a]

The district court held that the phrase "the law of the United States" referred to federal, not state, law.[183] To determine whether an offense for which extradition was sought constitutes a felony under United States law, the FJDA, in the court's opinion, had to be considered. Under the FJDA, at least two procedures are possible:

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175. 649 F.2d at 915. Article II(1)(a) of the U.S.-U.K. Extradition Treaty, provides that by Agreement of the Parties, the treaty obligations shall extend to territories for which the United Kingdom has responsibility in international relations. The parties agreed to name Hong Kong a party in 1976.

176. 649 F.2d at 916.

177. 28 U.S.C. § 2241(c)(3) (1976).

178. U.S.-U.K. Extradition Treaty, *supra* note 127, art. III(1)(c).

179. 18 U.S.C. § 5032 (1976).

180. *See* United States v. Frasquillo-Zomosa, 626 F.2d 99, 101 (9th Cir. 1980); United States v. Allen, 574 F.2d 435, 437 (8th Cir. 1978); United States v. Hill, 538 F.2d 1072, 1074 (4th Cir. 1976); United States v. Canniff, 521 F.2d 565, 569 (2d Cir. 1975), *cert. denied sub nom.*, Benigno v. United States, 423 U.S. 1059 (1976).

181. 649 F.2d at 916.

182. Hu Yau-Leung v. Soscia, 500 F. Supp. 1382, 1387 (E.D.N.Y. 1980), *rev'd*, 649 F.2d 914 (2d Cir.), *cert. denied*, 454 U.S. 971 (1981).

182a. *Id.* at 1390.

183. *Id.* at 1385.

> [w]here federal offenses are committed by persons under sixteen, juveniles are turned over to state juvenile programs unless the relevant state lacks or refuses to include the juvenile in an appropriate program. In that case, the district courts retain jurisdiction over the juvenile. Under the Act, according to the district court, a juvenile is not "convicted" of a crime but "adjudicated a juvenile deliquent."[184]

It also is possible under the FJDA for the Attorney General to order that a juvenile, aged sixteen to eighteen, who commits crimes that would be felonious if committed by an adult, be subject to the same penalties as an adult.[185] In order to effect this transfer to the conventional criminal justice system, a district court judge must determine whether the "interests of justice" are served.[186] The district court, assuming that such a proceeding might have been initiated against Hu had he committed the acts for which he was accused in the United States, conducted a hearing.[186a] It was after this hearing that the district court determined that Hu would have been proceeded against as a juvenile delinquent under the FJDA and, therefore, was not extraditable.[186b]

The district court acknowledged that the Treaty made no specific reference to the treatment of juveniles, but found in the Treaty evidence of an intent on the part of the United States and United Kingdom to consult their own domestic policy.[187] Of particular significance to the court was the content of Article III(1) itself. The court noted that a felony is defined by United States law as "any offense punishable by death or imprisonment for a term exceeding one year,"[188] and concluded that subsection (a) of Article III(1) (length of punishment available for conviction of crime) and subsection (c) (offense constitutes a felony under laws of U.S.) would be redundant if subsection (c) were read narrowly to encompass only the nature of the offense and not other policy concerns.[189]

The Court of Appeals reversed in a divided opinion. The majority concluded that subsection (c) of Article III(1) of the Extradi-

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184. 649 F.2d at 916.
185. 18 U.S.C. § 5032 (1976).
186. 18 U.S.C. § 5032.
186a. 649 F.2d at 916.
186b. 500 F.Supp. at 1390.
187. *Id.* at 1386.
188. 18 U.S.C. § 1(1) (1976).
189. 500 F. Supp. at 1384.

tion Treaty was not a bar to extradition. The double criminality test, reflected in Article III(1), simply sought to determine "if the individual had committed the same acts in the United States, would a crime have been committed and would it have been a felony?"[190] The majority found inappropriate the consideration of collateral issues in an extradition hearing:

> [W]e do not believe that the framers of the British Extradition Treaty intended that minitrials would be held to determine whether individuals might in some way receive more lenient treatment under the criminal law. The Treaty, like most other treaties, explicitly limits the type of hearing in the requested country to determine extraditability. Such hearings have been held to have limited scope, both as to the type of defenses which may be raised and the type of evidence which may be received. It would be contrary to this policy against protracted extraditability hearings to allow extradition courts to consider how other courts might exercise their discretion in determining whether an individual such as Hu should be treated as within a juvenile justice system.[191]

At least as significant as the court's discussion of the scope of the double criminality requirement, was the court's discussion of the appropriate focus for determining whether the offense is a felony under the laws of the United States. Here again, the Second Circuit disagreed with the district court's conclusion that under subsection (c) only federal law was relevant.[192] The Court of Appeals held that "[t]he phrase 'under the law of the United States of America' in an extradition treaty referring to American criminal law must be taken as including both state and federal law absent evidence that it was intended to the contrary."[193] According to the court, the most reasonable interpretation of the language of subsection (c) is that "for conduct that would have violated any federal statute, federal law determines whether the conduct would have been a felony, and for conduct that would have violated only a state statute, state law governs the felony determination."[194] In

190. 649 F.2d at 918.

191. *Id.* at 919-20. The court found further support for this conclusion by reference to other extradition treaties of the United States. Many of these treaties contain special provisions relevant to juveniles. *Id.* at 920.

192. *Id.* at 918.

193. *Id.*

194. *Id.*

this case, the law of the State of New York, the state in which Hu was found,[195] governed.[196] Under New York law, Hu would be considered an "eligible youth" under New York's youthful offender system,[197] and thus could have been relieved "from the onus of a criminal record"[198] under circumstances similar to those recognized by the FJDA. The court held, however, that under the terms of the U.S.-U.K. Extradition Treaty, the availability of alternate proceedings against eligible youths was not an appropriate consideration in an extradition hearing.[199]

In his dissenting opinion, Judge Tenney disagreed with the majority on both the source, and the scope, of the double criminality inquiry under the Treaty. First, in Judge Tenney's view, federal law, rather than state law, was the appropriate source.[200] Focusing on federal law assured that a uniform standard would determine the gravity of the offense and would promote national policies.[201] Second, Judge Tenney disagreed with the majority's conclusion that the scope of inquiry under Article III(1) was limited to the nature of the offense, stating:

> It is true that extradition turns on the status of the crime, not the status of the criminal. Yet it is not Hu's youth qua youth that prohibits extradition, but the "non-criminal" result effected by the Act that is necessarily invoked by virtue of Hu's age.[202]

IV. LIMITS ON LIABILITY UNDER THE WARSAW CONVENTION: FRANKLIN MINT CORPORATION V. TRANS WORLD AIRLINES

In one of the most interesting and politically significant Survey cases, the Second Circuit Court of Appeals was confronted with the question of what unit of account was to be employed in converting

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195. *Id.* Where state law applies, it is the law of the state where the offender is found that will be consulted under the terms of extradition proceedings. The only exception to this rule exists where that state's law is contrary to the weight of law in other American jurisdictions. *Id* n.4. *See* Factor v. Laubenheimer, 290 U.S. 276 (1933). This exception, to some extent, diminishes the possibility of an extradition decision turning on the fortuity of an offender being found in a state whose law is aberrational.

196. 649 F.2d at 918.

197. N.Y. CRIM. PROC. LAW § 720.10.2 (McKinney Supp. 1982).

198. 649 F.2d at 919.

199. *See id.*

200. 649 F.2d at 922 (Tenney, J., dissenting).

201. *Id.*

202. *Id.* at 921.

judgments under the Warsaw Convention into United States dollars. In this case, *Franklin Mint Corp. v. Trans World Airlines*,[203] the court declared the Convention's limits on liability prospectively unenforceable.[204] The court's opinion and subsequent United States action[205] leaves the exact status of the Warsaw Convention in United States courts in serious doubt.

The Warsaw Convention,[206] drafted in the late 1920's, is one of many international transport liability conventions which limit carriers' liability for claims arising out of personal, or property, damages or loss.[207] The Convention sets out the circumstances under which the carrier shall be liable for personal injuries, damage or loss of baggage, and damage due to delay.[208] The Convention also establishes a limit on the extent of liability for personal injury and loss of luggage or other goods.[209] In 1979, plaintiff, Franklin Mint, contracted with defendant, Trans World Airlines (TWA), to carry a shipment of numismatic material by air from the United States to England. The material was either lost or destroyed, rendering TWA liable under the Convention. In a suit brought by Franklin Mint in the United States District Court for the Southern District of New York, TWA sought to limit its liability under Article 22 of the Convention.[210] The liability limits in Article 22 are stated in

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203. Franklin Mint Corporation v. Trans World Airlines, Inc., 690 F.2d 303 (2d Cir. 1982), *cert. granted*, 103 S.Ct. 3084 (1983).

204. *Id.*

205. *See infra* text accompanying note 234.

206. Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention].

207. Asser, *Golden Limitations of Liability in International Transport Conventions and the Currency Crisis*, 5 J. MAR. L. & COM. 645 (1974).

208. Warsaw Convention, *supra* note 206, art. 17, 18, 19.

209. *Id.*, art. 22.

210. 690 F.2d 303, 304-05. Article 22 of the Convention states in pertinent part:

> (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
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> . . . .
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> (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

terms of a specific number of French "Poincare" francs. A "Poincare" franc is a unit of account which consists of 65 1/2 milligrams of gold at a standard fineness of 900 thousandths.[211] The dollar value of each specified limit is calculated by converting the gold value of the specified number of "Poincare" francs into United States dollars. On its face, this conversion appears relatively simple. The Second Circuit, however, articulated the complex problem facing courts asked to apply the Convention's liability limits:

> The difficulty arises from the fact that when Article 22 was drafted, gold served official monetary functions and its price was set by law. The Convention thus selected it as the unit of conversion in order to ensure judgments of uniform value as well as a stable and easily calculable limitation on liability. The plain but highly troublesome fact is that by international agreement and United States domestic legislation gold has now lost its monetary functions and no longer has an official price. Unfortunately for parties to international airline transactions as well as for us, the terms of Article 22 continue to utilize gold as the unit of conversion. Thus, the parties raise the issue of what unit of account is now to be used to convert judgments under the Convention into United States dollars.[212]

The parties in *Franklin Mint* offered four alternatives in arguing the issue before the district and circuit courts: the last official price of gold in the United States, the price of gold on the free market, the Special Drawing Right (SDR) (a unit of account established by the International Monetary Fund), and the exchange value of the French franc at the time of conversion.[212a] The choice of the appropriate standard held considerable financial consequences for the parties because the dollar value of the limitation ranged from $6,500 to $400,000 depending on the standard selected.[213] Additionally, in the court's opinion, each alternative "appears to have a devastating argument against it,"[214] despite the fact that "each has been adopted as the proper unit of account by at least one party, or domestic tribunal of a party, to the Convention."[215]

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211. Warsaw Convention, *supra* note 206, art. 22(4).
212. 690 F.2d at 305.
212a. *Id.*
213. *Id.*
214. *Id.* at 306.
215. *Id.* at 309.

The court began its analysis by recognizing the need for an established unit of conversion, stressing that "[w]ithout it, a rational limit on liability cannot exist, much less one which produces judgments of equal value in different currencies."[216] It then turned to each of the proferred alternatives individually.

The conversion standard employed by the district court in determining the dollar value of TWA's liability under Article 22 of the Warsaw Convention was the last official price of gold in the United States.[217] The district court reasoned that the last official price of gold, as a conversion standard, had been espoused by the Civil Aeronautics Board, thus coming "as close as anything to constituting a governmental interpretation of the Article 22 limitation."[218] The court found further support for use of this standard in the fact that all domestic carriers, including TWA, employed it in calculating liability printed on their tariffs. The court concluded this was evidence of intent by the parties in the case to apply the last official price of gold.[219]

The Second Circuit, while adopting this standard to resolve the instant case,[220] refused to accept it as the governing standard for future cases.[220a] The court pointed to both international and domestic action indicating that use of the official price of gold as a conversion standard was "wholly out of touch with economic and monetary reality."[221] Thus, the court concluded, use of the re-

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216. *Id.*

217. Franklin Mint Corp. v. Trans World Airlines, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981).

218. *Id.* at 1289.

219. *Id.*

220. *See infra* text accompanying note 233.

220a. 690 F.2d at 312.

221. *Id.* at 309. The court addressed at some length the decline of the gold standard and the economic causes and effects of that decline. *Id.* at 306-09. Of particular importance to the issue presented in *Franklin Mint* was the reaction of the international community and the United States to the declining strength of the dollar, and the growing United States balance of payments deficit during the 1960's. These events led the International Monetary Fund (IMF) to propose the abolishment of the official price of gold and to substitute Special Drawing Rights (SDRs) as the Fund's unit of account. This plan, proposed in the 1976 Jamaica Accords, was passed by IMF members and took effect on April 1, 1978. In the interim between proposal and passage of the plan in the IMF, the United States passed implementing legislation abolishing the official price of gold. (The official price of gold at that time was $42.29 per ounce). *See* Par Value Modification Act, 31 U.S.C. § 449 (1976), *repealed by* Pub. L. No. 94-564, § 6, 90 Stat. 2661 (1976).

> This radical change in the international monetary system created an obvious problem under the Warsaw Convention. With gold abandoned as a currency base and the official price repealed, gold became a commodity with a daily fluctuating

pealed official price of gold "finds no support in law or logic."[222] The court similarly found no logical support for the district court's reliance on the Civil Aeronautics Board's use of the official price of gold. The Board had refused to adopt Special Drawing Rights as a unit of conversion because of the absence of congressional approval for that unit, yet the Board had adopted the last official price of gold in the face of specific rejection of that unit by Congress.[222a]

The Second Circuit rejected adoption of the free market price of gold as a unit of conversion, characterizing it as "the highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values."[223] Adoption of the current exchange value of the French franc was similarly rejected by the court largely because it had initially been rejected by the parties to the Warsaw Convention. The parties wanted to avoid the use of a single national currency, the value of which could be changed by unilateral action.[224]

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free market price. That the difficulty in continuing to use gold as a monetary base undermined the Convention's unit of conversion was immediately recognized. Thus, the Warsaw conferees met in Montreal in 1975, even before the Jamaica Accords, and drafted and signed a Protocol substituting SDR's as the Convention's unit of conversion. At the time of the proposal, the SDR was calculated in terms of gold. With the Jamaica Accords, the referent was changed to a basket of 16 national currencies, and in January, 1981, the basket was reduced to five currencies. The Montreal Protocol was presented to the United States Senate in January, 1977 but has not been approved.

690 F.2d at 308, (footnotes omitted). Since this opinion was published the United States Senate rejected the Montreal Protocol. *See infra* text accompanying note 234.

222. 690 F.2d at 309.

222a. *Id.* at 310.

223. *Id.* at 306. One United States court adopted this conversion standard. In Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, 531 F. Supp. 344 (S.D. Tex. 1982), the District Court for the Southern District of Texas held that Pan American's limitation of liability under the Warsaw Convention was properly calculated by reference to the current free market price of gold. *Id.* at 353. Plaintiff, Boehringer, sought to recover against Pan Am under Article 18 of the Warsaw Convention for damage to an automated blood analyzer that it had contracted with the airline to ship from Brazil to Houston, Texas.

The district court rejected the defendant's contention that its liability should be determined by the last official price of gold. The court reasoned that allowing Pam Am to limit its liability under the Convention based on the repealed official price of gold "would perpetrate a legal fiction of the purest kind." *Id.* at 352. The court found no judicial decisions on point and concluded that absent such precedent it must rest its decision on "a close reading and interpretation of Article 22 of the Convention." *Id.* Examining the ordinary meaning of the words and the negotiating history of the Convention, the district court determined that the framers adopted gold because of "its tendency to reflect real values better than currency." *Id.* at 350. This purpose, the court concluded, would best be served by use of the free market price of gold. *Id.* at 353.

224. *Id.* at 310.

Finally, the court turned to the question of adopting the International Monetary Fund's Special Drawing Rights (SDRs) as units of conversion.[225] The relative stability of SDRs led some of the signatories of the Warsaw Convention to propose it as a substitute for the "Poincare" franc as the unit of account under the Convention. This proposal was incorporated into the 1975 Montreal Protocol to the Warsaw Convention, which has been presented to the signatories to the Convention for ratification.[226] Despite the existence of the Protocol, the court found adoption of the SDR as a unit of conversion to be inappropriate for three reasons. First, the Convention gives no authority for use of the SDR and the Senate had not authorized such use by ratifying the Montreal Protocol.[227] Second, adoption of the SDR would only be a first step and "a further step must be taken to define the limitation of liability in terms of a particular number of SDRs per kilogram of baggage."[228] The court would be required to set this limitation. Finally, the SDR, being a creation of the IMF, is subject to modification or elimination by that body. The court found it had "no power under the terms of the Convention or relevant domestic source of authority to adopt a unit of conversion variable at the whim of an international body distinct from the parties to the Convention."[229]

The court characterized the issue presented not as requiring interpretation of a treaty, but as requiring substitution of a new treaty term:

> We deal here not with ambiguities which may be clarified by reference to underlying purpose or with language which inadequately mirrors the understood intentions of the drafters. For almost two generations, the Convention's limits on liability have been translatable into domestic currency values by application of

225. Since 1981, SDRs have been calculated by reference to the national currencies of five members (the United States dollar, the West German mark, the French franc, the Japanese yen, and British pound sterling). Ward, *The SDR in Transport Liability Conventions: Some Clarifications*, 13 J. MAR. L. & COMM. 1, 3 (1981). Each currency is assigned a percentage weight in determining the value of one SDR. *Id.*

226. 690 F.2d at 310. Substitution of the SDR for the franc under the Convention was supported by the United States but there has been considerable opposition to the proposal by signatories to the Convention who are not members of the International Monetary Fund. At the time of the Second Circuit's decision in *Franklin Mint* few signatories had ratified the Montreal Protocol. *Id.* The United States Senate has since expressly rejected it. *See infra* text accompanying note 234.

227. 690 F.2d at 310.

228. *Id.*

229. *Id.* at 310-11.

> a clear and easily applied formula. An essential ingredient of that formula has, as a consequence of international action followed by domestic legislation, ceased to exist. What the parties ask us to do is to select, upon the basis of our judgment as to what is best as a matter of policy, a new unit of conversion. We are without authority to do so.[230]

The Second Circuit was presented with an impediment neither anticipated nor treated by the contracting parties to the Warsaw Convention. The unforeseen impossibility of calculation under the Convention, and the relative roles of the three branches of the United States Government in the proposal, adoption, and interpretation of treaties, led the court to declare the liability limits in the Warsaw Convention unenforceable in United States courts.[231] The court's ruling is prospective only. "Prospective effect is compelled by the fact that this is the first case in which a court has declined to enforce the Convention's limits on liability.... Parties to transactions covered by the Convention should have time to adjust their affairs to this ruling."[232] For the purposes of the instant case, and all cases based on events creating liability that occur within sixty days after the court's ruling, the last official price of gold in the United States was selected by the court to calculate the limit on liability.[233]

Two questions are left unanswered by the Second Circuit's decision in *Franklin Mint*. First, will the refusal to enforce the liability limits with regard to property damage or loss be extended to personal injury actions? The court's rationale for refusing to enforce the liability limits in suits for injury to property would appear to be equally compelling when applied to the Convention's limits for injury to the person because both are measured by the same unit, the "Poincare" franc, under Article 22. Recent Senate action adds support to this conclusion.

On March 8, 1983, the United States Senate rejected the Montreal Protocol despite the fact that the Protocol had been supported by the Ford, Carter, and Reagan administrations.[234] Opposition to the Protocol in the Senate apparently was based upon the

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230. *Id.* at 311.
231. *Id.*
232. *Id.* at 312.
233. *Id.*
234. 129 CONG. REC. S2279 (daily ed. Mar. 8, 1983); New York Times, March 9, 1983 at D6, col. 5.

low limits of liability and the bar against negligence suits contained in the Protocol.[235] Thus, the refusal of the Second Circuit to adopt the SDR as the appropriate unit of account under the Warsaw Convention, based upon Senate inaction concerning the Montreal Protocol, now finds additional justification in the Senate's rejection.

The more complex question created by the Second Circuit's decision in *Franklin Mint* is whether plaintiffs retain rights to sue under the Warsaw Convention absent an enforceable limit to defendant's liability. The court expressly refused to rule on the enforceability of those articles in the Convention that create liability.

> Given the lack of an internationally agreed upon standard of conversion, it might be argued that the Convention has been abrogated. However, treaties involve international obligations entered into by coordinate branches of the government and it is not the province of courts to declare treaties abrogated or to afford relief to those . . . who wish to escape their terms. These are not matters for "judicial cognizance." They belong to the executive and legislative departments because they are more properly the domain of "diplomacy and legislation, . . . not . . . the administration of laws."[236]

Thus, the Second Circuit's opinion in *Franklin Mint* raises more questions than it answers, and in light of the drastic consequences of the Second Circuit's opinion, it is not surprising that the United States Supreme Court has granted certiorari to review the case. The current role of the Warsaw Convention in United States aviation litigation clearly requires further definition. Ultimately, the executive branch may be required to seek renegotiation of the liability limits to a level acceptable to the United States Senate.

V. "OF THEIR CHOICE"—THE RELATIONSHIP BETWEEN TITLE VII AND UNITED STATES TREATY OBLIGATIONS: AVIGLIANO V. SUMITOMO SHOJI AMERICA, INC.

The Second Circuit Court of Appeals rejected a treaty-based[237] attempt by an American subsidiary of a foreign corpora-

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235. New York Times, *supra* note 234. The Protocol would increase liability from $75,000 to $110,000 per passenger but would bar lawsuits against airlines for negligence or misconduct.

236. 690 F.2d at 311, n. 26 (citations omitted).

237. An American subsidiary of a Japanese corporation moved to dismiss plaintiffs' ac-

tion to avoid compliance with Title VII of the Civil Rights Act of 1964[238] in *Avigliano v. Sumitomo Shoji America, Inc.*[239] The court held that American subsidiaries of Japanese corporations may claim rights under the Treaty of Friendship, Commerce and Navigation (FCN) between the United States and Japan[240] (U.S.-Japan Commercial Treaty), but that the Treaty does not provide immunity from American discrimination laws.[241] The United States Supreme Court reversed in a unanimous decision,[242] holding that the defendant American subsidiary was not a company of Japan and, therefore, could not invoke the rights claimed under the U.S.-Japan Commercial Treaty.[243] Because the Supreme Court did not reach the issue of the relationhip between treaty rights under the U.S.-Japan Commercial Treaty and United States employment discrimination laws, an examination of the Second Circuit's analysis of that issue is appropriate for this Survey.

Plaintiffs brought a class action suit under Title VII,[244] against Sumitomo Shoji America, Inc. (Sumitomo), alleging that Sumitomo's practice of hiring only male Japanese nationals for management positions discriminated against them on the basis of nationality and gender.[245] Sumitomo, a New York-incorporated,

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tion claiming immunity from Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976 & Supp. 1981), under the Treaty of Friendship, Commerce, and Navigation, *done* April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143 (effective Oct. 30, 1953) [hereinafter cited as U.S.-Japan Commercial Treaty].

238. 42 U.S.C. § 2000e (1976 & Supp. 1981).

239. 638 F.2d 552 (2d Cir. 1981), *rev'd*, 457 U.S. 176 (1982).

240. U.S.-Japan Commercial Treaty, *supra* note 237.

241. 638 F.2d at 558.

242. Sumitomo Shoji America, Inc. v. Avagliano, 457 U.S. 176 (1982).

243. *Id.* at 189.

244. 42 U.S.C. § 2000e-2(a) (1976) provides in pertinent part:

It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

245. Plaintiffs alleged discrimination under the Thirteenth Amendment of the United States Constitution and the Civil Rights Act of 1966, 42 U.S.C. § 1981 (1976), as well as under Title VII of the 1964 Civil Rights Act. The district court dismissed plaintiffs' § 1981 claim and found that the Thirteenth Amendment claim had been abandoned. Avigliano v. Sumitomo Shoji America, Inc., 473 F. Supp. 506 (S.D.N.Y. 1979), *modified*, 638 F.2d 552 (2d Cir. 1981), *rev'd*, 457 U.S. 176 (1982).

wholly-owned subsidiary of a Japanese firm, moved to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the U.S.-Japan Commercial Treaty exempts United States-incorporated, wholly-owned subsidiaries of Japanese trading companies from the application of Title VII.[246] The district court denied Sumitomo's motion, holding that the U.S-Japan Commercial Treaty was not intended to protect the employment practices of Japanese subsidiaries incorporated in the United States.[247] Upon Sumitomo's request, the district court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b). The Second Circuit held that Sumitomo could invoke the U.S.-Japan Commercial Treaty provisions,[248] thus raising the question of whether the Treaty provided immunity from Title VII.

Article VIII(1) of the U.S.-Japan Commercial Treaty provides in pertinent part: "Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, . . . executive personnel . . . *of their choice*."[249] The problem facing the Second Circuit was how to reconcile the conflict between the Treaty's Article VIII(1) "of their choice" language with the proscription against employment discrimination in Title VII.[250] The

246. 473 F. Supp. 506, 512-13.

247. *Id.*

248. 638 F.2d at 569. This specific holding was reversed by the Supreme Court. Sumitomo Shoji America, Inc., v. Avigliano, 457 U.S. 176 (1982). Judge Mansfield, writing for the Second Circuit Court, held that the place of incorporation is not determinative of whether a corporation could invoke rights under the Treaty. 638 F.2d at 555-56. Plaintiffs had argued that because three articles in the Treaty explicitly granted rights to subsidiaries and article VII, the section relevant to the controversy here (see discussion at note 256, *infra*), contained no such explicit grant, that article did not apply to subsidiaries. The Second Circuit rejected this interpretation of the Treaty. *Id.* at 556. The court found it "unlikely that the parties to the Treaty would have agreed to grant each other broad rights to establish and manage subsidiaries abroad in Article VII, and then gone on to bar those same subsidiaries from invoking almost all of the substantive provisions which the Treaty contains." *Id.* The purpose of the Treaty, its "unitary structure," the Treaty's legislative history, and the construction of other Friendship, Commerce, and Navigation Treaties to which the United States is a party lent support to the court's determination that Sumitomo could claim rights under Article VIII of the Treaty. *Id.* at 556-58.

The Fifth Circuit Court of Appeals reached the same conclusion that a locally-incorporated subsidiary of a Japanese corporation is covered under Art. VIII of the Treaty. Spiess v. C. Itoh & Co. (America), 643 F.2d 353 (5th Cir. 1981), *cert. denied*, 454 U.S. 1130 (1982). The court disagreed with the Second Circuit on the effect of the Treaty on Title VII. *Id. See infra* text accompanying notes 255-261.

The United States Supreme Court reversed in light of the plain meaning of the language in Article VIII of the Treaty, the intent of the parties to the Treaty, the purpose of the Treaty, and the current position of the parties to the Treaty on this issue. 457 U.S. 176.

249. U.S.-Japan Commercial Treaty, *supra* note 237, art. VIII(1) (emphasis added).

250. *See supra* note 244.

court held that "[t]he right of Japanese firms operating in the United States under the Treaty to hire executives 'of their choice' does not give them license to violate American laws prohibiting discrimination in employment."[251]

The court began its analysis by focusing on the "of their choice" language of Article VIII(1) and concluded that the background of the Treaty does not support an expansive interpretation of this language:

> At the time when the Treaty was negotiated, a number of American states and many foreign countries severely restricted the employment of noncitizens within their boundaries. . . . The provision in Article VIII of the Treaty allowing companies of either party to engage executive personnel "of their choice" . . . was a reaction to those restrictions. It was primarily intended to exempt companies operating abroad from local legislation restricting the employment of noncitizens.[252]

The court found no intent of the parties to grant a right to discriminate. An interpretation of the "of their choice" language allowing such a right would, in the court's opinion, "immunize a party not only from Title VII but also, from laws prohibiting employment of children, . . . laws granting rights to unions and employees, . . . and the like."[253]

In *Spiess v. C. Itoh & Co. (America)*,[254] a case raising the identical legal issue, the Fifth Circuit Court of Appeals resolved the conflict between Article VIII(1) of the Treaty and Title VII in a manner contrary to the decision reached by the Second Circuit in *Avigliano*. The court in *Spiess* held that the Treaty exempted a wholly-owned subsidiary of a Japanese corporation from employment discrimination laws in the hiring of Japanese nationals for certain managerial positions.[255] The court based its opinion on the following criteria: preservation of the meaning of Article VIII(1) of the Treaty,[256] the grant of absolute rights in other Treaty

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251. 638 F.2d at 558.

252. *Id.* at 558-59.

253. *Id.* at 559 (citations omitted).

254. 643 F.2d 353 (5th Cir. 1981).

255. *Id.* at 355. Before reaching this issue the Fifth Circuit decided, as did the Second Circuit, that a locally-incorporated subsidiary, wholly-owned by a Japanese corporation, could invoke Article VIII of the Treaty. *See supra* note 248.

256. *Id.* at 362.

> Clearly, article VIII(1) provides some right to Japanese companies to manage their own affairs. It is irrelevant whether the source of potential interference with that

articles,[257] the views of a State Department expert on commercial treaties,[258] the legislative history of the Treaty,[259] and rules of statutory construction.[260]

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right is state legislation characterized as "ultranationalistic" or a federal statute labeled "progressive." The right of Japanese companies to choose essential personnel is a right to maintain Japanese control of the overseas investment. To make this right subject to Title VII's [bona fide occupational qualification] requirements, or to interpret it to override only state law, would render its inclusion in the Treaty virtually meaningless.

Id.

257. *Id.* at 360-61. The Fifth Circuit agreed with the Second Circuit that an overriding goal of the Parties to the Treaty was to provide national treatment to foreign businesses operating in the host country. The Fifth Circuit read Article VIII as establishing an absolute right beyond national treatment:

> This is accentuated by the fact that the phrase "nationals of either Party shall be accorded national treatment" appears repeatedly in other provisions of the Treaty. Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII(1) means exactly what it says: Companies have a right to decide which executives . . . will manage their investment in the host country, without regard to host country laws.

Id. at 361.

258. *Id.* The court relied heavily on the views of Herman Walker who, according to the State Department, formulated the modern concept of Friendship, Commerce, and Navigation treaties and negotiated many of them for the United States. *Id.* at 357, n.2. Mr. Walker's views on these treaties and provisions akin to Article VIII are contained in three articles: Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956); Walker, *Provisions on Companies in United States Commercial Treaties*, 50 AM. J. INT'L L. 373 (1956).

259. 643 F.2d at 361-62. The court cited Senate subcommittee hearings to demonstrate that the Senate was concerned that American companies have the right to use American personnel to control their investments in Japan. *Commercial Treaties-Treaties of Friendship, Commerce & Navigation, with Israel, Ethiopia, Italy, Denmark, Greece, Finland, Germany and Japan: Hearings before the Subcomm. of the Senate Comm. on Foreign Relations*, 83rd Cong., 1st Sess. 2, 3, 6-9 (1953). The court determined that it was "self-evident that this same goal of American negotiators in formulating Article VIII(1) was the goal of Japanese negotiators who sought it to protect Japanese companies operating in the United States." 643 F.2d at 362.

260. The court applied the following, generally accepted rule of interpretation for reconciling Treaty and domestic legal obligations:

> The general rule is that subsequent federal legislation will invalidate treaty obligations if the congressional intent to do so is clearly expressed. No evidence suggests that Congress intended to repudiate Article VIII(1) when it enacted Title VII. Domestic employment discrimination laws occupy a high priority on the nation's agenda, and courts often resolve statutory conflicts in their favor. In this case, however, resolving doubts in favor of Title VII would go beyond the judicial sphere of interpretation. In the absence of congressional guidance, we decline to abrogate the American government's solemn undertaking with respect to a foreign nation.

Id. at 362 (citations omitted).

Having held that Sumitomo, as a subsidiary of a foreign corporation, could claim rights under the U.S.-Japan Commercial Treaty and that such rights did not include freedom from the strictures of Title VII, the Second Circuit in *Avigliano* briefly examined the application of Title VII to Sumitomo's hiring practices. This aspect of the decision may be the most significant for foreign-owned companies doing business in the United States. Recognizing that the "of their choice" clause was intended to "facilitate a party's employment of its own nationals to the extent necessary to insure its operational success in the host country,"[261] the Second Circuit noted that "Title VII, construed in light of the Treaty, would not preclude the company from employing Japanese nationals in positions where such employment is reasonably necessary to the successful operation of its business."[262] Thus, the object of the Treaty could be accomplished without exemption from Title VII by reference to the bona fide occupational qualification (BFOQ) exception of Title VII.[263] Although the United States Supreme Court has held that Title VII's BFOQ exception must be narrowly construed,[264] the Second Circuit stated that, as applied to a Japanese company enjoying rights under the Treaty, the BFOQ exception must be "construed in a manner that will give due weight to the Treaty rights and unique requirements of a Japanese company doing business in the United States."[265]

The Second Circuit set out four relevant factors in this context: "(1) Japanese linguistic and cultural skills, (2) knowledge of Japanese products, markets, customs and business practices, (3) familiarity with the personnel and workings of the principal or parent enterprise in Japan, and (4) acceptability to those persons with whom the company or branch does business."[266] Only the fourth factor, customer acceptability, appears to depart in a major way from current standards for defining BFOQs.[267]

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261. 638 F.2d at 552, 559.

262. *Id.*

263. *Id.* Title VII provides in relevant part:

"it shall not be an unlawful employment practice for an employer to hire and employ employees, . . . on the basis of . . . national origin in those certain instances where . . . origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ."

42 U.S.C. § 2000e-2(e) (1976).

264. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

265. 638 F.2d at 559.

266. *Id.*

267. United States corporations have been unsuccessful in arguing that hiring prac-

The Supreme Court's determination that the U.S.-Japanese Commercial Treaty does not encompass United States-incorporated, wholly-owned Japanese subsidiaries rendered unnecessary any determination of the relationship between the Treaty and Title VII. With the rapid proliferation of foreign-owned companies doing business in the United States, the Court is likely to be faced with the question in the future. Because the FCN's[268] to which the United States is a party do not provide a clear answer in their language, spirit, or negotiating history, the question is likely to be difficult to resolve.

Three answers immediately suggest themselves. First, a determination that United States employment discrimination laws must give way to the nation's Treaty obligations. This resolution would help create a healthy legal environment for foreign investment in the United States. Numerous consequences of an expansive interpretation of the "of their choice" clauses in commerical treaties suggest, however, that this resolution is unacceptable. First, it is difficult to perceive how the "of their choice" language can be read to exempt foreign employers from the strictures of Title VII and not from other laws regulating employment practices. Second, the FCN's are intended to assure national treatment to foreign companies, that is, the same rights and duties under law as the host country's companies enjoy. Such an expansive reading of the Article VIII "of their choice" language would offer foreign companies better treatment than U.S. companies enjoy. Freeing foreign companies from regulations binding national companies would give a competitive advantage, rather than equal treatment, to foreign companies.

A second resolution of the tension between the treaty language and domestic civil rights law would be to give an ascendant position to the latter. Requiring foreign-owned companies to meet the obligations imposed upon domestic companies in their employment practices would preserve and enhance the social values reflected in the civil rights laws. Nevertheless, requiring foreign-owned companies to comply with U.S. civil rights laws, while clearly a valid act of legislative jurisdiction, potentially dissuades

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tices based on customer preferences are not proscribed by Title VII. Diaz v. Pan Am World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

268. The United States has Friendship, Commerce, and Navigation treaties in force with at least 49 nations. OFFICE OF THE LEGAL ADVISOR, U.S. DEPT OF STATE, PUB. NO. 9136, TREATIES IN FORCE (1981).

such companies from investing in the United States. Additionally, binding foreign-owned companies to the full legal obligations created by U.S. domestic legislation potentially encourages other nations to follow suit, thus subjecting American companies doing business abroad to domestic employment obligations in the host country.

The Second Circuit's resolution of the apparent conflict between the Treaty language and the civil rights laws avoided the problems inherent in elevating one source of legal obligation over the other. By defining the scope of the "of their choice" language in a manner compatible with Title VII, the court preserved the interests of the foreign-owned company by acknowledging that in certain key positions, nationality may be a relevant consideration in employment. In addition, the court preserved the essential function of Title VII by holding that such companies are subject to the obligations of U.S. civil rights laws.

VI. THE FOREIGN SOVEREIGN IMMUNITIES ACT CASES

The Foreign Sovereign Immunities Act of 1976 (FSIA)[269] reflects four congressional goals: first, the Act codifies the restrictive theory of sovereign immunity;[270] second, it transfers immunity determinations from the executive branch to the judicial branch;[271] third, it provides *in personam* jurisdiction over a foreign state;[272] and finally, it also provides a post-judgment procedure to aid in

269. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. § 1330; 1332(a)(2)-(4); 1391(f); 1441(d); 1602-1611 (1976)).

270. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604. The restrictive theory of sovereign immunity recognizes immunity as a defense only where the suit arose out of the public acts of a foreign state. Where the suit arose out of a foreign state's commercial acts the defense is unavailable. The United States implicitly adopted this theory of sovereign immunity in 1952 when the State Department indicated that it would no longer suggest immunity from claims arising out of the commercial acts of a foreign state. Letter from Jack B. Tate, State Department Acting Legal Advisor, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984-85 (1952).

271. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6606. Prior to the FSIA, either the court or the defendant sought the views of the State Department as to whether immunity was available as a defense to suit in United States courts. Although not binding on the court, the State Department's suggestion usually was followed. Congress' purpose in transferring immunity decisions to the judiciary was to "[reduce] the foreign policy implications of immunity determinations and [assure] litigants that these often crucial decisions would be made on purely legal grounds and under procedures that insure due process." *Id.*

272. 28 U.S.C. § 1330(b) (1976).

satisfying judgments against foreign states.[273] "[A] marvel of compression,"[274] the FSIA, "[t]hrough a series of intricately coordinated provisions,"[275] establishes the availability of the defense of sovereign immunity, the subject matter jurisdiction of the federal courts, and the statutory basis for personal jurisdiction over the defendant.

The grant of original subject matter jurisdiction in the federal district court extends to non-jury[276] civil actions against a foreign state if that state is not entitled to immunity from the claim.[277] Statutory *in personam* jurisdiction exists when the state is not entitled to immunity and has been properly served.[278] Since the existence of both subject matter and *in personam* jurisdiction are dependent upon the lack of sovereign immunity from the claim, the determination of the availability of immunity is a predicate inquiry. An initial understanding of the FSIA's immunity provisions requires an appreciation of two features of the Act. First, the FSIA provides that, subject to any international agreement to which the United States was a party in 1976, foreign states *are* immune from suit in United States courts.[279] Second, the FSIA provides for significant exceptions which, in practice, nearly consume the general rule of immunity.[280]

During the Survey years, the Second Circuit decided two cases raising complex issues under the FSIA.[281] In resolving these issues, the court made a significant contribution to a general appreciation of Congress' intent in passing the FSIA and to an

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273. 28 U.S.C. § 1610(c) (1976).

274. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306, (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

275. *Id.*

276. The Second Circuit was called upon to interpret the effect and constitutionality of the bar to jury trials in this grant in Ruggiero v. Compania Peruana de Vapores "Inca Capa Yupanqui", 369 F.2d 872 (2d Cir. 1981). *See* Youngblood, *1980 Survey of International Law in the Second Circuit*, 8 SYR. J. INT'L L.& COM. 159, 221 (1980).

277. 28 U.S.C. § 1330(a).

278. 28 U.S.C. § 1608. The effect of the dual requirement of lack of immunity and proper service to achieve in personam jurisdiction means that the appearance of a foreign state in an action does not confer personal jurisdiction over the foreign state if the state enjoys immunity from the claim. 28 U.S.C. § 1330(c). The foreign state may waive its immunity, thus consenting to in personam jurisdiction over it.

279. 28 U.S.C. § 1604.

280. 28 U.S.C. § 1605(a)(1)-(5).

281. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983).

understanding of the complex interrelationship of the Act's three major components: immunity, subject matter, and personal jurisdiction.

A. *TEXAS TRADING & MILLING CORP. V. FEDERAL REPUBLIC OF NIGERIA*

In enacting the FSIA, Congress "put [its] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental"[282] activity, a distinction crucial to the restrictive theory of foreign sovereign immunity. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria (Texas Trading)*[283] represents the first major effort by a United States Court of Appeals to "apply systematically the FSIA's series of intricately coordinated provisions"[284] and, particularly, the Act's commercial activity exception. The Second Circuit, in a well-reasoned opinion, justified Congress' faith in United States courts.

In 1975, Nigeria embarked on a massive cement purchasing program to build its infrastructure. As part of this program, it executed over one hundred contracts with suppliers throughout the world for the purchase of more than sixteen million metric tons of cement. Four of the contracts were made with plaintiffs, New York corporations.[285] Each contract required Nigeria to establish a confirmed, irrevocable letter of credit for the total amount due. Nigeria set up irrevocable letters of credit with the Central Bank of Nigeria, an instrumentality of the Nigerian government, and advised these letters through the Morgan Guaranty Company of New York.[286]

The cement deliveries made pursuant to these contracts first strained, and later overwhelmed Nigeria's port at Lagos/Apapa. By July, over 400 ships were waiting to unload, 260 of them carrying cement.[287] Unable to accept delivery, Nigeria cabled its suppliers and asked them to stop shipping cement. Central Bank in-

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282. Hearings on H.R. 11315 Before the Subcommittee on Administrative Law & Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 28 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State).

283. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

284. *Id.* at 306.

285. *Id.* at 303.

286. *Id.* at 304.

287. *Id.* at 305.

structed Morgan not to pay under the letters of credit unless the supplier submitted a statement from Central Bank that payment should be made. Morgan notified each supplier of Nigeria's instructions and then refused to make payments under the letters of credit. In December 1975, Nigeria prohibited the entry into Nigerian ports of any ship that had not secured a two month prior approval. Criminal penalties were imposed for unauthorized entry into the ports.[288]

Cement suppliers sued Nigeria in courts throughout the world.[289] The four plaintiffs in *Texas Trading* filed separate suits[290] against the Republic of Nigeria and the Central Bank in the federal district court for the Southern District of New York, alleging that Central Bank's changing the terms of payment under the letters of credit constituted an anticipatory breach of the cement contracts and the letters of credit.

Nigeria and the Central Bank apparently did not seriously dispute these allegations.[291] Rather, they challenged the court's jurisdiction under the FSIA. In one of the cases, *Texas Trading*, the trial judge found jurisdiction lacking;[292] in the others, *Nikkei*, *East Europe*, and *Chenax*, the trial judge found jurisdiction present.[293]

Defendants appealed from the jurisdictional ruling and award in *Nikkei*, *Chenax*, and *East Europe*. Texas Trading appealed from the district court's jurisdictional ruling. The Second Circuit affirmed the jurisdictional holding in *Nikkei*, *East Europe*, and *Chenax* and reversed the jurisdictional holding in *Texas Trading*.[294]

Perhaps the most significant feature of *Texas Trading* is the structure used by the court to analyze "the three crucial questions in a suit against a foreign state: the availability of sovereign immunity as a defense, the presence of subject matter jurisdiction

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288. *Id.*

289. *Id.* at 306.

290. *Id.* Decor by Nikkei International v. Federal Republic of Nigeria [Nikkei], Chenax Majesty, Inc. v. Federal Republic of Nigeria [Chenax], and East Europe Import-Export Inc. v. Federal Republic of Nigeria [East Europe] were consolidated for trial. Texas Trading & Milling Corp. v. Federal Republic of Nigeria [Texas Trading] was decided separately and consolidated with the other three on appeal.

291. 647 F.2d at 306.

292. 500 F. Supp. 320 (S.D.N.Y. 1980).

293. 497 F. Supp. 893, 902-06 (S.D.N.Y. 1980).

294. 647 F.2d at 316.

over the claim, and the propriety of personal jurisdiction over the defendant."[295] Identifying such an analytical structure where the commercial activity exception is in issue was no small accomplishment because "the FSIA seems at first glance to make the answer to one of the questions, subject matter jurisdiction, dispositive of all three."[296] The Second Circuit recognized the subtle but important differences between these inquiries under the FSIA, and formulated an analysis that insures that the separate considerations under the act are properly identified and evaluated.

The court's analysis of the section 1605(a)(2) (commercial activity) exception is structured around five questions to be examined and answered seriatum.

> 1. Does the conduct the action is based upon or related to qualify as "commercial activity"?
> 2. Does that commercial activity bear the relation to the cause of action and to the United States described by one of the three phrases of § 1605(a)(2), warranting the Court's exercise of subject matter jurisdiction under § 1330(a)?
> 3. Does the exercise of this congressional subject matter jurisdiction lie within the permissible limits of the "judicial power" set forth in Article III?
> 4. Do subject matter jurisdiction under § 1330(a) and service under § 1608 exist, thereby making personal jurisdiction proper under § 1330(b)?
> 5. Does the exercise of personal jurisdiction under § 1330(b) comply with the due process clause, thus making personal jurisdiction proper?[297]

According to the court, the first question presents "perhaps the most important decision a court faces in an FSIA suit."[298] Despite the importance of the commercial activity inquiry, the FSIA provides no guidance as to the definition of commercial activity. The Act does, however, make clear that the characterization of an activity as commercial is to be made by reference to the nature of the conduct or transaction rather than by reference to its purpose.[299] The court examined three sources of authority to solve this definitional problem. First, the court turned to legislative

295. *Id.* at 306.
296. *Id.*
297. *Id.* at 308.
298. *Id.*
299. *Id.*

history.[300] That history suggested that "if the activity is one in which a private person could engage, [the foreign state] is not entitled to immunity."[301] Second, pre-FSIA case law was examined.[302] Finally, the court turned to international law to add content to the commercial activity exception, and concluded that there was little doubt that international law followed the restrictive theory of sovereign immunity.[303] Unfortunately, the court did not identify the particular role played by international law in defining the *content* of the commercial activity exception.

After examining these sources, the court concluded that the cement contracts and letters of credit were commercial activities engaged in by Nigeria.

> "If a government department goes into the marketplaces of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the marketplace." Nigeria's activity here is in the nature of a private contract for the purchase of goods. Its purpose—to build roads, army barracks, whatever—is irrelevant.[304]

The court then turned to the second inquiry: whether the activity bears the necessary relationship to the cause of action and the United States, sufficient to establish subject matter jurisdiction.[305] The court immediately identified the third clause of section 1605(a)(2)[306] as providing the necessary basis of subject matter jurisdiction. That clause requires that the action be based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere [that act causing] a direct effect in the United States."[307] In *Texas Trading* the precise issue

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300. *Id.* at 309.

301. *Id.*

302. *Id.* at 309-10.

303. *Id.* at 310.

304. *Id.*, (quoting *Trendtex Trading Corp. v Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 369, 1 All E.R. 881).

305. *Id.* at 310.

306. § 1605(a)(2) provides:

(a). A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case—

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.

307. *Id.*

was whether there was a direct effect in the United States; the court held that there was such an effect.[308] In reaching this conclusion the court looked to case law discussing direct effects on natural persons,[309] and analogized to the kinds of effects that might be directly felt by juridical persons.[310] Recognizing that the task of identifying and locating the injury to a corporation can be difficult, the court concluded that the plaintiff corporations were directly affected by the financial loss they suffered as a result of defendant's breach of contract.[311] Two facts supported a finding that this direct effect occurred in the United States, as required by the third clause of section 1605(a)(2). First, those who supplied cement to Nigeria were to present the required documents and collect money in the United States and the suppliers were precluded from so doing by the alleged breach. Second, each of the plaintiffs was an American corporation.[312] The presence of both factors in the instant case satisfied the requirements of section 1605(a)(2). The court refused to discuss whether either one alone would have sufficed.[313]

Perhaps the most interesting feature of the court's discussion of section 1605(a)(2) is its articulation of the spirit in which a section 1605(a)(2) analysis should be pursued.

> Courts construing [the terms "direct" and "in the United States"] should be mindful more of Congress's concern with providing "access to the courts" to those aggrieved by the commercial acts of a foreign sovereign than with cases defining "direct" or locating effects under state statutes passed for dissimilar purposes. . . . Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it. The question is, was the effect sufficiently "direct" and sufficiently "in the United States" that Congress would have wanted an American court to hear the case? No rigid parsing of § 1605(a)(2) should lose sight of that purpose.[314]

The court quickly resolved the third relevant inquiry:

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308. 637 F.2d at 313.

309. Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056 (E.D.N.Y. 1979); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979).

310. 637 F.2d at 312.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 312-13.

whether there is a constitutional basis for the statutory grant of subject matter jurisdiction.[315] Since each suit was between a citizen of a state and a foreign state, the suits fell within the diversity grant.[316]

The statutory validity of personal jurisdiction also was not difficult to establish in the instant case. Since section 1330(b) provides for personal jurisdiction as to any claim over which the court has power under section 1330(a) so long as process has been served under section 1608, the court simply recognized that service had been made and no objection to it had been raised by defendants.[317]

The final analysis, whether the exercise of personal jurisdiction in this case satisfied constitutional requirements, was more difficult of resolution. The court began by inquiring whether the dictates of the due process clause of the Fifth Amendment apply to FSIA cases. Following its own precedent, the court concluded that it did.[318] The court therefore applied a minimum contacts analysis as required by *International Shoe v. Washington*[319] and later refined in *World-Wide Volkswagen Corp. v. Woodson*.[320] In considering whether minimum contacts existed in the instant case the court first inquired: whose contacts, and with what?[321] The court concluded that the relevant contacts were not only those of defendants, but also those of defendants' agent. Thus, Central Bank's and Morgan's activities were charged to Nigeria.[322] Since service was made pursuant to section 1608, the area in which contacts were to be measured was the entire United States.[323] The court then articulated the precise inquiry to determine whether these contacts met the constitutional minimum.

> [T]he court must examine the extent to which defendants availed

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315. *See supra* text at note 297.

316. U.S. Const. art. III, § 2, cl. 1.

317. 647 F.2d at 313.

318. *Id.* Cases discussing the issue are rare largely because most pre-FSIA cases were based on quasi-in-rem jurisdiction. Until the United States Supreme Court decided Shaffer v. Heitner, 433 U.S. 186 (1977), it was not clear that the due process clause operated to restrict the exercise of quasi-in-rem jurisdiction. The Second Circuit had held that, even where jurisdiction is quasi-in-rem, foreign states are entitled to due process scrutiny of the court's jurisdiction over them. Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979).

319. 326 U.S. 310 (1945).

320. 444 U.S. 286 (1980).

321. 647 F.2d at 314.

322. *Id.*

323. *Id.*

> themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States and the countervailing interest of the United States in hearing the suit.[324]

The court had no trouble finding "purposeful availment" in the instant case. Central Bank's activities, in particular, suggested such availment.[325] The same activities supported the conclusion that defendants had invoked the benefits and protections of American law. The court reasoned that Nigeria and Central Bank "would have every 'reason to expect to be haled before a . . . court' here."[326] Not only had defendants threatened litigation[327] but they had been notified by Morgan of the likelihood of suit by the cement contractors.[328] The court similarily concluded that litigation in the United States was not unduly inconvenient for defendants and that the United States had an interest in providing a means of redress for its residents.[329]

B. *VERLINDEN B.V. V. CENTRAL BANK OF NIGERIA*

Verlinden B.V. v. Central Bank of Nigeria[330] arose out of the same cement contract crisis that lay the factual background of *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*.[331] Verlinden is a Dutch corporation that contracted with Nigeria to ship cement under the terms of a letter of credit nearly identical

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324. *Id.*

325. *Id.* at 314-15. Among these activities were: sending its employees to New York for training; keeping large cash balances in New York; maintaining a custody account there; regularly advising letters of credit through Morgan; and using Morgan as its means of paying bills throughout the world. The activities of Central Bank in relation to the cement contracts were particularly relevant.

> In Nigeria's behalf and on Nigeria's instructions, Central Bank advised each of the letters of credit through Morgan in the United States, regardless of the individual supplier's wishes. Having chosen American law and process as their protectors, Nigeria and Central Bank were not hesitant to invoke them; at the mere hint Morgan was reluctant to honor defendants' amendments to the letters of credit, an officer of Central Bank threatened to "go to court" to enforce them.

Id.

326. *Id.* at 315 (quoting Schaffer v. Heitner, 433 U.S. 216 (1977)).

327. *See supra* note 325.

328. 647 F.2d at 315.

329. *Id.*

330. 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983).

331. 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

to those established in favor of the plaintiffs in *Texas Trading*.[332] Verlinden sued the Central Bank of Nigeria in the Southern District of New York for anticipatory breach of an irrevocable letter of credit.[333] Central Bank of Nigeria did not seriously dispute its breach. Rather, Central Bank moved to dismiss for lack of jurisdiction under the FSIA.[334] The district court determined that Central Bank was entitled to immunity and granted the motion.[335] The Second Circuit affirmed on a different basis, holding that the district court lacked subject matter jurisdiction over the action.[336]

The court analyzed the subject matter jurisdiction question on two levels. Initially, it considered whether the FSIA granted subject matter jurisdiction over a civil action between a foreign plaintiff and a foreign state defendant.[337] Second, it considered whether Article III of the United States Constitution permitted such a grant.[338]

Because section 1330(a), the grant of subject matter jurisdiction in the FSIA, did not identify the required citizenship of the plaintiff, the court examined the Act's legislative history and concluded that Congress had not manifested a specific intention as to the matter.[339] The court concluded, on the basis of the broad statutory

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332. 647 F.2d at 322. Under the terms of the letter of credit, Verlinden could collect, upon presentation of specified documents, $60 per ton of cement shipped to Nigeria. Verlinden subcontracted with a third party to purchase 240,000 tons of cement at $51 per ton. In the subcontract, Verlinden agreed to pay the third party $5 per ton if Verlinden reneged on the purchase. *Id.*

333. The alleged anticipatory breach was based on the same conduct by Nigeria as had formed the basis of the breach claim in *Texas Trading*. *See supra* notes 283-290. Verlinden sought $4.66 million in damages for lost profits and the money it was forced to pay the third party under the terms of the subcontract. 647 F.2d at 323.

334. 647 F.2d at 323.

335. Verlinden B.V. v. Central Bank of Nigeria, 498 F. Supp. 1284 (S.D.N.Y 1980), *rev'd*, 647 F.2d 320 (2nd Cir. 1981), *rev'd* 103 S. Ct. 1962 (1983).

336. 647 F.2d at 322.

337. *Id.* at 323-24.

338. *Id.* at 324-30.

339. *Id.* at 323-24. The court characterized the legislative history as "murky and confused." *Id.* at 324. The House Judiciary Committee Report contained references to "our citizens," "U.S. businessmen" and "American property owners," thus suggesting that § 1330(a) was intended to serve as a jurisdictional base only in suits brought by United States citizens. House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. REP. No. 1487, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605. Congress also emphasized that it did not intend "to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Hearings on H.R. 11315 Before the Sub-*

language granting jurisdiction over "any non-jury civil action against a foreign state," that the classification of parties under section 1330(a) included both foreign plaintiffs and foreign state defendants.[340]

Having so held, the court was required to determine the constitutionality of a congressional grant of jurisdiction over a suit between a foreign plaintiff and a foreign state defendant. The trial judge had determined that the case fell within Article III because it arose out of federal law.[341] The Second Circuit began its analysis, not with federal question jurisdiction, but with diversity jurisdiction holding that Article III's diversity grant did not embrace a suit between two foreign parties.[342] Thus, Congress lacked the authority to grant such jurisdiction to the federal courts on the basis of diversity.

The court then turned to the availability of the federal question jurisdiction. Beginning with an examination of the statutory grant of jurisdiction over federal question cases found in 28 U.S.C. § 1331,[343] the court distinguished three types of cases: cases involving a cause of action created by federal law,[344] cases where plaintiff's case requires an interpretation of federal law,[345] and cases involving the imposition of federal common law where the court finds "a national interest so strong that a judge-made federal rule

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committee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 74th Cong., 2d Sess. 31 (1976).

The court also found support for a congressional intent not to limit the FSIA's jurisdictional grant to suits brought by Americans. 647 F.2d at 324. This intent was evidenced not only in statements in congressional hearings but also by the removal provision within the FSIA, 28 U.S.C. § 1441(d), which is not limited to suits brought by U.S. citizens.

340. 647 F.2d at 324.

341. 488 F. Supp. at 1291-92. The trial judge held that the case arose out of federal law because the FSIA injected "an essential federal element into all suits brought against foreign states." *Id.* at 1292.

342. 647 F.2d at 325.

343. The court explained its choice to focus on the statutory language prior to a consideration of the nearly identical language of Article III.

> The federal courts have had little opportunity to construe the crucial language of the phrase, "arising under . . . the Laws of the United States," mainly because the passage in 1875 of the predecessor to § 1331 made direct resort to the Constitution unnecessary. A huge body of law interprets the statute. It is, therefore, to the almost identical words in § 1331—"arises under the . . . laws . . . of the United States"—to which we first turn in exploring whether Verlinden's suit "arises under" federal law for purposes of Article III.

Id. at 325.

344. American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916).

345. Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921).

of decision preempts the state law that would otherwise govern the case."[346]

The court had little trouble concluding the FSIA suits were not of the first or third type.[347] Seeming to acknowledge FSIA suits were more akin to the second type, the court nonetheless concluded that plaintiff's complaint did not require an interpretation of the FSIA.[348]

> [T]he issue of sovereign immunity is not disclosed by Verlinden's well-pleaded complaint. That complaint alleges the breach of a letter of credit, *simpliciter*. The Act retains sovereign immunity as a defense, to be raised by the defendant. Defenses that have to be raised affirmatively, no matter how urgent their federal nature, do not confer jurisdiction.[349]

Nor do FSIA suits fall into the narrow category of cases where federal jurisdiction is held to be present because plaintiff's complaint revealed the necessity of construing a federal statute conferring substantive rights.[350] In *Smith v. Kansas City Title & Trust Co.*,[351] the United States Supreme Court held "where it appears from [plaintiff's complaint] that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under [the predecessor to 28 U.S.C. § 1331]."[352] The issue in *Smith* involved the validity of a congressional authorization of farm loan bonds. The plaintiff sought an injunction against the defendant bank to prohibit it from investing in bonds that had been issued by Federal Land Banks under the authority of the

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346. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

347. 647 F.2d at 326. Inclusion in the first group was precluded by § 28 U.S.C. § 1606 which provides that in FSIA suits, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." The court noted, "There is no intent here to create new federal causes of action; the purpose of the Act instead is to provide 'access to the courts in order to resolve ordinary legal disputes.'" 647 F.2d at 326 (citations omitted).

As to the inclusion of the instant case in the third group, the court simply concluded that the required strength of federal interest was not met. *Id.*

348. 647 F.2d at 326.

349. *Id.* at 326-27, citing Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908).

350. 647 F.2d at 327.

351. 255 U.S. 180 (1921).

352. *Id.* at 199.

Federal Farm Loan Act of 1916.[353] The gravamen of plaintiff's complaint in *Smith* was that the Farm Loan Act did not validly grant the authority to issue the farm loan bonds. According to the *Verlinden* court, federal jurisdiction was held present in *Smith* and its progeny[354] because there was a need to construe a statute conferring substantive rights. "While in none of those cases did a federal law create a cause of action, each suit required construction of a law which, in another posture, had the power to do so. The laws regulated conduct and created rights outside the courtroom."[355] Although it calls for the construction of a federal statute, *Verlinden* is distinguished by the court because that statute, the FSIA, regulates judicial practice rather than conduct outside the courtroom.[356]

The Second Circuit acknowledged that section 1331's "arising under" language "occupies less than all of the ground staked out by the parallel phrase in Article III,"[357] but concluded that the instant case did not "stand on the narrow strip that remains."[358] By the enumeration of specific cases over which federal courts could exercise jurisdiction, the Framers intended to "exclude all ideas of more extensive authority."[359] "The Framers created federal courts to protect, first, rights secured by the Constitution, and, second, rights created by federal law. They were concerned with the enforcement of uniformity in the interpretation of federal laws, but only insofar as those federal laws regulated conduct."[360]

The court found a further problem, one that is created by the structure of Article III, with the argument that a case can "arise under" a jurisdictional statute. Section 2, cl. 1 of that article enumerates nine types of cases over which the federal judicial power extends.[361] Finding a basis for jurisdiction over the instant

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353. Federal Farm Loan Act, ch. 245, 39 Stat. 360 (1916) (repealed).

354. Ivy Broadcasting Co. v. American Telephone & Telegraph Co., 391 F.2d 486 (2d Cir. 1968); Empresa Houndurena de Vapores, S.A. v. McLeod, 300 F.2d 222 (2d Cir. 1962), *vacated on other grounds*, 372 U.S. 10 (1963).

355. 647 F.2d at 327.

356. *Id.* The court found *Verlinden* analogous to Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). *Skelly Oil* called for an interpretation of the Declaratory Judgment Act, 28 U.S.C. § 2201 but the Supreme Court found jurisdiction lacking because the right to be vindicated was state created and not a right arising under federal law. *Id.* at 673.

357. 647 F.2d at 328.

358. *Id.*

359. *Id.* (citing A. Hamilton, *The Federalist*, No 83, at 519 (Putnam ed. 1888)).

360. 647 F.2d at 329.

361. U.S. Const. art. III, § 2, cl. 1 provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under

case based upon the presence of a federal question would, in effect, render the remaining types of cases superfluous.[362] The court concluded that in order to preserve meaning in the other case types, the federal question grant must be restricted to cases arising under a federal substantive law.[363]

The United States Supreme Court reversed.[364] It agreed with the lower courts' conclusion that the FSIA allows a foreign plaintiff to sue a foreign sovereign in United States courts,[365] but disagreed with the Second Circuit that this grant of jurisdiction violated Article III of the United States Constitution.[366] The Court held that the federal question clause of Article III provides a constitutional basis for the FSIA's grant of subject matter jurisdiction here. *Osborn v. Bank of the United States*[367] was cited as supporting "a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law."[368] The Court characterized the instant case as involving not a "mere speculative possibility that a federal question may arise" but questions of substantive federal law that are necessarily raised at the outset of the suit.[369]

The Supreme Court reiterated that Article III federal question jurisdiction is broader than the statutory grant in section 1331 and thus labeled as misplaced the Second Circuit's reliance on decisions construing that statute.[370] In addition, the Court rejected the

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this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;— to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

362. 647 F.2d at 329. The court noted specifically the effect of such an interpretation on the meaning and content of diversity jurisdiction. If a case could be brought in federal court under § 1332, the statutory grant of diversity jurisdiction to federal district courts, the jurisdiction so granted would be constitutionally supported not only by the diversity clause in Article III, § 2, cl. 1 but by the federal question clause as well. *Id.*

363. *Id.*

364. 103 S. Ct. 1962 (1983).

365. *Id.* at 1969.

366. *Id.* at 1971.

367. 22 U.S. (9 Wheat.) 738 (1824).

368. 103 S. Ct. at 1971.

369. *Id.*

370. *Id.*

Second Circuit's characterization of the FSIA as exclusively a jurisdiction-creating statute.[371] According to the Court, the jurisdictional provisions of the FSIA are but one part of a comprehensive scheme.

> The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law . . . and applying those standards will generally require interpretation of numerous points of federal law. . . . That the inquiry into foreign sovereign immunity is labeled under the Act as a matter of jurisdiction does not affect the constitutionality of Congress' action in granting federal courts jurisdiction over cases calling for application of this comprehensive regulatory scheme.[372]

The Court remanded to the Court of Appeals for a determination of whether the district court was correct in holding that none of the statutory exceptions to immunity are present in the instant case.

The effect of the Second Circuit's holding in *Verlinden* would have been to send foreign plaintiffs suing foreign states to American state courts where the Foreign Sovereign Immunities Act is equally applicable.[373] Congress, in enacting the FSIA, made clear its intent to create uniformity in the determination of sovereign immunity claims in order to offer consistent treatment to foreign sovereign defendants. In creating a comprehensive method through which to sue foreign state defendants in American courts, Congress sought to assure that foreign sovereigns would not be subjected to immunity determinations colored by the political passions of the day. This intent recognizes not only the interests of the foreign sovereign, but also the interests of the United States Government. The United States' interest is twofold: that the exercise of American judicial power should not needlessly complicate executive efforts at stable relations with other nations, and that the United States as defendant before foreign courts be treated in a uniform and fair manner. The Second Circuit Court of Appeals clearly minimized this interest. The United States Supreme Court recognized the interest and preserved it.

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371. *Id.* at 1972.
372. *Id.* at 1973.
373. 28 U.S.C. §§ 1604, 1605(a) (1976).

VII. CONCLUSION

> International law, or the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimature of the court attests its jural quality.[374]

The international law cases decided by the Second Circuit Court of Appeals during the 1981-82 Survey years raised as many questions as they answered. Thus, the enforceability of the damage limitations contained in the Warsaw Convention awaits determination by the United States Supreme Court. A definition of the relationship between the requirements of Title VII of the Civil Rights Act, and the obligations of commercial treaties to which the United States is a party, awaits a case which precisely and necessarily presents the issue. The assignment, to the executive branch, of decisional power over determinations of the applicability of the political offense exemption contained in United States extradition treaties awaits congressional action. The cases surveyed above represent the process by which international law and legal concerns of the international community are woven into the fabric of American law. By carefully balancing the domestic interests of the United States, and the interests of the international community, and more importantly, by recognizing that the interests of the two often coincide, the Second Circuit Court of Appeals during these Survey years has contributed to the continued advancement of that process.

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374. New Jersey v. Delaware, 291 U.S. 361, 383 (1934) (J. Benjamin Cardozo).