Vanderbilt Journal of Transnational Law

Volume 15
Issue 3 *Summer 1982*

Article 3

1982

Recent Decisions

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RECENT DECISIONS

JURISDICTION AND PROCEDURE - FORUM NON CONVENIENS— THE FOREIGN PLAINTIFF IS ENTITLED TO LESS DEFERENCE IN HIS CHOICE OF FORUM THAN IS A CITIZEN OR RESIDENT PLAINTIFF; A CHANGE OF LAW RESULTING FROM DISMISSAL IS NOT A SUBSTANTIAL FACTOR IN THE FORUM NON CONVENIENS ANALYSIS.

I. FACTS AND HOLDING

Plaintiff, a California citizen and resident[1] representing the relatives of five Scottish decedents killed in an airplane crash in Scotland, brought a wrongful death action in the Superior Court of California against Piper Aircraft Company (Piper) and Hartzell Propeller, Inc. (Hartzell).[2] Hartzell had the action removed to the federal district court, and upon the motion of both defendants the district court transferred the action to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. section 1404(a). The district court then granted defendant's *forum non conveniens* [3] motion.[4] In granting dismissal the

1. Plaintiff Gaynell Reyno is a legal secretary for the attorney who filed the lawsuit. In 1977 a California probate court appointed her administratrix of the five passengers' estates. Piper Aircraft Co. v. Reyno, 55 U.S.L.W. 4055, 4056 (U.S. Dec. 8, 1981).

2. Piper manufactured the airplane in Pennsylvania. Hartzell manufactured the propeller in Ohio. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 729 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981).

3. The parties stipulated that federal *forum non conveniens* law would apply. *Reyno*, 630 F.2d at 158 (3d Cir. 1980). The Supreme Court has declined to decide whether federal or state *forum non conveniens* law should govern in a diversity case. *See Piper Aircraft Co.*, 50 U.S.L.W. at 4059; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). The Third Circuit Court of Appeals noted in the instant case that "[v]irtually all the district courts and commentators that have squarely faced the issue have decided to apply federal law." *Reyno*, 630 F.2d at 158 n.19.

4. Analyzing the respective private interests of the litigants, the district court found that the plaintiff had little contact with the forum originally chosen,

district court qualified the *Gulf Oil Corp. v. Gilbert* doctrine[5] by holding that the foreign plaintiff's choice of forum, unlike the "citizen or resident" plaintiff's choice of forum, should be given "little weight."[6] The district court recognized that dismissal would result in the application of Scottish law that would be "less helpful" to the plaintiff, but ruled that this factor should not be given "undue weight."[7] The Third Circuit Court of Appeals reversed the district court's decision, rejecting the rule that gave less deference to a foreign plaintiff's choice of forum[8] and added

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California, while the dispute itself had "overwhelming" connections with Scotland. *Reyno*, 479 F. Supp. at 732. It is odd that the district court looked at the plaintiff's contact with California, rather than the contact with Philadelphia, when the choice of forums at this point was between Pennsylvania and Scotland. The district court also held that the defendants' inability to implead third parties in the plaintiff's forum "weighs heavily" in favor of dismissal. *Reyno*, 479 F. Supp. at 732. Turning to the public interest factors, the district court, having found that Scottish substantive law would have to be applied to one party and Pennsylvania substantive law to another, ruled that under those circumstances a trial in the Pennsylvania forum would be "hopelessly complex." *Id.* at 734. A second public interest factor favoring dismissal, according to the district court, was the difficulty presented by the need to interpret Scottish law. A third public interest factor favoring dismissal was the imposition of a burden on United States courts of a case that belonged in a foreign forum, which, unlike the Pennsylvania forum, had a real interest in the outcome. *Id.* at 735. The district court believed that the primary rationale for applying Pennsylvania strict liability law was to protect resident consumers, not to deter resident manufacturers from distributing defective products, or protect foreign consumers. *Id.* at 738. The district court stated: "If the foreign law that ought to govern a case does not protect its citizens as fully as the law of the dismissing forum, that is a matter to be dealt with in the foreign forum." *Id.* at 738. *But see infra* note 68 and accompanying text.

5. 330 U.S. 501 (1947).

6. *Reyno*, 479 F. Supp. at 731-32 (citing Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 927 (S.D.N.Y. 1977)); Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972).

7. *Reyno*, 479 F. Supp. at 738. Scotland does not recognize a strict liability doctrine.

8. Analyzing the private interest factors, the appellate court first considered the plaintiff's estoppel argument and held that while a successful transfer motion by the defendant will not automatically preclude dismissal on a later *forum non conveniens* motion, an earlier transfer should weigh against the defendant's motion. *Reyno*, 630 F.2d at 155-56, (citing Insurance Co. of N. Am. v. Ozena/ Stinnes-Linien, 367 F.2d 224, 227 (5th Cir. 1966)). The appellate court rejected the district court's ruling which gave less deference to a foreign plaintiff's choice of forum, adding that even if the rule were upheld, it was an abuse of the district court's discretion to apply it when a foreign plaintiff already had been

that even if the rule were upheld, it was an abuse of the district court's discretion to apply it when the foreign plaintiff already had been forced to transfer from his chosen forum.[9] The appellate court also found that if dismissal of a case resulted in the application of less favorable law for the plaintiff, no dismissal could be granted, regardless of the other *Gilbert* factors.[10] On appeal to the United States Supreme Court, *reversed. Held:* A court analyzing the question of *forum non conveniens* should give greater deference to the United States citizen or resident plaintiff's choice of forum than to a nonresident alien plaintiff's choice and should consider a change in substantive law resulting from dismissal an insubstantial factor in the analysis. *Piper Aircraft Co. v. Reyno,* 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981).

II. LEGAL BACKGROUND

The *forum non conveniens*[11] doctrine provides a court with discretion to refuse to adjudicate a case even when jurisdiction and venue requirements are satisfied.[12] Denial of access to a state court on the basis of state citizenship raises constitutional ques-

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forced to transfer from his chosen forum. *Reyno,* 630 F.2d at 159. The appellate court held that because the defendants had failed to produce affidavits demonstrating that witnesses would be unavailable in the Pennsylvania forum, no dismissal could be granted on the basis of witness unavailability. *Id.* at 161 (citing 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3851 (1976)). Increasing the necessity of the affidavits was the fact that the expert witnesses relevant to plaintiff's strict liability claim were in or close to the Pennsylvania forum. *Reyno,* 630 F.2d at 161. According to the appellate court, the defendants' inability to implead a third party defendant was "burdensome," but not unfair, and not grounds for dismissal. *Id.* at 162. The appellate court also found error in the district court's analysis of public interest factors. The appellate court decided that Scottish substantive law would not have to be applied in the Pennsylvania forum, and further added that even if Scottish law governed one party, dismissal was not justified. *Id.* at 164; *see supra* text accompanying note 63.

9. *Reyno,* 630 F.2d at 159-60 (citing Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978); Alcoa S.S. Co. v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1981) (en banc) (later withdrawn).

10. *Reyno,* 630 F.2d at 159-60.

11. The term "forum non conveniens" is a Scottish latinization of an English doctrine of law. Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908, 909 (1947).

12. *See generally id.; The Doctrine of Forum Non Conveniens in Anglo-American Law,* 29 COLUM. L. REV. 1 (1929) (historical background of the *forum non conveniens* doctrine).

tions under the Privileges and Immunities Clause,[13] but no such constitutional limitation prevents a federal court from denying a nonresident[14] foreigner access. The United States, however, has entered into agreements with other nations[15] and as a member of the United Nations[16] that restrict its power to limit foreigners' access to its courts. Although the United States traditionally[17] has not discriminated against foreigners by limiting their access to its courts, these courts, having found that the plaintiff's chosen forum is an inappropriate one, historically have dismissed the case under the *forum non conveniens* doctrine.[18] In *Canada Malting, Ltd. v. Paterson Steamships, Ltd.*,[19] the Supreme Court, recognizing the discretionary power of courts in admiralty to decline

13. U.S. CONST. art. IV, § 2, cl. 1. *See* Missouri *ex rel* S. Ry. Co. v. Mayfield, 340 U.S. 1 (1950); The *Mayfield* case has been interpreted to allow discrimination under *forum non conveniens* by a state on the basis of state citizenship. Note, *Forum Non Conveniens — Closing the Gap Between the Procedural Rights of Residents and Nonresidents in New York State*, 58 CORNELL L. REV. 783, 783 (1973). The case, however, seems to equate citizenship with residency, which is a legitimate basis upon which to discriminate. *Mayfield*, 340 U.S. at 4.

14. Even United States citizens do not have a constitutional right of access to United States federal courts. Vanity Fair Mills, Inc. v. T. Eaton Co., 234 F.2d 633, 645 (2d Cir. 1956), *cert. denied*, 352 U.S. 871 (1956). But a policy restricting access of resident aliens as opposed to citizens is probably unconstitutional in light of the holding that resident aliens are a suspect class under the fourteenth amendment. Graham v. Richardson, 403 U.S. 365 (1971). For a similar argument, see Note, *Federal Venue for Aliens: The Presumption of Nonresidency*, 3 CAL. W. INT'L L.J. 417 (1973).

15. *See* Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20 (1953). In Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978), the court of appeals rejected the district court's holding that a foreign plaintiff's right to sue in the United States is of "lesser magnitude" on the basis that in that case the foreign plaintiff's country (Iran) had a treaty with the United States allowing equal access. *Id.* at 882; *see also* Grimandi v. Beech, 512 F. Supp. 764, 778 (D. Kan. 1981).

16. For example, article 7 of the Universal Declaration of Human Rights provides in relevant part: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." G.A. Res. 217, U.N. Doc. A/810, at 137 (1948).

17. "[T]he policy of the United States in all cases of complaints made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens." 4 J. MOORE, INTERNATIONAL LAW DIGEST § 536 (1906).

18. *See, e.g.*, Rogers v. Guaranty Ins., 288 U.S. 123 (1933); Canada Malting Co. v. Paterson S.Ss., Ltd., 285 U.S. 413 (1932).

19. 285 U.S. 413 (1932).

suits between foreigners, upheld the federal district court's decision to dismiss a case brought by a Canadian cargo owner against a Canadian steamship company, even though dismissal resulted in the non-application of United States law.[20] In *Rogers v. Guaranty Trust Co.*[21] the Court upheld a New York federal district court's refusal to hear a stockholder's derivative suit by a New York resident against a New Jersey corporation. The Court stated:

> Obviously, no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholder's suits relating to the conduct of internal affairs of foreign corporations. But it may safely be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals.[22]

The *Rogers* Court also stated that one of the factors favoring dismissal was the difficulty of interpreting New Jersey corporation law, which could be better interpreted by a New Jersey court.[23] In *Williams v. Green Bay,*[24] however, the Court minimized the importance of having to apply unfamiliar law: "the fact that the corporation law of another state is involved does not set the case apart for special treatment."[25] One year after *Williams* the Court handed down a pair of cases which revitalized the *forum non conveniens* doctrine: *Gulf Oil Corp. v. Gilbert*[26] and *Koster v. Lum-*

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20. *Id.* at 420.
21. 288 U.S. 123, 131 (1933).
22. *Id.* at 131.
23. *Id.* at 132.
24. 326 U.S. 549 (1946). The necessity of applying foreign law has been inconsistently weighted by the courts as a factor in determining whether to grant a *forum non conveniens* motion. *Compare* Schertenleib v. Traum, 589 F.2d 1156, 1165 (2d Cir. 1978) (granting *forum non conveniens* motion partially on basis of need to apply Swiss tort law) *with* Mobil Tankers v. Mene, 363 F.2d 611, 615 (3d Cir. 1966) (denying *forum non conveniens* motion even though Venezuelan Civil Code applied). The degree of difficulty in interpreting the law and the degree to which it comports with United States standards of justice should weigh heavily in the decision.
25. *Williams,* 326 U.S. at 553.
26. 330 U.S. 501 (1947). In *Gilbert* a resident of Virginia brought an action in a federal district court in New York City against a Pennsylvania corporation to recover damages for destruction of plaintiff's public warehouse located in Virginia. The plaintiff's only rationale for trial in New York was that the requested damages, $400,000, would "stagger the imagination" of the local Virginia jury.

berman's Mutual Casualty Co.[27] *Gilbert* created an open-ended analysis by which courts were to rule on *forum non conveniens* motions. The first step in the *Gilbert* analysis was to determine the availability of a suitable alternative forum in which the dispute would be heard.[28] The second step was to weigh the private interests of each litigant and how these interests would be af-

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Id. at 510. Factors that supported granting the *forum non conveniens* motion were: (1) the plaintiff resided in Virginia; (2) the witnesses resided in Virginia; (3) the scene of the alleged negligence was Virginia; (4) the defendant claimed he needed to implead a third party defendant who was subject to the jurisdiction of the Virginia courts but not the New York Court; (5) the Virginia court would be better able to apply Virginia law. *Id.* at 509-12.

27. 330 U.S. 518 (1947). The plaintiff brought a derivative action in New York against an Illinois corporation. The Court indicated that "there is good reason" why a case should be tried in the plaintiff's "home" forum, but went on to say that a shareholder's derivative suit actually involved hundreds of plaintiffs, a factor weakening the presumption favoring the plaintiff's choice of his resident forum. *Id.* at 524-25. Noting that the plaintiff was "utterly silent" as to any reason of convenience or justice which pointed toward the New York forum, the Court granted the *forum non conveniens* motion. *Id.* at 531-32.

28. *Gilbert*, 330 U.S. 506-07; *see, e.g.*, Phoenix Can. Oil Co. v. Texaco, Inc., 78 F.R.D. 445 (D. Del. 1978). In *Phoenix Can. Oil Co.*, the plaintiff asserted that "The Courts of Law in Ecuador specifically provide that they do not accept jurisdiction over foreign aliens in disputes which relate to the controversy which would have existed here . . . ." *Id.* at 456 n.43. Finding no suitable alternative forum, the court denied the *forum non conveniens* motion. A recent district court case suggests that this step of the *Gilbert* analysis will suffer from inconsistent application just as the other steps have. In Canadian Overseas Ores Ltd. v. Compania De Acero Del Pacifico, No. 52584 (S.D.N.Y. Jan. 8, 1982) the court refused to grant the defendant's *forum non conveniens* motion because the defendant questioned (but did not substantiate) the independence of the alternative Chilean forum. *Id.* at 12. Compare the instant decision, in which the plaintiff had little or no chance of recovery in the alternative forum because of the change of law, but in which the Supreme Court upheld dismissal.

The lower courts disagree on whether the alternative forum must be one in which the plaintiff could originally bring suit. *Compare* Schertenleib v. Traum, 589 F.2d 1156, 1164 (2d Cir. 1978) (upholds *forum non conveniens* motion despite fact that plaintiff could not have originally brought suit in the alternative forum) *with* Tivoli Realty v. Interstate Circuit, 167 F.2d 156-57 (5th Cir. 1948), *cert. denied*, 334 U.S. 837 (1948) (denies *forum non conveniens* motion because plaintiff would not originally have brought suit in the alternative forum). The courts generally grant dismissal conditionally, reserving the right to hear the case if it is not litigated in the alternative forum. *See, e.g.*, Reyno v. Piper Aircraft Co., 479 F. Supp. 727 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981).

fected by a change of forum.[29] The Court qualified this balancing of private interests in *Gilbert* by saying that unless the balance was strongly in favor of the defendant, then the plaintiff's choice of forum should be honored.[30] The final step in the analysis was the balancing of the public interest factors.[31] In *Koster,* unlike *Gilbert,* the plaintiff had chosen the federal forum in which he resided to litigate the dispute. Language in *Koster* seemed to modify the *Gilbert* analysis, instructing the lower courts to favor even more strongly the resident plaintiff's choice of forum.[32] Four years later in *Swift v. Compania Columbiana Del Caribe, S.A.,*[33] the Court stated that a United States *citizen's* choice of forum should be more favored than the noncitizen's choice of forum.[34]

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29. The *Gilbert* Court listed some private interest factors:

> [T]he relative ease of access to proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Gilbert, 330 U.S. at 508.

Gilbert involved a situation in which the defendant would have difficulty impleading a third party defendant. *Id.* at 511. As with many of the factors included in the *Gilbert* analysis, the lower courts have differed widely on the weight given the defendant's need to implead a third party. *Compare* Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972) (benefits of impleader must be considered but are not in themselves grounds to necessitate dismissal on *forum non conveniens* grounds) *with Piper Aircraft Co.,* 50 U.S.L.W. at 4062 (if inability to implead is "burdensome," it is grounds for dismissal).

30. *Gilbert,* 330 U.S. at 509.

31. *Id.* at 508. Public interest factors included preventing court congestion, avoiding imposition of jury duty when litigants have no connection with the chosen forum, resolving local disputes locally in a forum with an interest in the litigation, and having courts interpret law with which they are familiar. *Id.*

32. Koster v. Lumberman's Mut. Casualty Co., 330 U.S. 518, 524 (1947). Specifically the *Koster* Court stated:

> He [the plaintiff] should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) established such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be shown to be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems.

Id.

33. 339 U.S. 684 (1950).

34. *Id.* at 697. The Court apparently thought that the United States citizen would be subject to prejudice in a foreign court. The original intent, therefore, was to prevent discrimination against United States citizens. *See infra* note 35.

Relying on *Swift*, the Third Circuit said that *forum non conveniens* would not be invoked against a United States citizen unless not granting dismissal resulted in "manifest injustice" to the defendant.[35] The District of Columbia Circuit Court of Appeals, however, rejected the idea of using a different standard for citizens and residents than for noncitizens and nonresidents, arguing that citizenship and residence are inadequate in themselves to alter the *Gilbert* analysis.[36] The Second Circuit, apparently changing its position, agreed.[37] Despite the controversy concerning the factors to be considered in the *forum non conveniens* analysis, the courts seemed to agree on the two principles underlying the doctrine. The Court had made it clear in *Southern Railway v. Painter*[38] that justice was a primary goal and convenience a secondary one:

> the doctrine of *forum non conveniens* is not to be applied merely upon considerations of convenience or expense, but is to be applied only where the trial of the case in the forum in which it is pending will produce an injustice . . . the doctrine of *forum non conveniens* is never to be applied where it will result in an injustice to plaintiff.[39]

Recognizing the desirability of empowering the federal courts to transfer actions to more appropriate forums within the federal system, Congress in 1946 enacted 28 U.S.C. section 1404(a),[40]

This discriminatory approach, however, eventually was applied *against* foreign plaintiffs, a use not originally intended. *Compare* Farmanfarmaian v. Gulf Oil Corp., 437 F. Supp. 910, 923 (S.D.N.Y. 1977) (foreign plaintiff's right to sue is of "lesser magnitude") *with* Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978) (questioning the proposition).

35. Hoffman v. Goberman, 420 F.2d 423, 428 (3d Cir. 1970). The Fifth Circuit originally applied this "manifest injustice" standard. *See* Burt v. Isthmus Dev. Co., 218 F.2d 353, 357 (5th Cir. 1955).

36. Pain v. United Tech. Corp., 637 F.2d 775, 797 (D.C. Cir. 1980).

37. *Compare* Aloca S.S. Co. v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1981) (en banc) (later withdrawn) (citizenship and residency are not substantial factors) *with* Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972) (balance of factors favoring dismissal must be even stronger when plaintiff is American citizen and alternative forum is foreign). For a discussion which convincingly rejects favoring a plaintiff solely on the basis of citizenship or residency, see Note, *Forum Non Conveniens and American Plaintiffs in the Federal Courts*, 47 U. CHI. L. REV. 373 (1980).

38. 314 U.S. 155 (1941).

39. *Id.* at 156.

40. "For the convenience of parties and witnesses, in the interest of justice, a

which provided the courts with discretionary power to transfer actions to more appropriate forums within the federal system. While not a codification of common law *forum non conveniens* doctrine,[41] section 1404(a) was an adaptation of the doctrine designed as a "federal housekeeping measure."[42] In *Van Dusen v. Barrack*[43] the Court noted that a transfer under section 1404(a) might result in a change in law which might in effect deny the plaintiff a remedy. To avoid this result the Court ruled that after a section 1404(a) transfer a case would remain controlled by the choice of law rule of the state from which the case was transferred.[44] The Court's purpose was to prevent forum shopping by defendants who otherwise would use section 1404(a) as a means to obtain more favorable law, a use the Court felt was in contradiction with the purpose of the statute.[45] The *Van Dusen* Court also pointed out that the transfer decision should be based on the convenience which would result under the law which ultimately governed the case, not necessarily on the substantive law of any particular forum.[46] *Van Dusen* prevented a potential harm to the plaintiff resulting from a change of forum under section 1404(a), but after *Gilbert* the problem remained with regard to a common law *forum non conveniens* dismissal.[47] The Second Circuit had held that in considering a *forum non conveniens* motion the

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district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1976).

41. H.R. REP. No. 308, 80th Cong., 1st Sess. 132 (1947) (revisers note).

42. Van Dusen v. Barrack, 376 U.S. 612, 636 (1964).

43. *Id.*

44. *Id.* at 639. Under *Van Dusen,* the applicable law is determined by the choice of law rules applied by the state of the chosen forum's situs. The law which is applied by the choice of law rule of the transferring forum, therefore, may or may not be the substantive law of that forum.

45. *Id.*

46. *Id.* at 643.

47. *Canada Malting Co. v. Paterson S.Ss., Ltd.,* 285 U.S. 413 (1932). *Canada Malting* held that a change in law would not bar dismissal, *id.* at 419, but after *Gilbert* and *Van Dusen* this holding was in doubt. *Canada Malting* involved two foreign litigants, a situation distinguishable from a situation involving a foreign plaintiff and a United States defendant. In the instant case, however, the Supreme Court chose to ignore this distinction. Piper Aircraft Co. v. Reyno, 55 U.S.L.W. 4055, 4058 (U.S. Dec. 8, 1981). The Court cited cases upholding *Canada Malting,* making no distinction between those involving only foreign litigants and the one involving a United States litigant. *Piper Aircraft Co.,* 50 U.S.L.W. at 4059. *But see infra* note 68 and accompanying text.

courts should not consider the effect of a change of law;[48] but the Third Circuit Court of Appeals, analogizing the common law *forum non conveniens* doctrine to the section 1404(a) ruling in *Van Dusen,* stated in dicta in *DeMateos v. Texaco, Inc.*[49] that if the plaintiff would be subject to less favorable law upon dismissal, it would not grant a *forum non conveniens* motion.[50] The instant case provided the Third Circuit the opportunity to apply this rule and extend the plaintiff the same protection that he would receive under 28 U.S.C. section 1404(a) as interpreted by *Van Dusen,* but the question remained whether the Supreme Court would be willing to apply the *Van Dusen* rule to *forum non conveniens* motions outside the scope of section 1404(a) and the federal system.

III. INSTANT OPINION

In the instant case the United States Supreme Court rejected the Third Circuit's *forum non conveniens* rule, which automatically disallowed dismissal if the plaintiff would be subject to less favorable law;[51] the Court stated that a change in law resulting from a dismissal is not a substantial factor in the *Gilbert* analysis.[52] The Court gave five reasons for rejecting the Third Circuit's position that *forum non conveniens* motions should be denied if the plaintiff would be subject to less favorable law. First, the Court cited *Canada Malting* and maintained that *Gilbert* did not affect this earlier ruling.[53] Second, the Court found that if the rule were adopted the *forum non conveniens* doctrine would lose its flexibility to the point of uselessness, because the plaintiff always would choose the forum with the most favorable law, and the rule would then preclude dismissal in virtually every case.[54] A third reason given for rejection of the rule was the difficulty the court would have in comparing the "rights, remedies, and procedures" of the two forums in deciding if the plaintiff would be sub-

48. Pain v. United Tech. Corp., 637 F.2d 775, 794-95 (2d Cir. 1980).
49. 562 F.2d 895, 899 (3d Cir. 1977).
50. *Reyno,* 630 F.2d at 164.
51. *Piper Aircraft Co.,* 50 U.S.L.W. at 4058. Justices White, Stevens, and Brennan agreed with the majority's rejection of the Third Circuit's rule, but declined to rule on other issues. *Id.* at 4062.
52. *Id.* at 4058-59.
53. *Id.*
54. *Id.* at 4059.

ject to less favorable law.[55] According to the Court, the rule also would make the federal forum even more popular to foreign plaintiffs, further burdening the courts.[56] Finally, the Court held that the Third Circuit's reliance on *Van Dusen v. Barrack*'s interpretation of 28 U.S.C. section 1404(a) was misplaced because *Van Dusen* "is simply inapplicable" to dismissal under the *forum non conveniens* doctrine.[57] The Court also found reversible error in the appellate court's rejection of the district court's analysis of other *Gilbert* factors. The Court stated: "[T]he District Court's distinction between 'resident or citizen' plaintiffs and foreign plaintiffs is fully justified."[58] Finding that the "central" purpose of *forum non conveniens* is convenience, the Court held that the foreign plaintiff is inherently in an inconvenient forum and therefore entitled to less deference.[59] While suggesting that the district court may have overstated the case, the Court agreed that it was reasonable for the district court to hold that the Scottish forum would create fewer evidentiary problems.[60] The Court rejected the appellate court's requirement that the defendant prove by affidavit that procurement of witnesses would be more difficult in the plaintiff's chosen forum[61] and found that the appellate court had given insufficient weight to the defendant's claimed inability to implead a third party defendant in the plaintiff's chosen forum.[62] The Court declined to decide whose choice of law analysis was correct, but stated that if the district court were right in its determination that both Scottish and Pennsylvania substantive law would have to be applied in the Pennsylvania forum, this was further grounds for dismissal.[63] Even if Scottish law did not apply to

55. *Id.* at 4060.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 4060-61.
60. *Id.* at 4061.
61. *Id.*
62. *Id.*
63. *Id.* at 4062. The district court found that Piper would be subject to California's choice of law rule while Hartzell would be subject to Pennsylvania's choice of law rule. Furthermore, the court interpreted California's choice of law to mean that the local law of Pennsylvania would govern Piper on plaintiff's strict liability cause of action. Hartzell, on the other hand, would be subject to the local law of Scotland. *Reyno*, 479 F. Supp. at 734-37. The appellate court disagreed with this conflict of law analysis. Although the appellate court believed that California's choice of law rule governed Piper and Pennsylvania's

Hartzell, the Court found that the public interest factors favored dismissal because Scotland had an interest in the dispute while the United States interest was "incremental."[64]

IV. COMMENT

The applications of the *forum non conveniens* doctrine by the three courts involved in the instant case reveal the inconsistency which has resulted in the courts' attempts to apply *Gilbert* and its progeny. Unfortunately, the Supreme Court's opinion here instructs the courts to ignore a factor affecting justice — a change of law — and weigh factors which may or may not affect justice or convenience — residency and citizenship. The result is a further separation of the principles underlying the *forum non conveniens* doctrine from the rules which govern its application. The Supreme Court's holding that a change in the applicable law which is unfavorable to the plaintiff should not automatically preclude dismissal upon a *forum non conveniens* motion is consistent with the underlying principles of the *forum non conveniens* doctrine. Recognizing that allowing the plaintiff to choose a forum whose law is very favorable and whose locale is significantly deterimental to the defendants would not always serve the interests of justice, the Court wisely rejected the absolute rule created by the Third Circuit.[65] As the Court was aware, the rule would in effect render the *forum non conveniens* doctrine useless.[66] The Court's failure, however, to give more weight to a change in law as a factor in determining dismissal is not so easily justified. The Court's reliance on *Canada Malting*[67] is unsatisfying because that case was decided before *Gilbert* and *Van Dusen* and involved two foreign litigants.[68] Nor are the comparison of laws or the application

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choice of law rule governed Hartzell, the court found that both defendants would be subject to the local law of Pennsylvania. *Reyno*, 630 F.2d at 164-71.

64. *Piper Aircraft Co.*, 50 U.S.L.W. at 4062. *But see infra* note 68 and accompanying text.

65. If a plaintiff were denied law without which he had no case, however, it is difficult to imagine a degree of inconvenience which would justify dismissal. *See infra* note 79 and accompanying text.

66. *Piper Aircraft Co.*, 50 U.S.L.W. at 4059.

67. *See supra* text accompanying note 53.

68. There are at least two reasons for distinguishing between a case involving only foreign litigants from a case involving a United States defendant, and using this distinction to deny a *forum non conveniens* motion if dismissal will result when a United States defendant is involved. First, the United States defendant

of foreign law problems sufficient reasons for dismissal.[69] Scottish law appears to be very similar to United States tort law: the application of foreign law should favor dismissal only if the law is so complex that injustice might result if the court attempts application. As the Court recognized in *Van Dusen*[70] and the instant case,[71] analysis of the laws of both forums is necessary to decide upon convenience factors and the appropriateness of the alternative forum. The Court seems to be asking the lower courts to look at the law in the alternative forum without examining it closely. This is an undesirable instruction because the choice of law often will be outcome determinative, and the courts will be tempted to clothe their rulings with statements about the appropriate factors while actually basing their decisions on the effect of a change of law. The Court also mentions the public interest factor of easing

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enjoys the protection of United States law, and therefore, should be subject to the limitations that this law places on it. Second, the United States has an interest in insuring that its citizens and residents are accountable as reflected by United States law. This enhances the value of the products and services offered in export by these citizens and residents and also indicates that the United States does not promote or allow the "dumping" of inferior or dangerous products in other countries by its own citizens. *See, e.g.*, Hodson v. A.H. Robins Co., 528 F. Supp. 809 (E.D. Va. 1981) (Dalken Shield IUD litigation). Such occurrences are reason to discourage dumping. Another reason is the protectionist measures that may be taken as a result of such occurrences. *See* Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts*, 69 GEO. L.J. 1257, 1277 (1981) (referring to the European Economic Community's plan to adopt a strict standard of products liability).

A California federal district court stated:

> [T]he state of manufacturers has a most significant interest in applying its measure of damages to a product distributed throughout the world for the sake of uniformity of decisions . . . to insure the integrity of its products . . . and also to insure that anyone coming within the ambit of strict products liability shall know that its liability for a defect shall be uniform . . . . This is demonstrated by Title 14, Code of Federal Regs., Part 25, which has 365 sections concerning the requirements in the construction of an airplane before it can be certified as "airworthy" and allowed to be sold.

In re Paris Air Crash, 399 F. Supp. 732, 745-46 (C.D. Cal. 1975); *see also* Brownie v. McDonnell Douglas Corp., 504 F. Supp. 514, 517 (N.D. Cal. 1980). *Contra* Pain v. United Tech. Corp., 637 F.2d 775, 793 (D.C. Cir. 1980) (quoting Dahl v. United Tech. Corp., 632 F.2d 1027, 1032 (3d Cir. 1980)).

69. *See generally* Williams v. Green Bay, 326 U.S. 549 (1945); *supra* note 24.

70. 376 U.S. 612; *see supra* text accompanying note 46.

71. *Piper Aircraft Co.*, 50 U.S.L.W. at 4058.

congestion in the lower courts,[72] but sanctioning dismissal which in effect denies the plaintiff recovery possibly due him under United States legal principles[73] for the purpose of easing the courts' burden subordinates justice to convenience and contradicts the underlying principles of *forum non conveniens* as stated by the Supreme Court.[74] This holding will encourage reverse forum shopping by the defendant, promoting the misuse of the doctrine.[75] That this is a violation of the principles behind the doctrine was made clear in *Van Dusen,* and it is strange that the Court in the instant case cryptically declares *Van Dusen* inapplicable[76] when section 1404(a) and the common law *forum non conveniens* doctrine are based on the same underlying rationale.

The real issue presented in the instant case is whether the foreign plaintiff, a purchaser of goods or services from a United States corporation, should be extended the protection of United States law. Without directly addressing the issue,[77] the Court, by not giving sufficient weight to the change of law factor, has answered that he should not. This conclusion is reinforced by the Court's holding that a foreign plaintiff's choice of forum is entitled to less deference than that of the "citizen or resident."[78] As the Second, Third, and District of Columbia Circuits had realized, citizenship and residency are only partial indicators of convenience, and therefore, should not become characterizations that dramatically alter the analysis without consideration of other factors.[79] Although it may be generally assumed that the federal

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72. *Id.*

73. Plaintiff's recovery apparently depended upon the court's recognition of strict liability principles not recognized by the Scottish legal system. *Reyno,* 630 F.2d at 167.

74. *See supra* text accompanying note 39.

75. *See* Note, *Forum Non Conveniens and Foreign Plaintiffs in the Federal Courts,* 69 GEO. L.J. 1257, 1258 (1981).

76. *Piper Aircraft Co.,* 50 U.S.L.W. at 4060.

77. *See* Harrison v. Wyeth Laboratories, 510 F. Supp. 1 (E.D. Pa. 1981), in which the district court directly addressed the issue and rejected the idea that foreign plaintiff consumers should be protected by United States law. *Id.* at 4-5. The *Harrison* court claimed that Pennsylvania had no interest in the litigation and that the faulty nature of the product (a contraceptive drug) was the concern of the consumer's country, not the United States. *Id.* The court added, however, that if the country were greatly dissimilar to the United States then the situation might differ. *Id. But see supra* note 68 and accompanying text.

78. *Piper Aircraft Co.,* 50 U.S.L.W. at 4061.

79. *See* Pain v. United Tech. Corp., 637 F.2d 775 (D.C. Cir. 1980); Alcoa S.S.

court system was created and is maintained for United States citizens, the legislative history preceding the creation of those courts and the United States commitment by treaty and declaration to the doctrine of equal access is evidence that the federal courts have a broader purpose.[80]

The Court's decision that "residents or citizens" are to be favored under the *Gilbert* analysis is troublesome in another respect: instructing the lower courts to favor these two groups without regard to the underlying principles of justice or convenience gives the courts little guidance and further complicates the already unwieldy *Gilbert* analysis. When factors in the analysis have little relation to the principles underlying them, their application becomes somewhat mystical.[81] The Court in the instant case stated that the foreign plaintiff's choice of forum is entitled to "less deference." An examination of the facts suggests that the foreign plaintiff may now be granted no presumption favoring his choice of forum. The Court gave little weight to the fact that the

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Co., v. M/V Nordic Regent, 636 F.2d 860 (2d Cir. 1980) (en banc) (later withdrawn); Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980), *rev'd* 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981); Note, *Forum Non Conveniens and American Plaintiffs in Federal Courts*, 47 U. CHI. L. REV. 373 (1980). When suit is brought at the residence of either party, some degree of convenience results. *See* Schertenlieb v. Traum, 589 F.2d 1156, 1164 (2d Cir. 1978) (bringing suit in the forum of the *defendant's* residence "weighs heavily" in the plaintiff's favor and against dismissal). Residency, however, is only one of the factors affecting convenience, and as such it should not be allowed to overshadow other factors affecting convenience. Moreover, courts should remember that justice is the primary goal of the *forum non conveniens* doctrine, not convenience. In Panama Processes v. Cities Servs. Corp., 650 F.2d 408 (2d Cir. 1981), the court granted a *forum non conveniens* motion even though the plaintiff brought the action in the defendant's home forum and even though dismissal resulted in plaintiff's being relegated to a forum in which discovery was unavailable. Judge Maletz charged in his dissent:

> It is almost a perversion of the *forum non conveniens* doctrine to remit a plaintiff in the name of expediency, to a forum in which, realistically, it will be unable to bring suit when the defendant would not genuinely be prejudiced by having to defend at home in the plaintiff's chosen forum.

Id. at 420.

80. James Madison stated: "We well know sir, that foreigners cannot get justice done them in these (state) courts and this has prevented many wealthy gentlemen from trading or residing among us." 3 ELLIOT'S DEBATES 583 (1888). *See also The Federalist* No. 80 (A. Hamilton); *see also supra* note 68.

81. For example, how much favor should a court give to a United States citizen, residing in Germany, when suing a United States corporation in a California federal district court?

bulk of the plaintiff's evidence was in the United States, while the defendant's evidence, most of which was not relevant except in the context of the impleader, was in Scotland.[82] Suggesting that defendants traditionally overstate the problem of procuring witnesses, the lower courts had been requiring specific affidavits proving actual difficulty in witness procurement.[83] Inexplicably, the Court in the instant case rejected this requirement.[84] The Court also gave great weight to the defendant's inability to implead a third party,[85] despite the fact that the defendants ability to recover in an independent action appeared likely, while the plaintiff's likelihood of recovery upon dismissal appeared non-existent. The Court downplayed the United States interest in the litigation, while speaking of the Scottish interest.[86] However, it is arguable that Scotland has little interest in seeing its citizens denied recovery.[87] The United States, on the other hand, has a very real interest in applying its laws to United States corporations.[88] Finally, the appellate court made note of the fact that the defendant originally had the case transferred to Pennsylvania, and then claimed the forum was inconvenient;[89] the Supreme Court took no notice of this "trifling" with the judicial system,, despite

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82. *Piper Aircraft Co.*, 50 U.S.L.W. at 4061.

83. *See Reyno*, 630 F.2d at 161 n.35.

84. *Piper Aircraft Co.*, 50 U.S.L.W. at 4061.

85. *Id.* at 4062. Conceivably, the defendants could be liable on strict liability principles and be forced to prove negligence against the third party defendant air carrier to obtain indemnity. *Reyno*, 630 F.2d at 162. The appellate court said this was burdensome but not unfair and not grounds for dismissal. *Id.* The instant Court, however, said that its burdensomeness was grounds for dismissal. *Piper Aircraft Co.*, 50 U.S.L.W. at 4062.

86. *Piper Aircraft Co.*, 50 U.S.L.W. at 4062.

87. Evaluating the interest of the country of foreign plaintiffs, a California district court stated: "As for those countries or states where recovery would be less than by applying California law, surely they have no interest in limiting recovery of their resident plaintiffs as against a nonresident of their country or state which is a defendant here." *In re* Paris Air Crash, 399 F. Supp. 732, 845 (C.D. Cal. 1975); *see also* Browne v. McDonnell Douglas Corp., 504 F. Supp. 514, 517 (N.D. Cal. 1980).

88. *See supra* note 68 and accompanying text.

89. *Reyno*, 630 F.2d at 159. The appellate court apparently gave this consideration significant weight, citing a Fifth Circuit case in which a *forum non conveniens* motion was denied on estoppel grounds and the defendant was charged with "trifling" with the judicial process. *Id.* at 155-56; *see supra* note 8 and accompanying text.

the fact that the Fifth Circuit Court of Appeals refused to hear a *forum non conveniens* motion for this reason.[90]

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90. *Piper Aircraft Co.*, 50 U.S.L.W. 4055; *see supra* note 8 and accompanying text. In fact the Court misstated the facts in the instant opinion, claiming that the action was originally brought in Pennsylvania. *Id.* at 4057.

ALIENS—EXCLUSION OF ALIENS FROM STATE PROBATION OFFICER POSITION IS NOT UNCONSTITUTIONAL BECAUSE IT FALLS WITHIN THE POLITICAL FUNCTION EXCEPTION

I. FACTS AND HOLDING

Plaintiffs,[1] lawfully admitted resident aliens, brought suit in the United States District Court for the Central District of California against the County of Los Angeles and several county officials claiming that a California law[2] requiring that all "peace officers" be United States citizens violated the equal protection clause of the fourteenth amendment.[3] Plaintiffs' applications for positions as Deputy Probation Officers, who are classified as "peace officers" under state law,[4] were denied. Noting that the statute bars aliens from menial jobs as well as important policy-making positions,[5] plaintiffs first claimed that the law was uncon-

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1. Jose Chavez-Salido was a Spanish-speaking citizen of Mexico and a legal resident of Los Angeles County with a Bachelor of Arts degree from California State College at Long Beach. Pedro Luis Ybarra, a Spanish citizen who has resided in the United States since 1972, received a Bachelor of Arts degree in Spain, a Master of Arts degree from the University of California at Los Angeles, and was a Masters Degree candidate at California State University at Northridge at the time the suit was filed. Riccardo Bohorquez, a Columbian citizen who has resided in the United States since 1961, received a Bachelor of Arts degree from the University of California at Los Angeles. Cabell v. Chavez-Salido, 102 S. Ct. 735, 744 & n.1 (1982).

2. That law provides in relevant part: "Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards: (a) Be a citizen of the United States; . . . . " CAL. GOV'T CODE § 1031(a) (West 1980).

3. The pertinent part of this clause provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

4. The statute in force at the time plaintiffs sought employment provided: "(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer." CAL. PENAL CODE § 830.5 (West Supp. 1981).

5. In relevant part that statute provided:

(a) The following persons are peace officers while engaged in the performance of the duties of their respective employments:

(1) Security officers of the California State Police Division.

(2) The Sergeant at Arms of each house of the Legislature.

(3) Bailiffs of the Supreme Court and of the courts of appeal.

stitutionally overbroad.[6] Second, they argued that the statute was unconstitutional as applied to them.[7] They recognized that jobs requiring the formulation or execution of broad public policy fall within the "political function exception"[8] to the constitutional requirement that classifications based on alienage are subject to strict scrutiny.[9] Plaintiffs claimed, however, that probation officers do not exercise these political functions and thus strict scrutiny was mandated.[10] A three-judge panel accepted plaintiffs'

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(4) Guards and messengers of the Treasurer's office.

(5) The Director of the Department of Harbors and Watercraft and employees of such department designated by him pursuant to Section 71.2 of the Harbors and Navigation Code.

(6) Members of a state college police department appointed pursuant to Section 24651 of the Education Code.

(7) The hospital administrator of a state hospital under the jurisdiction of the Department of Mental Hygiene and police officers designated by him pursuant to Section 4312 of the Welfare and Institutions Code.

(8) Any railroad or steamboat company policeman commissioned by the Governor pursuant to Section 8226 of the Public Utilities Code.

(9) Persons designated by a cemetery authority pursuant to Section 8325 of the Health and Safety Code.

(10) Harbor policemen regularly employed and paid as such by a county, city, or district, and the port warden and special officers of the Harbor Department of the City of Los Angeles. However, notwithstanding the provisions of Section 171c, 171d, or 12027, such persons are not peace officers for purposes of such sections except when designated by local ordinance or, if the local agency is not authorized to act by ordinance, by resolution, either individually or by class, as peace officers for such purposes.

(11) Special officers of the Department of Airports of the City of Los Angeles commissioned by the city police commission.

(12) The chief of toll services, captains, lieutenants, and sergeants employed by the Department of Public Works on vehicular crossings pursuant to Chapter 13 (commencing with Section 23250) of Division 11 of the Vehicle Code.

(13) Persons employed as members of a security patrol of a school district pursuant to Section 15832 of the Education Code.

Id. § 830.4 (West 1969) (amended 1980).

6. *Cabell*, 102 S. Ct. at 736-37.

7. *Id.* at 742.

8. *Id.; see infra* text accompanying notes 30 & 31.

9. *See infra* note 22 and accompanying text.

10. Brief for Appellee at 4-6, 13-30, Cabell v. Chavez-Salido, 102 S. Ct. 735, 742 (1982). Plaintiffs also claimed that the statute impermissably infringed upon their right to travel and unconstitutionally interfered with Congress' plenary power to regulate aliens. The district court, however, never addressed these issues. Cabell, 102 S. Ct. at 737.

arguments and declared the statute unconstitutional.[11] The United States Supreme Court vacated and remanded for reconsideration[12] in light of its recent decision in *Foley v. Connelie*.[13] The district court again ruled that the statute violated the fourteenth amendment.[14] On appeal to the United States Supreme Court, *reversed and remanded. Held*: (1) Because the law achieved a "substantial fit" with a legitimate governmental goal, it was neither unconstitutionally overinclusive nor underinclusive and; (2) Because probation officers exercise the sovereign's power of coercive force, they fall within the political function exception to the doctrine requiring that all laws that discriminate against a suspect class such as aliens pass the strict scrutiny test. *Cabell v. Chavez-Salido*, 102 S. Ct. 735 (1982).

II. LEGAL BACKGROUND

For nearly one hundred years aliens have been considered "persons" protected by the equal protection clause[15] of the fourteenth amendment.[16] Discriminatory state legislation generally falls into one of three categories: restrictions on an alien's ability to work, discrimination in the distribution of state benefits, and citizenship requirements for state employees. Historically, the Supreme Court has struck down state laws prohibiting aliens from pursuing legal occupations.[17] In the second category of cases, aliens

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11. Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977).

12. County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978).

13. 435 U.S. 291 (1978); *see infra* text accompanying notes 44-49.

14. Chavez-Salido v. Cabell, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982).

15. *See supra* note 3.

16. Yick Wo v. Hopkins, 118 U.S. 356 (1886). The fourteenth amendment grants aliens considerably more protection against state discrimination than the fifth amendment provides against discrimination by the federal government. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). Fifth amendment protection is narrower in scope because of the federal government's plenary power over immigration and naturalization granted by the Constitution. *Id.* at 100; *see* U.S. CONST. art. I, § 8. *See generally* Hines v. Davidowitz, 312 U.S. 52 (1941) (federal government has plenary power over immigration and naturalization).

17. *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (California law which effectively prohibited Chinese from operating laundries); Truax v. Raich, 239 U.S. 33 (1915) (Arizona statute requiring that 80% of every work force be composed of United States citizens); Examining Bd. of Engrs. v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rican law limiting eligibility for engineer's license to United States citizens); *see also infra* note 19.

have challenged states' power to deny them state benefits solely because they are not United States citizens.[18] In the past, the Court has held that this form of discrimination did not violate the fourteenth amendment because states had a "special public interest" in regulating the use of natural resources,[19] and in controlling the distribution of public revenues.[20] The Court subsequently struck down the special public interest doctrine in *Graham v. Richardson*,[21] ruling that because aliens are a suspect class, classifications based on alienage are subject to strict judicial scrutiny.[22] In *Graham* the Court invalidated an Arizona state statute that denied welfare benefits to resident aliens,[23] holding that a state cannot discriminate against aliens in the distribution of state benefits without showing that the discrimination is necessary to further a compelling governmental interest.[24] Two years later, the Court in *Sugarman v. Dougall*[25] carved a narrow exception to the *Graham* analysis, holding that in limited circumstances states could bar aliens from state employment.[26] The statute under review in *Sugarman* excluded aliens from competitive

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18. *E.g.*, Graham v. Richardson, 402 U.S. 365 (1971) (welfare benefits); *see also infra* notes 19, 23, 24, and accompanying text.

19. At that time the Court held that the natural resources of a state were owned by its citizens. *E.g.*, McCready v. Virginia, 94 U.S. 391 (1877). In accordance with this principle, the Court upheld state statutes prohibiting aliens from owning land, Terrace v. Thompson, 263 U.S. 197 (1927), or exploiting natural resources such as oyster beds, *McCready*, 44 U.S. 391 (1877), and wild game, Patsone v. Pennsylvania, 232 U.S. 138 (1914).

20. *See* Hein v. McCall, 239 U.S. 175 (1915) (upholding a statute prohibiting aliens from being state employees).

21. 403 U.S. 365 (1971). Since the special public interest doctrine was based on the distinction between a "right" and a "privilege," discredited in Sherbert v. Verner, 374 U.S. 398 (1963), the Court stated that the doctrine would no longer provide justification for official state discrimination against aliens. *Graham*, 403 U.S. at 374.

22. *Graham*, 403 U.S. at 376. According to the *Graham* Court, discrimination against aliens falls within the "suspect class" branch of equal protection analysis. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

23. *Graham*, 403 U.S. at 367.

24. *Id.* at 376. The Court reaffirmed its ruling in *Graham* when it declared unconstitutional a New York law limiting eligibility for state higher education loans and grants to United States citizens. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977). *See generally* Plyler v. Doe, 102 S. Ct. 2382 (1982) (holding that a state cannot deny public education to illegal aliens).

25. 413 U.S. 634 (1973).

26. *Id.*

state civil service jobs.[27] The Court held that a state's ability to define its "political community" by setting qualifications for its voters and state office holders was an important governmental interest.[28] The court explained, in dicta, that the usually fatal strict scrutiny standard of review[29] was inappropriate because the state's power to define its political community extends

> not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.[30]

A rational relationship exists between a classification excluding aliens from jobs involving these political functions and the important state interest in defining the political community.[31] Therefore, the first part of the *Sugarman* equal protection analysis requires a court to inquire whether the position from which aliens are excluded demands a review of "broad public policy."[32] If so, the rational basis test is applicable.[33] The second prong of the *Sugarman* analysis inquires whether the statute is overinclusive

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27. The New York Civil Service Law established four job classifications from which the state selected its employees. *Id.* at 639-40. High executive officials, municipal officials, and judicial department employees who comprised the "exempt" class were not required to take an examination. All other positions for which an examination would be impractical made up the "noncompetitive" class. The "labor" class included all unskilled laborer positions. Finally, all positions for which an examination was practical were classified as "competitive." This group ranged from menial jobs to important policy-making positions. The citizenship requirement applied only to the competitive class. *Id.*

28. *Id.* at 643.

29. *See supra* text accompanying notes 22-24 (discussion regarding the application of the strict scrutiny standard of review).

30. *Sugarman*, 413 U.S. at 647. The Fifth Circuit recently adopted the *Sugarman* dicta, holding that states constitutionally could exclude aliens from voting in an election for the governing board of a local community action agency. Cervantes v. Guerra, 651 F.2d 974 (5th Cir. 1981).

31. *Sugarman*, 413 U.S. at 647.

32. *Id.*

33. *Id.* at 647-48. Though the rational basis test is stated in varying terms, as a general proposition, laws will be upheld if they "bear a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory . . . . " Nebbia v. New York, 291 U.S. 502, 537 (1934). The state need not prove the relationship by empirical evidence. It is sufficient to show that a law "might" be a logical way to correct a problem. Williamson v. Lee Optical, 348 U.S. 483, 488 (1955).

and arbitrary, encompassing offices which do not belong within the political function exception.[34] Reasoning that the New York citizenship requirement would prevent an alien from serving as a Class B sanitation worker, but permit him to hold a powerful state executive office,[35] the Court held that the statute was not "precisely drawn" and therefore did not satisfy this second prong of the analysis.[36] To reach its conclusion the Court examined a number of statutes which, together with the state constitution, formed a broad framework of laws limiting the number of state jobs for which aliens would be eligible.[37] The Court examined both the competitive civil service section of the law[38] and other relevant statutes,[39] focusing on whether these laws created irrational and arbitrary distinctions between aliens and citizens. In *In re Griffiths*,[40] the Court struck down a Connecticut court rule which excluded noncitizens from admission to the bar.[41] The Court rejected the state's argument that under state law attorneys fell within the political function exception because they were court officers.[42] Subsequently, however, the Court consistently has expanded the scope of the political function exception. For example, in *Perkins v. Smith*, Maryland was permitted to exclude aliens from state grand juries.[43] In the next Court opinion to address the scope of the political function exception, *Foley v. Connelie*,[44] the Court upheld a New York statute prohibiting aliens from serving as state troopers. Acknowledging that overly broad

34. *Id.* at 643.

35. *See supra* note 27.

36. *Sugarman*, 413 U.S. at 643.

37. *Id.*

38. *See supra* note 27 and accompanying text.

39. These relevant laws included all laws limiting the number of jobs for which aliens would be eligible. *Sugarman*, 413 U.S. at 643.

40. 413 U.S. 717 (1973). *In re Griffiths* was announced on the same day as *Sugarman*.

41. *Id.*

42. *Id.* at 724. The Court concluded that a license to practice law does not empower an attorney to be a "formulator of government policy." *Id.* at 729. Relying upon *Sugarman* and *In re Griffiths*, two federal courts subsequently struck down citizenship requirements for notaries public as unconstitutional. *See* Cheng v. Illinois, 438 F. Supp. 917 (N.D. Ill. 1977); Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975).

43. 426 U.S. 913 (1976), *aff'g mem.*, 370 F. Supp. 134 (D. Md. 1974).

44. 435 U.S. 291 (1978).

statutes would be unconstitutional,[45] the opinion instead focused on the first prong of the *Sugarman* analysis. The Chief Justice stated that the Court would "examine each position in question to determine whether it involves discretionary decisionmaking . . . . "[46] In addition to those employees making "broad public policy"[47] decisions, the Court expanded the political function exception to include decision-makers whose actions substantially affect members of the political community.[48] The Court held that state troopers fall within the political function exception because their discretionary power to arrest "affects members of the public significantly and often in the most sensitive areas of daily life."[49] The Court in *Ambach v. Norwick*[50] again expanded the reach of the political function exception when it upheld the constitutionality of a statute restricting eligibility for public school teaching positions to citizens or aliens who had applied for citizenship. The Court concluded that teaching is a state function sufficiently "bound up with the operation of the State as a governmental entity" to justify exclusion of aliens.[51] The *Ambach* Court inquired whether teaching is a "governmental function"[52] but did not follow its earlier analysis in *Foley*,[53] which examined whether the particular position required the officer to formulate broad public policy or to exercise discretion.[54] *Ambach* and *Foley* signalled a

45. *Id.* at 296 n.5.

46. *Id.* at 296.

47. *Id.* (quoting *Sugarman*, 413 U.S. at 647).

48. *Id.*

49. *Id.* at 297. *Foley* expands the political function exception to encompass state offices that the *Sugarman* analysis would not have included. Since there are more state officers who exercise discretion than people who formulate broad public policy, *Foley* brings more state positions within the political function exception. Cabell v. Chavez-Salido, 102 S. Ct. 735, 749 (1982) (Blackmun, J., dissenting).

50. 441 U.S. 68 (1979).

51. *Id.* at 73-74.

52. *Ambach*, 441 U.S. at 75 & 76 n.6. The *Ambach* rationale appears to be inconsistent with the *Sugarman* analysis because *Ambach* focuses on whether the worker performs a significant government function. The *Sugarman* Court ruled that a sanitation worker's job does not fall within the political function exception. *See Sugarman*, at 647; *see also supra* text accompanying note 35. *Ambach*, however, held that the same sanitation worker performs a "significant government function," and thus falls within the political function exception. *Ambach*, 441 U.S. at 76 n.6.

53. *See supra* notes 44-49 and accompanying text.

54. *See supra* text accompanying note 46.

retreat from the relatively broad protections accorded aliens in *Sugarman* and *Graham*. By presenting the *Sugarman* test through a governmental function analysis, *Ambach* restated the *Sugarman* test in new language that creates a strong foundation for a discussion of state sovereignty in aliens' rights cases. In this sense, *Ambach* echoed renewed concerns about preserving the important attributes of state sovereignty expressed in *National League of Cities v. Usery*.[55] The instant case presented the Court with the opportunity to return to the broad protections of *Sugarman* and *Graham* or continue to develop the shift away from protection of the individual rights of aliens[56] toward the protection of the powers reserved to the states under the tenth amendment.

III. INSTANT OPINION

The instant Court argued that the *Sugarman* test, as modified in *Ambach* and *Foley*, clearly supported the constitutionality of the California statute.[57] Initially, the Court rejected plaintiffs' claim that the statute was both overinclusive and underinclusive.[58] Unlike the *Sugarman* analysis,[59] the Court limited its ex-

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55. 426 U.S. 833 (1976). In *Usery* the Court held that enforcement of the maximum hours and minimum wage provisions of the Fair Labor Standards Act against state or city employees would impair "traditional governmental functions." *Id.* at 845. Consequently, the Act intrudes into areas of governmental power which traditionally have been reserved to the states under the tenth amendment, and therefore it exceeds the power granted to Congress by the Constitution's Commerce Clause. *Id.* The Supreme Court subsequently listed three requirements for holding that a law violates the tenth amendment under the *Usery* analysis:

> First, there must be a showing that the challenged statute regulates the "States as States". . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 101 S. Ct. 2352, 2366 (1981); *see also* United Transp. Union v. Long Island R.R., 50 U.S.L.W. 4315, 4317 (U.S. Mar. 23, 1982).

56. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971); *see also supra* notes 21-24 and accompanying text.

57. Cabel v. Chavez-Salido, 102 S. Ct. 735, 740 (1982).

58. *Id.* at 740-41.

59. *Id.* at 742 n.12. The Court commented that although "some language" in *Sugarman* supported the argument that the entire statutory scheme should be

amination to the provision excluding aliens from serving as peace officers[60] and did not consider the broad exclusionary scheme created by the statutes. The Court conceded that the cemetery sexton and bedding inspector positions, from which aliens also were excluded by the statute, had only a tenuous connection to the police powers.[61] Nevertheless, the Court ruled that because these jobs were sufficiently few in number, the statutes passed constitutional muster.[62] Requiring only a "substantial fit" between the classification and the state's interest in defining its political community,[63] the Court held that the statute was sufficiently tailored to withstand constitutional challenge.[64] The Court then rejected plaintiffs' argument that the statute was unconstitutional as applied to them.[65] Recognizing a shift away from the *Sugarman* analysis, the Court stated it "will not look to the breadth of policy judgments required of a particular employee."[66] Instead, the Court would "look to the importance of the function . . . to the concept of democratic self-government."[67] Rather than scrutinize the responsibilities and policy judgments required of the particular office, the Court instead asked whether that job plays an important part in representative government.[68] The Court indicated that the degree of scrutiny exercised would not be stringent: "Definition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government, subject to limited judicial review."[69] Concluding that probation officers exercise substantial power and responsibility over probationers, the Court held that

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examined, the *Ambach* and *Foley* decisions did not adopt that position. *Id.* at 741 (citing *Sugarman*, 413 U.S. at 640).

60. *See supra* note 4.

61. *Cabell*, 102 S. Ct. at 742.

62. *Id.*

63. The Court said that exclusion of aliens from "basic governmental processes" is a "necessary" part of "self government." *Id.* at 740.

64. *Id.* at 741. The Court also rejected plaintiff's argument that the statute was underinclusive. Unlike the statute in *Sugarman*, which affected a broad range of state jobs, the California law applied only to a narrow category. The Court reasoned, therefore, that it was insignificant that peace officers had to be citizens but teachers did not. *Id.* at 742 n.12.

65. *Id.* at 742.

66. *Id.* at 740 n.7.

67. *Id.*

68. *Id.* at 743.

69. *Id.* at 742.

California constitutionally could exclude aliens from that office.[70]

Justice Blackmun, dissenting,[71] argued for a more stringent standard, claiming that state discrimination is only constitutional when it is a necessary means of promoting a substantial state interest.[72] He noted that the "peace officer" category contained over seventy unrelated occupations.[73] The dissent asserted that the statute was invalid because various officers had been added to the peace officer category for reasons unrelated to a legitimate state purpose.[74] Justice Blackmun found that the Court's "substantial fit" standard[75] was inconsistent with *Sugarman*;[76] therefore the California statute was unconstitutionally overinclusive.[77] The dissent also argued that the statute was unconstitutional as applied to plaintiffs.[78] Because the state failed to articulate any reason for declaring that aliens as a class are unqualified to serve as probation officers,[79] Blackmun concluded that the statute stemmed "solely from state parochialism and hostility toward foreigners" and therefore was unconstitutional.[80]

IV. COMMENT

The *Cabell* decision further erodes the protection accorded aliens by the *Sugarman v. Dougall*[81] equal protection analysis.[82]

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70. *Id.* at 743.

71. Justices Brennan, Marshall, and Stevens joined Blackmun's dissent.

72. *Cabell*, 102 S. Ct. at 745.

73. *Id.*

74. The dissent noted that some groups of workers lobbied to achieve "peace officer" status in order to be eligible for better insurance benefits. *Id.* at 744-45 & 746 n.5.

75. *See supra* note 64 and accompanying text.

76. 413 U.S. 634 (1973).

77. *Cabell*, 102 S. Ct. at 747.

78. *Id.* at 749.

79. *Id.* at 749-51. The dissenters noted that, unlike probation officers, other state employees possessing coercive power are not subject to a citizenship requirement. The dissenters also dismissed the Court's justification that peace officers exercise discretion, commenting that nearly every state employee exercises some form of discretion. The dissent disagreed with the Court's contention that probation officers are a symbolic extension of the judiciary and are, therefore, properly within the political function exception. Justice Blackmun stated that this argument was inconsistent with the Court's ruling in *In re Griffiths*. *Id.* at 751; *see also supra* notes 40-42 and accompanying text.

80. *Cabell*, 102 S. Ct. at 751.

81. 413 U.S. 634 (1973).

Together with *Ambach v. Norwick*[83] and *Foley v. Connelie*,[84] *Cabell* manifests the Supreme Court's growing unwillingness to protect the rights of aliens by intruding into state hiring decisions. The ruling significantly reduces the level of scrutiny used in the *Sugarman* analysis. By refusing to analyze the entire statutory scheme designed to exclude aliens from state employment,[85] the Court, in effect, eliminates underinclusiveness as a ground for overturning a statute.[86] An overinclusiveness argument will be equally unsuccessful because the instant decision requires only a substantial fit between the statute and the substantial state interest it purportedly promotes.[87] This standard is less stringent than *Sugarman*'s requirement of a "carefully tailored" statute.[88] Although the extent of deference which the Court is now willing to accord is unclear, haphazardly drafted statutes similar to the one under review in this case, which include state police officers and bedding inspectors in the same category,[89] apparently pass constitutional muster. The *Cabell* opinion nearly eliminates the scrutiny in the second branch of the *Sugarman* analysis. States need no longer show that an employee formulates or executes broad public policy.[90] The Court reduces the level of scrutiny by bringing employees performing all "important sovereign functions" within the ambit of the political function exception.[91] Furthermore, the Court seems willing to allow the states to define those "important sovereign functions" without significant judicial inter-

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82. It is significant that Justice Blackmun wrote the Court's opinion in *Sugarman* but authored the dissenting opinion in *Cabell*.

83. 441 U.S. 68 (1979).

84. 435 U.S. 291 (1978).

85. *See supra* notes 37 & 60 and accompanying text.

86. The Court indicated that it would narrowly define the categories delineating the discrimination. The *Sugarman* court examined the entire civil service statute, *see supra* note 27, as well as the state constitution to determine whether the exclusion of aliens followed a rational and consistent pattern. The instant Court, however, refused to look beyond the narrow peace officer category. *Cabell*, 102 S. Ct. at 742 n.12. By so doing, it defeated the argument that because teachers are not included within the political function exception, the statute is underinclusive. *See id.* at 747 & n.6.

87. *See supra* text accompanying note 64.

88. *See supra* text accompanying notes 36 & 37.

89. *Cabell*, 102 S. Ct. at 745.

90. *See supra* text accompanying notes 30 & 66.

91. *See supra* text accompanying notes 67 & 68.

vention.[92] Thus, *Cabell* expands the political function exception to include types of jobs never contemplated by the *Sugarman* Court. Because *Cabell* focuses on the nature of the office and not on the importance of the functions performed, a state may be able to exclude aliens from serving as notaries public, thereby overruling several prior cases.[93] Furthermore, given the states' new discretion to fix the limits of the political function exception by defining "important sovereign functions,"[94] it is conceivable that the *Griffiths*[95] decision, in which the states were prohibited from denying aliens access to the bar,[96] could be reversed.

Of special significance is the role that the Court's analysis will play in the current movement to use notions of federalism to support the political function exception. The seeds of federalism analysis are found in the broad language of *Sugarman*.[97] Creation of the political function exception in that case permitted the state to choose its own state officers without federal court interference.[98] Language in *Ambach* indicates that employees who perform "significant government functions" may properly be classified within the political function exception.[99] This parallels the language of *National League of Cities v. Usery*,[100] in which the Court struck down the application of the Fair Labor Standards Act to state workers because the resulting impairment of "traditional governmental functions"[101] exceeded the powers granted to Congress by the commerce clause.[102] By permitting a state to define its governmental functions,[103] the shift toward federalism notions in the political function analysis creates a potential limitation on the federal government's traditionally broad plenary power to regulate immigration and naturalization.[104] For example, if the Congress decided that it could make unlawful statutes ex-

92. *See supra* text accompanying note 69.
93. *See supra* note 42.
94. *See supra* text accompanying notes 68 & 92.
95. 413 U.S. 717 (1973).
96. *Id.*
97. *See supra* text accompanying note 30.
98. *See supra* text accompanying note 31.
99. Ambach v. Norwick, 441 U.S. 68, 76 n.6 (1979).
100. 426 U.S. 833 (1976).
101. *Id.* at 852.
102. U.S. CONST. art. I, § 8.
103. *See supra* text accompanying note 68.
104. *E.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); *see also supra* note 16.

cluding aliens from teaching positions to promote the assimilation of recent immigrants,[105] a Court decision based on the federalism notions evident in the instant case might invalidate that law as beyond the scope of congressional power. A ruling of this significance approaches the precedential importance of the *Usery* decision.

In *Cabell* the Supreme Court again failed to set forth the rationale for the political function exception.[106] The Court avoids explanation of its reasoning precisely because it shifts the focus of its analysis away from individual rights and towards federalism concerns. Furthermore, since the states may define their political functions without significant judicial review,[107] courts will uphold applications of the political function exception without having to explain why the exception applies to a particular state office. If the Court intends to reduce aliens' protection against official discrimination, as it has done through the expansion of the political function exception, it should justify this shift. Until the Court provides an explanation, critics rightfully may view the political function exception as a product of "state parochialism and hostility toward foreigners"[108] instead of a rational by-product of the Court's federalism concerns.

Christopher Qualley King

105. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979) (sustaining citizenship requirements for teachers).

106. Justice Stevens, in his dissent in *Foley*, criticized the Court for failing to express the rationale for the political function exception. 435 U.S. at 311-12.

107. *See supra* text accompanying note 68.

108. Cabell v. Chavez-Salido, 102 S. Ct. 735, 751 (1982) (Blackmun, J., dissenting).

SOVEREIGN IMMUNITY — SHIP OWNING CORPORATION'S CONTACTS WITH UNITED STATES ARE SUFFICIENT TO EXTEND JURISDICTION OVER ACTION FOR DAMAGES INVOLVING MARITIME COLLISION: FINANCIAL EFFECT ON A UNITED STATES CORPORATION IS SUFFICIENTLY DIRECT EFFECT ON UNITED STATES FOR PURPOSES OF THE COMMERCIAL ACTIVITIES EXCEPTION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT.

I. FACTS AND HOLDING

Compagnie Nationale Algerienne de Navigation (CNAN), a company wholly owned by the Republic of Algeria,[1] moved for summary judgment on its claim of sovereign immunity in a suit arising from a collision in the Mediterranean Sea between the *M/V Ibn Batouta,* a cargo ship owned by CNAN, and the *S.S. Yellowstone,* owned by Rio Grande Transport, Inc. (Rio Grande), a New York corporation.[2] CNAN's shipping activities include regular commercial service to United States ports.[3] The *Ibn Batouta* served routes between Northern European ports and Algeria and was enroute from Algeria to West Germany on the day of the collision.[4] The collision allegedly resulted in the sinking of the *Yellowstone,* death, injury and property loss to her crew-members, total loss of her cargo, and damage to the *Ibn Batouta.*[5] Rio

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1. Matter of Rio Grande Transp., Inc., 516 F. Supp. 1155, 1158 (S.D.N.Y. 1981).

2. *Id.* at 1157-58.

3. *Id.* at 1161. CNAN stipulated that it is doing business in the United States. *Id.* n.5.

4. *Id.* at 1161.

5. Damages alleged are:

Loss of *Yellowstone*	$2,500,000
Cargo loss	$2,900,000
Death and personal injury	$9,129,700
Damage to *Ibn Batouta*	$ 750,000

Plaintiff Rio Grande Transport, Inc.'s Memorandum of Law in Opposition to CNAN's Renewed Motion for Summary Declaratory Judgment at 5, Matter of Rio Grande Transp., Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981).

The *Yellowstone* was carrying a cargo of grain owned by an agency of the Republic of Tunisia (Tunisia). The grain was purchased under an agricultural commodities agreement entered into between the United States and the Government of Tunisia. Memorandum of Law on Behalf of the Embassy of Tunisia at 2, Matter of Rio Grande Transp., Inc., 516 F. Supp. 1155 (S.D.N.Y. 1981).

Grande filed a complaint[6] for exoneration from or limitation of liability for the collision. CNAN then sought a declaratory judgment, claiming immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).[7] Rio Grande's answer[8] to CNAN's claim of immunity alleged that CNAN's actions fit within the first and third clauses of the commercial activity exception to the FSIA.[9] On renewed motion for summary judgment on CNAN's claim of sovereign immunity[10] in the United States District Court for the Southern District of New York, *denied. Held:* (1) United States jurisdiction extends to a cause of action arising from actions by a foreign state's wholly owned commercial entity conducted in the

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6. *Rio Grande,* 516 F. Supp. at 1157. Rio Grande's complaint was filed on June 13, 1978, pursuant to Rule F of the Supplemental Federal Rules of Procedure for Certain Admiralty and Maritime Claims (hereinafter cited as Rule F). Claims filed against Rio Grande included a cargo claim by Tunisia, three wrongful death claims brought on behalf of *Yellowstone* crewmembers, fourteen personal injury claims by *Yellowstone* crewmembers, one property loss claim by a *Yellowstone* crewmember, and a conditional claim by CNAN for damage to the *Ibn Batouta. Id.* at n.1.

7. 28 U.S.C. §§ 1330, 1602-1611 (1976). CNAN also filed a conditional claim and answer which was to be considered if, and only if, CNAN's defense of sovereign immunity were denied. On December 12, 1978, CNAN filed a complaint for exoneration from or limitation of liability pursuant to Rule F. *Rio Grande,* 516 F. Supp. at 1157-58.

8. Rio Grande also filed a counterclaim against CNAN for damages. *Rio Grande,* 516 F. Supp. at 1157.

9. *Id.* at 1157, 1161-62. The answer also alleged the following: CNAN's activities fit within the international agreement caveat of the FSIA; the claim involved immovable property in the United States; CNAN had waived immunity; and CNAN's counterclaim against Rio Grande barred immunity. *Id.* at 1158-61. CNAN's motion for summary judgment on its claim of sovereign immunity was denied because there were genuine issues of material fact. The court referred CNAN's claim of immunity to a magistrate for discovery. *Id.* at 1158.

10. On August 5, 1981, Judge Pierce certified the question of sovereign immunity for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b) (1976). The court stated that there were substantial grounds for a difference of opinion with respect to the controlling jurisdictional law. Matter of Rio Grande Transp., Inc., No. 78 Civ. 5972, slip op. at 2 (S.D.N.Y. Aug. 6, 1981). Noting that some Second Circuit Court opinions provided guidance on the jurisdictional issues, the court stated that it had "ruled on several questions not explicitly addressed by those opinions." *Id.* The court further noted that the position taken in the instant opinion with respect to the interpretation of the first clause of 28 U.S.C. § 1605(a)(2) is opposite to the position taken by the Third Circuit Court of Appeals. Although the court stated that an immediate appeal would "materially advance the ultimate termination of this litigation," *Id.*, the Second Circuit denied the request for interlocutory appeal.

regular course of commercial conduct and having substantial contact with the United States; (2) direct financial effect on a United States corporation invokes the direct effects clause of the commercial activity exception of the FSIA and defeats a claim of sovereign immunity. *Matter of Rio Grande Transport, Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981).

II. LEGAL BACKGROUND

The doctrine of sovereign immunity is based upon the assumption that allowing one government to exercise jurisdiction over another government violates the principle of sovereign equality among nations.[11] Under the absolute theory of sovereign immunity, a sovereign is immune from jurisdiction of another country, regardless of the nature or function of the act in question. Under the restrictive theory, governmental or public acts (jure imperii) are granted immunity but no such deference is accorded private acts (jure gestionis).[12] The 1940s marked both the culmination of a judicial trend to defer to the executive's judgment on sovereign immunity issues[13] and the United States first assertion of juris-

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11. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 61 (1964).

12. *Id.* at 345. The Supreme Court recognized the absolute principle of sovereign immunity in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 287 (1812). *The Schooner Exchange* was a libel action by a United States citizen against Napoleon in which the libelants claimed that the seized ship was their private property. The principle question was "whether a public national vessel of France, coming into the United States to repair, is liable to be arrested upon the claim of title by an individual." *Id.* at 289. The Court upheld the claim of sovereign immunity stating:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

Id. at 294.

13. *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943). In *Ex parte Peru*, a vessel owned by the Republic of Peru was the subject of an in rem proceeding. Since the State Department formally recognized the claim of immunity, the Court upheld the claim of immunity stat-

diction over a vessel owned by a foreign sovereign.[14] The United States embraced the restrictive theory of sovereign immunity in 1952.[15] On October 21, 1976, Congress passed the FSIA, which codified the restrictive theory of sovereign immunity.[16] The Act

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ing "[t]he certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations." *Ex parte Peru*, 318 U.S. at 589. The Court stated that it is an "overriding principle of substantive law" that the courts may not exercise jurisdiction so "as to embarrass the executive arm of the Government in conducting foreign relations." *Id.* at 588.

The *Hoffman* Court held that "[i]n the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist." *Hoffman*, 324 U.S. at 34-35. This determination must be made "in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations." *Id.* As a "guiding principle," the courts should determine their jurisdiction in a manner which will not embarrass the political branch. *Id.* at 35.

14. *Hoffman*, 324 U.S. at 30. In *Hoffman* the Court disallowed the Republic of Mexico's claim of immunity finding it controlling that the United States Government had not recognized the extension of immunity where a foreign state owned the vessel, but the vessel was not in the possession or service of the foreign sovereign. *Id.* at 38.

15. The United States embraced the restrictive theory of sovereign immunity in a letter sent by Jack B. Tate, Acting Legal Adviser for the Secretary of State, to Attorney General Philip B. Perlman. Letter from Jack B. Tate, Acting Legal Adviser for the Secretary of State, to Attorney General Philip B. Perlman, May 10, 1952, *reprinted in* 26 DEP'T ST. BULL. 984 (1952). After discussing the policies and practice of other countries, Tate noted that since the United States policy was to not claim immunity for its publicly owned and operated merchant vessels it would be inconsistent for the United States to grant immunity to foreign sovereigns in the same circumstances. These factors, along with governments' increasing involvement in commercial activity, led to the adoption of the restrictive theory of sovereign immunity. *Id.* at 984-85.

16. 28 U.S.C. §§ 1330, 1602-1611 (1976); *see* H.R. REP. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as Rep. No. 1487]. The Senate and the House filed identical reports. All references will be to the House Reports which may also be considered the view of the Senate. *See* S. REP. No. 1310, 94th Cong., 2d Sess. (1976). Congressional purposes for passing the FSIA were: to insure the uniformity of application of the restrictive principle of sovereign immunity in all United States courts; to "provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state;" and to "conform the execution immunity rules more closely to the jurisdiction immunity rules." REP. No. 1487 at 8, *reprinted* at 6605-08. The purpose of the bill, as stated in § 1602 of the FSIA, is to "serve the interests of justice" and "protect the rights of both foreign states

grants immunity to foreign states[17] whose actions fall within the ambit of the Act.[18] The FSIA does not extend sovereign immunity to the purely commercial activities of a foreign state.[19] Although

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and litigants in United States courts." 28 U.S.C. § 1602 (1976).

17. The definitions of "foreign state" and an "agency or instrumentality of a foreign state" are found in 28 U.S.C. § 1603. Section 1603(a) provides: "A 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Section 1603(b) provides:

> (b) An "agency or instrumentality of a foreign state" means any entity —
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

18. The basic grant of immunity is found in 28 U.S.C. § 1604 (1976), which provides as follows:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

The exceptions to the grant of sovereign immunity are found in 28 U.S.C. §§ 1605 and 1607 (1976). *See* REP. No. 1487, *supra* note 16, at 17-23, *reprinted* at 6615-22.

19. 28 U.S.C. § 1605(a)(2) (1976). The commercial activity exception consists of three clauses. Section 1605(a)(2) provides:

> (a) A foreign state shall not be immune from the jurisdiction of 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 act causes a direct effect in the United States . . . .

Id.

Other provisions of the FSIA state that sovereign immunity does not apply in cases in which: "the foreign state has waived its immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1) (1976); "rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4) (1976), or; the action is "brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State . . . with respect to any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C. § 1607 (1976).

the FSIA defines "commercial activity" and "commercial activity carried on in the United States by a foreign state,"[20] Congress expected the courts to have a "great deal of latitude in determining what is a 'commercial activity' " and whether the "particular commercial activity has been performed in whole or in part in the United States."[21]

The commercial activity exception contains three separate clauses. The first clause withholds immunity when the "action is based upon a commercial activity carried on in the United States by the foreign state."[22] In *Harris v. VAO Intourist, Moscow*,[23] the court, interpreting the first clause, distinguished "commercial activity carried on in the United States" in the FSIA from the concept of "doing business"[24] and held that the action must be based upon "the *specific* commercial activity carried on in the United States."[25] In *East Europe Domestic International Sales Corp. v.*

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20. 28 U.S.C. § 1603(d), (e) (1976). These sections provide:

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

Id.

21. REP. No. 1487, *supra* note 16, at 16-17, *reprinted* at 6615-16.

22. 28 U.S.C. § 1605(a)(2)(cl. 1) (1976); *see supra* note 19.

23. 481 F. Supp. 1056 (E.D.N.Y. 1979). In *Harris* an American citizen brought a wrongful death action against two state-owned Russian tourist services and the Soviet Union to recover damages for the death of an American tourist in a fire at a Moscow hotel. The court held that although the Soviet Union's integrated tourism activities would provide a basis for due process jurisdiction, the relationship between the operation of the hotel and the activity in the United States was so attenuated that the action did not fit within the first clause. *Id.*

24. *Id.* at 1059. The *Harris* court found that Congress had "authorized the exercise of less than the complete personal jurisdiction that might constitutionally be afforded American courts under traditional concepts of fairness and due process" and "due to the policy and language of the Immunities Act, the Act's bases of jurisdiction are less comprehensive than those found in the usual jurisdictional statutes of the states and the District of Columbia." *Id.*

25. *Id.* at 1061 (emphasis added). The court stated that the first clause of the exception is similar to the "transaction" of business clauses which many states have in their long-arm statutes and, therefore, the first clause deals with the transaction of individual business deals in the United States. *Id.*

Terra,[26] the court held that neither plaintiff's domicile nor its acts, which constituted "doing business" in the United States, were sufficient contacts to satisfy due process requirements.[27] In *Sugarman v. Aeromexico, Inc.*,[28] the Third Circuit Court of Appeals interpreted the first clause to require a nexus between the "grievance" and the United States commercial activity.[29]

The third clause of the commercial activity exception withholds immunity when liability arises out of commercial conduct abroad which has "direct effects in the United States."[30] Interpreting this

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26. 467 F. Supp. 383 (S.D.N.Y.), *aff'd without opinion*, 610 F.2d 806 (2d Cir. 1979). In *East Europe Domestic Int'l Sales Corp.*, the plaintiff, a New York corporation, alleged that a Rumanian trading company wrongfully interfered with the corporation's trade and business.

27. *Id.* at 390. In interpreting the third clause of the commercial activity exception, the court further stated that it must examine the "specific transaction at issue." *Id.* at 388.

28. 626 F.2d 270 (3d Cir. 1980). In *Sugarman*, a United States citizen who had bought a roundtrip ticket to Mexico, brought an action for damages against an airline owned by the Republic of Mexico. The Third Circuit held that although the act did not take place in the United States, it resulted from a regular course of commercial conduct carried on in the United States and, therefore, immunity was unavailable. *Id.*

29. *Id.* at 272-73.

The second clause of the commercial activity exception applies when the action is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." 28 U.S.C. § 1605(a)(2)(cl. 2) (1976).

30. 28 U.S.C. § 1605(a)(2)(cl. 3) (1976). *See supra* note 19. According to the House Report, jurisdiction under the third clause must be consistent with the principles the RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAWS OF THE UNITED STATES § 18 (1965) (hereinafter cited as RESTATEMENT). REP. No. 1487, *supra* note 16 at 19, *reprinted* at 6618. Section 18 of the RESTATEMENT, *supra* reads:

> Jurisdiction to Prescribe With Respect to Effect Within Territory.
>
> A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
>
> (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
>
> (b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

exception, the *Upton v. Empire of Iran*[31] court held that when the only direct effect of the commercial activity was direct injury to the plaintiff, the direct effects were not extended to the United States within the meaning of the FSIA and therefore immunity was not withheld.[32] Agreeing with *Upton*, the *Harris* court stated that a "direct effect"[33] must be "both substantial and the direct and foreseeable result of conduct outside the jurisdiction."[34] The *Harris* court noted that if Congress had wanted to provide broader protection in United States courts, it would have omitted the word "direct" from the FSIA.[35] In an application of the "direct effects" exception, the *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*[36] court stated that because a corporation can suffer only a financial loss, the relevant question is "whether the corporation suffered a 'direct' financial loss."[37]

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31. 459 F. Supp. 264 (S.D.N.Y. 1978). The *Upton* court prevented the United States plaintiff from bringing suit against Iran because the injuries sustained by the plaintiff when the roof of an Iranian owned airport collapsed were not direct effects extending into the United States. *Id.* at 266.

32. *Id.* The court further stated that "[t]he common sense interpretation of a 'direct effect' is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Id.* The language in the plaintiffs' claim showed the interruption between the act and the effect in the United States; the claim stated that "[d]efendants' acts caused the deaths and injuries to Americans *which caused* direct effects in the United States." *Id.*

33. *Harris*, 481 F. Supp. at 1062. The court stated that "[i]ndirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2)." *Id.*

In *Sugarman* the Third Circuit Court of Appeals agreed with *Upton* and *Harris* stating that "causing injury to American citizens abroad is simply not a direct enough effect." *Sugarman*, 626 F.2d at 272.

34. *Harris*, 481 F. Supp. at 1063. The *Harris* court derived this requirement from § 18(b), the more restrictive provision, of the Restatement. Section 18(b) applies, according to the *Harris* court, because of the use of the adjective "direct" in the "direct effect" clause. *Harris*, 481 F. Supp. at 1063; see *supra* note 30 for the text of § 18 of the RESTATEMENT.

35. *Harris*, 481 F. Supp. at 1065. The *Harris* court further noted that Congress could use the "doing business" concept of the New York court's long-arm jurisdiction if it wanted to provide broader protection in United States courts. *Id.*

36. 647 F.2d 300 (2d Cir. 1981).

37. *Id.* at 312. *Texas Trading* discounted the House Report's reference to § 18 of the RESTATEMENT, *supra* note 30, since, according to the court, § 18 applies in determining whether conduct overseas is governed by United States substantive law, not the "proper extraterritorial jurisdictional reach" of United States courts. *Texas Trading*, 647 F.2d at 311. The court also disregarded the House

Texas Trading involved the failure to pay a United States corporation in the United States, and the court noted that "[w]hether an American corporation injured overseas incurs a direct effect in the United States remains an open question."[38] This question and the scope of the phrase "regular course of commercial conduct" are addressed for the first time in the instant decision.

III. Instant Opinion

Having determined that CNAN was a foreign state within the meaning of the FSIA,[39] the instant court stated that CNAN's immunity under the first clause of the commercial activity exception depended on whether "commercial activity" refers to CNAN's worldwide operation or to the normal operation of the

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Report's reference to the District of Columbia's long-arm statute, noting that the long-arm statute looks to personal jurisdiction, not subject matter jurisdiction, and is concerned only with torts in its "effects" provision. *Id.*

38. *Id.* at 312 n.35.

39. *See Matter of Rio Grande Transp., Inc.*, 516 F. Supp. 1155, 1158 (S.D.N.Y. 1981). The instant court found that CNAN was the sole owner of the *Ibn Batouta* from 1978 to the present and that CNAN is a national corporation of the Republic of Algeria whose total stock is owned by and whose capital is exclusively provided by the Republic of Algeria. These findings were based on an attestation of the Algerian Minister of Transportation and an affidavit of the Algerian Charges D'Affaires to the United States, which was certified by the Deputy Chief of Protocol of the United States Department of State. The documents were uncontroverted by Rio Grande or any other claimant. *Id.*

The court also found that CNAN's filing of a conditional claim and answer did not constitute either an explicit or implied waiver of immunity. *Id.* at 1159. Noting the peculiar procedural context of the case, the court found that CNAN was required to file a conditional claim and answer within the time period specified by Rule F or lose its claim against Rio Grande should CNAN's defense of sovereign immunity be rejected. *Id.*

Because CNAN's claim was conditional and to be considered only in the event its defense of sovereign immunity was rejected, and because CNAN did not unconditionally intervene in Rio Grande's limitation proceeding, the court found that Rio Grande's counterclaim against CNAN did not bar CNAN's claim of sovereign immunity. *Id.* The court also found that CNAN's claim of sovereign immunity was not barred by the "international agreement" caveat of the general grant of sovereign immunity. *Id.* at 1160. The court stated that even if Algeria had been a party to the Convention on the High Seas, the United States objection to other signatories' reservations could not be considered part of an international agreement. *Id.* Citing the legislative history of the act, the court held that the limitation fund is not the type of immovable property which the FSIA seeks to protect, even though the fund must be maintained in the United States pending the outcome of the case. *Id.* at 1159-60.

Ibn Batouta.[40] By inserting the FSIA definitions of "commercial activity" and "commercial activity carried on in the United States by a foreign state"[41] into the first clause of the exception, the court found that the exception then read:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a regular course of commercial conduct carried on by such state and having substantial contact with the United States.[42]

Noting that "commercial activity" is broadly defined in the FSIA[43] and comparing the first clause with state long-arm statutes, the court determined that Congress intended that only the broad course of conduct need occur in, or have substantial contact with, the United States; the specific commercial transaction or act giving rise to an action need not exhibit the same contacts.[44] The instant action, according to the court, was based on CNAN's worldwide shipping activities. Therefore, the first clause of the commercial activity exception defeated CNAN's claim of immunity and conferred subject matter jurisdiction over the claims against CNAN.[45] Recognizing that the interpretation of the first clause addressed a novel question, and, therefore, might be overturned by a reviewing court, the instant court also analyzed the third clause of the commercial activity exception to determine whether it defeated CNAN's claim of immunity.[46] Noting that *Texas Trading* left open the question "whether an American corporation injured overseas incurs a direct effect in the United States,"[47] the court found that Rio Grande suffered a direct financial effect from the collision[48] because it was unable to earn income after the sinking of the *Yellowstone.*[49] The court concluded that because Congress enacted the FSIA to ensure uni-

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40. *Id.* at 1162; see *supra* note 19 for the text of 28 U.S.C. § 1605(a)(2) (1976).
41. See *supra* note 20 for the text of 28 U.S.C. § 1603(d), (e) (1976).
42. *Rio Grande,* 516 F. Supp. at 1162.
43. *Id.* at 1162; see *supra* note 20 for the text of 28 U.S.C. § 1603(d) (1976).
44. *Rio Grande,* 516 F. Supp. at 1162.
45. *Id.*
46. *Id.*
47. *Id.* at 1163; *see supra* text accompanying note 38.
48. *Rio Grande,* 516 F. Supp. at 1163.
49. *Id.*

form application of sovereign immunity, not to constrict jurisdiction,[50] the *Yellowstone - Ibn Batouta* collision satisfied the direct effect requirement of the FSIA, thus defeating CNAN's claim of immunity.[51]

IV. COMMENT

The instant case is the first in which a court addressed the question of the scope to be afforded the phrase "regular course of commercial conduct" in the first clause of the commercial activity exception of the FSIA.[52] By liberally interpreting the phrase to include cases in which the cause of action does not have a connection with the United States, the court narrows the number of FSIA cases in which a foreign sovereign will be granted immunity.[53] The case fails to address the issue whether the operation of the *Ibn Batouta* was an integral part of CNAN's shipping activities or simply a tangential element, separate from CNAN's United States shipping activities. The court did not address the *Harris* holding in which the specific event involved (a fire in a Moscow hotel) was so attenuated from the activity in the United States (providing service to tourists) that immunity remained.[54] If the operation of the *Ibn Batouta* was independent of CNAN's United States operations, a literal interpretation of the court's language would lead to the conclusion that the action was not based on "a regular course of commercial conduct . . . having substantial contact with the United States,"[55] and, therefore, did not come within the scope of the first clause. Since the instant court did not require a nexus between the grievance and CNAN's commercial activity in the United States, the court's interpreta-

50. *Id.; see Texas Trading,* 647 F.2d at 313.

51. *Rio Grande,* 516 F. Supp. at 1163. The court also held that the loss of the Tunisian cargo had a direct effect in the United States because the "loss of the grain impeded American foreign policy means and objectives." *Id.* at 1163 n.9. Turning to the other claims against CNAN, the court held that because the underlying policies of the FSIA favor "the adjudication in the American courts of *all* claims against a foreign state arising from the same transaction or occurrence," and the court has jurisdiction over Rio Grande's claim and Tunisia's claim, CNAN's claims are no longer conditional and, therefore, the court has jurisdiction over all claims against CNAN. *Id.* at 1164.

52. *Id.* at 1162.

53. *See id.*

54. *See supra* notes 23-25 and accompanying text.

55. *Rio Grande,* 516 F. Supp. at 1162; *see supra* text accompanying note 42.

tion is contrary to the holding in *Sugarman*.[56] By concentrating on the broad intent of Congress in passing the FSIA, the codification of the restrictive theory of sovereign immunity, the instant court and the *Texas Trading* court overlooked specific comments in the House Report that are contrary to the courts' interpretations of the first clause of the commercial activity exception. The shipping activities of the *Ibn Batouta* do not meet the Congressional requirement that the commercial transaction upon which jurisdiction is based be "performed in whole or in part in the United States."[57] The House Report indicates that Congress intended a greater connection with the United States than is present in the instant case.[58] The use of the word "transaction" also indicates that Congress did not anticipate that jurisdiction in United States courts would be based upon a broad interpretation of the phrase "regular course of commercial conduct."[59] The instant court's analysis is similar to the "doing business" concept found in state long-arm statutes.[60] The analysis, therefore, is contrary to the *Harris* court's interpretation that the FSIA requires the court action be based upon the *"specific* commercial activity carried on in the United States"[61] and that "[s]ystematic and continuous contacts with the United States" are not grounds for an exception to the FSIA.[62] The instant court was able to avoid a

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56. *See supra* text accompanying note 29.

57. REP. No. 1487, *supra* note 16, at 17, *reprinted* at 6615-16, in pertinent part:

> This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (*cf.* § 1605)(a)(5), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States — for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by United States citizenship or United States residence of the plaintiff.

Id.

58. *Id.*

59. *Id.*

60. *See supra* notes 24-27 and accompanying text.

61. *Harris*, 481 F. Supp. at 1061.

62. *Id.* at 1060.

Harris-type interpretation because of its novel juxtaposition of FSIA provisions.[63]

In its alternative holding that the third clause would defeat CNAN's claim of immunity even if the first clause did not apply, the court relied primarily upon *Texas Trading* and, therefore, did not engage in an analysis of whether jurisdiction was in conformity with the Restatement (Second) of Foreign Relations Law of the United States section 18.[64] In the instant case there is an attenuated chain of causation: CNAN's acts *caused* the collision in the Mediterranean *which caused* direct effects in the United States. Under the *Upton* analysis, this attenuated chain of causation is not sufficient to constitute a direct effect.[65] The instant decision joined *Texas Trading* in expanding the protection given to corporate plaintiffs in United States courts. The court stated without explanation that the sinking of the *Yellowstone* "undoubtedly" caused a direct effect on Rio Grande. Furthermore, it utilized neither the *Upton* nor the *Harris* definitions of "direct effect in the United States," thus failing to reconcile its holding with previous case law.[66]

Dee Ann Weldon-Wilson

63. *See supra* text accompanying notes 41-42.
64. *See supra* note 37.
65. *See supra* note 32.
66. *See supra* notes 31-35 and accompanying text.

SOVEREIGN IMMUNITY—FAILURE TO ASSERT AFFIRMATIVE DEFENSE OF SOVEREIGN IMMUNITY IN A MOTION TO DISMISS DOES NOT WAIVE IMMUNITY BY IMPLICATION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

I. FACTS AND HOLDING

Plaintiff,[1] a Bermudian corporation, brought suit against a Chilean state-owned corporation[2] to recover damages for spare parts, related equipment, and loans allegedly delivered to defendant's predecessor[3] by plaintiff's predecessor[4] prior to 1978. All of the transactions at issue and their underlying negotiations occurred in Chile and in the Spanish language.[5] Only three contacts created the alleged nexus between the parties to this cause of action and the State of New York: plaintiff alleged that United States concerns owned a substantial percentage of its securities;[6] defendant was authorized to do business in New York;[7] and defendant had appointed the New York Secretary of State to receive service of process.[8] Plaintiff averred that defendant assumed the contractual liabilities of its predecessor corporation through nationalization.[9] Further, plaintiff asserted that the Foreign Sovereign Immunities Act of 1976[10] (FSIA) conferred jurisdiction over this cause of action. Despite defendant's judicial "foreign state"[11] status, plaintiff contended that defendant impliedly

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1. Canadian Overseas Ores Limited (CANOVER).
2. Compania del Acero del Pacifico S.A. (CAP).
3. In November 1971 CAP nationalized and acquired Compania Minera Santa Fe (Santa Fe). Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico, S.A., No. 52584, slip op. at 1, 22 (S.D.N.Y. Jan. 7, 1982). Santa Fe was a Chilean-owned mining company with its principal place of business in Santiago, Chile. *Id.* at 7.
4. *Id.* at 1. Plaintiff's predecessor, Canadian Foreign Minerals, Limited (CAFOMI), was a Canadian corporation with its principal place of business in Hamilton, Bermuda. *Id.* at 7.
5. *Id.* at 7.
6. *Id.* at 9.
7. *Id.*
8. *Id.* at 19.
9. *Id.* at 1.
10. 28 U.S.C. §§ 1330, 1602-1611 (1976).
11. In prior litigation, CAP was determined to be a "foreign state" for purposes of the Foreign Sovereign Immunities Act of 1976 (FSIA or Act).

waived any sovereign immunity defense by its failure to assert this affirmative defense in its motion to dismiss[12] and by its appointment of the New York Secretary of State to receive service of process. Even absent a waiver, plaintiff contended that jurisdiction existed because section 1605(a)(3) of the FSIA allegedly governed defendant's expropriation of its predecessor corporation.[13] Plaintiff also asserted that because subject matter jurisdiction cannot be waived,[14] the waiver of sovereign immunity may be relevant to *in personam* (but not subject matter) jurisdiction. Defendant moved to dismiss the complaint on the following grounds:[15] any action concerning the sale of spare parts and related equipment was barred by the four year statute of limitations governing sales contracts under the New York Uniform

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Herzberger v. Compania de Acero del Pacifico, S.A., 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978) (available Mar. 7, 1982, on LEXIS, Genfed library, Dist file). A "foreign state" is defined by 28 U.S.C. § 1603 as follows:

> (a) A "foreign state," except as used in section 1608 of this title [28 U.S.C. § 1608], includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title [28 U.S.C. § 1332(c), (d)], nor created under the laws of any third country.

The *Herzberger* court determined that CAP, 95.5% of which was owned by the state, was an agency of the Chilean Government. CAP, therefore, qualified as a "foreign state" under 28 U.S.C. § 1603(b). *Herzberger*, 78 Civ. 2451.

12. *Canadian Overseas Ores, Ltd.*, slip op. at 16, 19. Plaintiff argued that defendant waived its immunity "by implication" under 28 U.S.C. § 1605(a)(1) (1976) because it failed to assert immunity in its motion to dismiss the complaint under FED. R. CIV. P. 12(b)(1)-(6). *Canadian Overseas Ores, Ltd.*, slip op. at 16; *see also infra* notes 57-58 and accompanying text.

13. *Canadian Overseas Ores, Ltd.*, slip op. at 20. Plaintiff asserted that because defendant acquired the contractual obligations of its predecessor by nationalization, the FSIA granted jurisdiction pursuant to 28 U.S.C. § 1605(a)(3). Defendant replied that the contractual right to payment asserted by plaintiff had not been "taken" as required by the FSIA. Defendant maintained that neither it nor any other party claimed ownership of the right to be paid under the contracts at issue, nor had any specific fund to which plaintiff was entitled been taken. *See infra* notes 66-72 and accompanying text.

14. *Canadian Overseas Ores, Ltd.*, slip op. at 18-19.

15. *Id.* at 1.

Commercial Code (N.Y.U.C.C.);[16] Chile was a more convenient forum than New York;[17] and the district court lacked subject mat-

16. *Id.* at 3. Defendant asserted that the foreign contract at issue was subject to the four year statute of limitations governing all sales contracts under N.Y.U.C.C. § 2-725(1). Defendant contended that the uniformity sought by the N.Y.U.C.C. would be precluded if this statute was not applied, "for then a different limitation period would govern any action on a sales contract where foreign substantive law were to be applied and the foreign jurisdicton did not happen to have a limitation period the same as New York." *Id.* at 6; *see also* Alaska Airlines, Inc. v. Lockhead Aircraft Corp., 430 F. Supp. 134, 140 (D. Alaska 1977); *infra* notes 28 & 29 and accompanying text. Plaintiff had asserted that this contractual claim failed to bear any appropriate relation to New York and was therefore not subject to the N.Y.U.C.C. pursuant to § 1-105(1) of the N.Y.U.C.C. Plaintiff contended that because New York was not the place of negotiation, performance, or the location of the subject matter of the contract, the transaction did not bear the requisite "appropriate relation" to New York and thus did not trigger the application of the N.Y.U.C.C. *Canadian Overseas Ores, Ltd.*, slip op. at 2; *see also infra* note 30 and accompanying text. Additionally, plaintiff argued that the general six year statute of limitations provided by N.Y. CIV. PRAC. LAW § 213 (McKinney 1972 & Supp. 1981-82) should apply. *See infra* notes 32-33 and accompanying text. Defendant responded that:

> [R]eliance on the UCC choice-of-law provision, § 1-105, is misplaced because resort to choice-of-law provisions is only appropriate where there is a conflict between local law and the law of another jurisdiction, *see* Restatement (Second) of Conflict of Laws, § 2, comment a (3) (1971), and here there is no such conflict because New York law applies to the question, even if in some instances New York "borrows" shorter statutes of limitation of other jurisdictions under § 202.

Canadian Overseas Ores, Ltd., slip op. at 3. Defendant asserted, therefore, that N.Y.U.C.C. § 1-105 cannot be used to create a conflict between the N.Y.U.C.C. limitations period and that of the New York Civil Practice Law Rules.

17. *Id.* at 7-13. Defendant moved to dismiss this case under the doctrine of *forum non conveniens* for the following reasons: (1) the Chilean courts provide an alternative forum where all parties are amenable to suit and where a suit presenting issues identical to those at bar is pending; (2) all transactions occurred in the Spanish language; (3) all defendant's witnesses reside in Chile and those witnesses who are not defendant's employees would not be subject to compulsory process from this court; (4) the appearance of defendant's witnesses in this court would impose an unnecessary financial burden; (5) the need for continuous translation of testimony would render the resolution of the credibility issues more difficult; (6) the voluminous defense documents are located in Chile and are prepared in accordance with Chilean accounting procedures; (7) any judgment obtained in Chile would be enforceable in New York and the procedural protections applicable in Chilean courts would ensure a fair trial; and (8) the stockholders of Santa Fe (the predecessor of defendant), who would indemnify defendant for any liability in this matter, had only agreed to the jurisdiction of the courts in Santiago, Chile; therefore, they could be impled in Santiago but

ter jurisdiction pursuant to the FSIA.[18] In the alternative, defendant requested a stay pending the result of Chilean litigation adjudicating issues identical to those at bar.[19] Upon removal to the United States District Court for the Southern District of New York, *dismissed. Held:* a foreign sales contract at issue before a New York court is subject to the four year statute of limitations provided by the N.Y.U.C.C.;[20] a foreign judiciary whose continuing independence is in question does not constitute an adequate alternative forum under the doctrine of *forum non conveniens;*[21] and a corporation qualifying as a "foreign state" under the FSIA

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not in a United States court. *Id.* at 7-8.

Plaintiff responded that the Chilean courts could not guarantee a fair trial because the ruling military junta would influence the judiciary in favor of the defendant state-owned corporation. Despite Chilean constitutional guarantees of the independence of the judiciary, the plaintiff stressed that the junta could alter constitutional powers by executive decree. Plaintiff also noted the following procedural limitations on discovery in Chilean courts: (1) There is no provision for oral deposition in Chile; (2) Chilean courts limit the number of witnesses a party may call on particular issues; and (3) the Chilean judge conducts all of the questioning of witnesses. *Id.* at 8-9.

18. *Id.* at 13-14. Defendant asserted that it is a foreign sovereign entitled to immunity under the FSIA. Plaintiff opposed the motion to dismiss on the following grounds: (1) The motion was barred under FED. R. CIV. P. 12(h) because defendants had earlier moved to dismiss or stay the action without asserting the defense of immunity; *see infra* note 64 and accompanying text; (2) defendant waived its immunity under 28 U.S.C. § 1605(a)(1) by moving to dismiss without asserting its immunity and by participating in the litigation without invoking immunity; *see infra* note 57 and accompanying text; (3) defendant consented to be sued in New York by appointing the New York Secretary of State to receive service of process; and (4) the defense of sovereign immunity was not available because expropriatory action by the Chilean government forced the contract in dispute upon plaintiff's predecessor. *Canadian Overseas Ores, Ltd.,* slip op. at 13.

Defendant replied that sovereign immunity is an affirmative defense which cannot be waived under FED. R. CIV. P. 12. *See infra* notes 55-65 and accompanying text. Defendant emphasized that it specifically reserved the defense of sovereign immunity in its petition for removal, in its opposition to a motion for remand, and in a stipulation by which it agreed to accept the amended complaint and the substitution of plaintiffs. Finally, defendant contended that the FED. R. CIV. P. distinguishes motions from pleadings, and the affirmative defense of sovereign immunity can only be waived if it is not pled in a responsive pleading. *Id.*

19. *Canadian Overseas Ores, Ltd.,* No. 52584, slip op. at *i* n.1 (S.D.N.Y. Jan. 7, 1982).

20. *Id.* at 25.

21. *Id.*

does not impliedly waive sovereign immunity by failing to assert immunity in a motion to dismiss.[22] In any event, the court held that the Second Circuit Court of Appeals' recent decision in *Verlinden B. V. v. Central Bank of Nigeria*[23] divested the court of subject matter jurisdiction over the action.[24] *Canadian Overseas Ores Limited v. Compania de Acero del Pacifico S.A.*, No. 52584, slip op. (S.D.N.Y. Jan. 7, 1982).

II. LEGAL BACKGROUND

A. *Conflicting Statutes of Limitations Governing Contracts of Sale*

A federal court with diversity jurisdiction must apply the statute of limitations applicable in a court of the forum state.[25] Section 202 of the New York Civil Practice Law and Rules (CPLR) governs the choice among conflicting statutes of limitations for a cause of action accruing outside the state.[26] Pursuant to this provision, a New York court must apply either its own statute of limitations or that of the foreign jurisdiction, whichever is the shorter.[27] Section 2-725 of the N.Y.U.C.C. provides a four year

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22. *Id.*

23. 647 F.2d 320 (2d Cir. 1981), *cert. granted*, 50 U.S.L.W. 3528 (U.S. Jan. 11, 1982) (No. 81-920). [See case digest published at page 651 of this issue—Eds.].

24. On November 14, 1980, the parties were informed that CAP's motion to dismiss or stay under the doctrine of *forum non conveniens* would be denied. Shortly thereafter, the parties were informed that defendant's motion to dismiss the complaint on the basis of the New York statute of limitations governing sales contracts would be granted. Before the court had an opportunity to confirm these decisions in writing, defendant filed its motion under the FSIA and the Second Circuit handed down *Verlinden*. The parties were informed that a written opinion on all the pending motions, including those for which an oral decision was informally given, would be forthcoming. CAP's alternative request for a stay of this action until related litigation in Chile was completed was rendered moot by disposition of the other motion. *Canadian Overseas Ores, Ltd.*, slip op. at *i* n.1.

25. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

26. N.Y. CIV. PRAC. LAW § 202 (McKinney 1972 & Supp. 1981-1982).

27. *Id.* This section reads as follows:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued; except that where the cause of action accrued in favor of a resi-

statute of limitations governing sales contracts.[28] The Official Comment to that provision expressly states that the purpose of section 2-725 is "to introduce a uniform statute of limitations for sales contracts."[29] According to the N.Y.U.C.C. choice of law provision, section 1-105(1), the application of the N.Y.U.C.C. is limited to "transactions bearing an appropriate relation to this state."[30] The Official Comment to that section states that "the mere fact that suit is brought in a state does not make it appropriate to apply the substantive law of that state."[31] When an insufficient relation exists between a sales contract and New York, one arguably might look beyond the N.Y.U.C.C. for the applicable statute of limitations, and section 213 of the CPLR[32] provides a six year statute of limitations for an action upon an express or implied contractual obligation or liability "except as provided in Article 2 of the uniform commercial code."[33] Whether a case with an insufficient relation to New York under the N.Y.U.C.C. choice of law provision would consequently be subject to the CPLR statute of limitations[34] is unclear. The Practice Commentary[35] to sec-

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dent of the state the time limited by the laws of the state shall apply. *Id.*

28. N.Y.U.C.C. § 2-725(1) (Consol. 1981) provides: "An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it." *Id.*

29. *Id.* (Official Comment).

30. *Id.* Section 1-105(1) provides:

> Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

31. *Id.* at comment 2. Comment 2 goes on to describe cases lacking an appropriate relation:

> Cases where a relation to the enacting state is not "appropriate" include, for example, those where the parties have clearly contracted on the basis of some other law, as where the law of the place of contracting and the law of the place of contemplated performance are the same and are contrary to the law under the Code.

Id.

32. N.Y. CIV. PRAC. LAW § 213 (McKinney 1972 & Supp. 1981-82).

33. *Id.*

34. *Id.*

35. The Practice Commentaries to McKinney's Consolidated Law of New York Annotated were written for the following reasons:

tion 213, however, states that "actions for breach of contract for sale are not governed by this statute. . . . [N.Y.U.C.C.] § 2-725 . . . prevails over the CPLR. . . ."[36] Prior to the instant decision, the New York courts had not addressed the issue whether CPLR section 213 or N.Y.U.C.C. section 2-725 governed a sales contract in a case in which the substantive law to be applied was not that of New York.

B. *Forum Non Conveniens*

Under the doctrine of *forum non conveniens,* a seriously inconvenient trial forum typically will not exercise jurisdiction if a more appropriate forum is available.[37] The forum in which a suit is brought, however, should never dismiss a case under the doctrine of *forum non conveniens* unless an "adequate" remedy ex-

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> The general purpose of the Commentaries is to supplement, and to some extent summarize, the other research work in these CPLR volumes. They are designed to explain changes, to clarify meaning, to warn of possible pitfalls and to offer useful practice suggestions. Often, they will address themselves to problems which are contemplated but have not yet arisen. Their thrust is to accent current and practical, rather than academic, problems.

N.Y. CIV. PRAC. LAW (McKinney 1972), Explanation at III. It is important to note that these commentaries are not those of the draftsmen.

36. N.Y. CIV. PRAC. LAW § 213 (McKinney 1972 & Supp. 1980-1981) (Practice Commentary 213:2); *see also* Voth v. Chrysler Motor Corp., 545 P.2d 371, 375 (1976).

37. RESTATEMENT (SECOND) OF CONFLICTS § 84 (1971). The rationale for this doctrine is stated as follows:

> The due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution and the Conflict of Laws rules of judicial jurisdiction establish only the outermost limits beyond which a state may not go. Within these limits, the owner of a transitory cause of action will often have a wide choice of forums in which to sue. Some of these forums may have little relation either to the parties or to the cause of action, and suit in them may increase greatly the burden to the defendant of making a defense. On occasion, a plaintiff will bring suit in such a forum in the belief that he may there secure a larger or an easier recovery or in the hope that the inconvenience and burden of making a defense will induce the defendant to enter a compromise, to contest the case less strenously, or to permit judgment to be entered against him by default. The rule has been developed that a court, even though it has jurisdiction, will not entertain the suit if it believes itself to be a seriously inconvenient forum provided that a more appropriate forum is available to the plaintiff.

Id.

ists in the alternate forum.[38] In *Gulf Oil Corp. v. Gilbert*[39] the United States Supreme Court issued the most notable *forum non conveniens* decision. The Court prefaced its discussion by stating that "*forum non conveniens* can never apply if there is absence of jurisdiction."[40] Two categories of consideration were relevant to the Court's *forum non conveniens* analysis: the private interests of the litigants and the public interests in applying the doctrine. The relevant private interests included relative ease of access to sources of proof; availability of compulsory process; cost of obtaining the attendance of willing witnesses; enforceability of a foreign judgment; and relative advantages and obstacles to a fair trial.[41] Public interest considerations included congested trial dockets; imposition of jury duty upon a community having no relation to the litigation; local interest in the controversy; and the relative advantages of litigating in a diversity court which is familiar with the applicable law as compared to a court which is required to "untangle problems in conflict of laws, and in law foreign to itself."[42] In its most recent discussion of the doctrine of *forum non conveniens,* the Supreme Court in *Piper Aircraft Co. v. Reyno*[43] held that this doctrine is designed in part to help courts avoid complex exercises in comparative law.[44] Although proving foreign law may be burdensome, the Court held that this difficulty alone will not justify the application of the *forum non conveniens* doctrine.[45] The *Piper* Court also noted that every post-*Gilbert* federal court of appeals has held that dismissal on grounds of *forum non conveniens* may be granted although the applicable law in the alternative forum is less favorable to the plaintiff's chance of recovery.[46] Nonetheless, the *Piper* Court qualified the holdings of these courts:

> We do not hold that the possibility of an unfavorable change in law

38. R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.33, at 207 (2d ed. 1980).

39. 330 U.S. 501 (1946).

40. *Id.* at 504.

41. *Id.* at 508.

42. *Id.* at 508-09.

43. Piper Aircraft Co. v. Reyno, 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981). [See recent decision published at page 583 of this issue—Eds.]

44. *Id.* at 4059.

45. Manu Int'l, S.A. v. Avon Prods., Inc., 641 F.2d 62, 67 (2d Cir. 1981) (quoting Olympic Corp. v. Societe Generale, 462 F.2d 376, 379 (2d Cir. 1972)).

46. *Piper Aircraft Co.*, 50 U.S.L.W. at 4059.

> should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight. . . .[47]

Finally, the *Piper* Court noted that there is ordinarily a strong presumption in favor of the plaintiff's choice of the forum of its residence[48] and, consequently, a foreign plaintiff's choice of a United States forum deserves less deference.[49] The instant court faced the dilemma of choosing between a potentially inadequate Chilean forum and a New York forum having minimal contacts with the cause of action.

C. *Foreign Sovereign Immunity*

Sovereign immunity is a doctrine of international law under which domestic courts refrain from the exercise of jurisdiction in deference to the sovereignty of a foreign state.[50] The Foreign Sov-

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47. *Id.* at 4060.
48. *Id.*
49. *Id.* at 4061.
50. The doctrine of sovereign immunity was first recognized in a United States court in The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). In that landmark case, Chief Justice Marshall applied the absolute doctrine of sovereign immunity in a case involving the armed ship of a foreign sovereign. During the early years of this century, Supreme Court decisions in sovereign immunity cases began to place greater emphasis on State Department practices and policies rather than on the law and practice of nations. H.R. REP. No. 1487, 94th Cong., 2d Sess. 8; *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606 [hereinafter cited as U.S. CODE CONG. & AD. NEWS]. In *Ex parte* Peru, 318 U.S. 578 (1943), the Supreme Court deferred to the opinion of the State Department because it was "required to accept and follow the executive determination" of immunity. *Id.* at 588. In Republic of Mexico v. Hoffman, 324 U.S. 30 (1943), in which the Court asserted jurisdiction over a foreign government-owned ship which was possessed and operated by a private party under a government lease, the Supreme Court shifted away from absolute immunity and toward a more restrictive theory. The State Department formally adopted the restrictive principle in the "Tate Letter" of 1952. 26 DEP'T ST. BULL. 984 (1952). In this letter, the State Department stated that a foreign sovereign's immunity would be recognized in cases based on a foreign state's public acts (*jure imperii*), but not in cases based on commercial or private acts (*jure gestionis*). U.S. CODE CONG. & AD. NEWS, *supra* at 6607. The Tate Letter posed numerous difficulties:

> From a legal standpoint, if the Department applied the restrictive principle in a given case, it is in the awkward position of a political institution

ereign Immunities Act of 1976 (FSIA) codifies and clarifies prior common law,[51] providing "when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and when a foreign state is entitled to sovereign immunity."[52] Section 1330(a) of title 28 of the United States Code (U.S.C.) provides the district courts with original subject matter jurisdicion over any nonjury civil action against a foreign state not otherwise entitled to immunity either under sections 1605-1607 of title 28 or under any international treaty.[53] Section

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trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

Id. In Victory Transp., Inc. v. Comisaria General de Abastecimientos Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965), the Second Circuit attempted to clarify the above uncertainties created by the Tate Letter enumeration of the restricted theory by formulating five categories of highly sensitive foreign public acts worthy of immunity: (1) internal administrative acts, such as the expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; and (5) public loans. *Id.* at 360. The ambiguities and uncertainties surrounding the doctrine of foreign sovereign immunity ultimately led to the enactment of the FSIA. U.S. CODE CONG. & AD. NEWS, *supra* at 6607.

51. This Act was enacted to accomplish four objectives: (1) the codification of the restrictive principle of sovereign immunity; (2) the transfer of the determination of sovereign immunity from the executive branch to the judicial branch; (3) the provision of a statutory procedure for obtaining *in personam* jurisdiction over a foreign state; and (4) the provision of a remedy for a plaintiff unable to enforce a judgment rendered in a foreign state. U.S. CODE CONG. & AD. NEWS, *supra* note 50, at 6605-06.

52. *Id.* at 6604.

53. 28 U.S.C. § 1330(a) (1976) reads:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immu-

1330(b) also provides personal jurisdiction over foreign states subject to the original jurisdiction of the district courts.[54] Subject to specified exceptions, the act provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."[55] Section 1605 provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> (1) in which the foreign state has waived its immunity either explicitly[56] or by implication, notwithstanding any withdrawal of the waiver to which the foreign state may purport to effect except in accordance with the terms of the waiver . . . .[57]

The legislative history to the FSIA elaborates upon implied waivers:

> [T]he courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.[58]

The defense of sovereign immunity must be raised in a responsive pleading because it is an affirmative defense which must be specially pleaded.[59] In a case in which sovereign immunity is waived either explicitly or by implication, sections 1330(a) and 1604 indicate that minimum contacts will not be a necessary prerequisite to the exercise of jurisdiction.[60] Section 1608(d) of the FSIA dis-

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nity either under sections 1605-1607 . . . or under any applicable international agreement.

54. *Id.* at § 1330(b). This section reads as follows:

Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 . . . .

55. *Id.* at § 1604 (1976).

56. Explicit waivers most often appear in international treaties and contracts between a foreign state and private parties. U.S. CODE CONG. & AD. NEWS, *supra* note 50, at 6617. There were no explicit waivers in the instant case.

57. 28 U.S.C. § 1605 (1976).

58. U.S. CODE CONG. & AD. NEWS, *supra* note 50, at 6617.

59. *Id.* at 6616; *see also* FED. R. CIV. P. 8(c).

60. "Each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, *or* an express or implied waiver by the foreign state of its immunity from jurisdiction." U.S.

cusses the responsive pleading requirement and provides that "a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section."[61] The legislative history to the FSIA states that this section corresponds to similar provisions applicable in suits against the United States, its officers or its agencies, such as Federal Rule of Civil Procedure Rule 12(a) (FRCP).[62] The term "responsive pleading," however, is not defined in the FSIA. Congress apparently intended to mirror the use of the term "pleading" in the FRCP. Rule 7 distinguishes pleadings from motions.[63] Furthermore, Rule 12(h)(1) specifies that only the following defenses are waived if not included in a motion: lack of jurisdiction over the person; improper venue; insufficiency of process; and insufficiency of service of process.[64] In distinguishing motions from

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CODE CONG. & AD. NEWS, *supra* note 50, at 6612 (emphasis added). Sections 1330(a)-(b) also imply that such waiver may provide United States courts with subject matter and personal jurisdiction over foreign states. *See infra* note 114 and accompanying text.

61. 28 U.S.C. § 1608(d) (1976).

62. U.S. CODE CONG. & AD. NEWS, *supra* note 50, at 6624. FED. R. CIV. P. 12(a) provides as follows: "The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to the counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted."

63. FED. R. CIV. P. 7(a)-(b) reads as follows:

> (a) PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.
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> (b) MOTIONS AND OTHER PAPERS.
>
> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.
>
> (2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

64. FED. R. CIV. P. 12(h)(1) provides as follows:

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if

responsive pleadings, the courts have consistently held that a motion to dismiss a complaint is not a responsive pleading.[65] Prior to the instant decision, no New York court had been confronted with the legal effect of the failure to assert the sovereign immunity defense in a Rule 12 motion.

Section 1605(a)(3) of the FSIA provides an additional exception to the sovereign immunity of foreign entities in cases involving property taken in violation of international law:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case
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> * * *
>
> (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .[66]

This provision governing the expropriation of property was drafted specifically to deal with immunity issues[67] and it "in no way affects existing law or the extent to which, if at all, the 'act of state' doctrine may be applicable."[68] Yet the legislators also referred to 22 U.S.C. section 3270(a)(2)[69] subsequent to the previ-

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omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

65. Kamerman v. Pakco Cos., 75 F.R.D. 673, 674 (S.D.N.Y. 1977); Adams v. Campbell County School Dist., 483 F.2d 1351, 1353 (C.D. Wyo. 1973).

66. 28 U.S.C. § 1605(a)(3) (1976).

67. U.S. CODE CONG. & AD. NEWS, *supra* note 50, at 6618.

68. *Id.*

69. 22 U.S.C. § 2370(e)(2) (1976) provides as follows:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of principles of international law, including the principles of compensation and the other standards set out in this subsection: PROVIDED, That this subparagraph

ous statement. This section, commonly known as the Hickenlooper Amendment, prevents the application of the act of state doctrine[70] in expropriation cases in which a "claim of title or other right to property" is asserted.[71] The property right to which the Hickenlooper Amendment refers is the taking of tangible property; a "claim for breach of contract is not a 'claim of title or other right to property' within the meaning of the Hickenlooper Amendment and . . . the repudiation of a contractual obligation does not amount to a 'confiscation or other taking' as those terms are used in the statute."[72] If Congress intended that the phrase "rights in property taken in violation of international law" has the same meaning for both the FSIA and the Hickenlooper Amendment, United States courts can never assert jurisdiction over a claim arising from the expropriation of a contractual obligation by a foreign sovereign subject to immunity. The instant court was presented with the problem of interpreting the phrase "rights in property" in the context of the FSIA.

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shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

70. The act of state doctrine dictates the following:

> [T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1963). For a general discussion of this doctrine, see Conank, *The Act of State Doctrine and Its Exceptions: An Introduction*, 12 VAND. J. TRANSNAT'L L. 259 (1979).

71. 22 U.S.C. § 2370(e)(2) (1976).

72. Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd in part on other grounds sub nom.* Alfred Dunhill of London, Inc., v. Republic of Cuba 425 U.S. 682 (1976) (citing French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704 (1968), *cert. denied*, 425 U.S. 991 (1976)).

D. *The Impact of Verlinden*

In *Verlinden B.V. v. Central Bank of Nigeria,*[73] the Second Circuit Court of Appeals addressed the issue whether "a foreign plaintiff [may] sue a foreign state in federal court for breach of an agreement not governed by federal law?"[74] Interpreting the ambiguous FSIA jurisdictional language,[75] the court held that an alien's federal court suit against a foreign state was properly filed.[76] Nonetheless, the court concluded that in order "to satisfy federal jurisdictional requirements . . . , every case must be supported by both a Congressional grant of jurisdiction[77] and a constitutional base on which the statute rests."[78] The court, interpreting the intent of the Framers of the Constitution, concluded that article III does not grant district courts the power to litigate a claim by a foreign party against a foreign sovereign.[79] Therefore, "in the constitutional sense," the court lacked jurisdiction.[80]

III. Instant Opinion

The instant court first declared that plaintiff's suit was time barred under the four year statute of limitations provided by N.Y.U.C.C. section 2-725.[81] Pursuant to CPLR section 202, the court recognized that it was bound to apply either New York's

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73. 647 F.2d 320 (2d Cir. 1981), *cert. granted,* 50 U.S.L.W. 3528 (U.S. Jan. 12, 1982) (No. 81-920).

74. *Id.* at 322. Plaintiff, a Dutch corporation, brought suit against the Central Bank of Nigeria to recover lost profits resulting from the anticipatory breach of a letter of credit issued in Nigeria. The provision specifying that the letter of credit was payable through a New York bank provided the sole contact with the United States.

75. In reviewing 28 U.S.C. § 1330(a) (1976), the court concluded that the district court had jurisdiction over nonjury civil actions against foreign states. *Verlinden,* 647 F.2d at 324. It held that there were no express limitations in the statute or its legislative history indicating that aliens could not be plaintiffs. *Id.*

76. *Id.*

77. *Id.* at 324-25 (citing *Ex parte* Edelstein, 30 F.2d 636 (2d Cir. 1929), *cert. denied,* 279 U.S. 851 (1929)).

78. *Id.*

79. *Id.* at 322.

80. *Id.* In Hawaiian Agronomics Co. v. Republic of Iran, 518 F. Supp. 596, 598 (C.D. Cal. 1981), the court held that the *Verlinden* analysis would be inapplicable in a suit against a foreign sovereign by an alien corporation having its principal place of business in the United States.

81. Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., No. 52584, slip op. at 6 (S.D.N.Y. Jan. 7, 1982).

limitation period or the limitation period of the jurisdiction where the cause of action accrued, whichever was shorter.[82] Assuming that the cause of action accrued in Bermuda and that Bermuda's limitation period was six years, the court questioned whether the applicable New York limitation period was the six year period in CPLR section 213, which governed contractual liability,[83] or the four year period for sales contracts prescribed by N.Y.U.C.C. section 2-725.[84] Addressing this issue of first impression in New York, the court concluded that CPLR section 213 excepted *all* sales contracts from its provisions.[85] Despite plaintiff's argument that the N.Y.U.C.C. was inapplicable because the transactions at bar[86] failed to bear an appropriate relation to New York,[87] the court applied section 2-725 for policy reasons. Specifically, the court noted that the combination of the potential of the N.Y.U.C.C. to create uniformity in decisions governing statutes of limitations for sales contracts;[88] the clear inapplicability of CPLR section 213 in sales contract cases;[89] the need to prevent forum shopping; and the unique problems caused by the prosecution of causes of action governed by foreign law[90] suggested the application of the N.Y.U.C.C. statute of limitations.

The court next addressed defendant's motion to dismiss the

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82. *Id.* at 3-4; *see also supra* note 25 and accompanying text.

83. *Canadian Overseas Ores, Ltd.*, slip op. at 3-4; *see also supra* note 32 and accompanying text.

84. *Canadian Overseas Ores, Ltd.*, slip op. at 4; *see also supra* note 28 and accompanying text. The parties and the court agreed that if the N.Y.U.C.C. four year limitation governed, any recovery for spare parts and related equipment would be barred; yet if the six year limitation period prescribed by N.Y. CIV. PRAC. LAW § 213 (McKinney 1972 & Supp. 1980-1981) controlled, such recovery would not be barred. *Canadian Overseas Ores, Ltd.*, slip op. at 2.

85. *Canadian Overseas Ores, Ltd.*, slip op. at 5 (citing Voth v. Chrysler Motor Corp., 545 P.2d 371, 375 (1976)); *see also supra* note 24 and accompanying text.

86. *Canadian Overseas Ores, Ltd.*, slip op. at 5. Plaintiff's reliance on CPLR § 213, according to the court, was a weak argument. *Id.* The court never contended that the N.Y.U.C.C. would supply the substantive law over this case; it merely sought a statute of limitations to serve the purposes of CPLR § 202.

87. *Canadian Overseas Ores, Ltd.*, slip op. at 2-3; *see also supra* note 16 and accompanying text.

88. *Canadian Overseas Ores, Ltd.*, slip op. at 6; *see also supra* note 29 and accompanying text.

89. *Canadian Overseas Ores, Ltd.*, slip op. at 5; *see also supra* note 36 and accompanying text.

90. *See supra* note 16.

complaint under the doctrine of *forum non conveniens.*[91] Citing *Gulf Oil Corp. v. Gilbert,*[92] the court noted that the *forum non conveniens* doctrine presupposes an alternative and adequate forum.[93] In accordance with *Piper Aircraft Co. v. Reyno,*[94] the court denied defendant's motion to dismiss and held that the instant case represented a "rare circumstance" in which the adequacy of the alternative forum asserted by defendant had not been established and could not be presumed.[95] The court agreed with the defendant that Chilean judicial procedures are essentially the same as those of other civil law countries.[96] Furthermore, the court held that mere differences in procedure do not bar dismissal under the doctrine of *forum non conveniens.*[97] Nonetheless, the court questioned whether the defendant's status as a state-owned corporation[98] would hurt the parties' chances of a fair trial in the Chilean courts. The court elaborated, explaining that "the expressed power of the junta to amend or rescind constitutional provisions by decree impugns the continuing independence of the judiciary regardless of the fact that it appears that the constitutional provisions relating to the independence of the judiciary are currently in force."[99] Despite the inability of the instant court to "hold as a matter of fact that the Chilean judiciary is not independent of the junta or that [plaintiff] could not possibly receive

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91. *Canadian Overseas Ores, Ltd.,* slip op. at 7-13; *see also supra* note 17.

92. 330 U.S. 501, 508 (1947); *see supra* note 39 and accompanying text.

93. *Canadian Overseas Ores, Ltd.,* slip op. at 10; *see also* Manu Int'l, S.A. v. Avon Prods., Inc., 641 F.2d 62, 67 (2d Cir. 1981).

94. 50 U.S.L.W. 4055 (U.S. Dec. 8, 1981); *see supra* note 47 and accompanying text.

95. *Canadian Overseas Ores, Ltd.,* slip op. at 11.

96. *Id.* The court specified that Chilean procedures are similar to those of France, Italy, and Spain. *Id.*

97. *Id.* The Court supported this proposition by stating that this doctrine is "designed in part to help courts avoid conducting complex exercises in comparative law." *Id.* (quoting Piper Aircraft Co. v. Reyno, 50 U.S.L.W. 4055, 4059 (U.S. Dec. 8, 1981)).

98. *Id.* at 12. In reaching its decision, the court considered the views of eminent experts on both sides of the issue. It emphasized that "[t]here is some suggestion that the junta has in fact interceded in a pending case to request reversal of an interlocutory decision where the government was not a party." *Id.; see also infra* note 99 and accompanying text.

99. *Canadian Overseas Ores, Ltd.,* slip op. at 11-12 (quoting Affidavit of Henry P. DeVries, Professor of Latin American Law at Columbia University School of Law, ¶ 5).

a fair trial there,"[100] the court nonetheless held that the serious doubts about the independence of the Chilean judiciary justified encumbering the defendant with the burden of persuasion that plaintiff's choice of forum should be disturbed.[101] The defendant failed to carry this burden.[102]

The court granted defendant's motion to dismiss the complaint on the ground that it was immune from suit under the FSIA.[103] Absent the applicability of any of the FSIA exceptions to foreign immunity,[104] defendant's status as a "foreign state" within the meaning of the FSIA[105] rendered the court powerless to exert jurisdiction. The court first found that the waiver exception under section 1605(a)(1) of the Act[106] did not apply because sovereign immunity is an affirmative defense[107] which was not impliedly waived by defendant's failure to include it in a Rule 12 motion to dismiss.[108] The court recognized that a motion does not constitute a pleading under the FRCP,[109] and that the "responsive pleading" used in the FSIA should be interpreted in accordance with its use in the FRCP.[110] Only Rule 12(h)(1) defenses are deemed waived if not included in a motion.[111] Plaintiff's assertion that sovereign immunity under the FSIA is only relevant to *in personam* and not subject matter jurisdiction because it was subject to waiver was also rejected.[112] Under the unique jurisdictional provisions of

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100. *Id.* at 12.

101. *Id.*

102. *Id.* at 12-13.

103. *Id.* at 23.

104. *Canadian Overseas Ores, Ltd.*, slip op. at 15; *see supra* notes 53-58, 66-72 and accompanying text.

105. *Id.* at 15; *see also* Herzberger v. Compania de Acero del Pacifico, 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978) (available Mar. 7, 1982, on LEXIS, Genfed library, Dist file).

106. *Id.; see supra* notes 57-58 and accompanying text.

107. This holding was consistent with the legislative history of the FSIA. *Id.* at 15-16; *see supra* note 59 and accompanying text.

108. *Id.* at 16. It is also important to note that, as an affirmative defense, sovereign immunity must be specially pleaded. *See* note 58 and accompanying text.

109. *Id.* (citing FED. R. CIV. P. 7(a)-(b), *supra* note 63). The court went further and noted that this distinction was maintained throughout the Rules. *Id.* (citing FED. R. CIV. P. 5(a), 7, 10(c), 12).

110. *Id.* at 17-18; *see also supra* notes 61-62 and accompanying text.

111. *Canadian Overseas Ores, Ltd.*, slip op. at 16; *see also supra* note 64 and accompanying text.

112. *Canadian Overseas Ores, Ltd.*, slip op. at 18-19.

28 U.S.C. section 1330(a),[113] "a foreign state may waive what would otherwise be a defect in the subject matter of the court."[114] The expropriation exception to sovereign immunity for rights in property taken in violation of international law under section 1605(a)(3) was also inapplicable.[115] After noting that section 1605(a)(3) "appears to be intended to match the exception to the act of state doctrine created by the Hickenlooper Amendment,"[116] the court interpreted the reference to "rights in property" contained in the FSIA in accordance with judicial interpretations of the "claim of title or other right to property" language used in the Hickenlooper Amendment.[117] The phrase "claim of title or other right to property," according to the court, has consistently been interpreted "to apply only to takings of tangible property, not to include intangible interests like the contractual right to payment asserted by [plaintiff] . . . ."[118] The court concluded that, "[w]ere the phrase 'rights to property taken in violation of international law' in the FSIA interpreted more broadly than the similar phrase utilized in the Hickenlooper Amendment, Congress would have conferred jurisdiction for suits only to have them dismissed in accordance with the Act of State doctrine."[119]

In any event, the court held that it was divested of subject matter jurisdiction over this action pursuant to the Second Circuit Court of Appeals' *Verlinden* decision in which the court held that a foreign plaintiff may not sue a foreign state in a federal court for breach of an agreement not governed by federal law.[120]

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113. *See supra* note 53 and accompanying text.

114. *Canadian Overseas Ores, Ltd.*, slip op. at 19.

115. *Id.* at 20; *see also supra* note 66 and accompanying text.

116. *Canadian Overseas Ores, Ltd.*, slip op. at 21.

117. *Id.* at 20-21; *see also supra* notes 69-72 and accompanying text.

118. *Canadian Overseas Ores, Ltd.*, slip op. at 20 (citing Menendez v. Saks & Co., 485 F.2d 1355, 1372 (2d Cir. 1973), *rev'd in part on other grounds sub. nom.* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (citing French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704 (1968), *cert. denied*, 425 U.S. 991 (1976))).

119. *Canadian Overseas Ores, Ltd.*, slip op. at 21. The court seemed especially puzzled over plaintiff's statement that "expropriation without compensation is not raised by [plaintiff] in this action." *Id.* at 22 (citing Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss at 5).

120. *Id.* at 23-25; *see also supra* notes 74-80 and accompanying text. Although it is clear that the instant case involved a foreign plaintiff suing a foreign state, plaintiff argued that this case was distinguishable from *Verlinden* for the following reasons: (1) this action reached federal court through removal proceed-

IV. COMMENT

The *Verlinden* decision divested the instant court of subject matter jurisdiction over this foreign plaintiff's suit against a foreign state. In reality, the *Verlinden* holding formed the beginning and ending of the court's basic jurisdictional analysis. Nonetheless, the *Verlinden* holding is partially obfuscated because the instant court had committed itself to issue a written opinion on all motions in the instant case pending prior to the *Verlinden* decision.[121]

The instant court was the first New York court to decide whether CPLR section 213 or N.Y.U.C.C. section 2-725 governs a sales contract when the substantive law to be applied is not New York law. The court's careful decision to apply the four year N.Y.U.C.C. limitation enforces the policy of uniformity underlying the Code;[122] furthermore, this decision will prevent forum shopping and the prosecution of foreign claims in New York and other jurisdictions which adhere to the instant court's logic. Any contrary decision would afford a longer statute of limitations to parties bringing causes of action governed by foreign law than to parties bringing causes of action under New York law and thereby preclude the United States goal of uniform treatment of sales transactions.[123] Thus, a suit brought upon a sales contract arising outside New York will be subject to the four year period of the N.Y.U.C.C. unless the statute of limitations of the jurisdiction where the cause of action arose is shorter.

The second aspect of the court's ruling, that New York was a more appropriate forum for this case than Chile, was an inappro-

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ings; (2) defendant was engaged in business in the United States, and plaintiff had significant United States ownership; and (3) issues of expropriation, which the appellate court excepted from the scope of the *Verlinden* decision, were presented here. *Canadian Overseas Ores, Ltd.*, slip op. at 23-24. This court found each of these arguments to be without merit. First, "[i]f the jurisdiction exceeds the constitutional limits on the power of the federal courts, it makes no difference whether Congress purports to grant such jurisdiction by way of original jurisdiction or removal jurisdiction." *Id.* at 24. Second, despite the minimal contacts that the parties had with the United States, there was no assertion that this case was not one between a foreign plaintiff and a defendant foreign state. *Id.* Finally, the court concluded that this suit did not actually involve expropriated property; rather, it was an action for breach of contract. *Id.*

121. *See supra* note 24.

122. *See supra* notes 29 & 88 and accompanying text.

123. *See supra* note 16.

priate political attack against the Chilean state. The Supreme Court has held that *forum non conveniens* can never apply when there is an absence of jurisdiction.[124] It is unfortunate that the court had committed itself to a written opinion on this issue in a case in which it had no jurisdiction. The rationale for the instant opinion further harms its precedential value. The court held that the *possibility* that the military junta *might* amend or rescind the Chilean Constitution in order to favor the state-owned defendant undermined the adequacy of the Chilean forums. Only unsubstantiated doubts and hearsay[125] provided the basis for the court's decision that New York, with which the transaction and parties had minimal contacts, provided a more convenient forum than that in which the cause of action accrued virtually in its entirety. An impossible burden of persuasion was shifted to defendant on the basis of vague doubts regarding the independence of the Chilean judiciary. Moreover, the instant court failed to emphasize the *Piper* holding that a foreign plaintiff's choice of forum deserves less deference than the similar choice of a national.[126] Finally, it is surprising that the instant court failed to evaluate either Bermuda or Canada as an alternative and adequate forum, because both maintained greater contacts with this action than New York.[127] The instant decision could prove detrimental to United States foreign policy toward politically unstable nations, and it could deter foreign state-owned corporations from conducting business with the United States.

Despite the obvious shortcomings of the court's analysis of the adequacy of the New York forum, the instant court's skillful analysis of jurisdiction under the FSIA should protect the instant holding in the event *Verlinden* is reversed by the Supreme Court.[128] In a case of first impression in New York, the court carefully demonstrated the distinction between a motion to dismiss and a responsive pleading under the FRCP,[129] and it logically applied this distinction in holding that a failure to assert sovereign

124. *See supra* notes 39 & 40 and accompanying text.

125. *See supra* notes 98 & 99 and accompanying text.

126. *See supra* notes 48 & 49 and accompanying text.

127. Plaintiff and its predecessor corporation both maintained principal places of business in Hamilton, Bermuda, and plaintiff's predecessor was incorporated in Canada. *See supra* notes 1 & 4 and accompanying text.

128. *Certiorari* was granted to the *Verlinden* case only four days after the instant holding. *See supra* note 22.

129. *See supra* notes 106-11 and accompanying text.

immunity in a motion to dismiss does not constitute an implied waiver providing FSIA jurisdiction pursuant to 28 U.S.C. section 1605(1).[130] Additionally, the court skillfully analogized similar phrases in the FSIA and the Hickenlooper Amendment[131] to determine that a breach of contract claim against a foreign sovereign resulting from a foreign expropriation cannot, in and of itself, confer jurisdiction on a United States court pursuant to 28 U.S.C. section 1605(a)(3).[132] These two findings clarify ambiguities in the FSIA. This well-reasoned conclusion that the FSIA divested the court of jurisdiction over this case ensures that the instant holding will stand even if *Verlinden* is reversed. In the unlikely event that *Verlinden* is reversed by the Supreme Court, however, the existence of the instant opinion could create serious problems. If *Verlinden* is an invalid basis for decision, had the instant defendant actually waived its sovereign immunity, the instant court would have exercised jurisdiction over two foreign parties having no practical contacts with the United States.[133] It is not the purpose of any United States court to play the role of an international tribunal when there are no United States interests at stake. Yet, this is a problem inherent in the wording of the FSIA.

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130. *See supra* note 108 and accompanying text.
131. *See supra* notes 114-19 and accompanying text.
132. *Id.*
133. *See supra* note 114 and accompanying text.