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Ministry of Supply, Cairo v. Universe Tankships, Inc.: The Status of Foreigner-Foreign State Cross-Claims under the Foreign Sovereign Immunities Act of 1976

Gregory Scott Prentzas

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In the 1983 admiralty case, *Ministry of Supply, Cairo v. Universe Tankships, Inc.*,[1] the Second Circuit Court of Appeals was faced with the issue of whether, under the Foreign Sovereign Immunities Act of 1976[2] (hereinafter "FSIA" or "the Act"), a cross-claim filed by a foreign corporation against a governmental agency should be dismissed on the ground of foreign sovereign immunity. The court held that the cross-claim was exempted from sovereign immunity[3] and further held that the FSIA exception withdrawing sovereign immunity with respect to counterclaims did not implicitly foreclose application of other FSIA exceptions.[4] The decision furnishes an important judicial interpretation of an issue not directly encompassed in the Act.

On March 14, 1979, Universe Tankships, Inc., a Liberian corporation with an office in New York, entered into a one-year time charter of the motorship Ulysses with Babanaft, a Panamanian corporation headquartered in Greece. Universe contracted to make and maintain the Ulysses fit for service. Babanaft entered into a voyage charter with Claybridge Shipping Co., which subsequently contracted with Ministry of Supply,[5] whereby Claybridge agreed to transport a cargo of wheat from the United States to Egypt. When the shipment arrived at Port Said, Egypt, the cargo was delivered "short or otherwise damaged." Ministry brought suit for cargo damages against the ship MIS Ulysses, Universe Tankships, Inc., and Claybridge Shipping Co., S.A.[6]

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[1] 708 F.2d 80 (2d Cir. 1983).

[2] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2), (3), 1391(f), 1441(d), 1601-1611 (1976).

[3] 708 F.2d at 85.

[4] *Id.* at 86.

[5] The Ministry is engaged in carrying out in the United States a program for the purchase of grain and its transport to Egypt, under P.L. 480, 7 U.S.C. §§ 1427, 1431, 1691-1736(n) (1982). 708 F.2d at 82. P.L. 480 is a United States government program under which the Department of Agriculture provides financing for sales of food by American corporations to friendly foreign countries. *See* Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs, 647 F.2d 317, 318 (2d Cir. 1981).

[6] 708 F.2d at 81-82. Ministry initially demanded arbitration. The Ulysses submitted to arbitration with Babanaft but denied the jurisdiction of the district court over it in the action brought by Ministry. *Id.* at 82.

Babanaft moved to intervene as a plaintiff against Universe.[7] Babanaft later amended its complaint, annexing a cross-claim against Ministry which alleged that Ministry had wrongfully halted the discharge at Port Said and thus wrongfully denied Babanaft rightful use of the vessel under its time charter with Universe. Ministry moved for dismissal of the cross-claim.[8]

The U.S. District Court for the Southern District of New York held that Babanaft's cross-claim was barred on the ground of sovereign immunity.[9] The court found no exception under the "commercial activities" clause of section 1605(a)(2)[10] because there was no direct effect on the United States, and it held that the counterclaim exception of section 1607[11] applied only to counterclaims.[12]

The court of appeals reversed, holding that the cross-claim was exempted under the first clause of section 1605(a)(2).[13] More important, the court further held that the exclusion of a section in the FSIA explicitly dealing with cross-claims did not implicitly foreclose application of other exceptions within the Act to cross-claims.[14]

The court emphasized that the exception in the first clause of section 1605(a)(2)[15] withdrawing sovereign immunity must be read in light of the definitions provided in section 1603.[16] The court concluded that when a foreign state has carried on a commercial activity within the

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[7] Babanaft's complaint alleged that the Egyptian consignees and port officials halted discharge of the cargo as a result of heavy metal rust scale from the ship's cargo compartment having intermixed with the grain. The period of discharge was thereby prolonged for nearly three months, during which time Babanaft incurred the cost of charter hire and fuel and lost the use of the ship. *Id.* at 82.

[8] *Id.* at 83.

[9] *Id.* The unpublished opinion and order of the district judge was filed December 14, 1982.

[10] 28 U.S.C. § 1605(a)(2) (1976) provides that:

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

[11] 28 U.S.C. § 1607(a) (1976) provides that:

> In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—
>
> (a) for which a foreign state would not be entitled to immunity under § 1605 of this chapter had such claim been brought in a separate action against the foreign state.

Id.

[12] 708 F.2d at 83.

[13] *Id.* at 84.

[14] *Id.* at 86.

[15] 28 U.S.C. § 1605(a)(2).

[16] 708 F.2d at 84. 28 U.S.C. §§ 1603(d) and (e) provide:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of

United States, the first clause of section 1605(a)(2) withdraws immunity with respect to claims based not only on acts performed within the United States, but also with respect to acts performed outside of the United States if they comprise an integral part of the state's "regular course of commercial conduct" or a "particular commercial transaction" having substantial contact with the United States.[17] The court found substantial contacts in Ministry's purchase of wheat under P.L. 480[18] and in its arrangement for the carriage of the grain to Egypt.[19]

The court also held that Congress, by making a separate exception for counterclaims did not intend to limit other FSIA claims brought in separate actions against a foreign sovereign, thereby leaving sovereign immunity a bar to all cross-claims.[20] It determined that section 1607[21] was intended to reduce the scope of sovereign immunity, not to foreclose cross-claims.[22] The court concluded that the language of section 1605(a)(2) is broad enough to include a cross-claim and that no good reason exists why Congress would have intended to preserve sovereign immunity when a foreign state's commercial activity is the subject of a cross-claim, while withdrawing that immunity when the foreign state is a party against which a counterclaim is brought.[23]

To understand the significance of the court's decision in *Ministry of Supply*, it is necessary to examine the development of sovereign immunity in the United States.[24] The doctrine of sovereign immunity was first recognized in the United States in *The Schooner Exchange v. M'Faddon*[25] in 1812. In *The Schooner Exchange*, the Supreme Court held a plea of immunity, which was supported by an executive branch request, to be consistent with the public law and practice of nations.[26] In the early part of this century, American courts began to place less emphasis on whether immunity was supported by the law and practice of nations, but rather relied upon the practices and policies of the State Department.[27] This practice reached its zenith in *Ex Parte Republic of Peru*,[28] in which the

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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.

[17] 708 F.2d at 84.

[18] *See supra* note 5.

[19] 708 F.2d at 84-85.

[20] *Id.* at 86.

[21] 28 U.S.C. § 1607.

[22] 708 F.2d at 86.

[23] *Id.*

[24] For an excellent survey of the background of sovereign immunity doctrine, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34-43 (1976).

[25] 11 U.S. (7 Cranch) 116 (1812).

[26] *Id.* at 145-46.

[27] H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606 [hereinafter cited as House Report].

[28] 318 U.S. 578 (1943).

Supreme Court declared that it was the "duty" of the judiciary to accept and to follow the executive branch's determination of sovereign immunity.[29]

In order to clarify its position on sovereign immunity, and to make certain that the immunity determinations of the United States were consistent with the practices of other nations, the State Department informally adopted the restrictive theory of sovereign immunity in the "Tate Letter."[30] Under the restrictive theory, a foreign state is entitled to immunity for its public acts, but not for its private or commercial acts.[31] Prior to this time, the United States followed the absolute theory of immunity, under which a sovereign must consent to the jurisdiction of the courts of another country, regardless of the act in question.[32]

Recognizing that governments were engaging in commercial activity with greater frequency, the State Department felt it necessary to adopt the restrictive theory to insure that the rights of U.S. persons doing business with a foreign government would be determined by U.S. courts.[33] Until the passage of the FSIA in 1976, courts deferred to the immunity determinations of the State Department.[34]

The position taken by the U.S. courts presented several problems.[35] First, the State Department was not structured to take evidence, to hear witnesses, or to afford appellate review of its immunity determinations.[36] Second, the strong pull of diplomatic and political influence made it difficult for the State Department to apply the doctrine of the Tate Letter consistently.[37] Finally, the courts found themselves outside the mainstream of international law because virtually every other country considered the question of sovereign immunity as a judicial, rather than an executive, determination.[38]

In response to these problems, Congress passed the Foreign Sover-

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[29] *Id.* at 588-89. *See also* Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1944) ("It is, therefore, for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize") (footnote omitted).

[30] Letter from State Department Acting Legal Advisor Jack B. Tate to Acting Attorney General Phillip B. Perlman (May 11, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, Victory Transp., Inc. v. Comisaria General, 336 F.2d 354, 358 (2d Cir. 1964) (formulating a test for determining whether an act is public or private and commercial, absent any official State Department communication), *cert. denied*, 381 U.S. 934 (1965). *See also*, Petrol Shipping Co. v. Kingdom of Greece, 336 F.2d 103 (3d Cir. 1964), *cert. denied*, 385 U.S. 931 (1966); Rovin Sales Co. v. The Socialist Republic of Romania, 403 F. Supp. 1298 (N.D. Ill. 1976).

[35] For a discussion of the problems under the doctrine announced in the Tate Letter, *supra* note 30, see Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 905-13 (1969).

[36] House Report, *supra* note 27, at 8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6607.

[37] *Id.*

[38] *Id.* at 9, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6608.

eign Immunities Act of 1976.[39] Its purpose was to enumerate the circumstances under which parties could bring an action against a foreign state, and when a foreign state was entitled to sovereign immunity.[40] A further purpose of the FSIA was to codify the restrictive theory,[41] thereby transferring determinations of sovereign immunity from the executive branch to the judiciary, and assuring that immunity decisions would not be subject to political or diplomatic pressures.[42]

The FSIA grants original jurisdiction to district courts, without regard for amount in controversy, over any *in personam* nonjury civil action against a foreign state[43] in which it is determined that the foreign state is not entitled to immunity.[44] Section 1604 of the Act sets forth the general grant of immunity to a foreign state from the jurisdiction of United States courts,[45] subject to certain exceptions.[46] Congress clearly intended that the requirements of minimum contacts and adequate notice be observed.[47]

A number of cases decided under the "commercial activities" exception of section 1605(a)(2) provide guidance in cases involving sovereign immunity. In the leading case of *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*,[48] the Second Circuit Court of Appeals established five threshold issues which must be resolved in order to permit the exercise of jurisdiction under section 1605(a)(2).[49] In *Texas Trading*, the claims arose out of Nigeria's breach of contracts to purchase cement, and breach of related letters of credit. In holding that the district court had jurisdiction under the Act, the court set forth a standard for jurisdiction which it contended fit the congressional intent underlying the Act.[50]

The five critical issues enumerated by the court are: (1) does the

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[39] FSIA, *supra* note 2.

[40] House Report, *supra* note 27, at 6, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6604.

[41] *Id.* at 7, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605.

[42] *Id.*, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605-06.

[43] A "foreign state" is defined in the Act to include "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a).

[44] *See* 28 U.S.C. § 1330 (1976).

[45] 28 U.S.C. § 1604 provides:

> 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.

[46] The exceptions to sovereign immunity are provided in 28 U.S.C. §§ 1605, 1606, 1607.

[47] House Report, *supra* note 27, at 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6612.

[48] 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). For critical surveys of decisions under the Act, see Brower, Bistline, & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200 (1976); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Immunities Act in Practice*, 33 SW. L.J. 1109 (1979); Kahale & Vega, *Immunities and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211 (1979); von Mehren, *supra* note 24.

[49] 647 F.2d at 306.

[50] *Id.*

conduct the action is based upon or related to qualify as "commercial activity";[51] (2) does the commercial activity bear the relation to the cause of action and the United States described by one of the three phrases of section 1605(a)(2), warranting the court's exercise of subject matter jurisdiction under section 1330(a);[52] (3) does exercise of this Congressional subject matter lie within the permissible limits of the "judicial power" set forth in Article III;[53] (4) do subject matter jurisdiction under section 1330(a) and service of process under section 1608 exist, thereby making personal jurisdiction proper under section 1330(b);[54] and (5) does the exercise of personal jurisdiction under section 1330(b) comply with the due process clause, thus making personal jurisdiction possible?[55] All of these questions must be answered in the affirmative to a establish proper exercise of jurisdiction.

A number of cases indicate that the conduct giving rise to the cause of action need not occur in the United States. In *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*,[56] the Second Circuit found statutory subject matter jurisdiction under the first clause of the commercial activities exception. The Syrian defendants in *Gemini* guaranteed payment for a shipment of grain from the United States to Syria, but breached the guarantee agreements after the grain reached its destination.[57] The court held that the breach was a commercial activity, reasoning that Congress intended the phrase "carried out in the United States" to include commercial activities having "substantial contact with the United States."[58] Characterizing the rice sale carried out under P.L. 480[59] as the underlying commercial activity having substantial contact with the United States, the court broadly construed the guarantee as part and parcel of the sale.[60]

The Second Circuit's interpretation is consistent with the Third Circuit's decision in *Sugarman v. Aeromexico, Inc.*[61] The plaintiff in *Sugarman*

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[51] *Id.*

[52] *Id.* at 307-08.

[53] *Id.* at 308.

[54] *Id.*

[55] *Id.* The court further elaborated that defendant's contacts with the forum had to meet due process standards of minimum contacts. The court must examine the extent to which defendants availed themselves of the privileges of U.S. law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interests of the United States in hearing the suit. *See also* International Shoe v. Washington, 326 U.S. 310 (1945); World-Wide Volkswagon v. Woodson, 444 U.S. 286 (1980). For a discussion on the problems caused by application of the minimum contacts test to aliens, see Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 124-27 (1983).

[56] 647 F.2d 317 (2d Cir. 1981).

[57] *Id.* at 318-19.

[58] *Id.* at 319.

[59] *See supra* note 5.

[60] 647 F.2d at 319.

[61] 626 F.2d 812 (3d Cir.), *cert. denied*, 102 S. Ct. 1297 (1981). (In suit brought under FSIA and the Seamans Wage Act, court held that it is immaterial that the acts constituting the breach of contract may have taken place outside the United States because the alleged miscon-

was stranded for fifteen hours in the Alcapulco airport during a round trip Aeromexico flight. He subsequently brought suit against Aeromexico claiming that he suffered physical and mental injuries and financial loss from the airline's delay.[62] Basing its decision on the first clause of the commercial activities exception, the court found a sufficient nexus between the cause of action and the United States to support jurisdiction.[63] In support of its decision, the court emphasized that the airline ticket was purchased in a state where Aeromexico maintained an office, and that the delayed round trip was bound for New York.[64]

Two decisions, however, establish a limit on the extraterritorial reach of the first clause of section 1605(a)(2). In *Gilson v. Republic of Ireland*,[65] and *East Europe Domestic International Sales Corp. v. Terra*,[66] the courts ruled that communication from abroad by mail, telephone, or telegraph is not a commercial activity having substantial contact with the United States.[67] Therefore, while an act complained of need not occur within the United States, it must be based upon substantial commercial activity within the United States.

In *Carey v. National Oil Corp.*,[68] the court held that neither Libya nor a corporation wholly owned by the Libyan Government was amenable to suit in the United States on any claim arising out of contacts between a Bahamian subsidiary of a New York corporation and the Libyan instrumentality.[69] The court emphasized that the legislative history of section 1605(a)(2) made clear that it embodies the standards set out in *International Shoe v. Washington*.[70]

Recently, in *Verlinden B.V. v. Central Bank of Nigeria*,[71] the Supreme Court established that, under the FSIA, foreigners may bring actions against foreign states in U.S. courts. In *Verlinden*, a Dutch corporation brought a suit against an instrumentality of the Nigerian government, alleging anticipatory breach of a letter of credit.[72] The Supreme Court held that Congress did not exceed the scope of Article III of the Constitution by granting to federal district courts subject matter jurisdiction over certain civil actions by foreign parties.[73] While the Article III diversity

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duct does not have to occur in the United States if the claims arose out of a course of commercial activity in the United States).

[62] 626 F.2d at 270-71.

[63] *Id.* at 272-73.

[64] *Id.*

[65] 517 F. Supp. 477 (D.D.C. 1981).

[66] 467 F. Supp. 383 (S.D.N.Y.), *aff'd*, 610 F.2d 806 (2d Cir. 1979).

[67] 517 F. Supp. at 483; 467 F. Supp. at 390.

[68] 592 F.2d 673 (2d Cir. 1979) (per curiam).

[69] *Id.* at 676-77.

[70] *Id.* at 676. *See also*, House Report, *supra* note 27, at 7-8, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 6605-07.

[71] 103 S. Ct. 1962 (1983).

[72] *Id.* at 1966. *Verlinden* was one of six consolidated lawsuits in the Second Circuit involving suits against Nigeria and the Central Bank of Nigeria arising out of contracts with U.S. suppliers to purchase cement. For a factual summary, see *Texas Trading*, 647 F.2d at 303-06.

[73] 103 S. Ct. at 1970-71.

clause is not broad enough to support such subject matter jurisdiction, the "arising under" clause constitutes an appropriate basis for the statutory grant of jurisdiction.[74] Most importantly, the Court held that the FSIA does not merely concern access to the federal courts, but rather governs the type of actions for which foreign sovereigns may be held liable in a federal court.[75] Thus, a foreign sovereign, or an agency thereof, is amenable to suit in the United States on the basis of the nature and substantiality of its activities in the United States. The nationality of the plaintiff is irrelevant.

The decision in *Ministry* is consistent with the cases above, and it provides a significant interpretation of a novel issue under the FSIA. The court pronounced a rule respecting a cross-claim filed by a foreigner against a co-plaintiff foreign state, arising from allegedly wrongful acts committed outside the United States pursuant to a commercial transaction conducted partially within the United States. While the status of cross-claims is treated neither in the Act nor in its legislative history, the court interpreted the intent of the Act to encompass federal jurisdiction over foreigner-foreign state cross-claims when the cause of action is based upon the foreign state's commercial activity within the United States.

The court's determination that an exception to sovereign immunity exists when the activities giving rise to the cause of action are conducted only partially within the United States is consistent with previous interpretations of "commercial activities" under the FSIA. Furthermore, the court correctly concluded that the facts of *Ministry* satisfy the *Texas Trading* test.[76] Since Ministry carried out the grain deal under P.L. 480,[77] its course of conduct qualified as a "commercial activity within the United States" under sections 1603(d) and (e). Consistent with *Gemini*,[78] Ministry's activities fell within the ambit of the first clause of section 1605(a)(2), thereby warranting the court's exercise of subject matter jurisdiction. As *Verlinden* indicated, a cause of action between two foreign parties which has a sufficient nexus with the United States lies within the limits of judicial power prescribed by Article III of the Constitution.[79] Finally, Ministry's contacts with the United States through the grain deal fulfill the "minimum contacts" requirement of the due process

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[74] *Id. See* Osburn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824) ("When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause."). *See also*, 1 J. MOORE, FEDERAL PRACTICE ¶ 0.06[4] n.11 (2d ed. 1980) (*Osburn* supports federal jurisdiction over foreigner-foreign state suits).

[75] 103 S. Ct. at 1983. *See generally* Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385 (1982); Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction*, 90 YALE L.J. 1891 (1981).

[76] *See supra* text accompanying notes 49-53.

[77] *See supra* note 5.

[78] *See supra* text accompanying notes 54-58.

[79] *See supra* text accompanying notes 69-73.

clause, thereby making the exercise of personal jurisdiction under section 1330(b) proper.

As *Verlinden* provided, the fact that both parties are foreign is not a controlling factor. Rather, the sufficiency of the foreign state's contacts with the forum dictates whether the foreign entity is amenable to the jurisdiction of the federal courts. Allowing Babanaft to litigate its cross-claim against Ministry in a U.S. court does not represent an extension of the reach of federal jurisdiction under the FSIA. Ministry's contacts with the forum through its commercial transactions fit comfortably within the language of section 1605(a)(2). Also, Ministry had availed itself of the forum by bringing its action against Universe Tankships.

The decision in *Ministry* may encourage foreigners to bring suit against foreign states in U.S. courts more frequently. This expanded access to U.S. courts presents several potential problems.[80] First, the United States must incur both the pecuniary and temporal expenses of adjudicating claims between foreigners. In addition, litigating the suit in the United States may present various inconveniences to the parties.[81] [82] Moreover, there exists the potential of damaging foreign relations by trying suits based upon conduct within the territory of another state. Finally, the courts in the United States are placed in the untenable position of interpreting and applying foreign law.

Counterbalancing these problems, the United States does have an interest in trying some suits between foreigners. First, it can deter undesirable behavior affecting the United States. Second, overall efficiency is served by adjudicating all of the issues arising out of the same nucleus of facts in a single action. Finally, the availability of dismissal under the doctrine of forum non conveniens mitigates any significant inconvenience placed upon the parties if a more convenient forum exists.[83]

The decision in *Ministry* does not broadly expand the access of foreign parties to U.S. courts. Clearly, a cross-claim based upon a cause of

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[80] *See generally* Note, *supra* note 75, at 1870-79 (discussing the desirability of resolution of foreigner-foreign state suits in the United States).

[81] *E.g.*, compulsory process over witnesses and documents may not be obtained. *See* Papegeorgiou v. Lloyd's of London, 436 F. Supp. 701, 703 (E.D. Pa. 1977) (dismissing suit in favor of foreign forum in part because witnesses available there were beyond the subpoena power of U.S. courts); Schertenleib v. Traun, 589 F.2d 1156, 1165 (2d Cir. 1978) (dismissing in part because documents were beyond court's subpoena power, but not beyond that of alternative forum). Also, the costs of transporting and presenting evidence may be excessive. *See* Fitzgerald v. Westland Marine Corp., 369 F.2d 499, 501 (dismissing suit in part because of costs of bringing witnesses from alternative jurisdiction); *Schertenleib*, 589 F.2d at 1165 (dismissing suit on ground that substantial expense of translating evidence could be avoided if suit were tried in Switzerland).

[82] *See* Del Rio v. Ballenger Corp., 391 F. Supp. 1002, 1004 (D.S.C. 1975) (forum non conveniens dismissal appropriate in part because courts of Panama more competent to apply their own law).

[83] *See generally* Comment, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29 U. CHI. L. REV. 740, 749 (1962) (crowding of local dockets weighs in favor of forum non conveniens dismissal in primarily foreign controversies); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS, 205-12 (2d ed. 1980).

action arising out of the same transaction or occurence as the foreign state's original claim falls comfortably within the jurisdictional limits of the FSIA and the Constitution. If a foreign state sees fit to bring suit in a U.S. court pursuant to its commercial activities within the United States, no compelling reason exists to deny a foreign co-plaintiff the right to pursue a cross-claim when the cross-claimant establishes an exception to sovereign immunity under the Act. It remains to be seen whether the benefits of adjudicating claims which affect the United States in U.S. courts outweigh the costs of the resultant expansion of access to U.S. courts now afforded foreign parties. Irrespective of any countervailing costs, the decision in *Ministry* establishes a well-reasoned rule with respect to cross-claims between foreigners and foreign states under the FSIA.

—GREGORY SCOTT PRENTZAS