

Federal Jurisdiction Over Foreign Governments for Violations of International Law: Foreign Sovereign Immunity and the Alien Tort Statute After *Amerada Hess Shipping Corp. v. Argentine Republic*

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ARTICLES

FEDERAL JURISDICTION OVER FOREIGN GOVERNMENTS FOR VIOLATIONS OF INTERNATIONAL LAW: FOREIGN SOVEREIGN IMMUNITY AND THE ALIEN TORT STATUTE AFTER *AMERADA HESS SHIPPING CORP. v. ARGENTINE REPUBLIC*

THOMAS M. DiBIAGIO*

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I. INTRODUCTION

On June 8, 1982, a Liberian oil tanker in international waters was attacked by Argentine fighter aircraft on combat patrol during the Falklands War. The damage was extensive and the vessel was eventually scuttled in the South Atlantic. The vessel's owner and its time-charter subsequently brought a civil action in the United States District Court for the Southern District of New York against the Republic of Argentina.¹ The district court dismissed the claims and held that the Republic of Argentina was immune from suit under the Foreign Sovereign Immunities Act.²

On appeal, the United States Court of Appeals for the Second Circuit, in a two to one decision, reversed the district court and held that the Alien Tort Statute³ vested the trial court with federal jurisdiction over the Republic of Argentina.⁴ The Alien Tort Statute was viewed as granting the federal court jurisdiction over any civil action by an alien for a tort committed in violation of international law.⁵ Relying on the evolving standards of international law, the Second Circuit ruled that an attack on a neutral vessel in international waters violated "settled" principles of international law so as to state a *prima facie* case under the Alien Tort Statute and foreclose any claim of sovereign immunity under the Foreign Sovereign Immunities Act.⁶

1. *Amerada Hess Shipping Corp. v. Argentine Republic*, 638 F. Supp. 73 (S.D.N.Y. 1986).

2. *Id.* at 74-77 (citing 28 U.S.C. §§ 1602-11 (1982)). Section 1604 states as follows:

Subject to 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.

3. 28 U.S.C. § 1350 (1982) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

4. *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987), *cert. granted*, 108 S.Ct. 1466 (1988). See *Court Rules that Argentina Can Be Sued in Attack on Tanker*, N.Y. Times, Sept. 13, 1987, at A15, col. 1 (discussing decision of the Second Circuit); N.Y. Times, Apr. 19, 1988, at A22, col. 1 (reporting that the Supreme Court had agreed to grant *certiorari* to review the decision of the Second Circuit and to decide "whether Argentina may be sued in the United States for its military attack on a neutral oil tanker engaged in United States domestic trade").

5. *Amerada Hess*, 830 F.2d at 425.

6. *Id.*

The decision in *Amerada Hess* dramatically expands federal jurisdiction over foreign governments. However, the tenet underlying this exercise of virtually unlimited jurisdiction is seriously flawed for several reasons. First, the ruling that the actions of the Republic of Argentina were illegal and subject to the jurisdiction of and civil liability in a United States federal court is an arbitrary interference by the judiciary with the fluidity and flexibility of United States foreign policy. By declaring that an act of the Argentinean armed forces was in violation of international law, the Second Circuit has recklessly impinged upon the constitutional parameters of the executive to structure the tenor of American diplomatic relations. Second, the decision fundamentally encroaches upon the sovereign discretion of the Republic of Argentina to pursue its national security interests. Third, the purported basis for the decision, that Argentina violated customary principles of international law, disregards the pervasive lack of consensus afforded the right to innocent passage of neutral shipping in a time of war. Fourth, by unilaterally expanding the reach of federal jurisdiction, the decision seriously contradicts the legislative intent to set forth the exclusive standards for asserting jurisdiction over foreign sovereigns within the parameters of the Foreign Sovereign Immunities Act. Thus, the decision encroaches upon the power of Congress to define the jurisdiction of the federal courts in matters affecting the diplomatic relations of the United States.

For these aforementioned reasons, a fundamental recalibration is needed to address whether: (1) the Foreign Sovereign Immunities Act in fact sets forth the exclusive standards for asserting jurisdiction over foreign governments; (2) the act of state doctrine remains a viable principle in American jurisprudence or is an anemic tenet; (3) the Foreign Sovereign Immunities Act sets forth an exclusive jurisdictional grant; and (4) there is any limitation, either legal, territorial or political, governing federal jurisdiction over foreign governments. Absent review by the Supreme Court affirming the Foreign Sovereign Immunities Act as the exclusive grant of federal jurisdiction over foreign sovereigns, the present uncertainty will most likely generate legislative reversal of the Second Circuit's decision.⁷

7. For examples of situations in which the legislature has acted to modify a judicial opinion, see, e.g., *Senate to Thwart Court, Approves A Bill Extending Anti-Bias Laws*, N.Y. Times, March 23, 1988, at A1, col. 3. (reversing by statute the effects of a 1984 Supreme Court decision limiting civil rights enforcement); *Maryland Senate, Without Debate, Defeats Two Gun Control Measures*, Wash. Post, March 25, 1988, at C1, col. 3. (Maryland Senate nullifies 1985 decision by the Maryland Court of Appeals, *Kelly v. R.G. Industries*, 304 Md. 120, 497 A.2d 1143 (1985) holding makers

II. FOREIGN SOVEREIGN IMMUNITY IN UNITED STATES COURTS

A. *Traditional Principles*

The extent to which a court is authorized to entertain suits against foreign governments has traditionally depended upon the principle of foreign sovereign immunity. Foreign sovereign immunity is a customary principle of international law under which a court is to respect the integrity of a foreign government by abstaining from exercising jurisdiction over the foreign state.⁸ United States jurisdiction over foreign governments has not been divorced from this immunity doctrine. Up until the early 1950's, the United States followed the doctrine of absolute sovereign immunity which barred claims against foreign governments without exception.⁹ This absolute immunity was applied irrespective of the nature of the conduct underlying the action.¹⁰

Initially, the responsibility for determining whether a foreign government was amenable to suit or entitled to sovereign immunity rested with the State Department through formal advisory recommendations to the judiciary. In light of the prevailing theory of absolute immunity, this analysis was merely perfunctory. However, depending upon the particular diplomatic alliance of the sovereign defendant, the State Department in some cases recommended that the foreign government was not immune from suit.¹¹ Recommendations, whatever the slant, were dispositive of the issue and were deferred to by the courts without exception.¹² With the post World War II emergence of the global economy, based on international commercial transactions, and the expan-

and sellers of small handguns can be held liable for injuries with those weapons).

8. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). *Accord* *Lete-lier v. Republic of Chile*, 488 F. Supp. 665, 670 (D.D.C. 1980). *See also* H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6-7 (1976), *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6004, 6005-06 [hereinafter LEGISLATIVE HISTORY]. ("Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs from diplomatic immunity (which is drawn into issue when an individual diplomat is sued).")

9. *Verlinden*, 461 U.S. at 486-88 (citing *Ex parte Peru*, 318 U.S. 578, 586-590, (1943)); *Mexico v. Hoffman*, 324 U.S. 30, 33-36 (1945).

10. *Verlinden*, 461 U.S. at 486 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)). Although the Supreme Court in *The Schooner Exchange* held that the courts of the United States lacked jurisdiction over a naval vessel of a foreign state found in a United States port, that decision came to be regarded as extending virtually absolute immunity to foreign sovereigns. *See, e.g., Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Jet Line Services, Inc. v. M/V MARSA EL HARIGA*, 462 F. Supp. 1165, 1168-69 (D. Md. 1978).

11. *Verlinden*, 461 U.S. at 486-88.

12. *Id.*

sion of United States political, economic, and military commitments throughout the world, the scope of sovereign immunity evolved away from the traditional concept of absolute immunity. In the early 1950's, the State Department formally adopted the "restrictive theory" of foreign sovereign immunity.¹³ Under this theory, immunity was accorded for the foreign sovereign's public acts but was denied for a foreign state's commercial activity.¹⁴ The practical aim of the restrictive theory was to veer away from the practice of absolute immunity and move towards an assumption of jurisdiction over foreign governments participating in commercial transactions.¹⁵ The incorporation of the restrictive theory did not alter the procedural mechanism of the dispositive State Department immunity determinations.¹⁶

13. *Id.* The State Department adopted the "restrictive" theory of foreign sovereign immunity in the "Tate Letter". The pertinent provisions are quoted extensively in *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 273-74 (3d Cir. 1980).

14. *Verlinden*, 461 U.S. at 487; see *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 256 (7th Cir. 1983) ("Under this approach [restrictive theory] immunity was 'restricted' to suits involving public, governmental acts, while no immunity was provided for claims involving the commercial or private acts of a foreign state . . ."). Under the restrictive theory, only actions involving sensitive governmental affairs were considered public and required the court to abstain from exercising its jurisdiction. These public acts primarily were limited to the following categories: (1) internal administrative acts; (2) legislative acts; (3) acts concerning the armed forces; (4) acts relating to diplomatic activity, and (5) public loans. Unless it was clear that the particular activity came within one of these exceptions, the State Department would not recommend that the foreign government was immune from suit. *Amerada Hess*, 638 F.Supp. at 74.

15. *Amerada Hess*, 638 F. Supp. at 74.

16. *Verlinden*, 461 U.S. at 487; *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985). The adoption of the restrictive theory of foreign sovereign immunity was also intended to conform United States foreign sovereign practices with the prevailing international standards. See LEGISLATIVE HISTORY, *supra* note 8, at 6607-08 which stated:

In the mid-1950's, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960's, it became the practice of the Department of Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970's, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a

Under the post-1950 scheme, however, the application of sovereign immunity frequently led to results which were inconsistent with the restrictive theory of immunity.¹⁷ Diplomatic pressure directed at the State Department often succeeded in influencing its counsel to the court. Considerations of realpolitik, therefore, continued to lead to recommendations of immunity in cases where abstention was not supported by the prevailing theory of immunity.¹⁸ Thus, from at least 1950, sovereign immunity determinations were subject to a variety of political realisms.¹⁹ These political considerations led to a pervasive absence of consistency and clarity in the application of sovereign immunity and the determination of the amenability of foreign governments to suit in the United States courts.

B. *The Foreign Sovereign Immunities Act*

1. *Purpose*

The lack of uniformity in the application of the restrictive theory of foreign sovereign immunity compelled Congress to enact the Foreign Sovereign Immunities Act in 1976 ("FSIA" or "Act").²⁰ The FSIA was intended to set forth the exclusive standards governing the amenability of foreign governments to the jurisdiction of the United States courts.²¹ This legislation was primarily aimed at (1) extinguishing the inconsistency which had plagued prior recommendations of immunity; (2) bringing a concentrated and consistent structure to future determinations of foreign sovereign immunity; and (3) reducing the political

foreign state's immunity in this country

17. *Verlinden*, 461 U.S. at 488; *Letelier v. Republic of Chile*, 488 F. Supp. 665, 670 (D.D.C. 1980).

18. *Verlinden*, 461 U.S. at 487; *Amerada Hess*, 638 F. Supp. at 74.

19. *Verlinden*, 461 U.S. at 488-89.

20. 28 U.S.C. §§ 1602-11 (1982).

21. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 254 n.8 (D.D.C. 1985); see LEGISLATIVE HISTORY, *supra* note 8, at 6610-11 which sets forth in pertinent part:

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch.

and diplomatic implications of foreign sovereign immunity determinations.²² The Act codified the restrictive theory and, thereby, formally reconciled the standards governing sovereign immunity in United States courts with the prevailing international standards.²³ Moreover, in order to ensure that routine actions against foreign governments for claims arising out of their commercial activity would not take on undue political significance,²⁴ Congress abolished the courts' dependence on advisory recommendations by the State Department and placed the responsibility for making immunity determinations solely within the

22. *Verlinden*, 461 U.S. at 488; *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985); *Letelier*, 488 F. Supp. at 670.

23. See *Von Dardel*, 623 F. Supp 246, 251; *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982) which notes:

The legislative history states that the Act "incorporates standards recognized under international law," and the drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations. At this point, there can be little doubt that international law follows the restrictive theory of sovereign immunity. *House Report* at 6613. See, e.g., State Immunity Act, 1978, s. 3 (United Kingdom); Council of Europe, European convention on State Immunity, art. 4 (1972), *reprinted in 1976 Hearings* at 37, 38; *Empire of Iran*, 45 I.L.R. 56 (1963) (West Germany).

See also LEGISLATIVE HISTORY, *supra* note 8, at 6605-06 stating.

The bill, . . . would accomplish four objectives. . . . First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will often request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. . . . Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state.

24. *Von Dardel*, 623 F. Supp. at 254 n.8; see also LEGISLATIVE HISTORY, *supra* note 8, at 6611 ("Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.").

judiciary.²⁵

2. *Comprehensive Provisions*

The Act is unambiguous and sets forth the comprehensive standards governing the amenability of foreign governments to suit in both federal and state courts. Jurisdictional issues involving foreign government defendants were intended to be determined exclusively pursuant to the comprehensive provisions set forth within the FSIA. The provisions of the Act were expressly stated to be the "sole and exclusive" standards to be used in asserting actions against foreign governments and resolving questions of sovereign immunity.²⁶ That interest is reflected in the structure of the 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."²⁷ If none of the exceptions to sovereign immunity set forth in the FSIA applies, the foreign government is not subject to the jurisdiction of a United States court.²⁸ In *Verlinden B.V. v. Central Bank of Nigeria*,²⁹ the Supreme Court affirmed the comprehensive nature of the FSIA as governing the amenability of foreign sovereigns to suit in the United States. In holding that the Act governed suits against foreign governments brought by aliens, the Court reasoned that the legislative history

25. *Verlinden*, 461 U.S. at 488; *Frolova*, 761 F.2d at 372; *Von Dardel*, 623 F. Supp. at 253. As an additional note, the exercise of jurisdiction under the FSIA must also comport with the due process requirement of minimum contacts. *Texas Trading*, 647 F.2d at 308; *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 252 (7th Cir. 1983); *Waukesha Engine Div. v. Banco Nacional De Fomento*, 485 F. Supp. 490, 492-93 (E.D. Wis. 1980) (It is plain from the legislative history of the Foreign Sovereign Immunities Act that due process notions of minimum contacts have been incorporated in the Act); see also *Imodume Corp. v. Ardinias Argentinas*, 640 F. Supp. 354, 360 (E.D. Va. 1985) ("Exercise of personal jurisdiction over Argentinean airline under Foreign Sovereign Immunities Act required airline's minimum contacts with Virginia and could not be based on contacts of airline with nation as a whole."); *contra Kalamazoo Spice Ext. Co. v. Provisional Military*, 616 F. Supp. 660, 665 (D. Mich. 1985) ("In determining whether foreign state has sufficient minimum contacts with forum state for forum state to exercise personal jurisdiction, relevant question is whether foreign state has sufficient contacts with United States as a whole, rather than any particular state, so that maintenance of the suit does not offend traditional notions of fair play and substantial justice.").

26. *Verlinden*, 461 U.S. at 489-90; *Alberti*, 705 F.2d at 250; *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987); LEGISLATIVE HISTORY, *supra* note 8, at 6610-11.

27. 28 U.S.C. § 1604 (1982).

28. *Verlinden*, 461 U.S. at 485 n.5.

29. *Id.* at 480.

revealed a clear intent not to restrict the class of potential plaintiffs to actions brought solely by United States citizens.³⁰

3. *Exceptions to Foreign Sovereign Immunity*

Under the FSIA, a foreign sovereign is presumptively immune from all actions that may be asserted against it by either a United States citizen or an alien.³¹ This presumption is subject to a set of specific exceptions detailed in sections 1605 and 1607.³² If the claim asserted against a foreign sovereign is encompassed within one of these exceptions, a court may exercise jurisdiction. However, if the action does not fall within one of the exceptions, the court is jurisdictionally incompetent to preside over the claim against the foreign state.³³

The FSIA was intended to provide jurisdiction over a foreign government's commercial conduct and over a limited number and type of tort actions committed within the United States. A foreign sovereign is generally immune from suit for any action taken in its governmental capacity.³⁴ Specifically, the exceptions set forth within the Act include cases in which: (1) a foreign state has waived its immunity,³⁵ (2) the

30. *Id.* at 490-91.

31. The Supreme Court in *Verlinden* explained that:

The House Report recites that the Act would provide jurisdiction for "any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607," . . . and also states that its purpose was "to provide when and how parties can maintain a lawsuit against a foreign state or its entities," At another point, however, the Report refers to the growing number of disputes between "American citizens" and foreign states, . . . and expresses the desire to ensure "our citizens . . . access to the courts," As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. § 1605 (1982). If an action satisfies the substantive standards of the Act, it may be brought in federal court regardless of the citizenship of the plaintiff. . . . (footnote omitted) (citations omitted).

Id. at 490-91. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372; *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 252 (7th Cir. 1983); *MacArthur*, 809 F.2d at 919.

32. *MacArthur*, 809 F.2d at 919; *Von Dardel*, 623 F. Supp. at 250.

33. *Verlinden*, 461 U.S. at 485 n.5; *Frolova*, 761 F.2d at 372; *Alberti*, 705 F.2d at 256.

34. See, e.g., *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 307 (2d Cir. 1981). (If the activity is not "commercial" but rather is "governmental" foreign state is entitled to immunity under § 1605 and "original jurisdiction" is not present under § 1330(a)).

35. See 28 U.S.C. § 1605(a)(1) (1982); *Frolova v. Union of Soviet Socialist Republics*, 558 F. Supp. 358, 363 n.3 (N.D. Ill. 1983), *aff'd*, 761 F.2d 370 (7th Cir.

action is based upon either a foreign sovereign's commercial activity carried on in the United States or commercial activity having a connection with the United States;³⁶ (3) the action is one in which rights in property are taken in violation of international law;³⁷ (4) the action involves rights in real estate and other property located in the United States;³⁸ (5) the action is for certain noncommercial torts within the United States;³⁹ (6) the action involves certain maritime liens;⁴⁰ and (7) the action involves certain counterclaims.⁴¹ The FSIA contains no general exception to immunity based on violations of international law outside of the context when property is taken in violation of international law.

III. ACT OF STATE DOCTRINE

In addition to the Foreign Sovereign Immunities Act, an action asserted against a foreign government must withstand the scrutiny of the act of state doctrine. This doctrine is a common law abstention principle which declares that a court will not adjudicate a politically sensitive dispute involving a determination of the validity or legality of

1985)(rejecting concept of implicit waiver); *but see* *Siderman v. Republic of Argentina*, No. Civ. 82-1772-RMT (C.D. Cal. March 12, 1984)(sovereign may implicitly waive its immunity for human rights violations). *Accord Von Dardel*, 623 F. Supp. at 256.

36. 28 U.S.C. § 1605(a)(2) (1982). The commercial activity exception is the most widely cited exception to foreign sovereign immunity. The commercial activities exception states in substance that a foreign state is immune from the suit when the action is based upon (1) a commercial activity carried on in the United States by the foreign state; or (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) 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. *See Four Corners Helicopters, Inc. v. Turbomeca S.A.*, 677 F. Supp. 1096, 1098-1101 (D. Colo. 1988).

37. 28 U.S.C. § 1605(a)(3) (1982).

38. 28 U.S.C. § 1605(a)(4) (1982).

39. 28 U.S.C. § 1605(a)(5) (1982). Subsection (a)(5) denies immunity to claims for damages sought against a foreign government for personal injury or property damage occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment. *See Frolova*, 761 F.2d at 379 (recognizing explicit legislative intent to deny immunity only where injury or damage occurs in the United States). 28 U.S.C. § 1605(a)(5) was originally directed at the problem of traffic accidents involving diplomats. However, the section was drafted to encompass a broader class of tort actions. *Cf. MacArthur*, 809 F.2d at 921.

40. 28 U.S.C. § 1605(b) (1982).

41. 28 U.S.C. § 1607 (1982).

an act of a foreign government.⁴² The traditional American formulation of the doctrine has been stated as follows:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another one within its own territory. Redress of grievances by reason of such acts must be obtained through means open to be availed of by sovereign powers as between themselves.⁴³

Although not a strict jurisdictional hurdle, the act of state doctrine does require a court to abstain from deciding issues affecting certain public acts of foreign governments notwithstanding a statutory grant of jurisdiction.⁴⁴ It precludes a court from inquiring into the merits or legality of the conduct of a foreign sovereign acting in its public capacity.⁴⁵ Furthermore, this abstention is based upon a reluctance to review certain non-commercial judgments and, thus, avoid inquiry by a foreign court into the policies of the United States.⁴⁶ As a consequence, a

42. *International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Amerada Hess*, 830 F.2d at 452; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 691 n.7 (1976) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)); *see Oetjen v. Central Leather Co.*, 246 U.S. 297, (1918) *cited in Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1548-49 (N.D. Cal. 1987); *Republic of Philippines v. Marcos*, 818 F.2d, 1473, 1481 n.4 (9th Cir. 1987). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the United States Supreme Court held that the act of state precluded the adjudication of the validity of certain expropriations of the Cuban government. *Id.* at 415-37. The Supreme Court based its decision, in part, on the absence of any international consensus as to whether a government's expropriation of private property without just compensation constituted a violation of international law. *Id.* at 415. In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) the Circuit Court for the District of Columbia recognized that the acts of a foreign government often flow beyond any geographical limitation and extended the act of state doctrine to a terrorist attack allegedly undertaken by Libya in Israel. *See, e.g., P.L.O. Accuses Israel in Killing of Senior Military Figure in Tunis*, N.Y. Times, Apr. 17, 1988, at A1, col. 3.

43. *Liu v. Republic of China*, 642 F. Supp. 297, 300-303 (D. Cal. 1986) (act of state doctrine provides a basis for dismissal only if the case cannot be resolved without passing on the validity of the relevant act of state).

44. *Amerada Hess*, 830 F.2d at 452.

45. *Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7 (D.D.C. 1986), *aff'd*, 834 F.2d 203 (D.C. Cir. 1987) (act of state doctrine precluded court from inquiring into validity of Czechoslovakia's nationalization of textile plants).

46. *Amerada Hess*, 830 F.2d at 452; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *see International Ass'n of Machinists*,

United States court is advised to abstain from adjudicating issues which question the legitimacy and legality of the conduct or policy of a foreign government.⁴⁷

The act of state doctrine essentially acknowledges the reality that certain claims involving foreign affairs are not within the competency of the judiciary.⁴⁸ As a result, the doctrine is particularly designed to preempt judicial review of questions touching on foreign affairs.⁴⁹ This abstention primarily stems from a recognition that the adjudication of the value and validity of foreign policy judgments will obstruct rather than advance United States diplomatic interests.⁵⁰ This reluctance, additionally, is the product of a resolve to defer issues involving foreign policy questions to the discretion of the Executive.⁵¹ Consequently, al-

649 F.2d at 1359 (abstention is warranted regardless of whether the foreign government is named as party to the suit or whether the validity of its actions are directly challenged in the pleadings).

47. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 786 (D.C. Cir. 1984). The act of state doctrine is analogous to the discretionary function exception. Under this exception, the government is liable only for its "operational" decisions, not its "planning" decisions. *Payton v. United States*, 679 F.2d 475 (5th Cir. 1982). The purpose of the discretionary function exception is to permit government executives "to make policy decisions in an atmosphere free of concern over possible litigation." *Id.* at 479-80; *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641, 647 (9th Cir. 1984); see also *MacArthur*, 809 F.2d at 922 (explaining that the discretionary function exception intended to preserve immunity for decisions grounded in social, economic, and political policy).

48. See *International Ass'n of Machinists*, 649 F.2d at 1358-59; *Liu*, 642 F. Supp. at 300-301.

49. *Tel-Oren*, 726 F.2d at 803 (Bork, J., concurring). *Accord* *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520-21 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985); see *International Ass'n of Machinists*, 649 F.2d at 1360 (The "touchstone" or "crucial element" is the potential for interference with our foreign relations); *Amerada Hess*, 830 F.2d at 452 (the district court must engage in the broader analysis of the possible adverse effects upon foreign relations to make a preliminary assessment of the impact on international relations that would result from judicial consideration of the sovereign's act).

50. *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 605 (9th Cir. 1984), *cert. denied*, 472 U.S. 1032 (1985); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

51. *Tel-Oren*, 726 F.2d at 802 (Bork, J., concurring). See also *Drexel Burham Lambert Group Inc. v. Galadari*, 610 F. Supp. 114, 117 (D.C.N.Y. 1985). The court stated:

The act of state doctrine was originally grounded in principles of sovereign immunity. . . . In its modern incarnation, however, the doctrine focuses on the balance of power between the three branches of our own government, and in particular the danger that the judiciary might interfere with the dominant role of the executive branch in the conduct of foreign affairs. . . . The doctrine does not take the form

though the Constitution does not expressly impose the act of state doctrine, the underlying rationale has been recognized as involving "constitutional underpinnings."⁵² The concern for preserving the balance of power in the foreign affairs arena arises from the practical recognition of the adverse inconsistency which may result from the competition of ideas in resolving foreign policy issues⁵³ and a desire to preserve a single voice in the conduct of foreign affairs.⁵⁴ Therefore, the scope of judicial inquiry in cases involving the conduct of foreign policy must be limited in order to respect the dignity of an independent foreign state as well as to preserve the basic relationship between branches of government in conducting foreign policy.

IV. ALIEN TORT STATUTE

The Alien Tort Statute ("ATS") was originally enacted as part of the First Judiciary Act of 1789. During this period, the United States was in its nascent stage of development and plagued with the desire to promote its commercial relationships by maintaining diplomatic harmony.⁵⁵ The ATS purports to grant the federal district courts "original

of an absolute or inflexible rule, but rather requires a careful case-by-case analysis to determine if, in a particular situation, the conduct of foreign affairs by the executive branch is likely to be vexed or hindered by judicial review of the acts of a foreign government.

52. See *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 697 (1976); *First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972). Foreign relations: There are sweeping statements to the effect that all questions touching foreign relations are political. *E.g.*, "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative - 'the political' - departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). Also:

Not only does [the] resolution of such issues frequently turn on standards that defy judicial application, or involve the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."

Baker v. Carr, 369 U.S. 186, 211-12 (1962)(footnote included).

53. *Sabbatino*, 376 U.S. at 423.

54. *Id.* at 427-28.

55. *Tel-Oren*, 726 F.2d at 782, 784 (Edwards, J., concurring); *Tel-Oren*, 726 F.2d at 812, 814-815 (Bork, J., concurring). This orientation was clearly expressed in a pertinent discussion contained within George Washington's final manuscript of his Fare-

jurisdiction" over any tort action by an alien if committed: (1) in violation of international law, or (2) in violation of a United States treaty.⁵⁶ Sensitive to the international ramifications of denying ambassadors redress, Congress intended the statute to open United States courts to suits by foreign ambassadors claiming violations of their diplomatic immunity.⁵⁷ The statute does not require that the alleged tort be committed within the United States. Because the Alien Tort Statute was enacted during a period in which foreign sovereigns generally enjoyed absolute immunity, the ATS was intended to set forth a jurisdictional grant over individuals and not sovereigns. Consequently, the ATS was not intended to conflict with principles of sovereign immunity.

Two interpretations of what violations of international law are contemplated by the Alien Tort Statute have emerged from the federal circuits. A broader view of the jurisdictional grant of the ATS has been set forth by the Second Circuit in *Filaritiga v. Pena-Irala*.⁵⁸ In *Filaritiga*, a former Paraguayan police official residing in the United States faced a civil suit brought by Paraguayan citizens for the death of a young man allegedly tortured to death in Paraguay in retaliation for the young man's father's anti-government protests.⁵⁹ The defendant was not permitted to invoke the defense of diplomatic immunity. The Second Circuit sustained jurisdiction over the defendant under the

well Address dated September 19, 1796. Washington noted:

The Great rule of conduct for us, in regard to foreign Nations is in extending our commercial relations to have with them as little political connection as possible.—So far as we have already formed engagements let them be fulfilled, with perfect good faith.—Here let us stop. Europe has a set of primary interests, which to us have none, or a very remote relation.—Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns.—Hence therefore it must be unwise in us to implicate ourselves, by artificial ties, in the ordinary vicissitudes of her politics, or the ordinary combinations and collisions of her friendships, or enmities:—Our detached and distant situation invites and enables us to pursue a different course.—If we remain one People, under an efficient government, the period is not far off, when we may defy material injury from external annoyance

F. GILBERT, TO THE FAREWELL ADDRESS: IDEAS OF EARLY AMERICAN FOREIGN POLICY 145-46 (1961).

56. 28 U.S.C. § 1350 (1982). See, e.g., *Tel-Oren*, 726 F.2d at 820-21 (Bork, J., concurring); *Guinto v. Marco*, 654 F. Supp. 276, 279 (S.D. Cal. 1986).

57. *Tel-Oren*, 726 F.2d at 815 (Bork, J., concurring). See also *Von Dardel*, 623 F. Supp. at 254 (In 1789, Congress expanded the jurisdiction of the district courts of the United States to suits by aliens claiming tortious violations of diplomatic immunity").

58. 630 F.2d 876 (2d Cir. 1980).

59. *Id.* at 878.

ATS.⁶⁰ The appellate court emphasized that an action brought pursuant to the ATS must sufficiently assert a uniformly accepted violation of international law.⁶¹ Interpreting international law as a developing body of principles,⁶² the court found that the "official torture" of an individual constituted a "clear and unambiguous" violation of international law.⁶³

Most recently, the *Filartiga* decision was explained in *Forti v. Suarez-Mason*.⁶⁴ In *Forti*, a civil action was brought in the United States District Court for the Southern District of California by Argentinean citizens against a former Argentinean general responsible for the Buenos Aires province. The action arose out of Argentina's "dirty war" against dissident citizens and claimed damages from the defendant general for conduct including torture, murder, arbitrary detention, disappearance and degrading treatment, all allegedly committed in Argentina by various military and police personnel under the defendant's command. The court held that "official torture," "murder" and "arbitrary detention" constituted cognizable violations of international law.⁶⁵ The court emphasized that the prohibition against these acts was "clear," "unambiguous," "universal," "obligatory," and "definable."⁶⁶ As a result, the court found that there was a sufficiently recognized foundation to allege a violation of international law and assert jurisdiction under the ATS over the former Argentinean military officer.⁶⁷

60. *Id.* at 889.

61. *Id.* at 880.

62. *Id.* at 881 ("Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."); *Accord Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

63. *Filartiga*, 630 F.2d at 878.

64. 672 F. Supp. 1531 (N.D. Cal. 1987); *Aliens May Sue for Torts Abroad*, Nat. Law J. Nov. 2, 1987, at 3, col. 1. See also *Ex-Argentine General Loses U.S. Extradition Case*, N.Y. Times, Apr. 28, 1988, at A7 col. 1 (discussing extradition of the defendant and status of civil suits).

65. *Forti*, 672 F.Supp. at 1539.

66. *Id.*

67. *Id.* The court noted:

[T]he proper interpretation of the statute [ATS] has been discussed at some length in the principal decisions upon which the parties rely. . . the unanimous decision in *Filartiga* . . . and the three concurring opinions in *Tel-Oren* The Court is persuaded, however, that the interpretation of § 1350 forwarded by the Second Circuit in *Filartiga*, . . . and largely adopted by Judge Edwards in *Tel-Oren*, is better reasoned and more consistent with principles of international law. There appears to be a growing consensus that 1350 provides a cause of action for certain "international common law torts." [A] plaintiff seeking to predicate jurisdiction on the Alien Tort Statute need only plead a "tort. . . in violation of the law

However, the court dismissed the claims for "disappearance" and "degrading treatment" based on a lack of consensus that those claims violated accepted principles of international law.⁶⁸

The Court of Appeals for the District of Columbia considered the application of the ATS and detailed a more narrow view of what violations of international law were contemplated by the statute's jurisdictional grant. In *Tel Oren v. Libyan Arab Republic*,⁶⁹ the court considered whether jurisdiction over Libya and the Palestinian Liberation Organization could be properly maintained for claims brought by Israeli citizens arising from a terrorist attack in Israel. The plaintiffs, survivors of the attack and representatives of some of those killed, asserted jurisdiction primarily pursuant to the ATS. The court of appeals dismissed the action but issued three distinct concurring opinions. Judge Edwards adopted the *Filartiga* analysis but, based upon factual distinctions, held that no sufficient international consensus existed to warrant an extension of *Filartiga* to support federal jurisdiction over the tort of terrorism.⁷⁰ Judge Bork adopted a more narrow reading of the statute and reasoned that the doctrine of separation of powers limited the jurisdiction of the ATS to those violations of international law that were recognized as actionable in 1789.⁷¹ Judge Bork indicated that the purpose of the statute, to avoid diplomatic contention, would only be sustained by limiting the jurisdictional grant to those tortious actions contemplated in 1789.⁷² Judge Robb cited separation of powers concerns similar to those expressed by Judge Bork and cautioned against judicial interference in politically sensitive areas, such as international terrorism, where the principle of international law is vague

of nations." . . . The contours of this requirement have been delineated by the *Filartiga* court and by Judge Edwards in *Tel-Oren*. Plaintiffs must plead a violation of the law of nations as it has evolved and exists in its contemporary form. . . . This "international tort" must be one which is definable, obligatory (rather than hortatory), and universally condemned. . . . The requirement of international consensus is of paramount importance, for it is that consensus which evinces the willingness of nations to be bound by the particular legal principle, and so can justify the court's exercise of jurisdiction over the international tort claim. . . .

68. *Id.* at 1543.

69. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

70. *Id.* at 791-96 (Edwards, J., concurring). Judge Edwards outlined the actions fitting within the international law definition of the ATS as follows: (1) genocide, (2) slavery or slave trade, (3) the murder; (4) torture; (5) arbitrary detention; (6) systematic racial discrimination; and (7) any consistent pattern of recognized human rights violation. *Id.* at 781.

71. *Id.* at 813-14 (Bork, J., concurring).

72. *Id.* at 815-16.

and not adequately defined.⁷³

The decisions in *Tel-Oren* and *Filartiga* reveal an absence of consensus as to what constitutes a "violation of international law" for the purposes of asserting jurisdiction under the ATS. Although the two decisions are distinguishable, there remains a common principle which squarely registers. To sustain jurisdiction under the ATS, an alien must assert a tort which is recognized as a uniformly accepted violation of international law. The distinction between *Filartiga* and *Tel-Oren* is whether this recognition is limited to those torts accepted in 1789 or may be based on more modern assumptions.

Jurisdiction pursuant to the ATS appears to be limited to personal injury and wrongful death actions, not property damage claims.⁷⁴ Furthermore, pure jurisdiction under the ATS has only been sustained against individual defendants; namely, former government officials, not foreign sovereigns. Reliance on the decision in *Von Dardel v. U.S.S.R.*⁷⁵ to support the assertion that the ATS confers jurisdiction over a foreign state for a violation of international law is misplaced. In *Von Dardel*, the court sustained jurisdiction under the ATS and entered a default judgment against the Soviet Union in an action brought against it for various torts committed against a Swedish diplomat believed to have been imprisoned and killed by the Soviet Union after World War II.⁷⁶ Although jurisdiction was upheld against the foreign state, the district court based its decision more on a violation of diplomatic immunity, one of the torts recognized in 1789, than on a contemporary violation of international law.⁷⁷ Consequently, *Von Dardel* tends to buttress the opinion of Judge Bork in *Tel-Oren* rather than to expand the reasoning in *Filartiga* to support a jurisdictional grant encompassing a property damage claim against a foreign government.

V. *Amerada Hess Shipping Corporation v. Argentine Republic*

A. *Facts*

United Carriers, Inc. ("United Carriers"), a Liberian corporation, was the owner of a 220,117 deadweight ton oil tanker of Liberian Reg-

73. *Id.* at 827 (Robb, J., concurring).

74. *See, e.g., De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) ("the standards incorporated into the law of nations encompass only such basic human rights; the taking by a state of its national's property does not contravene the international law of minimum rights").

75. 623 F. Supp. 246 (D.D.C. 1985).

76. *Id.*

77. *Id.* at 262-63.

istry named HERCULES.⁷⁸ On April 26, 1977, Amerada Hess Shipping Corporation ("Hess"), a Liberian Corporation, time-chartered the vessel for the purpose of transporting crude oil from Valdez, Alaska to a Hess oil refinery in the Virgin Islands.⁷⁹ The vessel's width precluded passage through the locks of the Panama Canal. As a result, the HERCULES sailed between Alaska and the Virgin Islands by travelling around South America, past the Falkland Islands and through the South Atlantic.⁸⁰

In April of 1982, the Falkland Islands literally became the battleground of a seventy-four day war between the Republic of Argentina and Great Britain involving intensive sea and air combat operations.⁸¹ On May 2, 1982, the HMS CONQUEROR, a British submarine, sank the Argentine cruiser GENERAL BELGRANO.⁸² On May 5, while voyaging from Valdez to St. Croix, the HERCULES became involved in the Falklands War. At the request of the Argentine Navy, the vessel was diverted off her course, in order to search for survivors of the GENERAL BELGRANO. The HERCULES was released and later completed her voyage to St. Croix.⁸³

78. Joint Brief for Appellants at 2, *Amerada Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602 and 86-7603).

79. A time-charter is a contract by which the owner leases a vessel to a "charterer" for a specific time or use. See BLACK'S LAW DICTIONARY 1330 (5th ed. 1976); see also G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, §§ 4-14 through 4-19, at 229-39 (1957).

80. *Amerada Hess*, 638 F. Supp. at 73. The Falkland Islands are located approximately 300 miles off of the eastern coast of Argentina in the South Atlantic.

81. For an excellent discussion of the conflict, see Freedman, *The War of the Falkland Islands, 1982*, 60 FOREIGN AFF. 196 (1982).

82. *Mayday in the South Atlantic*, THE ECONOMIST, May 8, 1981, at 19. The magazine reported the incident as follows:

On May 2nd a British hunter-killer nuclear-powered submarine, believed to be HMS CONQUEROR, torpedoed Argentina's second largest ship, the GENERAL BELGRANO, a creaking 43-year-old 13,645-ton cruiser. The ship tried to limp home, but foundered in a storm after its crew had taken to the lifeboats. Some 750 of the 800-1,000 men thought to be on board were reported to have been rescued by Thursday. Two days later, the Argentines had their revenge: a French-made Exocet missile, fired from a Super Etendard naval fighter-bomber, skimmed across maybe 20 miles of water to hit the 4,100-ton destroyer HMS SHEFFIELD. The missile struck the control room, starting a fire that could not be put out. Most of the crew of 270 were lifted off but at least 30 men were thought to have died. . . . Both the GENERAL BELGRANO, which was just outside Britain's 200-mile no-go area around the Falklands, and the SHEFFIELD, whose position at the time of being struck is a British military secret shared by Argentina, appear to have been on the fringes of their respective fleets.

83. *Amerada Hess*, 638 F. Supp. at 74.

On May 25, 1982, the HERCULES began its return voyage to Alaska. On June 2, Argentine aircraft attacked the British-flag commercial tanker WYE. As a response to this attack and in an effort to protect neutral shipping in the area, the United States Maritime Administration sent telexes to Argentina and Great Britain listing United States flag vessels and United States interest shipping that would be transiting the war zone.⁸⁴ By June 8, 1982, the HERCULES was in international waters approximately 600 nautical miles off the Argentinean coast and outside the declared blockage zone.⁸⁵ That afternoon, the HERCULES was attacked in three different strikes by Argentine Air Force fighter aircraft.⁸⁶ The vessel's deck and hull suffered extensive damage. A bomb penetrated the vessel's superstructure and remained undetonated at the bottom of the ship's No. 2 tank.⁸⁷ Partially disabled, the vessel was diverted to the port of Rio de Janeiro, Brazil. After an investigation by the Brazilian Navy, the vessel was ordered to leave the port.⁸⁸ The owner, realizing that it would be unreasonably dangerous to attempt to remove the bomb and repair the HERCULES, scuttled the tanker on July 20, 1982, in the South Atlantic.⁸⁹

United Carriers claimed a loss of \$10,000,000 on the sunken vessel and the loss of the charter hire. Hess claimed damages in the amount of \$1,901,259.07 as a result of the loss of the bunkers (fuel) which

84. *Id.*

85. *Amerada Hess*, 830 F.2d at 423; see *Invasion*, THE ECONOMIST, May 1, 1982, at 18 ("Britain has sharply stepped up the pressure on Argentina by declaring a complete blockade of the Falklands from April 30th. The 200-mile exclusion zone around the islands previously applied only to Argentine naval ships; from Friday all ships and aircraft from any country, commercial or military, became "liable to be attacked" by British forces. . . .). See also *Mayday in the South Atlantic supra* note 82, at 19 ("On April 30th, the Argentines . . . declared their own 200-miles exclusion zones off their coast and around the Falklands.").

86. *Amerada Hess*, 830 F.2d at 423. Argentine military aircraft strafed, rocketed and bombed the vessel in three separate attacks on June 8, 1982: at 1350 Greenwich Mean Time ("G.M.T."), when she was located, 46 degrees, 30 minutes West longitude; at 1430 G.M.T. when she was at 45 degrees 16 minutes South latitude, 48 degrees 25 minutes West longitude; and at 1625 G.M.T. when she was at 46 degrees 55 minutes West longitude. The British had requisitioned and dispatched numerous merchant vessels, such as container ships and commercial tankers, to support its action against the Argentineans. See *Will Two Weeks' Steaming Let Off the Pressure*, THE ECONOMIST, May 8, 1981, at 19. The Argentinean pilots may have mistaken the vessel for a British support vessel. In fact, one of the British commercial container ships was sunk by Argentinean forces. See *The Battle of San Carlos*, THE ECONOMIST, May 29, 1982, at 19.

87. Joint Brief for Appellants, *supra* note 78, at 7.

88. Brief for Appellee at 3, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602 and 86-7603).

89. *Amerada Hess*, 630 F. Supp. at 74.

went down with HERCULES.⁹⁰ After an unsuccessful attempt to seek recourse in Argentina,⁹¹ the owner and charterer brought a consolidated action in federal district court in New York.

B. *The Opinion of the District Court*

The United States District Court for the Southern District of New York rejected any expansion of federal jurisdiction over a foreign sovereign beyond the FSIA. The district court held that “[a] foreign state is subject to jurisdiction in the courts only if an FSIA exception empowers the court to hear the case.”⁹² The court ruled that unless a foreign sovereign waives immunity, asserting a tort claim against a foreign government requires that the damage or loss occur within the United States.⁹³ The district court held that because there was no waiver of immunity and the losses claimed occurred outside the United States, the action fell beyond the purview of the FSIA. As a result, the court summarily dismissed the suit for lack of jurisdiction.⁹⁴

The court further held that to interpret the ATS as vesting a court with jurisdiction over foreign governments where the FSIA forbids it would make a “nullity” of foreign sovereign immunity in United States courts.⁹⁵ The court, although crediting Hess’ assertion that the Alien Tort Statute provided a basis for jurisdiction as being “innovative,” rejected that contention.⁹⁶ Relying on a static interpretation of the ATS, the court found that Argentina would have been immune from suit in 1789. Moreover, the court recognized that although the FSIA did not tacitly repeal the ATS, it repealed any grant of jurisdiction for actions brought against foreign governments.⁹⁷

90. *Amerada Hess*, 830 F.2d at 423. The Hercules was returning to Alaska “in ballast” or without cargo. The loss to Hess would have been substantially larger if the vessel had been attacked on its fully loaded voyage from Alaska to the Virgin Islands.

91. *Amerada Hess*, 638 F. Supp. at 74.

92. *Id.* at 75.

93. *Id.* at 76. The court dismissed any contention that this tort action fell within the purview 1605(a)(5) because the damage and loss of property occurred outside the United States.

94. *Id.*

95. *Id.* at 77 (citing *In Re Korean Air Lines Disaster of September 1, 1983*, Misc. No. 83-0345 (D.D.C. Sept. 1, 1985)).

96. *Id.*

97. *Amerada Hess*, 638 F. Supp. at 76. Hess also argued that the Argentina’s refusal to offer restitution was a manifest violation of its obligation under international law. The District Court responded by ruling that the failure of Argentina to recognize its responsibilities as a nation did not empower it to create an ad hoc exception to the FSIA. *Id.*

The court principally relied on two unpublished district court opinions which had rejected similar arguments that the ATS authorizes jurisdiction against foreign governments for violations of international law. First, in *Siderman v. Republic of Argentina*,⁹⁸ a claim was brought directly against Argentina for torture and the taking of property by the former military regime. In dismissing the action, the court reviewed the legal history of foreign sovereign immunity and concluded that the ATS did not provide an exception to foreign sovereign immunity for a violation of international law.⁹⁹ Second, in *In re Korean Air Lines Disaster of September 1, 1982*,¹⁰⁰ the court dismissed wrongful death claims brought against the Soviet Union arising from the downing of Korean Air Lines flight 007 on September 1, 1983, when it strayed into Soviet territory. Although the court relied on both the FSIA and the act of state doctrine, it found no basis for interpreting a collateral statute authorizing jurisdiction for actions against foreign governments beyond the exceptions set forth in the FSIA.¹⁰¹

The district court recognized, however, that similar arguments had been "incorrectly" accepted by the District Court for the District of Columbia in *Von Dardel v. U.S.S.R.*¹⁰² The district court responded to *Von Dardel* by stating that the legislative history cited therein¹⁰³ merely states that Congress sought to adopt international standards to preserve claims for violations of diplomatic immunity, not that immunity would be waived for violations of international law.¹⁰⁴ The district court concluded its analysis by commenting that it had addressed the arguments "in greater detail than they merit, given the clarity of the FSIA's language and the precedents that support this result."¹⁰⁵

C. *The Opinion of the Court of Appeals*

The United States Court of Appeals for the Second Circuit reversed the district court and held that federal jurisdiction could be properly asserted over Argentina. The court based its decision on five fundamental points. First, an attack on a neutral vessel was held to violate "mutual" and "recognized" principles of international law. Sec-

98. No. 82-1772 (D.C. Cal. March 7, 1985).

99. *Siderman*, No. 82-1772, slip. op. at 3 (D.C. Cal. March 7, 1985) cited in *Amerada Hess*, 638 F. Supp. at 77.

100. Misc. No. 83-0345 (D.D.C. Sept. 1, 1985).

101. *Amerada Hess*, 638 F. Supp. at 77.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

ond, the ATS was interpreted as authorizing jurisdiction over an individual or foreign sovereign for a violation of international law. Third, the court ruled that there was no foreign sovereign immunity for violations of "settled" principles of international law. Fourth, the FSIA was held as not preempting the jurisdictional grant of the ATS. Fifth, the assertion of jurisdiction over Argentina did not violate any substantive principles of due process.

The underlying premise of the Second Circuit's decision was that Argentina violated customary principles of international law.¹⁰⁶ The court observed that whether a court faced with the circumstances of this case in 1789 would have exercised jurisdiction over a foreign sovereign was inconsequential. The court adopted the view in *Filartiga* and revealed, in a phalanx of supply side judicial overreaching, the underpinnings of its reasoning:

We need not decide, however, whether a court faced with the circumstances of this case in 1789, the year the Alien Tort Statute was enacted, would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.¹⁰⁷

The court held that principles of innocent passage and the rights of neutral shipping were uniformly accepted principles of international law:¹⁰⁸ "[S]ince the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law."¹⁰⁹ The court held that Argentina's attack, combined with its refusal to compensate, were "analogous to piracy" and were, thus, in violation of international law.¹¹⁰ The court explained that:

106. *Amerada Hess*, 830 F.2d at 423.

107. *Id.* at 425.

108. *Id.* at 424.

109. *Id.* at 426.

110. *Id.* at 424. Specifically the majority opinion held that, as a matter of law, the actions of Argentina violated the established boundaries of international conduct governing the relationship between warships and neutral merchant shipping on the high seas. *Id.* See *The Lusitania*, 251 F. 715, 732-37 (S.D.N.Y. 1918) (because the act of the German submarine commander in sinking the *Lusitania*, an unarmed British passenger vessel, without warning and without making any provisions for the safety of passengers and crew was illegal being in violation of the laws of nations recognized even by Germany prior to the sinking of the *Lusitania*, the owners of the vessel were not liable for the death of the passengers).

[I]t is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law. . . [Furthermore][w]here the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law.¹¹¹

The court held that Hess had established a claim of a violation of international law under the ATS.¹¹² Thus, the court detailed that the elements of a *prima facie* case under the ATS sustaining jurisdiction were met in the instant case because: (1) Hess is a Liberian corporation and, therefore, an alien; (2) the action alleged the tort of attacking a neutral vessel in international waters; and (3) the tort alleged is a violation of international law.¹¹³

The Second Circuit rejected Argentina's contention that the FSIA preempted any jurisdictional grant indigenous to the ATS.¹¹⁴ Argentina argued that because the ATS was enacted at a time when a state enjoyed absolute immunity, the lack of an express intent to provide jurisdiction in the ATS over a foreign sovereign indicated an intent to maintain the grant of immunity. Therefore, the only actions which could be asserted against a foreign sovereign were set forth within the specific FSIA exceptions. The court disagreed with this argument and ruled that as to the loss of a neutral merchant vessel in international waters, the grant of sovereign immunity set forth within the FSIA did not control the amenability to suit of a foreign sovereign for a violation of international law.¹¹⁵ Although admitting that Argentina's view of the ATS could be traced to the statute's legislative history,¹¹⁶ the court held that a close examination of the FSIA revealed that Congress did not intend to remove the "existing remedy" under the ATS for viola-

111. *Amerada Hess*, 830 F.2d at 424. The court added that "attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution."

112. *Id.*

113. *Id.* at 425.

114. *Id.* at 426. In support of its view that the FSIA preempted the jurisdictional grant of the ATS, Argentina cited to the "comprehensive" language in the second circuit's opinion in *O'Connell Machinery Co. v. M/V AMERICANA*, 734 F.2d 115, 116 (2d Cir.), *cert. denied*, 496 U.S. 1086 (1984) ("The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act.").

115. *Amerada Hess*, 830 F.2d at 426.

116. *Id.*

tions of international law.¹¹⁷

The court next reconciled any inconsistency in its interpretation of the ATS and FSIA. The Second Circuit interpreted the ATS as a pre-existing jurisdictional grant for an entire class of actions against foreign governments beyond the exceptions set forth within the FSIA. The court held that the FSIA did not preempt the ATS's jurisdictional grant for violations of international law because a United States court generally denies immunity for violations of international law.¹¹⁸ The court viewed the ATS as a straightforward and independent statute vesting federal courts with jurisdiction for claims by aliens for violations of international law irrespective of the status of the defendant as a foreign sovereign or individual.¹¹⁹ The court reasoned that it was merely preserving the validity and virtue of an existing jurisdictional grant for violations of international law. Furthermore, the court indicated that the jurisdictional character of ATS and the FSIA were in *pari passu* to be applied with equal force with respect to a claim against a foreign sovereign.¹²⁰

Anticipating the argument that its decision arbitrarily encroached upon the intent of the statute, the court explained that the FSIA was not intended to be the aegis for violations of international law.¹²¹ The court outlined the three objectives of the FSIA: (1) to incorporate into United States law the "restrictive theory of sovereign immunity;" (2) to insure the role of the judiciary in developing and applying the law as an organic principle of the immunity; and (3) to provide a comprehensive set of procedures to permit suits against foreign sovereigns. The court explained that these objectives were not intended to eliminate the jurisdictional grant of the ATS or alter its remedy for violations of international law.¹²² The court noted that international law violations were simply not discussed in the FSIA or its legislative history outside of the commercial context.¹²³ Therefore, the ATS was held not to be

117. *Id.*

118. *Id.* at 426.

119. *Id.* at 425.

120. *Id.* at 427.

121. *Id.* at 426-27 ("A close examination of the legislative history of the FSIA demonstrates that Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here").

122. *Id.* at 427 ("Thus, international law violations were not the focus of the 'comprehensive' language of the drafters of the FSIA anymore than they were the focus of the Supreme Court in the *Verlinden* case. . . . The elimination [through the FSIA] of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law.").

123. *Id.*

the focus of the "comprehensive" language of the drafters of the FSIA. After this less than exhaustive analysis, the court found the legislative history of the FSIA "devoid" of any indication that Congress intended the FSIA to bar jurisdiction under a suit under the ATS for a violation of international law.¹²⁴

[A]lthough Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.¹²⁵

Construing the FSIA to bar jurisdiction under the "unusual" circumstances of this case would, according to the court, actually frustrate the intent of the FSIA. The central premise of the Act is that immunity determinations are to be made by the courts pursuant to its exclusive statutory scheme. Thus, according to the court, although the FSIA does not focus on suits for violations of international law, it clearly expected courts to apply substantive principles of international law to claims of sovereign immunity. Therefore, because Congress did not express a clear intent to contradict what the court perceived as the immunity standards of international law, the court held that the FSIA was not intended to preempt the jurisdictional grant of the ATS over violations of international law.¹²⁶

The court further found that the exercise of jurisdiction over Argentina comported with accepted due process notions of minimum contacts.¹²⁷ The court supported its reasoning by holding that the act of piracy committed by Argentina is within a class of offenses under international law that "always have sufficient 'effects' within the United

124. *Id.* The court held that "[w]e would consider it odd to hold that, by enacting a statute designed to narrow the scope of sovereign in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law." *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 428. *Cf. Kane, Suing Foreign Sovereigns: A Procedural Compass*, 34 *STAN. L. REV.* 385, 404-07 (1982).

States to satisfy due process.”¹²⁸ As an alternative basis, the court explained that the actions alleged were sufficiently related to the United States for Argentina to have been on notice that it would be subject to the jurisdiction of United States courts:

Argentina was specifically notified by the United States that HERCULES would be passing through the South Atlantic on neutral business, clearly revealing to Argentina a United States interest in the ship and its safety. Furthermore, HERCULES was plying the United States domestic trade, transporting oil from one part of the United States to another part of the United States pursuant to a contract that called for payment in the United States. Of course Argentina was also aware of the obvious United States interest in protecting the freedom of the high seas.¹²⁹

The court concluded its majority opinion by attempting to narrow the decision to preempt the wholesale assertion of jurisdiction against foreign governments by recognizing that:

The FSIA is the sole source from which a foreign sovereign may obtain immunity and ordinarily, it is the only basis on which a court can exercise jurisdiction over a foreign sovereign. However, where an alien sues a foreign sovereign for a violation of international law, Congress has provided subject matter jurisdiction under the Alien Tort Statute. . . . The class of actions that are recognized as international law violations, as distinguished from a mere tort, is quite small. Moreover, the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example . . . would still have to be considered.¹³⁰

The court noted that its decision may inevitably invite legislative repeal:

We realize that the question of the effect of these two statutes enacted by Congress is a difficult one. We are heartened by the

128. *Amerada Hess*, 830 F.2d. at 428.

129. *Id.* The majority also explained that “[c]onsiderations of fairness also weigh in favor of exercising jurisdiction since appellants have sought redress of their grievances in Argentina and were unable to obtain even a hearing”. *Id.*

130. *Id.*

knowledge that, if we are mistaken, there is no bar to a statutory remedy. It should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great.¹³¹

The suggestion that the ATS sanctioned jurisdiction over an alien's claim against a government for a violation of international law produced a strong dissent.¹³² The dissenter viewed the majority opinion as substituting its judgment for the unqualified Congressional intention to detail jurisdiction over foreign governments within the FSIA. The dissent reasoned that it was clear from both the statutory language and the legislative history that: (1) the FSIA provided the exclusive framework to resolve a foreign sovereign's claim to immunity; and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Because the FSIA did not set forth an applicable exception denying immunity to Argentina, the district court lacked jurisdiction over the claim.¹³³

VI. ANALYSIS

A. *Interference with the Conduct of Foreign Affairs*

1. *General Principles*

The control and conduct of foreign policy is vested within the Executive and Congress.¹³⁴ The validity of this doctrine, as it relates to the Executive, was reaffirmed by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*,¹³⁵ which referred to the "very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations."¹³⁶ Conse-

131. *Id.* at 429.

132. *Id.* at 429-30 (Kearse, J., dissenting). The dissent explained that: [E]ven assuming that when Congress passed the Alien Tort Statute in 1789 it intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," a premise of which I am skeptical, I cannot see how we can properly disregard the clearly restrictive provisions of the Foreign Sovereign Immunities Act. . . which were "intended to preempt any other State or Federal law. . . for according immunity to foreign sovereigns.

Id.

133. *Id.*

134. See Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284 (1988).

135. 299 U.S. 304 (1936).

136. *Id.* at 319-20.

quently, judicial forays into the conduct of foreign policy have been largely foreclosed through the act of state doctrine and other prophylactic measures. The *Amerada Hess* decision upholding federal jurisdiction over a claim arising out of the conduct of the armed forces of a foreign government is contrary to the prohibition against judicial interference with foreign affairs. Furthermore, it may seriously usurp the Executive's constitutional discretion to conduct foreign policy.¹³⁷

The reasoning behind limiting judicial expeditions into the area of foreign affairs was recently analyzed by the United States Court of Appeals for the Fourth Circuit. In *Smith v. Reagan*,¹³⁸ several relatives of American servicemen missing in action in the Vietnam War brought suit against the President, the Secretaries of Defense and State, and the Director of the Defense Intelligence Agency, seeking a declaration that American prisoners continue to be held in captivity in Southeast Asia. The district court dismissed a portion of the lawsuit and held that because the claim directly involved foreign policy decisions, its adjudication would squarely interfere with the Executive's discretion to conduct foreign policy.¹³⁹

The Fourth Circuit went beyond the district court's opinion and dismissed the entire action. The appellate court held that it lacked any "judicially discoverable and manageable standards for resolving" the foreign policy question and understood the "peril" inherent in its adjudication of the issue:¹⁴⁰

[The plaintiffs] ask the courts to determine whether American service personnel remain in captivity in southeast Asia and to assess the adequacy of the executive's efforts to secure the release of any who do. Either course of action is fraught with peril for the judiciary. In order to grant the relief requested, the courts would be asked to intrude in the conduct of sensitive diplomatic negotiations. Furthermore, they would be asked to make determinations of fact in an area where the judiciary lacks power to obtain information, and in which it has neither expertise to evaluate the information brought before it nor standards to guide its review. Finally, as different courts address these issues, the judiciary may speak with multiple voices in an area where it is imperative that the nation speak as one. These difficulties lead us to conclude that this suit

137. *Verlinden*, 461 U.S. at 493.

138. No. 87-1661 (4th Cir. April 18, 1988).

139. *Smith v. Reagan*, 637 F. Supp. 964, 967 (E.D.N.C. 1986).

140. *Id.*

presents a nonjusticiable political question.¹⁴¹

The court reasoned that the action presented issues which were “constitutionally committed” to the Executive. The court recognized the possible implication of its decision on the Executive’s conduct of foreign affairs:

Plaintiffs seek in this suit to investigate and evaluate the Executive branch’s conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review. . . . Not every suit that touches on foreign relations is beyond judicial cognizance. A cause of action under the Hostage Act, however, would inescapably involve courts in matters of the most delicate diplomacy. A charge that a foreign government has “unjustly deprived” an American citizen of liberty is likely to have far-reaching and unforeseeable effects on the conduct of foreign relations.¹⁴²

The court prudently realized that the judiciary was “unschooled in the delicacies of diplomatic negotiations [and] the inevitable bargaining for the best solution of an international conflict.”¹⁴³ The court explained that:

Plaintiffs would simply place too many actors on the diplomatic stage. The Supreme Court noted in *Baker* that issues involving foreign relations often pose political questions because, in part, they “uniquely demand single-voiced statement of the Government’s views. . . .” It is important that this country speak with a single, clear voice. . . . Pronouncements by the federal courts may differ sharply from those of the executive, and might themselves not be

141. *Smith*, No. 87-1661, slip. op. at 6 (4th Cir. April 18, 1988).

142. *Id.* at 8-9. The Fourth Circuit quoted extensively from the Supreme Court’s decision in *Chicago & Southern Airlines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). The Supreme Court stated in *Chicago & Southern* that:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & Southern, 333 U.S. at 111 cited in *Smith*, No. 87-1661, slip op. at 8-9 (4th Cir. April 18, 1988).

143. *Id.*

consistent.¹⁴⁴

Consequently, the court abstained from an independent inquiry into sensitive foreign policy matters in order to avoid the infraction on the Executive's discretion to conduct foreign policy.¹⁴⁵

The considerations addressed by the Fourth Circuit in *Smith* are not unique to that case. A court's adjudication of a claim involving foreign policy issues presents numerous perils for the judiciary. Regardless of the particular issue, the court would most likely be forced to move beyond mere determinations of immunity and to intrude directly into the conduct of diplomacy. The court would also be compelled to make determinations of fact in an area where it lacked any expertise or authority to obtain information. Finally, the standards of review would be more arbitrary than consistent with any legal or political principles.

2. *Diplomatic Redress*

A centerpiece of the management of foreign policy is the role of the Executive and Congress, not the courts, in seeking redress against a foreign sovereign for a violation of international law.¹⁴⁶ On Monday,

144. *Id.* at 11 (citations omitted). The court in *Smith* noted that:

The courts also lack the powers for the task which plaintiffs would have them undertake. The political branches have worked for years, since the end of American involvement in hostilities in southeast Asia, to obtain a full accounting of missing Americans from foreign governments. The courts, which lack even the limited tools of diplomatic leverage, are unlikely to be more successful in obtaining information from those governments. Further, the courts lack the expertise to evaluate what information would be laid before them. Much of the evidence proffered by plaintiffs consists of intelligence reports, with which courts are inexperienced and unfamiliar. In the end, evaluation of this information requires not so much the application of law as the exercise of judgment. That judgment should be made by the political branches of our government.

Id. at 13.

145. *Id.* at 10.

146. *See Kline v. Republic of El Salvador*, 603 F. Supp. 1313 (D.D.C. 1985). In holding that El Salvador was immune from suit, the district court explained that:

[T]he violent death of an American abroad is a tragic occurrence. By virtue of their offices, United States diplomatic officials have the obligation to use their best efforts to protect and assist American citizens and their families in dealing with events in foreign lands, and to conduct vigorous inquiries and to take other diplomatic and political action when foreign governments do not provide adequate protection to the citizens of this nation. These, in fact, are among the reasons why the United States maintains vast ambassadorial and consular establishments around the world. *See generally*, 22 C.F.R. § 71.1. But the manner in which these obligations are exercised, and the conduct of foreign relations generally, are constitution-

July 4, 1988, *The New York Times* reported that the USS VIN-CENNES had mistakenly shot down an Iranian passenger plane over the Persian Gulf killing 290 passengers.¹⁴⁷ Two days later it was reported that the United States was contemplating paying the victims' relatives compensation.¹⁴⁸ On July 12, 1988, the Reagan Administration publicly announced that the United States would offer compensation, *ex gratia*, without admitting culpability or liability.¹⁴⁹

ally entrusted to the Executive Branch, with oversight by the Congress, not to the Judiciary. . . . For a court to hold executive officials liable in damages because in its view their inquiry on foreign soil was not sufficiently vigorous, their pressure on a foreign government not sufficiently severe, or the information they released not sufficiently extensive, would be to involve the Judicial Branch in matters with respect to which it has neither expertise nor jurisdiction. These are highly judgmental matters, and the officials to whom decision thereon is entrusted are for that reason protected from damage suits by the immunity doctrines discussed above.

Id. at 1321-22; *but see* Joint Brief for Appellants, *supra* note 78, at 33, (arguing that shipowners whose vessels had been seized or destroyed have historically not sought relief by diplomatic means through their flag state but by trial in the admiralty court).

147. *U.S. Downs Iran Airliner Mistaken for F-14; 290 Reported Dead; A Tragedy, Reagan Says*, N.Y. Times, July 4, 1988, at A1, Col. 6.

148. *U.S. Weighs Paying Victims' Relatives in Downing of Jet*, N.Y. Times, July 6, 1988, at A1, col. 1.

149. *U.S. Compensation Will be Provided in Airbus Downing*, N.Y. Times, July 12, 1988, at A1, col. 6 (payments reportedly would be made to the individuals directly through international aid organizations); *but see Calculation Mixes with Compassion*, N.Y. Times, July 18, 1988, A14, col. 1 (discussing congressional opposition to compensation payment); *see also The Roots and the Rudiments of Compensation to Foreigners*, N.Y. Times, July 13, 1988, A18, col. 1:

The practice in which one country makes amends for misfortune visited on another country's citizens has deep roots in modern diplomacy and international law. International law generally imposes no obligation to compensate civilians injured in wartime. But the United States has made a number of voluntary settlements, including \$1.6 million paid to some 700 people who suffered injuries or property lost in the 1983 invasion of Grenada. This group included the families of 18 patients who died when American forces accidentally bombed a mental hospital. In World War II, the United States paid Switzerland \$4 million as compensation for an accidental full-scale bombing raid on the town of Schaffhausen. One of the most famous cases resulting in compensation to the United States involved a Confederate ship, the *Alabama*, which sank 65 Union ships before going down in a spectacular sea duel off Normandy with the Union warship *Kearsarge*. The *Alabama* was built under contract to the Confederacy by a shipyard in Liverpool. Despite warnings by the American Ambassador, the British claim for damages against Britain became the subject of the first major international arbitration, which in 1871 found Britain liable for the damage caused by the *Alabama* and ordered it to pay \$15.5 million. In the most recent case that is roughly comparable, Israel met the full United States demand for \$7 million compensation for the 34 seamen killed and 75 injured in an Israeli air and sea attack on the intelligence ship *Liberty* in

On January 31, 1988, *The New York Times* reported that the United States, through its State and Defense Departments, was preparing to submit a multimillion dollar claim against Iraq for compensation for the death of thirty seven sailors caused by the Iraqi attack on the guided missile frigate STARK in the Persian Gulf on May 17, 1987.¹⁵⁰ It was reported that this compensation claim would be eventually accompanied by two additional submissions seeking compensation for the injuries suffered by other crewmen and reimbursement for the repair of the vessel.¹⁵¹ Claims for compensation, involving an attack on a neutral vessel should involve, as the VINCENNES and STARK incidents illustrate, government to government diplomatic negotiations,¹⁵² not judicial proceedings and civil penalties. Granting competing avenues of recourse in the federal courts, thus, serves only to subvert and disrupt the traditional foreign responsibilities of the Executive.¹⁵³

the 1967 war in the Middle East. In 1973, Israel shot down a Libyan passenger plane over the Sinai, killing 108, and paid Libya \$3 million. In 1983, the United States sought compensation from the Soviet Union for the 30 American citizens who were among the 269 victims of the shooting down of a South Korean airliner. But the Soviet Government would not even receive the diplomatic notice containing the request.

150. *See U.S. Seeks Iraqi Payments for Kin of Stark's Dead*, N.Y. Times, Jan. 31, 1988, at A13, col. 1.

151. *Id.* It was reported that the United States government was relying on the precedent set in the case of the Israeli attack on the American intelligence ship LIBERTY during the 1967 Middle East War. "In 1968, Israel paid the United States nearly \$7 million for the families of the 34 seamen killed in the attack and for wounds suffered by 75 crew members. But the issue remained divisive until 1980, when the Israelis also agreed to pay \$6 million for damage to the vessel." *Id.* In the Joint Response for Appellants submitted in a letter to the Clerk of the Court for the Second Circuit dated July 23, 1987, the owner and charterer argued that the universal right of neutral vessels to free passage was "reaffirmed" by the STARK incident. The right may have been recognized, but the appendage consensus as to the proper recourse is, however, disputed. The point of the STARK incident is not that it may pertain to the right of free passage, but, rather, how it may relate to the proper recourse for the interruption of freedom of navigation. The STARK retribution was obtained through diplomatic means.

152. In fact, senior officials of the Argentine Embassy were summoned to the United States Department of State where a formal "oral demarche" was delivered regarding the attack. *See Joint Brief for Appellants, supra* note 78, at 7.

153. The United States has traditionally provided its citizens recovery for injury resulting from an armed conflict. *See, e.g.*, the War Claims Act, 50 U.S.C. § 2017a(b) (1982):

The Commission is directed to receive and to determine according to the provisions of this title [sections 2017-2017p of this Appendix] the validity and amount of claims of nationals of the United States for . . . (b) damage to, or loss or destruction of, ships or ship cargoes directly or indirectly owned by a national of the

3. *Diplomatic Disruption*

The claim against Argentina in *Amerada Hess* raises sensitive issues affecting American foreign policy in South America. The judicial pronouncement that the conduct of Argentina's armed forces violated international law does not, and cannot, adequately reflect the diplomatic consequences of such an official condemnation on the legitimacy and integrity of a foreign state. In spite of the fact that Argentina is passing through a fragile and transitional stage of democracy¹⁵⁴ and is confronted with a massive international debt obligation,¹⁵⁵ Argentina has been placed in jeopardy of responding to a twelve million dollar civil judgment in a United States court as a result of the acts of the former military government's combat operations during the Falklands war. In the crucible of foreign policy debate, a court's inherent inability to synthesize the social, economic, military and political consequences of a judicial pronouncement on the legitimacy of a foreign state, establishes the justification for limiting any jurisdictional grant to those actions contemplated by Congress and detailed in the FSIA. A meddling decision based upon disputed principles of international law would serve only to undermine United States diplomatic prestige. Issues involving sensitive foreign policy judgments should actuate a court

United States at the time such damage, loss, or destruction occurred, which was a direct consequence of military action by Germany or Japan during the period beginning September 1, 1939, and ending September 2, 1945; no award shall be made under this subsection in favor of any insurer or reinsurer as assignee or otherwise as successor in interest to the right of the insured. . . .

154. See *Argentina Troops Move on Rebel Soldiers at Base*, N.Y. Times, Jan. 18, 1988, at A3, col. 3 (rebel soldiers threaten second coup against elected Government of President Raul Alfonsin); *Failed Argentina Coup Reflects Military's Inclinations on Democracy, Latin Generals Remain Unconvinced*, N.Y. Times, Jan. 24, 1988, at E3, col. 1 (revolt by Argentine Lt. Colonel in January of 1988 reflected failure of democratic government to persuade armed forces to respect and accept democracy); *Rebels Hint New Actions In Argentine*, N.Y. Times, Feb. 11, 1988, at A5, col. 1 (military officers intend to continue opposition to Argentine democratic government); *Corruption Cases Rise in Argentina*, N.Y. Times, Apr. 24, 1988, at A9, col. 1; *Drug Traffic Rises Sharply in Argentina*, N.Y. Times, Apr. 28, 1988, at A5, col. 1; *Argentine Jurists Shed Anonymity, Emerge as New Heroes of Democracy*, Wash. Post, May 6, 1988, at A24, col. 3.

155. See *Argentina Still Can't Pay Its Debt*, N.Y. Times, March 7, 1988, at D10, col. 1. (official report crisis looming due to Argentina's 54 billion dollar debt). *Argentina's Economy Seen as Out of Control*, N.Y. Times, Apr. 18, 1988, at D14, col. 5 ("After six years of the foreign debt crisis and four years of democratic government, the Argentine economy today is widely viewed as exhausted, chaotic and out of control."). For a thorough discussion of the Latin American debt crisis see Kuczynski, *The Outlook for Latin American Debt*, 66 FOREIGN AFF. 129 (1988).

to more accurately focus on whether the claim alleged falls within the purview of the explicit statutory immunity exceptions set forth within the FSIA and to veer away from assuming a competitive role as an active foreign policy formulator.¹⁵⁶

Finally, the *de facto* review of Argentina's action would be an inappropriate retrospective interference with the United States diplomatic judgment during the Falklands war itself and set the precedent permitting the courts to second-guess foreign policy judgments. The Falklands war drew very intense American diplomatic efforts due to the European and Latin American consequences of the war on United States standing in those regions. Initially, the United States attempted to preserve and maintain a neutral position.¹⁵⁷ The Reagan Administration attempted to mediate the dispute through "frenetic" shuttle diplomacy.¹⁵⁸ However, as a diplomatic solution appeared to be improba-

156. See *Lawsuit Dismissed on Ship That Struck Mine*, N.Y. Times, Dec. 12, 1987, at A10, col 1. See *infra* note 157 and accompanying text.

157. See *Everybody's Friend*, THE ECONOMIST, April 10, 1982, at 22 (discussing the attempt by the United States to shield itself from having to absorb any animosity generated among the Latin American governments); *But see In Latin America, Noriega Is a Principle*, N.Y. Times, Apr. 24, 1988, at E3, col. 1:

Yet the reality of United States power also defines the reality for Latin America. And, in practice, no big Latin American nation has allowed its relations with Washington to be poisoned by disagreements over how to deal with General Noriega. To some extent, this is because the region's acute economic troubles have sapped its political strength and increased its dependence on the United States. More fundamentally, it is because bilateral ties with the United States have always won out over regional solidarity. The 1982 war between Britain and Argentina over the Falkland Islands was a case in point. At the time, many officials in Washington feared that their support for Britain would permanently scar relations with Latin America, but today it is merely remembered as evidence of the region's secondary importance to the United States. Similarly, the Reagan Administration has been deeply involved in Central America in the 1980's, but it has paid relatively little attention to its relations with South American countries, which are more concerned with seeking relief from their foreign debt problems than with Central America.

158. *The Fleet Gets Closer than a Solution*, THE ECONOMIST, April 17, 1982, at 19. See also *Conservatives for Argentina*, THE ECONOMIST, April 24, 1984, at 22-26: When President Reagan's national security council convened on Wednesday morning, its assessment of the Falkland Islands crisis was grim. Mr. Alexander Haig, the secretary of state, had spent virtually all of his time for ten days attempting to negotiate a solution, only to find that Argentina's last, best offer fell short of the British requirement that the wishes of the islanders themselves be taken into account. . . . Mr. Reagan found himself appealing to both sides to give the United States more time to try to work something out. . . . The Reagan administration has not got any new tricks in its bag, but the prospect of a shooting war between Britain and Argentina poses a desperate dilemma for American policy makers.

ble, the United States moved toward siding with Great Britain.¹⁵⁹ On May 1, 1982, the Reagan Administration made the political judgment and publicly allied itself with Great Britain.¹⁶⁰

There exists virtually no distinction between the Reagan Administration's political judgment of May, 1982, and the court's legal decision in September, 1988, except possibly that the political decision was better informed. Each decision involves a judgment of the legitimacy of a foreign sovereign's national security policy. Furthermore, because of the unfavorable political view of the military regime which controlled Argentina during the Falklands War, the *Amerada Hess* decision was mostly made with relative ease. However, if the political circumstances had been different, or the attack on the HERCULES had been undertaken by British Hannier jets, the court's decision may well have been different. That issue aside, the foreign policy implications inherent within any decision directed at the legitimacy of Argentina's conduct during the war are readily apparent.

The decision in *Amerada Hess* fails to address appendage constitutional issues associated with its judicial surfeit into the independent

Public opinion is sympathetic to Britain, but Washington opinion is irritated that the country's foreign policy is being immobilized by the Falklands affair. . . . Ironically, Mr. Haig's intense involvement in this matter—and his Kissingeresque attempts at shuttle diplomacy—may have served to increase the American stake in a resolution of the Falklands dispute. Mr. Haig has been roundly criticized in foreign policy circles for possibly having plunged in too soon and too thoroughly, without any reasonable likelihood of success. If he does fail, that could not only appear to be a failure of American foreign policy, but might also further damage the secretary of state's already shaky political standing.

159. *Id.* Additionally:

With Mr. Alexander Haig on his way to Buenos Aires on April 15th for his second visit and seventh day of continuous shuttling, it became clear that the United States was moving from its role as mediator in the Falklands dispute towards being an ally of Britain again. If General Galtieri is unwilling to withdraw Argentina's troops from the islands without any but the barest of preconditions, the United States is ready to support the British case and impose penalties, maybe including trade sanctions, against Argentina. . . .

160. *Mayday in the South Atlantic*, *supra* note 82, at 20:

The Americans, exasperated by Argentina's conflicting authorities, came down with unexpected firmness on Britain's side on May 1st. Mr. Alexander Haig, the American secretary of state, branded Argentina an aggressor, and announced a series of measures against the country, including a ban on military sales, a freeze on credits, and most important, an offer to respond positively to requests for material support from British forces. The American Navy is preparing two tankers to assist the British replenishment fleet. America's decision to get off the fence risked arousing traditional anti-gringo ire elsewhere in Latin America as well as in Argentina, and made the United States unacceptable as sole mediator. . . .

province of the Executive and the Congress and indicates an insensitivity to the reality of conducting foreign affairs.¹⁶¹ Judicial decisions affecting foreign policy necessitate precise and accurate opinions which refrain from asserting political judgments and declaring that the conduct of a foreign sovereign's armed forces was illegal.¹⁶²

This is not a case where the court's interference with foreign policy is authorized by statute. For example, the federal courts were used

161. On December 12, 1987, the New York Times reported that:

A Federal judge had dismissed a lawsuit that sought \$1.6 million from the United States Government in connection with a Norwegian cargo ship that was damaged by a mine two years ago in Nicaraguan harbor. The owner of the ship and a Norwegian insurance concern had filed the suit on the ground that the Central Intelligence Agency had negligently and maliciously mined the harbor with President Reagan's approval. In dismissing the suit, Judge Charles H. Tenney of Federal District Court in Manhattan ruled that the case had raised "political questions" that a court could not adjudicate. "To avoid becoming embroiled in sensitive foreign policy matters such as this one," Judge Tenney declared, "the court declines to interpose its own will above the will of the President or the Congress." . . . The suit was filed by the Chaser Shipping Corporation, owner of the ship, the Iver Chaser, and the Norwegian War Risk Insurance for Ships. The Iver Chaser, registered in Liberia, was carrying a cargo of molasses and benzene when it was extensively damaged by a mine in the harbor at Corinto, Nicaragua. Judge Tenney said the suit sought to recover damages on the theory that "the Government violated a duty to innocent third-party vessels" by failing to comply with an established practice of warning ships that mines had been placed in the harbor. The Government contended, the judge continued, that the constitutional separation of powers would be violated if the court conducted a judicial analysis of "the high-level C.I.A. and Presidential activities alleged by plaintiffs." . . . Judge Tenney observed that the Government would certainly refuse to provide the "classified intelligence documents" that would be needed as evidence if the case went to trial. Even if plaintiffs were accorded access to intelligence documents concerning the mining of the harbor at Corinto," he said, "the court would be incapable of assessing the underlying military and diplomatic considerations which resulted in the decision to place the mines without warning to innocent third-party vessels." If he adjudicated the claims in the suit, Judge Tenney said, he would be compelled to resolve "sensitive issues involving the foreign policy conduct of executive branch officials." The judge also cited decisions of the United States Supreme Court that cautioned against judicial monitoring of covert military operations, whether before or after they happened. He described the suit as "an action by two foreign entities seeking damages for injuries suffered in foreign waters due to covert mining operations conducted there by the executive branch."

See Lawsuit Dismissed on Ship That Struck Mine, supra note 156.

162. The owner and charterer stated in their joint brief in the Second Circuit that such would be the case in Argentina: "The same firm [Abeledo & Gottheily Associates of Argentina] sent an opinion of the National Supreme Court of Justice of Argentina whereby the Court held it had no jurisdiction for acts committed by government agencies during the [Falklands] war." Joint Brief for Appellants, *supra* note 78, at 10.

by the Reagan Administration to further assert economic sanctions against Panama and the regime of General Manuel Antonio Noriega. On March 8, 1988, *The New York Times* reported that the District Court for the Southern District of New York extended a restraining order preventing two banks from transferring money to the National Bank of Panama. The court's action certainly had an effect on foreign policy. Its order, however, was based upon a 1941 federal statute authorizing the seizure of German and Japanese bank accounts in the United States during World War II.¹⁶³ Absent such statutory authorization, a court's decision affecting foreign policy is inherently unsound.

Courts lack the experience and expertise to appreciate the nuances, sensitivities and multi-dimensional considerations which consume the conduct of American foreign policy.¹⁶⁴ In spite of these concerns, the Second Circuit has imprudently fashioned a rule of law which substitutes its judgment for the diplomatic skill of the United States government. By opting for a broad interpretation of the ATS and a narrow view of foreign sovereign immunity, the court has moved beyond the constitutional parameters of palatable judicial interference with the tenor of United States diplomatic relations.¹⁶⁵

163. See *U.S. Court Extends Panama Bank Curb*, N.Y. Times, March 8, 1988, at A3, col. 1.

164. In *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), the district court held:

The Court concludes that the fact finding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR is mandated because our forces have been subject to hostile fire or are taking part in war effort are appropriate for congressional, not judicial, investigation and determination. Further, in order to determine the application of the 60-day provision, the Court would be required to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist. This inquiry would be even more inappropriate for the judiciary. . . . The question presented does require judicial inquiry into sensitive military matters. Even if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas in El Salvador where U.S. forces are stationed and the exact nature of U.S. participation in the conflict (and this information may well be unavailable except through inadmissible newspaper articles), the Court no doubt would be presented conflicting evidence on those issues by defendants. The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador.

165. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208-09 (D.C. Cir. 1985), which stated:

We have no doubt that these considerations of institutional competence preclude

B. *A Convenient Principle of International Law*

As a general rule, federal jurisdiction does not extend to questions involving the conduct of United States foreign policy.¹⁶⁶ Particular exceptions have arisen when: (1) the question is precisely defined; (2) the standards of adjudication are appropriately clear; and (3) the courts act pursuant to authority specifically granted or reasonably contemplated by Congress.¹⁶⁷ More specifically, the exercise of jurisdiction pursuant to the ATS must be based upon clear and settled principles of international law.¹⁶⁸ Absent precise and accepted principles of international law, the court must abstain from exercising jurisdiction pursuant to the ATS.

The exercise of federal jurisdiction in *Amerada Hess* does not fit within any abstention exception and more importantly, the claim in *Amerada Hess* is based upon convenient and disputed principles of international law. The decision in *Amerada Hess* demonstrates a superficial understanding of international law in the maritime context. The decision relies on principles of freedom of navigation and innocent passage, but an adroit analysis reveals that the scope of these rights is both disputed and politically sensitive. As recently as February 13, 1988, *The New York Times* reported that conflicting interpretations of these principles had caused a diplomatic incident in the Black Sea when two United States warships, the destroyer CARON and the cruiser YORK-TOWN, sailed within the 12-mile limit that the Soviet Union claimed

judicial creation of damage remedies here. Just as the special needs of the armed forces require the courts to save to Congress the creation of damage remedies against military officers for allegedly unconstitutional treatment of soldiers, so also the special needs of foreign affairs must stay our hand in the creation of damage remedies against military and foreign policy officials for allegedly unconstitutional treatment of foreign subjects causing injury abroad. The foreign affairs implications of suits such as this cannot be ignored — their ability to produce what the Supreme Court has called in another context “embarrassment of our government abroad” through “multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 226, 217, 82 S.Ct. 691, 710 7 L.Ed.2d 663 (1962). Whether or not the present litigation is motivated by considerations of geopolitics rather than personal harm, we think that as a general matter the danger of foreign citizens’ using the courts in situations such as this to obstruct the foreign policy of our government is sufficiently acute that we must leave to Congress the judgment whether a damage remedy should exist.

166. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 825 (D.C. Cir. 1984); *Haig v. Agee*, 453 U.S. 280, 292 (1981) (“Matters intimately related to foreign policy are rarely proper subjects for judicial intervention”); *accord Dames & Moore v. Reagan*, 453 U.S. 654 (1981).

167. *Tel-Oren*, 726 F.2d at 825.

168. *Id.* See *supra* note 55 and accompanying text.

as its territorial waters.¹⁶⁹ The American warships sought to exercise the "right to innocent passage," but were "bumped" by the Soviet navy, which evidently held a contrary view of what the Second Circuit construed as "settled" and established international legal principles.¹⁷⁰

Almost two hundred years of American diplomatic history reflect a constant international tension surrounding principles of "freedom of navigation." Disputes concerning the rights of neutral shipping form the basis of at least three diplomatic junctures in American history: (1)

169. See 2 *Soviet Warships Reportedly Nudge U.S. Navy Vessels*, N.Y. Times, Feb. 13, 1988, at A1, col 1:

The American ships had entered the 12-mile limit claimed by the Soviet Union as part of a Navy policy of occasionally asserting the right of passage in waters exceeding the 3-mile territorial limit recognized by the United States. . . . Like most countries, the Soviet Union maintains that its waters extend 12 miles from its shore, a limit that is recognized by the International Law of the Sea Treaty, which the United States has not signed. The United States only claims a three-mile limit for its own territorial waters. . . . Under international law, nations are supposed to allow free passage to vessels operating peacefully in short transits across territorial waters. But the Soviet Union has insisted that only certain sea lanes running between commonly visited areas can be used in this fashion.

170. See also, Letter to Editor from Professor Josef Silverstein, Rutgers University *U.S. Ships Broke Law in Black Sea Scrape*, N.Y. Times, March 22, 1988, at A30, col. 3. The letter claimed:

The United States has an announced policy on the issues of the territorial sea and the rights of innocent passage, to which our vessels did not adhere. . . . On March 10, 1983, President Reagan announced an oceans policy. He did so because a year earlier he refused to allow his representatives to initial the Law of the Sea Convention, which the United States and all maritime nations had worked on for 10 years. In his oceans policy he said that the convention included provisions on the traditional uses of the oceans that "generally confirm existing maritime law and practice and fairly balance the interests of all states." . . . He then declared that the United States "will recognize the rights of other states in the waters off their coasts, as reflected in the convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states. . . . The Law of the Sea Treaty is very specific about the breadth of the territorial sea: every state has the right to declare up to 12 miles as the width of its territorial sea. It is equally specific in defining innocent passage: "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state." Among its definitions of prejudicial behavior is "any act aimed at collecting information to the prejudice of the defense or security of the coastal state." . . . If Mr. Reagan meant what he said nearly five years ago, our ships should not have been inside the Soviet-declared 12-mile territorial sea for the purposes of spying. . . . If the United States is a nation under law, then treaties, customary international law and Presidential declarations upholding both must be observed. In the Black Sea we broke the law, and we should recognize that our actions only furthered disrespect for the law and undermined our credibility when we accuse others of doing the same.

the Napoleonic wars; (2) the American Civil War; and (3) World War I. These events demonstrate the lack of consensus afforded legal principles which the Second Circuit has claimed to be "settled."

A review of American diplomatic history during the Napoleonic wars reveals a malignant failure of the United States to protect and preserve its neutral shipping rights. Throughout this period, France and England waged economic warfare by instituting maritime blockades and interrupting neutral shipping. American merchant vessels were constantly harassed and threatened and their right to innocent passage was frequently violated.¹⁷¹ In 1804, a British warship attacked an American merchant vessel and killed a member of its crew. On June 22, 1807, the attack on the American warship *CHESAPEAKE* approximately ten miles off the American coast resulted in the deaths of three American seamen and the wounding of eighteen others. Furthermore, the British Navy seized numerous merchant vessels or detained hundreds of American seamen. The lack of an international consensus to protect the rights of American neutral shipping was one of the causal facts that eventually led to the War of 1812.¹⁷²

The political and military reality of this period is reflected in the observation of the diplomatic historian Daniel Smith:

The harsh truth is that no body of generally accepted neutral rights existed in 1793. Small navy powers with substantial commercial interests had long contended that as neutrals they had a right to continue trading freely with other neutrals and even with the belligerents during a war, except in contraband goods directly related to military use. They held that lists of contraband goods should be severely limited, that belligerent blockades of enemy coasts should be actually effective in order to be legal, and that enemy-owned goods aboard neutral vessels should be immune from confiscation, as "free ships make free goods." Great naval powers such as England, on the other hand, naturally sought to control neutral commerce and to strike hard at the economy of an opponent. In their hand contraband lists tended to expand to include foodstuffs and naval stores, normally considered civilian goods, and other materials capable of either civilian or military use. The "consolato del mare," or so-called law of the sea, made enemy goods subject to seizure even if carried under a neutral flag. In the unilaterally pro-

171. See HARRISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 1789-1877*, at 98-103, 105-07 (1972).

172. See D. SMITH, *THE AMERICAN DIPLOMATIC EXPERIENCE*, 49-62 (1972).

claimed "Rule of War of 1756," England prohibited neutral trade in wartime that was not open in times of peace. By this proclamation she intended to prevent an opponent from opening its colonies to neutrals in order to compensate for its own naval weaknesses. In practice, belligerents also frequently announced "paper blockades" that could not be effectively enforced, to frighten neutrals and to justify random interference with their commerce.¹⁷³

During the American Civil War, the United States conveniently abandoned its liberal stance on neutral shipping rights in favor of the military necessity of a coercive maritime naval strategy. Union warships instituted a blockade of Southern ports and seized neutral vessels in international waters. The Union's naval vessels frequently violated the rights of neutrals by entering the three-mile territorial limit to intercept shipments intended for the Confederacy.¹⁷⁴

The legality of this blockade was upheld by the Supreme Court in the *Prize Cases*.¹⁷⁵ The claimants in the *Prize Cases* were shipowners, including foreigners as well as United States citizens, who challenged the legality of the Union's seizure of neutral ships and confiscation of cargoes. The Court rejected these claims and held that:

Neutrals have a right to challenge the existence of a blockage de facto, and also the authority of the party exercising the right to institute it. They have a right to enter the ports of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy. . . . The right of prize and capture has its origin in the "jus belli," and is governed and adjudged under the laws of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city or territory, in possession of the other. Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force. . . . On this first question, therefore, we are of the opinion that the President had a right, jure belli, to institute a blockade of ports in possession of the States in rebellion

173. *Id.* at 49-50.

174. *Id.* at 163-65.

175. *See* *Preceat v. United States*, 67 U.S. (2 Black) 459 (1862).

which neutrals are bound to regard. . . .¹⁷⁶

Again, the real consensus afforded these principles of freedom of navigation during this period is summarized by Professor Smith:

The reversal of America's historic role during the Civil War reveals a basic fact of international life: national survival necessarily outweighs mere consideration of ideals and principle. . . . [O]fficially sanctioned departures from America's past practices indicated only too clearly the expedient nature of so-called international law and morality.¹⁷⁷

In World War I, the United States conveniently reverted to its position as an advocate of neutral shipping rights and attempted to compel respect for the rights of its neutral shipping. These attempts were impotent when matched against Britain's determination to use the Royal Navy, as in the Napoleonic Wars, to disrupt neutral trade to the European continent. Despite direct State Department protests concerning the interference with American shipping and neutral rights under international law, Britain detained American ships and seized cargoes consigned to neutral European countries.¹⁷⁸ The German maritime strategy relied on submarine warfare rather than surface warships to execute its economic blockade. On February 4, 1915, Germany proclaimed that all "belligerent" shipping would be subject to submarine attacks without warning and without making provisions for the safety of crews and passengers.¹⁷⁹ The Germans attacked the British steamer *FALABA* on March 28, 1915, with the loss of one American life, and the *LUSITANIA* on May 7, 1915, with the loss of 128 American citizens.¹⁸⁰ President Wilson protested the sinkings as indefensible acts in violation of the rights of neutral shipping and contrary to international law.¹⁸¹ Diplomatic maneuvers eventually resulted in a German conditional pledge not to sink passenger liners; however, the pledge did not apply to merchant vessels and was not strong enough to prevent the eventual United States entry into World War I.¹⁸²

These events in American diplomatic history, combined with cur-

176. *Id.* at 476-77 (emphasis added).

177. D. SMITH, *supra* note 172, at 164-65.

178. *Id.* at 280-85.

179. *Id.* at 282.

180. *Id.* at 283.

181. *Id.* at 284.

182. *Id.*

rent disputes, reveal, contrary to the decision in *Amerada Hess*, that the principle of international law underlying the claim in *Amerada Hess* is more a political concept of convenience and military necessity than a legal principle of international consensus.¹⁸³ Any assertion to the contrary ignores the present and past instability of international maritime affairs.¹⁸⁴ The decision in *Amerada Hess*, therefore, suffers critically from a lack of legal and historical support for the claim that Argentina violated a "settled principle of international law." However, the imprecision and inaccuracy of the decision has permitted the court to discriminately subject Argentina to federal jurisdiction.

183. See *Shift in Gulf Battle Fronts*, N.Y. Times, March 23, 1988, at A1, col. 1 (widening attacks on Persian Gulf shipping reflects desire for diplomatic advantage); see also Commager *Reagan Just Loves to Send Troops*, N.Y. Times, March 27, 1988, at A31, col. 1, which stated:

Early in the Civil War, the Confederate Government contracted with the Laird shipbuilders of Liverpool to build ironclad rams—powerful warships—for delivery in 1863. If they were allowed to slip out of Liverpool harbor, the cost to Union warships and merchantmen would be catastrophic. The American Minister to London, Charles F. Adams, challenged the legality of permitting the ships to escape from British waters. . . . When it appeared that the rams would be allowed to depart, Mr. Adams set a short note to the Foreign Secretary, Lord John Russell: "It would be superfluous in me to point out to your Lordship that this is war." Britain avoided war! . . . We no longer take transgressions of traditional principles of international law so seriously — when they are our transgressions. And no Administration has a more formidable record of successive violations of such principles than Ronald Reagan's. Among these principles are nonintervention in the affairs of other nations, adjudication of disputes, sparing civilians from haphazard attack and deliberate destruction of the environment. The principles are enshrined in treaties and thus form a part of the law of our land. . . . Mr. Reagan's record embraces a series of military operations that, if directed against us, would clearly and promptly be recognized as acts of war. And to its discredit, the Congress has been all too compliant. . . . We are familiar enough with the Administration's vengeful military actions in Lebanon, Libya and Grenada, along with harbor mining in Nicaragua and support for the contras' nonstop war, and the dispatching of troops to Honduras. . . . During the Civil War, the issue of illegal clearance of the warship Alabama, built for the Confederacy, is no less illuminating than the crisis settled amicably when Lord Russell prevented the Laird rams from leaving Liverpool. The Alabama did slip out of Liverpool and accounted for more than 60 Union ships until finally it was destroyed by the Kearsarge. . . . Later, we pressed claims against Britain on this issue. The dispute was submitted to an international tribunal and settled amicably. Britain acknowledged guilt and paid an indemnity of \$15.5 million. . . . It seems improbable that the Reagan Administration or its successors will acknowledge comparable (but immensely larger) claims for compensation to the victims of its passion for military solutions to political problems and its own contempt for international law.

184. See Ratiner, *The Law of the Sea: A Crossroads for American Foreign Policy*, 60 FOREIGN AFF. 1006 (1982).

The only clear reference made by the court to a settled principle of international law is to the act of piracy. Undisputedly, piracy has been universally treated as an offense against the law of nations and would support the exercise of federal jurisdiction pursuant to the ATS. The Constitution links piracy and the law of nations by granting Congress power "to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."¹⁸⁵ A superficial analysis would, thus, seem to reveal that Argentina's attack on the *HERCULES* would constitute a violation of an accepted principle of international law and come within the purview of the tort violation of international law set forth by the ATS. However, the true definition of piracy is "robbery upon the sea."¹⁸⁶ It cannot be committed by a sovereign government: "[W]hen the acts in question are committed from purely political motive, it is hardly possible to regard them as acts of piracy involving all the important consequences which follow upon the commission of that act."¹⁸⁷ Consequently, any reliance on the tort of piracy to support federal jurisdiction in *Amerada Hess* over Argentina or any other foreign sovereign is misplaced.

The claimants in *Amerada Hess* do not and cannot sufficiently state a cause of action for a violation of a uniformly accepted principle of international law.¹⁸⁸ Here, the claim lacks the prerequisite international consensus supporting the exercise of federal jurisdiction pursuant to the ATS. The right of neutral vessels at sea to be free from unprovoked attack has not been the subject of any international consensus and, therefore, the prohibition is neither clear nor unambiguous.¹⁸⁹ Therefore, the exercise of federal jurisdiction over Argentina is simply an exercise in intellectual abstraction.¹⁹⁰

185. See U.S. CONST. art. I, § 8.

186. *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1819).

187. *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 814 n.23 (D.C. Cir. 1984) (Bork, J., concurring).

188. The owner and charterer cited, with apparent success in the Second Circuit, erudite authority to support the argument that the principle of freedom of navigation had been universally accepted. See Joint Brief for Appellants, *supra* note 78, at 40-46 (citing the Declaration of Paris of 1856; the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention of 1907); the London Naval Conference of 1909; the 1928 Pan-American Convention Relating to Maritime Neutrality; the International Treaty for the Limitation and Reduction of Naval Armament of 1930; the 1958 Geneva Convention on the High Seas; and the Law of the Sea Convention of 1982).

189. *But see Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

190. Principles of international law are difficult to maintain in times of war and the Falklands War was not an exception. See *Made to Be Broken*, *THE ECONOMIST*, June 5, 1988, at 20-21:

C. *Inappropriate Interference with the Sovereignty of a Foreign Government*

The decision in *Amerada Hess* involves unique questions which touch on sensitive matters of diplomacy and questions the legitimacy of the conduct of a sovereign state. A court must abstain from exercising jurisdiction over an action which calls into question the legitimacy and legality of a government acting within its sovereign capacity.¹⁹¹ This is not a case involving a clear departure from the presumption of sovereignty such as the torture of civilians, arbitrary imprisonment, political assassination or other uniformly recognized violations of human rights and international law.¹⁹² The decision to conduct combat flight operations in the South Atlantic was an exercise of Argentina's sovereignty and discretion to make use of its armed forces in order to pursue its perceived national security interests.¹⁹³ Argentina was free to exercise prejudicial air operations during the Falklands War. Given this authority, Argentina's conduct was clearly discretionary in character, and

The laws of war are practically impossible to enforce, and fighting men are usually too busy with their work to look them up in the heat of battle. Almost 30 conventions, protocols and resolutions are applicable. Here are some issues raised by the Falklands conflict: . . . Hospital ships must, as far as possible, be "situated in such a manner that attacks against military objectives cannot imperil their safety" (Geneva Convention I, 1949). In bringing the UGANDA close to shore by night to pick up wounded, the British may have breached that provision. . . Prisoners of war, except officers, may be employed as workers by their captors, but not on work that is military in character or purpose, or of an unhealthy or dangerous nature: "The removal of mines or similar devices shall be considered as dangerous labour" (Geneva Convention, III, 1949). Argentine prisoners have been ordered by their captors to clear minefields near Goose Green. Others have been injured—apparently together with British soldiers—in an explosion that may have arisen when handling ammunition. . . After a naval engagement, "parties to the conflict shall, without delay, take all possible measures to search and collect the shipwrecked, wounded and sick" (Geneva Convention III, 1949). This does not appear to have been done after the sinking of the GENERAL BELGRANO, when the British might at least have offered to drop lifeboats by helicopter to survivors in the water. . . These, and no doubt other, matters yet to appear will be the subject of anguished inquiry once the fighting ends. . .

191. *Amerada Hess*, 638 F. Supp. at 77; see *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1391 (5th Cir. 1985) (when a foreign state's sovereign acts are the basis of a suit the United States must refrain from exercising jurisdiction).

192. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

193. See, e.g., *3,000 G.I.'s Arrive At Honduras Base To Show Support*, N.Y. Times, March 18, 1988, at A1, col. 1 (more than 3,000 G.I.'s began arriving at a Honduran air base as a show of support for the Honduran Government amid border clashes between Honduran and Nicaraguan forces).

should have remained immune from judicial review.¹⁹⁴

A sovereign state acts in the arena of international relations based upon the assumption that the perceived liabilities consist of diplomatic sanction, domestic protest, and possible reciprocal military operations, not the risk of amenability to civil suit and penalty in a foreign jurisdiction.¹⁹⁵ A judgment rendering the conduct of a foreign government's armed forces illegal seriously interferes with the basic assumptions which underlie a government's structure of its foreign policy. In sum, *de novo* judicial review of a foreign sovereign's policy judgments injects a new and possibly dangerous dimension to foreign relations.

Adjudication of the claims in *Amerada Hess* requires a judicial inquiry into the legitimacy of Argentina's strategy in conducting its war operations during the Falklands War, and consequently, places the court in the inappropriate position of judging the legality and integrity of a sovereign's policy decisions.¹⁹⁶ *Per se* judgments simply cannot be made with any semblance of accuracy in the arena of national sovereignty. Consequently, the decision in *Amerada Hess* will be viewed in the region as reflecting a lack of respect for Argentine sovereignty and will most likely be interpreted as an exercise of American imperialism.¹⁹⁷ The decision of the Second Circuit in *Amerada Hess* will be seen more as a whim of American power to meddle in the domestic affairs of Argentina than a new commitment to international law in Latin America.¹⁹⁸ Furthermore, the subjection of a foreign government

194. *Asociacion De Reclamantes v. United Mexican States*, 561 F. Supp. 1190, 1198 (D.D.C. 1983), *aff'd on other grounds*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Matter of Sedco, Inc.*, 543 F.Supp. 561, 576 (S.D. Tex. 1982) ("To deny immunity to a foreign state for the implementation of its domestic economic policies would be to completely abrogate the doctrine of foreign sovereign immunity.").

195. Assumptions underlying foreign policy decisions have been outlined as involving the determinations: 1) defining a concept of national security; 2) defining a national purpose; and 3) assessing the available resources. Kissinger, *The Great Foreign Policy Divide*, Wash. Post, Nov. 24, 1987, at A23, col. 2. See also Weinberg, *The Use of Force and the National Will*, Balt. Sun, Dec. 3, 1984, at 10A, col. 1 (delineating six points to be weighed before committing combat forces).

196. See, e.g., *Hunt v. Mobil Oil Corporation*, 550 F.2d 68, 77 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

197. Compare *Honduran Unrest Persists In Wake of Embassy Riot*, N.Y. Times, Apr. 9, 1988, at A1, col. 6 and *Stark Anti-Americanism in Honduras*, N.Y. Times, Apr. 9, 1988, at A6, col. 1 (discussing student riots that erupted after extradition of Honduran drug trafficker to the United States in violation of Honduran law).

198. In discussing the Latin American resentment of Reagan Administration's campaign to topple Panama's military regime, the reporter commented that:

These are, of course, well-practiced reactions. Since President James Knox Polk's

to the jurisdiction of a United States court sets a dangerous precedent for reciprocal judicial review of the legitimacy of United States policy decisions in a foreign or federal court.¹⁹⁹

On April 15, 1988, *The Baltimore Sun* reported that a lawsuit had been filed in the United States District Court for the District of Columbia seeking damages for claims arising out of the April 15, 1986, United States retaliatory air strike on Libya.²⁰⁰ The action asserted that the bombing resulted in the deaths of civilians and therefore violated United States laws and treaties and international law.²⁰¹ The article reported that the lawsuit was seeking damages for forty civilians

troops first seized half of Mexico's territory in 1847, a history regularly punctuated by military and political interventions has forced Latin America to learn to live with the reality of American power. In fact, even in the annals of the Reagan Administration which invaded Grenada in 1983 and still dreams of toppling Nicaragua's Sandinista Government, the latest Panamanian episode is so far no more than a footnote.

Id. Unfortunately, the decision in *Amerada Hess* may be viewed in a similar vein. Additionally, the reporter explained the essence of the resentment of the Reagan Administration's Latin American policy:

The essence of this response is, of course, self-preservation. By legitimizing the idea that unsavory leaders should be undermined by outside forces, all governments would open themselves up to the risk of destabilization. And while the United States has traditionally placed its own national security interest above strict adherence to international law, Latin American governments view juridical principles as their only shields For our countries that are weak and have no large armies or atomic bombs, it has to cause fear when the United States converts itself into the policeman of the continent and decides which countries are or are not democratic and which deserve economic sanctions and boycotts," said Venezuela's former President, Carlos Andres Perez, in an interview with a Mexican daily. . . .

Id. It is difficult to gauge whether the decision in *Amerada Hess* will invoke similar responses. The point which must be emphasized is that it is with the discretion of the Executive and Congress to assume the risks of acting in the international arena.

199. See Brief for the United States as Amicus Curiae at 17, *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602 and 86-7603), which claims:

To the extent that a contrary result would create jurisdiction where none was intended by the FSIA, it exposes the United States to similar jurisdiction abroad. The theory of jurisdiction advanced by appellant could expose the United States to jurisdiction abroad for virtually any act said to be inconsistent with international law, as construed by any country in which the United States might be found. The United States does not believe Congress intended to establish jurisdiction over cases such as this, and would vigorously oppose the assertion of such jurisdiction against the United States abroad.

200. See *Libyan Bombing Lawsuit Seeks Personal Money Damages from Reagan, Thatcher*, *Balt. Sun*, Apr. 15, 1988, at 9A, col. 1.

201. *Id.*

injured and fifteen others who were killed in the air strike. Many of the fifty civilians were Libyan nationals, but others were Egyptians, Greeks, Lebanese and Yugoslavians. Among those named as defendants were President Reagan, British Prime Minister Margaret Thatcher, former Defense Secretary Caspar W. Weinberger, other military officials, and the pilots who flew the Air Force and Navy planes. Whether an act of the United States or a foreign country, the inquiries presented by the Libyan suit and by the *Amerada Hess* decision are precisely the type of determination from which a court should abstain from unilaterally interpreting a grant of federal jurisdiction.²⁰² If *Amerada Hess* is allowed to stand, there would be no basis for holding that a review of the legitimacy of the Libyan air operation is non-justiciable. The United States would, thus, be subject to claims arising from its conduct of foreign policy. Any argument to the contrary would be effete in light of the rule of decision established in *Amerada Hess*.

D. *Jurisdictional Inconsistency*

The formal adoption of the view stated in the Second Circuit's opinion in *Amerada Hess* would grant aliens greater access to the jurisdiction of the federal courts for actions against foreign governments than is granted to United States citizens. The exclusive source authorizing an American citizen to sue a foreign government in a United States court is the FSIA. Under the FSIA, a United States vessel owner or charterer would not be permitted to maintain the very same action which the Second Circuit has now allowed an alien to assert. Clearly, the intent of the ATS and the FSIA was not to accord aliens a

202. *Liu v. Republic of China*, 642 F. Supp. 297, 302 (D. Cal. 1986); *Northrop Corporation v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). See also *Guinto v. Marcos*, 654 F. Supp. 276, 279-80 (S.D. Cal. 1986), which opined:

[I]t appears that plaintiffs' theory of liability is that Marcos in his capacity as President of the Philippines engaged in a systematic policy of suppressing rights of free speech in the Philippines. This theory of recovery requires precisely the type of inquiry in which the federal courts have refused to engage under the Act of State doctrine. It is beyond the capacity of the federal courts to subject the official acts or policies of the head of a foreign state to traditional standards of judicial review.

Accord West v. Multibanco Comermex, S.A., 807 F.2d 820 (9th Cir. 1987) (act of state doctrine which prohibits courts from reaching merits of issue in order to avoid embarrassment of foreign governments in politically sensitive matters and desire to avoid interference with conduct of United States foreign policy precluded consideration of alleged nonfeasance or misfeasance of Mexican officials charged with enforcing their country's banking laws).

privilege not granted to United States citizens. Thus, at the very least, the Second Circuit's decision would permit an inequitable result which would be contrary to the stated purpose of the FSIA to codify a uniform standard governing the amenability of foreign governments to suit in the United States.²⁰³

There is an additional policy basis for denying jurisdiction. The *HERCULES* was a Liberian flag vessel of convenience. The owner and charterer were both Liberian corporations which consciously chose to avoid the tax and regulatory consequences of incorporating in the United States and the higher operational costs of flagging the *HERCULES* under United States law.²⁰⁴ American flag vessels sustain a reciprocal financial burden but receive certain benefits and protections which are appendages to flying the United States flag.²⁰⁵ More specifically, one of the benefits a United States flag vessel has at its disposal

203. The families of the sailors on the *STARK* would certainly not possess a cause of action against Iraq. There have been other actions brought by Americans which have been dismissed but would have been allowed to stand if brought by an alien. *See Perez v. The Bahamas*, 652 F.2d 186 (D.C. Cir. 1981) (sovereign immunity barred action against Bahamas for tort arising from incident in which plaintiff's minor son was injured when Bahamian government gunboats fired on plaintiff's fishing vessel); *Legerwood v. State of Iran*, 617 F. Supp. 311 (D.D.C. 1985) (Foreign Sovereign Immunities Act precluded former hostage's action in tort for alleged personal injuries and deprivation of civil rights arising out of seizure by Iran of the United States Embassy in Iran). In *Kline v. Republic of El Salvador*, 603 F. Supp. 1313 (D.D.C. 1985), the court dismissed a wrongful claim brought by American citizens against El Salvador arising out of the death of an American citizen in El Salvador. The courts held that it was vested with jurisdiction only if the tort as well as the injury occurred in the United States. The court remarked that to hold otherwise would result in:

Every alleged governmental tort occurring in any foreign country would be subject to review in the courts of the United States at the request of any member of the family of the victim who claimed to have suffered emotional distress here as a consequence of the foreign act. Such international judicial interference would be entirely unprecedented, and a court would not be justified in engaging in it unless congressional intent to grant jurisdiction therefor were manifestly plain. That, as indicated, is not true here. The claim against the government of El Salvador will accordingly be dismissed.

Id. at 1316.

204. *See* 46 C.F.R. §§ 30-40 (1987) (Coast Guard regulations for tank vessels); 46 C.F.R. §§ 90-106 (1987) (Coast Guard regulations for cargo vessels). *See also Spreading the Gulf Umbrella*, Wash. Post, May 3, 1988, at A26, col. 1 (in discussing Reagan Administration's decision to broaden naval protection in the Persian Gulf the author noted that, "[i]t takes some getting used to that American-owned ships that fled to a foreign flag to avoid American maritime union wages can now slip in under the wing of the U.S. Navy.").

205. *See Kuwait to Switch tankers to U.S. Flags for Protection*, Balt. Sun, May 13, 1987, at A1, col. 2.

is the full brunt of the diplomatic, economic, and military power of the United States government.²⁰⁶ One of the burdens assumed by a Liberian flag vessel is the absence of recourse opportunities which can be provided by a defense or foreign ministry²⁰⁷ and the more immediate coercion which a country sustaining a blue water navy can extend in response to attack on one of its merchant vessels in international waters.²⁰⁸ As a result, denying United Carriers, Hess, and similarly situated claimants' access to United States courts would not create any undue hardship, or assert any latent risk or notion of inequity. The vessel owner and charterer chose to forego the financial burden of a prominent national flag in order to receive the corresponding commercial benefit of a flag of convenience. They must now accept the corresponding burden of limited recourse opportunities afforded by this commercial convenience.²⁰⁹

206. See *U.S. Strikes 2 Iranian Oil Rigs, Hits 6 Navy Vessels In Battles Over Mining Sea Lanes in Gulf*, N.Y. Times, Apr. 19, 1988, at A1, col. 4; *U.S.-Flag Tanker Struck By Missile In Kuwaiti Waters*, N.Y. Times, Oct. 17, 1987, at A1, col. 1. (Iranian Silkworm missile attack on U.S.-flagged Kuwaiti tanker SEA ISLE CITY eventually prompted the United States to shell Iranian offshore oil drilling platform); *U.S. Weighs Response To Ship Attack in Gulf*, N.Y. Times, Oct. 17, 1987, at A5, col. 6. But see *U.S.-Run Tanker Hit By Iranians in Gulf; Tehran Seen Defying Naval Retaliation*, Wash. Post, Nov. 7, 1987, at A16, col. 3 (Iranian speedboat attack with rocket propelled grenades on U.S.-operated Panamanian tanker - not retaliation contemplated; Navy's rules of engagement limit the task force to defending U.S.-flagged vessels in Persian Gulf, not U.S.-managed vessels flying foreign flags).

207. In fact on June 12, 1982, the Government of Liberia, in notes directed to both the British and Argentine Governments, requested clarification of the attacks on HERCULES. On July 5, 1982, the United Kingdom replied, denying any involvement in the attack and stating that British Military Intelligence had confirmed that the attacking aircraft were from Argentina. No response was ever received from the Argentine Government. See Joint Brief for Appellants, *supra* note 78, at 8.

208. The owner and charterer have conceded this point in their brief before the Second Circuit:

As this Court is no doubt aware, contemporary cases where U.S. flag vessels have been illegally taken on the high seas by foreign sovereigns are rare. In fact, the last case was the S.S. MAYAGUEZ, Dig. of U.S. Prac. in Int'l L. (1975) at 777-886. In that case, the American owner received restitution of his ship and cargo by the intervention of U.S. frigates and marines. Obviously, the Republic of Liberia does not have the military means to effect restitution of her ships illegally seized or destroyed by other sovereigns. Instead, the Republic of Liberia must depend upon international law as practiced by this country and other countries which respect and honor their obligations for events occurring on the high seas.

Joint Brief for Appellants, *supra* note 78, at 31 (citations omitted).

209. It has been argued that the interest of the United States in the attack may have been of a sufficient nature to warrant the investment of American diplomatic and military prestige. See Brief of Amicus Seamen's Church Institute at 8-9, *Amerada*

E. *Judicial Activism*

The Second Circuit has inappropriately substituted its judgment for the clear intent of Congress to establish the line of departure by defining the jurisdictional limits of the courts in matters affecting the diplomatic relations of the United States. The Second Circuit's recognition that the FSIA is the "sole source" from which a foreign sovereign may obtain immunity and the only basis upon which a court can exercise jurisdiction over a foreign sovereign²¹⁰ directly conflicts with its pronouncement that Congress intended to provide federal jurisdiction over a foreign government under the ATS. The difficulty in reconciling this conflicting analysis is reflected in the untenable result which affords aliens greater access to the jurisdiction of the federal courts to

Hess, 830 F.2d 421 (2d Cir. 1987) (Nos. 86-7602 and 86-7603), which states:

Compounding the problem of U.S. reliance on foreign imports is the fact that today, unlike the situation of even 10 or 15 years ago, the vast majority of merchant ships are ships which, wherever beneficial ownership may lie, are flying the flags of foreign nations and not that of the United States. Thus, from these figures it can be seen that the United States not only has an interest in protecting the right of its own ships to travel freely, as neutral ships through combat zones, but also to protect this right as applied to neutral ships of other nations who bring to our shores the goods and materials that we need. . . . Were the United States, and/or other nations of the world to not protect this right of unmolested passage for neutral merchant ships through war zones, not only the economy of the United States, but that of much of the rest of the world would come to a grinding halt.

The owner and charterer also make the point that:

The importance of Liberian flag ships to U.S. economic survival cannot be overestimated. In the era in which the Alien Tort Statute was enacted, the United States had a large American flag merchant fleet which transported over 80 percent of the country's foreign commerce. . . . Of U.S. ocean borne foreign trade in 1980, only 3.7 percent was carried on U.S. flag ships. In the case of tankers like HERCULES, the figure was 2.2 percent. In contrast, the dependence of the United States on seaborne imports has steadily increased. . . . In the case of national needs for strategic metals and minerals, in most cases, imports account for between 80 and 100 percent of these requirements. U.S. companies have, for economic reasons, developed foreign flag fleets, the largest being those sailing under the flag of Liberia. These stark facts establish the economic reliance of the United States on having its seaborne commerce carried by neutral foreign flag ships such as those of Liberia and give modern meaning to the Colonial slogan, "Free goods on free ships."

Joint Brief for Appellants, *supra* note 78, at 47. If true, United States diplomatic and military prestige, as it was in the Mayaguez incident, should have been applied. See *U.S. Will Increase Its Gulf Defense of Merchant Ships*, N.Y. Times, Apr. 23, 1988, at A1, col. 1; and *Reagan Orders Broader Protection of Commercial Shipping in Gulf*, N.Y. Times, Apr. 30, 1988, at A4, col. 1 (reporting on United States decision to commit to defend neutral commercial shipping in Persian Gulf against Iranian attack).

210. *Amerada Hess*, 830 F.2d at 429.

assert actions against foreign sovereigns than is afforded United States citizens.

Pursuant to its authority over foreign commerce and foreign relations, Congress has the undisputed power to define whether, and under what circumstances, foreign nations shall be amenable to suit in the United States.²¹¹ Furthermore, only Congress is authorized to define offenses against the law of nations.²¹² Pursuant to this authority, Congress enacted the FSIA to comprehensively regulate the amenability of foreign governments to suit in the United States. The FSIA initially grants a presumption of immunity to foreign states and their instrumentalities and then carves out certain classes of actions which are exceptions to this grant of immunity.²¹³ Unless one of the statutory exceptions applies, the federal courts lack both subject-matter²¹⁴ and personal jurisdiction.²¹⁵ These specific and unambiguous guidelines govern the assertion of jurisdiction over foreign sovereigns.

The FSIA is the exclusive source of jurisdiction over foreign sovereigns, and a public act of the foreign state is not an act within the exception to immunity.²¹⁶ The exceptions to immunity are plenary in scope and definitive in character.²¹⁷ The FSIA was intended to comprehensively preempt all actions against foreign governments beyond the exceptions set forth in the statute including a claim based upon a viola-

211. U.S. CONST. art. I.

212. U.S. CONST. art. I, § 8.

213. 28 U.S.C. §§ 1605-1607 (1982).

214. 28 U.S.C. § 1330(a) (1982).

215. 28 U.S.C. § 1330(b) (1982).

216. *See Letelier v. Republic of Chile*, 488 F. Supp. 665, 672 (D.D.C. 1980):

Any notion that the Congress wished the courts to go outside the scheme promulgated by legislative action to determine the extent to which the defense of sovereign immunity could be invoked is foreclosed by the committee reports that not only state that "[t]his bill . . . sets forth the sole and exclusive standard to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States," "that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in section 1605-1607," H.R.Rep. No. 94-1487, *supra* at 17 (emphasis supplied). Thus, it is apparent that the terms of section 1605(a)(5) set the sole standard under which any claim of sovereign immunity must be examined.

217. The majority view can be accurately characterized as interpreting the FSIA as the exclusive source of jurisdiction over foreign states. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983); *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir. 1984), *cert. denied*, 461 U.S. 1086 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1984), *cert. denied*, 469 U.S. 880 (1984); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982).

tion of international law.²¹⁸ The FSIA does not set forth a residual clause defining any parameter to broaden the jurisdictional grant over a foreign government or refer to collateral statutes which broaden the jurisdiction over a foreign state, but only states its exclusivity. It is therefore unlikely that Congress intended the FSIA to be only one of several avenues for asserting a claim against a foreign government.²¹⁹

The comprehensive scheme established by the FSIA must be viewed as the exclusive means by which foreign governments may be sued by either an American citizen or alien in United States courts.²²⁰ Accordingly, if a court determines that none of the exceptions set forth within the FSIA applies, the plaintiff, whether alien or United States citizen, will be barred from asserting the claim in any court in the United States against a foreign sovereign irrespective of the nature and characterization of the underlying action. The plain language of the FSIA establishes a patent legislative intent to set forth the exclusive framework within which the courts of the United States are to determine the amenability of a foreign government to the jurisdiction of a United States court. Any review of the decision in *Amerada Hess* should, thus, seize upon the opportunity to firmly establish this jurisdictional principle.

The ATS does not provide an independent basis for jurisdiction over foreign sovereigns. It is an obscure statute which was enacted to avoid inflaming the diplomatic relations of the United States in the 1790's. A court may be permitted to look beyond the limited actions originally contemplated, as they related to ambassadors and consular officers, to fashion a more comprehensive or "modern" statutory right. However, the statute should not be read to encompass tort actions against a foreign government which is beyond the scope of the FSIA.²²¹

218. See Note, *Torts In Violation of International Law*, 1 LMCLQ 10 (1988) ("in a case such as *Amerada Hess*, international law does not at present warrant an exception to sovereign immunity. . .").

219. In fact service on Argentina was made in accordance with the FSIA. See Brief for Appellee at 3 and most likely, any collection of a judgment against Argentina would be pursuant to the FSIA. See *Leteiler v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

220. See *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 372 (7th Cir. 1985); *Verlinden*, 461 U.S. at 488; *Amerada Hess*, 638 F.2d at 74; *Ledgerwood v. State of Iran*, 617 F. Supp. 311, 315 (D.D.C. 1985) (congress has vested exclusive jurisdiction over suits against foreign state defendants in the FSIA).

221. See, e.g., *Guinto v. Marcos*, 645 F. Supp. 276, 280 (S.D. Cal. 1986) (violation of First Amendment right of free speech does not rise to level of universally recognized right and does not constitute violation of "law of nations," for purpose of jurisdiction under ATS); *Dreyfus v. Von Finck*, 534 F.2d 24, 30-31 (2d Cir. 1976) (taking of

To include actions against foreign governments would be so beyond the initial purpose as to contradict the intent of the ATS and to substantially dilute the FSIA.²²²

In attempting to establish novel jurisdictional principles against foreign governments, it would be imprudent to divorce the enabling analysis from the original intention of the ATS. Although the statute should evolve to consider modern assumptions, in order to avoid any wholesale substitution of the legislative intent, a broader or more modern reading must continue to consider the statute's original purpose of which was to avoid inflaming diplomatic relations.²²³ To go beyond this juncture would be to ignore the historical reference. The expansion of the ATS as detailed in *Amerada Hess* ignores the statute's historical context and goes beyond any permissible sphere of interpretative license so as to refract congressional intent, not reflect it.

The majority opinion in *Amerada Hess* is largely pedestrian and at best schematic. In a tangible sense, the analysis in *Amerada Hess* is inferior to *Filartiga*. *Filartiga* expanded the extra-territorial jurisdiction of a federal court over a wrongful death action against a former foreign official for a violation of the laws of Paraguay and international law. The decision in *Amerada Hess* fails to appreciate the delicate and precise limitations of the *Filartiga* doctrine to suits against former foreign officials in their individual capacity and not foreign governments in their sovereign capacity. The *Amerada Hess* construction of the ATS permitting a property damage claim against a foreign sovereign is too sweeping and opens a potential Pandora's box of side issues. What constitutes a "tort" within the purview of the ATS will be handled differently depending on the parochial orientation of the various district courts towards the particular foreign government. Thus, federal jurisdiction over foreign governments will be unpredictable and viewed as arbitrary because the jurisdictional allegation will most likely vary between the federal circuits.²²⁴ The adoption of the reasoning in *Amerada*

Jewish German citizen's property by Nazis not a violation of international law), *cert. denied*, 429 U.S. 835 (1976); *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (acts of theft not violations of international law and not triable here under ATS statute).

222. *See Sanchez-Espunosa v. Reagan*, 770 F.2d 202, 206 (D.C. Cir. 1985) (ATS intended to cover only private nongovernmental acts that are contrary to treaty or international law the most prominent examples being piracy and assaults upon ambassadors).

223. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C. Cir. 1984) (Bork, J., concurring).

224. *Cf.*, *Federal Sentences in Limbo as Guidelines Challenged*, Wash. Post, March 2, 1988, at A19, col. 1 (discussing inconsistency created by lack of uniformity

Hess will consequently create the same absence of uniformity in bringing actions against foreign sovereigns which compelled the initial enactment of the FSIA. Accordingly, the rejection of the construction of federal jurisdiction established in *Amerada Hess* is supported by political, historical, and legal considerations.

VII. CONCLUSION

The decision in *Amerada Hess* conveniently avoids the historical context in which the FSIA and the ATS were enacted and neglects a clinical analysis of the undermining nature of precedent. This is not a case of simple statutory misinterpretation which should be left alone. The precedent established by the ruling will have broad consequences beyond a property damage claim within the maritime context. The decision will result in the subjection of the policy judgments of foreign sovereigns to determinations of legality in United States courts with inevitable consequences for the tenor of American diplomatic relations.

Foreign affairs involve a complex understanding of the economic, historical, and political considerations which are beyond the limited resources of a federal district court judge assisted by law clerks and a chambers library restricted to volumes of legal precedent. While the law may at times accommodate a certain amount of contradiction and duality, such lack of clarity is impermissible in the area of foreign affairs. Because the conduct of foreign policy consists of the relationship between governments and translates into a direct impact on the human condition, the requisite analysis affecting the tone of these relationships must be the product of a sophisticated and experienced foreign policy apparatus. It is inappropriate, therefore, for a federal court to influence both the value and validity of the direction of American foreign policy. It is equally inappropriate for a court to consider the legitimacy and legality of a foreign government's sovereign acts.

Congress intended to extend the FSIA to the full extent afforded by the existing political consensus. It was extremely palatable to extend federal jurisdiction to sovereign acts which so closely resemble that of any other commercial entity and to torts committed by a foreign sovereign in the United States. The gap in the regime established by the FSIA concerns the tortious conduct committed by sovereigns outside the United States. Compensation for these offenses can be obtained by one of three ways: (1) possible unilateral recognition by a foreign sovereign of its obligation to compensate the victims of its conduct;²²⁵ (2)

in the Federal Sentencing Guidelines).

225. See *U.S. Compensation Will Be Provided in Airbus Downing*, N.Y. Times,

decisions of international courts of justice or tribunals,²²⁶ or (3) diplomatic pressure exerted on the sovereign to provide compensation.²²⁷ If a foreign sovereign's public acts result in personal injury or property damage, the redress outlined above would provide an available recourse which may, in some circumstances, afford a more acceptable administration of justice and compensation than is afforded by civil litigation in a federal district court.

The FSIA is the exclusive means of asserting a claim against a foreign government.²²⁸ The ATS does not provide independent jurisdiction over claims against foreign governments for violations of international law. It may provide jurisdiction over claims of aliens for torts uniformly accepted as violations of international law where they are committed: (1) in the United States (concurrently with the FSIA tort exception); or (2) outside the United States by foreign officials in their

July 12, 1988, A1, col. 6 (United States will pay compensation to the families of the 290 passengers killed when a Iranian jetliner was shot down by an American warship in the Persian Gulf).

226. See *O.A.S. Tribunal Finds Honduras Guilty in Political Killing, A First*, N.Y. Times, July 30, 1988, A1, col. 2 (Inter-American Court of Human Rights ruled that the Honduran government is guilty in the disappearance of a Honduran citizen in 1981 and the court ordered Honduras to pay damages to the victim's relative); *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, International Court of Justice, slip. op. at 3-6, (June 27, 1986) holding that:

[B]y laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations, under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce [T]he United States of America . . . by declaring a general embargo on trade with Nicaragua on 1 May 1985 has committed acts calculated to deprive of its object and purpose the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 [The] United States of America, by the attacks on Nicaraguan territory referred to [above] . . . and by declaring a general embargo on trade with Nicaragua on 1 May 1985, has acted in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956 [T]he United States of America is under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above

227. See *U.S. Bills Chile in Killing of Letelier*, N.Y. Times, October 13, 1988, A1, col. 1 (reporting that the Reagan Administration has demanded \$12 million in compensation from Chile for the killing of Chilean exile in Washington, D.C. in 1976).

228. LEGISLATIVE HISTORY, *supra* note 8, at 6604 ("The purpose of the [Foreign Sovereign Immunities Act] is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.").

individual capacity, acting beyond their scope of authority or contrary to the laws of their own nation. Although the decision is consistent with the current proclivity to limit immunity,²²⁹ when a case presents broad and novel questions involving foreign sovereign immunity and the interfacing of the FSIA and the ATS, the proper deliberative body to resolve the question is the Congress which can draw upon the experience of the Executive through the Congressional committee hearing process.

The United States federal courts must refrain from the raw exercise of political power in the area of foreign affairs. If the Congress should decide that torts committed by foreign governments outside of the United States are proper subjects for judicial inquiry, Congress is free to accurately and precisely define the guidelines by which such judicial inquiries should proceed by enacting the proper jurisdictional statutes. If such guidelines are set forth along the lines of the Second Circuit's decision in *Amerada Hess*, Congress, and not the courts, will consciously assume the corresponding diplomatic risk of a federal court's adjudication of the legality and culpability of foreign sovereign conduct.

The impact of the decision is difficult to gauge. There remains the question of whether: (1) the violation of international law must be maritime in nature²³⁰ and (2) regardless of whether there must be a maritime nexus, must the claim have a substantive connection with United States commerce? In light of the attacks in the Persian Gulf, will a foreign vessel owner or charterer, whose vessel is attacked by land-based rockets or strafed by speed boats and damaged, be granted access to a federal district court to bring an action against Iran or Iraq pursuant to the ATS?²³¹ Will a foreign seaman injured by those attacks be able to present an action in the federal courts against those Persian Gulf nations?²³² In a much wider context, will claims against

229. See *Appeals Court Restricts Immunity For Congress on Defamation*, N.Y. Times, Nov. 8, 1988, at A32, col. 1 (discussing recent decision rejecting extension of official immunity to members of Congress under certain circumstances).

230. Maritime tort jurisdiction extends to all incidents that: (1) occur on navigable waters (*situs*) and (2) bear a "significant relationship to traditional maritime activity" (*status*). See *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864 (1986).

231. See *Iranian Gunboats Raid Two Tankers*, N.Y. Times, Dec. 7, 1987, at A3, col. 1; *Iranian Frigate Attacks Greek Tanker in Gulf*, Wash. Post, Dec. 16, 1987, at A38, col. 1; *4 Tankers Are Reported Attacked By Iranian Speed Boats in the Gulf*, N.Y. Times, Nov 17, 1987, at A12, col. 4.

232. See *54 Feared Dead on 2 Oil Tankers In Iraqi Attack on Iran Terminal*, N.Y. Times, March 22, 1988, at A1, col. 3. The New York Times reported that more

South Africa for its repression²³³ or Palestinian claims against Israel for deaths, injuries and damage recently inflicted by the Israeli Army in the Occupied West Bank and Gaza territory²³⁴ be cognizable in a federal court?²³⁵ The Second Circuit, through its decision in *Amerada Hess* has answered these questions in the affirmative. For now it is the responsibility of the Supreme Court to decide if the extent of federal jurisdiction over foreign sovereigns for violations of international law will be confined to the parameters of the Foreign Sovereign Immunities Act.

than 50 seamen from two Norwegian managed supertankers reported missing and presumed dead and detailed that:

More than 200 seamen have been killed in about 480 attacks by both sides since the "tanker war" started in 1984. Statistics kept by Lloyd's of London say twice as many ships were hit in the first two and a half months of this year as in the same period in 1987, the most intense year in the shipping war. . . . The worst known previous gulf death toll among merchant seamen was recorded last December, when 21 crewmen on the Norwegian-managed tanker SUSANGIRD, chartered by Iran, were killed in an Iraqi attack. . . . Iraq launched the tanker war in an effort to sever Iran's main source of revenues. Iran has responded by striking at neutral vessels on their way to gulf nations including Saudi Arabia and Kuwait, which Teheran holds to be allies of Baghdad. . . .

Id. (capitalization supplied).

233. See *Foe of Apartheid Is Shot Dead in Paris*, N.Y. Times, March 30, 1988, at A3, col. 3. (Paris representative of African National Congress allegedly killed by South African secret police); *South Africa Bans Most Anti-Apartheid Activities*, N.Y. Times, Feb. 25, 1988, at A1, col. 1 (South Africa bans activities of seventeen leading anti-apartheid organizations from political action).

234. See *Israel Says Arabs Under Detention Now Number 3,000*, N.Y. Times, Mar. 23, 1988, at A1, col. 4 (reporting that Israel was detaining 3,000 Palestinians in connection with the protests in the occupied territories); *6 Arabs Are Slain By Israeli Troops*, N.Y. Times, Apr. 3, 1988, at A1, col. 6 (six Palestinians were shot to death by Israeli soldiers in Israeli-occupied West Bank); *Army Says Israeli Girl Was Killed by Her Guard*, N.Y. Times, Apr. 9, 1988, at A1, col. 2, (Israeli Army destroys 14 houses of those accused of participating in death of Israeli girl); *8 Arabs Deported To South Lebanon By Israeli Order*, N.Y. Times, Apr. 12, 1988, at A1, col. 2 (Israel expels eight Palestinians into southern Lebanon and ordered the deportation of 12 others); *U.S. Assails P.L.O. Aide's Killing as 'Act of Political Assassination*, N.Y. Times, Apr. 19, 1988, at A1, col. 5.

235. See *Foreign Sovereigns' Right to Sue Here Expanded*, Nat. Law J., Sept. 28, 1987, at 33. ("Specialist in international law said the ruling [*Amerada Hess*] is likely to help human rights groups gain jurisdiction in U.S. courts for cases involving foreign victims, foreign nations and extraterritorial events. They predict some of the owners of the 281 merchant shops attacked between 1984 and last July by Iran and Iraq in the Persian Gulf also may find the ruling useful.").