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Abstract

This Comment argues that the act of state doctrine should not preclude the availability of mandatory jurisdiction under the penalty wage statute. Part I discusses the penalty wage statute and the act of state doctrine. Part II presents the factual and the procedural background of the Tismo decision. Part III argues that the court in Tismo erroneously applied the act of state doctrine to preclude the court's mandatory jurisdiction under the penalty wage statute. This Comment concludes that U.S. courts should retain mandatory jurisdiction over both penalty wage statute claims and related pendent claims in order to protect the welfare of sailors and the interests of U.S. port states.

THE ACT OF STATE DOCTRINE AND MANDATORY JURISDICTION UNDER THE PENALTY WAGE STATUTE: *TISMO v.* M/V IPPOLYTOS

INTRODUCTION

U.S. courts historically have protected sailors as the wards of admiralty,[1] thereby safeguarding them from exploitation by their shipowners.[2] In an attempt to protect sailors, the U.S. Congress enacted the penalty wage statute,[3] which penalizes shipowners for improperly withholding sailors' wages by requiring shipowners to pay sailors two days' wages for each day

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1. *See* Harden v. Gordon, 11 F. Cas. 480, 483-85 (C.C.D. Me. 1823) (No. 6047) (holding that sailors are "wards of admiralty," requiring special protection by courts because they are incapable of caring for themselves and of bargaining with shipowners themselves); *see also* Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065, 1069 (4th Cir. 1969), *aff'd*, 400 U.S. 351 (1971). The court in *Arguelles* stated that "[s]ince ancient times seamen have been accorded special protection by their Governments and Courts, particularly with respect to the prompt payment of wages due them." *Id.*; *see* Hume v. Moore-McCormack Lines, 121 F.2d 336 (2d Cir.) (discussing historical protection for sailors), *cert. denied*, 314 U.S. 684 (1941).

2. *See* Brown v. Lull, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2018) (observing that sailors' rights need zealous protection by courts because of unequal bargaining position and skill between sailors and shipowners); *see also* Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 243 (5th Cir. 1991). The court in *Castillo* recognized the ease with which shipowners could exploit sailors, and thus reiterated the reasons for the special protection accorded them, stating that

> [h]istorically, seamen have enjoyed a special status in our judicial system. They enjoy this status because they occupy a unique position. A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment.

Id.

3. Act of July 20, 1790, ch. 29, § 6, 1 Stat. 133. The original wage protection statute was enacted by the first Congress in 1790. *Id.* The act was amended first in 1872 to include a penalty for the nonpayment of sailor's wages. Shipping Commissioners Act of 1872, ch. 322, § 35, 17 Stat. 269 (1873). It was then amended in 1898 to remove courts' discretion in calculating the penalty and the time limit for which the penalty was applicable. Act of Dec. 21, 1898, ch. 28, § 4, 30 Stat. 756 (1899). H.R. REP. No. 1657, 55th Cong., 2d Sess., 2, 3 (1898); S.R. REP. No. 832, 54th Cong., 1st Sess. 2 (1896). The statute was amended again in 1915 to include the double wage provision. Seamen's Act of March 4, 1915, ch. 153, § 3, 38 Stat. 1164-65 (1915). The statute has remained essentially unchanged since the 1915 amendment, and is codified at 46 U.S.C. § 596 (1976) and 46 U.S.C. § 10313 (1988). The legislative history indicates that the purpose of the statute was to protect sailors. H.R. REP. No. 852, 63rd Cong., 2d Sess. 19 (1914); H.R. REP. No. 645, 62d Cong., 2d Sess. 8 (1912); 52 CONG. REC. 4808 (1915) (statement of Senator Vardman); 50 CONG. REC. 5748-49 (1915) (statement of Senator Fletcher).

of a specified violation.[4] Congress, as an additional protection, provided for mandatory federal subject matter jurisdiction for these wage claims, provided sailors bring them in good faith.[5] Congress specifically considered and approved the application of this legislation to non-U.S. vessels.[6]

The U.S. penalty wage statute exemplifies the traditional protective attitude of admiralty of safeguarding the payment of sailors.[7] Sailors' wage claims have been called "sacred claims."[8] The courts have taken an aggressive stance in ensuring that sailors receive their payment by granting a lien against their vessel.[9] Thus, a sailor can sue to bring an action *in rem* against the vessel to secure the payment of wages.[10] Protecting the sailor's right to wage payment, therefore, has consistently been highly regarded by courts.[11] Moreover, since ancient

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4. 46 U.S.C. § 10313(e)-(i) (1988).

5. *See, e.g.*, Abraham v. Universal Glow, Inc., 681 F.2d 451, 453 (5th Cir. 1982) (holding that penalty wage statute requires mandatory jurisdiction over claims brought in good faith); Dutta v. *Clan Grahan*, 528 F.2d 1258, 1260 (4th Cir. 1975) (holding that wage claim must be brought in good faith in order to secure subject matter jurisdiction over case itself and ancillary jurisdiction over other employment related claims against shipowner).

6. 46 U.S.C. § 10313(i) (1988). The statute states that "[t]his section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section." *Id.*

7. *See* MARTIN J. NORRIS, THE LAW OF SEAMEN, § 12:1, at 424. Norris states that

> [i]t has been truly said that the seaman is the ward of the legislature for perhaps no other class of worker has received from a national legislative body the protection, care and the degree of solicitude as that given to merchant seamen. Practically every phase of the seaman's working conditions aboard ship from the time he first ships out as an apprentice or as an ordinary seaman, to the disposal of his estate at his decease, has been accorded legislative attention. Chief among these are the statutes governing his wages.

Id. (footnote omitted).

8. *The Samuel Little*, 221 F. 308, 310 (2d Cir. 1915).

9. *The Madonna D'Idra*, 1 Dodson Adm. 37, 165 Eng. Reprint 1224 (1811). Sir William Scott, later Lord Stowell, stated that these claims are "sacred liens, and as long as a plank remains the sailor is entitled, against all other persons, to the proceeds, as a security for wages." *Id.*, *reprinted in* NORRIS, *supra* note 7, § 12:1, at 425.

10. Shepherd v. Taylor, 30 U.S. 675 (1831); McCall v. U.S. Shipping Bd. Emergency Fleet Corp., 294 F. 989 (D. Wash. 1924); Saylor v. Taylor, 77 F. 476 (4th Cir. 1896); *The Acorn*, 32 F. 638 (D. Pa. 1887).

11. *See* NORRIS, supra note 7, § 12:1, at 424-25 (explaining consistent high regard that courts have given to sailors' wage claims). *See also* Arguelles v. U.S. Bulk Carriers, Inc., 400 U.S. 351 (1971) (holding that policies of allowing sailors to bring suit under penalty wage statute outweighed those of other labor legislation, in this case, the Labor Management Relations Act).

times, maritime nations have recognized the need to protect the right to wage payments and thus included similar provisions in their admiralty codes.[12]

Recently, however, the U.S. District Court for the District of New Jersey, in *Tismo v.* M/V Ippolytos,[13] avoided the mandatory jurisdiction of the penalty wage statute by applying the act of state doctrine.[14] The act of state doctrine provides that the U.S. courts should decline to rule on the acts of non-U.S. sovereigns that are taken within their own territories.[15] In *Tismo*, the court applied the act of state doctrine, holding that a

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12. Laws of Hanse Towns, *reprinted in* 30 F. Cas. 1197. This code states that "[m]asters shall pay their seamen at three payments, one third when the ship sets sail, outward bound; one third when she is unloaden, and the other when she is returned home." *Id.* art. XXVIII, at 1199. "If a master discharges a seaman during the voyage, for no lawful cause given, he is bound to pay him his whole wages, and defray the charge of his return; but if the mariner desires the master's leave to quit the ship, he shall be bound to restore all the money he received, and pay his own charges." *Id.* art. XLII, at 1200. Laws of Wisbuy, art. III, *reprinted in* 30 F. Cas. 1189. This code states that

> [a] master may turn off a mariner without any lawful cause given, before he sets sail, paying him half what he had promised him for the voyage. After he has set sail, and is gone out of his port, that master who turns off a mariner without lawful cause given, is obliged to pay him all his wages as much as if he had performed the voyage.

Id. art III, at 1189-90. Laws of Oleron, arts. XII, XIII, XVIII, XX, *reprinted in* 30 F. Cas. 1171, 1177-80. These provisions of the Laws of Oleron reflect concern for the protection of sailors. *Id.* Marine Ordinances of Louis XIV, art. X, *reprinted in* 30 F. Cas. 1203, 1209. This article of these ordinances states that "[i]f a master dismiss a mariner without a sufficient cause before the voyage is begun, he must pay him one third of his wages; and if after the voyage is begun, he shall pay him his whole wages, together with his charges for returning to the place of his departure." *Id.* art. X, at 1209.

13. 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

14. *Id.* at 932-35.

15. *See* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990) (holding that courts should only apply act of state doctrine when adjudicating validity of official acts of sovereign taken within sovereign's territory). The Court defined the act of state doctrine, stating that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.*; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Underhill v. Hernandez, 168 U.S. 250 (1897). Many articles have discussed the act of state doctrine. *See, e.g.*, Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964); Myres S. McDougal & W. Michael Reisman, *The Changing Structure of International Law*, 65 COLUM. L. REV. 810 (1965); Donald W. Hoagland, *The Act of State Doctrine: Abandon It*, 14 DENV. J. INT'L L. & POL'Y 317 (1986); Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AMER. J. INT'L L. 68 (1985); Stephen G. Wolfe, Comment, *Rational-*

preexisting bilateral agreement between Cyprus and the Philippines provided for exclusive jurisdiction of the suit in the country where the employment contracts had been signed.[16] The court, reluctant to infringe on this jurisdictional provision of the bilateral agreement, applied the act of state doctrine and declined to hear the case.[17] The Third Circuit affirmed this decision without opinion.[18]

This Comment argues that the act of state doctrine should not preclude the availability of mandatory jurisdiction under the penalty wage statute. Part I discusses the penalty wage statute and the act of state doctrine. Part II presents the factual and the procedural background of the *Tismo* decision. Part III argues that the court in *Tismo* erroneously applied the act of state doctrine to preclude the court's mandatory jurisdiction under the penalty wage statute. This Comment concludes that U.S. courts should retain mandatory jurisdiction over both penalty wage statute claims and related pendent claims in order to protect the welfare of sailors and the interests of U.S. port states.

I. *THE PENALTY WAGE STATUTE AND THE ACT OF STATE DOCTRINE*

A. *The Penalty Wage Statute*

The penalty wage statute reflects several legislative purposes that courts seek to enforce. The statute codifies the traditional concern of giving sailors a cause of action against shipowners for timely payment of wages.[19] The statute also at-

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izing the Federal Act of State Doctrine and Evolving Judicial Exceptions, 46 FORDHAM L. REV. 295 (1977).

16. *Tismo*, 776 F. Supp. at 929-35.

17. *Id.* at 932-35.

18. Tismo v. *M/V Ippolytos*, 947 F.2d 937 (3d Cir. 1991). The Third Circuit's reasoning in affirming this decision and showing a reluctance to afford non-U.S. sailors the protection afforded by other U.S. labor legislation is paralleled by its decision in Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218 (3d Cir. 1991). In that case, however, the labor statute in question, the Fair Labor Standards Act ("FLSA"), did not explicitly apply to non-U.S. sailors. *Id.* Congress, on the other hand, made the penalty wage statute explicitly applicable to non-U.S. sailors. 46 U.S.C. § 10313(i) (1988); Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920).

19. 46 U.S.C. § 10313(i) (1988); *see also supra* note 12 (discussing similar provisions of ancient sea codes that seek to ensure that shipowners and masters pay sailors).

tempts to protect U.S. port states from bearing the burden of caring for impecunious sailors.[20] To further these purposes, the statute specifically protects sailors aboard non-U.S. vessels when present in U.S. harbors.[21] Courts also interpret the statute to require mandatory jurisdiction over wage claims brought by non-U.S. sailors, provided that the claims are brought in good faith.[22]

1. The Provisions of the Statute

The penalty wage statute establishes certain requirements and penalties concerning the payment of wages to sailors.[23] These provisions require that, when a ship enters a U.S. port to discharge crew or cargo, the sailor is entitled to receive, on demand, one-half the wages due at that point of the voyage.[24] At the end of the voyage, the sailor must receive the balance of the wages within twenty-four hours following discharge of the cargo, or within four days following discharge of the sailor, whichever is earlier.[25] If shipowners fail to make this payment on discharge, without sufficient cause, they must pay the sailors two days' wages for each day that payment is delayed.[26]

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20. 46 U.S.C. § 10313 (1988); *see* Monteiro v. Sociedad Maritima San Nicolas, S.A., 280 F.2d 568, 574 (2d Cir.) (explaining that purposes behind penalty wage statute were designed to protect sailors and ports from dangers of sailors' being discharged into ports without money), *cert. denied*, 364 U.S. 915 (1960); *see supra* note 3 and accompanying text (explaining legislative history of penalty wage statute).

21. 46 U.S.C. § 10313(i) (1988). The statute states that "[t]his section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section." *Id.*

22. *See* Abraham v. Universal Glow, Inc., 681 F.2d 451, 453 (5th Cir. 1982) (interpreting penalty wage statute to confer mandatory jurisdiction when wage claim brought in good faith); Dutta v. *Clan Grahan*, 528 F.2d 1258, 1260 (4th Cir. 1975) (same).

23. 46 U.S.C. § 10313 (1988).

24. *Id.* § 10313(e). The statute provides that "[a]fter the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage." *Id.*

25. *Id.* § 10313(f). The statute further provides that "[w]hen a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman." *Id.*

26. *Id.* § 10313(g). The statute states that "[w]hen payment is not made as provided under subsection (f) of this section without sufficient cause, the master or the owner shall pay to the seaman 2 days' wages for each day payment is delayed." *Id.*; *see, e.g.*, Collie v. Ferguson, 281 U.S. 52, 56 (1930) (holding that statutory requirement of sufficient cause was to prevent "arbitrary refusals to pay wages, and to in-

Strictly interpreting the punitive nature of the statute, the U.S. Supreme Court precluded any judicial discretion to modify the amount of the award.[27]

The statute protects all sailors on non-U.S. vessels when these vessels are present in U.S. harbors.[28] The Supreme Court has interpreted the statute to protect non-U.S. sailors aboard any ship present in U.S. harbors.[29] This extension of the penalty wage statute's protection to non-U.S. sailors further benefits U.S. sailors by removing the shipowners' incentive to hire unprotected non-U.S. sailors instead of U.S. sailors.[30]

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duce prompt payment when payment is possible"); Conte v. Flota Mercante Del Estado, 277 F.2d 664, 672 (2d Cir. 1960) (asserting that sufficient cause may be found where bona fide dispute over amount owed exists); Bender v. Waterman S.S. Corp., 166 F.2d 428 (3d Cir. 1948) (asserting that sufficient cause may be found where payment withheld in reasonable belief that it was not due); *The Thomas Tracy*, 24 F.2d 372, 374 (2d Cir.) (holding that sufficient cause may be found where there was honest error of judgment), *cert. denied*, 277 U.S. 595 (1928). *See supra* note 12 and accompanying text (discussing ancient sea codes' similar requirement that if masters discharge sailors without sufficient cause, masters are then liable to sailor for wages for entire voyage.)

27. *See* Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 577 (1982) (holding that district court had no discretion to alter amount of award by limiting time period of payment delinquency). In *Griffin*, the Court penalized the shipowner US$300,000 for failure to pay wages in the amount of US$412.50. *Id.* at 574-76. The sailor's daily wage was US$101.20, and the period of delay for the US$412.50 was between the date of the sailor's discharge, April 1, 1976, and the date of payment, September 17, 1980. *Id.* at 566-68. The Court therefore required the shipowner to pay twice the daily wage, US$202.40, for each day in this period of time, resulting in an award of over US$300,000. *Id.* at 574-75; *see generally* Mark S. Dugan, Note, *Griffin v. Oceanic Contractors: A Response*, 35 BAYLOR L. REV. 157 (1983) (explaining Court's decision and more closely examining damages calculations under statute).

28. 46 U.S.C. § 10313(i) (1988).

29. *See* Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 355 (1920) (interpreting congressional intent to include all U.S. sailors and non-U.S. sailors on non-U.S. vessels when present in U.S. harbors). The Supreme Court held that Congress intended the protection of the wage statute to extend to U.S. and non-U.S. sailors alike, noting that when

> taking the provisions of the act as the same are written, we think it plain that it manifests the purpose of Congress to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned, with equal opportunity to resort to the courts of the United States for the enforcement of the act.

Id.

30. *See id.* at 355 (holding that purpose of statute of aiding U.S. sailors would be undermined if statute did not apply to non-U.S. sailors because shipowners would not employ protected U.S. sailors); Monteiro v. Sociedad Maritima San Nicolas, S.A., 280 F.2d 568, 574 (2d Cir.) (explaining that intent of Congress was to help U.S.

2. Mandatory U.S. Federal Jurisdiction Under the Statute

Federal jurisdiction over wage claims asserted under the statute is mandatory, provided that the plaintiff-sailor shows that the claim is brought in good faith.[31] In view of the congressional intent to grant non-U.S. sailors access to the U.S. courts for these claims, courts enjoy wide latitude in determining the good faith of wage claims.[32] Courts review the merits of the claims to assess their good faith, and may determine that the plaintiff-sailors brought the claims in good faith even if the claims are weak.[33] A judicial determination of the good faith nature of these claims is subject to reversal only if clearly erroneous.[34]

Once the court grants subject matter jurisdiction over the penalty wage claim, plaintiffs may introduce other employment related claims.[35] Absent special circumstances, the courts gen-

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sailors find work by making wage statute provisions apply to non-U.S. sailors as well), *cert. denied*, 364 U.S. 915 (1960).

31. *See* Abraham v. Universal Glow, Inc., 681 F.2d 451, 453 (5th Cir. 1982) (holding that jurisdiction over wage claim made in good faith is mandatory); *see also* 46 U.S.C. § 10313(i) (1988) (granting access to U.S. courts to sailors on non-U.S vessels).

32. *Abraham*, 682 F.2d at 453.

33. *See, e.g.*, Dutta v. *Clan Grahan*, 528 F.2d 1258, 1260 (4th Cir. 1975) (holding that weakness of wage claims not sufficient to establish lack of good faith). The court stated that "[a] claim may be asserted in good faith even though it ultimately may be found to be unmeritorious." *Id.*; *see* Morewitz v. Andros Compania Maritima, S.A., 614 F.2d 379, 382 n.4 (4th Cir. 1980) (holding that measuring weakness of claim aids determination of good faith). The *Morewitz* court stated that

> [i]n the present context, the use of "good faith", a term associated with presence or absence of proper motive, may not seem apt when the resolution is in terms of whether the claim is one which will succeed or not. . . . Nevertheless, in the circumstances, prognostication as to probable success or lack of success of the action is a surer technique for assessing good faith than any other.

Id.; *see* Vlachos v. *M/V Proso*, 637 F. Supp. 1354, 1358 (D. Md. 1986) (holding that based on *Morewitz* and *Dutta* tests for good faith, court must answer "not whether plaintiff's claims are weak, but whether there is no way—or just about no way—in which they may succeed").

34. *See Morewitz*, 614 F.2d at 381-82 (holding that finding of good faith was factual question that would not be reversed unless clearly erroneous).

35. *See Dutta*, 528 F.2d at 1260. The court stated that "if the court possesses jurisdiction over the wage claim, 'the general rule in this circuit is that the entire case should be disposed of on the merits . . . even though the court might otherwise decline to exercise jurisdiction over the remaining claims.' " *Id.* (quoting Bekris v. Greek *M/V Aristoteles*, 437 F.2d 219, 220 (4th Cir. 1971)); *see* Hernandez v. Naviera Mercante, C.A., 716 F. Supp. 939, 940-41 (E.D. La. 1989) (stating that if jurisdiction

erally will adjudicate these claims as well.[36] Thus, plaintiffs can invoke the penalty wage statute to establish U.S. federal jurisdiction over their pendent claims.[37] The penalty wage statute is therefore an especially valuable means for non-U.S. plaintiffs, whose pendent claims might otherwise be precluded by *forum non conveniens* considerations, to ensure that jurisdiction will be granted in a U.S. federal court.[38] The potential for abuse in extending the mandatory jurisdiction by the penalty wage statute to other employment related claims underscores the need for the requirement of good faith.[39] The motive, however, of asserting a wage claim just to obtain jurisdiction

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over wage claim is present, court is required to entertain personal injury claims in suit and dispose of entire case on merits).

36. *See Dutta*, 528 F.2d at 1260 (holding that such special circumstances include contacts with United States, location of injury, location of treatment, location and language of medical records and physicians, and location of counsel); *see also Vlachos*, 637 F. Supp. at 1361 (adding to these factors likelihood of alternative forum available to hear suit). *But see Dutta*, 528 F.2d at 1261 (Widener, J., dissenting) (dissenting over location of counsel factor).

37. Abraham v. Universal Glow, Inc. 681 F.2d 451 (5th Cir. 1982). The plaintiff-sailor avoided dismissal of the personal injury claim by amending the complaint to include a penalty wage claim. *Id.* at 452-53.

38. 46 U.S.C. § 10313(i) (1988). The Merchant Marine Act of 1920 (the "Jones Act") provides for personal injury, unseaworthiness, and maintenance and cure claims. 46 U.S.C. § 688 (1988). It is disputed whether U.S. federal jurisdiction under this statute is mandatory or subject to *forum non conveniens* considerations. Timothy O'Shea, Note, *The Jones Act's Specific Venue Provision: Does It Preclude* Forum Non Conveniens *Dismissal?*, 14 FORDHAM INT'L L.J. 696 (1990-1991). Several cases, however, have posited factors to determine whether an action under the Jones Act will be dismissed for *forum non conveniens* reasons. *See, e.g.*, Dorizos v. Lemos and Pateras, Ltd., 437 F. Supp. 120, 122-23 (S.D. Ala. 1977) (explaining factors to determine choice of law issues and *forum non conveniens* issues); *see also* Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970); Lauritzen v. Larsen, 345 U.S. 571 (1953); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) (each discussing factors used in determining appropriateness of U.S. federal jurisdiction over Jones Act claims). A discussion of these factors is beyond the scope of this Comment.

39. *See, e.g.*, *Dorizos*, 437 F. Supp. at 123 (reiterating importance of requirement of good faith in bringing wage claim). The court stated that

> [a] contrary interpretation would subject the act to grave abuse. For instance, it would take a particularly dull attorney not to be able to find at least some basis for a wage claim, however tenuous, and tack to that claim a prayer for compensation for personal injuries sounding in negligence, unseaworthiness, and maintenance and cure.

Id. (quoting Mihalinos v. Liberian *S.S. Trikala*, 342 F. Supp. 1237 (S.D. Cal. 1972)). Due to this potential for abuse, the courts must first determine the issue of good faith. *Dorizos*, 437 F. Supp. at 123. If the court finds that the plaintiff-sailor makes the wage claim without good faith and is merely bringing a frivolous wage claim to establish jurisdiction, the court can dismiss the case. *Id.*

over other claims does not necessarily constitute bad faith on the part of the plaintiff.[40]

3. U.S. Courts Have Rejected All Attempts to Avoid Mandatory Jurisdiction

To protect sailors' rights, courts generally reject challenges to the statute's mandatory jurisdiction.[41] Shipowners thus have been unable to avoid mandatory jurisdiction through utilization of forum selection clauses in the sailors' employment contracts,[42] assertions of jurisdiction by non-U.S. labor agencies,[43] releases of wage claims from the sailors,[44] or assertions of the foreign sovereign immunity defense when the shipowner is a sovereign.[45] Courts have granted jurisdiction even when the plaintiff has failed to follow mandatory grievance procedures in collective bargaining agreements made by the sailors' unions or representatives.[46] The Supreme Court has also protected sailors from contracting away their rights to personal injury remedies.[47]

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40. *See Abraham*, 681 F.2d at 452. In *Abraham*, the plaintiffs' original complaint had asserted various tort claims. It was amended, however, to include a penalty wage claim in an attempt to retain U.S. jurisdiction after the tort and Jones Act claims were dismissed on *forum non conveniens* grounds. *Id.* The court found that the wage claims were not necessarily brought in bad faith and remanded for a determination of whether the claims were brought in good faith. *Id. But see Dorizos*, 437 F. Supp. at 124 (commenting, in dicta, that it would view such motive for wage claim as "unprofessional manner in an effort to require jurisdiction"); *Mihalinos*, 342 F. Supp. at 1242-43 (commenting that absence of evidence for wage claim precludes good faith). The *Mihalinos* court posited as an example of the potential abuse that this mandatory jurisdiction can invite because the value of the wage claim of US$125 was minuscule compared to value of the personal injury claim of US$36,500. *Id.* at 1243 nn.7-8.

41. *See, e.g., Abraham*, 681 F.2d at 453; Dutta v. *Clan Grahan*, 528 F.2d 1258, 1261 (4th Cir. 1975).

42. Castillo v. Spiliada Maritime Corp., 937 F.2d 240 (5th Cir. 1991).

43. Jose v. *M/V Fir Grove*, 765 F. Supp. 1024, 1027 (D. Or.), *later proceeding*, 765 F. Supp. 1037 (D. Or. 1991).

44. 46 U.S.C. § 10313(e) (1988). The statute states that "a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires." *Id. See Castillo*, 937 F.2d at 245 (setting aside release of wage claim obtained in Philippines through coercion, duress, and unfair treatment by defendant-shipowners).

45. Velidor v. *L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

46. Vlachos v. *M/V Proso*, 637 F. Supp. 1354, 1360 (D. Md. 1986); Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065, 1069 (4th Cir. 1969), *aff'd*, 400 U.S. 351 (1971).

47. Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).

Courts have rejected the use of forum selection clauses as a means of avoiding the jurisdiction of the penalty wage statute.[48] Unwilling to allow sailors to contract away their right to bring wage claims in the United States, courts have held that these clauses, asserting that wage claims will be adjudicated in a non-U.S. forum, cannot supersede U.S. federal jurisdiction.[49] Courts will, however, defer to the forum selection clause for any underlying claims if the wage claim is dismissed for insufficiency or lack of good faith.[50]

Courts have also rejected assertions by non-U.S. labor agencies that these agencies possess exclusive jurisdiction over wage claims.[51] Although these agencies often assert that they have exclusive jurisdiction, based on either their national law or the forum selection clauses in the sailors' contracts, U.S. courts have retained jurisdiction by applying the penalty wage statute.[52] U.S. courts have rejected these agencies' claims of exclusive jurisdiction, though the agencies may have jurisdiction concurrent with U.S. courts.[53] In similar labor disputes

48. *See, e.g.*, Castillo v. Spiliada Maritime Corp., 732 F. Supp. 50, 52 (E.D. La.) (stating that mandatory jurisdiction under penalty wage statute would be defeated if parties could contract around it), *summ. judgment granted*, 740 F. Supp. 409 (E.D. La. 1990), *rev'd*, 937 F.2d 240 (5th Cir. 1991); Galon v. *M/V Hira II*, 1990 A.M.C. 344 (W.D. Wa. 1989) (holding that forum selection clause within sailor's employment contract could not contravene mandatory U.S. federal jurisdiction over wage claims); *Arguelles*, 408 F.2d at 1071-72 (holding that collective bargaining procedure in contract was not mandatory alternative to seeking redress pursuant to wage statute).

49. *See Arguelles*, 408 F.2d at 1071 (holding that penalty wage statute, enacted to aid sailors, should not be nullified or circumvented by private agreements).

50. Dorizos v. Lemos and Pateras, Ltd., 437 F. Supp. 120, 121-22 (S.D. Ala. 1977) (holding that forum selection clauses in admiralty law are " 'prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances' ") (quoting *M/S Bremen* v. Zapata Off-Shore Co., 407 U.S. 1, 7 (1972)).

51. Jose v. *M/V Fir Grove*, 765 F. Supp. 1024, 1027 (D. Or.) (recognizing that though Philippine labor code provided for exclusive jurisdiction in Philippines for wage disputes, provision did not supersede U.S. federal jurisdiction), *later proceeding*, 765 F. Supp. 1037 (D. Or. 1991).

52. *See Castillo*, 732 F. Supp. at 51 (explaining that although employment contracts granted original and exclusive jurisdiction to Philippine Overseas Employment Agency and Philippine Court of Justice, U.S. federal courts should retain jurisdiction in order to guarantee that sailors' rights are upheld), *summ. judgment granted*, 740 F. Supp. 409 (E.D. La. 1990) (on issue of validity of contractual releases), *rev'd*, 937 F.2d 240 (5th Cir. 1991) (on issue of validity of contractual releases).

53. *See, e.g.*, *Jose*, 765 F. Supp. at 1027 (explaining that though sailors could elect to bring suit in Philippine forum, this option does not deprive United States of jurisdiction); *see The Estrella*, 102 F.2d 736 (3d Cir. 1938) (allowing Norwegian consul to

involving U.S. workers outside the United States, two U.S. courts have rejected assertions of exclusive jurisdiction by other nations' labor agencies when these assertions were based on the act of state doctrine.[54]

Under the penalty wage statute, courts may also set aside a contractual release of a wage claim if the release is not in the interests of justice.[55] Recognizing the sailors' poor bargaining position and the general policy of protecting sailors from exploitation by the shipowners, courts closely scrutinize contractual releases of sailors' wage claims.[56] Courts may find, however, that a plaintiff's previous execution of a release of a wage claim is valid, thus precluding the required jurisdictional element of good faith.[57]

The U.S. Court of Appeals for the Third Circuit has also rejected an attempt by a non-U.S. sovereign shipowner to utilize the Foreign Sovereign Immunities Act ("FSIA")[58] to avoid the mandatory jurisdiction of the penalty wage statute.[59] Although the FSIA normally grants non-U.S. sovereigns immunity from suit in U.S. courts,[60] the FSIA contains a commer-

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have concurrent jurisdiction over case because of treaty between United States and Norway); *but see* Lascoratos v. *S/T Olympic Flame*, 227 F. Supp. 161 (E.D. Pa. 1964) (asserting that modern view is to assert mandatory jurisdiction and not to defer to non-U.S. authority).

54. Randall v. Arabian Amer. Oil Co., 778 F.2d 1146 (5th Cir. 1985) (refusing to allow law of non-U.S. state to deprive U.S. courts of jurisdiction). The court held that only the Constitution and the laws of the United States could mandate the cases the U.S. federal courts could hear. *Id.* at 1149-50. Therefore, the court held that its refusal to honor the exclusive jurisdiction provisions of non-U.S. sovereign's law did not violate the act of state doctrine. *Id.* at 1153. *Accord* Veitz v. Unisys Corp., 676 F. Supp. 99, 101 (E.D. Va. 1987).

55. 46 U.S.C. § 10313(e) (1988). The statute states that "[n]otwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires." *Id.*

56. Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 244 (5th Cir. 1991); Wink v. Rowan Drilling Co., 611 F.2d 98, 100 (5th Cir.), *cert. denied*, 449 U.S. 823 (1980).

57. *Castillo*, 937 F.2d at 244; *see* Morewitz v. Andros Campania Maritima, S.A., 614 F.2d 379, 382 (4th Cir. 1980) (holding that release executed without duress, fraud, or unseemly conduct pretermits good faith wage claim).

58. 28 U.S.C. §§ 1602-1611 (1988).

59. Velidor v. *L/P/G Benghazi*, 653 F.2d 812 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982).

60. 28 U.S.C. § 1604. The statute states that "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." *Id.*

cial activity exception under which courts may deny immunity to defendant sovereign shipowners.[61] Under the commercial activity exception, a non-U.S. sovereign or governmental agency is open to suit in the United States if the plaintiff's claim relates to certain commercial activities of the sovereign.[62] According to the legislative history of the FSIA, merchant shipping by a non-U.S. sovereign constitutes one example of such a commercial activity.[63] The court held that when the wage claim arises from circumstances involving the use of a U.S. harbor by a non-U.S merchant ship, a sufficient nexus or relation exists between the claim and the shipowners' commercial activity to satisfy the commercial activity exception of the FSIA.[64] The court therefore upheld mandatory jurisdiction over penalty wage claims, rejecting the sovereign immunity defense under the commercial activity exception to the FSIA.[65]

Courts also permit mandatory jurisdiction over penalty wage claims for plaintiff-sailors before they utilize grievance procedures of collective bargaining agreements.[66] Indeed,

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61. 28 U.S.C. § 1605(a)(2) (1988). The commercial activity exception states that courts will deny sovereign immunity in cases

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

Id.; *see Velidor*, 653 F.2d at 819-20 (holding that commercial activity exception to FSIA applies when wage claim arises on vessel owned by non-U.S. sovereign using U.S. harbor).

62. *Velidor*, 653 F.2d at 820.

63. H.R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.C.C.A.N. 6604 (listing operation of merchant shipping by sovereign as commercial enterprise for purposes of FSIA).

64. Velidor v. *L/P/G Benghazi*, 653 F.2d 812, 819-20 (3d Cir. 1981) (finding required nexus solely because ship owned by non-U.S. sovereign sailed into U.S. port), *cert. dismissed*, 455 U.S. 929 (1982).

65. *Id.*

66. *See, e.g.*, Vlachos v. *M/V Proso*, 637 F. Supp. 1354, 1360 n.8 (D. Md. 1986) (asserting that failure to follow collective bargaining procedures does not preclude good faith in bringing wage claim); *see also* Arguelles v. U.S. Bulk Carriers, Inc., 408 F.2d 1065, 1071 (4th Cir. 1969), *aff'd*, 400 U.S. 351 (1971). The *Arguelles* court called the collective bargaining agreement an

> additional mode of redress for such seaman and which he may pursue, at his election. . . . To construe the grievance procedure as a mandatory substitute for the seaman's statutory right to prompt payment of his wages is, in our

courts have allowed sailors to sue for wage rates mandated by their collective bargaining agreement even though the sailors did not adhere to the grievance procedures established in the same collective bargaining agreement.[67] By allowing sailors to bypass grievance procedures, courts illustrate their desire to prevent the sailors' unions from bargaining away the sailors' right to U.S. jurisdiction.[68]

Tismo is the first U.S. decision to deny jurisdiction under the penalty wage statute on the basis of the act of state doctrine. This is also the first case involving a bilateral agreement between two non-U.S. sovereigns that purports to deprive the U.S. courts of mandatory jurisdiction under the penalty wage statute by means of an original and exclusive jurisdiction provision. Only recently, therefore, has a court deferred jurisdiction under this statute to a non-U.S. forum on the basis of the act of state doctrine.[69]

B. *The Act of State Doctrine*

The act of state doctrine is a common law doctrine by which U.S. courts decline to adjudicate claims that require ruling on the validity of governmental actions taken by non-U.S. sovereigns within their own territories.[70] Early U.S. cases de-

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opinion, palpable error. Statutes enacted out of considerations of public policy, such as section 596 pertaining to seaman's wages, should not and cannot be nullified or circumvented by private agreement.

Id. § 596 is the equivalent version of the current § 10313. 46 U.S.C. § 10313 (1988).

67. *Arguelles*, 408 F.2d at 1070-71.

68. *Id.*

69. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

70. Underhill v. Hernandez, 168 U.S. 250, 252 (1897). In *Underhill*, the Court pronounced the basic formulation of the act of state doctrine:

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

Id.; *see* JOSEPH MODESTE SWEENEY, ET AL., THE INTERNATIONAL LEGAL SYSTEM 383 (1988) (explaining rationale of act of state doctrine). The authors explained the rationale of the act of state doctrine, stating that

> if the foreign rule stems from an exercise of sovereignty by the foreign state, such as an act of governance, and the plaintiff is seeking to attack the fundamental validity of that conduct by the foreign state, the forum judge will become more cautious and may hesitate or refuse to examine the act of the foreign state.

cided under the act of state doctrine applied the principle of sovereign immunity.[71] The U.S. Supreme Court extended immunity to individuals who acted as agents of governmental authority in performing official acts within their own territory.[72] Courts now, however, rely on a constitutional separation of powers rationale.[73] On the basis of this separation of powers reasoning, U.S. courts refrain from adjudicating cases that might interfere with the foreign relations prerogatives of the executive branch.[74] By preventing courts from examining these acts of non-U.S. sovereigns, however, the act of state doctrine validates official acts of non-U.S. sovereigns performed within their territory as rules of decision for the U.S. courts.[75]

1. *Kirkpatrick* and *Sabbatino*: The Modern Act of State Doctrine

U.S. courts apply a two-step approach when considering

Id.

71. *See, e.g., Underhill*, 168 U.S. at 252.

72. *Id.* at 252. The Court refused to adjudicate the case, basing its decision on the principle that individuals acting in the scope of their authority within their state's territory cannot be judged in foreign tribunals. *Id.* The Court stated that

> [n]or can the principle be confined to lawful or recognized governments, or to cases where redress can manifestly be had through public channels. The immunity of individuals from suits brought in foreign tribunals for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact.

Id.

73. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (holding that act of state doctrine rests on separation of powers rationale wherein judicial branch declines to adjudicate validity of act of non-U.S. sovereign taken within its own territory); *but see Underhill*, 168 U.S. at 252 (stating that court will not entertain suit against official of non-U.S. sovereign state); *see also* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., Ltd., 246 U.S. 304 (1918) (presenting similar situations wherein the Court refused to adjudicate expropriations performed by Mexican military officials during a Mexican revolution). *See* Wolfe, *supra* note 15, at 304 (commenting that early basis of sovereign immunity has given way to separation of powers rationale due to restrictions on sovereign immunity of states).

74. *Sabbatino*, 376 U.S. at 427-29; *see generally* Mark D. Pethke, Recent Decision, 22 VAND. J. TRANSNAT'L L. 1231, 1235 (1989). Mr. Pethke comments that the modern formulation of the act of state doctrine is based on reluctance to adjudicate matters involving foreign affairs. *Id.* at 1235 n.32.

75. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990). Justice Scalia held that the act of state doctrine provides that official acts of non-U.S. sovereigns performed within their own territory are to be "deemed valid" by U.S. courts when deciding a case involving one. *Id.*

application of the act of state doctrine. To apply the doctrine, courts first must determine that the case at issue meets the threshold requirement of the doctrine. The case must directly place into question the validity of an official act by a non-U.S. sovereign that was taken within the sovereign's territory. Once this threshold requirement is established, courts must then apply a balancing test that weighs several factors to determine the propriety of applying the act of state doctrine.

The Supreme Court enunciated this threshold requirement of the act of state doctrine in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*[76] The Court held that it could not apply the act of state doctrine in order to avoid the court's inquiry into allegations that the defendant had bribed a Nigerian official in order to obtain a valuable government contract.[77] Refusing to apply the act of state doctrine, the court held that it was proper for a U.S. court to adjudicate the case because the validity of the official act of the Nigerian sovereign, the execution of the contract, was not in issue.[78] The Court held that any potential embarrassment ensuing from the Court's inquiry into the motivations of the Nigerian official was insufficient to implicate the act of state doctrine.[79]

The establishment of the threshold requirement led the Court to restrict the act of state doctrine by mandating that courts may not refuse to hear cases merely to avoid embarrassment to the sovereigns or inquiry into the motivation for the sovereigns' acts.[80] Courts may only refuse to hear cases under the doctrine if the adjudication of the case requires a ruling on the validity of an official act of the non-U.S. sovereign taken within its own territory.[81] Thus, if a case merely contains polit-

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76. *Id.* at 409-10 (holding that technical availability of act of state doctrine is met when act of non-U.S sovereign taken within its own territory is at issue before court). *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025-27 (6th Cir. 1990) (commenting that *Kirkpatrick* posited threshold requirement for act of state doctrine).

77. *Kirkpatrick*, 493 U.S. at 406.

78. *Id.*

79. *Id.* at 408-10.

80. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 408-10 (1990); *see also* Nelson v. Saudi Arabia, 923 F.2d 1528, 1531-32 (11th Cir. 1991) (commenting that *Kirkpatrick* indicates restrictive attitude toward applying act of state doctrine).

81. *See* Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989) (refusing to apply act of state doctrine to suit involving Republic of China's order to assassinate man in U.S. territory). *Cf.* Grupo Protexa, S.A. v. All American Marine Slip, 954

ically sensitive issues or may embarrass a non-U.S. sovereign, but does not require the court to adjudicate the validity of an official act of a non-U.S. sovereign taken within its own territory, the court may not apply the act of state doctrine.[82] Once the threshold requirement is satisfied, courts should balance several factors to determine whether to apply the act of state doctrine.[83]

The Supreme Court set forth these factors in its modern formulation of the act of state doctrine in *Banco Nacional de Cuba v. Sabbatino*.[84] In *Sabbatino*, the Cuban government sued a court-appointed receiver in U.S. federal court to recover profits made by a U.S. sugar company from assets that had been taken out of Cuba after Cuba had nationalized the company's assets.[85] The Supreme Court, applying the act of state doctrine, declined to adjudicate the validity of Cuba's expropriation of the sugar company's assets.[86] The Court based its decision primarily on its desire to avoid potential conflict with the U.S. executive's foreign relations powers.[87]

The Court formulated several factors that courts should balance when considering application of the act of state doctrine.[88] First, courts should consider the degree of codification or consensus concerning the particular area of law around

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F.2d 130 (3d Cir. 1992) (declining to decide whether act of state doctrine precluded court from adjudicating issue where Mexican official acted in reference to wreck of ship that had sunk outside territorial waters of Mexico).

82. *Kirkpatrick*, 493 U.S. at 408-10. The Court states that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.* at 409.

83. *Id.* at 409. The Court, in emphasizing that the threshold requirement of the act of state doctrine must be met before the policies underlying the act of state doctrine can be evaluated, stated that "[i]t is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine's technical availability, it should nonetheless not be invoked." *Id.*

84. 376 U.S. 398 (1964).

85. *Id.*

86. *Id.* at 427-39.

87. *Id.*

88. *Id.* at 427-29. These factors highlighted the separation of powers rationale. *Id.* The Court stated that the act of state doctrine's "continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." *Id.* at 427-28.

which the dispute centers.[89] The greater the codification or consensus, the greater the justification for the court to adjudicate the case.[90] Second, courts should analyze the sensitivity of the issue to the executive's foreign relations policies.[91] The more sensitive the issue is to the current foreign affairs situation, the greater the justification for the court to defer to the executive and decline to adjudicate the case.[92] Third, the court should consider the continued existence of the non-U.S. state whose acts are in question.[93] If the government that performed the act is defunct, the political implications of hearing the case will be less significant.[94] In *Sabbatino*, the decision to apply the act of state doctrine evinced that the second factor, that of the sensitivity of the matter to the executive's foreign relations, weighed more heavily than the other factors.[95] The *Sabbatino* factors thus require a flexible balancing approach for courts to determine whether to apply the act of state doc-

89. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). The Court asserted that when the international law governing the issue clearly defines the principles to be applied, the "more appropriate it is for the judiciary to render decisions regarding it." *Id.* The Court would not be interfering with the executive's formulation of such sensitive principles by adjudicating such a case. *Id.*

90. *Id.*

91. *Id.* at 428. The Court stated that courts should gauge the importance of the issue to the executive's foreign relations policies when deciding whether to apply the doctrine. *Id.* The Court stated that "[i]t is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Id.*

92. *Id.*

93. *Id.* at 428. The Court commented that if the non-U.S. sovereign that performed the act in question is no longer in existence, for example, Nazi Germany, the foreign policy implications of adjudicating such an act would probably be weaker than if the country was viable. *Id.* The Court stated that "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered." *Id.*

94. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

95. *See id.* at 428-32. Again, the Court emphasized that it wanted to avoid conflict with the executive branch, holding that

> [c]onsiderably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. . . . In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

Id. at 432-33; *see* Pethke, *supra* note 74, at 1238 (commenting that preeminence of factor of interference with executive is understandable under separation of powers rationale).

trine.[96]

2. Exceptions to the Act of State Doctrine

Several criticisms of the act of state doctrine have arisen, leading to the promulgation of exceptions to the doctrine. One criticism is that the act of state doctrine effectively validates the actions of non-U.S. sovereigns by preventing redress for such actions in U.S. courts.[97] Similarly, by applying the doctrine, the U.S. courts may be said to ratify actions that might contravene international law.[98] A final criticism is that application of the doctrine may prevent U.S. courts from performing their constitutional duty of dispensing justice and from contributing to the development of international law.[99]

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96. *Sabbatino*, 376 U.S. at 428. The Court stated that it was not "laying down or reaffirming an inflexible and all-encompassing rule in this case." *Id.*; *see* Pethke, *supra* note 74, at 1237 (commenting that Court advocated "flexible, case-by-case balancing approach" for determining application of act of state doctrine).

97. Foreign Assistance Act of 1964, 22 U.S.C. § 2370(e)(2) (1988). Congress displayed its dissatisfaction with the *Sabbatino* decision by enacting the second Hickenlooper Amendment of the Foreign Assistance Act [hereinafter "Hickenlooper II"]. *Id.* Through Hickenlooper II, Congress voiced its concern that the act of state doctrine would prevent courts from serving justice by validating expropriation of U.S. property by non-U.S. governments in violation of international law. *Id.* Congress, specifically limiting Hickenlooper II to situations involving an expropriation of property in violation of international law, thus provided that the court could apply the act of state doctrine in such cases if the executive informed the court that adjudicating the case would impede the executive's foreign relations policies. *Id.*

98. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964) (White, J., dissenting). Justice White stated that

> I am dismayed that the court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of courts of the United States in a large and important category of cases. I am also disappointed in the court's declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy. This backward-looking doctrine, never before declared in the Court, is carried a disconcerting step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act.

Id. (White, J., dissenting).

99. *See id.* at 450-57; *see also* U.S. CONST. art. III, § 2. The Constitution states that

> [t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or

These problems have led both the Supreme Court and lower courts to fashion exceptions allowing courts to adjudicate cases that otherwise would fall under the act of state doctrine.[100] Though they have been used in varying degrees by the lower courts, the Supreme Court has never explicitly adopted these exceptions.[101] These exceptions to the act of state doctrine include the *Bernstein* exception, the treaty exception, the commercial activity exception, and the extraterritorial exception.[102]

a. The *Bernstein* Exception

The *Bernstein* exception compels courts to adjudicate cases when the executive branch affirmatively notifies the court that deciding such cases will not interfere with foreign relations.[103]

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which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and consuls;—to all Cases of admiralty and maritime Jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, and Subjects.

Id. Justice White asserted that by not adjudicating these cases on the merits, courts do not fulfil their responsibility under the U.S. Constitution. *Sabbatino*, 376 U.S. at 450-57. International law is part of U.S. law, and courts have the obligation to ascertain and administer it in appropriate cases. *See e.g.*, The Paquete Habana, 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); Hilton v. Guyot, 159 U.S. 113, 163 (1895) (emphasizing that judicial tribunals must adjudicate cases involving international law, whether they use treaties, statutes, or customary international law principles).

100. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400 (1990). The Supreme Court recently had an opportunity to evaluate these exceptions to the act of state doctrine, but declined to do so because it held that the doctrine did not apply. *Id.* at 405.

101. *Id.*

102. *See infra* notes 103-118 and accompanying text (describing relevant exceptions of act of state doctrine).

103. Bernstein v. Van Heyghen Freres Societe Anonyme ("Bernstein I"), 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947). *Bernstein I* involved the adjudication of a taking of property by the Nazi government. *Id.* When suit was brought to recover the proceeds of this property, Judge Learned Hand ruled that the act of state doctrine shielded the validity of the expropriation from adjudication unless the executive branch affirmatively notified the court that it could hear the case. *Id.*; *but see* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvarrt-Maatschappij ("Bernstein II"), 210 F.2d 375 (2d Cir. 1954) (allowing adjudication of case because State

The Supreme Court did not approve this exception.[104] Courts still consider letters from the executive branch as strong evidence of the political sensitivity of the case.[105] Courts, therefore, continue to consider executive branch recommendations in weighing the *Sabbatino* factors, though they are not bound by them.

b. The Treaty Exception

Under the treaty exception, the act of state doctrine does not apply when a treaty or international agreement clearly outlines the controlling legal standards that the court should employ to adjudicate the case at issue.[106] When a treaty clearly addresses the issues in question adjudication using the standards of the treaty or agreement should neither embarrass the executive nor conflict with its foreign policy, because the treaty already represents the U.S. interpretation of international law.[107] Although never explicitly decided by the Supreme

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Department sent letter to court advising that executive saw no interference with foreign relations if court heard case). *Id.* In *Bernstein II*, the Court stressed the evil nature of the German confiscation. *Id.*

104. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972). Three Justices in the plurality opinion adopted the *Bernstein* exception in *First Nat'l City Bank*, 406 U.S. at 760-70, but two concurring justices and four dissenting justices rejected it. *Id.* at 770-73 (Douglas, J., concurring); *id.* at 773-76 (Powell, J., concurring); *id.* at 776-96 (Brennan, J., dissenting). The facts of *First Nat'l City Bank* were similar to *Sabbatino* because they both involved a Cuban expropriation. *Id.*; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In *First Nat'l City Bank*, however, the executive branch affirmatively notified the court that adjudicating the case would not hinder foreign relations and therefore asked the court to adjudicate the case and thereby to affirm the *Bernstein* exception. *First Nat'l City Bank*, 406 U.S. at 762-70. Four dissenting and two concurring Justices, however, rejected the *Bernstein* exception, averring that it constituted unwarranted executive interference with the judiciary. *Id.* at 776-96 (Brennan, J., dissenting).

105. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 519-23 (2d Cir.) (reviewing its earlier position in light of executive branch's newly expressed position on case), *cert. dismissed*, 473 U.S. 934 (1985); Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 n.38 (2d Cir. 1981) (listing executive's stated position on matter as factor in determining whether to apply act of state doctrine), *cert. denied*, 454 U.S. 1148 (1982).

106. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (holding that judiciary will not adjudicate taking of property within sovereign's own territory if sovereign government is "extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law").

107. *See, e.g.*, Kalamazoo Spice Extraction Co. v. Provisional Military Gov. of So-

Court, this exception follows from the Court's language in *Sabbatino*, in which the Court expressed reluctance to adjudicate a case in part due to the lack of clear international law on the issue.[108] The Supreme Court, however, has given courts no guidance in determining whether a treaty's provisions contain controlling legal principles, thus leaving the validity and application of the exception unclear.[109]

c. The Commercial Activity Exception

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*,[110] a plurality of the Supreme Court articulated the commercial activity exception, granting an exception to the act of state doctrine when the sovereign engages in purely commercial activity.[111] In *Dunhill*, the Court held that Cuba, which had nationalized its

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cialist Eth., 729 F.2d 422 (6th Cir. 1984) (commenting on additional materials that serve as guidelines for the interpretation for such treaties); *see also* Eric. L. Schwimmer, Note, *A Treaty Exception to the Act of State Doctrine: A Framework for Judicial Application*, 4 B.U. INT'L L.J. 201, 212 (1986). The author stated that the treaty gives the court the applicable law on which to adjudicate the case, because

> [w]here a breach of a treaty is alleged, it is unnecessary for a court to defer to the executive. In the treaty, the executive has already established the foreign policy position of the United States and articulated the United States interpretation of international law. Since the executive has not given its views on the issue in the treaty or executive agreement, the court would not be interfering with the executive branch by adjudicating the case. As mentioned above, however, the Supreme Court has not yet decided a case on this treaty exception and thus its formula for application is not clear.

Id.

108. *See Sabbatino*, 376 U.S. at 428 (holding that such treaty would provide sufficient legal principles to adjudicate case); *see, e.g.*, *Kalamazoo Spice*, 729 F.2d at 427-28.

109. *Sabbatino*, 376 U.S. at 428. The issue of determining whether a treaty or agreement contains unambiguous and controlling legal principles is not settled. *See, e.g.*, Ethiopian Spice Extraction Share Co. v. Kalamazoo Spice Extraction Co., 543 F. Supp. 1224 (W.D. Mich. 1982), *rev'd sub nom.*, Kalamazoo Spice Extraction Co. v. Provisional Military Gov. of Socialist Eth., 729 F.2d 422 (6th Cir. 1984). The district court held that the phrase "prompt, adequate, and effective compensation" was ambiguous and could not be used by the court to determine the appropriate compensation for this matter. *Id.* at 1227. The Sixth Circuit, however, held that the phrase was unambiguous when interpreted according to the friendship, commerce and navigation treaties, prior U.S. case law, and amicus curiae briefs filed by the Departments of State, Treasury and Justice. *Kalamazoo Spice*, 729 F.2d at 426-29. These briefs argued that the 1953 Treaty of Amity between the United States and Ethiopia contained controlling legal principles on which the case should be adjudicated. *Id.*

110. 425 U.S. 682 (1976). Four justices adopted this commercial activity exception, and therefore this exception has not been accepted by a majority of the Supreme Court. *Id.*

111. *Id.*

cigar industry, could not claim the act of state doctrine as a defense for its repudiation of debts because this debt repudiation was a commercial, not a governmental activity.[112] When using the commercial activity exception, courts do not contravene the act of state doctrine because they do not interfere with the governmental acts of a non-U.S. sovereign, but only its purely commercial acts.[113] Like the commercial activity exception to the FSIA, this commercial activity exception allows the courts to adjudicate cases where the sovereign act in question is commercial, not governmental.[114]

d. The Extraterritorial Exception

Under the extraterritorial exception, courts should not apply the act of state doctrine when the sovereign act has effects outside the sovereign's jurisdiction that contravene the law and policy of the United States.[115] This exception is an exten-

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112. *Id.* at 695. The Court stated that "we are nevertheless persuaded . . . that the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Id.*

113. *Id.* at 703-06; *see* Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1048 n.25 (9th Cir. 1983) (holding that courts normally will not apply act of state doctrine for purely commercial activity); *see also* Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982) (recognizing commercial activity exception, but holding that expropriation of gas line was governmental and not commercial activity because performed for public interest), *cert. denied*, 460 U.S. 1041 (1983).

114. *See* 28 U.S.C. § 1605(a)(2) (1988) (allowing jurisdiction over non-U.S. sovereign when acts involved in suit are commercial). The FSIA commercial activity exception is jurisdictional, and will defeat a claim of sovereign immunity. *Id.* The act of state doctrine commercial activity exception is discretionary, because the court in its discretion can still apply the act of state doctrine even if the act is purely commercial. International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981) (holding that though price fixing of oil products by Organization of Petroleum Exporting Countries had commercial component, deference to executive and legislative branches is appropriate in case involving Mideast "petropolitics"), *cert. denied*, 454 U.S. 1163 (1982). The court stated that "[b]ecause the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available when such caution is appropriate, regardless of any commercial component of the activity involved." *Id.* at 1360. *See generally* Wolfe, *supra* note 15, at 317-18.

115. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 473 U.S. 934 (1985). In this case, the situs of a debt was in the United States and not Costa Rica. Therefore, the decree by Costa Rica expropriating these funds was not shielded from judicial examination by the act of state doctrine because the property in question, the debt, was located outside the territory of

sion of the reasoning in *Sabbatino*, in which the Court specifically limited the act of state doctrine to expropriations involving property located outside the United States.[116] Although the Court has not explicitly addressed the extraterritorial exception, it implicitly referred to this exception when it held that the threshold for application of the act of state doctrine is met when a court is faced with adjudicating the official act of a sovereign performed within its own territory.[117] Thus, if the extraterritorial effect of the sovereign's act reaches within the United States and contravenes U.S. law and policy, courts normally will not apply the act of state doctrine.[118]

II. TISMO v. *M/V IPPOLYTOS: MANDATORY JURISDICTION UNDER THE PENALTY WAGE STATUTE AND THE ACT OF STATE DOCTRINE*

Recently, the U.S. District Court for the District of New Jersey, in *Tismo v.* M/V Ippolytos,[119] allowed the act of state doctrine to supersede the mandatory jurisdiction of the penalty wage statute.[120] Prior to *Tismo*, no court had ever been faced with the issue of whether a bilateral agreement between two non-U.S. sovereigns could supersede the mandatory juris-

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Costa Rica. *Id.* The taking or expropriation, therefore, was not within the territory of Costa Rica and therefore the act of state doctrine did not apply. *Id.* The appellate court stated that "[a]cts of foreign governments purporting to have extraterritorial effect—and consequently, by definition, falling outside the scope of the act of state doctrine—should be recognized by the courts only if they are consistent with the law and policy of the United States." *Id.* at 522; Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965) (refusing to validate expropriation of property in United States by Iraq, holding that to do so would violate U.S. policy against confiscation), *cert. denied*, 382 U.S. 1027 (1966).

116. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (limiting its holding to cases where non-U.S. sovereign expropriates U.S. property located within territory of non-U.S. sovereign).

117. W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 409 (1990). The Court held that "[t]he act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *Id.*

118. *See, e.g.*, F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281 (7th Cir. 1989) (allowing adjudication of suit under extraterritorial exception to act of state doctrine to prevent seizure of assets in United States), *reh'g denied, cert. denied*, 110 S. Ct. 3301 (1990).

119. 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

120. *Id.*

diction of the penalty wage statute.[121] The court held that the case met the act of state doctrine threshold because maintaining jurisdiction would invalidate a provision of a bilateral agreement between the Philippines and Cyprus.[122] Declining to adjudicate the case, the court held that the policies underlying the act of state doctrine were implicated to a greater degree than those of the penalty wage statute.[123] Through *Tismo*, a court may have therefore finally given non-U.S. shipowners a means to evade successfully the traditional mandatory jurisdiction and admiralty protections provided for sailors by the penalty wage statute.

A. *Facts and Procedural History*

In *Tismo*, the plaintiff sailors were Filipinos who signed employment contracts to work on the *Ippolytos*, owned by the private defendant, Outlook Shipping, Ltd., of Cyprus.[124] The parties negotiated, signed, and received approval for the employment contracts in the Philippines by the Philippine Overseas Employment Agency [hereinafter "POEA"].[125] These contracts granted original and exclusive jurisdiction to the POEA and declared that Philippine law, international conventions, treaties and covenants to which the Philippines was a signatory would govern the contract.[126] The bilateral shipping agreement between Cyprus and the Philippines also granted original and exclusive jurisdiction over employment contract disputes to the Philippines, the state where the contract was signed and approved.[127]

The shipowner, Outlook Shipping, Ltd., and the General Workers of Cyprus Union, an affiliate of the International

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121. *Id.* at 931-32.
122. *Id.*
123. *Id.* at 932-33.
124. 776 F. Supp. 928, 929 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).
125. *Id.*
126. *Id.*
127. *Id.* The relevant provision of the bilateral agreement stated that

> [a]ny disputes arising out of the respective contract of employment between a shipowner of the one contracting Party and a seaman of the other Contracting party shall be referred for settlement solely to the exclusive jurisdiction of the competent Court or Authorities, as the case may be, in the country of the seaman's nationality where the contract of employment was signed and approved.

Id.

Transportation Workers Federation ("ITWF"), had concluded a collective bargaining agreement.[128] This collective bargaining agreement, circulated among the sailors on board, provided for higher wages than those provided by the sailors' original POEA contract.[129] The Filipino sailors, who had signed their employment contracts prior to this collective bargaining agreement, read the collective bargaining agreement containing the higher wages, and claimed that the captain orally promised that the new wages applied to them as well as the Cypriot sailors.[130]

When the ship docked in Newark, New Jersey, plaintiffs brought suit against the shipowner *in rem* and *in personam* for failure to pay wages and repatriation expenses, and for the penalty wages accrued under the penalty wage statute due to refusal to pay back wages.[131] The court granted the request to seize and attach the vessel *Ippolytos* as security for the suit.[132] The ship was released when Outlook posted a US$200,000 bond for the ship, paid plaintiffs' wages under the POEA scale and repatriation expenses, and agreed to a discovery schedule.[133] The sailors in turn stipulated that they received all wages due under the POEA contract, that they were not members of the Cyprus Union, and that they had not made a formal demand for the collective bargaining agreement wages.[134]

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128. *Id.* at 929-30.

129. 776 F. Supp. 928, 930 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

130. *Id.* at 929-30.

131. *Id.* The *in rem* jurisdiction was brought against the ship, *Ippolytos*, that was seized in order to pay for the claims. The *in personam* jurisdiction was against the shipowner, Outlook, Ltd. *Id.* at 930. Traditionally, sailors' wage claims have been so highly regarded by courts that they have allowed sailors a maritime lien to be placed on the vessel itself, *in rem*, as well as against the shipowner, *in personam*. Norris, *supra* note 7, § 12:1, at 424-26. Black's Law Dictionary defines *in rem* jurisdiction as one that "[r]efers to an action that is taken directly against the defendant's property. The term may be contrasted with *in personam* jurisdiction. Power over a thing possessed by a court which allows it to seize and hold the object for some legal purpose." BLACK'S LAW DICTIONARY 794 (6th ed. 1990). Black's defines *in personam* jurisdiction as "[p]ower which a court has over the defendant himself in contrast to the court's power over the defendant's interest in property (*quasi in rem*) or power over the property itself (*in rem*). A court which lacks personal jurisdiction is without power to issue an in personam judgment." *Id.* at 791.

132. *Tismo*, 776 F. Supp. at 930.

133. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 930 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

134. *Id.*

At trial, the parties presented the factual scenario of the wage dispute.[135] The plaintiff-sailors presented evidence that the POEA admonished them for bringing the suit, and that they had been blacklisted from employment as sailors for bringing this suit and for contacting the ITWF.[136] While the defendant Outlook Shipping, Ltd. contended that the collective bargaining agreement only applied to the Cypriot sailors, the Filipino sailors contended that they too should receive the wage rate in the collective bargaining agreement, and presented an affidavit from a Cyprus Union representative that Outlook and the Union intended that the Filipino sailors receive payment according to the collective bargaining agreement's wage rate.[137] Though the plaintiff Filipino sailors asserted that the captain of the *Ippolytos* orally promised them the wage increase indicated in the agreement, they based their claim on the collective bargaining agreement, not upon an oral promise.[138]

B. *The Holding*

The U.S. District Court for the District of New Jersey applied the act of state doctrine based on the bilateral agreement between Cyprus and the Philippines.[139] This agreement explicitly provided for original and exclusive jurisdiction over the resolution of employment contract disputes involving shipowners and sailors of the two nations.[140] Although the court did not discuss the threshold requirement that the official act be performed within the sovereign's own territory, it held that the defendant-shipowner had met the threshold for application

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135. *Id.* at 929-33.

136. *Id.* at 932. *See, e.g., Labor: Filipino Seamen Left To Sink Or Swim*, INTER PRESS SERVICE, Jun. 11, 1991, *available in* LEXIS, Nexis Library, Currnt File (explaining Philippine sailors' fear of being blacklisted for contacting union). Furthermore, the ITWF blacklists ships that are noted for poor working conditions. *See, e.g., Collision Ship Was Blacked*, NEWSPAPER PUBLISHING PLC: THE INDEPENDENT, Apr. 14, 1991, *available in* LEXIS, Nexis Library, Currnt File (explaining that ITWF had "blacked" ship involved in collision for using flag of convenience and failing to sign collective agreement).

137. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 930 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

138. *Id.*

139. *Id.* at 932-36.

140. *Id.* at 929; *see supra* note 127 (quoting section of agreement on merchant shipping containing forum selection provision for disputes).

of the act of state doctrine because the validity of the official act of a non-U.S. sovereign was directly in issue before the court.[141] The court did not completely defer, however, to the jurisdictional choices of the Philippine and Cypriot sovereigns.[142] Instead, the court stressed that it would entertain applications to reopen the case should the plaintiffs not receive a fair hearing in the non-U.S. forum.[143]

Having found that the threshold for application of the doctrine was met, the court considered the purposes of the act of state doctrine and the penalty wage statute in light of the facts in *Tismo*.[144] It held that the purposes of the act of state

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141. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 932-33 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991). The court, quoting *Kirkpatrick*, stated that

> "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." . . . The factual predicate for application of the act of state doctrine is an official act of a foreign sovereign. . . . "[i]n every case in which we have held the act of state doctrine applicable, the relief sought or the defense would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."

Id. (quoting W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405, 409 (1990)).

142. *Id.* at 935-36. The court retained limited jurisdiction over the US$200,000 bond and stated that it would entertain motions to reopen the case if the plaintiffs did not receive a fair hearing in the foreign forum. *Id.* The court stated that

> [a]lthough this court will not assume the function of a court of appeal for any final disposition obtained abroad, it will at least entertain any future application to reopen this matter should any foreign decision or proceeding be so devoid of due process or fundamental fairness that it does not warrant recognition in this Court. Accordingly, the present action is stayed pursuant to the terms set forth in the Order which accompanies this Opinion.

Id. at 935. The Order stated that "[t]his court retains limited jurisdiction to administer the $200,000.00 fund generated for purposes of releasing the *M/V Ippolytos* and to entertain applications, if any, to reopen this matter upon final disposition of plaintiffs' claims in the appropriate foreign forum." *Id.* at 936.

143. *Id.* at 934-35.

144. *See id.* at 933. The court commented that

> [t]his case squarely places the issue before the Court whether the 'mandatory' jurisdiction (if applicable) under the wage penalty statute is superseded by the act of state doctrine. In this case, the Court finds that the policies underlying the act of state doctrine are implicated to a greater degree than those implicated by the wage penalty statute. Accordingly, this Court will apply the act of state doctrine and direct the plaintiffs to litigate their claims in an appropriate forum in either Cyprus or The Philippines.

doctrine, i.e., deference to both the executive and to the official acts of non-U.S. sovereigns, outweighed the policies of the penalty wage statute.[145] The court acknowledged affidavits from the former Labor Attaché of the Government of the Philippines for the United States and the Director of Merchant Shipping and the Registrar of Cyprus Ships as evidence of the desire of the two governments to have their agreement honored and the matter adjudicated in the Philippines.[146] Although the court recognized that these declarations of policy by non-U.S. governments cannot bind U.S. courts, it found them to be strong evidence that asserting jurisdiction over these claims would invalidate a treaty provision and implicate a politically sensitive matter.[147]

The court asserted that the general policies behind the penalty wage statute were absent in this case.[148] The court did not need to protect sailors from victimization by the shipowners because the sailors were paid the wages they agreed to under their POEA employment contracts.[149] Similarly, the court did not need to protect port states from the burden of caring for unpaid sailors because the sailors were repatriated to the Philippines and had the opportunity to return to the U.S. court if unfairly treated in the Philippine forum.[150] Finally, the court asserted that no evidence was presented to it that this case furthered the penalty wage statute policy of promoting the employment of U.S. sailors.[151] The court thus held that the policies underlying the penalty wage statute were not

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Id.

145. *See id.* at 933-34 (commenting that act of state doctrine is used to avoid judiciary determining validity of acts of non-U.S. states within their own territory). The court stated that "the treaty between Cyprus and the Philippines . . . would be rendered invalid if this court assumes jurisdiction. The governments of each of these nations has made the affirmative decision as to dispute resolution, and the Court should not seek to nullify this decision." *Id.*

146. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 934 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

147. *See id.* at 934 n.2. The court commented that the affidavits of the Philippine and Cypriot representatives constituted evidence that the act of state doctrine was implicated. *Id.* The court recognized, however, that it was by no means bound by these statements. *Id.*

148. *Id.* at 933-34.

149. *Id.* at 934.

150. *Id.* at 934-35.

151. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 934 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

present, or at least not important enough to supersede the bilateral agreement between Cyprus and the Philippines.[152]

The U.S. Court of Appeals for the Third Circuit affirmed this decision without opinion.[153] The courts traditionally have jealously guarded sailors' mandatory right to a U.S. forum under the penalty wage statute and have not allowed any method such as forum selection clauses or assertions of jurisdiction by non-U.S. labor agencies to avoid its mandatory jurisdiction.[154] The Third Circuit in *Tismo*, under the rubric of the act of state doctrine, recognized the validity of such clauses and assertions, however, because they were contained in a bilateral agreement.[155] The court in *Tismo* thus may have provided non-U.S. shipowners with a means of avoiding the netlesome mandatory jurisdiction of the penalty wage statute.

III. TISMO: *THE ACT OF STATE DOCTRINE SHOULD NOT SUPERSEDE THE PENALTY WAGE STATUTE'S MANDATORY JURISDICTION*

The Third Circuit in *Tismo* should not have applied the act of state doctrine to avoid the mandatory jurisdiction of the penalty wage statute. The case did not meet the threshold for application of the doctrine, and both the *Sabbatino* balancing factors and the exceptions to the doctrine demonstrate that the doctrine should not have been applied in these circumstances. U.S. courts consistently have refused to allow non-U.S. sailors to negotiate away their right, granted by Congress, to access to the U.S. courts under the penalty wage statute. Because Congress specifically intended the statute to apply to non-U.S

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152. *Id.* at 933-35.

153. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991). The court retained jurisdiction over the bond to ensure that the plaintiff-sailors received a hearing before the POEA. *Id.* at 935. The court stated that

> [a]s expressed at oral argument, however, if plaintiffs' rights under Philippine or Cypriot laws, contracts or treaties are patently ignored or abused in the foreign forum, the significance of their right of access to this Court under 46 U.S.C. § 10313 would escalate considerably. In essence, this Court is according comity to the nations of Cyprus and The Philippines in the expectation that the plaintiffs will receive a fair hearing, whatever its result may be.

Id.

154. *Id.* at 930-35.

155. *Id.*

sailors and shipowners, the court, given this positive direction from Congress, should have adjudicated the case. Furthermore, international law does not require the United States to respect a treaty or bilateral agreement to which it is not a party. The court should therefore not have applied the act of state doctrine and given effect to a bilateral agreement to which the United States is not a party and which contravenes the U.S. statute that protects such a traditional right as the wage claims of sailors.[156]

A. *The Court in* Tismo *Should Not Have Applied the Act of State Doctrine*

The court should not have applied the act of state doctrine for several reasons. First, the execution of the Philippine-Cypriot bilateral agreement, although an official act, has ramifications beyond the sovereign's territory and thus did not satisfy the threshold requirement of the act of state doctrine. Second, application of the *Sabbatino* factors indicates that the court should not have declined to adjudicate the case because the issue is not a politically sensitive dispute involving uncharted areas of international law. Third, the circumstances of the case fell within the extraterritorial and the commercial activity exceptions to the act of state doctrine.

1. The Threshold for Application of the Act of State Doctrine is Absent

The threshold for application of the act of state doctrine is not present in *Tismo*.[157] The Supreme Court recently declared

156. *See* Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 246 (5th Cir. 1991) (scrutinizing releases obtained in Philippines to ensure that no duress or force was used to obtain them). *Castillo*, in essence, reiterates the diligence the courts will use to protect sailors. *Id.* The court stated that

> [s]eamen, as wards of the court, are entitled to a careful review when a district court refuses to exercise jurisdiction over their claims. We are convinced that federal courts must remain vigilant in protecting the rights of seamen, whether foreign or domestic, in their relations with their employer. This protection comports with our nations' long history of concern and solicitude for seamen with employment disputes. The settlement of wage disputes between shipowners and seamen must be closely scrutinized.

Id. at 247.

157. *See* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405, 409 (1990) (stating that factual predicate for application of act of state

that courts may only apply the act of state doctrine when confronted with the issue of the validity of an official act of a non-U.S. sovereign performed within its own territory.[158] The execution of a bilateral agreement is an official act of a non-U.S. sovereign, but it is not performed within the territory of the sovereign.[159] Rather, because the exclusive jurisdiction provision of the Philippine-Cypriot bilateral agreement acts to deny the rights of these states' sailors in other sovereigns' jurisdictions and territories, the agreement is therefore effectively performed outside Philippine and Cypriot territory.[160] The bilateral agreement in *Tismo* denies the plaintiff-sailors their right under the penalty wage statute to access to the U.S. courts for a cause of action arising in the United States.[161] Due to this extraterritorial scope of the agreement, *Tismo* therefore does not meet the threshold or factual predicate for application of the act of state doctrine. The Third Circuit thus should not have applied the act of state doctrine.[162]

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doctrine is that court must determine validity of official act of non-U.S. sovereign performed within its own territory).

158. *Id.*

159. *Id.* Justice Scalia stated in *Kirkpatrick* that "[i]n every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Id.* at 405.

160. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (stating that it was limiting its holding to official acts of non-U.S. sovereigns that expropriate property within their own territories); Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.) (stating that even though official decree of expropriation was performed within Costa Rica, act of state doctrine could not be used to prevent adjudication because property expropriated was located within United States), *cert. dismissed*, 473 U.S. 934 (1985). Therefore, even though the treaty document itself may have been executed in the Philippines, Cyprus, or at some neutral site, just as this expropriation decree in *Allied Bank* was issued within the sovereign's territory, the United States should not apply the act of state doctrine when the official act affects property or activities within the United States. The only provision of the Vienna Convention on the Law of Treaties relating to this issue of the location of the treaty merely states that a treaty is binding on parties as to their entire territory unless otherwise expressed. Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, art. 29, 1155 U.N.T.S. 331, 339 (1980), *reprinted in* 8 I.L.M. 679, 691 (1969).

161. 46 U.S.C. § 10313(i) (1988).

162. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991); *see* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 405-09 (1991) (emphasizing that act of state doctrine has only been applied when court is faced with validity of official acts taken within non-U.S. sovereign's territory or jurisdiction).

2. The *Sabbatino* Factors Are Absent

An evaluation of the balancing factors pronounced in *Sabbatino* also suggest that the Third Circuit should not have applied the act of state doctrine.[163] Under *Sabbatino*, courts should consider the degree of codification of international law, the continuing existence of the non-U.S. sovereign state, and the political nature or sensitivity of the situation.[164]

In *Tismo*, the *Sabbatino* factors have limited importance.[165] The first factor, the degree of codification of international law, is not critical because there are no complex, sensitive, and unchartered areas of international law to be explored in *Tismo* as there were in *Sabbatino*.[166] The provision of the penalty wage statute that grants non-U.S. sailors access to U.S. courts applies only when the vessels are in U.S. harbors.[167] The vessels are therefore in U.S. internal waters which are part of the territory of the United States and thus subject to her jurisdiction according to international law.[168] The Supreme Court has held that Congress possessed the constitutional authority to enact such statutes controlling the employment conditions of sailors on board ships that enjoy access to U.S. ports.[169] Thus,

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163. *See Sabbatino*, 376 U.S. at 428 (stating general factors to be evaluated in deciding whether act of state doctrine applied).

164. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

165. *Id.*; Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

166. *See Tismo*, 776 F. Supp. at 934 n.2 (recognizing that it was not at all bound to defer to exclusive jurisdiction provision of Cypriot-Filipino agreement); *see also Sabbatino*, 376 U.S. at 428 (commenting that there was no codified or tangible body of international law governing expropriations of property with which to adjudicate such politically sensitive, international case).

167. 46 U.S.C. § 10313(i) (1988).

168. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, art. 1-19, 15 U.S.T. 1606, 1608-12 (1958), T.I.A.S. No. 5639, 516 U.N.T.S. 205, 206-219 (1964); *see* J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 195-96 (1976) (stating that ports are normally part of state territory for statute jurisdiction). Starke states that "[t]he general rule is that a merchant vessel enters the port of a foreign state subject to the local jurisdiction. The derogations from this rule depend on the practice followed by each state." *Id.* at 195. *Cf.* Wildenhus's Case, 120 U.S. 1 (1887) (holding that, in criminal cases, though it is customary for merchant vessels to subject themselves to the laws of port states, the United States would normally exercise jurisdiction unless the peace of the port is threatened). International law therefore places no restrictions on the ability of Congress and the courts to allow this jurisdiction for wage claims under the penalty wage statute.

169. *See* Strathearn S.S. Co. v. Dillon, 252 U.S. 348, 356 (1920) (holding that Congress has authority to enact such statute). Justice Day stated that

because Congress had the authority according to the U.S. Constitution and international law to apply the penalty wage statute to non-U.S. sailors and shipowners enjoying access to U.S. ports, this exercise of jurisdiction is not a new and sensitive issue in international law.[170] Rather, the statute at issue pertains to the domestic issue of regulating commercial activity in U.S. harbors.[171] This factor for applying the act of state doctrine was therefore weak.[172]

The second *Sabbatino* factor, the continuing existence of the states of Cyprus and the Philippines, though perhaps relevant, is not dispositive.[173] Because the governments of Cyprus and the Philippines that agreed to this bilateral agreement still exist, the political sensitivity of the matter is greater than if they did not still exist.[174] Although these governments do still exist, this factor is not controlling because the mere continued

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> we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States.

Id.

170. *See* Boureslan v. Arabian Amer. Oil Co., 111 S. Ct. 1227 (1991) (holding that Congress can overcome the presumption against extraterritorial application of statutes by expressing such intent); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 142-43 (1957) (holding that Congress could have chosen to make Labor Management Relations Act applicable to non-U.S. ships and sailors when in U.S. waters by expressing such intent). The Court stated that

> [i]t is beyond question that a ship voluntarily entering the territorial limits of another country subjects itself to the laws and jurisdiction of that country. . . . It follows that if Congress had so chosen, it could have made the Act applicable to wage disputes arising on foreign vessels between nationals of other countries when the vessel comes within our territorial waters. The question here therefore narrows to one of intent of Congress as to the coverage of the Act.

Id. at 142.

171. *Benz*, 353 U.S. at 142-43; 46 U.S.C. § 10313(i) (1988).

172. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

173. *See Sabbatino*, 376 U.S. at 428 (commenting that if government that performed act in question is no longer in existence, act of state doctrine may have less weighty implications); *see also* Republic of Phil. v. Marcos, 862 F.2d 1355, 1360-61 (9th Cir.) (commenting that when challenged acts were by non-U.S. sovereign no longer in power, issue of continuing existence of non-U.S. sovereign is relevant, but not dispositive), *cert. denied*, 490 U.S. 1035 (1988).

174. *Sabbatino*, 376 U.S. at 428. The Court stated that "[t]he balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered." *Id.*

existence of the non-U.S. sovereign itself does not, by itself, raise politically sensitive questions sufficient to merit application of the act of state doctrine.[175]

The third factor, interference with the executive, is also not prominent in *Tismo* because adjudicating the case would not interfere with the executive's ability to conduct foreign relations.[176] The executive signed the penalty wage statute into law, and thus should be bound by it.[177] Correspondingly, the United States is not a party to the Philippine-Cypriot bilateral agreement, and likewise should not be bound by it.[178] The novel and crucial international and political issues of communism, lost foreign investments, nationalization and expropriation of U.S. property that were grounds for deferral to the executive in other act of state doctrine cases are not present in *Tismo* because there is no dispute over whether Congress has the right under international law to pass such statutes, or whether the U.S. courts may disregard a treaty or bilateral agreement to which it is not a party.[179] Furthermore, the sub-

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175. *See Marcos*, 862 F.2d at 1360-61 (commenting that when challenged acts were by non-U.S. sovereign no longer in power, issue of continuing existence of non-U.S. sovereign is relevant, but not dispositive).

176. *See Sabbatino*, 376 U.S. at 428 (stating that certain issues involve politically sensitive international issues more than others, and courts must be aware of this). The Court stated that "[i]t is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *Id.*

177. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

178. Vienna Convention on the Law of Treaties, *supra* note 160, art. 34-38, 1155 U.N.T.S. 331, 341, *reprinted in* 8 I.L.M. 679, 693-94 (1969). These articles state that a treaty creates no obligations or rights for a third party state without its consent.

179. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991); *see, e.g.*, International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981) (holding that court will decline to examine OPEC's oil price control systems under federal antitrust laws on basis of act of state doctrine), *cert. denied*, 454 U.S. 1163 (1982). The court deferred to the legislative and executive branches to deal with the very complex international and economic issues raised by OPEC's activity. *Id.* The court stated that

> [t]he political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. . . . The act of state doctrine . . . requires that the courts defer to the legislative and executive branches when those branches are better equipped to resolve a politically sensitive question.

Id. at 1358. *See supra* notes 165-71 and accompanying text (stating that Congress has

stantive issue of ensuring the payment of sailors dates back to ancient times, and thus cannot be called an issue requiring expedient executive attention.[180] Though the court avers that the affidavits from non-U.S. labor officials are strong evidence of the political sensitivity of the matter, the U.S. executive branch has not indicated its concern for the sensitivity of this issue.[181] This third *Sabbatino* factor is therefore also unimportant because adjudicating the case would not constitute unwarranted interference with the foreign policy prerogatives of the executive branch.[182] The Third Circuit should therefore not have applied the act of state doctrine in *Tismo* because the three *Sabbatino* factors were not prominent.

3. Exceptions to the Act of State Doctrine

The court also should have rejected the application of the act of state doctrine by utilizing the exceptions to the doctrine. The cause of action in *Tismo* arises from a commercial activity occurring outside the sovereign states' territory.[183] The facts in *Tismo* therefore apply more appropriately to the extraterritorial and commercial activity exceptions of the act of state doctrine than to the doctrine itself.

a. Extraterritoriality of the Treaty Provision

The court should have rejected application of the act of state doctrine under the extraterritorial exception. The exclusive jurisdiction provision of the bilateral agreement involves extraterritorial effects in the United States that contravene U.S.

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the right under international law to pass such statutes regulating use of U.S. harbors, and that U.S. courts have the ability to disregard treaties to which the U.S. is not a party).

180. *See supra* notes 1-12 and accompanying text (describing longstanding admiralty policy of ensuring payment for sailors).

181. *Tismo*, 776 F. Supp. at 934 (commenting that affidavits present evidence that act of state doctrine is implicated). The court, however, recognizes that it is not bound by these affidavits. *Id.* at 934 n.2.

182. *Id.*

183. *See supra* notes 97-118 and accompanying text (explaining relevant exceptions to act of state doctrine). The *Bernstein* exception does not apply because the executive did not inform the court of its position on the matter. *See supra* notes 103-05 and accompanying text (explaining *Bernstein* exception). The treaty exception also does not apply because the agreement does not supply controlling legal principles on which to adjudicate the case. *See supra* notes 106-09 and accompanying text (explaining treaty exception).

law and policy.[184] Allowing this bilateral agreement to supersede the penalty wage statute's mandatory jurisdiction for non-U.S. sailors contravenes the policies of the statute, namely, to ensure the payment of sailors' wages, to protect the port states from the burden of caring for unpaid sailors, and to equalize the wages of U.S. and non-U.S. sailors.[185] Therefore, because the forum selection provision of the Philippine and Cypriot bilateral agreement has the extraterritorial effect of reaching within U.S. harbors and directly contravening the long-standing U.S. admiralty law and policy of protecting the payment of sailors by granting mandatory access to non-U.S. sailors for wage claims, the court should not have applied the act of state doctrine under the extraterritorial exception.[186]

b. The Commercial Activity Exception

The act of state doctrine also should not apply in *Tismo* because execution of bilateral agreements by sovereigns may fit under the commercial activity exception.[187] Though execution of a bilateral agreement constitutes an official act of a non-U.S. sovereign, the applicable portion of the agreement governs only private commercial disputes, and therefore can be construed as governing purely commercial activity.[188] Furthermore, because the penalty wage claim fits within the commer-

184. *See* Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir.) (holding that expropriation by Costa Rica was not shielded by the act of state doctrine because money being expropriated could be construed as existing in United States), *cert. dismissed*, 473 U.S. 934 (1985). The court held that because the situs of the debt was in the United States the expropriation of that sum by Costa Rica was not performed within its own territory. *Id.* The court stated that "[a]cts of foreign governments purporting to have extraterritorial effect—and consequently, by definition, falling outside the scope of the act of state doctrine—should be recognized by the courts only if they are consistent with the law and policy of the United States." *Id.* at 522; Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47 (2d Cir. 1965) (refusing to validate expropriation of property in United States by Iraq, holding that to do so would violate U.S. policy against confiscation), *cert. denied*, 382 U.S. 1027 (1966).

185. *See supra* notes 1-12 and accompanying text (explaining courts' and Congressional policies behind penalty wage statute).

186. *See supra* notes 1-12 and accompanying text (explaining courts' and Congressional policies behind penalty wage statute).

187. *See* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1974) (holding by four justice plurality that act of state doctrine should not be applied when non-U.S. sovereign engages in purely commercial activity).

188. *Id.*; Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 929 (D.N.J), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

cial activity exception of the FSIA, a penalty wage claim should also be considered a commercial activity under the act of state doctrine.[189]

If the court concluded that the commercial activity had broader governmental functions, however, the commercial activity exception might not apply.[190] According to news reports, for example, the Philippine government and the POEA control the wages of Filipino sailors to make the sailors more employable by the world's shipowners.[191] If the court concluded that this provision of the agreement had the broader governmental purpose of helping the employment prospects of the Filipino sailors, the commercial activity exception might not have applied.[192] The Philippines, however, seems to be fulfilling this purpose through the exploitation of its own citizens by attempting to deprive them of their admiralty rights under U.S. law.[193] The courts should therefore not view this provision of the bilateral agreement as one supporting the public interest.[194]

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189. *See Dunhill*, 425 U.S. at 698-706 (asserting that FSIA and act of state doctrine commercial activity exceptions are interrelated); *see also* Velidor v. *L/P/G Benghazi*, 647 F. Supp. 246 (S.D. Ala. 1977) (holding that FSIA did not protect non-U.S. sovereign shipowner from liability under penalty wage statute because owning ship that used U.S. ports where claim arose fell under commercial activity exception). *But see* International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries, 649 F.2d 1354 (9th Cir. 1981) (holding that courts can apply act of state doctrine when commercial activity would be sufficient for jurisdiction under FSIA), *cert denied*, 454 U.S. 1163 (1982).

190. *See* Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 326 (5th Cir. 1982) (holding that, although Mexican government expropriated equipment of U.S. gas company operating in Mexico, purpose was not commercial but governmental because government had expropriated gas line to supply its people with gas), *cert. denied*, 460 U.S. 1041 (1983).

191. *R.P. To Send Mission to Japan on Seamen Issue*, KYODO NEWS SERVICE, Jan. 5, 1985, *available in* LEXIS, Nexis Library, All File. The Philippines Labor Minister, Blas Opal, went on a "goodwill mission" to Japan concerning the very low wages that Filipino sailors receive when Japan threatened to boycott ships manned by Filipino sailors. *Id.* The POEA administrator, when asked why wages for Filipino sailors were so low, commented that the "[l]ower wage rate is our only selling point." *Id.* The Labor Minister also commented that there were 54,000 Filipino sailors who brought US$250 million into the Philippines annually. *Id. See* Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 221 (3d Cir. 1991) (stating that the POEA requires that 80% of wages paid to sailors during overseas employment be repatriated home to the Philippines).

192. KYODO NEWS SERVICE, *supra* note 191.

193. *Id.*

194. *See Compania de Gas de Nuevo Laredo*, 686 F.2d at 326 (holding that expropri-

B. *Implications of* Tismo's *Use of the Act of State Doctrine*

Tismo was an improper application of the act of state doctrine because the court allowed a treaty between two non-U.S. sovereigns to take effect in the United States in contravention of a U.S. statute and court holdings that require mandatory jurisdiction for sailors' wage claims. Neither the international law on treaties, nor the international law concerning internal waters and ports required such deference.[195] The principal cases on the act of state doctrine emphasized the right of non-U.S. sovereigns to exercise their power in their own territories, and the prudence of deferring to the executive branch a novel or politically crucial issue that it was better equipped to handle.[196] The circumstances surrounding *Tismo* present neither of these situations, because the non-U.S. sovereigns are exercising power within U.S. ports by disallowing suits for wages, and because allowing such suits and protecting sailors is a traditional and longstanding aspect of U.S. admiralty law.[197] *Tismo* also undermines the policies of the penalty wage statute by attempting to deprive sailors of their rights to collect wages while in U.S. ports. Congress intended the penalty wage statute to ensure the prompt payment of sailors' wages, to protect the port states from the burden of caring for unpaid sailors, and to equalize the wages of U.S. and non-U.S. sailors.[198] Congress and the courts furthered these policies by extending the protection of the penalty wage statute to non-U.S. sailors and granting them mandatory access to U.S. courts.[199]

The policies behind mandatory jurisdiction arise from the need to protect sailors because of their vulnerable position.[200] Though the court in *Tismo* does not describe the pay and work-

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ation of gas lines was not commercial activity under act of state doctrine because it was done for public benefit of citizens).

195. *See supra* notes 168-72, 178 and accompanying text (asserting that U.S. is not required to defer to this treaty).

196. *See supra* notes 70-96 (describing bases of the act of state doctrine).

197. *See supra* text accompanying notes 1-12, 19-68 (explaining the aggressive stance U.S. courts have taken on maintaining this jurisdiction).

198. *See supra* notes 1-12 and accompanying text (explaining policies behind penalty wage statute).

199. 46 U.S.C. § 10313(i) (1988); Strathearn S.S. Co. v. Dillon, 252 U.S. 348 (1920).

200. *See supra* notes 1-12 and accompanying text (explaining policies behind mandatory jurisdiction for non-U.S. sailors under penalty wage statute).

ing conditions of the plaintiff-sailors, other cases illustrate the exploitation of sailors that Congress and the U.S. courts have attempted to ameliorate through the penalty wage statute.[201] The statute prevents shipowners from practicing fraud and double-bookkeeping in paying sailors, and from blacklisting sailors who bring wage claims in U.S. courts.[202] The statute also protects sailors from duress and fraud in negotiating releases of their wage claims by allowing courts to set aside such releases.[203] To effectuate the statute's protection, U.S. courts

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201. *See, e.g.*, Raby v. *M/V Pine Forest*, 1990 A.M.C. 2441 (W.D. Wa. 1990), *rev'd in part*, 918 F.2d 80 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2015 (1991). The court asserted jurisdiction over wage claims brought by Filipino sailors against the Japanese managers of the Republic of Vanuatu flag ship, *Pine Forest*. *Id.* at 2443-44. The managers kept two sets of books indicating the wages paid to the sailors. *Id.* One indicated the low wage rate according to the Japan Shipping Union [hereinafter JSU]/Associated Marine Officers and Seamen's Union of the Philippines [hereinafter AMOSUP] collective bargaining agreement, and another false set indicated wages in conformance with the ITWF collective bargaining agreement wage rates. *Id.* The plaintiff-sailors received the pay they originally agreed to, but signed for the ITWF level wages on receipt. *Id.* When the plaintiff sailors made the demand for these ITWF wages, they were repatriated to the Philippines and blacklisted from new employment as sailors due to their wage demand. *Id.* The court awarded US$32.5 million to the plaintiffs, based on their wage claims, damages for loss of future income, punitive damages, emotional distress, interest, costs, and attorney's fees, while the total wage claims would have been approximately US$166,000. *Id.* at 2447-50. The court, impressed by the bad faith exploitation of these sailors, found jurisdiction under both the federal admiralty jurisdiction in article III of the Constitution, and under 46 U.S.C. § 10313(i) (1988). *Id.* at 2447. The court stated that

> [t]he conduct by the defendants at all times relevant herein was intentional, deliberate, reckless, callous, flagrant, malicious, indifferent, and unconscionable; that such conduct by the defendants was to intimidate, coerce and punish the plaintiffs; that such conduct was in complete disregard of the plaintiffs' rights; and that defendants' conduct at all times relevant herein violates the laws and public policy of the United States. The plaintiffs herein are entitled under statute and general maritime law of the United States to the protection of the courts.

Id. at 2446. The Ninth Circuit reduced the amount of the bond on appeal. *Raby*, 918 F.2d at 80.

202. *Cf. U.S. Judge to Heavily Punish Japanese Firm in Seamen's Pay Dispute*, UPI, July 14, 1990, *available in* LEXIS, Nexis Library, UPI file. The shipowners in *Raby* saved over US$400,000 per year on this double bookkeeping practice and practiced it on all ten of their ships. *Id.* The defendant shipowners admitted this practice and contended that it was widespread in the industry. *Id.*

203. *See* 46 U.S.C. § 10313(e) (1988) (stating that courts may set aside releases of wage claims in the interest of justice); Castillo v. Spiliada Maritime Corp., 937 F.2d 240 (5th Cir. 1991). On bringing a suit for their contracted wages, the plaintiffs in *Castillo* were discharged, repatriated to the Philippines, and blacklisted. *Castillo*, 937 F.2d at 243. Before bringing the suit, the plaintiffs executed a release of their penalty wage claim while in the Philippines. *Id.* at 243-44. The court of appeals held that the

should therefore maintain their mandatory jurisdiction, refusing to defer these cases to forums less sympathetic to sailors' rights.[204]

In *Tismo*, the court treated lightly these policies of the penalty wage statute and deferred jurisdiction, holding that the policies of the act of state doctrine were implicated more strongly.[205] The court asserted that because the sailors were paid their substandard POEA wages and they have been repatriated to the Philippines, the policies of the penalty wage statute were satisfied.[206] The court also held that the policy of aiding the employment of U.S. sailors was not relevant because the plaintiffs did not present evidence that upholding jurisdiction in this case would further this purpose.[207] The court neither addressed the evidence of blacklisting, nor examined the merits of the claim for higher wages under the collective bargaining agreement.[208]

The precedent set by the Third Circuit in *Tismo* is therefore improper because it permits a bilateral agreement containing a forum selection clause to sanction these abuses that the penalty wage statute was explicitly designed to protect.[209] Under *Tismo*, the nations of the sailors can abrogate the U.S. penalty wage statute admiralty rights of their citizens and use the act of state doctrine to insulate themselves from liability in

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releases should be set aside despite claims of validity under Philippine law. *Id.* The court set aside the releases because a significant language barrier existed between the sailors and the shipowners' agents during negotiations, there were threats to blacklist and file charges against the sailors with the POEA, and neither the counsel advising the sailors nor the sailors themselves were aware of the remedy available to them in the United States under the penalty wage statute. *Id.* at 244-48. The court focused on determining whether the plaintiffs' release was just and in conformance with the penalty wage statute. *Id.*

204. *See R.P. to Send Mission to Japan on Seamen Issue*, KYODO NEWS SERVICE, Jan. 5, 1985, *available in* LEXIS, Nexis Library, All file (explaining POEA's pro-shipowner attitude in allowing Filipino sailors to work for substandard wages). The attitude of the POEA therefore does not seem to be one adamant in protecting its sailors, but rather exploitive. *Id.* The POEA does not seem supportive of its sailors when they bring suit in the United States, as the evidence presented by the sailors in *Tismo* reveals. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928, 931 (D.N.J. 1990), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

205. *Tismo*, 776 F. Supp. at 931-33.

206. *Id.*

207. *Id.*

208. *Id.* at 930-31.

209. Tismo v. *M/V Ippolytos*, 776 F. Supp. 928 (D.N.J.), *aff'd mem.*, 947 F.2d 937 (3d Cir. 1991).

U.S. courts. Non-U.S. governments can sanction the underpayment, fraud, abuse, and mistreatment suffered by non-U.S. sailors while the act of state doctrine eliminates the sailor's access to redress in the U.S. courts.[210]

CONCLUSION

The U.S. judiciary should not allow governments to circumvent the traditional protection for sailors mandated by the penalty wage statute. The U.S. courts are not bound by any treaty provision to which the United States is not a party, and international law allows the U.S. courts to exercise jurisdiction over non-U.S. vessels using U.S. harbors and internal waters. Courts should therefore treat forum selection provisions of bilateral agreements as they do private contractual forum selections clauses and refuse to allow them to circumvent U.S. jurisdiction. If the courts allow non-U.S. sovereigns to evade U.S. jurisdiction, shipowners may have an opportunity to overcome admiralty's traditional wage protection for sailors by influencing their governments to add similar forum selection clauses to bilateral agreements. Courts should not allow the act of state doctrine to be used to strip these sailors of their traditional mandatory access to the U.S. courts, which may be the only courts open to them.

Edward J. Donahue, Jr. *

210. Patrice O'Shaughnessy and James Rosen, *Tanker Crew Wins Bayonne Fight*, N.Y. DAILY NEWS, February 12, 1992, at 2, col. 2. A recent near mutiny occurred in New Jersey, part of the Third Circuit where *Tismo* was decided. *Id.* The uprising of the mostly Egyptian crew of the Maltese-flag *Prime Noble* was only averted when the Bayonne, New Jersey Police Chief supervised negotiations where the shipowners paid over US$100,000 in back wages, took on fresh drinking water and acceptable food, and agreed to provide clean showers and toilets for the crew. *Id.*

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