1982

# The International Legal Status of Foreign Government Deposits in Overseas Branches of U.S. Banks

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## I. INTRODUCTION

Political as well as economic forces can lead governments to default on their obligations to foreign banks. For example, the demand of the revolutionary government of Iran that the United States return the former Shah and his wealth to Iran and the subsequent seizure of American embassy personnel in Tehran on November 4, 1979, were political events which quickly resulted in a default on Iranian obligations to U.S. banks.

Following the embassy seizure, the status of the Iranian Government's huge deposits in overseas branches of U.S. banks quickly came into question. In an effort to coerce the United States to yield to its political demands, the Iranian Government threatened to repudiate its obligations to U.S. creditors, to withdraw its vast deposits from U.S. banks, and to refuse to accept the U.S. dollar as payment for Iranian oil. In response, on November 14, 1979, President Carter issued an order which blocked or "froze" all Iranian Government assets in the hands of persons subject to the jurisdiction of the United States, whether in the United States or abroad.[1] The Bank Markazi Iran, Iran's central bank and the principal depositor, promptly sued in London and Paris, demanding that U.S. branch banks allow Iranian depositors their ordinary right to withdrawal under domestic law.

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1. Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

These suits placed the legal validity and enforceability of the freeze order squarely in issue.

This article discusses the public international law issues raised, actually or potentially, in the ensuing foreign litigation. The article analyzes the application of the freeze order to overseas deposits and reviews the role to be played by foreign courts in applying international law in such controversies. Although the courts involved did not reach the merits of the dispute,[2] the issues had enormous potential importance in the context of the hostage crisis and could have broad ramifications for the future.

## II. Application of the Freeze Order to Overseas Deposits

### *A. The Context*

From the moment that the extraterritorial applicability of the freeze order to the five billion dollars on deposit in overseas branches of U.S. banks first became an issue, the responsible U.S. Government officials were faced with conflicting policy considerations. The immediate reaction was that the freeze order should have such extraterritorial application in order to maximize the United States' protection against Iran's threatened economic actions and against Iran's apparent plan to cause the maximum discomfort to the American banking community. Moreover, there was no doubt that, as a matter of U.S. law, the President had statutory authority to issue the order.[3]

On the other hand, those who drafted and implemented the freeze order were also aware that an assertion by the United States of jurisdiction to regulate conduct abroad could create friction with our European allies. Over the years, particularly in the antitrust field, the United States repeatedly has asserted such extraterritorial jurisdiction, but other governments have disapproved, and the mere word "extraterritorial" evokes intense reactions in the countries which would be most affected by an extraterritorial freeze order. In fact, shortly before the Iranian crisis the British Government had sharply protested, both through diplomatic channels and in court filings, the asserted application of American antitrust law to overseas conduct in the world ura-

2. The issues essentially were rendered moot before decision. In connection with the release of the hostages, the United States agreed to transfer to an escrow account all Iranian deposits and securities which on or after November 14, 1979, stood on the books of overseas branches of U.S. banks. Declaration of the Government of the Democratic and Popular Republic of Algeria, *reprinted in* 81 DEP'T STATE BULL. No. 2047, at 1-2 (Feb. 1981).

3. *See* International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. II 1978). When the blocking order was executed, the Treasury issued implementing regulations, codified at 31 C.F.R. § 535 (1980). Those regulations made the order applicable to all "persons subject to the jurisdiction of the United States," including "[a]ny corporation organized under the laws of the United States or of any state, territory, possession or district of the United States." 31 C.F.R. § 535.329(c) (1980). The regulations also reached overseas Iranian assets in the hands of foreign corporations owned or controlled by U.S. nationals. 31 C.F.R. § 535.329(d) (1980).

nium market[4] and had introduced unprecedented legislation aimed at blunting American attempts to control economic activity outside U.S. borders.[5] France had made similar protests in the recent past, and a French court had once even placed the French subsidiary of a U.S. corporation in receivership to avoid the extraterritorial application of U.S. controls on trade with China.[6] Significantly, virtually all of the offshore bank deposits to which the freeze order was directed were located in the United Kingdom and France.

The political realities took on particular significance in the days immediately following the seizure of the embassy in Tehran, as the United States began to realize that the crisis could be long-lasting and that the U.S. would need as much assistance from its allies as it could muster. There was a need for both diplomatic support and, even more importantly, a multi-national structure of economic sanctions against Iran. In order to lay a foundation for such a structure, the United States filed suit against Iran in the International Court of Justice in the hope that a favorable decision would provide a basis for U.N. sanctions against Iran. In addition, recognizing that the United Nations might fail to act, either as a result of a veto or otherwise, the United States also prepared an alternative plan for persuading traditional allies to join in a non-U.N. sanctions program.[7] It was recognized that an extraterritorial freeze order would not increase allied good will, but it was decided to make the blocking order applicable to the deposits in London and Paris and then to make immediate efforts to justify the action in the eyes of our allies.

Once the extraterritorial freeze order came into force and was challenged in the European courts, the United States, for political reasons, saw a need to avoid adverse judicial rulings on the merits. In immediate terms, a judicial order requiring the release of five billion dollars to Iran would have relieved some of the economic pressure on Iran. Far more importantly, however, the United States needed to avoid the broader political consequences of a judicial ruling that its

4. *See In re* Uranium Antitrust Lit. 617 F.2d 1248, 1253 (7th Cir. 1980).

5. Protection of Trading Interests Act, 1980, ch. 11. For discussion of this legislation, see Danaher, *Anti-Antitrust Law: The Clawback and Other Features of the United Kingdom Protection of Trading Interests Act, 1980*, 12 LAW & POL'Y INT'L BUS. 947 (1980).

6. *See, e.g.*, Fruehauf Corp. v. Massardy (May 22, 1965), *excerpted in* 5 INT'L LEGAL MATERIALS 476 (1966). *See* Craig, *Application of the Trading with the Enemy Act to Foreign Corporations Owned by Americans: Reflections on* Freuhauf v. Massardy, 83 HARV. L. REV. 579 (1970); Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 310, 335-41 (1979).

7. In fact, the International Court of Justice rendered two decisions in favor of the United States. *See* United States Diplomatic and Consular Staff in Tehran, [1979] I.C.J. 7; [1980] I.C.J. 3. The Soviet Union vetoed the United States' proposal for U.N. sanctions. *See* 80 DEP'T STATE BULL. No. 2035, at 67-71 (Feb. 1980). After the Soviet veto, the United States succeeded in persuading its major allies to join in a non-U.N. sanctions program—a program which applied significant pressure on Iran and may have speeded Iran's ultimate decision to release the hostages. *See* 80 DEP'T STATE BULL. No. 2039, at 49 (June 1980). *See also* 80 DEP'T STATE BULL. No. 2040, at 71-73 (July 1980).

freeze order was illegal or unenforceable under international law. Such a ruling could have seriously dampened the ardor of many governments which were making vigorous diplomatic efforts in support of the United States; it would probably have weakened the case for allied sanctions; it surely would have prompted a new outburst of Iranian anti-American rhetoric; and it might even have encouraged the Iranian militants to prolong the hostages' captivity.

With the freeze in effect, the U.S. Government needed to act quickly to explain the legal justification for the order. It was entirely possible that the British and French courts would ask their governments to express an opinion as to the legality of the freeze order,[8] and the United States had to act before such requests were made in order to maximize the chance that the British and French authorities would take the position that the United States' freeze order was justified as a matter of international law and enforceable in foreign courts.

### *B. U.S. Regulation of Firms of U.S. Nationality*

The U.S. Government's task of justifying the extraterritoriality of the blocking order in the eyes of the British and French Governments was greatly simplified by several factors. First, governments around the world generally recognized that the physical safety of their own diplomats abroad was dependent upon the principle of diplomatic immunity. Consequently, these governments, including the United Kingdom and France, had a strong common interest in bringing Iran's assault upon that principle to a rapid conclusion.[9]

A second factor in the United States' favor was that the blocking order was not based on the "effects doctrine" (also known as the "objective territorial principle"), the rationale of many of the United States' more controversial assertions of extraterritorial jurisdiction.[10] Rather, the U.S. action was based upon an international legal principle that enjoys broader international support, the "nationality principle" that a state may assert jurisdiction and regulate the conduct of its na-

8. Under British practice, the attorney general may intervene in a court proceeding to present the views of the government of the United Kingdom in matters of public importance. *See, e.g., In re* Westinghouse Elec. Corp. Uranium Contract Lit., [1978] A.C. 547, 589. In French courts, the Ministry of Justice, acting through the *Ministère Public*, may address the court as a representative of the public interest and is required to do so when the court requests its participation. *See* P. HERZOG & M. WESER, CIVIL PROCEDURE IN FRANCE 122 (1967).

9. For a partial list of public actions taken by governments, including those of the United Kingdom and France, and other bodies supporting efforts to release the U.S. hostages, see 80 DEP'T STATE BULL. NO. 2034, supp. E (Jan. 1980).

10. Under the "objective territorial principle," a state may regulate conduct occurring outside its territory if it has effects within its territory, at least when the effects are direct, foreseeable, and substantial. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965). The landmark case articulating the principle in the context of the U.S. antitrust laws is United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). The European Economic Community and several of our allies have asserted their own versions of this "effects doctrine," but others have roundly criticized it.

tionals, wherever located, at home or abroad.[11] Because the nationality principle is generally accepted even among states that have condemned applications of the "effects doctrine,"[12] the occasions when regulation on the basis of nationality has produced international friction have usually come about either because two states have regarded the same person as falling within their own nationality jurisdictions or because one state's exercise of extraterritorial nationality jurisdiction has clashed with some important public policy of the territorial sovereign. Neither of those factors was present in the Iranian case.

Thirdly, the U.S. position was eased by the fact that in general the banks whose overseas conduct the United States was seeking to regulate had followed the usual banking practice of operating abroad through unincorporated branches rather than through subsidiary corporations established under foreign law.[13] The difference may seem more formal than substantive, but previous U.S. attempts to exercise jurisdiction over a foreign subsidiary on the basis of its parent's U.S. nationality had led to objections from the government of the place of the subsidiary's incorporation.[14] By contrast, during the Iranian crisis no foreign government objected to the U.S. position that the overseas banking offices affected by the freeze order were U.S. nationals and thus were subject to the jurisdiction of the United States.

### *C. The Countermeasures Doctrine*

Although the nationality principle provided a firm international legal basis for making the blocking order applicable to the branches of U.S. banks overseas, the United States sought to strengthen its position by demonstrating the reasonableness of the prohibition placed on the overseas banking offices.[15] Thus, the United States invoked the international law doctrine which recognizes the right of any state to protect its interests by taking reasonable and proportionate "countermeasures" when it is aggrieved by another state's breach of international obligations. The international community recognizes the validity of counter-

11. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 30 (1965).

12. *See, e.g.*, 1967 BRIT. PRAC. INT'L L. 58.

13. "In contrast with manufacturing, mining and trading businesses, banks overwhelmingly choose branch offices as the means of doing business abroad." Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y INT'L BUS. 903, 911 (1979). Some of the reasons for doing so are discussed in Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3717 (U.S. Feb. 26, 1982) (No. 81-1591).

14. *See* note 6 *supra*.

15. The draft of a revised Restatement under consideration by the American Law Institute suggests that even though one of the bases for jurisdiction (such as nationality) is present, "a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable" in the light of all relevant factors. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) § 403 (Tent. Draft No. 2, 1981).

measures, sometimes categorized as "reprisals" or "retorsion,"[16] because no effective policing mechanisms yet exist for the neutral enforcement of international law. In essence the countermeasures doctrine authorizes an aggrieved state to undertake reasonable self-help to induce the offending state to end its illegal or wrongful conduct. Under the doctrine, an act which otherwise would be improper under international law may be rendered lawful if taken in response to the prior illegal or unfriendly act of another state.[17]

In mid-December 1979, and again in May 1980, the International Court of Justice rendered two unanimous decisions which provided strong support for the United States' invocation of the countermeasures doctrine.[18] The World Court condemned the Iranian seizure and detention of the U.S. hostages as the clearest possible violation of international law, thus providing general justification for the blocking order as a unilateral economic countermeasure designed to encourage Iran to terminate its continuing violation.

Moreover, although neither of the parties to the World Court proceeding challenged the propriety of the U.S. blocking order, one judge (Judge Morozov, from the U.S.S.R.) raised the question *sua sponte* and suggested, both by a question during oral argument and in a separate opinion, that the blocking order constituted an American violation of international law.[19] The court itself, however, did not endorse that view. Although it did not expressly rule that the blocking order was lawful, the court referred to the order as one of several "measures taken in response to what the United States believed to be grave and manifest violations of international law by Iran"[20]—a reference which to some readers rather clearly suggests that the court regarded the U.S. action as justifiable under the countermeasures doctrine.

### *D. "Abuse of Rights" and Economic Self-Protection*

The United States also was prepared to take the position that the freeze order could be independently justified as a legitimate response to

16. Oppenheim defines reprisals as "such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency," and retorsion as "retaliation for discourteous, unfriendly, unfair, and inequitable acts by acts of the same or a similar kind." 2 L. OPPENHEIM, INTERNATIONAL LAW 136 (7th ed. H. Lauterpacht 1952).

17. Case Concerning the Air Services Agreement of 27 March 1946 (United States v. France), Arbitral Award of 9 December 1978, 54 I.L.R. 304 (1979). The arbitral award is excerpted and discussed at 1978 DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW at 768-81. *See also* Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980).

18. *See* note 7 *supra*.

19. Judge Morozov's question during oral argument and the response of Mr. Owen as agent for the United States are reprinted at 80 DEP'T STATE BULL. No. 2038, at 56-57 (May 1980). Judge Morozov dissented in part. [1980] I.C.J. 51-57.

20. [1980] I.C.J. 28.

a separate violation of international law on the part of Iran. Specifically, Iran was threatening to withdraw its deposits from American branch banks in Europe, apparently believing that the threat of such withdrawals might prompt the United States to comply with the Iranian demand for the return of the former Shah to Iran. As a matter of ordinary domestic banking law, Iran, as a depositor, probably would have had the right to make the withdrawals regardless of motive (subject to the banks' right to set off their own claims against Iran). As a matter of international law, however, the United States had a strong argument that Iran's improper motive converted the contemplated withdrawals of deposits from a proposal for lawful action to a threat of unlawful action which violated the "abuse of rights" doctrine.

The latter doctrine holds that an impermissible motive converts an otherwise lawful act into a legal wrong, thus erecting a legal prohibition against conduct which the actor otherwise would have a right to undertake. In its simplest form, the doctrine states that the exercise of a right, "or supposed right, since the right no longer exists [,] for the sole purpose of causing injury to another is prohibited."[21] In the Iranian situation, therefore, if the Bank Markazi had had legitimate business reasons for withdrawing its deposits from the American banks in London and Paris, it would have had a legal right to do so, but under the "abuse of rights" doctrine the Bank Markazi's threat to withdraw the deposit for the sole purpose of causing injury to the United States constituted a threat to violate international law. In Professor Oppenheim's words, a state is precluded from availing itself of its right "in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage."[22] The doctrine is a corollary to the principle, firmly imbedded in international law, that states are required to act in good faith and to refrain from inflicting unjustifiable injury on other states.[23] Thus, when Iran threatened to withdraw its deposits from U.S. branch banks in Europe in order to inflict economic injury, the abuse of rights doctrine provided the United States with a separate legal justification for the blocking order, wholly independent from the arguments based on the seizure of the hostages.

Moreover, while the abuse of rights doctrine focuses on the actor's bad intent, another related doctrine looks to the impact on the state affected by the attempted act. International law recognizes the right of any state to take measures for self-protection when its security or economy is endangered by a severe external threat, even when the threat

21. BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS, *quoted in* 5 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 224 (1965).

22. 1 L. OPPENHEIM, INTERNATIONAL LAW 345 (8th ed. H. Lauterpacht 1958).

23. The doctrine has a domestic counterpart in the "prima facie tort" cause of action recognized by some states. *See, e.g.*, Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160, 170 N.Y.S.2d 828 (1958).

arises from wholly lawful action. Consistent with that principle, the major treaties regulating economic activity generally contain an "escape clause" or "safeguards provision" enabling a state party to take appropriate protective action in an economic emergency.[24] Arguably, Iran's proposal to withdraw five billion dollars *en masse* from American banks in London and Paris would have justified the U.S. blocking order, even in the absence of an evil Iranian motive, assuming that the threatened injury was sufficiently severe.

The abuse of rights and economic self-protection arguments supporting the United States' use of the blocking order, however, lead into largely uncharted waters. For example, it could be that an *en masse* withdrawal of five billion dollars would cause some temporary inconvenience for the American banks involved without causing injury to the security or economy of the United States as a nation. If Iran had been able to prove such a lack of injury, would Iran's illegitimate motive nevertheless have rendered the proposed withdrawal unlawful and the U.S. blocking response proper? In other words, could a state in the position of the United States properly interfere with the financial affairs of another state in order to protect itself against a threatened economic attack which is intended to cause injury but is not in fact capable of doing so? Perhaps the answer should depend on whether the responding state had a good faith belief that the other state had the capacity to inflict such injury,[25] but the issue is surely subject to debate.

On another issue, suppose that Iran, rather than allowing the seizure and detention of the American hostages, had merely warned the United States that if the Shah were not returned to Iran, Iran would take economic measures against the United States. Further, suppose that those threatened measures included a repudiation of its debts to U.S. creditors, a refusal to accept dollars in payment for oil, and a withdrawal of the five billion dollars in Iranian funds on deposit in American banks in London and Paris. Under those circumstances, would the United States Government have been justified in treating the threatened withdrawal as a violation of international law (an abuse of rights) so as to justify the freezing of the deposits?

In weighing that issue it may be relevant that at about the same

24. For example, Article XIX of the General Agreement on Tariffs and Trade, 61 Stat. (5), (6), T.I.A.S. No. 1700, authorizes the suspension of obligations when imports of a product "cause or threaten serious injury to domestic producers." Articles VI, XII, XX, and XXI also contain exceptions to general obligations for the protection of important national economic interests. The Articles of Agreement of the International Monetary Fund, 60 Stat. 1401, T.I.A.S. No. 1501, permit the suspension of operation of certain provisions of the agreement during emergency circumstances. Of particular relevance to the Iran crisis was the U.S.-Iranian Treaty of Amity, Economic Relations, and Consular Rights, 28 U.S.T. 1975, T.I.A.S. No. 8532, which permits measures, including presumably economic measures, "necessary to protect [a party's] essential security interests."

25. *See* Damrosch, *supra* note 17, at 75. For a view that Iran did not realistically have the economic power to cause significant injury to U.S. financial interests, see Carswell, *Economic Sanctions and the Iran Experience*, 60 FOREIGN AFF. 247, 258 (1981-1982).

time that the United States refused to send the Shah to Iran, the Government of Chile refused to extradite to the United States the alleged assassins of Orlando Letelier. The United States imposed a variety of economic and other sanctions on Chile in response to Chile's refusal, actions which it considered proper as a matter of international law.[26] But if the latter actions were legal, how could the United States condemn an Iranian threat to withdraw its deposits in response to an American refusal to return the Shah? Despite distinctions between the two situations, including the technical extradition problems involved,[27] the analogy raises troublesome questions as to when a state may legitimately use economic sanctions to compel desired conduct. At any rate, the Iranian hostage crisis did not raise quite such difficult issues, because the primary illegality of the hostage-taking, compounded by so many other hostile and unjustifiable Iranian acts, left little doubt as to the propriety of the American response.

## III. THE ROLE OF THIRD-COUNTRY COURTS IN ENFORCING INTERNATIONAL LAW IN BILATERAL DISPUTES

One interesting aspect of the U.S. freeze order is that if the propriety of the freeze order as a matter of international law had been judicially resolved, the resolution might well have taken place in the courts of third countries (England or France) rather than in the courts of Iran or of the United States or in the World Court. The Bank Markazi's position in these third-country courts was that the freeze order could not have extraterritorial effect, and the pleadings of the parties raised various other international law issues as well. Nevertheless, the third-country courts might have avoided the international legal questions and decided the case on other grounds, and lawyers representing the American banks in London and Paris sought to enhance that possibility.

One of the available arguments was that U.S. law was the "proper law" of the contracts of deposit under the principles of choice of law which are normally applied by the courts of the forum in commercial disputes.[28] While this argument had limitations,[29] difficult public inter-

26. 80 DEP'T STATE BULL. No. 2034, at 65-66 (Jan. 1980); 80 DEP'T STATE BULL. No. 2042, at 73-74 (Sept. 1980).

27. The United States could not legally extradite the Shah to Iran because the United States had no extradition treaty with Iran. The Supreme Court has held that in the absence of a treaty the executive is without power under federal law to surrender a person to a foreign government. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5 (1936). *See* 18 U.S.C. § 3184 (1976). Conversely, under the United States' extradition treaty with Chile, the Chilean government had an affirmative legal obligation to extradite the alleged Letelier assassins, and Chile's breach of its duty was a violation of international law justifying the U.S. sanctions.

28. *See* 2 A. DICEY & J. MORRIS, THE CONFLICT OF LAWS 747-75 (10th ed. 1980). The "proper law" under this concept is the system of law by which the parties intended the contract to be governed or which has the closest connection with the transaction. *Id.* at 747.

29. *See* Edwards, *Extraterritorial Application of the U.S. Iranian Assets Control Regulations*, 75 AM. J. INT'L L. 870, 877 (1981). For authorities in support of the proposition that the law

national law questions could have been avoided if the courts had accepted it. A related argument arose from contract law: courts will not order specific performance of a contract if the acts in question would be illegal at the place of performance.[30] Lawyers for the banks intended to demonstrate that any withdrawal of the dollar deposits located in London and Paris would have required that the transactions be cleared through the banks' home offices in the United States. If either the British or the French courts had ordered the banks involved to release dollar deposits to the Bank Markazi, the courts would in effect have been ordering U.S. nationals (the banks) to take action in the United States (the clearing) in violation of U.S. law (the freeze order). The reluctance of courts to issue such orders in commercial cases might have resolved the case, without ever reaching the international law issues.

While these arguments based on traditional choice of law rules and traditional contract law principles might have had merit, they did not necessarily assure success in the British and French courts. Accordingly, there was a need to proffer an alternative approach which, either in conjunction with these other arguments or on its own, would persuade the third-country courts not to undercut the freeze order.

### *A. The Weighing of Interests Approach to Conflicts of Jurisdiction*

In order to justify its freezing of Iranian deposits in England and France, the United States was prepared to urge judicial adoption of the "balancing of interests" approach that U.S. courts have used to resolve actual or potential conflicts between the assertions of regulatory jurisdiction by two sovereign states.[31] Under this approach, when two states both have jurisdiction to prescribe and enforce rules of law, and when the rules in question may require inconsistent conduct on the part of a person, each state is required to consider moderating its exercise of jurisdiction based on a balancing of interests of the involved parties. The five major factors in this balancing test are: the vital national interests of each state; the extent and the nature of the hardship that inconsistent enforcement actions would impose upon affected persons; the extent to which the required conduct is to take place in the territory of the other state; the nationality of affected persons; and the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[32]

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applied to a deposit in a branch bank is ordinarily the law of the jurisdiction where the branch is located, see Heininger, *supra* note 13, at 944.

For a discussion of various arguments raised in the foreign litigation, see Hoffman, *The Iranian Assets Litigation*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1980 329, 343-60 (1980).

30. 2 A. DICEY & J. MORRIS, *supra* note 28, at 794-801.

31. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

32. *Id.*

In the past the U.S. Government has strongly endorsed this "weighing of interests" or "balancing test" approach,[33] and U.S. courts hearing antitrust and other cases affecting the interests of more than one sovereign have already adopted this method of analysis.[34] Whether foreign courts will follow the same approach is not yet clear, but there were significant indications of foreign government support for the balancing test in 1979 and 1980 when the governments of Australia, Canada, South Africa, and the United Kingdom all urged through diplomatic channels and in *amicus curiae* briefs that the test be applied by the U.S. courts which were hearing the uranium antitrust litigation.[35] These official statements of support for the balancing approach might well have substantial persuasive effect in the courts of those countries, and perhaps in other courts as well.

One important jurisprudential issue is whether courts view the weighing approach as merely a matter of comity or as a positive rule of customary international law. Analysis of when a practice originating in comity has attained the status of a rule of law is beyond the scope of this paper, but the actions of national courts and the positions of governments form part of the evidence in support of the conclusion that a practice or approach has become generally accepted as law.[36]

If the British and French courts had applied the weighing of interests approach in the Iranian litigation, they might well have concluded that the U.S. banks involved were bound to obey the U.S. blocking order rather than follow the conflicting requirements of the banking laws of the fora. Applying the five balancing factors noted above, these courts' analysis might have taken the following course:

(a) The vital national interests of the United States were directly involved in the foreign litigation. The United States had issued the blocking order in an attempt to secure the release of American hostages, most of them government officials, and to counter Iran's threatened economic actions against important U.S. interests. Thus, while the United Kingdom and France had substantial commercial interests which would ordinarily have justified application of their banking laws, the United States seemed to have more critical national interests at stake.

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33. *See, e.g.*, Statement of Interest of the United States, Westinghouse Inc. v. Rio Algom, Ltd., No. 76-C-3830 (N.D. Ill. 1980), *reprinted in* 74 AM. J. INT'L L. 928 (1980).

34. *See, e.g.*, Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976). *See also* Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979); *In re* Westinghouse Elec. Corp. Uranium Contracts Lit., 563 F.2d 992 (10th Cir. 1977).

35. See the discussion of foreign government *amicus curiae* briefs by the court in *In re* Uranium Antitrust Lit., 617 F.2d 1248 (7th Cir. 1980), and by the executive branch in communications to the courts hearing that litigation, *reprinted in* 74 AM. J. INT'L L. at 665-67, 928-29 (1980).

36. Article 38 of the Statute of the International Court of Justice treats as among the sources of international law "international custom, as evidence of a general practice accepted as law," and "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law." 59 Stat. 1055 (1944).

(b) When weighing the hardships of affected persons, the courts would have had to consider the situations confronting both the Iranian depositors and the U.S. banks. Application of U.S. law to uphold the blocking order presumably would have caused some degree of commercial inconvenience, or even hardship, to the Bank Markazi. On the other hand, application of domestic banking rules would have required the U.S. banks to violate U.S. law and to expose themselves to possible criminal prosecution by U.S. authorities.[37] In short, application of the banking laws of the fora would have placed the U.S. banks in the clear "hardship" situation of having to choose between criminal prosecution in the United States and contempt proceedings (or the equivalent thereof) in England and France.

(c) As to the extent to which the required conduct was to take place in one or the other state, the balance was perhaps about even. The transfer of the London and Paris deposits to the Bank Markazi could not have been completely consummated in the United Kingdom or France because clearing transactions would have had to take place in the United States. Therefore, this factor probably would not have weighed heavily in any judicial decision.

(d) The nationality of the affected persons supported the application of U.S. law. The Iranian nationality of the Bank Markazi was essentially a neutral factor because that bank was not a national of the United States, the United Kingdom, or France. The other affected persons, the U.S. banks, were U.S. nationals, rather than either British or French nationals, a factor which clearly weighed in favor of the U.S. position.

(e) As to the extent to which enforcement by any of the states involved could reasonably be expected to produce compliance, the foreign courts might not have been able to make an effective order to release the funds. As noted above, a dollar transfer would require actions to be taken in the United States, beyond the territorial reach of a foreign court's enforcement powers. Furthermore, while contempt sanctions (or their equivalent) were a theoretical enforcement mechanism, the banks might well have chosen to risk those sanctions rather than to subject themselves to criminal prosecution in the United States. Under these circumstances, the foreign courts might have been reluctant to attempt enforcement by seizing the assets of the foreign branches.[38] After weighing these considerations, the courts might well

37. The maximum penalties for violations of regulations issued under the authority of the International Emergency Economic Powers Act are a $50,000 fine or 10 years' imprisonment or both. 50 U.S.C. § 1705 (Supp. II 1978).

38. The dollar deposits that were the subject of the London and Paris litigation were liabilities of the American banks for which the head offices ultimately were responsible. Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854 (2d Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3717 (U.S. Feb. 26, 1982) (No. 81-1591). The foreign courts might have avoided some of the enforcement problems by ordering payment of the dollar equivalent in local currency. *Id.* at 865-67 n.7.

have struck the balance in favor of allowing the U.S. banks to continue to comply with U.S. law.

In summary, the United States had strong arguments to support implementation of the blocking order if the British and French courts had adopted the balancing of interests approach. Moreover, as explained below, even if the British and French courts had been reluctant to adopt the foregoing balancing analysis, another consideration strongly supported upholding the U.S. freeze order.

### *B. The* Erga Omnes *Rule*

The balancing of interests test suggests that the British and French courts had sound reasons to give effect to the U.S. freeze order, even if the only British and French interests in the litigation had been the protection of the integrity of their banking institutions. In fact, however, both the United Kingdom and France had another important national interest involved which pointed toward the same result—an interest in the principle of diplomatic immunity.

The rules of diplomatic immunity which Iran was egregiously violating were designed not merely to protect one particular state in a specific transaction, but to benefit the entire international community. In the words of the World Court, "the institution of diplomacy, with its concomitant privileges and immunities, has . . . proved to be an instrument essential for effective cooperation in the international community, and for enabling States, irrespective of their differing constitutional and social systems, to achieve mutual understanding and to resolve their differences by peaceful means."[39] In other words, every member of the international community benefits from the diplomatic immunity principle, and Iran, by violating that principle, was engaged in a violation of an obligation which it owed *erga omnes*—to all, not just to the country whose diplomats were seized.[40] Each member of the international community not only is justified in taking steps to enforce an *erga omnes* rule, but also has a moral and political obligation to do so.[41] Thus, the *erga omnes* factor, if recognized by the British and French courts, would have weighed heavily in favor of upholding the U.S. freeze order.

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39. [1979] I.C.J. 19.

40. Iran's hostage-taking was in violation of the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, and the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, both of which are accepted by the overwhelming majority of states and are considered to reflect customary international law.

41. *In re* Barcelona Traction, Light & Power Co. (Second Phase), [1970] I.C.J. 2, 32. In *Barcelona*, the World Court noted that all states have a legal interest in the enforcement of certain obligations that either have entered into the body of general international law or are conferred by international instruments of a universal or quasi-universal character. Iran's obligations concerning diplomatic immunity and the taking of hostages derive both from general international law and from international instruments supported by the overwhelming majority of states.

## IV. CONCLUSION

In today's increasingly interdependent world a dispute between two countries such as the United States and Iran is not likely to remain confined to the limits of their bilateral relationship. Third countries frequently will be drawn into such disputes, and in some cases those countries will be called upon to rule upon the legality of actions taken by one or both of the protagonists. Third countries may be reluctant to adjudicate such matters, but if the rule of law is to be given its proper place in the international setting, then the adjudicatory responsibility must be shouldered. Using the approaches described in this article, courts can play an important role in minimizing international tensions and extending the rule of law.