In re Philippine National Bank: Transcending Traditional Act of State Doctrine Limitations

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I. INTRODUCTION

The Philippine Supreme Court's decision to forfeit the Marcos Swiss assets in favor of the Republic of the Philippines (ROP) unwittingly embroiled the Philippine National Bank (PNB) in threatened contempt proceedings before the United States District Court for the District of Hawaii (Hawaii District Court). In a recent opinion granting PNB's *mandamus* relief, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) acknowledged that the case raises new and important problems on the act of state doctrine.

The controversy, as the Ninth Circuit puts it, was one more chapter in a long-running dispute over the rightful ownership of the Marcos Swiss assets. This battle began nearly two decades ago and, on previous occasions, had been brought before the Ninth Circuit in order to resolve the legal skirmishes between the protagonists. The opinion's concise recital of the underlying facts thus comes as no surprise. Yet, the Ninth Circuit's teaching

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on the act of state doctrine is best appreciated in the context of the antecedent multi-jurisdictional proceedings that precipitated the legal issue tackled by the court. Such premise underpins this Article.

In revisiting the Ninth Circuit's opinion, this Article unfolds in three parts. First, it unearths the key links of the decades-long chain of events constituting the factual foundation of the case. It then teases out the arguments of the contending parties relating to the act of state doctrine, which comprise the underlying fabric of the court's pronouncements on the scope of the doctrine. Finally, it highlights the court's holding especially as it resolved the novel issues concerning the application of the act of state doctrine.

II. UNDERGIRDING THE CHAIN OF EVENTS

A. Swiss Mutual Assistance and Philippine Forfeiture Proceedings

1. Freezing the Assets

Less than a month after the Marcos family fled the country in February, 1986, the Swiss Federal Council, the highest governing body in the Swiss Executive Branch, issued an Executive Order freezing all the Marcos-owned assets that were held in Switzerland, in anticipation of the recovery efforts by the ROP.[1] A week later, the ROP formally requested for mutual assistance from the Swiss Confederation under the auspices of the Swiss Federal Act of International Mutual Assistance for Criminal Matters (IMAC). The assistance sought consisted in the transmission of information on the details of the Marcos assets in Switzerland and the freezing of such assets.[2]

Pursuant to the procedures set forth in the IMAC, the investigating magistrates of the cantons of Zurich, Fribourg and Geneva granted the ROP's request by ordering the blocking of the assets of various Marcos-owned foundations (Foundations) and the transmission of the relevant bank account documents. These cantonal orders superseded the Executive Order of the Swiss Federal Council. The assets, consisting of cash in various

1. Credit Suisse v. United States District Court for the Central District of California, 130 F.3d 1342, 1346 (9th Cir. 1997). *See also* Credit Suisse v. Republic of the Philippines et al. (Swiss Federal Supreme Court, Jan. 15, 1998) (stating that the Swiss Federal Council garnished the Marcos assets in Switzerland as a precautionary measure on Mar. 24, 1986).

2. Letter from Sedfrey Ordonez, Solicitor General of the Republic of the Philippines, to the Swiss Federal Office for Police Matters (Apr. 7, 1986).

currencies and securities, were held by Swiss Bank Corporation in Geneva and Fribourg and by Credit Suisse in Zurich.[3]

The concerned Foundations, the heirs of Ferdinand Marcos (Ferdinand Marcos died on 28 September 1989), and Imelda Marcos challenged the Fribourg and Zurich cantonal orders. The Swiss Federal Supreme Court denied their appeal in its two Decisions of 21 December 1990, relevantly ruling that the remittance to the ROP of the blocked assets "is in principle granted, *their transfer however being deferred until an executory decision in the Sandiganbayan or another Philippine tribunal* legally competent in criminal matters to pronounce on their restitution to those entitled or their confiscation."[4] The Swiss tribunal further prescribed that the proceedings to this end must commence within a maximum of one year from the pronouncement of its decision, otherwise the seizure of the assets shall be lifted on the request of the interested parties. The Geneva investigating magistrate modified his order to conform to the aforesaid decisions of the Swiss Federal Supreme Court. Parenthetically, these decisions subsequently spurred the amendment of the IMAC provisions on the handing over of property or assets for the purpose of forfeiture or return.[5]

The ROP then initiated before the Sandiganbayan (a) a petition for forfeiture filed on 17 December 1991 under Republic Act No. 3019 in conjunction with Executive Order Nos. 1, 2, 14 and 14-A, and (b) six

3. BGE 123 II 595 (publishing the decision by the Swiss Federal Supreme Court in Federal Office for Police Affairs v. Aguamina Foundation et al, Dec. 10, 1997). The details of the issuance of the cantonal orders are: (a) on Apr. 22, 1986 and Mar. 8, 1987, by the Geneva investigating magistrate against the assets of Maler 1, Maler 2, and Arelma held by the Swiss Bank Corporation; (b) on Jun. 8, 1988, by the Sarine investigating magistrate against the assets of Aguamina held by the Swiss Bank Corporation; and (c) on Sept. 26, 1989, Dec. 6, 1989, and Jan. 1-2, 1990, by the Zurich District Attorney against the assets of Palmy, Avertina, and Vibur held by Credit Suisse.

4. BGE 116 Ib 452 (publishing the decision of the Swiss Federal Supreme Court in Heirs of Ferdinand Marcos, et al. v. Republic of the Philippines, Dec. 21, 1990, which concerns the account of Aguamina Foundation in Swiss Bank Corporation, Fribourg; the decision is in French) (emphasis supplied). The other decision of Dec. 21, 1990, which is in German, pertained to the respective accounts of Avertina, Vibur and Palmy Foundations in Credit Suisse, Zurich.

5. Federal Office of Justice, Federal Department of Justice and Police, International Mutual Assistance in Criminal Matters Guideline, 14-15 & n.99 (2001 rev. ed) *citing* PEMEX: BGE 115 Ib 517 ff.; Marcos: BGE 116 Ib 452 ff, *available at* http://www.ofj.admin.ch/themen/rechtshilfe/wegl-str-e.pdf (*last accessed* Jan. 7, 2005).

criminal complaints on 18 December 1991. In his declaratory order of 06 February 1992, the Office of the District Attorney IV for the Canton of Zurich (Zurich District Attorney) – which was earlier designated as lead canton pursuant to the IMAC – noted that the Sandiganbayan proceedings fulfilled the time frame prescribed by the Swiss Federal Supreme Court.[6]

2. Anticipatory Restitution of the Assets

On 10 August 1995, the ROP, through the Presidential Commission on Good Government (PCGG), made an Additional Request for Mutual Assistance, seeking for an early transfer (i.e., a transfer prior to the presentation of a legally valid Philippine court judgment) of the blocked Swiss assets to an escrow account with PNB. The constitution of the escrow account is embodied in several Escrow Agreements executed between the PCGG and PNB's Trust Banking Group.

The Zurich District Attorney granted the request for advance transfer or anticipatory restitution in his three identical Orders of 21 August 1995. These Orders (a) directed the Credit Suisse branch in Zurich and the Swiss Bank Corporation branches in Geneva and in Fribourg to transfer to the ROP the Marcos assets respectively held by them under the framework set out in the Escrow Agreements, and (b) prescribed that the escrowed assets may be invested only in institutions having a Standard & Poor's rating of at least "AA."[7]

The Foundations, the Estate of Ferdinand Marcos, Imelda Marcos, Credit Suisse and Swiss Bank Corporation appealed the Orders of 21 August 1995. The Superior Court of the Canton of Zurich (Zurich Superior Court) quashed the orders in its nine judgments of 20 February 1997. It ruled that the requirement of an executory decision by the Sandiganbayan or another Philippine tribunal, as set forth in the Swiss Federal Supreme Court's Decisions of 10 December 1990, should be met prior to any transfer of the assets.[8] The Swiss Federal Office for Police Affairs, the ROP, Credit Suisse and Swiss Bank Corporation appealed to the Swiss Federal Supreme Court.

In a Decision dated 10 December 1997 (Aguamina Decision), the Swiss Federal Supreme Court overruled the Zurich Superior Court. According to

6. BGE 123 II 595.

7. The three Orders of Aug. 21, 1995 were issued against the following Marcos Foundations: (a) Aguamina Corporation, Rosalys Foundation; (b) Avertina Foundation, Palmy Foundation, Vibur Foundation; and (c) Fondation Maler 1, Fondation Maler 2, Arelma, Inc.

8. BGE 123 II 595.

the court, the IMAC prescribes as a general rule, but not as a *sine qua non* requirement, the existence of a valid and enforceable judgment before frozen assets can be transferred to the requesting state. The competent authority may therefore waive this requirement under exceptional cases such as when the circumstances are so clear that the criminal origin of the assets is indisputable. When clear criminal provenance is availing, it is in Switzerland's best interest that the frozen assets be transferred the soonest. The Swiss Federal Supreme Court found the Marcos assets as falling under this exceptional case. Thus, it confirmed the Orders of 21 August 1995 with the following conditions: (a) that the ROP guarantees to decide the seizure or restitution of the assets in judicial proceedings which comply with the procedural principles established in Article 14 of the International Covenant on Civil and Political Rights; and (b) that the ROP regularly informs the Swiss authorities about all essential development regarding (i) the judicial proceedings and (ii) the measures and proceedings to indemnify the victims of the human rights violations under the Marcos regime.[9] The Swiss Federal Supreme Court applied *mutatis mutandis* the ratio of the Aguamina Decision in its twelve subsequent decisions pertaining to the other appeals (Advance Restitution Decisions).[10]

In compliance with the Advance Restitution Decisions, the Zurich District Attorney directed Credit Suisse and Swiss Bank Corporation to transfer the blocked assets to the PNB-designated escrow accounts. From April to July 1998, these Swiss banks transferred over US$567 million to PNB. In accordance with the investment policy prescribed by the Swiss

9. *Id.*

10. The Advance Restitution Decisions are: (1) BGE 123 II 595; (2) Federal Office for Police Affairs v. Anderson, Hibey & Blair et al., Dec, 19, 1997; (3) Federal Office for Police Affairs v. Avertina Foundation, Palmy Foundation, Vibur Foundation et al., Dec. 19, 1997; (4) Federal Office for Police Affairs v. Fondation Maler, Arelma Inc. et al., Dec. 19, 1997; (4) Federal Office for Police Affairs v. Golden Buddha Corporation et al., Dec. 19, 1997; (5) Federal Office for Police Affairs v. Estate of Ferdinand Marcos, Imelda Marcos-Romualdez et al., Dec. 22, 1997; (6) Republic of the Philippines v. Anderson, Hibey & Blair et al., Jan. 7, 1998; (7) Republic of the Philippines v. Golden Buddha Corporation et al., Jan. 7, 1998; (8) Republic of the Philippines v. Aguamina Corporation et al., Jan. 7, 1998; (9) Republic of the Philippines v. Avertina Foundation, Palmy Foundation, Vibur Foundation et al., Jan. 7, 1998; (10) Republic of the Philippines v. Fondation Maler, Arelma Inc. et al. Jan. 7, 1998; (11) Republic of the Philippines v. Estate of Ferdinand Marcos, Imelda Marcos-Romualdez et al., Jan. 7, 1998; (12) Swiss Bank Corporation v. Republic of the Philippines et al., Jan. 15, 1998; and (13) Credit Suisse v. Republic of the Philippines et al., Jan. 15, 1998. These decisions are in German.

authorities, PNB invested the escrowed assets in various banks located in Singapore that have a Standard & Poor's "AA" rating.

3. Forfeiture of the Assets

With the completion of the advance transfer, the Philippine forfeiture proceedings turned up a notch. After being apprised of the transfer, the Sandiganbayan asserted exclusive control over the escrowed funds.[11] On 10 March 2000, the ROP eschewed the trial phase of the proceedings by filing a motion for partial summary judgment. The Sandiganbayan initially granted the motion, but later reconsidered to deny it. The ROP raised the denial to the Philippine Supreme Court on petition for review on *certiorari*.

On 15 July 2003, the Philippine Supreme Court *en banc* reversed the Sandiganbayan and ordered the forfeiture of the escrowed funds – amounting to US$ 658,175,373.60 as of 31 January 2002, plus interest – in favor of the ROP (Forfeiture Decision).[12] On motion for reconsideration by the Marcoses, the Court affirmed its Forfeiture Decision with finality on 18 November 2003.[13] The Sandiganbayan issued the corresponding *Writ* of Execution on 22 January 2004, which was served on PNB the next day. On 30 January 2004, PNB, through the PCGG, transferred the funds to the Bureau of Treasury.[14]

B. In re Estate of Ferdinand Marcos Human Rights Litigation

1. Tort Judgment and Permanent Injunction

Even as the ROP sought to recover the Marcos ill-gotten wealth, several lawsuits against President Marcos were filed in the United States on behalf of persons who were arrested, tortured, executed or who disappeared during the Marcos regime. These cases were eventually consolidated (docketed as MDL No. 840) and certified as a class action (consisting of 9,541 individuals) before the Hawaii District Court, with United States District Judge Manuel

11. Republic of the Philippines v. Ferdinand Marcos, et. al., Civil Case No. 0141 (Sandiganbayan, Dec. 17, 1991) (Resolution, Feb. 10, 1999).

12. Republic of the Philippines v. Sandiganbayan, 406 SCRA 190 (2003).

13. Republic of the Philippines v. Sandiganbayan, 416 SCRA 133 (2003).

14. The transferred sum excluded the money deposited in Westlandesbank AG, Singapore branch, which refused to release it despite PNB's demand. Instead, WestLB filed an interpleader action before the High Court of Singapore, which is still pending.

L. Real presiding. Upon his death in 1989, President Marcos was substituted by his estate (Marcos Estate).

On 3 February 1995, the Hawaii District Court entered a final judgment approving jury awards of US$ 1.2 billion in exemplary damages and US$ 766 million in compensatory damages against the Marcos Estate.[15] Moreover, this judgment entered a permanent injunction (1995 Permanent Injunction) restraining the Marcos Estate and its agents, representatives, aiders and abettors from transferring or otherwise conveying any funds or assets held on behalf of or for the benefit of the Estate pending the satisfaction of the judgment. It also made a finding of fact that the ROP is an agent or aider and abettor of the Marcos Estate. The Ninth Circuit affirmed the award of damages,[16] but vacated the injunction to the extent that it covers the ROP citing sovereign immunity.[17]

2. The *Credit Suisse* Precedent

To satisfy the judgment, the Human Rights Litigation plaintiffs sought to execute against Credit Suisse and Swiss Bank Corporation (Swiss Banks). The plaintiffs first registered the judgment in the Central District of California. In connection with the *writ* of execution and notices of levy served on the California offices of the Swiss Banks, the United States District Court for the Central District of California, through Judge Real, "directed the Swiss Banks to deposit into the court registry 'as an interpleader proceeding all assets in the possession of the BANKS that are the subject matter of this proceeding.'"[18] On appeal by the Swiss Banks, the Ninth Circuit vacated this order.[19]

Subsequently, the plaintiffs filed before the same district court an action directly against the Swiss Banks, i.e., *Rosales et al. v. Credit Suisse and Swiss Bank Corp.*, No. CV 96-6419 (C.D. Cal.). The plaintiffs' relief included: "(1) an injunction restraining the Banks from transferring or otherwise conveying any funds or assets held by the Banks [i]n behalf of the Marcos Estate except as ordered by the district court; and (2) a declaration that the

15. In re Estate of Ferdinand Marcos Human Rights Litigation, MDL No. 840 (D. Haw.) (Final Judgment, Feb. 3, 1995).

16. Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litigation), 103 F.3d 767 (9th Cir. 1996).

17. Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litigation), 94 F.3d 539, 543 (9th Cir. 1996).

18. Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litigation), 95 F.3d 848, 851 (9th Cir. 1996).

19. *Id.*

Chinn assignment [a document purportedly assigning all right, title and interest of the Marcos Estate in any bank accounts (sic) maintained in Switzerland to Plaintiffs' lawyer, Robert A. Swift, for the benefit of the Plaintiffs] is valid and binding on the Banks."[20] After their motion to dismiss was denied, the Swiss Banks petitioned the Ninth Circuit for a *writ* of *mandamus* on the basis of, among other grounds, the act of state doctrine.

The Ninth Circuit granted the Banks' petition. It found that "Switzerland's act of issuing first the Executive Order and then the cantonal freeze orders was paradigmatically sovereign in nature ... clearly an official act of a foreign sovereign performed within its own territory."[21] The Ninth Circuit held that the aforesaid relief sought by the Plaintiffs violates the act of state doctrine, explaining thus:

> Both of these forms of relief would not only require a United States court to question the validity of the freeze orders, but would also "render nugatory" Switzerland's attempts to render legal assistance to the Republic of the Philippines by protecting the Estate assets. The relief sought therefore violates the act of state doctrine, and the district court's refusal to dismiss the action was clearly erroneous as a matter of law.
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> The injunction sought by the plaintiffs would compel the Banks to hold any assets of the Marcos Estate subject to the district court's further orders. It is clear that the district court plans on taking control of any Estate assets held by the Banks, even though those assets are currently frozen pursuant to official orders of Swiss authorities. Any order from the district court compelling the Banks to transfer or otherwise convey Estate assets would be in direct contravention of the Swiss freeze orders. Subjecting Estate assets held by the Banks to the district court's further orders would thus allow a United States court to question and, in fact, "declare invalid the official act of a foreign sovereign." Issuance of the injunctive relief sought would therefore violate the act of state doctrine.
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> A declaration by a United States court that the Chinn assignment is valid and binding on the Banks would also violate the act of state doctrine. The assignment purports to assign to Robert Swift, counsel for the MDL plaintiffs, all of the Estate's "right, title and interest in and to bank accounts maintained in Switzerland." The assignment directs entities having authority over such bank accounts "to perform all necessary acts to effect the transfer of the above bank accounts forthwith."
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> A declaration that this assignment is valid and binding on the Banks would be a declaration that the Banks must transfer all Estate assets held by the Banks to Swift "forthwith." Such a declaration would not only contradict,

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20. *Credit Suisse*, 130 F.3d at 1347.

21. *Id.* (citations and internal quotations omitted).

> and therefore declare invalid, the Swiss freeze orders, but would also require the Banks to disregard the Swiss orders.
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> United States courts are "bound to respect the independence of every other sovereign State," including Switzerland. If the MDL plaintiffs want to contest the legality of the Swiss freeze orders, seek a declaration of the validity of the Chinn assignment as against the Banks, or seek an injunction compelling the Banks to turn over the assets, they should do so via the Swiss judicial system.[22]

In issuing the *writ* of *mandamus*, the Ninth Circuit directed the district court (a) to vacate its order of denial of the Swiss Bank's motion to dismiss and to dismiss the *Rosales* action, and (b) to "refrain from taking any further action in the *Rosales* action or any other case involving any or all of the [Plaintiffs] and any assets of the Estate of Ferdinand E. Marcos held or claimed to be held by the Banks."[23] Later, the Ninth Circuit clarified that its mandate did not preclude the Hawaii District Court from participating in any settlement discussions or performing its duties under Rule 23 of the Federal Rules of Civil Procedure "so long as such duties do not involve an attempt to reach Marcos assets held or claimed to be held by the [Swiss] banks...."[24]

3. The Compromise Judgment of 29 April 1999

The extreme difficulty to satisfy the judgment prompted the plaintiffs to enter into an "Agreement of Compromise and Settlement" with the Marcos Estate. Under its terms, the Marcos Estate would pay the plaintiffs US$ 150 million to satisfy all claims, which sum will be sourced from the escrowed funds. Although named as a party, the ROP did not sign the agreement. Nonetheless, then PCGG chairman Magtanggol Gunigundo and the representatives of both PNB and the Foundations executed an Undertaking dated 10 February 1999, which relevantly provides that the PCGG would seek to transfer US$ 150 million from the PNB escrow accounts to the settlement fund created under the settlement agreement. Such transfer however is conditioned upon, *inter alia*, the approval of the settlement agreement by the Hawaii District Court. Further, both the Sandiganbayan

22. *Id.* at 1347-48 (citations omitted).

23. *Id.* at 1348.

24. Philippine National Bank v. United States District Court for the District of Hawaii (In re Philippine National Bank), 397 F.3d 768, 771 n.3 (9th Cir. 2005) *citing* the Ninth Circuit's unpublished Order of Dec. 23, 1997 in Credit Suisse v. U.S. Dist. Ct for the Cent. Dist. of Cal., 130 F.3d 1342 (9th Cir. 1997).

and the Philippine President should approve the Undertaking itself and the release and transfer of the US$ 150 million.

The Hawaii District Court stamped its imprimatur by entering the compromise judgment of 29 April 1999. Armed with the Philippine President's endorsement, PCGG moved for the approval of the Undertaking, which the Sandiganbayan denied.[25] On 24 January 2001, upon motion by the plaintiffs, the Hawaii District Court terminated the compromise judgment.

C. *Threat of Contempt Proceedings Cast*

1. The September 2003 Orders

Although PNB was never a party to the Human Rights Litigation, Judge Real's crosshair lined up on the bank in the wake of the promulgation of the Forfeiture Decision. When the Hawaii District Court learned of the forfeiture judgment and the impending transfer of the funds, it entered two orders on 3 September 2003 (September 2003 Orders).

First, the "Order Directing Compliance" noted the worldwide scope of the 1995 permanent injunction and concluded that any transfer of said assets held in the PNB escrow account would violate the injunction. The order stated:

> The Court's Special Master has brought to the Court's attention that there is an imminent threat that monies transferred from the Swiss banks to Singapore, pursuant to a "certain escrow agreement" identified in the Memorandum Opinion filed herewith, may be released by the banking officials pursuant to claims filed by the Philippine [Presidential] Commission on [G]ood Government. Those claims have recently resulted in a decision by the Philippine Supreme Court which purports to adjudicate that such funds constitute ill[-]gotten gain acquired by the former Philippine President while in public office. *A review of the opinion by the Philippine Supreme Court indicates there has been no evidence presented in support of such a determination as required by the lower court* [i.e., Sandiganbayan] *judgment, the Philippine Supreme Court claims to review.*
>
> *It is clear that such an adjudication violates any elementary institutional sense of due process.*
>
> IT IS HEREBY ORDERED that any such transfer, without first appearing and showing cause in this Court as to how such transfer might occur

25. *See* Republic of the Philippines v. Ferdinand Marcos, et al., Civil Case No. 0141 (Sandiganbayan, Dec. 17, 1991; Resolution, July 27, 1999) denying PCGG's motion for approval of the Undertaking of Feb. 10, 1999.

> without violating the Court's injunction shall be considered contempt of the Court's earlier order. *Any and all persons and banking institutions participating in such transfers, including but not limited to the Swiss banks, which were the original depository institutions and the depository institutions where the money is currently invested, are hereby notified that such transfer would be considered in contempt of this Court's injunction....*[26]

Second, the "Memorandum and Order" purported to analyze the Philippine Supreme Court's forfeiture judgment from the perspective of due process. The Hawaii District Court saw the Forfeiture Decision as violating its judgments and decrees because the consequence of the forfeiture is that none of the forfeited funds will be available to satisfy the compromise judgment of 29 April 1999.[27] The district court then said:

> Considerations of due process issues by this Court have no geographical limitation if proffered to defeat due process of law in a United States Court. Therefore, it is appropriate to analyze the July 15, 2003 ruling of the Philippine Supreme Court to ascertain if it, given its consequence on the judgment and decrees of this Court, comports with due process as required not only by the conditions of the escrow agreement created by the Swiss authorities, but also by international standards of due process.
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> The Philippine Supreme Court opinion is noteworthy in the following respects:
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> As noted by the lower court [i.e., Sandiganbayan] decision, which the Philippine Supreme Court purported to review, the applicable Philippine statutes (1) assume that the property of a public official was acquired unlawfully; but (2) require that the public official or those claiming through him be given an opportunity to prove that the property was not acquired unlawfully before forfeiture can occur ... No proof was offered about whether the property was acquired before or after his assumption of public office. After eight years, the government could offer no such evidence in the [Sandiganbayan], even though the [Sandiganbayan] had required that the trial begin. Rather, the government decided to present its case based on a Motion for Summary Judgment, which the [Sandiganbayan] denied, ruling in favor of the Marcos claimants.
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> Even assuming the burden of proof had shifted, the government's case was dismissed for failure to present evidence at trial. After many long years, the Marcos family, by the recent decision of the Philippine Supreme Court, has been denied any opportunity to present any such evidence in rebuttal.
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> No civilized notion of due process would permit the adjudication of such substantial claims after more than 15 years in several international forums

26. In re Estate of Ferdinand Marcos Human Rights Litigation, MDL No. 840 (D. Haw.), Order Directing Compliance, Sept. 2, 2003 (emphasis supplied).

27. *Id.,* Memorandum and Order at 2.

> (sic) without allowing the parties on both sides to appear and present evidence as the Swiss Court was assured would occur before it permitted transfer of the funds to Singapore. The Supreme Court ruled without requiring the government to prove its claim [that] the property was unlawfully acquired. Due process requires that a claimant prove at least by preponderance of the evidence its claim.
>
> The Court concludes due process by any standard was not afforded in the ruling of the Philippine Supreme Court setting aside its own rules of evidence and procedure to render its judgment. Its judgment is entitled to no respect or deference by this Court and none is given.[28]

The operative text of this order reinstated the compromise judgment and settlement of 29 April 1999. It concluded by directing plaintiffs' counsel "to immediately serve notice of this order and decision and the accompanying Notice to Insure Compliance, as well as a copy of the injunction on all depository institutions in Singapore and Switzerland, past and present, and counsel of the Republic in the related proceeding pending in this Court, as well as the Swiss Government."[29]

It is noteworthy that the ROP appealed the September 2003 Orders. However, the Ninth Circuit dismissed the appeal in its opinion of 28 December 2004. The court held that the ROP lacked legal standing because it was neither a party to the litigation nor a person or banking institution bound by the Order Directing Compliance.[30]

2. The Order to Show Cause

After the funds were transferred to the ROP, the Hawaii District Court issued on 25 February 2004, upon plaintiffs' motion filed on the same day, an "Order to Show Cause" to PNB. This order required the bank (a) to explain why it should not be held in contempt of the 1995 Permanent Injunction and the September 2003 Orders, and (b) to present evidence as to: (i) whether it transferred assets claimed at any time by the Marcos Estate to the ROP, (ii) the dates, amounts and sources of all such assets transferred to the ROP and any documents evidencing such transfer and deposit, (iii) a detailed inventory of all other assets currently in its custody or possession which are claimed by the Marcos Estate.[31]

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28. *Id.* at 4-5 (emphasis supplied).

29. *Id.* at 7.

30. *See* Hilao v. Estate of Ferdinand Marcos (In re Estate of Ferdinand Marcos Human Rights Litigation), 393 F.3d 987 (9th Cir. 2004).

31. In re Estate of Ferdinand Marcos Human Rights Litigation, MDL No. 840 (D. Haw.), Order to Show Cause, Feb. 25, 2004.

PNB responded by filing a brief and submitting a declaration made by its Senior Vice President, Mr. Rogel L. Zeñarosa, who was familiar with the escrowed funds. In its submission, PNB acknowledged that it had transferred the funds pursuant to the Forfeiture Decision. The bank further requested the Hawaii District Court to withdraw its order citing, *inter alia*, the following grounds: first, the September 2003 Orders and the Order to Show Cause violate the act of state doctrine; and, second, the district court lacked jurisdiction to enter these orders because the Ninth Circuit in *Credit Suisse* ordered it to refrain from touching the Marcos Swiss assets. PNB finally submitted that Philippine banking secrecy laws prevent it from providing more evidence as required by the Order to Show Cause other than Mr. Zeñarosa's declaration.

On 22 March 2004, a hearing on the Order to Show Cause was held before the Hawaii District Court. Judge Real rejected all the arguments raised by PNB and found that it had insufficiently complied with the district court's discovery directive. On 8 April 2004, the Hawaii District Court ordered that the deposition of Mr. Zeñarosa be taken before it on 24 May 2004.

PNB then filed a petition for *writ* of *mandamus* with a motion for stay of proceedings before the Ninth Circuit. The bank sought to restrain the Hawaii District Court from enforcing its Order to Show Cause and from pursuing discovery against PNB, particularly Mr. Zeñarosa.

III. ARGUING THE ACT OF STATE DOCTRINE

A. Asserting the Act of State Doctrine Argument

In its petition, PNB primarily contended that the September 2003 Orders violated the act of state doctrine in purporting to invalidate the Philippine Supreme Court's Forfeiture Decision. The Order to Show Cause, being premised on the September 2003 Orders, is tainted with the same infirmity.

To support this argument, PNB first cursorily highlighted the key official acts taken by the ROP from the time the Marcos Swiss assets were frozen in Switzerland until the escrowed funds were transferred to the ROP. These acts included: (1) the request for mutual assistance to the Swiss government resulting in the freeze orders and advance transfer of the assets to PNB; (2) the Forfeiture Decision, with emphasis on the Philippine Supreme Court's characterization of the Hawaii District Court's attempt to enjoin the transfer of the assets as transgressing both the principle of territoriality under public international law and the Supreme Court's jurisdiction recognized by the parties in interest and the Swiss Government;

and, (3) the *Writ* of Execution implementing the Forfeiture Decision and mandating PNB to deliver the escrowed funds to the ROP.[32]

PNB then averred that the present situation closely resembles the factual milieu of the *Credit Suisse* case.[33] Also, the controversy echoes *Reebok International Limited v. Mclaughlin,*[34] where the Ninth Circuit vacated the U.S. district court's contempt order against a Luxembourg bank which was compelled by a Luxembourg court order to release the funds that were subject of an earlier injunction issued by the U.S. district court. PNB categorically asserted that "the Philippine court decisions in the Forfeiture Proceedings, like those issued in *Credit Suisse* and *Reebok*, are official acts of a foreign sovereign."[35]

Secondly, PNB analyzed the September 2003 Orders and the Order Directing Compliance as expressly nullifying the official acts taken by the ROP to assert its rights over the escrowed funds. It further pointed out that these Orders directly conflicted with the Forfeiture Decision in fundamental ways, namely:

> *First*, the Memorandum and Order purports to "reinstate" the terminated 1999 settlement and apparently would obligate the Republic to now contribute $150,000,000 for the benefit of the Marcos Estate. This is a direct contradiction to the Philippine Supreme Court's holding that all the escrowed funds are the property of the Republic and the Marcos Estate has no interest therein. *Second*, the Order Directing Compliance purports to prohibit the transfer of any of the escrowed funds without the prior approval of the District Court. That injunction conflicts with the Philippine court decisions and orders in precisely the same way *Credit Suisse* held that the injunctive relief requested by the plaintiffs conflicted with the orders of the Swiss government. *Third*, the [Order to Show Cause] threatens to hold PNB in contempt for complying in its own country with the decisions and orders of its own courts. A more direct conflict would be hard to imagine.[36]

PNB concluded with a stinging rebuke of the Hawaii District Court's overreaching of its authority:

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32. Philippine National Bank v. U.S. Dist. Ct for the Dist. of Haw. (In re Philippine National Bank), 397 F.3d 768 (9th Cir. 2005) (Petition For *Writ* of *Mandamus* of Philippine National Bank (Emergency Motion For Stay of Proceedings Filed Concurrently) at 35-36) [hereinafter "PNB's Petition"].

33. *See supra* text accompanying notes 21 to 22.

34. Reebok International Limited v. Mclaughlin, 49 F.3d 1387 (9th Cir. 1995).

35. PNB's Petition, *supra* note 32 at 37.

36. *Id.* at 3.

> The District Court must recognize the limits imposed on its authority. Those limits have been violated here because it has again sought to extend that authority into the territory of another nation and to impose inconsistent duties upon the subjects of that nation whose actions were undertaken in conformity with official acts of its government. The District Court does not have the power to conduct its own foreign policy or pass judgment on final decisions of the judicial branch of a foreign government in derogation of its sovereignty.[37]

B. Assailing the Act of State Doctrine Argument

In their response to PNB's petition, the plaintiffs counter-argued that the act of state doctrine does not apply to invalidate the orders issued by the Hawaii District Court because the purported acts of the ROP fall outside the scope of the doctrine's application as delimited by relevant jurisprudence.

The plaintiffs posited that the purported act of the Philippine Supreme Court did not concern matters "within its own territory." In contrast, the development of the act of state doctrine—from the first formulation of the doctrine in *Underhill v. Hernandez*[38] to its sharpening in *Banco Nacional de Cuba v. Sabbatino*[39] and in the *Restatement of the Law Third, the Foreign Relations Law of the United States* – ineluctably recognizes territorial restrictions.[40] The plaintiffs argued thus:

> The deposited funds in dispute in this appeal are (or were at the time of the decisions of the Philippine Supreme Court) all located outside the territorial boundaries of the Republic of the Philippines. Because the essential locus of a bank deposit is at the location of the branch where the deposit was made, the *situs* of all these disputed assets must be considered for the purpose of this appeal to be outside the Philippine territory. If the Philippine court purported to control these assets, it was seeking to extend the reach of its decree to assets outside its jurisdiction.
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> PNB's petition cites no cases to support its position that the act of state doctrine has applicability to assets outside the country exercising official

37. *Id.* at 40-41.

38. 168 U.S. 250, 18 S. Ct 83, 42 L. Ed. 456 (1987).

39. 376 U.S. 398, 423, 84S. Ct. 923, 11 L. Ed. 2d 801 (1964).

40. Philippine National Bank v. U.S. Dist. Ct. for the Dist. of Haw. (In re Philippine National Bank), 397 F.3d 768 (9th Cir. 2005) (Response of Real Party In Interest Maximo Hilao to the Petition of Philippine National Bank for Writ of Mandamus and its Motion for a Stay of Proceedings at 33-37).

> action, because no such cases exist. The only cases cited by PNB in this section of its Petition (beside *Underhill* and *Sabbatino*) are *Reebok International Ltd. v. Mclaughlin*, 49 F.3d 1387, 1390-1391 (9th Cir, 1995) and the 199[6] *Credit Suisse* decision. *Reebok* is not on point because this Court concluded in that case that the U.S. District Court did not have personal jurisdiction over Banque Internationale a Luxembourg. In the present case, by contrast, the District Court clearly has jurisdiction over PNB and PNB has never argued otherwise. *Credit Suisse* is also inapplicable, because that case involved an act of the Swiss executive branch and assets that were within the territorial boundaries of Switzerland.[41]

Additionally, the plaintiffs argued that the act of state doctrine applies only to executive actions and/or legislative acts of the highest level such that a judicial decision by a foreign court is insufficient to set the doctrine in play. They said that "[a] judgment issued by a court is usually not an act of state, because such judgment 'involves the interests of private litigants' and 'court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests.'"[42] They expounded:

> In essence, then, PNB asks this Court to expand the concept of the act of state doctrine to apply to activity that it has never covered. This assertion flies in the face of teachings by the U.S. Supreme Court explaining that the scope of the act of state doctrine is limited and that it should not be invoked to reduce the power and obligation of U.S. courts to decide cases and controversies….
>
> PNB cites no authority for the proposition that a foreign court decision regarding assets outside the territorial boundaries of that court's country constitutes an act of state warranting deference by a United States court because there is no such authority. Indeed, the motivating force behind the United States Supreme Court's seminal decision in *Sabbatino* is that the separation of powers between the executive and judicial branches of government should be maintained so that the U.S. Executive Branch, alone, can address controversial matters of foreign and international policy. *That same principle also leads inevitably to the conclusion that a subsequent judgment in a foreign court – particularly where the property to be executed upon is located outside of that foreign state – is not entitled to deference in the United States as an act of state.*[43]

C. Amplifying the Act of State Doctrine Argument

PNB squarely addressed the plaintiffs' counter-arguments by amplifying its discussion of the act of state doctrine in its reply. PNB rebutted the plaintiffs'

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41. *Id.* at 33 & 36-37 (citations omitted).

42. *Id.* at 37-38 (citations omitted).

43. *Id.* at 38-40 (citations omitted) (emphasis supplied).

contention that the Forfeiture Decision did not pertain to property within Philippine territory on two fronts.

First, PNB reiterated that the act of state doctrine is not limited to acts that involve a taking of property, but rather includes other governmental acts. Assailing the plaintiff's misstatement of the doctrine, PNB emphasized that under the *Restatement of the Law Third, the Foreign Relations Law of the United States* § 443(1) the "doctrine applies to two types of acts of foreign states: (1) a taking of property within its own territory and (2) other acts of a governmental character done by a foreign state within its own territory."[44] The second category subsumes the Forfeiture Decision:

> Here, *the act of state which the September 2003 Orders nullify*, and which would necessarily be disregarded if PNB were to be held in contempt or sanctioned as a result of a ruling on the [Order to Show Cause], *did not concern a taking of property, but a decision of the Philippine Supreme Court regarding the rightful ownership of property, an act indisputably done within the Philippines, regardless of where the subject assets were located. The forfeiture of the escrowed funds was not a taking or expropriation or confiscation. Rather, the Forfeiture Proceeding, which after long litigation (recognized and participated in by the Marcoses) was finally resolved by the Philippine Supreme Court, is the culmination of the effort of the Republic to seek, using the words of the Second Circuit, "recovery of property illegally taken by a former head of state, not confiscation of property legally owned by him."* Republic of the Philippines v. Marcos, 806 F.2d 344, 360 (2d Cir. 1986).[45]

Second, assuming arguendo that the Forfeiture Decision is correctly characterized as a taking of property by the ROP, the taking did occur in the Philippines and not, as vigorously asserted by the plaintiffs, outside it. This is due to the following factors: (a) the litigation over the rightful ownership of the funds took place solely in the Philippines between Philippine parties, including the ROP; (b) PNB, the escrow-holder, is a Philippine bank domiciled in the Philippines; (c) the escrow agreements were executed in the Philippines; (d) the Sandiganbayan declared and asserted exclusive control over the escrowed funds; and (e) the *Writ* of Execution that led to the delivery of the funds to the ROP was issued and served on PNB in the Philippines.[46]

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44. Philippine National Bank v. U.S. Dist. Ct. for the Dist. of Haw. (In re Philippine National Bank), 397 F.3d 768 (9th Cir. 2005) (Reply of Philippine National Bank in Support of Petition for *Writ* of *Mandamus* and Motion for Stay at 6) [hereinafter "PNB's Reply"].

45. *Id.* at 8.

46. *Id.* at 8-9.

PNB likewise rebutted plaintiffs' argument on the Singapore *situs* of the funds by focusing on the fact that the object of the taking was intangible property. When intangibles are involved the determination of *situs* in order to apply the act of state doctrine requires a different sort of analysis emphasizing a pragmatic approach. The *Restatement of the Law Third, the Foreign Relations Law of the United States* accordingly suggests that:

> In principle, it might be preferable to approach the applicability of the act of state doctrine to intangible assets not by searching for an imaginary situs for property that has no real situs, but by determining how the act of the foreign state in the particular circumstances fits within the reasons for the act of state doctrine and for the territorial limitation.47

The Fifth Circuit developed this practical approach into a test in *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*,[48] which the Ninth Circuit adopted in *Tchacosh Co., Ltd. v. Rockwell Intern. Corp.*[49] The test formulated by the Fifth Circuit in *Tabacalera* reads:

> The underlying thought expressed in all of the cases touching on the Act of State Doctrine is a common sense one. It is that when a foreign government performs an act of state which is an accomplished fact, that is when it has the parties and the *res* before it and acts in such manner as to change the relationship between the parties touching the *res*, it would be an affront to such foreign government for courts of the United States to hold that such act was a nulli[t]y.[50]

Applying this test, PNB then concluded that the forfeiture of the funds "has absolutely no impact on Singapore and little or none on the United States, but has serious political, economic and social consequences to the [ROP]" and that the Hawaii District Court's unsupported conclusion that the Forfeiture Decision "is 'entitled to no respect or deference by this Court' has clearly offended the Philippine government."[51]

The bank's next hurdle was the Plaintiffs' contention that the scope of the act of state doctrine excludes judgments issued by a foreign court because such judgments involve private litigants and are not the means by which a state gives effect to its public interest. PNB dispelled this argument by negating the proposition that the act of state doctrine is not violated when an

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47. *Id.* at 9-10 *citing* RESTATEMENT OF THE LAW THIRD, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §443 n. 4 (1987).

48. Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968).

49. Tchacosh Co., Ltd. v. Rockwell Intern. Corp., 766 F.2d 1333 (9th Cir. 1985).

50. PNB's Reply, *supra* note 44 at 10.

51. *Id.* at 11-12 (reference to the records omitted).

American court nullifies the judgment of a foreign court on the basis of the American court's finding that the foreign court violated its own adjectival rules. The bank asserted:

> There is no rule that the act of state doctrine cannot be violated by an American court which declares invalid a final decision of the highest court of a sovereign nation. The doctrine applies generally to "the official act of a foreign sovereign performed within its own territory." Here, the District Court's September 2003 Orders, which nullify a decision of the highest court of the Philippines because it purportedly did not comport with "due process by any standard," clearly meets that test. The only standard referenced by the District Court for this bold conclusion is that the Philippine Supreme Court allegedly set aside "its own rules of evidence and procedure." It is well established that the act of state doctrine precludes judicial examination of the validity or lawfulness of the act of a foreign government on the ground that it was contrary to the state's own constitution or laws.[52]

Furthermore, in situating the controversy within its peculiarly Philippine context, PNB averred that acts of the Philippine executive and legislative branches were also involved. The bank first characterized the Forfeiture Decision as the end result of the efforts by the executive branch of the ROP to recover the Marcos ill-gotten wealth. PNB emphasized that the forfeiture proceedings initiated by the ROP "is not a case involving ordinary civil litigation between private parties, but one by the foreign state itself based on political and public policy decisions of its executive branch."[53] These decisions were crystallized through the following issuances of Philippine President Corazon C. Aquino: (a) Executive Order No. 1 which created the PCGG in order to assist in the recovery of all ill-gotten wealth accumulated by Marcos, his family and their cronies; (b) Executive Order No. 2 which authorized the freezing of all Marcos assets in the Philippines and authorized the PCGG to request foreign governments where any such assets might be found to freeze them pending adjudication of ownership in the Philippine courts; and (c) Executive Order No. 14 which gave the Sandiganbayan original and exclusive jurisdiction over cases filed by the PCGG involving the recovery of the Marcos ill-gotten wealth, such as the forfeiture proceedings.[54] Consequently, PNB concluded thus:

> It follows that every act leading to the Philippine Supreme Court decision was grounded on the prior and continuing decision of the Philippine executive branch to recover ill-gotten wealth of Marcos and the executive action, through the PCGG, to pursue recovery of such assets. The

52. *Id.* at 12-13 (citations and reference to the records omitted).

53. *Id.* at 13.

54. *Id.* at 13-14.

> September 2003 Orders and the [Order to Show Cause] are affronts to the Philippine government, not just to its judicial branch, but its executive branch as well.[55]

It should be noted that Philippine President Aquino was expressly charged by the Philippine Constitution to go after the ill-gotten wealth of the Marcoses and their cronies: "The President shall give priority to measures to achieve the mandate of the people to … (d) *recover ill-gotten properties of the previous regime and protect the interest of the people through orders of sequestration or freezing of assets or accounts*."[56] She therefore issued the aforesaid executive orders in compliance with this constitutional mandate and, also, in exercise of her legislative powers as conferred by the Philippine Constitution.[57]

Second, PNB argued that even the Philippine Congress has asserted its power to appropriate public funds over the escrowed assets. Specifically, Section 63(b) of Republic Act No. 6657 or the Comprehensive Agrarian Reform Law of 1988 (CARL), as amended through Republic Act No. 8532, earmarked the proceeds from the Marcos ill-gotten wealth to fund the country's agrarian reform program. Accordingly, the Hawaii District Court's "attempt to coerce use of the escrowed funds to satisfy the judgment in this case directly contradicts the will of the Philippine legislature in enacting CARL, which is an expression of its public policy that such funds be reserved for land reform."[58]

PNB concluded the presentation of its case by differentiating between the Hawaii District Court's tort judgment in favor of the plaintiffs and the Philippine Supreme Court's forfeiture judgment in favor of the ROP:

> The judgment in favor of plaintiffs in the case below is a money judgment based on tort claims. It is directed against individuals, not against property. So is the District Court's Permanent Injunction. Since plaintiffs' money judgment is *in personam* only, it is not in any sense conflicting with the judgment for the Republic in the Forfeiture Proceeding, which was an *in rem* proceeding relating to ownership of the escrowed funds. On the other hand, the September 2003 Orders (on which the [Order to Show Cause] is predicated) are clearly designed to restrain the world from making any

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55. *Id.* at 13-14 (reference to the records omitted) (emphasis supplied).

56. Proclamation No. 3, Provisional Constitution of the Republic of the Philippines, art. ii, § 1 (Mar. 24, 1986) (emphasis supplied).

57. President Aquino's legislative powers ended on July 27, 1987 when the first Congress under the 1987 Constitution convened. *See* 1987 PHIL. CONST. art. xviii, § 6 *and* JOAQUIN G. BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1337 (2003 ed.).

58. PNB's Reply, *supra* note 44, at 13-14.

> transfer of the escrowed funds. The District Court has never had, and plaintiffs do not claim that it had, any jurisdiction over the escrowed funds. The District Court must not be allowed to restrain PNB from transferring the escrowed funds to the Republic, or to sanction it for doing so. A *writ* of *mandamus*, as requested by PNB in its Petition, should be issued at this time.[59]

IV. AFFIRMING THE ACT OF STATE DOCTRINE ARGUMENT

A. Mandamus Factors Availing

In *Philippine National Bank v. United States District Court for the District of Hawaii (In re Philippine National Bank)*,[60] the Ninth Circuit granted PNB's petition for *writ* of *mandamus*. In deciding whether to issue the *writ*, the court considered the presence of the so-called *Bauman* guidelines or factors, namely: (1) The party seeking the *writ* has no other adequate means, such as a direct appeal, to attain the relief he or she desires; (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal; (3) The district court's order is clearly erroneous as a matter of law; (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; (5) The district court's order raises new and important problems, or issues of law of first impression.[61] The Ninth Circuit further noted that none of these factors or guidelines is determinative and all five factors need not be concurrently satisfied in order for a *writ* of *mandamus* to issue.[62]

In the Ninth Circuit's analysis, only the fourth factor is missing in PNB's petition. As regards the fifth factor, the court ruled that the "district court's ruling raises new and important problems regarding the act of state doctrine."[63] Accordingly, it held:

> Four of the five Bauman factors thus favor issuance of the *writ*. We therefore grant the Bank's petition. The district court's order, dated February 25, 2004, to the Philippine National Bank to show cause, and its order, dated April 8, 2004, to the Bank to produce its employee, Rogel L. Zenarosa, for a deposition are vacated. The district court is directed to

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59. *Id.* at 17-18.

60. 397 F.3d 768 (9th Cir. 2005).

61. In re Philippine National Bank, 397 F.3d at 774, *citing* Bauman v. U.S. Dist. Ct., 557 F.2d 650, 654-55 (9th Cir. 1977).

62. *Id.*, *citing* Credit Suisse v. U.S. Dist. Ct for the Dist. Of Cal., 130 F.3d 1342, 1345 (9th Cir. 1997)).

63. *Id.* at 775.

> refrain from any further action against the Philippine National Bank in this action or any other action involving any of the funds that were the subject of the decision of the Philippine Supreme Court dated July 15, 2003. This court retains jurisdiction over the district court litigation, MDL No. 840, to the extent that it involves any action against the Philippine National Bank.
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> *WRIT OF MANDAMUS ISSUED.*[64]

Undeterred, the plaintiffs and the Marcos Estate respectively filed petitions for rehearing *en banc*, which the Ninth Circuit denied on 30 March 2005. On 27 May 2005, the Ninth Circuit's *Writ* of *Mandamus* was filed in the Hawaii District Court, directing Judge Real to "take such action as is consistent with the opinion of the Court filed February [4], 2005."[65]

B. The Forfeiture Decision is an Act of State

The Ninth Circuit resolved the "new and important problems" spawned by the Hawaii District Court's orders by holding that such orders violated the act of state doctrine. Citing the *Underhill* and *Kirkpatrick* cases, the Ninth Circuit observed that while the act of state doctrine was originally deemed to arise from international law, it has more recently been viewed as a function of the constitutional separation of powers.[66] This view of the doctrine "reflects the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs."[67] Using this understanding of the doctrine as its prism, the Ninth Circuit ruled:

> The district court's orders in issue violated this principle. In order to obtain assets from the Philippine [National] Bank, or to hold the Bank in contempt for the transfer of those assets to the Republic, the district court necessarily (and expressly) held invalid the forfeiture judgment of the Philippine Supreme Court. We conclude that this action of the district court violated the act of state doctrine.[68]

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64. *Id.*

65. Philippine National Bank vs. U.S. Dist. Ct. for the Dist. Of Haw. (In re Philippine National Bank), 397 F.3d 768 (9th Cir. 2005) (*Writ* of *Mandamus*, May 23, 2005).

66. In re Philippine National Bank, 397 F.3d at 772, *citing* Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897) and W.S. Kirkpatrick & Co. v. Environmental Tectonics Corporation, International, 493 U.S. 400, 404, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990).

67. *Id.* (internal quotations omitted) *citing* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 84 S.Ct. 923, 11 L.Ed.2d 801 (1964).

68. *Id.* (emphasis supplied).

The Ninth Circuit found that the Forfeiture Decision of the Philippine Supreme Court qualifies as an act of state. It subscribed to PNB's position that the doctrine is not limited to governmental acts taken by the executive and legislative branches of a foreign state. The Ninth Circuit reasoned that while "the act of state doctrine is normally inapplicable to court judgments arising from private litigation, there is no inflexible rule preventing a judgment sought by a foreign government from qualifying as an act of state."[69] Moreover, according to the court, the Forfeiture Decision actually advanced the public policy of the ROP to recover the Marcos ill-gotten wealth:

> There is no question that the judgment of the Philippine Supreme Court gave effect to the public interest of the Philippine government. The forfeiture action was not a mere dispute between private parties; it was an action initiated by the Philippine government pursuant to its "statutory mandate to recover property allegedly stolen from the treasury." We have earlier characterized the collection efforts of the Republic to be governmental. The subject matter of the forfeiture action thus qualifies for treatment as an act of state.[70]

That the act of state doctrine may equally apply to court judgments is not lost to the *Restatement of the Law Third, The Foreign Relations Law of the United States*. According to this treatise, the act of state doctrine is "directed to acts of general application decided by the executive and legislative branches of the acting state, *even if confirmed or applied by courts in that state*."[71]

C. Doctrine's Underlying Considerations Outweigh Singapore Situs

The Ninth Circuit next disposed of the plaintiffs' arguments pertaining to the territorial limitations of the doctrine. The court found that the Philippine Supreme Court's act was in fact done within the Philippines and was not wholly external because its judgment, which the Hawaii District Court declared invalid, "was issued in the Philippines and much of its force upon [PNB] arose from the fact that the Bank is a Philippine corporation."[72]

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69. *Id.* at 773, *citing* Liu v. Republic of China, 892 F.2d 1419, 1433-34 & n. 2 (9th Cir. 1989).

70. *Id. citing* Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litigation), 94 F.3d 539, 546 (9th Cir. 1996) (footnote citation omitted) (emphasis supplied).

71. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 443 reporter's note 10 (1987) (drawing a distinction between the public judgment doctrine and the act of state doctrine) (emphasis supplied).

72. In re Philippine National Bank, 397 F.3d at 773.

As regards the Singapore *situs* of the escrowed funds, the Ninth Circuit affirmed PNB's contention that a pragmatic and flexible approach should be applied when the act of state doctrine is asserted vis-à-vis intangible property. According to the court, assuming that the assets were located in Singapore, such *situs* does not preclude treatment of the Forfeiture Decision as an act of state in the extraordinary circumstances of the case. The Ninth Circuit concluded:

> Thus, *even when an act of a foreign state affects property outside of its territory, "the considerations underlying the act of state doctrine may still be present." Because the Republic's "interest in the enforcement of its laws does not end at its borders," the fact that the escrow funds were deposited in Singapore does not preclude the application of the act of state doctrine. The underlying governmental interest of the Republic supports treatment of the judgment as an act of state.*[73]

Finally, the Ninth Circuit alluded to its *Credit Suisse* opinion as having approved the Swiss acts of state that ultimately resulted in PNB investing the proceeds of the Marcos Swiss assets in Singapore:

> It is most important to keep in mind that the Republic did not simply intrude into Singapore in exercising its forfeiture jurisdiction. The presence of the assets in Singapore was a direct result of events that were the subject of our decision in *Credit Suisse*.... Indeed, the Philippine National Bank argues that the district court's orders violated our mandate in *Credit Suisse* "directing the district court to refrain from taking any further action" with regard to assets of the Marcos estate "held or claimed to be held by the [Swiss] Banks." The district court held that our mandate did not apply to the assets once they left the hands of the Swiss banks. We need not decide the correctness of that ruling because we conclude that, in these circumstances, the Philippine forfeiture judgment is an act of state. *The Swiss government did not repudiate its freeze order, and the Swiss banks did not transfer the funds in the ordinary course of business. They delivered the funds into escrow with the approval of the Swiss courts in order to permit the very adjudication of the Philippine courts that the district court considered invalid. To permit the district court to frustrate the procedure chosen by the Swiss and Philippine governments to adjudicate the entitlement of the Republic to these assets would largely nullify the effect of our decision in Credit Suisse. In these unusual circumstances, we do not view the choice of a Singapore locus for the escrow of funds to be fatal to the treatment of the Philippine Supreme Court's judgment as an act of state.*[74]

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73. *Id.* at 773-74, *citing* Callejo v. Bancomer, S.A., 764 F.2d 1101, 1121 n.29 (5th Cir. 1985) (emphasis supplied).

74. *Id.* at 774 (citations omitted) (emphasis supplied).

V. CONCLUSION

The application of the act of state doctrine is traditionally limited to those governmental acts taken by the highest echelons of a foreign state's executive and legislative branches, and to such acts taken, or concerning matters, within the territory of the acting foreign state. The case of *Philippine National Bank v. U.S. Dist. Ct. for the Dist. of Haw*[75] fine-tuned the scope of application of the act of state doctrine by transcending these traditional limitations.

In this opinion, the Ninth Circuit deemed as an act of state a judgment of the Philippine Supreme Court forfeiting ill-gotten assets of former Philippine President Marcos in favor of the ROP. The fulcrum of this holding rests on the proper characterization of the Forfeiture Decision as the necessary conclusion of the effort by the ROP to recover the ill-gotten wealth of its former head of state, erstwhile stashed in Switzerland, which recovery effort effectuates an established and fundamental public policy. Such characterization further overrides the territorial limitation usually ascribed to the act of state doctrine such that the undergirding rationale of the doctrine far outweighs the Singapore *situs* of the forfeited assets.

75. In re Philippine National Bank, 397 F.3d 768 (9th Cir. 2005).