C. THE ACT OF STATE DOCTRINE DOES NOT BAR THIS INTERPLEADER ACTION.

1. Introduction

Defendants Republic of the Philippines and the Presidential Commission on Good Government (PCGG)(hereafter referred to as "PCGG") argue that the present interpleader action is barred by the act of state doctrine. Their argument is that this interpleader action, governing the distribution of the Arelma Merrill Lynch account, will interfere "with the orders of assistance rendered to the Philippines by the Swiss government." The argument presented by the PCGG is meritless for several reasons. The PCGG has not carried its burden of establishing that the judicial act of the Swiss court meets the formal requirements of being an official "act of state," nor has it demonstrated that the interpleader action in the U.S. District Court would require any U.S. court to question the legitimacy of the Swiss action. And most significantly, as explained below, because the property in dispute is not within the jurisdiction of Switzerland, the act of state doctrine has no applicability to any Swiss action that attempts to control the property. Even if it could be established that the Swiss action was an act of state, the legitimacy of that action should be questioned in a United States court since the assets at issue are in the United States.

At page 11 of its memorandum, the PCGG offers the "classic formulation" of the act of state doctrine from Underhill v. Hernandez, 168 U.S. 250, 252 (1897): "the courts of one country will not sit in judgment on the acts of the government of another country *done within its own territory*" (emphasis added). It is undisputed by the parties in this case that the Merrill Lynch account in dispute is not, in fact, in Switzerland, but is rather in the United States, where it has always been. If the action of the Swiss court was designed to govern these assets within the United States, then the Swiss court was attempting to govern matters extraterritorially, and the act of state doctrine would not be applicable to its decree.

2. The Location of the Assets Bars Application of the Act of State Doctrine

The fact that the Merrill Lynch accounts at issue are located in the United States is dispositive of the Republic's "act of state doctrine" argument. "Notions of territoriality run deep through the doctrine." Tchacosh Co. v. Rockwell International Corp., 766 F.2d 1333, 1336 (9th Cir. 1985) . The United States indisputably has an independent concern with protecting property and transactions within its borders, and it is that interest which forms the basis of the so-called "extraterritorial exception" to the act of state doctrine. F. & H.R. Farman-Farmaian Consulting Engineers Firm v. Harza Engineering Co., 882 F.2d 281, 287 (7th Cir. 1989) .

This exception is well settled – "when property is located within United States territory at the time of confiscation, 'the policies mandating a hands-off attitude no longer apply with the same force.'" Tchacosh Co., 766 F.2d at 1337 (quoting Bandes v. Harlow & Jones, Inc., 570 F. Supp. 955, 960 (S.D.N.Y. 1983)). Instead, "[w]hen property confiscated [by a foreign sovereign] is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" Id. (quoting Republic of Iraq v. First National City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966)).

It follows that "act of state" objections to interpleader jurisdiction have no merit where the stakeholder and the property at issue are located in the United States and deposit the property with the United States courts. For example, in Bandes v. Harlow & Jones, Inc., 852 F.2d 661 (2d Cir. 1988), the court rejected an "act of state" argument in a case procedurally similar to the case at bar. Bandes, a New York resident, sued Harlow & Jones ("H&J"), a

Connecticut steel manufacturer, in the Southern District of New York, seeking to recover inventory that was in H&J's possession when the Sandinista government seized control of Bandes' Nicaraguan steel corporation. H&J then filed an interpleader in the same court, naming Bandes and the Sandinista-appointed representative of the seized corporation as claimants. Id. at 664-65. The Court refused to dismiss the case based on the "act of state" doctrine, despite the "official" transfer of control over the corporation, because the inventory was located in the United States.

> The rationale [underlying the doctrine], however, does not extend to property located within the United States. When another state attempts to seize property held here, our jurisdiction is paramount. Conversely, the foreign sovereign is acting beyond its enforcement capacity when it involves itself within our nation's jurisdiction. The act of state doctrine, accordingly, does not apply, and we may look to our own laws to determine the reach of the foreign sovereign's proscriptions. Only acts that are consistent with this nation's policies will be given effect within our borders.

Id. at 666-67 (internal citations omitted). See also F. & H.R. Farman-Farmaian Consulting Engineers Firm v. Harza Engineering Co., 882 F.2d 281, 285 (7th Cir. 1989) (noting that courts have properly rejected the proposition that "a foreign sovereign's dissolution of its own corporation is dispositive of the corporation's power to exercise dominion over assets located within the United States simply because the dissolution of the corporation is an "act of a foreign state, done within its own territory.'")

To overcome this argument the PCGG cites the Legal Assistance Treaty between the United States and the Philippines. However, the only portion of the treaty having even a remote nexus with this case, article 16, provides for determinations by [judicial] authorities in the country having jurisdiction over the property subject to forfeiture. Thus article 16 supports the interpleader litigation here. Moreover, the Treaty is a bilateral instrument between two nations and there is no evidence that the Philippines has invoked its terms.

Therefore, because the United States has sole jurisdiction over the Merrill Lynch account at issue, the potential for interference with foreign acts of state with respect to that account is not a bar to jurisdiction in this case.

3. The Burden Is on the PCGG to Prove That an Act of State Occurred.

The U.S. Supreme Court held squarely in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 691, 694-95 (1976), that the party attempting to hide behind the act of state doctrine has the burden to prove that an event occurred that constitutes an act of state. See also Republic of the Philippines v. Marcos, 862 F.2d 1355, 1361 (9th Cir. 1988)(*en banc*), *cert. denied,* 490 US. 1035 (1989)(confirming that "[t]he burden of proving acts of state rests on the party asserting the applicability of the doctrine"); Liu v. Republic of China, 892 F.2d 1419, 1432 (9th Cir. 1989)(adding that "[a]t a minimum, this burden requires that a party offer some indication that the government acted in its sovereign capacity and some indication of the depth and nature of the government's interest").

4. The Swiss Judicial Order Is Not an Act of State Because It Is Only a Provisional and Temporary Act, Not a Final and Conclusive One, and Because It Was Issued by a Court Rather than by the Executive Branch.

A matter rises to the status of an "act of state" only if it is an official and final act formally decreed by a government. To qualify, an event must be "the public act of those with authority to exercise sovereign powers" sufficient to be "entitled to respect in our courts." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 694 (1976). In Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1535 (D.C. Cir. 1984), *vacated on other grounds*, 105 S.Ct. 2353 (1985), an *en banc* panel ruled that a decree issued by the President of Honduras saying that property "shall be expropriated under the right of eminent domain on account of public exigency and for the public good" was not an act of state because "a conclusive foreign act must be completed before the doctrine is invoked," *id.* at 1535 n. 154 (relying on language in the Restatement (Second) of the Foreign Relations Law of the United States (1965), sec. 43 comment a, which said that the "act of state doctrine...becomes applicable only when and if the act has been fully executed").

A judgment issued by a court is usually not an act of state, because such a 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." Liu v. Republic of China, 892 F.2d 1419, 1433 (9th Cir. 1989), *cert. dismissed*, 497 U.S. 1058 (1990)(quoting from Restatement (Second) of Foreign Relations Law of the United States (1965), sec. 41 comment d). Numerous cases illustrate that U.S. courts are reluctant to grant the elevated "act of state" status to events that occur in the context of administrative or judicial proceedings. *See, e.g.*, Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 607-08 (9th Cir. 1976)(refusing to grant "act of state" status to the administrative actions of the Honduran government and its judicial decrees); Mannington Mills, Inc. v. Congoleum Corp. 595 F.2d 1287, 1295 (3rd Cir. 1979)(refusing to grant "act of state" status to a foreign sovereign's grant of a patent); Faysound Ltd. v. Walter Fuller Aircraft Sales, Inc., 748 F.Supp. 1365, 1374 (E.D.Ark. 1990)(ruling that the PCGG's foreign judicial judgment did not rise to the status of an act of state, and that the sale by the PCGG had the "strong odor of corruption").

5. This Interpleader Action Does Not Require U.S. Courts to Examine the Legitimacy of the Swiss Decision.

In W.S. Kirkpatrick & Co. v. Environmdntal Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990), the U.S. Supreme Court explained that the act of state doctrine is not relevant to a case in which a court can grant the requested relief without "declar[ing] invalid the official act of a foreign sovereign performed within its own territory." Because the assets in dispute are within the jurisdiction of the United States, the actions taken by the U.S. courts regarding these assets are not inconsistent with actions taken by the Swiss government regarding share certificates of Arelma, Inc. within its control. Because the two court systems can operate separately within their separate spheres of jurisdiction, the act of state doctrine is not implicated.

6. The Act of State Doctrine Is Inapplicable Because the Purported Act of the Swiss State Did Not Concern Matters "Within Its Own Territory."

As the PCGG Memorandum explains at page 7, Arelma, S.A., is a Panamanian corporation established with the "sole business" of maintaining a Merrill Lynch account in New York. At page 12 n.6, the PCGG recognizes "that Arelma's only reason for being was the Merrill Lynch account." The PCGG also acknowledges at page 2 of its Memorandum that "Merrill Lynch has held the Arelma assets for many years," and thus that these assets have always been located in the United States. Just as the essential locus of a bank deposit is at the

location of the branch where the deposit was made, *see* Hilao v. Estate of Marcos, 95 F.3d 848, 851 (9th Cir. 1996), the only situs of the Merrill Lynch account was in the United States, where the investment was made and managed. If the Swiss court purported to freeze these assets, it was seeking to extend the reach of its decree to assets outside its jurisdiction.

The act of state doctrine, but its very terms, is limited to activities undertaken by a government regarding matters "within its own territory." *See* Underhill v. Hernandez, 168 U.S. 250, 252 (1897); Alfred Dunhill of London, Inc. v. Republic of Cuba, 452 U.S. 682, 691 n.7 (1976). U.S. courts have repeatedly refused to apply the doctrine to activities and assets located outside the country that has exercised an "act of state." *See, e.g.,* Liu v. Republic of China, 892 F.2d 1419, 1431-33 (9th Cir. 1989)(refusing to apply the act of state doctrine to the Republic of China's murder of an individual within the United States, because an inquiry into the "legality and propriety of an act that occurred within the borders of the United States...would hardly affront the sovereignty of a foreign nation"); Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980)(refusing to apply the act of state doctrine to the Republic of Chile's activities in planning the assassination of an individual within the United States); Flatow v. Islamic Republic of Iran, 999 F.Supp. 1, 24 (D.D.C. 1998)(refusing to apply the act of state doctrine to the Islamic Republic of Iran's participation in the bombing of a bus in Israel, even if the actions taken by Iran were on Iranian soil, in part because "the bombing complained of" was not "perpetrated within the Islamic Republic of Iran"); Restatement (Third) of the Foreign Relations Law of the United States (1987), sec. 443 Reporters' Note 4 ("The act of state doctrine does not extend to takings of property located outside of the territory of the acting state at the time of the taking, even if the property belonged to an enterprise based in that state.")

Because the property in dispute is in Hawaii and was never in Switzerland, any action taken by any Swiss governmental body regarding this property would thus not be covered by the act of state doctrine