

THE EFFECT OF THE TAIWAN RELATIONS ACT OF 1979 ON *RES JUDICATA* AND COLLATERAL ESTOPPEL WITH RESPECT TO TAIWANESE AND THIRD-COUNTRY PARTIES IN UNITED STATES COURTS

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ABSTRACT

President Jimmy Carter terminated diplomatic relations between the United States and the Republic of China (the ROC) or Taiwan on January 1, 1979, and Congress enacted the Taiwan Relations Act of 1979 (the TRA), effective on April 10, 1979, in order to replace the former diplomatic relations. The question then arose as to whether United States courts must recognize and enforce judgments of Taiwanese courts with respect to third-country plaintiffs who have prevailed over Taiwanese defendants. If so, then such third-country plaintiffs would be able to rely on the principles of *res judicata* and collateral estoppel in United States courts. If not, then losing Taiwanese defendants in judgments of Taiwanese courts may relitigate and retry cases against winning third-country plaintiffs in judgments of Taiwanese courts in United States courts.

An obscure New York state court case, *Serano Ltd. v. Canadian Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25, 2001 N.Y. App. Div. (2001) (*Serano*), was a case of first impression to consider this question. The courts never ruled on this question, however, as the case was dismissed based on the theory of *forum non conveniens*.

This article will attempt to resolve this question by analyzing *Serano* and the provisions of the TRA. This article concludes that, based on the provisions of the TRA, losing defendants in judgments of Taiwanese courts may relitigate and retry cases against winning third-country plaintiffs in judgments of Taiwanese courts in United States courts. This is contrary to the principles of *res judicata* and collateral estoppel as ordinarily applied in United States courts. A chart is provided in this article which summarizes when United States courts will recognize and enforce judgments from courts on Taiwan and apply the principles of *res judicata* and collateral estoppel as between: (1) Taiwanese natural and legal persons versus Taiwanese natural and legal persons; (2) Taiwanese natural and legal persons versus United States natural and legal persons; (3) Taiwanese natural and legal persons versus Third-Country natural and legal persons; (4) United States natural and legal persons versus Third-Country natural and legal persons; (5) Third-Country natural and legal persons versus Third-Country natural and legal persons; and (6) United States natural and legal persons versus United States natural and legal persons.

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1. INTRODUCTION

The People’s Republic of China (the PRC), on the mainland of Asia with a capital city of Beijing, was admitted to membership in the World Trade Organization (the WTO) as “China” on December 11, 2001.¹ The Republic of China (the ROC) or Taiwan, on the island known as either Taiwan or Formosa with a capital city of Taipei, was admitted to membership in the WTO as “Chinese Taipei” on January 1, 2002.² In order to establish diplomatic relations between the United States and the PRC, President Jimmy Carter terminated diplomatic relations between the United States and Taiwan effective at 12:00 a.m. on January 1, 1979.³ In order to replace the former diplomatic relations between the United States and Taiwan, Congress enacted on April 10, 1979 the Taiwan Relations Act of 1979 (the TRA).⁴

Since no diplomatic relations exist between the United States and Taiwan, the question arises as to whether United States courts must recognize and enforce judgments of Taiwanese courts with respect to third-country plaintiffs who have prevailed over Taiwanese defendants. If so, then such third-country plaintiffs can rely on the principles of *res judicata* and collateral estoppel in United States courts. If not, then losing Taiwanese defendants in judgments of Taiwanese courts may relitigate and retry cases against winning third-country plaintiffs in judgments of Taiwanese courts in United States courts.

This has significant multijurisdictional legal implications for third-country plaintiffs involved in international trade who have prevailed over Taiwanese defendants in Taiwanese courts if such third-

¹ General Council Decision, *Accession of the People’s Republic of China*, WT/L/432 (Nov. 23, 2001).

² General Council Decision, *Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu*, WT/L/433 (Nov. 23, 2001).

³ 22 U.S.C. § 3301(a) (2006).

⁴ 22 U.S.C. §§ 3301–16.

country parties also are residents, "doing business" in, or have assets in the United States. An obscure New York state court case of first impression, *Serano Ltd. v. Canadian Imperial Bank of Commerce (Serano)*,⁵ explored the issue of whether United States state courts must recognize and enforce judgments from Taiwanese courts with respect to winning third-country plaintiffs and losing Taiwanese defendants when no diplomatic relations exist between the United States and Taiwan. The New York state courts, however, never ruled on the issue because the case was dismissed on appeal from the trial court to the intermediate court of appeals based on the principle of *forum non conveniens*.⁶

This article assumes that a Taiwanese defendant losing to a third-country plaintiff in a judgment of a Taiwanese court can prevail in a United States court as the same Taiwanese plaintiff over the same third-country defendant in a motion to dismiss based on *forum non conveniens* made by the third-country defendant. The purpose of this article is to resolve the issue of whether United States courts must recognize and enforce judgments of Taiwanese courts with respect to third-country plaintiffs who have prevailed over Taiwanese defendants and therefore must apply the principles of *res judicata* and collateral estoppel. This will be done by analyzing: (1) the facts of *Serano*; (2) the *Serano* litigation *vis-à-vis* the Taiwanese and New York state courts; (3) the application of *forum non conveniens* by the New York state courts; (4) the application of *res judicata* and collateral estoppel by the New York state courts; (5) the provisions of the TRA; (6) the provisions of the TRA applied to the *Serano* litigation; and (7) the provisions of the TRA applied to United States and third-country parties in general. This article concludes that, based on the provisions of the TRA, losing Taiwanese defendants in judgments of Taiwanese courts may be able to relitigate and retry cases against winning third-country plaintiffs in United States courts. Opposite outcomes in the judgments of the Taiwanese and United States courts may result, contrary to the principles of *res judicata* and collateral estoppel as ordinarily applied in United States courts.

⁵ *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001). The author was counsel to *Serano* in the state trial and intermediate appellate courts of New York. He was retained in London, England by counsel in Taipei, Taiwan for the managing director and sole shareholder of *Serano* in Taipei, Taiwan.

⁶ See *id.*

2. THE FACTS SURROUNDING THE SERANO CONTRACTUAL RELATIONSHIPS

At the end of the last century, Serano Limited (Serano) was a corporation organized under the laws of the British Virgin Islands whose managing director and sole shareholder was a Chinese businessman living on Taiwan.⁷ Serano as a legal person was therefore a citizen of the British Virgin Islands. The Canadian Imperial Bank of Commerce (Canadian Imperial Bank) was a corporation organized under the laws of the Province of Ontario, Canada with a principal place of business or home office in Toronto, Ontario, Canada.⁸ Canadian Imperial Bank as a legal person was therefore a citizen of Canada.

Serano and Canadian Imperial Bank entered into an International Swap Dealers' Association Master Agreement (the Master Agreement) and a Schedule thereto governed by English law.⁹ The Master Agreement stated that Canadian Imperial Bank was a multijurisdictional organization.¹⁰ It also provided that only the Toronto, Ontario home office, the New York, New York, the London, England, or the Tokyo, Japan branch offices of Canadian Imperial Bank had the authority to enter into transactions on behalf of Serano.¹¹ For every transaction entered into for Serano by Canadian Imperial Bank, Serano was required under the Master Agreement to execute a document by its managing director called a Confirmation in which Serano confirmed the terms of the particular transaction entered into for it by Canadian Imperial Bank.¹²

In order to have a valid contract under English or American contract legal theory, there must be an offer communicated by the offeror to the offeree.¹³ There must also be a mirror image acceptance of the offer communicated by the offeree to the offeror.¹⁴ Confirmations executed by Serano as the offeree would act as written mirror image acceptances of offers to enter into transactions on behalf of Serano by Canadian Imperial Bank as the offeror.

⁷ Transcript of Record at 2-4, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377). The Record contains all the written documents filed in the case before the trial court, *i.e.*, the pleadings, motions, briefs, legal memoranda, affidavits, opinion of the trial court judge, and judgment entered by the clerk of court.

⁸ *Id.* at 2-3.

⁹ *Id.* at 5-6, 49, 58.

¹⁰ *Id.* at 57-58.

¹¹ *Id.*

¹² *Id.* at 36.

¹³ See CORBIN ON CONTRACTS § 1.11 (2009).

¹⁴ See *id.*

The sole shareholder of Serano in his personal capacity, and not in his corporate capacity as managing director of Serano, simultaneously entered into a Guarantee Agreement with Canadian Imperial Bank and the Master Agreement between Serano and Canadian Imperial Bank.¹⁵ Under the terms of the Guarantee Agreement, the sole shareholder of Serano in his personal capacity, and not in his corporate capacity as managing director of Serano, guaranteed to make payments to Canadian Imperial Bank on behalf of Serano if Serano defaulted on such payments or was not able to make them under the terms of the Master Agreement.¹⁶

Canadian Imperial Bank entered into four transactions on behalf of Serano for which Serano executed Confirmations under the Master Agreement.¹⁷ In other words, under Anglo-American contract legal theory, Serano, as the offeree, accepted offers made by Canadian Imperial Bank, as the offeror, under the Master Agreement. The Confirmations were prepared by Canadian Imperial Bank and showed on their faces that two of the four transactions were entered into on behalf of the New York City branch office of Canadian Imperial Bank and the other two of the four transactions were entered into on behalf of the London, England branch office of Canadian Imperial Bank.¹⁸

These four transactions were known as the "Confirmed Transactions."¹⁹ The Confirmations for these Confirmed Transactions required that payment for each of them be made by Serano to the New York City bank account of Canadian Imperial Bank whose New York City branch office supervised and documented the actual consummation of the transactions.²⁰

Canadian Imperial Bank also entered into four additional transactions on behalf of Serano for which Serano did not execute Confirmations under the Master Agreement.²¹ In other words, Serano, as the offeree, effectively rejected offers made by Canadian Imperial Bank, as the offeror, under the provisions of the Master Agreement. Serano, however, claimed that it had not authorized Canadian Imperial Bank to enter into these transactions on behalf of it, and, therefore, Serano did not execute the Confirmations for these four additional transactions.²² These four additional transactions were known as the "Unconfirmed Transactions" or the "Disputed Transac-

¹⁵ Transcript of Record at 488-91, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377).

¹⁶ *Id.*

¹⁷ *See id.* at 417-46.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 447-89.

²² *Id.* at 10-13, 447-89.

tions."²³ If Serano had executed Confirmations for these Disputed Transactions, they required that payment for each of the Disputed Transactions be made by Serano to the New York City bank account of Canadian Imperial Bank whose New York City branch office was to have supervised the actual consummation and documentation of the transactions.²⁴

Accordingly, Serano was due profits from Canadian Imperial Bank with respect to the Confirmed Transactions,²⁵ and Canadian Imperial Bank sustained losses with respect to the Unconfirmed Transactions.²⁶ Canadian Imperial Bank offset the profits it owed to Serano with respect to the Confirmed Transactions against the losses Canadian Imperial Bank sustained with respect to the Unconfirmed Transactions.²⁷ Canadian Imperial Bank sent a demand letter to Serano for payment of the difference between the profits Canadian Imperial Bank owed to Serano with respect to the Confirmed Transactions and the losses Canadian Imperial Bank sustained with respect to the Unconfirmed Transactions.²⁸ This demand was in excess of \$3.5 million.²⁹ After Serano received the demand letter from Canadian Imperial Bank, Serano sent a demand letter to Canadian Imperial Bank for payment of the profits Canadian Imperial Bank owed to Serano with respect to the Confirmed Transactions.³⁰ This was in excess of \$2.5 million.³¹

On one hand, Canadian Imperial Bank claimed that Serano had defaulted on the Unconfirmed Transactions or Disputed Transactions in breach of the Master Agreement, the Schedule thereto, and the unexecuted Confirmations for the Unconfirmed Transactions which Canadian Imperial Bank had prepared for execution and which Serano did not execute. On the other hand, Serano claimed that Canadian Imperial Bank had defaulted on the Confirmed Transactions in breach of the Master Agreement, the Schedule thereto, and the executed Confirmations for the Confirmed Transactions which Canadian Imperial Bank had prepared for execution and which Serano did execute.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 10-13, 61-62, 447-89.

²⁷ *Id.*

²⁸ *Id.* at 61-62.

²⁹ *Id.*

³⁰ *Id.* at 65-73

³¹ *Id.*

3. THE *SERANO* LITIGATION VIS-À-VIS THE TAIWANESE AND NEW YORK STATE COURTS

Two parallel court cases concerning the Serano contractual relations were litigated at the same time in the trial and appellate courts of Taiwan and in the state trial and intermediate appellate courts of New York.

First, Canadian Imperial Bank as plaintiff sued the managing director and sole shareholder of Serano in his personal capacity, because he was Guarantor under the Guarantee Agreement,³² in the trial courts on Taiwan. Canadian Imperial Bank sued for the difference between the profits Canadian Imperial Bank owed to Serano with respect to the Confirmed Transactions and the losses Canadian Imperial Bank sustained with respect to the Unconfirmed Transactions under the Master Agreement.³³ There was no judgment on Taiwan or elsewhere that Serano had defaulted on any payments it owed to Canadian Imperial Bank under the Master Agreement. Serano was not a party in the Taiwan case.³⁴

Second, after Canadian Imperial Bank commenced the Taiwan case, Serano sued Canadian Imperial Bank for breach of contract or, in the alternative, intentional breach of contract or, in the alternative, negligent breach of contract, in the state trial courts of New York, seeking the profits Canadian Imperial Bank owed to Serano with respect to the Confirmed Transactions under the Master Agreement as well as punitive damages.³⁵

³² See *id.* at 488–91. *Can. Imperial Bank of Commerce v. Lim Lung Fau*, Judgment of Taiwan District Court, Taipei, Taiwan, July 22, 1999. “On September 18, 1998, defendant [Canadian Imperial Bank] brought a Petition in Civil Action (‘Taiwan Petition’) in the Civil Tribunal of the Taipei District Court of Taiwan (‘Taiwan District Court’) against Lim, as the Managing Director and sole shareholder of plaintiff [Serano]. Exhibit A to Notice of Motion [to Dismiss].” *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

³³ Transcript of Record at 641–54, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377); *Can. Imperial Bank of Commerce v. Lim Lung Fau*, Judgment of Taiwan District Court, Taipei, Taiwan, July 22, 1999. “In the Taiwan Petition, defendant [Canadian Imperial Bank] sought \$3,431,541.51, plus interest and attorneys’ fees, based on Lim’s personal guarantee of plaintiff’s [Serano’s] obligations on all transactions.” *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

³⁴ *Can. Imperial Bank of Commerce v. Lim Lung Fau*, Judgment of the Taiwan District Court, Taipei, Taiwan, July 22, 1999.

³⁵ *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001).

After Serano commenced the New York case, the trial court in the Taiwan case entered judgment in favor of Canadian Imperial Bank against the managing director and sole shareholder of Serano in his personal and not in his corporate capacity and held him liable for damages in an amount in excess of \$3.5 million.³⁶

After the trial court in the Taiwan case entered judgment against the managing director and sole shareholder of Serano, the trial court in the New York case granted the motion of Canadian Imperial Bank to dismiss that case based on the principles of *res judicata* and collateral estoppel or, in the alternative, *forum non conveniens*.³⁷

After the trial court in the New York case dismissed that case, the managing director and sole shareholder of Serano appealed against the judgment of the trial court in the Taiwan case to the court of appeals on Taiwan.³⁸ Serano then appealed against the dismissal of the New York case to the state intermediate court of appeals in New York.³⁹

After Serano's appeal against the dismissal of the New York case, the court of appeals in the Taiwan case reversed the judgment of the Taiwanese trial court with respect to the judgment in excess of \$3.5 million entered in favor of Canadian Imperial Bank and remanded the case for a new trial.⁴⁰

After the court of appeals on Taiwan reversed and remanded the Taiwan case, the intermediate court of appeals in the New York case affirmed the dismissal by the trial court of that case based on the principle of *forum non conveniens*.⁴¹

The state intermediate court of appeals in New York never ruled in the New York case on the issue of whether United States courts must recognize and enforce judgments of Taiwanese courts with respect to third-country plaintiffs who have prevailed over Taiwanese

³⁶ Can. Imperial Bank of Commerce v. Lim Lung Fau, Judgment of the Taiwan District Court, Taipei, Taiwan, July 22, 1999.

³⁷ Serano Ltd. v. Can. Imperial Bank of Commerce, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

³⁸ Can. Imperial Bank of Commerce v. Lim Lung Fau, Judgment of the Taiwan District Court, Taipei, Taiwan, July 22, 1999.

³⁹ Serano Ltd., 287 A.D.2d at 309, 731 N.Y.S.2d at 25.

⁴⁰ Can. Imperial Bank of Commerce v. Lim Lung Fau, Judgment of the Taiwan Court of Appeals, Taipei, Taiwan. "On appeal, defendant [Canadian Imperial Bank] acknowledges that the action cannot be dismissed on the ground of *res judicata* by reason of the subsequent reversal of a Taiwanese judgment which had been rendered in its favor and upon which the IAS [trial] court had relied in dismissing the plaintiffs [Serano's] action." Serano Ltd., 287 A.D. 2d at 309, 731 N.Y.S.2d at 25.

⁴¹ See Serano Ltd., 287 A.D.2d at 309, 731 N.Y.S.2d at 25.

defendants, because the New York case was dismissed on appeal affirming the principle of *forum non conveniens*.⁴²

4. THE APPLICATION OF FORUM NON CONVENIENS BY THE NEW YORK STATE COURTS

The Master Agreement provided that it was subject to English law and that Canadian Imperial Bank was a multijurisdictional organization.⁴³ Two of the Confirmed Transactions were entered into for Serano on behalf of the New York, New York branch office of Canadian Imperial Bank.⁴⁴ Two of the Confirmed Transactions were entered into for Serano on behalf of the London, England branch office of Canadian Imperial Bank.⁴⁵ Under English banking law, each branch office of a bank is treated as a separate entity, although the head office is ultimately liable for the acts of each branch office.⁴⁶ Therefore, Serano as plaintiff could sue Canadian Imperial Bank as defendant for the profits Canadian Imperial Bank owed to Serano with respect to all four of the Confirmed Transactions under the Master Agreement in the courts of Ontario; or in the courts of New York; or in the courts of England. The head office of Canadian Imperial Bank in Toronto ultimately would be liable for the acts of its branch offices in New York and London if either or both of these branch offices were sued.

The connection between the Master Agreement and the courts of New York was strongest because under each of the Confirmations for the Confirmed Transactions Serano was required to wire-transfer funds to the New York City bank account of Canadian Imperial Bank whose New York City branch office consummated and documented all four of the transactions. In a successful lawsuit in the courts of New York, Serano could also be awarded punitive damages for either intentional or negligent, *i.e.*, tortious, breach of contract under the Master Agreement by Canadian Imperial Bank, which the courts of England

⁴² See *Serano Ltd.*, 287 A.D.2d at 309, 731 N.Y.S.2d at 25.

⁴³ See Transcript of Record at 36-54, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377).

⁴⁴ *Id.* at 417-46.

⁴⁵ *Id.*

⁴⁶ See *Libyan Arab Foreign Bank v. Bankers Trust Co.*, (1988) 1 L.R.Q.B. 259 (U.K.). The author was an international law intern from October 1, 1986 to December 15, 1986, with the solicitor offices of Herbert Oppenheimer, Nathan & Vandyk, City of London, England, and worked on this case. The issue was whether President Reagan's freeze on Libyan assets was enforceable on American branch banks in London. It was not. The firm of solicitors advised the U.S. Department of the Treasury in respect of the case. The internship the author completed was a required component for the award of the Diploma in Advanced International Legal Studies from the University of the Pacific, McGeorge School of Law, Salzburg, Austria, in December 1986.

do not have the authority to award.⁴⁷ Additionally, under American civil procedure law according to *International Shoe Co. v. Washington*,⁴⁸ minimum contacts of a legal person (a corporation) with a forum state may give the courts of that state personal jurisdiction over the legal person (the corporation) without violating the Due Process Clause of the United States Constitution. Canadian Imperial Bank had more than minimum contacts with New York, because it was "doing business" in that state through its New York City branch office.

Canadian Imperial Bank was required under the banking laws of New York to register its New York City branch office with the New York State Department of Banking and to name the Department as agent for service of process in New York. Therefore, Serano as plaintiff could sue Canadian Imperial Bank as defendant for the profits Canadian Imperial Bank owed to Serano with respect to all four of the Confirmed Transactions under the Master Agreement and for punitive damages in respect of any tortious conduct on the part of Canadian Imperial Bank for breach of contract in the courts of New York. If Serano prevailed against Canadian Imperial Bank in the courts of New York, then Serano could attach the assets of Canadian Imperial Bank found in New York in satisfaction of the judgment. Any deficit in satisfying such New York court judgment would be satisfied by the head office of Canadian Imperial Bank in Toronto pursuant to substantive English banking law which governed the Master Agreement.⁴⁹

Diversity of citizenship for purposes of civil jurisdiction of United States federal trial courts is codified in 28 United States Code section 1332.⁵⁰ United States federal trial courts do not have personal jurisdiction over a non-United States citizen defendant when the plaintiff is also a non-United States citizen.⁵¹ Canadian Imperial Bank as putative defendant was a citizen of Canada. Serano as putative plaintiff was a citizen of the British Virgin Islands. For purposes

⁴⁷ Under *Hadley v. Baxendale*, [1854] 9 Ex. 341, 156 Eng. Rep. 145, English courts award consequential damages for breach of contract so long as the damages are foreseeable. However, under *Rookes v. Barnard*, [1964] 1 All E.R. 367, per Lord Devlin, English courts do not award punitive damages in tort except for: (1) oppressive, arbitrary, or unconstitutional actions by servants of government, (2) conduct that was "calculated" to make a profit for the defendant (i.e., defendant calculated that he or she would earn a profit regardless of any loss sustained by his or her conduct), or (3) where a statute expressly authorizes the award of punitive damages. The facts of *Serano* did not fit any of these three criteria.

⁴⁸ *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁴⁹ See Transcript of Record at 2-35, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377).

⁵⁰ See 28 U.S.C. § 1332 (2006).

⁵¹ *Id.*

of personal jurisdiction in the United States federal trial courts, the United States District Court for the Southern District of New York, in Manhattan, New York City, did not have personal jurisdiction over Canadian Imperial Bank as putative defendant, because Canadian Imperial Bank as putative defendant and Serano as putative plaintiff were both non-U.S. citizens. However, for purposes of personal jurisdiction in the New York state trial courts, the Supreme Court of the State of New York for New York County, in Manhattan, New York City, did have personal jurisdiction over Canadian Imperial Bank as putative defendant and Serano as putative plaintiff, because there is no United States citizenship requirement for parties in the state courts of the United States in general or in the state courts of New York in particular. Therefore, Serano as plaintiff could sue Canadian Imperial Bank as defendant for the profits Canadian Imperial Bank owed to Serano with respect to all four of the Confirmed Transactions under the Master Agreement *and* for punitive damages in respect of any tortious conduct on the part of Canadian Imperial Bank for breach of contract in the state trial courts of New York and specifically in the Supreme Court of the State of New York for New York County, in Manhattan, New York City.

Forum non conveniens—"the forum is not convenient"—is a theory by which a court of competent civil jurisdiction may dismiss a case on the motion of the defendant, because the defendant is able to assert successfully that a more convenient forum exists elsewhere for the trial of the case.⁵² The defendant bears the burden of proving that a more convenient forum exists elsewhere, but generally deference is given to the choice of forum made by the plaintiff when the claim is filed.⁵³ The New York case was dismissed by the state trial court on the motion of defendant Canadian Imperial Bank based on *forum non conveniens* that a more convenient forum existed elsewhere on Taiwan, because the Taiwan case was in the process of being litigated there. The Supreme Court of the State of New York for New York County stated in its unpublished written opinion that, ". . . the transactions were negotiated by Serano, through [Serano's managing director and sole shareholder], in Taiwan with employees of [Canadian Imperial Bank] in its Hong Kong branch [office]."⁵⁴ On appeal, the Supreme Court of the State of New York, Appellate Division, First De-

⁵² BLACK'S LAW DICTIONARY 680 (8th ed. 2004).

⁵³ See Helen E. Mardirosian, *Developments in the Law: Federal Jurisdiction and Forum Selection: Forum Non Conveniens*, 37 LOY. L.A. L. REV. 1643 (Summer 2004).

⁵⁴ *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

partment affirmed the dismissal of the New York case by the state trial court and stated in its published written opinion that:

However, the IAS court [state trial court] also indicated that because the action is virtually devoid of New York connections, it should be dismissed on the ground of *forum non conveniens* as well . . . The disputed transactions also constitute the subject matter of a pending action in Taiwan that defendant [Canadian Imperial Bank] brought against plaintiff's [Serano's] shareholder based on the latter's guarantee of plaintiff's [Serano's] obligations under the Master Agreement . . . [C]learly Taiwan provides a more convenient forum to resolve plaintiff's [Serano's] claim [citations omitted]. Specifically, the Taiwanese courts have already litigated the parties' claims, and there is virtually no connection between the parties and the subject matter to New York . . . We are not persuaded otherwise by the fact that the money necessary to fund the transactions was wired by plaintiff [Serano] to defendant's [Canadian Imperial Bank's] New York branch, which had some kind of supervisory responsibility over defendant's [Canadian Imperial Bank's] international swap transactions and which allegedly confirmed several undisputed transactions between the parties [citations omitted].⁵⁵

In the passage quoted above from the published opinion of the Supreme Court of the State of New York, Appellate Division, First Department, the court states that, "clearly Taiwan provides a more convenient forum to resolve plaintiff's [Serano's] claim." Specifically, the court states, "*the Taiwanese courts have already litigated the parties' claims.*"⁵⁶ However, this statement by the court was not accurate, because Serano was never a party in the Taiwan case. Serano was a corporate legal person and the managing director and sole shareholder of Serano was a natural person. They were two separate and distinct legal entities. In essence, the court pierced the corporate veil of Serano and substituted the managing director and sole shareholder of Serano in its place without ever making such a finding of fact and conclusion of law and stating so in its opinion. The statement by the court was also not accurate because the Taiwanese court of appeals had reversed and remanded the judgment of the Taiwanese trial court for a new trial. Thus, the Taiwanese courts had not already litigated the parties' claims.

⁵⁵ *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 309-10, 731 N.Y.S.2d 25, 25-26 (N.Y. App. Div. 2001).

⁵⁶ *Id.* [emphasis added].

The argument will be made below that the Supreme Court of the State of New York, Appellate Division, First Department erred in not applying the TRA to the facts of the New York case and in dismissing it based on *forum nonconveniens*. As federal law, the TRA must be applied not only by federal courts but by state courts as well. As will be seen below, applying the TRA to the facts of the New York case would have precluded its dismissal by the intermediate appellate court based on *forum non conveniens*.

5. THE APPLICATION OF RES JUDICATA AND COLLATERAL BY THE NEW YORK STATE COURTS

Res judicata—"the thing has been decided"—refers to claim preclusion and collateral estoppel refers to issue preclusion.⁵⁷ The difference between *res judicata* and collateral estoppel is explained by the United States Supreme Court in *Allen v. McCurry*.⁵⁸ Justice Stewart wrote that:

The federal courts have traditionally adhered to the related doctrines of *res judicata* and collateral estoppel. Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case. As this Court and other courts have often recognized, *res judicata* and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.⁵⁹

Justice Stewart's explanation of *res judicata* and collateral estoppel assumes two things: (1) a judgment has been entered by a court of competent jurisdiction with respect to claim preclusion; and (2) issues have been determined by a court of competent jurisdiction with respect to issue preclusion. Courts of competent jurisdiction may be either domestic in or foreign to the United States.

With respect to courts of competent jurisdiction domestic in the United States, *res judicata* and collateral estoppel are generally controlled by the Full Faith and Credit Clause of the United States Constitution and the Full Faith and Credit Act. The Full Faith and Credit

⁵⁷ BLACK'S LAW DICTIONARY 1336-37 (8th ed. 2004).

⁵⁸ *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

⁵⁹ *Id.*

Clause of the United States Constitution provides that “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”⁶⁰

The Full Faith and Credit Act provides that:

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in the other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.⁶¹

The Full Faith and Credit Act also provides that “[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions from which they are taken.”⁶²

The result of the application of the Full Faith and Credit Clause of the United States Constitution and the Full Faith and Credit Act is that a judgment of one court in the United States will be recognized and enforced by another court in the United States. *Res judicata* and collateral estoppel are therefore recognized among courts in and also between states of the United States.

With respect to courts of competent jurisdiction foreign to the United States, the United States is not a party to any bilateral or multilateral treaty concerning the recognition and enforcement of judgments of foreign courts.⁶³ *Res judicata* and collateral estoppel are therefore controlled by comity granted by federal and state courts to judgments of foreign courts, or by federal legislation with respect to the recognition and enforcement of judgments of specific foreign courts. Since no diplomatic relations have existed between the United States and Taiwan since January 1, 1979 and the TRA is federal legislation that replaces the former diplomatic relations between the United States and Taiwan effective April 10, 1979, one must look to the TRA to determine if it provides for the recognition and enforcement by courts in the United States of judgments from Taiwanese courts. If so, then *res judicata* and collateral estoppel will be applied by United States courts to Taiwanese judgments. If not, then *res judi-*

⁶⁰ U.S. CONST. art. IV, § 1.

⁶¹ 28 U.S.C. § 1738 (2006).

⁶² *Id.*

⁶³ See UNITED STATES DEPARTMENT OF STATE, TREATIES IN FORCE (2009), available at <http://www.state.gov/documents/organization/123746.pdf>.

cata and collateral estoppel will not be applied by United States courts to Taiwanese judgments.

The judgment of the Supreme Court of the State of New York for New York County in the New York case is not reported or published. However, by reviewing the record of the trial court in the New York case, as filed with the clerk of court, one sees that the trial court dismissed the New York Case based on *res judicata* and collateral estoppel in addition to *forum non conveniens*.⁶⁴ On appeal, the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, in the New York case states that "defendant [Canadian Imperial Bank] acknowledges that the action cannot be dismissed on the ground of *res judicata* by reason of the subsequent reversal of a Taiwanese judgment which had been rendered in its favor and upon which the IAS [state trial] court had relied in dismissing plaintiff's [Serano's] action."⁶⁵ Thus, the state intermediate court of appeals dismissed the New York case based on *forum non conveniens*, and not on *res judicata* and collateral estoppel.

The argument will be made below that the Supreme Court of the State of New York for New York County erred in not applying the TRA to the facts of the New York case and in dismissing it based on *res judicata* and collateral estoppel, not considering also its dismissal based on *forum non conveniens*. As federal law, the TRA must be applied not only by federal courts but by state courts as well. As will be seen below, applying the TRA to the New York case would have precluded its dismissal by the trial court based on *res judicata* and collateral estoppel.

6. THE PROVISIONS OF THE TRA

After President Jimmy Carter "terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979,"⁶⁶ Congress found enactment of the TRA necessary "to help maintain peace, security, and stability in the Western Pacific,"⁶⁷ and "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations

⁶⁴ Transcript of Record at 640-41, *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001) (No. 99-603377); see *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99 (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

⁶⁵ *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 309, 731 N.Y.S.2d 25, 25 (N.Y. App. Div. 2001).

⁶⁶ 22 U.S.C. § 3301(a) (2006).

⁶⁷ 22 U.S.C. § 3301(a)(1).

between the people of the United States and the people on Taiwan.”⁶⁸ The TRA designates that it is the specific policy of the United States “to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan.”⁶⁹ Therefore, although diplomatic relations were terminated between the United States and Taiwan, the TRA authorizes the continuation of all relationships, other than diplomatic, between the people of the United States and the people on Taiwan. These relationships must be examined in order to determine whether, under the TRA, the courts of Taiwan are courts of competent jurisdiction foreign to the United States whose judgments must be recognized and enforced by United States courts. If so, then United States courts must apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments. If not, then United States courts must not apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments.

There are several kinds of specific relationships between the United States and Taiwan to which the TRA applies. It will be seen below, however, that none of these relationships, which are codified in the TRA, specifically apply with respect to whether Taiwanese courts are those of competent jurisdiction foreign to the United States whose judgments must be recognized and enforced by United States courts. These relationships under the TRA do not provide guidance concerning whether United States courts must apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments.

The TRA continues to apply the laws of the United States generally with respect to Taiwan.⁷⁰ The TRA provides that:

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.⁷¹

The TRA continues to apply the laws of the United States that are applicable to foreign governments to Taiwan.⁷² The TRA provides with respect to this relationship that “[w]henever the laws of the United States refer or relate to foreign countries, nations, states, gov-

⁶⁸ 22 U.S.C. § 3301(a)(2) [emphasis added].

⁶⁹ 22 U.S.C. § 3301(b)(1) [emphasis added].

⁷⁰ 22 U.S.C. § 3303(a).

⁷¹ *Id.*

⁷² 22 U.S.C. § 3303(b)(1).

ernments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan."⁷³

The TRA continues to apply the laws of the United States with respect to rights and obligations of Taiwan.⁷⁴ The TRA provides with respect to this relationship that:

The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.⁷⁵

The TRA continues to apply the laws of the United States with respect to proprietary rights to the governing authorities on Taiwan.⁷⁶ The TRA provides with respect to this relationship:

For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.⁷⁷

The TRA continues to permit Taiwan to sue and be sued in the courts of the United States.⁷⁸ The TRA provides with respect to this relationship that "[t]he capacity of Taiwan to sue and be sued in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition."⁷⁹

The TRA does not require diplomatic relations between the United States and Taiwan, where diplomatic relations are a requirement of laws between the United States and third countries.⁸⁰ The TRA provides with respect to this relationship that "[n]o requirement, whether expressed or implied, under the laws of the United States

⁷³ *Id.*

⁷⁴ 22 U.S.C. § 3303(b)(3)(A).

⁷⁵ *Id.*

⁷⁶ 22 U.S.C. § 3303(b)(3)(B).

⁷⁷ *Id.*

⁷⁸ 22 U.S.C. § 3303(b)(7).

⁷⁹ *Id.*

⁸⁰ 22 U.S.C. § 3303(b)(8).

with respect to the maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.”⁸¹

The TRA continues all treaties in effect with Taiwan.⁸² The TRA provides with respect to this relationship that:

For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.⁸³

After the TRA describes these several kinds of relationships which apply between the United States and Taiwan, the TRA then provides an alternative for a United States embassy on Taiwan and an alternative for a Taiwanese embassy in the United States.⁸⁴ The TRA established The American Institute in Taiwan to take the place of a United States embassy.⁸⁵ It is a nonprofit corporation incorporated under the laws of the District of Columbia,⁸⁶ and it is referred to in the TRA as the “Institute.”⁸⁷ The Institute provides consular services to United States citizens on Taiwan the same as any United States embassy or consulate provides consular services to United States citizens in foreign countries.⁸⁸

The TRA also permits the establishment by Taiwan of an instrumentality in the United States similar to The American Institute in Taiwan.⁸⁹ The Taipei Economic and Cultural Representative Office in Washington, D.C., provides consular services to Taiwanese in the United States the same as a Taiwanese embassy or consulate would provide consular services to Taiwanese in the United States.⁹⁰

⁸¹ *Id.*

⁸² 22 U.S.C. § 3303(c).

⁸³ *Id.*

⁸⁴ See 22 U.S.C. §§ 3305–06.

⁸⁵ See *id.*

⁸⁶ 22 U.S.C. § 3305(a)(1).

⁸⁷ 22 U.S.C. § 3305(a)(2).

⁸⁸ 22 U.S.C. § 3306.

⁸⁹ See 22 U.S.C. § 3309.

⁹⁰ Under “Consular Services” on the website for the Taipei Economic and Cultural Representative Office in the United States are directions on how to apply for a Republic of China passport at the Representative Office. See www.taiwanembassy.org/us (The web address uses the word, “embassy,” but the Representative Office is neither an embassy nor a consulate).

It is not until one comes to the definitions of "laws of the United States" and "Taiwan" at the end of the TRA that one sees that they specifically apply with respect to whether Taiwanese courts are those of competent jurisdiction foreign to the United States whose judgments must be recognized and enforced by United States courts, which in turn must then apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments.⁹¹

At the end of the TRA the term "laws of the United States" is defined for the purposes of the TRA to include "any statute, rule, regulation, ordinance, or judicial rule of decision of the United States or any political subdivision thereof."⁹² This means that the TRA is applicable and is to be applied by all courts in all jurisdictions of the United States. The New York state trial and intermediate appellate courts were required to apply, but they did not apply, the TRA in the New York case.

Also, in the TRA the term "Taiwan" is defined for the purposes of the TRA to include:

As the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).⁹³

The phrase, "the people on those islands," means natural persons on the islands of Taiwan and the Pescadores. It is used instead of the phrase, "citizens of Taiwan." This can be seen from the use of two phrases describing the purpose of the TRA: "to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people *on* Taiwan,"⁹⁴ and "to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people *on* Taiwan."⁹⁵ The phrase, "people on those islands," does not include natural persons who are citizens elsewhere than on the islands of Taiwan and the Pescadores. Natural persons who are citizens elsewhere than on the is-

⁹¹ See 22 U.S.C. § 3314.

⁹² 22 U.S.C. § 3314(1).

⁹³ 22 U.S.C. § 3314(2).

⁹⁴ 22 U.S.C. § 3301(a)(2).

⁹⁵ 22 U.S.C. § 3301(b)(1).

lands of Taiwan and the Pescadores, but resident or doing business on those islands, are not included in the definition of "Taiwan".

The phrase, "corporations and other entities and associations created or organized under the laws applied on those islands," means corporations and other entities and associations organized under the laws applied on the islands of Taiwan and the Pescadores.⁹⁶ The phrase does not include foreign corporations, other foreign entities, and foreign associations created or organized under laws applied elsewhere than on the islands of Taiwan and the Pescadores. Corporations, other entities, and associations not organized under the laws applied on the islands of Taiwan and the Pescadores, but resident or doing business on those islands, are not included in the definition of "Taiwan."

Natural persons who are citizens elsewhere than on the islands of Taiwan and the Pescadores and corporations, other entities, and associations not organized under the laws applied in the islands of Taiwan and the Pescadores are, therefore, third-country parties on Taiwan.⁹⁷ The TRA neither includes nor applies to third-country parties on Taiwan. In the New York case, the New York state trial and intermediate appellate courts were required not to recognize, but they did instead recognize, the third-country party on Taiwan—Canadian Imperial Bank—in the Taiwan case for purposes of the application of *res judicata* and collateral estoppel in the New York case.

If by the definition of "laws of the United States" the TRA is applicable in and is to be applied by all courts in all jurisdictions of the United States, and if by the definition of "Taiwan" the TRA neither includes nor applies to third-country parties on Taiwan, then judgments of courts of competent jurisdiction on Taiwan must be recognized and enforced by United States courts, which in turn must then apply the principles of *res judicata* and collateral estoppel to those judgments. However, this only applies when those judgments are from Taiwanese courts in which a third-country party on Taiwan *is not* a party to the litigation in the Taiwanese courts. If a third-country party on Taiwan *is not* a party to litigation in Taiwanese courts, then United States courts must apply the principles of *res judicata* and collateral estoppel when the parties in the Taiwanese litigation sue each other again in United States courts. However, if a third-country party on Taiwan *is* a party to litigation in Taiwanese courts, then United States courts are precluded from applying the principles of *res judicata* and collateral estoppel when the parties in the Taiwanese litigation sue each other again in United States courts. This latter situation may lead to opposite judgments by courts on Taiwan and in the United

⁹⁶ 22 U.S.C. § 3314(2).

⁹⁷ See generally *supra*, Section 6. The Provisions of the TRA.

States between the same parties concerning the same issues and the same subject matter.

7. THE PROVISIONS OF THE TRA APPLIED TO *SERANO* LITIGATION

In the Taiwan case, Canadian Imperial Bank, as plaintiff, was a Canadian citizen. Canadian Imperial Bank was a foreign corporation created or organized under laws applied elsewhere than on the islands of Taiwan or the Pescadores.⁹⁸ Therefore, Canadian Imperial Bank was a third-country party on Taiwan. A third-country party on Taiwan is not included within the definition of "Taiwan" in the TRA.⁹⁹

In the Taiwan case, the managing director and sole shareholder of Serano, as defendant, was a natural person on the islands of Taiwan and the Pescadores.¹⁰⁰ A natural person on Taiwan is included within the definition of "Taiwan" in the TRA.¹⁰¹

In the New York case, Serano, as plaintiff, was a British Virgin Islands citizen. Serano was not a party in the Taiwan case.¹⁰² The TRA did not apply to Serano in the New York case, because it was not a party in the Taiwan case. However, the TRA would apply to Serano as a third-country party if it were a party in the Taiwan case.

In the New York case, Canadian Imperial Bank, as defendant, was a Canadian citizen.¹⁰³ Canadian Imperial Bank was a party in the Taiwan case. Canadian Imperial Bank was a third-country party on Taiwan in the Taiwan case. A third-country party on Taiwan is not included within the definition of "Taiwan" in the TRA,¹⁰⁴ and this did apply to Canadian Imperial Bank in the New York case.

Since Canadian Imperial Bank was a third-country party on Taiwan in the Taiwan case and a third-country party is not included within the definition of "Taiwan" in the TRA, the Taiwanese court in which Canadian Imperial Bank, as plaintiff, sued the managing director and sole shareholder of Serano, as defendant, in his personal, and not in his corporate capacity, was not a court of competent jurisdiction

⁹⁸ *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

⁹⁹ See 22 U.S.C. § 3314(2).

¹⁰⁰ *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

¹⁰¹ See 22 U.S.C. § 3314(2).

¹⁰² *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 309, 731 N.Y.S.2d 25, 25 (N.Y. App. Div. 2001).

¹⁰³ *Id.*

¹⁰⁴ See 22 U.S.C. § 3314(2).

foreign to the United States whose judgments must be recognized and enforced by United States courts, which in turn must then apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments.

In the New York case the intermediate court of appeals pierced the corporate veil between the managing director and sole shareholder of Serano, as a natural person on the one hand, and Serano, as a corporate legal person on the other hand, without making findings of fact and conclusions of law and explicitly stating so in its opinion. The court stated that, "the Taiwanese courts have already litigated the parties' disputes."¹⁰⁵ Because (a) the New York intermediate court of appeals substituted Serano for the managing director and sole shareholder of Serano in the Taiwan case, (b) plaintiff, Canadian Imperial Bank, as a Canadian citizen, was a third-country party on Taiwan and a third-country party is not included within the definition of "Taiwan" in the TRA, and (c) putative defendant Serano, as a British Virgin Islands citizen, would also be a third-country party on Taiwan and a third-country party is not included within the definition of "Taiwan" in the TRA, a Taiwanese court in which Canadian Imperial Bank as plaintiff would have sued Serano as defendant would not have been a court of competent jurisdiction foreign to the United States, whose judgments must be recognized and enforced by United States courts, which in turn must then apply the principles of *res judicata* and collateral estoppel with respect to Taiwanese judgments.

The Supreme Court of the State of New York for New York County erred in dismissing the New York case based on *res judicata* and collateral estoppel. Because Canadian Imperial Bank was a third-country party in the Taiwan case and a third-country party is not included within the definition of "Taiwan" in the TRA,¹⁰⁶ there was no judgment in the Taiwan case for the trial court in the New York case to recognize and to enforce. If there was no judgment in the Taiwan case to recognize and to enforce in the New York case, then the trial court in the New York case could not apply the principles of *res judicata* and collateral estoppel with respect to Canadian Imperial Bank. Therefore, Serano, as plaintiff in the New York case, had every right to prosecute its cause of action against Canadian Imperial Bank, as defendant, regardless of whether Serano ultimately would have won or lost, free from the application of *res judicata* and collateral estoppel. These principles simply did not apply in the New York case due to the definition of "Taiwan" in the TRA.¹⁰⁷ Any arguments raised to the

¹⁰⁵ *Serano Ltd.*, 287 A.D.2d at 309, 731 N.Y.S.2d at 25-26.

¹⁰⁶ See 22 U.S.C. § 3314(2).

¹⁰⁷ See *id.*

contrary by Canadian Imperial Bank that the court followed would have been irrelevant.

The Supreme Court of the State of New York for New York County also erred in dismissing the New York case based on *forum non conveniens*. The Supreme Court of the State of New York, Appellate Division, First Department, further erred in affirming the dismissal of the New York Case based on *forum non conveniens*. Serano, as putative plaintiff in the trial courts of Taiwan, would have been a third-country party on Taiwan, and a third-country party on Taiwan is not included within the definition of "Taiwan" in the TRA.¹⁰⁸ The New York trial and intermediate appellate courts did not have the legal authority to find that the Taiwanese courts were a more convenient forum in which Canadian Imperial Bank could be sued by Serano, because the New York courts could not recognize and enforce any judgment that Serano, as a third-country plaintiff, may have obtained against Canadian Imperial Bank, as a third-country defendant, in the Taiwanese courts due to the definition of "Taiwan" in the TRA which excludes third-country parties.¹⁰⁹ If Serano had won a judgment against Canadian Imperial Bank on Taiwan, then Serano could not have attached any assets of Canadian Imperial Bank in New York in order to satisfy the judgment on Taiwan, because both Serano and Canadian Imperial Bank would have been third-country parties on Taiwan pursuant to the definition of "Taiwan" in the TRA,¹¹⁰ and that Taiwanese judgment could not be recognized in New York. Therefore, Serano, as plaintiff in the New York case, had every right to prosecute its cause of action against Canadian Imperial Bank, as defendant, regardless of whether Serano ultimately would have won or lost, free from the application of *forum non conveniens*. This principle simply did not apply in the New York case due to the definition of "Taiwan" in the TRA.¹¹¹ Any arguments raised to the contrary by Canadian Imperial Bank of Commerce that were followed by the courts would have been irrelevant.

8. THE PROVISIONS OF THE TRA APPLIED TO UNITED STATES AND THIRD-COUNTRY PARTIES IN GENERAL

Neither the published opinion in *Serano* by the Supreme Court of the State of New York, Appellate Division, First Department, which can be cited as precedent,¹¹² nor the unpublished opinion in *Serano* by

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 309, 731 N.Y.S.2d 25, 25 (N.Y. App. Div. 2001).

the Supreme Court of the State of New York for New York County which cannot be cited as precedent,¹¹³ mention the TRA or cite to it.¹¹⁴ This means that the provisions of the TRA were never considered or applied by either court, although both courts were required to do so, because the TRA as federal law must be applied by state courts. It is important to note that of the reported cases in which the TRA is cited,¹¹⁵ and of the law review articles in which the TRA is cited,¹¹⁶ none deal with the issue of whether a judgment from a Taiwanese court in which the prevailing party is a third-country party on Taiwan must be recognized and enforced by United States courts which in turn must then apply the principles of *res judicata* and collateral estoppel with respect to the same parties and the same issues in the United States as were litigated on Taiwan.¹¹⁷ This article addresses that issue.

Based on the definition of "Taiwan" by Congress in the TRA,¹¹⁸ the following chart summarizes when United States courts will recognize and enforce judgments from courts on Taiwan and apply the principles of *res judicata* and collateral estoppel:

A. Taiwan Natural or Legal Persons Versus Taiwan Natural or Legal Persons

Taiwan natural or legal persons are included within the definition of "Taiwan" in the TRA.¹¹⁹ Therefore, United States courts will recognize and enforce a Taiwanese judgment between Taiwan natural and/or legal persons; and United States courts will apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in

¹¹³ *Serano Ltd. v. Can. Imperial Bank of Commerce*, No. 603377/99, (N.Y. Ct. June 2000), <http://www.courts.state.ny.us/comdiv/Law%20Report%20Files/July%202000/serano.html>.

¹¹⁴ The published opinion of the New York Supreme Court, Appellate Division, First Department never mentions the TRA. See *Serano Ltd. v. Can. Imperial Bank of Commerce*, 287 A.D.2d 309, 731 N.Y.S.2d 25 (N.Y. App. Div. 2001). The unpublished opinion of the New York Supreme Court for New York County never mentions the TRA. See *id.*

¹¹⁵ Search on LexisNexis Academic© provided by Murphy Library, University of Wisconsin-La Crosse, La Crosse, Wisconsin, U.S.A., for "Taiwan Relations Act and *Res Judicata* and Collateral Estoppel" in "Federal and State Cases Combined," Jan. 19, 2009.

¹¹⁶ Search on LexisNexis Academic© provided by Murphy Library, University of Wisconsin-La Crosse, La Crosse, Wisconsin, U.S.A., for "Taiwan Relations Act and *Res Judicata* and Collateral Estoppel" in "U.S. Law Reviews and Journals Combined," Jan. 19, 2009.

¹¹⁷ See *supra* notes 115–16.

¹¹⁸ See 22 U.S.C. § 3314(2) (2006).

¹¹⁹ See *id.*

United States courts between the same Taiwan natural and/or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is applied.

B. Taiwan Natural or Legal Persons Versus United States Natural or Legal Persons

Taiwan natural or legal persons are included within the definition of "Taiwan" in the TRA.¹²⁰ The TRA applies to United States natural or legal persons, because it is United States federal law (United States natural or legal persons otherwise would be third-country natural or legal persons on Taiwan). Therefore, United States courts will recognize and enforce a Taiwanese judgment between Taiwan natural or legal persons and United States natural or legal persons; and United States courts will apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in United States courts between the same Taiwan natural or legal persons and United States natural or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is applied.¹²¹

C. Taiwan Natural or Legal Persons Versus Third-Country Natural or Legal Persons.

Taiwan natural or legal persons are included within the definition of "Taiwan" in the TRA.¹²² Third-country natural or legal persons are not included within the definition of "Taiwan" in the TRA.¹²³ Therefore, United States courts will *not* recognize and enforce a Taiwanese judgment between Taiwan natural or legal persons and third-Country natural or legal persons; and United States courts will *not* apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in United States courts between the same Taiwan natural or legal persons and third-country natural or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is *not* applied.¹²⁴

D. United States Natural or Legal Persons Versus Third-Country Natural or Legal Persons.

The TRA applies to United States natural or legal persons, because it is United States federal law (United States natural or legal

¹²⁰ See *id.*

¹²¹ For purposes of this application, United States natural and legal persons do not include third-country natural or legal persons.

¹²² See 22 U.S.C. § 3314(2).

¹²³ See *id.*

¹²⁴ For purposes of this application, third-country natural or legal persons do not include United States national or legal persons.

persons otherwise would be third-country natural or legal persons on Taiwan). Third-country natural or legal persons are not included within the definition of "Taiwan" in the TRA.¹²⁵ Therefore, United States courts will *not* recognize and enforce a Taiwanese judgment between United States natural or legal persons and third-country natural or legal persons; and United States courts will *not* apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in United States courts between the same United States natural or legal persons and third-country natural or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is *not* applied.¹²⁶

E. Third-Country Natural or Legal Persons Versus Third-Country Natural or Legal Persons.

Third-country natural or legal persons are not included within the definition of "Taiwan" in the TRA.¹²⁷ Therefore, United States courts will *not* recognize and enforce a Taiwanese judgment between third-country natural or legal persons and will *not* apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in United States courts between the same third-country natural or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is *not* applied.¹²⁸

F. United States Natural or Legal Persons Versus United States Natural or Legal Persons.

The TRA applies to United States natural or legal persons, because it is United States federal law (United States natural or legal persons otherwise would be third-country natural or legal persons on Taiwan). Therefore, United States courts will recognize and enforce a Taiwanese judgment between United States natural and/or legal persons and will apply the principles of *res judicata* and collateral estoppel in order to dismiss cases in United States courts between the same United States natural and/or legal persons in the Taiwanese judgment. The usual application of *res judicata* and collateral estoppel is applied.

¹²⁵ See 22 U.S.C. § 3314(2).

¹²⁶ For purposes of this application, United States natural or legal persons do not include third-country natural or legal persons, and third-country natural or legal persons do not include United States natural or legal persons.

¹²⁷ See 22 U.S.C. § 3314(2).

¹²⁸ For purposes of this application, third-country natural or legal persons do not include United States natural or legal persons.

9. CONCLUSION

The provisions of the TRA with respect to the definition of "Taiwan" may have multijurisdictional impact on third-country individuals and companies resident or "doing business" in international trade on Taiwan and in the United States. A losing Taiwanese defendant to a third-country plaintiff in the courts on Taiwan may turn around and sue, as plaintiff, the third-country company, as defendant, in United States courts on the same issues that were tried on Taiwan. Opposite outcomes between such judgments of the courts on Taiwan and United States courts may result. If the losing Taiwanese defendant in the courts on Taiwan becomes a winning plaintiff in United States courts, then the Taiwanese plaintiff in the United States may attach the assets of the third-country defendant in the United States in order to satisfy the United States judgment. United States courts are precluded from granting comity to judgments of the courts on Taiwan between a third-country plaintiff and a Taiwanese defendant, and United States courts are precluded from applying the principles of *res judicata* and collateral estoppel to judgments of the courts on Taiwan between a third-country plaintiff and a Taiwanese defendant, because the TRA defines "Taiwan" to include "the islands of Taiwan and the Pescadores" and first, "the people on those islands," meaning natural persons who otherwise would be citizens of Taiwan, and second, "corporations and other entities and associations created or organized under the laws applied on those islands. . . ." ¹²⁹

Third-country parties in litigation in the courts on Taiwan are excluded by Congress from the definition of "Taiwan" in the TRA. ¹³⁰ Even if this was an oversight by Congress in drafting the TRA, United States courts do not have the authority to correct it. The constitutional separation of powers among the legislative, executive, and judicial branches of the United States Government preclude federal and state courts from correcting any oversight of Congress. Only if Congress changes the definition of "Taiwan" in the TRA to include third-country parties resident or "doing business" on Taiwan may United States courts grant comity to judgments from courts on Taiwan between third-country plaintiffs and Taiwanese defendants and in turn apply the principles of *res judicata* and collateral estoppel to those same parties in the United States. The usual application of *res judicata* and collateral estoppel by United States courts does not apply to Taiwanese and third-country parties.

¹²⁹ 22 U.S.C. § 3314(2).

¹³⁰ See *id.*