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CAN THE COURTS COPE WITH THE FOREIGN SOVEREIGN IMMUNITIES ACT?

*by Victor Rabinowitz**

On January 19, 1977, the Foreign Sovereign Immunities Act[1] (FSIA) became effective, to the accompaniment of loud huzzas from the State Department, the Justice Department and the international law establishment, which had been promoting the bill with energy for about six years.[2] The problems to which the Act addressed itself were, among others:

(1) What procedure shall be followed in determining when a foreign sovereign will be granted immunity from suit?[3]

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1. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a)(2-4), (1391(f), 1441(d), 1602-1611 (1976)).

2. *See, e.g.*, S. REP. NO. 1310, 94th Cong., 2d Sess. 11 (1976) [hereinafter cited as SENATE REPORT]; OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 320-28 (1976). An impressive list of lawyers, representing an important segment of American banking and industrial interests, supported the bill. *See, e.g., Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 67-97 (1976) (statements of international law practitioners) [hereinafter cited as *House Hearings* 1976].

3. The FSIA also addresses two closely related procedural problems: (1) how does a claimant against a foreign sovereign get jurisdiction over his

(2) What are the substantive rules to be applied in determining whether immunity will be granted to a sovereign defendant?

This article will examine the question of under what circumstances and by what procedure sovereign immunity should be granted.

The doctrine that a sovereign cannot be sued without its consent has been engraved deeply in our law and in the law of most other nations, and was well recognized by the 18th and 19th century international law authorities.[4] The prohibitions against suing a

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claimed debtor; and (2) how is a judgment against a sovereign to be enforced. Prior to the passage of the Act, the normal method of securing jurisdiction over a sovereign was by the attachment of its property, thus giving *quasi-in-rem* jurisdiction. It was through such an attachment that most of the pre-1979 sovereign immunity cases arose and it was generally agreed that the procedure was undesirable in many respects. As has been pointed out, pre-judgment attachments are a harsh remedy. They are often granted on *ex parte* applications and frequently have the effect of tying up property for months or even years while the merits of a case were litigated. The Supreme Court has, in a series of decisions, suggested that many of the state statutes permitting pre-judgment attachments were unconstitutional. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186 (1977), Rush v. Savchuk, 100 S. Ct. 571 (1980).

The statute solves this problem in what appears to be a satisfactory method by providing for long-arm jurisdiction through service of process upon the Foreign Office of the defendant either directly or through diplomatic channels.

Regarding the enforcement of a judgment against a sovereign, prior to the enactment of the FSIA there were no comprehensive provisions in U.S. law relating to this problem. Jurisdiction over a foreign sovereign defendant could be obtained only be seizing and attaching the sovereign's property, and judgments against sovereign defendants could not be enforced because they enjoyed absolute immunity from execution. *See* SENATE REPORT, *supra* note 2, at 8-9. The question of recovering on the money judgment secured against a foreign sovereign was addressed by the Act. The rule had long been that while jurisdiction over a foreign sovereign could be obtained by securing *quasi-in-rem* jurisdiction, the judgment could not be satisfied by attaching the property of a sovereign even in a case in which sovereign immunity from suit had not been recognized. *See* Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. (1930); New York & Cuba v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). It is too early to make even a tentative judgment as to how this provision will be applied by the courts.

4. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he repre-

sovereign have been applicable whether the claimant was a citizen or an alien of the defendant state, *i.e.*, a citizen of the United States could no more sue his own sovereign without its permission than he could a foreign sovereign.[5] The general rule was promulgated by Chief Justice Marshall in *The Schooner Exchange v. McFadden*,[6] and was accepted without much question for over a century.

However, the nature of international trade had so changed after the second decade of the 20th century that the rules promulgated by Chief Justice Marshall and his successors required re-examination. After World War I, many nations owned or chartered vessels for the purpose of carrying on conventional commercial activity. When ordinary contract or tort claims were asserted against a sovereign, the courts had difficulty in dealing with them, resulting in a series of inconsistent and indecisive rulings, and leaving the law in some disarray.[7]

> sents, prevents his appearance to answer a suit against him in the courts of another sovereignty. . . . Hence, a citizen of the nation wronged by the conduct of another nation, must seek redress through his own government.

United States v. Diekelman, 92 U.S. 520, 524 (1875). In the early 19th century, generally speaking, the property of a sovereign stayed at home except when at war. The waging of war was universally understood to be an essential part of a sovereign's function. No one challenged the doctrine that causes of action arising from such activity were immune from suit; it would be absurd for a farmer at Waterloo to bring an action in tort because the British Army had killed his cow.

5. "The United States, as sovereign, is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). The consent of the United States to be sued cannot be implied but must be unequivocally expressed. United States v. King, 395 U.S. 1, 4 (1969). *See also* United States v. Testan, 424 U.S. 392 (1976); Fitzgerald v. United States Civil Service Comm'n, 554 F.2d 1186 (D.C. Cir. 1977). Permission to sue the sovereign has been granted by statute in some cases, but not without limitation. *See, e.g.*, 28 U.S.C. § 2680 (1976) (limitations on tort liability of the United States).

6. 11 U.S. (7 Cranch) 116 (1812).

7. *Compare* The Pesaro, 255 U.S. 216 (1921) (suggestion of immunity must be certified by Dep't of State and shall not be granted if asserted directly in court by foreign government) *with* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926) (assertion made directly in court by foreign government is sufficient for court to grant immunity, if such assertion can be substantiated). *See also* Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938) (foreign government may apply to either the Dep't of State or the

By the end of World War II, virtually every state was engaged in activities that were commercial in nature. When creditors of those states sought to apply commercial law to disputes arising from such activities, the sovereigns sought to rely on the historical rules of sovereign immunity. It was argued by creditors that if, for example, a sovereign purchased wheat, it should not be able to avoid the obligation to pay for it by a plea of sovereign immunity.[8] It was urged strenuously that the doctrine of absolute immunity, which appeared to be a consequence of the *Schooner Exchange* decision, be changed to a policy of "restrictive immunity," applicable only when the transaction involved was a government function.

In 1952 Jack Tate, Acting Legal Advisor for the State Department, issued a statement setting forth Department policy.[9] The "Tate Letter" announced that henceforth the State Department would not issue suggestions of immunity in cases in which the right asserted arise out of commercial transactions (*jure gestiones*) and would utilize its power to grant suggestions of immunity only in litigation in which governmental rather than commercial interests were involved (*jure imperii*).

Prior to the passage of the FSIA, when an action was started against a sovereign, the defendant either applied to the State Department for a suggestion of immunity, or pleaded, as a defense to the action, that it was immune from suit.[10] In the former (and more common) situation, the State Department, using its own standards, would either file with the court a suggestion of immunity, or refuse to file a suggestion. Where the Department determined that the defendant was immune from suit, the court was bound by that determination.[11] This was based on the assumption that if the State

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court; the court is bound to accept finding of immunity by Dep't of State but not bound to grant immunity asserted directly by foreign government).

8. *See, e.g.*, Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), discussed in note 12 *infra*.

9. 26 DEP'T STATE BULL. 984 (1952).

10. *See* Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945); Ex Parte Peru, 318 U.S. 578, 588 (1943).

11. In *Ex Parte Peru*, 318 U.S. at 588, the Court stated:

> That principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a freindly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations . . . the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to

Department thought litigation might interfere with relations between the United States and a foreign sovereign, the courts should not interfere. The Tate Letter did not purport to direct the courts in their own consideration of pleas of immunity, but when the State Department refused to grant a suggestion of immunity, the courts usually concurred. When no application was made to the State Department, the courts decided the question on their own, having assumed that if the State Department had not spoken on the subject, the courts were free to apply their own standards, which were usually those of the Tate Letter.[12]

To assist in determining when sovereign immunity should be granted, the State Department set up an informal hearing procedure through which litigants could argue the issue before the Legal Advisor. The State Department hearing procedure determined first, whether the defendant was in fact the sovereign, and, second, assuming an affirmative answer, whether immunity ought to be granted. The State Department determinations were not reviewable. The FSIA changed this procedure by transfering the determination of whether a litigation involved a commercial transaction to the judicial branch.

The State Department evidently felt that the procedure it had been following to determine whether sovereign immunity ought to be granted was a great burden. It had to process suggestions of immunity filed by defendant sovereigns, and to hold hearings on such suggestions.[13] It claimed that this function interfered with the proper management of United States foreign policy because foreign sovereigns felt, incorrectly, that they could put pressure on the State

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accept and follow the executive determination that the vessel is immune.

12. The leading case on the subject is Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). The court, in the absence of an immunity suggestion from the Department of State, adopted restrictive guidelines, limiting immunity to internal administrative acts, legislative acts, acts concerning the armed forces, diplomatic activities, and public loans. *Id.* at 360. Since the charter party in *Victory Transport* involved a shipment of wheat and was found by the court to have all the earmarks of a typical commercial transaction, it did not fit any of the immunity categories, and immunity was therefore denied.

13. In the 12 years between 1960 and 1973 there were a total of 48 cases on which the Department of State reached final decision. Immunity was suggested in 23 cases. During that period there were an average of six cases pending at any one time. *See Immunities of Foreign States: Hearings on H.R.*

Department for a grant of immunity, whereas the same pressure could not be applied to a court. The FSIA, by transferring to the courts the responsibility of deciding pleas of sovereign immunity, shifted that burden to the Judicial Branch, but may have done so in violation of the principles of *United States v. Curtis-Wright Export Corp.*[14] as applied specifically to sovereign immunity cases.[15]

The issue of the judiciary's exercise of jurisdiction over a foreign sovereign had been discussed in the act of state cases where it was pointed out that a court might challenge the dignity of a foreign sovereign, with potential embarrassment to the Executive Branch and, more importantly, that the Executive Branch had expertise in the conduct of foreign affairs which the courts lacked.[16] Harlan's

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3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 49-51 (1973) [hereinafter cited as *House Hearings 1973*].

14. 299 U.S. 304 (1936). In his opinion Mr. Justice Sutherland concluded that, because of the delicate nature of foreign affairs, the executive branch (*i.e.*, the President) should be accorded a degree of discretion and freedom from restriction which would not be permissible with respect to domestic affairs alone:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation . . . [the President has] very delicate, plenary and exclusive power . . . in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 319-320.

15. *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); Ex Parte Peru, 318 U.S. 578 (1943).

16. The difference between the act of state doctrine and the doctrine of sovereign immunity should be kept in mind. Sovereign immunity relates only to whether a domestic court will accept jurisdiction of a case against a foreign sovereign, thus possibly incurring its ill will. A grant or denial of immunity implies no finding on the merits—a grant of immunity forecloses judicial decision on the merits, while denial merely allows the suit to proceed on the merits. The act of state doctrine, on the other hand, necessarily reaches the merits. Absent the doctrine, courts would be required to pass judgment on the legality *vel non* of the acts of a foreign sovereign. At this level the potential for "embarrassment" becomes critical.

Many commentators, led by Mr. Justice White in his opinion in Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 696-706 (1976), and the Solicitor General in his brief *amicus curiae*, at 13-15, *Alfred Dunhill v. Cuba, supra*, have confused the two doctrines, a confusion which no doubt stems

Opinion in *Banco Nacional v. Sabbatino*,[17] Brennan's dissent in *First National City Bank v. Banco Nacional*[18] and Marshall's dissent in *Alfred Dunhill, Inc. v. Cuba*[19] point out the danger of compelling courts to decide issues that are beyond their capacity to decide. Not only would the executive arm of the government be embarrassed if the courts were required to decide sensitive issues in the field of foreign relations, but, more importantly, at least to the Supreme Court, the judiciary would "become embroiled in the politics of international relations to the damage not only of the courts and the Executive but of the rule of law."[20]

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from the fact that both these commentators disapprove of both doctrines and seek to restrict the operation of both. The difference between the doctrines has been articulated by the Supreme Court in First Nat'l City Bank v. Banco National de Cuba, 406 U.S. 759, 773-4 (1972) (Powell, J., concurring); 789 n. 13 (Brennan, J., dissenting).

The doctrines of sovereign immunity and act of state have, however, at least one thing in common—both raise the question of whether our courts will be called upon to exercise functions which are basically political in nature.

17. 376 U.S. 398 (1964).

18. 406 U.S. 759, 776 (1972) (Brennan, J., dissenting).

19. 425 U.S. 682, 715 (1976) (Marshall, J., dissenting).

20. *First Nat'l City Bank v. Banco Nacional*, 406 U.S. at 778 (Brennan, J., dissenting). *See also* comments of former Attorney General Katzenbach on the famous *Rose Mary* decision, Anglo Iranian Oil Co., Ltd. v. Jaffrate, [1953] 1 W.L.R. 246 (Sup. Ct. Aden). The case involved the litigation of title to oil extraced from wells belonging to a British-owned company that were nationalized by Iran. The *Rose Mary*, carrying oil from those wells, was attached by the company while in the Port of Aden. The defendant charterers of the vessel claimed that the Iranian nationalization law had divested the company of its title to the oil. The court disagreed, holding that title to the oil remained in the company because the Iranian nationalization decree was invalid because it expropriated property without compensation. Commenting on the decision, Mr. Katzenbach stated:

> Objectivity of judgment and judicial independence are vital domestic principles that have a more limited scope in the jungle of international affairs: the seizure and sale of Iranian oil by Mossadegh's government is distinguishable from Roe's conversion of Doe's cow . . . The English government had unequivocally expressed and widely circulated its views—what the court [in Aden] called its 'public policy' —with regard to the 'illegality' of the Iranian nationalization decree; as an incident of diplomatic pressure, it was clearly desirable from the government's point of view to limit the salability of Iranian oil in the world market. That the English court could have responsibly ignored this [diplomatic] policy is inconceivable.

Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1155 (1956).

Of the three interests involved, the interest of the creditor in enforcing a claim, the interest of the State Department in avoiding the necessity of making decisions, and the interest of the court in maintaining its independence from the Executive, it is the latter consideration that has priority, and the Act has violated that principle.

It is submitted that the Congressional action was wrong in principle. Had the Act been in effect for the last ten years, serious problems would have arisen which might have been most "embarrassing" to United States foreign policy. Even now, important litigation in our courts raises the question whether the courts' jurisdiction over delicate political disputes is desirable. Several cases in the past two decades will serve to illustrate:

(1) *Rich v. Naviera Vacuba, S.A.*[21] On July 24, 1961, an Eastern Airlines plane was hijacked over Florida and forced to fly to Havana. It was one of a series of hijackings of commercial planes of the United States to Cuba, and public interest in the incident was very high, especially in view of the bad relations then existing between the United States and Cuba. Cuba, on its part, asserted that for a period of about two years, Cubans had been hijacking airplanes from Cuba and running them to Florida. The matter was raised in the Security Council of the United Nations, and, on August 2, 1961, the Government of the United States made a formal declaration that it would return all hijacked property belonging to Cuba if prompt application were made to the State Department.[22] On August 16th Cuba released the Eastern Airlines plane.[23] On the very next day, the *Bahia De Nipe*, a Cuban-owned freighter, was diverted by its captain into United States territorial waters at Hampton Roads, Virginia. In the next five days, five separate writs of attachment were sued out against the ship and cargo.[24]

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21. 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

22. 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS, 88, 93, 95 (1968) [hereinafter cited as CHAYES].

23. *Id.* at 103.

24. The claims were, *inter alia*, for wages by the defecting crew members, by a judgment creditor of Cuba attempting to collect on a judgment obtained in Louisiana and by United Fruit Sugar Co. which claimed to own the cargo on board the vessel because it had been seized by the Government of Cuba as part of its nationalization program. 197 F. Supp. at 712. The incident occurred shortly after the decision of the District Court in Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961), which was decided on March 31. Under that decision, on the merits, United Fruit was entitled to the cargo.

On August 19th the Cuban Government advised the State Department that the ship belonged to it and later asserted that it was entitled to immunity as the property of a sovereign. On the same day the State Department issued its suggestion of immunity, stating that "the release of this vessel would avoid further disturbances to our international relations in the premises."[25] The United States Attorney appeared in the case as attorney for the Coast Guard and the United States. The lawyers for the Cuban Government were asked not to appear in the litigation because such appearance might result in an adverse reaction from the court in view of the very bad relations between Cuba and the United States.

In the course of argument, government counsel stated that even the short delay of two weeks which had been caused by the litigation was proving a matter of serious embarrassment to the United States. The court held that the ship was immune from seizure pursuant to the decision in *Ex Parte Peru.*[26]

There can be no doubt that the State Department, in declaring that the *Bahia De Nipe* was protected by sovereign immunity, was violating the policy set forth in the Tate letter, since the Cuban vessel was clearly engaged in a commercial enterprise. In view of the dramatic background of the case, little of which appears in the court opinions, to have denied the claim of sovereign immunity, or even to have litigated it at length, would have resulted in a serious set-back to United States foreign policy.

(2) *Spacil v. Crowe.*[27] On October 2, 1973, a Chilean plaintiff attached a Cuban vessel while the latter was transiting the Panama Canal, claiming breach of contract by the Cuban Government in connection with a prior sale of sugar to Chile. The ship was carrying commercial cargo, and the cause of action asserted by plaintiff also arose out of a commercial transaction. Cuba requested the State Department to file a suggestion of immunity which, after a hearing, was issued by the State Department and recognized by the court pursuant to *Ex Parte Peru.* The State Department has commented that it

> does not regard this case as a departure from the restrictive theory of immunity as set forth in the 'Tate letter'. . . . It involved a combination of unusual circumstances that make the case *sui generis.* Although the underlying trans-

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25. CHAYES, *supra* note 22, at 109.
26. 197 F. Supp. at 725. *See* note 11 *supra.*
27. 489 F.2d 614 (5th Cir. 1974).

> actions were commercial in character, the case as it developed centered upon issues between two foreign sovereigns of peculiar political sensitivity and not suitable for litigation in United States courts.[28]

The court likewise noted that "the degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second guess the executive."[29]

Had the FSIA been in effect either in 1961 or in 1973, sovereign immunity should have been denied in both the *Rich* and *Spacil* cases, because both transactions were clearly commercial within the Act. As the State Department asserted in both cases, such a result would have been contrary to the best interests of the United States.[30]

(3) *The Iranian litigation.* Even more serious is the situation which arose in 1979 resulting from the revolution in Iran and the seizure of approximately 50 hostages at the United States Embassy in Teheran. In response to these incidents, the United States, acting pursuant to its powers under Section 5 of the Trading With The Enemy Act,[31] issued an order blocking the transfer of Iranian funds on deposit in the United States or elsewhere subject to the control of nationals in the United States.[32]

This action has resulted in a flood of litigation in the United States District Courts. In the Southern District of New York alone, there are almost 90 pending cases. The list of defendants includes the Republic of Iran, Bank Markazi Iran (the central bank of Iran), and other Iranian governmental agencies. Although it is too early to attempt any analysis of the incipient litigation, it is clear that it relates to what may be the most delicate foreign relations dispute the United States has been involved with since the Cuban missle crisis of 1962. Virtually all of these actions raise questions of sovereign immunity, but they are pending before many different district court judges, some of whom have already indicated differences of opinion.[33] In each of these cases the defendants probably have, or

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28. OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, 1973 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 226 (1974).

29. 489 F.2d at 619.

30. *See* notes 25 and 28 and accompanying text *supra*.

31. 50 U.S.C. App. § 5 (1917), *as amended by* Act of Dec. 28, 1977, Pub. L. 95-223, Title I, §§ 101(a), 102, 103(b), 91 Stat. 1625, 1626.

32. 31 C.F.R. § 535.101 (1979).

33. *Compare* Behring International, Inc. v. Imperial Iranian Air Force,

are likely to enter pleas of sovereign immunity, and were this within the jurisdiction of the State Department, they could be considered in the context of relations between the United States and Iran. Such a luxury, however, is not permitted to the State Department under the Act, and instead it finds itself in the position of having to act through the courts.

Indeed, the State Department has filed a "suggestion of interest" in many of the cases.[34] This suggestion notes that the United States is in the midst of an unprecedented international crisis:

> The efforts to secure the release of the hostages in Tehran are at a very delicate stage. Under the circumstances, the Department of State has reason to believe that the content of the briefs to be filed in this action raise the possibility that their filing will prejudice the efforts being made with respect to the hostage crisis.[35]

Accordingly, it was suggested that "in light of the rapidly developing events in Iran" the court stay all proceedings for a total period of 90 days pending diplomatic efforts to solve the problem.[36]

That complex questions will have to be decided in the Iranian litigation is unavoidable, but what should be avoidable is the effort to submit the sovereign immunity questions and their political consequences to the decisions of a variety of district courts.

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475 F. Supp. 396 (D.N.J. 1979) with Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979). Both cases involve the interpretation of the 1957 Treaty of Amity between the United States and Iran, in the light of the FSIA. As a matter of fact, neither court seems to have plumbed the depths of the complexities caused by the Act in relation to this and about 20 similar treaties of amity to which the United States is a party. For example, the Iranian Treaty provides that disputes between the parties arising under the Treaty are to be submitted to the Permanent Court of International Justice, not to a United States district court. This would seem to presuppose a decision by the State Department in the first instance; otherwise the PCIJ would have no jurisdiction. But there is room for such a decision under the FSIA. We will not venture a prediction as to how this and a series of related problems will be resolved, but it seems difficult to see how they can be resolved without consideration of many political questions.

34. Chas. T. Main Int. v. Iran, No. 79-6276 (S.D.N.Y., February 14, 1980) (Suggestion of Interest).

35. *Id.*

36. *Id.*

(4) *International Association of Machinists v. OPEC.*[37] Here the plaintiff sued OPEC[38] and its thirteen oil-producing member nations, contending that the defendants' price-fixing policies violated the anti-trust laws of the United States. The court upheld a plea of sovereign immunity against the argument that the subject matter of the suit was a commercial transaction. We will discuss this case further but pause now only to note that incalculable and unpredictable political consequences might have resulted, had a district court held that OPEC and its constituent members could be tried in a United States court for violating the United States anti-trust laws.

No less unfortunate is the statute's attempt to define a commercial transaction. If the application of a restrictive policy of sovereign immunity were entrusted to the State Department, the doctrine could be conformed reasonably to what is required by the diplomatic interests of the nation. When rigidly defined by the legislature, however, the result could be quite different. The legislative enactment of the restrictive doctrine ignores the important consideration articulated by the District Court in *Rich v. Naviera Vacuba:* "No policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations."[39]

We doubt seriously whether the distinction between *jure imperii* and *jure gestionis* is workable when set forth in legislative terms which a court, is, in theory, obligated to follow.[40] Many commen-

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37. 477 F. Supp. 553 (C.D. Cal. 1979).

38. Organization of Petroleum Exporting Countries; Algeria, Ecuador, Gabon, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, United Arab Emirates and Venezuela.

39. 197 F. Supp. 710, 724 (E.D.Va. 1961).

40. For example, in discussing the "Tate Letter" the court in Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 359 (2d Cir. 1964) stated that some courts "have looked to the nature of the transaction, categorizing as sovereign acts only activity which could not be performed by individuals. While this criterion is relatively easy to apply it ofttimes produces rather astonishing results. . . ." Nonetheless, this approach was advocated in the government's amicus brief to the Supreme Court in Dunhill v. Republic of Cuba, 425 U.S. 682 (1976), where the Solicitor General considered that a contract by a sovereign to purchase clothing for its army was a commercial act. Govt. Br., p. 30, fn. 13. However, on the other hand, in Aero Trade, Inc. v. Republic of

tators are of the opinion that the distinction between governmental and commercial acts is impossible to apply and, as we have seen, the Tate letter distinction has been followed or ignored by the State Department as called for by the foreign policy requirements of the United States.[41]

There is, however, another and much more serious problem—a problem which is not met either by the Tate Letter, the judicial definition in *Victory Transport*,[42] or the legislative definition in the FSIA. That problem by its nature cannot be solved by the adoption of any formula, but must be handled on a case-by-case basis because it is, by its nature, a world-wide political problem which is much more important than the domestic political problem giving rise to the *Curtis Wright* rule.[43]

The world has changed much since the days of *Schooner Exchange*. One of the most fundamental changes has been the emergence of the so-called developing nations as independent states whose existence depends on the export of raw materials to the industrialized northern hemisphere. The United Nations has on many occasions pointed out that every nation has, in a fundamental sense, sovereignty over its natural resources and may determine the terms upon which those resources are exploited.[44] To a purchaser in the

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Haiti, 376 F. Supp. 128 (S.D.N.Y. 1974), Judge Weinfeld held that the purchase of goods for the use of the armed forces was entitled to a grant of immunity.

41. In England, the British courts abandoned the absolute theory of sovereign immunity in The Philippine Admiral [1976] 1 LLOYD'S L. REP. 234; [1977] A.C. 373; Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 1 LLOYD'S L. REP. 581; [1977] 1 Q.B. 529. The English Law on the subject was considered at some length in the *I Congresso*, [1980] 1 LLOYD'S L. REP. 23. Evidently, the English courts are having as much difficulty in defining commercial transactions as our courts, particularly in those areas in which there are political issues of significance to the parties in the litigation and to the government of the court in which the proceedings are pending.

Also see, in addition to the *Rich* and *Spacil* cases, Isbrandtsen Tankers, Inc., v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971).

42. Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *see* note 12 *supra*.

43. *See* note 14 *supra*.

44. Resolution 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, 2d Comm. 327, U.N. Doc. A/C 2/5 R 850 (1962); Charter of Economic Rights and Duties of States, G.A. Res. 3281, Ch. II, Art. 2(1), U.N. Doc. A/RES/3281 (XXIX) (1974); Declaration on the Establishment of a New International Economic Order in 1974, G.A. Res. 3201 (S-VI), § 4(e), U.N. GAOR, 6th Spec. Sess.,

United States, the sale of oil by Kuwait may be a simple commercial action to which sovereign immunity could not be applied. To the OPEC nations and much of the rest of the world, however, this may not be true since the sale of oil and other natural resources involves sovereign acts governed in every respect by local law, without which the people of undeveloped nations must be condemned to an existence of perpetual deprivation and poverty.

This problem was addressed by the court in *International Association of Machinists v. OPEC.*[45] In upholding the plea of sovereign immunity, the court found the statutory standards defining a commercial transaction to be "somewhat nebulous . . . in the context of a particular factual situation."[46] The District Court suggested that "in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries."[47]

Nothing in the legislative history of the Act indicates any such legislative intent—indeed, as has already been noted, the legislative intent of the FSIA was quite the contrary.[48] The District Court "solved" the problem by holding that "commercial activity" should be defined narrowly. The court proceeded to examine, not the standards enacted by the legislature, but rather "the standards recognized under international law."[49] The court quoted as authority Resolution 1803 of the 17th Session of the General Assembly of the United Nations (1962)[50] as well as a series of similar resolutions running up to 1966. The court stated: "The defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples."[51] The court noted a similar historical development in the United States.[52] We think

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Supp. (No. 1) 3, U.N. Doc. A/9559; Resolution 3171, G.A. Res. 3171, 28 U.N. GAOR 30 (Vol. 1) 52, U.N. Doc. A/9030 (1973).

45. 477 F. Supp. 553 (C.D. Cal. 1979).

46. *Id.* at 567.

47. *Id.*

48. Section 1602 of the FSIA declares as a purpose of the Act that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States. . . ." 28 U.S.C. § 1602 (1976).

49. 477 F. Supp. at 567.

50. Resolution 1803, *supra* note 44.

51. 477 F. Supp. at 568.

52. *Id.* The court cited the Connally Hot Oil Act, 15 U.S.C. § 715, *et*

that the result reached by the court was correct and that its argument was eminently reasonable and quite in line with the political requirements of the situation. To say, however, that the decision was required by or even consistent with the FSIA is, we think, unjustified. The court paid its proper respects to the Act but paid little attention to its terms.

Neither the enactment of the FSIA nor its recent application in the courts has resolved the inherent problems raised by pleas of sovereign immunity. The solutions adopted by Congress are unworkable and may even be unconstitutional. The State and Justice Department officials and many of the other witnesses testifying for the bill misled the legislature into the adoption of a law which is, at best, inconvenient and, at worst, disastrous.

The State Department has been confronted with the same dilemmas that plagued it prior to the enactment of the FSIA. Because of the political problems implicit in sovereign immunity cases, the State Department's involvement has not been diminished; on numerous occasions, foreign policy considerations have forced it to intervene in a pending case.

The State Department has the flexibility to base its decisions upon political reality and foreign policy interests. The courts, of necessity, must make their decisions on the basis of abstract and inconclusive guidelines provided by the Act. Judicial determinations of sovereign immunity without reference to the broader political context can seriously impede the development and implementation of a coherent and consistent American foreign policy.

The responses of the courts have been telling of the obstructive nature of the Act in the delicate area of foreign affairs and point to the conclusion that the issue of sovereign immunity is better left outside the courts.

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seq. (1976), enacted by Congress to enforce state statutes imposing restrictions requiring proration and limiting the quantities of oil that could be taken from the wells.