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Amending the Foreign Sovereign Immunities Act of 1976 to Better Accommodate Non-Market Economies

J. Thomas Cristy*

I. INTRODUCTION

Foreign sovereign immunity is the principle of international law under which foreign states are deemed not amenable to the jurisdiction of domestic courts.¹ Determining in which cases this waiver of jurisdiction is appropriate has long been an area of controversy in international law.² This determination is becoming increasingly difficult as the commercial and political contacts between states with differing views of the government's role grow.³

With the Foreign Sovereign Immunities Act of 1976 (FSIA, 1976 Act, or Act), the United States became the first country to attempt to codify the rules of foreign sovereign immunity.⁴ The 1976 Act extends immunity from legal action to foreign states and their agencies or instrumentalities,⁵ subject to various exceptions and qualifications.⁶ It also establishes a comprehensive jurisdictional scheme for actions involving foreign states.⁷ The Act has been in effect for more than ten

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1. Recent Developments, 5 BROOKLYN J. INT'L L. 191, 191 (1979) [hereinafter Recent Developments]; McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 LAW & POL'Y INT'L BUS. 477, 478 (1984); 2 D. O'CONNELL, INTERNATIONAL LAW 913 (1965); 1 L. OPPENHEIM, INTERNATIONAL LAW § 115a (8th ed. H. Lauterpacht ed. 1952). See also H.R. REP. NO. 94-1487, 94th Cong., 2d Sess., at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6606 [hereinafter HOUSE REPORT].

2. Recent Developments, *supra* note 1, at 191.

3. McCormick, *supra* note 1, at 477.

4. See Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 303 (1986).

5. 28 U.S.C. §§ 1603(a), 1604 (1982).

6. 28 U.S.C. § 1605 (1982).

7. 28 U.S.C. §§ 1330, 1604-1607 (1982).

years⁸ and Congress is considering amendments to enhance its operation.⁹ These amendments, however, fail to correct the Act's greatest deficiency: its inadequacy in cases involving non-market economies.¹⁰

The Act fails to account for the ideological differences between capitalist nations and socialist or communist nations.¹¹ Capitalist nations are usually associated with a relatively free market economy where private ownership and an emphasis on individual rights are the norm.¹² In contrast, socialist states are associated with a planned economy where the major means of production are usually nationalized and individual property and contract rights are secondary to the interests of the national community.¹³ These ideological distinctions are fundamental to any legal transaction because they surround and give meaning to the legal terms of a transaction.¹⁴ They must not be overlooked in formulating the standards of foreign sovereign immunity.¹⁵

The purpose of this Note is to demonstrate the need for an amendment to the 1976 Act, in addition to those presently under consideration, which recognizes the political and economic realities of the modern world. The following discussion focuses on the FSIA and its inability to accommodate the ideology of non-market economies in making immunity determinations. After examining the FSIA and the development of foreign sovereign immunity in general, the discussion turns to an analysis of the differences between capitalist, or free market societies, and so-

8. The FSIA was enacted on October 21, 1976 and it became effective on January 19, 1977. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 33 n.1 (1978).

9. The amendments, proposed by Senator Charles McC. Mathias (R., Md.), deal with the effect of arbitration agreements on sovereign immunity, limitations on the defense of act of state in expropriation and breach of contract cases, prejudgment attachments of foreign governmental agency property, execution of judgments on commercial property of foreign governments and their agencies, admiralty claims against foreign governmental shipping, and treatment of governmental loan transactions as commercial activity not entitled to sovereign immunity under the Act. See S. 1071, 99th Cong., 1st Sess., 131 CONG. REC. S5363 (daily ed. May 3, 1985). For a discussion of the proposed amendments, see Atkeson & Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act*, 79 AM. J. INT'L L. 770 (1985).

10. See generally S. 1071, *supra* note 9; Atkeson & Ramsey, *supra* note 9; *infra* text accompanying notes 11-15. The problems posed by the 1976 Act's standards for immunity are more fully developed *infra* in Sections IV and V of this Note.

11. Note, *Breaking Out of the Capitalist Paradigm: The Significance of Ideology in Determining the Sovereign Immunity of Soviet and Eastern-Bloc Commercial Entities*, 2 HOUS. J. INT'L L. 425, 426 (1980) [hereinafter *Capitalist Paradigm*]. See also Recent Developments, *supra* note 1, at 199-205; Recent Developments, *Foreign Sovereign Immunity—Communist and Socialist Organizations—Effect of State's System of Property Ownership on Determination of Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act of 1976*, 9 GA. J. INT'L & COMP. L. 111, 121-22 (1979) [hereinafter *Property Ownership*].

12. *Capitalist Paradigm*, *supra* note 11, at 426.

13. *Id.*

14. *Id.* at 425.

15. *Id.*

cialist/communist, or non-market systems. Sections IV and V analyze two areas where the failure of the Act is especially pronounced—the definition of an “agency or instrumentality of a foreign state” and the commercial activity exception to foreign sovereign immunity. Each section includes a proposal that would improve the operation of the FSIA with respect to non-market economies without sacrificing its performance in the case of free market systems.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act of 1976¹⁶ represents Congress' attempt to standardize the law governing sovereign immunity by providing federal and state courts with a comprehensive framework to resolve all issues of foreign sovereign immunity.¹⁷ The Act codifies the restrictive theory of sovereign immunity,¹⁸ which the United States adopted in 1952.¹⁹ Nearly all major states substan-

16. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1982)). The structure of the FSIA's major sections in Title 28 of the United States Code is as follows:

§ 1330: Actions against foreign states (jurisdiction)

§ 1602: Findings and declaration of purpose

§ 1603: Definitions

§ 1604: Immunity of a foreign state from jurisdiction

§ 1605: General exceptions to the jurisdictional immunity of a foreign state

§ 1606: Extent of liability

§ 1607: Counterclaims

§ 1608: Service; time to answer; default

§ 1609: Immunity from attachment and execution of property of a foreign state

§ 1610: Exceptions to the immunity from attachment and execution

§ 1611: Certain types of property immune from execution

[hereinafter reference to the FSIA will be to the 1982 Edition of 28 U.S.C.]

17. HOUSE REPORT at 12, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6610 (The FSIA sets forth the “sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States.”).

18. HOUSE REPORT at 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605. According to the restrictive view of foreign sovereign immunity, a municipal court may exercise jurisdiction over a foreign sovereign regarding matters arising from the foreign sovereign's private acts (*jure gestionis*), but not in matters stemming from its public acts (*jure imperii*). McCormick, *supra* note 1, at 480; Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 HARV. INT'L L.J. 1, 2 (1985).

The alternative to the restrictive theory of sovereign immunity is the absolute theory of sovereign immunity. Under this view of immunity, without its consent a state cannot be sued in the courts of another state for any reason. Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 168 (1981). This view of immunity stems from the belief that the exercise of jurisdiction over a foreign sovereign insults the independence, equality, and dignity of that sovereign. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812). United States courts adhered to the absolute theory of foreign sovereign immunity, refusing to adjudicate any claims between United States citizens and foreign governments, until 1952. Feldman, *supra* note 4, at 303; Comment, *Foreign Sovereign Immunities Act of 1976—Judicial Predominance*, 4 BROOKLYN J. INT'L L. 146, 147-48 (1977). See *infra* note 19.

19. The United States adopted the restrictive theory of foreign sovereign immunity in 1952 with the

tially engaged in international trade have now abandoned the absolute theory of foreign sovereign immunity in favor of the restrictive view.²⁰ Only socialist states, such as the U.S.S.R. and the People's Republic of China, still officially contend that, in theory, international law requires that foreign sovereigns be accorded absolute immunity from judicial process in foreign states.²¹ In practice, however, even these states appear to recognize the actuality of restrictive sov-

State Department's issuance of the Tate Letter. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to the Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]. This decision was prompted by explosive growth in international trade and the emergence of governmental trading agencies in the Eastern bloc, both of which resulted in a tremendous increase in commercial contacts between states and the private citizens of other nations. McCormick, *supra* note 1, at 483-84. *See also* Tate Letter, *supra*, at 985; Hill, *supra* note 18, at 171; Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429, 432 (1977) [hereinafter *Judicial Control*]. With the increasing commercial contacts between private parties and foreign governments, the State Department felt that despite the importance of international trade, considerations of fairness to persons doing business with foreign governments required that such persons be able to have their rights determined in court. Tate Letter, *supra*, at 985. *See also* Singer, *supra* note 18, at 9; Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 212 (1979). In adopting the restrictive view of immunity, the United States fell in line with most Western European nations. These states had already perceived that the justifications for granting immunity become inapplicable when a sovereign departs from its political and governmental roles and enters into the commercial, industrial, and similar spheres. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 220 (1951); Singer, *supra* note 18, at 1.

20. Singer, *supra* note 18, at 6. England became the last major international trader to adopt the restrictive view of immunity with the State Immunity Act of 1978. *Id.* at 4. *See also* McCormick, *supra* note 1, at 483-84; Hill, *supra* note 18, at 171; *Judicial Control*, *supra* note 19, at 432-33.

The trend toward restricted immunity was described as follows:

[T]he swing toward the more radical doctrine of holding states responsible to the courts for their economic activities was given a great impetus by the appearance on the international stage of the Union of Soviet Socialist Republics. Courts . . . saw beneath the garments of the sovereign a powerful economic competitor of national business firms, which should not be allowed to handicap private enterprise by the claim of sovereign prerogative.

E. ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS* 301-02 (1933).

21. Singer, *supra* note 18, at 6; *Jurisdiction of United States Courts in Suits against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of House Comm. on the Judiciary*, 94th Cong., 2d Sess., 56 (1976) [hereinafter *1976 Hearings*] (Testimony of Monroe Leigh, Legal Advisor, US Department of State).

The Soviet Union rejects the theory of restrictive immunity because it believes that a distinction cannot be made between acts of a socialist state that are of a public nature and acts that are of a private or commercial nature. Osakwe, *A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice*, 23 VA. J. INT'L L. 13, 14 (1982). Under prevailing Soviet political theory concerning the nature of the state, an act of a socialist state does not cease to be sovereign merely because the state is performing functions that are traditionally reserved to private persons in non-socialist legal systems. *Id.* The Soviets argue that in a capitalist system, the state has *voluntarily* agreed to share some of its powers with private interests while at the same time abdicating some of its functions entirely to private persons. The socialist state, on the other hand, has not agreed to share any powers with private

foreign immunity.²² The restrictive theory is thus firmly implanted as the standard for immunity under international law,²³ and is appropriately adopted by the FSIA.

In addition to formalizing the law of restrictive foreign sovereign immunity, the Act seeks to make the application of that law more uniform, fair, and hence predictable, by transferring the authority to make immunity determinations from the executive to the judiciary.²⁴ Prior to the FSIA the State Department, rather than the courts, was the dominant force in immunity determinations.²⁵ Foreign

parties. *Id.* at 22. In the Soviet view, such abdication of functions or sharing of powers with private persons is impossible in the socialist state, because the personality of the socialist state is indivisible. All activities, political as well as economic, are endowed with the same degree of sovereignty. *Id.*; see also Boguslavsky, *Foreign State Immunity: Soviet Doctrine and Practice*, 10 NETH. Y.B. INT'L L. 167, 169–70 (1979).

China's adherence to the principle of absolute foreign sovereign immunity is based, in part, on reasons similar to those advanced by the Soviet Union. See Comment, *China's Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People's Republic of China*, 22 COLUM. J. TRANSNAT'L L. 101, 121–22 (1983) [hereinafter *China's Stance*]. It is also a product of China's adverse experience with extraterritorial laws of Western powers and China's extension to foreign states of absolute immunity from the jurisdiction of Chinese courts in the nineteenth and early twentieth centuries. *Jackson v. People's Republic of China*, 794 F.2d 1490, 1494 (11th Cir. 1986) (quoting United States' statement of interest). See also *China's Stance*, *supra*, at 119–20. In addition, the Chinese have a traditional distaste for litigation as a means of dispute settlement. They much prefer arbitration to adversary judicial proceedings. *China's Stance*, *supra*, at 120–21.

For a general discussion of the reasons behind China's position on sovereign immunity, see *China's Stance*, *supra*, at 119–22; Recent Developments, *Government Shipping Company of the People's Republic of China is an "Agency or Instrumentality" for the Purposes of the Foreign Sovereign Immunities Act of 1976*, 14 VAND. J. TRANSNAT'L L. 637, 650 n.67 (1981).

22. The Soviet Union commonly enters into bilateral treaties in which it consents to subject its state trading enterprises to the jurisdiction of municipal courts in disputes arising out of their commercial activities. Singer, *supra* note 18, at 6–7; 1976 Hearings, *supra* note 21, at 56 (testimony of Monroe Leigh). This treaty practice is best viewed as an ideological rather than a merely pragmatic acceptance of the restrictive doctrine. Singer, *supra* note 18, at 6. See, e.g., *Claim Against the Empire of Iran Case*, Apr. 30 1963, Bundesverfassungsgericht, W. Ger., 16 BVerfG 27, 54–55 (1962), reprinted in 45 I.L.R. 57, 75 (1972).

Like the U.S.S.R., the PRC and its organizations have begun to enter into commercial agreements containing sovereign immunity waivers. See *China's Stance*, *supra* note 21, at 125. The PRC's willingness to recognize a restrictive interpretation of sovereign immunity is corroborated by the increasing willingness of Chinese entities to appear as parties before United States courts. *Id.* at 125–29. In fact, the PRC itself recently entered a special appearance for the limited purpose of asserting its sovereign immunity in the *Hunguang Railway Bonds* case. *Jackson v. People's Republic of China*, 794 F.2d at 1492, 1494. Although the PRC argued absolute immunity, *id.* at 1494, the very fact that it appeared at all indicates a willingness to relax its absolute perspective. See *China's Stance*, *supra* note 21, at 125–29; Singer, *supra* note 18, at 6–7. It thus appears that little remains of the doctrine of absolute immunity in the actual practice of socialist states. Singer, *supra* note 18, at 7.

23. Singer, *supra* note 18, at 7.

24. HOUSE REPORT at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605–06.

25. See Feldman, *supra* note 4, at 303–04; Hill, *supra* note 18, at 174–76; *Judicial Control*, *supra* note 19, at 435–36; McCormick, *supra* note 1, at 484–85; von Mehren, *supra* note 8, at 41.

states could submit claims of immunity to the courts through the State Department.²⁶ Because the judiciary deferred to State Department immunity determinations,²⁷ foreign states often placed diplomatic pressure on the Department to allow immunity for foreign policy reasons in cases where it was not available under the restrictive theory.²⁸ The FSIA terminated the dominant role of the State Department in the area of sovereign immunity to reduce the political pressures brought to bear upon the Department in its consideration of immunity pleas and to assure private litigants that immunity determinations would be made on purely legal grounds.²⁹

26. Hill, *supra* note 18, at 174–75; *Judicial Control*, *supra* note 19, at 435; Feldman, *supra* note 4, at 303.

27. The doctrine of judicial deference to executive determinations of sovereign immunity was the product of a series of Supreme Court cases culminating in *Ex Parte Peru*, 318 U.S. 578 (1943), and *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). In *Peru*, the Court indicated that the executive had a constitutionally mandated prerogative of action in the field of foreign relations, 318 U.S. at 588. Because of the implications to United States foreign relations, wrongs to foreign nations were better righted through diplomatic negotiation than through the courts. It thus concluded that the executive's determination as to sovereign immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations." *Id.* at 589. In *Hoffman*, the Court more explicitly enunciated a political question restriction on the courts' jurisdiction. It further noted that courts should not embarrass the executive by reviewing its immunity determinations. 324 U.S. at 35–36. Together these two cases came to stand for the proposition that a United States court must dismiss a cause of action against a sovereign state upon the interposition of a sovereign immunity plea by the State Department. See von Mehren, *supra* note 8, at 40, 41; Hill, *supra* note 18, at 174; *Judicial Control*, *supra* note 19, at 431–32; Feldman, *supra* note 4, at 303–04.

28. Feldman, *supra* note 4, at 304. Immunity pleas directed to the State Department were analyzed without established procedures for taking evidence, applying precedent, justifying determinations, or affording the opportunity for appeal. *Judicial Control*, *supra* note 19, at 435–36; Hill, *supra* note 18, at 175. See generally Note, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts With a Judicial Function*, 69 Nw. U.L. REV. 302, 311–22 (1974). There were, in fact, inconsistencies in the Department's application of the restrictive theory and instances where political considerations blatantly overrode the dictates of the Tate Letter. Kahale & Vega, *supra* note 19, at 216; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986). See *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974) (suggestion of immunity from suit in commercial case); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971) (suggestion of immunity from suit in commercial case involving a waiver of immunity), *cert. denied*, 404 U.S. 985 (1971); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961) (suggestion of immunity from attachment of commercial vessel notwithstanding a waiver of immunity). See also Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543, 547–49 (1977) [hereinafter *Plaintiff's Day*]. This fueled the arguments of those who favored a depoliticization of the decision-making process in order to protect the interests of private individuals. Kahale & Vega, *supra* note 19, at 216; Hill, *supra* note 18, at 175.

29. See HOUSE REPORT at 7–8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605–06. Although one of Congress' primary objectives in passing the 1976 Act was to depoliticize immunity determinations by transferring them from the State Department to the judiciary, the Act does not guarantee this result. Rather, it remains to the judges applying the Act to depoliticize it. *Judicial Control*, *supra* note 19, at 454. The Act merely states that claims of immunity are to be decided by United States courts in conformity with the FSIA; it does not prevent the courts

Under the Act, a foreign state, or agency or instrumentality of a foreign state,³⁰ is immune from the jurisdiction of United States courts³¹ unless the plaintiff can show that the defendant's act falls under one of the expressly enumerated exceptions to foreign sovereign immunity.³² The exceptions to the general rule of immunity include waiver of immunity, commercial activities, expropriation claims, and most non-commercial torts.³³ Because the FSIA codifies the restrictive theory of sovereign immunity, the most important of these exceptions relates to commercial activities.³⁴ The commercial activities exception to sov-

from taking into account views communicated to them by the executive. Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea For Drastic Surgery*, 74 AM. SOC'Y INT'L L. PROC. 49, 61 n.63 (1980). The State Department has indicated that it will not hesitate to express its views as *amicus curiae* on issues arising under the Act. See Letter from the Legal Advisor of the State Department to the Attorney General (Nov. 2, 1976), reprinted in 41 Fed. Reg. 50883, 50883-884 (1976).

In this regard, it is interesting to note that in the *Novosti Press Agency* case the State Department responded to a request for diplomatic assistance by stating that it "concurs with the position taken by the attorneys for Novosti" regarding the retroactivity of the Act's application, and the court referred to and substantially accepted this statement. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978). The Department, however, did decline to render an opinion on the merits of the claim to immunity. Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act in Practice*, 73 AM. J. INT'L L. 200, 206 (1979).

The judiciary must be careful not to allow State Department suggestions to control the courts' immunity determinations. Were it otherwise, the courts would once again be deferring to the State Department, which would be subject to the very foreign policy considerations that the 1976 Act sought to eliminate. Indeed, the House Report indicates that the judiciary should not defer to the executive branch regardless of how the executive presses its views on the court. See HOUSE REPORT at 12, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6610.

30. A foreign state, its agency or its instrumentality is defined in 28 U.S.C. § 1603(a) and (b). This definition is set out *infra* at notes 147-50 and accompanying text. An analysis of the problems with the Act's definition of an "agency or instrumentality of a foreign state" is presented *infra* in Section IV of this Note.

31. Jurisdiction is obtained under 28 U.S.C. § 1330(a), which provides:

The district court shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in § 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under §§ 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1604 recognizes a general rule of immunity for a foreign state acting under its own name or through an instrumentality or government-owned entity.

32. Exceptions are listed in 28 U.S.C. § 1605. Under the 1976 Act, sovereign immunity is an affirmative defense which must be specifically pleaded. The defendant bears the burden of producing evidence in support of its claim of immunity. If it establishes that it is a foreign state or an agency or instrumentality of a foreign state, it is presumed to be immune. The burden then shifts to the plaintiff to show that the defendant's acts fall under one of the statutory exceptions to sovereign immunity. See HOUSE REPORT at 17, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6616. For a discussion of the procedural complexities involved in raising and proving sovereign immunity, see Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 412-24 (1982).

33. 28 U.S.C. § 1605(a).

34. HOUSE REPORT at 18, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6617; Recent Developments, *supra* note 1, at 198.

ereign immunity dictates that a foreign sovereign is not immune in cases arising out of "either a regular course of commercial conduct or a particular commercial transaction or act."³⁵ Thus, the distinction between public and commercial activities is vital.

Although the United States formally adopted the restrictive view of foreign sovereign immunity in 1952, confusion over the appropriate means to distinguish between a state's public and commercial acts remained until the passage of the FSIA.³⁶ Prior to the Act, courts and commentators formulated a variety of tests to differentiate between public and private acts.³⁷ Some focused on the nature of the act, classifying as sovereign those acts that could be performed only by the sovereign;³⁸ others adopted a "purpose" approach, considering sovereign those acts performed for a public purpose.³⁹ As can easily be imagined, this led to confusion and inconsistent results.⁴⁰

The "commercial activity exception" is provided by 28 U.S.C. § 1605(a)(2) which states:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

35. 28 U.S.C. § 1603(d) defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

36. Feldman, *supra* note 4, at 303–04. See also Hill, *supra* note 18, at 175–76; McCormick, *supra* note 1, at 484–85; *Judicial Control*, *supra* note 19, at 435; von Mehren, *supra* note 8, at 41. Foreign states had the option of deciding which immunity determinations they would submit directly to the courts and which they would submit through the State Department. With two different branches of the government involved the governing standards were neither clear nor uniform. Hill, *supra* note 18, at 174–75; *Judicial Control*, *supra* note 19, at 435; Feldman, *supra* note 4, at 303.

37. Kahale & Vega, *supra* note 19, at 212.

38. *Id.* at 212–13. See also *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 204 N.Y.S.2d 971, 25 Misc. 2d 299 (Sup. Ct. 1960), *aff'd*, 233 N.Y.S.2d 1013, 17 A.D.2d 927 (App. Div. 1962); Weiss, *Competence ou Incompetence des Trigunaux a l'Egard des Etats Etrangers*, 1 RECEUIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 521 (1923).

39. Kahale & Vega, *supra* note 19, at 213. See, e.g., *Kingdom of Roumania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir. 1918), *cert. denied*, 246 U.S. 663 (1918); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952).

40. After the Tate Letter of 1952, courts in the United States began taking different and sometimes inconsistent approaches to immunity determinations. In *Petrol Shipping Corp. v. Kingdom of Greece*, Ministry of Commerce, Purchase Directorate, 360 F.2d 103 (2d Cir. 1965), *cert. denied*, 385 U.S. 394 (1966), Greece's Ministry of Commerce claimed immunity from suit on a contract for purchases and shipments of grain, but immunity was denied. But in *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), the court upheld sovereign

In *Victory Transport, Inc. v. Comisaria General*,⁴¹ the Second Circuit rejected both the “nature” and the “purpose” tests as “unsatisfactory” and “unworkable”⁴² and created its own classification of political and public acts.⁴³ It then declared that foreign states would be entitled to immunity only from claims arising out of those activities.⁴⁴ These immune governmental activities were comprised of:

- (1) internal administrative acts, such as expulsion of an alien;
- (2) legislative acts, such as nationalization;
- (3) acts concerning the armed forces;
- (4) acts concerning diplomatic activity; and
- (5) public loans.⁴⁵

This distinction between public and commercial activities was followed in a number of subsequent decisions.⁴⁶ As a result, *Victory Transport* became the leading statement of commercial activity analysis in sovereign immunity cases prior to the passage of the Foreign Sovereign Immunities Act of 1976.⁴⁷

The FSIA rejects both the classification scheme of *Victory Transport* and the

immunity on an action based on a contract for grain shipments. The two cases were similar, but the results opposite. See generally *Property Ownership*, *supra* note 11, at 116; Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U.L. REV. 901, 907 (1969); Kahale & Vega, *supra* note 19, at 212; *Judicial Control*, *supra* note 19, at 436. For a fuller discussion, see *Plaintiff's Day*, *supra* note 28, at 543.

41. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). In this case, the Comisaria General, a branch of the Spanish Ministry of Commerce, chartered a vessel from *Victory Transport, Inc.* to carry a cargo of wheat to Spanish ports. *Id.* at 356. The Second Circuit found that the action by the Comisaria General was not a strictly public or political act but rather a commercial and private act. *Id.* at 360–61. It therefore denied sovereign immunity to the Spanish government. *Id.* at 362 n.20.

42. The court eschewed both the nature and the purpose tests for distinguishing between acts *jure imperii* and acts *jure gestionis*. It observed that under the “nature” test, certain activities traditionally considered exclusively within the realm of governments, such as the purchase of bullets or shoes for an army, would be characterized as commercial. The “purpose” test was considered even more unsatisfactory, “for conceptually the modern sovereign always acts for a public purpose.” *Id.* at 359–60; Kahale & Vega, *supra* note 19, at 213.

43. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

44. *Id.*

45. *Id.*

46. von Mehren, *supra* note 8, at 51; Hill, *supra* note 18, at 180; Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1012 (1979). See also *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971) note 55, at 1200; *Petrol Shipping Corporation v. Kingdom of Greece*, Purchase Directorate, 360 F.2d 103, 110 (2d Cir. 1965), *cert. denied*, 385 U.S. 394 (1966); *Sea Transport Corp. v. The S/T Manhattan*, 405 F. Supp. 1244, 1246 (S.D.N.Y. 1975); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975); *Pan American Tankers Corp. v. Republic of Vietnam*, 296 F. Supp. 361, 363–64 (S.D.N.Y. 1969); *American Hawaiian Ventures v. M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

47. Kahale & Vega, *supra* note 19, at 213; von Mehren, *supra* note 8, at 50; Hill, *supra* note 18, at 180.

“purpose” test for distinguishing public from commercial activities. Instead it reverts to the “nature” test, indicating that whether a foreign state’s actions constitute commercial activity is determined from the nature of the acts in question.⁴⁸ The broadest application of the nature test would afford immunity to the sovereign only when the act is of such a nature that no party other than a government could perform such an act.⁴⁹ Because an individual cannot legislate, a state acts *jure imperii* when it passes legislation. Conversely, because an individual can borrow money or make a contract, a foreign state that borrows money or enters into a contract engages in a commercial activity under this test.⁵⁰ The fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant. It is the essentially commercial nature of an activity or transaction that is critical.⁵¹ In this respect, the identity of the entity being sued is irrelevant in evaluating the commercial nature of the activity in question.⁵² While this may appear desirable upon first glance, it presents difficulties when applied to non-market economies.

48. 28 U.S.C. § 1603(d). The Section-By-Section Analysis expands on this by indicating:

[T]he fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

49. von Mehren, *supra* note 8, at 49; Carl, *supra* note 46, at 1032.

50. Carl, *supra* note 46, at 1031–32; von Mehren, *supra* note 8, at 49. Lauterpacht, *supra* note 19, at 223, argues that a nature test “merely postpones the difficulty.” He contends:

To what extent is it true to say that contracts made by the state for the purchase of shoes for the army, or of a warship, or of munitions, or of foodstuff necessary for the maintenance of the national economy, are not immune from the jurisdiction for the reason that they are contracts and that an individual can make a contract? For can it not be said that these particular contracts can be made by a state only, and not by individuals? Individuals do not purchase shoes for their armies; they do not buy warships for the use of the state; they are not, as such, responsible for the management of the national economy.

Id.

51. HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

52. See HOUSE REPORT at 15–16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6613–15. See generally von Mehren, *supra* note 8, at 49, 53–54. The Fifth Circuit stated in *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379–80 (5th Cir. 1980), that:

The focus . . . is not on whether the defendant generally engages in a commercial enterprise or activity . . . ; rather, it is on whether the particular conduct giving rise to the claim in question constitutes or is in connection with commercial activity, regardless of the defendant’s generally commercial or governmental character.

Problems with the commercial activity exception are discussed *infra* in Section V of this Note.

III. NON-MARKET ECONOMIES (NMEs)

Market and non-market societies have radically different notions of the structure and authority of the state.⁵³ Such differences are reflected in the divergent concepts of property ownership held by each of these societies.⁵⁴ Moreover, governmental agencies play fundamentally different roles in market and non-market economies.⁵⁵ As Sections IV and V below demonstrate, the FSIA fails to account for the differences between these two antithetical ideologies, making it inadequate for NMEs. A basic understanding of certain ideological differences, particularly in the area of property ownership, is necessary to fully appreciate the problems in the 1976 Act. The following discussion of Russian and Yugoslav property systems serves to highlight the differences between market and non-market ideologies. Additionally, it indicates that any amendments to the FSIA to correct this defect must address many variations among NMEs themselves.

A. *Marxism-Leninism*

The socialist state, or dictatorship of the proletariat, is the intermediate phase between capitalism and communism.⁵⁶ The legal framework of much of the socialist world is dominated by Marxism-Leninism, a doctrine that explains the present world and provides a path to a better one.⁵⁷ In the Marxist-Leninist perspective, the nature of a society is determined by its economic infrastructure and the conditions in which the means of production are exploited.⁵⁸ All else is superstructure, closely dependent on the economic infrastructure.⁵⁹ Both the law and the state are superstructures.⁶⁰ They appear only when society is divided into social classes, one of which, by seizing control of the means of production,⁶¹ is able to economically exploit the other.⁶² In such a situation, the ruling class uses the state and its laws to strengthen and perpetuate its domination.⁶³ Thus, under Marxism-Leninism, law is closely identified with the state. It is an instrument designed to protect the interests of the ruling class and maintain social inequality.⁶⁴ Class struggle is primarily the efforts of one class to seize the means of

53. See generally R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD* 155–66, 268–83 (2d ed. 1978).

54. *Id.* at 268–73. See generally A. CHLOROS, *YUGOSLAV CIVIL LAW* 133–209 (1970).

55. See *Capitalist Paradigm*, *supra* note 11, at 438. See also *supra* note 21.

56. R. DAVID & J. BRIERLEY, *supra* note 53, at 162.

57. See R. DAVID & J. BRIERLEY, *supra* note 53, at 162–65.

58. R. DAVID & J. BRIERLEY, *supra* note 53, at 158.

59. *Id.*

60. *Id.*

61. *Id.* at 158–59.

62. *Id.*

63. *Id.*

64. *Id.*

production from another and thus establish its own dictatorship.⁶⁵ It is an inherent defect in the capitalist, or bourgeois, system.⁶⁶ Only when all private ownership of the means of production is abolished, and productive property is made the property of the collectivity, will class antagonism end.⁶⁷ In the resulting society, man will be transformed and the state and its laws will become useless and disappear.⁶⁸ Although this may seem straight forward, the manner in which it is applied varies widely among socialist states. The Soviet Union and Yugoslavia illustrate the differences.

B. U.S.S.R.

While the goal of Marxism-Leninism is a stateless/lawless society,⁶⁹ the Soviets argue that the state must not wither away immediately.⁷⁰ Rather, the state and its laws must be maintained provisionally to economically restructure society and destroy the selfish and anti-social tendencies inherited from centuries of poor economic organization under bourgeois rule.⁷¹ For this reason, an essentially economic preoccupation and instructive approach characterizes Soviet law, as opposed to "bourgeois law" which the Soviets believe blindly tries to establish order and morality, unobtainable in a world based on a defective economic system.⁷² In conformity with this interpretation of Marxism-Leninism, most of the property and means of production in the U.S.S.R. are exploited in accordance with a five-year plan of economic development drawn up by the Soviet leaders and approved by the Soviet parliament.⁷³ The admitted exceptions to this centrally developed plan, such as the complementary economy of the *kolkhozi*,⁷⁴ are of limited significance.⁷⁵ Soviet leaders admit that they are simply another ruling class presiding over an imperfect society, but claim to be enlightened, at least, by Marx and Lenin, and thus advanced upon the road of progress.⁷⁶

Under Marxism-Leninism the manner in which property is appropriated is foundational to the economic structure upon which society is based.⁷⁷ Because of the radical differences between socialist and capitalist ideas of economic and political systems, however, the Western concept of ownership is inapplicable in

65. *Id.* at 159–60.

66. *Id.* at 163–64.

67. *Id.* at 160.

68. See R. DAVID & J. BRIERLEY, *supra* note 53, at 160–61.

69. See *id.* at 143.

70. See *id.* at 175–76.

71. See *id.*

72. R. DAVID & J. BRIERLEY, *supra* note 53, at 163.

73. *Id.* at 172.

74. See *infra* notes 90–95 and accompanying text.

75. R. DAVID & J. BRIERLEY, *supra* note 53, at 172.

76. *Id.* at 162–64.

77. See *supra* notes 58–68 and accompanying text.

the socialist context of the people's dictatorship and collectivization of the economy.⁷⁸

As under Western ownership systems, every owner under Soviet law has the right to possess, use, and dispose of property within the limits laid down by law.⁷⁹ Whereas property law in Western countries is based on a unitary scheme of private ownership,⁸⁰ however, Soviet property law is predicated on public ownership⁸¹ and is composed of three different regimes: personal ownership, cooperative ownership, and state ownership.⁸² Personal ownership is composed of minor consumer goods and personal income, much like private property in capitalist countries, and allows Soviet citizens to satisfy their personal needs.⁸³ It constitutes a very minor portion of the property in the U.S.S.R.⁸⁴

While personal ownership has a Western analogue, the remaining two categories of ownership are unique to the Soviet system.⁸⁵ They constitute "socialist ownership."⁸⁶ Article 10 of the Soviet Constitution indicates that "socialist ownership of the means of production in the form of state property, and collective farm-and-cooperative property" constitutes "[t]he foundation of the economic system of the U.S.S.R."⁸⁷ Because socialist property cannot be used for personal

78. See R. DAVID & J. BRIERLEY, *supra* note 53, at 144, 267–68.

79. FUNDAMENTALS OF CIVIL LEGISLATION OF THE USSR AND THE UNION REPUBLICS (1961), art. 19, reprinted in SOVIET CIVIL LEGISLATION AND PROCEDURE 67 (Y. Sobnikov trans. 1974) [hereinafter FUNDAMENTALS].

80. See R. DAVID & J. BRIERLEY, *supra* note 53, at 269.

81. Stalin once observed of Soviet society:

The foundation of our system is public ownership, just as the foundation of capitalism is private ownership. Whereas the capitalists have proclaimed private property rights to be sacred and inviolable, achieving in their time the strengthening of the capitalist system, we Communists have all the more reason to proclaim public ownership sacred and inviolable, so as to strengthen thereby the new socialist forms of economy in all fields of production and trade.

Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 854 (S.D.N.Y. 1978) (quoting G. GUINS, SOVIET LAW AND SOVIET SOCIETY 106 (1954)).

82. R. DAVID & J. BRIERLEY, *supra* note 53, at 269.

83. See R. DAVID & J. BRIERLEY, *supra* note 53, at 270.

84. See *Capitalist Paradigm*, *supra* note 11, at 444 n.143.

85. R. DAVID & J. BRIERLEY, *supra* note 53, at 270.

86. See U.S.S.R. CONST. arts. 10–13, reprinted in Hazard, *infra* note 87, at 22–23. For the text of Article 10, see *infra* note 87.

87. Article 10 of the Soviet Constitution states:

The foundation of the economic system of the USSR is socialist ownership of the means of production in the form of state property (belonging to all the people), and collective farm-and-cooperative property.

Socialist ownership also embraces the property of trade unions and other public organizations which they require to carry out their purposes under their rules.

The state protects socialist property and provides conditions for its growth.

No one has the right to use socialist property for personal gain or other selfish ends.

U.S.S.R. CONST. art. 10, reprinted in Hazard, *Union of Soviet Socialist Republics* 22, in 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (A. Blaustein & G. Flanz eds. 1978).

gain,⁸⁸ it is difficult to compare the Soviet property system with the property systems of capitalist countries, which tend to view personal gain as a legitimate reason for private ownership.⁸⁹

Cooperative ownership is exemplified by the perpetual right to exploit the land in cooperative farms or *kolkhozes*.⁹⁰ Land has been nationalized, so it does not actually belong to the *kolkhozi*.⁹¹ Rather, the cooperative has a perpetual right of use and enjoyment over it.⁹² The permanence of the right distinguishes this form of ownership from the Western notion of beneficial use, which is generally only temporary.⁹³ Moreover, in exchange for the right to use and enjoy the land in perpetuity, the *kolkhozi* must satisfy a series of obligations to the state.⁹⁴ Thus, it is impossible to compare this second regime to an estate or the cooperative ownership found in laws of capitalist countries.⁹⁵

State property is the principal form of socialist property⁹⁶ and prevails in the industrial sector and in the state agricultural farms (*sovkhosi*).⁹⁷ It includes land, buildings, structures, raw materials, and products.⁹⁸ The "owner" of state prop-

88. *Id.* There is no right of private individual ownership of socialist property assets. See U.S.S.R. CONST. arts. 10–13, reprinted in Hazard, *supra* note 87, at 22–23.

89. See *Capitalist Paradigm*, *supra* note 11, at 426.

90. R. DAVID & J. BRIERLEY, *supra* note 53, at 270. See also U.S.S.R. CONST. art. 12, reprinted in Hazard, *supra* note 87, at 22. Like the *kolkhozes*, trade unions and public organizations represent other forms of cooperative enterprises whose property is deemed to be a part of the "socialist property" of the Soviet Union. U.S.S.R. CONST. art. 10, reprinted in Hazard, *supra* note 87, at 22. For further discussion of public organizations, see *infra* note 102.

91. R. DAVID & J. BRIERLEY, *supra* note 53, at 270. See also U.S.S.R. CONST. art. 11, reprinted in Hazard, *supra* note 87, at 22. For the text of Article 11, see *infra* note 98.

92. R. DAVID & J. BRIERLEY, *supra* note 53, at 270. According to Article 12 of the Soviet Constitution:

The property of collective farms and other cooperative organizations, and of their joint undertakings, comprises the means of production and other assets which they require for the purposes laid down in their rules. The land held by collective farms is secured to them for their free use in perpetuity.

The state promotes development of collective farm-and-cooperative property and its approximation to state property.

Collective farms, like other land users, are obliged to make effective and thrifty use of the land and to increase its fertility.

U.S.S.R. CONST. art. 12, reprinted in Hazard, *supra* note 87, at 22.

93. See R. DAVID & J. BRIERLEY, *supra* note 53, at 271.

94. See *id.* See also U.S.S.R. CONST. art. 12, reprinted in Hazard, *supra* note 87, at 22. For the text of Article 12, see *supra* note 92.

95. R. DAVID & J. BRIERLEY, *supra* note 53, at 271.

96. U.S.S.R. CONST. art. 11, reprinted in Hazard, *supra* note 87, at 22. For text of Article 11, see *infra* note 98.

97. R. DAVID & J. BRIERLEY, *supra* note 53, at 271.

98. Article 11 of the Soviet Constitution dictates that:

State property, i.e. the common property of the Soviet people, is the principal form of socialist property.

The land, its minerals, waters, and forests are the exclusive property of the state. The state

erty is the state,⁹⁹ or rather the people or the nation of which the state is the provisional representative.¹⁰⁰ Such property is generally consigned to state economic entities¹⁰¹ and public organizations¹⁰² which perform a set function within the economic plan.¹⁰³

A state organization is frequently a separate juridical personality with certain property rights, individual profit motives and the capability to sue or be sued in

owns the basic means of production in industry, construction, and agriculture; means of transport and communication; the banks; the property of state-run trade organisations and public utilities, and other state-run undertakings; most urban housing; and other property necessary for state purposes.

U.S.S.R. CONST. art. 11, *reprinted in Hazard, supra* note 87, at 22.

99. "The state is the sole owner of all state property." FUNDAMENTALS art. 21, *reprinted in SOVIET CIVIL LEGISLATION AND PROCEDURE, supra* note 79, at 67.

100. R. DAVID & J. BRIERLEY, *supra* note 53, at 272. *See also* U.S.S.R. CONST. art. 11, *reprinted in Hazard, supra* note 87, at 22. For the text of Article 11, *see supra* note 98.

101. *See* Recent Development, *Foreign Sovereign Immunity—The Status of Legal Entities in Socialist Countries as Defendants Under the Foreign Sovereign Immunities Act of 1976*, 12 VAND. J. TRANSNAT'L L. 165, 173–74 (1979) [hereinafter *Legal Entities*]. State economic enterprises are entities established to conduct certain aspects of the economic activities of the state. *See* W. BUTLER, SOVIET LAW 226–27 (1983). There are two categories of such entities. Osakwe, *supra* note 21, at 27 n.62. The first category includes those enterprises that are directly financed out of the state budget and are clearly not independent entities. The second category, *Khozraschet*, refers to those enterprises which possess, use, and dispose of "socialist property" as managers for the state, but not as owners. This is because the state owns all means of production and economically productive property. FUNDAMENTALS, art. 21, *reprinted in SOVIET CIVIL LEGISLATION AND PROCEDURE, supra* note 79, at 67. *See also supra* notes 97–100 and accompanying text. Nonetheless such entities are independent juridical persons because they operate under the principle of economic accountability, or *Khozraschet*; have the right to control and exploit the assets which have been placed in their operational management; are financially autonomous for their debts; and may sue or be sued in their own names. Osakwe, *supra* note 21, at 32. The most visible *Khozraschet* economic enterprises are foreign trade organizations (FTOs). FTOs are at the very center of all Soviet foreign trade operations. *Id.* at 26 n.56. They carry out export and import operations, each FTO having a particular function in terms of product, geographic market, or type of service. Although they are legal persons, all of their operations and policies are overseen and controlled by the state and its ministries.

102. Public organizations are entities designed to "promote [Soviet citizens'] political activity and initiative and satisfaction of their various interests." U.S.S.R. CONST. art. 51, *reprinted in Hazard, supra* note 87, at 29. The property of public organizations, like state property, is "socialist property." U.S.S.R. CONST. art. 10, *reprinted in Hazard, supra* note 87, at 22. Unlike state property, however, it can be owned by the public organization. *Legal Entities, supra* note 101, at 174 (citing CIVIL CODE OF THE RUSSIAN SOVIET FEDERATED SOCIALIST REPUBLIC, art. 1, *reprinted in SOVIET CIVIL LEGISLATION 1* (W. Gray ed. 1965)). *See also* FUNDAMENTALS, arts. 23–24, *reprinted in SOVIET CIVIL LEGISLATION AND PROCEDURE, supra* note 79, at 68–69. This is because public organizations pursue non-economic goals and their ownership is of a non-productive character. *Legal Entities, supra* note 101, at 174. The owner of a public organization is not specified in either the Soviet Constitution or the 1961 Fundamentals of Civil Legislation. *Id.* Such organizations are, however, juridical entities capable of suing, being sued, and acquiring property and non-property rights in their own names. *Id.*

103. *See* W. BUTLER, *supra* note 101, at 335; R. DAVID & J. BRIERLEY, *supra* note 53, at 272–73; Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 630–31 (1950); *Capitalist Paradigm, supra* note 11, at 451–52.

its own name.¹⁰⁴ Yet, this independence is largely illusory; although the state may assign the right to possess, use and dispose of a portion of state property to a state organization, it does not relinquish ownership.¹⁰⁵ Rather it places the property in the “operative management” of that organization, which must administer it in accordance with the law, the charter of the organization, and the designated purpose of the property.¹⁰⁶ Moreover, the terms of a concession to a state organization can always be modified unilaterally by state authorities, so the organization never has a right that can prevail over the state itself.¹⁰⁷ In this respect governmental regulations, within the overall economic plan, determine all aspects of a state entity’s organization and activities, including the scope of its legal personality, separate property status, and responsibilities.¹⁰⁸ State property as a

104. Fensterwald, *supra* note 103, at 630–31; *Capitalist Paradigm*, *supra* note 11, at 451–52. See also W. BUTLER, *supra* note 101, at 335–36.

105. See U.S.S.R. CONST. arts. 10–13, reprinted in Hazard, *supra* note 87, at 22; W. BUTLER, *supra* note 101, at 169–70, 336–37.

106. W. BUTLER, *supra* note 101, at 170; FUNDAMENTALS, art. 21, reprinted in SOVIET CIVIL LEGISLATION AND PROCEDURE, *supra* note 79, at 67.

107. R. DAVID & J. BRIERLEY, *supra* note 53, at 272. In a sense this is always true: the state as sovereign may create and remove rights in any legal system. The Soviet perspective, however, subordinates the law and even legal norms such that there is no appeal to any rights independent of the sovereign state. Economic profitability frequently does not play a role in that decision. *Capitalist Paradigm*, *supra* note 11, at 455.

108. *Capitalist Paradigm*, *supra* note 11, at 452. In Western states, “the term ‘juridical person’ is a term of art and usually means, prima facie, that the entity involved is separate and distinct from the government.” Osakwe, *supra* note 21, at 31 (quoting N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 316 (1973)). Under Soviet law, however, it is quite possible to be a juridical person and an agency and instrumentality of the Soviet state at the same time. As a matter of fact, all state juridical persons are agencies and instrumentalities of the Soviet state. *Id.* at 33. A *Khozraschet* economic enterprise’s status as a separate legal entity does not detract from its intrinsic character as an instrumentality of the Soviet state. Such entities are unconditionally subject to the directives of the Soviet government and its Ministries. The term “juridical person” as it applies to state economic enterprises merely means that the entity in question has the right of control and exploitation over the assets that have been placed under its operational management but that actually belong to the state; that the entity operates under the regime of economic accountability (*Khozraschet*); that it is financially autonomous (liable for its debts); and that the entity may sue or be sued in its own name. Even though an economic entity may be a legal person and enjoy a certain amount of autonomy, it is first and foremost a fictional extension of the state. The inability of an economic organization to dispose of the state property placed under its operative management without the consent of the state itself indicates that the juridical person is not “separate and distinct from the government.” *Id.* at 32.

The status of a public organization differs from that of an economic enterprise in only one critical respect: a public organization is a “social” or non-governmental organization. See Osakwe, *supra* note 21, at 33 (Osakwe uses “state juridical persons” to refer to economic entities and “nonstate juridical persons” to refer to public organizations). George C. Guins, in his book on the Soviet legal system, concludes that there is no real difference between economic enterprises and “voluntary organizations” (public organizations) organized under article 51. See G. GUINS, *supra* note 81, at 97. Like economic enterprises, public organizations are “always subject to government control and directives and perform special functions inspired by the highest organs of the state.” G. GUINS, *supra*

rule cannot be alienated to individual citizens.¹⁰⁹ Property produced by a state organization using assigned property is distributed to benefit another enterprise or a consumer in accordance with the national economic plan.¹¹⁰

Government planning is much more extensive in socialist states than in capitalist states.¹¹¹ While the state plays an important role in the economy of capitalist nations, the “flexible” economic planning that may exist in such countries is quite distinct from the “rigid” U.S.S.R. planning. Planning in the U.S.S.R. is not limited to setting general objectives but establishes a specific task for each enterprise.¹¹² The adaptation of property to the needs of production and consumption is the essence of the socialist regime of ownership.¹¹³ Under the Soviet system, it is not really important to know who owns the property or how it can be transferred. It is crucial, however, to know by whom, and how, property is to be administered or exploited and in what way it will be disposed of according to the established provisions of the national economic plan.¹¹⁴ Such a concept is far removed from the capitalist view that the owner is, in principle, sovereign and the manner in which one chooses to exploit one’s property is not, as a general rule, even taken into account by the law.¹¹⁵

C. Yugoslavia

Yugoslavia’s approach to socialism differs markedly from that of the Soviet Union.¹¹⁶ Although Yugoslav leaders subscribe to Marxism-Leninism and its ultimate goal of the ideal communist society, they interpret the doctrine differently than do their Soviet counterparts.¹¹⁷ Whereas the Russians believe the way to achieve the ideal community is to provisionally maintain the state bureaucracy to condition society for the new order,¹¹⁸ the Yugoslavs contend that the state and its laws must be eliminated immediately in all those areas where this can be accomplished without endangering society’s progress toward communism.¹¹⁹ As part of this immediate divestiture of power the Yugoslavs maintain that the means of production must be given “in fact” to the people rather than held by the state

note 81, at 97. As such, they are instrumentalities of the Soviet government as are all juridical persons. See G. GUINS, *supra* note 81, at 97; Osakwe, *supra* note 21, at 34.

109. See R. DAVID & J. BRIERLEY, *supra* note 53, at 272.

110. R. DAVID & J. BRIERLEY, *supra* note 53, at 272.

111. See R. DAVID & J. BRIERLEY, *supra* note 53, at 272–73.

112. R. DAVID & J. BRIERLEY, *supra* note 53, at 272–73.

113. *Id.* at 272.

114. *Id.*

115. *Id.*

116. See generally A. CHLOROS, *supra* note 54, at 133–209.

117. R. DAVID & J. BRIERLEY, *supra* note 53, at 187.

118. *Id.* at 143, 175–76. See R. DAVID & J. BRIERLEY, *supra* note 53, at 187–88. See also *supra* notes 69–71 and accompanying text.

119. R. DAVID & J. BRIERLEY, *supra* note 53, at 187.

for the people as in the U.S.S.R.¹²⁰ The Yugoslavs criticize the Soviet Union's bureaucratization of the socialist state as a departure from the Marxist path that has created a new form of capitalist state with the Soviet ruling class as the new bourgeois.¹²¹

To avoid the Soviet-style central state bureaucracy, the Yugoslav socio-economic system is decentralized¹²² through the active participation of workers and salaried employees in the economic management of the country.¹²³ The foundations of this system are social ownership of the means of production and worker self-management; self-managed organizations of workers use socially-owned resources as a means of production.¹²⁴ The assets used by these worker organizations are classified as "social property" according to Yugoslav law.¹²⁵ Although the Yugoslav Constitution does not expressly define "social property,"¹²⁶ it includes "[t]he means of production and other means of associated labour, products generated by associated labour and income realized through associated labour, resources for the satisfaction of common and general social needs, natural resources and goods in common use. . . ."¹²⁷ It is thus apparent that "social property" includes virtually all property and resources necessary to the industrial sector of Yugoslavia's economy.

Ownership of "social property" is also not defined in the Yugoslav Constitu-

120. *Id.*

121. *Id.*

122. Glickman & Sukijasovic, *Yugoslav Worker Management and Its Effect on Foreign Investment*, 12 HARV. INT'L L.J. 260, 262 (1971).

123. Conner, *Joint Ventures in Yugoslavia*, 10 INT'L LAW. 45, 46 (1976). See also R. DAVID & J. BRIERLEY, *supra* note 53, at 188-91.

124. Conner, *supra* note 123, at 46. Article 10 of the Yugoslav Constitution provides:

The socialist socio-economic system of the Socialist Federal Republic of Yugoslavia shall be based on freely associated labour and socially-owned means of production, and on self-management by the working people in production and in the distribution of the social product in basic and other organizations of associated labour and in social reproduction as a whole.

YUGO. CONST. art. 10, *reprinted in* Flanz, *Yugoslavia* 49, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Supp.) (A. Blaustein & G. Flanz eds. 1986).

A work organization is an independent self-managing organization of workers linked in labour by common interests and organized in basic organizations of associated labour of which the work organization is composed, or of workers directly linked together through the unity of the labour process.

YUGO. CONST. art. 35, para. 1, *reprinted in* Flanz, *supra*, at 59.

125. "An entity shall create the resources needed for the exercise of its activity by means of its operations. . . . The assets of an enterprise shall be social property." *Legal Entities*, *supra* note 101, at 175 (quoting BASIC LAW OF ENTERPRISES, art. 16, *reprinted in* 13 INSTITUTE OF COMPARATIVE LAW: COLLECTION OF YUGOSLAV LAW 15 (B. Blagojevic ed. 1966)).

126. A. CHLOROS, *supra* note 54, at 161.

127. YUGO. CONST. art. 12, para. 1, *reprinted in* Flanz, *supra* note 124, at 49.

tion,¹²⁸ which states only that “no one may acquire the right of ownership of social resources.”¹²⁹ This lack of definition has led to dispute among legal scholars as to whether the state owns the “social property” assets of worker organizations.¹³⁰ The confusion appears to stem from social property’s dual character as “both part of state property and separate from it.”¹³¹ At one time this property was state owned, like that in the U.S.S.R.¹³² The state created “social property” out of state property, however, when it decentralized the socio-economic structure and conferred upon workers in organizations the absolute right to use social property in connection with their labor “to satisfy their personal and social needs and to manage, freely and on equal footing with other workers in associated labour, their labour and the condition and results thereof.”¹³³ It thus appears that the “social property” assets of worker organizations are neither state-owned nor privately-owned.¹³⁴ Rather they belong to all the people of Yugoslavia, but are “held and used ‘in trust’ by the work organization for the general good of all the Yugoslav people.”¹³⁵

To this end, worker organizations are independent juridical entities with the capacity to sue, be sued, and contract in their own names.¹³⁶ They are also

128. *Legal Entities*, *supra* note 101, at 176.

129. No one may acquire the right of ownership of social resources which are conditions of labour in basic and other organizations of associated labour or are the economic foundations for the realization of the functions of self-managing communities of interest or of other self-managing organizations and communities and of socio-political communities.

YUGO. CONST. art. 12, para. 2, *reprinted in* Flanz, *supra* note 124, at 49.

130. A. CHLOROS observes that “many theories have been put forward to explain the nature of social property and the attempt of lawyers to supply a definition has caused a great deal of controversy.” A. CHLOROS, *supra* note 54, at 168. For a good discussion of several such theories, see A. CHLOROS, *supra* note 54, at 170–181.

131. A. CHLOROS, *supra* note 54, at 175. Chloros described social property as being somewhere “between state property and private property, . . . but partaking in some measure of both.” He also noted that there is state property which is separate and distinct from social property. “For example, in Yugoslav theory State funds, army equipment, warships, and aeroplanes are considered state property. Yugoslav theory, therefore, recognizes two kinds of property; state property and social property.” *Id.* Such property is necessary for defense of the country and maintenance of order and social peace. These functions are the last to be exercised by society directly; they will be transferred to the people only after all inequalities have disappeared. Continued exercise of such functions by the state, however, does not prevent the state from withering away in all other respects. R. DAVID & J. BRIERLEY, *supra* note 53, at 190.

132. A. CHLOROS, *supra* note 54, at 162.

133. YUGO. CONST. art. 13, para. 1, *reprinted in* Flanz, *supra* note 124, at 49–50. *See generally*, A. CHLOROS, *supra* note 54, at 162–63; R. DAVID & J. BRIERLEY, *supra* note 53, at 188–90.

134. A. CHLOROS, *supra* note 54, at 161; *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831 (D.D.C. 1977).

135. *Edlow*, 441 F. Supp. at 831.

136. *Legal Entities*, *supra* note 101, at 175 (citing BASIC LAW OF ENTERPRISES, art. 4, *reprinted in* 13 INSTITUTE OF COMPARATIVE LAW: COLLECTION OF YUGOSLAV LAW 15 (B. Blagojevic ed. 1966)).

accorded some ownership rights similar to those of Western corporations.¹³⁷ The workers in the organizations have the right to decide how to use social property assets, what products to produce, the rate of production, the selling prices and the marketing strategy, as well as the right (within limits) to set the organization's policy regarding distribution or reinvestment of profits.¹³⁸ Unlike the Soviet Union, Yugoslavia has no binding overall economic plan.¹³⁹ However, all of these rights must be exercised in a manner that is economically beneficial for society as a whole.¹⁴⁰ To ensure responsible use, "[t]he rights, obligations, and responsibilities concerning the disposal, utilization and management of social resources . . . [is] . . . regulated by the constitution and statute, in line with the nature and purpose of these resources."¹⁴¹ Yugoslavia's socio-economic system is thus somewhat more "democratic" than the Soviet system.¹⁴² It is not, however, a free market system where the use of property is largely determined by the individual owner's interest irrespective of society as a whole.¹⁴³

137. *Id.* The rights of the work organization include:

- (1) the right to use the property as prescribed by management;
- (2) the right to alter the nature and location of the property;
- (3) the right to invest or reinvest the property of the work organization;
- (4) the right to combine the property with that of other work organizations;
- (5) the right to sell, lease, or otherwise transfer the property of the work organization on such terms and conditions as management deems to be in its best interests; and
- (6) the right to allocate the income of the work organization from the use and investment of the social property as management determines.

[Furthermore,] the workers, through the workers' council or founders' council, under the right of self-management, are also the management.

Recent Developments, *supra* note 1, at 203 n.94 (citing Nuclearna Electramna Krsko's Memorandum in Support of Motion to Dismiss at 7–8.) See also Van Doren, *Ownership of Yugoslav Social Property and United States Industrial Property—A Comparison*, 26 RUTGERS L. REV. 73, 104 (1972).

138. Conner, *supra* note 123, at 46. For further enumeration of the ownership rights of worker organizations, see *supra* note 137.

139. Conner, *supra* note 123, at 46.

140. In exercising the right to work with social resources, workers in associated labour shall in their common and general social interest be mutually responsible for using these resources in a socially and economically opportune manner, for constantly renewing, expanding and improving them, as the economic foundations of their own and of total social labour, and for fulfilling their working obligations conscientiously.

In exercise of their right to work with social resources, workers in associated labour may not acquire material benefits or other advantages that are not based on their labour.

YUGO. CONST. art. 15, reprinted in Flanz, *supra* note 124, at 50.

141. YUGO. CONST. art. 13, para. 2, reprinted in Flanz, *supra* note 124, at 50.

142. See *Capitalist Paradigm*, *supra* note 11, at 447; R. DAVID & J. BRIERLEY, *supra* note 53, at 188–89; A. CHLOROS, *supra* note 54, at 163–65.

143. See *Capitalist Paradigm*, *supra* note 11, at 447.

IV. INADEQUACY OF THE FSIA TOWARD NON-MARKET ECONOMIES

The Foreign Sovereign Immunities Act applies only to foreign states, their agencies, or their instrumentalities.¹⁴⁴ The Act's definition of an "agency or instrumentality of a foreign state" is thus extremely important. Despite the importance of this section of the FSIA, however, the types of legal persons it encompasses remains ambiguous.¹⁴⁵

The very term "agency or instrumentality" poses serious definitional problems. Whether an entity constitutes an agency or instrumentality depends largely upon the role the entity plays in a country's economy. The roles of governmental agencies are, however, significantly different in market and non-market economies, and the Act's definition seems tailored to market economies.¹⁴⁶

An "agency or instrumentality of a foreign state" is identified by the Act as an entity:

- (1) which is a separate legal person, corporate or otherwise, and
- (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.¹⁴⁷

A foreign entity, claiming the defense of sovereign immunity, must satisfy all three criteria to be deemed an agency or instrumentality of a foreign state.¹⁴⁸ If these requirements are met, immunity will be granted, subject to any international agreements to which the United States is a party¹⁴⁹ and unless one of the enumerated exceptions applies.¹⁵⁰

In most cases, it will be relatively easy to determine whether the first and third requirements are satisfied.¹⁵¹ However, difficulties in interpreting the second requirement arise when applied to non-market economies.¹⁵² Although the increased involvement of the Soviet Union and other socialist states in international

144. See *supra* notes 30–32 and accompanying text.

145. Kahale & Vega, *supra* note 19, at 226.

146. *Capitalist Paradigm*, *supra* note 11, at 438.

147. 28 U.S.C. § 1603(b).

148. The House Report labels these three requirements as "criterion," and 28 U.S.C. § 1603(b)(2) ends with the word "and," indicating that Congress intended that all three must be satisfied for the entity to qualify as an "agency or instrumentality of a foreign state." See, e.g., HOUSE REPORT at 15–16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6613–14.

149. 28 U.S.C. § 1604. See also HOUSE REPORT at 17–18, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6616.

150. 28 U.S.C. § 1604. See also HOUSE REPORT at 18–22, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6616–21.

151. Kahale & Vega, *supra* note 19, at 226.

152. See generally *Capitalist Paradigm*, *supra* note 11; Recent Developments, *supra* note 1; *Property Ownership*, *supra* note 11; Kahale & Vega, *supra* note 19, at 226–29; *Legal Entities*, *supra* note 101.

trading was a major force in the development of restricted sovereign immunity,¹⁵³ the FSIA fails to take into account the nature of socialist states.¹⁵⁴ This problem is illustrated by two cases in which the courts reached seemingly inconsistent results.

A. *The FSIA Created Confusion in the Courts: Novosti and Edlow*

1. *Novosti: ownership test*

In *Yessenin-Volpin v. Novosti Press Agency*,¹⁵⁵ plaintiff brought a libel action against Novosti Press Agency, a “mass organization” functioning as “an information agency of Soviet public organizations.”¹⁵⁶ The suit was based on allegedly defamatory articles written and subsequently published by the agency. Novosti advanced a defense of immunity from suit claiming that it was owned by the state according to the provisions of the FSIA.¹⁵⁷ The plaintiff conceded that Novosti met the first and third requirements of the definition of an “agency or instrumentality of a foreign state.” He argued, however, that the U.S.S.R. did not own a majority of Novosti’s property assets. It therefore failed to meet the definition’s second requirement and could not be considered an agency of the U.S.S.R. for immunity purposes.¹⁵⁸

The court analyzed the status of Novosti under the “ownership test” of 28 U.S.C. § 1603(b)(2), relying heavily on the socialist concept of property ownership. Looking to the Constitution of the Soviet Union for a theoretical explanation of Soviet “ownership,” and to Stalin’s writings on the sacredness and inviolability of public ownership, the court found that the land, natural resources, banks, transport facilities, farms and means of communication are “state property, that is, belong to the whole people.”¹⁵⁹ Moreover, the court discovered that, in practice, the Soviet government gave Novosti the use of buildings, communications facilities, furniture, and equipment, which accounted for sixty-three percent of its property assets.¹⁶⁰

The court then noted that as a juridical personality, Novosti was empowered with property and contract rights, could sue and be sued, was financially respon-

153. See Fensterwald, *supra* note 103, at 614. See also *supra* notes 19–20 and accompanying text.

154. See *supra* text accompanying notes 11–15.

155. 443 F. Supp. 849 (S.D.N.Y. 1978).

156. NOVOSTI PRESS AGENCY STATUTE § 1(1), *quoted in* *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978). Novosti is a “mass organization” arising under Article 126 of the U.S.S.R. Constitution which was slightly amended in 1977 as Article 51. Under the 1977 Constitution “mass organization” was amended to read “public organization.” See *supra* note 128. The Novosti statute is the charter for the Novosti Press Agency.

157. *Novosti*, 443 F. Supp. at 850–51.

158. *Id.* at 852.

159. *Id.* at 853–54.

160. *Id.* at 853.

sible for its obligations and was self-administering.¹⁶¹ Even though Novosti had free use, management and control of state property, however, the state still had ultimate ownership. Possession, use, and disposition of state property by juridical persons does not equal ownership in the U.S.S.R.¹⁶² Rather, Novosti's control over state property assets was "something less than ownership, but something more than giving orders."¹⁶³ Novosti's free use, management and control of state property making up sixty-three percent of its fixed assets constituted a Soviet state majority ownership interest in Novosti and thus qualified it as a Soviet agency. The court also found that because of its "essentially public nature," Novosti was an organ of the U.S.S.R.¹⁶⁴ Therefore, the court held that Novosti qualified for sovereign immunity.¹⁶⁵

2. Edlow: government function and state control tests

While the court in *Novosti* considered the system of ownership in the U.S.S.R. crucial, the court in *Edlow International Company v. Nuklearna Elektrarna Krsko*,¹⁶⁶ found this factor nondeterminative.¹⁶⁷ In that case, a Bermuda corporation which acted as broker in the sale of uranium fuel sued the defendant Yugoslav nuclear power plant for broker's fees.¹⁶⁸ The court refused to accept plaintiff's contention that "virtually every enterprise operated under a socialist system [is] an instrumentality of the state within the terms of the Foreign Sovereign Immunities Act of 1976."¹⁶⁹ It observed that "[t]he Act's legislative history evinces Congress' intent that the definition of 'agency or instrumentality of a foreign state' be read broadly to encompass a 'variety of forms' . . ."¹⁷⁰ But it found no support in the legislative history for the proposition that a "foreign state's system of property ownership, without more, should be determinative on the question whether an entity operating within the state is a state agency or

161. *Id.*

162. Ownership is defined in Soviet law . . . as including the right of possession, use, and disposition of the thing which is owned. What the state owns it has a right to possess, use, and dispose of. But what a state economic enterprise possesses, uses, and disposes of—it does not own! May one speak then of a "right" of possession, use, and disposition in a state economic enterprise? Or does not the enterprise merely exercise certain economic-administrative functions delegated to it by the state?

Id. (quoting H. BERMAN, JUSTICE IN THE U.S.S.R. 115 (1963)). See also *supra* notes 85–110 and accompanying text.

163. Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 853 (S.D.N.Y. 1978) (quoting H. BERMAN, JUSTICE IN THE U.S.S.R. 116 (1963)).

164. *Id.* at 854.

165. *Id.*

166. 441 F. Supp. 827 (D.D.C. 1977).

167. *Id.* at 832.

168. *Id.* at 828–30.

169. *Id.* at 831.

170. *Id.*

instrumentality under the Act.”¹⁷¹ Therefore, rather than focusing on the Yugoslav system of property ownership, the court considered what it felt were “[t]wo more precise indices of an entity’s status as state agency or instrumentality,” namely the degree to which the entity discharges a government function, and the extent of state control over the entity’s operation.¹⁷²

Under the “government function” test, the *Edlow* court found that, in generating and distributing electric power, NEK was not performing a government function.¹⁷³ The court concluded that although subject to considerable governmental regulation, work organizations in Yugoslavia are more comparable to private corporations in the United States than to state-owned entities.¹⁷⁴ With respect to the “control” test, the court observed that Article 35 of the Yugoslav Constitution defines a “work organization” as independent and self-managing, at least in its day-to-day operations.¹⁷⁵ The court determined that the daily operations of NEK were virtually free of direct control by the government, and found that the government did not subsidize NEK, held no seats on its board of directors and otherwise did not participate in the daily management of NEK’s operations.¹⁷⁶ Since NEK was neither fulfilling a government function nor subject to government control, it did not meet the requirements of the Act’s definition of a foreign state. Because NEK was not a foreign state,¹⁷⁷ and because the court found that it lacked diversity jurisdiction,¹⁷⁸ it dismissed the case.¹⁷⁹

B. Courts’ Difficulties Arose from Inapplicability of Ownership Test to NMEs

Novosti and *Edlow* can be distinguished on their facts. The cases, nevertheless, represent two distinct approaches to the “agency or instrumentality” definition, one giving considerable and perhaps dispositive weight to general notions of public ownership in socialist states, the other emphasizing the functions of the entity involved and the nature of its relationship to its government.¹⁸⁰ Both the *Novosti* and *Edlow* courts, however, found the majority ownership test of 28 U.S.C. § 1603(b)(2) to be “ill-suited” to the concept of “socially-owned” prop-

171. *Id.* at 832.

172. *Id.*

173. *Id.*

174. *Id.* For a discussion of Yugoslav work organizations, see *supra* notes 136–41 and accompanying text.

175. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 831 (D.D.C. 1977).

176. *Id.* at 832.

177. *Id.*

178. *Id.* at 831.

179. *Id.* at 832.

180. Kahale & Vega, *supra* note 19, at 228.

erty, which is the principal form of ownership in socialist economic systems like Yugoslavia and the U.S.S.R.¹⁸¹

The difficulty arises because the Act's ownership interest test is better designed to apply to capitalist states such as the United States or the United Kingdom, where the economic systems are based on private ownership.¹⁸² No right exists in socialist societies to privately own "socialist property," which comprises the assets of legal entities such as worker organizations in Yugoslavia¹⁸³ and state economic enterprises, collective farms, and public organizations in the Soviet Union.¹⁸⁴ The legislative history of the FSIA does not indicate whether the socialist system of public ownership is itself sufficient reason to treat an entity as a foreign state.¹⁸⁵ If a nation's system of property ownership were alone determinative of whether an entity is an agency or instrumentality under the Act, then every entity of a socialist state arguably would be an agency or instrumentality.¹⁸⁶ Because the Act focuses the jurisdictional inquiry primarily on the nature of the activity, rather than on the entity being sued, it appears that Congress may not have intended to include every single entity of a socialist country within the definition.¹⁸⁷ On the other hand, it seems clear that the application of the definition was intended to be almost mechanical, obviating any intricate functional analysis which could give rise to factual disputes and uncertainties regarding the body of jurisdictional law relevant to a particular case.¹⁸⁸ Yet, if concepts more nebulous than ownership are employed in determining agency status, then such uncertainties do arise, leaving court judgments open to dispute.¹⁸⁹

The difference between capitalist and socialist property systems is complicated by differences in property systems among socialist states themselves. As Section III above illustrates, Yugoslavia and the U.S.S.R. have radically different no-

181. The *Novosti* court explicitly recognized that the ownership test, "which seems designed to establish the degree of the foreign state's identification with the entity under consideration, is ill-suited to concepts which exist in socialist states such as the Soviet Union." *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978). See also *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977) (foreign state's property system not determinative of agency status when more precise indices available); *Capitalist Paradigm*, *supra* note 11, at 444, 449-58; *Legal Entities*, *supra* note 101, at 181-83.

182. See *Capitalist Paradigm*, *supra* note 11, at 449-51, 457-58; *Legal Entities*, *supra* note 101, at 181.

183. *Legal Entities*, *supra* note 101, at 181. See also *supra* notes 124-41 and accompanying text.

184. *Legal Entities*, *supra* note 101, at 181. See *supra* notes 90-110.

185. HOUSE REPORT at 15-16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6614-15.

186. Brower, Bistline & Loomis, *supra* note 29, at 203.

187. See Kahale & Vega, *supra* note 19, at 227. See, e. g., HOUSE REPORT at 15-16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6614-15.

188. Kahale & Vega, *supra* note 19, at 228. See generally HOUSE REPORT at 15, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6614.

189. See generally Kahale & Vega, *supra* note 19, at 228-29; *Legal Entities*, *supra* note 101, at 183; *Capitalist Paradigm*, *supra* note 11, at 447.

tions of property law. Soviet law distinguishes among various “owners” of socialist property,¹⁹⁰ whereas Yugoslavia does not even define social property or its owners.¹⁹¹ To make an accurate determination of property ownership a court must deal not only with the differences between market and non-market economies, it also must be attuned to variations among non-market systems themselves. Combined with Western unfamiliarity with socialist ownership concepts, this difficulty opens the door to the very uncertainties, inconsistencies and unfair decisions Congress sought to avoid under the FSIA through an ownership test.¹⁹²

C. Possible Solutions to the FSIA’s Inadequate Definition of “Foreign State”

1. Government function test is unworkable

To redress the deficiency in the Act caused by the Act’s use of capitalist concepts,¹⁹³ the *Edlow* court, and apparently the *Novosti* court as well, adopted a

190. See U.S.S.R. CONST. art. 10, reprinted in Hazard, *supra* note 87, at 22. See also *supra* notes 81–110 and accompanying text.

191. See *supra* notes 126–41 and accompanying text.

192. See generally HOUSE REPORT at 7, 12, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605, 6610. Additional problems could arise, because theoretically the actual composition of the socialist framework changes over the course of the state’s historical development. See *Capitalist Paradigm*, *supra* note 11, at 444. In the early stages of the transition from capitalism to communism the state may own and control nearly everything. In the later stages, on the other hand, the people will have organized themselves into cooperative entities while the monolithic state withers away. *Id.* To accurately determine the disposition of property in a socialist system, the court must be able to determine the society’s present stage in the evolutionary process. *Id.* However, all of this is purely theoretical. To date, no socialist state has shown any sign of withering away, and none appears likely to do so in the foreseeable future.

193. Some courts appear to have responded to the difficulties in applying the majority ownership test to socialist entities by forgoing all analysis and simply assuming that any entity from a socialist system is necessarily a state agency or instrumentality. For example, in *Patterson, Zochonis (U.K.) Ltd. v. Compania United Arrow*, 493 F. Supp. 621 (S.D.N.Y. 1980), the China Ocean Shipping Corporation (COSCO), an entity organized under the laws of the People’s Republic of China (PRC), was sued for shipping losses. *Id.* at 622–23. The court observed that it “seemed clear” that COSCO was an “agency or instrumentality” of the PRC. It appeared to consider no evidence at all on this point, but simply to judge impressionistically that an entity from a communist state, even if corporate by name, had to be state-owned or state-controlled. *Id.* at 623.

Other courts have relied on the way in which the government of the socialist state in question chose to characterize the ownership during litigation. In several cases the only proof of ownership has been an affidavit or the oral testimony of a government official. Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention*, 26 HARV. INT’L L.J. 103, 146 (1985). In *S & S Machinery Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983), the court found persuasive an affidavit from the Romanian Consul that the entity in question was “a state foreign trade company wholly-owned by the Romanian Government.” *Id.* at 415. Such an approach is unreliable because it allows a foreign state to manipulate the evidence so that the case comes under the FSIA. See Varges, *supra*, at 146. For example, some Romanian legal experts would probably refute the court’s finding that Masinexportimport was an agency or instrumentality of Romania. *Id.* at 146 n.176.

function test: if an entity discharges a government function or is of an “essentially public nature,” it is an organ of the government.¹⁹⁴ Such a test is a dangerous proposition for it introduces the element of public purpose into the analysis.¹⁹⁵ The state, even when engaging in trade or management of industry, always acts as a public person for the general benefit of the community as a whole.¹⁹⁶ In a non-market system, where the state is viewed as an indivisible whole and virtually all economic and social activity is planned or controlled by the government, the entities engaged in such activities could be seen as mere extensions of the state imbued with public purpose.¹⁹⁷ Thus, when applied in a socialist setting, a test establishing organizations with an essentially public nature as organs of the state could have the same effect as the ownership test: all entities would be deemed to be “foreign states” for immunity purposes.¹⁹⁸ Such a standard places the private litigant at an extreme disadvantage because all socialist defendants could plead immunity.¹⁹⁹

2. The Edlow government control test does not provide viable standards to define control

The *Edlow* court’s control test²⁰⁰ is a better standard than the function approach discussed above, but it is not a solution to the FSIA’s deficiencies. The control test appears to work well because although communist or socialist political theory suggests that most of the property in such a state is owned or controlled by the state,²⁰¹ in reality some enterprises appear to function independently of government control.²⁰² In such a system, who administers the property and in what way it is operated to benefit society as a whole or satisfy the central economic plan is far more important than who actually “owns” the property.²⁰³ A definition of “agency or instrumentality” could focus, therefore, on the degree of governmental control exerted over a particular entity. If the government exercises such influence over the daily operations of the entity that it deprives the entity of its

194. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 854 (S.D.N.Y. 1978) (“essentially public nature of . . . organizations . . . in the Soviet Union”); *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977) (“degree to which the entity discharges a government function”). See also *supra* text accompanying notes 164 and 172.

195. See *Capitalist Paradigm*, *supra* note 11, at 445; *Legal Entities*, *supra* note 101, at 182.

196. *Lauterpacht*, *supra* note 19, at 224.

197. *Capitalist Paradigm*, *supra* note 11, at 445.

198. See *Fensterwald*, *supra* note 103, at 617. See generally *supra* text accompanying note 186.

199. See *Capitalist Paradigm*, *supra* note 11, at 456.

200. See *supra* text accompanying note 172.

201. See *supra* notes 87–114, 126–41 and accompanying text.

202. This point is illustrated by defendant NEK in the *Edlow* case. NEK for all intents and purposes was a separate entity similar to a corporation or other private organization. It was set up to be a “workers’ organization,” separate from the government of Yugoslavia. Despite the socialist form of government, NEK appeared on paper to be uncontrolled by the Yugoslav government. See *supra* text accompanying notes 130–31; *Property Ownership*, *supra* note 11, at 121.

203. See *supra* text accompanying notes 111–14.

independence and autonomy, then the entity is an “agent or instrumentality” of that foreign state.²⁰⁴ The control test avoids discussion of the political theory underlying non-market systems and focuses on what is a more relevant criterion in determining agency status—how much the daily operations of the enterprise are controlled by the government.²⁰⁵ Because systems founded on the principle of private ownership tend to equate ownership with control,²⁰⁶ a control test would also work in free market societies, where private ownership is the norm.²⁰⁷

Despite these advantages, the control test is not a truly viable solution to the problems inherent in the present statute. The political and economic differences between two antithetical societies cannot simply be disregarded. Perhaps the greatest drawback of a control test is the complexity of the notion of “control” over the affairs of an entity.²⁰⁸ Differences in legal and economic systems, and within particular types of systems such as socialism,²⁰⁹ make it extremely difficult, if not impossible, to determine exactly what factors should be considered in gauging the level of control exerted by the government. Factors applicable to one country may be grossly inapposite for another.²¹⁰ Moreover, the level of control required before an entity loses its autonomy varies with the circumstances.²¹¹ Any statutory list of factors to be examined when determining the level of control may overlook several considerations relevant to a particular case or a particular economic or political system. Leaving the standards solely to the courts, however, could give rise to inconsistent court-created criteria, resulting in arbitrary, unpredictable decisions.²¹² Both the private litigant and the defendant entity

204. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977) (The court noted that in an analogous case under the Federal Tort Claims Act, 28 U.S.C. § 1346 (1970), the critical factor was the “power of the federal government ‘to control the detailed physical performance of the contractor.’” *Id.* (quoting *United States v. Orleans*, 425 U.S. 807, 814) (1976)).

205. *Capitalist Paradigm*, *supra* note 11, at 447; *Property Ownership*, *supra* note 11, at 122.

206. *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* 1–7 (1984).

207. *Id.*

208. G. Delaume states that 28 U.S.C. § 1603(a)(2)’s ownership criterion is “[b]ased on a possibly crude but simple test, [which] affords a practical solution to a perennial problem. It has the advantage of avoiding the complexities of such notions as ‘control’ . . .” 2 G. DELAUME, *TRANSNATIONAL CONTRACTS, APPLICABLE LAWS AND SETTLEMENT OF DISPUTES* § 11.02, at 12 (1986).

209. The differences among socialist systems are highlighted by the differences between Soviet and Yugoslav socialism. Although both countries are socialist, with no right to private ownership of productive property, the degree and nature of state involvement in the economy varies markedly. *See supra* Section III of this Note.

210. *See supra* Section III of this Note. For an entity in the U.S.S.R., courts would have to consider the role of the Soviet Union’s centralized economic planning when determining the degree of government control over the entity. Such a consideration, however, would not be relevant to a Yugoslav entity because no such planning is employed. Rather the social plan would have to be taken into account. *See id.*

211. *See generally supra* text accompanying notes 190–92.

212. The problem of developed standards is highlighted in *Novosti* and *Edlow*. Each court examined different aspects of the defendant entity’s existence in reaching its decision. *See supra* text accompanying notes 159–79; *Capitalist Paradigm*, *supra* note 11, at 427.

would be subject to extreme uncertainty as to the defendant's status for immunity purposes. Congress apparently recognized this for it adopted the majority ownership test precisely to relieve the courts from a determination of control by the state.²¹³

In addition, the fact that an entity has control over its daily operations is largely irrelevant in a socialist society. The governmentally formulated economic or social plan of such a society dictates the exact purpose and focus of each organization.²¹⁴ Entities under such a plan must operate to meet their specified goals,²¹⁵ or for the benefit of the community as a whole,²¹⁶ and cannot operate for personal gain.²¹⁷ By controlling the purpose and goals of an organization, the government can, for practical purposes, control all significant administrative decisions.

Finally, a control test poses a problem in a socialist or communist society because of the close relationship between the party and the state. In capitalist societies a political party is distinct from the state.²¹⁸ In socialist states, however, it is often difficult to extricate the two. There is only one party and thus it is the state.²¹⁹ Party controlled entities may be used to discharge government functions.²²⁰ Under a simple control test, it is unclear how such entities should be treated. Although these entities are not controlled by the government itself, they

213. See *supra* note 208.

214. See *supra* notes 73, 111–14, 134–41 and accompanying text.

215. See *supra* notes 94, 101–08, 111–14 and accompanying text.

216. See *supra* notes 134–41 and accompanying text.

217. See *supra* notes 67, 88–89, 129, 134–41 and accompanying text.

218. See M. DUVERGER, *POLITICAL PARTIES, THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* 392–412 (B. North & R. North eds. 1964). See generally H. BERMAN, *THE RUSSIANS IN FOCUS* 175 (1953). For a discussion of party systems, see J. JUPP, *POLITICAL PARTIES* 1–21 (1968).

219. The Soviets are guided by the Communist Party of the Soviet Union. A. DENISOV & M. KIRICHENKO, *SOVIET STATE LAW* 143 (1960). However, the Communist Party and the Soviet state are not actually synonymous—each is a distinct entity. *Id.* Nonetheless, the Party takes an active part in the formation of the state organs.

The Communist Party directs the selection, distribution and training of the personnel of the Soviet state apparatus; it checks the activity of the organs of state power and state administration. Not a single important decision is taken by the Soviet state organs without preliminary guiding directions and advice from the Party. In this way the Communist Party of the Soviet Union imparts a planned and purposeful character to the work of the entire Soviet state apparatus.

Id. The Party carries out its decisions by directing the activity of state organs rather than by supplanting those organs. *Id.* See also J. HAZARD, *THE SOVIET SYSTEM OF GOVERNMENT* 46, 51, 57–8 (5th ed. 1980); D. SCOTT, *RUSSIAN POLITICAL INSTITUTIONS* 138 (3rd ed. 1965); H. BERMAN, *supra* note 218, at 187; *Capitalist Paradigm*, *supra* note 11, at 458 n.255. See generally W. BUTLER, *supra* note 101, at 145–63.

220. See A. DENISOV & M. KIRICHENKO, *supra* note 219, at 143. See also D. SCOTT, *supra* note 219, at 179; H. BERMAN, *supra* note 218, at 187; *Capitalist Paradigm*, *supra* note 11, at 458 n.255. See generally W. BUTLER, *supra* note 101, at 145–63.

are controlled by those in power.²²¹ Therefore they are effectively controlled by the state. Should they be treated as an “agency or instrumentality of a foreign state,” even though technically the government does not control them? If they are not, then form dominates substance and the results of a particular case could turn on how a country chooses to formally structure the control of its “agencies,” rather than on the effective control of those entities.

3. *The United Kingdom's State Immunity Act accounts for variations in economic/political systems*

A better way to resolve the problem of the FSIA's definition of an “agency or instrumentality of a foreign state” is to employ an approach similar to that taken by the United Kingdom in its State Immunity Act of 1978 (SIA).²²² The SIA does not use the term “agency or instrumentality of a foreign state,” thereby avoiding the need to define it.²²³ Instead, the SIA presumptively protects only states,²²⁴ which it defines to include, in addition to the state itself,²²⁵ only the head of state,²²⁶ the “government,”²²⁷ and “any department of that government.”²²⁸ The Act expressly does not cover “any entity” that is distinct from the executive organs of the government of the state and capable of suing or being sued.²²⁹ Such

221. A. DENISOV & M. KIRICHENKO, *supra* note 219, at 143; D. SCOTT, *supra* note 219, at 179; H. BERMAN, *supra* note 218, at 175, 187. See also *Capitalist Paradigm*, *supra* note 11, at 458 n.255. See generally W. BUTLER, *supra* note 101, at 145–63.

222. State Immunity Act 1978, ch. 33, *reprinted in* 17 INT'L LEGAL MATERIALS 1123 (1978) (published by AM. SOC'Y INT'L L.). Section 14 of the SIA provides:

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

- (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
- (b) the circumstances are such that a State . . . would have been so immune.

Id. at 1127.

223. See State Immunity Act 1978, § 14(1), *reprinted in* 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1127.

224. See *id.*

225. See *id.*

226. State Immunity Act 1978, § 14 (1)(a), *reprinted in* 17 INT'L LEGAL MATERIALS, *Supra* note 222, at 1127.

227. *Id.* (§ 14(1)(b)).

228. *Id.* (§ 14(1)(c)).

229. *Id.* (§ 14(1)).

a separate entity is jurisdictionally immune “only if the proceedings relate to anything done by it in the exercise of sovereign authority;²³⁰ and the circumstances are such that a State . . . would have been so immune.”²³¹ Thus, implicitly, the government of a foreign state includes entities that are capable of suing and being sued, but that are not distinct from the government involved.²³²

Whether an entity that is capable of suing and being sued is “distinct from the executive organs of the government” is a question of fact and depends on foreign law.²³³ In other words, the status of a foreign entity depends on the status conferred on it by the law of the state in which the entity was organized rather than on the factual situation or the law of the forum.²³⁴ If the entity is intended by the legislator to be distinct, then the fact that it acts in accordance with the directions of the government does not matter. Conversely, if the entity is not intended by the law to be distinct, its actual independence of government organs cannot deprive it of immunity.²³⁵

The SIA’s definition of a foreign state represents a significant improvement over its counterpart in the FSIA. By focusing on clear categories of structures deemed to qualify as foreign states, the U.K. Act avoids the definitional difficulties of “agency or instrumentality of a foreign state.”²³⁶ Moreover, the SIA implicitly recognizes that different countries have different notions of what constitutes a state.²³⁷ Appealing to the law of the foreign state in determining an entity’s status allows the SIA to take into account the differences between various economic/political systems.²³⁸ This is important because in socialist, or non-market, societies, separate entities are often used to perform what are seen as state functions.²³⁹ The FSIA fails to consider this because it applies capitalist notions to all entities, regardless of the ideology of their home state.²⁴⁰

Although the SIA’s definition has significant advantages over the FSIA, it is not without its own flaws. Defining the state as including “the government” is

230. *Id.* (§ 14(2)(a)).

231. *Id.* (§ 14(2)(b)).

232. Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT’L L. 185, 187 (1979); G. DELAUME, *supra* note 208, § 11.02, at 10.

233. Mann, *The State Immunity Act of 1978*, 50 BRIT. Y.B. INT’L L. 43, 48 (1979).

234. *Id.*

235. *Id.*

236. See Note, *The State Immunity Act of 1978*, 42 MODERN L. REV. 72, 73 (1979).

237. See *supra* text accompanying notes 233–35.

238. *Id.* See also G. DELAUME, *supra* note 208, § 11.02, at 9. See generally Singer, *supra* note 18. (Singer proposes that the doctrine of restrictive immunity should be analyzed in terms of jurisdiction to prescribe rules of law. Under his thesis, the law of the country with the authority to legislate the particular act and actor in question should be used to determine the status of that actor and act. In his view, this avoids the problem of extending the forum state’s jurisdiction beyond the limits of international law and adds a definiteness, otherwise lacking, to immunity decisions.); Mann, *supra* note 233, at 48.

239. See *supra* notes 21, 96–108, 122–41 and accompanying text.

240. See *supra* notes 146, 182–92 and accompanying text.

universally accepted.²⁴¹ Because the state is merely an abstraction, it is the government and the sovereign that represent the state and act on its behalf.²⁴² By government what is normally meant is the central government.²⁴³ To avoid any possible confusion as to what the term “the government” includes, however, the SIA could be improved by expressly stating that “the government” refers only to the central government.²⁴⁴

Just as the state is an abstraction, so too is the government. It is composed of the sovereign and individual organs and agencies all operating on its behalf.²⁴⁵ The SIA recognizes this abstraction by including the “sovereign”²⁴⁶ and “department[s] of th[e] government”²⁴⁷ in the list of structures recognized as states. The term “department,” however, implies a narrow structure that could exclude entities not traditionally viewed as departments, such as governmental boards, commissions, cabinets, and ministries.²⁴⁸ The Act should make clear that such entities are included in the definition of a state.²⁴⁹ This could be done by using the term “state organ” which possesses a broader scope incorporating such entities.²⁵⁰ It should be explicitly indicated, however, that the term “state organ” does not include any entity of separate legal status.²⁵¹

Furthermore, the State Immunity Act expressly leaves the treatment of constituent territories of a federal state to future implementation by means of Orders in Council dealing with individual cases.²⁵² Although there is no consensus on whether subnational geographical units should constitute a state for sovereign immunity purposes, avoiding the issue creates a great deal of uncertainty as to how such entities will be treated for any given activity.²⁵³ Since such entities, like other legally distinct entities, can exercise sovereign authority as delegated by the state,²⁵⁴ they should be granted sovereign status when exercising such author-

241. Vargès, *supra* note 193, at 124; W. BISHOP, INTERNATIONAL LAW 301 (1971); RESTATEMENT OF FOREIGN RELATIONS (REVISED) § 201 (Tent. Draft No. 2, 1981).

242. Vargès, *supra* note 193, at 124.

243. *Id.*

244. See Vargès, *supra* note 193, at 125. (Although Vargès' suggestions relate to the International Law Association Draft Convention on Sovereign Immunity, many of the comments are also relevant to the State Immunity Act of 1978 because it takes substantially the same form.)

245. Vargès, *supra* note 193, at 124.

246. See State Immunity Act 1978, § 14(1)(a), reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1127.

247. See *id.* (§ 14(1)(c)).

248. Vargès, *supra* note 193, at 124.

249. See Vargès, *supra* note 193, at 124–25.

250. *Id.*

251. *Id.* at 125.

252. State Immunity Act 1978, § 14(5), reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1127. See also Delaume, *supra* note 232, at 187–88 (1979); Mann, *supra* note 233, at 48–9.

253. Vargès, *supra* note 193, at 125.

254. See generally *supra* notes 21, 96–114, 134–41 and accompanying text.

ity.²⁵⁵ In any case where such a unit claims it is acting in sovereign authority, the state to which the unit belongs should be required to certify the state's agreement with the entity's claim.²⁵⁶ In this way the foreign government would be forced to take an active role in evaluating whether sovereign authority had been delegated to the entity.²⁵⁷ This standard should apply to all legally distinct entities.²⁵⁸

D. Proposed Amendment to FSIA § 1603(a) and (b) Definition of Foreign State

With the benefits and problem areas of the SIA in mind, 28 U.S.C. § 1603(a) and (b) of the FSIA should be amended to incorporate a modified version of § 14 of the SIA and read as follows:

A "foreign state" includes:

- (1) the sovereign or other head of the state in his public capacity,
- (2) the central government of the state,
- (3) any department of the central government of the State
 - (i) A department of the central government includes state organs which are not legally distinct from the central government.
 - (ii) A department of the central government does not include any entity (hereafter referred to as a "separate entity") which is legally distinct from the central government and capable of suing or being sued.

(4) Any constituent unit or other geographical subdivision of the state, but only for those acts or omissions which it claims are in the sovereign authority, i.e., *jure imperii*, of the central government of the state, provided the central government supports that claim. This support must be evidenced by certification from the ministry of foreign affairs or any other department representing the central government of the foreign state.

(5) Any "separate entity," but only for those acts or omissions which it claims are in the sovereign authority, i.e., *jure imperii*, of the central government of the state, provided the central government supports that claim. This support must be evidenced by certification from the central government of the foreign state as provided in (4). A "separate entity" means any entity:

- (i) which is created by, or under the laws of, the foreign state,
- (ii) which is a separate legal person, corporate or otherwise, and
- (iii) which is capable of suing or being sued.

At first glance the term "sovereign authority," in sections (4) and (5) of the above proposal, may appear to entail the same problems as "public purpose,"

255. See generally Vargès, *supra* note 193, at 126–29.

256. See Vargès, *supra* note 193, at 128.

257. See *id.* at 128, 136.

258. See *id.* at 122–23.

namely all governmental acts are sovereign.²⁵⁹ “Sovereign authority,” however, need not be defined as broadly as “public purpose.”²⁶⁰ Rather, as the next section demonstrates, “sovereign authority” can be restricted to a limited group of activities, which do not include commercial activities.

V. DEFICIENCIES IN THE FSIA’S COMMERCIAL ACTIVITY EXCEPTION

Once it is determined that a particular entity is covered by the Foreign Sovereign Immunities Act,²⁶¹ it must then be determined whether the particular transaction or event in question is one for which Act provides immunity.²⁶² In adopting the restrictive theory of sovereign immunity the FSIA attempts to discontinue the competitive advantages that sovereigns engaged in state trading and other commercial enterprises often gain through immunity from suit.²⁶³ The Act is structured in such a way that the definition of a foreign state is closely linked with the commercial nature of the act in question. A foreign state may escape jurisdiction upon establishing either that the actor was not an agent or instrumentality of that state or that its act was not commercial in nature.²⁶⁴ Although there are other exceptions to immunity,²⁶⁵ the commercial activity exception is really the core of the Act.²⁶⁶ Yet, despite this importance, the standard for commercial activity remains unclear.²⁶⁷

A. *The FSIA, Its Legislative History, United States Case Law, and International Law do not Adequately Define “Commercial Activity”*

The FSIA defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act.”²⁶⁸ The commercial character of the act in question is determined by reference to its nature, rather

259. Mann, *supra* note 233, at 51.

260. *Id.*

261. For a discussion of the problems involved in deciding whether an entity is covered by the FSIA, see *supra* Section IV of this Note.

262. See *supra* text accompanying notes 30–35, 48–52.

263. *Capitalist Paradigm*, *supra* note 11, at 426. See also *supra* Section III of this Note. The legislative history indicates that “American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes.” HOUSE REPORT at 6, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605.

264. See *supra* notes 30–35 and accompanying text.

265. See 28 U.S.C. § 1605; *supra* text accompanying note 33.

266. See *supra* text accompanying note 34; Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity (Part II)*, 85 COM. L.J. 228, 230 (1980). See generally von Mehren, *supra* note 8, at 48–54; Hill, *supra* note 18, at 205–06.

267. See generally von Mehren, *supra* note 8, at 48–54; Hill, *supra* note 18, at 205–06.

268. A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined

than its purpose.²⁶⁹ The rejection of the purpose test represents a significant departure from the test previously adopted by the Second Circuit in *Victory Transport*²⁷⁰ that considered both the nature and the purpose of the activity.²⁷¹ The court in that case classified public loans and acts “concerning the armed forces” as “political or public acts.”²⁷² Thus, under *Victory Transport*, a contract to purchase boots for the military of a foreign nation would be a public act because it concerns the armed forces.²⁷³ In contrast, the House Report states that a contract to buy provisions or equipment for the armed forces would be a commercial activity under the 1976 Act.²⁷⁴

Despite what one court has termed “the relatively straightforward language employed” in defining “commercial activity,”²⁷⁵ the definition is in fact self-contradictory. Although the FSIA rejects the purpose of an act as a criterion of its commercial character,²⁷⁶ the very term “commercial” suggests purpose and nothing else as the determinant of its presence.²⁷⁷ How else does one determine the “commercial nature” of an act except by examining its purposes? The legislative history itself recognizes this when its first example of a commercial act is one carried on for profit, which is a purpose.²⁷⁸ Nature and purpose interact so closely that independently neither is an effective criterion for identifying a commercial act.²⁷⁹

by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1605(3)(d).

269. See *supra* notes 48–52, 268 and accompanying text.

270. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

271. See *Victory Transport*, 336 F.2d at 359–60; *supra* notes 41–47 and accompanying text. See also von Mehren, *supra* note 8, at 52–53; Carl, *supra* note 46, at 1032.

272. *Victory Transport*, 336 F.2d at 360; Carl, *supra* note 46, at 1032.

273. *Victory Transport*, 336 F.2d at 359.

274. HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615; Carl, *supra* note 46, at 1032. In *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), the defendant claimed immunity in a suit based upon a contract for cement to be delivered in Nigeria, because some of the cement was intended for use in governmental works and military installations. The court held this transaction was a commercial arrangement, despite the possible military use. No convincing proof had been submitted at the trial to show that a major or substantial portion of the cement was procured with a governmental purpose in mind. Moreover, under the FSIA, the court stated the purpose would be irrelevant. *Id.* at 641–42.

275. *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 394 (D.Del. 1978). Despite such language, Kahale & Vega, *supra* note 19, at 239, approve of this case, but they seem generally unconcerned about the subtleties hidden in the concept of commercial act, *id.* at 236–44.

276. 28 U.S.C. § 1603(d). See also *supra* text accompanying notes 48, 269.

277. Dellapenna, *supra* note 266, at 232.

278. HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

279. See generally *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 359–60 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

More importantly, the definition of “commercial activity” is deficient in that it uses the term “commercial” to define “commercial activity.”²⁸⁰ Nothing in the FSIA or the legislative history provides any more precise meaning than the general term itself.²⁸¹ The House Report does offer some examples of commercial activity to guide courts, such as selling products or services, leasing property, borrowing money, and purchasing securities in an American corporation.²⁸² The term “regular course of commercial conduct” includes the carrying on of commercial enterprises such as an airline, a mineral extraction company, or a state trading corporation.²⁸³ If an exhaustive list of such examples could be made, interpretation would be quite simple.²⁸⁴ Congress apparently felt such a list to be impossible.²⁸⁵ Believing it to be unwise and impractical to attempt more precise definition, Congress chose instead to give the courts a “great deal of latitude” in determining the scope of the exception.²⁸⁶ The examples offered as guidance, however, are simply too insubstantial to be the sole indications of what is commercial.²⁸⁷

Commentators have suggested that the courts look to the legislative history of the Act, United States case law, and principles of international law for guidance in distinguishing between governmental and commercial acts.²⁸⁸ As noted above, however, the discussion of the commercial activities exception in the legislative history provides little real aid in evaluating state behavior.²⁸⁹ American case law

280. McCormick, *supra* note 1, at 490.

281. See Dellapenna, *supra* note 266, at 231–32. See generally HOUSE REPORT, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6604–35.

282. HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

283. *Id.* at 6614–15.

284. Dellapenna, *supra* note 266, at 232.

285. *Id.*; Kahale & Vega, *supra* note 19, at 236. The drafters felt that complex commercial transactions can take an infinite variety of shapes in today’s world, and they were reluctant to attempt to codify these diverse transactions in the rigid form of a statute. Consequently, a deliberate decision was made to allow the law to develop on a case-by-case basis within a framework of general common law of sovereign immunity. Feldman, *supra* note 4, at 311; 1976 *Hearings*, *supra* note 21, at 53 (Testimony of Monroe Leigh).

286. “The courts would have a great deal of latitude in determining what is a ‘commercial activity’ for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable.” HOUSE REPORT at 16, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

287. See Dellapenna, *supra* note 266, at 232–33.

288. Note, “Commercial Activity” *Under the Foreign Sovereign Immunities Act of 1976: Toward a More Practical Definition*, 34 BAYLOR L. REV. 295, 302 (1982) [hereinafter *Practical Definition*]. The court in *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309–10 (2d Cir. 1981), also examined these three areas for guidance in evaluating the commercial nature of the contracts involved. The court, nonetheless, voiced its dissatisfaction with the 1976 Act’s guidance. See *infra* notes 296–302; Kahale & Vega, *supra* note 19, at 237; *Judicial Control*, *supra* note 19, at 438.

289. See *supra* text accompanying notes 275–87.

is also a poor source from which to glean the meaning of “commercial activity.” The Act superseded the guidelines set out in the leading American case prior to the adoption of the Act,²⁹⁰ including that case’s definition of “commercial activity.”²⁹¹ Judicial determinations prior to that case were made on a number of inconsistent grounds; some courts looked to the nature of the activity, others to its purpose.²⁹² Because these conflicting United States precedents offer little help in adjudicating sovereign immunity pleas, some commentators advocate that international law is a more “fruitful source of guidance.”²⁹³ Once again, however, although 28 U.S.C. § 1602, entitled “Findings and declaration of purpose,” contains a “cryptic reference to international law, [it] wholly fails to adopt it.”²⁹⁴ Nothing in the FSIA, however, expressly prevents courts from looking to international law for help, provided they interpret that law consistently with the congressional intent behind the Act.²⁹⁵

Judicial dissatisfaction with the Act’s formulation of “commercial activity”

290. For a discussion of *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), see *supra* notes 41–47 and accompanying text.

291. *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609, 612 (S.D.N.Y. 1978) (citing von Mehren, *supra* note 8, at 48–54).

292. See *supra* notes 36–40 and accompanying text.

293. *Judicial Control*, *supra* note 19, at 438.

294. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981). 28 U.S.C. § 1602 as originally proposed in 1973 provided in part:

Under international law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by United States courts in conformity with these principles as set forth in this chapter *and other principles of international law*.

Proposed 28 U.S.C. § 1602 in S. 566, 93d Cong., 1st Sess., 119 CONG. REC. 2213 (1973) (emphasis added); S. 711, 93d Cong., 1st Sess., 119 CONG. REC. 3433 (1973); H.R. 3493, 93d Cong., 1st Sess., 119 CONG. REC. 2880 (1973). The italicized language was deleted in the final version of the Act, causing confusion over the role of international law in questions of foreign sovereign immunity before United States courts. See generally *Judicial Control*, *supra* note 19, at 451–53.

The House Report seems to more fully endorse the use of international law, but it too fails to indicate to what extent these legal principles should be adopted:

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity. . . .

HOUSE REPORT at 14, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6613.

295. See generally HOUSE REPORT, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6604–35. See *supra* notes 17–33 and accompanying text.

was expressed in *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*.²⁹⁶ In that case, Judge Kaufman intimated his dissatisfaction by stating that the court must look for principles for determining immunity claims in a “vaguely-worded statute, . . . a law described by its draftsmen as providing only ‘very modest guidance’ on issues of pre-eminent importance.”²⁹⁷ He further contended that “the determination of whether particular behavior is ‘commercial’ is perhaps the most important decision a court faces in an FSIA suit” and observed that “[u]nfortunately the definition of ‘commercial’ is one issue on which the Act provides almost no guidance at all.”²⁹⁸ The court was able to dispose of this case because it primarily concerned an application of the “nature” test²⁹⁹ and because sufficient precedent existed, both in the United States³⁰⁰ and abroad³⁰¹ characterizing this very program of purchases by Nigeria as “commer-

296. 647 F.2d 300 (2d Cir. 1981). In 1975, the Federal Military Government of Nigeria contracted to buy cement from 109 suppliers all over the world. Four of these suppliers were American corporations. Under the terms of these four contracts, the cement was to be shipped to Nigeria by the sellers and payment was to be made through an irrevocable letter of credit deposited with Morgan Bank, Central Bank of Nigeria’s correspondent bank in the United States. In the summer of 1975, Nigeria, finding it had ordered too much cement for its port facilities to unload, cabled its suppliers and asked them to stop sending cement. It then refused to allow Morgan Bank to pay the irrevocable letters of credit without Central Bank’s permission. The suppliers sued for anticipatory breach of the contracts and letters. Nigeria and the Central Bank did not dispute these claims. Instead, they asserted a defense of sovereign immunity under the FSIA. *Id.* at 304–07. The court found the contracts to be commercial in nature, *id.* at 310, with sufficient nexus to the United States, *id.* at 313, and thus denied the claim of sovereign immunity, *id.* at 316.

297. *Id.* at 302. Another court described the FSIA as a “‘remarkably obtuse’ document, a ‘statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and its many deliberately vague provisions, has during its brief lifetime been a financial boon for the private bar but a constant bane for the federal judiciary.’” *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1107 (5th Cir. 1985) (quoting *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105, 1106 (S.D.N.Y. 1982).

298. *Texas Trading*, 647 F.2d 300, 308 (2d Cir. 1981). The Fifth Circuit agreed with this view when it noted that “[a]lthough ascertaining the commercial or sovereign nature of a given activity is usually the critical question in a sovereign immunity case, the FSIA provides distressingly little guidance.” *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1392 (5th Cir. 1985).

299. *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981). Nigeria in this case was apparently trying to come under the test in *Victory Transport* by demonstrating that the purpose of its cement purchases was to build roads and army barracks and therefore contended that immunity should be extended. The court, however, declared that the purported purpose of the transaction was irrelevant and that Nigeria should be subject to “all the rules of the marketplace.”

300. *See National American Corp. v. Federal Republic of Nigeria*, 597 F.2d 314 (2d Cir. 1979).

301. *Texas Trading*, 647 F.2d at 310 n.29 (citing *Hispano Americana Mercantil S.A. v. Central Bank of Nigeria*, [1979] 2 Lloyd’s L.R. 277 (United Kingdom)); *Iptrade International, S.A. v. Federal Republic of Nigeria* (Int’l Chamber of Commerce Arbitration Award, April 25, 1978), *enforced*, 465 F. Supp. 824 (D.D.C. 1978); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356, 1 All E.R. 881 (United Kingdom); *Nonresident Petitioner v. Central Bank of Nigeria*, 16 INT’L LEGAL MATERIALS 501 (1977) (published by AM. SOC’Y INT’L L.) (Dist. Ct., Frankfurt/Main, Aug. 25, 1976) (West Germany).

cial.” Given the ease with which the court was able to decide the case, it is significant that the court, nonetheless, expressed concern over the lack of guidance for determining “commercial activities” under the FSIA.³⁰²

While many cases are relatively easy to resolve, a great many fact situations invite differing conclusions from various courts depending on just how those facts are interpreted.³⁰³ For example, a contract to work on documentary films for cultural exchange with a foreign government was found to be a political act,³⁰⁴ while a contract to provide artists for musical performances in the United States between the State Concert Society of the Soviet Union and an American impresario was viewed as commercial.³⁰⁵ Both courts³⁰⁶ and legal scholars³⁰⁷ have split over whether an expropriation in breach of a concession contract is a sovereign act (immune), or a simple breach of contract (not immune). Courts have even divided in their determinations of whether antitrust violations planned as part of national economic policies are commercial³⁰⁸ or sovereign acts.³⁰⁹ These cases illustrate the wide parameters within which arguments can be framed, and the uncertainty of results obtained.

B. Problems of the Public Nature of Commercial Activities in Non-Market Economies

By focusing on the nature, rather than the purpose, of the activity to determine the commercial nature of the conduct in question, Congress hoped to restrict the

302. *Practical Definition*, *supra* note 288, at 302.

303. *See* Dellapenna, *supra* note 266, at 232.

304. *Gittler v. German Information Center*, 408 N.Y.S.2d 600, 95 Misc.2d 788 (Sup. Ct. 1978).

305. *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978). This case also explicitly disavows any attempt to create a third possible category—artistic endeavors. *Id.* at 611.

306. Expropriation as a sovereign act: *Cary v. National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd on other grounds*, 592 F.2d 673 (2d Cir. 1979); *United Mexican States v. Ashley*, 556 S.W.2d 784, 786 (Tex. 1977). Expropriation as a commercial act: *First Bank of Boston (International) v. Banco Nacional de Cuba*, 61 Civ. 2116-CLB (S.D.N.Y. Jan. 4, 1980). *Cf.* *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695-706 (1976) (four justices holding an expropriation to be an act of state, but repudiation of certain contracts under it as commercial acts).

307. *Compare* *Kahale & Vega*, *supra* note 19, at 241-43 (expropriation is always a sovereign act), *with* *von Mehren*, *supra* note 8, at 57-8 (expropriation in breach of a concession is a breach of a contract and, therefore, a commercial act).

308. *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 394-96 (D.Del. 1978) (A Polish state-owned golf cart manufacturer was found to have engaged in commercial activities and therefore could not avail itself of the defense of sovereign immunity in a suit against it for antitrust violations, although the court did, in effect, apply the act of state doctrine to shield defendant from liability for governmentally mandated acts. *Id.* at 396-400).

309. *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553, 564-70 (C.D. Cal. 1979). (The district court found that the activities of the defendant sovereigns in controlling the production and price of oil were not commercial and that sovereign immunity therefore applied. On appeal, the Court of Appeals implicitly

opportunities for successful invocation of the sovereign immunity defense by non-market economies, where all trading activities might be considered to be imbued with a public purpose.³¹⁰ Yet, it is precisely when the commercial activity exception is applied to non-market economies that its inadequacies become most pronounced.³¹¹ The FSIA presupposes an ability to distinguish commercial from non-commercial acts by their *nature*, rather than by their *purpose*.³¹² This distinction breaks down, however, where an ideological premise exists that all acts have a public non-profit purpose. That purpose surrounds the act and transforms it from a formally commercial act to an act in the service of the state.³¹³ As with the concepts employed by the FSIA to define an “agency or instrumentality of a foreign state,”³¹⁴ a test based on the nature of the activity is consistent with a free market society, but not with a non-market one.³¹⁵ Many of the activities that are strictly private in free market economies are carried out solely by the government, or by entities which are neither public nor private, in non-market economies.³¹⁶ Thus, what may be considered private in nature by the law of a free market country is public in nature under the law of a non-market state. Although the court in *Edlow* never reached the commercial activities issue,³¹⁷ the *Novosti* decision provides a prime example of the problems associated with this definition in a non-market situation.

Once the court determined that *Novosti* qualified as an “agency or instrumentality of a foreign state” for immunity purposes,³¹⁸ it sought to determine whether *Novosti*’s activities were “in connection with a commercial activity of the foreign state.”³¹⁹ The court acknowledged that *Novosti*’s sales to foreign media constituted commercial activity.³²⁰ The critical issue, however, was whether the

reversed the finding that these were not commercial activities, but affirmed on other grounds. 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982)).

310. See *Judicial Control*, *supra* note 19, at 438; *Capitalist Paradigm*, *supra* note 11, at 436; *supra* notes 21, 263 and accompanying text; *infra* notes 324–27 and accompanying text. See, e.g., Fensterwald, *supra* note 103, at 620–22; Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 Nw. U.L. REV. 109 (1961).

311. See generally *Capitalist Paradigm*, *supra* note 11; *Legal Entities*, *supra* note 101; *Recent Developments*, *supra* note 1; *Property Ownership*, *supra* note 11; Singer, *supra* note 18; Kahale & Vega, *supra* note 19, at 226.

312. See *supra* notes 269–74, 282–86 and accompanying text.

313. See, e.g., *infra* notes 315–24 and accompanying text.

314. See *supra* notes 181–92 and accompanying text.

315. See *Capitalist Paradigm*, *supra* note 11, at 450.

316. See *supra* notes 21, 90–114, 122–41 and accompanying text.

317. The court found that NEK was not an “agency or instrumentality of a foreign state,” and thus never considered whether it was engaged in commercial activity. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977). See also *supra* text accompanying notes 173–79.

318. See *supra* notes 159–64 and accompanying text.

319. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 855 (S.D.N.Y. 1978).

320. *Id.* at 856.

alleged libels were “in connection with a commercial activity.”³²¹ Because the Soviet papers in which the articles appeared were published by official organs of the U.S.S.R., the court characterized Novosti’s collaboration as “acts of intra-governmental cooperation” rather than as commercial activities.³²² Holding the statements to be “official commentary of the Soviet government,” the court refused to “reach around the various organs of the Soviet government which actually published the alleged libels” and subject the Novosti Press Agency to its jurisdiction.³²³

This conclusion is highly suspect. The business of publication, including sales and distribution, can easily be considered commercial in nature.³²⁴ The court in *Novosti*, however, seemed to be examining the purpose of the publication when it noted that it was intra-governmental and in the service of the state.³²⁵ The result of the court’s interpretation may be a test upon which Socialist business enterprises can easily establish their public “nature” and corresponding immunity. Soviet ownership and service to the state is descriptive of all agencies and organizations in the U.S.S.R.³²⁶ Under the *Novosti* test, the defendant work organization in *Edlow* could easily have qualified as an agency if that would have been to its advantage.³²⁷ The *Novosti* decision, in its interpretation of the 1976 Act, may unwittingly give an advantage to non-market economies.

Although *Edlow* and *Novosti* were decided shortly after the FSIA became

321. *Id.*

322. *Id.*

323. *Id.*

324. Certainly the dissemination of information is for the public good in terms of freedom of speech and thought. The court cited the Soviet Constitution and the fact that the press is the servant of the people. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978).

325. *Capitalist Paradigm*, *supra* note 11, at 448. Obviously, the publication and distribution of periodicals is a business enterprise. The fact that it is not for private “profits” should not alter the commercial nature of such activity, or every enterprise in socialist nations could claim immunity on that basis. The act is certainly one that could be engaged in by a private person. *Novosti*, 443 F. Supp. at 856. A more recent case under the 1976 Act, *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978), refused to grant immunity to the Soviet State Concert Society on the basis of its artistic and governmental character. A contract under which the U.S.S.R. would send artists to the U.S. and Great Britain was breached by the U.S.S.R., and the plaintiff sued under the commercial activities exception to the 1976 Act. *Id.* at 610. The Court ignored the unprofitable character and diplomatic purpose of the contract, and deemed the nature of the transaction to be a “sale of a service.” *Id.* at 611. The court therefore denied immunity. *Id.* at 613. When contrasted with the *Novosti* case, this rationale appears more attentive to the intentions of the 1976 Act. The fact that the commercial act was a typical breach of contract made the determination easier in light of the 1976 Act. But as previously noted, the fact that a contract was involved has not always been dispositive. See *supra* notes 40, 304–07 and accompanying text; *infra* notes 328–41 and accompanying text.

326. See *supra* notes 21, 73, 90–114 and accompanying text.

327. *Capitalist Paradigm*, *supra* note 11, at 448. The work organization’s property was held in trust for all the people, and certainly its production of electrical power for the people was public in purpose and even in nature under the simplistic *Novosti* test.

effective, courts continue to have difficulty applying the commercial activity exception. In *MOL, Inc. v. People's Republic of Bangladesh*,³²⁸ the Bangladesh Ministry of Agriculture granted the plaintiff, an Oregon corporation, a ten-year license to capture and export rhesus monkeys. The agreement specified quantities, prices, and other terms, and required that the plaintiff build a breeding farm in Bangladesh. The license was conditioned upon exclusive use of the monkeys for medical and other scientific research. Bangladesh terminated the agreement two years after its inception because the plaintiff had not yet constructed the breeding farm and because the plaintiff allegedly sold monkeys to the armed services for "neutron bomb radiation experiments."³²⁹ MOL, in turn, sued the Bangladesh government for termination of the agreement. The Court of Appeals for the Ninth Circuit concluded that:

Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative. . . . It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function. . . . A private party could not have made such an agreement.³³⁰

The court thus held that revocation of the licensing agreement was a sovereign act and that Bangladesh was immune from suit.³³¹

As one of the drafters of the FSIA noted, "this decision appears to flout the intent of Congress."³³² Private parties cannot regulate a country's natural resources, but they can enter into contracts to purchase and sell goods. The licensing agreement was nothing more than a contract. What was really at issue in the case was the breach of that contract by the Bangladesh government. This license is not unlike a contract by a government to purchase equipment for its army. Although an individual could not enter such a contract, the House Report explicitly recognizes that the foreign state is not entitled to immunity for such a purchase.³³³ The fact that a contract may have a public purpose is irrelevant under the 1976 Act. A contract is commercial in nature and thus a foreign state is not entitled to immunity in its contractual dealings with foreign entities.³³⁴ "If this decision were followed, there would be no security of contract with foreign governments for the purchase of oil, metals or other primary commodities."³³⁵

328. 736 F.2d 1326 (9th Cir. 1984).

329. *Id.* at 1327-28.

330. *Id.* at 1329.

331. *Id.*

332. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 19, 31 (1986) [hereinafter Feldman II].

333. HOUSE REPORT at 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615. See also *supra* notes 270-74 and accompanying text.

334. See HOUSE REPORT at 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615; *Chisholm & Co. v. Bank of Jamaica*, 643 F. Supp 1393, 1400 (S.D.Fla. 1986) (A contract is inherently commercial, even when the ultimate purpose behind it is governmental regulation.). See also *supra* notes 48-52 and accompanying text.

335. Feldman II, *supra* note 332, at 32.

This could severely impair foreign trade. Yet, the court in *Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*,³³⁶ relied on *MOL* when it found that Liberia's granting of a concession contract to Liberian Eastern Timber to harvest and exploit Liberian timber and Liberia's subsequent revocation of that concession were regulations of Liberia's natural resources and sovereign acts.

Both the *MOL* and the *Liberian Eastern Timber* courts made the mistake of looking to the purpose of the activity—the regulation of natural resources—rather than to its nature—commercial contract. One of the FSIA's drafters conceded that:

[T]he draftsmen [of the Foreign Sovereign Immunities Act of 1976] may have erred in relying on such vague formulations as the "nature" and "purpose" of a transaction to guide courts, which too often may be intimidated by the perceived sensitivities of foreign governments. The *MOL* court simply denied that it was looking at the "purpose" of the agreement. It said "consideration of the special elements of export license and natural resources look only to the *nature* of the agreement. . . ." ³³⁷

In *de Sanchez v. Banco Central de Nicaragua*,³³⁸ the Fifth Circuit actually admitted that it looked to the purpose of Banco Central's activity in holding that the Nicaraguan bank was entitled to immunity for its refusal to honor a check issued in exchange for a certificate of deposit.³³⁹ The court observed that an absolute separation between the nature and the purpose of an act is not always possible.³⁴⁰ It went on to conclude that "[w]here a government enters into a contract in its sovereign capacity, then the breach of that contract partakes of the contract's initial sovereignty."³⁴¹ As contracts are commercial in nature, regardless of their purpose, the court's ruling contravenes 28 U.S.C. § 1603(d)'s nature test.

MOL, *Liberian Eastern Timber*, and *de Sanchez* indicate that the commercial activity exception remains a source of confusion for the courts. Moreover, this confusion is not limited to cases involving non-market economies, such as the Soviet Union or Yugoslavia, but extends to third world nations as well.

C. Courts Need Guidelines to Achieve Consistent Results

Although the FSIA was intended to introduce uniformity into the process of making sovereign immunity determinations,³⁴² Congress, rather than provide

336. 650 F. Supp. 73, 75 (S.D.N.Y. 1986).

337. Feldman II, *supra* note 332, at 32 (quoting *MOL, Inc. v. The People's Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984)) (emphasis in original).

338. 770 F.2d 1385 (5th Cir. 1985).

339. *Id.* at 1387, 1393, 1395.

340. *Id.* at 1393.

341. *Id.* at 1394.

342. See HOUSE REPORT at 7–8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6605–06. See also *supra* notes 17–29 and accompanying text.

explicit direction as to commercial activities, paradoxically put its faith in the courts to develop standards on a case-by-case basis.³⁴³ Under the Act the courts have been given such wide latitude and so few guidelines as to what constitutes commercial activity³⁴⁴ that ultimately immunity determinations are as unpredictable as they were when made by the State Department.³⁴⁵ How a court distinguishes public from private acts depends upon its particular view as to the appropriate economic and political roles of the state. Different courts draw different, and sometimes inconsistent, lines dividing public from private acts.³⁴⁶ Consequently no ascertainable standard capable of functioning as a rule of law of general application is produced.³⁴⁷ It is simply not possible to build the restrictive doctrine of sovereign immunity out of judicial practice based upon broad formulations of the distinction between public and private acts.³⁴⁸ Rather it is desirable, even necessary, to provide guidance to the judiciary through a set of standards incorporating a predetermined view as to the appropriate role of the state and representing a reasonable accommodation of conflicting perspectives.³⁴⁹

D. United Kingdom's State Immunity Act and Victory Transport Case Suggest Better Approaches

One possible solution to the present ambiguities of the FSIA would be to adopt the approach taken in the United Kingdom's State Immunity Act of 1978.³⁵⁰ The SIA parallels the FSIA, codifying the restrictive theory of sovereign immunity by conferring a general grant of immunity upon foreign states.³⁵¹ This immunity is then subject to exceptions in cases where there is a waiver³⁵² or the proceedings are of a commercial, industrial, financial, professional, or contractual nature.³⁵³ In contrast to the FSIA, however, the SIA lists and classifies all acts deemed to be commercial.³⁵⁴ In addition, it specifically precludes immunity in a variety of

343. See *Texas Trading and Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308-09 (2d Cir. 1981); *Callejo v. Bancomer, S.A.* 764 F.2d 1101, 1107 (5th Cir. 1985). See generally *supra* notes 285-87, 297-98 and accompanying text.

344. See Hill, *supra* note 18, at 204-05; *supra* text accompanying notes 280-87. See also HOUSE REPORT at 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS, *supra* note 1, at 6615.

345. See *Practical Definition*, *supra* note 288, at 301; *supra* notes 288-309 and accompanying text. See also *supra* notes 318-41.

346. See Singer, *supra* note 18, at 2; *supra* notes 303-09, 318-41 and accompanying text.

347. Singer, *supra* note 18, at 3.

348. *Id.*

349. *Id.*

350. State Immunity Act 1978, reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1123.

351. "A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Act." State Immunity Act 1978, § 1(1), reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1124.

352. State Immunity Act, § 2, reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1124.

353. *Id.*, § 3(3), reprinted in 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1124.

354. The SIA defines "commercial transaction" as:

other circumstances including employment contracts, property damage or personal injury, British real estate transactions, estate and trust disputes, and patent and trademark cases.³⁵⁵

This approach would make immunity decisions more consistent and predictable by providing the courts with a detailed list of litigable areas. It fails, however, to squarely confront the problem of managing two antithetical legal systems. Regardless of the number of listed exceptions to immunity, it is always possible to interpret the activity as primarily governmental and therefore unfit for such private legal categories.³⁵⁶ The problem is not due simply to the difficulty of predicting all the possible future situations in which immunity should be denied and classifying them in advance.³⁵⁷ The problem is, in fact, much more fundamental: Congress seems shackled to Western or free market conceptions of commercial or governmental purposes and natures when setting the standards for immune activity.³⁵⁸ Yet classifications based on the nature and purpose of activities break down in non-market systems, such as the U.S.S.R. and Yugoslavia, where perhaps no commercial activity can be truly non-governmental and every act of a commercial nature has a constitutionally public purpose.³⁵⁹

A better approach to correcting the problems inherent in the current formulation of the FSIA is a return to a formulation similar to that advanced in *Victory Transport*.³⁶⁰ The Act proclaims sovereign immunity to be the general rule and non-immunity to be the exception.³⁶¹ It thus reverses the approach taken in *Victory Transport*, where the court stated: “[W]e are disposed to deny a claim of sovereign immunity . . . unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive.”³⁶² One commentator contends that the drafters of the Act have not advanced a satisfactory reason for this reversal, and that there appears to be none.³⁶³ A comprehensive rule of non-immunity should

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

Id. “Commercial transaction” does not include an employment contract between a state and an individual. *Id.*

355. *Id.*, §§ 4–11, at 1124–26.

356. *Capitalist Paradigm*, *supra* note 11, at 450.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). *See also supra* text accompanying notes 41–47.

361. 28 U.S.C. § 1604. *See also supra* text accompanying notes 30–32.

362. *Victory Transport*, 336 F.2d at 360. *See also von Mehren*, *supra* note 8, at 53.

363. *Smit*, *supra* note 29, at 64 n.85.

be prescribed.³⁶⁴ Only if a state's activity falls within an expressly enumerated category of sovereign authority should immunity attach.

Although this formulation may seem to be a radical departure from the approach presently followed, it is probably not contrary to any generally accepted principle of international law or to any uniform state practice in the matter.³⁶⁵ International law prescribes a restrictive view of foreign sovereign immunity.³⁶⁶ Such a view can be carried into practice as a general grant of immunity with broad exceptions of non-immunity, or as a general denial of immunity with narrow exceptions of immunity. The latter formulation may actually be preferable because under international law a state is absolutely sovereign within its own territory.³⁶⁷ Sovereign immunity is a derogation from the normal rule of territorial sovereignty. It is thus sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to a basic rule of immunity.³⁶⁸ Sovereign immunity should therefore be granted only when international law requires—that is to say, only when the sovereignty of the foreign state is in question.³⁶⁹ It should not be granted when the state acts as a private individual or has entered into a transaction which does not involve its political or governmental powers.³⁷⁰

E. Most Ancient Immunity Justifications Obsolete in Modern World

Due to increasing government involvement in the marketplace and the emergence of the restrictive doctrine,³⁷¹ the concepts which formerly justified immunity, such as the equality and independence of states and the dignity of sovereigns,³⁷² are no longer valid.³⁷³ The equality of nations now requires that states that choose to enter the marketplace in their own name not be unilaterally

364. For similar suggestions, see Smit, *supra* note 29, at 63; Lauterpacht, *supra* note 19, at 222, 226, 227.

365. Singer, *supra* note 18, at 20 n.74; Lauterpacht, *supra* note 18, at 226. See also Hill, *supra* note 18, at 183; Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 *NETH. INT'L L. REV.* 265, 270–71 (1982).

366. See *supra* notes 20–23 and accompanying text.

367. See Hill, *supra* note 18, at 183.

368. Higgins, *supra* note 365, at 271. See also Fensterwald, *supra* note 103, at 621.

369. See Hill, *supra* note 18, at 183. In *The Schooner Exchange*, Chief Justice Marshall recognized that the basic principle is not the immunity of the foreign state but the full jurisdiction of the territorial state. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). He felt that because immunity is a derogation of that jurisdiction, any immunity accorded to a foreign state must be traced to the territorial state's waiver of its jurisdiction. *Id.* According to Marshall, since the host state extends immunity to the foreign state voluntarily, it can withdraw immunity and reassert its jurisdiction at any time. Moreover, immunity may be extended upon such conditions as the host sees fit to impose, which gives it the right to enact laws such as the FSIA. *Id.*

370. Fensterwald, *supra* note 103, at 621.

371. See *supra* notes 18–23 and accompanying text.

372. See *supra* notes 18–19 and accompanying text.

373. Higgins, *supra* note 365, at 271.

entitled to extended immunities that other states that leave trade to the commercial sector do not claim.³⁷⁴ Similarly the independence of nations is now regarded as consistent with granting immunity in some cases and withholding it in others to prevent the independence of the trading state from being exalted at the expense of the independence of its neighbors.³⁷⁵ Even the concept of the dignity of the sovereign has altered. International law no longer regards it as contrary to the dignity of nations to adjudicate claims against them.³⁷⁶ On the contrary:

It is more in keeping with the dignity of the foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decision of courts of acknowledged impartiality, than by arbitrarily rejecting their jurisdiction. In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts. . . . Foreign sovereigns should not be in any different position.³⁷⁷

These changes reflect the evolution of international law from a system that provided direct benefits only for states, to one increasingly concerned with providing appropriate protection for individuals.³⁷⁸ The function of the restrictive doctrine is to prevent the acts of private litigants from interfering with the sovereign functions of states while allowing rights and remedies arising out of trading transactions to be adjudicated on their merits according to the rules of the market.³⁷⁹

Most scholars agree that there remains a core area of sovereign activity, principally the conduct of governmental activities pertaining to national defense, diplomacy and administration, entitled to immunity from jurisdiction of other states as a matter of international law.³⁸⁰ Beyond that, the distinction between immune and non-immune transactions is drawn by municipal, rather than by international law and varies among states based upon differences in local law.³⁸¹

374. *Id.*

375. *Id.*

376. *Id.*

377. *Rahimtoola v. Nizam*, 1958 A.C. 379, 418.

378. *Higgins*, *supra* note 365, at 271.

379. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). See generally *Hill*, *supra* note 18, at 181–82, 204–05; *Crawford*, *International Law and Foreign Sovereigns: Distinguishing Immune Transactions*, 54 BRIT. Y.B. INT'L L. 75, 83 (1983); *Lauterpacht*, *supra* note 19, at 237–39; *Lowenfeld*, *supra* note 40, at 929.

380. *Feldman*, *supra* note 4, at 302; *Crawford*, *supra* note 379, at 78.

381. *Feldman*, *supra* note 4, at 302; *Crawford*, *supra* note 379, at 78. According to *Lowenfeld*, *supra* note 40, at 931, the writers in the area all say substantially the following:

Foreign sovereigns and the governments of foreign States enjoy immunity from the jurisdiction of municipal courts. However, the extent of the immunity actually accorded them varies greatly, and the most that can be said of customary international law is that it enjoins immunity from the judicial process only in respect of governmental activities that pertain to administration, and does not compel it in respect of other activities which are more truly commercial than administrative.

Id. (quoting D. O'CONNELL, *supra* note 1, at 913.)

The restrictive theory of immunity, therefore, does not require that the interests of private litigants be sacrificed to the interests of the state in other than these limited categories.³⁸² Rather the interests of the state must be balanced against the interests of the individual. In all instances where the sovereign function of the state is not at issue, the interests of the individual should prevail.

F. Proposed Amendment to FSIA §§ 1604 and 1605 Definition of Immune Sovereign Authority

In conformity with internationally recognized areas of immune conduct, 28 U.S.C. §§ 1604 and 1605 of the FSIA should be amended to read as follows:³⁸³

(a) Subject to existing international agreements to which the United States is a party at the time of the enactment of this Act (as amended) a foreign state shall not be immune from the jurisdiction of the courts of the United States and of the states except for actions arising out of the exercise of its sovereign authority as detailed in parts (b) and (c) of this section.

(b) The sovereign authority of a foreign state extends only to—

(1) legislative acts and measures taken in pursuance thereof, such as nationalization,

(2) executive and administrative acts within territory of the foreign state, such as expulsion of an alien or conferment of nationality on persons sufficiently connected with the state,

(3) disposition of armed forces within the jurisdiction of the foreign state, and

(4) acts concerning diplomatic activity.

(c) The sovereign authority of a foreign state does not extend to—

(1) any arrangement (contract or otherwise) for the supply of goods or services,

382. See Lauterpacht, *supra* note 19, at 227, 237–39; *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

383. In addition to restricting immunity to certain well defined categories of sovereign activity, the FSIA should include a provision under which a foreign state may waive its right to immunity even in these areas. The waiver exception to immunity presently in the FSIA, however, is extremely vague as to what kind of conduct constitutes a waiver. See 28 U.S.C. § 1605(a)(1). This provision should be redrafted to conform more closely to that in the International Law Association Draft Convention on Sovereign Immunity (ILADC). See *generally* Draft Articles for a Convention on State Immunity, art. III, § A, *reprinted in* 22 INT'L LEGAL MATERIALS 287, 288–89 (1983) (published by AM. SOC'Y INT'L L.). Like the FSIA, the ILADC provides that the foreign state is not immune from jurisdiction “[w]here the foreign state has waived its immunity from the jurisdiction of the forum state either expressly or by implication.” *Id.* at 288. Unlike the FSIA, however, it goes on to give examples of what constitutes express or implied waivers. *Id.* at 288–89. This combination of a general rule followed by specific instances which constitute express and implied waivers provides courts with the guidance for making waiver determinations that is sorely lacking in the current FSIA formulation.

(2) any financial transaction involving lending or borrowing or guaranteeing financial obligations, or

(3) any other transaction or activity (whether commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority as specified in part (b) of this section.³⁸⁴

The importance of the activities shielded by these categories requires that they be granted immunity. For example, a government could not function smoothly and effectively if its internal administrative acts were constantly threatened by judicial inquiry at the instigation of private citizens.³⁸⁵ Similarly, a government's foreign diplomacy would be substantially hampered if it were made a potential subject of litigation in foreign courts.³⁸⁶ The government's interest in freedom from suit outweighs the private litigant's interest in access to the courts in cases involving such actions.³⁸⁷ In all other cases, the individual's interest in court adjudication of a private claim outweighs the state's interest in avoiding such litigation.³⁸⁸

Subsection (c) is an adaptation of the United Kingdom's State Immunity Act of

384. In addition to the proposed amendment, which relates to subject matter jurisdiction for actions involving foreign sovereigns in United States courts, the FSIA must contain a provision detailing the personal jurisdiction of the courts—the nexus required between the act in question and the United States. This nexus is presently provided in the commercial activity exception itself, which states that a foreign sovereign shall not be immune in any case:

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). This provision, along with 28 U.S.C. § 1330(a), *see supra* note 31, has been criticized for combining (or confusing) notions of subject matter and personal jurisdiction. To make the nexus requirement clear, the FSIA should contain a separate provision detailing the necessary contacts with the forum. Such a provision is beyond the scope of this note. For a discussion of the nexus requirement and an analysis of the present provisions, see Hill, *supra* note 18, at 212–28; Note, *The Foreign Sovereign Immunities Act of 1976 and Jurisdiction Under the Commercial Activities Exception*: Vencedora Oceanica Navegacion, S.A. v. Compagnie Nationale Algerienne de Navigation, 4 B.U. INT'L L.J. 125 (1986); Comment, *Establishing Jurisdiction Under the Commercial-Activities Exception to the Foreign Sovereign Immunities Act of 1976*, 19 Hous. L. Rev. 1003 (1982); Developments, *Comprehensive Guidelines For the Commercial Activities Exception of the Foreign Sovereign Immunities Act*: Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 11 DEN. J. INT'L L. & POL'Y 123 (1981).

385. Hill, *supra* note 18, at 182.

386. *Id.*

387. *See supra* text accompanying notes 368–70, 377–80.

388. Hill, *supra* note 18, at 171–73, 181–183. *See also supra* notes 368–70, 377–83 and accompanying text.

1978's definition of commercial activity.³⁸⁹ Although the transactions to which it relates are excluded from the four categories of immune behavior, it is included in the amendment to emphasize that such activity is not entitled to immunity.

Such a formulation of the immunity doctrine is clear and easily applied. It permits courts to reach consistent conclusions without excessive inquiry into the affairs of a defendant state. Additionally, the detailed description of categories of immunity allows both private persons and foreign states to predict with reasonable certainty whether a claim of immunity is likely to be sustained.³⁹⁰ Moreover, it avoids the problem of trying to anticipate all of the possible situations in which immunity should not be granted: non-immunity is the rule, rather than the exception.

Casting the doctrine in the negative emphasizes the notion that extending immunity is not a preferred practice. Rather it is an exception to normal jurisdiction and should not be encouraged. This recognizes that in most cases the interests of the private litigant are paramount to those of the government.³⁹¹

Most important, however, this formulation avoids the use of Western or free market conceptions of commercial purposes and natures. By basing immunity on international legal requirements, it immunizes only those activities traditionally protected by sovereigns.³⁹² While an act of a commercial nature in a non-market system may be performed by the government and/or have a constitutionally public purpose, it is not necessarily a sovereign function. Governments may freely put aside the sovereign mantle and become involved in non-sovereign activities. The government is welcome to enter the marketplace. If it chooses to do so, however, it must do so under the terms of the market. As discussed in Section II of this Note, those terms include a restrictive view of sovereign immunity. Both the U.S.S.R. and the People's Republic of China appear to have recognized this in recent years.³⁹³ Therefore, this proposal should not upset the political sensibilities of any major international traders.

VI. CONCLUSION

A society's political and economic ideology shapes the meaning of legal terms in a transaction. That ideology cannot be disregarded when evaluating the activity of a state. The Foreign Sovereign Immunity Act of 1976, despite its intended purpose of facilitating immunity determinations, is inadequate when applied to non-market economies because it ignores the ideological differences between East and West. As contacts between United States citizens and foreign entities

389. State Immunity Act 1978, § 3(3), *reprinted in* 17 INT'L LEGAL MATERIALS, *supra* note 222, at 1124.

390. *See generally* Hill, *supra* note 18, at 182 (Advantages of system created in *Victory Transport*).

391. *See generally id.*

392. *See* Kahale & Vega, *supra* note 19, at 245.

393. *See supra* note 22 and accompanying text.

continue to increase, these deficiencies will become more acute. It is thus imperative that Congress provide the courts with more appropriate guidance in immunity determinations.

The problems inherent in the present version of the Act can be avoided by eliminating the capitalist notions embedded in the Act's draftsmanship and appealing to the international legal doctrine of restrictive sovereign immunity. Congress, therefore, should amend the 1976 Act to provide a more detailed definition of a foreign state, a definition that avoids Western concepts of ownership by appealing to foreign law in classifying the entity involved. Additional complications can be avoided by making non-immunity the rule, rather than the exception, and extending immunity only in select circumstances. Such an amendment would go a long way toward eliminating the capitalist concepts presently in the FSIA, thus making the Act applicable to market and non-market economies alike.