



Jurisdictional Immunities of Foreign States

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LEGISLATIVE NOTE

JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

INTRODUCTION

Jurisdictional or sovereign immunity which is a part of and is derived from the broad concept of sovereignty, is a principle in international law¹ and legal history² that has been the subject of continual critical study.³ In preventing courts from establishing jurisdiction over a foreign state or its property, absolute sovereign immunity⁴ necessarily bars execution on

1. Cf. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 221-22 (1951) [hereinafter cited as Lauterpacht].

[A] considerable majority of states have departed from that assumed rule [of absolute immunity] of international law, at least to the extent of exercising jurisdiction over foreign states in matters *jure gestionis*, without, as a rule, giving occasion for protest on the part of the foreign states concerned. Accordingly, in so far as the actual practice of states may be said to be evidence of customary international law, there is no doubt that the principle of absolute immunity forms no part of international custom.

[I]t is by no means certain that immunity from execution is an inevitable or universally recognized rule of international law.

Id.

2. *E.g.*, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

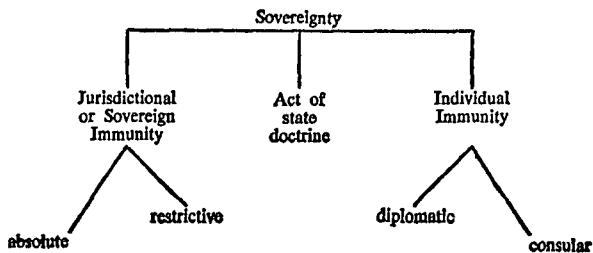
3. This is understandable considering the impact this principle has on a nation's ability to resolve legal conflicts over matters in which it may have an interest in another nation; and the impact this principle has on a state's foreign relations.

4. Sovereignty is that broad, umbrella-like concept that attaches to nationhood and is the basis of all the immunities that inure to a foreign state and prevent jurisdiction over that state in another nation's courts. There are three forms of "immunity" arising from the concept of sovereignty: (1) the rule of individual immunities which applies to diplomatic and consular representatives; (2) the act of state doctrine which applies to governmental acts of a foreign state in that state's own territory—a foreign locus (*see* note 51 *infra*); (3) jurisdictional or sovereign immunity which relates to the acts and effects of acts of a foreign state in and on another state. From the principle of jurisdictional or sovereign immunity, two conflicting theories of immunity have arisen: absolute jurisdictional or absolute sovereign immunity (or simply absolute immunity) and restrictive jurisdictional or restrictive sovereign immunity (or simply restrictive immunity). Schematically, the immunities might appear as follows:

a judgment against a state.⁵ Inconsistencies have developed in the practice of invoking immunity from jurisdiction. Neither the federal nor the domestic state courts have been uniform in their application of immunity and the State Department has frequently been arbitrary in its suggestion of immunity.⁶

In January of 1973, the Chairman of the House Judiciary Committee, Congressman Peter W. Rodino, Jr., introduced in the House of Representatives "A Bill to define the circumstances in which foreign states are immune from the jurisdiction of United States courts . . ." and in which execution on a foreign state's assets will be prohibited.⁷ The measure, H.R. 3493, is Congress' first attempt at codifying the legal principles surrounding grants of jurisdictional immunity to foreign states.

The proposed legislation is an effort to clarify the conditions under which another nation either will or will not be accorded jurisdictional immunity. The legislation is necessary for two reasons: the confusion caused by relevant decisions and the separation of powers question.⁸ Additionally, H.R. 3493 would contribute to a more uniform application of international law in United States courts. The United States would also join an increasing number of nations which have either established statu-



5. Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607 (1962).

The use of the term *state* throughout this note will refer to a foreign nation and not to a domestic state of the United States unless otherwise specified. Use of the word *court* or *courts* refers to both domestic state and federal courts unless otherwise specified.

6. See discussion in text at notes 28-57 *infra*.

7. H.R. 3493, 93d Cong., 1st Sess. (1973). Congressman Rodino and Congressman Edward Hutchinson introduced the bill which was sent to Subcommittee No. 2 of the Judiciary Committee where hearings were held June 7, 1973. H.R. 3493 is the same as the draft bill submitted to the Speaker of the House by the Secretary of State and the Attorney General in January of 1973. In the Senate, Senators Hugh Scott and Roman Hruska introduced the same measure, S. 566. The bill was not acted upon during the First Session of the 93d Congress.

8. That is, executive interference in the judicial branch through State Department suggestion of immunity for a foreign state.

tory norms or have accepted guidelines clarifying the circumstances under which a nation will be immune from jurisdiction.⁹ This note will consider these matters in the analysis of the proposed legislation.

I. HISTORY

Traditionally a sovereign state has been immune from suits in its own courts.¹⁰ Likewise, whether for reasons of comity or convenience, a foreign state has been immune from suits in another state's courts.¹¹

Sovereign immunity is a vestige of an era when a king or emperor was the embodiment of a sovereign state and could not be subject to even a reprimand.¹² Though that notion has been abandoned, other reasons and justifications for the principle of sovereign immunity have been substituted. One reason is simply comity among nations.¹³ Oppenheim, in criticizing jurisdictional immunity, attributed the concept to "principles of equality, of independence, and of dignity of States."¹⁴ Avoiding "possible embarrassment to those responsible for the conduct of the nation's foreign relations" is another consideration.¹⁵ Yet, more recently, acceptance of sovereign immunity seems to be due more to judicial precedent and executive policy than to any clearly defined rationale.¹⁶

9. Council of Europe: European Convention on State Immunity, 11 INT'L LEGAL MATERIALS 470 (1972); Asian-African Legal Consultative Committee, 3d Sess. (Colombo 1960).

10. "A sovereign cannot be sued in his own courts without his consent." United States v. Diekelman, 92 U.S. 520, 524 (1875). This principle was reaffirmed in United States v. Lee, 106 U.S. 196 (1882). Those instances or areas in which cases have been brought against the United States were done so where consent had been granted. *E.g.*, under the Federal Torts Claim Act, 28 U.S.C. §§ 2671 to 2680 (1970), action against the government can be brought because Congressional consent has been given.

In *The Beaton Park*, 65 F. Supp. 211, 212 (W.D. Wash. 1946), the court noted that "when our Government enters upon an ordinary commercial business undertaking, . . . it does so under the same liabilities and responsibilities as private individuals . . .; and Congress has given consent for the institution of legal actions by those aggrieved. . . ."

11. The Parlement Belge, [1880] 5 P.D. 197; U.N. Doc. A/CN.4/245 (1971) (the Secretary-General's "Survey of International Law"). *C.f.* Convention on Private International Law ("Bustamante Code"), 86 L.N.T.S. 111.

12. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 357 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

13. *The Carlo Poma*, 259 F. 369, 370 (2d Cir. 1919), *vacated* 255 U.S. 219 (1920) ("international comity [is] due from one sovereign to another").

14. H. LAUTERPACHT, 1 OPPENHEIM'S INTERNATIONAL LAW 272 (8th ed. 1955) [hereinafter cited as OPPENHEIM].

15. *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 357 (2d Cir. 1964).

16. *National City Bank v. Republic of China*, 348 U.S. 356, 358-59, *reh. denied*, 349 U.S. 913 (1955); *see Wacker v. Bisson*, 348 F.2d 602 (5th Cir. 1965).

The concept of and theory behind sovereign immunity may have originated with Bartolus' maxim, "*par in parem non habet imperium*."¹⁷ In effect, that has come to mean that any foreign state is prima facie immune from jurisdiction in another's courts. Interestingly, some classical international law scholars never referred to state immunity from jurisdiction. Indeed, Grotius, often called the "father of international law," makes no mention of the term.¹⁸

The principle of sovereign immunity was first recognized in the United States in *The Schooner Exchange v. McFaddon* in 1812.¹⁹ In that case, France "nationalized" a vessel owned by two Americans. When the ship entered the harbor of Philadelphia for repairs, they sued for its return. The Court held that the ship was an "armed national vessel" of a foreign nation and not subject to suit.²⁰ Later sovereign immunity was held to encompass all ships owned by a sovereign friendly to the United States,²¹ and the principle has been confirmed and broadened in subsequent cases.²²

The broadening of the concept of sovereign immunity to include the immunity of property or assets other than merchant vessels of other states was perhaps the most significant aspect of jurisdictional immunity, both historically and procedurally. Whether the property or assets at stake were serving a diplomatic or other function, the property or assets were generally immune from attachment for jurisdictional purposes.²³ Moreover, property was immune from execution even if a court could get in rem jurisdiction—for example, through a counterclaim—and the plaintiff in the counterclaim was able to win the verdict.²⁴

17. "[A]n equal does not have control over an equal." Lowenfeld, *Claims against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901, 930 n.85 (1969) [hereinafter cited as Lowenfeld].

18. Lauterpacht at 228.

19. 11 U.S. (7 Cranch) 116 (1812).

20. *Id.* at 135. In dicta, Chief Justice Marshall suggested that a foreign state's immunity might be broader than that. *Id.* at 142.

21. *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562 (1926); *accord*, *The Pampa*, 245 F. 137 (E.D.N.Y. 1917). *Cf.* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 68 (1965) [hereinafter cited as RESTATEMENT II].

22. *E.g.*, *United States v. Guaranty Trust Co.*, 60 F. Supp. 103 (S.D.N.Y. 1945), *modified*, 161 F.2d 571 (2d Cir. 1947) (an attorney's claim for fees for services rendered to the Soviet Union precluded by sovereign immunity). *See generally* RESTATEMENT II § 65.

23. *Loomis v. Rogers*, 254 F.2d 941 (D.C. Cir. 1958) (where the government of the foreign state did not waive its immunity, the court has no jurisdiction to attach funds from a sale which the plaintiff sought as payment for legal services performed for the Italian government).

24. *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir.

In *Hannes v. Kingdom of Roumania Monopolies Institute*,²⁵ the New York Supreme Court, Appellate Division determined that a state-owned corporation was immune only if it was operated for governmental purposes. A distinction was made between acts of a private nature, *jus gestionis*, and acts of a public nature, *jus imperii*.²⁶ This distinction—the first step in the erosion of absolute immunity—led to a change in the American practice relating to jurisdictional immunity, namely executive suggestion of immunity,²⁷ which change, in turn, raised the problem of separation of powers.

The most blatant expression of executive suggestion was and still is interference by the State Department with the judicial branch. *Compania Espanola v. The Navemar* held that if a claim of immunity is “recognized and allowed, . . . it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General”²⁸; but where the Department of State declines to make a suggestion, the courts may determine the question of immunity. *Ex Parte Peru* held that the Supreme Court had jurisdiction to issue a writ of mandamus compelling release of a vessel owned by a foreign state where the State Department had recognized that nation’s claim to immunity.²⁹ But one of the most flagrant executive interferences with the courts was the prevention of the service of process on a Cuban ship by Coast Guardsmen who were acting under orders. Here the court held that valid service of process could not be prevented but a claim of immunity must be granted if recognized by the executive.³⁰ Executive incursion, however, became more pronounced with the increasing limitation of absolute immunity.

Absolute immunity was functional at one time in that it prevented frivolous actions against a state and was helpful in maintaining foreign rela-

1930), *cert. denied*, 282 U.S. 896 (1931) (where a sovereign consented to be sued through a counterclaim and lost the counterclaim, the state was still immune from execution).

25. 260 App. Div. 189, 20 N.Y.S.2d 825, *appeal denied*, 260 App. Div. 1006, 24 N.Y.S.2d 994, *order resettled*, 260 App. Div. 1058, 26 N.Y.S.2d 856 (1940).

26. 260 App. Div. 189, 197, 20 N.Y.S.2d 825, 833.

27. *Ex parte Republic of Peru*, 318 U.S. 578 (1943) (the judicial branch must abide by the executive branch’s suggestion of immunity; a ship owned by Peru was seized for in rem jurisdiction but the State Department recognized a claim of sovereign immunity); *accord*, *Isbrandtsen Tankers v. President of India*, 446 F.2d 1198 (2d Cir. 1971). See *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Compania Espanola de Navegacion Martima, S.A. v. The Navemar*, 303 U.S. 68 (1938). For a recent case reaffirming executive suggestion of immunity, see *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

28. 303 U.S. at 74.

29. 318 U.S. 578 (1943).

30. *Rich v. Naviera Vacuba, S.A. (The M/V Bahia de Nipe)*, 197 F. Supp. 710 (E.D. Va.), *aff’d*, 295 F.2d 24 (4th Cir. 1961).

tions. Few, for example, doubt the need for definitive law concerning diplomatic³¹ or consular³² immunity. But the entrance of foreign governments into commercial and private ventures raised objections as to the legitimacy of immunity in all cases. Questions arose such as whether a foreign state should be immune from suit for breach of contract or what recourse the plaintiff has if the breaching party has absolute immunity. Concern for individual rights and the public welfare as well as the increasingly private acts of governments prodded American courts to restrict or at least to articulate their discontent with claims of absolute immunity.³³ Even where a court recognized a claim of immunity, the court did so grudgingly.³⁴

Legal scholars—and dissenting judges³⁵—were even more outspoken in their opposition to absolute immunity. Oppenheim felt that the “grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection.”³⁶ Lauterpacht not only objected to the principle but felt it was not a principle of international law at all.³⁷ He based that view on the fact that most nations had abandoned the principle and where they had not, immunity depended on reciprocity. Sir Hersch also added, “States do not make the observance of established rules of international law dependent upon reciprocity.”³⁸

Andreas Lowenfeld has written that the application of the doctrine of immunity in the United States is a confusing mass of cases, policies, mis-

31. Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95, U.N. Doc. A/CONF.20/14/add. 1.

32. Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261, U.N. Doc. A/CONF. 25/16/add. 1.

33. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703 (1949); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d at 357; *Republic of Iraq v. First Nat'l City Trust Co.*, 207 F. Supp. 588, 591 (S.D.N.Y. 1962), *appeal dismissed*, 313 F.2d 194 (2d Cir. 1963); *Kingdom of Norway v. Federal Sugar Refining Co.*, 286 F. 188, 194 (S.D.N.Y. 1923).

34. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. at 682, 703. “It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages.” (This case involved the sovereign United States but the criticism is valid whether the sovereign is the United States or another state.) *Id.*

35. *E.g.*, Justice Musmanno's dissent in *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 170, 215 A.2d 864, 881, *cert. denied*, 385 U.S. 822 (1966). *See also* Judge Mack's opinion in *The Pesaro*, 277 F. 473 (S.D.N.Y. 1921).

36. OPPENHEIM at 273.

37. LAUTERPACHT at 221.

38. *Id.* at 228.

understandings and procedural defects.³⁹ Lowenfeld's proposal is similar to the draft legislation presently before Congress⁴⁰ and under consideration here.

The judicial and scholarly dissatisfaction resulted in the concept of restrictive immunity. Where the act was commercial in nature, *jus gestionis*, a foreign state could not claim immunity; but where the act was public or governmental, *jus imperii*, the claim of immunity was allowed.⁴¹ The two types of immunity, absolute and restrictive, created a confusion which, combined with the frequent intrusion of foreign policy questions into the judicial arena, led the State Department, in cooperation with the Justice Department, to attempt clarifying the situation by issuing the "Tate Letter."⁴²

Noting that many countries were abandoning absolute immunity for restrictive sovereign immunity, the "Tate Letter" said that it would be the policy of the State Department "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."⁴³ One of the reasons for the change, apart from the practice of other nations, was that, both in theory and practice, a foreign state could get more favorable treatment in United States courts than could the federal government itself. Though an early court decision had already pointed out the problem,⁴⁴ the "Tate Letter" emphasized the fact that the courts did not always take this "favoritism"

39. Lowenfeld at 901.

The law applied in the United States to claims against foreign states is at present an amalgam of judicial decisions, Executive Branch policies, some uncertain notions of international law and wholly inadequate procedure. As governments increasingly engage in activities that bring them into contact with private parties in the United States and elsewhere, the defects of current United States law and practice concerning claims brought in this country against foreign states become more and more apparent and important.

Id.

40. H.R. 3493. Lowenfeld's proposal does differ in one significant way. Lowenfeld was against strong execution provisions in his proposal unlike H.R. 3493. Lowenfeld at 928, 936-38.

41. *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 App. Div. 189, 196-97, 20 N.Y.S.2d 825 (1940).

42. 26 DEP'T STATE BULL. 984 (1952) (named after the Department's Acting Legal Advisor, Jack B. Tate).

43. *Id.* at 985. "[T]he granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels." *Id.*

44. *The Beaton Park*, 65 F. Supp. 211, 212 (W.D. Wash. 1946).

into account and that, therefore, a justifiable reason existed for restricting absolute immunity.

Nevertheless, the "Tate Letter" still failed to solve two problems. The first was that it did not eliminate the executive department's role in the judicial determination of immunity. Indeed, it seems the purpose of the "Tate Letter" was just the opposite:

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.⁴⁵

Before the "Tate Letter" cases had held that in order for a state's claim to immunity could be recognized, the executive department must advise the courts as to whether or not a claim is valid. Generally such a suggestion of immunity was felt to be binding on the courts.⁴⁶ Since 1952 when the "Tate Letter" was issued, the case law has followed this viewpoint.⁴⁷ When the executive department fails or refuses to suggest immunity, however, authority indicates that the court is free to decide the legitimacy of a claim.⁴⁸

Clearly a significant separation of powers problem exists in the confusion over jurisdictional immunity. Though it is not the purpose of this note to explore that issue, it is relevant to briefly consider the matter. Under "Tate Letter" policy, the practice of the State Department, theoretically, is to suggest or not to suggest immunity to the courts on the basis of *jus imperii* or *jus gestionis*.⁴⁹ State Department suggestion of im-

45. 36 DEP'T STATE BULL. 985 (1952).

46. Cases cited *supra* note 27.

47. National City Bank v. Republic of China, 348 U.S. 356, 360 (1955); Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974); Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619, 623 (4th Cir. 1964); United States v. Anchor Line, Ltd., 232 F. Supp. 379, 385 (S.D.N.Y. 1964); Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 725 (E.D. Va. 1961); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 143, 215 A.2d 864, 868, *cert. denied*, 385 U.S. 822 (1966).

48. Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938); Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619, 623 (4th Cir. 1964); Gonzalez v. Industrial Bank (of Cuba), 33 Misc. 2d 283, 284, 227 N.Y.S.2d 456, 458 (Special Term N.Y. County 1961) (where the court said that the State Department's "failure or refusal to suggest immunity is accorded significant weight"). See National City Bank v. Republic of China, 348 U.S. 356 (1955).

49. 26 DEP'T STATE BULL. 984 (1952).

munity amounts to an executive interference which also takes on other forms.⁵⁰ H.R. 3493 would confront this problem by transferring any question of a foreign state's immunity to the courts.⁵¹ Freeing the courts from executive incursion would make them more effective instruments of international law since concern over foreign policy questions and political motives, characteristic of the executive branch, is not normally of interest to the courts.⁵²

The proposed legislation would also free the State Department from being suspected of political motives for not suggesting immunity. As the

50. Prevention of the service of process is an example.

51. Parenthetically, the same problem of executive suggestion exists with the act of state doctrine. In *Underhill v. Hernandez*, 168 U.S. 250 (1897), Justice Fuller gave his classic definition of the doctrine at 252: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done in its own territory."

Initially, the doctrine was clear if not absolute. However, the so-called "Bernstein Exception" was the first major qualification. *Bernstein v. New York Nederlandse-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). The court in *Bernstein* held that the act of state doctrine need not be applied where the executive department determined that the government would not be harmed by not applying the doctrine.

In 1964, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, through Justice Harlan, clarified the doctrine without specifically ruling on the "Bernstein Exception." It seemed that the courts, when applying the act of state doctrine, would be free of executive interference. That belief was shortlived because in 1972, Justice Rehnquist, writing for the Court in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), apparently adopted the "Bernstein Exception." He concluded "that where the Executive Branch expressly represents to the Court that the application of the doctrine would not advance the interests of American Foreign policy; [sic] that doctrine should not be applied by the Courts." *Id.*

See generally Falk, *The Sabbatino Controversy*, THE AFTERMATH OF SABBATINO (L. Tondel ed. 1965); R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964); Palmer, *First National City Bank v. Banco Nacional de Cuba*, 10 GLOBE No. 1 (Ill. Bar Ass'n 1972). See also note 4 *supra* for schematic diagram of relationships among various immunities and act of state doctrine.

52. R. FALK, *supra* note 51. It is true that courts have frequently considered international law outside their purview. See Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 VAND. J. TRANSNAT'L L. 25, 51 (1973):

[I]t is relatively simple for municipal courts considering [an] . . . issue to deem themselves jurisdictionally unimpaired by violations of international law and to proceed with the case as if the violation of international law did not exist.

The rationale sustaining this dichotomy between violations of internal law and violations of international law is predicated on one interpretative approach to the doctrine of separation of powers in municipal law. Under this approach violations of international law are deemed within the prerogatives of the executive, not the judiciary, and, furthermore, municipal courts assert that they have no enforceable sanctioning powers over such violations; only the executive can deal with such questions.

Acting Legal Advisor of the State Department put it, "foreign states are sometimes inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision."⁵³

The second problem which the "Tate Letter" failed to resolve was that of determining which acts were public or private, governmental or commercial, *jus imperii* or *jus gestionis*. The courts have not exhibited consistency. While a foreign state's effort to equip an army through contractual purchases in the United States was held to be a public act,⁵⁴ another state's doing business through a corporation has been held to be private.⁵⁵ Likewise, the operation of a railroad by a foreign state was held to be a public function,⁵⁶ but the hiring of an advertising agency to promote tourism in another country was said to be private.⁵⁷

A final problem which new legislation must resolve is that of an improved method of obtaining jurisdiction over a sovereign. Presently, jurisdiction is exercised by attachment of property (in rem) or assets (quasi in rem). Both cause no small amount of trouble and are not always possible; and neither is feasible in many cases, since execution is seldom permitted. In personam jurisdiction is virtually unheard of in jurisdictional immunity cases. In the following analysis of H.R. 3493, jurisdiction is more specifically examined as are the methods for the service of process.

II. THE PROPOSED LEGISLATION H.R. 3493

The Bill's fundamental purpose is to define those circumstances in which a foreign state is immune from jurisdiction and free from execution. Essentially the measure is the "Tate Letter" in statutory form⁵⁸ but there are significant and encouraging differences. Unlike the "Tate Letter" the Bill would make the "question of a foreign state's entitlement to immunity

53. *Hearings on H.R. 3493 before the Subcommittee (II) on Claims and Governmental Relations of the House Committee on the Judiciary*, 93d Cong., 1st Sess. 14 (1973) [hereinafter cited as *Hearings*].

54. *Kingdom of Roumania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir.), *cert. denied*, 246 U.S. 663 (1918).

55. *Coale v. Societe Co-operative Suisse des Charbons*, 21 F.2d 180 (S.D.N.Y. 1921).

56. *Oliver American Trading Co. v. Government of the United States of Mexico*, 5 F.2d 659 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925).

57. *Harris & Co. Adv., Inc. v. Republic of Cuba*, 127 So. 2d 687 (Fla. App. 1961).

58. Letter from William P. Rogers and Richard Kleindienst to the Speaker of the House, January 31, 1973, *Hearings* at 33-35. The effect of the Bill, in other words, is to codify the distinction between *jus imperii* and *jus gestionis*.

an issue justiciable by the courts, without participation by the Department of State,"⁵⁹ and would also introduce enforcement provisions for the execution of a judgment.⁶⁰

A. Section One of H.R. 3493

Section One of H.R. 3493 would insert a new chapter, chapter 97, into Title 28 of the United States Code.⁶¹ This section, comprised of §§ 1602-1611, would set forth definitions, circumstances of and the exceptions to immunity from jurisdiction and execution as well as provisions for service of process.

Section 1602 declares the purpose of the Congress in passing the Bill and states that all claims of immunity would be decided by the courts in conformity with "this chapter and other principles of international law."⁶² The section quite definitely declares that under international law, states are not immune for acts arising out of commercial undertakings. The United Nations Secretary-General, in his "Survey of International Law," was not as certain of this assumption though he did note that many nations adhere to the practice of restrictive immunity.⁶³

The other significant aspect of the measure is contained in the last sentence of § 1602. The drafters' intent in doing away with executive interference and avoiding acts as had occurred in *Rich v. Naviera Vacuba, S.A.*,⁶⁴ is clear.⁶⁵

Commercial activity is defined as "a regular course of commercial conduct or a particular commercial transaction or act."⁶⁶ However, in § 1603(b), the drafters add that the "commercial character of an activity"

59. *Id.*

60. As noted in the bill itself, the proposed legislation, if passed, would be subject to existing and future international agreements and treaties.

61. H.R. 3493, Section One. The title of the new chapter would be "Jurisdictional Immunities of Foreign States."

62. *Id.* at Section One, § 1602 [hereinafter the various sections of H.R. 3493's chapter 97 will be cited as given in the bill].

63. U.N. Doc. A/CN.4/245 at 38. Lauterpacht and Oppenheim are not hesitant, however, in writing that the theory of restrictive immunity is a part of international practice. Lauterpacht, *supra* note 1 and OPPENHEIM, *supra* note 14. The Council of Europe's recent convention on jurisdictional immunity, the European Convention on State Immunity, indicates that the principle of restrictive immunity is part of customary international law, 11 INT'L LEGAL MATERIALS 470 (1972). See also the Asian-African Legal Consultative Committee, 3d Sess. (Colombo 1960).

64. 197 F. Supp. 710 (E.D. Va. 1961) (prevention of the service of process under State Department orders).

65. § 1602.

66. § 1603(b).

will be determined by the "nature of the course of conduct" rather than by the purpose of the transaction. For example, a government contract to purchase army boots would be considered commercial.⁶⁷ Under the proposed legislation, the court would have latitude in defining commercial activity and would be able to decide questions of both law and fact regarding a claim of immunity. The important point here is that even if difficulty remains in the definition of public and private acts, it will be the court and not the executive who will decide.⁶⁸

Section 1603(a) defines foreign state to include political subdivisions of foreign nations (such as state or provincial,⁶⁹ county or city governments) as well as agencies or instrumentalities⁷⁰ of the foreign state or its subdivisions. This is noteworthy because a political unit of a state generally has not been given immunity.⁷¹

The proposed legislation starts with the premise that a foreign state is immune from jurisdiction in federal and state courts.⁷² Section 1605 then enumerates when and where immunity from jurisdiction will not be recognized.

Once a state has waived immunity "explicitly or by implication," there can be no withdrawal of the waiver.⁷³ For example, if a state has made a general appearance to contest litigation, the state has impliedly waived immunity.⁷⁴ There are other important illustrations of implied waiver of

67. *Hearings* at 40. Whether the foreign government carries or regular commercial activity or undertakes the obligations of a single contract makes no difference. If the activity is commercial in nature, immunity could not be claimed, no matter the purpose of the activity.

68. "The central principle of the draft bill is to make the question of a foreign state's settlement to immunity an issue justiciable by the courts, without participation by the Department of State. As the situation now stands, the courts normally defer to the views of the Department of State, which puts the Department in the difficult position of effectively determining whether the plaintiff will have his day in court." Letter from Rogers and Kleindienst to the Speaker of the House, *Hearings* at 34.

69. *See Sullivan v. State of Sao Paulo*, 122 F.2d 355 (2d Cir. 1941) (a state or province is also immune from suit on general international legal principles).

70. For purposes of serving process and execution on assets, a qualification is attached to defining foreign state as including agency or instrumentality. §§ 1608 and 1610. *See* discussion in text at notes 88-107 *infra*. For an example of the British approach, *see Krajina v. The Tass Agency*, [1949] 2 All E.R. 274 (Ct. App.).

71. RESTATEMENT II § 67. "It is believed, notwithstanding this ruling [*Sullivan v. State of Sao Paulo*, 122 F.2d 355 (2d Cir. 1941)], that reason supports the rule stated in this Section [§ 67]." RESTATEMENT II at 205. The European Convention on State Immunity, 11 INT'L LEGAL MATERIALS 470 (1972), does not recognize immunity for political subdivisions.

72. § 1604.

73. § 1605(1). This is unchanged from RESTATEMENT II § 70(1).

74. *See, e.g., Flota Maritima Browning de Cuba v. Motor Vessel Ciudad*, 335 F.2d 619 (4th Cir. 1964).

immunity. A state has waived immunity where it has invoked the aid of the courts but then claims immunity from a counterclaim.⁷⁵ Where a provision for arbitration is contained in a contract between a state and the injured party but the state refuses to arbitrate, § 1605(1) precludes a claim of immunity.⁷⁶ Explicit waiver of immunity would include waiver of immunity by treaty or contract. This provision makes sense especially where a contracting party relied on this contractual provision.⁷⁷

The second exception to a claim of immunity by a state is for "a commercial activity carried on in the United States."⁷⁸ Section 1605(2) specifies those commercial activities that are not immune from jurisdiction. An act "performed in the United States in connection with a commercial activity . . . elsewhere" and acts which are performed outside the United States but have "a direct effect" within the United States are not immune.⁷⁹ According to the State Department's legal advisor, the "jurisdictional standard" would be the same for a foreign state's activities as for the activities of foreign private enterprise.⁸⁰

Under the terms of § 1605(3), a foreign state would be unable to claim immunity from jurisdiction in litigation in which

rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state

This section would, of course, also apply to property owned or operated by an agency, instrumentality or political subdivision of the foreign state.⁸¹ A claim of immunity will not be allowed where the issue is over

75. See discussion in text at note 88 *infra*. See also § 1607. Cf. RESTATEMENT II § 70(2).

76. Note, *The Immunity of Foreign Sovereigns in U.S. Courts—Proposed Legislation*, 6 N.Y.U.J. INT'L L. & POLITICS 473, 476 (1973); accord, *Pan American Tankers Corp. v. Republic of Vietnam*, 296 F. Supp. 361 (S.D.N.Y. 1969).

77. Note, 6 N.Y.U.J. INT'L L. & POLITICS at 476-77, *supra* note 76. "It is grossly unfair to deny a private party his day in court when the private party, in entering into the contract with the foreign state, relied specifically on a provision waiving sovereign immunity." *Id.*

78. § 1605(2). This is unchanged from RESTATEMENT II § 17.

79. This remains the same as RESTATEMENT II § 18. Cf. RESTATEMENT II § 69.

80. *Hearings* at 41.

81. A crucial question related to the rights in property issue is the effect of the act of state doctrine. See note 51 *supra*. As stated above, the act of state doctrine presents United States courts from exercising jurisdiction over cases resulting from another state's acts on its own soil such as the expropriation of property. Thus,

rights in immovable property located in the United States and over property rights "acquired by succession or gift."⁸²

Tortious conduct by the foreign state or its representatives is the focus of § 1605(5). The "Section-by-Section Analysis," submitted to the Congress by the State Department's legal advisor and contained in the *Hearings* on H.R. 3493, states that § 1605(5) is directed at traffic accidents primarily but is also applied to other acts unrelated to commercial activities.⁸³ According to international law, there is no consular immunity for traffic accidents, for example, while there is diplomatic immunity for these mishaps.⁸⁴ Nothing in § 1605(5) is contrary to international law.

In order to maintain the United States' "role as one of the principal capital markets of the world,"⁸⁵ H.R. 3493 allows a foreign state immunity from jurisdiction of the courts in any case relating to the foreign state's public debt.⁸⁶ This immunity does not exist, however, if either the sovereign state waives immunity or the public debt is that of a political subdivision or agency or instrumentality.⁸⁷

In *National City Bank v. Republic of China*, the sovereign wanted "our law" to apply but "free from the claims of justice,"⁸⁸ that is, it brought an action in the federal courts but invoked sovereign immunity when a counterclaim was brought against it. Under § 1607, bringing an action amounts to a waiver of immunity and that waiver stands if a counterclaim is brought against the foreign state even though the counterclaim, if brought first as an original action against the sovereign, would be barred

if there is property or assets of the expropriating state in the United States, the act of state doctrine would preclude any action against that property or those assets. Testimony of the State Department's legal advisor indicates that the act of state doctrine remains unaffected by the bill. "Since this draft deals solely with issues of immunity, it in no way affects existing law concerning the extent to which the 'act of state' doctrine may be applicable in similar circumstances." *Hearings* at 20. This conclusion seems highly questionable. Judicial testing seems likely.

82. § 1605(4).

83. *Hearings* at 42. Where a remedy is already available for tortious acts under the NATO Agreement, Article VIII, the foreign state's representative will be immune. § 1605(5).

84. Vienna Convention on Diplomatic Relations, April 18, 1961, 500 U.N.T.S. 95, 110; Vienna Convention on Consular Relations, April 24, 1963, 596 U.N.T.S. 261, 298.

85. *Hearings* at 42.

86. § 1606(a). This public debt seems to include "not only direct bank loans but also governmental bonds and securities. . . ." *Hearings* at 42.

87. § 1606(a)(1) and (2). Remedies existing under federal securities laws will be preserved. § 1606(b).

88. 348 U.S. at 361-62.

by immunity.⁸⁹ Also, in the case of counterclaims which do not arise from the same subject-matter, § 1607(2) does not allow immunity so long as the relief sought is not different from the relief the foreign state is asking for. In this regard, the proposed legislation is consistent with the *Restatement*.⁹⁰

Presently, the manner of serving process on a foreign state is unclear because both executive and judicial policy have failed to establish the specific means by which such service could be adequately made. Part of the problem is attributable to the fact that in *rem* jurisdiction—for example, attaching a contested ship of a foreign state—or quasi in *rem* jurisdiction—attaching the assets of a foreign state—are the only forms of jurisdiction which have been sought. Under either of these forms, however, although the attachment may be effective for getting jurisdiction, that attachment could not be made for purposes of execution.⁹¹

H.R. 3493 radically departs from contemporary practice regarding service of process on and jurisdiction over a state in that it sets up a clear, mandatory method of service,⁹² establishes in personam jurisdiction,⁹³ and allows for execution on a judgment.⁹⁴ Under H.R. 3493, service in district court *shall* be made upon a foreign or political subdivision and *may* be made on a foreign state's agency or instrumentality "which is not a citizen of the United States"⁹⁵ by sending a copy of the summons and complaint by registered or certified mail to the ambassador or chief of the mission of a foreign state. If the United States has no diplomatic relations with a state, then the summons and complaint can be sent in the same way to the chief of mission of another state acting on behalf of that foreign state. For service on an agency or instrumentality, the

89. § 1607(1). The section deals with counterclaims as defined by the Federal Rules of Civil Procedure, Rule 13 (a and b), 28 U.S.C. [hereinafter cited as *FED. R. Crv. P.*]

90. *RESTATEMENT II* § 70.

91. The Department of State presented this view to the New York courts in 1961. *Stephen v. Zivnostenska Banka*, 15 App. Div. 2d 111, 116, 222 N.Y.S.2d 128 (1961). "The Department of State is of the further view that, where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited. . . . But property so attached to obtain jurisdiction over the defendant government cannot be retained to satisfy a judgment ensuing from the suit." *Id.*

92. § 1608.

93. *Hearings* at 15. The proposed bill's basis of jurisdiction is faithful to *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

94. § 1610.

95. See p. 1240 for discussion of alternative means of service on agencies or instrumentalities of foreign states *infra*.

summons and complaint may be sent to the agent who is authorized to receive service under the law of the foreign state or of the United States. In addition, two copies of the summons and of the complaint must be sent by registered or certified mail to the Secretary of State who will transmit one of these copies to the office charged with the conduct of foreign affairs for the foreign state.⁹⁶

Questions as to whether diplomatic immunity is violated by this method of serving process are resolved by the fact that diplomatic immunity refers to the "person of the foreign official" and not to the foreign state.⁹⁷ So long as the personnel and the premises of the diplomatic mission remain inviolate as required by the Vienna Convention on Diplomatic Relations,⁹⁸ service may take place through the mail system. Nothing in the Convention forbids service of process by mail. In fact, the International Law Commission in its *Report of the Tenth Session*, reported "there is nothing to prevent service through the post if it can be effected in that way."⁹⁹

Section 1608 creates an alternative means of service on agencies or instrumentalities of foreign states¹⁰⁰ because they can already be served under Rule 4(d)(3) of the *Federal Rules of Civil Procedure* even if they do carry on transactions for the sovereign state. The Federal Rules have no definitive method or provision, however, for service on the foreign state or its political subdivisions or its diplomatic and consular representatives. The *Rules* only provide for service on "domestic or foreign corporation[s]."¹⁰¹ Under H.R. 3493, then, service on the foreign state or its political subdivision is mandatory while service on the agency or instrumentality of the foreign state is permissible.

Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen held that the assets of a foreign state are immune from execution¹⁰² and § 1609 reiterates that rule except as specified in § 1610. The assets of a foreign state will not be immune from execution "to the extent that they are used for a particular commercial activity in the United States"¹⁰³ if the execution

96. § 1608.

97. Lowenfeld at 934.

98. 500 U.N.T.S. 95, 106, 112 (Articles 22 and 31).

99. U.N. Doc. 13 GAOR Supp. 9, 17, U.N. Doc. A/3859 (1958).

100. *Hearings* at 44. This is what § 1603(a) was referring to in excepting § 1608 from defining agency or instrumentality as a foreign state. See discussion in text at notes 69-71 *supra*.

101. FED. R. CIV. P. 4(d)(3).

102. 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931).

103. § 1610(a).

relates to a claim "based on that commercial activity or on rights in property taken in violation of international law . . ." ¹⁰⁴ If the state has waived its immunity from attachment or execution then the assets can be used for a judgment. ¹⁰⁵ Otherwise, only those assets of the foreign state relating to the commercial activity are subject to execution.

In contradistinction to that framework stands § 1610(b). If any agency or instrumentality of a state engages in a commercial activity in the United States or does an act inside or outside the United States but that act is related to a commercial activity elsewhere and has a direct effect within the United States, then any or all of the assets of the agency or instrumentality are subject to an execution. However, the execution must relate to a claim based on a commercial activity in the United States or to rights in property taken in violation of international law. ¹⁰⁶ If the agency or instrumentality waives immunity, attachment for execution purposes is permitted. ¹⁰⁷ Even though the assets of the agency or instrumentality of a foreign state do not arise out of the particular commercial activity which gives rise to the suit, those assets are not immune from execution.

The final part of section one of H.R. 3493, § 1611, is an attempt to prevent adversity in the balance of payments by retaining immunity for certain assets, despite § 1610. The assets of a "foreign central bank" ¹⁰⁸ would be immune as would assets held in the United States in connection with a military activity or assets which are of a military character or which are under military control. ¹⁰⁹

The impact of §§ 1609 and 1610 would be to give greater effect to the application of international law as applied in domestic courts, providing a remedy for parties who have heretofore suffered without any recourse. By comparison, the European Convention on State Immunity ¹¹⁰ is weak in its enforcement application and it has been criticized for that reason. ¹¹¹ There are those who feel any form of enforcement or execution provisions would be detrimental because it might encourage the

104. § 1610(a)(1).

105. § 1610(a)(2).

106. § 1610(b)(1).

107. § 1610(b)(2).

108. § 1611(1).

109. § 1611(2).

110. 11 INT'L LEGAL MATERIALS 470 (1972).

111. Comment, *Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity*, 12 COLUM. J. TRANSNAT'L L. 130 (1973).

executive department to intervene on behalf of a foreign state¹¹² or a foreign state might be discouraged from investing in the United States.

The execution provisions of H.R. 3493, however, are clearly limited to commercial activities. The importance of providing for a remedy at law where one does not exist is of more serious concern than unproved investment fears.

International law has not always effectively dealt with enforcement of judgments against a foreign state to the extent that is warranted. The proposed legislation is treading new ground by allowing for enforcement but it is not departing from the thrust of restrictive immunity in any way. Eventually the concept of restrictive immunity must come to mean, as H.R. 3493 would mean, not only restricted jurisdictional immunity under international law but also restricted enforcement immunity.

B. *Sections Two through Five of H.R. 3493*

Sections two through five of H.R. 3493 would add one new section, "§ 1330, Actions against foreign states," to Title 28 and amend three other sections.

Section 1330 would give the federal district courts original jurisdiction over actions against foreign states or their political subdivisions or against the agencies or instrumentalities of either (except those agencies or instrumentalities which are United States citizens). The amount in controversy would be of no requisite concern.¹¹³ The section would permit state courts to preside over a suit involving a foreign state, but either party could remove the suit to federal court. Original jurisdiction would be given to the federal courts because they are more likely to have knowledge of international legal principles and would apply them uniformly.¹¹⁴ Section 1330(b) is simply an assurance that jurisdiction over agencies or instrumentalities of foreign states which are citizens of the United States, as defined by statute,¹¹⁵ would not be affected by § 1330.

In order to facilitate venue, the Rodino Bill would amend § 1391 of Title 28 by adding a subsection (f).¹¹⁶ An action against a foreign state,

112. Lowenfeld at 930.

113. H.R. 3493, Section Two.

114. "The duty to apply it [international law] is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law." Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

115. 28 U.S.C. § 1332(c) and (d) (1970).

116. H.R. 3493, Section Three.

political subdivision or agency or instrumentality not an American citizen could be brought in a judicial district (1) where the act or substantial portion of the events giving rise to the claim occurred, (2) where the property which is the subject of the suit is located, (3) where the agency or instrumentality is licensed to do business, or (4) in the District of Columbia where it would be easiest to defend if the action is against a foreign state or political subdivision. Again, agencies or instrumentalities which are citizens of the United States will not be affected in terms of venue. There is nothing in the provision to prevent the doctrine of *forum non conveniens* from operating whether the defendant is invoking the doctrine to move the suit to another district or to dismiss "the action subject to a court in a foreign State taking jurisdiction" ¹¹⁷ The fourth section of the bill would amend § 1441 of Title 28 by adding a new subsection (d) which provides for removal to federal courts from state courts.

The final section of the proposed legislation would amend § 1332(a) by striking (2) and (3) and substituting "(2) citizens of a State and citizens or subjects of a foreign state; and (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties." ¹¹⁸ The effect would be the removal of "foreign states" as parties from § 1332 which grants original jurisdiction to federal courts on the basis of diversity of citizenship and where the amount in controversy exceeds \$10,000. This would be done because the new § 1330 would give original jurisdiction to federal district courts where a foreign state is a party to a suit without a required \$10,000 being in controversy. ¹¹⁹

III. CONCLUSION: COMPARISON AND CONTRIBUTION

The unique qualities of H.R. 3493 might be more easily recognized by comparing the Bill to other nations' practice of granting immunity. Although the European Convention on State Immunity ¹²⁰ is a source of international law, ¹²¹ it is nevertheless a regional convention and is more realistically compared with H.R. 3493 as an example of foreign law. ¹²² The Convention is clearer than the Rodino Bill in its specification of

117. *Hearings* at 48.

118. Compare with 28 U.S.C. §§ 1332(a)(2) and (3) (1970).

119. H.R. 3493, Section Five.

120. 11 INT'L LEGAL MATERIALS 470 (1972).

121. Mann, *New Developments in the Law of Sovereign Immunity*, 36 MOD. L. REV. 18, 24 (1973).

122. Restrictive immunity is not universally accepted as international law although it does seem to be accepted by most nations.

what acts are not to be accorded immunity¹²³ but the Convention's various articles qualify the restrictive immunity and allow numerous exceptions.

A notable difference between the proposed bill and the Convention is the Convention's lack of provisions for execution. The presence of execution provisions in H.R. 3493¹²⁴ will, no doubt, cause interesting and stimulating—if not startling—debate in the event of an international convention on state immunity. Another significant difference is the fact that in the European Convention, political subdivisions of a foreign state are not accorded any immunity¹²⁵ unlike H.R. 3493 where a political subdivision would be defined as a "foreign state."¹²⁶

Yet there are, apparently, two essential similarities. Both leave it to the courts to decide a question of immunity; and both attempt to curtail a foreign state's jurisdictional immunity.

The only other regional consideration given to restrictive immunity was by the Asian-African Legal Consultative Committee at its Third Session in Colombo, Sri Lanka in 1960. The Committee issued a report of its findings which were not binding except as the report may express a customary international legal obligation. The participants did acknowledge their acceptance of restrictive immunity, however, and, for this reason, it is of comparative interest.¹²⁷

The final report of the Committee expressed views similar to H.R. 3493 on the refusal to grant immunity to states for activities of a private or commercial nature and to trading organizations which are a part of or are related to a foreign state.¹²⁸ However, the Final Report of the Session stated that the "certification" of immunity by the foreign office should be binding on the courts¹²⁹ and this is where it differs from both the European Convention and the Rodino Bill. Finally, immunity from execution on a judgment is to be accorded a foreign state and in this the Asian-African Report is like the European Convention and unlike the House Bill on jurisdictional immunity.¹³⁰

123. Council of Europe: European Convention on State Immunity, Articles 1-15, 11 INT'L LEGAL MATERIALS 470 (1972).

124. § 1610.

125. European Convention, Article 28.

126. H.R. 3493, § 1603.

127. General acknowledgment of a principle of international law can be taken as a customary principle.

128. Asian-African Legal Consultative Committee, 3d Sess. (Colombo 1960) 67.

129. *Id.*

130. *Id.* at 68.

H.R. 3493 is of importance to the international legal community because it would clarify the approach of the United States to the question of immunity. Not only would it contribute to international law by expressly adopting what many other nations have recognized and accepted either as customary practice or as binding conventional law—that is, restricted jurisdictional immunity—but the Bill would break new ground by providing for restricted enforcement immunity. The provisions for execution would give meaning to the entire question of jurisdictional immunity. The execution provisions of H.R. 3493 closely follow and parallel the jurisdictional provisions. The Bill offers a viable, workable solution in an area of law noted for its lack of enforcement capability.

Another significant contribution, one which others have advocated,¹³¹ would be to enlist the courts, noted for their independence, as domestic instruments of international law.¹³² No nation will rely on another nation's application of international law so long as the judicial branch defers to the executive branch which is, in turn, responsible for the conduct of foreign affairs and whose judgments are likely to be influenced by political considerations. Once the courts are effectively free of the executive department, domestic courts could be trusted to apply international law justly. This in itself would be a significant contribution to the development of the international legal order which has, over the years, been seen as a necessity in the American tradition. Thomas Jefferson wrote, "[t]he law of nations makes an integral part . . . of the laws of the land."¹³³ The Bill is in furtherance of this tradition.

Although the Rodino Bill may be "looked upon as an arrangement to be applied until such time as a satisfactory convention is drawn up and the United States becomes a party to it,"¹³⁴ H.R. 3493 would help clear the way for such an international convention. The Secretary of State and the Attorney General, in the letter to the Speaker of the House which accompanied the draft bill (H.R. 3493), went on to say that should the Bill be accepted, the Department of State would propose that the United States declare its acceptance of "the compulsory jurisdiction of the Inter-

131. See, e.g., R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964).

132. "The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, without participation by the Department of State. As the situation now stands, the courts normally defer to the views of the Department of State. . . ." Letter from Rogers and Kleindienst, *Hearings* at 34.

133. J. MOORE, *1 INTERNATIONAL LAW DIGEST* 10 (1906).

134. Letter from Rogers and Kleindienst, *Hearings* at 35.

national Court of Justice, on condition of reciprocity, with respect to disputes [over] immunity"¹³⁵

The positive and essential effect that H.R. 3493 would have on domestic law would be a clarification of the question of separation of powers. The proposed bill would also facilitate foreign relations by freeing the Department of State

from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.¹³⁶

Ferdinand Mesch

135. *Id.*

136. *Id.* at 34.