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## Foreign Sovereign Immunity in the United States Courts 1976-1986

Mark B. Feldman

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# FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES COURTS 1976-1986

Mark B. Feldman\*

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### I. CODIFICATION

When Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>1</sup> the United States became the first sovereign state to codify the law of foreign sovereign immunity in a statute. The broad purposes of the legislation were to transfer responsibil-

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\* A.B. Wesleyan University, 1957; LL.B. Harvard University, 1960. Mr. Feldman is a partner in the law firm of Donovan Leisure Newton & Irvine resident at Washington, D.C. As Deputy Legal Adviser of the United States Department of State, 1974-1981, he helped coordinate enactment of the Foreign Sovereign Immunities Act. He is now Chairman of the Ad Hoc Committee on Revision of the F.S.I.A. of the ABA Section of International Law and Practice.

1. 28 U.S.C. §§ 1330, 1391(f), 1441(d) and 1602-1611 (1982).

ity for the determination of sovereign immunity from the executive to the judicial branch and to codify the restrictive theory of immunity.

The FSIA, however, accomplishes much more. It establishes a comprehensive and exclusive legal regime for the administration of civil actions brought in United States courts against foreign states and their political subdivisions, agencies and instrumentalities.<sup>2</sup> That regime defines the basis for the exercise of subject matter and personal jurisdiction over foreign sovereign parties, specifies the procedure that may be used to serve notice on such parties, and provides for venue in the district courts and the right of removal from state to federal court. It also prescribes the circumstances in which parties may execute judgment against the assets of foreign states or obtain prejudgment attachment of such assets to secure ultimate execution of a judgment. Parties, however, may not obtain prejudgment attachments for purposes of obtaining jurisdiction over foreign sovereigns.

The FSIA broke new ground in several respects. Prior to its enactment, a foreign government sued in the United States would apply to the State Department for recognition of its immunity. If the State Department recognized and allowed that immunity, a "suggestion of immunity" would be presented to the court by the Justice Department. The court would accept that suggestion in deference to the President's constitutional responsibilities for the foreign relations of the United States.<sup>3</sup> In principle, the State Department based its determinations on the distinction, as applied by sovereigns that follow the "restrictive" theory of immunity, between acts *jure imperii* that are immune, and acts *jure gestionis* that are not.<sup>4</sup> In fact, these determinations were sometimes influenced, directly or indirectly, by diplomatic considerations.<sup>5</sup>

Prior to the Act, the United States had not adopted orderly procedures for service of process on foreign states. Jurisdiction

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2. *E.g.*, *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 2656, 86 L. Ed. 2d 273 (1985); *but see Wallenberg v. U.S.S.R.*, 623 F. Supp. 246 (D.D.C. 1985).

3. *See, e.g.*, *Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943); *Spacil v. Crowe*, 489 F.2d 614 (5th Cir. 1974).

4. The State Department announced the adoption of the "restrictive" theory in the Letter from Acting Legal Adviser Jack Tate to Acting Attorney General Philip B. Perlman, May 19, 1952, 26 DEP'T ST. BULL. 984.

5. Leigh, *Sovereign Immunity—The Case of the "Imias"*, 68 AM. J. INT'L L. 280 (1974).

often was established *quasi in rem* by the seizure of assets, particularly vessels and bank accounts, but the United States would not subsequently allow execution of judgment. The FSIA reversed this situation in order to minimize the foreign policy problems that were caused by prejudgment attachments and to improve the remedies available to successful litigants. The FSIA also provided that foreign states were not subject to trial by jury.<sup>6</sup> No punitive damages were allowed,<sup>7</sup> and a default judgment could not be entered against a foreign state “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”<sup>8</sup>

The legislation also contributes to the development of the substantive law of sovereign immunity. Although the courts are not asked to apply principles of international law in deciding issues of immunity, the draftsmen followed the United States perceptions of international law in defining the scope of immunity.<sup>9</sup> For instance, the Act clarifies that the “commercial” character of a governmental activity is to be determined by the nature of that activity, not by its governmental purpose.<sup>10</sup> Thus, a foreign government is not immune from the jurisdiction of a United States court in an action for breach of a contract for the purchase of boots for that government’s army. Likewise, a foreign state may be sued for the recovery of repair costs of its embassy building.<sup>11</sup>

One innovation made by the 1976 Act was the direct link established by the statute between the issue of immunity and the contacts that connect the dispute with the United States. Although this direct link was a departure from past practice, experience had convinced the draftsmen that the contacts with the jurisdiction often were the most important test of whether a United States court should exercise jurisdiction over an action brought against a foreign sovereign. In principle, a government generally should be accountable in the courts for its actions, but it does not follow that a government should be accountable in a foreign court for a particular action. That determination depends on the bal-

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6. 28 U.S.C. § 1330 (1982).

7. *Id.*, § 1606.

8. *Id.*, § 1608(e).

9. *Id.*, § 1602.

10. *Id.*, § 1603(d).

11. See H.R. REP. NO. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. CODE CONG. ADMIN. NEWS 6604, 6615.

ance to be struck between the interest of the forum state in the particular transaction and considerations of comity that might make it inappropriate for a foreign court to review the acts of a coequal sovereign.<sup>12</sup> Both the character of the act at issue and the contacts with the forum are relevant to this determination.

The draftsmen also considered that the adjudication of disputes between private parties and foreign sovereigns presents different questions of international order than the exercise of jurisdiction over private foreign parties. Therefore, the FSIA does not base *in personam* jurisdiction on either transitory presence in the jurisdiction or on a "doing business" test. Rather, the Act requires that jurisdiction is based on a nexus between the particular cause of action and the territorial jurisdiction of the United States.<sup>13</sup>

The novel structure of the FSIA is based on this nexus philosophy. In effect, the Act functions as a long-arm statute.<sup>14</sup> Jurisdiction *in personam* is established over the defendant foreign state if subject matter jurisdiction exists under section 1330<sup>15</sup> and if notice is given in accordance with the procedures prescribed in section 1608.<sup>16</sup> Subject matter jurisdiction exists if sovereign immunity does not apply under the criteria established in section 1605 of the Act. Those criteria include specific links with the United States which vary according to the particular cause of action.<sup>17</sup>

The draftsmen did not attempt to provide the courts with detailed guidance for the determination of questions of immunity. The Act includes general definitions of key concepts, such as "for-

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12. Such considerations of comity once underlay both sovereign immunity and the act of state doctrine. See *Underhill v. Hernandez*, 168 U.S. 250 (1897). The Supreme Court has reformulated the act of state doctrine to focus on considerations of separation of powers, see *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); but comity considerations are reflected in the FSIA.

13. See, e.g., *Vencedora Oceanica Navigacion v. Compagnie Nationale Algérienne de Navigation*, 730 F.2d 195 (5th Cir. 1984).

14. See H.R. REP. NO. 1487, *supra* note 11, at 13, *reprinted at* 6612.

15. 28 U.S.C. § 1330.

16. *Id.*, § 1608.

17. *Id.*, § 1605. The draftsmen were mindful of the need to meet constitutional minimum standards for the exercise of personal jurisdiction over foreign states, see *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), but considered that the contacts required by section 1605 generally were more stringent than those required by the Fifth Amendment of the Constitution.

eign state” and “commercial activity,”<sup>18</sup> but the draftsmen made a deliberate decision to allow the courts to develop the law of immunity on a case-by-case basis.<sup>19</sup> The draftsmen knew from experience that the fact patterns of international intercourse are so varied, and the norms so fluid, that it would be imprudent to attempt any detailed predetermination of the development of the law of immunity in legislation that is extremely difficult to amend. In this respect, the FSIA is more like a constitution to be expounded than a tax code to be applied strictly.

## II. ASSESSMENT

The structure of the Act itself and the difficulty of many of the questions arising under it have engendered wry commentary. In a frequently quoted opinion, Judge Ward observed in 1983:

The Foreign Sovereign Immunities Act of 1976 . . . [is 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 of the federal judiciary.<sup>20</sup>

Others have considered that “the statute has been largely successful in affording private parties the opportunity to have claims arising out of the commercial activities of foreign states adjudicated in federal courts, without engendering serious diplomatic repercussions.”<sup>21</sup>

In fact, the FSIA has had a significant impact on international practice. The United Kingdom,<sup>22</sup> Canada<sup>23</sup> and several other countries<sup>24</sup> have enacted statutes which apply the same basic principles as the FSIA. While a number of developing countries

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18. 28 U.S.C. § 1603.

19. *Hearings on H.R. 11315, Subcomm. on Administrative Law and Governmental Relations, House Comm. on the Judiciary, 94th Cong., 2d Sess. 53* (1976) (testimony of Monroe Leigh, Legal Adviser, U.S. Dep’t of State).

20. *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

21. Note, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1443 (1983).

22. State Immunity Act, 1978.

23. State Immunity Act, 1982, ch. 95, 1980-83 Can. Stat. 2949.

24. Singapore, State Immunity Act, 1979; Pakistan, State Immunity Ordinance, 1981; South Africa, Foreign States Immunities Act, 1981; Australia, Foreign State Immunities Act, 1985.

are unhappy with the expense of litigation in foreign courts, and a few foreign governments have refused to participate in certain "sensitive cases,"<sup>25</sup> the rules applied in the FSIA generally are accepted as consistent with international law and practice.<sup>26</sup>

Further, despite criticism by certain academics and judges, the innovative structure of the FSIA has proven workable. However, drafting problems in the statute have caused litigation that might have been avoided, and gaps in the statutory scheme, particularly as regards execution of judgment, have limited severely the practical remedies available to claimants. On the whole, the courts have done a good job in applying the statute, but a number of poor decisions have resulted, which may reflect the difficulty that both attorneys and judges experience in coping with issues of foreign relations law.

Bad judicial decisions can be the product of poorly written briefs. Sovereign immunity cases often are difficult to brief both because the FSIA is highly technical, and because it implicates policy questions affecting international trade and investment and foreign relations. Practitioners and judges who face such issues infrequently can be easily lead astray.<sup>27</sup> These considerations argue for more congressional guidance, but the difficulty of drafting detailed rules of general validity and of moving corrective legislation through the Congress make that approach impractical.

The balance of this article reviews a few of the problems the courts have encountered under the FSIA that are of particular interest to this author and explains the most important of the proposals that have been made by the American Bar Association (ABA) to amend the Act.

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25. See, e.g., *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982) (default judgment), 596 F. Supp. 386 (N.D. Ala. 1984) (action dismissed); *Letelier v. Republic of Chile*, 488 F. Supp. 665, 502 F. Supp. 259 (D.D.C. 1980).

26. For the best comprehensive review of international law and practice, see the series of reports prepared for the Australian Law Reform Commission by Professor James Crawford of Adelaide University and Sinclair, *The Law of Sovereign Immunity — Recent Developments*, 167 RECUEIL DES COURS 117 (1980).

27. See, e.g., *Kalamazoo Spice Extraction Co. v. The Provisional Military Gov't of Socialist Ethiopia*, 543 F. Supp. 1224 (W.D. Mich. 1982), *rev'd*, 729 F.2d 422 (6th Cir. 1984).

### III. DEFINITION OF FOREIGN STATE

#### A. International Organizations

The definition of "foreign state" in section 1603 of the Act has worked fairly well, but it can be criticized both for excluding international organizations and foreign officials when sued personally and for including a large number of state-owned enterprises and government agencies that were not accorded immunity under prior law. Each issue presents policy concerns that can be addressed only with some difficulty.

The immunity of international organizations is regulated by the International Organization Immunities Act of 1945, which provides that international organizations are to be accorded the same immunities as foreign governments.<sup>28</sup> Such immunity also is governed by a variety of treaties and international agreements which may, or may not, provide absolute immunity for a particular organization. International organizations frequently assert absolute immunity, whether guaranteed by treaty or not, and they strongly resist attempts to bring their organizations under the FSIA.<sup>29</sup>

#### B. Heads of State

The FSIA is silent as regards its application to actions brought against heads of state or other foreign officials in their personal capacity. Sometimes an action brought against an incumbent official of a foreign state is simply misstated and should be treated as an action brought against the state itself. However, in a number of cases, plaintiffs have attempted to hold present or former heads of state or other foreign officials personally liable for damages.

These actions raise a variety of complex questions which are litigated only rarely and which are poorly understood.<sup>30</sup> Under the emerging practice, it appears that the State Department will recognize and allow the personal immunity of a head of state or foreign minister from jurisdiction in an action for damages which

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28. 22 U.S.C. §§ 288-288i (1982).

29. See generally *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980); *Tuck v. Pan American Health Org.*, 668 F.2d 547 (D.C. Cir. 1981).

30. For a full treatment of these issues, see Note, *Resolving the Confusion Over Head of State Immunity: The Defined Right of Kings*, 86 COLUM. L. REV. 169 (1986).



is based on the performance of official duties by that individual.<sup>31</sup> A strong argument can be made that the personal immunity of senior officials in foreign courts should be absolute when related to their official acts. The foreign state itself can be sued for these acts if the appropriate prerequisites to jurisdiction are present.

Such a policy would appear to conform with the practice of other sovereign states. The United Kingdom, for instance, in the State Immunity Act of 1978, accords to foreign heads of state the immunities provided to diplomatic agents under international law.<sup>32</sup> Arguably, this analogy implies absolute personal immunity for senior officials on official visits to a foreign state. However, no official is immune from jurisdiction in an action based on personal business activity in another foreign state, such as dealings in financial markets.<sup>33</sup>

Further, a distinction may be made between an action brought by the foreign state itself, and one brought by a third party. The Executive Branch analyzed these questions during the negotiations leading to the release of the United States diplomats held hostage by Iran, and concluded that an action brought by a foreign state in a United States court to recover its own property from a former sovereign should not be barred by a defense of head of state immunity or by the act of state doctrine.<sup>34</sup> Iran's action to recover property from the estate of the former Shah was

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31. See, e.g., *Domingo v. Marcos*, C82-1055V (W.D. Wash. Dec. 23, 1982 and July 14, 1983); *Kilroy v. Windsor, Prince of Wales*, 1978 DIG. U.S. PRAC. INT'L L. 641 (N.D. Ohio 1978); *Chong Boon Kim v. Kim Yong Shik*, 58 AM. J. INT'L L. 186 (Hawaii Cir. Ct. 1963).

32. State Immunity Act, 1978, ch. 33, § 20, *reprinted in* 1978 L. REP. STAT. 715, 726.

33. See Vienna Convention on Diplomatic Relations, April 18, 1961, art. 31(1)(c), 23 U.S.T. 3227, T.I.A.S. 7502 (entered into force with respect to the United States Dec. 13, 1972); *Lasidi v. Financiera Avenida S.A.*, Index No. 5864/82 (S.D.N.Y.) Order, July 15, 1983, Order, Jan. 30, 1984, *reprinted in* N.Y.L.J., Feb. 7, 1984, at 11. "The United States submitted a Suggestion of Interest urging sensitivity to the dignity of the office of the President of the United Arab Emirates, but it did not suggest immunity from suit." *Id.* at 11, col. 2.

34. See Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 INT'L LEGAL MATERIALS 224, 228 (1981), where the United States agreed to advise the courts, in specified circumstances, that litigation brought by Iran to recover state property from the estate of the former Shah "should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law."

later dismissed on grounds of *forum non conveniens*.<sup>35</sup>

Proceedings against foreign officials give rise to complex questions, such as the scope of discovery and the relevance of immunity to sanctions under Rule 37 of the Federal Rules of Civil Procedure for failure to make discovery, that are argued both in the courts and before the State Department. Although the authorities are sparse, there is considerable scope for creative advocacy which takes into account international legal principles and past practices at the State Department.

### C. State Enterprises and Government Agencies

Prior to the FSIA, it was generally assumed that commercial enterprises owned by foreign states and government agencies with a separate juridical identity from the state were not entitled to immunity from the jurisdiction of foreign courts or from execution of judgment against their assets. Exceptions did arise in particular cases in which such enterprises conceivably performed "public" functions for the foreign state and thus arguably were clothed with the state's immunity as regards those particular actions.

This approach to immunity may have worked well in the majority of cases, but it presented problems for the courts and for the State Department when they found it difficult to determine the status of the agency under its national law. This difficulty could create a foreign relations problem if the foreign state's assertions of the nature of its relationship with the agency were disputed. In at least one case involving the Soviet Union, the State Department was led to advise a court that the Department "accepts as true the representations" made by the Soviet Ambassador.<sup>36</sup> The possibilities for tension in this situation are evident.

The FSIA avoids this particular problem by a broad definition of "foreign state" that includes all entities that are majority-owned by the state even if the entities have a separate legal personality.<sup>37</sup> Except as provided otherwise by treaty or other international agreement,<sup>38</sup> determinations of immunity are made on

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35. *Islamic Republic of Iran v. Pahlevi*, 464 N.Y.S. 2d 487 (A.D. 1st Dept. 1983).

36. *See Prelude Corp. v. Owners of F/V Atlantik*, 1971 A.M.C. 2651 (N.D. Cal.).

37. 28 U.S.C. § 1603(a)-(b) (1982).

38. *Id.*, § 1604.

the basis of the particular acts or transactions related to the controversy and not on the basis of the status of the defendant.<sup>39</sup> However, entities organized under the laws of the United States or a third country generally are not immune.<sup>40</sup>

This structure has produced unfortunate consequences that were not fully anticipated by the draftsmen. Because of the special contacts required for jurisdiction in cases involving agencies of foreign states, a party's right to a United States forum in an action against a commercial enterprise may depend on the identity of the shareholders of that enterprise.<sup>41</sup> It is difficult to explain why the contacts required for jurisdiction over an action against a state airline, steel mill or nationalized bank should be different from those required to adjudicate the same controversy with another enterprise majority—owned by private parties, particularly where the state-owned enterprise is organized under the corporate law applicable to private companies in the country concerned.

Even more seriously, application of the FSIA's severe restrictions on execution of judgment and prejudgment attachment to all entities owned by foreign governments may result in the denial of effective relief in cases that involve foreign parties who have no immunity under their own national law. However, a hardly noticed dictum of the Supreme Court suggests that the courts may well hold that foreign law authorizing an agency with a legal personality separate from the state to sue and be sued constitutes a waiver of immunity.<sup>42</sup>

The ABA proposals for amendment of the FSIA provisions relating to execution and provisional remedies, *infra*, would ease this situation considerably. An alternative solution, as far as government agencies are concerned, would remove all immunity for those entities that are organized primarily to conduct commercial activities. In many, if not most, cases such agencies have no immunity under the law of the state in which they are organized.

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39. *Id.*, § 1605.

40. *Id.*, § 1603(b)(3).

41. *Id.*

42. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983).

## IV. JURISDICTION

The numerous cases arising under the jurisdictional provisions of the FSIA are discussed elsewhere in this volume. I will take this opportunity to comment on a few of the issues that have arisen under section 1605(a)(2) of the Act, which permits actions based on the commercial activities of a foreign state that have specified contacts with the United States.<sup>43</sup>

Resolution of a case arising under this provision requires a three-part inquiry.<sup>44</sup> The first task of the court is to identify the conduct relevant to the question of immunity. The second is to classify the conduct as “commercial activity,” as defined in the Act, or not. Finally, the court must consider whether the relevant commercial activity has the relationship to the cause of action and to the United States described by one or more of the three clauses of section 1605(a)(2).<sup>45</sup>

The statute defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.”<sup>46</sup> A claim under section 1605(a)(2) must be “based upon” such a commercial activity or upon an “act” related to a commercial activity. A foreign state (including an agency of the state) cannot be sued in the United States simply because it is doing business here. Thus, if a foreign government agency, such as a shipping line or air carrier, is engaged in service to or from the United States, the question arises whether a cause of action can be related to that regular course of conduct or whether the claim must be based on a particular transaction or act.

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43. For a more extensive discussion of this provision, see Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective—A Founder's View*, 35 INT'L & COMP. L. Q. 302 (1986).

44. *TransAmerican S.S. Corp. v. Somali Democratic Republic*, 590 F. Supp. 968, 971 (D.D.C. 1984); see Note, *Foreign Immunity and Commercial Activity: A Conflicts Approach*, 83 COLUM. L. REV. 1440, 1488 (1983).

45. Section 1605(a)(2) of the Act provides that a foreign state “shall not be immune from the jurisdiction” of courts in the United States 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.

46. 28 U.S.C. § 1603(d) (1982).

After a few false starts,<sup>47</sup> the courts have properly concluded that the statute requires a nexus between the plaintiff's claim and the commercial activity which is connected with the United States. Thus, the fact that the Algerian state shipping company did business with the United States did not provide the contacts necessary to sustain jurisdiction of an unrelated claim based on the detentional loss of a vessel in an Algerian port.<sup>48</sup>

As to the second issue, in most cases, the courts have not found it difficult to distinguish acts *jure gestionis* which are justiciable in United States courts from acts *jure imperii* which are not. Thus, a foreign bank's sale of certificates of deposit was deemed "commercial," and the subsequent nationalization of the bank held irrelevant to the court's jurisdiction, while the state's foreign exchange regulation which restricted payment of the certificates was unmistakably a "sovereign" act. The Court of Appeals for the Fifth Circuit allowed jurisdiction under section 1605(a)(2) for breach of the contract of deposit, but held that review of the foreign exchange regulations was precluded by the act of state doctrine.<sup>49</sup>

In another Fifth Circuit decision, the Court held that when, in the last hours of the Somoza regime, the Central Bank of Nicaragua issued a dollar check to the wife of the former Defense Minister, the Bank was not acting commercially, but performing the "intrinsically governmental" function of allocating the country's scarce foreign exchange reserves among competing uses. When the Central Bank subsequently refused to honor the check, at the behest of the new authorities, "the sovereign nature of Banco Central's issuance of the check imbued its later breach with sovereignty." The result in this case is compelling, but the Court's insistence that it looked to the "nature," not the "purpose" of the transaction is not entirely convincing.<sup>50</sup>

The statutory definition of "commercial activity" states that "[t]he commercial character of an activity shall be determined by

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47. See *In re Rio Grande Transport*, 516 F. Supp. 1155 (S.D.N.Y. 1981).

48. *Vencedora Oceanica Navigacion v. Compagnie Nationale Algérienne de Navigation*, 730 F.2d 195 (5th Cir. 1984). See also *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980); *Castillo v. The Shipping Corp. of India*, 606 F. Supp. 497 (S.D.N.Y. 1985).

49. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (1985). See also *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

50. *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393-94 (5th Cir. 1985).

reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose.”<sup>51</sup> The legislative history of this text is clear. An action on a contract is based on a commercial activity even if the ultimate object of the contract is a public function. Two classic cases are cited: A contract to purchase equipment for the armed forces and a contract for repair of an embassy building.<sup>52</sup> This provision was applied properly in *McDonnell Douglas Corporation v. Islamic Republic of Iran*,<sup>53</sup> where the Court rejected Iran’s claim of immunity in an action on a contract for the supply of military aircraft parts.

The United States courts have had a surprising amount of difficulty in disregarding the purpose of the transaction when the administration of natural resources are involved.<sup>54</sup> In *MOL, Inc. v. The People’s Republic of Bangladesh*,<sup>55</sup> the government terminated an agreement that gave an Oregon company a ten-year license to capture and export rhesus monkeys from Bangladesh. The agreement specified quantities, prices and other terms, including the use of the animals for medical research. Bangladesh terminated the agreement for breach of those conditions, and MOL, in turn, sued the Bangladesh Government.

The Court of Appeals for the Ninth Circuit concluded that revocation of the licensing agreement was a sovereign act and that Bangladesh was immune from suit. In the Court’s words,

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.<sup>56</sup>

With all respect to the court, this decision appears to flout the intent of Congress. Private parties do not normally raise armies

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51. 28 U.S.C. § 1603(d) (1982).

52. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 16, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6615.

53. 758 F.2d 341 (8th Cir. 1985).

54. See generally Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT’L L. 319 (1985); *IAM v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff’d on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

55. 736 F.2d 1326 (9th Cir. 1984).

56. *Id.* at 1329.

nor regulate exports of natural resources, but they do contract for the purchase and sale of goods. 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.

This case demonstrates that the draftsmen 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. . . ."<sup>57</sup>

This decision is so troublesome that it may be prudent to amend the statute to provide for adjudication of all claims of breach of contract which have the requisite contacts with the United States. The United Kingdom State Immunity Act of 1978 is instructive in this regard. This Act establishes the jurisdiction of the English courts with respect to all contracts that are to be performed in the United Kingdom, in whole or in part, and other contracts within the statutory definition of "commercial transactions."<sup>58</sup>

The courts have encountered greater difficulty in applying the three-part contacts test of section 1605(a)(2) than anticipated by the draftsmen. The Executive and congressional sponsors of the FSIA recognized that generally an international transaction by definition has contacts with more than one jurisdiction. The sponsors intended to establish the jurisdiction of the United States courts over all international commercial transactions and activities having "substantial" contacts with the United States and expected most of these cases to fall within the first clause of section 1605(a)(2) which refers to "commercial activity carried on in the United States by the foreign state."<sup>59</sup>

The statutory definition is precise: "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact

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57. *Id.*

58. See *supra* note 22, ch. 33, § 3(1)(a)(b). Immunity is retained for contracts made in the territory of the state concerned if the obligation in question is governed by that state's administrative law and the contract is not defined as a commercial transaction in section 3(3). See *id.*, ch. 33, § 3(3).

59. 28 U.S.C. § 1605(a)(2) (1982).

with the United States.”<sup>60</sup> Further, the legislative history expressly provides that this particular definition includes “sales to, or purchases from, concerns in the United States” as well as loans made to a foreign state by a “private or public lending institution in the United States.”<sup>61</sup>

These principles have been applied generously in some cases<sup>62</sup> and ignored in others.<sup>63</sup> For reasons that are not clear to this author, the courts frequently have been reluctant to give the first clause of section 1605(a)(2) the scope intended by Congress. Rather, in several cases where “substantial” contacts existed, the courts have preferred to base jurisdiction on the third clause of the section,<sup>64</sup> which covers “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.”<sup>65</sup>

Generally, the courts have relied on the same contacts which would have supported jurisdiction under the first clause of the section, but they frequently have relied as well on the fact that a United States national experienced a financial loss in the United States. This factor was emphasized first in the context of juridical persons on the theory that a corporation experiences financial loss where its headquarters are located.<sup>66</sup> The same weight recently has been accorded financial loss suffered by natural persons in the United States.<sup>67</sup> In contrast, the courts have not recognized such “direct effects” in cases of personal injury suffered abroad even if the case might fall under section 1605(a)(2) because of the

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60. *Id.*, § 1603(e).

61. H.R. REP. No. 1487, *supra* note 11, at 17, *reprinted at* 6615-16.

62. *See* *Gibbons v. Udaras na Gaeltachta*, 549 F. Supp. 1094 (S.D.N.Y. 1982). *See also* *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983); *Gemini Shipping Inc. v. Foreign Trade Org. for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981).

63. *Exchange National Bank of Chicago v. Empresa Minera del Centro del Peru*, 595 F. Supp. 502 (S.D.N.Y. 1984); *Waukesha Engine Div., Dresser Americas Inc. v. Banco Nacional de Fomento Cooperativo*, 485 F. Supp. 490 (E.D. Wis. 1980).

64. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Callejo v. Bancomer*, 764 F.2d 1101 (5th Cir. 1985); *Harris Corp. v. Nat'l Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982).

65. 28 U.S.C. § 1605(a)(2) (1982) (emphasis added).

66. *Texas Trading & Milling*, 647 F.2d at 300.

67. *Bancomer*, 764 F.2d at 1101.



commercial context of the tort.<sup>68</sup>

This approach to the statute has two disadvantages. First, a number of the United States allies and trading partners, including Canada and the United Kingdom, reject the "effects" doctrine as a basis for the jurisdiction of United States courts in antitrust cases. Reliance on the third clause of section 1605(a)(2) makes it more difficult to obtain foreign acceptance of the exercise of jurisdiction under the FSIA and should be avoided where other clauses of that section will suffice equally as well or better.

Second, there is a dangerous tendency in some of the decisions under the "direct effects" clause to exercise jurisdiction whenever a United States national "feels" a financial loss in the United States.<sup>69</sup> This assertion of jurisdiction nearly approaches adjudication on the sole basis of the plaintiff's United States nationality. The legislative history indicates that Congress intended section 1605(a)(2) "to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."<sup>70</sup> While this statement is made with particular reference to the first clause of the section, it has a bearing on all of its provisions.

## V. PROPOSED AMENDMENTS TO THE FSIA

A committee of the Section of International Law and Practice of the American Bar Association considered a wide range of proposals for amendment of the FSIA in 1982-83.<sup>71</sup> In August, 1984, the ABA House of Delegates adopted a resolution which recommended eight separate proposals for amendment of the Act.<sup>72</sup> Bills incorporating these recommendations, with certain perfecting amendments, have been introduced in both Houses of Con-

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68. *E.g.*, *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979).

69. *See, e.g.*, *Schmidt v. Polish People's Republic*, 579 F. Supp. 23 (S.D.N.Y. 1984) (dictum), *aff'd*, 742 F.2d 67 (2d Cir. 1984); *In re Rio Grande Transport*, 516 F. Supp. 1155 (S.D.N.Y. 1981).

70. H.R. REP. No. 1487, *supra* note 11, at 17, *reprinted at* 6616.

71. The Ad Hoc Committee on Revision of the Foreign Sovereign Immunities Act of 1976 was co-chaired by Charles Brower, Robert Craft and Mark B. Feldman.

72. Resolution 113A, August 1984, was adopted by consensus on the recommendation of the Sections of International Law and Practice; Corporation, Banking and Business Law; Litigation; and Tort and Insurance Practices.

gress,<sup>73</sup> and hearings were held in the House of Representatives on May 20, 1986.<sup>74</sup>

The ABA study concluded that the Act has been successful in serving its major purposes—the transfer of decision making responsibility from the Executive to the Judiciary and the codification of the restrictive theory of immunity — but also concluded that a number of significant problems have arisen which require further action by Congress.<sup>75</sup> The Committee expressed little sentiment for a basic restructuring of the Act, but made many useful suggestions to perfect the Act's operation. In the end, the practical problems of the legislative process in Congress led the Committee to focus all of its efforts on a few issues of the highest priority.

The four major amendments recommended by the ABA all aim to eliminate ambiguities in the Act as presently drafted or to fill gaps in the Act's provisions which can result in the frustration of legitimate claims and thus threaten the integrity of the remedies that the FSIA was intended to ensure. These problem areas are: (1) the enforcement of foreign arbitral awards, (2) the execution of judgments, (3) provisional remedies to secure the execution of judgments and arbitral awards, and (4) the application of the act of state doctrine in cases involving expropriations and actions for breach of contract.

The four other proposed amendments are more technical. Three deal with admiralty matters and are of particular interest to members of the admiralty bar. The fourth, at the request of the banking bar, would make explicit the intent of Congress, as clearly indicated in the legislative history of the FSIA, that all financial obligations incurred by foreign states under loan agreements, loan guarantees, and similar undertakings are commercial activities for purposes of section 1605(a)(2) of the Act. In the pages that follow, I shall review, more or less briefly, the terms of the most important amendments and the reasons why they are

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73. S.1071, 99th Cong., 1st Sess. (1985) (Sen. Mathias); H.R. 3137, 99th Cong., 1st Sess. (1985) (Mr. Glickman).

74. *Hearings before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986). See Statement of Mark B. Feldman On Behalf of the American Bar Association, to be printed in \_\_\_\_ INT'L LAW \_\_\_\_ (1986) [hereinafter ABA Testimony].

75. See Report, Section of International Law and Practice to the ABA House of Delegates (August 1984).

needed.<sup>76</sup>

### A. Enforcement of Arbitral Awards and Arbitration Agreements

In recent years, international commercial arbitration has become the most important procedure for protecting the legal rights of parties to international trade and investment transactions. Arbitration is frequently the dispute settlement machinery of choice in contracts between private parties and foreign states and government agencies. Thus, arbitration plays a key role in protecting foreign investment and in securing capital flows necessary for economic development, particularly in third world countries.

International commercial arbitration is a consensual process that is grounded in the agreement of the parties, but the efficacy of arbitration as a legal remedy depends on national law and international agreement for the enforcement of arbitral agreements and awards. The United States is a party to several international agreements that provide for the recognition and enforcement of foreign arbitral awards.<sup>77</sup> The promotion of arbitration for the settlement of disputes has long been an objective of United States diplomatic, legislative,<sup>78</sup> and judicial policy.<sup>79</sup>

Thus, it is surprising that the FSIA makes no specific reference to the enforcement of arbitration agreements with foreign states and resultant awards.<sup>80</sup> The reason is that the draftsmen believed that under United States law and international practice, acceptance of international arbitration constitutes an implied waiver of

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76. See generally Atkeson & Ramsey, *Proposed Amendment of the Foreign Sovereign Immunities Act*, 79 AM. J. INT'L L. 770 (1985).

77. E.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090; Declaration of the Democratic and Popular Government of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 75 AM. J. INT'L L. 422 (1981).

78. See, e.g., 22 U.S.C. § 2370(e)(1)(c) (1982).

79. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

80. The State Immunity Acts of the United Kingdom, *supra* note 22, § 9, and Australia, *supra* note 23, § 17, expressly provide for the enforcement of arbitral awards.

sovereign immunity as to enforcement of both the agreement to arbitrate and any award rendered against the sovereign party pursuant to that agreement. As the legislative history clearly indicates, Congress expected that actions to enforce arbitral awards and agreements would be brought under sections 1605(a)(1) and 1610(a)(1) of the Act which apply when a foreign state has waived its immunity "either explicitly or by implication."

The House Report notes that the courts have found implicit waivers of immunity from jurisdiction "in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract."<sup>81</sup> The Report further states that the same principles apply to waivers of immunity from execution under section 1610(a)(1) as apply to waivers of immunity from jurisdiction under section 1605(a)(1).<sup>82</sup>

Unfortunately, the judicial opinions that discuss this question strongly suggest that legislative action is required to make explicit the congressional intent to enforce arbitral awards rendered against foreign states in jurisdictions other than the United States. The Seventh Circuit recently reviewed the cases in a dictum and concluded as follows:

Cases involving arbitration clauses illustrate that provisions allegedly waiving sovereign immunity are narrowly construed. Courts have found an implicit waiver under Section 1605(a)(1) in cases involving contracts in which a foreign state has agreed to arbitrate disputes without specifying jurisdiction in a particular country or forum . . . or where another nation has stipulated that American law should govern any contractual disputes. . . . But most courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States.<sup>83</sup>

This statement could be misleading. I have discussed elsewhere the United States cases and the international law framework in an article devoted to this subject.<sup>84</sup> In sum, the Court reached the correct result in *Ipirtrade International, S.A. v. Federal Republic*

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81. See H.R. REP. NO. 1487, *supra* note 11, at 18, *reprinted at* 6617.

82. *Id.* at 28, *reprinted at* 6627.

83. *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985).

84. Feldman, *Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association*, 40 *ARB. J.* 24 (March 1985). See also ABA Testimony, *supra* note 75.

of Nigeria,<sup>85</sup> where a waiver of immunity was implied in an action to enforce an arbitral award made in Switzerland against Nigeria under a contract that provided for adjudication of disputes in accordance with Swiss law and by arbitration under International Chamber of Commerce Rules. The decisive element in that case was the fact that Switzerland is a State Party to the New York Convention. The United States has a treaty obligation to enforce arbitral awards made in the territory of another State Party to the New York Convention unless the party opposing enforcement can establish one of the particular grounds enumerated in the treaty on which enforcement may be refused.<sup>86</sup> The Treaty does not include an exception for sovereign immunity although it clearly applies to arbitration with sovereign parties.<sup>87</sup>

None of the cases cited by the Seventh Circuit hold to the contrary. Indeed none involves an action to enforce an arbitral award. These cases involve assertions that the foreign state's agreement to arbitrate elsewhere, in effect, waives the state's immunity to an adjudication on the merits of a claim in a United States court.<sup>88</sup> The courts have properly recognized that an agreement to arbitrate does not constitute a waiver of immunity except as to the enforcement of that undertaking, *i.e.*, to enforce the agreement to arbitrate or an award resulting from the agreed upon procedure. Consent to use a particular procedure for dispute settlement does not imply consent to a different procedure.<sup>89</sup>

However, these cases include criticism of some of the reasoning in *Ipitrade* and other dicta which cloud the issue. As the cases now stand, no litigant can be confident of the result, and United States law may be perceived as inconsistent with United States obligations under the New York Convention.

The ABA proposals, as further refined in S. 1071 and H.R. 3137, spell out the jurisdiction of the courts to enforce arbitration agreements and to execute foreign arbitral awards in three

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85. 465 F. Supp. 824 (D.D.C. 1978).

86. See 9 U.S.C. § 201 (1982).

87. See A. van den Berg, *The New York Arbitration Convention of 1958* (The Netherlands: Kluwer, 1981) p. 279.

88. See *Verlinden B.V. v. Central Bank of Nig.*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded*, 461 U.S. 480 (1983); *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981); *Chicago Bridge & Iron Co. v. Iran*, 506 F. Supp. 981 (N.D. Ill. 1980).

89. See *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

circumstances:

- (1) Where the Arbitration takes place in the United States;
- (2) where the underlying claim against the foreign state could have been brought in a United States court under the FSIA, *i.e.*, where the sovereign party would not have been immune from jurisdiction because of the nature of the claim and the contacts with the United States; and
- (3) where the agreement or award is governed by a treaty or other international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards, *e.g.*, where the arbitration was held in the territory of a State Party to the New York Convention.<sup>90</sup>

This legislation would obviate the need for litigation in the cases stated of the question whether the parties to the arbitration agreement intended a waiver of sovereign immunity. The statute, if so amended, would in effect presume such intent. In the first case, the intent to waive immunity is manifest. In the second case, it is unnecessary because the United States court could have exercised jurisdiction of the underlying claim, but for the agreement to arbitrate. In the third case, a waiver of immunity may be implied because the sovereign party knew, or should have known, that the agreed upon arbitration procedure would implicate the treaty obligations of the United States and other countries.

This amendment would codify the decision in the *Ipirtrade* case, but it would not replace sections 1605(a)(1) and 1610(a)(1) of the Act. A court could still hold, in circumstances not specified in the amendment, that a particular agreement to arbitrate constitutes a waiver of immunity and consent to the jurisdiction of the court.<sup>91</sup>

Many scholars believe that a state's agreement to submit a dispute to binding third-party arbitration, which carries the good faith obligation to comply with an adverse award, necessarily implies the waiver of any objection to the enforcement of the award on the grounds of state immunity.<sup>92</sup> Further, the United Kingdom

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90. See S. 1071, 99th Cong., 1st Sess. 2 (1985) (section 2(a)(3) adding paragraph (6) to section 1605(a) of the Act, text appended).

91. The model arbitration clause recommended by the American Arbitration Association stipulates that "judgment upon the award rendered may be entered in any Court having jurisdiction thereof." Many international contracts provide that the "award may be enforced by any court of competent jurisdiction." Such language constitutes a waiver of immunity.

92. Bernini and Van den Berg, *THE ENFORCEMENT OF ARBITRAL AWARDS*

and Australian State Immunity Acts provide for enforcement of arbitral awards without distinction as to the situs of arbitration.<sup>93</sup>

The ABA proposal is a compromise which is fully consistent with the expectations of parties to arbitration agreements. Any government that agrees to arbitration in the territory of a State Party to the New York Convention, or in a location to be determined by a third party, has every reason to expect that the proceedings will result in an award which is enforceable under the New York Convention. The sovereign party expects to benefit from the award if it prevails, and cannot reasonably object if the other party enjoys the same benefit.<sup>94</sup> This result also serves the interests of developing countries who wish to attract investment and trade.

### B. Execution of Judgment

The provisions for execution of judgment in sections 1609-1611 of the FSIA include some of the most problematic texts in the Act. In general, the scope for execution of judgment against the property of an agency or instrumentality of a foreign state is generous if that agency or instrumentality is "engaged in commercial activity in the United States,"<sup>95</sup> but neither the statute nor its legislative history state precisely what is meant by "engaged in commercial activity in the United States." Otherwise, the scope for execution of judgment against the property of a foreign state, including agencies or instrumentalities not engaged in commercial activity in the United States, is quite narrow unless the foreign state waives its immunity from execution of judgment.<sup>96</sup> The language of the Act may make the possibility of execution appear even more limited than actually intended. The legislative history of these provisions is sparse and, where it exists, tends to confuse

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AGAINST A STATE: THE PROBLEM OF IMMUNITY FROM EXECUTION, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 359, 360 (Lew ed. 1986).

93. See *supra* note 81.

94. The "minimum contacts" required for the constitutional exercise of jurisdiction over parties not present within the jurisdiction, *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945), are satisfied where the action is brought to enforce a judgment or arbitral award against property in the jurisdiction. See *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977). But cf. *Transatlantic Bulk Shipping v. Saudi Chartering S.A.*, 622 F. Supp. 25 (S.D.N.Y. 1985) (no property in jurisdiction).

95. 28 U.S.C. § 1610(b).

96. *Id.*, § 1610(a)(1), (b)(1).

the issue rather than to clarify it.

There are few relevant cases. In *Letelier v. The Republic of Chile*,<sup>97</sup> the district court, believing that Congress would not have established jurisdiction over the foreign state without also providing an effective remedy, ordered execution against the assets of the state-owned airline to enforce a default tort judgment entered against Chile under section 1605(a)(5) of the Act.<sup>98</sup>

The court of appeals reversed on two grounds: (1) the airline was a juridical entity separate from the state that owned it and its assets therefore were not available for execution of a judgment against the state, and (2) even if the district court were correct in disregarding the airline's separate identity on the particular facts of this case, the commercial property of a foreign state is immune from execution of a tort judgment under section 1605(a)(5) of the Act. Thus, "Congress did in fact create a right without a remedy."<sup>99</sup>

Although the result in this case might have been different, considering that Chile used commercial aviation to effect its murderous scheme, the court of appeals is correct on one point. Congress did not provide for execution of every judgment rendered against a foreign state. In the case of a tort judgment, if commercial activity is not involved, the only property subject to execution under section 1610(a)(5) is the insurance, if any, "covering the claim which merged into the judgment."<sup>100</sup> In the case of a commercial tort, the remedy under section 1605(a)(2) also is limited. Assuming in the *Letelier* case that plaintiffs had overcome all other obstacles, in order to execute the judgment, plaintiffs would have had to establish that the particular airline property within the Court's grasp was used for the commercial activity "upon which the claim is based."<sup>101</sup>

These words present a question of interpretation analogous to the question that arises under section 1605(a)(2) of the Act as to the scope of commercial activity relevant to the jurisdiction of the court. In the case of an airline carrying commercial traffic to and from the United States, is the relevant commercial activity that general course of conduct or must there be a nexus between the

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97. 575 F. Supp. 1217 (S.D.N.Y. 1983).

98. *Id.* at 1219.

99. 748 F.2d 790, 798 (2d Cir. 1984).

100. 28 U.S.C. § 1610(a)(5).

101. *Id.*, § 1610(a)(2).



claim and a particular flight to or from the United States?<sup>102</sup> Transposed to section 1610(a)(2), the question is: Are all the commercial assets used for air service to the United States available for execution or only the equipment used for the particular flight? If a tight nexus is required, the possibilities for execution of any judgment against a foreign state will be slim indeed, absent a waiver of immunity.

Difficult questions of interpretation also arise with respect to execution of judgments relating to foreign expropriations, counterclaims, and maritime liens. Section 1610(a)(3) provides for execution against property "used for a commercial activity in the United States" if "the execution relates to a judgment establishing rights in property which has been taken in violation of international law . . ."<sup>103</sup> Did Congress intend to restrict execution to the very property "in" which rights were at issue (or to property exchanged for such property), or did Congress intend to authorize execution against any commercial assets of the foreign state when the claim is based on a violation of international law?

The draft Restatement (Revised) of the Foreign Relations Law of the United States adopts the narrow construction, and support for this view is found in the cryptic legislative history.<sup>104</sup> However, there are persuasive arguments for a more generous view: (1) unlike paragraphs (a)(2) and (a)(5) of section 1610, which limit the "property" subject to execution, paragraph (a)(3) refers to the "judgment" sought to be executed; it does not say what property is subject to execution and; (2) although the scope of jurisdiction over foreign expropriations under the FSIA is rather limited, the presence of such property in the United States is only one basis for jurisdiction of such claims.

Many more cases are likely to involve enforcement of arbitral awards under section 1605(a)(1),<sup>105</sup> commercial activity in the United States by a foreign government agency that owns or operates the expropriated property, as provided in section

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102. Compare *In re Rio Grande Transport*, 516 F. Supp. 1155 (S.D.N.Y. 1981) with *Vencedora Oceanica Navigacion v. Compagnie Nationale Algérienne de Navigation*, 730 F.2d 195 (5th Cir. 1984).

103. 28 U.S.C. § 1610(a)(3).

104. See H. R. REP. No. 1487, *supra* note 11, at 28-30, reprinted at 6627-29.

105. See *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated without opinion after settlement*, 684 F.2d 1032 (D.D.C. 1981).

1605(a)(3),<sup>106</sup> or counterclaims under Section 1607(b) of the Act.<sup>107</sup> There are also indications in the legislative history that section 1610(b) may allow execution against a foreign government agency's property in the United States when section 1605(a)(3) establishes jurisdiction of the claim against the foreign state on the basis of the agency's commercial activity in the United States.<sup>108</sup>

Whenever judgment is entered on a counterclaim brought under Section 1607 of the Act, an argument can be made that the foreign state has waived its immunity from execution of such judgment by initiating the action in the United States courts.<sup>109</sup> However, the silence of the FSIA on this point presents difficulties. The Act is also silent on the enforcement of a judgment based on a maritime lien under Section 1605(b) of the Act.

The scope of execution against the property of a foreign government agency under section 1610(b) depends on the meaning of the phrase "engaged in commercial activity in the United States." Did the Congress intend these words to be given the same meaning as the words "commercial activity carried on in the United States" in section 1605(a)(2)? Or did Congress use slightly different words deliberately in order to impose a higher burden for execution of a judgment? The first interpretation might mean that all the property in the United States of any agency or instrumentality of a foreign state, as defined in Section 1603(b) of the Act, is available for execution if the agency or instrumentality makes any purchases in the United States or makes any contract having substantial contacts with the United States. The second interpretation could limit the application of section 1610(b) to agencies created for commercial purposes that are "doing business" in the United States. Intermediate constructions are also possible.

Based on this brief review of some of the most obvious problems in section 1610, it is apparent that this provision is both poorly drafted and unduly restrictive. Although the scope for execution of judgment against the property of a foreign state consistent with international law remains controversial, a growing

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106. See *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985).

107. See cases cited *infra* notes 142-143.

108. See H.R. REP. NO. 1487, *supra* note 11, at 29-30, *reprinted at* 6628-29.

109. See *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356 (1955).

weight of authority supports the affirmation made in Section 1602 of the Act: Under international law, the commercial property of foreign states "may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." Indeed, there is no reliable authority restricting the right of execution of judgment against the commercial property of a foreign state for any judgment that might be obtained pursuant to the jurisdiction provisions of the FSIA.<sup>110</sup>

S. 1071 and H.R. 3137 would amend section 1610(a) to provide for execution upon any judgment entered under the Act and upon any arbitral award enforced under the Act against any property of the foreign state that is used or intended to be used for a commercial activity in the United States. This amendment would eliminate the present restriction of execution of judgments under section 1605(a)(2) to property used for "the commercial activity upon which the claim is based" and would provide the possibility of executing judgments on tort, expropriation and other claims against any commercial assets of the foreign state that can be found in the United States.

The bills would add specific language at the end of section 1610(a), as redrafted, to make clear that no judgment or arbitral award may be executed against diplomatic or consular property, even if the foreign state has waived its immunity from execution, except against a bank account that is "also used for commercial purposes unrelated to diplomatic or consular functions." There have been cases before and after enactment of the FSIA in which embassy bank accounts have been attached in connection with suits on commercial obligations.<sup>111</sup> There is no doubt this is improper where the bank account is used exclusively for diplomatic or consular purposes, but there are two problems. First, the purchase of supplies for the Embassy is clearly a commercial activity as defined in the Act, and a foreign state may be sued under section 1605(a)(2) for the debts contracted by its Embassy. Second, foreign states sometimes use their Embassy bank accounts for business transactions by state enterprises or government agencies, such as a national petroleum agency, even though

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110. See generally Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 AM. J. INT'L L. 820 (1981); Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985).

111. See *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

this is not a proper diplomatic function.

The policy issue is whether such a “mixed” bank account is to remain protected, in which case property used for commercial activity is sheltered from execution, or whether the account loses its protection, which would interfere with the operation of the Embassy. S. 1071 and H.R. 3137 resolve the issue by reintroducing, for this special situation, the “purpose” test which the FSIA rejects as the criterion for jurisdiction.<sup>112</sup> Under this provision, an Embassy bank account is at risk only if used improperly for commercial purposes unrelated to the diplomatic function.

Although section 1610 would be restructured for drafting purposes, the substance of section 1610(b) in the present law would remain unchanged. A judgment against an agency or instrumentality of a foreign state engaged in commercial activity in the United States can be executed against any property of that agency or instrumentality. It remains to be seen whether the ambiguities of definition inherent in that provision are resolved in the legislative process.

These amendments would also bring to the fore an issue which is not fully clarified by FSIA. Under what circumstances can a government agency with juridical identity separate from the foreign state be held responsible for the actions of the state and *vice versa*? This question arises with respect to both jurisdiction and execution.

Although the definition of “foreign state” in Section 1603(a) of the Act includes autonomous agencies of the state, the structure of the Act and its legislative history makes clear that one autonomous agency of the state is not responsible for claims against another autonomous agency of that state.<sup>113</sup> However, the legislative history also clearly provides that the FSIA does not address the question when is the state responsible for the actions of its agencies or when may the property of an agency be executed upon to satisfy a claim against the state? The draftsmen regarded this as a question of substantive law beyond the scope of the FSIA.<sup>114</sup>

The Supreme Court addressed the issue in *First National City Bank v. Banco Para El Comercios Exterior de Cuba*,<sup>115</sup> (*Bancec*), where the defendant, Citibank, asserted as a counterclaim against

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112. 28 U.S.C. § 1603(d).

113. See H. R. REP. NO. 1487, *supra* note 11, p. 29-30, reprinted at 6628-29.

114. See *id.* at 12, reprinted at 6610.

115. 462 U.S. 611, 628-30 (1983).

the Cuban agency its claim against the state for the expropriation of its branches in Cuba. The Court held that normally the separate personality of agencies established as distinct and independent entities will be respected. However, equitable principles permit a court to disregard the separate identities of a sovereign and its instrumentalities when the agency is so extensively controlled by its owner that a relationship of principal and agent is created, where adherence to the corporate form would "work fraud or injustice" or where the separate form is used to defeat legislative policies.<sup>116</sup>

If the ABA amendments are adopted, this question will arise more often, because execution will not be limited to commercial property related to the activity upon which the claim is based. Presumably, the courts would rely on the principles stated in *Bancec* to resolve these issues on a case-by-case basis.

### C. Prejudgment Attachments

The FSIA clearly prohibits prejudgment attachments for purposes of obtaining jurisdiction over foreign states.<sup>117</sup> Such attachments create diplomatic problems and no longer are needed because the FSIA acts as a long-arm statute and permits service through diplomatic channels when necessary.<sup>118</sup>

The FSIA also restricts the use of prejudgment attachments to secure satisfaction of a judgment to cases in which the foreign state, as broadly defined in section 1603(a), has "explicitly waived" its immunity from attachment prior to judgment.<sup>119</sup> These restrictions do not apply where such immunity is set aside by a treaty,<sup>120</sup> but at least one court has concluded that the treaty language must be as plain as the "explicit" waiver required in the case of an ordinary contract.<sup>121</sup>

These limitations on prejudgment attachments reflect executive branch concerns about tensions with foreign governments whose assets might be attached. However, this gap in the statutory scheme could render useless the access to the courts and the right

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116. *Id.* at 630. See also *Kalamazoo Spice Extraction Co. v. The Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985).

117. 28 U.S.C. § 1610(d).

118. *Id.*, § 1608(a)(4).

119. *Id.*, § 1610(d)(1).

120. *Id.*, § 1609.

121. *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411 (2d Cir. 1983).

of execution established by the FSIA because a foreign state sued under the Act is free to remove its assets from the jurisdiction with impunity.

The implications of this condition became apparent in the Iranian claims litigation spawned by the seizure of the United States Embassy in Tehran on November 4, 1979. Dozens, and ultimately, hundreds of lawsuits were filed against Iranian agencies by United States contractors. Prejudgment attachments of Iranian assets were authorized by treasury regulation after those assets were blocked pursuant to President Carter's Executive Order of November 14, 1979,<sup>122</sup> and plaintiffs' counsel put forward a variety of ingenious arguments to get around the restrictions of the FSIA.

A number of courts, responding to the exigencies of the hostage crisis, approved attachments on one theory of waiver or another,<sup>123</sup> or issued preliminary injunctions which are not barred expressly by the Act.<sup>124</sup> Subsequently, in a case involving Romania, the Court of Appeals for the Second Circuit rejected one of the waiver theories and held that the FSIA precludes a court from using its equity powers to accomplish by other means the prejudgment attachment directly prohibited by the Act.<sup>125</sup>

This experience has persuaded the ABA that the interests of both litigants and foreign states would be served better by an amendment of section 1610(d) that permits the courts to grant provisional remedies to secure execution of judgment in limited circumstances and under carefully defined, uniform safeguards. Thus, the bills would authorize prejudgment attachment or injunctive relief to secure execution with respect to the property of an agency or instrumentality of a foreign state which is "engaged in commercial activity in the United States." Provisional measures would not be authorized with respect to the property of the foreign state itself.

In order to obtain such relief, the claimant necessarily must establish that the property would be subject to execution on a judg-

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122. Exec. Order No. 12,170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1986).

123. *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979); *Reading & Bates Corp. v. Nat'l Iranian Oil Co.*, No. 79, Civ. 6034 (S.D.N.Y. November 29, 1979).

124. *See, e.g., Am. Int'l Group Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980), *modified on other grounds*, 657 F.2d 430 (D.C. Cir. 1981).

125. *Masinxportimport*, 706 F.2d at 411.

ment under the FSIA and that the property of a private party would be subject to such relief "in like circumstances." In addition, the claimant also must establish the probability of success on the merits and the probability that the assets will be removed from the United States or disposed of before a judgment is entered or satisfied. Further, the moving party would be required to post a bond of at least fifty percent of the value of the property attached.<sup>126</sup> This compromise proposal has been criticized by many attorneys as too restrictive and by some in the government as too risky. Its ultimate fate remains to be seen.

#### D. Act of State Doctrine

One of the most intractable problems encountered in litigation with foreign states, and in other actions as well, is the act of state doctrine. The extensive literature on the subject will not be reviewed here.<sup>127</sup> For present purposes, suffice it to say that the doctrinal basis for the court decisions is keenly disputed and that the exceptions have swallowed much of the whole.<sup>128</sup> The doctrine has been out of favor for some years with Congress<sup>129</sup> and the Executive.<sup>130</sup> The Supreme Court has declined to apply the doc-

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126. S. 1071, 19th Cong., 1st Sess. (1985) (section 4, text appended).

127. See, e.g., Bayzler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985); Henkin, *Act of State Today: Recollection in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 125 (1967).

128. See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 469 (Tent. Draft No. 2, Dec. 5, 1985).

129. 22 U.S.C. § 2370(e)(2) (the "Sabbatino" amendment).

130. The Executive has never advised a court, as permitted by the *Sabbatino* amendment, that the act of state doctrine should be applied in a particular case. To the contrary, the State Department has advised the courts in at least five cases involving a variety of circumstances that the act of state doctrine should not be applied. *E.g.*, *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976); *Banco Nacional de Cuba v. First National City Bank*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 912 (2d Cir. 1981); *Kalamazoo Spice Extraction Co. v. The Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985); *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980), *vacated without opinion after settlement*, 684 F.2d 1032 (D.D.C. 1981). In *Occidental of Umm Al Qayayn, Inc. v. A. Certain Cargo of Petroleum Laden Abroad the Tanker 'Dauntless Colorontic'*, 577 F.2d 1196 (1978), *cert. denied*, 422 U.S. 928, the Department advised the court to abstain from deciding a boundary disputed by two foreign states, not on the basis of the act of state

trine since the decision in *Banco Nacional de Cuba v. Sabbatino*.<sup>131</sup> However, the Court has been reluctant to reexamine the doctrine as a whole, and efforts to abolish the doctrine by legislation have foundered on the complexities.<sup>132</sup>

The legislative problem is complicated by the fact that the courts have used the same phraseology, "act of state," in very different lines of cases. As stated in *Underhill v. Hernandez*,<sup>133</sup> and reformulated in *Sabbatino*, the doctrine refers to the reluctance of the United States courts to pass upon the validity under international law of acts of foreign sovereigns taken within their own territory. The lower courts have used the same words in antitrust cases to express their reluctance to look behind the acts of foreign governments in order to examine the motives of foreign officials.<sup>134</sup> Businessmen who strongly oppose the application of the act of state doctrine in expropriation cases find the doctrine useful as a defense in antitrust matters.

In this context, the ABA developed a compromise proposal for restricting application of the act of state doctrine in a few priority situations. S. 1071 and H.R. 3137 would add a new section 1606(b) to the FSIA which reads as follows:

The Federal act of state doctrine shall not be applied on behalf of a foreign state with respect to any claim or counterclaim asserted pursuant to the provisions of this chapter which is based upon an expropriation or other taking of property, including contract rights, without the payment of prompt, adequate, and effective compensation or otherwise in violation of international law or which is based upon a breach of contract, nor shall such doctrine bar enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state.<sup>135</sup>

This provision applies only to actions against foreign sovereigns,

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doctrine, but rather "from the general notion that national courts should not assume the function of arbiters of territorial conflicts between third powers even in the context of a dispute between private parties." 1978 DIGEST U.S. PRAC. INT'L L. 919, 923-24, n.13.

131. 376 U.S. 398 (1964).

132. See *Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

133. 168 U.S. 250 (1897).

134. *Hunt v. Mobil Oil*, 550 F.2d 68 (2d Cir. 1977). See also *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

135. S. 1071, 99th Cong., 1st Sess. 2 (1985); H.R. 3137, 99th Cong., 1st Sess. (1985).



and it applies only to the causes of action specified, *i.e.*, claims for expropriation and breach of contract and actions to enforce an arbitration agreement or award. It would not apply in any case brought against private parties. Although this proposal has limited objectives, if adopted it would clarify the law in three important areas and prevent the recurrence of miscarriages of justice which actually have occurred, or which narrowly were averted in recent cases.

It is appropriate to address the act of state doctrine in amendments to the FSIA because the two doctrines overlap in their origins and application. Congress has considered and resolved the comity concerns which were important considerations in the origin of both doctrines. Thus, the application of the act of state doctrine in cases in which Congress has given the courts the mandate to adjudicate claims against foreign states frustrates the intent of Congress.

### 1. *Expropriation*

In view of the diplomatic sensitivity in cases of foreign expropriation, Congress has given the courts very limited jurisdiction over such claims. Thus, it is all the more regrettable when a court refuses to exercise the jurisdiction conferred upon it by Congress.

An expropriation claim can come before a United States court under three provisions of the FSIA. If the claimant achieves an arbitral award for compensation, an action may be brought to enforce the award under Section 1605(a)(1) of the Act, *i.e.*, on the basis of an implied waiver of sovereign immunity, or under section 1605(a)(6), if the ABA amendments are enacted. I will discuss this aspect under the heading of arbitration.

Section 1605(a)(3) provides for jurisdiction of two classes of cases in which "rights in property taken in violation of international law are in issue." In the first class, the property of property exchanged for it is present in the United States in connection with a commercial activity carried on in the United States by the foreign state. In the second class, the property, or property exchanged for it, is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. The physical presence of property in the United States is not required.<sup>136</sup>

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136. See *Kalamazoo Spice*, 616 F. Supp. at 662-63.

A cogent argument can be made that Congress intended to preclude the application of the act of state doctrine in these and other expropriation cases when it enacted the "second Hicklooper amendment" reversing the decision of the Supreme Court in the *Sabbatino* case.<sup>137</sup> However, the Court of Appeals for the Second Circuit and cases following its authorities have restricted the scope of that statute to the first class of cases encompassed by 1605(a)(3), *i.e.*, where the property is present in the United States.<sup>138</sup> Thus, there is a high risk that the act of state doctrine would bar an expropriation claim brought under the second part of the carefully defined jurisdictional grant unless another exception to that doctrine is applicable.

An expropriation claim was presented in *Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia*,<sup>139</sup> but the Court of Appeals for the Sixth Circuit resolved the act of state issue in that case by its decision that the Treaty of Amity and Economic Relations between the United States and Ethiopia brought the expropriation claim within the "treaty exception" to the act of state doctrine noted by the *Sabbatino* Court.

Many, perhaps most, of the expropriation cases falling under the Act arise as counterclaims in actions brought by foreign states or their agencies to collect debts from United States banks and other enterprises whose assets have been expropriated by the foreign state. In such cases all the equities, and precedents in the law of sovereign immunity,<sup>140</sup> cry out for adjudication of the counterclaim. Nevertheless, some courts have applied the act of state doctrine to expropriation counterclaims with the result that the injured United States party is required to pay the foreign state without receiving any compensation for its confiscated

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137. See *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 594 F. Supp. 1553, 1560 n.8 (S.D.N.Y. 1984). See also *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984), *vacated on other grounds*, 105 S. Ct. 2353 (1985).

138. *Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 402 (2d Cir. 1970), *vacated and remanded on other grounds*, 400 U.S. 1019 (1970), *original judgment adhered to*, 442 F.2d 530 (2d Cir. 1971), *reversed on other grounds*, 406 U.S. 759 (1972).

139. 729 F.2d 422 (6th Cir. 1984). The reference to "counterclaim" in the opinion is not accurate. The related counterclaim was not on appeal.

140. See *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356 (1954).

property.<sup>141</sup>

Present indications are that the Supreme Court recognizes a counterclaim exception to the act of state doctrine when the counterclaim does not exceed the amount of the plaintiff's affirmative claim.<sup>142</sup> Until the Court expresses its view more explicitly, however, the lower courts will continue to have trouble with the issue. The ABA amendments would resolve the problem in expropriation and breach of contract cases and would permit a judgment for the full amount of the counterclaim when allowed by Section 1607 of the FSIA.

## 2. Breach of Contract

From the legislative history, it is clear that in enacting the FSIA, Congress expected the courts to exercise jurisdiction in cases involving the commercial activities of foreign states without regard to the act of state doctrine. The committee reports in both the House and Senate<sup>143</sup> indicate that Congress approved the "commercial activities" exception recognized by the four Justice plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*.<sup>144</sup>

In a few decisions, the courts have applied the "commercial activities" exception,<sup>145</sup> but most courts appear to regard this as an open issue.<sup>146</sup> In one decision that shocked the Bar, *Allied Bank International v. Banco Credito Agricola DeCartago*,<sup>147</sup> the court of appeals, without reaching the act of state issue, refused to enforce a loan agreement providing for payment in New York on the grounds that comity considerations required the court to give effect to the foreign state's exchange regulations that barred payment even if the situs of the debt was in New York.

When the case was reconsidered at the request of the United

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141. See *Empresa Cubana Exportadora Inc. v. Lamborn & Co.*, 652 F.2d 231 (2d Cir. 1981).

142. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.28 (1983); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 770-73 (J. Douglas, concurring). See *Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 594 F. Supp. 1553, 1559 (S.D.N.Y. 1984).

143. H. R. REP. No. 1487, *supra* note 11, at 20, n.1, reprinted at 6619; S. REP. No. 1310, 94th Cong., 2d Sess. 19, n.1 (1976).

144. 425 U.S. 682 (1976).

145. See, e.g., *Texas Trading & Milling*, 647 F.2d at 300.

146. See *Bancomer*, 764 F.2d at 1106-07.

147. 733 F.2d 23 (1984), *withdrawn, vacated*.

States Government, the court abandoned the “comity” rationale and enforced the loan agreement holding that the act of state doctrine did not apply because the situs of the debt was New York, not Costa Rica.<sup>148</sup>

The ABA amendment, by precluding the application of the act of state doctrine in breach of contract actions brought under the Act, would settle the issue in *Allied Bank* and give effect to congressional approval of the “commercial activities” exception in the largest class of cases brought under Section 1605(a)(2) of the Act. This provision would also benefit parties whose contract claims come before the courts under Sections 1605(a)(1) and (3) of the Act<sup>149</sup> and as counterclaims under section 1607.

### 3. Arbitration

Courts should not raise concerns about the act of state doctrine in cases that involve the enforcement of arbitration awards, because the courts need not review the acts of foreign sovereigns nor decide any merits issue in such cases. These issues are entrusted to the arbitration tribunal by the consent of the parties and are not subject to judicial review. Under United States arbitration law and international agreements, a court may decline enforcement of an arbitration award only for those reasons specified in the law or treaty.<sup>150</sup>

However, the confidence of the Bar in this position was shaken by the decision in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiya*,<sup>151</sup> in which the court refused to enforce the award on an expropriation claim on the basis of the act of state doctrine. The district court apparently was troubled about giving effect to an arbitration clause in a concession agreement that the foreign state had repudiated, but this concern was unnecessary. It is settled law in the United States, and in other countries, that the arbitration clause is deemed to be a contract

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148. *Allied Bank Int'l v. Banco Credito Agricola DeCartago*, 757 F.2d 516 (2d Cir.), *cert. dismissed*, 106 S. Ct. 30 (1985).

149. *But see Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico*, 528 F. Supp. 1337 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984).

150. *See* 9 U.S.C. §§ 9-10, 207 (1970); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 3.

151. 482 F. Supp. 1175 (D.D.C. 1980), *vacated without opinion after settlement*, 684 F.2d 1032 (D.C. Cir. 1981).

separate from the agreement in which it is included for purposes of determining the authority of the arbitration tribunal. The arbitration tribunal retains jurisdiction to decide a claim of breach of contract even when the respondent alleges that the agreement is void on account of fraud in the inducement or that the contract has been rescinded.<sup>152</sup>

In view of the importance of international arbitration as a mechanism for the peaceful resolution of disputes between private parties and foreign states, S. 1071 and H.R. 3137 have been drafted to provide explicit direction to the courts that the act of state doctrine shall not "bar enforcement of an agreement to arbitrate or an arbitral award rendered against a foreign state."<sup>153</sup>

## VI. CONCLUSION

The amendments proposed by the ABA would strengthen the judicial remedies available in the United States to parties with claims against foreign states and government agencies, *inter alia*, by ensuring the enforcement of foreign arbitral awards and by broadening the possibilities of attachment and execution of judgment against the assets of foreign sovereign parties in appropriate circumstances. The fate of these proposed amendments will depend to a significant degree on the attitude of the Executive Branch.

In principle, the Reagan Administration should support measures that strengthen the international trading system and that help secure United States investment abroad, as such measures encourage the flows of capital, technology and know-how from the private sector, which the Administration recognizes to be essential to successful economic development in the Third World. However, the responsible attorneys in the State Department and the Justice Department are particularly sensitive to the reactions of foreign governments and to the interests of United States agencies as potential defendants in foreign courts.

The Executive finally defined its position in hearings in the House of Representatives on May 20, 1986.<sup>154</sup> The Administration

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152. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967).

153. Another bill introduced by Sen. Mathias, S. 1395, would deal with this issue by amendment to the U.S. Arbitration Act, 9 U.S.C. § 207 (1970).

154. See Testimony of Elizabeth Verville, Acting Legal Adviser, Department of State, Amending the Foreign Sovereign Immunities Act and Elimination Act

supported the substance of the ABA proposals on the enforcement of arbitral agreements and awards and the technical amendments removing certain problems in admiralty cases.<sup>156</sup> It also indicated a disposition "to support a change which would place the state owned essentially commercial enterprise in the same position regarding prejudgment attachment as its privately owned counterpart, except to the extent of its governmental activities, if any."<sup>156</sup> The Administration did not support the ABA's proposals concerning execution of judgment or the act of state doctrine, although it expressed interest in studying the act of state doctrine further. "We are prepared to look carefully at the possibility of legislation limiting the use of the doctrine by broadly adopting the 'reverse Bernstein' approach."<sup>157</sup> Unfortunately, the ninety-ninth Congress concluded before any of these proposals could be brought to fruition.

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of State Doctrine in Certain Cases, Before the Subcomm. on Admin. Law of the House Comm. of the Judiciary (May 20, 1986). Statement of Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division Department of Justice, Amendments to Foreign Sovereign Immunities Act of 1976, before the Subcomm. on Admin. Law and Governmental Relations (May 20, 1986).

155. The admiralty provisions were before the Subcommittee in H.R. 4592. See Statement of William R. Dorsey, III for the Maritime Law Association of the United States Before the House Judiciary Subcomm. on Admin. Law and Governmental Relations on Proposed Amendments to the Foreign Sovereign Immunities Act (May 20, 1986).

156. Verville, *supra* note 147, at 21.

157. *Id.* at 10.

