Spring 1978

The Foreign Sovereign Immunities Act of 1976

Dumont IV Clarke

Follow this and additional works at: http://scholarship.law.unc.edu/ncilj

Part of the Commercial Law Commons, and the International Law Commons

Recommended Citation

Available at: http://scholarship.law.unc.edu/ncilj/vol3/iss2/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
The Foreign Sovereign Immunities Act of 1976

by Dumont Clarke, IV*

As the level of international trade undertaken by sovereign states or their agencies has steadily increased, so too has concern over the continuing validity of the doctrine of foreign sovereign immunity. Although the doctrine's scope varies from nation to nation, it essentially offers foreign states a measure of immunity from the jurisdiction of domestic courts. The strength of the sovereign immunity principle in a legal system determines the extent of an individual's right to bring suit within that system against a foreign state or one of its agencies. Most nations have gradually restricted the immunity granted to foreign states, which was once almost total. Now a concept of limited immunity prevails. With a few exceptions, this general pattern of gradual restriction of immunity has been followed in the United States. The process of restriction was considerably advanced by the recent passage of the Foreign Sovereign Immunities Act of 1976. The Act codifies some common law rules of the doctrine of sovereign immunity, and it effects substantial changes in others. This comment will briefly review the development of foreign sovereign immunity in the United States, and will analyze the provisions of the Foreign Sovereign Immunities Act in order to determine its effect upon that doctrine.

I. Development of the Law of Sovereign Immunity

The concept of absolute immunity for foreign sovereigns was first applied in the United States in 1812 by Chief Justice John Marshall's opinion in Schooner Exchange v. McFaddon. In granting immunity in an

---

*J.D. 1978, University of North Carolina School of Law.
4 11 U.S. (7 Cranch) 116 (1812).
in rem action brought against a ship owned by France, Justice Marshall stated the doctrine as follows:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are received by implication, and will be extended to him.

... Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case in which the sovereign power has impliedly consented to waive its jurisdiction. 5

The doctrine of absolute sovereign immunity rests upon several theoretical bases that Marshall mentioned in his opinion. 6 It has developed primarily from the concept of the independence of all sovereign states. Since all are independent and thus of equal sovereignty, none can be made subject to the laws of another. Closely linked to this concept is the belief that allowing individuals to bring suit against sovereign states will embarrass such states and deprive them of the dignity to which every sovereign is entitled. 7 The doctrine has also relied for support on a general theory of comity among sovereigns. Each sovereign state, not wishing to be subject to suit brought by individuals in the courts of other sovereign states, has been willing to grant sovereign immunity to foreign states within its own courts, in order to encourage similar treatment abroad. A final factor was judicial cognizance of the great potential that suits brought by individuals against foreign states hold for disruption of foreign relations, a field traditionally reserved for the executive branch of government.

From these sources, Justice Marshall formulated the doctrine of absolute sovereign immunity as it was to be applied in the United States throughout the nineteenth and for over half of the twentieth century. 8

5 Id. at 137,146.
6 For an in-depth discussion of these bases of the doctrine of sovereign immunity, see 2 D. O'CONNELL, INTERNATIONAL LAW 913-916 (1965) and S. SUCHARITKUL, supra note 1, at 3-14.
7 In the British counterpart of the Schooner Exchange, The Parlement Belge, 5 P.D. 197, 207 (1880) (C.A.), the court relied heavily on this basis, declaring:
   From all these authorities it seems to us, although other reasons have sometimes been suggested, that the real principle on which the exemption of every sovereign from the jurisdiction of every Court has been deduced is that the exercise of such jurisdiction would be incompatible with this regal dignity — that is to say, with his absolute independence of every superior authority.
8 See Garcia-Mora, supra note 2, at 340.
His opinion in *Schooner Exchange*, however, did not consider whether the nature of the act engaged in by a foreign sovereign could possibly limit the application of the doctrine. The Court had occasion to consider this question in the 1926 case of *Berizzi Brothers Co. v. S.S. Pesaro*. The owners of a cargo of olive oil had brought suit for damage sustained during shipment of the oil from Italy to the United States aboard a merchant vessel owned and operated by the Italian Government. The district court, crediting the plaintiff's contention that immunity should not be allowed when a foreign sovereign engages in an act of a commercial nature, denied the Italian Ambassador's claim of immunity. The Supreme Court reversed, relying heavily on Justice Marshall's opinion in the *Schooner Exchange*:

> We think the principles [of the *Schooner Exchange*] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

Thus the concept of absolute sovereign immunity was firmly established, and it appeared that courts of the United States were unwilling to limit its scope in any meaningful way.

Several unique aspects of the sovereign immunity doctrine developed in the course of its application in the United States. First, U.S. courts developed a unique solution to the problem presented when a purported agency or instrumentality of a foreign state sought to claim immunity by virtue of its relationship to the foreign state. They took the position that when it was necessary to determine whether such an entity should be accorded immunity, the judiciary should defer to the executive branch of government. The potential for embarrassment to the executive in its conduct of the nation's foreign affairs was cited as the basis for this deference; the executive, through the State Department, should have complete control of foreign relations. Thus, the customary method of obtaining sovereign immunity was for a representative of the foreign sovereign to request that the State Department communicate

---

9 The doctrine of sovereign immunity as formulated by Chief Justice Marshall was strictly *ratione personae* with no consideration of the nature of the act in which the foreign sovereign had engaged that gave rise to the claim against it. See Garcia-Mora, *supra* note 2, at 337.

10 271 U.S. 562 (1926).

11 Id. at 574.

the claim to the court in which suit had been brought. After making a
determination whether the agency or instrumentality of a foreign
sovereign was or was not entitled to sovereign immunity, the State
Department would either recognize, suggest, or reject the claim of
sovereign immunity and communicate its position to the court. Where
the State Department only "suggested" sovereign immunity as opposed
to recognizing it, courts professed to be free to reject the suggestion and
make their own determination; in reality, they rarely did so. When
the State Department failed to make any recommendation, the court was
free to make an independent determination of the particular entity's
entitlement to immunity.

Second, by generally refusing to grant immunity to an instrument-
tality of a foreign sovereign that was operating as a corporation, the
courts grafted an exception onto the doctrine of sovereign immunity
which had no counterpart in other jurisdictions. This exception was
applied in cases where the corporation was both partly and wholly
owned or controlled by a foreign state. It can probably best be
explained as a reflection of the uniquely American philosophy of the
sanctity of the corporate fiction and a concomitant refusal to look behind
the corporate entity to determine actual control.

While courts in the United States continued to apply the doctrine of
absolute sovereign immunity, courts of other jurisdictions began to
question the bases of the doctrine and to restrict its availability to foreign
sovereigns. The courts of these jurisdictions made the distinction — as
the plaintiff in the Pesaro case sought to have the Court make — be-
tween the acts of a foreign sovereign that are jure imperii and acts jure
gestionis. Acts jure imperii are those of a public nature; acts jure gestionis
are those of a private nature. All essentially commercial activities in
which a sovereign state might engage, e.g., operating a merchant ship,
are acts *jure gestionis*. It was with respect to suits arising out of such acts that some jurisdictions began to deny sovereign immunity.

Just as was true of the original doctrine of absolute sovereign immunity, the genesis of the restrictive form of sovereign immunity has many sources. Foremost among them, however, was the increase in state trading activity that developed during the latter part of the nineteenth and during the twentieth century. Governments undertook the operation of railroads, shipping lines, and other extensive trading activities. As such state conducted trading increased, the incidents in which states sought to claim sovereign immunity from the jurisdiction of foreign courts increased correspondingly. Concern for individuals left without a remedy against a foreign sovereign was easily subordinated to the more weighty national interests to be served by according sovereign immunity to foreign states. However, as the number of affected individuals increased, the bases for the doctrine were increasingly questioned. Coupled with the simple increase in number of individuals suffering injury in the course of dealing with a foreign sovereign was a heightened concern for the rights of individuals and the principles of fairness and nondiscrimination. The doctrine of absolute sovereign immunity, formulated at a time when most acts of governments were strictly *jure imperii*, began to appear increasingly anachronistic.

In adapting to these changed circumstances and seeking to distinguish between the different acts of foreign states as a basis for selectively denying immunity, courts have encountered difficulties. Although the distinction between acts of a commercial nature and acts *jure imperii* may at first seem clear, courts have experienced great difficulty in formulating a test to be applied to any given situation. One method developed was to examine the nature of the act and deny sovereign immunity when a particular act was essentially commercial or private. To deter-

---

19 For a more extensive application of the distinction between acts *jure gestionis* and acts *jure imperii* see I. Brownlie, Principles of Public International Law, 321 (1973). Brownlie points out the inherent difficulty that is encountered in trying to draw a distinction between public and private acts of a government. "The short point is that there is a logical contradiction in seeking to distinguish between the 'sovereign' and 'non-sovereign' acts of a state. The concept of acts *jure gestionis*, of commercial, non-sovereign, or less essential activity, requires value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies." Id. at 323. In holding that a foreign state retains its immunity with respect to claims arising out of its operation of a merchant ship, the Supreme Court echoes the same concept. "We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace any less a public purpose than the maintenance and training of a naval force." Berizzi Bros. V S.S. Pesaro, 271 U.S. 562, 574 (1926).


21 Id. at 226.

22 Garcia-Mora, supra note 2, at 343-44.

23 See Sucharitkul, supra note 1, at 267-75.

24 Id. at 269.
mine the nature of the particular act courts looked to whether the act was one in which a private person could engage; if it was, immunity from jurisdiction would be denied. The second method of making the distinction was to examine the purpose of the act and determine whether it was traditionally a function of a sovereign state or whether it was a traditionally private and commercial one. The difficulties in applying either test have stemmed from the general lack of consensus on the proper role of government. As the prevalence of state planned and operated economies has increased, this lack of a consensus has increased correspondingly.

Although the Supreme Court of the United States in the *Pesaro* case reaffirmed its support for absolute sovereign immunity and thereby set the legal precedent that U.S. courts were to follow for the next thirty years, there were other indications that support for sovereign immunity was eroding in the United States. Many of the treaties of friendship, commerce, and navigation negotiated by the State Department during this period expressly provided that neither party to the treaty would invoke sovereign immunity to protect publicly owned enterprises engaged in commercial manufacturing or shipping activities in the other country. Judicial opinions which applied the theory of absolute immunity began to discuss the concept of restrictive immunity and compare the two. Extensive analysis and comparison of the competing theories appeared in legal periodicals with the majority of that analysis clearly favoring the adoption of the restrictive theory of sovereign immunity.

In 1952 the State Department adopted the doctrine of restrictive sovereign immunity in a letter from its Acting Legal Adviser, Jack B.

---

25 *Brownlie*, *supra* note 19, at 324.
26 Despite the difficulty in applying criteria on which the distinction between acts *jure gestionis* and acts *jure imperii* can be made, the number of countries adhering to the restrictive theory of sovereign immunity steadily increased. France, Italy, and Belgium were in the vanguard of the movement to limit sovereign immunity, but their formulation of the doctrine has been adopted by the courts of Germany, Egypt, Switzerland, and others. Until recently, the courts of the United States and Great Britain, however, continued to apply the doctrine of absolute sovereign immunity.

27 In a communication by the State Department with respect to the *Pesaro* case itself, it was suggested that the doctrine of sovereign immunity should be limited by not extending it to state owned commercial ships. Letter from Secretary of State Lansing to Attorney General McGregor (Sept. 18, 1918), *reprinted in 2 Hackworth, Int'l Law* 429-30 (1941). It was the judiciary in the United States that steadfastly refused to limit the doctrine. *Sucharitkul, supra* note 1, at 195.
Tate, to the Department of Justice. The letter announced, "it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." The Tate letter acknowledged that a "shift in policy by the executive cannot control the courts." It did, however, express the hope that the courts would be influenced by the decision and would follow the executive’s change in policy.

Although the courts have generally accepted the shift in executive policy and have applied the doctrine of restrictive sovereign immunity, problems have persisted. First, in deciding whether to allow a claim of sovereign immunity, the State Department makes what is essentially a judicial determination thus violating the traditional separation of powers. Executive interference has increased as the number of claims has multiplied and the State Department has been called on to make more recommendations to the courts. Second, the State Department has never enunciated clear guidelines for making its determination and has been susceptible to political pressure brought by foreign states seeking a favorable recommendation on a claim of sovereign immunity. The result has often been a suggestion of sovereign immunity from the State Department in a situation where the act giving rise to the claim was arguably of a commercial nature if not clearly so.

A third problem that developed under the Tate approach was that when suit against a foreign country was permissible there was no generally acceptable method of commencing suit against it. As personal service on an ambassador of the foreign state had long been prohibited, individuals seeking to sue a foreign state sought to attach its assets that were located within the United States seeking either in rem or quasi in rem jurisdiction. Although initially the State Department held that property of a foreign state was not only immune from attachment

31 Letter of Acting Legal Adviser, Jack B. Tate, To Department of Justice, May 19, 1952, 26 DEP’T OF STATE BULL. 984 (1952) [hereinafter cited as Tate Letter].
32 Id.
33 See, e.g., Victroy Transport Inc. v. Comisaria General De Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964).
34 Letter from Charles N. Browder, Acting Legal Adviser to the State Dept., to Representative Harold Donahue, July 24, 1973, Hearing on H.R. 3493, Before the Subcomm. on Claims and Governmental Relations of the House Committee on the Judiciary, 93rd Cong., 1st Sess. 49-50 (1973) [hereinafter cited as Hearing on H.R. 3493].
38 See In Re Baiz, 135 U.S. 403 (1890).
for purposes of execution but immune when attachment was used as a means of gaining jurisdiction as well, it later reversed its stand and indicated approval of the practice.\textsuperscript{40} Once the State Department approved attachment of assets of foreign states as a means of gaining jurisdiction over them, the practice increased rapidly.\textsuperscript{41} Although in many cases this method of obtaining jurisdiction was successful, foreign states which incurred attachment of their assets and resulting disruption of their activities increasingly expressed their irritation with the practice to the State Department.\textsuperscript{42}

Conflicts continued to persist as well with respect to the related doctrine of sovereign immunity from execution. In accord with the application of absolute immunity from jurisdiction, American courts long had adhered to a doctrine of absolute immunity from post-judgment execution on the property of a foreign state.\textsuperscript{43} The issue arose only occasionally, and in most instances, foreign states were granted jurisdictional immunity.\textsuperscript{44} But with the change in policy initiated by the Tate letter and the development of a limited doctrine of waiver of sovereign immunity, absolute immunity from execution was questioned increasingly as individuals were thus able to surmount the jurisdictional obstacles to suit against a foreign state only to be denied an effective remedy by the prohibition on execution.

Concern over these problems engendered by practice under the Tate letter policy gave rise to a concerted effort to reformulate the doctrine of sovereign immunity. In 1966, the legal staff of the State Department, in consultation with representatives of the Department of Justice, began studying issues that had arisen under the Tate letter policy and preparing a draft proposal for corrective legislation.\textsuperscript{45} By 1973, drafting had been successfully completed and the Foreign Sovereign Immunities Act was introduced in the first session of the ninety-fourth Congress.\textsuperscript{46} Although hearings were held shortly after its introduction, it was sub-

\textsuperscript{42} See, e.g., Weilamann v. Chase Manhattan Bank, \textit{supra} note 39.
\textsuperscript{43} New York and Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Dexter and Carpenter v. Kunglig Jarnvaggsstyrelsen, 43 F.2d 705 (2d Cir. 1930), \textit{cert. denied}, 282 U.S. 8% (1931). Even with the adoption of the restrictive theory of immunity from jurisdiction, the practice of absolute immunity from execution remained unchanged. Although there was only scant rationalization of its retention, it appears that the abrasive nature of the act — seizure of the property of a foreign state — may have been the basis. \textit{See} Garcia-Mora, \textit{supra} note 2, at 350. Courts of other jurisdictions, e.g., Egypt, follow a restrictive practice of sovereign immunity with respect to both jurisdiction and execution. \textit{Sucharitkul}, \textit{supra} note 1, at 262-63.
\textsuperscript{44} E.g., Loomis v. Rogers, 254 F.2d 941 (D.C. Cir. 1958).
sequently withdrawn from consideration. After some revision, the Act was reintroduced in early 1975, during the first session of the ninety-fifth Congress. With only minor amendments, this second version was approved by Congress in late 1976 and signed into law.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act has four primary objectives. First, it shifts the authority to determine whether to allow a claim of immunity from the State Department to the courts. Second, the Act codifies the Tate letter's *jure imperii/jure gestionis* distinction and provides a legal standard by which the distinction can be made. Third, the Act provides a comprehensive scheme for commencing suit against a foreign country, complete with provisions for obtaining personal jurisdiction and methods of serving process on a foreign state. And fourth, the Act provides that foreign states will no longer enjoy absolute immunity from execution and seeks to draw a distinction here analogous to that drawn with respect to immunity from jurisdiction.

A. Transfer from State Department to the Judiciary

A particularly troublesome question that arose under the Tate approach was the competence of the State Department to determine — on the basis of its *jure imperii/jure gestionis* distinction — whether a particular claim of sovereign immunity should be recognized or denied. The policy to be applied under the Tate doctrine depended "less on political judgment regarding the effect of litigation on foreign relations than on a detailed analysis of particular facts bearing on the classification of the activity on which the claim was based." Accordingly, it was suggested that "[d]etermination of whether an act was *jure gestionis* or *jure imperii* seemed, under the Tate approach, to be more a judicial than a State Department function." Political pressure brought to bear on the State Department in particular cases was also thought to have been influential and resulted in arguably inconsistent grants of immunity.

The Foreign Sovereign Immunities Act transfers to the judiciary the authority to determine whether or not a particular claim of sovereign immunity should be allowed. Although it may still be possible, in a

---

47 The Bill was introduced in the House by Representatives Rodino and Hutchinson as H.R. 11315, 94th Cong., 1st Sess. It was introduced in the Senate as S. 566, 94th Cong., 1st Sess.
50 See text accompanying note 34 supra.
51 Lowenfeld, supra note 41, at 907.
52 Id.
54 Section 1602 provides that "claims of foreign states to immunity [shall] henceforth be decided by courts of the United States."
particularly sensitive case, that the State Department will communicate its views to the court, the grant of authority to the judiciary is essentially exclusive. A foreign sovereign seeking to invoke immunity will present its claim directly to the court, which will then hear evidence on the activity from which the claim arose and determine whether such activity comes within one of the exceptions to the general grant of immunity that the Act affords. If it does, immunity will be denied; otherwise, the claim will be honored.

B. Legal Standards for Evaluating Claims of Sovereign Immunity

The Foreign Sovereign Immunities Act begins with the broad premise that “subject to existing international agreements to which the United States is a party at the time of the enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States.” After creating this broad presumption of sovereign immunity, the Act qualifies it by providing numerous exceptions.

The primary exception is embodied in section 1605(a)(2); it essentially codifies the jure imperii/jure gestionis distinction made by the Tate letter in providing:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the 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 caused a direct effect in the United States.

Elsewhere in the Act “commercial activity” is defined as “either a regular course of commercial conduct or a particular commercial transaction or act.” As it is under this exception that courts will most frequently be called upon to deny a claim of sovereign immunity, it requires extensive analysis.

The first of the three situations in which a claim of immunity will be denied is where “a commercial activity is carried on in the United States.” The definitional portion of the Act, both clarifies and qualifies this exception by providing that “‘a commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by

---

55 Hearings on H.R. 3493, supra note 34, at 15. The possibility that the State Department may, in exceptional cases, continue to make suggestions to the courts has aroused considerable scholarly ire. See, e.g., Atkeson, Perkins & Wyatt, H.R. 11315 – The Revised State–Justice Bill on Sovereign Immunity: Time for Action, 70 AM. J. INTL L. 298, 311 (1976). It is feared that any continued participation by the Department of State, other than in a technical sense, would result in the continued politicization of sovereign immunity claims and should be avoided.


57 Id. § 1603(d).
such state and having *substantial contact* with the United States."^{58} It would seem that the intent of this limitation is to accord foreign states the benefits of the constitutional limitations on the assertion of in personam jurisdiction that were established by the Supreme Court in the *International Shoe* case.^{59} Thus, although the Act clearly provides for denial of immunity where the commercial activity is carried on either wholly or in part in the United States, it provides that there must be a degree of contact at least beyond a bare minimum.^{60} Once a plaintiff shows the requisite contacts, however, this portion of section 1605(a)(2) can be used to obtain jurisdiction in disputes such as an action for breach of a contract to repair a merchant ship operated by a foreign state where the contract was entered into and the repairs were made in the United States, and disputes arising from commercial transactions relating to import-export operations.^{61}

The second of the three exceptions made in section 1605(a)(2) to the general presumption of immunity in section 1604 is when suit against a foreign state "is based upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." When presented with a claim based on such conduct, a court will not only be required to hear evidence on and determine whether activity of the foreign state conducted elsewhere comes within the section 1603(d) definition of commercial activity, but will also be obligated to determine whether the act performed in the United States on which the suit is based is connected with that activity. Given this two step process and the inherent difficulties of proof that it will engender, a plaintiff seeking to rely on this exception can expect numerous problems. Despite this heavier burden, however, there may be cases where a plaintiff may prefer to proceed under this section, given the *substantial contacts* limita-

^{58} Id. § 1603(e) (emphasis added).

^{59} *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The inclusion of this language indicates the drafters' intent to make the scope of jurisdiction in this section coextensive with that exercised under state long-arm statutes. See Atkeson, Perkins & Wyatt, *supra* note 55, at 304.

^{60} As the *Section-by-Section Analysis* points out, the definition in section 1603(b) is "intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff." It was added to the Bill after it was withdrawn from consideration in the 93rd Congress. H.R. 11315, 94th Cong., 1st Sess. (1976), *Section-by-Section Analysis* [hereinafter cited as *Section-by-Section Analysis*]. Both the text of H.R. 11315 and the *Section-by-Section Analysis* are reprinted in 15 *INT'L LEGAL MATERIALS* 88 (1976).

^{61} Other examples given by the *Section-by-Section Analysis*, to which the courts will be able to look as legislative history of the Act, include "import-export transactions involving sales to, our purchases from, concerns in the United States, business torts occurring in the United States (cf. § 1605(a)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States (e.g., loans, guarantees or insurance provided by the Export-Import Bank of the United States)." Id.
tion on "commercial activity carried on in the United States by a foreign state." 62

The third exception, providing for denial of immunity when suit is based 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," rests on the established principle of jurisdiction over extraterritorial conduct having effects within the United States. 63 A court presented with a suit based on this exception to the general presumption of sovereign immunity will be required to make three findings. First, that the activity conducted outside the United States by the foreign state was a commercial activity; second, that the act on which the suit is based was done in connection with that activity; and third, that the act caused a direct effect in the United States. As with the second exception based on commercial activity of a foreign state, a plaintiff seeking to bring suit under this portion of section 1605(a)(2) can expect to encounter difficult problems of proof.

The Act gives courts little in the way of a legal standard by which to determine whether a particular activity is commercial. In addition to defining commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act," the one attempt at a standard is in section 1603(d), which provides that "the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Although this directive indicates a definitive choice between competing methods of drawing the jure imperii/jure gestionis distinction, it fails to provide the necessary criteria on the basis of which the distinction can be made. 64 It is on this ground that the Act has been most severely criticized; it was contended that the Act should provide extensively developed standards by which courts could

62 The "substantial contact" limitation in section 1603(e) applies only to "commercial activity carried on in the United States" and thus would not apply to "an act performed in the United States in connection with a commercial activity elsewhere." Although courts are likely to require more than minimal contact in this area as well, the absence of an express limitation like section 1603(e) may make it easier to meet that burden.

63 United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965).

64 The legal adviser to the State Department, Charles N. Brower, gave some further explanation of the test in his statement to the committee considering the Bill.

For example, a foreign government airline or trading corporation would constitute a "regular course of commercial conduct" and therefore would qualify as commercial activity. A single contract, if of the same character as a contract which might be made by private persons, would ordinarily constitute a "particular commercial transaction or act."

The fact that the goods or services to be procured through the contract are to be used for a public purpose is irrelevant. For example, there would be no immunity with respect to a contract to manufacture army boots for a foreign government or the sale by a foreign government of a service or a product. Hearings on H.R. 3493, supra note 35, at 15-16.
determine whether a particular conduct was of a commercial nature.\textsuperscript{65} Despite this pressure, the drafters adhered to their purposefully indefinite approach, declaring that the alternative approach not only is impracticable but also unwise.\textsuperscript{66} Providing the courts with a degree of discretion in developing the standard by which activity of foreign states will be judged would appear to be the correct approach as it will allow them to "give a liberal interpretation to the commercial activity exception and to cast the net of jurisdiction widely."\textsuperscript{67}

A second major exception to section 1604's presumption of sovereign immunity, waiver of the right by a foreign state, is provided for by section 1605(a)(1). This exception encompasses both explicit and implicit waivers. Explicit waivers are of two kinds: general and specific. An example of a general waiver of sovereign immunity would be the terms of a treaty of friendship, commerce and navigation, providing that neither of the signatory nations will claim sovereign immunity with respect to suits arising out of commercial activities in which they shall choose to engage.\textsuperscript{68} Multilateral agreements to waive any claim to sovereign immunity with respect to a particular activity provide another example of general waivers of immunity.\textsuperscript{69} A specific waiver of immunity is a waiver contractually entered into between a foreign state and an individual with respect to a particular transaction or series of transactions. Such a contractual provision generally provides that the foreign state will forego any right it may have to claim sovereign immunity as a defense to a suit arising out of conduct entered into pursuant to the contractual agreement. It is anticipated that courts will have little difficulty in applying this exception when it is based on an explicit waiver. The one problem with such waivers has occurred when

\begin{itemize}
\item \textsuperscript{65} \textit{Sklaver, Sovereign Immunity in the United States: An Analysis of S. 566, 8 INT'L LAW. 408 (1974); Comment, The Impact of S. 566 on the Law of Sovereign Immunity, 6 LAW & POL'Y INT'L Bus. 179 (1974). For a succinct presentation of the difficulties of applying the "nature of the transaction" test, see the opinion of the court in Victory Transport Inc. v. Comisaria General De Abastecimientos Y Transportes, supra note 33.}
\item \textsuperscript{66} \textit{Statement of Legal Adviser to the State Department, Charles N. Brower, Hearings on H.R. 3493, supra note 34, at 16.}
\item \textsuperscript{67} \textit{Atkeson, Perkins & Wyatt, supra note 55, at 305.}
\item \textsuperscript{68} \textit{See, e.g., Treaty of Friendship, Commerce, and Navigation with the Federal Republic of Germany, Oct. 25, 1954, 7 U.S.T. 1839, T.I.A.S. No. 3593. Article XVIII, para. 2 provides:}
\begin{quote}
No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.
\end{quote}
\item \textsuperscript{69} \textit{See, e.g., The Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639. In article 21 it is provided that government-operated commercial vessels are subject to jurisdiction and execution to the same extent as private vessels.}
\end{itemize}
some courts deprived them of their full effect by allowing a foreign state to withdraw its waiver and plead immunity.\textsuperscript{70} Section 1605(a)(1) removes that last impediment to the effective use of the explicit waiver by providing that a foreign state may withdraw its waiver only "in accordance with the terms of the waiver."

Section 1605(a)(1) also provides for implicit waiver of sovereign immunity. Although the case law in this area remains unsettled, it is sufficiently well developed to merit the inclusion of such waivers. Examples of implicit waivers that have been developed by the courts include situations in which a foreign state, before raising any question of sovereign immunity, has filed a responsive pleading in a particular action brought against it.\textsuperscript{71} Other less settled instances of implicit waiver include situations in which a foreign state has agreed contractually that the law of the country in which the plaintiff is attempting to bring suit will govern any disputes arising out of the contract,\textsuperscript{72} and situations in which a contract between a foreign state and an individual provides for arbitration and the foreign state refuses to submit to arbitration.\textsuperscript{73} As the Act provides for no delimitation of the doctrine of implicit waiver, courts will be free to apply the doctrine as it has been judicially developed and to continue to expand it to encompass other forms of implied waiver.

Section 1605(a)(3) provides that sovereign immunity will not be granted where:

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

The Act also provides for denial of immunity where such property is "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States," although such property is not present in the United States. Although this provision of the Act makes it clear that a foreign state cannot avail itself of a claim of immunity to block such a suit, the

\begin{itemize}
  \item \textsuperscript{70} Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), cert. denied, 404 U.S. 985 (1971).
  \item \textsuperscript{71} Flota Maritima Browning De Cuba v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964). Haynsworth, J., observed, "consent to suit is manifested and waiver of sovereign immunity accomplished when the sovereign enters a general appearance, certainly if the general appearance is unaccompanied by a claim of immunity." \textit{Id.} at 625. The court noted, however, that even a waiver based on such conduct would not prevent a claim of sovereign immunity where "the overriding political considerations would require recognition of the immunity when the State Department suggests it is in the national interest notwithstanding the earlier general appearance." \textit{Id.}
  \item \textsuperscript{72} Note, \textit{The Immunity of Foreign Sovereigns in U.S. Courts - Proposed Legislation, 6 N.Y.U. J. INT'L L. \\& POL'Y} 473, 476 (1973).
  \item \textsuperscript{73} Note, \textit{Jurisdictional Immunities of Foreign States, supra} note 53, at 1237.
\end{itemize}
plaintiff may yet be prevented from getting an adjudication on the merits by application of the Act of State doctrine.\textsuperscript{74}

Section 1605(a)(4) of the Act codifies a long-standing exception to the sovereign immunity doctrine. It denies immunity to foreign states where a suit puts in issue “rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States.” The exception was born of necessity and bolstered by the traditional right of every sovereign to control the disposition of property within its borders.\textsuperscript{75}

Section 1605(a)(5) is designed to abrogate sovereign immunity with respect to suits for monetary damages based on tortious acts committed by a foreign state or any of its representatives while acting within the scope of their employment.\textsuperscript{76} This provision is primarily intended to permit a suit against a foreign state whose employees, while acting within the scope of their employment, cause automobile accidents which result in injuries to others. This section does not make the individual representative liable, and thus does not alter the concept of diplomatic immunity, but does offer the injured plaintiff, in such instances, a sorely needed remedy. The abrogation of foreign sovereign immunity in this section is limited by several provisions that are closely patterned after the limitations on sovereign liability in the Federal Tort Claims Act.\textsuperscript{77}

\textsuperscript{74} Related to the Sovereign Immunity doctrine, the Act of State doctrine evolved from the premise that “every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of government of another done in its own territory.” Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Like the Sovereign Immunity doctrine, it is largely based on the policy of avoiding potential embarrassment of the executive department’s conduct of foreign relations by judicial restraint with respect to actions of foreign states. The Act of State doctrine has been limited in recent years, both judicially and legislatively. See the “Sabbatino Amendment” to the Foreign Assistance Act of 1964, 22 U.S.C.A. § 2370(e) (West 1970); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

In the recent case, Alfred Dunhill of London v. Republic of Cuba, \textsuperscript{76} U.S. \textsuperscript{96} S.Ct. 1854 (1976), the Supreme Court relied heavily on the distinction drawn in sovereign immunity determinations between acts \textit{jure imperii} and acts \textit{jure gestionis} to limit the Act of State doctrine. The Court held that it does not apply to prevent adjudication of the validity of “acts committed by foreign sovereigns in the course of their purely commercial operations.” \textit{Id.} at 1861. Thus, while the \textit{Section-by-Section Analysis} of the Foreign Sovereign Immunity Act of 1976 and the statements of persons who participated in its drafting make clear that this provision is not intended to affect the Act of State doctrine, \textit{Hearings on H.R. 3493, supra} note 34, at 20, it is apparent that the concept to be applied with respect to sovereign immunity determinations has influenced and will continue to influence the development of the Act of State doctrine. Although it is unlikely that the inclusion of section 1605(a)(3) in the Act will allow all owners of property that is taken in violation of international law to adjudicate their claims, it will at least relieve them in most cases of the double burden of contesting the application of the sovereign immunity as well as the Act of State doctrine. Furthermore, it may well lead to further delimitation of the Act of State doctrine itself. See \textit{generally}, Atkeson, Perkins & Wyatt, \textit{supra} note 55, at 310.

\textsuperscript{75} See Tate Letter, \textit{supra} note 31.

\textsuperscript{76} See Atkeson, Perkins & Wyatt, \textit{supra} note 55, at 305.

The final exception to sovereign immunity in section 1605 relates to the enforcement of maritime liens against foreign sovereigns. Its effect is to deny immunity to a foreign state in enforcement proceedings where the maritime lien against a vessel or cargo of the state is "based upon a commercial activity of the foreign state." The section also makes special provisions for giving notice of a suit to enforce such liens.

Section 1606 of the Act accords a foreign state a general grant of immunity with respect to claims based on its public debt. The immunity granted by this section is expressly limited to foreign states and does not include political subdivisions, agencies or instrumentalities. The latter will not be granted immunity from claims that are based on their debt obligations. The immunity accorded foreign states by this section is further limited to those cases arising from debt obligations that were "incurred for general governmental purposes." The Act fails to provide any standards by which courts can draw the distinction between debt obligations issued for a specific purpose and those incurred for "general governmental purposes." The distinction in this section, based as it is on the purpose of the debt obligation, is directly counter to the explicit directive in 1603(d) that courts, in drawing the distinction between commercial and non-commercial activities of a foreign state, shall not look to the foreign state's purpose in entering into the particular transaction. Because the purpose test was rejected as impracticable in section 1603(d) does not necessarily mean it is an impracticable standard for use with respect to the public debt. But the difficulties that have been encountered in applying that standard elsewhere may well be carried over to this area, particularly as the standard here is so lacking in specificity and guidance.

Although the immunity accorded to foreign states with respect to cases related to their public debt incurred for general governmental purposes may, in some instances, leave an injured plaintiff without a remedy, that result is made unlikely by the inclusion of two qualifications in section 1606(b)(1). The first qualification provides that immunity under this section will be denied where "the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." As such waivers are usually considered by

---

78 The Section-by-Section Analysis indicates that the primary purpose of this section is to create in personam jurisdiction for the enforcement of maritime liens so as to avoid "arrests of vessels or cargo of a foreign state to commence a suit." Supra note 60.

79 This immunity granted to foreign states with respect to public debt is perhaps best explained by the traditional public nature of such activity. Public loans were among the five categories of "strictly political or public acts about which sovereigns have traditionally been quite sensitive" identified in the well-grounded opinion in Victory Transport v. Comisaría General De Abastecimientos Y Transportes, supra note 33. The strong possibility that courts would hold under section 1605(a) (2) that incurring public debt obligations is a "commercial activity" necessitates this special section on immunity for such activity.
underwriters of public debt obligations to be essential to the success of such issues, they will generally be included as a matter of course. And finally, section 1606(b)(2) imposes another substantial qualification on the general grant of immunity in cases relating to public debt by denying such in cases arising under the laws administered by the Securities and Exchange Commission.

Immunity with respect to counterclaims arising during the course of suits brought by foreign states in the courts of the United States is governed by section 1607 of the Act. United States courts had early developed the rule that by invoking the jurisdiction of the courts of the U.S. to bring suit against an individual, a foreign state implicitly waives its immunity with respect to at least some types of counterclaims. Although the concept applied initially only to counterclaims based on the subject matter of the foreign state's suit, the Supreme Court, in *National City Bank v. Republic of China,* approved lower courts' gradual expansion of the doctrine. There the Court held that when a foreign state initiates suit it will be prohibited from claiming immunity not only with respect to counterclaims based on the subject matter of the state's suit but also with respect to any counterclaim to the extent that it does not exceed the amount of the state's claim. For purpose of codification and clarification, the drafters of the Act thought it advisable to include a separate section on the extent of such implicit waiver.

A foreign state will be unable to invoke immunity from counterclaims in three situations: first, where it would not have been entitled to immunity under other provisions of the Act had the claim been brought in a separate action; second, where the counterclaim arises "out of the transaction or occurrence that is the subject matter of the claim of the foreign state"; and third, with respect to any counterclaim, whether or not such claim could have been brought independently, "to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state." The logic of the first counterclaim exception should be self-evident. If the claim could have been brought in a separate action, judicial economy suggests the defendant be allowed to assert it in the proceeding against him. The second exception is the broadest; it will allow a defendant to assert an unlimited counterclaim that he could not bring in a separate action against a foreign state, so long as the claim is sufficiently related to the claim brought by the foreign state against the defendant. The third exception, although valuable, is somewhat limited in scope. It provides relief to an individual who is sued by a foreign state and who has an independent claim against the state which he would be unable to bring

---


82 *348 U.S. 356 (1955).*
in a separate action because of the availability of sovereign immunity to the foreign state. The extent and nature of the claim brought by the foreign state will limit the relief which can be counterclaimed.

C. Service of Process Under the Act

One of the major difficulties under the Tate approach that led to the present reformulation of the sovereign immunity doctrine was the method by which suits against foreign states were commenced.\(^83\) A party was generally compelled to attach assets of the foreign state to establish either in rem or quasi in rem jurisdiction over it. This practice often led to friction between the United States and the foreign state whose property was attached. It was also, from a plaintiff's point of view, an unsatisfactory means of obtaining jurisdiction over a foreign state as courts were generally less than favorable to the practice.\(^84\)

Cognizant of the difficulties with this approach, the drafters of the Act took two steps: one, they prohibited attachment of a foreign state's property as a means of obtaining jurisdiction over it;\(^85\) second, they included in section 1608 extensive provisions for service of process on foreign states, their agencies and instrumentalities. Thus, an individual with a claim against a foreign state, one of its agencies, or instrumentalities, not barred by sovereign immunity, will be able to assert in personam jurisdiction over the defendant and serve process on it under one of the varied methods provided by section 1608.

In most of its provisions for service of process, section 1608 draws a distinction between service on a foreign state and service on an agency or instrumentality of a foreign state.\(^86\) The preferred method of service on both, however, is "by delivering a copy of the summons and of the complaint in accordance with any special arrangement for service" between the plaintiff and the defendant. This provision will allow an individual entering into a transaction with a foreign state, one of its agencies, or one of its instrumentalities to contractually provide for a method of service that is acceptable to both parties. In drafting such an agreement individuals would be well advised to include such a provision in conjunction with a provision waiving the immunity of the foreign state\(^87\) in order to eliminate any question about the assertion of jurisdiction or the method of service of process to be used in the event of a suit based on the contract.

---

\(^{83}\) See text accompanying note 37 supra.

\(^{84}\) See Lowenfeld, supra note 41, at 924.

\(^{85}\) § 1609.

\(^{86}\) Section 1608 also provides that all of its provisions are "subject to existing and future international agreements to which the United States is a party." Therefore, in a given situation, some of the methods of service provided may be prohibited by agreement or other methods may be available. It will be necessary for litigants to study the agreements which apply to a particular situation to make such a determination.

\(^{87}\) See text accompanying notes 66-68 supra.
If service cannot be effected on an agency or instrumentality under the terms of a "special arrangement," section 1608 provides that it shall be made by "delivery of a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." A litigant who is unable to serve process under the terms of a "special arrangement" will generally find that service can be effected under this method as most states require that an entity such as an agency or instrumentality of a foreign state that is engaged in commercial transactions appoint or designate an agent for service of process in the United States.\(^{88}\)

At the next stage, the provisions for service of process become almost identical again for foreign states, their agencies and instrumentalities. If service cannot be made on a foreign state under the terms of a "special arrangement," or on an agency or an instrumentality of the foreign state by service in the manner previously discussed, the litigant can serve process by delivering

> a copy of the summons and the complaint, together with a translation into the official language of the foreign state, as directed by an authority of the foreign state or of a political subdivision in response to a letter rogatory or request, or by sending a copy of the summons and the complaint, together with a translation into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the official in charge of the foreign affairs of the state which is, or whose political subdivision is named in the complaint, or (where the suit is against an agency or instrumentality of the foreign state) to the agency or instrumentality to be served.\(^{89}\)

A litigant seeking to serve process on an agency or instrumentality of a foreign state has a third alternative at this stage as well. He may serve process "as directed by order of the court consistent with the law of the place where service is to be made."\(^{90}\) Under this provision, a plaintiff could conceivably convince a court to appoint an individual to physically serve process on the entity in the foreign state where it is located. A court could not do so, however, where the law of the foreign state prohibits such service pursuant to the order of a foreign court.\(^{91}\)

\(^{88}\) See Atkeson, Perkins & Wyatt, supra note 55, at 303, n.29.
\(^{89}\) § 1608(2)(b).
\(^{90}\) § 1608(b)(3)(c).
\(^{91}\) The first version of the Foreign Sovereign Immunity Act that was introduced in 1973 included a provision for service of process on the diplomatic representatives of a foreign state. S. 566, 93d Cong., 1st Sess. (1973), proposed § 1608. Strenuous objections were made to this method, however, on the basis of Article 22 of the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, and it was removed from the final version of the Act. See Section-by-Section Analysis, supra note 60, at § 1608.
Litigants seeking to serve process on a foreign state who are unable to do so by any of the methods already discussed may have a final alternative available to them. The plaintiff may request that the Secretary of State send "two copies of the summons and complaint, together with a translation into the official language of the foreign state" through diplomatic channels to the foreign state. The Secretary will comply with the request in three instances only: one, where the plaintiff's claim is based on a tortious act of a diplomatic or consular representative of the foreign state; two, where the foreign state uses the same method to serve process on other sovereigns; and three, where neither of the first two conditions are met, the State Department will comply with the request if "the foreign state has not notified the Secretary of State prior to the institution of the proceeding in question that it prefers that service not be made through diplomatic channels." Although it is unlikely, given the other methods of service, that a litigant must attempt before he may resort to service through diplomatic channels, that this method of service will be heavily used, its inclusion will insure that in some instances service can be made by a plaintiff in difficult situations where other attempts are unsuccessful. It will thus serve as a method of last resort available only under limited circumstances.

Sections 1608(d) and (e) offer defendants certain unique procedural protections. Foreign states, their agencies, and their instrumentalities will have sixty days within which they must "serve an answer or other responsive pleading" after a complaint has been served on them. Section 1608(e) affords all such defendants the identical protection the United States enjoys with respect to suits brought against it; a plaintiff may not obtain a default judgment without first establishing "his claim or right to relief by evidence satisfactory to the court."

D. Immunity from Execution Under the Act

Both before and after the adoption of the Tate approach, a plaintiff who was able to surmount the obstacle of a foreign state's immunity from jurisdiction and obtain a judgment against it was denied the right of execution against property owned by the foreign state. Immunity from execution arose largely from the same considerations that gave rise to the concept of immunity from jurisdiction. That it survived in its absolute form after the Tate letter, however, is indicative of the concern that any limitation on immunity from execution would create even
greater potential for embarrassment to foreign states and consequently would interfere with the executive's conduct of foreign affairs.\textsuperscript{96} It was the position of the State Department after the adoption of the Tate approach, therefore, that there is "a distinction between immunity from jurisdiction and immunity from execution ... in accordance with international law, property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit ...."\textsuperscript{97} Unless a litigant who was successful on the merits of his suit was able to secure voluntary compliance by the foreign state with the judgment, he was generally left without a remedy. He might seek to have diplomatic pressure brought to bear on the foreign state, but that method is cumbersome and not particularly successful.\textsuperscript{98} In many cases the foreign state that chose to disregard a judgment awarded against it by a United States court was free to do so.

As the adoption of the Tate approach made it possible for individuals to bring suit more readily against foreign states and their instrumentalities, the lack of an effective method for enforcement of judgments against foreign states became a matter of concern. Therefore, in drafting the Foreign Sovereign Immunities Act, the Justice and State Departments sought to limit the doctrine of absolute immunity from execution. In doing so, they relied on the distinction that was employed in the Tate letter to limit sovereign immunity from jurisdiction. They sought to authorize execution in satisfaction of judgments against foreign states and their instrumentalities where property used for commercial activity by the foreign state or its instrumentality is available for execution.\textsuperscript{99} Because of the particular sensitivity of foreign states to execution against their property, however, the Act imposes considerable limitations on the availability of the remedy and may still leave a successful litigant without recourse to satisfy a judgment.

The Act provides in section 1609, in accord with the presumption of jurisdictional immunity, that as a general rule property belonging to a foreign state, an agency, or instrumentality of the state is immune from execution subject to any limitations on that principle in other parts of the Act. Section 1610 then sets out the exceptions to that general rule under which execution will not be prohibited.

Section 1610 first makes general exceptions to the grant of immunity from execution on the property of foreign states, their agencies, and their instrumentalities that is used for a commercial activity in

\textsuperscript{99} Hearings on H.R. 3493, supra note 34, at 22.
the United States. Post-judgment execution will be allowed where the state or its agency has waived its immunity from execution "either explicitly or by implication." The provision is virtually identical to the waiver exception to jurisdictional immunity in section 1605(a) (1) and the analysis of waivers under that section applies here equally.\textsuperscript{100} Explicit waivers of immunity from execution are already in effect under the terms of some U. S. treaties of friendship, commerce, and navigation. Individuals entering into transactions with foreign states or their instrumentalities should bargain for the inclusion of such a waiver in their agreement.

The lack of a developed doctrine of implied waiver of immunity from execution will certainly give rise to considerable litigation.\textsuperscript{101} Courts have been reluctant to find any implied waiver of immunity under prior law, and they may continue to limit its scope.\textsuperscript{102} The drafters of the Act, however, purposefully left the concept of implied waiver undefined, thereby giving the courts broad discretion in determining what actions shall constitute implicit waiver.

Where the property of the foreign state or its instrumentality used for a commercial activity in the United States upon which the successful litigant seeks to execute "is or was used for the commercial activity upon which the claim is based," it will also not be immune from execution.\textsuperscript{103} This exception is similar to the commercial activity exception in section 1605(a) (2) to jurisdictional immunity. This exception, although it is modified with respect to property of a foreign state’s agency or instrumentality by section 1610(b), is certain to give rise to considerable litigation. The litigant seeking to execute against such property will have the burden of showing that the property is or was used for the commercial activity on which he based his claim. In situations where property that was directly used for the commercial activity from which the claim arose is insufficient to satisfy the judgment, a successful litigant is certain to seek execution against other property of the defendant that was only tenuously connected with the activity on which the suit was based. The Act clearly leaves the courts free to develop limits to this exception on a case-by-case basis. Also, an individual seeking post-judgment execution against assets that are no longer used in the commercial activity on which his claim was based will undoubtedly have a difficult burden in proving that the assets on which he seeks to execute were formerly used in such activity. The inclusion of this part of the provision is commendable and will prevent a foreign state from escaping the enforcement of

\textsuperscript{100} See note 68 \textit{supra}.

\textsuperscript{101} See generally, Flota Maritima Browning v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964).


\textsuperscript{103} § 1610(a)(2).
judgments against it by quick transfers of its assets.104 It will, however, not be a simple matter for a litigant to meet the burden of proof imposed by this section, and it is likely that a foreign state that resorts to such a transfer of assets as a means of avoiding execution will be prepared to litigate the issue extensively.105

Sections 1610(a)(3), (4), and (5) provide for three other exceptions to the immunity from execution of property belonging to a foreign state and its agencies or instrumentalities that is used for a commercial activity in the United States. The first exception, which complements the exception to jurisdictional immunity in section 1605(a)(4), allows execution against such property where "the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law."106 The second exception, which is consistent with the exception to jurisdictional immunity in section 1605(a) (5), denies immunity from execution where the litigant is seeking to enforce a judgment that establishes "rights in property which is acquired by succession or gift, or which is immovable and situated in the United States."107 The third exception authorizes execution against "any contractual obligation or any proceeds from such contractual obligation" where a foreign state or its instrumentality has in effect a policy of "liability or casualty insurance covering the claim which merged into the judgment."108 This third exception is included primarily to provide for satisfaction of judgments obtained in suits brought under the section 1605(a)(5) exception to jurisdictional immunity for tortious acts committed by representatives of a foreign state while acting in the course of their employment.

Section 1610(b), by modifying some of the limitations imposed in section 1610(a), expands the right of an individual to execute against the property of an agency or an instrumentality of a foreign state that is engaged in commercial activity in the United States. Whereas, in section 1610(a) the right of execution is limited to property "used for a commercial activity in the United States," execution may be had against an agency or instrumentality of a foreign state under 1610 with respect to "any property in the United States" belonging to the entity if certain conditions are satisfied.109 First, execution will be allowed against "any property in the United States" where the agency or instrumentality has waived its immunity from execution either implicitly or explicitly. Second, such ex-

---

104 Hearings on H.R. 3493, supra note 34, at 22.
105 Section-by-Section Analysis, supra note 60, at § 1608.
106 See text accompanying notes 72-75 supra.
107 See text accompanying note 77 supra. There is an exception to this exception that prohibits execution against property "used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission."
108 § 1610(a)(4)(c).
109 (Emphasis added).
panded execution will be allowed where the "judgment relates to a claim for which the agency or instrumentality is not immune by virtue of sections 1605(a)(2), (3), or (5) or 1605(b) . . . regardless of whether the property is or was used for the activity upon which the claim is based." 110 This expansive right of execution, which is provided in order to enforce judgments against agencies or instrumentalities of foreign states engaged in commercial activity in the United States, is a particularly commendable change in the U.S. law of sovereign immunity. They perform essentially the same function as do private American corporations engaged in commercial activities abroad, and individuals who transact business with them should be entitled to the protection that this broad right of execution offers.

Sections 1610(c) and (d), by imposing further limitations on the effectuation of execution, offer foreign states unique protections. First, section 1610(c) provides that execution shall be permitted only upon court order. Before issuing such an order, a court must determine that "a reasonable period of time has elapsed following the entry of judgment." The Section-by-Section Analysis of H. R. 11315 suggests that in making this assessment, "the courts should take into account procedures including legislation that may be necessary for payment of a judgment by a foreign state, which may take several months."

Section 1610(d) provides that the property of a foreign state, its agencies, or its instrumentalities is immune from "attachment prior to entry of judgment . . ., or prior to the elapse of the period of time" provided in section 1610(c) with one exception. Such property may be attached prior to judgment where "the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against a foreign state" and the foreign state, agency, or instrumentality has "explicitly waived its immunity from attachment prior to judgment." The effect of this prohibition is to deny individuals the protection of available attachment procedures to prevent a foreign state defendant from removing assets from the jurisdiction of the court to avoid their being subjected to execution in satisfaction of a judgment. 111

When coupled with the reasonable period of time that section 1610(c) requires to elapse before an order for execution against a foreign state, its agency, or instrumentality may be issued, the prohibition on attachment in section 1610(d) may deprive the claimant who is successful on the merits of an effective method of enforcing his judgment. This relatively broad prohibition of pre-judgment attachment is due, at least in

110 § 1610(b)(2). The sections provide exceptions to sovereign immunity where an instrumentality of a foreign state is engaged in a commercial activity, where rights in property taken in violation of international law are at issue, where damages are sought for a tortious act causing injury, and where suit is brought to enforce a maritime lien based on commercial activity of the instrumentality.

part, to the considerable irritation engendered among foreign states by the practice followed by plaintiffs since the adoption of the Tate approach of attaching their assets to secure jurisdiction over them. The drafters of the Act may have envisioned scores of litigants attaching available assets of foreign states to assure satisfaction of potential judgments, when, in reality, protective attachment will not generally be necessary. Such a fear would seem unfounded and, even if well-grounded, might still be legitimately questioned as justification for depriving those individuals who genuinely need it of protective attachment.

Section 1611 specifically exempts certain types of property from execution. Property of international organizations that is held for a foreign state may not be executed against by the judgment creditor of the state. "Property of a foreign central bank or monetary authority held for its own account," is afforded similar protection. Section 1611(b)(2) provides that "property of a foreign state that is, or is intended to be, used in connection with a military activity and is of a military character or under the control of a military authority or a defense agency" is likewise immune from attachment for execution. Although the first two prohibitions on execution in this section are essentially technical and will not affect the overall scheme of the Act, the third may result in considerable litigation considering the volume of military supplies and weapons that are purchased in the United States by foreign states from private individuals.

E. Further Changes in the Judicial Code

As part of the transfer of authority to make determinations with respect to claims of immunity to the courts, the Act makes several changes in other parts of the judicial code. A new section 1330 is added that gives federal district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state ... as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity." The section also provides that "personal jurisdiction over a foreign state shall exist"
where process has been served pursuant to the provisions of the Act. Section 1332 is amended to remove foreign states as parties from the section, which gives jurisdiction to federal courts in diversity suits, because, with the addition of section 1330, this basis for jurisdiction over suits against foreign states will no longer be necessary.

To clarify procedures for bringing suit under the Act, several changes were made in the federal venue and removal statutes. A new subsection (f) is added to section 1391 providing for venue in four situations: 1) suit may be brought against a foreign state, its agency, or instrumentality “in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated”; 2) suits brought to enforce a maritime lien under section 1605(b) may be brought in “any judicial district in which the vessel or cargo of the foreign state is situated”; 3) where suit is brought against an agency or instrumentality of a foreign state, venue is proper “in any judicial district in which the agency or instrumentality is licensed to do business or doing business”; and 4) where suit may be brought against a foreign state or one of its political subdivisions “in the United States District Court for the District of Columbia.” A new subsection (d) authorizing a foreign state, its agency, or instrumentality to remove at will a suit brought against it in a state court to federal court is added to section 1441.116

F. Conclusion

As one of the drafters of the Foreign Sovereign Immunities Act observed, “no one would contend that the jurisdiction of domestic courts of the United States over claims against foreign states is one of the great problems of the day.”117 Passage of the Act should, however, have a salutary effect on the problems that have arisen as a result of the traditional approach to sovereign immunity in the United States. First, the Act will assure private persons entering into commercial transactions with foreign states or their agencies or instrumentalities that should a dispute arise between them, determinations with respect to claims of immunity will be made in a fair and consistent manner. Transferring to

116 Litigation has already occurred under this section. See Martropico Compania Nave- era S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 428 F. Supp. 1035 (D.C.N.Y. 1977), where the federal district court remanded a case removed from state court on the defendant’s motion made shortly after the passage of the Act. The court held that Congress did not intend the removal authorization to apply retroactively to suits against foreign states or their instrumentalities filed in state courts prior to the passage of the Act. It relied on the prospective nature of the Act’s grant of subject matter jurisdiction to federal courts and the time limitation imposed on removal by the Act. Although section 1441(d) provides that such time limitation “may be enlarged at any time for good cause shown,” the court ruled that “To allow passage of the statute alone to constitute ‘cause shown,’ however, would be to eviscerate that standard by making it automatically satisfied in all cases pending in state courts on the effective date of the Immunities Act.” Id. at 1038.

117 Lowenfeld, supra note 41, at 936.
the courts exclusively the authority to determine whether a claim of immunity will be allowed should depoliticize the process and insure that an individual is not denied a remedy in order to further the foreign policy goals of a particular administration. Courts, with their traditional independent status, are far better adapted to making fair and consistent determinations of this kind that depend upon application of general legal standards to complex fact situations. Moreover, the role of domestic courts as interpreters of international law will be enhanced.\footnote{118} 

Besides depoliticizing the immunity determinations, the Act, by codifying and in some instances modifying the Tate approach, has the salutary effect of clarifying the law of sovereign immunity. Although one of the purposes of the Tate letter was to accomplish the same goal, it failed to cover all aspects of the doctrine, and developments in the law of sovereign immunity since the issuance of the letter have been extensive. This clarification through legislation will create greater certainty in the law and allow individuals contemplating entering into transactions with foreign states, their agencies, and their instrumentalities to determine what possible legal recourse would be available to them should the need for such action arise. One result of this greater certainty with respect to the legal rights one has available against foreign states is certain to be an increase in trade with countries, such as the Soviet Union, which carry on most of their trade by means of state controlled agencies and instrumentalities.

The two major modifications of the Tate approach that are effected by the Act are of tremendous practical significance to potential litigants. By prohibiting the practice of attaching property of foreign states as a means of gaining jurisdiction over them and substituting the extensive service of process provisions by which parties can secure in personam jurisdiction, the Act will make commencement of suit against a foreign state, its agency, or instrumentality a far less complex process. At the same time, the Act eliminates the possibility of further irritation of foreign states as a result of attachment of their property. By abrogating the traditional absolute sovereign immunity from execution, the Act provides that individuals will not only have the right to proceed against foreign states, their agencies, and instrumentalities, but, when successful on the merits of a claim, that they will have a remedy as well.

In addition to the favorable effect it will have on the law of foreign sovereign immunity in the United States, the Act can be expected to contribute substantially to the development of international law. Sovereign immunity is an area of international law that is peculiarly suited to unification by multilateral agreement, and it is conceivable that

\footnote{118} Note, Jurisdictional Immunities of Foreign States, supra note 71, at 1233.
FOREIGN SOVEREIGN IMMUNITY

such an agreement will be forthcoming in the not too distant future.\textsuperscript{119} The codification of the U.S. law with respect to foreign sovereign immunity clarifies this country's position with regard to such immunity, and it could serve as a starting point for negotiation on an international agreement.\textsuperscript{120} Where the Act breaks new ground, e.g., by allowing a broad right of execution against agencies and instrumentalities of foreign states, it can be expected to particularly influence the development of international law as other countries reevaluate their laws in light of the U.S. experience under the Act.

Viewed as a whole, the Act reflects a universal pattern of restriction of the scope of sovereign immunity. It represents a further shift in the balancing of the need to prevent political embarrassment of governments at the hands of foreign courts against the need to provide a legal remedy for the injured individual. Because the right of individuals to effective legal redress against foreign states is increasingly necessary in the modern world of extensive state trading, the passage of the Foreign Sovereign Immunities Act represents commendable progress in the development of international law.

\textsuperscript{119} In anticipation of such an agreement, section 1604 of the Act provides that immunity of foreign states shall be governed by its provisions "subject to existing and future international agreements." The legal adviser to the State Department, Charles N. Brower, observed in his statement on the Act:

\begin{quote}
We have done this [draft of the Foreign Sovereign Immunities Act] also conscious of the fact that the Council of Europe has prepared and has had signed, I believe, by seven countries, a convention on sovereign immunity and how the question would be handled in countries which are part of it, and we do hope that we have something here in this statute before us that takes into account what is going on in the rest of the world and which could lead us to a broader and more precise agreement throughout the world. Hearing on H.R. 3493, supra note 34, at 49-50.
\end{quote}

\textsuperscript{120} An example of international agreement on the law of sovereign immunity is the European Convention on State Immunity, 11 INT'L LEGAL MATERIALS 470 (1972). Although it is only regional in its application, it indicates a growing awareness that the problem is best handled by multilateral agreement. See Mann, New Developments in the Law of Sovereign Immunity, 36 MOD. L. REV. 18 (1973); See Comment, Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity, 12 COLUM. J. TRANSNAT'L L. 130 (1973). The Convention, although similar to the Foreign Sovereign Immunity Act in that its basic thrust is towards restriction of the doctrine, differs from it considerably in several aspects. Rather than creating a general legal standard for determining when to allow claims of immunity, it specifies particular acts with respect to which foreign states are not to be accorded immunity. The Convention also provides only a very limited right of execution against the property of foreign states and their instrumentalities. Any future general international agreement would have to resolve these differences in approach to the question of state immunity.