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The Right of Foreign Sovereigns To Contest Federal Court Jurisdiction Pro Se

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Abstract

This Note argues that foreign sovereign defendants should be accorded pro se status in federal courts to contest jurisdiction, subject to the discretion of the court. Part I examines the problems faced by foreign sovereigns being sued in United States federal courts. Part II analyzes pro se representations and the policies underlying limitations on its use. Part III presents rationales in support of pro se representation by foreign states and proposes factors for courts to consider in determining the propriety of pro se representation.

NOTES

THE RIGHT OF FOREIGN SOVEREIGNS TO CONTEST FEDERAL COURT JURISDICTION *PRO SE*

INTRODUCTION

The United States federal courts have not articulated a coherent policy for permitting foreign sovereigns to proceed *pro se*¹ in United States courts to contest threshold issues of jurisdiction under the Foreign Sovereign Immunities Act of 1976² ("FSIA" or "the Act"). Although federal courts generally allow foreign sovereigns to appear *pro se*,³ the courts have not reconciled such representation with traditional limitations on *pro se* representation.⁴ The FSIA provides for the immunity of foreign states⁵ from suit in United States courts except in certain limited and specifically enumerated circumstances. The problem faced by foreign sovereigns being sued in United States courts is how to assert an immunity defense without having to employ local counsel, thereby incurring considerable legal expenses. For instance, in one case, the United Mexican States ("Mexico") paid between US\$200,000 and US\$300,000 in legal fees to contest jurisdiction under the FSIA.⁶ The

1. *Pro se*, which literally means "for himself, in his own behalf," applies to situations in which an individual appears in court without retaining an attorney. BLACK'S LAW DICTIONARY 1099 (5th ed. 1979). While *in propria persona* is often used interchangeably with *pro se*, the former phrase means "in one's own proper person" and has historically had a meaning distinct from *pro se*. *Id.* at 712.

2. Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332, 1391, 1441(d), 1602-1611 (1982)).

3. See *infra* notes 29, 37 & 45 and accompanying text.

4. See *infra* notes 67-77 and accompanying text.

5. Sovereign immunity, in the context of international law, is a doctrine under which domestic courts relinquish jurisdiction over a foreign state in appropriate circumstances. Sovereign immunity differs from diplomatic immunity; the latter involves situations in which an individual diplomat is being sued rather than the sovereign. See HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. at 8 (1976) [hereinafter H.R. REP. NO. 1487], reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6606; I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 330-34 (3d ed. 1979).

6. Telephone interview with Miguel Angel Gonzalez-Felix, Coordinator General For Litigation Abroad, Legal Advisor's Office, Mexican Secretariat for Foreign Relations (Jan. 11, 1988) [hereinafter Gonzalez-Felix Interview] (author's notes available at the *Fordham International Law Journal* office). The case involved was *Asociacion de*

Court of Appeals for the District of Columbia affirmed the lower court's dismissal of the case, noting that the conduct complained of clearly lacked the required nexus with the United States.⁷

This Note argues that foreign sovereign defendants should be accorded *pro se* status in federal courts to contest jurisdiction, subject to the discretion of the court. Part I examines the problems faced by foreign sovereigns being sued in United States federal courts. Part II analyzes *pro se* representation and the policies underlying limitations on its use. Part III presents rationales in support of *pro se* representation by foreign states and proposes factors for courts to consider in determining the propriety of *pro se* representation.

I. THE FOREIGN SOVEREIGN IN UNITED STATES COURTS

In abrogating the sovereign immunity of foreign nations in several express instances, the FSIA discontinued the role previously played by the State Department of minimizing claims brought against sovereign defendants. The burden now rests with foreign sovereign defendants to assert an immunity defense, often at great expense and without regard to the merits of the claim.

A. Immunity Under the Foreign Sovereign Immunities Act

For a plaintiff to proceed against a foreign nation in United States courts,⁸ a court must have subject matter and personal jurisdiction according to the provisions of the FSIA.⁹

Reclamantes v. United Mexican States, 561 F. Supp. 1190 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

7. *Reclamantes*, 735 F.2d at 1524. In granting Mexico's motion to dismiss, the trial court noted that "[n]either the United States nor an appropriate legal forum within its borders ever found plaintiffs' claims to be legally cognizable." *Reclamantes*, 561 F. Supp. at 1201. While it seemed quite apparent to the trial court that subject matter jurisdiction was lacking, plaintiff continued through the appellate process. *Id.* at 1195.

8. United States federal courts have original but not exclusive jurisdiction over claims brought pursuant to the FSIA. 28 U.S.C. § 1330(a) (1982). The FSIA provides for removal of civil actions from state courts to federal courts at the discretion of the foreign sovereign defendant. 28 U.S.C. § 1441(d) (1982). A petition for removal must be filed, however. *Id.*; see also H.R. REP. NO. 1487, *supra* note 5, at 32-33, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6631-32; *infra* note 128.

9. 28 U.S.C. § 1330(a)-(b) (1982); H.R. REP. NO. 1487, *supra* note 5, at 22, *re-*

The FSIA provides the exclusive basis for exercising jurisdiction over foreign sovereigns.¹⁰

Prior to the enactment of the FSIA in 1976,¹¹ the United States Department of State was permitted to interpose and file a formal but non-binding suggestion of immunity on the behalf of foreign states in United States courts.¹² The FSIA, however, was designed to bring United States practice into conformity with that of most other nations by leaving sovereign immunity

printed in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610. It is not clear whether immunity is a subject matter jurisdiction bar or an affirmative defense or both. The FSIA explicitly refers to "jurisdictional immunity" in § 1605, 28 U.S.C. § 1605 (1982), and the legislative history states that "jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity." H.R. REP. NO. 1487, *supra* note 5, at 13, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6611. However, the legislative history also characterizes sovereign immunity as an affirmative defense. *Id.* at 17, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6616. Further, "[t]he ultimate burden of proving immunity would rest with the foreign state." *Id.* (emphasis added).

As to in personam jurisdiction, § 1330(b) of the Act is, in actuality, a federal long-arm statute over foreign states. *Id.* at 13, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6612. The requirements of minimum contacts and adequate notice are included in the provision. *Id.* See generally *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe v. Washington*, 326 U.S. 310 (1945). For a court to exercise personal jurisdiction over a foreign state under the Act, the foreign state must not be entitled to immunity under §§ 1605-1607. H.R. REP. NO. 1487, *supra* note 5, at 13, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6612. In addition, an appearance by a foreign state does not in itself confer personal jurisdiction. *Id.* at 14, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6612.

10. Section 1604 provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1982); see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496-97 (1983); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *O'Connell Mach. Co. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984); see also Comment, *Foreign Sovereign Immunity After Amerada Hess Shipping Corp. v. Argentine Republic: Did It Go Down With the Hercules?*, 11 FORDHAM INT'L L.J. 660 (1988). But see *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425-27 (2d Cir. 1987) (district court has jurisdiction over foreign sovereign under the Alien Tort Statute, 28 U.S.C. § 1350 (1982), if an alien brings suit against a sovereign, for tort only, that sufficiently alleges a violation of international law), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372).

11. The Act was passed on October 21, 1976, and became effective 90 days after its enactment. See Pub. L. No. 94-583, § 8, 90 Stat. 2891, 2898.

12. H.R. REP. NO. 1487, *supra* note 5, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6607. However, the Supreme Court in 1943 held that suggestions of immunity by the executive branch "must be accepted by the courts as a conclusive determination by the political arm of the Government." *Ex parte Republic of Peru*, 318 U.S. 578, 588 (1943).

determinations exclusively to the courts.¹³ Thus, the determination of sovereign immunity was transferred from the executive branch to the judicial branch. The transfer of immunity determinations freed the State Department from pressure from foreign states to recognize their immunity from suit.¹⁴ The main purpose of the FSIA, however, was to codify the principle of restrictive sovereign immunity.¹⁵ According to this principle, the immunity of a foreign state is restricted to suits involving a state's public acts (*jure imperii*) and does not extend to suits based on commercial or private acts (*jure gestionis*).¹⁶ The State Department adopted the restrictive principle of sovereign immunity in its so-called Tate Letter of 1952.¹⁷

Since the passage of the Act, foreign sovereigns must assert all immunity defenses on their own behalf directly to a court without the aid of the State Department.¹⁸ However, the State Department may appear as *amicus curiae* in cases of significant interest to the United States Government.¹⁹

B. *The Foreign Sovereign's Predicament*

Pursuant to the FSIA, United States courts cannot exercise jurisdiction over a foreign state if it is entitled to immunity. Under the Act, immunity is granted to a foreign sovereign defendant unless the plaintiff alleges claims that fall under one of the five enumerated exceptions.²⁰ Specifically, a foreign state is not immune from the jurisdiction of United States courts if:

13. *Id.* at 12, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6610.

14. *Id.* at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606.

15. *Id.*, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605.

16. *Id.*; see also I. BROWNIE, *supra* note 5, at 330-34.

17. H.R. REP. NO. 1487, *supra* note 5, at 8, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6607 (citing letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984 (1952)).

18. *Id.* at 7, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6606.

19. U.S. DEP'T OF STATE, DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW 325 (1976). One commentator has suggested that although sovereign immunity determinations now rest with the judicial branch, the fact that the State Department may intervene, at its discretion, as *amicus curiae* creates the perception that recommendations of immunity by the State Department are subject to political considerations. Gonzalez-Felix, *The Foreign Sovereign Immunities Act: Fair Play for Foreign States and the Need for Some Procedural Improvements*, 8 Hous. J. INT'L L. 1, 8 (1985).

20. See 28 U.S.C. § 1605(a)(1)-(5) (1982). In the context of the FSIA, the issue of *pro se* representation is applicable only to foreign sovereign defendants since pro-

- (1) the foreign state has waived immunity;
- (2) the action is based upon a commercial activity carried on in the United States by the foreign state;
- (3) rights in property taken in violation of international law are at stake;
- (4) rights in property in the United States acquired by succession or gifts or rights in immovable property situated in the United States are in issue; or
- (5) money damages are sought against a foreign state for personal injury or death occurring in the United States and caused by the tortious act or omission of that foreign state.²¹

The burden of affirmatively showing that none of the exceptions applies in a particular situation—that is, that subject matter jurisdiction is lacking—rests with the foreign sovereign defendant.²² There is no specific provision in the Act permitting courts to dismiss even the most frivolous complaints *sua sponte*.²³ Thus, the foreign sovereign has an initial choice of either appearing in court and asserting a defense of sovereign immunity or risking a default judgment.²⁴

Prior to the enactment of the FSIA, the Department of

ceeding as a plaintiff constitutes a waiver of immunity. *See id.* § 1605(a)(1); *see also* I. BROWNIE, *supra* note 5, at 322; *supra* note 9.

21. 28 U.S.C. § 1605(a)(1)-(5).

22. *See supra* note 9.

23. One commentator has stated that under § 1605 of the Act, courts have the discretion to dismiss a complaint without an appearance by the foreign state if the court determines that jurisdiction is lacking. Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009, 1057 (1979).

For purposes of dismissal, however, allegations in the complaint must be accepted as true. *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam). In addition, courts disfavor dismissal of actions except where the complaint is patently frivolous on its face or wholly insubstantial. *Sexton v. Ryan*, 804 F.2d 26, 26-27 (2d Cir. 1986) (per curiam).

Under the FSIA, a plaintiff need only allege one of the five exceptions under § 1605(a) to establish subject matter jurisdiction. The burden is on the foreign state to prove that the exception is inapplicable and, accordingly, that subject matter jurisdiction is lacking. Thus, a court may dismiss a complaint under the FSIA for lack of subject matter jurisdiction only if the plaintiff fails to allege one of the § 1605 exceptions. *Cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 n.20 (1983) (even if a foreign state does not enter an appearance, a district court must still determine that immunity is unavailable under the Act).

24. Under the FSIA, however, courts can enter default judgments against foreign states only when the claimant demonstrates his right to relief by "evidence satisfactory to the court." 28 U.S.C. § 1608(c) (1982).

State was permitted to intervene on behalf of the foreign state.²⁵ Thus, the foreign state did not have to appear in court.²⁶ One of the roles of the State Department was to minimize the possibility of a foreign state being sued in United States courts without sufficient cause, as in the case of frivolous, vague, or groundless complaints.²⁷ At present, however, foreign states must respond to *all* complaints without regard to the merits of the claims.²⁸

Mexico has aggressively pursued the right to proceed *pro se* in United States courts.²⁹ Mexico has stated that one of the most significant burdens of defending itself is "the unbearable cost" of retaining local counsel in the United States to establish its immunity.³⁰ Moreover, Mexico has argued that requiring it to protect its interests by employing local counsel would "cripple its efforts" to defend its sovereignty in the United States.³¹ This sentiment has also been echoed by legal commentators in the United States on the ground that "compelling a sovereign defendant to retain American counsel imposes an unjustified burden on foreign nations, especially those third world countries whose financial resources are limited."³²

Mexico first proceeded *pro se* in a United States court in 1977 in *Aquino Robles v. Mexicana de Aviacion*.³³ Although it was evident from the pleadings that the court did not have subject matter jurisdiction under the FSIA, Mexico still had the bur-

25. See *supra* note 12 and accompanying text.

26. *Id.*

27. Gonzalez-Felix, *supra* note 19, at 21.

28. *Id.*

29. Mexico, however, is not the only foreign sovereign that has attempted to represent itself *pro se*. In one case, Romania initially appeared *pro se* to contest personal jurisdiction in a New York federal court. The court gave no reason why Romania subsequently retained counsel. *East Europe Domestic Int'l Sales Corp. v. Terra*, 467 F. Supp. 383, 385 (S.D.N.Y.), *aff'd*, 610 F.2d 806 (2d Cir. 1979).

30. Memorandum of Points and Authorities in Support of Motion to Restore Motion to Set Aside Default and Motion to Dismiss to Calendar at 13, *The Export Group v. Reef Indus.*, No. 84-159 (C.D. Cal. 1986).

31. *Id.* at 17.

32. Carl, *supra* note 23, at 1057; see Gonzalez-Felix, *supra* note 19, at 22.

33. No. 77-50 (Tribunal Superior de Puerto Rico, Sala de San Juan, filed July 20, 1977); see Gonzalez-Felix Interview, *supra* note 6. See generally Carl, *supra* note 23, at 1056 (the plaintiff in *Aquino Robles* sued the Mexican government for alleged false imprisonment in Mexico; the act complained of was clearly governmental, not commercial in nature).

den of bringing this fact to the court's attention.³⁴ In the interim, Mexico had received an estimate of US\$10,000 in legal fees from American counsel.³⁵ Even though subject matter jurisdiction was clearly lacking, Mexico found itself faced with the choice of either paying considerable legal fees to have the case dismissed or risking a default judgment. In the end, a Mexican lawyer in the Foreign Ministry prepared a special motion to dismiss the case and the motion was subsequently granted by the court.³⁶

Since the *Aquino Robles* case, Mexico has been permitted to proceed *pro se* in a number of federal courts and has successfully contested threshold issues of subject matter and personal jurisdiction under the FSIA.³⁷ However, the courts did not articulate a policy or rationale for allowing *pro se* representation of foreign sovereign defendants in these cases.³⁸ One Mexican official stated that Mexico has saved the equivalent of US\$1,300,000 in legal fees by representing itself *pro se*.³⁹

Mexico is currently attempting to proceed *pro se* in the Southern District of New York⁴⁰ and has recently been permit-

34. Carl, *supra* note 23, at 1057.

35. *Id.* at 1056.

36. *Id.* at 1056-57.

37. See, e.g., Allen v. United Mexican States, No. 86-0245 (W.D. Okla. Dec. 3, 1987) (Order of Dismissal); Gulf Serv. & Rental, Inc. v. Empresa Mexicana de Transporte Multimodel, S.A. de C.V., No. 87-1367 (E.D. La. Sept. 30, 1987) (Judgment); Moreno v. Mexican Consulate, No. 87-01769 (C.D. Cal. June 3, 1987) (Order of Dismissal); Lucchino v. Foreign Countries, 631 F. Supp. 821 (E.D. Pa. 1986); Security Pac. Nat'l Bank v. Derderian, No. 85-6970 (C.D. Cal. May 28, 1986) (Order for Dismissal); Turner v. State Farm County Mut. Ins. Co., No. 85-34 (S.D. Tex. Feb. 13, 1986) (Order on *Pro Se* Appearance of Mexico) (Mexico was allowed to proceed *pro se* until the court ruled on Mexico's motion to dismiss; the case was ultimately dismissed on May 22, 1986); International Sewing Supplies Corp. v. Compania de Mexicana Aviacion, S.A., No. 85-2795 (S.D. Fla. Feb. 7, 1986) (Order Granting Defendant's Motion to Dismiss); Continental Graphics v. Hiller Indus., No. C83-0602G (D. Utah Nov. 25, 1985) (Order of Dismissal With Prejudice); Leibsohn v. Republic of Mexico, No. 84-Z-415 (D. Colo. Feb. 21, 1985) (Order Ruling on Motion to Dismiss).

38. See cases cited *supra* note 37.

39. This estimate is based on a four-year period from February 1983 to February 1987. Gonzalez-Felix Interview, *supra* note 6.

40. See Kline v. Kaneko, No. 87 Civ. 6479 (S.D.N.Y. filed May 21, 1987). Mexico has moved for dismissal of the claims in *Kline*. Motion to Dismiss, Kline v. Kaneko (S.D.N.Y. filed Oct. 5, 1987) (No. 87 Civ. 6479). In his papers, the plaintiff in *Kline* raised no objection to Mexico's *pro se* representation. See Memorandum in Opposition, Kline v. Kaneko (S.D.N.Y. filed Dec. 7, 1987) (No. 87 Civ. 6479). Mexico has brought the issue of *pro se* representation before the court. See Motion to Dismiss at 6, 9-11, Kline v. Kaneko (S.D.N.Y. filed Oct. 5, 1987) (No. 87 Civ. 6479).

ted to represent itself in the Central District of California.⁴¹ In *Gerritsen v. de la Madrid Hurtado*,⁴² at present pending in federal court in California, the plaintiff alleged that the Mexican consulate staff in Los Angeles unlawfully stopped him from distributing leaflets critical of the Mexican Government.⁴³ Initially, the district court denied Mexico *pro se* status but dismissed the action for lack of subject matter jurisdiction as pleaded under 28 U.S.C. § 1343(a).⁴⁴ The district court refused Mexico *pro se* status on the basis of a local rule prohibiting a corporation or unincorporated organization from appearing or proceeding *pro se*.⁴⁵ On appeal, the Ninth Circuit reversed and remanded the case, finding subject matter jurisdiction under the FSIA.⁴⁶ Because the district court's denial of *pro se* representation was not appealed, the Ninth Circuit did not specifically address the issue.⁴⁷ The court did note its agreement with the district court's denial of *pro se* status, but nevertheless allowed the Mexican Consul to appear as an amicus at oral argument.⁴⁸

41. See *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987).

42. 819 F.2d 1511 (9th Cir. 1987).

43. *Id.* at 1513.

44. *Id.* at 1513, 1514 n.3. The complaint alleged jurisdiction solely on the basis of 28 U.S.C. § 1343(a) (1982), which provides the district courts with original jurisdiction in any civil action to redress the deprivation under color of any state law, of any right, privilege, or immunity secured by the Constitution.

45. Local Rule 2.9.1 provides "[a] corporation or unincorporated association may not appear in any action or proceeding *pro se*." *Gerritsen v. Escovar y Cordova*, No. CV 85-5020, Tentative Ruling at 2 (C.D. Cal. Feb. 8, 1988) (citing C.D. CAL. R. 2.9.1) [hereinafter Tentative Ruling] (order issued pursuant to the Tentative Ruling on Feb. 8, 1988). The district court had considered Mexico as an unincorporated organization. *Id.*

46. 819 F.2d at 1517-18. The Ninth Circuit based subject matter jurisdiction on § 1605(a)(5) of the FSIA, which provides for jurisdiction when money damages are sought for personal injury occurring in the United States that is caused by the tortious act or omission of a foreign state or any official or employee of that foreign state. The court also found jurisdiction under 28 U.S.C. § 1351 (1982), which affords jurisdiction of all civil actions and proceedings against consuls or vice consuls of foreign states. 819 F.2d at 1515.

Plaintiff, in his complaint, alleged subject matter jurisdiction based only on 28 U.S.C. § 1343. *Id.*; see *supra* note 44. The Ninth Circuit noted, however, that in determining the existence of subject matter jurisdiction the court is not limited to the jurisdictional statutes identified in the complaint. 819 F.2d at 1515.

47. *Gerritsen*, 819 F.2d at 1514. Apparently, Mexico was not aware that a separate cross-appeal was necessary. Gonzalez-Felix Interview, *supra* note 6.

48. *Gerritsen*, 819 F.2d at 1514 n.3. The Ninth Circuit rejected the Justice Department's recommendation that an official of the Mexican Consul in Los Angeles be

On remand, Mexico filed a motion for reconsideration of the district court's denial of its *pro se* representation.⁴⁹ The district court subsequently granted Mexico's motion to proceed *pro se*, citing the wide discretion of a district court in interpreting local rules.⁵⁰ The court further observed that "because the policies of the FSIA are best served by allowing *pro se* status, the court will allow the UMS [Mexico] to represent itself in this proceeding."⁵¹ The apparent confusion of the district court in *Gerritsen*, coupled with the absence of a rationale based on the statutory right to proceed *pro se*,⁵² illustrate the lack of a coherent policy regarding *pro se* representation of foreign sovereigns in United States federal courts.⁵³

II. PRO SE REPRESENTATION IN UNITED STATES COURTS

While *pro se* representation in federal courts is recognized by statute, it has been limited in scope, particularly with regard to juridical entities. The policies behind these limitations, however, do not necessarily extend to foreign sovereign defendants.

A. Limits on Pro Se Representation in the Federal Courts

Although the right to counsel has constitutional underpinnings,⁵⁴ the right to proceed *pro se* in federal courts is purely

allowed to argue *pro hac vice*. *Id.* The court also rejected the United States Attorney's argument that the Mexican Consul had a right to appear pursuant to article 5 of the Vienna Convention on Consular Relations, Apr. 24, 1963, art. 5, 21 U.S.T. 77, 82-83, T.I.A.S. No. 6820, at 5, 596 U.N.T.S. 261, 268. Article 5 of the Convention provides that consular functions include representing or arranging appropriate representation for nationals before tribunals in the forum state subject to the practices and procedures of the forum state. *Id.* The Court stated that it was not consistent with the practices and procedures of the United States to have individuals who are neither parties nor attorneys admitted to practice before the federal courts to appear at oral argument. *Gerritsen*, 819 F.2d at 1514 n.3; see also *infra* notes 120-121 and accompanying text. The court made no reference to 28 U.S.C. § 1654 (1982), which governs *pro se* representation in federal courts. See *infra* notes 55-65 and accompanying text.

49. Gonzalez-Felix Interview, *supra* note 6.

50. Tentative Ruling, *supra* note 45, at 2.

51. *Id.* at 3.

52. See *infra* notes 67-77 and accompanying text.

53. See *supra* notes 37-38 and accompanying text.

54. The sixth amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

statutory.⁵⁵ The statute provides, in relevant part, "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel."⁵⁶ While *pro se* appearances are often involved in the defense of criminal prosecutions,⁵⁷ *pro se* litigants are found in the civil context as well.⁵⁸

United States courts have almost universally held that corporations,⁵⁹ partnerships,⁶⁰ charitable organizations,⁶¹ and un-

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added). The right to counsel, however, extends only to criminal proceedings and not to civil cases. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 137 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986); *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983); *Caruth v. Pinkney*, 683 F.2d 1044, 1048 (7th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1214 (1983); *O'Reilly v. New York Times Co.*, 692 F.2d 863, 867 (2d Cir. 1982).

55. See 28 U.S.C. § 1654 (1982).

56. *Id.* The full text of the statute reads, "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654 (1982). *Pro se* pleadings are held to less stringent standards than formal pleadings drafted by lawyers and are to be construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Pro se litigants are expected to abide by the rules of the court in which they litigate. *Carter v. Commissioner*, 784 F.2d 1006, 1008-09 (9th Cir. 1986). In addition, *pro se* litigants must comply with substantive and procedural law. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *Brown v. Frey*, 806 F.2d 801, 804 (8th Cir. 1986).

57. See *infra* note 65. See generally Note, *The Right to Appear in Proper Person in the Federal Courts*, 38 N.Y.U. L. Rev. 753 (1963).

58. See sources cited *supra* note 57.

59. *Osborne v. Bank of United States*, 22 U.S. 738, 830 (1824); *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983); *Strong Delivery Ministry Ass'n v. Board of Appeals*, 543 F.2d 32, 34 (7th Cir. 1976) (per curiam); *Shapiro, Bernstein & Co. v. Continental Record Co.*, 386 F.2d 426, 427 (2d Cir. 1967).

A few courts have created exceptions to the rule. In one case, the sole shareholder of a corporation was allowed to proceed *pro se* on behalf of the corporation because neither the shareholder nor the corporation could afford an attorney, and to require the corporation to appear by an attorney would effectively exclude it and its sole shareholder from the courts. The court based its exception on the inherent power of a court to supervise the proper administration of justice in bankruptcy cases. *In re Holliday's Tax Servs.*, 417 F. Supp. 182, 184 (E.D.N.Y. 1976), *aff'd without opinion sub nom. Holliday's Tax Servs. v. Hampton*, 614 F.2d 1287 (2d Cir. 1979). In another case, *DeVilliers v. Atlas Corp.*, 360 F.2d 292, 294 (10th Cir. 1966), the court noted that appellant's status as an attorney was uncertain and reiterated its holding in *Flora Construction Co. v. Fireman's Fund Insurance Co.*, 307 F.2d 413 (10th Cir.), *cert. denied*, 371 U.S. 950, *reh'g denied*, 373 U.S. 240 (1962), that a corporation may appear in court only by an attorney. It is unclear why the court allowed *pro se* representation of the corporation in *DeVilliers*.

incorporated organizations⁶² cannot proceed *pro se* because they are artificial legal persons and cannot appear for themselves personally.⁶³ Since a natural person must necessarily represent these types of organizations in court, United States federal courts have required that such persons be attorneys licensed to practice law.⁶⁴ Moreover, it has been firmly established that only a person licensed to practice law may represent anyone other than himself in court proceedings.⁶⁵ This wide-

60. *S. Stern & Co. v. United States*, 331 F.2d 310, 315 (Fed. Cir. 1963), *cert. denied*, 377 U.S. 909 (1964); *First Amendment Found. v. Village of Brookfield*, 575 F. Supp. 1207, 1207 (N.D. Ill. 1983). *But see* *United States v. Reeves*, 431 F.2d 1187, 1188 (9th Cir. 1970) (*per curiam*) (where the United States government sues to foreclose partnership property, and state law gives each partner a specific right to property, then an individual partner may appear *pro se* because he is pleading his own case).

61. A reverend, who was president and founder, was not allowed to represent his organization in a tax proceeding. *Strong Delivery Ministry Ass'n v. Board of Appeals*, 543 F.2d 32, 34 (7th Cir. 1976) (*per curiam*); *see also* *Lindstrom v. Illinois*, 632 F. Supp. 1535, 1538 (N.D. Ill. 1986) (a clergyman, who was not a licensed attorney, could not represent his church), *dismissed without opinion*, 828 F.2d 21 (7th Cir. 1987). *But see* *Church of the Visible Intelligence that Governs the Universe v. United States*, 226 Ct. Cl. 529, 533-34 (1981) (where the court was unsure whether the church consisted only of defendant and his revelation or whether there were other members, the court allowed defendant to proceed *pro se*).

62. *MOVE Org. v. United States Dep't of Justice*, 555 F. Supp. 684, 693 (E.D. Pa. 1983).

63. *Turner v. American Bar Ass'n*, 407 F. Supp. 451, 476 (N.D. Tex. 1975), *aff'd sub nom.* *Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976).

64. *See, e.g., Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983); *Turner*, 407 F. Supp. at 476.

65. *See supra* notes 55-56 and accompanying text. Section 1654 of title 28, enacted to enforce the sixth amendment's guarantees to right to counsel, has been specifically construed to allow for only two types of representation: that by an attorney admitted to the practice of law by a governmental body and that by a person representing himself. *Turner*, 407 F. Supp. at 476.

The statute has also been construed to grant a right of *pro se* representation only to individuals. *See Russell v. United States*, 308 F.2d 78, 79 (9th Cir. 1962); *Collins v. O'Brien*, 208 F.2d 44, 45 (D.C. Cir. 1953), *cert. denied*, 347 U.S. 944, *reh'g denied*, 347 U.S. 970 (1954); *Sermor, Inc. v. United States*, 13 Cl. Ct. 1, 5 (1987). A sole shareholder may not represent his corporation unless he is an attorney licensed to practice law. *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 609 (11th Cir. 1984), *cert. denied*, 471 U.S. 1056 (1985). *But see In re Holliday's Tax Servs.*, 417 F. Supp. 182, 184 (E.D.N.Y. 1976), *aff'd without opinion sub nom.* *Holliday's Tax Servs. v. Hampton*, 614 F.2d 1287 (2d Cir. 1979).

A corporation may not be represented *pro se* by its president or officers. *Richdel, Inc. v. Sunspool Corp.*, 699 F.2d 1366, 1366 (Fed. Cir. 1983) (*per curiam*); *Southwest Express Co. v. Interstate Commerce Comm.*, 670 F.2d 53, 55 (5th Cir. 1982); *James v. Daley*, 406 F. Supp. 645, 648 (D. Del. 1976). A spouse cannot act as a representative for his or her spouse and be accorded *pro se* status without being a

spread and venerable rule has even been applied to an individual acting on the behalf of the United States government.⁶⁶

B. *The Policies Behind the Limitations*

The requirement that an attorney appear for corporations and other organizations in United States federal courts is a practice that can be traced back to the common law.⁶⁷ The rule protects courts "from pleadings awkwardly drafted and motions inarticulately presented."⁶⁸ As most courts have experienced first-hand, the conduct of litigation by a non-lawyer often creates unusual burdens for his adversaries and for the

licensed attorney. *Lindstrom v. Illinois*, 632 F. Supp. 1535, 1537 (N.D. Ill. 1986), *dismissed without opinion*, 828 F.2d 21 (7th Cir. 1987).

A prisoner may not represent a fellow prisoner *pro se*. *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982); *cf.* *United States v. Wilhelm*, 570 F.2d 461, 465 (3d Cir. 1978) (a criminal defendant has no right to be represented by a friend who is not an attorney).

There is no right to hybrid or dual representation (simultaneous self-representation and representation by counsel). *Munz v. Fayram*, 626 F. Supp. 197, 198 (N.D. Iowa 1985) (criminal proceeding), *dismissed without opinion*, 786 F.2d 1169 (8th Cir. 1986); *Lanigan v. LaSalle Nat'l Bank*, 609 F. Supp. 1000, 1002 (N.D. Ill. 1985) (civil proceeding). *But see* *United States v. Coupeze*, 603 F.2d 1347, 1351 (9th Cir. 1979) (the court has discretion in *pro se* proceedings to appoint "standby" counsel to advise or assist a criminal defendant).

A trustee who is not an attorney cannot represent his trust *pro se*. *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987).

A minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney. *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986).

A non-attorney *pro se* litigant may not attempt to represent others in a purported class action. *McShane v. United States*, 366 F.2d 286, 288 (9th Cir. 1966).

66. In *United States v. Onan*, 190 F.2d 1, 6-7 (8th Cir.), *cert. denied*, 342 U.S. 869 (1951), the court held that a statute providing that a suit to recover damages for fraud committed against the United States may be brought and carried on by "any person" did not authorize a layman to carry on a suit as an attorney for the United States. Rather, the court stated that only a person licensed to practice law could conduct proceedings in court for anyone other than himself. 190 F.2d at 6-7. It is important to note that the court's decision was based on former 31 U.S.C. § 232, Act of Dec. 23, 1943, ch. 377, sec. 1, § 3491, 57 Stat. 608, 608-09 (current version at 31 U.S.C.A. §§ 3730-3731 (West 1983 & Supp. 1988)), and 28 U.S.C. § 144 (1982), and *not* on 28 U.S.C. § 1654.

67. *Brandstein v. White Lamps, Inc.*, 20 F. Supp. 369, 370 (S.D.N.Y. 1937).

68. *Simbrow, Inc. v. United States*, 367 F.2d 373, 375 (3d Cir. 1966); *see also* *Heiskell v. Mozie*, 82 F.2d 861, 863 (D.C. Cir. 1936) (en banc) (the rule "arises out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional duty").

court⁶⁹ and can have a disruptive effect on the litigation process.⁷⁰

Although *pro se* litigants are subject to Rule 11 of the Federal Rules of Civil Procedure,⁷¹ *pro se* litigants are not bound by many of the attorney's ethical responsibilities,⁷² such as avoiding unwarranted or vexatious claims or refraining from dilatory tactics.⁷³ Inasmuch as attorneys, who have been qualified and admitted to practice, are officers of the court, they are subject to its control.⁷⁴ It is also recognized that most organizations, particularly corporations, are entities separate from the individuals who participate in their functioning and that the individual's interests may not necessarily coincide with those of the organization.⁷⁵ It has been noted that in choosing the advantages of incorporation, an individual must also accept the

69. *Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983). As one court noted:

The rules for admission to practice law in the Courts . . . require the applicant to submit to an examination to test not only his knowledge and ability, but also his honesty and integrity, and the purpose behind these requirements is the protection of the public and the courts from the consequences of ignorance or venality.

Heiskell, 82 F.2d at 863.

70. *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 610 (11th Cir. 1984) (a complicated antitrust case demands skilled attorneys), *cert. denied*, 471 U.S. 1056 (1985).

71. FED. R. CIV. P. 11; *see, e.g.*, *Day v. Amoco Chems. Corp.*, 595 F. Supp. 1120, 1122-23 (S.D. Tex.), *dismissed without opinion*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086, *reh'g denied*, 471 U.S. 1095 (1985); *see also infra* note 131 and accompanying text.

72. *Jones*, 722 F.2d at 22.

73. *See* THE LAWYER'S CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1)-(2) (1978); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1984).

The American Bar Association functions as a self-regulating body by adopting professional standards that serve as models of the regulatory law governing the legal profession. Violation of established standards may result in disciplinary action ranging from censure to disbarment. *See* MODEL RULES OF PROFESSIONAL CONDUCT, *supra*, at ix-13.

74. *See Turner v. American Bar Ass'n*, 407 F.Supp. 451, 476 (N.D. Tex. 1975), *aff'd sub nom. Pilla v. American Bar Ass'n*, 542 F.2d 56 (8th Cir. 1976); *MacNeil v. Hearst Corp.*, 160 F. Supp. 157, 159 (D. Del. 1958); *Brandstein v. White Lamps, Inc.*, 20 F. Supp. 369, 370 (S.D.N.Y. 1937).

75. *See Strong Delivery Ministry Ass'n v. Board of Appeals*, 543 F.2d 32, 34 (7th Cir. 1976) (*per curiam*); *Church of the Visible Intelligence that Governs the Universe v. United States*, 226 Ct. Cl. 529, 533 (1981); H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* 144-45 (3d ed. 1983).

burdens of incorporation.⁷⁶

Because the policy limitations on *pro se* representation exist for the protection of the court, violation of the rule is appropriately raised *sua sponte*.⁷⁷

III. *THE FOREIGN SOVEREIGN AS A PRO SE LITIGANT*

Requiring foreign states to be represented by United States lawyers in United States courts to assert claims of sovereign immunity directly contradicts a policy and practice recognized by both United States and international law. Sovereign defendants should be allowed to proceed *pro se* unless the efficient administration of justice is compromised.

A. *The Case for Pro Se Representation of Foreign Sovereign Defendants*

1. *Pro Se* Representation and United States Case Law

The right of a sovereign nation to appear in United States courts through its accredited representatives was explicitly recognized by the Supreme Court in 1921 in *Ex parte Muir*.⁷⁸ In *Muir*, a British Government vessel was involved in a collision at sea with an Italian vessel.⁷⁹ The British Government attempted to assert a defense of sovereign immunity through private counsel acting as *amicus curiae*.⁸⁰ The Court refused to determine immunity based upon a mere suggestion made by private counsel appearing as *amicus curiae* on behalf of the British Embassy.⁸¹ Rather, the Court stated that, as of right, the British Government was entitled to appear in the suit to assert its jurisdictional claim or to have its accredited and recognized representative appear to protect the sovereign's interests.⁸²

A few years later, the Supreme Court reiterated its recognition of the sovereign's right to appear through its represent-

76. *Mercu-Ray Indus. v. Bristol-Myers Co.*, 392 F. Supp. 16, 19 (S.D.N.Y.), *aff'd*, 508 F.2d 837 (2d Cir. 1974).

77. *See, e.g., MOVE Org. v. United States Dep't of Justice*, 555 F. Supp. 684, 693 n.33 (E.D. Pa. 1983).

78. 254 U.S. 522 (1921).

79. *Id.* at 527.

80. *Id.*

81. *Id.* at 532.

82. *Id.*

atives in *Berizzi Bros. v. S.S. Pesaro*⁸³ and *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*.⁸⁴ In *Pesaro*, the Italian ambassador to the United States appeared on behalf of the Italian Government and successfully asserted a defense of sovereign immunity.⁸⁵ Similarly, in *Navemar*, the Spanish ambassador to the United States challenged the district court's jurisdiction on the basis of sovereign immunity.⁸⁶ The Supreme Court again stated that a foreign government was entitled to raise the jurisdictional question in its own name or through an accredited representative.⁸⁷ More recently, in *Victory Transport Inc. v. Comisaria General*,⁸⁸ the Second Circuit stated that "the accredited and recognized representative of the foreign sovereign may present the claim of sovereign immunity *directly* to the court."⁸⁹ These cases are not necessarily dispositive, however, because the courts did not specifically address the issue of *pro se* representation by a foreign state.⁹⁰

Section 71 of the Restatement (Second) of the Foreign Relations Law of the United States provides that an assertion of immunity may be made "by the government of the foreign state or its accredited diplomatic representative upon an appearance before the court."⁹¹ The Restatement specifically

83. 271 U.S. 562, 570-71 (1926) (determining immunity of Italian vessel).

84. 303 U.S. 68, 74 (1938) (determining immunity of Spanish vessel).

85. *Pesaro*, 271 U.S. at 570.

86. *Navemar*, 303 U.S. at 70-71.

87. *Id.* at 74.

88. 336 F.2d 354, 358 (2d Cir. 1964) (agreement to arbitrate in New York constituted a consent to jurisdiction where the Spanish general consul chartered a vessel to transport cargo to Spain), *cert. denied*, 381 U.S. 934 (1965).

89. 336 F.2d at 358 (emphasis added). However, in *Victory Transport*, the Second Circuit was apparently disturbed by the Spanish Consul's lack of specific authority from his government to interpose a claim of sovereign immunity. *Id.* at 358-59 n.7.

90. The foreign state in each of these cases was represented by U.S. counsel. See *Navemar*, 303 U.S. at 70; *Pesaro*, 271 U.S. at 565; *Muir*, 254 U.S. at 523; *Victory Transport*, 336 F.2d at 355. These cases are ambiguous because it is not clear whether the courts, in referring to the "representative" of a foreign state, meant a diplomatic representative or a legal representative.

91. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 71(1)(b) (1965) [hereinafter SECOND RESTATEMENT]; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, at 392 (1987) [hereinafter THIRD RESTATEMENT]. The Third Restatement, which became available in 1988, does not purport to supersede the Second Restatement. However, in the event of any inconsistency between the two, the Third Restatement is authoritative. Telephone interview with Louis Henkin, Chief Reporter, Restatement (Third) of the Foreign Relations Law of the United States (May 9, 1988). Citations to the Second

prescribes that when a foreign state asserts immunity on its own behalf in federal court, it must do so by "an accredited diplomatic representative *or* by counsel acting for it."⁹²

As indicated by *Muir* and its progeny, immunity was generally asserted in United States courts by a special appearance of the state that was being sued.⁹³ The State Department's practice of making a suggestion of immunity to the court developed later as an alternative method of claiming immunity.⁹⁴ Thus, while the FSIA largely discontinued the State Department's role in immunity determinations, it seems clear that the FSIA did not specifically overturn the previously established procedure by which claims of immunity could be presented directly to a court by a foreign state's representative.⁹⁵

2. The Legislative Intent of the FSIA and *Pro Se* Representation

Allowing foreign sovereigns to proceed *pro se* in United States courts to contest jurisdictional issues is consistent with the purposes of the FSIA since "[t]he broad purposes of this legislation [are] to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation."⁹⁶ If foreign sovereigns do not retain U.S. counsel because of the attendant financial burden and are not afforded the opportunity to proceed *pro se*, there is greater likelihood of default judgments being entered against foreign nations.⁹⁷ Clearly, such situations would fail to "facilitate and depoliticize litigation against foreign states."⁹⁸ Fur-

Restatement in this Note are neither incorporated nor controverted in the Third Restatement, and thus remain valid.

92. SECOND RESTATEMENT, *supra* note 91, § 71 comment b (emphasis added).

93. See *supra* notes 78-87 and accompanying text.

94. THIRD RESTATEMENT, *supra* note 91, ch. 5, at 392; *supra* notes 78-87 and accompanying text.

95. See *supra* note 90 and accompanying text.

96. H.R. REP. NO. 1487, *supra* note 5, at 45 (letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler Jr., Deputy Attorney General to the Honorable Carl O. Albert, Speaker of the House of Representatives) (Oct. 31, 1975), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6634.

97. See *supra* note 24. The FSIA provides for the attachment and execution of property of a foreign state in very limited and specific circumstances. See 28 U.S.C. §§ 1609-1611 (1982).

98. H.R. REP. NO. 1487, *supra* note 5, at 45, reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS at 6634.

ther, if a default judgment is not entered against the foreign sovereign, the plaintiff has no recourse whatsoever. Under the FSIA, courts can enter default judgments against foreign states only when the claimant demonstrates his right to relief by "evidence satisfactory to the court."⁹⁹ Thus, encouraging foreign sovereigns to appear by allowing *pro se* representation benefits plaintiffs as well as foreign states.

The United States Department of Justice favors *pro se* representation by foreign states on the ground that it will improve implementation of the FSIA.¹⁰⁰ Abraham D. Sofaer, Legal Advisor of the Department of State, supports *pro se* representation by foreign states in United States courts.¹⁰¹ Judge Sofaer, in a declaration to the District Court in *Gerritsen*, stated that requiring foreign states to obtain U.S. counsel will "materially hinder our [the State Department's] continuing efforts and the considerable progress we have made in convincing foreign governments to comply with the system established by the FSIA."¹⁰² Thus, those departments of the U.S. Government best acquainted with the problems faced by foreign sovereigns in U.S. courts favor permitting foreign nations to appear *pro se*.

3. Considerations of Comity and *Pro Se* Representation

It is generally recognized that a state may not unreasonably restrict the opportunity of another state to raise the issue of immunity.¹⁰³ Under the FSIA, foreign states may assert a defense of sovereign immunity only by appearing in a United States court.¹⁰⁴ If sovereign defendants are required to make an appearance only by U.S. counsel, the attendant financial burden of employing U.S. lawyers might preclude foreign

99. See 28 U.S.C. § 1608(e) (1982).

100. United States' Memorandum in Support of Mexico's Motion for Leave to Appear Pro Se at 7, *Gerritsen v. de la Madrid Hurtado* (C.D. Cal. filed Jan. 28, 1988) (No. CV85-5020) [hereinafter United States Memorandum].

101. *Id.* at 14. The State Department, for practical reasons, prefers that foreign governments retain U.S. counsel. *Id.*

102. *Id.* at 15.

103. Section 65(2) of the Second Restatement provides, "A state may require another state . . . to take certain procedural steps as a condition of immunity, but such a requirement must not unreasonably restrict the opportunity of the other state effectively to assert its immunity." SECOND RESTATEMENT, *supra* note 91, § 65(2).

104. See *supra* notes 13-19 and accompanying text.

states from asserting a defense of sovereign immunity.¹⁰⁵

In addition, many nations allow their foreign ministries to appear in their domestic courts to assert immunity on behalf of foreign states,¹⁰⁶ as was the practice of the United States prior to the FSIA.¹⁰⁷ Such nations perceive a lack of reciprocity in the United States because they are required to hire attorneys to appear in U.S. courts while the United States need not do so in their courts.¹⁰⁸

With regard to Mexico, in particular, it is interesting to note that Mexican law would not require the United States to obtain Mexican counsel to appear in a Mexican court to assert a defense of sovereign immunity.¹⁰⁹ However, the Department of Justice always retains foreign counsel to represent the United States in foreign courts as a matter of policy and practice.¹¹⁰ To require Mexico to retain U.S. lawyers to appear in federal courts might present problems of comity and mutual respect between co-equal sovereigns,¹¹¹ as Mexico extends the option of self-representation to the United States.

4. Due Process Considerations

Although foreign states do not generally enjoy rights as "persons" under the United States Constitution, they are afforded procedural due process.¹¹² A number of courts have held that the language used in the FSIA incorporates the standard set out in *International Shoe Co. v. Washington*¹¹³ regarding the minimum contacts with the forum that are necessary to satisfy due process requirements.¹¹⁴ Due process requires that a

105. See *supra* notes 6-7, 30-32 and accompanying text.

106. United States Memorandum, *supra* note 100, at 8.

107. See *supra* note 12 and accompanying text.

108. United States Memorandum, *supra* note 100, at 8.

109. See Gonzalez-Felix Interview, *supra* note 6.

110. Telephone Interview with David Epstein, Director, Office of Foreign Litigation, Civil Division, United States Department of Justice (Jan. 20, 1988).

111. Comity is a general concept involving the mutual respect of the laws and institutions among nations. See generally 1 L. OPPENHEIM, *INTERNATIONAL LAW* § 19c, at 33-35 (H. Lauterpacht 8th ed. 1955). Comity has been defined as "the rules of politeness, convenience, and goodwill observed by the States in their natural intercourse without being legally bound by them." *Id.* at 34 n.1.

112. THIRD RESTATEMENT, *supra* note 91, § 453 comment c & reporters' note 3; *id.* § 721 comment l & reporters' note 6.

113. 326 U.S. 310 (1945).

114. See *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421,

deprivation of life, liberty, or property be preceded by both notice and an opportunity for a hearing.¹¹⁵ Although due process is a flexible concept, it must ensure fundamental fairness.¹¹⁶

A foreign sovereign defendant arguably has a property interest at stake when it is sued in United States courts. A failure to appear could result in a default judgment with subsequent execution against the sovereign's property in the United States.¹¹⁷ To require a foreign state to appear only by a U.S. attorney might effectively exclude the foreign state from the court.¹¹⁸ If the financial burden of retaining U.S. counsel precludes foreign states from appearing each time they are sued in the United States, foreign states would arguably be denied an opportunity for a hearing and, *a fortiori*, procedural due process. Such a result seems especially harsh since the foreign sovereign defendant bears the ultimate burden of proving that it is immune from the jurisdiction of the court.¹¹⁹

5. *Pro Se* Representation and International Agreements

Pro se representation is compatible with existing international agreements. Article 3 of the Vienna Convention on Diplomatic Relations defines the functions of a diplomatic mission, *inter alia*, as "(a) representing the sending State in the receiving State; (b) protecting in the receiving State the interests

428 (2d Cir. 1987), *cert. granted*, 56 U.S.L.W. 3712 (U.S. Apr. 18, 1988) (No. 87-1372); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982); *Carey v. National Oil Corp.*, 592 F.2d 673, 676 (2d Cir. 1979) (*per curiam*); *Wyle v. Bank Melli of Tehran*, 577 F. Supp. 1148, 1159-60 (N.D. Cal. 1983).

Although the meaning and scope of due process has developed mostly in the application of the due process clause of the fourteenth amendment governing state action, due process has essentially the same meaning and scope in the fifth amendment as applied to the federal government. *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 198-200 (1982); *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976); *see also* THIRD RESTATEMENT, *supra* note 91, § 453 reporters' note 3.

115. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

116. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1984).

117. *See* 28 U.S.C. §§ 1608-1611 (1982); *supra* notes 24, 97.

118. This same rationale was the basis of an exception in allowing a corporation to proceed *pro se*. *See In re Holliday's Tax Servs.*, 417 F. Supp. 182 (E.D.N.Y. 1976), *aff'd without opinion sub nom. Holliday's Tax Servs. v. Hampton*, 614 F.2d 1287 (2d Cir. 1979); *see also supra* note 59.

119. *See supra* notes 22-24 and accompanying text.

of the sending State."¹²⁰ Appearing in court to assert a defense of sovereign immunity certainly falls within the purview of protecting the interests of the sending state. Similarly, article 5 of the Vienna Convention on Consular Relations states that consular functions consist of "protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate."¹²¹ Representing the sovereign seems well within the stated functions of a consulate.

The policy limitations on *pro se* representation are not necessarily applicable to foreign nations because foreign nations are fundamentally different from corporations and other organizations.¹²² The underlying rationale for limiting *pro se* representation is to protect the courts and legal entities from unscrupulous or incompetent representation.¹²³ While these considerations might be entirely appropriate in the case of corporations and other organizations appearing *pro se* through a non-attorney agent, they are misplaced when applied to foreign sovereigns.

It is generally recognized that a corporation, as an artificial entity composed of natural persons, has interests distin-

120. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 3, 23 U.S.T. 3227, 3231-32, T.I.A.S. No. 7502, at 5-6, 500 U.N.T.S. 95, 98. The United States and Mexico are both parties to this agreement. 23 U.S.T. at 3419, 3432, T.I.A.S. No. 7502, at 193, 206, 500 U.N.T.S. at 193, 201.

121. Vienna Convention on Consular Relations, Apr. 24, 1963, art. 5, 21 U.S.T. 77, 82, T.I.A.S. No. 6820, at 6, 596 U.N.T.S. 261, 268. The United States and Mexico are both parties to this agreement. 21 U.S.T. at 361, 369, T.I.A.S. No. 6820, at 285, 293, 596 U.N.T.S. at 440, 451.

122. While a corporation is an artificial legal person created by state law, a foreign state "is an entity which has a defined territory and permanent population, under the control of its own government, and which engages in, or has the capacity to engage in, formal relations with other such entities." THIRD RESTATEMENT, *supra* note 91, § 201; see also I. BROWNLIE, *supra* note 5, at 74-75; H. HENN & J. ALEXANDER, *supra* note 75, at 147; J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 91-92 (9th ed. 1984).

Traditional corporate attributes include: "(a) Power to take, hold and convey property in the corporate name; (b) Power to sue and to be sued in the corporate name; (c) Centralization of management in the board of directors; (d) Ready transferability of interests; (e) Perpetual succession; and (f) Limited liability." H. HENN & J. ALEXANDER, *supra* note 75, at 147. Some of these attributes inhere in unincorporated business enterprises as well. *Id.*

As the respective characteristics would indicate, foreign states and corporations are not, by their very nature, comparable.

123. See *supra* notes 68-77 and accompanying text.

guishable from the interests of its individual members.¹²⁴ However, the same cannot generally be said of a foreign sovereign and its duly authorized and accredited representatives. Since heads of state, heads of government, and ministers of foreign affairs are recognized representatives of their state for treaty negotiation purposes,¹²⁵ they also seem to be appropriate representatives of their state in United States courts. It would be unwise, if not officious, for United States courts to require a sovereign to take measures, such as obtaining counsel, to protect itself from the ostensibly separate interests of its own designated representatives.¹²⁶

B. Evening the Odds: What Foreign Sovereigns Can Do

There are several ways a foreign state can prepare itself to proceed *pro se* in United States courts to assert a defense of sovereign immunity. For example, a foreign nation could send one or more of its nationals, perhaps foreign ministry employees, to special programs to familiarize themselves with the American legal system.¹²⁷

In addition, foreign states could develop a basic litigation manual outlining both the procedural and substantive aspects of the FSIA. A manual describing the intricacies of the FSIA would be very helpful because the Act is so comprehensive and detailed.¹²⁸ Mexico, for one, hired a U.S. law firm to prepare

124. See *Strong Delivery Ministry Ass'n v. Board of Appeals*, 543 F.2d 32, 34 (7th Cir. 1976) (per curiam); *Church of the Visible Intelligence that Governs the Universe v. United States*, 226 Ct. Cl. 529, 533 (1981); H. HENN & J. ALEXANDER, *supra* note 75, at 144-45.

125. THIRD RESTATEMENT, *supra* note 91, § 311 comment b. Heads of diplomatic missions are regarded as possessing like powers within their jurisdiction. *Id.*

126. Carl, *supra* note 23, at 1058.

127. For example, Fordham University School of Law offers a one-year program (24 credits minimum) for foreign lawyers. Completion of the program allows foreign lawyers to sit for the New York State Bar Exam pursuant to rule 520.5 of the New York Court of Appeals, N.Y. COMP. CODE & REGS. tit. 22, § 520.5 (1986). FORDHAM UNIV. SCHOOL OF LAW, BULLETIN 1987-1988, at 43 (1987).

Mexico, for example, sent one of its foreign ministry employees to the University of Houston Law Center for a Master of Laws degree in 1984. Gonzalez-Felix Interview, *supra* note 6. That employee is currently Coordinator General for Litigation Abroad. *Id.* Mexico has subsequently sent four additional foreign ministry employees to United States law schools. *Id.*

128. For example, a petition to remove a case from state court must be filed with the appropriate district court within 60 days according to 28 U.S.C. § 1608(d) unless good cause is shown pursuant to 28 U.S.C. § 1446 (1982). Thus, failing to petition

such a manual.¹²⁹ Also, most district courts have a *pro se* clerk who can provide procedural advice.¹³⁰

Further, when a foreign state does prevail in asserting a defense of sovereign immunity and the claim appears to have been unwarranted, frivolous, or otherwise without merit, the foreign state should request that the court impose sanctions on the plaintiff under Rule 11 of the Federal Rules of Civil Procedure.¹³¹ Such a motion, particularly if successful, might serve as a deterrent for future groundless claims against the foreign state. Unfortunately, the FSIA contains no specific fee or cost provisions as are provided in other statutes.¹³²

Finally, it seems clear that foreign states lack the option of having one of their lawyers proceed *pro hac vice*,¹³³ whereby a lawyer admitted to a bar of one state may be admitted to practice in another jurisdiction for a particular case. Most local rules of the federal courts require a *pro hac vice* applicant to be

to remove within 60 days without good cause will result in a forfeiture of the foreign sovereign defendant's right to remove. See 28 U.S.C. §§ 1446, 1608 (1982); see also H.R. REP. NO. 1487, *supra* note 5, at 32, reprinted in 1976 U.S. CODE & ADMIN. NEWS at 6631.

129. Gonzalez-Felix Interview, *supra* note 6.

130. Telephone interview with Lisa Evans, *Pro Se* Clerk, Eastern District of New York (Jan. 29, 1988) (*Pro Se* Clerks are attorneys).

131. Rule 11 allows "an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." FED. R. CIV. P. 11. Although unlikely to occur, an interesting foreign relations problem might arise if a foreign sovereign were to be sanctioned under Rule 11. In effect, a United States court would be sanctioning the government of a foreign country.

132. See, e.g., Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1982 & Supp. IV 1986); Consumer Credit Protection (Truth in Lending) Act § 130, 15 U.S.C. § 1640 (1982); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

Most courts decline to award attorney's fees to *pro se* litigants. See *Cunningham v. FBI*, 664 F.2d 383, 384-88 (3d Cir. 1981) (Freedom of Information Act); *Lovell v. Snow*, 637 F.2d 170, 171 (1st Cir. 1981) (Civil Rights Attorney's Fees Awards Act); *Hannon v. Security Nat'l Bank*, 537 F.2d 327, 328 (9th Cir. 1976) (Truth in Lending Act). But see *Cox v. United States Dep't of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979) (Freedom of Information Act).

However, the fact that a *pro se* litigant is not entitled to attorney's fees does not mean he is not entitled to some form of compensation for his adversary's misconduct. *In re Emergency Beacon Corp.*, 52 Bankr. 979, 996 (Bankr. S.D.N.Y. 1985); see also *supra* note 131 and accompanying text.

133. *Pro hac vice* literally means "for this one particular occasion." BLACK'S LAW DICTIONARY, *supra* note 1, at 1091.

a member in good standing of a United States bar.¹³⁴

C. *Factors for Judicial Consideration in According Pro Se Status*

Despite the reasons supporting *pro se* representation by foreign sovereign defendants, consideration must be afforded for judicial economy. There may be situations in which it is simply not practical or prudent for a court to allow a foreign sovereign to proceed *pro se*. If a court finds itself inundated with "pleadings awkwardly drafted and motions inarticulately presented"¹³⁵ by a *pro se* foreign sovereign defendant, the court should retain the discretion to deny *pro se* representation either by motion or sua sponte.¹³⁶

If a determination of sovereign immunity involves only a question of law, such as an interpretation of one of the provisions in the FSIA, then the foreign state should be allowed to proceed *pro se*.¹³⁷ *Pro se* representation also seems to be appropriate where there is a basic factual dispute between the parties, such as whether or not the foreign state has waived its immunity. However, in cases where it appears that a determination of sovereign immunity would involve a full trial on the merits with complex issues of fact and law, *pro se* representation may not be practical.¹³⁸ Courts should also consider the complexity of the substantive law at issue as well as potential problems involving discovery.¹³⁹

134. See, e.g., E.D. CAL. R. 180(b)(2); D. CONN. R. 2(a)-(d);¹ S.D. FLA. R. 1-2; E.D.N.Y. R. 2(a)-(c); S.D.N.Y. R. 2(a)-(c).

135. *Simbraw, Inc. v. United States*, 367 F.2d 373, 375 (3d Cir. 1966).

136. See, e.g., *MOVE Org. v. United States Dep't of Justice*, 555 F. Supp. 684, 693 n.33 (E.D. Pa. 1983).

137. For example, if the issue involves an application of any of the definitions in § 1603 of the Act, then it would be appropriate to allow the foreign state to proceed *pro se*. Other situations might include the exceptions listed in § 1605(a). For instance, under § 1603(a)(3), a foreign state is not immune from jurisdiction if rights in property taken in violation of international law are at issue. If the only issue before the court is whether international law was violated in the taking of the property, then *pro se* representation would be appropriate. See 28 U.S.C. §§ 1603, 1605 (1982).

138. Comment c to § 65 of the Second Restatement provides that where a foreign state is entitled to immunity, consideration of the merits of the claim presented by the plaintiff is barred. SECOND RESTATEMENT, *supra* note 91, § 65 comment c. Section 71 provides that the sovereign's immunity claim may only be asserted if it does not place the merits of the controversy in issue. *Id.* § 71. In addition, a claim of immunity is ineffective if made after the merits of the claim have been placed in issue by the foreign state. *Id.*

139. Discovery can present a number of problems for foreign sovereign defend-

CONCLUSION

Foreign sovereigns should be permitted to proceed *pro se* in United States federal courts to contest jurisdictional issues under the FSIA. Mexico's experience demonstrates that *pro se* representation is a viable and feasible alternative to the financial burden of employing U.S. lawyers. Despite the propriety of *pro se* representation for foreign sovereign defendants, United States federal courts must be afforded discretion to deny *pro se* status in those limited situations where it would be prudent and judicious to do so.

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ants both because of its complexity and intrusiveness. For a brief discussion of discovery in the context of the FSIA, see Gonzalez-Felix, *supra* note 19, at 33-34; see also THIRD RESTATEMENT, *supra* note 91, § 451 comment c.

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