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Member, State Bar of California; A.B.; 1974, Dartmouth College; J.D., 1977, New York University; LL.M., 1980, Columbia University. This paper was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. The author researched and wrote the article while he was a Jervey Fellow at Columbia Law School during the academic year 1979-1980 and a visiting scholar at the Max Planck Institute for Foreign & International Private Law, Hamburg, West Germany, during the academic year 1980-1981.

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INTRODUCTION

The Foreign Sovereign Immunities Act of 1976[1] (the Act or the FSIA) extends immunity from legal action to foreign states and their agencies and instrumentalities, subject to various exceptions and qualifications. In addition, the Act establishes a comprehensive jurisdictional scheme for actions involving foreign states.[2]

These provisions effect substantial changes from prior law, which was outdated, uncertain and heavily influenced by foreign policy considerations of the executive branch of government.[3] Legislators

1. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.).

2. 28 U.S.C. §§ 1330, 1604-1607 (1976). For a brief analysis of the Act's operation as a long-arm statute, see East Europe Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y.), *aff'd*, 610 F.2d 806 (2d Cir. 1979); *see* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12-14, 16-22, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6611-13, 6614-21 [hereinafter cited as House Report]. Great Britain enacted a very similar law in 1978. The State Immunity Act, 1978, ch.33.

3. *See* T. Giuttari, The American Law of Sovereign Immunity (1970); S. Sucharitkul, State Immunities and Trading Activities in International Law (1959); García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 Va. L. Rev. 335 (1956); Goodman, *Immunity of Foreign Sovereigns: A Political or Legal Question*—Victory Transport *Revisited*, 38 Brooklyn L. Rev. 885 (1972); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220 (1951); Lowenfeld, *Litigating a Sovereign Immunity Claim—The* Haiti *Case*, 49 N.Y.U. L. Rev. 377 (1974) [hereinafter cited as Lowenfeld I]; Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U. L. Rev. 901 (1969) [hereinafter cited as Lowenfeld II]; Pugh & McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25 (1966); Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 Nw. U. L. Rev. 109 (1961) [hereinafter cited as Timberg I]; Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 Fordham L. Rev. 543 (1977) [hereinafter cited as *Day in Court*]; Note, *The Jurisdic-*

and jurists have high hopes that the FSIA will be successful in curing the many problems that previously attended litigation against foreign states in United States courts.[4] A substantial number of cases have now been decided under the Act, and the time has come to undertake an initial assessment of its success in addressing the problems that existed in the prior law of sovereign immunity.

This Article focuses on the policies underlying various aspects of the law of sovereign immunity and explores its conceptual structure. Part I briefly explains the roots of sovereign immunity and traces its evolution to the present day. This will provide a mode of analysis for the modern law of sovereign immunity.

Part II describes and analyzes the most troubling problems that existed in the rules of immunity in 1976, when the FSIA was enacted. Part III evaluates the Act's proffered solutions to the problems described in Part II. The evaluation discusses whether those problems have been solved by the statute and suggests tentative remedies in those areas where difficulties remain.

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tional Immunity of Foreign Sovereigns, 63 Yale L.J. 1148 (1954) [hereinafter cited as *Jurisdictional Immunity*]; J. Sweeney, The International Law of Sovereign Immunity (October 1963) (Policy Research Study, Bureau of Intelligence & Research, U.S. Dep't of State); *see also* Restatement (Second) of Foreign Relations Law of the United States §§ 65-72 (1965).

4. *See* Atkeson, Perkins & Wyatt, *H.R. 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 Am. J. Int'l L. 298 (1976); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979); Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 Am. J. Int'l L. 399 (1977); Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J. Transnat'l L. 211 (1979); Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 Int'l Law. 408 (1974); von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 Colum. J. Transnat'l L. 33 (1978); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale St. World Pub. Ord. 1 (1976); Note, *Sovereign Immunity—Limits of Judicial Control—The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891*, 18 Harv. Int'l L.J. 429 (1977) [hereinafter cited as *Sovereign Immunity*]; Note, *Sovereign Immunity—Proposed Statutory Elimination of State Department Role—Attachment, Service of Process and Execution—Senate Bill 566, 93d Congress, 1st Session (1973)*, 15 Harv. Int'l L.J. 157 (1974) [hereinafter cited as *Proposed Statutory Elimination*]; Note, *The Immunity of Foreign Sovereigns in U.S. Courts—Proposed Legislation*, 6 N.Y.U. J. Int'l L. & Pol. 473 (1973); Note, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts with a Judicial Function*, 69 Nw. U. L. Rev. 302 (1974) [hereinafter cited as *Proposed Draft Legislation*]; Note, *The Problem of Execution Uniformity Under the Foreign Sovereign Immunities Act of 1976 and Federal Rule of Civil Procedure 69*, 12 Val. L. Rev. 569 (1978) [hereinafter cited as *Problem of Execution Uniformity*]; Note, *The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States*, 6 Vand. J. Transnat'l L. 549 (1973); 4 Brooklyn J. Int'l L. 146 (1977).

I. The Concept of Sovereign Immunity

The concept of sovereign immunity embodies the principle that the government of a nation, state, or political subdivision thereof may not be subjected to process in a court of law without its consent.[5] No person may compel an immune sovereign to litigate claims against it, irrespective of the legitimacy of those claims or the wrongfulness of the governmental conduct giving rise to the claims. This general principle, however, is subject to numerous exceptions and qualifications.

The law of sovereign immunity draws a fundamental distinction between the domestic sovereign and foreign states.[6] The privilege of immunity extends to both, but its underlying rationale differs depending upon which kind of sovereign is involved. Consequently, rules of foreign state immunity have developed independently of those regulating immunity in the municipal context.

A. *The Roots of Sovereign Immunity.*

1. Sovereign Immunity in Municipal Law

Sovereign immunity in domestic law shields the United States government[7] from lawsuits by private citizens without its consent.[8] Such

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5. The general principle was first formulated in Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812). *Accord* Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938); United States v. Diekelman, 92 U.S. 520, 524 (1875).

6. In United States v. Lee, 106 U.S. 196, 209 (1882), Justice Miller noted that sovereign immunity of foreign states is based on different considerations from those giving rise to immunity of the domestic government. *See* National City Bank v. Republic of China, 348 U.S. 356, 358-59 (1955); Guaranty Trust Co. v. United States, 304 U.S. 126, 132-36 (1938); Ulen & Co. v. Bank Gospodarstwa Krajowego (National Economic Bank), 261 A.D. 1, 4-5, 24 N.Y.S.2d 201, 204 (1940).

7. State governments generally also enjoy immunity from suit in their own courts. *See* Railroad Co. v. Tennessee, 101 U.S. 337 (1879); Beers v. Arkansas, 61 U.S. (20 How.) 527 (1857); Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. Ill. L.F. 795; Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1966 U. Ill. L.F. 919. A more complicated issue is whether state governments may be sued in federal court. *See* Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 7-12 (1972). For a case discussing the immunity of one state in the courts of another, see Nevada v. Hall, 440 U.S. 410 (1979). *See generally* Martiniak, *Hall v. Nevada: State Court Jurisdiction Over Sister States v. American State Sovereign Immunity*, 63 Calif. L. Rev. 1144 (1975).

8. *See* Feres v. United States, 340 U.S. 135, 139-40 (1950); United States v. Sherwood, 312 U.S. 584, 586 (1941); Borchard, *Governmental Responsibility in Tort* (pt. 7), 28 Colum. L. Rev. 577 (1928) [hereinafter cited as Borchard I]; Borchard, *Governmental Responsibility in Tort* (pts. 4-6), 36 Yale L.J. 1, 757, 1039 (1926-27) [hereinafter cited as Borchard II]; Borchard, *Governmental Liability in Tort*, (pts 1-3), 34 Yale L.J. 1, 129, 229 (1924) [hereinafter cited as Borchard III]; Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 Harv. L. Rev. 209 (1963);

consent has been given statutorily for many types of actions, but its existence does not detract from the validity of the basic principle of immunity.[9]

This principle is rooted in the twelfth century English feudal system, in which each petty lord held his own court to settle the disputes of his vassals.[10] Because the lord controlled the court, as a matter of practical necessity it was powerless to coerce him. The petty lord, however, was vassal of the king or a higher lord and was subject to suit in the latters' courts. Only the king, who stood at the apex of the feudal pyramid, was completely immune from suit, for no court existed higher than his own.[11]

This system of sovereign immunity was based on the impracticability of coercing a lord or the king in their own courts, rather than on any abstract notion that the king could do no wrong.[12] Indeed, because the feudal system admitted the possibility that the king could do wrong, the "petition of right" developed to hold him accountable.[13] This petition, dating from the thirteenth century, was distinguished from the "petition of grace" and could not rightfully be denied by the king.[14] Thus, it represented a mechanism to circumvent the sovereign's personal right of immunity from suit.

In the sixteenth century the conceptual view of the sovereign changed, and immunity from suit became premised on the idea that the sovereign could do no wrong. Thomas Hobbes and, to a lesser extent, Jean Bodin established the proposition that the king was above the law in the sense that he was the law-giver appointed by God. Thus, the king could not be subjected to the indignity of suit by his subjects.[15] This fundamental shift in the perception of the king, giving him the spiritually sovereign role that had previously been reserved to the church, corresponded to secular developments. The

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Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) [hereinafter cited as Jaffe I].

9. *See, e.g.*, Dalehite v. United States, 346 U.S. 15, 26-33 (1953); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 687-97 (1949); White v. Administrator of Gen. Servs. Admin., 343 F.2d 444, 447 (9th Cir. 1965). Federal consents to suit include the Tucker Act of 1887, ch. 359, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.); the Suits in Admiralty Act of 1920, ch. 95, 41 Stat. 525 (codified in scattered sections of 46 U.S.C.); and the Federal Tort Claims Act of 1946, ch. 753, tit. IV, 60 Stat. 842 (codified in scattered sections of 28 U.S.C.).

10. *See* Engdahl, *supra* note 7, at 2-5; Jaffe I, *supra* note 8, at 1-19.

11. Engdahl, *supra* note 7, at 3 n.6 (citing 1 F. Pollock & F. Maitland, History of English Law 518 (2d ed 1959)); *see* Nevada v. Hall, 440 U.S. 410, 414-15 (1979).

12. Engdahl, *supra* note 7, at 3 n.7; Jaffe I, *supra* note 8, at 3-4.

13. Engdahl, *supra* note 7, at 3; Holdsworth, *The History of Remedies Against the Crown*, 38 L.Q. Rev. 141, 149 (1922).

14. Engdahl, *supra* note 7, at 3; Holdsworth, *supra* note 13, at 148-50.

15. *See* Borchard II, *supra* note 8, at 785. The seminal works on sovereignty are J. Bodin, Six Livres de la République (4th ed. 1579) (1st ed. 1576) and T. Hobbes, Leviathan (1651).

centralization of political functions and the concentration of military and economic power in the king's hands contributed to the rise of the nation-state in the form of a monarchy. These parallel spiritual and political developments transformed the personal immunity of the king as an individual into an institutional immunity of crown and state.[16] That transformation marks the birth of the modern concept of sovereign immunity.

Writing approximately a century after Hobbes, Blackstone stated that the king "is not only incapable of doing wrong, but even of thinking wrong."[17] Blackstone, however, was sufficiently a realist to disbelieve in the factual impossibility of an injustice done by the king. Instead, he relied on the legal fiction that any wrong done in the king's name was, in the eyes of the law, not done by the king at all.[18] Blackstone thus justified the continuation of the practice of vesting immunity in the crown, but noted that the petition of right and the possibility of maintaining actions against government officers personally were the means of redress for wrongs committed in the name of the crown.[19]

Through Blackstone, the monarchistic doctrine of sovereign immunity was introduced to the American colonies. Although it had limited application to the early American confederation, a number of factors combined to cause the retention of sovereign immunity in the United States. An important practical reason for maintaining the doctrine was the difficult financial position of the states, which sought to insulate themselves from crippling private claims.[20] Of course, the nature of a confederacy required an exception to a state's immunity when disputes arose between two states. Such disputes were best settled in a superior federal tribunal. Thus, the states initially agreed to be subject to suit only by each other in a federal tribunal.[21] Later, the Constitution further abrogated states' immunity from suit in federal court by providing for suits between states and citizens of another state.[22] The eleventh amendment subsequently restored states' immunity in certain limited circumstances.[23]

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16. Laski, *The Responsibility of the State in England*, 32 Harv. L. Rev. 447, 447-53 (1919); Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 478-79 (1953).

17. 1 W. Blackstone, Commentaries on The Laws of England *246 (emphasis omitted).

18. *See id.* at *238-39.

19. *See* Engdahl, *supra* note 7, at 4-5.

20. *Id.* at 6.

21. *Id.*

22. U.S. Const. art. 3, § 2, cl. 1. The Constitution provides that the judicial power shall extend "to Controversies between two or more States; between a State and Citizens of another State; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.* The Supreme Court affirmed a state's lack of immunity from suit by a private citizen from another state in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). *See generally* Engdahl, *supra* note 7, at 6-7.

23. U.S. Const. amend. XI; *see* Engdahl, *supra* note 7, at 8-11.

Initially, the more important issue was the amenability to suit of a state or the federal government in its own courts. A number of arguments were made early on for the inapplicability of the monarchistic concept of immunity to a republican system.[24] Nevertheless, Americans adopted the doctrine of sovereign immunity, partly for the practical reason noted above, partly by default. Administratively, it was considered too difficult to oblige the federal executive to enforce federal court orders issued to the federal government.[25]

Notwithstanding the acceptance of the sovereign immunity doctrine in United States law, a strong distaste for governmental immunity remained from the political climate preceding the revolution.[26] Accordingly, redress for governmental wrongs was provided in the form of personal official liability. Government officers were held personally liable for official acts that the courts found unsupported by law.[27] This harsh rule resulted in the considerable erosion of immunity in the United States.

After the Civil War, sovereign immunity re-emerged as a strong doctrine in United States law. As the responsibilities of government became more complex, the need for immunity became more acute. The Supreme Court acknowledged this need, recognizing an inherent right on the part of governments to protect themselves against suit.[28] In an 1868 case involving a government owned vessel, the Court stated that

> [t]he doctrine rests upon reasons of public policy. . . . It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.[29]

The historical development of sovereign immunity reveals a significant pattern. The doctrine originated for practical reasons inherent in the English feudal system. Subsequently, monarchist political theory turned immunity into an absolute concept. Imported into the United

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24. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 450-53, 466-69, 469-79 (1793) (separate opinions of Iredell, J., Cushing, J., Jay, C.J.); Engdahl, *supra* note 7, at 7 n.26.

25. *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 477-78 (1793) (Jay, C.J.); Engdahl, *supra* note 7, at 11-12.

26. *See* J. Story, Commentaries on the Constitution of the United States § 1675 (4th ed. Boston 1873) (1st ed. Boston 1833); Engdahl, *supra* note 7, at 13.

27. United States v. Lee, 106 U.S. 196 (1882); Osborn v. United States Bank, 22 U.S. (9 Wheat.) 737 (1824); Fowler v. Lindsay, 3 U.S. (3 Dall.) 411 (1799); Engdahl, *supra* note 7, at 14-21.

28. Nichols v. United States, 74 U.S. (7 Wall.) 122, 126 (1868).

29. The Siren, 74 U.S. (7 Wall.) 152, 154 (1868).

States because of historical circumstance, that concept was disfavored and gradually eroded.[30] It revived in modern times, however, for vastly different policy reasons concerned with the unhampered functioning of a complex modern government.[31]

This pattern is significant in that it attests to the doctrine's durability and flexibility. Even though it has been justified, at various times, by very different rationales and has been operative in vastly different political systems, it has remained intact for eight centuries. Notwithstanding the changes in underlying policies, the doctrine has retained its original conceptual components of (i) sovereign governmental power, (ii) immunity vested in that power, and (iii) consent voluntarily grantable by that power. As will be seen, that pattern bears a resemblance to the development of sovereign immunity in the international context.

2. Sovereign Immunity in International Law

The classic formulation of sovereign immunity in the international legal system was advanced by Chief Justice Marshall in *The Schooner Exchange v. McFaddon*.[32] In that case, the Chief Justice stated:

> 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 reserved by implication, and will be extended to him.
>
> This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[33]

Although this case was decided in 1812, it has retained remarkable vitality and is frequently cited today.[34] Both American and foreign

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30. The historical English basis of sovereign immunity was completely rejected in Langford v. United States, 101 U.S. 341, 343 (1879). *See* Pugh, *supra* note 16, at 480.

31. For a brief analysis of some of the modern rationales underlying sovereign immunity in tort law, see Comment, *An Analysis of the Theories Advanced for the Continuation of Municipal Tort Immunity*, 2 Cum.-Sam. L. Rev. 437 (1971). *See generally* Symposium, *Sovereign Immunity and Public Responsibility*, 1966 U. Ill. L.F. 793.

32. 11 U.S. (7 Cranch) 116 (1812).

33. *Id.* at 136.

34. *E.g.*, Nevada v. Hall, 440 U.S. 410, 416 (1979); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972); National City Bank v. Republic

courts have relied on Chief Justice Marshall's opinion to such an extent that *The Schooner Exchange* can be characterized as the seminal case for the modern development of sovereign immunity in the international context.

In *The Schooner Exchange*, United States plaintiffs sought to attach a French military vessel that was alleged to have been seized wrongfully by the French government. The latter defended by interposing a claim of sovereign immunity. The Supreme Court accepted that defense, holding that the vessel could not be seized and that the French government could not be compelled to litigate its ownership, because sovereign immunity shielded it from legal process in courts of the United States.[35]

Chief Justice Marshall derived the principle of immunity of foreign governments from the independence and sovereignty of every nation.[36] He began with the fundamental axiom of modern political theory that each nation enjoys complete and absolute sovereignty within the boundaries of its territory. Consequently, when another nation enters upon that territory in any capacity, it is subject to the laws and judicial power of the host state, unless the latter agrees not to exercise its absolute territorial power. Marshall found that in practice all nations had consented to a relaxation of their complete territorial jurisdiction in cases involving foreign states. Such consent, which could be express or implied, had through common usage come to be expected by every state when entering a foreign territory.

Marshall gave several reasons why nations had generally consented to waive their territorial power. First, all nations are considered to possess equal rights and equal independence in the world community. If one nation purports to judge the actions of another, the principles of equality and independence suffer. One nation cannot adjudicate the rights of another without thereby implying coercion and superiority. In order to avoid any inference of dependence and inequality, nations mutually agree upon the principle of sovereign immunity.[37]

Another reason for extending sovereign immunity to foreign states is a desire not to affront the latters' dignity and honor. Justice Marshall viewed the potentially humiliating subjection to legal process as incompatible with formal and orderly conduct of diplomacy and foreign relations. Consuls and ambassadors are considered the official representatives of governments, which in the Chief Justice's time were frequently monarchies. He believed that any affront to emissaries'

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of China, 348 U.S. 356, 359 (1955); International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 565 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981).

35. 11 U.S. (7 Cranch) at 136-37.

36. *Id.* at 136.

37. *Id.* at 137.

dignity could constitute an insult to the king or prince they represented, with potentially disturbing effects on international relations and damage to the foreign policy of the host country.[38]

Finally, Marshall reasoned that any nation which sends emissaries, dignitaries, or military personnel abroad cannot have an intention of subjecting such persons to the authority of a foreign power. The very purpose of their mission requires independence from the host state and absolute allegiance to the home government. The host state's consent to receive such persons implies a consent to extend the rights and privileges necessary for the accomplishment of their mission.[39]

Sovereign immunity should thus be seen as a principle founded on the express or implied consent of each host country, extended for policy reasons. At the time Chief Justice Marshall wrote, those policy reasons were persuasive primarily as a matter of comity and mutual intercourse, in that each nation wished to secure for itself the benefits it extended to other states. Mutual consent to grant immunity had thus reached the status of custom and general practice among nations. As Marshall pointed out, however, that consent could be withdrawn at any time if the host country considered it expedient. Marshall required only that such denial of immunity be effected upon advance notice. Notice was necessary because the practice of extending immunity was so widespread that other nations were justified in expecting it as a matter of course.[40]

Chief Justice Marshall's analysis of sovereign immunity should be viewed as distinguishing between its conceptual framework and its underlying policy objectives. The conceptual basis of sovereign immunity has remained constant.[41] Sovereign immunity is founded on the consent of the host country. States continue to consider themselves entitled to withdraw or alter the terms of their consent to immunity.[42] Governments have treated the granting of such consent as a political bargaining chip to be given or withheld to influence the conduct of other nations.[43] Governments have also considered it

38. *Id.* at 137-39.

39. *Id.* at 139, 143.

40. *Id.* at 137.

41. *See* Nevada v. Hall, 440 U.S. 410, 416-18 (1979). In this case the Court held, in an interstate context, that California was free to withdraw the immunity that it had in the past extended to Nevada as a matter of comity. *Id.* at 418. The Court emphasized the sovereignty of each state as the basis of its freedom to extend or deny immunity to another state. *Id.* at 425-27; *cf.* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) (presumption of sovereign immunity granted to foreign sovereigns absent explicit declaration to the contrary); Comment, *The American Doctrine of Sovereign Immunity: An Historical Analysis*, 13 Vill. L. Rev. 583, 584-87 (1968) (same) [hereinafter cited as *The American Doctrine*].

42. *See* Nevada v. Hall, 440 U.S. 410, 416 (1979); Lauterpacht, *supra* note 3, at 239, 269; von Mehren, *supra* note 4, at 35-36.

43. *See* Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961) (per curiam). In *Naviera Vacuba*, the State Department issued a suggestion of immunity in a

appropriate to withdraw their consent when the nation claiming immunity was an "unfriendly" power.[44] Thus, Marshall's view of sovereign immunity as a voluntary waiver of absolute territorial power has been accepted and has remained essentially intact as the proper framework.

By contrast, the policy reasons underlying sovereign immunity have changed significantly since *The Schooner Exchange* was decided.[45] In Marshall's opinion, the principle of immunity primarily served the diplomatic realities of his time, in which equality and respect among nations were essential for political stability. The contemporary policy underlying sovereign immunity, however, is to mutually protect essential governmental functions from harassing and interfering litigation.[46] Nations are now active in numerous international areas other than diplomacy. It is essential that activities in the military, economic, and political spheres be protected from infringement by private persons, at least to the extent that they are related to important public and governmental functions. [47] Additionally, the egalitarian policies emphasized by Marshall are less persuasive and less important today because intercourse among nations is now conducted from a perspective of "realpolitik" that reflects differences in status. Moreover, dignity and honor are not of great import for non-monarchical governments that are essentially devoid of personality.

The remarkable endurance of Chief Justice Marshall's opinion in *The Schooner Exchange* lies not in its articulation of policy—for that has changed sustantially—but in its creation of a coherent framework in legal and political theory for the concept of sovereign immunity.

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clearly commercial case as to which the defendant, Cuba, had previously waived immunity. *Id.* at 26. The State Department's suggestion was given in return for Cuba's release of a hijacked airliner. *Proposed Draft Legislation*, *supra* note 4, at 312 n.49.

44. *See* Dade Drydock Corp. v. M/T Mar Caribe, 199 F. Supp. 871, 874 (S.D. Tex. 1961). In *Mar Caribe*, Cuba was not allowed to plead sovereign immunity because diplomatic relations with the United States had been severed.

45. *Jurisdictional Immunity*, *supra* note 3, at 1163-65, 1169-70; *see* Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 695-705 (1976); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 Am. J. Int'l L. 93, 104-06 (1953); Lauterpacht, *supra* note 3, at 230-31. For an extensive historical and policy treatment, see Harvard Law School, *Draft Convention of the Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l L. 451 (Supp. 1932). *See generally* von Mehren, *supra* note 4, at 37-43 (shift towards restrictive doctrine).

46. Comment, *Judicial Adoption of Restrictive Immunity for Foreign Sovereigns*, 51 Va. L. Rev. 316, 321-24 (1965) [hereinafter cited as *Judicial Adoption*]; *see* Friedmann, *Some Impacts of Social Organization on International Law*, 50 Am. J. Int'l L. 475 (1956); Lauterpacht, *supra* note 3, at 226-41; Schreuer, *Some Recent Developments in the Law of State Immunity*, 2 Comp. L.Y.B. 215 (1978).

47. Friedmann, *supra* note 46, at 480. Friedmann reduces the range of protected government activities to a "hard core of an irreducible minimum of government activities." *Id.* (emphasis omitted).

Fluctuations of policy thus do not disturb the concept that a foreign state's immunity exists only by consent of the host country. United States courts over the course of time have been able to advance a variety of justifications for the existence of sovereign immunity, yet have always referred to the reasoning of *The Schooner Exchange*.[48]

3. Comparison of Immunity in Municipal and International Law

While sovereign immunity in international law has withstood substantial changes and yet remained essentially the same in effect, municipal immunity has been weakened substantially. It is, therefore, instructive to briefly compare the two doctrines.

Municipal immunity is an absolute concept considered inherent in the nature of government. Because the reasons for its existence are eminently practical, such as the difficulty of compelling the king to appear in his own court, both medieval and modern writers consider immunity a central and indispensable aspect of government.[49] International sovereign immunity, by comparison, is a relative concept. It is not inherent in or necessary to the international order or the interaction among states, but rather depends entirely on the willingness of each nation to cede part of its territorial power. The concept permits negation of the privilege it embodies in that any nation can reassert its territorial prerogative by subjecting a foreign state to judicial process.[50]

Municipal immunity, through legislation and judicial practice, has been eroded to a far greater extent than foreign states' immunity. Most legal systems have consented to great curtailments of immunity by developing numerous means by which citizens can bring almost any legal action against their own government.[51] Sovereign immu-

48. See Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 571-74 (1926), in which the Court relied heavily on *The Schooner Exchange* in extending immunity to commercial vessels of foreign states. Thirty years later, the Supreme Court again invoked Chief Justice Marshall's opinion when it denied immunity to a foreign state from counterclaims to an action instituted by the foreign state. National City Bank v. Republic of China, 348 U.S. 356, 362-65 (1955).

49. *Compare* Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (municipal immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends") (Holmes, J.) *with* Blackstone, *supra* note 17, at *242 ("[N]o suit or action can be brought against the king . . . . For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who . . . shall command the king?").

50. *See* Lauterpacht, *supra* note 3, at 235. A brief comparison of immunity in municipal law and international law is provided in Nevada v. Hall, 440 U.S. 410, 414-18 (1979), and in Reeves, *The Foreign Sovereign Before United States Courts*, 38 Fordham L. Rev. 455, 455-79 (1970).

51. *See* Pock, *Systems of Public Responsibility in Switzerland, Germany, and Austria*, 1966 U. Ill. L.F. 1023.

nity in international law, however, has been eroded only recently and imperfectly.[52] Generally, the principle remains a significant obstacle to suits by private persons against foreign states.

An important similarity between municipal immunity and international immunity is the distinction between concept (form) and policy (content). Both types of immunity have remained essentially unchanged in their conceptual structure. Municipal immunity is conceptually inherent in the sovereign government which voluntarily may consent to be sued. International immunity is conceptually derived from the territorial prerogative of each nation, which voluntarily relinquishes a part of that power. The constancy of each of those frameworks, however, has not prevented significant changes in the policies underlying each type of immunity. The modern policies for each focus on the smooth administration of government and international relations, whereas formerly immunity was concerned with the sovereign's power and dignity.

The foregoing observations raise an important question about international sovereign immunity. As noted, the modern policies underlying the two types of immunity are remarkably similar. At the same time, international immunity appears to be a more relative concept than municipal immunity, because it is dependent on each host state's relinquishment of territorial power. The question arises why the weaker concept of international immunity has not eroded to the same extent as its stronger counterpart in the municipal context. One might expect that the similar modern policies underlying the two immunities would cause a similar pattern of erosion. Nevertheless, international immunity has retained far greater influence than municipal immunity.

That discrepancy may, in large part, be due to the differences between the national and the international legal order. The existence of a sovereign lawgiver in the nation-state permits waivers of immunity to develop on a rational and consistent basis. Moreover, municipal immunity has a history of governmental consent to suit by virtue of the English "petition of right" to the king.[53] The international order, by comparison, lacks a supreme sovereign and operates in the anarchical system of nations. That lack, combined with the natural vagaries of a principle based largely on custom and comity, has greatly impeded a rational progression towards the abandonment of sovereign immunity.

International sovereign immunity has certainly eroded to some extent, as evidenced by the shift from the absolute to the restrictive doctrine. This shift, however, occurred in a random manner. Moreover, a closer examination of this shift suggests a new and more

52. *See* Reeves, *supra* note 50, at 469.

53. *See supra* notes 12-14 and accompanying text.

rational approach to international immunity and the promotion of policies that resemble those operative in municipal immunity.

B. *The Absolute Doctrine and the Restrictive Doctrine*

1. Major Differences

Sovereign immunity was traditionally a firm rule prohibiting suit against a foreign state under any circumstances, except by its consent. More recently, some countries began to recognize exceptions to the rule. Thus developed two versions of sovereign immunity, the "absolute" rule and the "restrictive" rule.[54] The latter is now accepted by the vast majority of states, but the distinction remains important as an analytical tool.[55]

The restrictive view would extend immunity to foreign states only for legal actions arising out of certain types of acts. In order to distinguish acts entitled to immunity from those that are actionable, the restrictive doctrince recognizes *acta jure imperii* and *acta jure gestionis*. The former label designates acts of a governmental nature, whereas the latter means acts of a commerical or private nature. Immunity is granted only with respect to acts of public character.[56]

Various tests have been formulated to categorize the acts of foreign states according to their public or private character. The two most commonly used tests focus, respectively, on the nature and the purpose of the activity in question.[57] The "nature" test, for example, would deny immunity from legal actions arising out of an ordinary commerical contract, even if the contract had been concluded for the purpose of procuring governmental goods, such as military equipment. The "purpose" test would grant immunity if such a contract had a public purpose, but might deny immunity in the case of a governmental regulation intended to have a commercial effect.[58]

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54. *See* Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 698-705 (1976); *Judicial Adoption*, *supra* note 46, at 316-20. *See generally* von Mehren, *supra* note 4, at 37-43 (references to the laws of other countries regarding sovereign immunity); Weber, *supra* note 4, at 18-19 (same).

55. The importance of the distinction is not merely theoretical, however, for socialist countries still adhere to the absolute rule. *See* Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 Case W. Res. J. Int'l L. 148 (1975). *See generally* M. Boguslavskij, Staatliche Immunität (1965) (one of the major works on the socialist version of sovereign immunity).

56. *See* Lauterpacht, *supra* note 3, at 220-25.

57. *See* Pugh & McLaughlin, *supra* note 3; *see also* Restatement (Second) of Foreign Relations Law of the United States § 69 (1965).

58. *Compare* Roumania v. Guaranty Trust Co., 250 F. 341 (2d Cir.) ("purpose" test used to grant immunity for purchase of army boots), *cert. denied*, 246 U.S. 663 (1918) *with* Judgment of Mar. 13, 1926, Corte cass., Italy, 1926 Foro It. I 584, 1925-1926 Ann. Dig. 179 (No. 128) ("nature" test used to deny immunity on same purchase contract).

Another line of thought eschews both the "nature" test and the "purpose" test and opts for identifying specific activities that will be immune from judicial inquiry.[59] Actions not falling within the categories identified will not be entitled to immunity. The exempted areas of government activity include such public functions as diplomacy, military operations, and internal administrative acts.

Finally, one scholar argued that a government's acts should be considered public only when a private person would be incapable of performing them.[60] Thus virtually any contract, including debt instruments issued by a government, would be actionable because private persons are able to enter into such transactions. The set of immune activities would be reduced to legislative, military, and similar functions.

The absolute doctrine avoids the difficult distinctions sought to be made by the foregoing tests. It simply extends immunity to activities by a foreign state, irrespective of their public or private nature, unless the state has waived immunity.[61] Because all acts of a government are by definition "governmental" and serve a public purpose, however indirectly, the proponents of this view argue that the public-private distinction is untenable and that all activities by governments should be immune.

2. Underlying Policies

The dual problems of absolute versus restrictive doctrine and public versus private acts have been thought to hinge on the proper definition of governmental acts.[62] That perception, while not necessarily incorrect, has obscured more fundamental problems, the solution of which would have aided in defining a governmental act for purposes of sovereign immunity. No inquiry has been made comparing the respective policies that are served by the different versions of the restrictive doctrine. The results of such an inquiry would have redirected the arguments from their focus on terminology and concepts to the crucial issue of which underlying policy best serves the contemporary international political and economic order.

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59. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); Goodman, *supra* note 3; *Judicial Adoption*, *supra* note 46; *infra* notes 112-122 and accompanying text.

60. Weiss, *Compétence ou Incompétence des Tribunaux à l'égard des États Étrangers*, 1923 Hague Academy Int'l L. receuil des Cours 525, 546 (1923); *see* Lauterpacht, *supra* note 3, at 225.

61. *See* García-Mora, *supra* note 3, at 339-54; *see also* Lauterpacht, *supra* note 3, at 222-30 (good comparison of the absolute and the restrictive doctrine); *Jurisdictional Immunity*, *supra* note 3, at 1160-63 (same).

62. *See* Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614, 615-24 (1950); Lauterpacht, *supra* note 3, at 222-25.

It may be unfair to suggest that no one has attempted an analysis of the policies underlying sovereign immunity. Several commentators have correctly identified the inapplicability of the policies inherent in the absolute doctrine to contemporary international relations.[63] In their analysis, the absolute version of sovereign immunity reflects a deep concern with the dignity and inviolability of foreign states. That concern was appropriate, and even necessary, at a time when stability in the international order depended heavily upon mutual respect and equality among states. Moreover, they reasoned, nations rarely engaged in commerical activities that would expose large numbers of private individuals to potential loss. Consequently, political concerns naturally dominated the minimal private interests. While these factors justified the absolute doctrine in the nineteenth and early twentieth century, these critics recognized that they were inapplicable or substantially changed today. Thus, they advocated moving away from the absolute doctrine towards the restrictive doctrine, accommodating new conditions and growing private interests.[64]

Scholars who advocated this analysis, however, failed in two major respects. First, they did not place their analysis in the context of Chief Justice Marshall's theoretical framework set forth in *The Schooner Exchange*. Second, they neglected to include a systematic evaluation of the policies inherent in different versions of the restrictive doctrine.

The failure to refer back to Marshall's schema in *The Schooner Exchange* weakens the policy argument in favor of the restrictive doctrine. The Chief Justice premised the existence of immunity on the consent of the host country and allowed for the possibility of a later withdrawal of such consent. Moreover, he recognized specific policy reasons, operative in limited situations, for which immunity was extended among nations. That theory permits a host country to extend immunity upon any conditions it may choose and to alter those conditions at will. [65]

The restrictive doctrine can thus be accommodated within Marshall's schema. Changing circumstances in the international order create issues different from those recognized by Marshall. Accordingly, it bears examination whether a host country should change the conditions upon which it extends immunity in order to account for the new situations. That examination is embodied in the policy analysis that discredits the absolute doctrine and indicates that immunity should be extended under a more restrictive rule.

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63. *See, e.g.*, Bishop, *supra* note 45; Fensterwald, *supra* note 62; Friedmann, *supra* note 46; García-Mora, *supra* note 3; Lauterpacht, *supra* note 3; Lowenfeld II, *supra* note 3; Timberg I, *supra* note 3.

64. *See* García-Mora, *supra* note 3, at 343-54. *But see* Weber, *supra* note 4, at 81 n.124 (listing several authors who advocated adherence to the absolute rule).

65. *See supra* notes 36-44 and accompanying text.

The great flexibility of Chief Justice Marshall's framework facilitates a shift to the restrictive doctrine. By emphasizing the consent of the host country, Marshall permits changes in the conditions of that consent without affecting the basic framework of immunity. In effect, his concept of sovereign immunity can account for vastly different policies over a period of time without damage to its basic structure, simply by changing its attendant conditions. Thus, adoption of the restrictive doctrine does not constitute a fundamental change in sovereign immunity, but merely alters its conditions in response to new circumstances that require new policies.

Viewed in this light, the shift from the absolute to the restrictive doctrine is a relatively modest change that does not threaten the basic concept of sovereign immunity. Indeed, other countries have accomplished the change with little difficulty, without losing sight of the importance of sovereign immunity.[66] American courts, however, dogmatically adhered to the absolute doctrine on the basis of precedent until 1952, invoking the limited power of the judiciary in matters of foreign policy.[67]

The failure to apply Chief Justice Marshall's schema, however, is far less serious than the failure to analyze thoroughly the policies inherent in different forms of the restrictive doctrine. The American law of sovereign immunity has never developed a unified and coherent view of the restrictive doctrine because it lacked a thorough policy analysis. Indeed, that failure is reflected even in the FSIA version of restrictive immunity, which is based on a simplistic and superficial analysis of the operative policies.[68]

The policy underlying the restrictive doctrine should not be summarized in the formula that private interests should be protected in a world of increasing trade between private persons and foreign states.[69] Although that characterization is not incorrect, it is misleading. Its generality and one-sidedness fails to account for the subtle

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66. For discussions of the restrictive doctrine in other countries, see S. Sucharitkul, *supra* note 3; Castel, *Immunity of a Foreign State from Execution: French Practice*, 46 Am. J. Int'l L. 520 (1952); Lalive, *L'Immunite de Juridiction des États et des Organisations internationales*, [1953] III Hague Academy Int'l L. Recueil des Cours 205 (1953); Lauterpacht, *supra* note 3.

67. *See* Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 170, 215 A.2d 864, 881 (Musmanno; J., dissenting), *cert. denied*, 385 U.S. 822 (1966). *But see* Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 Corn. L.Q. 461 (1963).

68. *See infra* notes 252-273 and accompanying text.

69. In Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682 (1976), the Court described the policy supporting the restrictive view as assuring "those engaging in commercial transactions with foreign sovereignties that their rights will be determined in the courts whenever possible." *Id.* at 699. The Court also made reference to "the enormous increase in the extent to which foreign sovereigns had become involved in international trade." *Id.* at 702.

balancing of competing interests that should be the real thrust of the restrictive doctrine. In general form, those interests are the need of foreign states to discharge their major functions free from harassing litigation and the desire of private individuals to have their claims against foreign states adjudicated according to law. These interests conflict whenever the adjudication of a private claim against a foreign state interferes in the latter's functions. The major policy objective of the restrictive doctrine should be to translate, in principled fashion, that general formulation into concrete results. That objective is achieved by identifying the conflict situations, as well as the specific competing interests, and resolving the conflict in favor of the weightier interests.

An examination of the basic structure of the restrictive doctrine reveals that its thrust is toward that objective. Any restrictive rule identifies certain situations in which the governmental interest prevails and others in which the private interest is deemed more important. For example, one version of the restrictive doctrine extends immunity to foreign states against legal action arising from their public debt.[70] Arguably, that result is based on the premise that litigation over public debt raises a fundamental conflict of interests—vindication of the private claim and non-interference in governmental functions. That conflict is resolved in favor of the latter because raising money is a sufficiently important public function to outweigh the private interest in recovery on claims against the foreign state. Another version of the restrictive doctrine, extending immunity only for acts that cannot be performed by private persons, would permit legal action concerning public debt.[71] Accordingly, that doctrine can be described as balancing the competing interests differently.

Each version of the restrictive doctrine can be analyzed in terms of such balancing judgments. That analysis, however, has never been undertaken. Therefore, the different ways of resolving conflict situations were never precisely and systematically identified, and an effective policy comparison of the various versions was impossible. Moreover, the lack of an examination of those policy judgments hindered the development of a more finely tuned restrictive rule that would reflect a careful balancing of the competing interests. Instead, the restrictive doctrine became a rough rule of thumb that relied on the inadequate "public" and "private" labels. The doctrine did not articulate the underlying delicate balancing process; much less did it consciously work with that process.

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70. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). *But see* Goodman, *supra* note 3, at 904 (criticism of public debt criterion).

71. *See* von Mehren, *supra* note 4, at 49, 54.

While the balancing of competing interests should be the major policy objective of sovereign immunity, a secondary policy should be to promote a coherent and stable international legal order. Successful implementation of this policy would facilitate interaction and trade among states and between states and private persons. Accordingly, the restrictive doctrine should be cast in the form of a clear rule that affords predictable results and conveys a sense of fairness and consistency. American scholars and judges have recognized this secondary objective, but have generally failed to implement it.[72]

In summary, the restrictive doctrine should be viewed as a particular conception of sovereign immunity, formed within the framework created by Marshall. It embodies a policy responsive to new social and political conditions and is conceptually based on the right of a host country to change the terms of its consent to foreign states' immunity. Most nations have adopted the restrictive doctrine; thus, it may appear unnecessary to justify it by reference to Marshall's theoretical framework or by a detailed analysis of its policy objectives. The usefulness of the above discussion, however, lies in its applicability to future problems that will require refinements and corollaries in the law of sovereign immunity. Although widely accepted, the restrictive doctrine is far from being a uniform and easily applicable rule.

II. Major Problems in the Law of Sovereign Immunity

A. *Dominance of the Executive Branch*

At an early date, United States courts developed the practice of seeking advice from the executive branch of the government on questions of sovereign immunity.[73] As early as *The Schooner Exchange v. McFaddon*,[74] the Supreme Court made reference to the special power of the executive in matters of foreign relations.[75] Chief Justice Marshall gave no indication, however, that advice from the executive branch would count as more than one of many factors in the Court's decision. Nonetheless, subsequent cases gave increasing weight to ex-

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72. *See, e.g.*, Lowenfeld II, *supra* note 3, at 927-28. Professor Lowenfeld had been with the State Department from 1961 to 1966, holding the position of Deputy Legal Adviser from 1964 to 1966. He was heavily involved in sovereign immunity cases and prepared a study identifying the defects in the American approach and suggesting a new approach. *Id.* at 901. Five years later, Professor Lowenfeld again became involved in a sovereign immunity case, that time as counsel to the defending foreign state. In an article based on that experience, he noted many of the same defects in American law. Lowenfeld I, *supra* note 3, at 423-36.

73. *See* Ex Parte Muir, 254 U.S. 522, 533 (1921), and cases cited therein. On the issue of executive dominance in foreign relations, see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-37 (1964), and Oetjen v. Central Leather Co., 246 U.S. 297, 302-03 (1918).

74. 11 U.S. (7 Cranch) 116 (1812).

75. *Id.* at 146-47.

ecutive suggestions of immunity, until a series of Supreme Court decisions established conclusively that State Department suggestions should be followed without an independent judicial inquiry.[76] Executive allowance of a foreign state's immunity was therefore given effect irrespective of the factual circumstances.[77]

This practice was based in part on the view that the executive had a constitutionally mandated prerogative of action in the field of foreign relations,[78] and in part on a reluctance to embarrass the executive branch in its conduct of foreign policy.[79] Courts were considered an inappropriate forum in which to adjudicate controversies implicating foreign affairs and calling for sensitive political judgments. Thus, courts increasingly referred litigants suing foreign states to "diplomatic channels" for the vindication of their claims.[80]

A distinct body of legal rules developed concerning the procurement and effect of State Department suggestions of sovereign immunity. At the initial stage of litigation, a defendant government had a choice of where to raise its claim of immunity.[81] It might choose not to request a State Department recognition of immunity, thus leaving the court free to make its own inquiry on whether the requirements of sovereign immunity had been met.[82] In that situation, it was unclear whether courts were bound to apply State Department policy on sovereign immunity or whether they could apply the law as they understood it.[83]

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76. *See* Mexico v. Hoffman, 324 U.S. 30, 38 (1945); Ex Parte Peru, 318 U.S. 578, 587 (1943); Compania Espanola de Navegacion Maritima v. Navemar, 303 U.S. 68, 74 (1938); Ex Parte Muir, 254 U.S. 522, 532-33 (1921).

77. *See* Chemical Natural Resources, Inc. v. Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966). This case has a thorough discussion of State Department suggestions, both for and against the rule of executive dominance. The case involved expropriation and confiscation, affecting various contracts and damaging plaintiffs in an amount over $116,000,000. The case was dismissed, over strong dissent, based on an executive suggestion. *Id.* at 161-62, 215 A.2d at 877.

78. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918); von Mehren, *supra* note 4, at 40. *But cf.* Baker v. Carr, 369 U.S. 186, 211 (1962) (courts can resolve questions of international and national law regarding foreign states).

79. *See* Mexico v. Hoffman, 324 U.S. 30, 35 (1945); von Mehren, *supra* note 4, at 40.

80. *See* Mexico v. Hoffman, 324 U.S. 30, 34 (1945).

81. See Lowenfeld I, *supra* note 3, for an extensive analysis of the strategy of foreign states in raising the defense of sovereign immunity.

82. *Id.* at 389-95. In the case discussed by Professor Lowenfeld, Haiti decided not to request immunity through the State Department. *See Proposed Draft Legislation*, *supra* note 4, at 317-22.

83. *See* Weber, *supra* note 4, at 17. *Compare* Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969) (denial of immunity required by State Department inaction) *with* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358-59 (2d Cir. 1964) (State Department inaction leaves court to conduct independent inquiry), *cert. denied*, 381 U.S. 934 (1965).

Alternatively, a defendant might choose to press its claim of immunity through the State Department, which had developed a set of administrative procedures for making determinations of immunity.[84] These included adversarial hearings, the submission of briefs, and deliberations by panels of State Department officials. The losing party, however, could not obtain administrative or judicial review. Moreover, the Department was under no obligation to articulate the reasoning behind its decisions.[85]

Many commentators severely criticized the role of the State Department on questions of sovereign immunity.[86] They charged that the Department's internal methods were deficient; suggestions of immunity were thought to be issued in accordance with political expediency, without regard for consistency and principle.[87] Moreover, because the Department generally failed to articulate its reasons for reaching a decision,[88] litigants were unable to utilize precedent to form a coherent strategy in presenting their case. Additionally, because decisions could not be reviewed within the Department or by the judiciary, plaintiffs had no recourse after immunity was granted and felt frustrated by their impotence in the face of the unexplained rejections of their arguments.

The most poignant example of these problems was the inadequacy of the so-called Tate Letter[89] as a guiding policy. The Tate Letter,

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84. *See* Belman, *New Departures in the Law of Sovereign Immunity*, 1969 Am. Soc'y Int'l L. Proc. 182, 185-86; Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 Harv. L. Rev. 608, 617 (1954); Lowenfeld I, *supra* note 3, at 391-94; von Mehren, *supra* note 4, at 41. *See generally*, Panel, *Litigating the Immunity of Foreign Sovereigns: Selected Problems of Presenting Your Case in the Courts and the Executive Branch*, 1976 Am. Soc'y Int'l L. Proc. 41 (collected comments regarding the FSIA's impact on suits against foreign governments).

85. *See* Spacil v. Crowe, 489 F.2d 614, 619 (5th Cir. 1974).

86. *See, e.g.*, Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 Colum. L. Rev. 453, 462-63 (1940); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168, 169 (1946); Timberg I, *supra* note 3, at 115-16.

87. *See, e.g.*, Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 Tex. L. Rev. 1, 11 (1976) [hereinafter cited as Timberg II]; Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 Ad. L. Rev. 159, 163 (1965) [hereinafter cited as Timberg III]; Note, *The Sovereign's Immunity and Private Property: A Due Process Problem*, Geo. L.J. 284, 292-98 (1961).

88. *See* Spacil v. Crowe, 489 F.2d 614, 616 (5th Cir. 1974). In this case, plaintiff had requested a statement of reasons from the State Department for its decision to allow immunity. The Department responded that it had considered "'all the circumstances'" and had consulted with "'other interested bureaus and officials.'" *Id.* at 616.

89. Letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to the Acting Attorney General (May 19, 1952), in 26 Dep't State Bull. 984 (1952) [hereinafter cited as Tate Letter]; *quoted in* Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 711-15 (1976). The letter advised the Justice Department that henceforth the

published by the State Department in 1952, purported to adopt the restrictive doctrine of sovereign immunity. Although viewed and intended as a major shift in United States policy and legal practice, the Tate Letter proved problematic because it provided no criteria for the implementation and application of the new policy.[90] Moreover, the Tate Letter failed to state the Department's position on a number of subsidiary issues, such as seizures of property, that might have been affected by adoption of the restrictive doctrine.[91] The inadequacy of the Tate Letter, coupled with the courts' traditional deference to State Department policy, created a dilemma for judges. They saw themselves bound by the policy enunciated in the letter, but were unable to extract therefrom any specific principles to guide their decisions.[92]

The State Department failed to resolve that dilemma in subsequent determinations of immunity and statements of policy. In a few decisions, the Department expressly and soundly followed the general rule of the Tate Letter.[93] The majority of its decisions, however, did not fall into any discernible pattern and were variously consistent or inconsistent with the Tate Letter.[94] For example, suggestions of immunity were issued in some clearly commercial cases[95] and in instances where immunity had been waived by the defendant government.[96]

State Department would "follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." Tate Letter, *supra*, 985; *see also* Bishop, *supra* note 46 (commenting on the change to the restrictive doctrine).

90. *See* Ocean Transp. Co. v. Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967); von Mehren, *supra* note 4, at 41; Comment, *International Law—Sovereign Immunity—The First Decade of the Tate Letter Policy*, 60 Mich. L. Rev. 1142, 1147 (1962).

91. *See* Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 Am. J. Int'l L. 790 (1960); Myers, *Contemporary Practice of the United States Relating to International Law*, 54 Am. J. Int'l L. 632 (1960).

92. *See* Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359 (2d. Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

93. *See, e.g.*, Ocean Transp. Co. v. Ivory Coast, 269 F. Supp. 703, 704 n.1 (E.D. La. 1967) (State Department refused to suggest immunity because breach of contract is a commercial act); Waltier v. Thomson, 189 F. Supp. 319, 320 (S.D.N.Y. 1960) (State Department allowed immunity for a governmental act by a Canadian immigration officer).

94. *See* Dobrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 Va. L. Rev. 1 (1968); Note, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 Va. J. Int'l L. 75 (1964) [hereinafter cited as *The American Law of Sovereign Immunity*].

95. *E.g.*, Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (per curiam); Aerotrade, Inc. v. Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974).

96. *E.g.*, Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); *see* Comment, *Sovereign Immunity: The Effect of Executive Intervention on the Restrictive Theory and Waiver*, Isbrandtsen Tankers, Inc. v. President

The foregoing problems could have been largely corrected without changing the basic scheme of judicial deference to executive policy. The Department might have improved its inadequate quasi-judicial procedure by publicizing the grounds of its decisions and granting review in some cases. Moreover, it could have issued guidelines in the nature of regulations to advise potential litigants of the circumstances in which a defense of sovereign immunity would be upheld. The State Department could also have instituted an internal policy of basing decisions primarily on long-term legal and policy goals rather than immediate political objectives.

Those measures, however, would not have addressed a more fundamental criticism attacking the very basis of judicial deference to executive suggestions. Some scholars argue that the courts are charged with deciding cases arising under United States law and that the separation of powers doctrine does not require wholesale abdication of judicial action in the area of sovereign immunity.[97] As a rule of international law, sovereign immunity forms part of United States law. Therefore, the courts are in the first instance responsible for its application.

Critics have also observed that it is not unusual for courts to exercise a high degree of power in other areas touching upon foreign relations.[98] Judges easily apply principles of international law and decide cases with foreign elements. For example, cases arising under the Act of State doctrine are decided by the judiciary which will sometimes receive non-binding advice from the State Department.[99] Because those cases are not considered to involve sufficient foreign relations implications to require judicial abdication, sovereign immunity likewise should not be treated as intimately affecting American foreign policy.

Moreover, it is argued that sovereign immunity does not touch upon foreign relations as closely as has been supposed. It has become increasingly acceptable in the international legal order to subject foreign states to legal process. Thus, denial of immunity rarely disrupts or seriously affects foreign relations. Accordingly, the executive

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of India (2d Cir. 1971), 11 Colum. J. Transnat'l L. 334, 339 (1972) [hereinafter cited as *Effect of Executive Intervention*]; Note, *International Law—Sovereign Immunity—The Last Straw in Judicial Abdication*, 46 Tul. L. Rev. 841, 843-44 (1972) [hereinafter cited as *The Last Straw*].

97. *See* Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451, 469-79 (1956); Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 Minn. L. Rev. 1101 (1960); Jessup, *supra* note 86.

98. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439-72 (1964) (White, J., dissenting); Dickinson, *supra* note 97; Note, *Sovereign Immunity*, *supra* note 4, at 452-53.

99. *See* Note, *The Nonviable Act of State Doctrine: A Change in the Perception of the Foreign Act of State*, 38 U. Pitt. L. Rev. 725, 733-34 (1977).

branch should have little interest in the administration of sovereign immunity. Indeed, this argument may lead to the conclusion that the separation of powers doctrine not only permits, but requires, exclusive judicial responsibility in this area.[100]

Although sovereign immunity law as developed in the United States touched closely upon foreign relations, it was possible, and desirable, to remove the principle from that domain. In effect, the dominance of the State Department rendered the foreign relations implications of sovereign immunity a self-fulfilling prophecy. Because the Department had a natural inclination to exert its influence in this area for political ends, sovereign immunity increasingly became an instrument of foreign policy. Thus, it became nearly impossible to counter the argument that the foreign relations elements of sovereign immunity required a strong executive role, at least for policy reasons, if not also as a constitutional matter. By curtailing the State Department role, however, sovereign immunity could be restored to the status of an international legal principle of neutral application rather than a doctrine subject to the vagaries of foreign policy [101]

Underlying these problems was a basic schism in the American view of sovereign immunity. The arguments supporting judicial dominance saw the principle as a rule of international law, to be adjudiciated by the courts like any other legal rule upon a determination of facts.[102] The opposite view held that sovereign immunity is a flexible concept operative in international political relations.[103] The major source of difficulty was that the State Department clung to the latter view, but was forced to cast its foreign policy decisions regarding sovereign immunity in the vocabulary and process of the law, because the question of immunity always arises in the context of cases pending in the courts. The result was an incoherent body of rules claiming legal status but manipulated for political ends, and lacking essential attributes of law, such as certainty, generality and neutrality. These complex and problematic relations between the State Department and the judiciary were abruptly terminated in 1977, when the FSIA shifted to the courts exclusive responsibility for adjudicating claims of sovereign immunity.[104]

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100. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 450-51 (1964)(White, J., dissenting). The majority conceded that a high degree of consensus on rules of international law renders it appropriate for the judiciary to decide a case. *Id.* at 428. In Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 704-05 (1976), Justice White, writing for the majority, noted the international consensus regarding rules on commercial dealings of private parties. He believed that these established rules were properly applied by courts to the commercial transactions of a sovereign state. *See generally* R. Falk, The Role of Domestic Courts in the International Legal Order (1964).

101. *See* Timberg II, *supra* note 87, at 11.

102. *See* Timberg I, *supra* note 3.

103. *See* Cardozo, *supra* note 67.

104. 28 U.S.C. § 1602 (1976); *see infra* pt. 111(A)(1).

B. *Distinction Between Public and Private Acts*

Prior to 1977, however, the courts were absolutely bound by a State Department suggestion of immunity. The executive decision would override, for example, a prior waiver of immunity on the part of the defendant government.[105] A State Department recognition of immunity was binding on the courts even if it was plainly contrary to the Department's previously announced policies on sovereign immunity.[106]

If the Department declined to suggest immunity, the courts were largely left to their own devices. Some courts took the position that the executive's non-recognition of a claim of immunity was as binding on the judiciary as a suggestion of immunity and required a denial of immunity.[107] This position was arguably legitimate if the Department held hearings and took evidence in the case, thus creating a semblance of meeting due process requirements.[108]

Other courts took the view that when the State Department took no action with respect to a suggestion of immunity, they should conduct an independent inquiry.[109] Nevertheless, they gave considerable weight to the State Department's inaction, reasoning that it indicated inapplicability of a major policy underlying sovereign immunity, which they took to be the safeguarding of American foreign relations.[110] The courts, therefore, did not independently consider questions of sovereign immunity, and the State Department's erratic behavior prevented the courts from developing sound criteria for implementing the restrictive doctrine announced in the Tate Letter.[111] As a result, American legal practice lacked a thorough under-

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105. Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *see Effect of Executive Intervention*, *supra* note 96; *The Last Straw*, *supra* note 96.

106. *See* Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961) (per curiam); *The American Doctrine*, *supra* note 41, at 599-601. In Renchard v. Humphreys & Harding, Inc. 381 F. Supp. 382 (D.D.C. 1974), the court stated that "[t]he principles in the Tate letter . . . are not to be viewed as absolute or unyielding; rather, they are subject to interpretation and change and the Department of State is the proper organization to give such interpretation." *Id.* at 385 (footnote omitted).

107. Renchard v. Humphreys & Harding, Inc., 381 F. Supp. 382, 383-84 (D.D.C. 1974); Amkor Corp. v. Bank of Korea, 298 F. Supp. 143, 144 (S.D.N.Y. 1969).

108. *See* Lowenfeld I, *supra* note 3, at 389-95. *But see* Spacil v. Crowe, 489 F.2d 614, 619-20 (5th Cir. 1974)(in the area of foreign relations, the judiciary should not require State Department procedures to meet reasonableness or any other standards).

109. *See, e.g.*, Flota Maritima Browning de Cuba, S.A. v. M/V Ciudad de la Habana, 335 F.2d 619, 623 (4th Cir. 1964); Pan American Tankers Corp. v. Vietnam, 291 F. Supp. 49, 51 (S.D.N.Y. 1968).

110. *See* Flota Maritima Browning de Cuba, S.A. v. M/V Ciudad de la Habana, 335 F.2d 619, 623 (4th Cir. 1964); Ocean Transp. Co. v. Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967).

111. Among the more confusing instances of State Department and court relations are Stephen v. Zivnostenska Banka, 15 A.D.2d 111, 222 N.Y.S.2d 128 (1961), *aff'd*,

standing of the nuances of the public-private distinction, which is crucial to effective application of the restrictive doctrine.

A significant breakthrough in the distinction between public and private acts occurred in 1964 when the Second Circuit decided *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes.*[112] In *Victory Transport*, Judge Smith concluded that in the absence of a State Department suggestion of immunity, the court was free to construct its own rules regarding sovereign immunity. He listed and described certain kinds of activities that he considered governmental or public and declared that foreign states would be entitled to immunity only from claims arising out of those activities.

These immune governmental activities comprised: (i) internal administrative acts, (ii) legislative acts, (iii) acts concerning the armed forces, (iv) diplomatic acts, and (v) public loans.[113] Any other types of acts would be subject to legal action. This schema, of course, was operative only in cases in which the State Department had not filed a suggestion of immunity. The court also admitted the possibility that the Department might contract or expand the categories described in *Victory Transport.*[114]

The criteria formulated by Judge Smith were soon accepted by other courts as a rational and articulate test for implementing the restrictive doctrine.[115] The case also elicited several comments and articles in legal periodicals.[116] *Victory Transport* thus became the most prominent formulation of the American version of sovereign immunity for cases not decided by the State Department.[117]

A closer examination of *Victory Transport* reveals that it eschews both the "purpose" test and the "nature" test for applying the restrictive doctrine. Judge Smith criticized those tests, respectively, as functionally arbitrary and leading to poor results.[118] In their place, he attempted to identify in advance certain "strictly political or public

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12 N.Y.2d 781, 186 N.E.2d 676, 235 N.Y.S.2d 1 (1962), and Frazier v. Hanover Bank, 204 Misc. 922, 119 N.Y.S.2d 319 (Sup. Ct.), *aff'd*, 281 A.D. 861, 119 N.Y.S.2d 918 (1953).

112. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

113. *Id.* at 360.

114. *Id.*

115. *See, e.g.*, Rovin Sales Co. v. Romania, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975); Ocean Transp. Co. v. Ivory Coast, 269 F. Supp. 703, 705 (E.D. La. 1967); French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 51, 242 N.E.2d 704, 708, 295 N.Y.S.2d 433, 439 (1968).

116. *E.g.*, Goodman, *supra* note 3; Comment, *Sovereign Immunity Restricted to Non-commercial Activity*—Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 63 Mich. L. Rev. 708 (1965); *Judicial Adoption*, *supra* note 46.

117. Jet Line Servs. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1169 (D. Md. 1978); von Mehren, *supra* note 4, at 51-52.

118. 336 F.2d at 359.

acts about which sovereigns have traditionally been quite sensitive."[119] This effort to describe particular acts and activities avoids the troubling vagueness of the terms "public" and "governmental" as well as the imprecise distinction between the nature and the purpose of an activity.[120]

The major advantage of Judge Smith's approach is its clarity and ease of application. It permits courts to reach consistent conclusions without excessive inquiry into the affairs of a defendant state.[121] Additionally, the detailed description of categories of immunity allows both private persons and foreign states to predict with reasonable certainty whether a claim of immunity is likely to be sustained for various kinds of litigation.

The only significant drawback of *Victory Transport* is its rigidity. The clarity and simplicity of its criteria could lead to their mechanistic application with little regard for the conceptual and policy underpinnings of the restrictive doctrine. Strictly applied, Judge Smith's test would extend immunity to a foreign state for a tortious automobile accident if the vehicle involved was transporting a diplomatic pouch at the time of the accident and was thus engaged in an "act concerning diplomatic activity."[122] The criticism of rigidity can be met, however, by offering a considered and sensitive application of the *Victory Transport* criteria.

Judge Smith correctly recognized that the restrictive doctrine embodies a balancing of the competing interests of private persons and foreign states.[123] His formulation of immune activities constitutes an accommodation of those competing interests. As a general rule, *Victory Transport* allows the private interest to prevail and denies immunity. The immunized activities, however, are those traditionally protected by sovereigns.[124] Judge Smith considered the governmental interest in shielding those sensitive activities from litigation weightier than the private interest in adjudicating individual claims.

Although the balancing approach underlying *Victory Transport* is fundamentally sound, Judge Smith failed to explore it to sufficient depth. He reasoned, in essence, that (i) the purpose of the restrictive doctrine is an accommodation of the private interest with the governmental interest,[125] (ii) as a general matter the interests of private

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119. *Id.* at 360.

120. *Id.* at 360 n.11 (citing Lauterpacht, *supra* note 3, at 225-26).

121. *See* Lowenfeld I, *supra* note 3, at 414-15 (the purpose of sovereign immunity is undercut by excessive inquiry into the facts supporting a claim of immunity).

122. *Id.* at 430-31 (citing Judgment of Feb. 10, 1961, Supreme Court, Austria, 2 Ob. 243.60, 84 Juristische Blätter 43, 40 Int'l L. Rep. 73 (1970) (a case involving a United States embassy vehicle)).

123. 336 F.2d at 360.

124. *Id.*

125. *Id.*

plaintiffs should prevail,[126] and (iii) for certain activities about which sovereigns are very sensitive, immunity will be extended.[127] He then described the latter activities without explaining why heightened sensitivity is proper for them, or why their importance is such as to overcome conflicting private interests. This explanation is crucial because it explores the core of the restrictive doctrine by explicitly balancing specific governmental interests against specific private interests. Unfortunately, Judge Smith failed to explain why the shielding of internal administrative acts or acts concerning the armed forces is more important than the vindication of private claims.

Upon reflection, the importance of the activities immunized in *Victory Transport* appears obvious, and arguments readily come to mind to support the judgment that the governmental interest in shielding these activities from litigation outweighs the private interest. For example, a government cannot function smoothly and effectively if its internal administrative acts are constantly threatened by judicial inquiry at the instigation of private citizens. Similarly, a government's foreign diplomacy would be substantially hampered if it was made a potential subject of litigation in foreign courts. Therefore, the interests of private litigants should be discounted as regards vital governmental functions.

Nevertheless, the failure of *Victory Transport* to articulate and justify its policy judgments is a serious defect in at least two respects. First, a detailed explication and justification of the five immune activities might have resulted in more precise descriptions and would have guided other courts in determining whether a particular activity falls within the *Victory Transport* categories. When a court is faced with an immunity question in a case arising from an automobile accident in which the vehicle causing injury had been transporting a diplomatic pouch,[128] the problem arises whether the injurious act concerned diplomatic activity. The resolution of that issue is facilitated by an awareness of the policy factors that lead to immunizing diplomatic activity.[129]

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126. Judge Smith stated: "We do not think that the restrictive theory . . . requires sacrificing the interests of private litigants to international comity in other than . . . limited categories." *Id.*

127. Judge Smith concluded that in the absence of a State Department suggestion he would deny a claim of immunity "unless it is plain that the activity in question falls within one of the categories of strictly political . . . acts about which sovereigns have traditionally been quite sensitive." *Id.*

128. *See supra* note 122 and accompanying text.

129. Professor Lowenfeld suggests two possible solutions. First, to consider the nature of the activity rather than its purpose as dispositive, or second, to define the categories of immune activities more precisely. Lowenfeld I, *supra* note 3, at 431. His approaches, however, may not go far enough in evaluating the competing interests at stake. The plaintiff clearly has a substantial interest in recovery, while the foreign

Second, the formulation of an accurate process of balancing the competing interests would furnish an important tool for evaluating other versions of the restrictive doctrine. A sound method of balancing the private and the governmental interests would provide a means of analyzing, for example, certain provisions of the FSIA. Such an analysis would answer whether the statute effectively and fairly balanced those interests, thus furnishing a basis for criticism and possible improvement in the statutory scheme.

Enactment of the FSIA in 1976 significantly diminished the importance of *Victory Transport*. The public-private distinction, however, remains a problem that is not completely solved by the statute. The *Victory Transport* analysis therefore continues to be influential because of its fundamental understanding of the restrictive doctrine. At the same time, Judge Smith's failure to push his analysis further constitutes a missed opportunity to develop a more effective test for the public-private distinction of the restrictive doctrine.

C. *Jurisdiction*

1. The Conceptual Framework

The conceptually confused approach taken by the courts towards jurisdiction, prior to 1977, also caused serious problems. A sound jurisdictional scheme for actions against foreign states should proceed from two premises. First, the concept of sovereign immunity is independent from, and compatible with, the exercise of personal jurisdiction by a host country over another state present in its territory. As Chief Justice Marshall reasoned in *The Schooner Exchange*,[130] sovereign states enter upon the territory of another sovereign subject to the latter's absolute territorial power. The host state extends immunity to the foreign state voluntarily and can withdraw immunity and reassert its jurisdiction at any time.[131] Moreover, immunity may be extended upon such conditions as the host sees fit to impose.[132] Therefore, personal jurisdiction over a foreign state is in concept freely and completely within the discretion of the host country.

Second, the concept of jurisdiction has its own underlying policy goals that should be considered when subjecting a foreign state to jurisdiction. In the United States, these goals are closely tied to the requirements of due process and are intended to ensure justice and

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state has an insubstantial interest if the car was engaged in any ordinary use. But the state's interest in immunity might be much greater if the accident resulted from the driver speeding en route on an urgent diplomatic mission. In that case, immunity might be appropriate.

130. 11 U.S. (7 Cranch) 116 (1812); *see supra* notes 34-48 and accompanying text.

131. 11 U.S. (7 Cranch) at 136-37; *see* von Mehren, *supra* note 4, at 34-36.

132. *See* Lauterpacht, *supra* note 3, at 235; von Mehren, *supra* note 4, at 34-36; *supra* notes 40-48 and accompanying text.

fairness in the administration of law. Although it may appear self-evident that those requirements are fully applicable when the defendant is a foreign state, it is less obvious that their application in an international context may lead to different means of establishing personal jurisdiction. For example, the jurisdictional nexus required within the United States may have little meaning internationally, thus requiring the development of new standards when foreign governments are sued.[133]

These premises suggest that the jurisdictional scheme need not be concerned primarily with issues of sovereign immunity. Instead, it should in the first instance serve the ordinary policy goals inherent in jurisdictional principles, adjusted to account for certain special implications of commencing legal action against foreign states. The policies underlying sovereign immunity should be incorporated secondarily, and only to the extent compatible with the normal policy objectives of jurisdictional rules.

Jurisdiction and immunity are thus independent concepts, but are related by certain mutual policy constraints. The jurisdictional scheme cannot ignore the policies underlying sovereign immunity—relying purely on an immunity analysis after jurisdiction has been established—because some of the damage sought to be prevented by immunity may result from the mere exercise of jurisdiction. Jurisdictional attachments of property evidence that possibility, in that the attachment can substantially interfere in a foreign state's affairs even if immunity is subsequently established. At the same time, jurisdiction cannot be collapsed into sovereign immunity, for in that case the primary goals of the jurisdictional scheme suffer in the effort to promote the policies underlying immunity. The most effective legal structure would thus keep jurisdiction and immunity mutally independent, but would incorporate some of the latter's objectives into the rules of the former as secondary aspects. An understanding of that structure has been absent from courts' jurisdictional analyses in cases against foreign states.

2. The Courts' Practice

Generally, federal courts have always found a valid basis of subject matter jurisdiction over actions against foreign states. If plaintiffs were unable to rely on specific bases, such as admiralty, they could invoke federal diversity jurisdiction, which extended to actions between "citizens of a State and citizens or subjects of a foreign state."[134] The FSIA replaced this system in 1977 by providing its own basis of federal subject matter jurisdiction.[135]

133. *See* Carl, *supra* note 4, at 1058-63.

134. 28 U.S.C. § 1332(a)(2) (1976).

135. Pub. L. No. 94-583, §§ 2(a), 3, 90 Stat. 2891(1977) (amending 28 U.S.C. § 1332 (1976) and adding 28 U.S.C. § 1330 (1976)).

Federal personal jurisdiction, in comparison to subject matter jurisdiction, has, however, presented great difficulties for plaintiffs.[136] The major obstacles to acquiring personal jurisdiction were the lack of a valid means of service of process[137] and, less frequently, the absence of statutory authorization for the court's exercise of personal jurisdiction, for example, inadequate long-arm provisions.[138]

This situation changed slightly in the 1960's, when courts increasingly found the required statutory authority[139] and upheld various means of service of process on an ad hoc basis.[140] Notwithstanding the courts' growing liberality, they denied the validity of the more innovative attempts to serve process on foreign states. For example, they rejected the argument that diplomatic and consular missions should be deemed agents for service of process.[141] Similarly, courts did not accept the view that foreign states should be treated like foreign corporations for purposes of extra-territorial service of process in accordance with state corporation statutes.[142] The FSIA superseded those uneven and sporadic developments by establishing a uniform and exclusive method of service of process and its own bases of long-arm jurisdiction.[143]

Prior to enactment of the FSIA, the difficulty of acquiring personal jurisdiction caused plaintiffs to bring actions in rem or quasi in rem whenever possible. The usual pattern was for plaintiffs to attach

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136. *See generally* Comment, *Sovereign Immunity—The Restrictive Theory and Surrounding Jurisdictional Issues*, 15 Cath. U. L. Rev. 234 (1966); Note, *Amenability of Foreign Sovereigns to Federal In Personam Jurisdiction*, 14 Va. J. Int'l L. 487 (1974) [hereinafter cited as *Amenability of Foreign Sovereigns*].

137. *See* Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964); Oster v. Canada, 144 F. Supp. 746 (N.D.N.Y.), *aff'd sub nom.*, Clay v. Canada, 238 F.2d 400 (2d Cir. 1956), *cert. denied*, 353 U.S. 936 (1957).

138. *See* Rovin Sales Co. v. Romania, 403 F. Supp. 1298, 1302-03 (N.D. Ill. 1975) (some claims fell within the court's personal jurisdiction, but others did not and had to be dismissed); *Amenability of Foreign Sovereigns*, *supra* note 136, at 493-95.

139. *See* Republic Int'l Corp. v. Amco Engrs., Inc., 516 F.2d 161, 166-68 (9th Cir. 1975); *Amenability of Foreign Sovereigns*, *supra* note 136, at 493-95.

140. *See, e.g.*, Renchard v. Humphreys & Harding, Inc., 59 F.R.D. 530, 532 (D.D.C. 1973) (upholding service by registered mail to a foreign embassy); Petrol Shipping Corp. v. Greece, 360 F.2d 103, 107-08 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966) (same).

141. *See* Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 980-81 (D.C. Cir. 1965); Purdy Co. v. Argentina, 333 F.2d 95, 97 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Oster v. Canada, 144 F. Supp. 746, 748-49 (N.D.N.Y.), *aff'd sub nom.*, Clay v. Canada, 238 F.2d 400 (2d Cir. 1956), *cert. denied*, 353 U.S. 936 (1957).

142. *See* Carl, *supra* note 4, at 1013-14; Pugh & McLaughlin, *supra* note 3, at 29-30; *cf.* Vicente v. Trinidad & Tobago, 53 A.D.2d 76, 385 N.Y.S.2d 83 (1976) (service could not be made extraterritorially, but case dismissed on other grounds), *aff'd*, 42 N.Y.2d 929, 366 N.E.2d 1361, 397 N.Y.S.2d 1007(1977).

143. 28 U.S.C. §§ 1330(b), 1602-1611 (1976).

property of a foreign state, frequently either a vessel or funds in a bank account, in order to establish jurisdiction.[144] The issue of immunity was litigated only subsequent to such jurisdictional attachments.

Until 1955, the State Department had followed no particular policy with regard to jurisdictional attachments of property. In that year, the Department announced that the restrictive doctrine adopted in the Tate Letter did not extend to seizures of property.[145] Foreign states were thus absolutely immune from all attachments of property, including jurisdictional attachments for in rem or quasi in rem actions.[146] That position, however, was not tenable because it foreclosed the only effective means of bringing foreign governments into court, thus rendering the restrictive doctrine meaningless.[147] Subsequently, the State Department returned to the practice of permitting attachments of commercial property for jurisdictional purposes.[148]

The concept of personal jurisdiction over a foreign government was altered by the Second Circuit in *Petrol Shipping Corp. v. Greece*.[149] In this case, plaintiff brought a personal action against Greece for breach of a contract of transport, effecting service of process by ordinary mail to representatives of the defendant's Ministry of Trade and Ministry of Commerce in the United States. Judge Smith reviewed recent cases and trends in federal procedure and sovereign immunity and then upheld plaintiff's method of obtaining personal jurisdiction.[150]

Petrol Shipping recognized two conditions of personal jurisdiction, both deriving from the landmark case, *International Shoe Co. v. Washington*.[151] First, the defendant state must be amenable to suit in the forum by virtue of actual presence, consent, or other contact. The government of Greece had consented to arbitration in New York in the event of disputes arising from its contract with plaintiff. The court found this to be a sufficient nexus under an earlier case that also relied on consent to arbitration to support personal jurisdiction.[152] Judge

144. Lowenfeld I, *supra* note 3, at 386; *see* Lowenfeld II, *supra* note 3, at 923-24.

145. *See* New York & Cuba Mail S.S. Co. v. Korea, 132 F. Supp. 684, 687 (S.D.N.Y. 1955) (State Department suggests immunity from attachment where underlying claim and property were commercial).

146. *Id.* at 686-87.

147. *Id.* at 687 n.7; *see* Lowenfeld II, *supra* note 3, at 908, 921-24.

148. The State Department filed a letter with the court in Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 1088, 192 N.Y.S.2d 469, 472 (Sup. Ct. 1959), drawing a distinction between attachment for jurisdictional purposes and attachment for execution purposes.

149. 360 F.2d 103 (2d. Cir.), *cert. denied*, 385 U.S. 931 (1966).

150. *Id.* at 107-10.

151. 326 U.S. 310 (1945).

152. 360 F.2d at 107 (citing Farr & Co. v. Cia Intercontinental de Navegacion, 243 F.2d 342 (2d Cir. 1957)).

Smith also noted, however, that the defendant maintained an office in New York, thus rendering a doctrine of constructive presence unnecessary.[153]

The second condition was that the defendant must receive adequate notice of the litigation.[154] Under *International Shoe*, that condition is satisfied by any method of service "reasonably calculated" to give notice.[155] The plaintiff in *Petrol Shipping* had sent a summons to that branch of the Greek government which was a party to the contract at issue. Judge Smith found such service consistent with due process.[156]

The most difficult issue that Judge Smith faced was finding authorization for the particular method of service used by plaintiff. He conceded that Rule 4 of the Federal Rules of Civil Procedure was not applicable to a government entity and instead relied on Rule 83 which permits each district court to regulate its practice and make and amend its own rules in any manner not inconsistent with the Federal Rules. Because the local rules of the Southern and Eastern Districts of New York had a similarly flexible authorization, Judge Smith felt free to fashion his own rule approving plaintiff's method of service of process.[157]

The court also drew an important conceptual distinction between personal jurisdiction and sovereign immunity.[158] Personal jurisdiction concerns amenability to suit and adequacy of service. A consideration of those factors should proceed independently of any assessment of sovereign immunity issues. Only after in personam jurisdiction has been established does immunity become a proper subject of inquiry. If jurisdiction does not exist, the court does not reach the question of immunity. If jurisdiction exists, sovereign immunity becomes a potential ground for relinquishing jurisdiction.[159]

Judge Smith relied on that conceptual distinction by analyzing personal jurisdiction and sovereign immunity separately. Once he had determined that the court's exercise of in personam jurisdiction was valid, he turned to the defendant's claim of immunity. Applying the *Victory Transport* criteria, Judge Smith concluded that Greece's act of entering into a contract did not fall within one of the categories of immune activities.[160] Therefore, he denied immunity, a result that

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153. 360 F.2d at 107.

154. *Id.*

155. 326 U.S. at 320.

156. 360 F.2d at 110.

157. *Id.* at 107-10. A good discussion of this procedural problem is provided in Renchard v. Humphreys & Harding, Inc., 59 F.R.D. 530 (D.D.C. 1973).

158. 360 F.2d at 107; *see supra* notes 127-30 and accompanying text.

159. 360 F.2d at 106; *see* Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery*, 1980 Am. Soc'y Int'l L. Proc. 49, 63 [hereinafter cited as Smit I].

160. 360 F.2d at 110.

accorded with the State Department's refusal to suggest immunity because it also considered the act at issue commercial.[161]

Although *Petrol Shipping* provided a sound analysis of personal jurisdiction over foreign states, subsequent cases strictly limited the holding to its facts. For example, courts held that, short of actual presence, minimum contacts between the forum and a defendant state exist only when the latter has consented to jurisdiction or arbitration in the forum.[162] Similarly, courts held that plaintiff can meet the notice requirement only by serving process on that branch of the defendant government responsible for the transaction giving rise to his claim.[163]

3. Underlying Policies

The primary objective of a jurisdictional scheme should be to balance and reconcile plaintiff's interest in easy and certain access to the courts with defendant's interests in receiving notice, not being sued in too distant a forum, and having a meaningful opportunity to defend. The conflict between these interests has been amplified in litigation against foreign states because, historically, plaintiffs have had very difficult access to courts and defendants had a specially protected interest in not being forced to litigate. The secondary objective of the rules of jurisdiction should be to temper the exercise of jurisdiction sufficiently to avoid frustrating the policies inherent in sovereign immunity. Those policy objectives of jurisdictional rules are independent of the goals underlying the separate inquiry into sovereign immunity issues.

The jurisdictional scheme suggested in *Petrol Shipping* was more effective than in rem and quasi in rem jurisdiction in accommodating the conflicting interests of both plaintiff and the defendant government. Plaintiffs' heavy reliance on jurisdictional attachments—to establish in rem or quasi in rem jurisdiction—resulted in freezing numerous scattered properties and assets of foreign countries, thus causing significant irritation to their governments.[164] In addition, the necessity to locate property had several undesirable side-effects, including forum-shopping, races to the courthouse to secure attachment orders, and indiscriminate attachments of properties only tenuously

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161. *Id.*

162. *See* Carl, *supra* note 4, at 1013.

163. *See* Vicente v. Trinidad & Tobago, 53 A.D.2d 76, 77, 385 N.Y.S.2d 83, 85 (1976), *aff'd*, 42 N.Y.2d 929, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 (1977). *See generally* Miller, *Service of Process on State, Local and Foreign Governments under Rule 4, Federal Rules of Civil Procedure—Some Unfinished Business for the Rulemakers*, 46 F.R.D. 101 (1968).

164. House Report, *supra* note 2, at 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6625-26.

connected to plaintiff's claim.[165] Plaintiffs also attached property allegedly owned by foreign states but held in the possession of third parties not necessarily related to the defendant.[166] Moreover, plaintiff's recovery was generally limited to the value of the property attached.[167] All of these factors made litigation unnecessarily complex and cumbersome, inconveniencing the principal litigants as well as third parties, and frustrating the policies underlying sovereign immunity.

Petrol Shipping made personal jurisdiction available, thus relieving plaintiffs of the burden of locating and attaching property. The restrictions inherent in a nexus requirement were fair, and protected defendant's interest in not litigating in completely unexpected forums. Moreover, *Petrol Shipping* was largely effective in avoiding the irritation to foreign states caused by widespread attachments of their property. Finally, the *Petrol Shipping* court was willing to fashion an ad hoc and probably effective rule for service of process. In summary, *Petrol Shipping* largely accounted for the policies that any jurisdictional scheme should serve, while avoiding damage to the policies inherent in sovereign immunity.

Petrol Shipping was never widely followed in the United States, however, and thus did not receive the benefits of extensive judicial refinement. A valid and sound method of service of process, therefore, was still lacking.[168] Until enactment of the FSIA, the dominant method of acquiring jurisdiction was property attachments. The FSIA completely revamped this system in 1977 by prohibiting all seizures of property for the purpose of obtaining jurisdiction.[169] The statute adopts the approach of *Petrol Shipping*, but reflects an effort to refine and improve the basic features of that case.

D. *Enforcement of Judgments*

1. The Courts' Practice

One final problem with the law of sovereign immunity as it existed prior to 1977 was its approach to the enforcement of judgments.

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165. *See* Lowenfeld I, *supra* note 3, at 386-89; Pugh & McLaughlin, *supra* note 3, at 43-50; *infra* notes 233, 393 and accompanying text. *See generally* Delson, *Applicability of Restrictive Theory of Sovereign Immunity to Actions to Perfect Attachment*, 1961 Am. Soc'y Int'l L. Proc. 121 (analysis of law regarding attachments prior to 1976).

166. *See* Aerotrade, Inc. v. Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974); Lowenfeld I, *supra* note 3, at 386-87; *see also* National Am. Corp. v. Nigeria, 448 F. Supp. 622, 632-35 (S.D.N.Y. 1978) (series of complicated attachments), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

167. National Am. Corp. v. Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979).

168. Miller, *supra* note 163, at 121-38.

169. 28 U.S.C. § 1609 (1976).

Judgments against foreign states have generally been unenforceable due to their absolute immunity from execution proceedings. This principle was established in *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*.[170] Plaintiff had obtained a judgment against the Swedish national railroad, which the court considered part of the Swedish government. When plaintiff sought to enforce the judgment by executing upon property of Sweden located in the United States, Sweden claimed sovereign immunity. The court held that Sweden was entitled to absolute immunity from seizure of any of its property in the United States, including commercial property.[171] Although the court deplored the injustice of not enforcing a valid judgment, it believed that absolute immunity from execution was the rule throughout the world, including countries that had adopted the restrictive doctrine for other purposes. The court reasoned that seizure of property is an act so offensive to a state's dignity that no exceptions to immunity can be admitted.

Dexter & Carpenter became the rule in the United States. Although the Tate Letter adopted the restrictive doctrine of immunity in 1952, that change of policy had no impact on execution proceedings.[172] Judicial reluctance to restrict immunity from seizures of property was due largely to State Department policy. The Department adhered to a rule of absolute immunity from such seizures, even though it often rendered illusory the restrictive doctrine announced in the Tate Letter.[173]

Scholars have been divided on the issue of absolute immunity from execution. One commentator who favors the restrictive doctrine for immunity from suit nevertheless recommends an absolute rule for execution purposes.[174] He argues that a seizure of property constitutes an extremely serious affront to a nation's dignity and should be avoided at all costs. Instead, plaintiffs should seek to satisfy judgments against foreign states by presenting them through diplomatic channels. Another scholar, however, argues that foreign states will take advantage of execution immunity by routinely failing to satisfy judgments.[175] Therefore, he advocates adoption of a restrictive doctrine for execution purposes.

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170. 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931).

171. *Id.* at 708, 710.

172. Lowenfeld II, *supra* note 3, at 926-27; *see* Comment, *Sovereign Immunity vs. Execution of Judgment: A Need to Reappraise Our National Policy*, 13 B.C. Indus. & Com. L. Rev. 369, 374-82 (1971).

173. *See* Stephen v. Zivnostenska Banka Nat'l Corp., 15 A.D.2d 111, 116, 222 N.Y.S.2d 128, 133 (1961), *aff'd per curiam*, 12 N.Y.2d 781, 186 N.E.2d 676, 235 N.Y.S.2d 1 (1962). In this case the court, commenting on State Department policy, noted that a foreign state's property could be attached for jurisdictional purposes but could not be used subsequently for execution purposes.

174. Lowenfeld II, *supra* note 3, at 927-29.

175. *See* Smit I, *supra* note 159, at 67-68.

Most modern decisions accepted absolute immunity from execution without extended analysis.[176] A few cases sidestepped the rule, but failed to articulate their reasons clearly and never mounted a principled attack upon immunity from execution. Instead, they invoked subtle and sometimes unpersuasive distinctions to conclude that the general rule of immunity was inapplicable.

In *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*,[177] the Fourth Circuit held that the government of Cuba had implicitly waived immunity from suit by filing answers to plaintiff's complaint without reserving the immunity defense. After its analysis of implied waiver, the court turned to the question of whether plaintiff could execute upon the attached vessel.[178]

The court concluded that as a general rule a waiver of immunity from suit, whether explicit or implicit, does not automatically entail a waiver of immunity from execution. In this case, however, Cuba's implicit waiver was found to extend to execution because its property had already been seized when it entered its first appearance in the case. In view of the already completed property seizure, the failure to object could be construed as a waiver of immunity from property seizure. Although that seizure had been effected for jurisdictional purposes rather than execution purposes, the court reasoned that immunity from property seizure draws no distinction between jurisdiction and execution. Accordingly, any waiver of that immunity would extend to both jurisdictional and executional seizures of property. Thus, Cuba's failure to object to property seizure at an early stage of the litigation was held to constitute a waiver of immunity from execution.[179]

The court's convoluted reasoning ignores that the State Department and other courts recognized the very distinction it refused to draw between immunity from execution and immunity from jurisdictional attachment.[180] That distinction is obvious in that attachment is a provisional remedy, whereas execution amounts to an irrevocable deprivation of a foreign state's property. The State Department, however, had never formulated any precise policy on waivers of immunity from execution, nor issued a suggestion of immunity in this case.

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176. Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); *see* Spacil v. Crowe, 489 F.2d 614, 617-19 (5th Cir. 1974); Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198, 1200-01 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *The American Law of Sovereign Immunity, supra* note 94.

177. 335 F.2d 619 (4th Cir. 1964), *petition for prohibition or mandamus denied*, 380 U.S. 970 (1965).

178. *Id.* at 631.

179. *Id.* at 627.

180. *See Sovereign Immunity, supra* note 4, at 446-47; *supra* notes 148-50 and accompanying text.

Thus, the court could reach its own decision and avoid the traditional rule barring enforcement of a valid judgment against a foreign state.

Harris & Company Advertising v. Cuba[181] also avoided the traditional rule. In that case, an intermediate Florida court found for the plaintiff in a quasi in rem contract action based on various attachments of property. Because the transaction at issue was nongovernmental, the court denied defendant's claim of sovereign immunity from suit.[182]

The court then addressed the issue of permitting execution upon the attached property to satisfy plaintiff's judgment. The opinion made no attempt to distinguish the facts from those in *Dexter & Carpenter*. Instead, it reasoned very simply that the attached property was not immune from execution because it was not shown to be related to a governmental activity. In effect, the court casually and sub silentio adopted the restrictive doctrine for purposes of executing upon a foreign state's property. Moreover, *Harris & Company* required a defendant state to show "by a preponderance of the evidence" that property is governmental in order to establish immunity from execution.[183] The court thus reached a surprisingly modern result, although it can be criticized for oversimplifying the operative policies.

S.T. Tringali Co. v. The Tug Pemex XV[184] is another case that avoided the rule of *Dexter & Carpenter* by sleight-of-hand reasoning. Plaintiff brought an action for damages arising from a collision of ocean vessels, and attached a boat owned by a corporation that was in turn wholly-owned by the Mexican government. Defendant's motion to dismiss because of sovereign immunity did not prevail because the activities at issue were commercial. After plaintiff won on the merits, the court decided that the judgment could be satisfied by executing upon the attached vessel. The judge denied immunity from execution because the vessel was owned by a government instrumentality engaged in private commerce rather than by the Mexican government itself.[185]

The reasoning of *S.T. Tringali* confused the issue of the vessel's ownership with that of its function. The court refused to hold outright that the immunity was unavailable for a commercial government vessel, a holding which would have contradicted *Dexter & Carpenter*. Instead, the court emphasized the fact of ownership by an instrumentality engaged in commerce and held such ownership to be a sufficient

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181. 127 So.2d 687 (Fla. Dist. Ct. App. 1961); *see* United States v. Harris & Co. Advertising, 149 So.2d 384 (Fla. Dist. Ct. App. 1963); *see also* Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 Harv. L. Rev. 1607, 1612-13 (1962) (approving of result in *Harris*).

182. 127 So.2d at 692.

183. *Id.* at 693.

184. 274 F. Supp. 227 (S.D. Tex. 1967).

185. *Id.* at 230.

basis for denying immunity from execution.[186] That holding suggests that such an instrumentality is to be treated differently from the government for purposes of execution. Earlier in the same opinion, however, the court declared that the defendant corporation would be treated as equivalent to and part of the Mexican government for purposes of immunity from the suit.[187] The case thus suggests that wholly-owned instrumentalities should receive the same treatment as states for purposes of immunity from suit, but should receive less favorable treatment for purposes of immunity from execution. The FSIA adopts that approach,[188] and the position may be defensible, but the court neither explained nor justified it.

2. Underlying Policies

Prior to enactment of the FSIA, the absolute rule of *Dexter & Carpenter* prevailed in the United States. The above-described cases, however, illustrate that courts occasionally circumvented that rule and permitted execution upon commercial property. In effect, those cases follow a restrictive doctrine of immunity from execution, thus suggesting a comparison and reexamination of the policies underlying the two rules.

The policy that has most often been advanced as justifying the absolute rule is the avoidance of insult to the dignity and honor of a foreign nation and consequent embarrassment to American foreign policy. After the United States adopted the restrictive doctrine for immunity from suit, the seriousness of property seizure was thought to justify continued adherence to absolute immunity from execution.[189]

The governmental interest in protecting national dignity is still operative today, but its persuasive force has weakened for several reasons. First, the dignity of states is a less meaningful concept today than it was at a time when governments were frequently synonomous with royalty and interacted largely through personal relations among aristocrats. Today, international relations are handled by complex and impersonal bureaucracies whose effectiveness does not depend on the inviolability of their national dignity and honor.[190]

Second, governments are engaged increasingly in trade and commerce with private persons. The international roles of states in the

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186. *Id.*

187. *Id.*

188. *See* 28 U.S.C. §§ 1605(a)(2), 1610(a)(2),(a)(5),(b).

189. *See* Lowenfeld II, *supra* note 3, at 927-29. Other countries, however, are increasingly adopting restrictive rules of immunity from execution. *See* Garcia-Mora, *supra* note 3, at 354-59; Comment, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 Colum. L. Rev. 1086, 1090-91, 1094-95 (1965).

190. *See* Lauterpacht, *supra* note 3, at 230-31; Comment, *Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity*, 12 Colum. J. Transnat'l L. 130 (1973).

past were confined to the diplomatic, political and military areas, whereas today governments discharge a vast range of functions that bring them into close contact with foreign nationals. The frequency and depth of interaction results in familiarity and, to a lesser degree, equality between states and individuals. Governmental activities have thus acquired a flavor of ordinary business dealings that give little weight to the dignity and inviolability of states.

While the governmental interest in protecting national dignity has weakened, other interests have emerged that require strong protection against property seizure. The complexity of international economics and the rising level of coordination among nations result in ever higher degrees of interdependence. Moreover, the great volume of international commerce means that at any point in time a state is likely to have substantial assets located throughout the world. The combination of these factors makes any substantial seizure of foreign state property, commercial or otherwise, a potentially serious problem with economic and political repercussions that go beyond the monetary value of the property seized. By comparison, merely requiring a foreign state to defend itself in court is a more easily accepted interference in governmental functions. The concern with property seizure is especially acute for developing countries, whose foreign assets are likely to be more thinly spread and more sensitive to disruption.

The foregoing comments suggest that the governmental interest in immunity from execution has changed but is still fairly compelling. Nevertheless, it does not follow that absolute immunity is the proper rule. Before fashioning a rule for granting immunity from execution, the private interest in enforcing judgments should be evaluated and weighed against the governmental interest.

The interest in enforcing a valid judgment is, almost by definition, always substantial. In the absence of an enforcement mechanism, the judicial machinery for adjudicating rights among litigants loses much of its credibility. Thus, any legal system has a paramount interest in keeping intact its methods of enforcing court orders and judgments. Moreover, the successful plaintiff has a self-evident and compelling interest in having his judgment executed.

Notwithstanding these powerful factors, the private interest was in the past completely dismissed by the absolute rule, in favor of the interests of foreign states. A change has occurred, however, that today may suggest a more balanced weighing of interests. Previously, dealings between states and private individuals were sufficiently insubstantial that the aggregate private interest in enforcing judgments could be deemed vastly less important than the offense to governmental dignity caused by the seizure of state property. Today, however, the sheer volume of trade between states and persons has significantly amplified the aggregate private interest. Simultaneously, the

focus of the governmental interest has shifted from the preservation of dignity to the maintenance of smooth economic and other governmental functions. Thus, the previous disproportion between the governmental interest and the aggregate private interest has given way to a more equally weighted balance of interests. Furthermore, private and governmental entities now have a mutual substantial interest in establishing a stable international economic and political climate.

An absolute rule of immunity, therefore, is inappropriate because of its total disregard of the private interest and negative effect on the stability of the international legal order. The absolute doctrine reflects an undifferentiating a priori determination that a foreign state's interest will prevail over the private interest regardless of the circumstances. That determination appears crude and blatantly unjust. Its only advantage is predictability and ease of application. The three cases discussed above demonstrate that judges will sacrifice those benefits in order to account more accurately for the competing interests. None of those cases, however, fashions the finely tuned restrictive rule or achieves the delicate balancing of interests that is required in this area of highly polarized, conflicting concerns. The *Dexter & Carpenter* rule was thus properly replaced by a restrictive doctrine when Congress enacted the FSIA.

III. The Foreign Sovereign Immunities Act of 1976

The FSIA went into effect on January 19, 1977.[191] Since that date, the immunities of foreign sovereigns from legal action have been governed by the statutory provisions. The Act achieves four basic aims. First, it conclusively establishes the restrictive doctrine of immunity in United States law.[192] Prior to passage of the statute, that doctrine had been followed only erratically and was vulnerable to political pressures transmitted through the State Department.

Second, the FSIA terminates the dominant role of the State Department in the area of sovereign immunity.[193] It restores to the courts the responsibility for determining questions of sovereign immunity as a matter of legal principle, rather than foreign policy. At the same time, the FSIA is intended to cure the due process problems that afflicted State Department practice.[194]

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191. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.); *see* House Report, *supra* note 2, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604. For good articles on legal practice under the Act, see Carl, *supra* note 4; Kahale & Vega, *supra* note 4.

192. *See* 28 U.S.C. §§ 1602, 1603, 1605-07 (1976); House Report, *supra* note 2, at 14, 18-23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6613, 6616-22.

193. *See* 28 U.S.C. § 1602 (1976).

194. House Report, *supra* note 2, at 7-8, 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605-06, 6610-11.

Third, the Act establishes firm jurisdictional rules governing the commencement of legal action against foreign states.[195] The statute provides for federal subject matter jurisdiction over actions against foreign states,[196] establishes personal jurisdiction over foreign states,[197] and creates several exclusive methods of serving process on foreign states and their instrumentalities.[198] Significantly, the FSIA eliminates in rem and quasi in rem actions against foreign states by prohibiting attachments of foreign states' property for jurisdictional purposes and limiting subject matter jurisdiction to in personam actions.[199]

Fourth, the statute permits execution upon the property of foreign states in certain instances, thereby enabling plaintiffs to enforce judgments.[200] Thus, the FSIA fashions a restrictive doctrine that permits execution only upon commercial property and only if the property to be seized relates to the claim that is the basis of the judgment, or when certain other conditions are met.[201] Judgments against an agency or instrumentality of a foreign state, however, can be executed against any of the instrumentality's property in the United States, as long as the entity is engaged in a commercial activity in the United States.[202]

In addition to those four major changes, the FSIA effects a number of related modifications. For example, prejudgment attachments of property are prohibited for both jurisdictional and security purposes, but are exceptionally permitted for the latter purpose if the state has explicitly waived its immunity from prejudgment attachments.[203] The bar against prejudgment attachments extends to maritime liens against vessels,[204] thus eliminating an important in rem procedure that has no satisfactory in personam equivalent. In order to correct that defect, the Act declares by simple fiat that henceforth maritime liens against foreign states' vessels shall be treated as in personam actions and can be commenced by following certain procedures.[205] Finally, after entry of judgment, plaintiff can secure an attachment or

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195. *Id.* at 8, 12-14, 23-26, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606, 6610-12, 6622-25.

196. 28 U.S.C. § 1330(a) (1976).

197. *Id.* § 1330(b).

198. *Id.* § 1608.

199. *Id.* § 1610.

200. *Id.* § 1610(a); House Report, *supra* note 2, at 7-8, 26-31, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605-06, 6624-30.

201. 28 U.S.C. § 1610(a)(1)-(5) (1976). The other circumstances include waiver, property expropriated in violation of international law, property that is immovable or acquired by succession or gift, and liability insurance. *Id.* § 1610(a)(1)-(5).

202. *Id.* § 1610(b)(2).

203. *Id.* §§ 1609, 1610; House Report, *supra* note 2, at 26-27, 30, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6625-26, 6629.

204. 28 U.S.C. § 1605(b) (1976); *see* House Report, *supra* note 2, at 21-22, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6620-21.

205. 28 U.S.C. § 1605(b) (1976).

execution order by satisfying a notice requirement and demonstrating that the defendant state is likely to remove its assets from the court's jurisdiction.[206]

The FSIA also establishes criteria to determine when an entity will be deemed to be an agency or instrumentality of a foreign state.[207] The status of an entity is important: First, it determines whether treatment under the statute is required; second, it determines whether the special provisions governing agencies and instrumentalities are applicable.[208]

The Act has special provisions governing disputes over property that has been expropriated in violation of international law.[209] Foreign states do not enjoy immunity from legal action concerning such property or property exchanged for it. Additionally, execution is permissable in cases involving expropriation.[210]

Other areas covered by the FSIA include removal of actions from state to federal court,[211] venue,[212] the right to jury trial,[213] substantive tort law in regard to foreign states,[214] counterclaims,[215] and property acquired by foreign states through succession or gift.[216]

A. *Elimination of State Department Dominance*

1. The Statutory Solution

The FSIA has largely succeeded in eliminating the State Department's role in determinations of sovereign immunity. Section 1602 of the FSIA describes its purposes and states, that "[c]laims of foreign states to immunity should henceforth be decided by courts of the

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206. *Id.* § 1610(c).

207. *Id.* § 1603(b); *see* House Report, *supra* note 2, at 15-16, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6613-14.

208. *See* Carl, *supra* note 4, at 1028-31. The special provisions determine different methods of service of process for agencies and instrumentalities than for governments, and provide for punitive damages against the former but not the latter. 28 U.S.C. §§ 1606, 1608(b) (1976).

209. 28 U.S.C. §§ 1605(a)(3), 1610(a)(3) (1976); House Report, *supra* note 2, at 19-20, 28, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618, 6627.

210. 28 U.S.C. § 1610(a)(3) (1976).

211. *Id.* § 1441(d); House Report, *supra* note 2, at 32-33, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6631-32.

212. 28 U.S.C. § 1391(f) (1976); House Report, *supra* note 2, at 31-32, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6630-31.

213. 28 U.S.C. § 1330(a) (1976); House Report, *supra* note 2, at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6611-12.

214. 28 U.S.C. § 1605(a)(5), 1606 (1976); House Report, *supra* note 2, at 20-23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6619-22.

215. 28 U.S.C. § 1607 (1976); House Report, *supra* note 2, at 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622.

216. 28 U.S.C. §§ 1605(a)(4), 1610(a)(4)(A) (1976); House Report, *supra* note 2, at 20, 29, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6618-19, 6628.

United States . . . in conformity with the principles set forth in this chapter."[217] The legislative history explains that a principal purpose of the Act is "to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."[218]

After the statute's effective date, courts began to develop a coherent body of case law, thus correcting one of the principal defects of previous practice. Although cases have been decided inconsistently in a few areas,[219] courts are sensitive to the need for uniformity and predictability in interpreting the FSIA.[220] Determinations of immunity are now being made according to legal standards rather than in response to political pressures and foreign policy. The statute has thus eliminated the basic schizophrenia in the American approach to sovereign immunity. This approach previously wavered uneasily between political expediency and legal principle, and all too often disguised the former with the vocabulary of the law.[221]

The statutory provisions, of course, also constitute policy choices. They reflect judgments that seek to strike a fixed balance between the interests of private persons and foreign states, attempting to reach a fair accommodation. The Act's underlying policies thus minimize considerations based on short term foreign policy. In effect, the Act reflects a policy judgment that the benefits formerly gained by assigning a prominent role to the State Department did not outweigh the negative side effects, such as uncertainty in litigation, disregard for international law, and frequent injustice to private persons.[222]

2. New Problems

The FSIA succeeds in recasting the American concept of sovereign immunity in a uniform theoretical framework that is based on law and tailored to the international perception of the principle. The abruptness and magnitude of this change, however, raises the possibility that the pendulum has swung too far in the direction of the judiciary. Its exclusive control may result in the mishandling of cases

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217. 28 U.S.C. § 1602 (1976).

218. House Report, *supra* note 2, at 7, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606.

219. The best surveys of recent cases under the Act are Carl, *supra* note 4, at 1014-54, and Kahale & Vega, *supra* note 4, at 226-58.

220. See the extensive discussion of the Act's background in Jet Line Servs. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1168-71 (D. Md. 1978). The court said that its decision must be made "without reference to political considerations." *Id.* at 1172.

221. *See supra* notes 87-101 and accompanying text.

222. House Report, *supra* note 2, at 7-9, 14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605-08, 6612-13.

that require some input from the executive branch. Because sovereign immunity inescapably has some aspects related to foreign affairs, the attempt to isolate it completely from executive influence distorts reality and may lead to unsound results.

The Act's excessively harsh excision of executive influence is evidenced by three distinct, but related, situations. The State Department is no longer able to intervene (i) to prevent frivolous lawsuits against foreign governments, (ii) in large transnational cases which might be best resolved diplomatically or, (iii) in cases where national security might warrant executive input.

Foreign states are now required to respond to every legal proceeding through judicial channels, irrespective of the frivolousness of plaintiff's claim. In *Aquino Robles v. Mexicana de Aviacion*,[223] plaintiffs brought an action for false imprisonment by the Mexican government. It was clear from the plaintiffs' pleadings that the court did not have jurisdiction over the case.[224] Prior to enactment of the FSIA, the Mexican government could have relied on diplomatic channels to request a suggestion of immunity from the State Department. Under the statute, however, the State Department lacks that authority. Thus, Mexico was forced to respond through legal procedures, at potentially great expense and inconvenience.[225] Mexico ultimately was able to have the case dismissed, by having a Mexican lawyer in its foreign ministry file a special motion to dismiss.[226]

Other governments faced with similarly frivolous legal action, however, may not have the resources to prepare their own defense or may not be fortunate enough to deal with a sympathetic judge. Thus, they could be forced to retain American counsel, when a brief and inexpensive inquiry by the State Department might have revealed the insubstantiality of plaintiff's case and resulted in a quick dismissal. The FSIA prevents that solution and thus imposes an unnecessary and potentially heavy burden on foreign states.

The FSIA also creates difficulties in cases arising from large-scale problems with transnational implications. One example of such a problem is the 1979 blowout of a Mexican oil well in the Gulf of Mexico, pouring out more than 100 million gallons of oil that formed a giant slick in Texas coastal waters. The economic and environmental damage caused by the disaster resulted in numerous lawsuits amounting to more than 355 million dollars.[227] Other possible disasters with transnational implications come to mind readily, including,

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223. No. 77-50 (Tribunal Superior de Puerto Rico, Sala de San Juan, filed July 20, 1977); *see* Carl, *supra* note 4, at 1056-58.

224. *See* Carl, *supra* note 4, at 1056.

225. *See id.*

226. *Id.* at 1056-57.

227. *Id* at 1010, 1063; see Note, *Ixtoc I: International and Domestic Remedies for Transboundary Pollution Injury*, 49 Fordham L. Rev. 404 (1980).

for example, nuclear accidents, dumping of toxic substances, genetic engineering accidents, and chemical pollution. Moreover, disasters of this type are increasingly likely to occur in the future as technology and science become more advanced and create greater hazards more frequently.

Disputes like those arising from the oil well blowout may be more effectively and inexpensively resolved through diplomatic negotiations between the governments affected, than through litigation. The United States might negotiate for a lump sum settlement with Mexico, creating a fund from which to satisfy private claimants. Alternatively, the State Department might cooperate in establishing an impartial forum to adjudicate the dispute or might take the matter to the World Court. Although the FSIA does not prohibit resort to these alternatives, it raises the specter of numerous lawsuits proceeding on independent theories alongside action by the executive branch. The FSIA provides no effective means of coordinating individual and national action. The statute thus impedes the development of comprehensive solutions and joint national action in response to major transnational disasters.

Finally, the FSIA does not permit executive intervention in judicial proceedings even when it might be required by national security or in emergency situations. When Iran seized American hostages, for example, a national security problem developed that necessitated strong executive action. At least three aspects of the President's responsive strategy had substantial implications for litigation against Iran, yet could not be made to fit into the FSIA scheme.[228] First, the executive branch generally discouraged the institution of legal proceedings against Iran and sought numerous stays in pending actions.[229] The logic underlying this effort was that private legal action might offend the Iranian government and hinder sensitive negotiations for the release of the hostages.[230] Second, the President froze all Iranian assets in the United States, hoping to use them as a bargaining chip in negotiations.[231] That order and its implementing regulations[232] be-

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228. *See* McGreevey, *The Iranian Crisis and U.S. Law*, 2 Nw. J. Int'l L. & Bus. 384 (1980).

229. *See* National Airmotive v. Iran, 499 F. Supp. 401 (D.D.C. 1980); McGreevey, *supra* note 228, at 416-19.

230. *See* N.Y. Times, Aug. 29, 1980, at A17, col. 1. In a case filed against Iran in federal court, United States Attorney Kenneth Mighell filed a motion to stay the action, stating that "[t]he United States is deeply concerned that proceedings on the issues now pending before this court . . . will create a serious risk of prejudicing the continuing efforts of the United States government to resolve the hostage crisis." *Id.* at col. 1-2; *see also* Smit I, *supra* note 159.

231. 31 C.F.R. § 535.201-07 (1980). Authority for this order derives from the International Emergency Economic Powers Act, § 202, 50 U.S.C. §§ 1601-51 (1976), *as amended by* 50 U.S.C. § 1706 (Supp. II 1978 & Supp. III 1979).

232. Iranian Assets Control Regulations, 31 C.F.R. § 535 (1980).

came the subject of extensive litigation regarding their effect on prejudgment attachments, which the FSIA generally prohibits.[233] Third, the accords finally reached with Iran provided for the suspension of all claims pending in court against Iran and their resolution through an international claims commission.[234] The litigation that ensued generally challenged the President's power to suspend private claims, but also specifically questioned whether such action conflicts with the FSIA's purpose of eliminating the executive's role in litigation against foreign states.[235]

The courts' reaction to executive action in the Iranian crisis was mixed. Many initially stayed proceedings at the request of the State Department, but subsequently asserted their role under the FSIA and denied extensions of such stays.[236] One court read the freezing order as suspending Iran's immunity, under the FSIA, from prejudgment attachments.[237] This dubious reading finds no support in the FSIA, and was strongly criticized. Finally, the Supreme Court upheld the President's power to suspend private claims and provided a superficial and unsatisfactory analysis of the actions taken on the FSIA.[238]

The Iranian crisis suggests that in sensitive foreign policy situations the executive cannot ultimately be foreclosed from attempting to influence the courts or from taking independent action with implica-

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233. 28 U.S.C. § 1610(d) (1976); *see* Comment, *The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 Nw. J. Int'l L. & Bus. 517 (1980); *infra* note 393 and accompanying text.

234. For a text of the Agreements between Iran and the United States, see *Iran-United States: Settlement of the Hostage Crisis*, 20 Int'l Legal Materials 224 (1981). *See generally* McLaughlin & Teclaff, *The Iranian Hostage Agreements: A Legal Analysis*, 4 Fordham Int' l L. J. 223 (1981) (analysis of international and constitutional implications of Iranian Hostage Agreements); Note, *Settlement of the Iranian Hostage Crisis: An Exercise of Constitutional and Statutory Executive Prerogative in Foreign Affairs*, 13 N.Y.U. J. Int'l L. & Pol. 993 (1981) (same).

235. Electronic Data Sys. of Iran v. Social Sec. Org. of Iran, 508 F. Supp. 1350, 1360-63 (N.D. Tex. 1981); National Airmotive Corp. v. Iran, 499 F. Supp. 401, 405 (D.D.C. 1980).

236. *E.g.*, National Airmotive Corp. v. Iran, 499 F. Supp. 401, 405 (D.D.C. 1980); E-Systems, Inc. v. Iran, 491 F. Supp. 1294, 1297 n.4 (N.D. Tex. 1980); *see* McGreevey, *supra* note 228, at 417-19.

237. New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120, 129 (S.D.N.Y. 1980). This case was a consolidation of 96 cases on the issue of the availability of prejudgment attachment of blocked Iranian assets. *See* Carl, *supra* note 4, at 1047-50; McGreevey, *supra* note 228, at 407-11; Smit I, *supra* note 159, at 67-69.

238. Dames & Moore v. Regan, 101 S. Ct. 2972 (1981). The Court upheld the President's action by reasoning that the FSIA was not intended to deprive the executive of power in this area and that the suspension of claims did not deprive the federal courts of jurisdiction in violation of article III of the Constitution, but rather was a direction to the courts to apply a different rule of substantive law. The Court derived the President's general power to effect the claims settlement from a long history of congressional acquiescence in such executive action.

tions for lawsuits against other countries.[239] Frivolous lawsuits and major environmental disasters are also situations in which cooperation through official channels is likely to achieve sounder and more predictable results than independent, concurrent and potentially conflicting action.[240] This reality should be statutorily recognized and regulated, by providing for coordination between the two branches and, in some cases, for executive dominance.

3. Suggested Remedies

In constructing a role for the executive and establishing channels of communication between it and the judiciary, the drafters must avoid a recurrence of the executive dominance prevalent prior to enactment of the FSIA. Accordingly, the FSIA should retain provisions that ensure judicial dominance and should grant influence to the executive, other than through *amicus curiae* briefs, only in enumerated circumstances. The statute should be sufficiently flexible to enable the executive to respond to a variety of situations without unduly influencing cases that do not show a genuine need for non-legal solutions or extra-judicial action.

The problems described above as requiring some form of executive action suggest a possible two-tiered approach to amending the FSIA in this area. The oil spill disaster illustrates a large-scale transnational dispute that may be handled more efficiently through diplomatic mediation than litigation. A court can readily recognize from the circumstances of the case that judicial solutions would be less effective than executive action. Therefore, the FSIA should give the courts the option of calling on the executive when they determine that the executive's resources are better suited to resolving the case than are those of the judiciary.

The *Aquino Robles* case and the hostage crisis, by comparison, would not permit a court to determine upon a prima facie examination of the facts that executive action is appropriate. In cases like *Aquino Robles*, courts generally rely on the litigants to bring even

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239. *See supra* note 230 and accompanying text. The State Department has already indicated its desire to communicate its views on the Act to the courts. Dep't State Pub. Notice No. 507, 41 Fed. Reg. 50,883 (1976); *Sovereign Immunity*, *supra* note 4, at 454-55.

240. *See* Smit I, *supra* note 159, at 62. Professor Smit believes that the courts should remain dominant, but that in the event the executive is given power to accord immunity, it should be required to deposit a sum or undertaking with the court to protect the plaintiff. Smit also argues that the provisions shifting power to the courts should be more clear. *Id.* at 61 n.63. Professor Smit's proposal of posting a sum or undertaking can be criticized on the basis that litigation against that sum, as he suggests, will still lead to inquiry into the foreign state's affairs, the avoidance of which was presumably the objective of granting immunity.

glaring defects, such as lack of jurisdiction, to their attention.[241] In addition, the courts are not able to determine frivolousness from the facts of a case until litigation has proceeded at least to discovery. Therefore, intervention by the executive at its own initiative, but at the request of the foreign state defendant, would be necessary to expose the frivolous nature of plaintiff's claim.

Similarly, in an international crisis a court is not likely to recognize national security implications. The executive should again intervene on its own initiative to bring those implications to the court's attention and if appropriate, bring about a termination of legal action. The FSIA might thus be amended to permit executive intervention when required by national security or when legal action has been commenced frivolously and is likely to harass foreign states.

The general approach suggested ensures judicial dominance because it relies on the courts' initiative in the potentially broad range of cases, the complexity and transnational nature of which makes executive action desirable. Only in the rare instances of clear frivolousness or extreme crisis should intervention by the executive on its own initiative be permitted. At the same time, flexibility can be achieved by carefully defining and distinguishing the situations that are appropriate for intervention.

Excessive executive influence can be further avoided by limiting executive power to terminate a suit to those cases in which certain formal conditions have been met. For example, the statute might require a determination by the President that a national emergency exists before the executive can take action overriding the other provisions of the FSIA. In the case of frivolous legal action, the statute might provide that the courts shall not be bound by executive determinations of frivolousness. Finally, it might be required that any executive action conform to certain minimal standards of due process and provide adequate compensation if the property rights of plaintiffs are injured.

The FSIA at present expresses a policy of determining sovereign immunity in accordance with a balancing of plaintiffs' interests and foreign states' interests, without accounting for other factors.[242] Nevertheless, the Act should also recognize that in some situations the litigants' competing interests are collectively outweighed by considerations of national security or international emergencies. Weight must also be given to the policy of promoting a stable international economic climate. Moreover, the statute should account for situations in

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241. Carl, *supra* note 4, at 1057 (citing C. McCormick, Handbook of The Law of Evidence § 335, at 776 (2d ed. 1972)).

242. *See* Jet Line Servs. v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1172 (D. Md. 1978); Edlow Int'l Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827, 832 (D.D.C. 1977).

which the competing interests are best promoted and reconciled not by judicial solutions, but by political and diplomatic mediation. While the basic premise of the FSIA is sound and should be the norm, the Act should also recognize exceptional situations that require departures from the norm.

B. *The Restrictive Doctrine*

1. The Statutory Scheme

The legislative history of the FSIA states that one of its principal goals is the firm establishment of the restrictive doctrine of sovereign immunity in American legal practice.[243] The statutory means for implementing that goal is to establish a general rule of immunity subject to express exceptions.[244] The exceptions include actions based on waiver of immunity, commercial activities or transactions, property taken or expropriated in violation of international law, property acquired by succession or gift, immovable property, and certain torts.[245] In addition, the FSIA allows counterclaims arising out of the same transaction upon which a foreign state as plaintiff has instituted an action, as well as any setoff, whether or not related to the action instituted by a foreign state.[246]

The statutory version of the restrictive doctrine can be characterized as an attempt to implement the policy of giving plaintiffs legal recourse against foreign states, but only when litigation does not threaten governmental functions about which foreign states are likely to be sensitive.[247] The general rule of immunity amounts to a presumption that all activities of foreign states should be shielded from litigation because governmental interests outweigh private interests. The exceptions, however, represent a series of situations in which that presumption is defeated because the private interest in adjudicating claims outweighs the governmental interest in shielding its functions from foreign judicial scrutiny.

The commercial activity exception, for example, reflects a policy judgment that in business dealings the private party ordinarily has an expectation of judicial resolution of its claims, while sensitive govern-

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243. House Report, *supra* note 2, at 7, 14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605, 6613.

244. 28 U.S.C. §§ 1604-1605 (1976).

245. *Id.* § 1605(a)(1)-(5).

246. *Id.* § 1607.

247. The House Report states that the Act adopts the restrictive doctrine in order to give greater protection to private plaintiffs. House Report, *supra* note 2, at 7-9 *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6605-08. For a comparison of commercial activities as set forth in the Act and as defined in Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), see von Mehren, *supra* note 4, at 53.

mental activities are not likely to be implicated.[248] Moreover, international trade is promoted by denying immunity from commercial claims.[249] Accordingly, the FSIA codifies a judgment that in the business context the private interest is more significant than the governmental interest.

The other exceptions to immunity provided in the FSIA can also be viewed as the result of a delicate balancing of competing interests.[250] Private persons have an interest in having their rights determined according to law, while foreign states need to shield essential public functions from potentially crippling litigation. The only extraneous policy that should influence that balancing of competing interests is the goal of fostering a stable international economic climate.

The generalizations implicit in the statutory definitions are basically sound.[251] For example, it is sound policy to favor private over governmental interests in an ordinary commercial situation.[252] The statute, however, makes that generalization applicable in all commercial contexts without admitting the possibility that its underlying premise could be incorrect in some cases. The premise that private interests are of greater significance than governmental interests would be incorrect in a business transaction vitally affecting an essential public function. In a case arising from such a transaction, immunity might be appropriate notwithstanding that the activity at issue is commercial. The FSIA, however, would not permit that result.

The problem hypothesized above stems from several factors. The Act's heavy reliance on categorizations leads to rigidity and inflexibility in dealing with cases that frequently depend on subtle distinctions and sensitive policy judgments. Moreover, the generality and imprecision of the statutory definitions does not encourage extensive analysis of their constituent elements. For example, the definition of "commercial activity or transaction" is so broad and vague that it gives courts

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248. *Compare* Gittler v. German Info. Ctr., 95 Misc.2d 788, 408 N.Y.S.2d 600 (Sup. Ct. 1978) (filming and related activity held noncommercial) *with* United Euram Corp. v. U.S.S.R., 461 F. Supp. 609 (S.D.N.Y. 1978) (cultural project contracts for performing artists held commercial).

249. *See* Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 703-04 (1976).

250. For example, the waiver exception can be analyzed in terms of a balancing of interests. A waiver ordinarily occurs in a commercial context, such as the procurement of goods, in which the private interest is substantial and the governmental function is non-vital. The existence of a waiver implies that the defendant government has made its own determination that essential or sensitive functions would not be implicated if litigation occurred. This judgment by a foreign state makes it reasonable to conclude that its interest in immunity is not overwhelming and is therefore outweighed by the plaintiff's countervailing interest. 28 U.S.C. § 1605(a)(1) (1976); *see* House Report, *supra* note 2, at 18-19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6616-17.

251. *See* Kahale & Vega, *supra* note 4, at 243.

252. Alfred Dunhill, Inc. v. Cuba, 425 U.S. 682, 702-04 (1976).

little guidance in evaluating the factors that might lead one to include or exclude a particular act within the definition.[253]

Short of revamping the Act's network of definitions, Congress should add a form of saving clause to the Act that would allow courts to extend immunity after making certain determinations, notwithstanding the applicability of an exception. Such determinations might include considerations of whether statutory policy would be defeated by a denial of immunity or whether vital interests of the defendant state are at stake. The standard to be met by judges in applying the saving clause should be sufficiently specific to prevent ad hoc grants of immunity. Properly drafted, such a saving clause would give courts an alternative when facing unusual facts that can be made to fit the statutory scheme only through strained reasoning or distortion.

As long as the FSIA lacks a saving clause, its rigidity and generality will lead to occasional subversion of its underlying policies.[254] More importantly, however, those defects will have the indirect and more insidious effect of strained or poorly reasoned opinions. A series of such opinions could substantially retard the development of sound case law under the FSIA.[255]

2. The *OPEC* Case

The foregoing criticisms can be illustrated by analyzing a recent case decided by a federal district court in California. In *International Association of Machinists and Aerospace Workers v. OPEC*,[256] the court granted immunity to OPEC and its member states in an antitrust action based on price-fixing in violation of the Sherman Act and

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253. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C. § 1603(d) (1976); *see* Carl, *supra* note 4, at 1031-35.

254. A saving clause would resolve this problem by allowing the court to make a determination of immunity, notwithstanding the commercial context of the transaction, if an essential public function is implicated. In essence, that judgment would be based on the greater significance of the governmental interest as compared to the private interest. A denial of immunity under the ordinary commercial activity exception would defeat the statutory policy of balancing the competing interests and protecting the one found more important. The saving clause, however, would extend immunity on that policy basis.

255. See Kahale & Vega, *supra* note 4, commenting on the "intended generality of certain important provisions . . . and the unintended ambiguity of others." *Id.* at 258.

256. 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981); *see generally* Note, *Restrictive Immunity and the OPEC Cartel: A Critical Examination of the Foreign Sovereign Immunities Act and* International lAssociation of Machinists v. Organization of Petroleum Exporting Countries, 8 Hofstra L. Rev. 771 (1980); Note, IAM v. OPEC: *The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act against Foreign Sovereigns*, 41 U. Pitt. L. Rev. 841 (1980).

seeking injunctive and compensatory relief. The court recognized that the existence of subject matter jurisdiction under the FSIA depended upon whether the defendants were entitled to sovereign immunity. The latter question in turn hinged on whether the activities giving rise to the action were commercial or noncommercial.[257]

The court's first task was to describe the OPEC members' activities. These included acts such as agreeing on the oil pricing mechanism and the government share of the profits, and imposing production controls, taxation, and direct price quotation. The court correctly recognized that a crucial element in characterizing an activity as commercial or noncommercial is the breadth and comprehensiveness of its description.[258] The court also properly reasoned that a description of the activity at issue should be guided by the legislative intent of the FSIA. The court failed, however, to analyze this intent in terms of the policies underlying the statute, and to describe OPEC's activity in terms of those policies. Instead, Judge Hauk summarily concluded that a narrow description was appropriate, primarily because "a court must base its ruling on specific facts."[259]

Although the court purported to describe OPEC's acts narrowly, the resulting formulation is loose and general. The opinion summarizes the various components of OPEC's activity as "the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil—from its territory."[260]

The court's second task was to characterize the activity as commercial or public within the meaning of the FSIA. Accordingly, Judge Hauk first looked to the statute and its legislative history.[261] He

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257. *Id.* at 566.

258. *Id.* at 567. For example, the postal service could be described as selling courier services (commercial) or as providing an essential public service (governmental). Similarly opposite but correct descriptions can be fashioned for other quasi-public functions that can be equally well performed by private entities. Examples include mass transit, public utilities, public hospitals, certain types of insurance (such as crop insurance), and certain housing projects. *See* Vicente v. Trinidad & Tobago, 53 A.D.2d 76, 77, 385 N.Y.S.2d 83, 85 (Sup. Ct. 1976) (questioning whether ownership and management of a hospital by the state would be a private or public activity), *aff'd*, 42 N.Y.2d 929, 366 N.E.2d 1361, 397 N.Y.S.2d 1007 (1977); *see also* Timberg II, *supra* note 87, at 13-16. Four years before the *OPEC* case was decided, Timberg posed the question: "Is there any logic or praticality in allocating wheat sales to the legally responsible commercial sector, while assigning oil production and supply to the immunized governmental sector of the economy?" *Id.* at 15 (footnote omitted). The answer, not suggested by Timberg, may lie in the substantiality of the governmental interest in oil production, as compared to wheat procurement.

259. 477 F. Supp. at 567.

260. *Id.* Plaintiff sued OPEC as well as the member countries individually and jointly. The court treated OPEC as an international organization which could not legally be served with process. Thus, the court treated the lawsuit as one against the member countries. *Id.* at 560.

261. *Id.* at 566-67.

found, however, that the standards provided there were "somewhat nebulous . . . in the context of a particular factual situation."[262] Accordingly, he looked further to "the standards recognized under international law."[263] In that area, the court derived guidance from several United Nations documents recognizing the "sovereign right of every State to dispose of its wealth and its natural resources."[264] Finally, Judge Hauk described various forms of government regulation in the United States that controlled the production and marketing of natural resources and were considered acts of government.[265]

The principles derived from those sources establish and circumscribe (i) the right of a state over its natural resources, (ii) the right of a state to further its national development and the well-being of its people, and (iii) the right of the United States government to control the development of its natural resources.[266] Judge Hauk summarized his discussion as demonstrating the complete sovereignty of each nation over its physical attributes, the importance of natural resource development to the welfare of a national people, and the dependence of such development on the command of the sovereign.[267] On that basis, he concluded that a state's "establishing the terms and conditions for removal of natural resources from its territory . . . is a governmental activity."[268]

The *OPEC* court's initial task of describing OPEC's activity was rendered difficult by the absence of statutory guidance on how to isolate the acts that shall count for purposes of the FSIA.[269] The apparent statutory assumption is that such guidance is unnecessary because the operative activities are easily recognized and described and are then readily susceptible to characterization as "commercial" or "public." The *OPEC* case illustrates, however, that the two-step process of description and characterization is not automatic and its result not self-evident. The activities of governments are frequently too complex and multi-faceted to be analyzed effectively with such imprecise instructions.

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262. *Id.* at 567.

263. *Id.*

264. *Id.*, (quoting U.N. Resolution 1803, G.A. Res. 1803, § I(1), 17 U.N. GAOR, Supp. (No. 17) 107, U.N. Doc. A/C2/5R850 (1962)).

265. 477 F. Supp. at 568; *see* Parker v. Brown, 317 U.S. 341, 352 (1943).

266. 477 F. Supp. at 567-68.

267. *Id.*

268. *Id.* at 568. Plaintiff argued that, even if the activity at issue was governmental, the fact that several nations conspired to fix prices rendered the activity commercial. The court dismissed that agrument as "ridiculous." *Id.* at 569.

269. For example, OPEC's activities can be described correctly either as the exploitation of natural resources by a sovereign or as the production and marketing of oil. The former appears patently governmental, whereas the latter should be characterized as commercial. Because either description fits well within the FSIA schema, the statute affords no effective means of distinguishing commercial from public acts.

As the *OPEC* court noted, the appropriate description of an activity should account for the legislative intent of the FSIA. The court failed, however, to turn that principle into a meaningful guiding theory. Such a theory would in the first instance require that courts consider the policies underlying the statute when isolating and describing an activity for purposes of determining immunity. The principal policy is to balance the competing private and foreign state interests, extending immunity only if the latter outweigh the former. Since the state interest can usually be described as protecting a particular activity from litigation and judicial inquiry, the description of an activity should focus on the elements most directly threatened by the legal proceeding at issue. Those elements account for the statutory policy and therefore should be determinative of the commercial or noncommercial nature of an activity. Thus, the acts isolated and described should be those which weigh most heavily in the foreign state's favor when its interests are weighed against the private interest.

OPEC's activity, for example, comprises a number of elements, including exploitation of natural resources, regulation of distribution, pricing, marketing and taxation. OPEC's interest, naturally, is to shield all of these acts from judicial scrutiny by a foreign court. The American antitrust litigation, however, directly threatens only certain aspects of the overall activity, namely the pricing and marketing mechanism. Because that aspect appears patently commercial in nature, OPEC's activity should have been characterized as commercial within the meaning of the FSIA.

The court's conclusion that OPEC's activity is governmental is not wholly persuasive because the standards on which it relied provide no meaningful basis for distinguishing commercial from public activities. Those standards, as noted above, derive not from the FSIA but from other domestic and international law evidencing that states have certain sovereign rights with respect to their natural resources. The standards identified by the court establish that, under international law, every state may develop its natural resources as it sees fit.

The principle that states have a sovereign right to perform certain activities, however, does not determine whether those activities should be actionable by private persons. Many activities that are considered clearly actionable also fall within the category of acts that a state can perform as a matter of sovereign right. For example, one might establish through reasoning similar to that used in *OPEC*, drawing on national and international law, that states have a sovereign right to organize and manage a national airline, or to promote travel and tourism of foreigners in their country. Most courts would say, however, that those activities are commercial and would deny immunity for claims arising from them.[270] Judge Hauk's analysis,

270. *E.g.*, Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1061-65 (E.D.N.Y. 1979); Lan-Chile Airlines, Inc. v. Rodriguez, 296 So. 2d 498, 500 (Fla.

which relies on the concept of a sovereign right, is thus not persuasive as the formulation of a standard to distinguish commercial from public activities.

Nevertheless, the court's reasoning carries considerable weight, for it reveals the importance of the governmental interest at stake. The principles that the court considered determinative in characterizing an activity as governmental closely resemble descriptions of the defendant states' threatened interests. The focus on every state's sovereign right to develop its natural resources and the necessity of such development for the improvement of national welfare[271] highlight the great significance of OPEC's activity in the context of its member states' affairs. In effect, the court established that the activity implicated vital state interests and that international law recognizes and approves the importance of those interests.

3. Suggested Remedies

If the FSIA included a saving clause as suggested above,[272] the *OPEC* case could have been resolved clearly and coherently. One would first describe the activity at issue in terms of the state interest most threatened by the legal action, focusing on the pricing and marketing mechanism instituted by OPEC. Because that activity is patently commercial, immunity would be denied under the normal FSIA provisions.

The saving clause, however, would permit an analysis of the statutory policies as applied to the *OPEC* facts. The main policy is to balance the competing interests and promote the one found more significant. An evaluation of the interests at issue in the *OPEC* case would disclose an extremely strong state interest, notwithstanding the commercial context of the case. Failure to grant immunity would defeat that vital interest and therefore negate the statutory policy. Thus, one would extend immunity to OPEC for an essentially commercial activity.

The Act's present rigidity and its tightly knit, but overly general, definitions prevented the *OPEC* court from using the analysis advocated here. Unable to find guidance in the statute, Judge Hauk naturally turned to an evaluation of interests and policies. That evaluation, however, had to be cast in the vocabulary and structure of the FSIA, thus forcing the court to conclude unpersuasively that OPEC's activities were not commercial and therefore were entitled to immu-

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Dist. Ct. App. 1974), *cert. denied*, 310 So. 2d 305 (Fla. 1975); Argentine Airlines v. Ross, 64 A.D.2d 994, 408 N.Y.S.2d 831 (1978), *cert. denied*, 47 N.Y.2d 708, *cert. denied*, 444 U.S. 973 (1979).

271. International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 567-68 (C.D. Cal. 1979), *aff'd*, 649 F.2d 1354 (9th Cir. 1981).

272. *See supra* notes 254 & 269 and accompanying text.

nity. The resulting strained and inaccurate reasoning impedes the development of coherent and articulate case law under the FSIA.[273]

In the absence of a statutory amendment, the best remedy for the problems discussed above is for courts to apply a form of judicial activism in interpreting the Act.[274] They should recognize more explicitly than the statute does the competing interests at stake in determinations of immunity. The FSIA basically endorses a policy of balancing those interests, and courts can implement that legislative intent most effectively by engaging in an interest analysis that transcends strict application of the statutory definitions. Indeed, the legislative history recognizes the need for judicial flexibility in this area.[275]

The statutory exceptions, of course, are based on a particular balancing of interests that courts should not alter. At the same time, they should not blindly apply the exceptions. The FSIA does not govern simple and fixed situations, but sensitive and complex cases involving highly polarized interests. Judges should therefore interpret the Act flexibly in response to each factual setting, aiming for sound policy results rather than strict construction of the definitions. The tightly knit structure of the FSIA ensures that courts will not play too loosely with those definitions.

The *OPEC* case, for example, could have been handled more effectively through explicit judicial activism. The court might have concluded that OPEC's activities are of a public nature, notwithstanding their substantial commercial aspects. Although those activities are undertaken largely in the form of commercial acts, they implicate vital public interests. The latter are so significant, one might argue, that they infuse and subsume the seemingly commercial acts and convert them to public acts.

That analysis appears to constitute a return to the purpose test that was discredited by the FSIA.[276] It is true, of course, that interest

273. *See* Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978) (antitrust action). In *Pezetel*, the court held the activity at issue (manufacture of golf carts) to be commercial, so that the action could be maintained. *Id.* at 395-96. Under the analysis advocated in this paper, *OPEC* and *Pezetel* can be distinguished in that sensitive interests of the Polish government were not involved, thus making a denial of immunity proper. *OPEC*, on the other hand, threatened crucial interests of the defendant countries, thus requiring immunity. Indeed, on a different issue, the *Pezetel* court stated that the inquiry into the defendant's activity would not involve the political system of Poland or cause any embarrassment to the Polish government. *Id.* at 398. Again, one finds a court cautiously feeling its way towards a form of interest analysis, albeit in disguise.

274. For a jurisprudential argument generally in favor of judicial activism, see R. Dworkin, *Constitutional Cases*, in Taking Rights Seriously 131 (1977).

275. House Report, *supra* note 2, at 16, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6615.

276. *See* 28 U.S.C. § 1603(d) (1976). This section requires courts to determine the commercial nature of an activity by reference to its nature rather than to its purpose. House Report, *supra* note 2, at 16, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6614-15.

analysis must inquire into the purposes of an activity to ascertain the governmental interest at stake. The analysis, however, goes beyond the purpose test in that it does not merely identify the public purposes involved, but also evaluates them according to their importance. A seemingly commercial act will be rendered public only if truly fundamental or essential state interests are implicated. If that condition is met, one can reasonably maintain that the very nature of the act is public, thus meeting the statutory requirement of characterizing acts by reference to their nature.[277]

The foregoing discussion illustrates that courts can adopt a policy analysis and interest balancing that will render the statutory criteria more responsive to difficult cases. The suggested solution admittedly invites complexity, if not uncertainty, in application of the FSIA. Nevertheless, it is preferable to the incoherence and frustration of policy resulting from the mechanistic application of the statutory language to facts not readily analyzed in general terms. In addition, that approach would give foreign states a means of demonstrating, in some commercial contexts, that litigation threatens fundamental public interests. Cautiously applied, judicial activism in interpreting the FSIA will yield sounder results than a strict construction of its terms.

C. *Jurisdiction*

1. The Statutory Scheme

The Act's approach to jurisdiction reflects an effort to simplify and standardize prior law, but the new rules may be still more complex and problematic. Prior law relied heavily on jurisdictional attachments for commencing an action because personal jurisdiction was difficult to establish and no reliable means existed for serving process on foreign states.[278] That situation was imperfect in many ways, but plaintiffs had accommodated themselves to it by bringing most actions in rem or quasi in rem. Jurisdictional attachments, though inconvenient and cumbersome, were sure to give notice to the defendant state and sometimes facilitated the satisfaction of judgments by executing upon the property attached.[279]

The FSIA attempts to establish a comprehensive jurisdictional scheme for suits against foreign states.[280] Its elements include original subject matter jurisdiction in the federal district courts[281] and per-

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277. *See* 28 U.S.C. § 1603(d) (1976).

278. *See* House Report, *supra* note 2, at 8, 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606-07, 6622; *supra* pt. II(C)(1), (2).

279. Harris & Co. Advertising v. Cuba, 127 So. 2d 687 (Fla. Dist. Ct. App. 1961).

280. House Report, *supra* note 2, at 8, 12, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606, 6610.

281. 28 U.S.C. § 1330(a) (1976).

sonal jurisdiction over foreign states.[282] The FSIA provides for long-arm jurisdiction to support the courts' exercise of adjudicatory power over the parties,[283] and sets forth service of process rules for commencing actions against foreign states.[284] Finally, the statute includes special venue and removal provisions.[285]

Congress eliminated the prior rules and bases of jurisdiction, intending the new scheme to be both comprehensive and exclusive.[286] To that end, the FSIA amends section 1332 of title 28, governing diversity jurisdiction, to delete references to foreign states.[287] Section 1332 was previously one of the main bases of federal subject matter jurisdiction for actions against foreign governments.[288]

More importantly, the Act eliminates property attachments as a method of subjecting a defendant state to the court's power. Sections 1609 and 1610 have the effect of prohibiting all attachments of foreign states' property for jurisdictional purposes.[289] In addition, section 1605(b) provides that in rem maritime liens against foreign countries' vessels henceforth shall be considered in personam actions and may not proceed through the seizure of a vessel.[290] At the same time, the Act's grant of subject matter jurisdiction is limited to in personam claims.[291]

2. The Shift to Personal Jurisdiction

The main thrust of the new jurisdictional scheme is to focus on the person of a foreign sovereign rather than its property. The legislative history, however, raises the suspicion that the drafters lacked a thorough understanding of the core policies involved in that fundamental conceptual change. Instead, they only perceived several gaps in prior jurisdictional law that required correction.

For example, the Act's service of process procedures were explained in the House Report as filling "a void in existing Federal and State

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282. *Id.* § 1330(b).

283. *Id.* §§ 1605-1611; *see* House Report, *supra* note 2, at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612.

284. 28 U.S.C. § 1608 (1976).

285. *Id.* §§ 1391(f), 1441.

286. House Report, *supra* note 2, at 12, 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6610, 6622.

287. 28 U.S.C. § 1332 (1976); House Report, *supra* note 2, at 14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6613.

288. *See* House Report, *supra* note 2, at 14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6613.

289. 28 U.S.C. §§ 1609, 1610 (1976); House Report, *supra* note 2, at 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6625-26.

290. 28 U.S.C. § 1605(b) (1976); House Report, *supra* note 2, at 21-22, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6620-21.

291. *See* 28 U.S.C. § 1330(a) (1976).

law, and [ensuring] that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts."[292] More generally, the legislative history justifies the new jurisdictional scheme as "conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."[293]

Those observations are not very illuminating and hardly justify as sweeping a change in jurisdictional rules as the Act effected. Both comments reflect a desire to address specific problems of prior law—the difficulty of commencing suit and the lack of uniformity. Those problems were unquestionably significant and required correction. Their solution, however, cannot be effective unless based on a comprehensive understanding of the subtle interrelations among various aspects of sovereign immunity law. The drafters appeared to lack that understanding or to belittle its significance. As a result, the FSIA generally reflects a simplistic and superficial strategy, most glaring in its treatment of jurisdiction.[294] A prime example of that problem is the Act's naive fusion of subject matter jurisdiction, personal jurisdiction, and the criteria of immunity.[295]

A more thorough analysis by the drafters would have, at a minimum, evaluated and compared the respective effects of the two basic forms of jurisdiction, in rem and in personam, on the competing interests. That analysis would have furnished a means for determining whether a jurisdictional scheme focusing on persons balanced those interests better than the former scheme's reliance on property. Alternatively, the analysis would have suggested that the most effective jurisdictional system might be one which combines elements from both schemes.[296]

3. Subject Matter Jurisdiction

a. *Structural features*

A fundamental feature of the FSIA is that it establishes federal subject matter jurisdiction for actions involving foreign states and their political subdivisions, agencies, and instrumentalities.[297] Under prior law, subject matter jurisdiction could almost always be based on section 1332, governing diversity jurisdiction, if no other jurisdictional ground was available.[298] The FSIA substantially complicates that

292. House Report, *supra* note 2, at 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622.

293. *Id.* at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6611.

294. For an excellent analysis and critique of the Act's jurisdictional scheme, see Smit I, *supra* note 159.

295. Smit I, *supra* note 159, at 50-60, 62-63, 69-70.

296. *See supra* text accompanying notes 130-34, 163-69.

297. 28 U.S.C. § 1330(a) (1976).

298. 28 U.S.C. § 1332(a)(2) (1976) extended jurisdiction to actions between "citizens of a State and citizens or subjects of a foreign state." *Id.; see* National Am. Corp. v. Nigeria, 425 F. Supp. 1365, 1368 (S.D.N.Y. 1977).

situation. It extends subject matter jurisdiction to any in personam claim with respect to which the defendant state is not entitled to immunity under sections 1605 through 1607.[299] That limitation on subject matter jurisdiction has the unusual effect of fusing substance and procedure because the procedural issue of jurisdiction is made contingent upon a substantive inquiry into the grounds for immunity.[300]

At first glance, that structure appears to be a simplifying measure because it reduces separate questions to a single inquiry. That simplicity is deceptive, however, for the resolution of several secondary issues depends upon distinguishing subject matter jurisdiction from other jurisdictional requirements and substantive determinations. Those subsidiary issues include, for example, res judicata, collateral estoppel, the timing of raising a jurisdictional objection and determining who may raise the objection.[301] If it is unclear whether dismissal of a case was based on lack of subject matter jurisdiction or a grant of immunity, it becomes difficult to judge whether the dismissal is a proper basis for collateral estoppel in another action. In addition, the tie-in of subject matter jurisdiction with the grounds of immunity has the unprecedented result of permitting the parties to create subject matter jurisdiction by agreement, by means of the defendant's waiver of immunity.[302]

Subject matter jurisdiction is not readily analyzed in terms of the competing interests of private plaintiffs and foreign state defendants. It concerns the competence of a court to adjudicate certain claims rather than amenability to suit or capacity to sue.[303] Accordingly, a policy analysis of subject matter jurisdiction should focus on the efficient operation of the judicial system and fair administration of justice. From the litigants' point of view, the rules of subject matter jurisdiction should be simple, clear, and uniform to allow the predictability of the outcome of secondary issues, such as those mentioned above, and for properly timing a motion to dismiss for lack of jurisdiction.[304]

The FSIA does not achieve those objectives very effectively. As one commentator suggests, a simple declaration that subject matter jurisdiction shall be available for all actions involving foreign states would

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299. 28 U.S.C. § 1330(a) (1976) limits subject matter jurisdiction "to any claim for relief in personam."

300. Numerous courts have commented on the fusion of substance and procedure. *E.g.*, Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1065 (E.D.N.Y. 1979); Upton v. Iran, 459 F. Supp. 264, 265 (D.D.C. 1978), *aff'd mem.*, 607 F.2d 494 (D.C. Cir. 1979); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).

301. *See* Smit I, *supra* note 159, at 52-58.

302. *Id.* at 60.

303. *See* M. Rosenberg, J. Weinstein, H. Smit & H. Korn, Elements of Civil Procedure 209 (1976).

304. *See* Smit I, *supra* note 159, at 58, 61.

have been preferable.[305] The FSIA actually worsens the conditions existing under prior law, which rarely raised problems of subject matter jurisdiction. Thus, the Act fails to achieve its own stated policy of promoting uniformity and simplicity.

b. *The elimination of in rem and quasi in rem actions*

Subject matter jurisdiction under section 1330 is limited to in personam claims.[306] Because the Act is the exclusive basis for subject matter jurisdiction over claims against foreign states, federal courts no longer have competence to adjudicate in rem and quasi in rem actions against foreign states.[307]

This feature of the Act is subject to an important qualification. Section 1605(b) declares by simple fiat that a "maritime lien shall . . . be deemed to be an in personam claim against the foreign state."[308] In addition, this section alters certain aspects of admiralty actions in rem against foreign states to conform them to in personam procedures. For example, arrests of vessels are prohibited,[309] and service of process must be made in the same manner as in in personam actions.[310] Significantly, section 1605(b) requires that any judgment be limited to the value of the vessel or cargo that would have been attached if maritime liens were permissible,[311] thus preserving the most important feature of the in rem proceeding. In effect, section 1605(b) preserves the admiralty in rem action in the guise of an in personam claim, whereas other in rem proceedings are precluded.

The legislative history does not explain this two-tiered approach to in rem actions. Evidently, the legislators felt that the availability of very broad bases of in personam jurisdiction and the long-arm provisions rendered in rem and quasi in rem actions generally unnecessary.[312] Furthermore, such actions are ordinarily commenced by attachment of property, a procedure which the drafters strongly disfavored.[313] Those factors suggested the simultaneous elimination of

305. *Id.* at 64-66.

306. 28 U.S.C. § 1330(a) (1976).

307. *See* Smit I, *supra* note 159, at 56-60.

308. 28 U.S.C. § 1605(b) (1976).

309. *Id.* § 1605(b)(1); House Report, *supra* note 2, at 21-22, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6620-21.

310. 28 U.S.C. § 1605(b)(2) (1976).

311. *Id.* § 1605(b).

312. *See id.* § 1609; House Report, *supra* note 2, at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6611-12; von Mehren, *supra* note 4, at 46-47.

313. House Report, *supra* note 2, at 8, 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606, 6625-26. The Report states that jurisdictional attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. *Id.* at 27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6625-26; *see* Carl, *supra* note 4, at 1021-22; *Sovereign Immunity*, *supra* note 4, at 443; *cf.* Jet Line Servs. v. M/V Marsa El Hariga, 462 F. Supp. 1165 (D. Md. 1978) (plaintiff barred from suit because he had arrested vessel contrary to FSIA).

prejudgment attachments and all in rem actions. It may have become apparent to the drafters, however, that the new bases of in personam jurisdiction, as broad as they are, do not offer an effective substitute for admiralty in rem actions.[314] The latter often involve defendants who cannot be reached with long-arm jurisdiction, their only contact with the forum being the presence of a vessel they own.[315] Moreover, disputes involving foreign states often arise from shipping transactions or accidents caused by vessels. Those factors had made the maritime lien one of the most frequently invoked procedures in actions against foreign states.[316] Thus, it was undesirable to abandon admiralty in rem actions along with the general preclusion of in rem proceedings. The obvious solution was to preserve the maritime lien but convert it to an in personam claim in order to keep intact the policy of avoiding jurisdictional attachments of foreign states' property.[317]

If the foregoing analysis is correct, the legislators were striving for a delicate balancing of foreign states' interests and private interests. The interest of foreign governments in avoiding the paralyzing effect of property attachment conflicted directly with plaintiffs' interests in preserving the admiralty in rem action. The legislative solution to this conflict was to permit the latter actions, but prohibit their commencement by attachment. Maritime in rem actions were simply recast in an in personam guise, although still limited to in rem recovery.

That solution and the Act's general exclusion of in rem cases have been criticized on a number of grounds. One commentator notes the conceptual inconsistency of generally prohibiting in rem suits while permitting them in admiralty.[318] He also suggests that in some cases the in rem bases of jurisdiction may balance more finely the defendant's and plaintiff's interests than do the in personam rules.[319]

It is difficult to establish definitively whether in rem proceedings offer advantages that have not been built into the new in personam scheme. The in rem action protected foreign states by limiting their exposure to the value of the property attached, giving clear notice of the commencement of legal action, and providing the constitutionally

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314. Von Mehren, *supra* note 4, at 46-48.

315. *See* House Report, *supra* note 2, at 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6625-26.

316. *See* Rabinowitz, *Immunity of State-Owned Ships and Barratry*, 1962 J. Bus. L. 89 (1962); *Jurisdictional Immunity*, supra note 3, at 1150-52. For a more extensive survey covering other countries, see Brandon, *Sovereign Immunity of Government-Owned Corporations and Ships*, 39 Cornell L.Q. 425 (1954).

317. *See* Smit I, *supra* note 159, at 54-56. *But see* von Mehren, *supra* note 4, at 47-48 (criticism of maritime liens in form of in personam claims).

318. Smit I, *supra* note 159, at 54-56, 67.

319. *Id.* at 69; *see* Carrington, *The Modern Utility of Quasi In Rem Jurisdiction*, 76 Harv. L. Rev. 303 (1962); Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 Brooklyn L. Rev. 600 (1977) [hereinafter cited as Smit II].

required nexus with the forum. At the same time, it served plaintiff's interests by affording a sure means to institute legal action, virtually guaranteeing a responsive appearance by the foreign state, and encouraging satisfaction of the judgment, at least to the extent of the property attached. The FSIA, however, also achieves those objectives, although not in precisely the same form. Thus, one probably cannot find a distinct and persuasive policy reason for generally retaining in rem actions. The exception is maritime in rem actions, which are not adequately covered by the in personam rules and which the drafters therefore retained in the FSIA.

The foregoing considerations, however, do not inevitably lead to the elimination of in rem actions. Since the major historical disadvantage of the in rem action—harassment of foreign states through jurisdictional property attachment—was eliminated in the FSIA, that form of action has been rendered harmless from the point of view of immunity policy. Accordingly, the in rem action should have been retained if it offers even slight benefits, or if its elimination causes excessive complexity. Sufficient benefits might be found in the suggestion that, in some cases, in rem actions balance competing interests more finely than do in personam actions. In rem actions should thus be reexamined along the lines of that suggestion and the FSIA should possibly be amended to permit in rem actions against foreign states, as long as they are not commenced through property attachment.

Naturally, extending subject matter jurisdiction to include in rem actions would be meaningful only if a means exists for instituting them without attachment. The FSIA's treatment of maritime liens indicates that the legislators can conceive of in rem actions without the necessity of property attachment, notwithstanding that they felt compelled to label them "in personam."

A puzzling problem related to the Act's in rem treatment results from the interaction between removal and subject matter jurisdiction. While new section 1330 limits subject matter jurisdiction to in personam claims against foreign states, section 1441(d) permits removal from state to federal court of any "civil action . . . against a foreign state."[320] An in rem action can thus be pursued in federal court if first commenced in state court and then removed to federal court.[321]

Arguably, in rem actions cannot be instituted in state court because the Act prohibits prejudgment attachments for jurisdictional purposes. This prohibition applies to both federal and state courts and, as a practical matter, is likely to eliminate all in rem actions. Attachment of property, however, may not be a constitutional prerequisite to the exercise of in rem jurisdiction.[322] Accordingly, states could

320. 28 U.S.C. § 1441(d) (1976); House Report, *supra* note 2, at 32-33, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6631-32.

321. *See* Smit I, *supra* note 159, at 55.

322. *Id.* at 55-56.

provide that in rem actions may be instituted without attachment of property.

The possibility thus exists of removing to federal court in rem actions that could not originally have been brought there. The federal rules were amended in 1963 to eliminate precisely this result for in rem actions in general.[323] The FSIA reintroduces that anomaly, with its attendant undesirable forum-shopping implications, for actions against foreign states. No rationale is readily discernible to justify that disparate treatment of in rem actions against foreign states.

Foreign governments have a number of special interests that justify preferential consideration in the removal area. For example, they require uniformity of treatment as provided at the federal level, as well as heightened sensitivity to their governmental status and their lack of familiarity with United States laws.[324] Those factors justify the liberal removal provisions of the FSIA, such as extensions of time for filing removal petititons and the allowance of removal when multiple defendants would otherwise make it impossible.[325] The special interests of foreign states in removal of actions are as equally operative for in rem actions as for other kinds of actions. Therefore, it appears reasonable to permit removal of in rem actions.

This anomaly should thus not be traced to an overly liberal removal provision, but rather stems from the fact that in rem actions were eliminated in federal court but remained possible in state courts. The critical question is whether the policy supporting the elimination of federal in rem actions is equally applicable to state in rem actions. Arguably it is not, and this would justify retention of in rem actions in state court.

The factors leading to the elimination of federal in rem actions were the policy against jurisidictional attachments and the superfluousness of in rem proceedings after the expansion of in personam jurisdiction. In the single instance of an in rem proceeding that had not been rendered superfluous, the legislators retained it in a modified form which left intact the policy against property attachments.[326] At the state level, however, in personam jurisdiction over foreign states remains dependent on state law and may be relatively narrow, or at least unclear, in some instances. As a result, there is a strong possibility that in rem proceedings will continue to play an important role in the context of legal action against foreign states. It is thus appropriate for the FSIA not to preclude them, notwithstanding the anomaly caused by their possible removal to federal court. In any event, as a

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323. *Id.* at 55.

324. Gray v. Permanent Mission of the Congo to the U.N., 443 F. Supp. 816, 821 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978); House Report, *supra* note 2, at 32, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6631.

325. 28 U.S.C. § 1441(d) (1976).

326. *See supra* notes 292-303 and accompanying text.

practical matter, the elimination of prejudgment attachments precludes the commencement of state in rem actions, at least in the immediate future. Consequently, the removal of an in rem case to federal court is likely to be an extremely rare occurrence.

The FSIA might have avoided most of the above described complexities by permitting federal in rem actions as a general rule.[327] The benefit gained from their elimination is minimal, because the policy of protecting foreign states' property from seizure is fully embodied in the prohibition of jurisdictional attachment. Prohibiting in rem suits adds nothing to that policy. The simple deletion of the words "for relief in personam" from section 1330(a) would restore the in rem action and substantially simplify the Act's jurisdictional scheme.

4. Personal Jurisdiction

a. *Jurisdictional contacts*

Section 1330(b) provides that personal jurisdiction over foreign states exists if the claim is one over which the district court has original jurisdiction under section 1330(a) and if adequate service has been made under section 1608.[328] This dual requirement for personal jurisdiction embodies the standards of *International Shoe Co. v. Washington*[329] and *McGee v. International Life Insurance Co.*,[330] which condition personal jurisdiction on minimum contacts between the defendant and the forum state and on adequate notice to the defendant.[331]

The minimum jurisdictional contacts required by the FSIA are contained in the exceptions to immunity, set forth in sections 1605 through 1607.[332] Those exceptions include actions based on any of

327. *See* Smit I, *supra* note 159, at 65-67. Professor Smit argues for retention of in rem actions against foreign states in federal court. *Id.* It should be noted that the FSIA approach to prejudgment attachments should be reevaluated in the event that in rem actions are again permitted. Although Congress may not wish to return to the pre-FSIA era of liberal attachment, it may wish to permit the institution of in rem proceedings through some attachment procedure specially designed to account for foreign states' interests. After all, the most basic function of prejudgment attachments has traditionally been the commencement of an in rem proceeding. *Compare* Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 459 F. Supp. 1242 (S.D.N.Y. 1978) (quasi in rem action commenced just prior to Act's effective date), *aff'd*, 605 F.2d 648 (2d Cir. 1979) *and* National Am. Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978) (same), *aff'd*, 597 F.2d 314 (2d Cir. 1979) *with* Jet Line Servs. v. M/V Marsa El Hariga, 462 F. Supp. 1165 (D. Md. 1978) (vacated attachment of property owned by foreign government's agent).

328. 28 U.S.C. § 1330(b) (1976); House Report, *supra* note 2, at 13-14, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6611-12.

329. 326 U.S. 310 (1945).

330. 355 U.S. 220 (1957).

331. House Report, *supra* note 2, at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612.

332. 28 U.S.C. §§ 1605-1607 (1976).

the following: (i) a waiver by the foreign state; (ii) a commercial activity having substantial contact with the United States; (iii) an act performed in the United States in connection with a commercial activity elsewhere; (iv) an act performed outside the United States in connection with a commercial activity outside the United States if that act causes a direct effect in the United States; (v) rights in property in the United States in connection with a commercial activity carried on in the United States, if that property was taken in violation of international law; (vi) rights in property in the United States acquired by gift or succession; (vii) rights in immovable property in the United States; (viii) certain tortious acts or omissions causing injury or damage in the United States, but excluding certain kinds of torts; (ix) maritime liens based on commercial activity; and (x) counterclaims or setoffs to legal action by the foreign state in a court of the United States or a state.[333]

The legislative history provides little guidance on the factors that influenced formulation of the Act's long-arm provisions. Although the House Report discusses each of the exceptions to immunity, it focuses on their implications for immunity, rather than for personal jurisdiction.[334] The latter is addressed only briefly in stating that the FSIA incorporates a federal long-arm statute over foreign states, patterned on the one enacted for the District of Columbia.[335] In addition, the legislators stated that they intended the Act to meet the requirements of minimum jurisdictional contacts and adequate notice embodied in *International Shoe* and *McGee*.[336] The House Report states that each of the statutory immunity provisions requires either a connection between the lawsuit and the United States or a waiver by the foreign state of its immunity from jurisdiction.[337] Finally, the drafters offered a brief discussion of the jurisdictional contacts required by each of the three commercial-act bases of jurisdiction.[338]

A major weakness of this approach is the fusion of different concepts. The various statutory interconnections make the provisions of sections 1605 through 1607 determinative of subject matter jurisdiction, personal jurisdiction, and immunity. This scheme places too heavy a burden on a single set of criteria that cannot possibly account for the different policies underlying three distinct concepts. Subject

333. *Id.* For discussions of these provisions and cases decided thereunder, see Carl, *supra* note 4, at 1015-21; Kahale & Vega, *supra* note 4, at 244-52; *see generally* Note, *The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum Contacts*, 14 Cornell Int'l L. J. 97 (1981); Note, *Direct Effect Jurisdiction Under the Foreign Sovereign Immunities Act of 1976*, 13 N.Y.U. J. Int'l L. & Pol. 571 (1981).

334. House Report, *supra* note 2, at 17-23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6615-22.

335. *Id.* at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612.

336. *Id.*

337. *Id. But see id.* at 17-19, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6615-18 (discussion concerning the jurisdictional nexus between a foreign state's commercial activities and the United States).

338. *Id.* at 16-17, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6614-16.

matter jurisdiction focuses on efficient administration of justice; personal jurisdiction is concerned with the substantiality of contacts and service of process; and immunity looks to the public nature of the acts and property at issue.

Section 1605(a)(1), for example, deals with waivers of immunity by foreign states. If such a waiver exists, section 1605(a) properly makes immunity unavailable. The existence of a waiver also confers subject matter jurisdiction under section 1330(a). Subject matter jurisdiction, however, should not depend on the defendant's consent or on agreement of the parties. At the same time, the waiver establishes personal jurisdiction under section 1330(b), assuming there was proper service of process. This result is also inappropriate because a waiver of immunity is not the functional equivalent of consent to jurisdiction.[339] Under the FSIA, a waiver clause in a contract made and performed entirely outside the United States would confer federal long-arm jurisdiction. This result would unpleasantly surprise a defendant with no United States contacts who expected merely to waive the immunity defense and on that basis is forced to litigate in a distant forum.[340]

The FSIA thus may create too broad a basis of long-arm jurisdiction that raises constitutional questions and forces federal courts to adjudicate cases having little connection with the United States.[341] While the legislators intended to meet the constitutional requirements set forth in *International Shoe* and *McGee*, they ignored that those cases arose in an interstate and national context. The minimum standards established were premised on the increase of interstate commerce and communication, the dominance of a national economy, and a freedom of movement which greatly diminishes the inconvenience of defending in another state. These factors made it possible for the Supreme Court to relax the contacts requirement and instead focus on adequate notice for purposes of subjecting an out-of-state defendant to judicial power.[342]

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339. *Compare* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1300-02 (S.D.N.Y. 1980) (waiver of immunity in foreign courts is not equivalent to consent to United States jurisdiction), *aff'd*, 647 F.2d 320 (2d Cir. 1981) *with* Ipitrade Int'l v. Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978) (jurisdiction based on waiver of immunity in foreign tribunal, but court also noted existence of treaty).

340. *See* Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo, 485 F. Supp. 490, 493 (E.D. Wis. 1980). In this case, the court dismissed a contract action for lack of minimal jurisdictional contacts. If the contract had included a waiver of immunity clause, without a consent to jurisdiction, the FSIA arguably would recognize personal jurisdiction over the defendant.

341. *See* Carl, *supra* note 4, at 1058-63; Note, *Sovereign Immunity*, *supra* note 4, at 439-40.

342. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 222-24 (1957). In this case, the Court referred to "the fundamental transformation of our national economy," *id.* at 222, and reasoned that "modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State

These factors are not yet present at the international level. International commerce and communication have not developed to a point where it is legitimate to equate the United States economy with the world economy for purposes of subjecting foreign defendants to the power of United States courts. The world economy does not dominate national economies to the same extent that the American economy dominates state economies. In addition, defending in a foreign country is significantly more cumbersome and inconvenient for a foreign state than defending in another state is for a United States national. In view of these considerations, due process may require more jurisdictional contacts in the international context than in the domestic context to support the exercise of personal jurisdiction. *International Shoe* and *McGee* may not be proper standards for evaluating the constitutionality of the Act as regards personal jurisdiction.[343]

Another criticism of the statute's long-arm provisions is that they create an undesirable discrepancy between federal and state law.[344] Prior to enactment of the FSIA, the rules of personal jurisdiction were usually determined by state law because suits against foreign states were commonly based on federal diversity jurisdiction. To a large extent, state law also governed federal question cases in regard to personal jurisdiction.[345] The advantage of this system was that a lawyer practicing in a particular state dealt with only one set of rules.

Under the FSIA, however, federal personal jurisdiction depends upon the immunity provisions of sections 1605 through 1607, whereas states will continue to apply their own personal jurisdiction rules.[346] Of course, questions of immunity and service of process are governed

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where he engages in economic activity." *Id.* at 223; *cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) (due process requires defendant to have minimum contacts with forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice); International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (same).

343. Recent cases, however, have referred precisely to *International Shoe* and *McGee* in evaluating due process as regards suits against foreign states. *E.g.*, Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1250-52 (9th Cir. 1980); East Europe Domes. Int'l Sales Corp. v. Terra, 467 F. Supp. 383, 388-89 (S.D.N.Y.), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979). This treatment is inspired by legislative references to *International Shoe* and *McGee*. House Report, *supra* note 2, at 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6612. *But see* Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1295 (S.D.N.Y. 1980) (court noted that the FSIA jurisdictional provisions are "much narrower" than the "farthest reaches permitted by the due process clause" as applied to some domestic long-arm statutes), *aff'd*, 647 F.2d 320 (2d Cir. 1981).

344. Smit I, *supra* note 159, at 64.

345. *Id.*

346. Because states do not base personal jurisdiction on § 1330(b), which incorporates the immunity criteria, but rather on their own jurisdictional statutes, the states' long-arm provisions are not affected by the federal immunity provisions. *See* Smit I, *supra* note 159, at 64.

by the Act in both state and federal courts.[347] A case might arise, therefore, in which a foreign state is denied immunity under the FSIA and consequently is subject to federal in personam jurisdiction, while it might be beyond a state's jurisdictional reach under a different set of state rules. This complex dual system of personal jurisdiction created by the FSIA causes a lack of uniformity that may lead to forum shopping and may confuse foreign states regarding their amenability to suit in the United States.[348]

Finally, the Act's long-arm scheme can be criticized as being too narrow in that it fails to include "doing business" in the United States as a basis of jurisdiction. This defect is illustrated by *Harris v. VAO Intourist, Moscow*,[349] a wrongful death action brought in New York to recover for the death of a tourist in a Moscow hotel fire. In personam jurisdiction could not be based on the Act's exception for tortious conduct, because that provision requires that the act or omission causing injury occur within the United States.

The three variants of the commercial activity basis were also unsatisfactory. Although the claim was based on an act outside the United States related to a commercial activity outside the United States, it could not be said to have a direct effect in this country. Likewise, plaintiff's claim could not be related to a commercial activity having substantial contact with the United States. Nor could the claim be said to be based on an act in the United States related to a commercial activity elsewhere.[350]

Judge Weinstein noted that the usual basis of in personam jurisdiction for tourists injured abroad was the defendant's doing business in the United States.[351] In personam jurisdiction is ordinarily sustained on that basis even if the plaintiff's claim is not related to that business. In *Harris*, the defendant was unquestionably "doing business" in the United States, but the Act's circumscription of "commercial activity" does not make doing business a general basis of in personam jurisdiction for claims not related to that business. Judge Weinstein therefore regretfully dismissed the case.[352]

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347. 28 U.S.C. §§ 1604, 1605, 1607, 1608 (1976).

348. Smit I, *supra* note 159, at 64. Although states use their own long-arm system, they must use the FSIA service of process method. *See, e.g.*, 40 D 6262 Realty Corp. v. United Arab Emirates Gov't, 447 F. Supp. 710, 711-12 (S.D.N.Y. 1978); Gray v. Permanent Mission of the Congo to the U.N., 443 F. Supp. 816, 819 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978).

349. 481 F. Supp. 1056 (E.D.N.Y. 1979); *see* Smit I, *supra* note 159, at 60.

350. 481 F. Supp. at 1061.

351. *Id.* at 1059-60.

352. *Id.* at 1065-66.

b. *Service of process*

Section 1608[353] establishes the methods of serving process on foreign states and governs both federal and state courts. It creates a hierarchical scheme among several means of serving process. The preferred methods are in accordance with any special arrangement between plaintiff and the foreign state or, if no such arrangement exists, in accordance with any applicable international convention. If service cannot be made by those methods, section 1608 requires service to be made by return receipt mail to be dispatched by the clerk of the court to the head of the foreign affairs ministry of the foreign state. If service cannot be made through that method within thirty days, the plaintiff may have the clerk of the court send the documents to be served to the State Department, which is directed to transmit them to the foreign state through diplomatic channels.

Both of the latter methods of service require that the documents be accompanied by a translation into the official language of the state to be served. In addition, plaintiffs must send along with the documents a "Notice of Suit" addressed to the foreign state and in a form prescribed by the Secretary of State. The State Department has published regulations concerning service of process on foreign states.[354]

Section 1608 includes several other provisions. These impose special procedures for serving process on agencies or instrumentalities of foreign states,[355] including, significantly, service "by order of the court consistent with the law of the place where service is to be made."[356] In addition, section 1608 sets a sixty-day time period for the foreign state, its agency, or instrumentality to answer[357] and establishes certain conditions for entering default judgments.[358]

The House Report states that section 1608 is intended to fill the previously existing void in state and federal law.[359] Prior to enactment of the FSIA, the principal obstacle to commencing an in per-

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353. 28 U.S.C. § 1608 (1976); *see* House Report, *supra* note 2, at 23-26, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622-25.

354. 22 C.F.R. §§ 93.1-.2 (1980); *see also* U.S. Dep't State, Memorandum on Judicial Assistance under the Foreign Sovereign Immunities Act and Service of Process upon a Foreign State (May 10, 1979), *reprinted in* 18 Int'l Legal Mat'ls 1177 (1979) (regarding State Department responsibility to serve process on foreign government defendants under the FSIA); Letter from Lee R. Marks, Deputy Legal Adviser of State Dep't, to Charles N. Brower (June 15, 1979), *reprinted in* 18 Int'l Legal Mat'ls 1184 (1979) (regarding transmittal of foreign states' diplomatic notes to United States courts).

355. 28 U.S.C. § 1608(b) (1976).

356. *Id.* § 1608(b)(3)(C).

357. *Id.* § 1608(d).

358. *Id.* § 1608(e). The claimant must establish his claim or right to relief "by evidence satisfactory to the court." *Id.*

359. House Report, *supra* note 2, at 23, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622.

sonam action against foreign states was that no certain method of service of process existed.[360] The FSIA remedies that defect and at the same time eliminates the two major methods previously used for commencement of an action: attachment of a foreign state's property,[361] and mailing of documents to a diplomatic mission or foreign representative.[362]

One criticism which has been made of the Act's service provisions is that they invite unnecessary complexity by departing from Federal Rule 4(i), governing service on foreign defendants, and by relying on foreign law.[363] This criticism does not withstand close scrutiny. Rule 4(i), like other service of process rules, reflects a balancing of plaintiff's and defendant's respective interests in the fair commencement and notice of legal action.[364] The drafters of Rule 4(i), however, did not have in mind a foreign government defendant. The latter's interets, in the context of service of process, are significantly more complex than those of a private foreign defendant. For example, the cumbersome machinery of a government bureaucracy may not accommodate legal action as readily as can a private entity. Moreover, service on a state requires greater sensitivity to diplomatic and foreign relations factors than does service on private persons.[365]

These factors justify a departure from Rule 4(i) and the adoption of special service of process provisions, even at the cost of greater complexity and unusual difficulties for the plaintiff. Section 1608 essentially reflects a fair balancing of interests. The plaintiff is assured of the ability to commence legal action, but consideration is given to the special interests of foreign government defendants.[366]

Section 1608, however, is subject to another criticism. Evidence exists that the service of process methods required in the absence of a treaty or special arrangement do not function well in practice.[367]

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360. *Id.* at 23, 27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622, 6626; *see supra* pt. II (C)(2).

361. House Report, *supra* note 2, at 8, 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606, 6624-26. The use of the in rem procedure to start a suit provided the jurisdictional contact required as a matter of due process, because attachment is based on the presence of property within the forum.

362. House Report, *supra* note 2, at 26, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6625.

363. Smit I, *supra* note 159, at 66.

364. Fed. R. Civ. P. 4(i) is discussed in 4 C. Wright & A. Miller, Federal Practice and Procedure: Civil §§ 1133-1136 (1969 & Supp. 1980). *See generally* Miller, *supra* note 163, at 121-39 (extensive treatment of this rule).

365. *See* Gray v. Permanent Mission of the Congo to the U.N., 443 F. Supp. 816, 820-21 (S.D.N.Y.), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978).

366. The House Report reflects the drafters' awareness of those special interests in the statement that "section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest." House Report, *supra* note 2, at 23-24, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6622.

367. *See* Carl, *supra* note 4, at 1022-28.

Return-receipt mail to foreign states will often be ineffective in that the state may simply fail to return the receipt. Resort to the State Department may also be difficult because of potential delays or mishandling of documents transmitted through diplomatic channels and because of tensions in relations between states.[368] In addition, the Department's assigned role as courier in legal disputes could adversely affect sensitive dealings in other areas of foreign policy, with inevitable effects on its handling of the documents to be served.[369] In light of these practical difficulties, two courts recently fashioned a novel method of service by telex that clearly appears to be contrary to the FSIA.[370]

If these misgivings are confirmed in future cases, section 1608 will ultimately fail as an effort to reconcile the interests of the plaintiff and the foreign state. While it succeeds in accounting for those of the latter through complex procedures and State Department involvement, that effort could defeat the aim of giving the plaintiff a sure method of commencing legal action. The cumbersome requirements of section 1608 can be justified only if sensitivity to the interests of foreign states is balanced with the assurance that plaintiffs will have access to court. If section 1608 fails in that regard, it should be amended to provide for another method that satisfies the competing interests.

5. Suggested Remedies

The problems inherent in the Act's jurisdictional scheme fall roughly into three categories. First, the fusion of different concepts into the criteria for immunity ignores important differences among the policies underlying those concepts. This is evidenced by the possibility that a waiver of immunity can create both subject matter and personal jurisdiction. Second, the failure to appreciate interrelations among various elements of the jurisdictional scheme results in poor coordination. For example, the drafters did not understand the full ramifications of eliminating in rem actions, and as a result drafted complex and problematic provisions on removal and maritime liens.

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368. This would be the case in actions against Iran, for example, because the United States maintains no diplomatic relations with that country. Accordingly, all diplomatic communications are handled through the embassies of third countries.

369. The State Department would have a natural tendency to delay serving documents if it is involved in sensitive dealing with the country to be served. In effect, the Department's obligation to perform service of process could lead to a conflict of interests within the Department, since the discharge of that obligation could interfere with other foreign tasks.

370. International Schools Serv. v. Iran, 505 F. Supp. 178, 178-79 (D.N.J. 1981); New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80 (S.D.N.Y. 1980); *see also* Note, *Jurisdiction—Service of Process on Iran*, 21 Harv. Int'l L.J. 775 (1980).

Third, many of the Act's provisions create difficulties when put into practice. The service of process provisions illustrate that defect.

A comprehensive remedy to these problems would disentangle the different concepts, coordinate them more effectively, and attempt to work out the practical defects. These efforts should go hand-in-hand because they are unlikely to succeed independently of each other.[371]

Subject matter jurisdiction is a simple concept which can easily be isolated from other aspects of the FSIA. Most importantly, it should not be tied to the criteria for immunity. Instead, federal courts should be given original subject matter jurisdiction for all actions involving foreign states. Secondly, subject matter jurisdiction should be extended to in rem actions, thus eliminating the need to convert maritime liens to in personam claims. In addition, the provision on removal would not present an anomaly if in rem actions can be brought, without jurisdictional attachment, in federal court in the first instance.

Personal jurisdiction should also be isolated from the criteria for immunity. An independent basis of personal jurisdiction should incorporate the dual requirements of a sufficient nexus between the forum and the foreign state, and adequate notice to the latter.

The long-arm provisions should require sufficiently substantial contacts to make it reasonable for the forum to exercise its judicial power over a foreign state, but subject to the consideration that due process may be more exacting in an international, rather than a domestic, context. At the same time, the jurisdictional bases should be broad enough to reach states "doing business" in the United States for virtually any claim against them. If it is considered desirable to limit the kinds of claims that may be brought against foreign states, such limitations should be incorporated into the separate provisions on immunity rather than into the long-arm provision.

The service of process provisions should ensure access to court and notice, while displaying sensitivity to the special interests of foreign government defendants. They should not be so complex, however, that a plaintiff's ability to commence suit is seriously impaired. The present provisions achieve those goals reasonably well, although they may require revision to function more smoothly in practice.

D. *Enforcement of Judgments*

1. The Statutory Scheme

The FSIA makes considerable progress in solving the pre-1977 problems of foreign states' immunity from execution and plaintiffs' result-

371. *See* Smit I, *supra* note 159, at 69-70 (further remedies). An instructive model is also provided in the British State Immunity Act, 1978, which is conceptually more logical than the FSIA in keeping distinct the concepts of jurisdiction and immunity. The British Act also grants a broader basis for personal jurisdiction. The State Immunity Act, 1978, ch. 33.

ing inability to enforce judgments.[372] The Act adopts a restrictive version of immunity from execution, subjecting commercial property to execution in certain instances. The circumstances in which immunity from execution is available, however, are more extensive than those in which immunity from suit is available. Thus, some plaintiffs will find themselves unable to enforce valid judgments.[373] Nevertheless, the statutory provisions on execution are appropriate advances in the law of sovereign immunity.[374]

Section 1609 sets forth a general rule of immunity from execution for the property of foreign states, subject to certain exceptions.[375] The exceptions are listed in section 1610, which establishes separate schemes for foreign states and agencies or instrumentalities.[376] As regards foreign states, the exceptions apply only to property located in the United States and used for a commercial activity in the United States.[377] Subject to those important provisos, property may be seized for execution if (i) the foreign state has waived immunity, (ii) the property to be seized is used for the commercial activity upon which a plaintiff's claim is based, (iii) the judgment to be executed establishes rights in property taken in violation of international law, (iv) the judgment to be executed establishes rights in immovable property or in property acquired by succession or gift, or (v) the property to be seized is an insurance contract for liability on the claim that is the basis of the judgment.[378]

These same exceptions apply to agencies and instrumentalities but they affect a broader range of property. Moreover, certain additional exceptions facilitate seizure of agencies' or instrumentalities' property.[379] In addition, immunity is expressly extended to certain international organizations in the process of disbursing funds to foreign states,[380] to the property of a foreign state's central bank,[381] or to military property.[382]

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372. House Report, *supra* note 2, at 27-28, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6626-27.

373. *See* Kahale & Vega, *supra* note 4, at 217.

374. *See* Carl, *supra* note 4, at 1038-40; Smit I, *supra* note 159, at 67; *Day in Court, supra* note 3, at 569.

375. 28 U.S.C. § 1609 (1976).

376. *Id.* § 1610(a), (b).

377. *Id.* § 1610(a). For agencies and instrumentalities, the property to be seized must also be located in the United States, but it need not be used for commercial activity. Instead, it is sufficient if the agency or instrumentality is engaged in commercial activity in the United States. *Id.* § 1610(b).

378. *Id.* § 1610(a)(1)-(5).

379. *Id.* § 1610(b)(1)-(2).

380. *Id.* § 1611(a).

381. *Id.* § 1611(b)(1). Immunity is not available, however, if the bank has explicitly waived its immunity from execution.

382. *Id.* § 1611(b)(2).

The House Report describes the provisions on execution as furnishing a remedy to a judgment creditor if, after a reasonable period, a foreign state or its enterprise has failed to satisfy a final judgment.[383] The Act is intended to alter prior law, which accorded foreign states absolute immunity from execution even in ordinary commercial litigation involving the seizure of commercial assets. The drafters viewed the enforcement of judgments against foreign state property as a controversial subject marked by a trend toward limiting immunity.[384] That trend is evidenced by a number of treaties concluded by the United States and conventions more widely ratified.[385] The FSIA follows the trend by "partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity."[386]

The policy underlying the provisions on execution reflects a rough balancing of interests, subject to the legislators' characteristic caution when breaking with a traditional rule.[387] Prior law was inadequate in that it absolutely protected the interests of foreign states while disregarding plaintiffs' interests in satisfying claims that were judicially legitimized.[388] The FSIA partially corrects that misbalanced policy judgment by denying immunity in a number of situations that do not implicate sensitive interests of foreign states.[389]

2. Prejudgment Attachments

Both executions on property and prejudgment attachments involve seizures of a foreign state's property, yet the Act more liberally permits executions. This difference is justified for at least two reasons. First, execution is a more discriminating procedure than prejudgment attachment in that it is based on a legitimized claim and is limited to the amount of the judgment. Prejudgment attachment, by comparison, is based on potentially proper claims and occasionally on speculative assertions by the plaintiff. In addition, it is limited only by the value of the property attached.

Second, plaintiffs' interests are more compelling for executions than for prejudgment attachments. Execution embodies a plaintiff's vital interest in vindicating rights that have been judicially recognized. The FSIA provides no alternative method of enforcing those rights, and

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383. House Report, *supra* note 2, at 8, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606.

384. *Id.* at 8, 27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6606, 6626.

385. *Id.*

386. *Id.*

387. *See Problem of Execution Uniformity, supra* note 4, at 575.

388. *See Proposed Statutory Elimination, supra* note 4, at 165-66.

389. A notable exception is the provision permitting execution on property expropriated in violation of international law, 28 U.S.C. § 1610 (a)(3) (1976), a situation about which foreign states are likely to be extremely sensitive.

their denial would seriously compromise the policy of granting plaintiffs recourse against foreign states in non-sensitive situations. Execution is thus a vital procedure and is properly included in the statute, notwithstanding the general distaste for seizure of foreign states' property.[390]

The main purpose of prejudgment attachments was the commencement of in rem legal action, a function now served by in personam procedures.[391] Plaintiffs' other interests in prejudgment attachment are less significant and have been protected in part by the FSIA. Nonetheless, there are problems with the Act's less liberal approach towards prejudgment attachments.

Section 1610(d) permits prejudgment attachments exceptionally to freeze property within the forum for possible satisfaction of a later judgment.[392] The section requires both an explicit waiver of immunity from prejudgment attachment and a showing that the purpose of the attachment is to secure satisfaction of a possible later judgment and not to obtain jurisdiction.[393] A significant problem with this limitation is that it plainly does not protect a plaintiff who lacks the waiver. Such plaintiffs are exposed to a real danger that the foreign state defendant will remove its assets from the forum and, in effect,

390. The sensitivity to execution issues is shown by the Act's provision specifically extending immunity to the funds of foreign states' central banks and to military property. *Id.* § 1611(b); House Report, *supra* note 2, at 30-31, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6629-30; *cf. id.* at 21-22, 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6619-21, 6624-26 (denial of immunity for commercial claims, for maritime liens, for execution on certain properties and for service of process).

391. House Report, *supra* note 2, at 26-27, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6624-26; *see* Smit I, *supra* note 159, at 54-56.

392. 28 U.S.C. § 1610(d) (1976); *see* Smit I, *supra* note 159, at 65 n.98 (in the litigation between Martropico Compania Naviera, S.A. against Pertamina, defendants not only sought in vain to vacate prejudgment attachments laid before the effective date of the Act, but also made extensive efforts, including re-negotiation of various large contracts, to ensure that they would have no assets in the United States); *see also* von Mehren, *supra* note 4, at 44-45 & n.51 (sets forth the rationales underlying prejudgment attachments); *Sovereign Immunity*, *supra* note 4, at 450 (regarding the problem of a "flight of assets."). *See generally* Smit II, *supra* note 319 (regarding the enduring utility of the in rem rules).

393. A series of Iranian cases considered under what circumstances a waiver from prejudgment attachments exists. *E.g.*, New Eng. Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980); E-Systems, Inc. v. Iran, 491 F. Supp. 1294 (N.D. Tex. 1980); Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979); Reading & Bates Corp. v. Nat'l Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979); *see* McGreevey, *supra* note 228, at 400-11; Comment, *Prejudgment Attachment of Frozen Iranian Assets*, 69 Cal. L. Rev. 837 (1981); Comment, *Prejudgment Attachment of Iranian Assets in the United States: Waiving Sovereign Immunity*—Behring Int'l, Inc. v. Imperial Iranian Air Force, 13 N.Y.U. J. Int'l L. & Pol. 675 (1981); Comment, *The Foreign Sovereign Immunities Act: The Use of Pre-Judgment Attachment to Ensure Satisfaction of Anticipated Judgments*, 2 Nw. J. Int'l L. & Bus. 517 (1980); 12 L. & Pol'y Int'l Bus. 1001 (1980).

become judgment proof. This prospect may discourage plaintiffs lacking an explicit waiver from instituting legal action at all, thus defeating the statutory policy of adjudicating disputes that arise from non-immune activity.[394]

Plaintiffs can, of course, seek to protect themselves by always including in contracts an explicit waiver of immunity from prejudgment attachment. As one commentator notes, however, that strategy is not available to plaintiffs whose actions are not based on contract. Moreover, contracts concluded before the Act's effective date may not include sufficiently explicit waivers. Even post-Act contracts may have too general a provision to satisfy the requirements of section 1610(d).[395]

In effect, the Act's allowance of prejudgment attachments for security purposes is too restrictive and should be made available in a wider range of circumstances. Attachment should be available in the absence of an explicit waiver by the defendant state. To control the availability of such attachments, plaintiffs might be required to show a "likelihood" or "probability" that the defendant state will remove assests from the forum to escape a possible later judgment.

Prejudgment attachments should also be permitted in cases of explicit waiver, irrespective of the likelihood that assets will be removed to escape judgment. This would enable plaintiffs to protect themselves in contracts with foreign states, while putting the latter on notice of the possibility of prejudgment attachments. Moreover, if a foreign state has negotiated and contracted in regard to its immunity from prejudgment attachments, the FSIA policy of avoiding irritation does not seem operative. No policy reason exists for depriving private persons and foreign states of the freedom to negotiate and contract with respect to the valuable device of prejudgment attachments. Even the former absolute rule of immunity from suit permitted states to waive such immunity, thus avoiding the excessively protective stance now embodied in section 1610(d).

Another function traditionally served by prejudgment attachment is the assurance of an orderly disposition of assets when several plaintiffs bring actions against one defendant. The order of prejudgment attachments frequently determines plaintiffs' priorities in satisfying judgments from the defendant's assets.[396] The FSIA throws this sys-

394. Smit I, *supra* note 159, at 67-69.

395. *Id.* at 68; *see* von Mehren, *supra* note 4, at 55-56 (parties can draft contract clause waiving immunity from suit and execution). A contract provision may be broadly drafted and intended to extend to prejudgment attachments, but if it makes no explicit reference to prejudgment attachments, it may not constitute a waiver within the meaning of section 1610(d). *Id.*

396. *E.g.*, N.Y. Civ. Prac. Law § 6226 (McKinney 1980). The importance of attachment priorities is illustrated by the so-called Nigerian cement contract cases, involving numerous plaintiffs, many of whom relied on attachments of Nigerian funds to commence action and secure possible later judgments. Most of these actions

tem into disarray because section 1610(d) permits only certain types of plaintiffs to establish their priority for later satisfaction of a judgment. If plaintiffs do not meet the requirement of the section, they are unfairly disadvantaged and may find themselves obtaining meaningless judgments if the defendant state's assets have been attached by other parties. This problem could be remedied by liberalizing section 1610(d) to allow prejudgment attachments for the purpose of determining priorities among several plaintiffs.

3. Execution

The Act's execution provisions are also subject to criticism for not reaching a more finely tuned balance between plaintiffs' and defendants' interests. The commercial property exception of section 1610(a)(2),[397] for example, states that the property of a foreign state shall not be immune from execution if it is used for a commercial activity and located in the United States, and if the plaintiff's claim is based on that commercial activity or upon another commercial activity in the United States for which the property formerly was used.

The general policy underlying that exception to immunity is sound because commercial property is not ordinarily of such a sensitive nature that the satisfaction of a judgment should be denied. The problem is with section 1610(a)(2) which draws a tenuous and problematic distinction that is not supported by that policy. The clause restricts execution to judgments based on the commercial activity for which the property to be seized is or was used. The statute thus distinguishes between property related to the plaintiff's claim and property unrelated to that claim, permitting execution only upon the former. This distinction, however, places too much weight on the connection between commercial property and the activity upon which the plaintiff's claim is based. Extensive litigation may be necessary merely to determine whether the requisite nexus exists.

Moreover, this potentially problematic distinction is not relevant to the operative policies. The primary goal in extending immunity from execution should be to shield a foreign state from interference in sensitive areas and from disruption of important functions. That concern, however, is independent of the nature of the plaintiff's claim. A foreign state's property does not become less sensitive if the plaintiff's

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were commenced well before the effective date of the FSIA. For example, in National Am. Corp. v. Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd mem.*, 597 F.2d 314 (2d Cir. 1979), the court stated that plaintiff's attachment order was subject to two prior attachments. *Id.* at 633. For an extensive listing of the Nigerian cases filed in United States courts, see Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1290 n.22 (S.D.N.Y. 1980), *aff'd*, 647 F.2d 320 (2d Cir. 1981).

397. 28 U.S.C. § 1610(a)(2) (1976); *see* House Report, *supra* note 2, at 28, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6627.

claim is closely related to its use and, conversely, does not become more sensitive if the plaintiff's claim is unrelated to its use. The fortuitous presence in the forum of property connected to the plaintiff's claim is not a rational basis for distinguishing between otherwise similar judgments.

The foregoing problems can be illustrated by applying section 1610(a)(2) to a hypothetical. A foreign state might maintain and staff an office in the United States for the purposes of promoting trade with Americans, negotiating particular transactions, and soliciting capital investment.[398] The trade delegation, which does not constitute an agency or instrumentality,[399] might enter into a variety of contractual relations with private persons in the United States. It might be party to a lease for office space, employ American staff, borrow money, invest assets, and enter into contracts with American importers and exporters.

In the event of a breach by the foreign state of one or more contracts, judgment creditors would seek to seize assets used in connection with the activities of the trade delegation. Applying the FSIA, one might conclude that all assets used or managed by the trade delegation are property of the foreign state, located in the United States, and used for commercial activity in the United States. That would not end the inquiry, however, for the crucial issue is whether that commercial activity is also the basis of the plaintiffs' respective claims. This issue raises substantial difficulties, for it hinges on a precise description of activities that can be correctly described in various ways.

The activity of the trade delegation might be described broadly as "promoting trade with the United States." One would then argue that any of the plaintiffs' respective claims are related to the defendant's promotion of trade. The counter-argument, however, is that a commercial activity must be described more narrowly, or else virtually any claim could be based on it. In addition, the foreign state might have numerous other assets in the United States that are used in connection with the promotion of trade, none of which would be remotely related to the plaintiffs' claims.

Defining activities more narrowly, however, raises new difficulties in dividing assets among the various activities. The activities at issue would be described as "leasing office space" and "procuring grain," but a court would be hard-pressed to allocate specific funds and assets

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398. *See* García-Mora, *supra* note 3, at 350-54. *See generally* Fensterwald, *supra* note 62, at 634-39 (immunity accorded Soviet trade organizations in U.S. and other countries).

399. If the trade delegation was a separate agency or instrumentality, the connection between its property and plaintiff's claim would not be an issue, because its entire property would be subject to execution regardless of whether such a connection existed. *See* 28 U.S.C. § 1610(b)(1)-(2) (1976).

to them for purposes of execution.[400] Even if those determinations can be made by a court, they raise substantial accounting problems.[401] In addition, the trade delegation might commingle funds with its central government or other state organs, thus further complicating execution proceedings.

The Act raises these questions through its circumscription of seizable assets, but provides no standards for answering them. More importantly, however, those difficult issues are raised unnecessarily, for they are not relevant from a policy perspective. Rules of immunity from execution should balance the state's interest in non-interference against the private interest in enforcement of judgments. Applied to the above hypothetical, such rules should focus on the extent to which seizure of governmental assets would threaten sensitive governmental concerns. In that inquiry, the basis of the plaintiff's claim is irrelevant.

The foregoing analysis extends not only to claims based on commercial activities, but also to other claims. Since the legislators have judged that the seizure of commercial property located in the United States does not implicate and threaten important functions of the foreign state, execution should be permitted for any claim brought under sections 1605 through 1607.[402]

These problems primarily affect plaintiffs. The remedy suggested, a liberalizing of the commercial property exception, would go a long way toward promoting plaintiffs' interests more effectively. It offers greater flexibility in defining who may seize property and thus makes execution available to a wider range of plaintiffs.

From a defendant's perspective, however, foreign states have very substantial interests in shielding their property from seizure. The liberalizing of the commercial property exception in favor of plaintiffs may require a countervailing protection in favor of foreign states. The most effective means of implementing such protection is in the form of a saving clause similar to the provision proposed for immunity from suit.[403] The saving clause would permit, or require, a court to deny

400. For example, should a lessor be able to seize only assets specifically used for the lease that is the basis of his claim or could he attach assets used in connection with other office space or for overhead? Would a seller of grain be able to execute only upon assets earmarked for his grain supply contract or could he rely on assets used for general grain purchases or other purchases?

401. *Judicial Adoption*, *supra* note 46, at 326 n.56.

402. Prior to the FSIA, one commentator argued that "property utilized in the performance of activities which are not necessary to the exercise of an essential governmental function should be subject to execution in satisfaction of judgments." *Id.* at 326. A similar critique of the execution provisions is offered in von Mehren, *supra* note 4, at 61-65. Von Mehren also notes the problem of relating plaintiff's claim to the activity for which the property is used. *Id.* at 63.

403. Lauterpacht, *supra* note 3, also proposes that if immunity from execution is abolished in principle, the foreign state should be able to apply for a stay of execution under certain conditions. *Id.* at 243; *see supra* notes 251-55 and accompanying text.

execution upon otherwise vulnerable property—that is commercial property—when the defendant state shows that execution would defeat an important governmental interest.

Naturally, any seizure of property, commercial or otherwise, will cause some disruption in the smooth operation of government, or the implementation of economic policy.[404] Special statutory protection should thus be limited to substantial disruptions affecting vital public functions. A developing country, for example, should be able to prevent the seizure of commercial assets earmarked for grain purchases if it shows that its population is suffering from a hunger epidemic and that sufficient grain cannot be obtained without those funds. The inclusion of a sufficiently high standard in the saving clause would ensure that foreign states cannot defeat execution by showing the existence of frivolous concerns or insubstantial interests.

The proposed revisions would better accommodate the conflicting interests of plaintiffs and foreign state defendants. The revisions would also have incidental benefits. First, foreign states would be less likely to remove commercial assets from the forum if they could protect sensitive or vital property by a showing of a substantial governmental interest. Second, the liberalization of the commercial property exception avoids the complex and unworkable distinction between property related to the plaintiff's claim and property unrelated to that claim, thus eliminating a potentially major litigation problem.

One section of the Act achieves a balance of interests and a division of responsibility between the judiciary and the legislature that is noteworthy for its instructive character. Section 1610(c) states that no attachment or execution shall be permitted unless a court has first determined that a reasonable period of time has elapsed following the entry of judgment.[405] In addition, any order of attachment or execution must be made by a court rather than a clerk or local sheriff, as is permitted in some states.[406] The House Report describes some of the factors that a court should consider in determining whether the period elapsed has been reasonable. Those factors include the existence of required procedures before the foreign state can make payment, representations as to steps being taken to make payment, and evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.[407] Section 1610(c) is intended to have courts exercise their discretion in permitting execution.

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404. *See supra* pt. II(D)(2).

405. 28 U.S.C. § 1610(c) (1976); House Report, *supra* note 2, at 30, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6629.

406. House Report, *supra* note 2, at 30, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6629.

407. *Id.*

The policy underlying section 1610(c) is sound. It seeks to give plaintiffs reasonable assurance that execution will be available, while recognizing possible difficulties faced by states in liquidating funds for satisfaction of a judgment. Accordingly, the statute requires courts to balance various factors in determining whether a foreign state has had a reasonable time period available to satisfy a judgment. Moreover, if indications of bad faith on the part of the foreign state exist, the plaintiff's interest in preventing removal of assets also becomes a factor.

Section 1610(c) is significant because it is the only instance in which the Act expressly gives the courts discretion to balance a number of factors operating variously in plaintiff's or defendant's favor. This indicates that the drafters were willing to delegate policy decisions to the courts in at least one sensitive area of sovereign immunity, and suggests that other problems of sovereign immunity law could also be solved by outlining certain policy factors and instructing courts to use their discretion in reaching a "reasonable" result based on those factors.[408]

Additionally, section 1610(c) implies that some immunity issues cannot be resolved by fixed statutory rules but rather need to be addressed in an ad hoc fashion by courts, guided by legislative policy input. The legislators concluded that foreign states should have some grace period before execution to overcome special obstacles they might face in satisfying a judgment. A statutorily fixed time, however, is no solution because it might be too short for liquidating funds to satisfy very large judgments, yet could be long enough to enable foreign states to remove assets from the jurisdiction. The best way to resolve that dilemma is to specify an indefinite period to be set by a court on the basis of various factors.[409] Other problems of sovereign immunity, for which statutorily predetermined results are unjust or impractical, may also be appropriate for that kind of solution.[410]

Finally, section 1610(c) will give courts an opportunity to demonstrate their capacity to weigh a number of policy factors and apply open-ended standards in reaching sound and consistent decisions. If the FSIA is amended in the future, the courts' capacity to meet the challenge will constitute an argument in favor of solving other problems by judicial discretion.

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408. The clause "reasonable period" appears in the statute at § 1610(c).

409. See Comment, *Sovereign Immunity—Waiver and Execution: Arguments from Continental Jurisprudence*, 74 Yale L.J. 887 (1965), which states that in Italy and Greece courts cannot order execution without prior approval of the executive branch. *Id.* at 914-15. That requirement may be in part intended to solve the same problem addressed in § 1610(c).

410. *See supra* notes 251-55, 403-06 and accompanying text; *see also* Weber, *supra* note 4, at 39 (Congress should give courts a high degree of flexibility in the sovereign immunity area).

Conclusion

The criticisms of the FSIA that are made in this Article should not obscure the Act's significance. The prior law of sovereign immunity in the United States was unsound and unpredictable. The statute represents important policy advances and achieves a measure of certainty in litigation against foreign states.

Nevertheless, the FSIA requires improvement in some areas. The jurisdictional scheme, for example, should be substantially revised. The role of the executive branch should be refined. On a number of issues, the judiciary should be given more discretion, subject to policy guidelines.

Granting the courts wider latitude would enhance their ability to make discriminating policy judgments. Although the FSIA accounts for operative policies and competing interests better than prior law, many of its provisions could be tuned still more finely to resolve the delicate problems arising from legal action against foreign countries. Moreover, the international law of sovereign immunity is likely to continue developing in response to political and economic changes in international relations. Those developments will heighten the need for judicial latitude and a sensitive balancing of interests, lest United States law again lag behind that of other countries.

This Article seeks to develop an approach to sovereign immunity which will satisfy that need. It focuses on competing interests and policies rather than on fixed rights and precepts. The underlying premise is that foreign state immunity is not inherent in the international order or the concept of the nation-state, but instead is a function of the ever changing and growing intercourse across national boundaries between persons and states.

The four problems of sovereign immunity law addressed in the foregoing pages are not exhaustive of the troubled areas. Although an attempt was made to identify the most important issues, a complete treatment would cover many others. These include the status of agencies and instrumentalities, the sources and effects of waivers of different immunities, the relation between sovereign immunity and the Act of State doctrine,[411] the interaction of federal and state law, and conflict of laws questions. In addition, comparative studies should be made of the laws of other countries regarding various elements of sovereign immunity, including especially the success of the British State Immunities Act of 1978.[412] Any study of those topics, however, should begin with an understanding of the policies and concepts fundamental to foreign state immunity.

411. *See* Hill, *Sovereign Immunity and the Act of State Doctrine—Theory and Policy in American Law*, to be published in January 1982 in 46 Rabels Zeitschrift für ausländisches und internationales Privatrecht (Max Planck Institute, Hamburg, Germany 1982).

412. The State Immunity Act, 1978, ch. 33; *see* Note, *Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the Schooner Exchange to the State Immunity Act of 1978*, 13 Vand. J. Transnat'l L. 761 (1980).