The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court

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Recommended Citation
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I. INTRODUCTION

On January 21, 1977, the Foreign Sovereign Immunities Act of 1976 (Act) went into effect. The Act is the result of several years of patient effort jointly undertaken by the Departments of State and Justice in collaboration with the practicing bar. It is essentially a codification of the existing law governing suits involving foreign states in United States courts.

The Act sets forth the "sole and exclusive standards to be used in resolving

4. The Immunities Act defines foreign state to include the foreign state itself, its political subdivisions, and its agencies or instrumentalities. 28 U.S.C.A. § 1603(a) (West Supp. 1977). The term political subdivisions includes "all governmental units beneath the central government, including local governments." H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6613 [hereinafter cited as House Report, with page numbers as reprinted]. An agency or instrumentality of a foreign state is any entity: (1) which has a separate legal existence apart from the state, such that it can sue or be sued in its own name; (2) which is an organ of a foreign state or a majority of whose shares are owned by a foreign state; and (3) which is neither a citizen of the United States nor created under the laws of any third country. Id. at 6613-14. Thus, for example, a corporation which was organized and doing business pursuant to the laws of New York was found not to be an agency of a foreign state, despite the fact that a majority of its shares was owned by the Soviet Government. Amtorg Trading Corp. v. United States, 71 F.2d 524, 529 (C.C.P.A. 1934). An entity of a foreign state created under the laws of a third country is presumptively engaging in private commercial activity and is treated as any private entity. House Report, supra at 6614.

The Act, in several respects, offers those involved in litigation with an agency or instrumentality of a foreign state certain fundamental procedural advantages as compared to those procedures available in litigation involving a foreign state or its political subdivisions. Compare 28 U.S.C.A. §§ 1608(a), 1608(b) (West Supp. 1977) with id. §§ 1610(a), 1610(b). See also notes 156-68 & 186-207 infra and accompanying text. "The rationale for the difference in treatment is that each agency or instrumentality will probably have its own assets and will act as a separate entity, analogous to an American corporation." Sklaver, Sovereign Immunity in the United States: An Analysis of S. 566, 8 Int'l Law. 408, 422 (1974) (note that Sklaver's analysis was of the earlier proposed legislation).
questions of sovereign immunity raised... before Federal and State courts." Its general purpose is "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." It assures that citizens entering into commercial transactions with foreign states will not be deprived of legal redress. The rationale is that a foreign state that chooses to engage in commercial activities should bear the cost of doing business, including litigation.

This Note will examine the provisions of the Act with particular emphasis given to an analysis of its interaction with prior case law. As a preliminary matter, it should be noted that the Act does not affect substantive rules of liability. Its main thrust is a codification of the procedural rules to be applied in litigation involving foreign states. Consequently, this analysis will concentrate on the procedural aspects of the Act.

II. FOREIGN SOVEREIGN IMMUNITY IN UNITED STATES COURTS

The traditional rule regarding the sovereign immunity afforded a foreign state in United States courts was articulated by Chief Justice Marshall in Schooner Exchange v. McFadden, in which citizens of the United States had libeled an armed vessel in the possession of Napoleon's navy. The citizens claimed that the vessel had been wrongfully taken and converted into a war vessel. The Supreme Court dismissed the action and ordered the vessel released. Marshall stated the rule as follows:

5. House Report, supra note 4, at 6610.
7. 1976 Hearings, supra note 3, at 24 (testimony of Monroe Leigh accompanied by Michael Sandler). "At the heart of the bill are some modern-day realities. Increasingly, our citizens... are coming into contact with foreign governments and their agencies." Id. "[T]his bill is important because of the increasing tendency of governments abroad to conduct foreign business through state trading organizations, state-owned corporations, or directly through government ministries... In the resource area, state-owned firms now predominate in the oil field... National agricultural marketing boards are playing an increasing direct role in grain trade; in shipping, many developing countries are buying national fleets which are operated as state monopolies; and, of course, most international airlines have long been state-controlled entities. "States are also becoming involved in the creation of industrial conglomerates which buy, sell, and invest in the U.S. . . . ." Letter from Timothy W. Stanley, President, International Economic Policy Association, to Hon. Walter Flowers, Chairman, Subcomm. on Administrative Law and Governmental Relations, Comm. on the Judiciary, U.S. House of Representatives (June 24, 1976), reprinted in 1976 Hearings, supra note 3, at 71.
8. See Panel, Litigating the Immunity of Foreign Sovereigns: Selected Problems of Presenting Your Case in the Courts and the Executive Branch, 1976 Proc. Am. Soc'y Int'l L. 41, 58 (remarks of Mr. Sandler) [hereinafter cited as Litigating].
9. "Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state." House Report, supra note 4, at 6606.
10. 11 U.S. (7 Cranch) 116 (1812).
11. Id. at 146-47. As a corollary to the principle of sovereign immunity, a rule developed that
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.12

Under this theory of sovereign immunity, a foreign sovereign was considered absolutely immune from suit without its consent.13

At the turn of the century, as the number of commercial contracts between states increased, a new "restrictive" theory of sovereign immunity began to emerge14 which recognized immunity with regard to the sovereign or public acts of a foreign state but not with respect to its private acts.15 In contrast to the absolute immunity theory, in which every act of a foreign state was considered a sovereign act, the restrictive immunity theory was based upon the principle that a foreign state could engage in an entire panoply of activities without donning the cloak of sovereignty. Implicit in this limited recognition was the notion that a foreign state was not bound to confine itself

the property of a foreign state was immune from arrest or detention under judicial process. While Schooner Exchange dealt specifically with military property of a foreign state, the rule was extended to commercial property in Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 567 (1926). In Berizzi, the Supreme Court held that a merchant vessel owned and operated by a foreign state was immune from arrest under process based on libel in rem brought by a private citizen. But see Republic of Mexico v. Hoffman, 324 U.S. 30 (1945), discussed at notes 93-96 infra and accompanying text.

12. 11 U.S. (7 Cranch) at 137.
13. The United States thus joined the majority of nations adhering to the absolute immunity concept. The British courts expressed the rule in equally broad terms: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign . . . ." J. Sweeney, The International Law of Sovereign Immunity 20 (1963) (quoting the Parliament Belge, 5 P.D. 197, 217 (1880)). However, even under the absolute theory of sovereign immunity, the immunity of a state from judicial process did not extend to litigation regarding a determination of an interest in immovable or real property located in the territory of another state. Id. at 1. The Act continues this rule. See 28 U.S.C.A. § 1605(a)(4) (West Supp. '1977).
14. The restrictive theory of sovereign immunity "ha[d] become necessary because States increasingly exercise activities in the realm of . . . trade." Sweeney, supra note 13, at 37, (quoting Republic of Latvia Case, 221 I.L.R. 230, 231 (W. Ger. KGE, Berlin 1955)). It is interesting to note, however, that the development of the restrictive theory of sovereign immunity had been foreshadowed as early as Schooner Exchange where Justice Marshall stated: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual . . . ." 11 U.S. (7 Cranch) at 145.
15. For a discussion of the distinction between public and private acts, see Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep't State Bull. 984 (1952). See also Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Y.B. Int'l L. 220 (1951); Sweeney, supra note 13, at 20-23.
to a political role and could buy, own, contract, become creditor or debtor, and engage in commerce. As to these activities the state was acting as a private person, and under the restrictive theory, the foreign state as a civil person was amenable to the courts. Thus, under the restrictive theory of sovereign immunity, when a foreign state entered the marketplace as a merchant, it was held accountable for its commercial obligations. Even Chief Justice Marshall, otherwise an adherent of the absolute theory of sovereign immunity, had recognized "that when a government becomes a partner in any trading company, it divests itself... of its sovereign character, and takes that of a private citizen." However, while this restrictive theory correctly reflected economic reality, it was difficult to apply in practice.

Indeed, the conceptual difficulties involved in differentiating between the public and private acts of a sovereign led many commentators to declare that the restrictive theory of immunity was unworkable. Courts struggling to apply these distinctions reached completely inconsistent results. For example, in Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate, the Second Circuit held that a contract entered into by Greece's Ministry of Commerce for the purchase and shipment of grain was a non-immunized commercial act. On the other hand, in Isbrandtsen Tankers, Inc. v. President of India, the same court upheld India's defense of sovereign immunity in an action arising out of a contract for grain shipments similar to those in Petrol Shipping. In Et Ve Balik Kurumu v. B.N.S. International Sales Corp., plaintiff, a state enterprise of the Republic of Turkey, whose duty included supplying meat and fish to the Turkish army, had contracted for the purchase of mutton. A dispute arose and the court held that the plaintiff's acts constituted a commercial activity not immune from

17. See 1976 Hearings, supra note 3, at 30. This concept was recently reiterated by the Supreme Court: "When a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader..." Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 696 (1976) (quoting Ohio v. Helvering, 292 U.S. 360, 369 (1934)).
21. 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971). Isbrandtsen Tankers may be distinguished from Petrol Shipping in that in Isbrandtsen Tankers the court deferred to a State Department suggestion of immunity filed with the court. (For a discussion of the effect of these "suggestions," see notes 25-31 infra and accompanying text). However, the court did state that even in the absence of a State Department suggestion, "the mere fact that a contract with a private commercial interest is involved does not automatically render the acts of the foreign government private and commercial." Id. at 1200. Such a statement seems clearly at variance with the result in Petrol Shipping. See also Victory Transp. Inc. v. Comisión General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
defendant's counterclaims. However, another court, in *Kingdom of Roumania v. Guaranty Trust Co.* reached the opposite conclusion. There, a foreign state, which had entered into a contract in the United States to purchase shoes for its army, was allowed a sovereign immunity defense, because the transaction constituted a public act.

In the United States, the difficulties encountered in the application of the restrictive theory were compounded by a unique practice which had developed with respect to the adjudication of sovereign immunity claims. Specifically, in actions against foreign states in United States courts, the foreign state had the option of either litigating the defense of sovereign immunity in court or making a formal diplomatic request to the State Department to "suggest" to the court that the proceeding be dismissed on the ground of sovereign immunity.

The courts conclusively accepted these State Department "suggestions" without questioning their fairness or wisdom. The germination of this "practice of granting unquestioned discretion" to these suggestions may be seen in *Schooner Exchange* where Chief Justice Marshall stated that "there seems to be a necessity for admitting that the fact [of immunity] might be disclosed to the court by the suggestion of the attorney for the United States." Despite vigorous debate over the propriety of the State Department role, the courts continued their unquestioned acceptance of State Depart-
ment suggestions in order to avoid embarrassing the executive arm of the government in the conduct of foreign policy.1

Even where the foreign state chose to litigate the defense of sovereign immunity, judicial deference to State Department policy continued. In Republic of Mexico v. Hoffman,3 the Supreme Court declined to recognize a claim of immunity where the State Department had refused to suggest that the action be dismissed on the ground of sovereign immunity. The Court stated that “[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”33

In 1952, the State Department, in the Tate Letter,34 officially adopted the restrictive theory of sovereign immunity by announcing that “the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.”35 Theoretically therefore, in cases involving claims arising out of the commercial transactions of a foreign state, the State Department would decline to suggest that the action be dismissed. However, notwithstanding adoption of the Tate letter, the State Department, as an essentially political body, often succumbed to the daily exigencies of political pressure exerted by foreign states and issued State Department suggestions in return for concessions or political trade-offs on the foreign relations front.36 This occurred even where the claims involved arose out of what were arguably commercial activities of a foreign state.

Illustrative of this is Rich v. Naviera Vacuba S.A.,37 in which various United States judgment creditors of Cuba sought to attach a Cuban merchant vessel. The claims involved arose out of the commercial activities of Cuba. The State Department, in an action completely inconsistent with the policies

31. Hellenic Lines, Ltd. v. Embassy of South Vietnam, 275 F. Supp. 860, 861 (S.D.N.Y. 1967). However, one commentator, expressing his dissatisfaction with justifying judicial deference to Department suggestions on the basis of potential embarrassment to the Executive, stated that this is “‘one of the most overrated arguments in the annals of American legal history.’ It would be useful if someone would list the cases in which court action has embarrassed the Executive Branch in any significant way in the conduct of foreign affairs.” Panel, New Departures in the Law of Sovereign Immunity, 1969 Proc. Am. Soc’y Int’l L. 187, 192 (remarks of Monroe Leigh) [hereinafter cited as New Departures].

32. 324 U.S. 30 (1945).

33. Id. at 35. See also Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).


35. Letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in 26 Dep’t State Bull. 984, 985 (1952).

36. See 1976 Hearings, supra note 3, at 34-35 (remarks of Monroe Leigh in response to a question of Mr. Kindness).

37. 295 F.2d 24 (4th Cir. 1961).
that it had announced in the Tate letter, suggested that the suit be dismissed. The court accepted the suggestion and dismissed the suit. However, underlying the issuance of the suggestion, was the fact that the State Department had just completed sensitive negotiations with Cuba regarding the return of a United States airliner that had been hijacked and detained in Cuba. Such a bargain between the State Department and a foreign state involved in litigation often left the private litigant with no legal remedy.

In Chemical Natural Resources, Inc. v. Republic of Venezuela, a State Department suggestion of immunity as to the commercial activity of a foreign state was also accepted. The court concluded “that the State Department has silently abandoned the ‘revised and restricted policy’ set forth in the Tate letter and has substituted a case by case foreign Sovereign Immunity policy.” Indeed, the State Department, in a letter to the court, seemed to countenance its own departure from the Tate letter by announcing that the policies expressed therein were not unalterable.

It became apparent that the State Department was ill-equipped to make the dispassionate legal decisions inherent in the application of the Tate letter. Although the State Department did conduct informal hearings at which parties to an action could present their views regarding the issue of sovereign immunity, these hearings were hardly satisfactory to a private litigant seeking full judicial review of his claim. Indeed, to the extent that the issue of sovereign immunity presented a legal, rather than a political question, more appropriately cognizable before the judiciary, the State Department involvement ran afoul of fundamental notions of separation of powers and judicial process. Moreover, application of the Tate letter by the State Department often posed a devil’s choice:

If the Department [followed] the Tate letter in a given case, it [was] in the incongruous position of a political institution trying to apply a legal standard to litigation already before the courts. On the other hand, if forced to disregard the Tate letter in a given case, the Department [was] in the self-defeating position of abandoning the very international law principle it elsewhere [espoused].

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38. For a discussion of this case, see A. Chayes, T. Ehrlich & A. Lowenfeld, International Legal Process 87-144 (1968). Rich has been characterized as “one of the international legal monstrosities.” New Departures, supra note 31, at 191 (remarks of Monroe Leigh quoting Professor Lillich). One commentator has rejoined, “If cases such as Rich v. Naviera Vacuba are to be characterized as ‘legal monstrosities,’ consider what a ‘political monstrosity’ the failure to grant immunity could have occasioned in such a case.” Id. at 194, (remarks of Michael H. Cardozo). For a discussion of a case with similar political overtones, see Leigh, Sovereign Immunity—The Case of the “Imias,” 68 Am. J. Int’l L. 280 (1974).

40. Id. at 159, 215 A.2d at 876.
41. Id. at 161, 215 A.2d at 876.
44. 1976 Hearings, supra note 3, at 26 (testimony of Monroe Leigh).
In order to "create some semblance of order out of chaos and unburden the Department of State from the judicial function and political pressures," Congress enacted the Foreign Sovereign Immunities Act. Basically, the Act states a general premise of immunity and then creates exceptions to this general principle. A foreign state will not be subject to suit under the Act unless the activity of the foreign state, which is the subject of the suit, falls within one of the specifically enumerated sections encompassing the exceptions to immunity. The general exceptions are waiver, commercial activity of the foreign state having a nexus with the United States, expropriation claims, litigation relating to rights in immovable, inherited and gift property, noncommercial torts, and certain maritime liens.

III. Exceptions to Sovereign Immunity of Foreign Nations

A. Codification of the Restrictive Theory of Sovereign Immunity: Commercial Activity

The Act codifies the restrictive theory of sovereign immunity as expressed in the Tate letter. The most important feature of the Act is that it removes from the State Department decisions regarding sovereign immunity and delegates the responsibility for these decisions to the judiciary. The Act "builds on a long-term principle of great importance, that the ability of American courts to determine and apply international law through the domestic judicial system should be strengthened."

The determination as to whether a particular act in question is commercial,
to which the Act denies immunity, or governmental, to which the Act affords immunity, is to be made by reference to the nature of the act and not to its purpose.\textsuperscript{57} While the Act does not provide a precise definition of commercial activity,\textsuperscript{58} certain activities of a foreign state such as the sale or service of a product, leasing of property, borrowing of money, engagement of employees or investment in American corporations would clearly constitute commercial activity under the Act.\textsuperscript{59} Essentially, a court "would inquire whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments."\textsuperscript{60} Under this analysis, the fact that goods or services which are the subject of the contract are eventually to be used for a public purpose by a foreign state is irrelevant.\textsuperscript{61}

The Act provides three situations in which a foreign state engaging in a commercial activity which establishes a jurisdictional nexus in the United States would not be entitled to immunity.\textsuperscript{62} The first instance concerns commercial activities which are carried on in the United States by the foreign state.\textsuperscript{63} Such activities might include entering into a contract here, or establishing a business office here in connection with the operation of a wholly owned corporation. In this regard, the courts will have to conduct a factual analysis on a case-by-case basis to determine whether a particular activity has been performed in the United States. Secondly, there is no immunity where a foreign state performs an act in the United States "in connection with a commercial activity of the foreign state elsewhere."\textsuperscript{64} Thus, to the extent that a foreign state engages in commercial activity here, even if in connection with commercial activity to be performed elsewhere, it is subject to suit under the Act. For example, as in \textit{Petrol Shipping},\textsuperscript{65} the act of entering into a contract here for the shipment of grain abroad, would constitute a sufficient nexus as contemplated by the Act. The third situation arises where a foreign state performs an "act outside the territory of the United States in connection with

\textsuperscript{57} House Report, \textit{supra} note 4, at 6615.

\textsuperscript{58} Commercial activity is broadly defined as "either a regular course of commercial conduct or a particular commercial transaction or act." 28 U.S.C.A. § 1603(d) (West Supp. 1977). "The courts [will] have a great deal of latitude in determining what is a 'commercial activity' for purposes of [the] bill." House Report, \textit{supra} note 4, at 6615.

\textsuperscript{59} House Report, \textit{supra} note 4, at 6615.

\textsuperscript{60} \textit{1976 Hearings, supra} note 3, at 53 (testimony of Monroe Leigh).

\textsuperscript{61} "This would mean, for example, that a foreign state's purchase of grain from a private dealer would always be regarded as commercial, even if the grain were to serve some important government purpose, such as replenishing government stores or feeding an army." \textit{1976 Hearings, supra} note 3, at 27 (testimony of Monroe Leigh). Thus, under the Act, cases such as \textit{Isbrandtsen Tankers, Inc. v. President of India}, 446 F.2d 1198 (2d Cir.), \textit{cert. denied}, 404 U.S. 985 (1971), and \textit{Kingdom of Roumania v. Guaranty Trust Co.} 250 F. 341 (2d Cir.), \textit{cert. denied}, 246 U.S. 663 (1918), \textit{discussed at} notes 21-23 \textit{supra} and accompanying text, would have been decided differently.


\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} 360 F.2d 103 (2d Cir.), \textit{cert. denied}, 385 U.S. 931 (1966), \textit{discussed at} note 20 \textit{supra} and accompanying text.
a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.\(^6^6\) Thus, when a foreign state engages in commercial activity anywhere, and that activity has a "direct effect" in this country, the foreign state will be amenable to suit under the Act. For example, commercial activity by a foreign state abroad, such as price fixing, which has the result of affecting prices here, would subject the foreign state to suit here under the Act. It is suggested that "direct effect" be given a broad construction, in recognition of the fact that would-be litigants harmed by such activity, as a practical matter, have no other forum available in which to seek judicial review of their claims.

Application of the rule stated in the third situation is perhaps the most controversial aspect of the Act. However, the rule is in accord with international practice.

[I]t is certain that the courts of many countries, . . . which have given their . . . legislation a strictly territorial character, interpret [their] law in the sense that offenses, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offense, and more especially its effects, have taken place there.\(^6^7\)

The extraterritorial application of United States laws has most often occurred in the antitrust area. In United States v. Aluminum Corp. of America,\(^6^8\) one of the issues before the court was whether Aluminum, Ltd., a Canadian corporation, had violated the United States antitrust laws. Answering in the affirmative the court stated: "[I]t is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders . . . which the state reprehends. . . .\(^6^9\)

Therefore, a foreign state which engages in commercial activity anywhere, in contravention of any United States law, subjects itself to suit in the same manner as a private individual if that activity has a "direct affect" within the United States. In this regard, it is interesting to speculate how United States courts might handle a suit brought against a country which has engaged in economic sanctions against the United States having a direct effect here, as, for example, the case of the Arab oil boycott. To the extent that the activity is construed as commercial, and not political,\(^7^0\) such a suit would be cognizable under the Act.

B. Waiver of Sovereign Immunity

The Act denies immunity where the foreign state has explicitly or implicitly waived the defense of sovereign immunity. Under the Act, a foreign state may

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68. 148 F.2d 416 (2d. Cir. 1945).
69. Id. at 443.
explicitly waive its immunity by treaty.\textsuperscript{71} In this regard, the United States has entered into many treaties with foreign states containing express waivers of sovereign immunity for the purpose of facilitating trade and commerce between the countries.\textsuperscript{72} Where such a treaty exists, it will constitute an explicit waiver of sovereign immunity.

A foreign state may also explicitly waive immunity by contract.\textsuperscript{73} Prior to the passage of the Act, a private litigant who had secured such a waiver would nonetheless often be left remediless against the foreign state because of the unwillingness of the courts to ignore State Department suggestions. For example, in \textit{Isbrandtsen Tankers v. President of India},\textsuperscript{74} the plaintiff had entered into a contract with the defendant in which the defendant had given an express waiver of sovereign immunity and consented to be sued in the Federal District Court for the Southern District of New York. When a dispute arose, and the plaintiff sued, the court deferred to a State Department suggestion and dismissed the suit notwithstanding evidence of the waiver. Under the Act, such explicit waivers will be given effect.

Examples of implied waiver under the Act, consistent with prior case law, would be an agreement to arbitrate or the filing of a responsive pleading without raising the defense of sovereign immunity.\textsuperscript{75} For instance, in \textit{Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes},\textsuperscript{76} where the Spanish General Consul had entered into an agreement containing an arbitration clause, the court rejected the defense of sovereign immunity stating: "Implicit in the agreement to arbitrate is consent to enforcement of that agreement."\textsuperscript{77} Similarly, in another case,\textsuperscript{78} the Republic of Cuba sought to enter a defense of sovereign immunity, three years after entering a general appearance in the action. The court rejected the attempt stating that "[c]on

\begin{footnotes}
\item[73] House Report, supra note 4, at 6617. Attorneys drafting express waivers of sovereign immunity should be certain that the language contained therein is clear and unequivocal. An example of a well-drafted waiver might be: "The undersigned [foreign state] hereby waives all defenses, offsets, counterclaims at law, equity or admiralty to payment based on any . . . governmental ownership or relationship and confirms that the obligation hereunder is wholly commercial in nature and that any defense in relation thereto by reason of sovereignty is inapplicable and expressly waived." Waiver adopted from Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 177 N.Y.L.J., June 28, 1977, at 11, col. 4.
\item[74] 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971).
\item[75] See House Report, supra note 4, at 6617.
\item[77] 336 F.2d at 364.
\item[78] Flota Maritima Browning DeCuba v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964).
\end{footnotes}
sent to suit [was] manifested and [a] waiver of sovereign immunity accomplished when the sovereign enter[ed] a general appearance . . . unaccompanied by a claim of immunity.\textsuperscript{79} It has been suggested that the law of implicit waiver is beyond the scope of resolution by legislation.\textsuperscript{80} However, the general tenor of the Act is cast in favor of restricting sovereign immunity. It is suggested, therefore, that the scope of implied waiver should be given wide breadth to allow litigants their day in court and to allow the courts to develop precedent on a case-by-case basis.

It should be noted that the Act precludes a foreign state from unilaterally withdrawing its waiver when a dispute arises.\textsuperscript{81} However, the Act does not proscribe the withdrawal of a waiver before the cause of action accrues. For example, assume that a private citizen and a foreign state enter into a long-term contract, and that the foreign state provides an express waiver of immunity. During the term of the contract, but before any breach, the foreign state withdraws its waiver.\textsuperscript{82} The foreign state thereafter breaches the contract. Since the Act deals only with withdrawal of a waiver after a dispute arises, the citizen has no remedy under section 1605(a)(1). Notwithstanding such a withdrawal, however, to the extent that the activities of the foreign state are commercial, a cause of action may exist under section 1605(a)(2).\textsuperscript{83}

C. \textit{Noncommercial Torts}

Section 1605(a)(5) is similar in effect, and in operation, to the Federal Tort Claims Act.\textsuperscript{84} The purpose of the section is to permit the victim of a tortious act or omission committed within the United States by an employee of a foreign state acting within the scope of his employment to maintain an action against the foreign state.\textsuperscript{85} This section gives United States citizens similar rights vis-à-vis foreign states for damages resulting from torts, as have been awarded to private individuals in actions against the United States abroad. For example, in \textit{Holoubek v. United States},\textsuperscript{86} a car owned by the United States and driven by a United States embassy agent struck an Austrian citizen. The citizen sued the United States in an Austrian court which, in a

\textsuperscript{79} Id. at 625.
\textsuperscript{83} See notes 58-61 supra and accompanying text.
well-reasoned opinion, declined to grant immunity to the United States. The court alluded to the fact that in a converse situation, a foreign state, such as the United States, could undoubtedly sue a citizen in a local court for damages. Therefore, it concluded that it would be inequitable to leave the citizen "remediless vis-a-vis the foreign state."

It should be noted that while this section is specifically designed to deal with the problem of motor vehicle accidents, it is clear that it will be broadly construed to permit judicial review of all manner of tortious claims against foreign states. This construction is in keeping with the general tenor of the Act.

D. Maritime Liens

Under traditional admiralty practice, a claimant could commence an action by seizure of a vessel under process based on a libel in rem, which vested the claimant with an in rem claim. However, with respect to litigation involving vessels of foreign states this method was not available. In *Berizzi Brothers Co. v. S.S. Pesaro*, plaintiff brought an action for damages arising out of the failure of defendant to deliver goods which had been the subject of a contract between them. The action was commenced, by attaching the steamship "Pesaro" which had received the goods at her port in Italy. However, because the steamship was owned and possessed by the Government of Italy, the court held that the vessel, even if engaged in commercial activities, was immune from arrest under process based on a libel in rem. The rule enunciated in *Berizzi Brothers* operated to preclude private litigants from commencing suits in admiralty against foreign states by an in rem seizure, although this was often the only available method open to them. An exception to the rule was developed by the Supreme Court in *Republic of Mexico v. Hoffman*.

In *Hoffman*, a citizen of the United States had commenced an action by libel in rem of a vessel owned by the Republic of Mexico. The Court

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87. *Id.*
89. This procedure is based upon the doctrine of personification. Personification is a legal fiction that the claimant is actually proceeding against the vessel itself as the offending thing rather than against its owner. As Mr. Justice Holmes had stated: "A ship is the most living of inanimate things." O. Holmes, *The Common Law* 26 (1881). Under this procedure, claimant's recovery was limited to the value of the vessel. This did not, however, preclude a subsequent in personam action against the owner of the vessel to recover any deficiency in the claim not recovered in the first action. G. Gilmore & C. Black, *The Law of Admiralty* § 9-90, at 801-02 (2d ed. 1975).
90. *See* *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), *discussed at note 11 supra* and accompanying text.
91. 271 U.S. 562 (1926), *discussed at note 11 supra*.
92. In many cases the foreign state defendant was "present" here only through its property, specifically, in admiralty matters, its vessels. Unavailability of an in rem seizure was thus often fatal to plaintiff's claim as "[i]n many cases, jurisdiction could probably not be obtained otherwise." *Ocean Transp. Co. v. Government of Republic of Ivory Coast*, 269 F. Supp. 703, 705 n.8 (E.D. La. 1967).
93. 324 U.S. 30 (1945).
declined to grant immunity to the vessel, holding that a commercial vessel
which was owned, but not possessed, by a foreign government at the time the
action was commenced was not immune from seizure.

The Act codifies the rule of *Berizzi Brothers*, by obviating admiralty quasi
in rem jurisdiction. To this end, it contains a drastic penalty for attachment
of a vessel or cargo of a foreign state. For unless the plaintiff was unaware
that the vessel was owned by a foreign state, arrest or attachment thereof
will entitle the foreign state to immunity. The Act permits the plaintiff to
bring suit by instituting an in personam action against the foreign state. The
action is commenced by delivery of a summons and complaint to the master
or other person having possession of the vessel or cargo such as the second in
command. Furthermore, the plaintiff must demonstrate that he has taken
steps to assure that the foreign state itself receives copies of the summons and
complaint. The purpose of this requirement is to make certain that the
foreign state receives notice of the proceeding even if the copies delivered to
the master fail to reach the foreign state.

The plaintiff may then recover on an in personam claim against the foreign
state for an amount not greater than the value of the vessel or cargo.

94. The Court noted that the vessel in question had been leased to a private Mexican
corporation under a contract with the Mexican Government, and that the vessel was operating in
a private freighting venture when it was seized. *Id. at 33.*

95. *Hoffman* was followed in *S.T. Tringali Co. v. Tug Pemex XV*, 274 F. Supp. 227, 230
(S.D. Tex. 1967), where the court permitted an in rem seizure of the vessels in question after it
had ascertained that the vessels, ostensibly the property of a foreign sovereign, were, in fact,
owned and operated by an independent foreign corporation.

96. 28 U.S.C.A. § 1605(b) (West Supp. 1977); see *House Report, supra* note 4, at 6620.
Section 1605(b) parallels the provisions in *Suits in Admiralty Act, 46 U.S.C. §§ 741-752* (1970),
relating to the exercise of in rem jurisdiction over vessels owned by the United States. It is
anticipated that the loss of quasi in rem jurisdiction will be compensated by the additional in
personam remedies available against foreign states. *See 1976 Hearings, supra* note 3, at 97-98
(testimony of Michael M. Cohen, Chairman of the Committee on Maritime Legislation of the
notes 186-207 infra* and accompanying text, which provides for postjudgment execution in certain
circumstances, will compensate for the loss of prejudgment attachment and arrest. *1976 Hear-
ings, supra* note 3, at 98 (testimony of Michael Cohen).

97. This would be a rare case. The flag of the vessel, the circumstances giving rise to the
maritime lien, or the information contained in ship registers should alert the plaintiff as to the
ownership of the vessel or cargo. *House Report, supra* note 4, at 6620.

vessel or cargo (loss of in personam jurisdiction) has been criticized as bearing no relationship to
the offense. *See Report by the Comm. on Int'l Law of the Ass'n of the Bar of the City of New


101. 28 U.S.C.A. § 1605(b)(2) (West Supp. 1977). Thus the plaintiff must, in effect, serve the
foreign state as well. Service under the Act is discussed at notes 156-68 *infra* and accompanying
text.


103. 28 U.S.C.A. § 1605(b) (West Supp. 1977). This is in accord with practice under the
common law. *See note 89 supra.*
However, the plaintiff may still commence a second action in accordance with the procedures discussed above, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.104

IV. COUNTERCLAIMS AGAINST FOREIGN STATES

The position of a defendant seeking to recover on a counterclaim against a foreign state was originally an unenviable one. "[T]he defendant when sued by a foreign sovereign [could not] avail himself of any counterclaim or set-off except perhaps [as] a set-off arising out of the same transaction. Under no circumstances [could] he obtain an affirmative judgment."105 However, the courts soon began to realize the inequity of permitting a foreign government to invoke the aid of judicial process in seeking to enforce its claims, and yet evade such process with respect to claims asserted against it.106

In National City Bank of New York v. Republic of China,107 the Republic of China sued to recover a $200,000 deposit. The Bank interposed an unrelated counterclaim seeking an affirmative judgment of $1,634,432 on defaulted Treasury notes issued by the Republic of China and owned by the Bank. After the district court dismissed the counterclaims on the grounds of sovereign immunity,108 the bank appealed. While the appeal was pending the bank sought leave from the district court to amend the counterclaims by dropping the claim for affirmative relief and by asserting them as defensive setoffs instead. The district court denied leave.109 The Second Circuit affirmed the denial on the ground that the counterclaims were not based on the subject matter of the suit.110 The Supreme Court reversed and remanded the case with directions to reinstate the counterclaims as amended.111 While the Court admitted that the counterclaims in question could not be regarded as related to the subject matter of the suit,112 considerations of "fair dealing" mandated that the counterclaims denominated as setoffs be permitted.113 The Court noted that "[t]he Republic of China] wants our law, . . . but it wants our law free from the claims of justice."114 It became well settled that a foreign

104. Commentators on § 1605(b) had noted that the section, as drafted, did not expressly provide for such a second in personam action for the balance of the claim. See Statement by the Int'l Law and Transactions Div. of the D.C. Bar, reprinted in 1976 Hearings, supra note 3, at 69. The legislative record, however, makes clear that such a second action is permissible. House Report, supra note 4, at 6621.


107. Id.


112. Id. at 364-65.

113. Id. at 365.

114. Id. at 361-62.
state which commenced an action waived immunity from a counterclaim to the extent that the counterclaim did not exceed the foreign state's claim and did not seek an affirmative judgment.115

Under the Act, a foreign state which initiates or intervenes in a proceeding automatically waives immunity from a counterclaim in three situations.116 First, the foreign state will not be immune from a counterclaim if the counterclaim could have been brought as a direct claim in a separate action under the Act.117 In this situation, the defendant seeking to interpose a counterclaim would have to prove that the counterclaim falls within one of the exceptions to the general rule of sovereign immunity discussed earlier.118 Second, even if the foreign state is otherwise entitled to immunity, it would not be immune from a counterclaim arising out of the same transaction or occurrence which forms the subject matter of the claim of the foreign state.119 This is consistent with the notions of equity recognized at common law: namely, that a foreign state seeking justice in United States courts should not be immune from related claims which would reduce or exceed its recovery.120

Finally, where a foreign state retains immunity under the previous two situations, it would not be protected from a setoff.121 This codifies the rule set forth in National City Bank of New York v. Republic of China.122 Thus, under the Act, a defendant is permitted to interpose a defensive setoff, even if the setoff arises out of an unrelated transaction or occurrence not independently cognizable under the Act.

These provisions represent a significant improvement in the status of counterclaims against foreign states. No longer may a foreign state don the cloak of sovereignty to escape legitimate claims which exceed or reduce its recovery.


116. House Report, supra note 4, at 6605-06.


118. See notes 48-53 supra and accompanying text.

119. 28 U.S.C.A. § 1607(b) (West Supp. 1977). This is based on rule 13(a) of the Fed. R. Civ. P. See also Restatement (Second) of the Foreign Relations Law of the United States § 702 (1965).


V. Commencement of an Action Against a Foreign State

The commencement of an action by service of process upon a foreign sovereign has been described as a "'catch as catch can' proposition."123 This area has been a source of considerable trouble to litigators seeking to obtain jurisdiction over the foreign state by service of process.124 Problems arise because Rule 4 of the Federal Rules of Civil Procedure does not provide for service upon a foreign state.125 Furthermore, personal service upon a consular representative126 or an ambassador127 has been unequivocally rejected: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention."128 Indeed, service upon the person of an ambassador may be a felony.129

The rationale underlying this prohibition was explained in Hellenic Lines, Ltd. v. Moore,130 where a shipping company brought a mandamus action to compel a United States Marshall to serve process on the Tunisian ambassador. The State Department sent a letter to the court which stated:

The maintenance of friendly foreign relations between the United States and the [foreign] state concerned would certainly be prejudiced by service of process on an ambassador against his will. The . . . state might well protest to the Department that

124. 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, 121-22 (1969). It should be noted that the issue of sovereign immunity arises only after jurisdiction has been obtained. Indeed, as stated by the Supreme Court, sovereign immunity "presents no question of the jurisdiction of the district court over the person of a (foreign state] defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation." Ex parte Republic of Peru, 318 U.S. 578, 587 (1943).
128. Id. at 980 n.4. See also Restatement (Second) of the Foreign Relations Law of the United States §§ 73-93 (1965).
129. See, e.g., 22 U.S.C. § 253 (1970) (Any person involved in issuing process against an ambassador or public minister of a foreign state "shall be deemed a violator of the laws of nations and a disturber of the public repose, and shall be imprisoned for not more than three years . . . ".)
130. 345 F.2d 978 (D.C. Cir. 1965).
the United States had failed to protect the person and dignity of its official representative. . . . Other governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice. 131

Resourceful litigators who had commenced actions by direct mailing of process to a diplomatic mission of a foreign state engendered considerable controversy within the State Department. In 1973, the Department stated that “[w]hile both international law and United States law prohibit service of process by a Marshall on [the person of] a foreign ambassador without his consent, it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that this prohibition does not apply to service effected by mail.” 132 However, in 1974, the Department reversed its position and concluded that the Vienna Convention provided “a basis for objection to the propriety of process served [by mail].” 133

Litigators seeking to commence an action by attaching the assets of a foreign state faced equal uncertainty. In New York and Cuba Mail Steamship Co. v. Republic of Korea, 134 plaintiff's vessel sustained damage at defendant's port. When plaintiff commenced a suit in admiralty by attachment of the defendant's bank accounts in the United States, the State Department filed a suggestion that the property of the defendant was immune from attachment under international law. The court vacated the attachment and consequently dismissed the suit. 135 This principle was modified in Weilamann v. Chase Manhattan Bank. 136 There, plaintiff brought an action (pursuant to a default judgment) seeking attachment of certain funds of the Soviet Union held by the defendant bank. Upon request of the Soviet Union, the State Department issued a letter to the court which stated: “The Department is of the . . . view that even when the attachment of the property of a foreign sovereign is not prohibited for the purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment.” 137 The rule now appeared to be that the attachment of a foreign state's assets for purposes of obtaining jurisdiction was permitted while attachment for purposes of execution was prohibited. 138 Consequently, the operation of the rule placed the private litigant in the anomalous position of having to release the attached res when he received a decision in his favor. Indeed, this contradicted the

131. Id. at 980 n.5.
132. Litigating, supra note 8, at 44 (remarks of J. Roderick Heller III).
133. Id. (footnote omitted).
135. Id. at 687.
138. See, e.g., Ocean Transp. Co. v. Government of Ivory Coast, 269 F. Supp. 703, 705 n.8 (E.D. La. 1967) (The court stated that “where under International Law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited.”).
very purpose of quasi in rem jurisdiction which is to allow the prevailing litigant to apply the attached res to satisfy his claim.\textsuperscript{139}

A new method of commencing suit against foreign states soon developed whereby the actual service of process was relegated to a notice function similar to that of state long-arm statutes.\textsuperscript{140} Under such statutes, jurisdiction is conferred when the defendant has committed some act within the territorial entity.\textsuperscript{141} Thus, in Victory Transport Inc. \textit{v.} Comisaria General de Abastecimientos y Transportes,\textsuperscript{142} the Second Circuit found that a contractual agreement to arbitrate in New York by the Spanish Ministry of Commerce constituted consent to in personam jurisdiction in New York.\textsuperscript{143} Service of process by registered mail to defendant's office in Madrid was therefore upheld, since the court concluded that the only function of the process was to give the defendant notice of the action.\textsuperscript{144} Similarly, in another case,\textsuperscript{145} the plaintiff had entered into a contract with Uruguay's Ministry of Public Works to widen and improve two highways in Uruguay. A dispute arose and the court held that the presence of Ministry engineers in Los Angeles, where the contract had been finalized, was sufficient contact with the forum to subject Uruguay to personal jurisdiction under California's long-arm statute.\textsuperscript{146}

The Second Circuit also developed an alternative theory to uphold such methods of service. Illustrative of this is Petrol Shipping Corp. \textit{v.} Kingdom of Greece Ministry of Commerce,\textsuperscript{147} where the parties had entered into an agreement which contained an arbitration clause similar to the one in Victory Transport. Service by registered mail to the sovereign's New York Ministry of Commerce, where the contract had been negotiated, was upheld, as the service was reasonably calculated to give notice.\textsuperscript{148} The court based its holding on the power of the district courts to fashion rules of service in accordance with their general rulemaking authority as promulgated by Rule 83 of the Federal Rules of Civil Procedure.\textsuperscript{149}

\begin{itemize}
  \item 140. See, e.g., N.Y. Civ. Prac. Law § 302 (McKinney 1972).
  \item 141. See Reese \& Galston, \textit{Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction}, 44 Iowa L. Rev. 249 (1959).
  \item 142. 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
  \item 143. Id. at 363.
  \item 144. Id. at 364.
  \item 145. Republic Int'l Corp. \textit{v.} Amco Engineers, Inc., 516 F.2d 161 (9th Cir. 1975).
  \item 146. Id. at 168.
  \item 147. 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1960).
  \item 148. Id. at 110.
  \item 149. Id. at 108. Petrol was followed in Renchard \textit{v.} Humphreys \& Harding, Inc., 59 F.R.D. 530 (D.D.C. 1973), where a District of Columbia resident brought an action against the Government of Brazil alleging that his home had been damaged during construction of the Brazilian embassy. He attempted service by sending copies of the summons and complaint, by registered mail, to both the Brazilian embassy in Washington, D.C., and the Ministry of External Relations for the Government of Brazil in Brasilia. The court upheld both methods of service stating that they were "reasonably calculated to provide adequate notice." Id. at 531.
\end{itemize}
Victory Transport is a landmark case, important for its recognition that service of process on a foreign state should essentially serve a notice function. Together with the subsequent judicial refinements discussed above, it foreshadowed the development of the long-arm section of the Act which is designed to relegate service of process to a notice function only.

While the Act creates federal long-arm jurisdiction over foreign states, a foreign state will not be amenable to suit under the Act unless it has engaged in one of the enumerated activities constituting an exception of the general immunity of foreign states. Engaging in such activity will establish the necessary contacts that must exist between the foreign state and the appropriate forum before jurisdiction can be exercised. It is clear that the Act contemplates a case-by-case analysis of the activity of the foreign state to determine if it has in fact established the necessary contacts. In this regard, the Act should be liberally construed in order to accommodate judicial consideration of meritorious claims.

Where a foreign state does in fact engage in one of the enumerated activities, it will be amenable to suit if it has received adequate notice of the

151. See New Departures, supra note 31, at 186 (remarks of M. Belman).
152. 28 U.S.C.A. § 1330(b) (West Supp. 1977). See also 1976 Hearings, supra note 3, at 97 (testimony of Michael A. Cohen). But note that at least one commentator has stated that the Act does not create a true long-arm provision. "[T]he bill is not a 'long-arm statute,' which is only necessary when the defendant is not 'present.' Foreign countries are 'present' here by virtue of their embassies and activities, and the bill is merely a means of getting personal jurisdiction." Litigating, supra note 8, at 57 (remarks of Michael H. Cardozo).
153. See notes 48-53 supra and accompanying text. It should be noted that the Act contains four express provisions regarding venue in actions against foreign states. First, an action may be brought "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C.A. § 1391(f)(1) (West Supp. 1977). Thus in those cases involving a direct effect in the United States as a consequence of commercial activity abroad, see notes 66-70 supra and accompanying text, venue would lie wherever the direct effect was manifested, see House Report, supra note 4, at 6631. Second, where property is involved, venue would lie in the judicial district where the property that is the subject of the action is located. 28 U.S.C.A. § 1391(f)(1) (West Supp. 1977). For instance, if a plaintiff sued a foreign state defendant in ejectment over the right to occupy a certain building, venue would lie in that district where the building was located. See House Report, supra note 4, at 6631. Third, admiralty actions commenced pursuant to § 1605(b) may be brought in the district where the vessel or cargo is situated at the time of the commencement of the suit. 28 U.S.C.A. § 1391(f)(2) (West Supp. 1977). Fourth, actions against agencies or instrumentalities of foreign states may be brought wherever they are licensed to do business, or are doing business. Id. at § 1391(f)(3) (West Supp. 1977).

Actions against the foreign state or its political subdivisions may also be brought in the United States District Court for the District of Columbia. Id. at § 1391(f)(4) (West Supp. 1977). This is based upon the fact that most foreign states have diplomatic representatives in Washington, D.C., and therefore may find it easier to defend a suit there. See House Report, supra note 4, at 6631.
action as required under the Act.\textsuperscript{155} Proper notice includes any method of service that may have been agreed to by the parties.\textsuperscript{156} This is, indeed, the preferred method, as the Act seeks to encourage such arrangements.\textsuperscript{157} The latitude granted to the parties by this provision is of immense value to private citizens who engage in large numbers of transactions with foreign states. Contracts between private citizens and foreign states should include provisions regarding service which will facilitate convenient and efficient service should a dispute arise. Such a provision might include language to the effect that service at the place where the contract was entered into, or at the office of the foreign state's nearest business representative, will constitute valid service for purposes of claims arising under the contract.\textsuperscript{158}

Service upon a foreign state or its political subdivisions may also be effected by registered mail.\textsuperscript{159} Under this option, the foreign state would receive notice of the action by a "notice of suit" sent to the head of the ministry of foreign affairs for the foreign state concerned. A "notice of suit" would advise the foreign state of the legal proceeding and would also contain a short explanation regarding the significance of the summons and complaint, as well as the steps required to defend the action.\textsuperscript{160} This procedure has the benefit of arming the litigant with the knowledge that such service cannot be adverted by a supposedly unwary foreign state.

As a last resort, service may be effected through diplomatic channels.\textsuperscript{161} This method is not preferred, however, as a foreign state could protest the use of diplomatic channels to convey notice of a legal proceeding not of a strictly diplomatic nature. Notwithstanding the possibility of such irritation, "[s]ervice through diplomatic channels is widely used in international practice. . . . It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts."\textsuperscript{162} Service by diplomatic transmittal would be effected by the Secretary of State, Director of Special Consular Services.\textsuperscript{163} It is suggested that plaintiffs avoid use of this

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\textsuperscript{155}. 28 U.S.C.A. § 1608 (West Supp. 1977). Note that under the Act, the distinctions between in personam, in rem, and quasi in rem jurisdiction are eliminated. Service under § 1608 vests the plaintiff with an in personam claim.


\textsuperscript{157}. House Report, supra note 4, at 6623.

\textsuperscript{158}. See, e.g., Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966); note 20 supra and accompanying text.


\textsuperscript{160}. House Report, supra note 4, at 6623.


\textsuperscript{162}. House Report, supra note 4, at 6624. See also Litigating, supra note 8, at 45 n.5, for a list of countries that serve the United States through diplomatic means.

\textsuperscript{163}. 28 U.S.C.A. § 1608(a)(4) (West Supp. 1977). Transmittal via diplomatic channels could entail two alternative procedures. First, the Office of Special Consular Services in the Department of State could "pouch" a copy of the papers to the United States Embassy for the foreign state in question. The Embassy would deliver a diplomatic note of transmittal along with the other papers to an appropriate official in the Ministry of Foreign Affairs of the foreign state. Alternatively, the Department of State could transmit the papers to the foreign state's embassy in
last option. The liberalized methods discussed above provide certainty and efficiency without the possibility of diplomatic irritation or political inexpediency. It is not difficult to imagine a situation where the State Department would be less than enthusiastic about its role as a vehicle in the commencement of a suit. For example, even without the possibility of the issuance of a State Department suggestion, a situation such as that in *Rich v. Naviera Vacuba S.A.* might well discourage the Secretary of State from commencing diplomatic transmittal. Plaintiffs contemplating use of this method should be aware of possible political or foreign relations repercussions which may result in delay of transmittal.

In addition to the procedures mentioned above, the Act provides that service may be made on an agency or instrumentality of a foreign state by delivery of the summons and complaint to an officer, managing agent, or any other general agent thereof, authorized to receive process within the United States. Here, "state laws which designate, or compel [agencies or instrumentalities of a foreign state] to appoint, agents for service of process will . . . be of assistance to would-be litigants." Such state laws have the beneficial effect of making the agency or instrumentality immediately amenable to suit without recourse to any of the methods previously mentioned.

Moreover, with agencies and instrumentalities, the Act "authorize[s] [the courts] to fashion a method of service . . . 'consistent with the law of the place where service is to be made.'" This is a catch-all provision which will permit plaintiffs to serve process in the manner provided for in the place where the defendant is found. Under this provision, a foreign sovereign will not be heard to object to the propriety of service, since service will have been effected in accordance with its own laws. Conversely, service under this section will not be available when it is prohibited by the foreign state where service is to be made.

As a result of the provisions discussed above, plaintiffs should have little trouble commencing actions against foreign states. The Act obviates the confusion and uncertainty experienced under the common law. By providing both convenience and certainty, the service provisions serve as an integral part in effectuating one of the purposes of the Act: to give the plaintiff his day in court.

Washington, D.C. House Report, *supra* note 4, at 6623. Under either option, there is no requirement that the foreign state actually accept the documents as long as they have been transmitted in such a way that the foreign state has actual notice of the suit. *Id.*

164. 295 F.2d 24 (4th Cir. 1961); see notes 37-38 *supra* and accompanying text.
165. 28 U.S.C.A. § 1608(b)(2) (West Supp. 1977). The Act also provides for service on agencies or instrumentalities by letters rogatory or request or by registered mail. 28 U.S.C.A. § 1608(b)(3)(A) & (B) (West Supp. 1977). These procedures are fully explained in the legislative history and will not be treated here. *See* House Report, *supra* note 4, at 6624.
VI. Execution of Judgments

Under the common law, a prevailing litigant seeking to enforce a judgment against a foreign state was often without a remedy. This unfortunate situation occurred because "property of a foreign state could not be retained to satisfy a judgment ensuing from the suit. . . ."169 Similarly, the defendant who had prevailed on a counterclaim against a foreign sovereign was left with a judgment of often "nugatory" value.170 Although, as a practical matter, most foreign governments honored judgments awarded against them in order to avoid political repercussions which could result from the plaintiff's government pursuing the claim,171 the possibility still existed that the foreign state could choose to either default172 or simply run away from the judgment.173

In Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen,174 plaintiff, a judgment creditor of defendant, an entity of the Government of Sweden, had sought to execute on funds of the defendant deposited in a bank in New York City.175 Sweden filed a claim of immunity from execution. The court, while acknowledging that an "'award of execution is . . . an essential part, of every judgment passed by a court exercising judicial power,'"176 nevertheless upheld Sweden's claim of immunity stating that "'[t]he clear weight of authority in this country, as well as that of England . . . is against all seizures, even though a valid judgment has been entered."177

174. 43 F.2d 705 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931).
175. Id. at 706.
176. Id. at 708 (quoting Pam-to-pee v. United States, 187 U.S. 371, 383 (1902)).
177. 43 F.2d at 708. However, at least one commentator has noted that this is not the case in international practice. "'If it is true that courts usually grant immunity from execution, the exceptions, while not very numerous, are today sufficiently frequent to make it doubtful that there exists a real rule in the matter." Sweeney, supra note 13, at vii (quoting 84 Recueil des Cours 205, 275 (1953)). See also Restatement (Second) of the Foreign Relations Law of the United States § 69 (1965). Notwithstanding that international practice was to the contrary, United States courts continued to apply the Dexter rule of absolute immunity from execution. See New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Bradford v. Chase Nat'l Bank, 24 F. Supp. 28 (S.D.N.Y. 1938), aff'd sub nom. Berger v. Chase Nat'l Bank, 105 F.2d 1001 (2d Cir. 1939), aff'd mem., 309 U.S. 632 (1940); Wellmann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959). Adherence to Dexter had the effect of rendering the restrictive theory of immunity, the basis of which was that a foreign state was accountable for its commercial obligations, completely illusory. This result was vigorously, and justifiably, criticized. "Blind adherence to the doctrine of immunity from execution is an anachronism having no place in either American law or foreign policy. The desire to permit
A small minority of lower courts subsequently developed exceptions to the general rule of immunity from execution. *S.T. Tringali Co. v. The Tug Penex* XV is illustrative. There the property of a government-owned corporation was not considered as being owned by a foreign sovereign, and therefore, execution was permitted. Another example is *United States v. Harris & Co. Advertising* in which the court declined to recognize a plea of immunity from execution, where the plea was filed after the conclusion of the execution sales, and the chattels of the foreign government had gone beyond the control of the court.

Notwithstanding these limited exceptions, the doctrine that the property of a foreign sovereign was immune from execution rested on a practical doctrinal basis. "[T]he idea of a sheriff or marshall actually impounding a foreign state's property really does affront conceptions of friendly intercourse among states." Moreover, recurring execution on the available assets of foreign states might well discourage them from purchasing foreign missions or foreign reserve exchanges in the United States.

The Act attempts to compromise between the two evils of leaving the prevailing litigant with a legally useless judgment and executing upon the assets of a foreign state to the serious detriment of good international relations. In the same fashion as the Act treats jurisdictional immunities discussed earlier, it couches immunity from execution as the general rule, and then creates exceptions to this general rule of immunity.

redress for wrongs committed by foreign states—a desire which provided the impetus for adoption of the restrictive doctrine in the first place—is thwarted when execution is denied." Note, *Sovereign Immunity of States Engaged in Commercial Activities*, 65 Colum. L. Rev. 1086, 1095 (1965).

179. Id. at 230; see discussion at notes 93-95 supra and accompanying text. See also *Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana*, 335 F.2d 619 (4th Cir. 1964).
181. Id. at 385-86.
183. Id. at 929.
184. See notes 46-47 supra and accompanying text.
The Act modifies the rule of absolute immunity promulgated in *Dexter & Carpenter Inc. v. Kunglig Jarnvaagsstyrelsen* by creating certain circumstances under which property of a foreign state which is used for commercial activity in the United States will not be immune from execution. In this regard, the Act is consistent with the clear weight of authority in international practice. While there is no doubt that a foreign state may claim immunity from execution, the immunity will be granted only when execution is sought with respect to assets that the state holds as sovereign. Examples of such immunized assets would be military property or funds earmarked by the foreign state for such organizations as the International Monetary Fund or the World Bank. However, where a foreign state holds assets for use in connection with commercial undertakings, the assets are not immune from execution.

Under the Act, even when the property of a foreign state is used for commercial activity, it will be immune from execution unless the property "is or was used" for the commercial activity upon which the claim is based. Thus, property of a foreign state that is unrelated to the claim is immune from execution. For example, assume that a private citizen enters into a contract with a foreign state. The foreign state breaches the contract, and the plaintiff sues, and is awarded a judgment. Plaintiff seeks to collect the judgment by

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188. 43 F.2d 705 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931); see notes 174-77 supra and accompanying text.
190. See Sweeney, supra note 13, at 46-51.
191. The Act specifically provides that property of a military character is immune from execution. 28 U.S.C.A. § 1611(b)(2) (West Supp. 1977). This will eliminate the possibility of embarrassment to the United States resulting from the execution upon military equipment that has been purchased here by a foreign state. See Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 Int'l Law. 408, 423 (1974). This exemption pertaining to military equipment also serves United States policy with respect to the sale of such equipment to foreign governments. House Report, supra note 4, at 6630. It should be noted that § 1611 also exempts central bank funds. Central bank funds would encompass funds held by the foreign state on its own account, not to be used in connection with commercial activities. House Report, supra note 4, at 6630. The purpose of this exemption is "to encourage the holding of dollars in the United States by foreign states, particularly when we have an adverse balance of payments." Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 Int'l Law. 408, 422-23 (1974).
192. The International Monetary Fund and the World Bank are designated by the President of the United States under the International Organizations Immunities Act, 22 U.S.C. § 288 (1970). These organizations have been traditionally considered immune from attachment and execution. See Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, art. IX, § 3, 60 Stat. 1401, T.I.A.S. No. 1501.
194. 28 U.S.C.A. § 1610(a)(2) (West Supp. 1977). The language "is or was used" is designed to prevent a situation where property is transferred from the commercial activity which is the subject of the suit in order to avoid the process of the court. House Report, supra note 4, at 6627.
attaching defendant's bank account in New York City. The plaintiff will not be able to execute upon the assets in the account unless he can prove that the assets were being used for a commercial activity and that the assets are or were being used in connection with the very transaction sued upon. The rationale is that execution upon the assets of a foreign state may be a source of irritation, and that therefore, execution should not extend to property not directly involved in the dispute. Moreover, in the hypothetical described above, should execution become available on a large scale basis, the use of United States depositories for foreign funds might well be discouraged.

The Act is considerably more liberal with respect to execution upon the assets of an agency or an instrumentality of a foreign state. This reflects an idea implicit in the Act's treatment of agencies or instrumentalities, namely, that they are analogous to the corporate parent-subsidiary relationship, with the instrumentality exercising a degree of autonomy and independence from the controlling foreign state.195 Therefore, when an agency or instrumentality engages in commercial activity in the United States, execution is available upon any of its assets whether or not such assets are being used in connection with the commercial activity upon which the claim is based.196 Thus, in the hypothetical above,197 a plaintiff awarded a judgment against an agency or instrumentality of a foreign state, could execute upon any of its assets, even if it was engaged in more than one commercial activity.198 The availability of execution is of great benefit to private individuals who transact business with foreign states, as it places the parties on an equal footing should litigation arise.199

Under the Act, a foreign state200 may also waive immunity from execution.201 As in the section of the Act dealing with waiver of sovereign immunity,202 a foreign state may waive immunity from execution by explicit or implied waiver.203 Therefore, waiver for purposes of execution is governed by

195. See note 4 supra.
197. See note 194 supra and accompanying text.
198. The House Report states that § 1610(b) does not permit execution against the property of one agency or instrumentality to satisfy a judgment against an unrelated agency or instrumentality. House Report, supra note 4, at 6628. The courts will have to determine on a case-by-case basis whether property subject to execution is property "of" that agency or instrumentality. There are practical political reasons for such a rule stemming from the fact that disregard of the autonomy of separate agencies or instrumentalities could encourage foreign states to ignore the independence of United States corporations and their autonomous subsidiaries. Id. at 6628-29.
199. For instance, prior to the passage of the Act, an agency or instrumentality could bring an action against a private individual, secure in the knowledge that it was virtually immune from judgment on any counterclaims that the defendant prevailed upon. See, e.g., Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), cert. denied, 282 U.S. 896 (1931); notes 174-77 supra and accompanying text.
200. Foreign state is used here to include the foreign state itself, its political subdivisions, and its agencies or instrumentalities. See note 4 supra.
202. Id. § 1605(a)(1); see notes 71-75 supra and accompanying text.
the same principles as those which govern the waiver of sovereign immunity. A waiver may be explicitly contained in the form of a treaty or contract, or implied by the failure to raise a defense of immunity until after execution sales have commenced. In the interest of convenience, parties who secure an explicit waiver of sovereign immunity from a foreign state should also include a provision regarding waiver of immunity from execution.

The Act also permits execution against obligations owed to a foreign state under a policy of liability insurance. This provision was included for the benefit of individuals awarded judgments as a result of motor vehicle accidents with vehicles operated by the officials of a foreign state or its employees. This is a common sense approach. Since the purpose of liability insurance is to satisfy judgments awarded against the holder it is clear that a foreign state should not be offended by execution against such obligations.

While the provisions on execution represent significant improvement over the situation that existed at common law, they are not without imperfection. Unless the foreign state has given an explicit waiver, there is no provision in the Act affording litigants the device of "protective attachment." Such a device would prevent a foreign state from removing its assets beyond the territorial jurisdiction of the court during the pendency of the action, in order to avoid satisfaction of a judgment. As a practical matter, those foreign states conducting a large volume of business in the United States will not remove their assets in such a manner, because American firms could respond by ceasing to transact business with them. However, it has been suggested that such a protective device should be enacted if experience under the Act indicates that foreign states are using the hiatus between commencement of an action and entry of a judgment to remove assets, otherwise subject to execution, in order to frustrate the collection of judgments.

VII. Remedies Under the Act

Under the Act, where a foreign state is not immune from jurisdiction, its liability exists in the same manner as that of a private citizen. Thus, in the appropriate circumstances, a court could grant injunctive relief against, or require specific performance by a foreign state. The ability of a court to act in

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204. House Report, supra note 4, at 6627. See also notes 71-73 supra and accompanying text.
207. House Report, supra note 4, at 6628; see notes 85-88 supra and accompanying text.
208. See notes 169-73 supra and accompanying text.
209. See, e.g., N.Y. Civ. Prac. § 6201 (McKinney Supp. 1977), as amended by ch. 860, 1977 N.Y. Laws, for an example of a statute affording the device of protective attachment. 28 U.S.C.A. § 1610(d) (West Supp. 1977) allows attachment as a provisional remedy where there is an explicit waiver, as long as the purpose of the attachment is to secure satisfaction of a judgment that may be awarded and not to secure jurisdiction.
such a manner, would not, however, be dispositive of its ability to enforce such orders. For example, suppose a foreign state, through the discharge of environmental pollutants within its own territory, had damaged a body of water in this country, in violation of an applicable United States law. If this were the result of commercial activity, that state would certainly be amenable to suit under the Act. Assume further that a class action, seeking compensatory damages and an injunction, was commenced against the foreign state. While the Act does not address the propriety of maintaining class actions against foreign states, it is suggested that to the extent that the Act treats the foreign state as a private citizen, class actions should be available. A court could certainly award compensatory damages or order an injunction. However, where the foreign state involved has no available assets, or where the available assets are immune, collection of damages would seem doubtful. Moreover, should the foreign state simply choose to ignore the injunction or an order of contempt ensuing therefrom, the court would be powerless, under the Act, to proceed any further. While this hypothetical is an extreme case, it does indicate that the problems in this area are complex and that the availability of remedies means little without the power to enforce them.

It should also be noted that, under the Act, a foreign state will not be liable for punitive damages for its tortious acts or omissions. This is in accordance with international practice, and reflects the notion that a sovereign should not be imputed with malice, a traditional predicate to the availability of punitive damages. Moreover, “the people of the state as a whole should not be charged with additional damages for a wrong . . . of which they had neither knowledge nor wrongful intent.”

Plaintiffs seeking discovery against a foreign state should note that while the appropriate remedies under Rule 37 of the Federal Rules of Civil Procedure are available for an unjustifiable failure to make discovery, the concept of governmental privilege may be applicable where discovery involves the sensitive documents of a foreign state. Thus, where a foreign state is able to convince a court that, due to the circumstances of the case, there is a reasonable danger that discovery could imperil its national security, the privilege should apply. The rationale behind the privilege is that “governmental privilege is intended to protect the foreign state from embarrassment or to protect its interests by preventing disclosure of certain information. It is not a weapon for national policy, nor is it a substitute for national policy.”

212. See House Report, supra note 4, at 6621.
216. Id. at 724-25 (quoting I. Whiteman, Damages in International Law 717 (1937)).
217. See, e.g., 5 U.S.C. § 552(b) (1970), which provides for certain governmental information that would not be subject to discovery. This privilege would be extended, by analogy, to foreign states.
218. See, e.g., United States v. Reynolds, 345 U.S. 1 (1953). There the Court stated that “there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in
ment... needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning.”

This could be a controversial area. For instance, a suit against an agency of a foreign state for a violation of section 10(b) of the Securities Exchange Act of 1934 could entail extensive discovery. Such discovery could become an explosive issue, if what is sought are sensitive documents containing discussion of governmental or political rationale behind the activities leading to the alleged violation. For instance, suppose an agency of a foreign state had intimate knowledge of an impending coup d’etat or political assassination which could effect the viability of securities which it had issued or owned. The courts have traditionally exercised a great deal of discretion in dealing with such matters. For example, in Ticon Corp. v. Emerson Radio & Phonograph Corp., defendant, who had contracted with the United States Army for the manufacture of arming mechanisms, was sued by his subcontractor. The defendant moved to dismiss the action on the ground that its prosecution would require disclosure of classified information. The court denied the motion, but advised the parties that at the appropriate time, it would take measures to insure that national security would not be endangered. It is suggested that discovery should be strictly limited where a suggestion of governmental or diplomatic privilege is raised. Of course, where the cause of action arises out of the purely commercial activities of a foreign state, discovery should proceed as it would against a private individual.

VIII. CONCLUSION

Justice Holmes once justified the theory of sovereign immunity by stating that “[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but 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.” Perhaps Blackstone had the better argument when he wrote that the immunity of a sovereign state from suit “stretcheth not to the doing of any wrong.” The Imunities Act is really just an extension of Blackstone’s logic. It seeks to treat the foreign state as a private citizen only where the foreign state has engaged in wrongdoing. As such, the Act is both a legal and a moral necessity.

chambers.” Id. at 10. See also Totten v. United States, 92 U.S. 105 (1876). There the plaintiff had entered into a contract with President Lincoln to perform espionage behind the Confederate lines. Plaintiff’s action was dismissed on the pleadings, as the Court concluded that the disclosure of the existence of the contract itself could expose state secrets. Id. at 106-07.


221. Id. at 733, 134 N.Y.S.2d at 722.

222. See notes 57-61 supra and accompanying text.


224. 1. W. Blackstone, Commentaries *238.

The drafters have done an admirable job. They have sought to protect the conflicting interests of the foreign state in preserving its essential sovereignty and the private litigant seeking judicial review of his claim. The courts, while proceeding cautiously in this politically sensitive area, should nevertheless be vigilant in assuring that litigants are afforded what is really the crucial lynchpin of the Act: a day in court.

Kevin P. Simmons

226. It is evident that the judiciary may have to take into account potential sensitivities lurking behind an action. In this regard, while the amicus curiae briefs that may be submitted by the State Department in a particular action should be scrutinized with great care, any undue judicial deference toward State Department desires would violate the Act's express intent of removing State Department involvement in this area.