Part II
OFFICIAL RECORDS AND CORRESPONDENCE

Deuxième partie
ACTES OFFICIELS ET CORRESPONDANCE

A. ARGENTINA

ANALYSIS OF THE RELEVANT ARGENTINE NATIONAL LEGISLATION AND THE DECISIONS OF NATIONAL COURTS REGARDING JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 8 MAY 1979

"The Supreme Court of Justice, which was at first guided by the theory of immunity from jurisdiction, has opted for the conclusions of more recent doctrine" (*El Derecho Internacional Público ante la Corte Suprema* (International public law in the Supreme Court), by Dr. Isidoro Ruiz Moreno, Ed. Eudeba).

"In the action brought by the Minister Plenipotentiary of Chile against Carlos Porta, bankruptcy trustee of Fratelli Lavarello fú Gio Batta, for annulment of the sale of the *SS Aguila,* the Court stated in its decision that: "The contract of sale whose annulment has been applied for, and from which the present case originates, was made and came into being and was intended to be, and in fact was, performed and complied with within the jurisdictional limits of the Argentine Republic. Both these circumstances, together with the fact that only a few days before this action was brought a representative of the firm selling the vessel applied to the national courts for the enforcement of its rights in connexion with this transaction and also applied for and obtained in enforcement of the said contract an order blocking the monies of the Government of Chile which it had deposited in this country, and together also with the circumstance that the plaintiff alleges that there are in Buenos Aires funds arising out of this transaction and he for his part is applying for an order blocking these funds, *clearly show that the intrinsic validity of this contract and all matters relating to it should be regulated in accordance with the general laws of the Nation and that the national courts are competent in such matters*".

The Court drew attention to the provisions of articles 1209 and 1215 of the Civil Code concerning the law applicable to contracts which are to be performed in the Republic, and it added that: "Since the Government of Chile is acting in this case through its diplomatic representative in Argentina, who has offered and pledged his personal responsibility in the case, the provisions of article 101 of the Constitution and of article 1, paragraph 3, of the Act of 14 September 1863 are applicable". *For these reasons the Court declared itself competent and ordered the case to proceed.* (Decision No. 47, page 248.)

In its decision in the case of *Zubiaurre* v. *the Government of Bolivia,* the Court, without considering the validity of the instrument in question, stated merely that an action opposing a foreign testamentary provision did not come within the original jurisdiction attributed to it by article 101 of the Constitution and article 1 of Act. No. 48 (Decision No. 79, page 124).

The same argument was sustained in the case of the *the United States Maritime Administration* v. *Dodero Brothers Ltd.* (Decision No. 141, page 129).

In the case of *BAIMA and BESSOLINO* v. *the Government of Paraguay* (Decision No. I23, page 58), the Court expressed its considerations at greater length and held that a foreign Government cannot be sued in the courts of another country without its consent (Decision No. I23, page 58).

This question of immunity of States was considered at the time when on account of the Civil War, the Spanish Government decided to appropriate the vessel *Cabo Quilates* and assign it to the auxiliary naval forces for Government Service. When the vessel put in at Buenos Aires, the ship owners brought an action against the Spanish Government for recovery of the vessel. When the case opened, the Spanish Government, through its Ambassador, announced that it was unwilling to submit to the jurisdiction of the Argentine courts "on a matter of Government property used in the service of the Government". In other words, the Spanish Government expressly declared its refusal to accept the jurisdiction of the Argentine courts. The Court observed that it was a fundamental principle of international public law and constitutional law that there could be no compulsion of a State in such cases. It went on to explain, clearly and concisely, the considerations underlying this principle. "The wisdom and foresight of this rule of public law are unquestionable. *If the acts of a sovereign State could be examined by the courts of another State and could perhaps contrary to the former's wishes be declared null and void, friendly relations between Governments would undoubtedly be jeopardized and international peace disturbed*" (Decision No. I78, page I73).

From an examination of the decisions of the Court, Dr. Ruiz Moreno, in his aforementioned work, draws the following conclusions:

1. A foreign State may execute deeds governed by the ordinary law;
2. A foreign Government may be sued in an Argentine court, but its prior consent is necessary before the case can continue;
3. A statement by the diplomatic representative is sufficient to determine the nature of the deed or service in question.

B. BARBADOS

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF BARBADOS TO THE SECRETARIAT ON 16 JULY 1979

The Government of Barbados wishes to inform that Barbados at present has no legislation dealing specifically with the subject of Jurisdictional Immunities of States and their Property, nor have there been any relevant decisions of national tribunals. The current position in Barbados is that foreign states enjoy immunity from the jurisdiction of our courts under customary international law. This immunity is restricted to governmental or administrative activities, as distinct from commercial ventures. Barbados follows this distinction as developed in the courts of the U.K., prior to the passage by the U.K. of its State Immunity Act, and other common law jurisdictions.

The Government of Barbados further wishes to state that to date there has been no relevant diplomatic or official correspondence on the matter. The Barbados Government is however at the moment in the process of considering such legislation and

in addition is spearheading efforts for a Caribbean Convention on State Immunity. The Government of Barbados would therefore be very interested in seeing the International Law Commission develop a Convention on this topic.

C. CANADA

1. Reply by the Secretary of State for External Affairs to a request by the Ambassador of Government X regarding the granting of Sovereign immunity for the aircraft carrying the President of X[1]

. . . Your excellency's statement to the effect that an aircraft owned by a foreign state and carrying its Head of State is entitled under universally accepted rules of international law to sovereign immunity while on the territory of another state is concurred in. While there is no specific Canadian legislation on the subject the principle of sovereign immunity of such an aircraft would be recognized on Canadian territory to the extent that general principles of international law have been embodied in Canadian law as reflected by numerous decisions on the subject by Canadian courts.

Notwithstanding, a principle which is firmly established in the Canadian system of law and government is that of the separation of the executive, legislative and judicial powers. As a consequence, it would not be within the executive power of the Canadian government, to comply with a request such as that expressed in your Note, that the appropriate authorities be ordered to respect the sovereign immunity of a state-owned aircraft carrying [its] President...while on Canadian territory. If the issue of immunity were raised in some fashion, under the Canadian constitutional system, it would be for the Judiciary exclusively to rule upon. It would therefore neither be possible nor proper for the Executive Authority to attempt to interfere in a field outside its jurisdiction.

At the same time, such administrative measures as were appropriate were undertaken in order to facilitate the transit of the aircraft carrying His Excellency the President. . . .

2. Government memorandum concerning the issue of sovereign immunity in relation to a case in the United States District Court[2]

In an action in a United States District Court arising from a collison on May 23, 1965, in the Detroit River involving a United States vessel and the Belgian M/V *Patignies* with a Canadian pilot on board, holder of a Great Lakes pilot registration certificate issued by the Department of Transport, the government of Canada, in connection with the issue of its sovereign immunity in respect of damage resulting from the collison, submitted on June 12, 1968, the following memorandum of law on sovereign immunity:

Introduction

This action which has been commenced in the United States District Court,

[1] *Canadian Yearbook of International Law*, vol. 3 (1965), p. 316.

[2] *Ibid.*, vol. 7 (1969), p. 298.

Eastern District of Michigan, Southern Division, arises from a collision on May 23, 1965, in the Detroit River between the Belgian M/V *Patignies* and the *Seventh Angel*, a small United States pleasure craft registered under the No. "MC-0915-B.J.".

At the time of the collision, the pilot aboard the M/V *Patignies* was John Bowie, a holder of a Great Lakes pilot registration certificate No. 1713 issued by the Department of Transport of Canada and which states: "This certifies that the holder is a registered pilot as defined in part VI, A of the Canada Shipping and the United States Great Lakes Pilotage Act of 1960 for the waters of lakes Ontario, Erie, Huron, and Michigan". Mr. Bowie is a servant of the Government of Canada.

The function of a pilot is to direct the navigation of vessels at the discretion of and subject to the customary authority of the master of the ship.

Neither the Government of Canada nor the Canadian Department of Transport owned or operated the M/V *Patignies*. Except for the presence of the pilot, John Bowie, aboard the M/V *Patignies*, there is no connection between that ship or the collision of May 23, 1965, and the Government of Canada or the Canadian Department of Transport.

The Government of Canada is interested in this court action as a result of a Court Order given by the said court to bring the Department of Transport, Canada, into this action as an additional party. Under the court's order a summons was issued. As a result of this court Order, the issuance of the summons, and the purported service thereof upon the Department of Transport, the Embassy of Canada on behalf of its government delivered, on March 13, 1968, a note to the United States State Department pointing out that the Government of Canada had been improperly named and served under the designation of the Department of Transport and requesting that the Sovereign Immunity of the Canadian Government from suit in the Domestic Courts of the United States be upheld in regard to the above action, and that appropriate steps be taken to bring to the attention of the Court the Sovereign Immunity of the Government of Canada in this action.

Issue

At stake is the question of the recognition by the Government of the United States of America of the Sovereign Immunity of the Government of Canada from suit in action entitled Delores Pruitt *vs.* M/V *Patignies*, *et al.*, filed in the United States District Court, Eastern District of Michigan, Southern Division.

I

Argument

The Government of Canada is aware that the Department of State of the United States of America adopted in the "Tate letter" of May 19, 1952 a policy whereby the "restrictive" theory of Sovereign Immunity is followed and the "the Immunity of the Sovereign is recognized with regard to sovereign or public acts (*jus imperii*) of a State, but not with respect to private acts (*jure gestionis*)". The Government of Canada draws the attention of the State Department to the fact that the Government of Canada has never been and is in no way involved in the commercial or other activities performed by the Belgian vessel, M/V *Patignies*, which collided with the *Seventh Angel*, on May 23, 1965.

The Government of Canada has been drawn into this court action as a result of acts performed in fulfillment of its obligations under the agreement between the United States of America and Canada concerning coordination of pilotage services in the waters of the Great Lakes basin (with a memo of arrangement), signed at Washington on May 5, 1961 as amended by the exchange of notes of October 23, 1962 and February 21, 1963, by the exchange of notes of August 23, 1963 and September 10, 1963 and by a further exchange of notes of November 19, 1963 and December 4, 1963. These existing arrangements have since been replaced by a memo of arrangement forming an agreement on boundary waters: pilotage services on the Great Lakes and the St. Lawrence Seaway, signed at Washington on April 13, 1967. This agreement requires the Government of Canada to provide a "registered pilot" on board foreign vessels navigating in Canadian or United States waters of the Great Lakes. . . .

The Government of Canada points out that it was carrying out an international treaty obligation to the Government of the United States in providing a registered pilot for the M/V *Patignies* and was not engaged in any private or commercial activity in so doing. The Canadian Government does not accept the contention that the providing of a pilot aboard a vessel under an international agreement could result in a forfeiture of its sovereign immunity from this court action under the restrictive theory of the sovereign immunity on grounds that it was engaged in activities of a private or commercial nature (*jure gestionis*). It is the view of the Canadian Government that pilotage on the Great Lakes is to be regarded as a governmental function representing as such an act of sovereignty (*jure imperii*). This is so even under the restrictive theory of sovereign immunity set forth in the "Tate letter". Therefore, the immunity of the Government of Canada from this action should be upheld.

The Government of Canada is advised that a memo on behalf of Marvin Wingerter was filed with the Department of State, urging upon the department the position that the activities of the Government of Canada with respect to the incident in question fall beyond the restricted theory of sovereign immunity as set forth in the Tate letter.

The Government of Canada points out that most of the cases cited in that memo were concerned with the question of sovereign immunity in suits brought with respect to ships in which a foreign government had an actual interest, and which were operated either by that foreign government or by a third party for commercial purposes. While there may be some authority to the effect that sovereign immunity should not be afforded where a sovereign has a direct interest in a commercial vessel, it is submitted that even if that line of authority is legally correct, it is not determinative of the question at hand since those cases are neither factually nor legally relevant. Neither the providing of a pilot for the M/V *Patignies*, nor the activities of that pilot in any way carried with it participation by the Government of Canada or the Canadian Department of Transport, either de jure or de facto, in the commercial activities of the vessel M/V *Patignies*.

The Government of Canada knows of no legal authority which in any way directly questions the inherently governmental nature of the acts of the Canadian Government now under consideration, nor is any brought to its attention by the memo filed for Mr. Wingerter. Again, the Government of Canada emphasizes to the Department of State that in the situation at hand, the Government of Canada neither owned nor had an interest in the vessel in question, as was the case in most of the

authorities cited in the memo. As to those cases cited which deal with other factual situations, they bear even less relevance to the situation at hand.

II

As stated above, there was aboard the M/V *Patignies*, on May 23, 1965, date of the collision with the United States pleasure craft *Seventh Angel*, John Bowie, a holder of a Great Lakes pilot registration certificate number 1713 issued by the Department of Transport. This pilot was a servant of the Government of Canada and his sole function was to direct the navigation of the vessel at the discretion of and subject to customary authority of the master of the ship.

Furthermore, the nature of piloting is in itself the type of governmental activity that would bring it within the restrictive theory set forth in the "Tate letter", requiring as it does strict governmental regulation and control by the Canadian Government.

III

Although the Government of Canada considers that its submission in I above as to sovereign immunity is determinative of the issue, it wishes to point out that the memo submitted on behalf of Mr. Wingerter concedes on page one the possibility that the collision between the M/V *Patignies* and the *Seventh Angel* occurred within Canadian waters. It is understood by, and it is the position of, the Government of Canada that the collision did in fact occur within Canadian waters, and that accordingly an action arising therefrom involving the Canadian Government does not fall within the purview of a United States Court.

Conclusion

It is the position of the Government of Canada that the activity of pilotage on the Great Lakes as well as the working relationship between private pilots and the Government of Canada is a governmental function. Accordingly, the restrictive theory of sovereign immunity as declared in the "Tate letter" is applicable in the present case, and the sovereign immunity of the Government of Canada should be recognized.

D. COLOMBIA

1. Letter regarding the topic of jurisdictional immunities of States and their property transmitted by the Government of Colombia to the Secretariat on 16 July 1979

. . . In this connexion I should like, first of all, to call attention to the existing international legislation on the topic, namely the Vienna Convention on Diplomatic Relations, signed on 18 April 1961 and approved by Colombia in Act No. 6a of 1972 and in force, and the Vienna Convention on Consular Relations, signed on 24 April 1963, approved by Act No. 17 of 1971 and in force.

"These Conventions establish the privileges and immunities of diplomats and consuls. It is a known fact that the immunities and privileges of the diplomatic and consular corps have been laid down with a view to facilitating the effective functioning of foreign diplomatic missions and consular offices and are conferred on the sending State rather than on its representative. The Conventions deal in detail

with immunities relating to property. For example they recognize the inviolability of the archives and documents, wherever they may be, and of the premises and their furnishings and other property situated therein.

"As for the immunity of the State itself, in custom and doctrine international law grants the foreign State, its organs and its property, immunity from the jurisdiction of national courts. 'The reciprocal independence, equality, and dignity of sovereign States rendered every State duty-bound to refrain from exercising *in personam* or *in rem* jurisdiction for the purpose of enforcing local laws against a foreign State or its property' (*Manual of Public International Law* by Max Sorensen, New York, 1968, p. 424).

2. Note O/J 767/86 of 24 August 1964, addressed to the Ambassador of Colombia in Bonn

I am pleased to acknowledge receipt of your note No. 206/45 of 3 July 1964, in which you refer to the problem created by the decision of 30 April 1963 of the Constitutional Court of the Federal Republic of Germany and to the various meetings and expressions of opinion to which this decision has given rise within the diplomatic corps accredited to Bonn.

As you indicate, the decision establishes the principle that proceedings may be instituted against foreign States in German courts in respect of acts other than sovereign acts or acts by the public authorities, although it recognizes that this principle does not affect the prerogatives and immunities accorded to diplomatic missions accredited to Germany.

That is the essence of the decision, as set out in the statement appearing on page 42 of the French translation transmitted by you and in the light of the outline contained in the two paragraphs on page 43.

I have read the decision in question with close attention and great interest, since it relates to one of the most interesting topics in contemporary public international law. It must be said that the precedents, doctrine and international practice on which it is based enjoy wide acceptance among legal scholars. It must also be borne in mind that no one today disputes the fact that a change has taken place along these lines in the international community.

1. Having begun with an international society of a relational character based solely on the existence of States as the only subjects of international law and as the voluntary authors of international law, we have gone on to today's international society, which is institutional in character and based on assumptions which, although still the traditional ones of the past, have been broadened and modified as a result of the recognition of other subjects of international law, particularly international organizations endowed with powers and functions which imply an abdication of traditional State sovereignty in the strict sense of the term.

2. State sovereignty is not absolute but limited—limited, first of all, by the very conditions of existence of the international community and, in addition, by the existence of international organizations and entities of a supra-State or supranational character which exceed the strict limits of absolute State sovereignty in the traditional sense. In short, international law is no longer merely a body of law which performs co-ordinating functions as between its subjects but is also, and above all, a body of superimposed law which entails a limitation of State sovereignty.

Operating on this assumption, which we accept, the decision in question explores exhaustively the most varied sources of legal doctrine, precedent and inter-State practice in this regard and emphasizes the following basic distinction:

(*a*) Sovereign acts exercised by the State through its public authorities (*jure imperii*). In respect of such acts, immunity from domestic jurisdiction exists and is recognized without any difficulty whatsoever both in international law and in the German decision;

(*b*) Acts other than those mentioned above, i.e. acts which the State performs not as a sovereign entity but when it is operating on the same level as an individual, a private person. These are what are known as administrative acts (*jure gestionis*); the question which arises is whether or not they are subject to the domestic jurisdiction of the State in which they are performed. The German decision answers this question in the affirmative.

The decision duly indicates the basis for this affirmative answer. However—and I regard this as of paramount importance—it does not explain its reasoning but confines itself to a simple statement when it says: "In the present case, no importance should be attached to the special problem of the immunity of diplomatic missions. The exercise of German jurisdiction does not imply a violation of diplomatic prerogatives and immunities." (p. 42 of the decision)

This is precisely the key point, for the practical result of the German decision is nothing less than interference with and disregard of the diplomatic sphere of the agent of the defendant State, since it is he, as duly accredited representative of that State, who would be notified of the legal action and of everything that occurred in tne proceeding in which he was called upon to appear, give evidence and act on behalf of his Government, the international personification of the State in question.

Otherwise, it is impossible to see how the legal proceeding could take place or how the summoning, appearance and representation of the foreign State against which proceedings were instituted in a German court could proceed. It should also be borne in mind that the execution of the German decision would have to be effected through some sort of formal request delivered to thc competent judicial authorities of the other State.

In that event, which is the general rule in all countries, the national authorities of the foreign State against which proceedings had been instituted and a decision rendered would ultimately be the ones responsible for giving effect to the decision in question. In the case of Colombia, the decision would be enforced only subject to the net of requirements provided for in articles 555-561 of the Judicial Code concerning the execution of decisions of foreign courts.

One of these requirements calls for the foreign decision "not to affect national jurisdiction or be otherwise contrary to public order or morality" (art. 557.2 of the Code). It may be assumed that an affected country would be able to put forward numerous arguments in support of the thesis that such a foreign decision rendered against its State violated national jurisdiction and one of the basic principles of its domestic legal order, namely the principle that it is domestic judges who are competent to render such decisions.

Thus, in the absence of a public treaty directing compliance and of the application of legislative reciprocity or *de facto* reciprocity, the result would be non-compliance with the German decision in the foreign State against which it had been

rendered. One does not have to be a clairvoyant to foresee the difficulties that this would introduce in the normal development of relations of every kind between the two States in question, nor would it be rash to suppose that the German State and its courts would be tempted to try to enforce their decision which had failed of compliance by taking retaliatory measures directed precisely against the diplomatic and consular mission of the country against which the decision had been rendered.

In the light of these concerns, one wonders how the German State will arrange matters in practice so as not to violate the diplomatic prerogatives and immunities of the accredited diplomatic corps, since otherwise its decision will not be enforced and the new legal principle will then remain just that—a mere principle of German domestic law having no international application.

The German decision argues that a distinction must be made between the immunity of States as a general problem and the immunity of diplomatic missions as a special problem. It concludes that, in the case in point, no importance should be attached to the latter problem since the exercise of German jurisdiction does not imply any violation of diplomatic prerogatives and immunities. The decision adds that the criterion to be applied in distinguishing between sovereign State acts, which are exempt from jurisdiction or immune, and private State acts, which are not immune and are subject to German jurisdiction, must be sought in accordance with German domestic law.

In order to anticipate any criticism in this regard, since the delimitation of justiciable and non-justiciable State acts and, hence, the definition of the scope of the immunities of foreign States remain within the exclusive competence of the German national authorities, the decision explains that "the establishment by the national legislator of improper domestic jurisdiction would be at variance with the basic principle of good faith recognized under international law" (p. 40, third para., *in fine*).

However, this is a broad theoretical statement which, in my opinion, does not negate the practical problem to which I have already drawn attention. Moreover, it is not possible to accept without further examination the statement that in this case the special problem of the immunity of diplomatic missions is of no importance, for it seems to me that that is precisely what is at issue and is rightly causing concern to the diplomatic corps accredited to Bonn.

I therefore find very reasonable the opposing view put forward by the Federal Minister of Justice on behalf of the Federal Government when he does indeed attach importance to this problem and explains how diplomatic missions can be disturbed and hindered in the performance of their normal activities and functions as a result of legal proceedings instituted against a foreign State in the German courts.

The German Minister states as follows: "(*c*) Over and above the fundamental principle of the immunity of States, the special problem of the immunity of diplomatic missions is also of importance in the present case. Diplomatic missions must not be interfered with in the performance of their tasks. The admissibility of actions for payment of the kind we are dealing with here could be particularly troublesome to a diplomatic mission in the performance of its functions if such actions became numerous or, indeed, if the diplomatic mission was compelled, in connexion with the litigation, to disclose facts relating to its internal operations or to permit inspections to be conducted within the mission building." (p. 4, *in fine*)

These are the brief observations suggested to me by the decision of the Consti-

tutional Court of the Federal Republic of Germany, Second Chamber, composed of eight (8) judges, which decision has the force of law according to an explanation provided by the Department of Protocol of the German Government. They will serve to guide your actions when the matter is brought up again, either at meetings of the accredited diplomatic corps or with the authorities and Government of that country.

May I say in conclusion that, in connexion with this legal discussion, both the Secretary-General of the Foreign Ministry and the undersigned reviewed earlier presentations on the subject and, in so doing, refreshed our recollection of the wise teachings along similar lines imparted to many generations of Colombians by the distinguished professor and specialist in international law, Dr. Hermann Meyer-Lindenberg, at present Assistant Director of the Legal Division of the Federal Ministry of Foreign Affairs, with whom you might wish to discuss the contents of this note.

(Signed) Humberto Ruiz VARELA
Acting Legal Counsel

E. CZECHOSLOVAKIA

ANALYSIS OF THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY SUBMITTED BY THE GOVERNMENT OF CZECHOSLOVAKIA TO THE SECRETARIAT ON 20 JULY 1979

The Permanent Mission of the Czechoslovak Socialist Republic would like to point out in this connection that Section 47 of the . . . Act constitutes the basic provision of Czechoslovak law in the sphere of an exclusion of foreign states and their property from the jurisdiction of Czechoslovak civil courts and notarial offices. It clearly follows from this provision that the Czechoslovak law is based in this respect on the theory of absolute immunity.

This theory represents a legal concept according to which a foreign state (and its property as well), being a sovereign territorial and political entity, cannot be submitted to jurisdiction of another State unless it expressly agrecs to it. The theory of absolute immunity is the only possible and logic consequence of one of the cornerstones of contemporary international law—the principle of sovereign equality of states.

The application of this principle in international relations is based on the assumption that the will of a state will always be duly and fully respected. This principle does not, however, exclude the possibility that a state under certain circumstances can find it desirable or otherwise appropriate to submit a certain case to the jurisdiction of another State. This case being the consequence of that State's own decision is the only example when a State may establish its jurisdiction in respect to another State. Where there is no expressly declared readiness on the part of one State to submit certain cases to the jurisdiction of another State be it by an oral agreement or by an international treaty, any attempts to establish the jurisdiction unilaterally (by internal law, by decisions of the courts or otherwise) must be considered to be contrary to international law.

There is no rule in contemporary international law identifying possible exceptions from the immunity of States for certain areas of their activities (e.g. economy, finance, trade etc.).

With reference to section 47, para. 2, subpara. (*a*) of the enclosed Act the Permanent Mission underlines that this provision can in no may be viewed as forming an exception from the basic principle set forth in Section 47, para. 1. This rule, quite on the contrary, confirms the respect for the principle of the sovereign equality of States since its sole aim is to ensure the indisputable and self-evident link that exists between a territorial state and an object forming a content of real property or rights relating to real property in the state concerned.

Summing up, the Permanent Mission would like to note that since the concept of absolute immunity is shared by a considerable number of members of the interuational community, the correctness and purposefulness of the attitude that the Interuational Law Commission, or to be more exact, its appropriate Working Group, has adopted in this respect on its thirtieth session last year, must necessarily be questioned. The Permanent Mission has in mind particularly the following part of the above-mentioned Working Group's report: "A working distinction may eventually have to be drawn between activities of States performed in the exercise of sovereign authority which are covered by immunities, and other activities in which States, like individuals, are engaged in an increasing manner and often in direct competition with private sectors. . . . In other words only acta iure imperii or acts of sovereign authority as distinct from acta iure gestionis or jure negotii are covered by State immunities." (U.N. document A/33/10, p.388, para. 29). This approach to the topic in question cannot lead to any positive results, since it cannot be met in the affirmative by at least a significant part of the international community.

F. DENMARK

A LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF DENMARK TO THE SECRETARIAT ON 16 NOVEMBER 1981

There exists no general Danish legislation on the topic under reference. In practice, however, the provisions of the Administration of Justice Act are interpreted in conformity with the general principles of international law relating to immunity of foreign States from lawsuit and execution.

Provisions governing execution, distress, arrest or other legal detention in ships of foreign States are, however, embodied in a special Act (No. 198 of 16 May 1950). In this connexion it should be noted that Denmark has ratified the Convention of 10 April 1926 on the adoption of certain uniform rules concerning immunity for ships of foreign States, with Additional Protocol of 24 May 1934. In the Danish view, these rules reflect the tendency in modern international practice to restrict at any rate the immunity from lawsuit to acts performed by a State in its capacity of a subject of international law, i.e. *jure imperii*.

In connexion with raising government loans abroad, the Danish authorities frequently consider whether and, if so, to what extent immunity should be waived—an

appraisal in which the general rules of international law are also taken into account. As a general rule, a Danish waiver of immunity is accompanied by an explicit reservation with respect to "real property and buildings and the contents thereof owned by the Danish Ministry of Foreign Affairs and situated outside the Kingdom of Denmark, and assets of the Kingdom necessary for the proper functioning of the Kingdom as a sovereign power".

In the opinion of Denmark, this text—or wording to the same effect—of declarations by which States waive immunity—is in the nature of an *ordre public* reservation which follows also from general international law. Hence an exception with regard to assets such as referred to must be presumed to apply also where a State has waived immunity without making such an explicit reservation.

G. FINLAND

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF FINLAND TO THE SECRETARIAT ON 11 JUNE 1979

According to the Act on the Confiscation and Prohibition to Dispose of the Property of a Foreign State with Which Finland Maintains Friendly Relations passed on 27 May 1921 such property may not be confiscated or frozen as collateral for claims. The Act has in general been interpreted to mean that the final implementation, too, of any such measures against another State is prohibited, and that a foreign State is not answerable before the courts of another State. This interpretation is supported by the Vienna Convention on Diplomatic Relations of April 18, 1961. Nevertheless such immunity is generally considered to apply to cases of *acta iuris imperii* only, and not to cases of *acta iuris gestionis*. These questions have usually not constituted legal cases in practice because they have been settled by the diplomatic channel.

H. GERMAN DEMOCRATIC REPUBLIC

LETTER CONCERNING THE BASIC POSITION OF THE GERMAN DEMOCRATIC REPUBLIC ON THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 7 APRIL 1981

The German Democratic Republic takes the liberty to set forth its basic position on (Jurisdictional immunities of States and their property). Relevant excerpts from domestic laws and regulations are annexed to these comments.

As a matter of principle the German Democratic Republic holds the view that the general immunity of a State from the jurisdiction of another State cogently ensues from the international law principle of the sovereign equality of States and that equal immunity of all States corresponds to the sovereign equality of States.

The German Democratic Republic considers the immunity of a State from the jurisdiction of another State a State's right to which it is basically entitled with regard to all activities it legally undertakes within another State's area of sovereignty, a right which exists vis-à-vis all measures taken by that other State in the practical exercise of its governmental power. A State's immunity does not, however, restrict the validity of the substantive law of another State within its area of sovereignty.

It is for each State itself to decide whether to waive, generally or in individual cases, the exercise of the right to immunity in respect of certain activities it undertakes within the area of sovereignty of another State and in what legal form (by accession to corresponding multilateral or bilateral agreements or by unilateral (domestic) legal acts) it chooses to do so. Any decision by a court or other bodies of another State on this issue would subordinate it and its sovereignty to the sovereignty of that other State and thus violate the principle of sovereign equality.

This applies to the German Democratic Republic as a socialist country particularly where its exercise of economic activities is concerned since socialist countries in their activities cannot make a distinction between so-called "sovereign" and "non-sovereign" acts (acta juris imperii and acta juris gestionis). A State's economic role cannot be separated from its other activities since the socialist State, which is both the political organization of the people and the collective owner of people's property, in all its activities observes the unity of politics and economics. Therefore, the German Democratic Republic does not accept the theory of functional immunity.

State property in the German Democratic Republic is nationally-owned property of society as a whole. It is the mainstay of socialist relations of production and the economic foundation of the socialist social system. In respect of nationally-owned property the principle of inviolability applies. This principle is embodied in Chapters 1 and 2 of the Constitution of the German Democratic Republic. Article 20 of the Civil Code of the German Democratic Republic of 19 June 1975 also contains explicit provisions in this regard. As a matter of principle nationally-owned property is utilized and managed by nationally-owned enterprises and government institutions. They are allocated separate and clearly defined parts of nationally-owned property. In the discharge of the functions and powers assigned to them they are authorized to possess, use and control, on the basis of the laws and regulations, the nationally-owned property entrusted to them by the socialist State.

As a matter of principle the German Democratic Republic regards its State property as immune. There are, however, cases where claims to immunity are waived altogether or in part. In the German Democratic Republic's practice this is done by way of explicit provisions to this effect in international agreements. Waiver of immunities may also take the form of agreement to proceedings before a foreign court. However, recognition of foreign court decisions in the German Democratic Republic is subject to certain conditions. Under the Code of Civil Law Procedure of the German Democratic Republic of 19 June 1975 a decision by GDR court is required on the recognition and execution of a foreign court judgement or arbitration award. Besides, legally valid decisions are recognized and executed only on the basis of the principle of reciprocity. Furthermore, the Code of Civil Law Procedure stipulates on what grounds recognition is denied to foreign court judgements and arbitration awards. For instance, such judgements and awards must not have serious procedural shortcomings or contravene the ordre public of the German Democratic Republic.

I. GERMANY, FEDERAL REPUBLIC OF

1. Circular note transmitted by the Government of the Federal Republic of Germany to foreign Embassies in Bonn on 20 December 1973 (transmitted to the Secretariat by that Government)

Note circulaire

Le Ministère fédéral des Affaires étrangères présente ses compliments aux Missions étrangères et, pour éviter certains malentendus, a l'honneur de porter à leur connaissance la notice ci-jointe, avec traductions, relative à l'octroi de l'immunité dans les procédures civiles engagées devant les tribunaux de la République fédérale d'Allemagne.

Le texte de la Décision y mentionnée, prise par la Cour constitutionnelle fédérale le 30 avril 1963, a été transmis en son temps à chacune des Missions étrangères par Note circulaire du 11 août 1964 — Prot 2 84.09 — accompagnée de deux traductions non officielles.

Le Ministère fédéral des Affaires étrangères saisit cette occasion pour adresser aux Missions étrangères les assurances de sa haute considération.

Bonn, le 20 décembre 1973

MEMORANDUM

Court proceedings against diplomatic missions and consular posts in the Federal Republic of Germany

In the implementation of civil law contracts to which members of the diplomatic missions and consular posts, or foreign States, are parties, differences of opinion have arisen now and then over their interpretation.

While there is usually no doubt that such contracts—except if is otherwise agreed—are, on principle, subject to German substantive law, it is often not clear whether the courts in the Federal Republic of Germany have jurisdiction to decide such questions.

In order to obviate misunderstandings from the outset, the German Federal Foreign Office wishes to draw attention to the following principles.

1. In so far as contracts are concerned to which individual members of diplomatic missions and consular posts are parties, the courts are held to observe §§ 18 to 21 of the Law of the Constitution of the Courts of 27 January 1877, as amended by Notification of 12 September 1950 (Bundesgesetzblatt—Federal Law Gazette—I p. 513), as well as the Vienna Conventions of 18 April 1961 on Diplomatic Relations and of 24 April 1963 on Consular Relations, which Conventions have been ratified by the Federal Republic of Germany (Bundesgesetzblatt 1964 II p. 957 ff and Bundesgesetzblatt 1969 II p. 1585 ff).

The privileged persons are, within the purview of those Conventions, exempt from the German jurisdiction.

2. In the case of contracts concluded on behalf of a foreign State rather than on behalf of individual members of diplomatic missions or consular posts, personal

immunity is not the decisive criterion; a court must in such cases decide whether or not "State immunity" exists.

There is at present no general rule of international law on the question of State immunity under which foreign States would be altogether exempt from national jurisdiction (theory of absolute immunity). Rather, a distinction has to be made between *acta iure imperii* (acts performed in the exercise of sovereign authority, publie acts) and *acta iure gestionis* (acts under private law, private acts).

Whereas in respect of the former acts State immunity is today still generally recognized as a rule of international customary law, it cannot, aecording to recent trends in the practice of States and the governing jurisprudence, be invoked for the latter type of acts.

The highest court of the Federal Republic of Germany, the Federal Constitutional Court, too, in its decision of 30 April 1963 (Decisions of the Federal Constitutional Court, vol. 16 p. 27 ff) held to this effect on the problem of State immunity by taking into consideration especially the pertinent practice of States and the literature on international law. This decision has the force of law (Article 100, paragraph 2, of the Basic Law for the Federal Republic of Germany; § 31, paragraph 2, first sentence, and § 13 (12) of the Law concerning the Federal Constitutional Court) and must be observed accordingly by all courts of the Federal Republic of Germany.

3. In such proceedings, the Federal Foreign Office is frequently requested by the competent court to serve the writ of action. Over and beyond this the Federal Foreign Office has no functions in such proceedings.

Therefore, in view of the strict division of powers existing in the Federal Republic of Germany (Article 97, paragraph I, and Article 20, paragraph 2, second sentence, of the Basic Law for the Federal Republic of Germany) the Federal Foreign Office cannot exert any influence on the proceedings in question. It is exclusively for the courts themselves to determine the admissibility of the process of law and also to decide whether a particular case is within the jurisdiction of German courts or if sueh jurisdiction is controverted by immunity.

Judicial deeisions may be influenced only by the parties to the proceedings through the pleadings provided by law and may be contested, after their pronouncement, only with the remedies to which the parties are entitled. The Federal Foreign Office has no such means of recourse since it is not a party to the proceedings.

4. The decision as to whether and to what extent a natural person or a foreign State is exempt from jurisdiction in the Federal Republic of Germany hinges on a number of facts which ean be established only if the defendant has taken a step in the proceedings. He must make known to the court facts which support the claim of immunity and which challenge contentions to the contrary by the plaintiff.

It is only in this manner that the defendant can ensure that the greatest possible allowance is made for his immunity. The assertion of immunity in pending proceedings cannot be construed as a waiver of such immunity.

If the defendant fails to take any step in the proceedings he runs the risk of the plaintiff securing a "default judgment" (§ 331, Code of Civil Procedure) on the subject in dispute and of his own immunity rights not being acknowledged since they have not been made known to the court within the scope of the proceedings.

In effect, if the plaintiff moves for a default judgment against a defendant who

does not appear—or is not represented by counsel—at the oral hearing, the court is held to deem the factual oral representations by the plaintiff to be admitted. Solely on the basis of the facts alleged by the plaintiff, the court examines whether or not exemption from the German jurisdiction is present. If the court holds such exemption not to be present, it must then decide in accordance with the plaintiff's motion, provided that his action is sound.

2. Note from the Chargé d'Affaires of the Permanent Mission of the Federal Republic of Germany to the Secretariat on 7 August 1979

The legal order of the Federal Republic of Germany makes no special provision (laws or regulations) for jurisdictional immunity for foreign States and their property (see also H. Stenberger: International Law Association, State Immunity, Law and Praetice in the United States and Europe, Proceedings of Conference held on 17 November 1978, pp. 17-18).

However, article 25 of the Basic Law of the Federal Republic of Germany states that the general rules of public international law form part of federal law and that they take precedence over the laws. If, in the course of litigation, there are doubts as to whether a rule, as general rule of international law, forms part of federal law, the court shall submit the question to the Federal Constitutional Court for a ruling (Basic Law, Art. 100, para. 2).

. . .

It is thus the courts which first decide whether, and to what extent, foreign States and their property may enjoy jurisdictional immunity in the Federal Republic of Germany, with the Federal Constitutional Court playing a particular role in this connexion. In proceedings to determine whether or not certain rules of general international law form part of federal law (Basic Law, art. 100, para. 2), the Federal Constitutional Court also gives the Federal Government an opportunity to state its position.

Since the decisions taken by the Federal Constitutional Court on 30 October 1962 (decisions of the Federal Constitutional Court, 15/25) and 30 April 1963 (Decisions on the Federal Constitutional Court, 16/27), which have the force of law (Act establishing the Federal Constitutional Court, art. 31, para. 2), the courts of the Federal Republic of Germany have held that customary international law, as it now stands, affords immunity to States only in respect of their sovereign activitics, and not of their non-sovereign activities. In its note verbale of 20 December 1973 to all diplomatic missions and consular posts in the Federal Republic of Germany, the Federal Ministry of Foreign Affairs drew attention to this legal situation.

. . .

On 13 December 1977, the Federal Constitutional Court ruled that the principle that immunity was functionally limited to sovereign activities applied not only to trial proceedings but also to execution proceedings (Decisions of the Federal Constitutional Court, 46/342). At the same time, the Federal Constitutional Court held that general international law did not allow the legend of forced execution on property used by a foreign State for sovereign purposes, including a bank account maintained in the State of the forum by a foreign State to cover the costs and expenses of its embassy.

These rulings by the Federal Constitutional Court raise the following question: under what law is it possible to distinguish between sovereign and non-sovereign activities and purposes? The Federal Constitutional Court decided to make the distinction between acts *juris imperii* and acts *juris gestionis* on the basis of the *lex fori*, since in its view no precise rule had been established on that point in international practice. However, the applicability—which is not in itself desirable—of the *lex fori* is in turn limited by the fact that international law takes precedence over it whenever a large majority of States is of the view that the act complained of actually constitutes sovereign conduct.

The general principles of the major decisions rendered by the courts of the Federal Republic of Germany, translated into French, are attached.

. . .

In its statement of position to the Federal Constitutional Court in connexion with the proceedings leading to the decision of 13 December 1977, the Federal Government expressly declared its support for the doctrine of limited immunity. International law does not, of course, prohibit the granting of absolute immunity. However, the Federal Government's argument was that international law required immunity only in respect of sovereign acts (acts *juris imperii*) or of property used for sovereign purposes.

J. GREECE

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF GREECE TO THE SECRETARIAT ON 14 AUGUST 1981

Greek courts and Greek jurisprudence in general follow the principle of the so called relative or restrictive extraterritoriality of foreign states. According to this principle, Greek courts have no competence to deal with and pronounce themselves on acts of foreign states committed *jure imperii*. On the other hand Greek courts are competent and pronounce themselves on acts of foreign states committed in their capacity as *fiscus*. A special category of cases are those concerning diplomatic and consular immunities, which are dealt with in accordance with the relevant treaties or conventions to which Greece is a party.

It should be noted that in practice the distinction between the two categories is difficult, and therefore the decision of the court depends on the characteristics of each particular case.

Greek jurisprudence uses in general two criteria to distinguish between acts *jure imperii* and acts *jure gestionis:* The criterion of the "purpose" and that of the "nature" of the act. According to the first, a foreign state enjoys extraterritoriality not only as regards relations of public law but also relations of private law, when the latter serve a public purpose (*imperium*). On the other hand, the criterion of the nature of the act consists in examining if the act is of such a nature that it can be committed by states only and not by individuals. It is the second criterion that appears to have the preference of Greek jurisprudence.

As regards the execution of court decisions and the adoption of conservatory measures, Greek jurisprudence admits their application *vis-à-vis* foreign states, provided the previous authorization of the Ministry of Justice is obtained (cf. articles 689 and 923 of the Code of Civil Procedure).

K. NORWAY

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF NORWAY TO THE SECRETARIAT ON 26 JULY 1979

Norway has not enacted national legislation or decisions of national tribunals that relates to jurisdictional immunities of States and their property with the exception of a law dated 17 March 1939, containing certain regulations for foreign official ships. Under this law immunity is only granted when a ship is used for purposes such as for example fishery supervision. If a ship owned by a foreign government is in fact an ordinary merchant ship immunity is not granted.

L. POLAND

ANALYSIS OF POLISH DOMESTIC LEGISLATION AND DECISIONS OF NATIONAL TRIBUNALS REGARDING JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY, TRANSMITTED BY THAT GOVERNMENT TO THE SECRETARIAT ON 17 JULY 1979

State's immunity derives from its sovereignty. It is based upon the sovereign equality of States and their respective independence. For, in accordance with the principle *par in parem non habet imperium,* no sovereign nor independent State, as subject of international law, is subordinate to the laws of another State. State's immunity is of a very broad character, since the State does not fall under the legislation nor the jurisdiction or the authority of any other State, and as a subject of international law is but amenable to rules of that law. Each State, moreover, is obliged to respect the sovereignty of another State, as the principle of sovereign equality of States is universally binding. Stemming as they do from that latter principle a sovereign State and its institutions are not amenable to foreign national courts.

Under the principle of equality, no State has the right to adjudge in cases involving any other sovereign State, as they are all equal in the face of law. Thus, the jurisdictional immunity is a principle of international relations and an institution of international law.

Although the Polish Civil Code does not refer *expressis verbis* to the jurisdictional immunity with regard to a foreign State, Polish courts do recognize the validity of the immunity by rejecting summons brought against such a State, on the ground of absence of relevant national jurisdiction.

In its ruling of December 14, 1948 [C 635/48—*Państwo i Prawo* 1949, No. 4, p. 119], Poland's Supreme Court stated the following: "The question of jurisdiction by Polish courts over other States cannot be based on provisions of articles 4 and 5 of the Code of Civil Procedure of 1932; a foreign State cannot be considered an alien in the meaning of article 4 of the Code of Civil Procedure nor of the provisions of article 6 of the Code which applies to diplomatic representatives of such a State. The legal basis of a court immunity would be different for such a State as well as different for the court immunity of diplomatic representatives. In deciding upon the questions of court immunities with regard to foreign States, one should base directly on the generally recognized principles accepted in international jurisprudence, outstanding among which is that of reciprocity among States. The principle consists in one State rejecting or granting court immunity to another State to the very same extent as the latter would grant or reject the immunity of the former.

The ruling of the Supreme Court of March 26th, 1958, [2 CR 172/56: *Orzecznictwo Sadów Polskich*, 1959, No. 6/60] stipulates that due to customary international practice, whereby bringing summons against one State in the national courts of another State is inadmissible. Polish courts, in principle, are not competent to deal with cases against foreign States.

It is neither admissible to deem a foreign State to be subjected to the jurisdiction of Polish courts by way of the so-called *facta concludentia* [such a position has been taken in the above quoted ruling of the supreme Court of December 14th, 1948] like the common implications of purchasing real estate in Poland by such a State. A foreign State may renounce its immunity from Polish court jurisdiction, such a renunciation, however, must be unambiguous, drawn in writing, in the form of a statement of the Government concerned, addressed to the Government of Poland.

Jurisdictional immunity involves also the property of a foreign State. It is based upon executional immunity and the immunity against protective distraint. Accordingly, executionary measures may be employed against property belonging to another State only if the State concerned recognizes in a given case the competence of another State's courts. Executionary proceedings against another State's property, located on Poland's territory, would call for a separate and clear-cut renunciation of executional immunity.

M. SURINAME

LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY TRANSMITTED BY THE GOVERNMENT OF SURINAME TO THE SECRETARIAT ON 20 JULY 1981

In Suriname there is no practice on the jurisdictional immunity of States and their property. There is no legislation, nor are there judicial decisions on this topic.

As a part of the Kingdom of the Netherlands Suriname participated, before independence, in the Brussels Convention of 10 April 1926 on the Establishment of

Uniform Rules concerning the Immunity of State owned Ships. As yet the Government has not made a specific declaration of succession with regard to this Convention, but in view of the general declaration of succession of the Government of Suriname of 29 November 1975, Suriname considers itself still bound by the Convention, which reflects the principle of restrictive immunity with regard to state owned ships.

The Government is of the opinion that the principle of absolute immunity has become obsolete in international law and favours in general restrictive immunity. Immunity will not be granted to a foreign state in cases of *acta iure gestionis* and *acta iure privatorum*.

The Government recognizes the difficulties that arise in trying to draw a clear distinction between *acta iure imperii* and *acta iure gestionis et privatorum*, but holds the view that these difficulties do not impair a casuistic application of the principle of restrictive immunity.

As the granting of restrictive immunity is incorporated in the practice of many states, this principle can be considered to be the leading one in international law on the topic of state immunity.

With regard to the question of execution the Government is of the opinion that execution against a foreign State is not contrary to international law. It recognizes however that execution in certain cases may give rise to some disturbance in bilateral relations. In such cases a conscientious weighing of interests by the Government needs to take place.

N. UNION OF SOVIET SOCIALIST REPUBLICS

EXTRACT FROM NOTE NO. 36 OF 11 JULY 1977 FROM THE EMBASSY OF THE UNION OF SOVIET SOCIALIST REPUBLICS IN THE UNITED STATES OF AMERICA TO THE STATE DEPARTMENT OF THE UNITED STATES OF AMERICA (TRANSMITTED BY THE USSR GOVERNMENT TO THE SECRETARIAT)

(In the aforementioned note, the Embassy informed the State Department of the views of the Soviet Union on questions relating to the immunity of a foreign State)

". . . The Soviet Union bases its position on the generally recognized principle of the sovereignty and sovereign equality of States, as affirmed in the Charter of the United Nations. Given the sovereign equality of States and their independence from one another, it follows that no State can exercise authority in respect of another State. A foreign State and its organs and missions enjoy immunity from the jurisdiction of another State. Proceedings against a State or its organs or missions in the court of another State and also arrest and the attachment of the property of a foreign State, are permissible only with the consent of that State. . . ."

O. UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

1. Letter from the United Kingdom's Permanent Representative to the Council of Europe addressed to the Council of Europe regarding the ratification of European Convention on State Immunity (transmitted by that Government to the Secretariat)

Your Excellency,

I have the honour to refer to the instrument of ratification by the United Kingdom of Great Britain and Northern Ireland of the European Convention on State Immunity enclosed herewith, and to notify you of the following:

(*a*) In pursuance of the provisions of paragraph 1 of Article 24 thereof, the United Kingdom hereby declare that, in cases not falling within Articles 1 to 13, their courts and the courts of any territory in respect of which they are a Party to the Convention shall be entitled to entertain proceedings against another Contracting State to the extent that these courts are entitled to entertain proceedings against States not Party to the present Convention. This declaration is without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).

(*b*) In pursuance of the provisions of paragraph 2 of Article 19, the United Kingdom hereby declare that their courts, and the courts of any territory in respect of which they are a Party to the Convention, shall not be bound by the provisions of paragraph 1 of that Article.

(*c*) In pursuance of the provisions of paragraph 4 of Article 21, the United Kingdom hereby designate as competent courts: in England and Wales—the High Court of Justice; in Scotland—the Court of Session; in Northern Ireland—the Supreme Court of Judicature; and in any other territory in respect of which they are a Party to the Convention—the Supreme Court of the territory concerned. The question whether effect is to be given to a judgment in accordance with paragraph 1 of Article 21 may however also be justiciable in other civil courts in the exercise of their normal jurisdiction.

2. I also have the honour to inform you that simultaneously an instrument of ratification of the International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10 April, 1926, and of the Protocol supplementary thereto, done at Brussels on 24 May, 1934, is being deposited with the Government of the Kingdom of Belgium. This instrument of ratification, signed by Her Majesty The Queen in respect of the United Kingdom of Great Britain and Northern Ireland, contains the following reservations:

"We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of Our courts, or of Our courts in any territory in respect of which We are party to the Convention.

"We reserve the right, with respect to Article 2 of the Convention, to apply in proceedings concerning another High Contracting Party or ship of another High Contracting Party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the Sixteenth day of May, in the Year of Our Lord One thousand Nine hundred and Seventy-two.

"In order to give effect to the terms of any international agreement with a non-Contracting State, We reserve the right to make special provision

"(*a*) as regards the delay or arrest of a ship or cargo belonging to such a State, and

"(*b*) to prohibit seizure of or execution against such a ship or cargo."

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

WHEREAS a European Convention on State Immunity, opened for signature by member States of the Council of Europe at Basle from the sixteenth day of May, one thousand nine hundred and seventy-two, was signed on that date on behalf of the United Kingdom of Great Britain and Northern Ireland;

NOW THEREFORE the Government of the United Kingdom of Great Britain and Northern Ireland, having considered the convention aforesaid, hereby confirm and ratify the same on behalf of:

The United Kingdom of Great Britain and Northern Ireland
Belize
British Antarctic Territory
British Virgin Islands
Cayman Islands
Falkland Islands and Dependencies
Gilbert Islands
Hong Kong
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
Saint Helena and Dependencies
Turks and Caicos Islands
United Kingdom Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus

and undertake faithfully to perform and carry out all the stipulations therein contained.

IN WITNESS whereof this Instrument of Ratification is signed and sealed by Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs.

Done at London the tenth day of May, one thousand nine hundred and seventy-nine.

2. NOTE FROM THE UNITED KINGDOM'S AMBASSADOR IN BRUSSELS, ADDRESSED TO THE BELGIAN MINISTER FOR FOREIGN AFFAIRS TO ACCOMPANY UK INSTRUMENT OF RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITY OF STATE-OWNED SHIPS, 1926 8C PROTOCOL, THERETO (TRANSMITTED BY THE GOVERNMENT OF THE UNITED KINGDOM TO THE SECRETARIAT)

Your Excellency,

I have the honour to refer to the International Convention for the Unification of certain Rules concerning the Immunity of State-owned Ships, done at Brussels on 10

April 1926, and to the Protocol supplementary thereto, done at Brussels on 24 May 1934. In accordance with the provisions of Article 9 of the Convention, this Note is accompanied by the instrument of ratification by Her Majesty The Queen of the United Kingdom.

With reference to the provisions of Article 11 of the Convention, I have the honour to declare that the Convention and Protocol will not apply to the following territories under Her Majesty's sovereignty:

The Bailiwick of Jersey
The Bailiwick of Guernsey
The Isle of Man
Bermuda
British Indian Ocean Territory
Gibraltar

I avail myself of this opportunity to renew to Your Excellency the assurance of my highest consideration.

3. INSTRUMENTS OF RATIFICATION OF THE INTERNATIONAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES CONCERNING THE IMMUNITY OF STATE-OWNED SHIPS, 1926 8C PROTOCOL, THERETO

Elizabeth the Second, by the grace of God of the United Kingdom of Great Britain and Northern Ireland and of Her other realms and territories Queen, Head of the Commonwealth, Defender of the Faith, etc., etc., etc., to all and singular to whom these presents shall come, greeting!

Whereas an international Convention for the unification of certain rules concerning the immunity of State-owned ships was concluded and signed at Brussels on the tenth day of April in the year of our Lord one thousand nine hundred and twenty-six by the plenipotentiaries of us, in respect of our United Kingdom of Great Britain, and of the heads of certain other states;

And whereas a supplementary protocol, forming an integral part of the said Convention, was concluded at Brussels on the twenty-fourth day of May in the year of our Lord one thousand nine hundred and thirty-four;

Now therefore we, having seen and considered the Convention aforesaid, have approved, accepted and confirmed the same in all and every one of its articles and clauses, as we do by these presents approve, accept, confirm and ratify it, in respect of our United Kingdom of Great Britain and Northern Ireland, subject to the following reservations:

We reserve the right to apply Article 1 of the Convention to any claim in respect of a ship which falls within the Admiralty jurisdiction of our courts, or of our courts in any territory in respect of which we are party to the Convention.

We reserve the right, with respect to Article 2 of the Convention, to apply in proceedings concerning another high contracting party or ship of another high contracting party the rules of procedure set out in Chapter II of the European Convention on State Immunity, signed at Basle on the sixteenth day of May, in the year of our Lord one thousand nine hundred and seventy-two.

In order to give effect to the terms of any international agreement with a non-contracting State, we reserve the right to make special provision

(*a*) as regards the delay or arrest of a ship or cargo belonging to such a State, and

(*b*) to prohibit seizure of or execution against such a ship or cargo;

Engaging and promising upon our royal word that, subject to the said reservations, we will sincerely and faithfully perform and observe all and singular the things which are contained and expressed in the Convention aforesaid, and that we will never suffer the same to be violated by any one, or transgressed in any manner, as far as it lies in our Power. For the greater testimony and validity of all which, we have caused our great seal to be affixed to these presents, which we have signed with our royal hand.

Given at our Court of Saint James's the _____ day of _____ in the year of our Lord one thousand nine hundred and seventy-nine and in the twenty-eighth year of our reign.

4. LETTER CONCERNING THE TOPIC OF JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY SUBMITTED BY THE UNITED KINGDOM GOVERNMENT TO THE SECRETARIAT ON 3 JULY 1979

I am replying to your circular note of 18 January 1979, reference LE 113(32), in which you invited the United Kingdom to submit by 30 June relevant material on the topic of jurisdictional immunities of States and their property, including national legislation, decisions of national tribunals and diplomatic and official correspondence.

On 3 July, 1979, the United Kingdom Government deposited instruments of ratification of the European Convention on State Immunity, signed at Basle on 16 May 1972, and of the International Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships, signed at Brussels on 10 April 1926, and the Supplementary Protocol to the Brussels Convention signed at Brussels on 24 May 1934. The instrument of ratification of the European Convention on State Immunity was accompanied by a number of declarations, and the instrument of ratification of the Brussels Convention was accompanied by a number of reservations. I enclose copies of both instruments and of the diplomatic notes with which they were transmitted. These documents show the territories in respect of which the United Kingdom has ratified the two Conventions.

Special United Kingdom legislation was required to bring United Kingdom law into conformity with the obligations to be assumed under these two Conventions. This legislation, the State Immunity Act 1978, came into force for the United Kingdom on 22 November 1978, and as regards other territories to which the Conventions have been extended, on 2 May 1979. I enclose copies of the State Immunity Act 1978 (Commencement) Order 1978, and of the State Immunity (Overseas Territories) Order 1979. St. Helena, to which both the Conventions have been applied, enacted its own legislation and was therefore not covered by the State Immunity (Overseas Territories) Order 1979. Two other Orders in Council have been made under the State Immunity Act. The State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978 was required to give effect to the provision of the Protocol to the Treaty on Merchant Navigation between the United Kingdom and the Soviet Union, signed in Moscow on 1 March 1974. The State Immunity (Federal States) Order 1979 was required because Austria, which is a party to the European Convention on State Immunity has, in accordance with Article 28 of that Conven-

tion, notified her constituent territories as being entitled to invoke the provisions of the Convention applicable to Contracting States.

When the State Immunity Bill was before the United Kingdom Parliament copies of it were sent to all diplomatic missions in London on two occasions. The first version was a print of the State Immunity Bill as it was introduced in the House of Lords on 13 December 1977. This was accompanied by a circular letter of 9 January 1978 which explained the purpose of the legislation, made clear that the Bill would also place on a statutory basis the privileges and immunities enjoyed by Heads of State in their personal capacity, and offered arrangements to Federal States under which their constituent territories might be accorded sovereign immunity in the United Kingdom. The note explained that the United Kingdom intended to apply the provisions of the Bill to all sovereign States in the belief that the provisions of the European Convention reflected with sufficient accuracy general State practice in the field of sovereign immunity. As a result of debates in the House of Lords, the Bill underwent considerable changes before being introduced into the House of Commons on 4 April 1978. The Bill as it was introduced into the House of Commons was circulated again to diplomatic missions on 12 May 1978. The most significant changes made to the Bill as a result of the debates in the House of Lords were the following:

(1) the provision dealing with commercial transactions and contractual obligations to be performed in the United Kingdom (now section 3 of the Act) was extended; and

(2) provision was made permitting, in certain cases and subject to certain qualifications, execution in respect of property for the time being in use or intended for use for commercial purposes.

No State which was sent the legislation in draft offered substantial criticism of its terms.

I am also enclosing the texts of a number of important judgments on this topic by United Kingdom courts in the last few years. Although these judgments have largely been overtaken by the State Immunity Act they are of interest in showing the extent to which United Kingdom courts were beginning to move to bring the law in this field as applied in the United Kingdom into line with international law as applied by the courts and governments in other States. The decisions which I have selected as being of particular significance are the following:

Thai-Europe Tapioca Service Ltd v. *Government of Pakistan, Ministry of Food and Agriculture, (Directorate of Agricultural Supplies Imports and Shipping Wing)* (1975)

The Philippine Admiral. Philippine Admiral (Owners) v. *Wallem Shipping (Hong Kong) Ltd* (1975)

Trendtex Trading Corporation v. *Central Bank of Nigeria* (1976/77)

I. Congreso del Partido (1975/77)

Hispano Americano Mercantil SA v. *Central Bank of Nigeria* (1979). (In this case the court followed the reasoning in the *Trendtex Case*, holding that section 14(4) of the State Immunity Act, which was already in force, did not apply to proceedings in respect of matters that occurred before the coming into force of the Act.)

Uganda Company (Holdings) Ltd. v. *Government of Uganda* (This case was settled earlier this month before it came on for hearing in the Court of Appeal.)

P. UNITED STATES OF AMERICA

1. LEGISLATIVE HISTORY OF FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976; HOUSE REPORT NO. 94-1487

The Committee on the Judiciary, to whom was referred the bill (H.R. 11315) to define the jurisdiction of United States courts in suits against foreign states, the circumstances in which foreign states are immune from suit and in which execution may not be levied on their property, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

Purpose

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

Statement

The bill H.R. 11315 was introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Departments of State and Justice, and both Departments recommend its enactment with the amendments recommended in this report. The bill was the subject of hearings on June 2, 1976 and June 4, 1976 before this Committee's Subcommittee on Administrative Law and Governmental Relations. The amendments recommended to the bill are the result of matters discussed at those hearings and further developed in consultation with representatives of the Departments of State and Justice.

At the hearings on the bill it was pointed out that American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes. Instances of such contact occur when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price. Another is when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention. Still another example occurs when a citizen crossing the street may be struck by an automobile owned by a foreign embassy.

At present, there are no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state. Unlike other legal systems, U.S. law does not afford plaintiffs and their counsel with a means to commence a suit that is specifically addressed to foreign state defendants. It does not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity; and, in the event a plaintiff

should obtain a final judgment against a foreign state or one of its trading companies, our law does not provide the plaintiff with any means to obtain satisfaction of that judgment through execution against ordinary commercial assets.

In a modern world where foreign state enterprises are every day participants in commercial activities, H.R. 11315 is urgently needed legislation. The bill, which has been drafted over many years and which has involved extensive consultations within the administration, among bar associations and in the academic community, would accomplish four objectives:

First, the bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the exccutive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

Second, the bill would insure that this restrictive principle of immunity is applied in litigation before U.S. courts. At present, this is not always the case. Today, when a foreign state wishes to assert immunity, it will oftcn request the Department of State to make a formal suggestion of immunity to the court. Although the State Department espouses the restrictive principle of immunity, the foreign state may attempt to bring diplomatic influences to bear upon the State Department's determination. A principal purposc of this bill 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. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

Third, this bill would for the first time in U.S. law, provide a statutory procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state. This would render unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction.

Fourth, the bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. H.R. 11315 secks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

Background

Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign state. It differs

from diplomatic immunity (which is drawn into issue when an individual diplomat is sued). H.R. 11315 deals solely with sovereign immunity.

Sovereign immunity as a doctrine of international law was first recognized in our courts in the landmark case of *The Schooner Exchange* v. *M'Faddon*, 7 Cranch 116 (1812). There, Chief Justice Marshall upheld a plea of immunity, supported by an executive branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. In the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department. This trend reached its culmination in *Ex Parte Peru*, 318 U.S. 578 (1943)[3] and *Mexico* v. *Hoffman*, 324 U.S.30 (1945).[4]

Partly in response to these decisions and partly in response to developments in international law, the Department of State adopted the restrictive principle of sovereign immunity in its "Tate Letter" of 1952, 26 Department of State Bulletin 984. Thus, under the Tate letter, the Department undertook, in future sovereign immunity determinations, to recognize immunity in cases based on a foreign state's public acts, but not in cases based on commercial or private acts. The Tate letter, however, has posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.

From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria.

From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

The United States in foreign courts

Since World War II, the United States has increasingly become involved in litigation in foreign courts. This litigation has involved such diverse activities as the purchase of goods and services by our embassies, employment of local personnel by our military bases, the construction or lease of buildings for our foreign missions, and traffic accidents involving U.S. Government-owned vehicles.

In the mid-1950s, when the United States first became involved in foreign suits on a large scale, foreign counsel retained by the Department of Justice were instructed to plead sovereign immunity in almost every instance. However, the executive branch learned that almost every country in Western Europe followed the restrictive principle of sovereign immunity and the Government's pleas of immunity were routinely denied in tort and contract cases where the necessary contacts with the forum were present. Thus, in the 1960s, it became the practice of the Department of

[3] 63 S.Ct. 793, 87 L.Ed. 1014.

[4] 65 S.Ct. 530, 89 L.Ed. 729.

Justice to avoid claiming immunity when the United States was sued in countries that had adopted the restrictive principle of immunity, but to invoke immunity in those remaining countries that still held to the absolute immunity doctrine. Beginning in the early 1970s, it became the consistent practice of the Department of Justice not to plead sovereign immunity abroad in instances where, under the Tate letter standards, the Department would not recognize a foreign state's immunity in this country.

In virtually every country, the United States has found that sovereign immunity is a question of international law to be determined by the courts. The United States cannot take recourse to a foreign affairs agency abroad as other states have done in this country when they seek a suggestion of immunity from the Department of State.

History of the bill

H.R. 11315 is the product of many years of work by the Departments of State and Justice, in consultation with members of the bar and the academic community. Study of possible legislation began in the mid-1960s. In the early 1970s, a number of draft bills were prepared and submitted for comment to many authorities and practitioners in the international law field. On January 31, 1973, a bill (H.R. 3493) was introduced in the 93d Congress, and referred to the Committee on the Judiciary. The bill H.R. 3493 was the subject of a subcommittee hearing on June 7, 1973. Although extensive advice had already been obtained from the private sector, in the course of the subcommittee's consideration it became apparent that a few segments of the private bar had not been fully consulted. It was pointed out that the 93d Congress bill contained some technical deficiencies which could be remedied—particularly with respect to maritime cases and the jurisdictional provisions. The American Bar Association at the August 1976 meeting of its House of Delegates adopted a resolution urging approval of H.R. 11315. The letter of that association indicating its support is set out at the end of this report.

The current bill, H.R. 11315, contains revised language. It is essentially the same bill as was introduced in 1973, except for the technical improvements that have been made in the interim.

Committee amendments

The committee, after careful consideration of the bill, made the following amendments:

1. In sections 1604 and 1609 of the bill, the committee has preserved the reference to "existing international agreements" but has deleted the language that would make this bill subject to "future" agreements. Mention of future agreements was found to be unnecessary and misleading. The purpose for including the reference was to take into account the possibility that sovereign immunity might become the subject of an international convention. Such a convention would, under article VI of the Constitution, take precedence, whether or not the bill was made expressly subject to a future international agreement. Moreover, it was thought best to eliminate any possible question that this language might be construed to authorize a future international agreement. However, the reference to existing international agreements is essential to make it clear that this bill would not supersede the special procedures provided in existing international agreements, such as the North Atlantic Treaty—Status of Forces Agreement.

2. Section 1606, relating to public debt obligations, has been deleted and the former section 1605(*c*) has been renumbered as section 1606. The public debt provi-

sion was, at best, very limited. It applied only to debt obligations incurred "for general governmental purposes." It did not apply to debts incurred either for specific government projects (such as the building of a dam) or to further a commercial activity. In practice, the provision would have had virtually no effect because U.S. underwriters of foreign government bonds and U.S. banks lending to foreign governments would invariably include an express waiver of immunity in the debt instrument. Moreover, both a sale of bonds to the public and a direct loan from a U.S. commercial bank to a foreign government are activities which are of a commercial nature and should be treated like other similar commercial transactions. Such commercial activities would not otherwise give rise to immunity and would be subject to U.S. regulation, such as that provided by the securities laws. Thus, on reconsideration of all of the factors, the committee has concluded that a public debt provision would serve no significant purpose and would be inappropriate.

3. Former section 1605(*c*), renumbered as section 1606, has also been revised in two other respects. First, it makes clear that the exception for punitive damages applies to political subdivisions of foreign states, as well as to the foreign state itself. This accords with current international practice. Second, it would eliminate the exception for interest prior to judgment. Such an exception is not supported by international practice. If a foreign state is not immune from suit, it should be liable for interest to the same extent as a private party.

4. Section 1608 has been substantially revised, with the principal revisions being in subsection (*a*). A number of bar association studies, which otherwise expressed full support for the bill, pointed out that subsection (*a*), as previously drafted, created a significant gap in its provisions concerning service upon a foreign state through diplomatic channels. The Departments of Justice and State have reconsidered this provision and have indicated their preference for the revised language in the committee amendment. The committee has revised subsection (*a*) to fill the prior gap, and, at the same time, to minimize potential irritants to relations with foreign states. Subsection (*a*), as revised, would provide that service of a summons and complaint also be accompanied by a new document, called a notice of suit. The notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.

The revised paragraphs (*a*)(2) and (*b*)(2) of section 1608 give emphasis to service under an "applicable international convention on service of judicial documents." At present, there is such an applicable international convention—the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, TIAS 6638, 20 UST 361—to which the Senate gave its advice and consent to ratification, and which entered into force for the United States in 1969. At present 18 nations are parties to this convention. In the committee's view, if a country has entered into such an international convention, priority should be given to this method for service.

Subsection (*d*) has been revised to delete the references to cross-claims and counterclaims. The existence of a counterclaim against a foreign state indicates that the foreign state has already entered an appearance in the lawsuit; thus, there is no necessity for affording the foreign state with a special time period in which to respond to a counterclaim. When a cross-claim is filed against a foreign state, rules 19 and 20, of the Federal Rules of Civil Procedure, require that original service be made. Under rules of the bill, this would mean service under section 1608 (*a*) and (*b*).

5. Finally, your committee has made a few perfecting amendments in the bill's provisions involving maritime jurisdiction. These include changes in section 1605(*b*) to make it clear that the delivery of notice to a master of a vessel under paragraph (1) does not itself constitute "service"; and to make clear, in cases where the plaintiff is unaware that he has arrested a foreign state-owned vessel, that the 10-day period in paragraph (2) does not begin to run until the plaintiff has determined that a foreign state owns the vessel. Section 1609 has been amended to make it clear that it applies to arrests of a vessel, as well as to attachment and execution.

CONCLUSION

On the basis of the facts outlined in the executive communication and the testimony at the hearings on the bill, the committee finds that there is a clearly defined need for the enactment of these provisions into law. It is recommended that the amended bill be approved.

SECTION-BY SECTION ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See *Ex Parte Peru*, 318 U.S. 578, 588-589 (1943).[5])

The bill is not intended to affect the substantive law of liability. Nor is it intended to affect either diplomatic or consular immunity, or the attribution of responsibility between or among entities of a foreign state; for example, whether the proper entity of a foreign state has been sued, or whether an entity sued is liable in whole or in part for the claimed wrong.

Aside from setting forth comprehensive rules governing sovereign immunity, the bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states, procedures for commencing a lawsuit against foreign states in both Federal and State courts, and circumstances under which attachment and execution may be obtained against the property of foreign states to satisfy a judgment against foreign states in both Federal and State courts.

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art. 1, sec. 8, cl. 9; art. III, sec. 1); to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. 1, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States . . ." (art. 1, sec. 8, cl. 18; art, III, sec. 2, cl. 1). See *National Bank* v. *Republic of China*, 348 U.S. 356, 370-71 (1955)[6] (Reed

[5] 63 S.Ct. 793, 87 L.Ed. 1014.

[6] 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

J., dissenting); *cf. Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425 (1964).[7]

The committee wishes to emphasize that this section-by-section analysis supersedes the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress (that is, S. 566 and H.R. 3493, 93d Cong., 1st sess.); the prior analysis should not be consulted in interpreting the current bill and its provisions, and no inferences should be drawn from differences between the two.

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however, will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill.

(*a*) *Subject Matter Jurisdiction.*—Section 1330(*a*) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605–1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(*a*)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction, could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

(*b*) *Personal Jurisdiction.*—Section 1330(*b*) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia. Public Law 91–358, sec. 132(*a*), title I, 84 Stat. 549. The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. Cf. *International Shoe Co.* v. *Washington*, 326 U.S.

[7] 84 S.Ct. 923, 11 L.Ed.2d 804.

310 (1945),[8] and *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[9] For personal jurisdiction to exist under section 1330(*b*), the claim must first of all be one over which the district courts have original jurisdiction under section 1330(*a*), meaning a claim for which the foreign state is not entitled to immunity. Significantly, each of the immunity provisions in the bill, sections 1605–1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(*b*) also satisfies the due process requirement of adequate notice by prescribing that proper service be made under section 1608 of the bill. Thus, sections 1330(*b*), 1608, and 1605–1607 are all carefully interconnected.

(*c*) *Effect of an Appearance.*—Section 1330(*c*) states that a mere appearance by a foreign state in an action does not confer personal jurisdiction with respect to claims which could not be brought as an independent action under this bill. The purpose is to make it clear that a foreign state does not subject itself to claims unrelated to the action solely by virtue of an appearance before a U.S. court. While the plaintiff is free to amend his complaint, he is not permitted to add claims for relief not based on transactions or occurrences listed in the bill. The term "transaction or occurrence" includes each basis set forth in sections 1605–1607 for not granting immunity, including waivers.

SEC. 3. DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(*a*), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(*c*) and (*d*). See analysis to section 1603(*b*).

SEC. 4. NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalities. The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose

Section 1602 sets forth the central premise of the bill: That decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

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[8] 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057.

[9] 78 S.Ct. 199, 2 L.Ed.2d 223.

Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations. There is, however, a wide acceptance of the so-called restrictive theory of sovereign immunity: that is, that the sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign state which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952).)

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(*a*) *Foreign state.*—Subsection (*a*) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state" refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath the central government, including local governments.

(*b*) *Agency or instrumentality of a foreign state.*—Subsection (*b*) defines an "agency or instrumentality of a foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 1332(*c*) and (*d*) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political subdivision), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would of course be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision.

The third criterion excludes entities which are citizens of a State of the United States as defined in 28 U.S.C. 1332(*c*) and (*d*)—for example a corporation organized and incorporated under the laws of the State of New York but owned by a foreign state. (See *Amtorg Trading Corp.* v. *United States*, 71 F.2*d* 524 (C.C.P.A. 1934).) Also excluded are entities which are created under the laws of third countries. The rationale behind these exclusions is that if a foreign state acquires or establishes a company or other legal entity in a foreign country, such entity is presumptively engaging in activities that are either commercial or private in nature.

An entity which does not fall within the definitions of sections 1603(*a*) or (*b*) would not be entitled to sovereign immunity in any case before a Federal or State court. On the other hand, the fact that an entity is an "agency or instrumentality of a foreign state" does not in itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions contained in the bill (see sections 1605–1607 and 1610–1611) was applicable.

As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

(*c*) *United States.*—Paragraph (*c*) of section 1603 defines "United States" as including all territory and waters subject to the jurisdiction of the United States.

(*d*) *Commercial activity.*—Paragraph (*c*) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

By contrast, a foreign state's mere participation in a foreign assistance program administered by the Agency for International Development (AID) is an activity whose essential nature is public or governmental, and it would not itself constitute a commercial activity. By the same token, a foreign state's activities in and "contacts" with the United States resulting from or necessitated by participation in such a program would not in themselves constitute a sufficient commercial nexus with the United States so as to give rise to jurisdiction (see sec. 1330) or to assets which could be subjected to attachment or execution with respect to unrelated commercial transactions (see sec. 1610(*b*)). However, a transaction to obtain goods or services from private parties would not lose its otherwise commercial character because it was entered into in connection with an AID program. Also public or governmental and not commercial in nature, would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.

The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable. Activities such as

a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition.

(*e*) *Commercial activity carried on in the United States by a foreign state.*—As paragraph (*d*) of section 1603 indicates, a commercial activity carried on in the United States by a foreign state would include not only a commercial transaction performed and executed in its entirety in the United States, but also a commercial transaction or act having a "substantial contact" with the United States. This definition includes cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, business torts occurring in the United States (cf. §1605(*a*)(5)), and an indebtedness incurred by a foreign state which negotiates or executes a loan agreement in the United States, or which receives financing from a private or public lending institution located in the United States—for example, loans, guarantees or insurance provided by the Export-Import Bank of the United States. It will be for the courts to determine whether a particular commercial activity has been performed in whole or in part in the United States. This definition, however, is intended to reflect a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff.

Section 1604. Immunity of foreign states from jurisdiction

New chapter 97 of title 28, United States Code, starts from a premisc of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies, or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605–1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

The immunity from jurisdiction provided in section 1604 applies to proceedings in both Federal and State courts. Section 1604 would be the only basis under which a foreign state could claim immunity from the jurisdiction of any Federal or State court in the United States.

All immunity provisions in sections 1604 through 1607 are made subject to "existing" treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights or duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes.

Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where a conflict was manifest.

Section 1605. General exceptions to the jurisdictional immunity of foreign states

Section 1605 sets forth the general circumstances in which a claim of sovereign immunity by a foreign state, as defined in section 1603(*a*), would not be recognized in a Federal or State court in the United States.

(*a*) *Waivers.*—Section 1605(*a*)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver," is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally.

(*a*)(2) *Commercial activities having a nexus with the United States.*—Section 1605(*a*)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity. The definition of a "commercial activity" is set forth in section 1603(*d*) of the bill, and is discussed in the analysis to that section.

Section 1605(*a*)(2) mentions three situations in which a foreign state would not be entitled to immunity with respect to a claim based upon a commercial activity. The first of these situations is where the "commercial activity [is] carried on in the United States by the foreign state." This phrase is defined in section 1603(*e*) of the bill. See the analysis to that section.

The second situation, an "act performed in the United States in connection with a commercial activity of the foreign state elsewhere," looks to conduct of the foreign state in the United States which relates either to a regular course of commercial

conduct elsewhere or to a particular commercial transaction concluded or carried out in part elsewhere. Examples of this type of situation might include: a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; the wrongful discharge in the United States of an employee of the foreign state who has been employed in connection with a commercial activity carried on in some third country.

Although some or all of these acts might also be considered to be a "commercial activity carried on in the United States," as broadly defined in section 1603(*e*), it has seemed advisable to provide expressly for the case where a claim arises out of a specific act in the United States which is commercial or private in nature and which relates to a commercial activity abroad. It should be noted that the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.

The third situation—"an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States"—would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965).

Neither the term "direct effect" nor the concept of "substantial contacts" embodied in section 1603(*e*) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant. Thus, the bill does not affect the holdings in such cases as *United States* v. *Pacific & Arctic Ry. & Nav. Co.*, 228 U.S. 87 (1913),[10] or *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 803 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).[11]

(*a*)(3) *Expropriation claims.*—Section 1605(*a*)(3) would, in two categories of cases, deny immunity where "rights in property taken in violation of international law are in issue." The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality.

The term "taken in violation of international law" would include the nationalization or expropriation of property without payment of the prompt adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent to

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[10] 33 S.Ct. 443, 57 L.Ed. 742.

[11] 89 S.Ct. 872, 21 L.Ed.2d 784.

which, if at all, the "act of state" doctrine may be applicable. See 22 U.S.C. 2370(*e*)(2).[12]

(*a*)(4) *Immovable, inherited, and gift property.*—Section 1605(*a*)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23UST 3227, TIAS 7502 (1972), provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

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[12] The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the art of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory. For example, in the Supreme Court's recent decision in *Dunhill* v. *Republic of Cuba*, 44 U.S.L.W. 4665. No. 73–1288 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an "act of state".

The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R. 11315, whose touchstone is a concept of "commercial activity" involving significant jurisdictional contacts with this country. The conclusions of the committee are in concurrence with the position of the government in its *amicus* brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

"[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to reenter through the back door, under the guise of the act of state doctrine." (Amicus Brief of United States, p. 41.)

(*a*)(5) *Noncommercial torts.*—Section 1605(*a*)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(*a*)(2) relating to commercial activities. It denies immunity as to claims for personal injury or death, or for damage to or loss of property, caused by the tortious act or omission of a foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(*a*)(5), the phrase "tortious act or omission" is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(*a*) (5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 2680 (*a*) and (*h*).

Like other provisions in the bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(*a*)(2) and 1605(*a*)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(*a*)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state. It is noteworthy in this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with respect to civil actions brought by a third party for "damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, *supra*. Consequently, no case relating to a traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(*a*)(5) is to permit the victim of a traffic accident or other noneommercial tort to maintain an action against the foreign state to the extent otherwise provided by law. See, however, section 1605(*c*).

(*b*) *Maritime liens.*—Section 1605(*b*) denies immunity to a foreign state in cases where (i) a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of that foreign state, (ii) the maritime lien is based upon a commercial activity of the foreign state, and (iii) the conditions in paragraphs (1) and (2) of section 1605(*b*) have been complied with.

The purpose of this subsection is to permit a plaintiff to bring suit in a U.S. district court arising out of a maritime lien involving a vessel or cargo of a foreign sovereign without arresting the vessel, by instituting an in personam action against the foreign state in a manner analogous to bringing such a suit against the United States. Cf. 46 U.S.C. 741, *et seq*. In view of section 1609 of the bill, section 1605(*b*) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit. Instead, as provided in paragraph (1), a copy of the summons and complaint must be delivered to the master or other person having possession of the vessel or cargo (such as the second in command of the ship).

If, however, the vessel or its cargo is arrested or attached, the plaintiff will lose his in personam remedy and the foreign state will be entitled to immunity—except in

the case where the plaintiff was unaware that the vessel or cargo of a foreign state was involved. This would be a rare case because the flag of the vessel, the circumstances giving rise to the maritime lien, or the information contained in ship registries kept in ports throughout the United States should make known the ownership of the vessel in question, if not the cargo. By contrast, evidence that a party had relied on a standard registry of ships, which did not reveal a foreign state's interest in a vessel, would be prima facie evidence of the party's unawareness that a vessel of a foreign state was involved. More generally, a party could seek to establish its lack of awareness of the foreign state's ownership by submitting affidavits from itself and from its counsel. If, however, the vessel or cargo is mistakenly arrested, such arrest or attachment must, under section 1609, be immediately dissolved when the foreign state brings to the court's attention its interest in the vessel or cargo and, hence, its right to immunity from arrest.

Under paragraph (2), the plaintiff must also be able to prove that the procedures for service under section 1608(*a*) or (*b*) have commenced—for example, that the clerk of the court has mailed the requisite copies of the summons and complaint. The plaintiff need not show that service has actually been made under section 1608(*c*). The reason for this second requirement is to help make certain that the foreign state concerned receives prompt and actual notice of the institution of a suit in admiralty in the United States, even if the copies served on the master of the vessel should fail to reach the foreign state.

Section 1605(*b*) would not preclude a suit in accordance with other provisions of the bill—e.g., section 1605(*a*)(2). Nor would it preclude a second action, otherwise permissible, to recover the amount by which the value of the maritime lien exceeds the recovery in the first action.

Section 1606. Extent of liability

Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances. However, the tort liability of a foreign state itself, and of its political subdivision (but not of an agency or instrumentality of a foreign state) does not extend to punitive damages. Under current international practice, punitive damages are usually not assessed against foreign states. See 5 Hackwork, Digest of International Law, 723–26 (1943); Garcia-Amador, State Responsibility, 94 Hague Recueil des Cours 365, 476–81 (1958). Interest prior to judgment and costs may be assessed against a foreign state just as against a private party. Cf. 46 U.S.C. 743, 745.

Consistent with this section, a court could, when circumstances were clearly appropriate, order an injunction or specific performance. But this is not determinative of the power of the court to enforce such an order. For example, a foreign diplomat or official could not be imprisoned for contempt because of his government's violation of an injunction. See 22 U.S.C. 252. Also a fine for violation of an injunction may be unenforceable if immunity exists under sections 1609–1610.

The bill does not attempt to deal with questions of discovery. Existing law appears to be adequate in this area. For example, if a private plaintiff sought the production of sensitive governmental documents of a foreign state, concepts of governmental privilege would apply.[13] Or if a plaintiff sought to depose a diplomat in the

[13] e.g., 5 U.S.C. 552 concerning public information.

United States or a high-ranking official of a foreign government, diplomatic and official immunity would apply. However, appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Section 1607. Counterclaims

Section 1607 applies to counterclaims against a foreign state which brings an action or intervenes in an action in a Federal or State court. It would deny immunity in three situations. First, immunity would be denied as to any counterclaim for which the foreign state would not be entitled to immunity under section 1605, if the counterclaim had been brought as a direct claim in a separate action against the foreign state. This provision is based upon article 1 of the European Convention on State Immunity 11 Int'l Legal Materials 470 (1972).

Second, even if a foreign state would otherwise be entitled to immunity under sections 1604–1606, it would not be immune from a counterclaim "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." This is the same terminology as that used in rule 13(*a*) of the Federal Rules of Civil Procedure and is consistent with section 70(2)(*b*), Restatement of the Law, Second, Foreign Relations Law of the United States (1965). Certainly, if a foreign state brings or intervenes in an action based on a particular transaction or occurrence, it should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence. See *Alfred Dunhill of London, Inc.*, v. *Cuba*, _____ U.S. _____ No. 73–1288, decided May 24, 1976).[14]

Third, notwithstanding that the foreign state may be immune under subsections (*a*) and (*b*), the foreign state nevertheless would not be immune from a setoff. Subsection (*c*) codifies the rule enunciated in *National Bank* v. *Republic of China*, 348 U.S. 356 (1955).[15]

Section 1608. Service; time to answer; default

Section 1608 sets forth the exclusive procedures with respect to service on, the filing of an answer or other responsive pleading by, and obtaining a default judgment against a foreign state or its political subdivisions, agencies or instrumentalities. These procedural provisions are intended to fill a void in existing Federal and State law, and to insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.

Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the proposed section 1330 and sections 1605–1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605–1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(*b*). In addition to its integral role in the bill, section 1608 follows on the precedents of other statutory service provisions in areas of unusual Federal interest. See, for example, 8 U.S.C. 1105*a*(3) and 15 U.S.C. 21(*f*) and 77*v*.

(*a*) *Service on Foreign States and Political Subdivisions.*—Subsection (*a*) of section 1608 sets forth the exclusive procedures for service on a foreign state, or political subdivision thereof, but not on an agency or instrumentality of a foreign state

[14] 96 S.Ct. 1854, 48 L.Ed.2d 301.

[15] 75 S.Ct. 423, 99 L.Ed. 389, rehearing denied 75 S.Ct. 598, 349 U.S. 913, 99 L.Ed. 1247.

which is covered in subsection (*b*). There is a hierarchy in the methods of service. Paragraph (1) provides for service in accordance with any special arrangement which may have been agreed upon between a plaintiff and the foreign state or political subdivision. If such an arrangement exists, service must be made under this method. The purpose of subsection (*a*)(1) is to encourage potential plaintiffs and foreign states to agree to a procedure on service.

If no special arrangement exists, paragraph (2) would permit service in accordance with an applicable international convention on service of judicial documents. The only such convention to which the United States is at present a party is the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS 6638 (1969). In order for an international convention to be "applicable", both the United States and the foreign state concerned must be a party to the convention.

If neither an applicable international convention nor a special arrangement exists, paragraph (3) would provide for service by mail. The clerk of the court would send a copy of a "notice of suit" as prescribed by the Secretary of State by regulation, together with a copy of the summons and complaint, by mail to the head of the foreign state's ministry of foreign affairs or its equivalent. This procedure is based on rule 4(i)(1)(I), F.R. Civ. P.

Finally, as a method of last resort, paragraph (4) would provide for service through diplomatic channels if service could not be made by mail within 30 days. The clerk of the court would send two copies of the notice of suit, summons and complaint to the Secretary of State for transmittal through diplomatic channels. Transmittal through diplomatic channels would mean that the Office of Special Consular Services in the Department of State will pouch a copy of these papers to the U.S. Embassy in the foreign state in question. The U.S. Embassy, in turn, would prepare a diplomatic note of transmittal and deliver the diplomatic note with the other papers to the appropriate official in the ministry of foreign affairs of the foreign state. Use of diplomatic channels could also include transmittal of the papers by the Department of State to the foreign state's embassy in Washington, D.C. "Transmittal" of the notice of suit, summons and complaint does not require that the foreign state formally accept these papers. It only requires that these papers be transmitted in such a way that the foreign state has actual notice of the suit. All papers to be served would be accompanied by translations into an official language of the foreign state. Finally, the Secretary of State would be required to send back to the court the diplomatic note used in transmitting the papers to the foreign state.

A "notice of suit" as used in this section would advise a foreign state of the legal proceeding, it would explain the legal significance of the summons, complaint and service, and it would indicate what steps are available under or required by U.S. law in order to defend the action. In short, it would provide an introductory explanation to a foreign state that may be unfamiliar with U.S. law or procedures.

Service through diplomatic channels is widely used in international practice. It is provided for in the European Convention on State Immunity, *supra*, which was negotiated by 18 European nations. It is accepted and indeed preferred by the United States in suits brought against the United States Government in foreign courts. See Department of State's circular instruction No. CA–10922, June 16, 1961, 56 Am. J. Int'l L. 523–33 (1962).

(*b*) *Service on Agencies or Instrumentalities.*—Subsection (*b*) of section 1608 provides the methods under which service shall be made upon an agency or instrumentality of a foreign state, as defined in section 1603(*b*). Again, service must always be made in accordance with any special arrangement for service between a plaintiff and the agency or instrumentality. If no such arrangement exists, then service must be made under subsection (*b*)(2) which provides for service upon officers, or managing, general or appointed agents in the United States of the agency or instrumentality—or in the alternative, in accordance with an applicable international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, *supra*.

If there is no special arrangement and if the agency or instrumentality has no representative in the United States, service may be made under one of the three methods provided in subsection (*b*)(3). The first two methods provide for service by letter rogatory or request or by mail. The third method, subparagraph (C), authorizes a court to fashion a method of service, for example under rule 83, F.R. Civ. P., provided the method is "consistent with the law of the place where service is to be made." This latter language takes into account the fact that the laws of foreign countries may prohibit the service in their country of judicial documents by process servers from the United States. It is contemplated that no court will direct service upon a foreign state by appointing someone to make a physical attempt at service abroad, unless it is clearly consistent with the law of the foreign jurisdiction where service is to be attempted. It is also contemplated that the courts will not direct service in the United States upon diplomatic representatives, *Hellenic Lines Ltd.* v. *Moore*, 345 F. 2d 978 (D.C. Cir. 1965), or upon consular representatives, *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd*, 238 F. 2d 400 (2d Cir. 1956).

(*c*) *When Service Is Made.*—Subsection (*c*) of section 1608 establishes the time when service shall be deemed to have been made under each of the methods provided in subsections (*a*) and (*b*).

(*d*) *Time To Answer or Reply.*—Subsection (*d*) of section 1608 gives each foreign state, political subdivision thereof or agency or instrumentality of a foreign state or political subdivision up to 60 days from the time service is deemed to have been made in which to answer or file a responsive pleading. This corresponds to similar provisions applicable in suits against the United States or its officers or agencies. Rule 12(*a*), F.R. Civ. P.

(*e*) *Default Judgments.*—Subdivision (*e*) of section 1608 provides that no default judgment may be entered against a foreign state, or its political subdivisions, agencies or instrumentalities, "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." This is the same requirement applicable to default judgments against the U.S. Government under rule 55(*e*), F.R. Civ. P. In determining whether the claimant has established his claim or right to relief, it is expected that courts will take into account the extent to which the plaintiff's case depends on appropriate discovery against the foreign state.[16] Once the default judgment is entered, notice of such judgment must be sent in the manner prescribed for service in sections 1608(*a*) or (*b*).

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[16] Cf. Statement in the analysis of section 1606 noting that appropriate remedies would be available under Rule 37, F.R. Civ. P., for an unjustifiable failure to make discovery.

Special note should be made of two means which are currently in use in attempting to commence litigation against a foreign state. First, the current practice of attempting to commence a suit by attachment of a foreign state's property would be prohibited under section 1609 in the bill, because of foreign relations considerations and because such attachments are rendered unnecessary by the liberal service and jurisdictional provisions of the bill. See the analysis to section 1609.

A second means, of questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency with section 1 of article 22 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, TIAS 7502 (1972), which entered into force in the United States on December 13, 1972. Service on an embassy by mail would be precluded under this bill. See 71 Dept. of State Bull. 458–59 (1974).

Section 1609. Immunity from Attachment and Execution of Property of a Foreign State

As in the case of section 1604 of the bill with respect to jurisdiction, section 1609 states a general proposition that the property of a foreign state, as defined in section 1603(*a*), is immune from attachment and from execution, and then exceptions to this proposition are carved out in sections 1610 and 1611. Here, it should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit.

Attachment of foreign government property for jurisdictional purposes has been recognized "where under international law a foreign government is not immune from suit", and where the property in the United States is commercial in nature, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. N.Y. 1959). Even in such cases, however, it has been recognized that property attached for jurisdictional purposes cannot be retained to satisfy a judgment because, under current practice, the property of a foreign sovereign is immune from execution.

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

At the same time, one of the fundamental purposes of this bill is to provide a long-arm statute that makes attachment for jurisdictional purposes unnecessary in cases where there is a nexus between the claim and the United States. Claimants will clearly benefit from the expanded methods under the bill for service on a foreign state (sec. 1608), as well as from the certainty that section 1330(*b*) of the bill confers personal jurisdiction over a foreign state in Federal and State courts as to every claim for which the foreign state is not entitled to immunity. The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by

the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department.

Section 1610. Exceptions to Immunity from Attachment or Execution

Section 1610 sets forth circumstances under which the property of a foreign state is not immune from attachment or execution to satisfy a judgment. Though the enforcement of judgments against foreign state property remains a somewhat controversial subject in international law, there is a marked trend toward limiting the immunity from execution.

A number of treaties of friendship, commerce and navigation concluded by the United States permit execution of judgments against foreign publicly owned or controlled enterprises (for example, Treaty with Japan, April 2, 1953, art. 18(2), 4 UST 2063, TIAS 2863). The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 196 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial services in the same way as against privately owned vessels. Although not a party to this treaty, the United States follows a policy of not claiming immunity for its publicly-owned merchant vessels, both domestically, 46 U.S.C. 742, 781, and abroad, 46 U.S.C. 747; 2 Hackworth, Digest of International Law, 438–39 (1941). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, 15 UST 1606, TIAS 5639, to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used in commercial service.

However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. *Dexter and Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d 705 (2d Cir. 1930). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. See, *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469, 473 (Sup. Ct. N.Y. 1959). Sections 1610(*a*) and (*b*) are intended to modify this rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill.

(*a*) *Execution Against Property of Foreign States.*—Section 1610(*a*) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term "attachment in aid of execution" is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. See rule 69, F.R. Civ. P. The property in question must be used for a commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in paragraphs (1)–(5) of section 1610(*a*).

Paragraph (1) relates to explicit and implied waivers, and is governed by the same principles that apply to waivers of immunity from jurisdiction under section 1605(*a*) (1) of the bill. A foreign state may have waived its immunity from execution, *inter alia*, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution. As in section 1605(*a*)(1), a waiver on behalf of an agency or instrumentality or by the foreign state itself.

Paragraph (2) of section 1610(*a*) denies immunity from execution against property used by a foreign state for a commercial activity in the United States, provided that the commercial activity gave rise to the claim upon which the judgment is based. Included would be commercial activities encompassed by section 1605(*a*)(2). The provision also includes a commercial activity giving rise to a claim with respect to which the foreign state has waived immunity under section 1605(*a*)(1). In addition, it includes a commercial activity which gave rise to a maritime lien with respect to which an admiralty suit was brought under section 1605(*b*). One could, of course, execute against commercial property other than a vessel or cargo which is the subject of a suit under section 1605(*b*), provided that the property was used in the same commercial activity upon which the maritime lien was based.

The language "is or was used" in paragraph (2) contemplates a situation where property may be transferred from the commercial activity which is the subject of the suit in an effort to avoid the process of the court. This language, however, does not bear on the question of whether particular property is to be deemed property of the entity against which the judgment was obtained. The courts will have to determine whether property "in the custody of" an agency or instrumentality is property "of" the agency or instrumentality, whether property held by one agency should be deemed to be property of another, whether property held by an agency is property of the foreign state. See *Prelude Corp.* v. *Owners of F/V Atlantic*, 1971, A.M.C. 2651 (N.D. Calif.); *American Hawaiian Ventures* v. *M.V.J. Latuharhary*, 257 F. Supp. 622, 626 (D.N.J. 1966).

Paragraph (3) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and which has been taken in violation of international law or has been exchanged for property taken in violation of international law. See the analysis to section 1605(*a*)(3).

Paragraph (4) would deny immunity from execution against property of a foreign state which is used for a commercial activity in the United States and is either acquired by succession or gift or is immovable. Specifically exempted are diplomatic and consular missions and the residences of the chiefs of such missions. This exemption applies to all of the situations encompassed by sections 1610(*a*) and (*b*); embassies and related buildings could not be deemed to be property used for a "commercial" activity as required by section 1610(*a*); also, since such buildings are those of the foreign state itself, they could not be property of an agency or instrumentality engaged in a commercial activity in the United States within the meaning of section 1610(*b*).

Paragraph (5) of section 1610(*a*) would deny immunity with respect to obligations owed to a foreign state under a policy of liability insurance. Such obligations would after judgment be treated as property of the foreign state subject to garnishment or related remedies in aid or in place of execution. The availability of such remedies would, of course, be governed by applicable State or Federal law. Paragraph (5) is intended to facilitate recovery by individuals who may be injured in accidents, including those involving vehicles operated by a foreign state or by its officials, or employees acting within the scope of their authority.

(*b*) *Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.*—Section 1610(*b*) provides for execution against the property of agencies or instrumentalities of a foreign state in circumstances additional to those provided in section 1610(*a*). However, the agency or in-

strumentality must be engaged in a commercial activity in the United States. If so, the plaintiff may obtain an attachment in aid of execution or execution against *any* property, commercial and noncommercial, of the agency or instrumentality, but only in the circumstances set forth in paragraphs (1) and (2).

Paragraph (1) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States, where the agency or instrumentality has waived its immunity from execution. See the analysis to paragraph (1) of section 1610(*a*).

Paragraph (2) of section 1610(*b*) denies immunity from execution against any property of an agency or instrumentality engaged in a commercial activity in the United States in order to satisfy a judgment relating to a claim for which the agency or instrumentality is not immune by virtue of section 1605(*a*)(2), (3) or (5), or 1605(*b*). Property will be subject to execution irrespective of whether the property was used for the same commercial or other activity upon which the claim giving rise to the judgment was based.

Section 1610(*b*) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. See *Prelude Corp.* v. *Owners of F/V Atlantic,* 1971 A.M.C. 2651 (N.D. Calif.). There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another. See the analysis to section 1610(*a*)(2).

(*c*) *Necessity of court order following reasonable notice.*—Section 1610(*c*) prohibits attachment or execution under sections 1610(*a*) and (*b*) unless the court has issued an order for such attachment and execution. In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or to a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discretion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment, or in cases of a default judgment, since notice of the judgment was given to the foreign state under section 1608(*e*). In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.

(*d*) *Attachments upon explicit waiver to secure satisfaction of a judgment.*—Section 1610(*d*) relates to attachment against the property of a foreign state, or of a political subdivision, agency or instrumentality of a foreign state, prior to the entry of judgment or prior to the lapse of the "reasonable period of time" required under section 1610(*c*). Immunity from attachment will be denied only if the foreign state, political subdivision, agency or instrumentality has explicitly waived its immunity from attachment prior to judgment, and only if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against

the foreign state and not to secure jurisdiction. This subsection provides, in cases where there has been an explicit waiver, a provisional remedy, for example to prevent assets from being dissipated or removed from the jurisdiction in order to frustrate satisfaction of a judgment.

Section 1611. Certain types of property immune from execution

Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.

(*a*) *Property held by international organizations.*—Section 1611(*a*) precludes attachment and execution against funds and other property of certain international organizations. The purpose of this subsection is to permit international organizations designated by the President pursuant to the International Organizations Immunities Act, 22 U.S.C. 288, *et seq.*, to carry out their functions from their offices located in the United States without hindrance by private claimants seeking to attach the payment of funds to a foreign state; such attachments would also violate the immunities accorded to such international institutions. See also article 9, section 3 of the Articles of Agreement of the International Monetary Fund, TIAS 1501, 60 Stat. 1401. International organizations covered by this provision would include, *inter alia*, the International Monetary Fund and the World Bank. The reference to "international organizations" in this subsection is not intended to restrict any immunity accorded to such international organizations under any other law or international agreement.

(*b*) *Central bank funds and military property.*—Section 1611(*b*)(1) provides for the immunity of central bank funds from attachment or execution. It applies to funds of a foreign central bank or monetary authority which are deposited in the United States and "held" for the bank's or authority's "own account"—i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. If execution could be levied on such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.

Section 1611(*b*)(2) provides immunity from attachment and execution for property which is, or is intended to be, used in connection with a military activity and which fulfills either of two conditions: the property is either (A) of a military character or (B) under the control of a military authority or defense agency. Under the first condition, property is of a military character if it consists of equipment in the broad sense—such as weapons, ammunition, military transport, warships, tanks, communications equipment. Both the character and the function of the property must be military. The purpose of this condition is to avoid frustration of United States foreign policy in connection with purchases of military equipment and supplies in the United States by foreign governments.

The second condition is intended to protect other military property, such as food, clothing, fuel, and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control, and a "defense agency" is intended to include civilian defense organizations comparable to the Defense Supply Agency in the United States. Each condition is subject to the overall condition that property will be immune only if its present or future use is military (e.g., surplus

military equipment withdrawn from military use would not be immune). Both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the act.

SEC. 5. VENUE

This section amends 28 U.S.C. §1391, which deals with venue generally. Under the new subsection (*f*), there are four express provisions for venue in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities.

(1) The action may be brought in the judicial district wherein a substantial part of the events or omissions giving rise to the claim occurred. This provision is analogous to 28 U.S.C. §1391(*e*), which allows an action against the United States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the American Law Institute and incorporated in S. 1876, 92d Congress, 1st session, which does not imply that there is only one such district applicable in each case. In cases under section 1605(*a*)(2), involving a commercial activity abroad that causes a direct effect in the United States, venue would exist wherever the direct effect generated "a substantial part of the events" giving rise to the claim.

In cases where property or rights in property are involved, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship will be caused to the foreign state if it is subject to suit where it has chosen to place the property that gives rise to the dispute.

(2) If the action is a suit in admiralty to enforce a maritime lien against a vessel or cargo of a foreign state, and if the action is brought under the new section 1605(*b*) in this bill, the action may be brought in the judicial district in which the vessel or cargo is situated at the time notice is delivered pursuant to section 1605(*b*)(1).

(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(*b*) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. §1391(*c*).

(4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to defend. New subsection (*f*) would, of course, not apply to entities that are owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(*c*) and (*d*). For purposes of this bill, such entities are not agencies or instrumentalities of a foreign state. (See the analysis to sec. 1603(*b*).)

As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state, such as by failing to object to improper venue in a timely manner. (See rule 12(*h*), F.R. Civ. P.)

SEC. 6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a for-

eign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (*d*) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446.) However, in view of the 60-day period provided in section 1608(*c*) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition of removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (*Cf.* 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(*d*) will be to extinguish a demand for a jury trial made in the state court. (*Cf.* rule 81(*c*), F.R. Civ. P.) Because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl.1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332(*c*) and (*d*), or created under the laws of a third country.

SEC. 7. SEVERABILITY OF PROVISIONS

This action provides that if a portion of the act or any application of the act should be found invalid for any reason, such invalidity would not affect any other provision or application of the act.

SEC. 8. EFFECTIVE DATE

This section establishes that the effective date of the act shall be 90 days after it becomes law. A 90-day period is deemed necessary in order to give adequate notice of the act and its detailed provisions to all foreign states.

Statements under clause 2(1)(2)(B), Clause 2(1)(3) and Clause 2(1)(4) or Rule XI and Clause 7(a)(1) of Rule XIII of the House of Representatives

COMMITTEE VOTE

(Rule XI 2(1)(2)(B))

On September 9, 1976, the Full Committee on the Judiciary approved the bill H.R. 11315 by voice vote.

COST

(Rule XIII 7(a)(1))

The enactment of this bill will not require any new or additional authorization or appropriation of funds. Indeed, the enactment of the bill will result in a net saving, in an undetermined amount, in that the Department of State will no longer have

to undertake a consideration of diplomatic requests for sovereign immunity, and the Department of Justice will not be required to appear in the courts in support of the suggestions of immunity that are filed pursuant to the Department of State's sovereign immunity determinations.

OVERSIGHT STATEMENT

(Rule XI 2(1)(3)(A))

The Subcommittee on Administrative Law and Governmental Relations of this committee exercises the committee's oversight responsibility with reference matters involving the immunity of foreign states, in accordance with Rule VI(*b*) of the Rules of the Committee on the Judiciary. The favorable consideration of this bill was recommended by that subcommittee and the committee has determined that legislation should be enacted as set forth in this bill.

BUDGET STATEMENT

(Rule XI 2(1)(3)(B))

As has been indicated in the committee statement as to cost made pursuant to Rule XIII (7)(*a*)(1), the bill will not require any new or additional authorization or appropriation of funds. The bill does not involve new budget authority nor does it require new or increased tax expenditures as contemplated by Clause 2(1)(3)(B) of Rule XI.

ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

(Rule XI 2(1)(3)(C))

The estimate received from the Director of the Congressional Budget Office is as follows:

Congress of the United States,
Congressional Budget Office,
Washington, D.C., July 6, 1976.

Hon. Peter W. RODINO, Jr.,
Chairman, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

Dear Mr. Chairman: In response to your letter of June 10, 1976 and pursuant to section 403 of the Congressional Budget Act, the Congressional Budget Office has analyzed the costs associated with H.R. 11315, the "Foreign Sovereign Immunities Act of 1976." This legislation is estimated to have no budgetary impact.

Should the committee so desire, we would be pleased to provide additional assistance on this and future legislation.

Sincerely,

Alice M. RIVLIN,
Director.

OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE ON GOVERNMENT OPERATIONS

(Rule XI 2(1)(3)(D))

No findings or recommendations of the Committee on Government Operations were received as referred to in subdivision (D) of clause 2(1)(3) of House Rule XI.

INFLATIONARY IMPACT

(Rule XI 2(1)(3))

In compliance with clause 2(1)(4) of House Rule XI it is stated that this legislation will have no inflationary impact on prices and costs in the operation of the national economy.

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[The executive communication from the Departments of State and Justice is as follows:]

Department of State,
Washington, D.C., October 31, 1975.

Hon. Carl O. ALBERT,
Speaker of the House of Representatives.

Dear Mr. Speaker: The Department of State and Department of Justice submit for your consideration and appropriate reference the enclosed draft bill, entitled "To define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes." This is a proposed revision of the draft bill which was submitted in a letter (enclosed) to you dated January 16, 1973, and subsequently introduced by Chairman Peter W. Rodino, Jr., and Congressman Edward Hutchinson as H.R. 3493. A revised section-by-section analysis explaining the provisions of the bill in some detail is also enclosed. A hearing was held on H.R. 3493 before the Subcommittee on Claims and Governmental Relations of the Committee of the Judiciary in the House of Representatives in the 1st session of the 93d Congress on June 7, 1973.

The broad purposes of this legislation—to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation—remain the same. To this end the revised bill, like its predecessor, would entrust the resolution of questions of sovereign immunity to the judicial branch of Government. The statute would codify and refine the "restrictive theory" of sovereign immunity which has guided United States practice with respect to jurisdiction originally set forth in the letter of May 19, 1952, from the Acting Legal Adviser, Jack B. Tate, to the Acting Attorney General, Philip B. Perlman. It would also replace the absolute immunity now accorded foreign states from execution of judgment with an immunity from execution conforming more closely to the restrictive theory of immunity from jurisdiction. The measure also includes provisions for service of process, venue, and jurisdiction in cases against foreign states which would make it unnecessary to attach the assets of foreign states for purposes of jurisdiction.

Numerous technical changes have been made in the bill on the basis of the hearing in the House of Representatives, commentaries in a number of legal journals, and extensive discussions which have been held with members of the bar as well as the reports and recommendations of committees of several bar associations. A number of these technical revisions are important, but none of them alters the basic concept of the legislation as originally submitted.

The most important changes include (1) further definition of "commercial activity carried on in the United States by a foreign state" and "public debt" in sec-

tion 1603; (2) clarification of the limitations of immunity in tort actions (sec. 1605(5)), in respect of counterclaims (sec. 1607), and in case of execution of judgment (sec. 1610); and (3) substantial revision of section 1608 relating to service of process to conform with article XXII of the Convention on Diplomatic Relations, signed at Vienna April 18, 1961, and with the Federal Rules of Civil Procedure.

In addition, important new provisions have been added to preserve the jurisdiction of the courts of the United States in cases in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of a foreign state (sec. 1605(*b*)), and to avoid interference with disbursements to foreign states by certain international organizations located in the United States (sec. 1611(*a*)). These and other changes are discussed in the enclosed analysis.

The Departments of State and Justice believe that this revised draft bill is worthy of and will receive the support of the bar and would welcome hearings before the appropriate committees of the House to consider this measure as soon as possible.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

Robert S. INGERSOLL,
Deputy Secretary of State.
Harold R. TYLER, Jr.,
Deputy Attorney General.

2. TEXT OF LETTER TO THE ATTORNEY GENERAL FROM DEPARTMENT OF STATE LEGAL ADVISER ON 2 NOVEMBER 1976

Honorable Edward H. LEVI
Attorney General
Department of Justice
Washington, D.C. 20530

Re: The Foreign Sovereign Immunities Act of 1976, P.L. 94–583

Since the Tate Letter of 1952, 26 Dept. State Bull. 984, my predecessors and I have endeavored to keep your Department apprised of Department of State policy and practice with respect to the sovereign immunity of foreign states from the jurisdiction of United States courts. On October 21, 1976, the President signed into law the Foreign Sovereign Immunities Act of 1976, P.L. 94–583. This legislation, which was drafted by both of our Departments, has as one of its objectives the elimination of the State Department's current responsibility in making sovereign immunity determinations. In accordance with the practice in most other countries, the statute places the responsibility for deciding sovereign immunity issues exclusively with the courts.

P.L. 94–583 is to go into effect 90 days from the date it was approved by the President, or on January 19, 1977. We wish to advise you of how the Department of State proposes to treat sovereign immunity requests prior to January 19, 1977, and what the Department of State's interests will be after that date.

Immunity from suit. Until January 19, 1977, the Department of State will apply the Tate Letter, in the event that it makes any determination with respect to a for-

eign government's immunity from suit. It should be noted that P.L. 94–583 embodies in many respects the practice under the Tate Letter.

Immunity from attachment. Until January 19, 1977, the Department will continue to give prompt attention to diplomatic requests from foreign states, for recognition of immunity of foreign government property from attachment. The Department of State's policy until now has been to recognize an immunity of all foreign government property from attachment—unless (1) the property in question is devoted to a commercial or private use; (2) the underlying lawsuit is based on a commercial or private activity of the foreign state; and (3) the purpose of the attachment is to commence a lawsuit and not to assure satisfaction of a final judgment.

The Department does not contemplate changing this policy before P.L. 94–583 takes effect. We have noted that until P.L. 94–583 takes effect, it may be difficult for a private litigant to commence a suit against a foreign state or its entities. Also, since P.L. 94–583 will not have any effect whatsoever on the running of the statute of limitations, a continuation of existing policy on attachment until January 19, 1977 might be the only way a claim for relief could be preserved.

P.L. 94–583 will make two important and related changes in the Department's sovereign immunity practice with respect to attachment. First, the statute will prescribe a means for commencing a suit against a foreign state and its entities by service of a summons and complaint, thus making jurisdictional attachments of foreign government property unnecessary.

Second, Section 1609 of the statute will provide an absolute immunity of foreign government property from jurisdictional attachment. Such jurisdictional attachments have given rise to diplomatic irritants in the past and, in recent years, have been the principal impetus for a Department of State role in sovereign immunity determinations. It appears that after January 19, 1977, any jurisdictional attachment of foreign government property could, under Section 1609 of P.L. 94–583, be promptly vacated upon motion to the appropriate court by the foreign state defendant.

Immunity from execution. The Department of State has in the past recognized an absolute immunity of foreign government property from execution to satisfy a final judgment. The Department does not contemplate changing this policy in the period before January 19, 1977. On or after that date, execution may be obtained against foreign government property only upon court order and in conformity with the other requirements of Section 1610 of P.L. 94–583.

Future Department of State interests. The Department of State will not make any sovereign immunity determinations after the effective date of P.L. 94–583. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.

After P.L. 94–583 takes effect, the Executive Branch will, of course, play the same role in sovereign immunity cases that it does in other types of litigation—e.g., appearing as *amicus curiae* in cases of significant interest to the Government. Judicial construction of the new statute will be of general interest to the Department of State, since the statute, like the Tate Letter, endeavors to incorporate international law on sovereign immunity into domestic United States law and practice. If a court should misconstrue the new statute, the United States may well have an interest in making its views on the legal issues known to an appellate court.

Finally, we wish to express appreciation for the continuous advice and support

which your Department has provided during the ten years of work and consultation that led to the enactment of P.L. 94–583. We believe that the new statute will be a significant step in the growth of international order under law, to which the United States has always been committed.

Monroe LEIGH.