T II. TECHNIQUE FOR A SOLUTION

T21 Among the techniques for rationalizing the sovereign immunity law may be one or more of the following:

T21 1. An attempt to seek a Supreme Court pronouncement in a suitable case following a full presentation by the Solicitor General.

T21 2. A new formal pronouncement by the Federal Government—for example, in an exchange of letters between the State and Justice Departments.

T21 3. A federal statute. Such a statute could be limited to the assignment of functions as between courts and the Executive Branch; or it could attempt to go further and to lay down statutory guidelines for grant of immunity....

TF Assuming some reform were desired, which of the techniques suggested in the memorandum would you prefer?

GCA

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

T Each of the suggestions made in the memorandum quoted in the preceding question was considered, but the decision was soon made in the Executive Branch to seek legislation, rather than to attempt a judicial or administrative solution to the problems that had become apparent in the two decades since publication of the Tate Letter. The Office of Legal Adviser in the State Department, working with the Foreign Litigation Section of the Civil Division of the Department of Justice,[1] commissioned outside studies, retained consultants to canvass practice in foreign states and the work of the International Law Commission and other international organizations, and assembled a committee of advisers from law schools and the practicing bar to review various approaches to the proposed legislation. By 1973, a bill was ready to be introduced into Congress,[2] and hearings on that bill were held in the House Judiciary Committee.[3] But Congress felt at the time that not all members of the practicing bar had been adequately consulted, and the bill was not reported out of committee.

T Following consideration of the proposals by the American Bar Association and other professional groups, a revised bill was introduced at the request of the administration in December 1975, hearings were held in the summer of 1976, and the bill was passed in October as the Foreign Sovereign Immunities Act of 1976.

FN 1. The section of the Justice Department that looks after cases in foreign states in which the United States government is a party, either as plaintiff or as defendant

FN 2. S. 566, H.R. 3493, 93d Cong., 1st Sess. (1973).

3. *Immunities of Foreign States*, Hearing before Subcomm. on Claims and Governmental Relations of House Comm. on Judiciary on H.R. 3493, 93rd Cong. 1st Sess. (June 7, 1973). FN

SNL

A. AN OVERVIEW OF THE ACT[4]

T

The Foreign Sovereign Immunities Act essentially codifies the American view of the restrictive theory of immunity; sets forth rules and procedures for adjudicating claims against foreign states and instrumentalities in United States courts, including procedures for service of initiating process; and provides for enforcement of judgments against foreign states in certain cases. Many courts have complained about the confusing structure of the FSIA, using such epithets as "statutory labyrinth," "twisted exercise in statutory draftsmanship," and "bizarre structure."[5] A brief road map may therefore be useful before exploring the issues raised by the Act in more detail.

TXTHI

1. Jurisdiction of the Federal Courts

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Section 1330 of the FSIA confers jurisdiction on the federal district courts, without regard to the amount in controversy, of any civil action against a foreign state based on any claim as to which the state (or state instrumentality) is not entitled to immunity. Section 1604 provides that a foreign state is immune except as provided in §§ 1605–1607, and § 1605 and § 1606 set forth the circumstances in which the state is not immune. No role is provided for the State Department or other component of the Executive Branch. Whatever else Congress intended, it is clear that Congress sought to take decisions concerning sovereign immunity out of the political arena.

TXTHI

2. Immunity and Exclusion From Jurisdiction

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In order to establish jurisdiction under § 1330, a claimant against a foreign state must assert in its initial pleading that the cause of action comes within one of the exceptions to immunity set out in § 1605. The foreign state may challenge the assertion by a motion to dismiss.[6] Ordinarily the court will decide the issue of jurisdiction or immunity as a preliminary matter, and that decision may be appealed by either side.[7]

TXTHI

3. Commencement of Action

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The FSIA (drafted well before *Shaffer* v. *Heitner*, and adopted some nine months before that decision came down) abolishes prejudgment attachments, and particularly jurisdictional attachments, of the property of foreign states. § 1609. An action is to be commenced by filing a complaint with the court under Rule 3 of the Federal Rules of Civil Procedure, and service of the summons and complaint are to be made according to one of four options set out in § 1608(a), the most common

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4. The Act is reproduced in the Documents Supplement at pp. 336–48. The description in this section does not take into account the amendments in the 1990s described in Section IV of this chapter.

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5. For citations to these and other critical expressions in decisions under the FSIA, see J.W. Dellapenna, Suing Foreign Governments and their Corporations p. 32,note 232 (2d ed. 2003). See also, e.g., Judge Kaufman in *Texas Trading*, infra, at pp. ___-00.

FN

6. Whether this motion is technically under Rule 12(b)(1), (lack of subject matter jurisdiction) or Rule 12(b)(2), (lack of personal jurisdiction) is not clear. See discussion in question 1, p. ___ infra; also *Verlinden*, p. ___, note 5 infra.

FN

7. See p. ___, note 18 supra.

T of which are mail with return receipt sent by the clerk of court to the foreign ministry of the defendant state, and if that does not work, then by mail to the State Department for forwarding through diplomatic channels. If the defendant is a state instrumentality as defined in § 1603(b)—for instance a state-owned airline, service can also be made by delivering the summons and complaint to an officer or managing or general agent of the instrumentality, or by mail or letter rogatory, or as directed by the court, § 1608(b).[8]

TXTH1 ### 4. *Enforcement of Judgments*

T Post-judgment attachment of the property of a defendant state for purposes of execution is (for the first time) permitted under the FSIA, but only if the property is used for commercial activity in the United States and is linked to the claim on which the judgment is based. § 1610(a). Property of a state instrumentality that is engaged in commercial activity in the United States may be attached even if it is not related to the claim on which the judgment is based. § 1610(b). However, in contrast to civil actions not involving foreign states, in which the clerk of court may issue an order of attachment to enforce or execute a judgment,[9] attachment against the property of a state may be granted only by the court, and only after a reasonable time has elapsed following entry of judgment. § 1610(c).

TXTH1 ### 5. *Actions in State Courts*

T The FSIA does not make federal courts the exclusive forum for actions against foreign states and state instrumentalities, but it provides that service of the initial process must be made as described in paragraph 3 above, and that any action brought in State court against a foreign state or state instrumentality may be removed to the federal court for the district embracing the place where the action was initiated. § 1608, § 1441(d).

COM ## *Notes and Questions*

N 1. *Subject Matter or Personal Jurisdiction?* (a) Section 1330(a) of the FSIA looks like a provision conferring subject matter jurisdiction on the federal district courts, without regard to the question of personal jurisdiction. Section 1330(b) then provides that personal jurisdiction shall exist as to every claim over which there is subject matter jurisdiction, once service as prescribed in the Act has been carried out. But § 1605(a)(1) provides for waiver of immunity, which is not ordinarily available to cure absence of subject matter jurisdiction; on the other hand, § 1330(c) provides that an

FN 8. An interesting illustration of service as directed by the court came up during the massive litigation against Iran following the seizure of hostages at the American Embassy in Teheran and the freezing of Iranian assets by the United States. Diplomatic relations between Iran and the United States were broken and there was no mail service into Iran, but Judge Duffy discovered that telex machines connecting with Iran were still in operation, and he authorized service to be made by telex. See *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 495 F.Supp. 73, 79–81 (S.D.N.Y.1980).

9. See Federal Rules of Civil Procedure Rule 77(c). FN

appearance does not confer personal jurisdiction unless the claim passes muster under §§ 1605–07. Those sections in turn, and particularly § 1605(a)(2) and (a)(5), look like a long-arm statute, which one normally thinks of in connection with personal jurisdiction.

(b) Apart from creating confusion for lawyers, students, and judges, does all this matter? Can you think of situations in which the outcome of a case could turn on whether immunity is viewed as a matter of subject matter or personal jurisdiction?

(c) Why do you suppose the drafters addressed the question of jurisdiction at all? The British State Immunity Act,[1] for instance, makes provisions for when a state is immune and when it is not immune, but does not confer jurisdiction on English courts that they otherwise would not have, and expressly provides (in s. 12(7)) that the method of service on foreign states provided in the Act does not affect any rules of court whereby leave is required for the service of process outside the jurisdiction, thus in effect requiring the plaintiff to satisfy the requirements for service out of the jurisdiction with respect to service on a foreign state.[2] Could that approach have worked for the United States?

2. *Foreign States and the United States as Defendants.* Note several similarities between the provision for suits against foreign states under the FSIA and provisions in other statutes and rules for suits against the United States.

(a) Section 1330(a), which confers jurisdiction on courts for suits against foreign states, makes clear that such suits shall be without a jury;[3] the foreign state's liability for actions in tort, § 1605(a)(5), does not apply to discretionary acts, defamation, and an enumerated list of intentional torts;[4] and under § 1608(d) the defendant state has sixty days instead of the usual twenty to answer the initial pleading, as does the United States when it is a defendant.[5] Further, as noted earlier, pre-judgment attachment is forbidden in suits against foreign states, § 1609, as it is against the United States;[6] and no default judgment may be entered against a foreign state "unless the claimant establishes his claim by evidence satisfactory to the court," § 1608(e), again as is true for claims against the United States.[7]

(b) As under the Federal Tort Claims Act with respect to suits against the United States,[8] the FSIA provides in § 1606 that the foreign state, if not immune, "shall be liable in the same manner and to the same extent as a private individual in like circumstances." But punitive damages are not permitted, even as they are not permitted in suits against the United States.[9]

1. Documents Supplement p. 349.

2. Accord. Dicey and Morris on the Conflict of Laws vol. I, pp. 241–42 (13th ed. Collins 2000). For the requirements for "service out" under Order 11 and its successor regulation, see Chapter III pp. ___–00, question 5 supra, and Documents Supplement p. 1, 12.

3. Compare 28 U.S.C. § 2402.

4. Compare Federal Tort Claims Act, 28 U.S.C. § 1346(b), § 2680(a) and (h).

5. Compare Fed.R.Civ.P. Rule 12(a).

6. 28 U.S.C. § 2408.

7. Fed.R.Civ.P. Rule 55(e).

8. 28 U.S.C. § 1346(b).

9. Compare 28 U.S.C. § 2674. The provision in § 1606 for tort liability in a state, such as Massachusetts, that seems to link tort damages to degree of culpability is also copied from § 2674. Note that the prohibition on punitive damages does not apply to a foreign state instrumentality, such as a

N (c) Thus the FSIA creates jurisdiction and excludes immunity in stated circumstances, but it does not create liability. The assumption is that most claims against foreign states would be regarded in the United States as "State-created," as contrasted to federal, claims. It seems, however, that claims arising under federal laws, such as under the antitrust or securities laws, could be brought under the FSIA, and if a contract provided that it was governed by the law of a foreign state, that state's law could also be applied.

N 3. *Counterclaims.* (a) If a foreign state or instrumentality is the original plaintiff in a court in the United States, the FSIA provides for jurisdiction (i.e., exclusion from immunity) over related counterclaims without limit on recovery, even if the counterclaim, standing alone, would have been subject to the defense of immunity. § 1607(b). If a given transaction results in obligations on the part of both sides, it would plainly be unfair to permit only one party's claim to be adjudicated.[10]

N (b) The more difficult problem is raised by unrelated counterclaims. On the one hand, it seems unfair for a state to secure a judgment from another party but to deprive that party of the opportunity to have its own claim heard. On the other hand, while jurisdiction over a related counterclaim can be regarded based on consent to have a given controversy adjudicated, the same cannot be said about a counterclaim unrelated to the claim that the state sought to submit to the jurisdiction of the court. This issue came before the U.S. Supreme Court in *National City Bank v. Republic of China*, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955).[11] In 1948, the Shanghai–Nanking Railway Administration, an official agency of the Republic of China, deposited $200,000 with City Bank in New York. When the Republic (by now in Taiwan) sought to withdraw the funds, City Bank refused payment, and the Republic brought suit. City Bank interposed two counterclaims for $1.6 million on defaulted Treasury Notes issued by China and held by the bank. The district court dismissed the counterclaim on the grounds of sovereign immunity, and denied leave to City Bank to amend its counterclaim to reduce it to a set-off. The Court of Appeals affirmed, but the Supreme Court, by a 5–3 vote, reversed:

N11 > We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice....

N21 > Respondent urges that fiscal management falls within the category of immune operations of a foreign government as defined by the [Tate Letter]. This is not to be denied, but it is beside the point.... No doubt the present counterclaims cannot fairly be described as related to the

FN state-owned airline or manufacturer. Immunity for punitive damages in actions growing out of torture, extrajudicial killings, and comparable acts was eliminated in 1996, as discussed in Part IV Section B infra.

FN 10. The definitions of related and unrelated counterclaims track those in Rule 13(a) and (b) of the Federal Rules of Civil Procedure, and decisions interpreting Rule 13 are relevant in interpreting § 1607 of the FSIA. For a discussion of the experience with Rule 13, see, e.g., C. Wright, The Law of Federal Courts 526–36 (4th ed. 1983) and sources there cited.

FN 11. Recall that Justice Douglas saw the *Republic of China* case as the appropriate precedent in the act of state context in *First National City Bank*, Chapter VI, pp. ___-00 supra.

> Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and [City Bank] may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation. The considerations found controlling in *The Schooner Exchange* are not here present.... [12]

Thus the compromise was to permit the defendant, here City Bank, to recover up to the amount awarded to the state on its claim, but not to permit an affirmative recovery on the counterclaim.

(c) The compromise outcome of the *Republic of China* case was adopted in the Foreign Sovereign Immunities Act as § 1607(c). Though read literally § 1607(c) appears to limit an unrelated counterclaim to the amount *sought* in the principal claim by the foreign state, the legislative history, referring specifically to the *Republic of China* case and to § 70 of the Restatement (Second) of Foreign Relations Law makes it clear that the exclusion from immunity applies to setoff only, and does not authorize affirmative recovery.[13]

(d) Counterclaims can also flow the other way. If a foreign state or state instrumentality is sued and files an answer and a counterclaim without raising the defense of immunity, the state may be found to have waived the defense of immunity. See, e.g., *Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 503 N.Y.S.2d 555, 494 N.E.2d 1055 (1986). A counterclaim by a foreign state will generally be regarded as a waiver of immunity unless the state challenges the court's jurisdiction and the counterclaim is expressly made conditional on a finding of jurisdiction.

4. *Commercial Activity.* Clearly, the most important provision of the FSIA (apart from the provisions for initiating an action) is § 1605(a)(2) dealing with commercial activity—the translation of *jus gestionis* in the Tate Letter, in *Victory Transport*, and in much of the literature.

(a) Note first the wholly circular definition of "commercial activity," the critical term used in all three bases of jurisdiction (exclusion from immunity) in § 1605(a). Section 1603(d) invites the reader (or court) to start with "activity," proceed via "conduct" or "transaction" to "character," which is to be determined by "nature" rather than "purpose."[14] At the end one arrives back at the term "commercial," the term that was to be defined in the first place.[15]

12. 348 U.S. at 361–62, 364–65, 75 S.Ct. at 427–28, 428–30 (Frankfurter, J.). Justice Reed, for the minority, wrote:

> I find no justification for the Court's restricting [the Republic's] immunity in the absence of legislative or executive action.... Why should City Bank be able to assert its notes against the Republic of China, even defensively, when other noteholders not obligated to the sovereign are prevented from collecting their notes?

348 U.S. at 369, 371, 75 S.Ct. at 431, 432.

13. See House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R.Rept. No. 94–1487 p. 23, 94th Cong. 2d Sess. (1976); Restatement (Third) of Foreign Relations Law § 456(2)(a)(ii); *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 n. 7, 103 S.Ct. 2591, 2596 n. 7, 77 L.Ed.2d 46 (1983).

14. Recall the discussion of this point in question 2, p. ___ supra.

15. The present author made this point in 1974 in commenting on a draft of what

(b) The Restatement proposes the following definition:

An activity is deemed commercial, even if carried out by a state or state instrumentality, if it is concerned with production, sale, or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities of the kind that are carried on by natural or juridical persons. The fact that the goods, property, money, or services may be used for a public or governmental purpose does not alter the commercial character of the activity.[16]

Does this definition by illustration seem persuasive? Would you, for instance, still want to distinguish between a government guarantee of purchases of commodities on the one hand, and a long-term loan on the other? Putting the question another way, as counsel to a lender in the second situation, would you advise insisting on an express waiver of immunity? What if the borrower—say the Central Bank of Patria—declines to give such a waiver, and advises that under the constitution or laws of Patria, it is not authorized, when acting as fiscal agent of the state, to consent to be sued outside of Patria? Can the lender nevertheless rely on the FSIA?

(c) Satisfying the test of "commercial activity" goes only part of the way toward meeting the criteria of § 1605(a)(2). The other criteria look to connection between the activity on which the claim is based and the forum—here the United States as a whole.[17] One might think that the three clauses of subsection (a)(2), separated by semicolons, provide for [i] general jurisdiction; [ii] specific or activity-based jurisdiction; and [iii] effects jurisdiction. Would you agree with this interpretation? Or do all three clauses require a link between the claim and the United States? As to clause [iii], think back to the discussion of judicial jurisdiction over non-governmental parties in Chapter III, particularly *Helicopteros* and *Asahi*, and the cases in the Notes and Questions following those two decisions. Should those cases govern construction of § 1605(a)(2) as well? Must they?

(d) The State Department's Legal Adviser, testifying for the administration in favor of what became the FSIA, answered a question about the meaning of "commercial activity" as follows:

> . . . [F]rankly, aside from mentioning that it should not be based on the purpose for which an activity occurred, but rather on its nature, we have decided to put our faith in the U.S. courts to work out progressively, on a case-by-case basis, and using such guidance as has already developed in the very large body of case law which exists, on the distinction between commercial and governmental.[18]

became the FSIA. Lowenfeld, "Litigating a Sovereign Immunity Claim—The *Haiti* Case," 49 N.Y.U.L.Rev. 377, 435, note 244 (1974). Though the bill was changed in a number of ways in its passage through Congress, the definition was not improved.

16. Restatement (Third) of Foreign Relations Law § 453, comment *b*.

17. Since § 1605(a)(2) is an American, self-imposed limitation probably not required by international law, it is possible that an activity of a state may be entitled to immunity in the United States but not in a third state with which the activity had closer connection, or which does not require any connection. See Restatement, § 453 Reporters' Note 1.

18. Hearing before Subcomm. on Administrative Law and Governmental Relations of House Comm. on Judiciary on H.R. 11315, (hereafter "*House Hearings*") at 53 (94th Cong., 2d Sess. 1976).

Professor Joseph Dellapenna, writing at year-end 1987, reported that over 2000 cases had been brought under the FSIA in its first decade, resulting in over 400 officially published opinions plus numerous others available from topical reporters or computerized research services.[19] Not all the cases, of course, turned on § 1605(a)(2); but without doubt that section produced the most interesting, and the most problematic, decisions.

B. COMMERCIAL ACTIVITY HERE AND ABROAD

TEXAS TRADING & MILLING CORP. v. FEDERAL REPUBLIC OF NIGERIA

United States Court of Appeals, Second Circuit, 1981.
647 F.2d 300, cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982).

Before KAUFMAN and TIMBERS, CIRCUIT JUDGES, and WARD, DISTRICT JUDGE.*

IRVING R. KAUFMAN, CIRCUIT JUDGE:

These four appeals grow out of one of the most enormous commercial disputes in history, and present questions which strike to the very heart of the modern international economic order. An African nation, developing at breakneck speed by virtue of huge exports of high-grade oil, contracted to buy huge quantities of Portland cement, a commodity crucial to the construction of its infrastructure. It overbought, and the country's docks and harbors became clogged with ships waiting to unload. Imports of other goods ground to a halt. More vessels carrying cement arrived daily; still others were steaming toward the port. Unable to accept delivery of the cement it had bought, the nation repudiated its contracts. In response to suits brought by disgruntled suppliers, it now seeks to invoke an ancient maxim of sovereign immunity—*par in parem imperium non habet*[1]—to insulate itself from liability. But Latin phrases speak with a hoary simplicity inappropriate to the modern financial world. For the ruling principles here, we must look instead to a new and vaguely-worded statute, the Foreign Sovereign Immunities Act of 1976—a law described by its draftsmen as providing only "very modest guidance" on issues of preeminent importance.[2] For answers to those most difficult questions, the authors of the law "decided to put [their] faith in the U.S. courts."[3] Guided by reason, precedent, and equity, we have attempted to give form and substance to the legislative intent. Accord-

19. J.W. Dellapenna, Suing Foreign Governments and their Corporations, pp. vi–vii (1988). By early 2002, the number of cases brought had grown to over 3000, and the number of published opinions to over 500. See Dellapenna, 2d ed. 2003 at p.xiv.

* Of the United States District Court for the Southern District of New York, sitting by designation.

1. "An equal has no dominion over an equal."

2. *Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 94th Cong., 2d Sess. 53 (1976) ("*1976 Hearings*") (testimony of Monroe Leigh, Legal Adviser, Dep't of State).

3. Id.