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# THE PROBLEM OF EXECUTION UNIFORMITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 AND FEDERAL RULE OF CIVIL PROCEDURE 69

## INTRODUCTION

The American doctrine of sovereign immunity was first expressed in the 1812 case *The Schooner Exchange v. McFadden*.<sup>1</sup> In this case the Supreme Court held that unless Congress directs otherwise courts are bound by the "implied promise" that foreign sovereigns are exempt from United States jurisdiction. Today, by enacting the Foreign Sovereign Immunities Act of 1976,<sup>2</sup> the United States officially joins the majority of countries which applies the restrictive theory of sovereign immunity.<sup>3</sup> As generally adopted the restrictive theory removes a sovereign's exemption from suit and in certain circumstances allows one country's jurisdiction to be asserted over another.<sup>4</sup> The United States codification of the restrictive theory of sovereign immunity is phrased in terms of exceptions to the general rule that sovereigns are immune from United States

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1. 7 Cranch 116 (1812).

2. 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-11 (1976).

3. J. SWEENEY, *THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY* 22 (1963). Sweeney dates the adoption of the restrictive theory of sovereign immunity of the following countries: Argentina (1941), Austria (1950), Belgium (1903), Egypt (1912), France (1929), Germany (1957), Greece (1928), Italy (1926), Switzerland (1918).

The doctrine of sovereign immunity rests on two principles: (1) *par in parem non habet jurisdictionem*—that legal persons of equal standing cannot have their disputes settled in the courts of one of them and, (2) on the principle of non-intervention that precludes interference in the internal affairs of other foreign countries. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 315 (2d ed. 1973).

4. BROWNLIE, *supra* note 3, at 316. In contrast to the restrictive theory, the absolute theory of sovereign immunity totally precludes any assertion of jurisdiction over another foreign country whether for public or private acts. Interestingly, though the immunity is absolute, it may be waived. BROWNLIE, *supra* note 3, at 316. See generally 6 WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 353-8 (1968).

It appears that the Soviet Union and some of the African states are the last adherents to the absolute theory of sovereign immunity. The Soviet Union, however, waives its immunity under several multilateral treaties. See, e.g., SWEENEY, *supra* note 3, at 20-23.

The United Kingdom, long-time advocate of the absolute theory, has only recently adopted the "restrictive view;" see, e.g., *Committee Report: The Sovereign Immunity Act of 1975*, A.B.A. JOURNAL OF N.Y. 478, n.11 (1976).

jurisdiction. Under the Act a sovereign's affirmative defense of immunity may not bar suit in the limited cases where the foreign state either waives its immunity, carries on commercial activities related to the United States or commits certain torts.<sup>5</sup> Additionally, the new Act creates exceptions from immunity for foreign assets and allows execution on those assets to satisfy judgments regardless of the sovereign's willingness to pay.<sup>6</sup>

Although most foreign states agree that sovereign nations are subject to suit, their current use of the restrictive theory of immunity differs from that of the United States. As adopted by other foreign countries, the restrictive theory of immunity draws a distinction between "private acts" and "public acts" of the sovereign. According to this variation of the theory the assertion of jurisdiction is permissible only for private sovereign acts (*acte gestionis*) which are generally commercial.<sup>7</sup> Further, these countries

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5. 28 U.S.C. § 1604 (1976) provides:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(2) provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon 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.

Unless the contacts with sections 1605 to 1607 are met, the sovereign will remain immune from United States jurisdiction.

6. 28 U.S.C. § 1610 (1976).

7. The term "private acts" refers to commercial acts of a foreign state that are such as may be performed by private persons. "Public acts" are those acts which the foreign state performs in its official capacity, as in raising armies. The Act does away with the public or private act distinction and looks instead to the commercial nature of the activity. See S. REP. NO. 94-1310, 94th Cong., 2d Sess. 15 (1976) [hereinafter cited as SENATE REPORT]; H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 16 (1976) [hereinafter cited as HOUSE REPORT], reprinted in 5 U.S. CODE CONG., AND AD. NEWS 6604 (1976).

A different focus of these definitions is found in RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, Comment a (1965), which looks to the "purpose" of the activity. The distinction between public and private acts has been drawn since the first century A.D. See Setser, *The Immunities Of The State And Government Economic Activities*, 24 LAW AND CONTEMP. PROB. 291, 293 (1959): "[I]n the Roman Empire, where governmental authority was exalted to the highest degree, the state in its property relationship was suable in the courts."

still allow the immunity defense for public acts (*acte imperii*) which are diplomatic, legislative or military in nature.<sup>8</sup> A major difference between practices of the United States and other countries which follow the restrictive theory is that the United States is virtually alone in its attempt to enforce its judgments.<sup>9</sup> The Act provides for enforced execution without a treaty and is thus a unique extension of the restrictive view.

In effect the new United States Act creates a private act—public act distinction since a sovereign's potentially public acts are not included in the exceptions creating United States jurisdiction. Therefore, foreign states remain immune from United States jurisdiction and execution in connection with diplomatic, legislative and military acts even though the Act does not draw the public-private distinction. In fact the Foreign Sovereign Immunities Act abolishes the prior American judicial practice of characterizing foreign acts as private or public.<sup>10</sup>

The restrictive theory of immunity has been in practical force in the United States since 1952 when the State Department published a directive called the "Tate Letter."<sup>11</sup> The "Tate Letter" was an attempt to bring United States policy in line with prevailing international practice by recognizing the distinction between a sovereign's public and private acts.<sup>12</sup> That directive proclaims that the doctrine

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8. BROWNLIE, *supra* note 3, at 323; S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 255 (1959); 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 714 (1968).

9. See BROWNLIE, *supra* note 3, at 301: "[T]he United States government, and foreign governments . . . assume that there are *certain* limits to enforcement jurisdiction but there is no consensus on what those limits are." (Emphasis in original.)

Sweeney notes that a few cases sanctioning execution exist in Austria, Belgium, Czechoslovakia, Egypt, France, Italy and Switzerland. SWEENEY, *supra* note 3, at vi.

In this connection, it must be noted that the United States government prohibits execution on its property. See 31 U.S.C. § 724(a) (1970); 28 U.S.C. §§ 2414, 2517(a), 2518 (1970).

10. This idea surfaces in the following congressional reports: SENATE REPORT, *supra* note 7, at 10-11; HOUSE REPORT, *supra* note 7, at 9.

11. Letter of Jack Tate, then acting Legal Advisor to the State Department to Philip B. Perlman, then Attorney General (May 19, 1952), reprinted in *Change Of Policy On Sovereign Immunity Of Foreign Governments*, 26 DEPT. STATE BULL. 969 (1952).

12. In *National City Bank v. Republic of China*, 348 U.S. 356 (1955), the Supreme Court sanctioned the new view of sovereign immunity, holding that China's default was a "public" and therefore immune act. Yet, the Court allowed set-off on other grounds. The State Department had expressed no views in the case. Justices Reed, Burton and Clark dissented because the United States had not enacted a statute

of sovereign immunity need not bar the assertion of a court's jurisdiction over private or commercial acts of a foreign country.<sup>13</sup> The Foreign Sovereign Immunities Act corrects four deficiencies in the "Tate Letter." First, before denying sovereign immunity, American courts seek the justifying legislation they feel *The Schooner Exchange* mandates.<sup>14</sup> Second, the "Tate Letter" provides no standard by which a court can distinguish between private and public acts.<sup>15</sup> Third, courts are troubled by the State Department's practice of suggesting whether sovereign immunity applies before decisions on the merits.<sup>16</sup> The discretionary suggestions of the State Department are especially troublesome where judicial precedent calls for an opposite conclusion.<sup>17</sup> Finally, the only way to obtain jurisdiction under the "Tate Letter" is to attach assets of the foreign state *quasi in rem*.<sup>18</sup> Even assuming a successful suit by a

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restricting China's sovereign immunity. For an earlier case, see *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). Here, the State Department had denied Mexico's request for immunity in a suit on a damaged vessel and the Supreme Court refused to recognize the immunity, saying, "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35. State Department suggestions were thus considered binding. See also *Victory Transport v. Comisaria Gen. Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

13. This distinction was difficult to draw since the "Tate Letter" did not present any standard for judging the difference between private and public acts. See Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AM. J. OF INT'L LAW 899, 905 (1965).

14. See, e.g., *National City Bank v. Republic of China*, 348 U.S. 356, 368 (1955) (dissenting opinion). See also *Alfred Dunhill of London v. Republic of Cuba*, \_\_\_ U.S. \_\_\_, 96 S. Ct. 1854, 1876 (1976) (Marshall, J., dissenting): "The restrictive theory of sovereign immunity has not been adopted by this Court. . . ." These statements necessarily predate the enactment of the Foreign Sovereign Immunities Act of 1976. The Act now codifies the restrictive theory of sovereign immunity. SENATE REPORT, *supra* note 7, at 9; HOUSE REPORT, *supra* note 7, at 7.

15. See Lowenfeld, *The Sabbatino Amendment—International Law Meets Civil Procedure*, 59 AM. J. OF INT'L LAW 899, 905 (1965).

16. See note 12 *supra*.

17. See, e.g., *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961). The court did not recognize Cuba's immunity since the guidelines of the "Tate Letter" did not mandate it. The State Department, however, suggested immunity because it was privately negotiating with Cuba.

18. Attachment for *quasi in rem* jurisdiction was permitted by the "Tate Letter." See Falk, *The Immunity of Foreign Sovereigns In United States Courts—Proposed Legislation*, 6 N.Y.U. J. OF INT'L LAW AND POL. 473, 495 (1973). See also SENATE REPORT, *supra* note 7, at 9, 26; HOUSE REPORT, *supra* note 7, at 8, 26. Attachment for jurisdiction is now prohibited by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1610(d)(2) (1976): "the purpose of the attachment is . . . not to obtain jurisdiction."

plaintiff, those attached foreign assets can never be used to satisfy the judgment<sup>19</sup> because the "Tate Letter" does not contain execution provisions. Thus despite an adjudication on the merits it was said that the plaintiff's day in court was an "empty gesture."<sup>20</sup> These difficulties caused judicial application of the restrictive theory to proceed uneasily under the executive branch guidelines.

The Foreign Sovereign Immunities Act now codifies the restrictive theory of sovereign immunity.<sup>21</sup> By making questions of immunity justiciable issues the Act frees the courts from State Department suggestion.<sup>22</sup> Boldly, the Act grants *in personam* jurisdiction over foreign states<sup>23</sup> and allows for execution in aid of

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19. *Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930). The court held that it could not compel the Swedish Government to pay its judgment, although it settled out of court in 1933. See W. BISHOP, *INTERNATIONAL LAW* 636 (3d ed. 1971). *Contra*, *United States v. Harris and Co. Advertising, Inc.*, 149 So. 2d 384 (Fla. Dist. Ct. App. 1963) (State Department intervened too late and foreign chattels were sold at judicial sale). See also *Bradford v. Chase National Bank*, 24 F. Supp. 28 (S.D.N.Y. 1938).

20. See Letter of Richard Kleindienst, Secretary of State, to the President of the Senate (Jan. 22, 1973), reprinted in 119 CONG. REC. 2215:

Under the present law, a plaintiff who is able to bring his action against a foreign state because it relates to a commercial act . . . may be denied the fruits of his judgment against the foreign state. The immunity of a foreign state from execution has remained absolute.

See also SENATE REPORT, *supra* note 7, at 9: "[A] foreign state enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment." Countervailing reasons for execution naturally existed long ago: "An execution is the end of the law. It gives the successful party the fruits of his judgment." *United States v. Nourse*, 34 U.S. 8, 28 (1835).

21. 28 U.S.C. § 1605 (1976). See also SENATE REPORT, *supra* note 7, at 9; HOUSE REPORT, *supra* note 7, at 7.

22. 28 U.S.C. § 1602 (1976), provides in part:

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.

See also Department of State Notice, 41 Fed. Reg. 50, 883-4 (1976), wherein the Department states that it will no longer make sovereign immunity determinations after Jan. 19, 1977: "After [the act] 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. . . ."

23. 28 U.S.C. § 1330(a) (1976). This new section, added by the Foreign Sovereign Immunities Act, provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in per-*

judgment on commercially held assets in the United States.<sup>24</sup> For the first time in American history a plaintiff who succeeds on the merits against a foreign sovereign will have a statutory right to satisfaction of his judgment.

To eliminate the unsatisfactory "private act-public act" distinction of the "Tate Letter" the Act creates a test for the sufficiency of commercial "contacts" with the United States.<sup>25</sup> This test applies to only two categories of exceptions: the immunity defense does not bar jurisdiction or execution in aid of judgment when foreign commercial contacts are found. These exceptions may be determined by either a state court or a federal district court.<sup>26</sup> The Act may be inherently defective, however, because it grants concurrent jurisdiction to state courts and federal courts.

This note examines the judicial powers to execute judgments under the Foreign Sovereign Immunities Act of 1976, pursuant to rule 69 of the Federal Rules of Civil Procedure.<sup>27</sup> Though no procedures for judgment execution are contained in the Act, both the Senate and the House of Representatives stated in their analyses that rule 69 was controlling.<sup>28</sup> This means that the procedures of judgment execution under the Act will be those of the state in which the suit against a foreign sovereign is heard. The variations in these procedures must be carefully examined to provide any

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*sonam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

See also SENATE REPORT, *supra* note 7, at 9; HOUSE REPORT, *supra* note 7, at 7.

24. 28 U.S.C. § 1610 (1976). See also SENATE REPORT, *supra* note 7, at 9, 26-30; HOUSE REPORT, *supra* note 7, at 7, 27-30.

25. See 28 U.S.C. §§ 1605, 1610, which detail the exceptions to the general rule of immunity from, respectively, jurisdiction and execution. See also SENATE REPORT, *supra* note 7, at 17; HOUSE REPORT, *supra* note 7, at 17.

26. Federal and state courts have concurrent jurisdiction under the Foreign Sovereign Immunities Act: "Plaintiffs . . . will have an election whether to proceed in Federal court or in a court of a state. . . ." SENATE REPORT, *supra* note 7, at 12. See also HOUSE REPORT, *supra* note 7, at 13.

27. FED. R. CIV. P. 69 provides in part:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable.

28. SENATE REPORT, *supra* note 7, at 27; HOUSE REPORT, *supra* note 7, at 28.

potential party to a foreign suit an outline of subtleties and pitfalls not apparent on the face of the Act.

In contrast to this application of divergent state practices, the congressional desire to promote uniform treatment of foreign sovereigns in United States courts<sup>29</sup> must be explored. Congress is expressly cognizant of "the importance of developing a uniform body of law in this area."<sup>30</sup> Uniformity is a central policy goal here as both the Senate and the House have noted that the institution of suits against foreign states involves "potential sensitivity."<sup>31</sup> Moreover, the Act's endorsement of enforced execution goes a step beyond accepted international practice. Nonuniformity in the procedures of executing judgments against foreign sovereigns can lead to foreign disrespect of United States law and to strained foreign relations. For these reasons the Act reflects deference to sovereigns by making certain foreign assets immune from execution,<sup>32</sup> and by recognizing the superior status of foreign states over their agencies.<sup>33</sup> In general the Act is an attempt to strike a balance between the policies of uniformity and deference and the goal of judgment satisfaction for United States nationals. It will be demonstrated that the use of rule 69 to effect the execution provisions of the Act cannot meet these desired congressional goals. State law, which is the law of judgment execution applied under rule 69, is notoriously multifarious.<sup>34</sup> Varying judgment lives, capacities for renewal or

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29. See SENATE REPORT, *supra* note 7, at 12:

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.

See also HOUSE REPORT, *supra* note 7, at 13.

30. SENATE REPORT *supra* note 7, at 32; HOUSE REPORT, *supra* note 7, at 32.

31. *Id.*

32. 28 U.S.C. § 1611 (1976).

33. 28 U.S.C. §§ 1605, 1608, 1610 (1976). "States" as used in this note follows the definition of § 1603 of the Foreign Sovereign Immunities Act of 1976. Section 1603(a) of the Act provides in part:

A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

Explicit reference to the several states of the United States will be made when applicable.

34. R. MEHREN, ENFORCEMENT OF FOREIGN COUNTRY JUDGMENTS 50 (1974): "Each of the 50 states has its own detailed rules governing the procedures and remedies available to enforce its judgments." See generally S. RIESENFELD, CREDITORS' REMEDIES AND DEBTORS' PROTECTION (2d ed. 1975); D. EPSTEIN, DEBTOR-CREDITOR RELATIONS (1973).



revival and differing time limits on liens are among the many procedural differences extant in state execution laws. It may be that the policy of uniform treatment of foreign sovereigns in United States courts can be assured only by amending the Foreign Sovereign Immunities Act. An amendment could include not only a grant of exclusive jurisdiction to federal courts but also a federal execution provision that is unhampered by the diversity of state law.

This analysis of the clash between policy and practice examines rule 69 and the execution provisions of the Foreign Sovereign Immunities Act. The execution procedures operative in state courts is then described. After this background is established the problem of uniformity is considered, with emphasis placed on the justification for an amendment to the new Act. Before examining the execution provisions it is worthwhile to briefly explore the Act's new grant of jurisdiction to American courts.

#### JURISDICTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

The "Tate Letter" authorized the practice of attaching foreign assets to obtain *quasi in rem* jurisdiction. With enactment of the Foreign Sovereign Immunities Act the nature and scope of a court's jurisdiction over foreign states dramatically changed. The Act eliminates the use of attachment to obtain jurisdiction<sup>35</sup> and instead, asserts *in personam* jurisdiction over foreign states, their political subdivisions and their agencies and instrumentalities.<sup>36</sup> While the expansion of jurisdiction is a salutary effort to align judicial powers with the Act's execution provisions, a problem develops because the Act differentiates between foreign states and foreign agencies for purposes of service of process, subject matter of the suit and the execution of judgments.

#### *The Foreign State—Foreign Agency Distinction*

The Foreign Sovereign Immunities Act appears to substitute a new problem for an old one: the private act—public act classifications are abrogated but an initial jurisdictional determination must still be made as to whether a foreign state or agency is before the court. The anomalous situation occurs because service of process, the permissible subject matter of the suit, and any subsequent execution all hinge on the foreign state—foreign agency distinction. The Act does not, however, distinguish between states and agencies

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35. See note 18 *supra*.

36. 28 U.S.C. § 1330 (1976).

when defining exceptions to immunity from jurisdiction.<sup>37</sup> Unfortunately, the Act does not suggest any standard by which to judge the difference between state and agency activity, thus creating a new judicial problem. This problem is magnified by the very nature of most foreign agencies: they exist as arms of the states which create them and function only as foreign states direct.<sup>38</sup>

Though accepted in many countries, the restrictive theory of immunity has up to now related primarily to the issue of jurisdiction. In asserting jurisdiction according to their interpretation of the theory, other nations do not distinguish between states and agencies but do distinguish between private and public sovereign acts.<sup>39</sup> Among the civil law nations, agencies which are part of the government receive governmental immunity while those agencies with separate legal status and corporations in which the government has a slight interest generally do not.<sup>40</sup> In common law states, the determination of agency immunity is left to the forum and depends on the relationship between the agency and its state.<sup>41</sup> Some corporations in these common law countries receive immunity even though they operate "on the same basis and in the same manner as an agency of the state."<sup>42</sup> In all cases great weight attaches to the views of the foreign state.<sup>43</sup>

One noted international author calls the Act's foreign state-foreign agency distinction a drafting error.<sup>44</sup> It is submitted that the Act maintains this distinction out of deference to sovereigns because of the diplomatically sensitive nature of foreign suits. The fact that the United States attempts unilateral execution without the usual formalities of a treaty is an additional reason for recognizing any potential differences between the legislative or military activities of states and the purely commercial activities of some foreign agencies. Whether included by accident or by design, the Foreign Sovereign

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37. 28 U.S.C. § 1605 (1976).

38. See Falk, *supra* note 18, at 493. Query what a United States court would do with the foreign state-foreign agency distinction if one state acted as agent for another. This does not apply to domesticated agencies that are owned by a foreign state, as such agencies are treated as corporations under United States law. See SENATE REPORT, *supra* note 7, at 32; HOUSE REPORT, *supra* note 7, at 32. Falk has criticized this analogy to United States corporations, Falk, *supra* note 18, at 493.

39. See Falk, *supra* note 18, at 493.

40. SWEENEY, *supra* note 3, at vii.

41. *Id.*

42. *Id.*

43. *Id.*

44. Falk, *supra* note 18, at 493.

Immunities Act distinguishes between foreign states and their agencies. Though the line between foreign state and agency activity may be a fine one, state and federal courts may utilize both domestic and international law in making this determination.<sup>45</sup> Furthermore, it should not be too difficult for the foreign state defendant to prove its status as the presumption of sovereign immunity remains in effect until the sufficient commercial nexus with the United States is found.

### *The Commercial Test For Jurisdiction*

The sufficiency of commercial contacts with the United States is a crucial issue upon which hangs the power of the court to assert personal jurisdiction. As a practical matter, application of the commercial test settles the question of whether the suit is against the foreign state or its agency. Should a court decide that the agency or state does not have the requisite commercial contacts the sovereign immunity defense applies automatically. When, however, the foreign state waives its immunity or satisfies a nexus test of commercial activity with the United States, jurisdictional immunity does not apply. An explicit waiver of sovereign immunity may arise from a treaty<sup>46</sup> and implicit waivers are often found in agreements to arbitrate<sup>47</sup> or in such actions as the filing of a responsive pleading.<sup>48</sup> Additionally, a foreign state may waive the immunity of its political subdivisions, agencies and instrumentalities because their sovereignty is said to derive from the larger state entity.<sup>49</sup>

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45. In determining the sufficiency of commercial contacts with the United States, state and federal courts may also apply standards of international law. SENATE REPORT, *supra* note 7, at 14; HOUSE REPORT, *supra* note 7, at 14. International law may also be applied in determining what constitutes "a violation of international law" under Sections 1605 and 1610 of the Act.

It may, however, be difficult to determine what international law is. *See, e.g.,* Wilson, *The International Law Standard In United States Statutes*, 69 AM. J. OF INT'L L. 848, 851 (1975) (concluding that the United States frequently asserts "in its legislation the applicability of international law in general terms, without indicating what that law is believed to be or the manner in which it is or may become relevant").

*See also* BROWNIE, *supra* note 3, at 57:

When points of international law arise in a municipal court, and resort to the executive for guidance does not occur, the court will commonly face real difficulty in obtaining reliable evidence . . . of the state of the law, and especially the customary law. . . .

46. 28 U.S.C. §§ 1604, 1605(a)(1) (1976).

47. *See* SENATE REPORT, *supra* note 7, at 9; HOUSE REPORT, *supra* note 7, at 9.

48. *Id.*

49. *Id.* *See* 6 WHITEMAN, DIGEST OF INT'L LAW 353-8 (1968).

Personal jurisdiction also extends to cases dealing with non-commercial torts,<sup>50</sup> rights in immovable property<sup>51</sup> and maritime liens.<sup>52</sup> Further, the Act expressly declares that foreign states and agencies are subject to actions involving counterclaims and setoffs. In three contexts sovereign immunity does not bar suit against the foreign state or agency that engages in commercial activities with the United States. First, an American court may assert its jurisdiction when the sovereign carries on a commercial activity within the United States.<sup>53</sup> Second, jurisdiction extends to those sovereign acts performed in the United States in connection with a commercial activity located outside the United States.<sup>54</sup> Finally, the sovereign immunity defense does not bar suit on sovereign acts that have a "direct effect in the United States" regardless of the fact that the act complained of occurs outside the United States in connection with a commercial activity located outside the United States.<sup>55</sup> It is unclear how far United States jurisdiction extends abroad to effect the execution of judgments when foreign states and agencies have no property in the United States and the basis of the claim centers on an act having only "a direct effect" in the United States. This provision is one example of the latent extraterritorial nature of the new law—an affront to the sovereignty of the affected countries.<sup>56</sup>

Other less subtle problems exist with the commercial test. A foreign state or agency could conceivably prove that despite commercial contacts with the United States the primary purpose of the activity was to serve an unassailable state function such as boycotting commercial enterprises. Sovereigns are immune from suit if engaged in military or public debt activities,<sup>57</sup> but the list of immunities may lengthen if courts permit sovereigns to plead "public act" in order to escape jurisdiction after fulfilling the necessary commercial contacts. The Act attempts to eliminate considerations of public acts and purposes of activities by focusing on the commercial nexus. However, American courts may revert to the time-

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50. 28 U.S.C. § 1605(a)(5) (1976).

51. 28 U.S.C. § 1605(a)(4) (1976).

52. 28 U.S.C. § 1605(b) (1976).

53. 28 U.S.C. § 1605(a)(2) (1976).

54. *Id.*

55. *Id.*

56. Brownlie notes that while, in theory, a state cannot enforce its national laws on the territory of another State without the latter's consent, in fact, states acquiesce in some extraterritorial enforcement. BROWNIE, *supra* note 3, at 299. A well-known example of extraterritorial application is the United States antitrust law.

57. 28 U.S.C. § 1611 (1976).

honored distinction between a sovereign's private and public acts in order to decide whether the suit involves a foreign state or agency even before the commercial test applies.

The Act addresses the serious question of foreign expropriation or nationalization of American property by extending jurisdiction in limited instances to cover rights in property taken in violation of international law.<sup>58</sup> Generally, expropriations violate international law when the taking is not "in the public interest" and no "prompt, adequate and effective" compensation is paid.<sup>59</sup> Here the Act's deference to sovereigns surfaces in a clear distinction between foreign states and agencies. Congress denies immunity to foreign states when the concerned property is within the United States in connection with a foreign state's commercial activity.<sup>60</sup> When a foreign agency owns property taken in violation of international law and that agency engages in commercial activity in the United States a court may apply its jurisdiction even though the disputed property is not located within the United States.<sup>61</sup>

The problems raised by foreign expropriations involve other state defenses unrelated to the doctrine of sovereign immunity. One such defense is the "act of state" doctrine, by which foreign courts may not question sovereign acts performed in sovereign territory.<sup>62</sup> At one time the defense created a presumption that courts could not "sit in judgment" on some activities of a sovereign and effectively made expropriation cases nonjusticiable in the United States.

To correct the adverse effects of the "act of state" doctrine, Congress passed the "Sabbatino Amendment" to the Foreign Assistance Act of 1964.<sup>63</sup> This amendment directs courts to apply in-

58. 28 U.S.C. §§ 1605(a)(3), 1610 (a) and (b) (1976).

59. 8 WHITEMAN, DIGEST OF INT'L LAW 1143-85 (1967); See also BROWNIE, *supra* note 3, at 518. See 22 U.S.C. § 2181 (1968) (guaranty of payment for American expropriation losses abroad).

60. 28 U.S.C. § 1605(a)(3) (1976).

61. *Id.*

62. The doctrine, announced in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), is that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

63. 22 U.S.C. § 2370(e) (1964). See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Banco Nacional de Cuba v. Farr*, 243 F. Supp. 957 (S.D.N.Y. 1965), *aff'd* 383 F.2d 166 (2d Cir. 1967), *cert. denied*, 390 U.S. 957 (1968) (deciding *Sabbatino* after enactment of the "Sabbatino Amendment").

See also *Bernstein v. N.V. Nederlandsche — Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *Bernstein* the court originally granted immunity to the acts of state of the Nazi Regime. The State Department then "suggested" that immunity need not be recognized, creating the famous "Bernstein Exception" to the act of state doctrine.

ternational law and to decide cases on the merits notwithstanding the defense.<sup>64</sup> American presidents have authority under the amendment to suggest that the defense be recognized by the courts if it is within the foreign policy interest of the United States.<sup>65</sup> While the "act of state" defense no longer precludes adjudication of expropriation cases, the Foreign Sovereign Immunity Act does preclude suit when property is expropriated outside the United States by a foreign government because the commercial test is not met. Thus the more crucial aspects of expropriation in violation of international law are not dealt with by the Act.

Despite the Act's omissions and failure to standardize the foreign state—foreign agency distinction, the commercial test is a workable definition of the scope of *in personam* jurisdiction. Other countries following the restrictive theory of immunity can readily see the reflection of their own jurisdictional practices in the Act's commercial basis. However, because American states have no status in international law<sup>66</sup> the Act's grant of concurrent jurisdiction to state and federal courts may be offensive to foreign nations even though they agree with the underlying assertion of jurisdiction over their commercial activities within the United States.

#### *Where and How Suits Against Foreign Sovereigns May Commence*

Foreign states recognize the sovereignty and legitimacy of the American federal system. The American states, however, are not owed the same duty of recognition.<sup>67</sup> With possibly one exception no other nation in the world maintains the American distinction between federal and state judiciaries.<sup>68</sup> However, under the Act, state

64. 22 U.S.C. § 2370(e) (1964).

65. *Id.* See also Trelles, *The Act Of State Doctrine: The Interaction Of Domestic And International Factors—Some Observations And Suggestions*, 1 U. OF DAYTON L. REV. 121, 136-7 (1976):

[I]t appears that extra-legal factors will be ever present and exerting pressure upon the courts when litigation occurs dealing with matters of international significance . . . . The judiciary in the United States is caught between administering international law and giving comity to foreign nations' acts.

66. See BROWNLIE, *supra* note 3, at 73. See Jessup, *The Doctrine of Erie R.R. v. Tompkins Applied to International Law*, 33 AM. J. OF INT'L L. 740, 743 (1939): "The several states of the union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."

67. See generally W. BISHOP, *INTERNATIONAL LAW* 314 (3d ed. 1962).

68. *Id.* The possible exception is the Swiss cantons which may have a few international dealings.

and federal courts have concurrent jurisdiction over suits brought by or against foreign sovereigns. This means that foreign states must now submit to the judicial complexities of fifty states, the District of Columbia and the federal system—a result that is ill-designed to effect the congressional goal of uniform treatment for sovereign states. As this discussion proceeds it will become apparent that concurrent jurisdiction carries a seed of unpredictability.

The adequacy of notice of suit and the propriety of jurisdiction are two separately justiciable issues under the Foreign Sovereign Immunities Act.<sup>69</sup> Service of process upon a foreign state or its political subdivision is accomplished by either delivering the summons and complaint in accordance with special agreement of the parties or by complying with any applicable international convention.<sup>70</sup> If service cannot be made in this manner a mailed translation sent to the state's ministry of foreign affairs is sufficient to constitute notice.<sup>71</sup> Should that method prove ineffective the American Secretary of State transmits notice through diplomatic channels.<sup>72</sup>

If the suit involves a foreign agency, notice is sent by the method agreed upon by the parties or by delivery of the summons and complaint to an authorized agent.<sup>73</sup> When other methods fail, service is either mailed to an authority of the foreign state or is made as the forum court directs.<sup>74</sup> These subtle differences in service may necessitate an advance judicial determination of whether the suit involves a foreign state or agency.

When suit commences in a state court, it decides the delicate question of whether suit concerns a foreign state or agency.<sup>75</sup> Actions against foreign states may begin in a judicial district in which a substantial part of the claim arose or where a substantial part of the property that is the subject of the action is located.<sup>76</sup> Additional-

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69. SENATE REPORT, *supra* note 7, at 7; HOUSE REPORT, *supra* note 7, at 8.

70. 28 U.S.C. § 1608 (1976). *See, e.g.*, the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638, in force in the United States in 1969. Eighteen foreign states are parties to the convention.

71. 28 U.S.C. § 1608(a)(3) (1976).

72. 28 U.S.C. § 1608(a)(4) (1976).

73. 28 U.S.C. § 1608(b)(2) (1976).

74. 28 U.S.C. § 1608(b)(3) (1976).

75. 28 U.S.C. § 1608(e) (1976).

76. 28 U.S.C. § 1391(f)(1) (1976).

ly, suits may commence against agencies wherever the agency is licensed to do business.<sup>77</sup>

The Act expressly provides that suits against foreign states or their political subdivisions may originate in the United States District Court for the District of Columbia.<sup>78</sup> It would be easy for foreign states to defend actions in Washington, D.C., since all foreign representatives have diplomatic headquarters there.<sup>79</sup> There is thus a likelihood that more foreign states will litigate in the District of Columbia than elsewhere.

A liberal provision allows both foreign states and agencies to remove actions to a federal forum at their discretion.<sup>80</sup> The Act's grant of original jurisdiction to the federal courts expressly extends to only nonjury civil actions;<sup>81</sup> and removal to federal court also precludes the use of juries.<sup>82</sup> These provisions argue for the likelihood of congressional recognition that nonuniform or even prejudicial results might follow from trial to juries in state courts. This congressional awareness should be understood as background to the later discussion of specific execution uniformity problems.<sup>83</sup>

The Act is carefully drafted to assert jurisdiction over foreign states and still permit them to contract for a different choice of forum.<sup>84</sup> An agreement to arbitrate in another country can avoid United States jurisdiction and specifications in a binding contract that another country's laws are to govern suits arising out of it are enforceable.<sup>85</sup> It is also possible to remove a suit to another country on the doctrine of *forum non conveniens* when all of the requirements for United States jurisdiction are met.<sup>86</sup> Furthermore, a treaty may vary select portions of the Act.<sup>87</sup> Congressional respect for sovereignty and recognition of our own stake in the preservation of international comity compels deference to an express choice of laws.

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77. 28 U.S.C. § 1391(f)(3) (1976).

78. 28 U.S.C. § 1391(f)(4) (1976).

79. SENATE REPORT, *supra* note 7, at 31; HOUSE REPORT, *supra* note 7, at 32.

80. 28 U.S.C. § 1441(d) (1976). See SENATE REPORT, *supra* note 7, at 32; HOUSE REPORT, *supra* note 7, at 32.

81. 28 U.S.C. § 1330(a) (1976).

82. 28 U.S.C. § 1441(d) (1976).

83. See notes 137-156 *infra* and accompanying text.

84. SENATE REPORT, *supra* note 7, at 16; HOUSE REPORT, *supra* note 7, at 16.

85. *Id.*

86. See S. 566, 93d Cong., 1st Sess., 119 CONG. REC. 2220 (1973).

87. See 28 U.S.C. §§ 1604, 1609 (1976).



In summary, the Foreign Sovereign Immunities Act codifies the restrictive theory of immunity and asserts *in personam* jurisdiction over foreign states and their agencies. The new commercial test for jurisdiction is in line with the practice of countries following the restrictive view. Several problems with the Act center on the new jurisdiction, however, and include the foreign state-agency distinction and the grant of concurrent jurisdiction to state and federal courts.

Despite congressional concern to treat sovereigns uniformly, the likelihood is that the commercial test will devolve to a case-by-case guess as to which foreign entity is before the court, with concurrent jurisdiction adding an unnecessary element of unpredictability.

Through the execution provisions of the Act, judgment enforcement aligns with the new grant of *in personam* jurisdiction over foreign states. These provisions illustrate another congressional goal: the assurance of judgment satisfaction for United States nationals.

#### EXECUTION UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT

Even though execution provisions have been incorporated into many of the bilateral commercial treaties between the United States and certain foreign governments, judgment enforcement remains a controversial issue in international law.<sup>88</sup> Initially, it appears that

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88. "The enforcement of judgments against foreign state property remains a somewhat controversial subject in international law. . . ." SENATE REPORT, *supra* note 7, at 26; HOUSE REPORT, *supra* note 7, at 27.

The United States is a party to approximately eighteen bilateral commercial treaties. See MEHREN, *supra* note 34, at 139; TREATIES IN FORCE, Department of State Publication 8891, January, 1977.

Commercial treaties typically provide for the execution of commercial assets. An older example is The Treaty of Friendship, Commerce and Navigation with Argentina, in force Dec. 20, 1854, 10 STAT. 1005, T.S. 5, 5 BEVANS 61. It provides in part: "Art. II. There shall [exist] between all the territories of the United States and all the territories of the Argentine Confederation a reciprocal freedom of commerce. . . ."

A modern example of the execution provision in a bilateral commercial treaty is that of The Treaty of Friendship, Commerce and Navigation with the Netherlands, in force Dec. 5, 1957, 8 U.S.T. 2043; T.I.A.S. No. 3942; 285 U.N.T.S. 231, it provides in part:

Art. XVIII 2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publically owned or controlled shall, to the extent that it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or its property,

much reliance is placed on the willingness of the foreign sovereign to pay its judgments, so as to preclude utilization of the execution provisions of the Act. Execution is now enforceable on both foreign state and agency assets.<sup>89</sup> Here the Act draws the same problematical distinction noted earlier, this time between state and agency properties subject to execution. The new execution provisions will assure the plaintiff's satisfaction yet may inherently offend international expectations of deference.

*Property of the Foreign State and Agency Subject to Execution*

The Act's execution provisions represent the attainment of the congressional goal of guaranteed judgment satisfaction, whatever the desire of the foreign sovereign. In the same manner that the Act creates exceptions to the general rule of sovereign immunity from jurisdiction, these execution provisions establish exceptions to the general rule of immunity from execution. In furtherance of the policy of deference toward the foreign sovereign, the Act maintains a distinction between executable state and agency assets. Considerations of deference and reciprocity also prompted the creation of the provision under which certain assets are exempt even though they otherwise might fall within an executable category.

Diplomatic and consular properties remain immune from execution.<sup>90</sup> This is to be expected as a manifestation of the Vienna Conventions.<sup>91</sup> Property of organizations granted status under the Inter-

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immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

One such multilateral treaty is the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958, in force for the United States Sept. 10, 1964, 15 U.S.T. 1606 T.I.A.S. No. 5639, 516 U.N.T.S. 205. The treaty allows execution in certain circumstances on state-owned vessels; forty-four countries are parties.

89. 28 U.S.C. § 1610 (1976).

90. 28 U.S.C. § 1610(a)(4) (1976).

91. Vienna Convention on Diplomatic Relations of 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95. This multilateral treaty entered into force in the United States Dec. 13, 1972. One hundred twenty states are parties. Article 22 provides 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."

See also The Vienna Convention on Consular Relations of 1963, 21 U.S.T. 77 T.I.A.S. No. 6820, 596 U.N.T.S. 261. This multilateral treaty entered into force in the United States Dec. 24, 1969, with seventy-nine states parties. Article 43 abolishes consular officer immunity for vehicular damage. Still, "no case relating to a traffic accident can be brought against a member of a diplomatic mission;" SENATE REPORT, *supra* note 7, at 21; HOUSE REPORT, *supra* note 7, at 21.

national Organizations Immunities Act<sup>92</sup> is also exempt from attachment and execution in aid of judgment.<sup>93</sup> This immunity may be waived, however, and the President of the United States may also limit, condition, or eliminate certain of these privileges without congressional approval.<sup>94</sup>

The property of a foreign central bank or monetary authority is exempt, but this immunity too may be waived.<sup>95</sup> It is doubtful that this provision was intended to extend in a blanket fashion to foreign investments in United States corporations and industries<sup>96</sup> and thus may need to be reexamined. In an attempt to protect itself from reciprocity in foreign courts the legislature made all property of a military character or under military control exempt.<sup>97</sup> As a practical matter, these exemptions establish nothing that is not already internationally extant. What is new is that certain commercial assets of the foreign state and agency that are not otherwise exempt will be subject to execution. The fundamental distinction the Act draws between the foreign state and foreign agency carries through into the property execution provisions. Property of a foreign state itself is executable when it is within the United States, provided the property is commercial and is also the basis of the suit.<sup>98</sup> Foreign state properties acquired by gift are also subject to execution.<sup>99</sup>

In contrast to this provision, execution is permissible on the property of agencies located anywhere in the United States<sup>100</sup> and the assets need not be commercial<sup>101</sup> or relate to the precise nature

92. 22 U.S.C. § 288(a) (1968).

93. 28 U.S.C. § 1611(a) (1976).

94. 22 U.S.C. § 288(a) (1968). The privileges may be waived "by contract." This section also explains Presidential powers.

95. 28 U.S.C. § 1611(b)(1) (1976).

96. Falk, *supra* note 18, at 495 (example of Arab investments in American industries).

97. 28 U.S.C. § 1611 (1976). Reciprocity is difficult to define but generally recognized: "[T]he principle of reciprocity in the context of state immunity . . . is far from having a precise role . . . but it could find a place in a part of the law which depends in practice on mutual accommodation."

BROWNIE, *supra* note 3, at 328. See R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* 45 (1964) ("all doctrines of deference in international law rest upon a foundation of reciprocity").

98. 28 U.S.C. § 1610(a)(2) (1976).

99. 28 U.S.C. § 1610(a)(4) (1976).

100. 28 U.S.C. § 1610(b) (1976).

101. SENATE REPORT, *supra* note 7, at 29; HOUSE REPORT, *supra* note 7, at 29.

of the claim.<sup>102</sup> The execution may thus relate to any commercial activity having an effect in the United States.<sup>103</sup> As with the foreign state entity, properties which the agency receives as gifts are subject to execution.<sup>104</sup>

Noncommercial torts may now be prosecuted against foreign states and agencies.<sup>105</sup> The Act's execution provision on noncommercial torts appears, however, to be inapplicable to the foreign state entity. Only noncommercial torts may be sued upon, and only commercial property of the foreign state is executable in aid of the tort judgment. The requirements that the property of the foreign state must be commercial and also the basis of the claim will preclude judgment enforcement. Thus no property of the foreign state will ever be subject to execution under the Act for the satisfaction of a noncommercial tort judgment, unless the sovereign waives immunity.<sup>106</sup> Foreign agencies, on the other hand, are subject to execution in aid of a noncommercial tort judgment on both commercial and noncommercial property.<sup>107</sup>

There are obvious advantages that accrue under the Act to foreign state entities which foreign agencies do not share. Noncommercial agency property is always subject to execution while the noncommercial property of a foreign state is not. As mentioned earlier, execution is possible on agency property when a violation of international law is found regardless of whether that property is within the United States. This is true only when the agency engages in a commercial activity within the United States.<sup>108</sup> Property of the foreign state taken in violation of international law is not executable unless that property is present in the United States. Thus it makes a profound difference whether a suit involves the state or agency for execution purposes.

Congress apparently felt the added decisional burden on a court to be worth the deference to the sovereign these provisions reflect. By thus acknowledging the sensitive nature of executions, enforcement is allowed to proceed without the benefit of a treaty. Once liability is found the foreign sovereign is encouraged to volun-

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102. *Id.*

103. *Id.* See Falk, *supra* note 18, at 483. Falk argues that here the act authorizes *quasi in rem* jurisdiction for agency property.

104. 28 U.S.C. § 1610(b)(2) (1976).

105. 28 U.S.C. § 1605(a)(5), 1610 (1976).

106. 28 U.S.C. § 1610(a)(1) (1976).

107. SENATE REPORT, *supra* note 7, at 29; HOUSE REPORT, *supra* note 7, at 29.

108. See notes 62-65 *supra* and accompanying text.

tarily meet its judgment. When payment is not voluntarily made, a successful plaintiff is nonetheless assured satisfaction through the execution provisions of the Act.

At the outset it should be observed that if the foreign state pays its judgment the Act's execution provisions do not activate.<sup>109</sup> After entry of the judgment against a foreign sovereign, the court must wait a "reasonable period of time" before ordering attachment or execution in aid of the judgment.<sup>110</sup> In anticipation of the sovereign's willingness to pay the judgment the Act provides a fair opportunity to comply with the judicial order.

### *The Payment of Judgments By Foreign States*

Congress established the execution provisions of the Foreign Sovereign Immunities Act without detailing execution procedures to be used when a judgment is unsatisfied. This omission may have been an oversight. If so, there is no rationale for the Act's failure to provide procedures for judgment enforcement that appear to follow naturally from the Act's grant of power to execute. It is also possible that the omission was a planned consequence of the unannounced premise that a foreign state would pay its judgments voluntarily when found liable in the United States.

The proposition that the Act is completely premised on the foreign sovereign's willingness to pay, however, does not withstand close scrutiny for two reasons. First, the new Act changes previous law with respect to plaintiff's entitlement to judgment enforcement against foreign sovereigns. The Act's reliance on the foreign state's voluntary payment did not result in provision for payment when *quasi in rem* jurisdiction was asserted. Second, if total reliance was placed on the sovereign's willingness to pay its judgments, there would simply be no need for the execution provisions that are included in the Act.

Several contingencies may prevent rapid collectability of a judgment against a foreign entity. These include the possibility that in some countries other branches of a foreign government must first

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109. 28 U.S.C. § 1610 (1976), defines the exceptions to immunity from execution that will activate when there is non-payment of a judgment.

110. 28 U.S.C. § 1610(c) provides:

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

authorize the payment.<sup>111</sup> Property that is sought for satisfaction of a judgment may not be commercial as required under the Act,<sup>112</sup> may lie outside the court's jurisdiction to attach,<sup>113</sup> or may have been fraudulently conveyed.<sup>114</sup> Further, those countries following the absolute theory of immunity, expecting reciprocity in United States courts, may not feel compelled to pay a judgment they would not pay at home.<sup>115</sup> Even countries following the restrictive theory of sovereign immunity have stopped short of executing their own courts' judgments.<sup>116</sup> To compound these possible problems, international law is in a state of flux on the issue of acceptability of judgment enforcement provisions. In the recent past foreign states have lobbied with the State Department in an effort to secure as much immunity from jurisdiction as they could obtain.<sup>117</sup> With immunity from jurisdiction denied, foreign states may yet seek State Department intervention to prevent judgment enforcement.

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111. See, e.g., Comment, *Sovereign Immunity—Waiver And Execution: Arguments From Continental Jurisprudence*, 74 YALE L. J. 887, 914 (1965) (noting that Italy and Greece cannot order execution without the prior approval of the executive branch).

112. 28 U.S.C. §§ 1605, 1610 (1976).

113. The Act deals exclusively with *in personam* jurisdiction. It has been criticized for not allowing *quasi in rem* jurisdiction over foreign states by Falk, *supra* note 18, at 483, because no jurisdiction can be asserted when the foreign state or agency owns property in the United States but does not satisfy the commercial nexus text of § 1605 of the Act.

114. There are obvious limits to a court's power to inquire into the activities and laws of foreign states. See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968) (Oregon statute permitting non-resident alien to inherit personalty only if United States citizens enjoyed reciprocal rights was invalidated since it required more than routine examination of foreign laws).

115. This follows from the general "no-greater-effect-than-at-home" doctrine in use among the several states of the United States. See, e.g., MEHREN, *supra* note 34, at 65. It has been held, however, that it is not necessary for the domestic sovereign to permit execution in order to execute against foreign sovereigns, *Socobelge v. Greek State*, 79 Clunet 244, 18 Int'l L. Rep. 3 (Civil Tribunal Brussels, 1951). See also Falk, *supra* note 18, at 492.

116. "The majority of states concede immunity in respect of measures of execution directed against property of foreign states. . . ." BROWNIE, *supra* note 3, at 331. See generally 6 WHITEMAN, DIGEST OF INTERNATIONAL LAW 709-26 (1968).

117. The State Department could hardly remain neutral when pressed for an immunity grant by foreign governments. This may be a reason why the State Department, in helping to draft the Foreign Sovereign Immunities Act, did not write a role for itself in the determination process. See Fed. Reg. 50, 884 (1976).

The State Department can use diplomatic channels to obtain the payment of judgments. As stated by the United States in its brief in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964):

The important benefit of executive diplomatic action is that it is not restricted, as is judicial action, to cases which, by happenstance, come

Despite these problems the Foreign Sovereign Immunities Act grants execution privileges to successful plaintiffs. There may be no problem of judgment enforcement against certain foreign states. Countries which are parties to various commercial treaties have already agreed to permit execution on certain commercially held assets.<sup>118</sup> Customary international law,<sup>119</sup> through these treaties, may be said to promote judgment enforcement.<sup>120</sup> The fact that many countries already pay for their adverse judgments through a treaty is one encouragement for them to pay when found to be liable in United States courts.<sup>121</sup>

There are other good reasons why the foreign state would desire to pay, including enhanced diplomatic relations and general good business practice.<sup>122</sup> Whatever the reasons for or against payment the very existence of the Act now provides an added incentive for plaintiffs to seek satisfaction of judgments whenever possible. Money damages, injunctions, and specific performance may be

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within the jurisdiction of American courts. . . . The efforts of the Executive Branch to achieve general compensation for claims of all United States nationals . . . have in the past met with success.

Brief for the United States, 2 INT'L LEGAL MATERIALS 1009-10 (1963).

118. See note 88 *supra*.

119. This is defined as "evidence of a general practice accepted as law" in the Statute of the International Court of Justice, U.N. CHARTER, Art. 38.

Brownlie notes that the "evidence" includes diplomatic correspondence, policy statements, executive decisions, and opinions of official legal advisors, BROWNLIE, *supra* note 3, at 5. Custom is important to a formulation of international law as "formal sources" do not exist. The general "consent of states creates rules of general application." *Id.* at 2.

120. At least, this is the view of the United States. See SENATE REPORT, *supra* note 7, at 26-7; HOUSE REPORT, *supra* note 7, at 27.

121. A foreign sovereign may, however, argue the converse: that execution on certain commercial assets is permissible only through a treaty. See note 88 *supra*.

122. See Lowenfeld, *Claims Against Foreign States—A Proposal For Reform of United States Law*, 44 N.Y.U.L. REV. 928-9 (1969):

A combination of commercial and diplomatic pressure would probably induce governments that have an interest in maintaining good commercial reputations in the United States and good diplomatic relations with this country to pay judgments that have become final after due notice and full opportunity to contest on the merits.

See also Lauterpacht, *The Problem Of Jurisdictional Immunities Of Foreign States*, 28 BRITISH Y. B. OF INT'L LAW 220, 242-3 (1951):

It is significant that states affected by measures of execution have not as a rule protested against it as being unlawful. In fact it may be difficult to adduce reasons of principle which would require in the matter of execution a rule different from that obtaining in the matter of jurisdiction on the merits.

awarded to the successful plaintiff,<sup>123</sup> although the injunctions and specific performance may continue to be unenforceable.<sup>124</sup> Because rule 69 of the Federal Rules of Civil Procedure controls the practices of judgment enforcement under the Act, the successful plaintiff may be awarded any relief a private person could be compelled to perform under applicable state law, except the payment of punitive damages.<sup>125</sup>

Summarizing the new judicial power, the permissibility of judgment execution against foreign countries in United States courts under the Foreign Sovereign Immunities Act, represents a unique American addition to the restrictive theory of sovereign immunity. Still, considerations of deference and comity underlie the scope of execution that will be permitted against foreign sovereigns. They will be encouraged to voluntarily comply with judicial orders and will have a time allowance in which to demonstrate a good faith attempt to meet their judgments. To the extent that the sovereign's willingness to pay its judgment is a factor in the probability of the plaintiff's obtainment of satisfaction, it may be said that international precedent exists and makes voluntary payment a likely occurrence. When combined, the execution clauses in commercial treaties, the United States' policy of prompt accounting abroad and the importance of perpetuating good business practices may be persuasive enough to preclude the need for enforced judgments. The Act's execution provisions are also incentives for voluntary compliance with judicial orders. Whether it pays its judgment voluntarily or is subject to an enforced execution will be the sovereign's choice. The true test of the Act's success thus lies in the operability of the execution provisions which attempt to assure the payment of judgments even when payment is not freely made.

Once the execution provisions of the Act have been activated, their practical application depends on rule 69 of the Federal Rules of

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123. 28 U.S.C. § 1606 (1976), provides in part:

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages.

124. See SENATE REPORT, *supra* note 7, at 22; HOUSE REPORT, *supra* note 7, at 22.

125. This is a logical extension of the United States domestic policy of not allowing punitive damages against the national government, expressed in 28 U.S.C. § 2674 (1968).



Civil Procedure. Rule 69 provides that the prevailing procedures of judgment enforcement in the several American states are to be utilized to obtain the satisfaction of judgments against foreign sovereigns. State law thus controls judgment lives, the appraisal and sale of goods on execution, provisional remedies, differing lien time limits and much more. To understand the practical effects of this rule, it is necessary to examine the procedures of judgment execution which it makes applicable.

#### PROCEDURES OF JUDGMENT EXECUTION UNDER RULE 69

By its terms rule 69 opens the door to the application of the execution laws of the several American states. What emerges as the logically controlling rationale for the omission of execution procedures from the Act is that the practices operative in the fifty states and the District of Columbia will somehow achieve all of the desired congressional goals, including deference, predictability and uniformity. The absence of execution procedures within the Act thus leads to a remarkable result: an attempt is made to transform the laws of fifty-one jurisdictions into a uniform standard for the purpose of executing judgments against foreign sovereigns. Such a transformation is impossible in view of congressional goals. Perhaps in return for the privilege of doing business in the United States, Congress approved of the forfeiture of foreign convenience. Even so, a foreign state will yet expect continuing deference, predictability and uniformity from a foreign law that impinges on its sovereign immunity.

This discussion first examines the applicability of the Federal Rules of Civil Procedure through which the execution provisions of the Act operate. A brief survey of the execution procedures of the several states follows. It should be apparent that state law, concededly effective within a state's own borders, fails not only as a uniform standard of judgment enforcement but also as a mechanism for the attainment of the strong policy goals behind the Act.

#### *Applicability of the Federal Rules of Civil Procedure*

Rule 69 of the Federal Rules of Civil Procedure performs three functions under the Foreign Sovereign Immunities Act. First, it renders the execution provisions of the Act operable by providing procedures for judgment execution. Second, the use of rule 69 implies the relevance of other Federal Rules of Civil Procedure which in turn establish additional execution remedies. Finally, it is through rule 69 that Congress has articulated the applicability of state execution law to suits against foreign sovereigns.

Federal Rule 69<sup>126</sup> controls the process of judgment enforcement through the use of writs of execution. While rule 69 is operative only to enforce the payment of money, the Act also addresses the feasibility of specific performance.<sup>127</sup> By implication, through the use of rule 69, other Federal Rules of Civil Procedure come into play which affect the remedies available under the Foreign Sovereign Immunities Act. Federal Procedural Rule 70<sup>128</sup> controls supplementary proceedings and executions that order the performance of specific acts. It is likely that specific performance could be granted under the Act but a *caveat* must follow since enforcement cannot be assured.

Provisional remedies are available under the Act,<sup>129</sup> and by implication, derive from Federal Rules 64<sup>130</sup> and 65.<sup>131</sup> Some of these remedies have come under recent constitutional attack<sup>132</sup> and their availability is dependent on both foreign consent to their use<sup>133</sup> and on their vitality under applicable state law. When the foreign state consents, its property may be attached before the entry of judgment or before the lapse of a "reasonable time" after the judgment's entry.<sup>134</sup> It is doubtful, however, that a foreign state would consent to

126. See note 27 *supra*.

127. See note 123 *supra*.

128. FED. R. CIV. P. 70 provides in part:

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party. . . . The court may also in proper cases adjudge the party in contempt.

129. 28 U.S.C. § 1610(d) (1976).

130. FED. R. CIV. P. 64 provides in part:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held. . . . The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies. . . .

131. FED. R. CIV. P. 65 provides for the use of injunctions and temporary restraining orders.

132. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). These cases do not question the constitutionality of attachment for purely jurisdictional reasons. See generally *Levy, Attachment, Garnishment And Garnishment Execution: Some American Problems Considered In The Light Of The English Experience*, 5 CONN. L. REV. 399 (1972-3).

133. 28 U.S.C. § 1610(d) (1976).

134. *Id.*

attachment if it was desirous of removing property from a court's jurisdiction. Thus plaintiff's resort to the use of provisional remedies against a foreign sovereign defendant may often be only a theoretical possibility at best.<sup>135</sup>

This background is helpful for an understanding of the inter-relationship of state and federal law under the existing Act. The relationship must be understood not simply because the Act is new United States law, but also because international law may now be affected by the enforcement procedures of the several American states. A clearer picture of the effect of the utilization of these rules develops when they are applied in their proper settings in state and federal courts.

### *Execution In State Courts*

In order to show the nonuniformity of state execution processes it is necessary to consider only a few illustrative jurisdictions. This note does not attempt to survey the entire field of judgment enforcement practice in the several states. For the most part, federalism dictates that state law controls the particulars of executing judgments in federal courts.<sup>136</sup> Although they follow noticeable trends, the execution procedures in the fifty states differ greatly from jurisdiction to jurisdiction. The many different state practices often indicate conflicting views as to redemption rights, life of judgment and execution liens and capacities for judgment renewal or revival. The preceeding discussion demonstrates that foreign states are now subjected to these differences through the execution provisions of the Foreign Sovereign Immunities Act and the Federal Rules of Civil Procedure. It follows that the utilization of state execution laws will not achieve the congressional goals of uniformity and deference.

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135. The foreign state could no doubt use provisional remedies against private persons when it brings the action. Under 28 U.S.C. § 1332(a)(4) (1976), a foreign state has the express right to sue as plaintiff.

See also *Anderson v. Tucker*, 68 F.R.D. 461 (1975) (state rules applied under rule 69(a) are to be applied in a common sense manner; incongruous results under state law will not be incorporated as part of the federal practice under the rule). See *Yazoo and M.V. R.R. Co. v. Clarksdale*, 257 U.S. 10 (1921) (conformity to state practice does not demand a literal conformity that is impossible or impracticable).

136. Under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), state law applies in the federal courts to all matters not governed by the Federal Constitution or Acts of Congress. While the Foreign Sovereign Immunities Act is an Act of Congress, the applicability of Federal Rule of Civil Procedure 69 renders state execution law effective, even in the federal courts.

Foreign states will find that enforcement methods vary depending on which interests are sought for satisfaction of the judgment in particular states. In most states the process used for obtaining enforcement of a judgment is a writ of execution.<sup>137</sup> To effect the process of executing the judgment the sheriff of the appropriate county levies on assets subject to the writ, selling them at a public sale.<sup>138</sup> Diverse state statutes dictate the form the levy takes and may involve recordation or the posting of notice.<sup>139</sup> The writ in most jurisdictions reaches real estate and chattels and will execute by seizure and sale.<sup>140</sup> In other jurisdictions the writ reaches realty but enforcement is by foreclosure in equity.<sup>141</sup> In some jurisdictions the writ does not reach land at all.<sup>142</sup> Foreign states must also study the differing life spans of writs of execution that they are now subject to or that they may wish to utilize as plaintiffs. Writs of execution generally have limited lives.<sup>143</sup>

A further distinction made in the majority of the states is between judgment liens and execution liens. The judgment lien generally affects only real estate and varies in duration, methods of

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137. S. RIESENFELD, *CREDITORS' REMEDIES AND DEBTORS' PROTECTION* 86 (2d ed. 1975).

138. *Id.* at 95.

139. *Id.* at 131 n.5.

140. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory And A Prospectus*, 42 IOWA L. REV. 155 (1957) [hereinafter cited as *Collection of Money Judgments*].

141. *Id.*

142. Other methods, however, allow the execution of land by enforcing judgment liens in equity. VA. CODE §§ 8-399, 8-400, 8-391 (1950); W. VA. CODE ANN. §§ 3784-85, 5527, 3769 (1955). Another method is "set off" which transfers land in fee to the judgment creditor at an appraised value. ME. REV. STAT. c. 171, §§ 31 (1954); MASS ANN. LAWS c. 235, §§ 6ff, 26ff (1956); N.H. REV. STAT. ANN. §§ 529.1ff, 529.19ff (1955).

143. These states allow a writ life of sixty days: CAL. CIV. PROC. CODE § 683 (West Supp. 1977); MINN. STAT. ANN. § 550.05 (1947); N.Y. CIV. PRAC. LAW § 5230(c) (McKinney 1963).

In these states the life is ninety days: IND. CODE § 35-1-34-8 (1971). (The creditor may shorten this period); ILL. REV. STAT. ch. 77, § 8 (1973); MICH. COMP. LAWS ANN. § 600.6002 (Supp. 1977); N.J. CIV. P. RULES, rule 4:59-1 (1972); PA. RULES OF CIV. PROC., rule 3106(d) (1953); VERNON'S ANN. TEXAS RULES OF CIV. PROC., rule 621 (1972).

In Maryland the date is fixed by court rule, MD. R.C.P., rule 102 (1977); COURTS AND JUDICIAL PROCEEDINGS ART. § 2-304(A) (1973), while in Florida the writ is valid for the life of the judgment, generally twenty years. FLA. STAT. ANN. §§ 56.021, 56.041 (1969).

enforcement,<sup>144</sup> the interests it may cover,<sup>145</sup> and its assurance of adequate valuation on sale of the property.<sup>146</sup> The execution lien, in contrast, may reach both real property and chattels.<sup>147</sup> In about half of the American jurisdictions an execution lien arises by delivering the writ of execution to the sheriff.<sup>148</sup> In others the levy creates the lien.<sup>149</sup> All of these differences are important to a foreign sovereign since the scope and method of execution will affect its business assets.

Perhaps the best example of the subjection of foreign states to a myriad of diverse and unpredictable laws arises from an examination of "dormancy" statutes. In American practice the three attributes of a personal money judgment—executability, actionability, and operation of the lien—all came to have their own separate existences with their own separate statutes of limitations.<sup>150</sup> Today, many states limit the time within which a writ of execution may

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144. There are four basic methods of enforcing judgment liens. First, one method is foreclosure in equity as used in Connecticut and Virginia. See CONN. GEN. STAT. §§ 49-44 to 49-47 (1960); *Hobbs v. Simmonds*, 61 Conn. 235, 23 A. 962 (1891); VA. CODE §§ 8-399, 8-400, 8-391 (1950).

Another method of enforcement is levy and sale under a writ of execution as used in Rhode Island, Vermont, Florida, and Minnesota. See R.I. GEN. LAWS §§ 9-26-14 to 9-26-19 (1969); VT. STAT. ANN. tit. 12 §§ 2781-2800 (1973). See also *Grantz v. First Nat. Bank of Miami*, 138 So. 2d 367 (Fla. App. 1962); *Thompson v. Dale*, 58 Minn. 365, 59 N.W. 1086 (1894).

A third method is to combine foreclosure and levy and sale as in use in New Mexico, Texas and Alabama. See N.M. STAT. ANN. §§ 24-1-22, 24-1-25 (1953). See also *Baker v. West*, 120 Tex. 113, 36 S.W.2d 695 (1931); *Erlenbach v. Cox*, 206 Ala. 298, 89 So. 465 (1921).

A final method combines aspects of the three methods examined above, through a writ of enforcement. See *Collection Of Money Judgments*, *supra* note 140, at 164-71.

145. The American jurisdictions are divided on the issue of whether equitable interests in land are subject to the judgment lien, or whether only legal interests are subject. California, Indiana, New Jersey, Ohio, Oregon, and Texas recognize only legal interests. In contrast, equitable interests in Connecticut, Illinois, Iowa, New Mexico, Pennsylvania, and Washington are subject to judgment liens. See RIESENFELD, *supra* note 137, at 117 n.1.

146. See generally RIESENFELD, *supra* note 137.

147. See RIESENFELD, *supra* note 137, at 94.

148. Among the many states recognizing the creation of the execution lien by delivery are Arkansas, ARK. STAT. ANN. § 30-116 (1962); Colorado, COLO. REV. STAT. § 77-1-12 (1963); Indiana, IND. CODE § 34-1-34-9 (1973); and Kentucky, KY. REV. STAT. § 426.120 (1970). See RIESENFELD, *supra* note 137, at 155.

149. Among the states recognizing the execution lien's creation by levy are Montana, MONT. REV. CODES ANN. § 93-5810 (1964); Nebraska, NEB. REV. STAT. § 25-1504 (1964); Nevada, NEV. REV. STAT. § 21.080 (1973); and Oregon, OR. REV. STAT. § 23.410(5) (1974).

150. See *Collection of Money Judgments*, *supra* note 140, at 156.

issue to a period of from one to twenty years, and most provide procedures for judgment revival, renewal or extension.<sup>151</sup> Foreign states may wish to take advantage of the running of various statutes of limitations. The vast differences in dormancy statutes, however, merely compound the sovereign's predictability problem.<sup>152</sup>

These varying judgment lives, their capacity for renewal or revival, and the differing time limits on their liens are compelling evidence of the absurd lack of uniformity operable under the Foreign Sovereign Immunities Act as it now stands. The incongruity of the foreign sovereign's position in American courts should be apparent. These diverse execution practices apply to foreign sovereigns under the guise of a uniform standard. Foreign sovereigns seek the uniform standard because the several states have no international status. The sovereign may decide that notwithstanding the Act's attempts at deference any subjection to state law violates its sovereignty. Lack of uniformity among states is, from the foreign state's view, an added and aggravated affront. In view of the sensitive nature of enforced executions, United States practice cannot help but appear burdensome.

Turning to redemption statutes, half of the American jurisdictions permit the judgment debtor to buy his own realty back at the public sale.<sup>153</sup> No redemption rights exist, however, in Connecticut, Florida, Indiana, Maryland, Missouri, New Jersey, North Carolina, or Oklahoma, among other states.<sup>154</sup> No right of redemption exists independently under federal law.<sup>155</sup>

A foreign sovereign may wish to repurchase its own property at an execution sale. It is conceivable that the judgment creditor and the sovereign might be the only bidders at such a sale. Where redemption rights do not exist and the sovereign wishes to repurchase, adherence to state law offends the goal of deference. Even when redemption rights do exist under state law they do not

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151. *Id.*

152. *E.g.*, ILL. REV. STAT. ch. 77, § 6 (1963) (judgment dormant after seven years); TEX. REV. CIV. STAT. ANN. art. 3773 (1966) (ten years); IND. CODE § 34-1-34-1 (1971) (ten years); WASH. REV. CODE § 6.04.010 (1963) (ten years); WASH. REV. CODE § 4.56.210 (1963). See *Ball v. Bussel*, 119 Wash. 206, 205 P. 423 (1922) (no action to renew past six year life); OR. REV. STAT. §§ 18.360, 12.070 (1974); see *Mason v. Mason*, 148 Or. 34, 34 P.2d 328 (1934) (no renewal, but judgment lien may be extended one ten year period); S.C. CODE § 10-1520 (1962) (renewal only by leave of court).

153. See RIESENFELD, *supra* note 137, at 150.

154. *Id.*

155. *United States v. Heasley*, 283 F.2d 422 (8th Cir. 1960).

guarantee a fair price. Upset prices could help to assure the adequate valuation of foreign state properties taken on execution. When a state does not provide statutory redemption rights, it generally does have provisions establishing an upset price below which the property cannot be sold.<sup>156</sup>

In summary, differing state execution practices reduce the congressional goal of procedural uniformity to a mere abstract ideal and inject an element of tension into a sensitive area where deference may be the most effective instrument of such policy. Foreign states expect United States laws to apply to them as expressions of the national power. The divergent enforcement procedures of the several states do not answer this need for a uniform, national standard of enforcement.

Congressional policies of deference, predictability and uniformity seek to ease international friction over the assertion of the power to execute judgments. Reliance on state execution laws aggravates rather than eases this friction. There is, however, an easy solution to these difficulties. An amendment to the Foreign Sovereign Immunities Act could give exclusive jurisdiction to the federal courts and provide a uniform federal execution procedure.

#### AN ARGUMENT FOR UNIFORMITY

Several congressional policies have coalesced in the Foreign Sovereign Immunities Act. Perhaps the most significant recognized desire is to treat the foreign sovereign uniformly. It is through deference that the Act achieves its execution objective while respecting the sovereign equality of other nations. Deference to the sovereign can be found in the Act's liberal removal provision,<sup>157</sup> in the waiver provisions,<sup>158</sup> in the exempt property provision,<sup>159</sup> and in the provision restricting the use of provisional remedies.<sup>160</sup> The Act itself carries a tone of deference, because only exceptions to the general rule of sovereign immunity create United States jurisdiction. The fact remains that foreign states expect sovereign immuni-

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156. While they are not available everywhere, the following jurisdictions allow the use of upset prices: IND. CODE § 24-1-37-1 (1971). *See also* IND. T.R. 69 (1970); KAN. STAT. § 60-2415(b) (1976); N.M. STAT. ANN. § 24-2-5 (1954); OHIO REV. CODE ANN. § 2329.20 (1975); OKLA. STAT. tit. 12 § 762 (1971); and federal courts under 28 U.S.C. § 2001 (1970).

157. 28 U.S.C. § 1441(d) (1976).

158. 28 U.S.C. §§ 1605(a)(1), 1610(a)(1) (1976).

159. 28 U.S.C. § 1611 (1976).

160. 28 U.S.C. § 1610(c) and (d) (1976).

ty. No country has an absolute right to assert jurisdiction or to execute judgments over another without a treaty. Deference and comity are the international tenets of respect for the sovereignty and equality of other countries; both rely on reciprocity for their perpetuation. In granting judicial powers to execute judgments against foreign sovereigns, Congress expands the accepted theory of restrictive immunity and treads heavily in a politically sensitive area.

As noted earlier, the several states have no international status. Yet, because the Act grants concurrent jurisdiction to federal and state courts, foreign sovereigns must now submit to the complex judicial systems of fifty states, the District of Columbia and the federal courts. Evidence of the nonuniformity of state execution procedures is abundant. State enforcement laws vary as to scope and coverage of liens, methods of lien enforcement and statutes of limitations periods. The allowance of jury trials in state courts also leads to potentially nonuniform results.

Concurrent jurisdiction in this context blurs the constitutional separation of state and federal power. It is simply doubtful that fifty-one diverse practices can achieve the congressional goals of deference, predictability and uniformity. Such practices fit uneasily into a national pattern; much less so may they be said to articulate a national standard of enforcement procedure. Foreign sovereigns will, however, expect a national standard to govern the resolution of all issues arising from the new Act. Despite a long history of freedom to initiate suits of their own in United States courts, foreign sovereigns have never before been subjected to enforced execution of adverse judgments in the United States.<sup>161</sup>

The important and delicate difference between the foreign state and its agency, maintained under the Act for jurisdiction and execution purposes, may be a state court determination. State courts may, therefore, apply international law in resolving issues. Incorrect adjudications of sovereign immunity issues in state courts will naturally embarrass the State Department.<sup>162</sup> In view of the an-

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161. *The Sapphire*, 78 U.S. (11 Wall) 164 (1871) (holding that a foreign state may sue in United States courts; the only requirement is that the sovereign be "recognized" by the United States Government).

162. As the act of state cases in this Court have repeatedly recognized, executive diplomatic action may be seriously impeded or embarrassed by American judicial decisions which undertake . . . to pass upon the validity of foreign acts.

Brief for the United States, as *amicus curiae*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).



nounced expertise of the federal courts in matters of international law,<sup>163</sup> this embarrassment is an unnecessary risk. Beneath all of these factors lies express federal power to preempt the several states when suits commence against foreign countries.<sup>164</sup> The strongest and best argument for exclusive federal jurisdiction is the constitutional grant of power to the federal judiciary.

It is thus evident that there is a clash between articulated congressional policies and the realities of the Foreign Sovereign Immunities Act. In form, adjudication in a federal forum is encouraged because of the liberal removal provision, the absence of jurisdictional amount, the sensitivity of the issues, and the expertise of the federal courts. In substance, however, state law controls the enforcement process and concurrent jurisdiction subjects foreign sovereigns to multifarious laws and social climates.

An amendment to the Act giving federal courts exclusive jurisdiction over suits by or against foreign states and providing a uniform enforcement process could remove these deficiencies.<sup>165</sup> Such an amendment would properly involve the federal system in the determination of all foreign sovereign immunity questions.

An amendment could also eliminate any doubts about predictability by introducing a single execution process. Congress could again control deference to foreign sovereigns, extend it where necessary and curtail it where reciprocity dictates. The uniform procedure for enforcing judgments against foreign sovereigns should include uniform statutes of limitations for the three components of the

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163. Congress has noted that: "[T]he federal courts may be expected to have a greater familiarity with international law and with the trend of decisions in foreign states than would be true of courts of the States." See 119 CONG. REC. 2219 (1973).

164. U.S. CONST. art. III, § 2 provides in part:

The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;— . . . —to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

165. Lowenfeld has argued for exclusive jurisdiction in this context. His proposed Foreign Sovereign Immunities Act did not, however, contain execution provisions. See Lowenfeld, *supra* note 122, at 930-36.

The International Convention on the Settlement of Investment Disputes between States and Nationals of other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, seeks to aid the enforcement of foreign country judgement in the United States. See MEHREN, *supra* note 34, at 15-60. The federal courts have exclusive jurisdiction to enforce the Convention, 22 U.S.C. § 1650(a) (1966). Thus, exclusive federal jurisdiction is effective in contexts similar to those of the execution provisions of the Foreign Sovereign Immunities Act.

personal money judgment, the action, the execution and the lien. Additionally, the amendment should specify the scope and coverage, methods of enforcement and duration of appropriate liens. Uniform appraisal and redemption rights would assure adequate valuation of sovereign property taken on execution. Finally, the amendment should outline all appropriate remedies and exemptions so that foreign sovereigns need not guess at the scope of their property rights in the United States.

Any amendment designed to promote uniformity under the Foreign Sovereign Immunities Act will benefit not only foreign sovereigns, but also United States plaintiffs. In this sensitive area, foreign governments simply cannot respect enforcement procedures that offend sovereignty. A uniform Act will receive foreign respect and compliance. Thus while it achieves deference, predictability and uniformity, the amendment can advance the other important policy goal of judgment satisfaction for United States nationals. Absent the needed amendment, the Act falls sadly short of its potential for clarifying the American position on its disciplinary jurisdiction over foreign states and for obtaining congressional goals.

#### CONCLUSION

Successful judgment enforcement under the Foreign Sovereign Immunities Act of 1976 depends on two interrelated factors. The sovereign defendant must have the capacity and willingness to pay its judgment. The court must have effective judgment enforcement procedures. As a practical matter, the foreign sovereign has a great deal to gain both diplomatically and commercially by submitting to a United States court's judicial order. International precedent for enforced execution has been set by the multilateral and bilateral commercial treaties. The Act's exceptions to the doctrine of sovereign immunity are in accord with prevailing international sentiment. Commercial practice of the United States abroad is currently consistent with the new Act and represents a policy of respect for the judgments of foreign courts. As the Congress suggests with the Act's passage, it is time for other countries to demonstrate a similar deference.

It is likely that foreign sovereigns will often respect United States' court judgments. When the sovereign does not voluntarily comply with a judicial order, however, the Act's execution provisions activate to obtain the satisfaction of judgments. While problems with the distinction between state and agency properties subject to execution under the Act are certain to develop, United

States courts will be able to apply both international and domestic law to the resolution of this justiciable issue.

The new Act also addresses the larger issue of the proper role of domestic courts in the settlement of suits between United States nationals and foreign governments. Until an international treaty is in force on the subject of sovereign immunity, no country will have an absolute right to assert jurisdiction or to execute judgments over another. The Act is not an aggressive or dictatorial statement of America's jurisdictional power. Rather, it is a timely expression of the extent to which considerations of deference and comity still control United States foreign policy. At every turn the Act rejects absolutism. Concurrently, the Act is sensitive to the legal needs of American plaintiffs. Whether the Act will be successful in integrating the potentially conflicting goals of respect for sovereignty with its commitment to provide a legal forum for United States nationals is the question that must await international response.

It cannot be doubted that the test of the Act's strength lies in its execution provisions. Procedures of judgment enforcement that are both predictable and uniform would assure not only the attainment of the congressional goals behind the Act, but also the satisfaction of plaintiffs' judgments. Congress has expressed a desire to treat foreign sovereigns uniformly, yet under the Act state courts have jurisdiction to hear cases against foreign sovereigns. State law controls the procedures of judgment enforcement in those courts and also in federal courts, because of the applicability of the Federal Rules of Civil Procedure. This note argues that the jurisdictional grant to the several states is unwise, and that the use of the laws of the several states to enforce judgments does not achieve uniformity and involves, instead, unnecessary uncertainty and unpredictability.

The major defect blocking fulfillment of the congressional goals behind the Act is indeed curable. An amendment to the Foreign Sovereign Immunities Act of 1976 granting exclusive jurisdiction to the federal courts and providing a single federal execution procedure will assure the uniform treatment of foreign sovereigns in United States courts.