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Recent Developments in Anglo-American Doctrine of Foreign Sovereign Immunity

John M. Smallwood

RECENT DEVELOPMENTS IN THE ANGLO-AMERICAN DOCTRINE OF FOREIGN SOVEREIGN IMMUNITY

The flood of modern international activity has dramatically eroded earlier legal concepts. An increasingly interrelated world searches to define new legal relationships and responsibilities between parties which are not as distinct in nature nor distant in proximity as before. The development of the foreign sovereign immunity doctrine clearly reveals this evolutionary change. Recent American and British statutory formulations of the doctrine require a review of its current status and development.

The roots of foreign sovereign immunity run historically deep. Medieval princely custom and Enlightenment political theory nurtured the development of rules which govern one sovereign's treatment of another. Implicit in these rules is the principle that a sovereign's legal authority is absolute within its borders. From this, the foreign sovereign immunity doctrine emerged in the nineteenth century. Simply stated, the courts of one state would exempt from their jurisdiction a foreign sovereign and its agents when the foreigners acted in their official capacity. This doctrine enabled courts to avoid disputes involving a foreign sovereign, which usually raised troublesome political and enforcement problems. Such controversies were thus left to the Executive's diplomatic resources for solution.

Even in the doctrine's earliest form, a court confronted two analytical hurdles before it could allow the exemption. First, who is a sovereign? And second, what is an act in an official capacity? The broad nineteenth century application of the doctrine answered the second question by answering the first. In this so-called absolute formulation, identifying the sovereign was enough to qualify for jurisdictional immunity. The narrower twentieth century application of the doctrine emphasized the answer to the second question. As nations entered into an increasing array of activities, it became important to ask which activities warranted immunity. In the restrictive approach, only official acts deserved the exemption and unofficial (mostly commercial) acts did not.

Until recently, in the United States and Britain, this doctrine has been a product of the judiciary. Consequently, it has lacked the clear policy boundaries which legislation usually provides. With today's increasing volume of international activity, parties, whose dealings span national borders, need clearer indicants of the limits of judicial problem solving. Responding to this need, the U. S. Congress and the British Parliament have enacted the first comprehensive statutes which define the doctrine, the

American Foreign Sovereign Immunity Act of 1976[1] (hereinafter referred to as FSIA) and the British State Sovereign Immunity Act of 1978[2] (hereinafter referred to as SIA).

The analytical approach which follows will focus upon the two key conceptual problems in the doctrine's application, *i.e.*, the identity of the protected party and the nature of the acts included (excluded) from immunity. The second problem, which is crucial to the modern approach, often centers upon the commercial activity exception to foreign sovereign immunity. Commercial activities, being "non-official" acts of a foreign sovereign, do not warrant immunity treatment. Thus, this note will examine the parties protected and the commercial activity exception provided by the new American and British legislation. A short review of the doctrine's development will lay a framework upon which the legislative enactments can be best understood.

JUDICIAL CREATION OF FOREIGN SOVEREIGN IMMUNITY

The foreign sovereign immunity rule emerged as a binding legal doctrine in 1812. Chief Justice Marshall's opinion in *The Schooner Exchange v. M'Faddon*[3] sets forth its seminal exposition. This case arose when a French warship, formerly owned by Americans, sailed into Philadelphia. The Americans claiming ownership of the vessel attempted to attach it in District Court. The French government asserted its right to the ship by capture. Fearing disruption of its peaceful relations with France, the U.S. government intervened, requesting dismissal by arguing that the ship was in French government service. The District Court acceded and dismissed the case stating "a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of this country."[4] When the Circuit Court reversed on this issue, the case was presented to the Supreme Court.

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1. Pub. L. No. 94–583, 90 Stat. 2891, *codified in* 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602–1611; effective Jan. 19, 1977. For general analysis of the FSIA, *see* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 1 (1978); *Sovereign Immunity — Limits of Judicial Control*, 18 HARV. INT'L L. J. 429 (1977); G. DELAUME, TRANSNATIONAL CONTRACTS (Chapt. XI) (1978); and Brower, Bristline, and Loomis, *The Foreign Sovereign Immunities Act of 1976 In Practice*, 73 AM. J. INT'L L. 200 (1979).

2. 1978, c. 33; *reprinted in* 17 INT'L LEGAL MATS. 1123 (1978); effective Nov. 22, 1978. For general analysis, *see* Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979) and *A Comparative Analysis of the British State Immunity Act of 1978*, 3 B.C. INT'L & COMP. L. REV. 175 (1979).

3. 7 Cranch 116 (1812).

4. *Id.* at 120.

Writing for the Court, Chief Justice Marshall began by asserting that jurisdiction within a nation's territory is absolute. From this principle, he extrapolated his concept of immunity:

> [T]his full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[5]

Thus, two concepts underlie the immunity doctrine: the jurisdictional limits of national sovereignty and the peculiar personality of a sovereign entity. It is in the latter concept, defining the personality of the sovereign entity and its acts, that the major developments of the doctrine have occurred.

Within its territory, a nation has the discretion to apply or waive its jurisdiction. Marshall reviewed the traditional jurisdictional waivers extended to visiting sovereigns, their ambassadors and friendly foreign troops. All these had a common characteristic; all were functions of a foreign state in its public capacity. The host nation implicitly granted these waivers for reasons of respect and comity when it consented to receive official parties within its borders. Marshall formalized these traditions: "it seems . . . to be a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction."[6] Clearly distinguished from military vessels were private vessels operated for business or pleasure. Only public vessels in sovereign service embodied the sovereign and deserved the exemption.[7] Redress for an injustice caused by a foreign sovereign should be addressed through diplomatic channels, rather than the courts.[8] Thus, even in this earliest statement, the key concepts of the doctrine clearly emerge.

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5. *Id.* at 137.
6. *Id.* at 145–6.
7. *Id.* at 144.
8. *Id.* at 146.

The first British case to formalize this rule was the *Duke of Brunswick v. King of Hanover* in 1844.[9] The defendant was not only a foreign sovereign, but he was also an English Peer, who was temporarily visiting Britain. The plaintiff, also an English Peer, instituted an *in personam* suit alleging that the loss of his European lands resulted from the European actions of the King. The Lord Chancellor refused the King's request for immunity. Sustaining the King's subsequent demurrer, the court ruled that he had immunity for acts done by him as a foreign sovereign. When, however, the defendant acted as a British subject in Britain, no immunity protected him.[10] The principle justification for this lay in the difficulty of enforcement against a foreign sovereign.

These cases establish the rule's basic outline. The discretionary exemption from jurisdiction applied only to sovereigns (or their agents) acting in a public capacity. Refinements soon followed. *The Parlement Belge*[11] answered affirmatively whether the British courts would apply the rule in an *in rem* suit. A Belgian naval vessel which carried mail and private cargo operated sufficiently in a public purpose to trigger immunity. Citing the *Duke of Brunswick* and the *Schooner Exchange*, this British court applied the rule *in rem*. As governments became increasingly involved in commercial activity, the question naturally arose whether the rule applied to a government vessel which operated entirely in commerce. A British court in *The Porto Alexandre*[12] and the U.S. Supreme Court in *The Pesaro*[13] ruled in the affirmative. Both courts, citing *Parlement Belge*, found that government ownership was sufficient to raise the immunity protection, even if the vessel operated solely in a commercial manner. Both suits developed from issues arising from the commercial function of the vessels (*i.e.*, the failure to deliver cargo and the failure to pay charges).

These cases represented the "high water mark" of the foreign sovereign immunity rule. The key to jurisdictional waiver was foreign government ownership and operation of the enterprise. Once this was established, the rule barred suits without the foreign government's consent. With increasing government involvement in commerce, such an absolute rule came under much criticism for its injustice. The courts responded by modifying its application.

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9. (1844) 6 Beav. 1; *affd.* (1848) 2 HL Cas 1, 3 BILC 138.
10. *Id.* at 6 Beav. 57
11. (1880) 5 PD 197, 3 BILC 322.
12. The Porto Alexandre, (1920) P. 30, 3 BILC 350, C.A.
13. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926).

JUDICIAL RESTRICTIONS

Changing political and economic situations in the twentieth century created dissatisfaction with the foreign sovereign immunity rule in its nineteenth century absolute formulation.[14] The key change was government's deepening involvement in business and commerce. The laissez-faire myth of government and business separation crumbled with the adoption of socialist policies and with the need to protect national economies. When governments acted as private entrepreneurs, disgruntled plaintiffs questioned vigorously the sovereign right to immunity. The principal legal development which fueled the attack upon the absolute rule was the increasing assertion of individual rights against home governments.[15] Citizens were no longer content to allow their own governments to erect an immunity shield against tort and contract suits. The same arguments also applied to foreign sovereigns. These developments pressured the courts to modify the absolute rule.

American courts responded to this situation before their British counterparts. Their response, however, came in a typically judicial obscurant fashion. Upholding in theory the absolute standards of *The Schooner Exchange and The Pesaro*, the courts gave increasing deference to the Executive's policies in granting foreign sovereign immunity. The precedent of executive recommendation in such cases began with *The Schooner Exchange*. The practice became a rule in 1943 with the *Ex parte Republic of Peru*[16] in which a District Court refused to follow the State Department's request to grant immunity. In reversing the lower court, the Supreme Court ordered that courts must defer to executive determination of immunity and that "courts may not so exercise their jurisdiction . . . as to embarrass the executive arm . . . in conducting foreign relations."[17] Even if the Executive did not act in a particular case, the courts must still follow general executive policy in this matter. The decision's effect was twofold. First, it shifted the primary decision making burden away from the courts by making it an

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14. *See* Garcia-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 U. VA. L. REV. 335, 443 (1956). *See also*, Schmitthof and Wooldbridge, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the State Trading*, 2 DEN. J. INT'L. L. & POL'Y 199 (1972).

15. *See* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y. B. INT'L L. 220, 223 (xxxx): "[the opposition to absolute immunity] arise[s] to a large extent from the challenge to the prerogatives of the sovereign state which denies to the individual legal remedies for the vindication of his rights as against the state in the matter both of a contract and of tort. . . ."

16. 318 U.S. 578 (1943).

17. *Id.* at 588.

executive matter. Second, it allowed the courts to uphold the absolute rule in theory, while modifying it in practice at the direct or implied direction of the State Department. *Republic of Mexico v. Hoffman*[18] involved a vessel owned by the Mexican government but leased to a private corporation. Discerning an executive policy against granting immunity solely because of foreign government ownership, the District Court refused to allow an immunity defense. The Supreme Court affirmed, claiming it was proper to follow executive policies.

The Executive branch formally declared its adoption of a restrictive theory of foreign sovereign immunity in a 1952 letter from the State Department's Legal Advisor to the Attorney General (the "Tate Letter").[19] "The immunity of the sovereign would be recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[20] Furthermore, immunity would not be allowed for matters relating to real property (diplomatic property excluded) and to testate or intestate disposition of property.

The courts applied this new restrictive doctrine without specifically overruling the old absolute standard.[21] The adoption of this new rule shifted the emphasis on the conceptual problems facing a court. The absolute doctrine stressed sovereign identity by looking to ownership of the entity involved. The new restrictive rule emphasized the nature of the acts involved. A court not only had to determine government ownership, but it also had to distinguish public acts from private acts.

The "Tate Letter" provided no illumination on this problem. The Second Circuit in *Victory Transport Inc. v. Comisaria General* established a standard which was widely followed.[22] Using this standard, the only acts requiring immunity (*jure imperii*) were those arising from:

1. internal administration;
2. legislation;

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18. 324 U.S. 30 (1945).

19. Letter from Jack B. Tate, Acting Legal Advisor, State Department, to Philip Perlman, Acting Attorney General (May 19, 1952), 26 DEPT. OF STATE BULL. 984–985 (1952).

20. *Id.*

21. *See, e.g.*, Nat'l. City Bank of New York v. Rep. of China, 348 U.S. 356 (1955). Recently, a plurality of the Supreme Court stated, in dictum, that the old absolute rule no longer has validity. Alfred Dunhill of London, Inc. v. Rep. of Cuba, 425 U.S. 682, 700, 703, 715 (1976). As shown subsequently, the FSIA has layed the absolute rule formally to rest.

22. Victory Transport, Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965).

3. armed forces;
4. diplomatic activity; and
5. public loans; all other acts were private.[23]

When exercised, executive discretion continued to prevail.

The British courts responded much more slowly to the pressures for a restrictive approach. The absolute rule established by the *Duke of Brunswick* and *The Parlement Belge* continued to be applied for *in personam* suits[24] and *in rem* suits.[25] The judicial movement to adopt a restrictive approach began in a lonely dissent of Lord Denning in *Rahimtoola v. Nizam of Hyderabad* in 1957.[26] Lord Denning argued that immunity should only be granted depending on the nature of the conflict. Furthermore, "if the dispute concerns . . . the commercial transactions of a foreign government . . . and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."[27] Eighteen years later, Lord Denning further elucidated his belief in a restrictive approach. In *Thai-Europe Tapicoca Service Ltd. v. Govt. of Pakistan*,[28] he set out four exceptions to the immunity rule. No immunity should be granted in suits dealing with the following:

1. land in Britain;
2. services for that land;
3. trust funds in Britain; and
4. commercial transactions within British jurisdiction.[29] Although this scheme was also in a dissent, its specificity opened the gates to further developments.

Lord Denning's approach offers several interesting comparisons to the American development of the restrictive rule. Like the "Tate Letter," Denning limited the absolute rule by emphasizing the nature of sovereign acts. Since there existed no British pattern of judicial deference to the Executive, this new departure came from the bench itself. Secondly, Denning's method to distinguish public from private acts worked in the opposite manner than the American approach in *Victory Transport*. Denning defined those acts which did not warrant immunity; *Victory Transport* defined those acts which did require immunity. As described below, the

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23. *Id.* at 360.
24. *See e.g.*, Sultan of Johore v. Abubakar Tunku Aris Bendahar, (1952) 1 All ER 1261, 7 BILC 667, PC.
25. *See, e.g.*, The Arantzazu Mendi, (1939) AC 256, (1939) 1 All ER 719, 2 BILC 198, H.L.
26. (1958) AC 379, (1957) 3 All ER 441, 7 BILC 844, H.L.
27. *Id.* (1957) 3 All ER 441, at 463–4.
28. (1975) 3 All ER 961.
29. *Id.* at 965–6.

subsequent statutory approach has followed Denning's method. To state the general immunity rule and then carve out exceptions, as Denning did, allows immunity in an unforeseen situation. Considering the international ramifications of a possible suit against a foreign sovereign, this approach seems wise.

Two 1976 cases clearly established the restrictive rule in Britain. The Privy Council in *Philippe Admiral v. Wallem Shipping Ltd.* held that it would not grant immunity in an *in rem* suit against a ship owned by a foreign sovereign but operated for trading, as opposed to public, purposes.[30] This result clearly contradicted the holding in an earlier case, *The Porto Alexander*.[31] Justifying his conclusion, Lord Cross argued that the earlier case was decided wrongly and that the trend of opinion, especially in the United States, was toward a restrictive approach.[32] As an indication of this trend, Lord Cross pointed to the European Convention on State Immunity[33] which Britain signed in May 1972, but had not as yet enacted enabling legislation.

The restrictive approach finally became the British rule in *Trendtex Trading Corp. v. Central Bank of Nigeria*.[34] The case involved the attempt of Nigeria's Central Bank to renege on a letter of credit authorized for a government import purchase. In this suit on that letter of credit, the bank pleaded immunity as an agent of a foreign sovereign. The Court of Appeals, on which Lord Denning sat, refused to allow immunity. Lords Denning and Shaw found the restrictive approach to be the rule for foreign sovereign immunity. They avoided the dictates of stare decisis by ruling that the courts must follow prevailing international law unless it conflicted with an act of Parliament.[35] To distinguish an act *jure imperii* from an act *jure gestionis*, the court looked to the nature of the specific act done by the government entity. Here, issuing a letter of credit was a commercial act. No immunity was required in this case, even though the bank did serve other governmental functions.

A further judicial refinement in the restrictive rule occurred in *I Congreso del Partido*.[36] When the government of President Allende was

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30. (1976) 1 All ER 78.

31. *See supra* note 12.

32. *See* (1976) 1 All ER 78 at 95.

33. The European Convention on State Immunity, done May 16, 1972; *reprinted in* 11 INT'L LEGAL MATS. 470 (1972). The Convention entered into force on June 11, 1976; *see* 16 INT'L LEGAL MATS. 766 (1977).

34. (1977) 2 W.L.R. 356 (C.A.). *See generally* 13 TEX. INT'L L. J. 131 (1977); Higgins, *Recent developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AM. J. INT'L L. 423 (1977); 36 CAMB. L. J. 211 (1977); and 26 INT'L & COM. L. Q. 674 (1977).

35. (1977) 2 W.L.R. 356, 364–5.

36. (1978) 1 All ER 1169.

overthrown in Chile, the Cuban government decided to sever all diplomatic and commercial ties with Chile. Following a government directive, a Cuban state enterprise breached its obligation to sell sugar to a Chilean company. The Chilean owners of an undelivered sugar cargo sued *in rem* against a Cuban vessel for conversion and contract breach. The Admiralty Court accepted the restrictive rule established by the two cases mentioned above.[37] The issue was thus reduced to catagorizing the breach as a sovereign or private act. Since the breach was due to government orders, based upon foreign policy, the court concluded that these claims arose from an act *jure imperii*, and therefore the Cuban enterprise was entitled to sovereign immunity.[38]

Thus, by the mid 1970s, the British as well as the American courts had adopted the restrictive rule for foreign sovereign immunity.

LEGISLATIVE ACTION

Until a few years ago, the development of the foreign sovereign immunity doctrine lay entirely in the hands of the judicial and the executive branches of government. In the early 1970s, attempts were begun to establish the doctrine in a coherent, organized manner. The 1972 European Convention on State Immunity is the first example of this movement.[39] The U.S. Congress acted soon after by enacting the FSIA.[40] Responding to its obligation under the European Convention, the British Parliament enacted the SIA.[41]

Both the FSIA and the SIA cover a wide range of issues. Besides establishing the restrictive immunity rule, these acts define jurisdiction,[42] set down procedures of process,[43] control attachment of foreign property,[44] as well as list a variety of exceptions to the immunity rule.[45] As discussed above, the following analysis will concentrate only upon the two key conceptual issues in the foreign sovereign immunity doctrine: the identity of the protected party, and the acts excluded from immunity by the restrictive rule, particularly the commercial activity exception from immunity. The following discussion will focus upon each issue, exploring the American FSIA approach

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37. *Id.* at 1184.
38. *Id.* at 1196.
39. *See supra* note 33.
40. *See supra* note 1.
41. *See supra* note 2.
42. FSIA § 1330.
43. FSIA § 1608; SIA §§ 12 & 13.
44. FISA §§ 1610 & 1611; SIA § 13.
45. FSIA §§ 1605 & 1606; SIA §§ 2–11.

in detail, as amplified by subsequent litigation, and then contrasting that with the British SIA approach.

Protected Parties under the FSIA and SIA

The FSIA basic approach grants a defense of general immunity to all foreign states. From this general grant, the FSIA then carves out specific exceptions. Section 1604 sets forth the broad immunity grant.[46] Despite the broad language of this section, sovereign immunity remains an affirmative defense, whose burden to plead and prove rests upon the foreign state.[47]

To apply the foreign sovereign immunity rule, it must be determined whether the moving party putting forth this defense is entitled to the defense. In other words, is the party sufficiently part of or linked to a foreign sovereign to justify immunity treatment? The statutory boundaries which define the protected parties are found in § 1603. The definition of a foreign state (entitled to immunity under § 1604) includes itself, its political subdivisions and its agencies and instrumentalities.[48] Within the political subdivision category are all governmental units beneath the central government.[49]

For the vaguer concepts of agency or instrumentality, the FSIA provides three distinguishing characteristics. First, an agency or instrumentality must be a separate legal person, corporate or otherwise, created by the foreign state's law and capable of contracting and suing in its own name.[50] Second, it must either be an organ of the state or a majority of its ownership interest must be owned by the state.[51] Third, the agency or instrumentality cannot be a citizen of the United States or a creation of a third nation's law.[52] It should be noted that the last requirement excludes corporations incorporated under the law of a U.S. state and owned by a foreign state.[53]

When the party claiming immunity is a foreign corporation wholly owned by a foreign government, few analytical obstacles arise. The principal

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46. 28 U.S.C. § 1604: "Subject to existing international agreements . . . 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 . . ."

47. H. R. REP. No. 94–1487, 94th Cong., 2d Sess. 17 (1976); S. REP. No. 94–1310, 94th Cong., 2d Sess. (1976). The House and Senate Judiciary Committees adopted identical reports. Page numbers refer to the House Report. (Hereinafter referred to as Committee Reports).

48. 28 U.S.C. § 1603 (a).

49. Committee Reports 15.

50. 28 U.S.C. § 1603 (b)(1) and Committee Reports 15.

51. 28 U.S.C. § 1603 (b)(2).

52. 28 U.S.C. § 1603 (b)(3).

53. Committee Reports 15.

questions are those of proof. Two cases dealing with Libyan corporations exemplify this.[54] In *Jet Line Services v. M/V Marsa El Hariga*,[55] the plaintiff contested the defendant's assertion that it was wholly owned by the Libyan government. Since this is the threshhold question to the FSIA, the court required convincing evidence. In accepting the defendant's sovereign status, the court considered a variety of evidence including an affidavit by the Libyan attache, State Department verification of the attache's diplomatic status, Lloyd's Register of Ships and another federal case dealing with the same entity.[56]

A more serious problem lies in the assumption buried within § 1603's definitions. The foreign sovereign immunity doctrine and the FSIA embody the capitalist supposition that entities can be classified by a state vs. private dichotomy. Applying this theoretical dichotomy to socialist and "third world" structures poses problems, which have appeared in subsequent litigation. In *Edlow Intern v. Nuklearna Elektrarna Krsko*,[57] a Bermuda affiliate of a U.S. corporation sued NEK, a Yugoslav "work organization," which operated a nuclear power plant. The plaintiff sought an allegedly promised commission on a sale of nuclear fuel to NEK. Since both parties were alien corporations and diversity jurisdiction was lacking, the court turned to the FSIA to establish jurisdiction.[58] Use of the FSIA depended on whether the defendant "work organization" qualified as a foreign state under § 1603.[59]

Under the Yugoslav constitution, a "work organization" is an "independent, self managing organization of workers," whose operations are supervised by its own management alone.[60] The argument to construe such an entity as a state instrumentality views all property under a socialist system as ultimately owned by the state. The District Court in *Edlow* specifically rejected this approach. To do otherwise, the court pointed out, "would be to characterize virtually every enterprise operated under a socialist system as an instrumentality of the state."[61] The court could find no indication in the

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54. Carey v. National Oil Corp., 453 F. Supp. 1097, 1100 (S.D.N.Y. 1978); and Jet Line Services v. M/V Marsa El Hariga, 462 F. Supp. 1165, 1171–2 (D. Md. 1978).

55. 462 F. Supp. 1165 (D. Md. 1978).

56. *Id.* at 1171.

57. 441 F. Supp. 827 (D.D.C. 1977).

58. 441 F. Supp. at 831. FSIA section 28 U.S.C. 1330 (a) provides: "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state . . . as to any claim in personam . . ." The FSIA exceptions are applicable.

59. *Id.* This case reverses the usual roles in a foreign sovereign immunity dispute. Here, to avoid jurisdiction, the foreign entity argued that it did not qualify as a foreign state, while in the usual situation, it would argue that it was such.

60. 441 F. Supp. at 831.

61. *Id.*

act's legislative history that a state's system of property ownership should be determinative on the § 1603 requirements.[62] To help determine an entity's status, the court proposed its own indicators. First, the court applied a governmental function test. If the entity performed functions analogous to those performed by government in the United States, then it may qualify as a state agency.[63] Since the defendant produced electricity, a function fulfilled by private corporations in the United States, it did not meet the function test. The court also applied a control test, which looked to the extent of state control over the entity.[64] Finding that NEK's daily operations were free of direct government control, the court concluded that the defendant failed to meet § 1603 requirements to be a state agency or instrumentality.[65]

Another District Court confronted a similar problem in *Yessenin-Volpin v. Novosti Press Agency*,[66] a libel suit in which the defendant pleaded an immunity defense under the FSIA. Since Novosti was obviously a separate legal person [§ 1603 (b)(1)], and not a U.S. citizen or creature of a third nation [§ 1603 (b)(3)], the court's inquiry centered upon whether Novosti was "an organ of a foreign state . . . or a majority of [its] . . . ownership interest is owned by a foreign state . . ." [§ 1603 (b)(2)]. As the court admitted, "this definition . . . is ill-suited to concepts which exist in socialist states such as the Soviet Union."[67] Not part of the Soviet government, Novosti was an information agency for Soviet public organizations, with its own organizational structure and legal identity. The Soviet state, however, provided Novosti free use of most of its buildings, structures and equipment, even though the agency maintained its own sizable assets.[68] The issue thus reduced itself to whether the above constituted the required state ownership. Construing ownership as the right of possession and use, the court concluded that a socialist state "owns" practically every enterprise.[69] To buttress this conclusion, the court cited two facts: most of the property Novosti used was state owned and the Soviet Ambassador had certified Novosti's status as a state instrumentality. Thus, the court found that Novosti was owned by the Soviet state and was entitled to immunity.

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62. *Id.* at 832.

63. *Id.*

64. This test was borrowed from United States v. Orleans, 425 U.S. 807, 814 (1976), *quoting*, Logue v. United States, 412 U.S. 521, 528 (1973), where the Supreme Court used it to determine if a community action agency qualified as a federal agency within the Federal Tort Claims Act.

65. 441 F. Supp. at 832.

66. 443 F. Supp. 849 (S.D.N.Y. 1978).

67. *Id.* at 852.

68. *Id.*

69. *Id.* at 853–4.

These cases provide the extent of judicial analysis on this problem.[70] Problems remain. The theories in each case lead to opposite conclusions. *Edlow*'s function and control tests attempt to define a socialist reality by capitalist analogies. One must question the validity of such comparisons when each society is organized upon radically different premises. On the other hand, the *Yessenin-Volpin* approach would classify every major entity in a socialist state as an instrumentality of the state. In the end, each court accepted the view which each entity proposed. This result may reveal more about sources of information than correctness of interpretation. The foreign entity can control more easily than its opponent information about itself and the economic-political system in which it operates.[71] Although this problem is intellectually troublesome, it will arise only in a limited number of situations. For example, a foreign entity engaged in commercial activity would not have immunity protection due to the FSIA commercial activity exception.[72] In contractual situations, doubts about a party's status can be removed by a contractual waiver of immunity in the agreement.[73]

The British SIA[74] follows a similar pattern as its American counterpart. The Act begins with a general blanket of immunity for a "state," and then creates exceptions from this rule.[75] The definition of "state" in § 14(1) includes the head of state, the government of the state and any department of that state. Specifically excluded are "separate entities" which are defined as "distinct from the executive organs of the government . . . and capable of suing or being sued."[76] Thus, unlike the FSIA, the SIA does not extend

70. For other analysis of *Edlow* and *Yessenin-Volpin*, *see* 9 GA. J. INT'L & COMP. L. 111 (1979) and 12 VAND. J. TRANSNAT'L L. 165 (1979).

71. American courts often lack expertise in analyzing structures in a socialist system. The *Yessenin–Volpin* court, for example, relied principally upon a 1954 treatise and a 1963 book for its conceptual understanding of the Soviet system. One wonders if these sources remain valid in 1978.

72. *See, e.g.*, Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384 (D. Del. 1978). Here, the court simply assumed that the Polish manufacturer was a state entity, because it would not qualify for immunity anyway under the FSIA commercial activity exception.

73. 28 U.S.C. § 1605 (a)(1) allows immunity to be waived.

74. *See supra* note 2.

75. § 1 (1): "A State is immune from the jurisdiction of the courts . . . except as provided in the following provisions . . . of this act."

76. § 14 (1):

> The immunities and privileges conferred by this Part . . . apply to any foreign or commonwealth State . . .; and references to a State include references to—
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government, But not to any entity . . . which is distinct from the executive organs of the government of the State and capable of suing or being sued.

immunity to political subdivisions of a state. The act does allow the Executive to modify this.[77]

Section 14(2) allows immunity protection for certain separate entities. Two requirements are necessary. First, the judicial proceedings must relate to something done by the entity "in the exercise of sovereign authority," and second, "the circumstances are such that a State . . . would have been so immune."[78]

Problems may arise in the application of this section. Although the SIA defines separate entities as described above, it does not indicate whose law must be applied to determine if the entity is distinct from the executive organs and capable of suit. Should a British court apply British laws or foreign laws to this definition? Can foreign laws be adapted when they are derived from a noncapitalist society? Should British courts give great deference to the certification by the foreign state of its own laws? The latter path was followed in the pre-SIA case *Krajina v. The Tass Agency.*[79] Another pre-SIA case, the *Trendtex* case, reveals the difficulty in distinguishing an entity from its government.[80] Using both Nigerian law and a functional analysis, Lord Denning found it impossible to decide if the Central Bank of Nigeria was a separate entity from the Nigerian government. As noted above, Denning adopted the restrictive immunity rule and thus sidestepped this issue. The bank's commercial activities excluded it from immunity protection anyway.[81] Lord Stephenson analyzed the issue more rigorously. Ultimately, he put aside Nigerian law and used English concepts and law to distinguish the bank as a separate entity.[82] The third judge, Lord Shaw, provided no analysis but only a conclusion.[83] Despite extensive oral arguments, the *Trendtex* court could not provide a guiding way out of this problem. And neither does the SIA.

Once the meaning of a "separate entity" is determined, another problem arises. To allow immunity, a British court must then decide whether the acts were done "in exercise of sovereign authority." Nowhere in the SIA is this phrase explained. An earlier section which contrasts this phrase with

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77. § 14 (5).

78. § 14 (2): "A separate entity is immune from the jurisdiction of the courts . . . if any only if— (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State . . . would have been so immune."

79. (1949) 2 All ER 274 (C.A.). This case was cited in and followed by the *Yessenin–Volpin* court, 443 F. Supp. at 854.

80. *See supra* note 34.

81. (1977) 2 W.L.R. 356, at 371.

82. *Id.* at 374–5.

83. *Id.* at 385.

"commercial activity,"[84] introduces into the SIA the common law distinction between act *jure imperii* and *jure gestionis*. The courts are obviously left to continue their development of this concept. When non-western nations are involved, similar problems as those under the American FSIA are foreseeable.

The Commercial Activity Exception to Immunity

Section 1605 of the FSIA provides six exceptions to the general immunity rule.[85] The heart of this section, and of the act itself, lies in the commercial activity exception found in § 1605(a)(2).[86] The act precludes immunity in any case in which the action is based upon a commercial activity. Thus, the legislative approach to the restrictive rule defines what is excluded from immunity while the older common law approach often defined what was included in the immunity protection.[87]

"Commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the . . . act, rather than by reference to its purpose."[88] This general definition reflects the Congressional desire to allow the courts a great deal of freedom to determine the scope of commercial activity.[89] In assessing an activity, its purpose is irrelevant. For example, the legislative history suggests that a government contract to purchase goods for its army or to construct buildings for itself are commercial acts.[90] On the other hand, participation in a foreign

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84. § 3 (3)(c).

85. § 1605 suspends immunity for express waivers, commercial activities, expropriation situations, rights acquired by gift/succession in immoveable U.S. property, certain tort situations, and certain admiralty situations.

86. § 1605 (a):

A foreign state shall not be immune from the jurisdiction of the courts . . . in any case—

(1) . . .

(2) 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 causes a direct effect in the United States.

87. *See supra* note 22.

88. § 1603 (d).

89. Committee Reports 16.

90. *Id.*

aid program is essentially a public or governmental activity.[91] Congress revealed its most concrete guide in the Committee's discussion of a particular commercial act. "A single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction.' "[92] Extrapolating from this, any activity which could be done by a private person would constitute commercial activity. As one commentator noted, this broad definition has supplanted the narrower common law formulations.[93] Its broad sweep limits immunity possibilities to only those acts which are done exclusively by government.

Subsequent litigation has confirmed this approach. The manufacturing of a saleable item by a government entity constitutes commercial activity.[94] A less obvious example arose in *United Euram v. U.S.S.R.*,[95] in which the plaintiff, an impressario, sued a Soviet government agency, Gosconcert, for contract breach by failing to provide Soviet artists for an overseas tour. The defendant argued that the contracts were governmental, since they were made pursuant to cultural exchange agreements. The District Court disagreed for two reasons. Since the plaintiff was required to pay a fee to the defendant, Gosconcert was engaged in a sale of services. And furthermore, the purpose of the contracts was irrelevant under the § 1603(d) nature test.[96] *Behring International v. Imperial Iranian Air Force* offers another example of government actions deemed commercial activity.[97] The plaintiff, a freight forwarder, sought recovery for preparing goods for shipment by the Iranian Air Force. The District Court held that shipping goods was a commercial activity, and thus the defendant was not entitled to immunity.[98]

A recent case which held that price setting is not a commercial activity demonstrates the flexibility of the § 1603 definition and the judicial concerns in its application. In *International Association of Machinists v. O.P.E.C.*,[99] the union sought relief under the Sherman Act from O.P.E.C. fixing of crude oil prices. Reviewing the legislative history of § 1603 (d), the court concluded: "[i]f the activity is one which normally could be engaged in by a private party, it is a commercial activity . . . if the activity is one in which only a

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91. *Id.*
92. *Id.*
93. von Mehren, *supra* note 1, at 53–4. *Accord,* United Euram v. U.S.S.R., 461 F. Supp. 609, 612 (S.D.N.Y. 1978).
94. Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 396 (D. Del. 1978).
95. 461 F. Supp. 609 (S.D.N.Y. 1978).
96. *Id.* at 611.
97. 475 F. Supp. 383 (D.N.J. 1979).
98. *Id.* at 390.
99. 477 F. Supp. 553 (C.D. Cal. 1979).

sovereign can engage, the activity is noncommercial."[100] The District Court noted that the United Nations, with U.S. concurrence, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources. If governments alone can control resources, then, the court concluded that setting terms for resource extraction was a governmental activity.[101] This syllogism hinges upon the characterization of oil price setting as resource control, rather than as the sale of a commodity, which would be a commercial activity. Clearly explaining its concerns, the court set out to define commercial activity narrowly "to keep our courts away from those areas that touch very closely upon sensitive nerves of foreign countries."[102] Thus, the commercial activity definition remains a malleable commodity.

Section 1605 (a)(2) sets out three situations in which commercial activity prohibits a state from utilizing an immunity defense. The first of these is when a foreign state carries on a commercial activity in the United States. The FSIA also requires that this activity have "substantial contact" with the United States.[103] The purpose of this latter requirement is to insure that the immunity exception applies only to those transactions which have occurred "substantially" in the United States. The Congress has left the determination of the necessary degree of contact to the courts to decide.[104]

The second commercial activity situation is when an act is performed in the United States in connection with an extraterritorial commercial activity. Examples of this include acts in the United States which violate U.S. securities laws, or a wrongful discharge in the United States of an employee employed in connection with a commercial activity in a third nation.[105] The Congress specifically noted that "the act or omission in the United States are limited to those which in and of themselves are sufficient to form the basis of a cause of action."[106]

The third situation set forth in § 1605 (a)(2) is when an extraterritorial act in connection with an extraterritorial commercial activity has a "direct effect" in the United States. The Congress intended that this should be construed with the principles in the RESTATEMENT (SECOND) OF THE FOREIGN

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100. *Id.* at 566–67.

101. *Id.* at 567.

102. *Id.*

103. 28 U.S.C. § 1603 (e): "A 'commercial activity carried on in the United States by a foreign state' means commercial activity carried on by such state and having substantial contact with the United States."

104. Committee Reports 17.

105. *Id.* at 19.

106. *Id.*

RELATIONS LAW OF THE UNITED STATES § 18 (1965).[107] These require that the conduct and effect are constituent elements of the crime or tort, or that the effects are substantial, direct and foreseeable.

Of the three clauses in this section, the last one with its "direct effect" requirement has raised the most fervor in litigation. In *Carey v. National Oil Corp.*,[108] the dispute developed over several oil contracts between two Bahamian corporations and the National Oil Corporation owned by the Libyan government. The contracts and the commercial activity involved took place and were negotiated entirely outside the United States. The Bahamian corporations were, however, subsidiaries of U.S. corporations. The only conceivable immunity exception which may have been possible was the direct effect clause of § 1605 (a)(2). Based on the legislative history, the court concluded that the requirements of minimum jurisdictional contacts and adequate notice, embodied in *International Shoe Co. v. Washington*, must be read into § 1605 (a)(2).[109] Since the Libyan government had consciously sought to avoid contacts with the United States and "there has been absolutely no attempt by Libya or NOC to avail . . . of any . . . protections or privileges afforded by the U.S. . . .," the court held that not enough contacts existed to trigger the immunity exception.[110]

Several other cases have followed this same approach. *Upton v. Empire of Iran*[111] also applied the minimum contacts test to § 1605 (a)(2). This action for wrongful death and personal injury originated with the collapse of an airport terminal building roof in Iran. The plaintiffs argued that the direct effect clause barred an immunity defense. The Court could find only one effect in the United States, *i.e.*, the injuries themselves to American citizens. This was an insufficient contact to activate the immunity exception.[112] Also using this

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107. *Id. See also* the discussion of "direct effect" in 18 HARV. INT'L L. J. 439 n. 48.

108. 453 F. Supp. 1097 (S.D.N.Y. 1978).

109. *Id.* at 1101. The court cited the Committee Reports at 13 which described the FSIA personal jurisdiction section, 1330 (b). This section creates a federal long arm statute for foreign states. Like the D.C. long arm statute, after which it is modeled, the section implicity requires the minimum contact of *International Shoe*. The Committee Reports state "each of the immunity provisions . . ., sections 1605–1607, requires some connection between the lawsuit and the United States. . . . These immunity provisions, therefore prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction." From this, the *Carey* court concluded that minimum contact were implicit in § 1605 (a)(2).

110. *Id.*

111. 459 F. Supp. 264 (D.C.D.C. 1978).

112. *Id.* at 266. The court explained that the direct effect had to flow from the extraterritorial act directly to the U.S. In this case, the act (the alleged negligence) flowed indirectly through the injuries of the American citizens.

approach was *East Europe Domestic International Sales Corp. v. Terra.*[113] In this suit for wrongful interference in business, the only contacts of the defendant (a Romanian state trading company) were telex negotiations to the United States. The court analyzed each clause of § 1605 (a)(2) for the necessary minimum contacts. Unable to find enough contacts to support the immunity exception, the court dismissed the case.

In sum, the FSIA commercial activity exception to immunity requires two considerations. First, is the activity commercial? Here the courts have exhibited a good deal of flexibility. One court has held that providing artistic services for money is commercial, while another court has held that providing oil for money is noncommercial. Second, is there a nexus between the act constituting the cause of action and the United States? Here, the courts are applying the contacts tests of *International Shoe.* Although judicial leeway remains in both these considerations, the patterns of analysis are much more clear than they ever were under the common law approach.

Like the FSIA, the British SIA first spreads a blanket of immunity around foreign states and then cuts a series of exceptions from this rule. The restrictive approach to immunity is found in § 3 which excludes immunity for proceedings relating to commercial transactions. This section states:

> 3.(1) A State is not immune as respects to proceedings relating to
> (a) a commercial transaction entered into by the State; or
> (b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) fails to be performed wholly or partly in the U.K.

Unlike the American FSIA, the British act defines "commercial transaction" with a great degree of specificity. The relevent sections read:

> 3.(3)(a) any contract for the supply of goods or services;
> (3)(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such action or of any other financial obligation; and
> (3)(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in

113. 467 F. Supp. 383 (S.D.N.Y. 1979).

> which it engages otherwise than in the exercise of sovereign authority.

Notice the similarities to the FSIA. Section 3.(3)(a) implies that a "nature" test applies to contracts rather than a "purpose" test. Any contract to provide goods or services will be considered commercial regardless of its purpose. This approach follows that of the *Trendtex* case as well as the FSIA test in § 1603 (d).

On the other hand, the SIA spells out in much greater detail the kinds of activities which constitute the commercial activity exception to immunity protection. For example, § 3.3(3)(b), aimed at government-owned central banks as in the *Trendtex* case, makes almost any kind of banking transaction a commercial activity. Even the catchall section, § 3.(3)(c), containing more specificity than the FSIA, includes in commercial activity any act other "than in the exercise of sovereign authority." Although the courts have the freedom to define "sovereign authority," the section suggests that commercial activity can include even professional services.

Returning to the general rule stated in § 3.(1), any commercial transaction precludes immunity under § 3.(1)(a). Going a step further, § 3.(1)(b) denies immunity even to obligations created in the exercise of sovereign authority, if the performance must occur wholly or partly in the United Kingdom. This subsection is limited to contracts made outside the territory of the state concerned.[114] For example, a contract by nation "X" made pursuant to one of its foreign aid projects may well be in the exercise of sovereign authority, and thus immunity could act as a defense to its breach. If the agreement, however, was made to be performed in the United Kingdom, § 3.(1)(b) would not allow immunity to apply. Under the FSIA, the immunity defense would remain. Thus, the SIA reaches beyond the *imperii/gestionis* distinction of activity to deny immunity to obligations based on their place of creation and place of performance.

One final difference in scope between the SIA and the FSIA commercial activity exceptions should be noted. As mentioned above, the FSIA § 1605 (2) requires that the commercial activity be performed in the United States or have a direct effect in the United States.[115] The SIA § 3 does not make such requirements. There is no need to tie the commercial transaction to the United Kingdom, except as provided by the traditional rules of transnational jurisdiction.[116] The SIA leniency here restricts the use of the immunity defense more than in the FSIA.

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114. *Id.* at 388–9.

115. *See supra* note 86.

116. § 3 (2): "[S]ubsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law."

CONCLUSION

The foreign sovereign immunity doctrine has entered a new phase of maturity. For 150 years, American and British courts followed a similar pattern. The courts developed a broad immunity protection for foreign sovereigns, and then they slowly restricted its application to official acts. In the United States, the Executive branch of government urged the adoption of an increasingly restrictive approach to immunity protection. This may explain why the American courts accepted the restrictive rule sooner than their British counterparts.

The recent American and British legislation marks a new phase of development. Both acts have adopted the restrictive approach to immunity. Concerning the parties protected by immunity, both acts raise similar problems. The difficulty arises with organizations which are associated with governments, especially when this occurs in noncapitalist societies. Under the FSIA, the issue involves the definition of "agency and instrumentality," and under the SIA it occurs with the definition of a "separate entity." Organizations meeting these definitional requirements are entitled to immunity protection. The key questions which the courts will have to resolve are the following. Whose law should be used in meeting these definitional requirements? And, how should non-capitalist structures be interpreted within these definitions?

Both acts do not permit immunity for commercial activities of foreign sovereigns. The FSIA and the SIA adopt a nature test to distinguish a commercial activity. The test looks to the nature of the activity rather than its purpose. There are two differences between the acts which influence the scope of each act's commercial activity exception. The FSIA definition of commercial activity is much less specific than the SIA definition. Furthermore, SIA bars immunity for any contractual obligation any part of which is performed in Britain. Both of these differences make the British act's commercial activity exception more inclusive. This, in turn, restricts more narrowly the application of the immunity protection. Despite these differences, both acts establish the broad guidelines, leaving the specific applications for the courts to develop.

Further development of the doctrine will certainly continue. Activity between nations with differing economic systems and the political ramifications of potential international disputes assure careful application of foreign sovereign immunity protection. The doctrine remains an important device to adjust the dispute resolution mechanisms of national courts to controversies of an international scope.

John M. Smallwood