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The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States

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Notes

THE STATUTORY PROPOSAL TO REGULATE THE JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

I. INTRODUCTION

In January 1973, the Departments of State and Justice submitted to Congress a draft bill that defines the jurisdictional immunities of foreign states in United States courts.[1] This draft legislation[2] represents a major shift in the State Department's posture on the substantive and procedural issues of sovereign immunity that will undoubtedly stir considerable controversy within the international bar during its examination by Congress.[3]

A survey of current United States practice regarding the immunity of foreign states reveals that reform is mandatory. At present the determination whether a foreign state is entitled to jurisdictional immunity is made by the courts, whose decisions admittedly are governed by State Department "suggestions" transmitted through the

1. Department of State Release No. 321 (December 29, 1972).

2. S. 566, 93d Cong., 1st Sess. (1973); H.R. 3493, 93d Cong., 1st Sess. (1973). The bill, a Section-by-Section Analysis prepared by the drafters of the bill, and the letter of transmittal to the President of the Senate are published in 12 INT'L LEGAL MATERIALS 118-62 (1973).

3. The proposed statute is not the first attempt by the State Department to divest itself of its adjudicatory role in sovereign immunity cases. In 1969, the Office of the Legal Adviser drafted the Belman-Lowenfeld Proposal, which apparently never left the confines of the State Department. The process of changing foreign relations policy cannot be accomplished by State Department *fiat*. It is difficult enough to obtain agreement within the Department of State, but when the Departments of Justice, Defense, and Commerce must also endorse a proposal, the reasons for the failure of the Belman-Lowenfeld Proposal become apparent. For a discussion of the problems of interdepartmental clearance in changing foreign policy see the comments of Jack B. Tate, *International Law in Progress* 70 (Proc. 1st Cornell Summer Conf. on Int'l L. 1957). The present proposal, an outgrowth of the 1969 draft, is considerably more thorough and complex. *See* Belman, *New Departures in the Law of Sovereign Immunity*, 1969 PROC. AM. SOC'Y INT'L L. 182-87; Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901-03 (1969); Note, *Statutory Reforms in Claims Against Foreign States: The Belman-Lowenfeld Proposal*, 5 VAND. J. TRANSNAT'L L. 393 (1972).

Attorney General.[4] The promise of the Tate letter,[5] which announced the executive's withdrawal from the judicial process, has been undermined repeatedly by executive suggestions of immunity prompted by political exigencies. Moreover, the political considerations underlying these suggestions are not required to be disclosed and are not subject to judicial review. Even when the executive branch is silent in a particular case, the courts continue to defer to its dominant role on sovereign immunity issues by referring to the policy set forth in the Tate letter or to State Department "decisions" in past cases. Additionally, the present state of the law provides neither the foreign state nor the private claimant any assurance that a foreign state's activity falls within the scope of the Tate letter doctrine. Further, the variegated procedures for service of process and for attachment are inadequate. Even if the court assumes jurisdiction, a final judgment against the foreign sovereign may be worth nothing since the assets of a foreign state are wholly immune from execution in satisfaction of a judgment. Finally, the present arrangement is manifestly unfair to the victims of a foreign state's torts.[6] A more detailed examination of the

4. A State Department suggestion may take the form of an opinion, direction or suggestion. A "suggestion" is generally defined to mean a communication from the State Department to the Attorney General stating that a claim of immunity is "recognized and allowed" by the Department. The Attorney General then presents this communication to the court. A foreign state usually makes a request for immunity by diplomatic note to the Department of State, but may request immunity by the appearance in court of a diplomatic officer. In addition, the State Department may initiate a suggestion or may reply to a request from the court for guidance in a particular case. The procedural aspects of asserting a claim of immunity are discussed in Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court,* 67 HARV. L. REV. 608, 612-13 (1954); Moore, *The Role of the State Department in Judicial Proceedings,* 31 FORD. L. REV. 277, 279-84 (1962). These writers criticized the State Department practice of conducting ex parte hearings without notice to the parties. State Department procedure now permits written and oral argument prior to a determination, but such practice seems unnecessary because the Department is basing its decision whether to grant immunity on the status of the defendant and on foreign policy considerations; the merits of plaintiff's claims are inconsequential at this stage. In theory, however, the hearings do quiet procedural due process objections.

5. The "Tate letter" is the popular name given to a letter from Jack B. Tate, Acting Legal Adviser of the Department of State, to the Acting Attorney General, Philip B. Perlman, announcing the Department's decision to follow the restrictive theory of sovereign immunity. The letter is published as *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments,* 26 DEP'T STATE BULL. 984 (1952) [hereinafter cited as the Tate letter].

6. *See* Lowenfeld, *supra* note 3, at 901-03.

development and current practice of the doctrine of sovereign immunity is presented in Part II.

To resolve the above-described problems, the draft bill proposes a comprehensive regime that would regulate all aspects of a private suit against a foreign state, its political subdivisions, agencies and instrumentalities. First, and most significantly, the bill entirely removes the State Department from the judicial process. The Department would no longer issue suggestions at the request of a foreign sovereign or a domestic court. In determining whether to grant immunity to a foreign state, the courts would be guided solely by the statute, existing and developing American and foreign case law, and principles of international law. Secondly, the bill eliminates attachment as a jurisdictional basis for claims against foreign states and implements procedures for obtaining service of process by mail. Thirdly, the assets of a foreign state relating to its commercial activities in the United States will no longer enjoy absolute immunity from execution on adverse judgments. The particulars of the proposed statute are analyzed seriatim in Part III.

Notwithstanding the desiderata of a statutory regime governing claims against foreign states, the fundamental question raised by this particular proposal is whether it represents an unconstitutional infringement of the executive's powers over the conduct of foreign affairs. In its present form, the bill absolutely precludes executive suggestions of immunity. Part IV of this Note considers whether the executive has inherent powers in the area of foreign affairs, and, if so, whether the power to suggest immunity to the courts is a necessary incident of this power.

II. Development of the Doctrine of Sovereign Immunity in the United States

The doctrine of sovereign immunity was established in the United States in the early nineteenth century[7] and was subsequently adopted by the community of nations as a rule of international law.[8] Broadly stated, the doctrine stipulates that the courts of one state have no jurisdiction over another sovereign state. Although several theories have been advanced as the basis for sovereign immunity, it appears

7. S. Sucharitkul, State Immunities and Trading Activities in International Law 7 (1959).

8. No attempt is made in this note to digest either American or foreign case law, nor to examine foreign states' procedures in granting immunity. For a survey of the position of various countries on the question of sovereign immunity see E. Allen, The Position of Foreign States Before National

that the doctrine evolved as an amalgam of the theories of sovereign infallibility and independence, and principles of diplomatic immunity, comity, and the equality and dignity of nations.[9] In applying the doctrine, American courts consider several factors, including United States foreign policy, executive "suggestions," the nature or purpose of the foreign state's act and whether an adjudication on the merits would embarrass the executive branch of government.

This Part provides both the background and the focal point for the analysis of the proposed statute in Part III. The first subsection traces the judicial development of the doctrine of jurisdictional immunity in the United States and examines the role of the State Department in the judicial process. The immunity problems encountered by an American litigant in bringing a counterclaim, obtaining service of process, attachment and execution on a favorable judgment are discussed in separate subsections.

A. *Jurisdictional Immunity*

The classic, or absolute, formulation of sovereign immunity was first enunciated by Chief Justice Marshall in *The Schooner Exchange v. McFaddon.*[10] In that case a French warship, which had entered the port of Philadelphia to make repairs, was libeled on the grounds that it

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COURTS (1933); S. SUCHARITKUL, *supra* note 7; J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963) (Policy Research Study prepared for United States State Department); 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 553-726 (1968); García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications,* 42 VA. L. REV. 335 (1956); Harvard Draft Convention on the Codification of International Law, Part III, 26 AM. J. INT'L L. 451 (Supp. 1932) [hereinafter cited as Harvard Draft Convention]; Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* 28 BRIT. Y.B. INT'L L. 220, 250-72 (1952).

9. *See* 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW §§ 169-76 (1941); 2 D. O'CONNELL, INTERNATIONAL LAW 841-44 (2d ed. 1970). *But see* L. OPPENHEIM, INTERNATIONAL LAW § 115 (8th ed. Lauterpacht 1955): "The doctrine and practice of jurisdictional immunity of foreign States and their agencies have been variously—and often simultaneously—deduced from the principles of equality, of independence, and of dignity of State. It is doubtful whether any of these considerations supply a satisfactory basis for the doctrine of immunity. There is no obvious impairment of the rights of equality, or independence, or dignity of a State if it is subjected to ordinary judicial processes within the territory of a foreign state—in particular if that State, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it." (Footnotes ommitted.)

10. 11 U.S. (7 Cranch) 116 (1812).

had been seized from its private American owners on the open seas by the French Navy and then converted into a warship. Noting that in the absence of precedent the Court was exploring "an unbeaten path,"[11] the Chief Justice nonetheless clearly stated that the jurisdiction of the United States within its own territory was exclusive, absolute and subject to no limitation by any external source without the consent of the federal government. The Court explained, however, that this "perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction . . . ."[12] Thus concepts of comity and equality of states, coupled with the international custom of exempting visiting warships from the host state's jurisdiction,[13] were found to be ample grounds for dismissing the libel.[14]

The next significant United States decision on sovereign immunity was handed down over one-hundred years later. In *Berizzi Brothers Co. v. S.S. Pesaro*,[15] a vessel owned by the Italian Government was libeled in rem for breach of a contract to deliver goods. The Italian Ambassador appeared before the district court and stated that the vessel was owned, possessed and operated by and in the service of the Italian Government and, therefore, was immune from jurisdiction of United States courts. The parties agreed on the facts of ownership and operation, but stipulated that the vessel was not connected with military forces, but rather was employed in the carriage of goods between Italian ports and ports of other countries in the interest of the entire Italian nation, as distinguished from any individual or group. The Department of State advised the Italian Ambassador that it would not suggest immunity because the vessel was engaged in commerce. The State Department's position was transmitted to the Supreme Court, but the Attorney General disagreed with the new policy and refused to convey the State Department's suggestion that

11. 11 U.S. at 136.

12. 11 U.S. at 136 (footnote omitted).

13. 11 U.S. at 145.

14. In *The Exchange,* the executive department filed a suggestion with the court stating that regardless of whether the vessel had been unlawfully seized from the American owners, the vessel was now under the control of the Emperor of France and entitled to immunity. It is not clear from the opinion to what extent the suggestion affected the decision to grant immunity.

15. 271 U.S. 562 (1926).

immunity be denied to the Court.[16] The Court granted immunity on grounds that the ship was held by the Italian Government, served a public purpose by advancing the economic welfare of the nation, and, therefore, was as entitled to immunity as a vessel of war.[17] The significance of the *Pesaro* case is twofold: First, it marks the only instance during the development of the doctrine of sovereign immunity in which the Supreme Court has refused to follow a State Department suggestion. Secondly, it perpetuated the absolute theory

16. During this period, the United States Government owned the United States Merchant Navy. The State Department had instructed embassies abroad to inform the governments to which they were accredited that the United States would no longer claim immunity for government-owned vessels engaged in commercial activity. 2 G. HACKWORTH, *supra* note 9, at 429-30, 439-46. This posture created the climate for the Department's decision to require equal treatment for foreign state-owned vessels conducting commercial activities in the United States. The Attorney General disagreed with this policy because it subjected his office to increased litigation responsibilities abroad. The refusal to suggest immunity to the court was an attempt to preserve the absolute theory so that the Justice Department could plead immunity in foreign courts on a basis of reciprocity, notwithstanding the State Department's announced policy. Fensterwald, *United States Policies Toward State Trading,* 24 L. CONTEMP. PROB. 369, 387-93 (1959). The drafting of the proposed legislation discussed herein signifies, perhaps, an even greater shift in attitude for the Department of Justice than for the Department of State. For example, during the ten years between 1948 and 1958, the State Department negotiated some fourteen treaties containing provisions obligating each contracting party to waive immunity for state-controlled enterprises engaged in business activities within the territories of the other. The inclusion of such provisions was discontinued in 1958 at the insistence of the Department of Justice, which claimed that this practice made defenses of immunity untenable in foreign courts where the United States was the defendant. Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties,* 1961 PROC. AM. SOC'Y INT'L L. 89; Timberg, *Expropriation Measures and State Trading,* 1961 PROC. AM. SOC'Y INT'L L. 113, 114-15.

17. The Court noted that at the time *The Exchange* was decided no government operated merchant vessels and that this fact explained why the Court did not then examine this point. After quoting extensively from *The Exchange,* the Court concluded that the earlier decision "cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the absence of a treaty or statute of the United States evincing a different purpose. . . .

"We think the principles are applicable to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires,

of sovereign immunity in the United States at a time when most of our trading partners were adopting the restrictive theory of immunity.[18]

The Supreme Court again encountered the question of immunity of a state-owned commercial vessel in *Ex parte Republic of Peru.*[19] The Peruvian vessel had been libeled in rem for breach of a contract to carry sugar. The Republic of Peru communicated with the State Department and requested immunity. Although the Department of Justice, at the request of the State Department, filed a suggestion of immunity with the district court, Peru's claim of immunity was dismissed on the ground that immunity had been waived by a general appearance.[20] The Supreme Court reversed and held that "the judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune."[21] The Department of State's suggestion, which the Court had completely disregarded only a few years earlier, had now become the controlling element. While the executive suggestion in *Peru* conformed to the Court's holding in *Pesaro*, the Court announced in *Peru* its willingness to adhere to determinations by the executive branch and based its decision on this ground rather than on the *Pesaro* case.

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mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are." Berrizzi Bros. Co. v. Pesaro, 271 U.S. 562, 574 (1926).

Note, however, District Attorney Dallas' suggestion in *The Exchange* that if a foreign sovereign were to "descend from the throne and become a merchant . . . contract private debts . . . charter a vessel" he would submit to the law of the host country and lose the immunity of sovereignty. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 123 (1812).

18. *See, e.g.,* International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels (Brussels Convention), April 10, 1926, 176 U.N.T.S. 199 (the United States is not a party to this multinational agreement to subject state-owned commercial vessels to the same jurisdictional standards as private vessels).

19. 318 U.S. 578 (1943).

20. The Ucayali, 47 F. Supp. 203 (E.D. La. 1942). The district court held that Peru, by taking the testimony of the ship's master for use at trial and by motions for extension of time for filing defenses to the libel, had acted inconsistent with a special appearance to contest the court's jurisdiction.

21. 381 U.S. at 588. Moreover, the Court found that the State Department's determination of immunity "must be accepted by the courts as a *conclusive* determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations." 318 U.S. at 589 (emphasis added).

Two years later, in *Republic of Mexico v. Hoffman*,[22] the issue before the Court was whether to allow immunity to a merchant vessel solely because it was owned, though not possessed, by a friendly foreign government. Following a collision in Mexican waters, the foreign vessel was libeled in California for damages to libelant's vessel. The Mexican Ambassador filed a suggestion in the district court that the vessel was owned and in the possession of the Republic of Mexico and was entitled to immunity from suit. The State Department took no position on the assertion of immunity[23] and the district court, finding that the Mexican Government neither operated nor possessed the vessel, refused to recognize immunity.[24] In affirming the district court's decision, the Supreme Court enlarged its reliance on the determinations of the executive department and announced its future policy of avoiding embarrassment to the political branches.[25] Henceforth, the courts would be bound by State Department suggestions, and in the event that the Department were silent in a particular case, the courts would decide in accordance with the Department's

22. 324 U.S. 30 (1945).

23. The State Department's communication to the district court merely directed the court's attention to two prior immunity cases dealing with the "possession" issue. In the first case, *Ervin v. Quintanilla,* 99 F.2d 935 (5th Cir. 1938), *cert. denied,* 306 U.S. 635 (1939), the court had allowed immunity because the vessel was in the possession and service of the Mexican Government at the time of seizure. In the second case, Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938), the State Department refused to recognize the claim of immunity by the Spanish Government because it was not proved that the vessel was either in the possession or the service of the government.

24. The Baja California, 45 F. Supp. 519 (S.D. Cal. 1942), *aff'd,* Republic of Mexico v. Hoffman, 143 F.2d 854 (9th Cir. 1944).

25. "In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist. That is to say, it is for them to decide whether the vessel when seized was that of a foreign government and was of a character and operated under conditions entitling it to the immunity in conformity to the principles accepted by the department of the government charged with the conduct of our foreign relations. . . .

"Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. . . ." 324 U.S. at 34-35.

pronouncements in other cases.[26] The thrust of the *Hoffman* decision, then, is that the doctrine of sovereign immunity is a "political question" more properly resolved by judicial deference to the executive.[27]

In 1952, the State Department announced, in the now famous "Tate letter,"[28] that it had completed a study of sovereign immunity in the international community and that henceforth the Department would follow the more current restrictive theory of immunity.[29] According to the restrictive theory, the sovereign or public acts *(jure imperii)* of a state continue to enjoy complete immunity from suit in United States courts, but acts of a private or commercial nature *(jure gestionis)* are treated as those of any foreign commercial enterprise. The Tate letter declared that the Department of State "realized that a

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26. "It 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." 324 U.S. at 35 (footnote omitted). Justice Frankfurter stated in a concurring opinion: "[C]ourts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when 'the department of the government charged with the conduct of our foreign relations,' or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies." 324 U.S. at 41-42.

27. "It must be recognized that primarily the claim by a foreign sovereign of immunity from suit or process presents a political rather than a juridical question." New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 686 (S.D.N.Y. 1955). The "political question" doctrine and its correlation with sovereign immunity is discussed notes 124-27 *infra* and accompanying text. Commenting on the *Hoffman* decision, Judge Jessup has reasoned that the courts should assume jurisdiction according to their own rules of law and adjudicate the cases on the merits. Then, if the sovereign were displeased with the decision, it could negotiate with the executive branch through normal diplomatic channels. Jessup believes that the State Department should be consulted only as to the factual question of status; immunity presents a legal question which should be left wholly to the courts. Jessup, *Has the Supreme Court Abdicated One of its Functions?*, 40 AM. J. INT'L L. 168 (1946).

28. Note 6 *supra.*

29. It was clear by this time that the majority of nations had changed, or were in the process of changing, from the absolute to the restrictive theory of immunity. Thus the purposes of the Tate letter were to align United States policy with the policy of its trading partners and to ensure that foreign states received the same treatment in domestic courts that the United States received in foreign courts. J. SWEENEY, *supra* note 8; Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 95 (1953).

shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[30] It is noteworthy indeed that in less than three decades the executive department had risen from a posture subservient to the will of the courts to a position of formulating and directing national policy on the sovereign immunity question.[31]

Although the Tate letter gave the judiciary the criteria to be applied in future cases in which a foreign state claims immunity, it failed to define the standards adopted.[32] Nor has it succeeded in removing the executive branch from the judicial process.[33] In fact, while the courts

30. Tate letter, *supra* note 5, at 985.

31. "The practical effect of the Tate letter has been to make the *Pesaro* decision a dead letter . . . ." Timberg, *supra* note 16, at 114. *See* 60 MICH. L. REV. 1142 (1962). But note that the *Pesaro* decision has not been overruled, nor has the Supreme Court ever applied the restrictive theory of sovereign immunity. The Tate letter was cited with approval, however, in *National City Bank v. Republic of China,* 348 U.S. 356, 364 (1955).

32. "[T]he 'Tate letter' offers no guide-lines or criteria for differentiating between a sovereign's private and public acts. Nor have the courts or commentators suggested any satisfactory test. Some have looked to the nature of the transaction, categorizing as sovereign acts only activity which could not be performed by individuals. While this criterion is relatively easy to apply, it ofttimes produces rather astonishing results, such as the holdings of some European courts that purchases of bullets or shoes for the army, the erection of fortification for defense, or the rental of a house for an embassy, are private acts. . . . Others have looked to the purpose of the transaction, categorizing as *jure imperii* all activities in which the object of performance is public in character. But this test is even more unsatisfactory, for conceptually the modern sovereign always acts for a public purpose. . . . Functionally the criterion is purely arbitrary and necessarily involves the court in projecting personal notions about the proper realm of state functioning." Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359 (2d Cir. 1964) (citations and footnotes omitted). The Second Circuit then postulated the following categories of sovereign acts for which immunity would be granted by the court in the event the State Department was silent or refused to allow immunity: "(1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans." 336 F.2d at 360. These criteria were not entirely novel, but the case is the benchmark of judicial attempts to establish some bases for decision. *See* Lalive, *L'Immunité de Juridiction des Etats et des Organisations Internationales,* 84 RECUEIL DES COURS 205, 285-86 (1953); Belman, *supra* note 3, at 183-84; Lauterpacht, *supra* note 8, at 236-39.

33. "Ironically, while the shift in executive policy was designed to free the courts to adjudicate actions against foreign sovereigns, it also has had the effect of

struggle with the uncertainties of the Tate letter, the executive department freely departs from its announced policy when it determines that political and foreign relations considerations are of overriding importance.[34] For example, in *Rich v. Naviera Vacuba, S.A.*,[35] a Cuban-owned ship under the control of a defecting crew entered a United States port the day after the Castro government had released a hijacked American commercial aircraft. American claimants immediately filed libels against the vessel and its cargo.[36] Cuba had explicitly waived its immunity to jurisdiction and execution on the judgment in an earlier state court case[37] and the vessel was clearly employed by Cuba in a commercial activity. Nonetheless, the State Department filed a suggestion of immunity with the district court. In affirming the district court's dismissal of the suit, the Court of Appeals for the Fourth Circuit stated: "[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry."[38] In the

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making the judiciary even more dependent upon the suggestion by the Department of State." R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT 15 (1965). *See* Belman, *supra* note 3, at 184; Leigh, *New Departures in the Law of Sovereign Immunity,* 1969 PROC. AM. SOC'Y INT'L L. 187.

34. *See* Isbrandtsen Tankers Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied,* 385 U.S. 822 (1966).

35. 295 F.2d 24 (4th Cir. 1961), *aff'g* 197 F. Supp. 710 (E.D. Va. 1961). This case and the ramifications of the court's decision are discussed extensively in R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER 145-58 (1964); R. LILLICH, *supra* note 33, at 15-44; Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?,* 48 CORNELL L. REV. 461, 468-82 (1963).

36. Two longshoremen sued to recover an outstanding judgment granted by United States courts against the Republic of Cuba and Naviera Vacuba, the former owner of the nationalized vessel. A second libel was filed by a judgment creditor who had recovered the judgment in a Louisiana court by consent of Cuba. The United Fruit Sugar Company also filed a libel against the sugar cargo, which it claimed was confiscated without compensation by the Cuban Government. Libel for wages was also filed by the defecting master and crew. 295 F.2d at 25.

37. Mayan Lines, S.A. had obtained a $500,000 judgment against the Republic of Cuba in a Louisiana court. The Cuban government had specifically waived immunity in that case both with respect to the adjudication of liability and to the enforcement of the judgment by execution. 295 F.2d at 25.

38. 295 F.2d at 26. In addition, the Fourth Circuit stated: "We think that the doctrine of the separation of powers under our Constitution requires us to assume

final analysis, therefore, the Tate letter has not accomplished intransigent application of the restrictive theory of sovereign immunity by American courts, nor has it provided private litigants with even a modicum of certainty that their claims will be heard in suits against foreign states.[39] In sum, when the executive department determines that recognition of sovereign immunity is required for harmonization of relations with a foreign state, the plaintiff's claim and the Tate letter doctrine are sacrificed to the exigencies of international affairs.

B. *Immunity from Set-Off and Counterclaim*

A foreign sovereign bringing suit in a United States court implicitly subjects itself to the jurisdiction and rules of procedure of the forum.[40] Moreover, it is now settled in the United States that a foreign sovereign seeking the assistance of domestic courts on its claims is liable for defendant's set-offs and counterclaims based on the subject matter of the foreign sovereign's suit,[41] as well as for those which are unrelated to the original cause of action.[42] In the leading case of *National City Bank v. Republic of China*,[43] the Chinese Government brought suit against defendant bank to recover 200,000 dollars deposited by an agency of the government. Defendant asserted

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that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion." 295 F.2d at 26.

39. The political background of the *Rich* case tends to absolve the executive department from claims of usurpation. The agreement by Cuba to return the aircraft, however, was not conditioned upon the return of the vessel in the *Rich* case, but upon the promise of the United States to release a Cuban patrol boat. The correspondence between the United States and Cuba appears in 45 DEP'T STATE BULL. 407-08 (1961). The State Department's decision to suggest immunity for the Cuban vessel was far-sighted diplomacy which bore fruit in future hijacking of American airliners. *See* 1 A. CHAYES, T. EHRLICH & A. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE 87-111 (1968); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 554 (1968); Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607 (1962); note 36 *supra*.

40. Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938); The Secundus, 15 F.2d 713 (E.D.N.Y. 1926). *See generally* S. SUCHARITKUL, *supra* note 7, at 352-54.

41. Republic of China v. American Express Co., 195 F.2d 230, 233 (2d Cir. 1952); Hungarian People's Republic v. Cecil Associates, Inc., 118 F. Supp. 954, 957 (S.D.N.Y. 1953); French Republic v. Inland Navigation Co., 263 F. 410, 411 (E.D. Mo. 1920).

42. *See* note 44 *infra* and accompanying text; Annot., 99 L. Ed. 403 (1955).

43. 348 U.S. 356 (1955).

two counterclaims based on defaulted treasury notes of the Republic of China owned by the bank and sought an affirmative judgment of 1,634,432 dollars. The lower courts had dismissed the counterclaims on the ground of sovereign immunity because the counterclaims were not based on the subject matter of plaintiff's suit[44] and had refused to allow defendant to amend the counterclaims by denominating them set-offs. The Supreme Court reversed, finding that the same policy considerations of "fair play" apply regardless of whether the counterclaim or set-off is based on the subject matter or transaction out of which the suit arose.[45]

The *Republic of China* decision left unresolved the problem of distinguishing between acts *jure imperii*[46] and acts *jure gestionis*, and the question of bringing affirmative counterclaims in which the amount claimed by the defendant exceeds that sought by the foreign sovereign.[47] These questions, however, pose no difficulty under the restrictive theory of immunity and the Federal Rules of Civil Procedure. Since a foreign state waives its immunity when it initiates a suit in a United States court, the defendant cannot be stripped of his defenses by a claim of sovereign immunity, even when the state's claim is based on a sovereign or public act. In such cases, a counterclaim should be permitted, but only to the extent of the original claim because the state would not otherwise be liable under

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44. Republic of China v. National City Bank, 208 F.2d 627 (2d Cir. 1953), *aff'g* 108 F. Supp. 766 (S.D.N.Y. 1952). The Department of State gave the courts no indication that allowance of the counterclaims would be detrimental to the foreign relations policies of the United States with respect to China. 348 U.S. at 364.

45. "[T]he limitation of 'based on the subject matter' is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity." 348 U.S. at 364-65.

46. *See* notes 29-31 *supra* and accompanying text. The Republic of China did argue that the counterclaim was based on a public debt which would fall within the immune category of the Tate letter. The Court, however, offhandedly dismissed this plea: "This is not to be denied, but it is beside the point." 348 U.S. at 364.

47. This question was not before the court because defendant had amended its complaint and sought only a set-off. The traditional United States rule prohibits affirmative counterclaims against a foreign state. *See, e.g., In re* Patterson-MacDonald Shipbuilding Co., 293 F. 192 (9th Cir.), *cert. denied,* 264 U.S. 582 (1923); French Republic v. Inland Navigation Co. 263 F. 410, 412 (E.D. Mo. 1920); Hungarian People's Republic v. Cecil Associates, Inc., 118 F. Supp. 954, 958 (S.D.N.Y. 1953). In admiralty cases affirmative counterclaims have always been permitted. *See, e.g.,* United States v. Norwegian Barque "Thekla," 266 U.S. 328 (1924), *aff'g* The Gloria, 286 F. 188 (S.D.N.Y. 1923).

the restrictive theory of immunity. When the foreign state commences a suit based on a private or commercial act, however, an affirmative counterclaim should not be denied. In these cases, the question is not whether the counterclaim is related to the cause of action, but whether the foreign state could be sued independently under the restrictive theory. If the sovereign would be liable independently of its own private claim, the better approach would be to allow the defendant's affirmative counterclaim for reasons of fairness, convenience and judicial economy.[48]

C. *Commencement of Suit Against a Foreign Sovereign*

Acquisition of personal jurisdiction over a foreign sovereign, its agencies or instrumentalities, presents an obstacle for an American plaintiff, even though United States courts clearly have subject matter jurisdiction under the restrictive theory of sovereign immunity.[49] Attempts to acquire in personam jurisdiction over a foreign sovereign by

48. The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 70(2) (1965) [hereinafter cited as RESTATEMENT OF FOREIGN RELATIONS LAW does not support this view: "(2) A state initiating proceedings in a court of another state is not immune from (a) a counterclaim to the extent that it does not exceed the amount of the state's claims, or (b) a counterclaim, regardless of amount, arising from the same subject matter as the state's claim." Neither the text nor the comments of the *Restatement* mention the private versus public acts distinction, even though § 69 adopts the restrictive theory of sovereign immunity. Consequently, under the *Restatement* view, all that need be satisfied for an affirmative counterclaim is that it be based on the same subject matter as the state's claim. The Reporter's Notes, however, cite to a state court decision which supports either § 70(2) (b) or the view expressed in text preceeding this note. *See* Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960).

49. *See* New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (1955) (foreign state's bank accounts held immune from attachment in aid of jurisdiction on suggestion of State Department, even though defendant probably would not have been entitled to immunity if court had heard case on merits of plaintiff's claim). State Department practice on this issue, however, has since been modified. *See generally* Collins, *The Effectiveness of the Restrictive Theory of Sovereign Immunity*, 4 COLUM. J. TRANSNAT'L L. 119, 125-36 (1955).

50. Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y.), *aff'd sub nom.* Clay v. Dominion of Canada, 238 F.2d 400 (2d Cir. 1956), *cert. denied*, 353 U.S. 936 (1957); *see* Vienna Convention on Consular Relations, April 24, 1963, U.N. Doc. A/CONF.25/12, in 57 AM. J. INT'L L. 995 (1963) (ratified by the United States on November 24, 1969).

service of process on consular[50] and diplomatic officers[51] have been uniformally held invalid.[52]

Attachment in rem of a foreign sovereign's assets has been the most successful method of acquiring jurisdiction, particularly in admiralty cases.[53] Even after adoption of the restrictive theory of sovereign immunity, however, the Department of State continued to suggest immunity in cases in which a foreign state's nonmaritime assets, such as bank accounts, were attached. This policy now has been reversed, and unless the State Department suggests immunity[55] the courts may permit attachment,[56] particularly if the account is not used for

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51. Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965) (the Department of State, replying to a request of the court, opined that service on the Tunesian Ambassador would prejudice United States foreign relations and probably would impair performance of diplomatic functions). *See* Vienna Convention on Diplomatic Relations, April 18, 1961, U.N. Doc. A/CONF. 20/13 (1961), in 55 AM. J. INT'L L. 1064 (1961).

52. Moreover, service of process on ambassadors and public ministers of a foreign sovereign is subject to criminal penalty. 22 U.S.C. §§ 252-53 (1970). If suit were to be brought against a commercial enterprise of a foreign state operating within the United States, chances are greater that a plaintiff would be able to locate and serve process on a manager or business agent who would not be considered immune. In such cases the Federal Rules of Civil Procedure may be employed. *See generally* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966); H. STEINER & D. VAGTS, *supra* note 39, at 578-79.

53. *See, e.g.,* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Republic of Peru, 318 U.S. at 578 (1943); Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). In cases in which a ship is attached for purposes of acquiring jurisdiction in a nonmaritime cause of action, however, the suit may be dismissed for want of admiralty jurisdiction. American Hawaiian Ventures, Inc. v. M.V.J. Latuharhary, 257 F. Supp. 622 (D.N.J. 1966).

54. New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (1955).

55. Hellenic Lines, Ltd. v. Embassy of South Vietnam, 275 F. Supp. 860 (S.D.N.Y. 1967) (mem.) (court deferred to a State Department communication suggesting both immunity from attachment of foreign state's bank account and immunity from suit).

56. *See* note 50 *supra.* In Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959), the State Department modified its view and in a letter submitted to the court stated that execution on a foreign sovereign's assets in satisfaction of a judgment was violative of international law, but attachment for purposes of obtaining jurisdiction need not in all cases be prohibited. The letter is reproduced in 54 AM. J. INT'L L. 643 (1960). *See* Three Stars Trading Co. v. Republic of Cuba, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct.

"purely governmental" purposes.[57]

Under present law, service of process abroad or service by mail on a foreign state is not sufficient to confer jurisdiction on a United States court.[58] In two recent Second Circuit decisions, however, extraterritorial service was upheld for purposes of informing the foreign sovereign of the commencement of proceedings when personal jurisdiction was deemed to have been obtained by agreement to arbitrate in the United States.[59]

The current procedural ambiguities have been criticized on the grounds that present domestic concepts of jurisdiction are sufficient to confer personal jurisdiction over a foreign state's commercial activities in the United States. Moreover, permitting attachment of a foreign state's assets during the period of litigation can be a source of financial and political embarrassment to the foreign state and might seriously aggravate foreign relations with that nation.[60]

1961) (attachment of debts owed by American citizens to Cuban Government permitted for purposes of obtaining quasi in rem jurisdiction); 6 M. WHITEMAN, *supra* note 8, at 686-95; Lowenfeld, *supra* note 6, at 921-26.

57. Harris & Co. Advertising, Inc. v. Republic of Cuba, 127 So.2d 687 (Fla. D. Ct. App. 1961) (attachment in aid of jurisdiction permitted when plaintiff attached chattels of garnished debts owed to Cuba that were not "directly related" to activities of public or sovereign nature); *cf.* Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964); Three Stars Trading Co. v. Republic of Cuba, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961); Lowenfeld, *supra* note 6, at 923-24.

58. Purdy Co. v. Argentina, 333 F.2d 95 (7th Cir. 1964), *cert. denied,* 379 U.S. 962 (1965) (service abroad by mail in accordance with Federal Rules of Civil Procedure and the state's long-arm statute held insufficient to establish jurisdiction).

59. In Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965), service of a petition to arbitrate under the United States Arbitration Act, 9 U.S.C. § 4 (1970), was effected by registered mail at the Madrid office of defendant. The method of service was held sufficient to give notice and not violative of due process because defendant was deemed to have consented to the jurisdiction of the court by agreeing to arbitrate in New York. "[W]e see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation. . . . Implicit in the agreement to arbitrate is consent to enforcement of that agreement." 336 F.2d at 363-64. To the same effect is the decision in Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966).

60. Belman, *supra* note 3, at 184; Leigh, *supra* note 33, at 188-90.

D. *Execution in Satisfaction of a Judgment*

If the plaintiff is able to obtain jurisdiction over the foreign sovereign, and *if* his claim is adjudicated by "permission" of the Department of State, and *if* he is awarded a judgment against the foreign sovereign, his efforts will have been for naught if the foreign state refuses to pay the amount awarded.[61] The United States still adheres to the absolute theory of sovereign immunity regarding execution on assets of foreign states located within this country.[62] Thus, even if the plaintiff had acquired jurisdiction by attachment, the attached assets cannot be utilized to satisfy the judgment and must be released.[63] Moreover, a waiver of immunity has

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61. Fortunately, it is an uncommon occurrence for a state to refuse to satisfy a final judgment rendered against it. Most nations possessing commercial assets in the United States desire reciprocal treatment for their nationals and realize the benefits to be gained in maintaining good diplomatic and commercial relations with this country. Lowenfeld, *supra* note 6, at 928-29.

62. *See* Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception,* in ESSAYS ON INTERNATIONAL JURISDICTION 40, 53-57 (1961). The Tate letter was silent on the question of execution, but the State Department's view was communicated to the courts in the case of Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1085, 192 N.Y.S.2d 469 (Sup. Ct. 1959). The Department's letter is not published in the opinion, but may be examined in 6 M. WHITEMAN, supra note 8, at 709-12. The letter states in part: "The Department has always recognized the distinction 'immunity from jurisdiction' and 'immunity from execution'. The Department has maintained the view that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit.

"As you will recall there is precedent for not permitting execution of judgment obtained in a proceeding when the foreign sovereign has consented to suit. *Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyvelsen,* 43 F.2d 705 (2d Cir., 1930); followed in *Bradford v. Chase National Bank,* 24 F. Supp. 23, 38 (D.C.S.D.N.Y. 1938). Where the foreign sovereign has not submitted to the jurisdiction of the court it would be an *a fortiori* case." A similar State Department letter was filed with the court in Stephen v. Zivnostenska Banka, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961), but the court held that the suggestion that the foreign state was immune from execution was inapposite to the assets of defendant bank, which was an independent jural entity, separate from the foreign state government.

63. The letter cited in note 62 *supra* continued: "The Department is of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for purpose of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment ensuing from the suit

been construed not to constitute an expression of consent to execution on an adverse judgment.[64]

One reason for this anomalous policy on execution is that both the federal government and the state governments are deemed immune from execution of judgments of United States citizens.[65] Consequently, it would be both improvident and detrimental to international relations for American courts to subject foreign sovereigns to more rigorous treatment than the domestic sovereign. An additional reason is the very serious nature of an execution and sale of a foreign government's property in satisfaction of a judgment.[66] For a domestic court to make such a decision unilaterally could have a dramatic effect on the executive's conduct of foreign affairs, notwithstanding the executive's refusal to suggest jurisdictional immunity in the same case. In short, the present state of the law requires that the plaintiff take his unsatisfied judgment to courts of the foreign state or request that the Department of State make a diplomatic claim against the foreign state in his behalf.[67]

...." The RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965) states: "Caveat: The Institute expresses no opinion as to whether property of a foreign state connected with a commercial activity of the state may be subjected to execution in satisfaction of a judgment otherwise than as stated in this Section." The Reporter's Notes to § 69 of the *Restatement* indicate that the State Department's views cannot be regarded as a prevailing rule of international law. For purposes of execution many states now distinguish between property connected with private acts and public acts and accord immunity only to the latter. *See* García-Mora, *supra* note 8, at 359; Lauterpacht, *supra* note 8, at 242-43; Leigh, *supra* note 33, at 189-93.

64. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930). The judgment against Sweden in this case was eventually settled by diplomatic claim. *See* Kuhn, *Immunity of the Property of Foreign States Against Execution,* 28 AM. J. INT'L L. 119 (1934). *But see* Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964) in absence of any statement from Department of State, general appearance by foreign sovereign without reservation of any claim of immunity manifested both its consent to suit and consent to an execution on the judgment).

65. *Cf.* Glidden Co. v. Zdanok, 370 U.S. 530 (1962). For a discussion on this point see Lowenfeld, *supra* note 6, at 927-29.

66. Although writers often criticize the doctrine of absolute immunity with respect to executions, it is nowhere suggested that state property used for purely governmental purposes, such as warships and embassy property, be levied on to satisfy a judgment. *See, e.g.,* S. SUCHARITKUL, *supra* note 7, at 347-48; Lauterpacht, *supra* note 8, at 243.

67. Recovery by diplomatic claim is at best slow—at worst, the Department may not take up the claim at all. *See* Fensterwald, *Sovereign Immunity and Soviet*

III. THE PROPOSED STATUTE: A SECTION-BY-SECTION ANALYSIS

This Part examines seriatim each section of the proposed statute, "Jurisdictional Immunities of Foreign States." According to John R. Stevenson, Legal Adviser of the Department of State, the proposed statute culminates four years of research and drafting and "reflects the most modern thinking on the law governing when foreign states should be subject to the jurisdiction of United States courts."[68] The stated purpose of the bill is to allay the criticism of the international bar relating to the present inadequate and confused practice in sovereign immunity cases. Thus the statute incorporates significant changes in United States law in matters relating to jurisdiction, attachment, service of process and execution. Furthermore, the drafters of the bill have announced that if the proposed statute is enacted the Department of State will seek a declaration that the United States accepts the compulsory jurisdiction of the International Court of Justice, on condition of reciprocity, with respect to disputes concerning the immunity of foreign states.[69]

A. *Guiding Principles*

The first section (§ 1602) of the proposed legislation announces the principles that are to guide the courts in future cases involving sovereign immunity questions. First, the bill assumes that the interests of justice and of the parties will be served best by the determination of a claim of state immunity by the judicial branch of government. The bill does not provide procedures for executive department intervention in the judicial process. State Department foreclosure from sovereign immunity cases undoubtedly will become the focal point for controversy on the bill because of the ramifications on the executive's conduct of foreign affairs.[70] Secondly, the proposed

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State Trading, 63 HARV. L. REV. 614, 622-23 (1950). A provocative alternative to this procedure, suggested by NATO and Status of Forces Agreements, is that the United States indemnify the successful plaintiff. The costs for such a program could be allocated to governmental expense for the maintenance of friendly foreign relations. Lauterpacht, *supra* note 8, at 243; 5 VAND. J. TRANSNAT'L L. 264, 268-72 (1971).

68. *See* note 1 *supra.*

69. Letter from the Departments of State and Justice to the President of the Senate, January 22, 1973. The letter is reproduced in 12 INT'L LEGAL MATERIALS 118, 121-22 (1973). This proposal runs headlong into the "Connolly Reservation," 15 DEP'T STATE BULL. 452-53 (1946). The problem raised by this proposal is not within the scope of this topic.

70. *See* notes 142-71 *infra* and accompanying text.

statute adopts the restrictive theory of sovereign immunity as the standard of international law to be applied by the courts in determining whether to grant jurisdictional immunity.[71] Thirdly, the first section states that "[u]nder international law ... [states'] commercial property[72] may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." While it may seem desirable to implement this provision, it is by no means clear whether it represents an accurate statement of international law. A considerable number of states still adhere to the absolute theory of sovereign immunity concerning execution on the property of a foreign sovereign.[73] Indeed, this provision does not even reflect the present posture of the United States on this issue.[74]

B. *Definitions*

Section 1603 defines two terms that are used throughout the proposed statute. The term "foreign state" compromises the central government, a political subdivision, or an agency or instrumentality of a foreign state or political subdivision, except as the term is used in sections 1608 and 1610. Under the traditional rules, immunity usually extends only to the central government.[75] Constituent units and

71. It is now apparent that the restrictive theory of jurisdictional immunity of foreign states is the international standard. *See* notes 5, 8 & 29 *supra*.

72. The bill wisely refrains from attempting to define "commercial property." An attempt to define precisely the term could have a negative or restraining effect and make necessary strained constructions by the courts.

73. "[D]oes not immunity from seizure—whether by way of attachment or execution—constitute a rule of international law so generally accepted that any departure from it would constitute a most drastic innovation?" Lauterpacht, *supra* note 8, at 241. *See* 6 G. WHITEMAN, *supra* note 8, at 709-26; RESTATEMENT OF FOREIGN RELATIONS LAW, Reporter's Notes, *supra* note 48, at 215-18 (1965).

74. Moreover, the Belman-Lowenfeld Proposal of 1969 recommended that the United States retain the absolute theory of sovereign immunity with respect to execution on the assets of a foreign state located in this country. *See* notes 3 & 8 *supra*.

75. Traditionally, the United States accords immunity to the agencies and instrumentalities of a foreign government when they are found to be unincorporated organizations or associations. When the agency or instrumentality is found to be a corporation, immunity is generally denied on the ground that the corporation is an entity separate from the government. *See, e.g.*, S.T. Tringali Co. v. Tug Pemex XV, 274 F. Supp. 227 (S.D. Tex. 1967); Mirabella v. Banco Industrial De La Republica Argentina, 38 Misc. 2d 128, 237 N.Y.S.2d 499 (Sup. Ct. 1963). *Contra*, F. W. Stone Engineering Co. v. Petroleos of Mexico, 352 Pa.

political subdivisions having no political independence of the state, such as protectorates, provinces and cities, are not entitled to immunity.[76] The bill would extend the protection of sovereign immunity to the public acts of subdivisions of a foreign state and its agencies and instrumentalities on the theory that no reason exists to treat them differently when their acts are not of a commercial character and when the acts could be imputed to the central government.[77]

Section 1603(b) defines the term "commercial activity" as either a "regular course of commercial conduct or a particular commercial transaction or act," as determined by the "nature" of the activity rather than its "purpose." It is ironic that this bill, which purports to embody the most modern thinking on the law governing sovereign immunity, reverts to the "nature" test that the courts have criticized as unworkable and "purely arbitrary."[79] A test constructed along the lines suggested by the Second Circuit in the *Victory Transport* case[80] would seem considerably more manageable and would allow the courts sufficient latitude in deciding whether the conduct under scrutiny was a "commercial activity" or a sovereign function. One further problem posed by the "nature" of the act approach is that an initial determination must be made whether to apply the forum's law, the foreign state's law or international law before the courts can characterize the nature of the conduct as commercial.

C. *Jurisdictional Immunity and Exceptions*

Section 1604 stipulates that a foreign state shall be immune from the jurisdiction of the courts of the United States, except as otherwise provided under the statute. The drafters' intent is that this presumption of immunity will aid the foreign state in doubtful cases.[81] This section states, however, that existing and future international agreements by the United States shall not be altered by the proposed

12, 42 A.2d 57 (1945); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944). *See* Note, *The Jurisdictional Immunity of Foreign Sovereigns,* 63 YALE L. J. 1148, 1152-55 (1954).

76. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 48, § 67; Harvard Draft Convention, *supra* note 8, art. 1(a), at 475.

77. Section-by-Section Analysis, *supra* note 2, at 134-37.

78. *See* note 69 *supra* and accompanying text.

79. For a discussion on the problems engendered by the use of the "nature or purpose" tests see note 32 *supra.*

80. Victory Transp., Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964). *See* Bishop, *supra* note 29, at 103-05; *supra* note 32.

81. *See* Section-by-Section Analysis, *supra* note 2, at 137.

statute. Thus treaties and agreements entered into by the United States with foreign nations shall be the governing body of law on immunity that the courts must apply in suits against those nations,[82] even when the jurisdictional standards in such agreements are more lenient than those of statute.

The exceptions to the presumption of immunity from jurisdiction are set forth in section 1605. Section 1605(1) provides that in cases in which the foreign state has either explicitly or implicitly waived its immunity, immunity may not thereafter be reinstated after a claim against the state has arisen. In some past cases, a foreign state would repudiate a waiver after the claim against it had arisen and seek a suggestion of immunity from the State Department.[83] This procedure was patently unfair to businessmen when the waiver was explicitly stated in a commercial contract or when reliance had been placed on a treaty. The waiver provision of the bill insures that contractual promises of waiver by a foreign sovereign will be honored in the event of a breach of contract.

Section 1605(2) establishes three bases of "long arm" jurisdiction over the commercial activities of a foreign state. First, a foreign state loses its jurisdictional immunity when the action is based on a commercial activity within the United States. This proviso codifies the restrictive theory of sovereign immunity. Secondly, section 1605(2) exempts from the general provision of jurisdictional immunity any suit based on acts of a foreign state performed in the United States in connection with a commercial activity of the foreign state elsewhere. The mere fact that an act occurred in the United States in connection with a foreign state's commercial activities elsewhere is sufficient to destroy the state's immunity, even though the act itself has no impact in the United States.[84] This provision is an invitation to the exercise

82. *See, e.g.,* Treaty with Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, art. XVIII, para. 3, [1954] 5 U.S.T. 550, T.I.A.S. No. 2948; Convention on the Territorial Sea and the Contiguous Zone, April 27, 1958, § III, U.N. Doc. A/CONF.13/L.52, *noted in* S. SUCHARITKUL, *supra* note 7, at 100-02.

83. *See* Victory Transp., Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 48, § 70; *cf.* Petrol Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966).

84. The bill adopts the territorial principle of jurisdiction set forth in the RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 48, § 17: "A State has jurisdiction to prescribe a rule of law (a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are

of over-extended jurisdiction. In its present, unqualified form, the provision is not supported by any present concept of jurisdiction or rule of law and could only be the result of hasty drafting.[85] Thirdly, conduct occurring outside the United States in connection with the commercial activity of a foreign state that has a direct effect within the territory of the United States also destroys the presumption of immunity found in section 1604. While this principle of territorial jurisdiction has been in effect for many years in the United States, particularly with respect to foreign corporations engaging in restrictive trade practices,[86] it has never been applied by an American court against a foreign state.[87] Nonetheless, the provision is logically sound and does not seem to infringe unduly upon a foreign state's

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determined by the effects of the conduct outside the territory, and (b) relating to a thing located, or a status or other interest localized, in its territory." No cases are cited by the *Restatement* to support this rule. *See* note 85 *infra.*

85. Note that subsection (b) of the *Restatement* § 17, *supra* note 84, is not particularized in § 1605(2), cl. 2, of the proposed statute. The Section-by-Section Analysis, *supra* note 2, at 140, states, however, that an act falling within this clause "must have a sufficient connection with the United States to justify the jurisdiction of the United States courts over the matter." This statement is in line with present concepts of jurisdiction over foreign corporations "doing business" or having "minimum contacts" with the United States. In all events, the commercial activity of the foreign nation and the foreign state act complained of must have a reasonable relationship with the United States. *See* Belman, *supra* note 3, at 185. It is submitted that the language of the Section-by-Section Analysis be articulated in § 1605(2), cl. 2, in order to ensure that standards of due process are not offended. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

86. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); United States v. Sisal Sales Corp., 274 U.S. 268 (1927); United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945). *See also* Steele v. Bulova Watch Co., 344 U.S. 280 (1952); Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968); Haight, *International Law and Extraterritorial Application of the Antitrust Laws,* 63 YALE L.J. 639 (1954); Oliver, *Extraterritorial Application of United States Legislation Against Restrictive or Unfair Trade Practices,* 51 AM. J. INT'L L. 380 (1957); Timberg, *Antitrust and Foreign Trade,* 48 NW. U. L. REV. 411 (1953).

87. The *Restatement* notes that under international law a state may be held liable for damages that it causes *within the territory of another state* where the conduct is caused by activities within the negligent state's borders. RESTATEMENT OF FOREIGN RELATIONS LAW *supra* note 48, Reporter's Notes, § 18, at 55; Trail Smelter Arbitration (United States v. Canada), 8 Arb. Series (1941) (Canada held responsible for producing fumes that polluted the air in the United States).

sovereignty. The statute merely applies the same jurisdictional standards that are currently applied to foreign privately-owned commercial enterprises organized under foreign law and insures that a state will be liable to the same extent when it engages in commercial activities.[88]

Section 1605(3) eliminates a foreign state's immunity when rights to property "taken in violation of international law" are in issue and the contested property (or property exchanged for such property) is found within the territory of the United States in connection with a commercial activity of the foreign state.[89] The bill makes no attempt to define when property is taken in violation of international law. Presumably, the drafters intend that the traditional standard of "prompt, adequate and effective compensation" will govern the courts' decisions whether to grant immunity, but it is by no means clear that there exists an international consensus on this or any other standard.[90]

It is clear that this provision unnecessarily forces the courts to recognize or deny the validity of a foreign state's taking of property without providing adequate guides to make such a decision. Consequently, this provisision thrusts United States courts into the labyrinth of an area of international law from which there is presently no satisfactory egress. In addition, the courts will become embroiled in investigations and complex problems of tracing the property and

88. For an analysis of the bases and range of international jurisdiction see R. FALK, *supra* note 35, at 21-63.

89. § 1605(3) further states that, when property is taken in violation of international law and when that "property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States," the foreign state is not entitled to immunity from jurisdiction. Since under § 1603 a foreign state is defined to include political subdivisions, or agencies or instrumentalities of a foreign state or political subdivision, this provision seems redundant.

90. The act of state doctrine and the question of international consensus on what constitutes an unlawful taking of property are beyond the scope of this Note. For a discussion of the correlation between the act of state, sovereign immunity and political question doctrines, however, see notes 124-27 *infra* and accompanying text. *See generally* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), *rev'g* 307 F.2d 845 (2d Cir. 1962), 193 F. Supp. 375 (S.D.N.Y. 1961); R. FALK, *supra* note 35, at 64-138; Dawson & Weston, *Banco Nacional de Cuba v. Sabbatino: New Wine in Old Bottles,* 31 U. CHI. L. REV. 63 (1963); Lillich, *supra* note 33, at 45-111; Maier, *Sovereign Immunity and Act of State: Correlative or Conflicting Policies?,* 35 U. CIN. L. REV. 556 (1966).

assets of a foreign state that could be thwarted by an uncooperative foreign state defendant. Finally, this provision could affect relations between the United States and nations that have not taken property in violation of international law, but have acquired such property through exchange or purchase and have brought the tainted property to the United States in connection with its commercial activities.[91] For these reasons, it is submitted that section 1605(3) be deleted from the proposed statute. In cases in which confiscated property is found in the possession of a foreign state in connection with its commercial activities in the United States, section 1605(2) would seem sufficient to permit the courts to assert jurisdiction. Jurisdiction having been obtained (without the attendant problems discussed above) an act of state defense could be interposed, if appropriate, by the defendant foreign state,[92] or raised as a bar to adjudication by the court or by the executive branch.

Section 1604(4) adopts the traditional exception to the doctrine of sovereign immunity in cases in which a claim against a foreign state is based on real, or immovable property, or on property acquired by inheritance or gift. International law makes no distinction between property of a commercial or public character; the basis of the exception is the theory that land, and objects permanently attached thereto, form an indivisible part of the territorial sovereignty. If a foreign state could acquire real property within the territory of another state free of its jurisdiction, it would constitute a derogation of the territorial state's sovereignty and an impermissible extension of the sovereignty of the foreign state. Consequently, a foreign sovereign acquires the property subject to the jurisdiction and rules of law of the territorial sovereign. When a foreign state takes property, real or personal, by gift or succession, the state is subject to the laws of the territorial sovereign to the same extent as a private individual.[93]

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91. *See* Lowenfeld, *The Sabbatino Amendment–International Law Meets Civil Procedure,* 59 AM. J. INT'L L. 899, 900-02 (1965).

92. This reasoning is flawed by the inclusion of the "nature" test under section 1603(b). Using that test, the expropriation of property is undeniably a governmental or public act. Consequently, one provision of the proposed statute would grant immunity in cases involving confiscated property, while another would deny the immunity defense. This absurd result supports the suggestion to eliminate the nature test. *See* Maier, *supra* note 90, at 568-69.

93. *See generally* E. ALLEN, *supra* note 8, at 15-17, 44-46, 88; RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 48, § 68; J. SWEENEY, *supra* note 8, at i-ii; Harvard Draft Convention, *supra* note 8, art. 10, at 590; Section-by-Section Analysis, *supra* note 2, at 141-42; Tate letter, *supra* note 5; *cf.* Georgia v. Chattanooga, 264 U.S. 472 (1924).

The final exception to the jurisdictional immunity of foreign states is set forth in section 1605(5). Under this provision, a foreign state is subject to the jurisdiction of United States courts for claims based on injury or death, property damage or loss caused by a wrongful act or omission of any official or employee of the foreign state. The wrongful act or omission must occur in the United States and must not be one for which a remedy already exists under Article VIII of the NATO Status of Forces Agreement.[94] The stated purpose of this provision is to insure that victims of automobile accidents caused by officials or employees of foreign states will be compensated for their losses.[95] This provision is broadly stated, however, in order to cover other tortious conduct of such officials or employees.[96] When the tort is connected with a foreign state's commercial activity, however, section 1605(2) would be the operative provision.

Section 1606 grants immunity to a foreign state in connection with its public debt. A "foreign state" under this section, however, includes only the central government, not its political subdivisions, or the agencies or instrumentalities of the state or subdivisions.[97] The bill does not define "public debt," but the *Section-by-Section Analysis* states that the term includes debt obligations to a lending bank, securities and bonds issued by a foreign state.[98] Under this section, therefore, a bank, private lender or bondholder could not bring suit for default of principal or interest payments on the public debt of a foreign state, nor could assets of the foreign state located within the United States be attached for purposes of acquiring jurisdiction. A foreign state may waive its immunity under this section, however, and would probably do so in cases in which it otherwise would have difficulty in floating its issue or in obtaining a loan.[99] This section

94. Agreement with the Parties of the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 4 U.S.T. 1792, T.I.A.S. No. 2846.

95. Section-by-Section Analysis, *supra* note 2, at 142-43.

96. Section 1605(5) should be considered in connection with United States and international law regarding diplomatic and consular immunity. *See* notes 51 & 52 *supra;* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 48, at 228-301.

97. *See* § 1606(a) (2). This difference in treatment is not provided for in § 1603(a), the definitional section that includes a subdivision, agency, or instrumentality in the meaning of "foreign state," except for § 1608 and § 1610. This oversight should be corrected.

98. Section-by-Section Analysis, *supra* note 2, at 143-44.

99. Unlike § 1605(1), § 1606(a) (1) requires an explicit waiver of immunity on the foreign state's public debt.

further provides that the federal securities laws remain fully applicable to a foreign state issuing bonds or other securities in the United States.[100]

D. *Counterclaims*

Section 1607 of the proposed statute adopts the *Restatement* position on counterclaims against foreign states.[101] Thus any counterclaim, permissive or compulsory,[102] may be brought against the foreign state and may exceed the state's claim if it arises out of the same transaction or occurrence that is the subject matter of the foreign state's claim. If the counterclaim is not based on the subject matter of the foreign state's claim, however, it may not exceed the amount sought by the foreign state. Attempts to determine whether the counterclaim is "based on the same subject matter of the suit" have produced strained interpretations and diversity of opinion among the courts. Moreover, the Supreme Court criticized this approach in *Republic of China.*[103] It is submitted that this section should be drafted to conform to the restrictive theory of sovereign immunity, which is stated in section 1602 to be the guiding principle governing this proposed legislation; the counterclaims provision would be more aptly based on a determination whether the counterclaim arises out of a commercial activity of the foreign state. If so, then any counterclaim—permissive or compulsory—should be permitted without restricting the dollar amount, since the jurisdictional standard is satisfied. If the counterclaim is based on an act *jure imperii*, however, the counterclaim should be limited to a set-off of the foreign state's claim.[104]

E. *Procedures for Commencing a Suit Against a Foreign State*

At present, the *Federal Rules of Civil Procedure* do not include procedures for instituting suits against foreign governments. Con-

100. The following securities laws, as well as those to be enacted in the future, are applicable to foreign states: Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1970); Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.* (1970); Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.* (1970); Investment Companies and Advisers Act of 1940, 15 U.S.C. §§ 80a-1 *et seq.* (1970).

101. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 49, § 70(2).

102. *See* FED. R. CIV. P. 13(a)-(b).

103. National City Bank v. Republic of China, 348 U.S. 356 (1955).

104. *See* notes 41-49 *supra* and accompanying text.

sequently, section 1608 of the proposed statute was drafted to fill that gap and to provide simple procedures for service of process in suits against foreign states.[105] The function of section 1608 is to give the foreign state notice of an impending claim; jurisdiction is not bestowed by this section, but by section 1605. In the case of a claim against a foreign state or its political subdivision, the clerk of the court would be responsible for addressing and dispatching a copy of the summons and complaint by registered or certified mail to the ambassador or chief of the mission of the foreign state accredited to the government of the United States. In addition, the clerk would send two copies of the summons and complaint to the Secretary of State of the United States, who in turn would transmit one of these copies by diplomatic note to the department of the government of the foreign state charged with the conduct of that state's foreign relations. In the event of a suspension of diplomatic relations with the foreign state, service would be made in the above manner on the ambassador or chief of mission of the state which is acting as the protecting power for the defendant foreign state. In the case of a claim against an agency or instrumentality of a foreign state, or political subdivision thereof, that is not a citizen of the United States, the claimant would have the option of using the above procedure or serving an officer or agent authorized to receive service of process under the law of the foreign state or under the laws of the United States. If the latter procedure is employed, two copies of the complaint and summons would be required to be sent to the Secretary of State of the United States, who would then send a copy by diplomatic note to the foreign affairs office of the foreign state.

105. Under the proposed statute, title 28 of the United States Code would be amended to add section 1330, which would grant the district courts original jurisdiction over civil claims against foreign states and their political subdivisions, and over the agencies and instrumentalities of foreign states and subdivisions that are not citizens of the United States. In this regard see the proposed amendments to 28 U.S.C. §§ 1391, 1332(a) (2)-(3) (1970), *supra* note 2, at 131-32. In the event an agency or instrumentality of a foreign state or subdivision is incorporated under the laws of a state of the United States or has its principal place of business in a state of the United States, the agency or instrumentality is deemed a citizen of the United States pursuant to 28 U.S.C. § 1332(c)-(d) (1970). In that case, § 1608 does not apply and the plaintiff must proceed in accordance with FED. R. CIV. P. 4. Additionally, the agency or instrumentality that is defined as a citizen of the United States under § 1332(c)-(d) cannot be sued in a federal district court unless the jurisdictional requirements of diversity of citizenship or federal question are satisfied.

This section establishes a much needed uniform procedure for obtaining service of process on foreign state defendants.[106] At present, acquisition of jurisdiction over a foreign state is a haphazard process involving in rem and quasi in rem attachments of assets.[107] Attachment as a means of obtaining jurisdiction over a foreign sovereign is a highly unsatisfactory procedure that often impounds a state's assets for extended periods or requires the state to post bond in order to free the assets for use during the pending litigation.[108] In addition, attachment might be considered a serious affront to the sovereignty of a foreign state, as well as a threat to its financial security, and could cause disruption in the friendly intercourse between that state and the United States. This section obviates the attachment process and, since the service of the summons and complaint is by mail, maintains the inviolability of the diplomatic representative of the foreign state.[109] Moreover, notification by the two-pronged procedure for service of process assures that due process will not be violated and serves the additional function of keeping the State Department informed of suits against foreign states.

F. *Immunity from Attachment and Execution*

Section 1609 provides that a foreign state's assets in the United States shall be immune from attachment and from execution.[110] Immunity from attachment for purposes of obtaining jurisdiction is

106. Since the jurisdiction of the federal district courts is not exclusive, the plaintiff may proceed against a foreign state or its political subdivision, or an agency or instrumentality of a political subdivision that is not a citizen of the United States in a state court. The proposed statute, however, would amend 28 U.S.C. § 1441 (1970) by adding a new subsection permitting removal by the foreign state from a state court to a federal district court in the district and division where the action is pending. This amendment would help to insure that decisions concerning the immunity of foreign states would be uniform under the statute. Actions commenced in state courts against agencies or instrumentalities of a foreign state that are classified as citizens of the United States would remain subject to the existing provisions of 28 U.S.C. § 1441 (1970).

107. *See* notes 49-61 *supra* and accompanying text.

108. Moreover, attachment affords the plaintiff little relief because the assets attached for jurisdictional purposes cannot be levied on in satisfaction of a judgment. The entire procedure is highly artificial in suits against foreign states. *See* notes 49-60 *supra* and accompanying text.

109. *See* notes 49-53 *supra* and accompanying text.

110. Section 1609 creates a presumption of immunity where an exception is not clearly specified in § 1610. In doubtful cases, therefore, immunity from execution will be afforded the foreign state.

made conclusive by this section because the need for the attachment procedure has been eliminated by the prior section. This section also clearly indicates that attachment of a foreign state's assets by state courts would be prohibited by federal law. Consequently, the states would be required to adopt procedures conforming to those specified in section 1608. Immunity from execution of a judgment, however, is subject to certain exceptions set out in section 1610.

Section 1610 marks a reversal in United States practica and a fulfillment of the promise of the restrictive theory of sovereign immunity.[111] This section distinguishes between execution of a judgment[112] on the assets of a foreign state or political subdivision and execution on the assets of an agency or instrumentality of a foreign state or subdivision. To the extent that the assets of a foreign state or political subdivision are used for a particular commercial activity in the United States, such assets will not be immune if the execution relates to a claim based either on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity.[113] Thus not all assets of a foreign state found in the United States may be levied on to satisfy a judgment against the foreign state; the assets must be specifically related to the claim. This section treats each state-controlled enterprise as a separate entity and prohibits, for example, the execution on the assets of a state-owned airline to satisfy a judgment against a state-trading corporation. The reason for this limitation is apparent. The state *qua* state is not sued under the restrictive theory of sovereign immunity; foreign state liability arises only as a result of its connection with a particular commercial activity. All the commercial assets of a foreign state, therefore, should not be available for satisfaction of a judgment when only a particular activity is found liable. The proposed statute further provides, however, that

111. The precise language of the statute is that a foreign state's assets "shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that foreign state. . . ." Attachment for purposes of "execution" is somewhat confusing, but the drafters use this language to cover all bases. In some states an attachment execution is the term given to a process of garnishment for the satisfaction of a judgment. *See* Griffin, *Execution Against the Foreign Sovereign's Property: The Current Scene,* 1961 PROC. AM. SOC'Y INT'L L. 105.

112. See notes 60-67 *supra* and accompanying text.

113. The objection to a provision permitting execution on property "taken in violation of international law" is the same as that raised in connection with allowing jurisdiction over such property. *See* notes 89-92 *supra* and accompanying text.

this limitation may be waived, explicitly or implicitly, by the foreign state and may not be withdrawn after a claim arises. If a levy is to be made on public property or a public debt of the foreign state, the waiver must be explicit.[114]

The bill imposes no such limitations on the execution of a judgment on the assets of an agency or instrumentality of a foreign state or of a subdivision of a foreign state. In the event an agency or instrumentality is found subject to the jurisdiction of a court under section 1605, the court will have jurisdiction to order an execution on any assets of the agency or instrumentality found in the United States. The fact that the claim arises out of the activity of a particular segment of the agency or instrumentality will not serve to limit execution to the assets of that segment. The assets of another agency or instrumentality, however, may not be levied on to satisfy a judgment. Thus this section treats agencies or instrumentalities as separate "corporate" entities analogous to American corporations. The drafters expressed the fear that if all the assets of the commercial activities of a foreign state's agencies or instrumentalities were combined for purposes of satisfying a judgment, United States corporations operating abroad might be subjected to similar treatment. The foreign state, agency, or instrumentalities may waive this limitation under section 1610(b) (2).

The final section of the proposed legislation is section 1611, which specifies that notwithstanding section 1610 certain types of assets will remain immune from execution on a judgment. These immune assets are: (1) those of a foreign central bank or monetary authority held for its own account; and (2) those assets that are, or are intended to be, used in connection with a military activity if such assets are of a military character or are under the control of a military authority or defense agency. The immunity extended to a foreign central bank or monetary authority has, of course, no connection with the assets of a foreign state that are held in United States or foreign controlled banks in connection with the commercial activity of the foreign state, subdivision, agency or instrumentality. These types of bank accounts will remain subject to execution under the provisions of section 1610. Central banks, on the other hand, exist for the purpose of exchanging currencies in connection with the trading activities of the foreign state.[115] If these assets were to become available for executions on

114. While this requirement is not provided for in the statute, an explicit waiver in such cases conforms to the policy of the restrictive theory of sovereign immunity and § 1606(a)(1) of the proposed statute.

115. *See* Ames, *State Operations in Gold and Foreign Exchange*, 24 LAW & CONTEMP. PROB. 329 (1959).

judgments rendered against the foreign states, as in the case of a foreign state's general waiver under section 1610, the foreign state would probably refuse to deposit funds in the United States. Permitting executions on central banks, therefore, could aggravate our balance of payments condition.

The reason for granting immunity to assets of a military character fulfilling the requirements established in section 1611(2)(a) and (b) is threefold. First, these types of assets are of a public character and have been traditionally immune from attachment or execution in satisfaction of a judgment under international law. Secondly, military assets of a foreign state are generally found in this country only in connection with a purchase of such assets by the foreign state. If execution on these assets were permitted it could cause embarrassment to the United States[116] and might force foreign states to seek other sources for the purchase of military hardware. The overall effect in that case would be a deterioration of our balance of trade posture. Finally, execution on the military assets of foreign states in this country might invite reciprocal treatment by foreign states in which the United States has significant concentrations of troops and facilities.[117] Considering the magnitude of the deployment of United States forces abroad, it becomes obvious that the United States could lose much more than would be gained by allowing executions on foreign states' military assets.

IV. A Pragmatic Consideration of the Options Available to Congress

This Part postulates three alternatives presented to Congress by the proposed legislation and considers the ramifications of each. First, Congress may forego the opportunity to venture into this area of foreign relations and refuse to enact the bill. Secondly, Congress may pass the bill as drafted, thereby proscribing the future use of State Department suggestions. Thirdly, Congress could pass the bill, but amend it to include a "Hickenlooper loophole" in order to enable the executive to suggest immunity to the courts in cases where adjudication might adversely affect a vital national interest.

A. *Option No. 1: Refusal to Enact the Bill*

To date, Congress has played a minor role in the formulation of a national policy on sovereign immunity. Despite constitutional authority to prescribe the jurisdiction of the lower federal

116. Section-by-Section Analysis, *supra* note 2, at 156.
117. *Id.*

courts[118] and the insult of "executive legislation" by State Department pronouncement in the Tate letter, Congress has shown little interest in resolving the present problems of foreign state immunity. In fact, there is no evidence that Congress has ever initiated a study on the subject.[119] Consequently, it is not unduly pessimistic to suggest that the present proposal might not generate enough interest to be enacted into law.

In the event that Congress fails to enact the proposed legislation, the executive and judicial branches must continue the process of examining and defining their respective roles in this narrow area of international relations. As previously discussed, the courts now defer to State Department suggestions of immunity, regardless whether the claimant's suit is based on a commercial activity carried on in the United States by the foreign states.[120] It may be perilous, however, to rely on the past for guidance in future immunity cases. Not since 1926, in the *Pesaro* case,[121] has the Supreme Court considered the substantive issues of sovereign immunity. Moreover, the last case in which the weight and effect of a State Department suggestion of immunity was considered by the Supreme Court was decided over 30 years ago.[122] That the Court's attitude might have changed regarding the conclusive and binding effect of executive suggestions in foreign affairs cases is indicated in two recent cases involving the act of state doctrine. Before discussing these cases, it is important to establish the correlative nature of the sovereign immunity and act of state doctrines.[123]

Both doctrines are judicially created principles of "self-restraint" arising out of the courts' recognition that disputes involving foreign sovereigns are "political questions"[124] best resolved by the political

118. U.S. CONST. art. I, § 8 and art. III, § 2. For a discussion on Congress' power to define the jurisdiction of the federal district courts see Note, *supra* note 3, at 408-10.

119. T. GIUTTARI, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 320-21 (1970).

120. *See* notes 10-40 *supra* and accompanying text.

121. Berizzi Brothers Co. v. S.S. Pesaro, 271 U.S. 562 (1926). The lower courts, however, have consistently deferred to executive suggestion. *See* note 4 *supra.*

122. *Ex Parte* Republic of Peru, 318 U.S. 578 (1943).

123. For a penetrative analysis of the development and correlation of these two doctrines see Maier, *supra* note 90.

124. The political question doctrine was exhaustively studied by the Supreme Court in *Baker v. Carr,* 369 U.S. 186 (1962), a case involving domestic issues relating to a state's apportionment plan. The Court discussed, in dictum, the

branches of government. The courts assume that their intrusion into the foreign affairs area when the acts of a foreign sovereign are at issue might have a disruptive effect on the peace of nations and could embarrass the executive in his conduct of foreign affairs.[125] Thus, as far as private plaintiffs are concerned, both doctrines operate to deny them their day in court for the sake of foreign policy.[126] More important than the case of the hour, then, is the judicial realization that foreign policy is to be promulgated by the political branches, not by the courts. Nonetheless, the doctrines are not predicated on executive mandate; the courts have the power to adjudicate, but an acute awareness of the constitutional necessity of the separation of powers doctrine restrains them from exercising their jurisdiction.

In *Banco Nacional de Cuba v. Sabbatino*,[127] the Supreme Court invoked the act of state doctrine to preclude adjudication on the merits of a case arising out of the confiscation of American-owned assets in Cuba by the Castro government. Although the case did not involve either the sovereign immunity doctrine or an executive suggestion, the Court's reasoning is educative in the context of a discussion of judicial abstention in cases involving foreign affairs, political questions and the separation of powers doctrine. The Court examined the role of the executive vis-á-vis the courts and clearly stated that the decision to abstain was based solely on the Court's understanding of the proper role of the judiciary in foreign affairs

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application of the political question doctrine to cases in the foreign affairs sphere: "Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211. The Court concluded that factors such as the question posed, the history of this problem's management by the political branches, the ability of the judiciary to handle the case and the possible consequences of an adjudication could be as important as the need for the nation to speak with one voice. *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 210-16 (1972).

125. *Compare* Oetjen v. Central Leather Co., 246 U.S. 297 (1918), *with Ex parte* Republic of Peru, 318 U.S. 578 (1943), *and* Rich v. Naviera Vacuba, S.A., 295 F.2d 24 (4th Cir. 1961).

126. "[The political question doctrine] operates, and is intended to operate, to deny a plaintiff or defendant his day in court, or at least, to refuse a judicial application of private law to the settlement of his dispute.... Implicit in the doctrine's application is the recognition that justice for *these* parties is a consideration secondary to the long-term political interests of the nation as a whole, the advancement of which is entrusted to the President in international relations." Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 80 (1968).

127. 376 U.S. 398 (1964).

cases. Finding that the act of state doctrine was not compelled by either international law or the Constitution, the Court explained:

> The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[128]

While this excerpt from the *Sabbatino* opinion might suggest judicial deference to executive primacy in foreign relations, the Court dispelled any notion that an executive communication could control the Court's disposition of the case:

> It is suggested that if the act of state doctrine is applicable to violations of international law, it should only be so when the Executive Branch expressly stipulates that it does not wish the courts to pass on the question of validity. . . . It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to [sic] probable results and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries.[129]

It is clear that the *Sabbatino* Court did not attempt to circumscribe the executive's role in foreign affairs. It is also evident, however, that the executive cannot control the judicial process simply because the controversy extends beyond the boundaries of the United States.[130]

The most recent Supreme Court case to deal with the act of state doctrine is *First National City Bank v. Banco Nacional de Cuba.*[131] In this case the Cuban bank, an instrumentality of the Cuban government, sued to recover the excess realized by defendant in a sale of

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128. 376 U.S. at 423.

129. 376 U.S. at 436.

130. "The voices of the judges, when they pass over the water's edge, must harmonize with the executive's. The exercise of judicial deference is then recognition of the executive's prerogatives, not abdication of the judiciary's responsibility." Cardozo, *supra* note 35, at 498. For an analysis of all of the federal court opinions in the *Sabbatino* case see LILLICH, *supra* note 33, at 45-113.

131. 406 U.S. 759 (1972), *noted in* 6 VAND. J. TRANSNAT'L L. 272 (1972).

collateral that had secured a loan of the Cuban government. Defendant counterclaimed, alleging that it should be allowed to retain the excess as a partial set-off for losses incurred when the Castro government confiscated defendant's property located in Cuba. The Court of Appeals for the Second Circuit had held that the act of state doctrine barred adjudication on the merits of the counterclaim, notwithstanding a State Department suggestion during the litigation that the act of state doctrine need not be applied in this or similar cases involving the government of Cuba.[132] The Supreme Court reversed in a five-to-four decision, in which four separate opinions were written. For purposes of this discussion, the significance of the specific holding in the case is of secondary importance to the attitudes of the Justices expressed in their divisive opinions.

Writing for the court, Mr. Justice Rehnquist[133] sought a basis for accepting the State Department's suggestion as dispositive of the issue, which he apparently found in *The Schooner Exchange v. McFaddon*, the progenitor of the sovereign immunity doctrine in the United States.[134] Justice Rehnquist determined that since the executive branch had unequivocally determined that it would not be embarrassed by adjudication on the merits, the reasons for applying the act of state doctrine were no longer present in the controversy before the

132. Letter from John R. Stevenson to the clerk of the United States Supreme Court, the Honorable E. Robert Seaver, Nov. 17, 1970, in Banco Nacional de Cuba v. First National City Bank, 442 F.2d 530, 536-38 (1971). The letter stated, in pertinent part: "Recent events, in our view, make appropriate a determination by the Department of State that the act of state doctrine need not be applied when it is raised to bar adjudication of a counterclaim or setoff when (a) the foreign state's claim arises from a relationship between the parties existing when the act of state occurred; (b) the amount of the relief to be granted is limited to the amount of the foreign state's claim; and (c) the foreign policy interests of the United States do not require application of the doctrine. . . .

The Department of State believes that the act of state doctrine should not be applied to bar consideration of a defendant's counterclaim or set-off against the Government of Cuba in this or like cases."

133. Note that the case was decided by plurality, not majority, opinion. Mr. Justice Rehnquist was joined by the Chief Justice and Mr. Justice White.

134. "The separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source in the case of *The Schooner Exchange v. M'Faddon,* 7 Cranch 116, 146 (1812) [11 U.S. (7 Cranch) 116]. . . . [T]he policy considerations at the root of this fundamental principle [sovereign immunity] are in large part also the underpinnings of the act of state doctrine." 406 U.S. at 762.

Court.[135] For Justice Rehnquist, then, the act of state doctrine is to be treated in the same manner as the sovereign immunity doctrine: an executive suggestion will control in either context. Mr. Justice Douglas concurred in the result, but not in the reasoning of Justice Rehnquist. Disagreeing with the controlling effect given the State Department's letter,[136] Justice Douglas based his concurring opinion on the "fair dealing" principle of *National City Bank v. Republic of China.*[137] Mr. Justice Powell also concurred in the result, but reached his decision by still another route. He also disagreed with the conclusive effect given the State Department's letter, but found *Republic of China* inappropriate in an act of state case. Justice Powell concluded that the *Sabbatino* Court improperly applied the principles underlying the act of state doctrine and that unless an "exercise of jurisdiction would interfere with delicate foreign relations conducted by the political branches"[138] the Court should hear the case. Since there was obviously no interference present in this case, Justice Powell found that the Court's duty to adjudicate was compelled by international law, not by executive suggestion.[139]

Mr. Justice Brennan dissented[140] on the ground that the act of state doctrine was compelled in the present case by the Court's holding in *Sabbatino.* Since the Executive maintained that Cuba had violated international law by confiscating American-owned property, Justice Brennan reasoned that the Court had little choice but to rubber-stamp the executive's position; to do otherwise might grievously prejudice the executive's conduct of foreign affairs. Consequently,

135. Mr. Justice Rehnquist stated that "[o]ur holding is in no sense an abdication of the judicial function to the Executive Branch." 406 U.S. at 768. A reading of his opinion compels the opposite conclusion. The act of state doctrine is based on the "constitutional" underpinnings of the doctrine of separation of powers, not deference to the executive's primacy in international affairs.

136. "Otherwise, the Court becomes a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'." 406 U.S. at 773 (footnote omitted).

137. 348 U.S. 356 (1955). *See* notes 44 & 45 *supra* and accompanying text.

138. 406 U.S. at 775-76.

139. Mr. Justice Powell espoused the views persistently urged by Professor Richard A. Falk. According to Falk, domestic courts have an affirmative duty to apply international law where a consensus exists among the community of nations. "The judicial arena is an appropriate place for an articulation of a general view of international relations in which doctrines of reciprocal deference govern areas of significant diversity and in which common efforts at enforcement govern areas of significant consensus." R. FALK, *supra* note 35, at 173.

140. Justices Stewart, Blackmun and Marshall joined in the dissent.

Justice Brennan concluded that the Court could not function as an impartial tribunal under the present circumstances and, therefore, the act of state doctrine was required to preserve the dignity and credibility of both the judicial and political branches of government.

To the extent that the present attitude of the Supreme Court regarding its role in sovereign immunity cases can be extrapolated from *Sabbatino* and *First National City Bank*, it appears that the conclusive effect now given State Department suggestions will be re-examined in future immunity cases.[141] Ironically, a reversal of *Ex parte Republic of Peru* and an assertion of judicial competence to decide foreign state immunity cases would not be antagonistic to the executive branch. It is, after all, the executive branch that is seeking to remove itself from the decision-making process in immunity cases. Thus a congressional refusal to enact the proposed statute might well usher in an era of "judicial legislation" in cases involving foreign state defendants.[142] Indeed, it is arguable that judicial legislation is preferable to a federal statute on foreign state immunity. The State Department would be relieved of its obligation to entertain foreign state requests for immunity, but would retain the ability to suggest immunity in particular cases in which it would opine that national interests dictate the recognition of immunity.[143]

B. *Option No. 2: Enactment of the Bill in its Present Form*

The proposed statute is founded on the demonstrated need to regulate suits against foreign state-owned commercial activities doing business in the United States. Because Congress has the power to define the jurisdiction of the lower federal courts[144] and the power "[t]o regulate Commerce with foreign Nations,"[145] it cannot be

141. *See* L. HENKIN, *supra* note 124, at 63.

142. *Id.* at 216-24. Henkin suggests that the reasoning and dicta of *Sabbatino* "establishes foreign affairs as a domain in which federal courts can make law with supremacy."

143. The Court has never implied that an executive suggestion would be completely inconsequential in a case involving foreign affairs matters. In future cases a suggestion would doubtlessly be weighted by the courts, but not given the conclusive and binding effect now permitted.

144. *See* note 118 *supra.*

145. U.S. CONST. art I, § 8, cl. 3. Other provisions of the Constitution could also be employed to support the constitutionality of enacting the proposed statute. *See, e.g.,* U.S. CONST. art. I, § 8, cl. 18 ("necessary and proper" clause); U.S. CONST. art. I, § 8, cl. 1 ("general Welfare" clause); U.S. CONST. art. I, § 8, cl. 11 ("War powers" clause); *see* Note, *supra* note 3, at 411-13.

seriously doubted that the statute would be a constitutional exercise of legislative power. Authority for the constitutionality of the proposed statute is found by reference, once again, to the closely related act of state doctrine.

Following the Supreme Court's decision in the *Sabbatino* case,[146] an indignant and irate Congress passed the Hickenlooper amendment,[147] which reversed the presumption in act of state cases. This legislation stipulated that the courts could no longer invoke the act of state doctrine to bar adjudication in cases in which American-owned property had been confiscated in violation of international law. The amendment provided, however, that the President had the power to suggest that the act of state doctrine be applied when he deemed it necessary to the interests of foreign policy.[148] The Court of Appeals for the Second Circuit upheld the Hickenlooper amendment in the face of constitutional challenges based on legislative interference with the executive and the judiciary in the case of *Banco Nacional de Cuba v. Farr.*[149] The *Farr* court found ample authority for Congress's enactment of the statute in the commerce clause of the Constitution.[150]

While the *Farr* case appears dispositive of the question of authority to enact the proposed sovereign immunity statute, it is doubtful whether that case would support the constitutionality of the application of the proposed statute to future immunity cases. Unlike the Hickenlooper amendment, the proposed statute has no provision for executive suggestions.[151] The proposed statute could portend a constitutional crisis if, for example, a case similar to *Rich v. Naviera*

146. *See* notes 127-31 *supra* and accompanying text.

147. 22 U.S.C. § 2370(e)(2) (1970). The Hickenlooper Amendment, also known as the Sabbatino Amendment, was attached to the Foreign Assistance Act of 1964.

148. 22 U.S.C. § 2370(e)(2) (1970). The proviso permitting executive intervention states that the statute is not applicable "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."

149. 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

150. 383 F.2d at 182-83.

151. The proposed statute does not explicitly prohibit the use of executive suggestion of immunity and it is at least arguable that the executive could file one with the court, if circumstances dictate the need to do so. The drafters of the bill, however, have made it quite clear that the purpose of the statute is to preclude the use of suggestion. *See* Letter of Transmittal to the President of the Senate, *supra* note 2, at 119-20; Section-by-Section Analysis, *supra* note 2, at 133.

Vacuba[152] were to arise after the statute's enactment and the President communicated a suggestion of immunity to the court. A crisis might also arise if a court issued a writ of execution on certain foreign state-owned commercial property and the foreign state informed the President that if the property were sold at an execution sale all United States military facilities must be removed from that country immediately. Would not the executive have a constitutional duty[153] to communicate this information to the courts and demand that the court grant immunity from execution? If the court refused to defer to the executive's demand for immunity on the grounds that the statute absolutely precludes executive decision-making in sovereign immunity cases, the result would be of far greater consequence than mere embarrassment to the executive. Conversely, if the court determined that it must sustain the executive's power over foreign state immunity cases, the power of Congress would be vitiated and the court would have become a political arm of the executive branch.

It seems unnecessary to subject the courts to this dilemma. Although the Constitution defines certain powers that are within the exclusive domain of each of the three branches of the national government,[154] the document is not all-encompassing. Many foreign affairs powers are concurrently exercised by both political branches, with the result that there exists a "zone of twilight" in which authority can be found for either branch to exert its power.[155] In

152. *See* note 35 *supra* and accompanying text.

153. U.S. CONST. art. II, § 2: "The President shall be Commander in Chief of the Army and Navy of the United States . . . ." The President would be sorely remiss in his duties as Commander in Chief if he permitted, without objection, action by a domestic court which could seriously prejudice the safety of the United States or its allies. *See* Cardozo, *supra* note 35, at 462.

154. *See* L. HENKIN, *supra* note 124, at 89-104; Cheatham & Maier, *supra* note 126, at 43-94.

155. The often cited concurring opinion of Mr. Justice Jackson in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952), is instructive in this regard: "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . ." 343 U.S. at 637. This statement summarizes the present state of the law in sovereign immunity cases. Compare Justice Jackson's conclusions with the proposed statute in the event it were passed without change: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential

cases involving sovereign immunity, the courts have recognized that the decisions of the political branches should control.[156] Over the years Congress has acquiesced to the primacy of the executive branch in this field and judicial decision has established the validity of this executive power.[157] The fundamental question before Congress, therefore, is whether it should enact legislation stripping the executive of all power in an area in which "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[158] An exegesis of the Constitution, the holdings and dicta of federal court cases, and treatises by leading scholars is not attempted because the question propounded is not susceptible to precise resolution.[159] There is ample authority for the proposition that the executive has plenary powers over the conduct of foreign affairs as well as for the assertion that congressional legislation proscribes executive action.[160] Because this proposed statute intrudes on an area of conflicting and concurrent powers of the political branches of government, it is suggested that

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control in such a case only by disabling the Congress from acting upon the subject. . . ." 343 U.S. at 637-38. (In *Youngstown,* the President was precluded from seizing steel mills during a time of national crisis because the Congress had specifically denied him such power.)

156. *See, e.g.,* Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926). *See* cases cited note 34 *supra.*

157. "The effects of the 'creative tension' between the political and judicial departments of government, resulting in preeminence of the executive as a private lawmaker, is nowhere more effectively illustrated than in the line of cases concerning the doctrine of sovereign immunity." Cheatham & Maier, *supra* note 126, at 83-84. *See* 15 CATH. U.L. REV. 234-35 (1966).

158. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

159. "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other." 343 U.S. at 634-35. *See* Baker v. Carr, 369 U.S. 186, 211-12 (1962).

160. For a compilation of cases and authorities supporting either side of the "powers" question see E. CORWIN, THE PRESIDENT 1787-1957 (4th ed. 1957); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Berger, *The Presidential Monopoly of Foreign Relations,* 71 MICH. L. REV. 1 (1972); Cheatham & Maier, *Private International Law and Its Sources,* 22 VAND. L. REV. 27 (1968).

Congress approach this crucial question by examining the practicalities and possible consequences of silencing the executive voice in sovereign immunity cases.[161]

C. *Option No. 3: Enactment of the Bill with an Amendment Permitting Executive Suggestion*

Having demonstrated that the consequences of enacting the proposed statute could have extremely deleterious effects on the delicate interplay between the branches of the federal government and on the conduct of foreign affairs by the executive, consideration now is given to an amendment that would allow the executive to retain a role in future sovereign immunity cases. Specifically, the question is whether a proviso, similar to the Hickenlooper amendment,[162] should be added to the proposed statute. As previously discussed, the Hickenlooper amendment was a congressional response to judicial foreign policy-making under the act of state doctrine.[163] Congress reversed the presumption under that doctrine and compelled the courts of the United States to adjudicate cases involving the confiscation of American-owned assets by foreign states, unless: "[T]he President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States . . . ."[164]

The inclusion of a "Hickenlooper loophole" in the proposed foreign state immunity statute has considerable appeal. First, no compelling reason exists for completely silencing the executive branch in sovereign immunity cases. These cases arise in the "twilight zone" of concurrent powers wherein neither political branch has been constitutionally designated as the sole or exclusive actor. Moreover, the executive possesses far more competence in the area of foreign affairs. The executive branch has at its disposal the nation's intelligence-gathering services and only the executive is in a position to respond quickly and effectively to changing circumstances.[165] Neither Congress nor the courts have access to such

161. "[I]nternationally the consequences of a rejection of executive suggestions . . . can be grave in a world where friendly relations often rest on very thin ice." Cardozo, *supra* note 35, at 461.

162. 22 U.S.C. § 2370(e)(2) (1970).

163. *See* notes 146-50 *supra* and accompanying text.

164. 22 U.S.C. § 2370(e)(2) (1970).

165. *See* Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Cheatham & Maier, *supra* note 126, at 69-70; Fullbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 2-5 (1961).

information; moreover, they cannot communicate or negotiate with foreign sovereigns. Thus executive branch expertise would be more beneficial to the nation than an intractable domestic law that stifles the executive's voice. Cooperation rather than conflict is required for an effective national policy on foreign state immunity.

Secondly, amending the proposed statute would permit executive suggestions in cases in which judicial determinations might have adverse consequences on the nation's foreign relations policy, without the possibility of constitutional confrontation. The statute could be applied routinely in a majority of cases without executive intervention. The statute contains adequate guidelines for judicial decision, and foreign states would be put on notice that the State Department could no longer process requests for immunity. Executive intervention in the judicial process would occur solely because the executive branch had determined, either through its intelligence network or by diplomatic note from a foreign state, that adjudication or execution could prejudice national interests.

Thirdly, a Hickenlooper-type proviso offers important advantages over other forms of executive communication with the courts. For example, a State Department *amicus* brief presumably would not be precluded under the proposed statute. The utilization of an *amicus* brief to inform the courts of possible adverse consequences of an adjudication or of a judgment against the foreign state, however, could put an enormous burden on the court. The court might feel constrained to accord the *amicus* brief undue weight in arriving at its decision in order to avoid embarrassing the executive or to avert an international crisis. This sort of communication, therefore, could compromise the court's judicial function. Furthermore, a policy position urged in an *amicus* brief might become disguised in the court's opinion, which would then serve as precedent in future cases. An executive suggestion under a Hickenlooper-type proposal, however, would apply only in a particular case and would have no precedential value.

If a provision permitting executive suggestion is included in the statute, the executive obviously could retain its dominant role in deciding when foreign states should be granted immunity. After announcing in the Tate letter that the courts should decide future immunity cases in accordance with the restrictive theory of sovereign immunity, the State Department filed suggestions of immunity in four cases.[166] Nevertheless, the executive branch seems determined to

166. *See* cases cited note 34 *supra.*

divorce itself from the sovereign immunity decision making process. Within the past four years, the State Department has drafted two statutes that provide guidelines for judicial decision making and preclude executive intervention in the judicial process.[167] Apparently, the State Department has come to realize that it is the "wrong organ to be deciding questions of immunity."[168] Moreover, pressures on the Department to suggest immunity under the present system have produced anomalous results. The tendency has been to grant immunity to unfriendly nations instead of to our trading partners.[169] This practice does not go unobserved by friendly countries, which undoubtedly demand more favorable State Department treatment when they are called before a domestic court.

Nevertheless, it is submitted that the proposed statute should be amended to allow executive suggestions because the executive has a definite need to remain flexible in his conduct of foreign affairs.[170] A future President might well need all possible foreign affairs powers in order to avoid a foreign relations catastrophe.[171]

V. CONCLUSION

A formalized national policy on the foreign state immunity issue is clearly preferable to the current variegated state of the law and is essential to a viable foreign trade program. Moreover, the United States has the responsibility to both its own citizens and foreign state-owned commercial enterprises for providing a sound legal structure that will govern their transactions. Nonetheless, the crucial

167. Reference is made here to the Belman-Lowenfeld statutory proposal, which was never submitted to Congress. *See* Note, *supra* note 3, at 432-33.

168. Belman, *supra* note 3, at 183. "[T]he Department does not have adequate staff or adequate legal authority to cope with the task of sorting out all the complicated issues of law and fact which bear upon a sovereign immunity determination." Leigh, *supra* note 33, at 191. *See* Lowenfeld, *supra* note 6, at 913.

169. 60 MICH. L. REV. 1142, 1144 (1962).

170. "The political issues cannot be divorced from the legal considerations. Thus, if the State Department promoted a Hickenlooper Amendment without loopholes, or otherwise tied its own hands, then the political repercussions could be disastrous." Cardozo, *Comments,* 1969 PROC. AM. SOC'Y INT'L L. 193-94. *See generally* Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication,* 44 MINN. L. REV. 1101 (1960).

171. "If cases such as *Rich v. Naviera Vacuba* are to be characterized as 'legal monstrosities,' consider what a 'political monstrosity' the failure to grant immunity could have occasioned in such a case." Cardozo, *supra* note 170, at 194.

question presented by this draft legislation is not whether an unequivocal national policy is desirable, but whether Congress should create that policy by enacting legislation that would remove the executive from any role in foreign state immunity cases.

Given the inherent struggles in a constitutional government of exclusive and shared powers, perhaps the wiser course for Congress would be to leave the twilight zone intact, thus permitting a solution to gradually evolve through judicial decisions. But this is a slow and tedious process and the government needs a more immediate solution. A more expedient and agreeable alternative might be for the State Department to pursue amendments to Title 28 of the *United States Code* and to the *Federal Rules of Civil Procedure* so that jurisdiction and service of process on foreign state defendants will be statutorily defined. The remainder of the proposed statute could then be promulgated as national policy in a document similar to the Tate letter. Except for the new position on the execution of judgments, the present state of the law would remain basically unchanged. Whatever the decision of Congress on the proposed statute, it is hoped that the practical realities of the requirements of the United States *qua* political entity in the community of sovereign national states will not be obscured by the complaisant surrender of foreign affairs power by the executive branch.

R. Lee Bennett