# Recent Statutory Developments in the Law of Foreign Sovereign Immunity[1]

P. Sutherland
Barrister

## I TRANSITION IN THE LAW OF FOREIGN SOVEREIGN IMMUNITY

In 1951, Lauterpacht published a survey 'to show the change which has occurred, in the practice of most countries, in the direction of the abandonment of the principle of absolute jurisdictional immunity of foreign states'.[2] It transpired that courts in 'the great majority of states . . . [had] . . . declined to follow the principle of absolute immunity'.[3]

Two important exceptions to this general summation of international practice were the positions maintained by the judiciary in both the United States of America[4] and the United Kingdom.[5] Professor Lauterpacht commented that courts in these States had applied the principle of absolute immunity 'with a consistency bordering on rigidity, without distinction between acts *jure gestionis* and acts *jure imperii* '.[6]

During the period 1976-1978, both the United States and the United Kingdom have enacted legislation that has had the effect, broadly, of admitting this distinction for the purposes of the jurisdictional immunity of foreign States.

The problems inherent in granting foreign sovereigns immunity on the basis of the absolute immunity principle have been apparent for many years.[7] There is, in consequence, a considerable body of learned writings relating to this area of law.[8] It is not, therefore, intended here to examine these problems in detail. Rather, it is proposed first to explain briefly the

1. This paper will be concerned primarily with the legislative developments in the law of foreign sovereign immunity. For a more general discussion of sovereign immunity: see Sutherland, 'The Foreign Sovereign Immunity Question', (1978) 13 UWALR 409.
2. 'The Problem of Jurisdictional Immunities of Foreign States', (1951) 28 BYBIL 220 at 272.
3. At 251.
4. At 268-270.
5. At 270-272.
6. At 270. This observation was made in relation to the United Kingdom, but it may have been made equally with respect to the stance adopted by the US Courts.
7. See the judgment at first instance of Sir Robert Phillimore in *The Parlement Belge* (1878) 4 PD 129 (overruled by the Court of Appeal (1880) 5 PD 197).
8. See, in addition to articles cited elsewhere in this paper, the following: Dunbar, 'Controversial Aspects of Sovereign Immunity in the Case Law of Some States' (1971-I) 132 HR 197 (and the bibliography attached thereto at pp 361-362); Higgins, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom' (1977) AJIL 423; Johnson, 'The Puzzle of Sovereign Immunity', (1978) 6 Aust YBIL 1; Sucharitkul, 'Immunities of Foreign States before National Authorities', (1976-I) 149 HR 87 (and the bibliography attached thereto at pp 212-215).

law of foreign sovereign immunity in the United States and the United Kingdom prior to the introduction of the recent legislation. It will then be appropriate to analyse the provisions of the new statutes in some detail.

## II FOREIGN SOVEREIGN IMMUNITY IN THE UNITED STATES

One of the earliest reported decisions in the sovereign immunity field was that in *Schooner Exchange*.[9] Proceeding by analogy, Marshall CJ held that the *Exchange* was within a plea of immunity, being a naval vessel of a foreign power. It was stated that immunity was granted for considerations of comity and practical expediency in friendly international intercourse.

It is unfortunate that *Schooner Exchange* was extended by later American and English decisions, so that the principle of sovereign immunity was applied to commercial situations far beyond the bounds of what had been understood within the meaning of the concept of *acta jure imperii* in 1812. The United States Attorney General had admitted during the proceedings that upon the facts the *Exchange* had been entitled to immunity. Although the point was not decided, it was argued that 'if a sovereign descend from the throne and become a merchant, he submits to the laws of the country'.[10] In addition, *obiter dicta* of Marshall CJ can be interpreted to mean that sovereign immunity should extend only to public acts. An English court adopted such interpretation in 1878 in *Parlement Belge*.[11]

The *Schooner Exchange* decision was employed by the United States courts to extend the immunity principle to include all public shipping. In the *Athanasios*,[12] a District Court in New York dismissed a libel against a ship under requisition by the Government of Greece, which was carrying grain while on charter party to a private company. Many other decisions, justified in the name of comity, demonstrate that the absolute immunity principle was supreme.[13]

In 1924, the United States instructed foreign governments that it would claim immunity no longer on behalf of Shipping Board vessels, when engaged in commercial ventures.[14] The enlightened approach of the executive branch of government found sharp contrast in that of the judiciary. The Supreme Court held in *The Pesaro*[15] that the absolute immunity of state-owned shipping, whether engaged in commercial or public pursuits, should prevail. Despite a growing awareness that the absolute immunity rule was productive of injustice when applied in commercial situations,

9. 7 Cranch 116 (1812).
10. At 123.
11. 4 PD 129; overruled (1880) 5 PD 197.
12. 228 F 558 (1915).
13. *The Pampa* 245 F 137 (1917); *The Maipo* 252 F 627 (1918); *The Roseric* 254 F 154 (1918); *The Carlo Poma* 259 F 369 (1919). The one inconsistent decision of the period may be explained on the ground that the ship involved had been requisitioned by the Italian government, which was not a co-belligerent of the United States at the time of the decision: *The Attualita* 238 F 909 (1916).
14. See also the Suits in Admiralty Act 1920 (US), 41 Stat 525.
15. 271 US 562 (1926).

its application by the courts continued. *Pesaro* found favour in the *Navemar*,[16] the Supreme Court justifying its decision by reference to precedent and the separation of powers doctrine. The Court relied upon executive 'suggestion' as to whether immunity should be granted. Stone CJ stated that it was for the executive branch to conduct foreign policy since it alone was in a position to determine the consequence of execution of judgment upon international relations.[17]

Various reasons are given to explain the gradual movement from the absolute rule to the application of a limited principle of immunity.[18] Apart from the increasing ownership of shipping by states, which followed the 1914-1918 war, a grave change was occurring in the relationship of the State vis-à-vis the citizen. The State was becoming more open to suit in the interests of justice. In 1952, the State Department issued the famous Tate Letter,[19] admitting the restrictive theory and effectively rejecting the *Pesaro* decision.

Although the State Department had admitted formally that it would accept the distinction between commercial and public purposes, it retained control over the immunity question through the medium of executive 'suggestion' communicated to the courts. Professor Lillich objected to the reliance that the judiciary placed upon the executive decision on the ground that the conclusion reached by the State Department was attained without attention to due process.[20] Perhaps the classic illustration of this complaint was *Rich v Naviera Vacuba*.[21] In this case, a Federal District Court accepted a telephone message from the State Department, to the effect that release of a ship would preserve peaceful relations between Cuba and the United States, as a 'suggestion' of immunity. The court held, following *Ex parte Peru*[22] and *Mexico v Hoffman*,[23] that the 'suggestion' was binding, and that because of the separation of powers doctrine, the judiciary must assume that the State Department had examined the relevant considerations prior to reaching a decision.

The United Fruit Sugar Company argued before the Court of Appeals in *Rich* that its rights under the Fifth Amendment had been offended; that, before being deprived of property, the company was entitled to a fair hearing. The Court rejected this contention and in effect concurred with the executive decision to grant immunity, thereby depriving the company of its constitutional rights.

The controversy over the effect of the State Department 'suggestion'

16. 303 US 68 (1937).
17. Cp *Republic of Mexico v Hoffman* 324 US 30 (1945), where the Supreme Court declined to grant immunity on the ground that the State Department had made no 'suggestion' of immunity.
18. See Friedmann, 'The Growth of State Control over the Individual, and Its Effect upon the Rules of International State Responsibility', (1938) 19 BYBIL 118.
19. (1952) 26 Dept of St Bull 984.
20. Lillich RB, *The Protection of Foreign Investment* (1965), pp 32-40.
21. 295 F 2d 24 (1961).
22. 318 US 578 (1942).
23. 324 US 30 (1945).

was whether the force of the 'suggestion' should be interpreted as final and binding upon the courts, or whether the 'suggestion' should be considered by the courts; the latter retaining the ultimate decision to grant sovereign immunity. In a recent case, *Spacil v Crowe*,[24] the Court of Appeals cited *Schooner Exchange* and *Navemar*, refusing to accept responsibility for the question of immunity:[25]

> 'The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. . . . In the face of these authorities, the plaintiffs ask us to depart from the historic practice of granting unquestioned discretion to the executive. We decline to do so.'

The Court continued to explain that, in matters involving foreign policy considerations, there was no requirement that the executive disclose reasons upon which its 'suggestion' was based; that this practice was not akin to the ordinary administrative decision. Wisdom J said: 'In the narrow band of government action where foreign policy interests are direct and substantial we must eschew even limited "reasonableness" review.'[26]

Although *Spacil v Crowe* made no headway on the sovereign immunity issue and the role of the State Department 'suggestion', the case provoked Congressional measures designed to provide a procedure to be adopted when bringing an action against a foreign state, its constituent sub-division or agency. Since the Tate Letter in 1952 and despite the unsatisfactory decision in *Rich*, the United States has applied the restrictive rule of immunity.[27] This position has been clarified through the introduction of the Foreign Sovereign Immunities Act 1976.

## III FOREIGN SOVEREIGN IMMUNITY IN THE UNITED KINGDOM

The courts in the United Kingdom had persisted dogmatically in applying the absolute principle of sovereign immunity.[28] It was not until 1975 that the traditional application of foreign sovereign immunity came to be questioned by a superior appellate court. The Privy Council decision in the *Philippine Admiral*[29] has proved to be a milestone in the law of sovereign immunity in the United Kingdom.

The unanimous opinion of the Board in the *Philippine Admiral* was delivered by Lord Cross, a judgment notable for its excellent summary of the sovereign immunity question. The Privy Council held that *Porto*

24. 489 F 2d 614 (1974).
25. At 617.
26. At 619.
27. *Alfred Dunhill of London Inc v Republic of Cuba* 425 US 682 (1976) at 698 per White J.
28. *The Charkieh* (1873) LR 8 QB 197; *The Parlement Belge* (1880) 5 PD 197; *Mighell v Sultan of Johore* [1894] 1 QB 149; *The Porto Alexandre* [1920] P 30; *The Cristina* [1938] AC 485; *The Arantzazu Mendi* [1939] AC 256; *Krajina v Tass Agency* [1949] 2 All ER 274; *Juan Ysmael Co Inc v Government of Indonesia* [1955] AC 72; *Swiss-Israel Trade Bank v Government of Salta and Banco Provincial de Salta* [1972] 1 LIR 497.
29. [1977] AC 373.

*Alexandre*[30] should be disapproved on the ground that the Court of Appeal had had no valid reason to adopt the precedent established in the *Parlement Belge*.[31] Lord Cross found the disapproval expressed by three Law Lords in *The Cristina*[32] of significance in that it had been doubted whether sovereign immunity should extend to public ships owned by foreign States and engaged in ordinary commerce. Notwithstanding the inconsistency of applying the restrictive immunity rule to actions *in rem*, and the absolute theory to actions *in personam, Porto Alexandre* was overruled. The *Philippine Admiral* is, therefore, authority for the principle that a foreign State cannot claim sovereign immunity when an action *in rem* is brought against a vessel, if that vessel is being put to commercial use by either that government or a third party.

While the decisions of the Privy Council are not binding upon the Court of Appeal, the Board had provided the required impetus. *The Philippine Admiral* decision prepared the way for the decision in *Trendtex Trading Corporation v Central Bank of Nigeria*.[33]

The facts in *Trendtex* were as follows. The Central Bank had been established in 1958 to issue legal tender and provide financial services to the Nigerian Government. The Bank had issued a letter of credit (said to be irrevocable) for U.S. $14 000 000 in favour of the plaintiff. This sum was to pay for a quarter of a million tons of cement, which Trendtex had sold to a third party. The plaintiff had shipped the cement to Nigeria, where it was to have been used in the construction of army barracks. The ships carrying the cement arrived at Lagos and found almost fourteen hundred other vessels, carrying over twenty million tons of cement, waiting on demurrage. Amidst this chaos, the Central Bank refused to meet the cost of the cement or the demurrage charges.

Trendtex issued a writ in November, 1975, claiming against the Bank for payment to cover the letter of credit and demurrage. An injunction was granted against the Bank preventing the removal of funds to a place outside the United Kingdom. The Bank appealed against this order, claiming that it was a department of a state possessing the right to sovereign immunity and therefore beyond the Court's jurisdiction. Donaldson J agreed:[34] Trendtex looked to the Court of Appeal.

The Court held that the Central Bank was not a government department, but a legal entity of its own right, and therefore not entitled to sovereign immunity. Lord Denning MR and Lord Justice Shaw ventured so far as to state that, even if the Bank had been a government department, it would not have been entitled to immunity. The letter of credit, upon which Trendtex had sued, was a commercial document.[35] Through

30. [1920] P 30.
31. [1880] 5 PD 197.
32. [1936] AC 485.
33. [1977] QB 529. See White, 'State Immunity and International Law in English Courts', (1977) 26 ICLQ 674.
34. [1976] 3 All ER 437.
35. [1977] QB 529 At 558, 574, per Lord Denning and Shaw LJ respectively. See at 561-572 for the more cautious view expressed by Stephenson LJ.

the medium of the doctrine of incorporation, it was decided that international law was adopted within English law unless inconsistent. And international law no longer recognised the absolute theory. The Master of the Rolls continued to say that the limited immunity doctrine should be employed to cover the scope of actions *in rem* and *in personam* in the interests of justice. Thus, Lord Denning extended the decision in the *Philippine Admiral.*

It is apparent in the *Trendtex* case that the Master of the Rolls sought to establish uniformity between the law of foreign sovereign immunity as applied in the United Kingdom and the practice in other States. Lord Denning attributed particular significance to the decision of the United States Supreme Court in *Alfred Dunhill of London Inc v Republic of Cuba*,[36] and the enactment by the American Congress of the Foreign Sovereign Immunities Act of 1976.[37] In addition, further significance was drawn from the European Convention on State Immunity,[38] which at that time had been signed by a majority of European countries.[39] It is submitted, however, that in *Trendtex*, insufficient importance was attributed to the doctrine of *stare decisis*. It appears, nevertheless, that as a result of the *Trendtex* case, the restrictive doctrine of sovereign immunity had become applicable both in actions *in rem* and *in personam*. Since the parties to the litigation have subsequently settled their dispute out of court, the matter has not fallen to be considered by the House of Lords.[40] In 1977 the precedent established by the decisions in the *Philippine Admiral* and *Trendtex* was applied by Goff J in *I Congreso Del Partido*.[41]

The law relating to foreign sovereign immunity in the United Kingdom has always been governed by common law, but this had proved inadequate. In introducing the State Immunities Bill to the House of Lords for the second reading, the Lord Chancellor stated that ' . . . only legislation can achieve some of the results that we are looking for: a degree of precision which will make the law certain to apply, and enactment of the particular provisions—including the provision for recognition in the United Kingdom of foreign judgments given against the Crown—which are needed to enable the United Kingdom to ratify both the Brussels Convention and the European Convention'.[42] It is these objectives that the State Immunity Act has sought to achieve. However, prior to an

---

36. 425 US 682 (1976).
37. [1977] QB 529 at 556-557.
38. Reproduced (together with Additional Protocol) in (1972) 11 ILM 470. See Sinclair, 'The European Convention on State Immunity', (1973) 22 ICLQ 254.
39. [1977] QB 529 at 556. Note that Article 3(h) of the Treaty of Rome ' . . . lays down a general idea of approximation . . . that is "harmonisation" to be "undertaken by member states of the Council of Europe in the legal field" . . . which ought to result in the courts of all the European Economic Community countries coming as close to each other as possible in their decisions, the law which they apply and their application of it' ([1977] QB 529 at 571 per Stephenson LJ).
40. Trendtex was not taken to the House of Lords: *The Economist*, October 21 1978, p 137, col 2.
41. [1978] QB 500.
42. Parl Deb (HL) 5th Ser, vol 388, col 58.

examination of the United Kingdom legislation, it is proposed to consider the American statute.

## IV THE UNITED STATES FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The Foreign Sovereign Immunities Act[43] represents a major advance in the law relating to sovereign immunity in the United States. After the failure of earlier legislation,[44] the bill (HR 11315) was introduced in the House of Representatives on December 19, 1975, and in the Senate in June of the following year.[45] The resulting Act, which came into force on January 19, 1977,[46] represents the culmination of almost a decade of work by both the Department of Justice and the Department of State.[47]

Although HR 11315 suffered numerous technical changes[48] on the basis of the hearing before the House of Representatives, and consultations between the United States Government and the legal profession,[49] the bill closely conformed to the pattern of earlier drafts and retained the same broad aims of its predecessors.[50] These objectives may be stated to have been threefold.

The principle aim of the Act was to transfer the role of determining whether a foreign sovereign should be granted immunity from the Department of State to the courts, thereby relieving the executive branch of government from the political pressures involved in the exercise of this function.[51] Successful achievement of this primary objective possessed the inherent advantages of clarifying the confusion created in the previous case law,[52] while simultaneously serving to reinforce the distinction that should be made between the executive and judiciary according to the separation of powers doctrine.[53]

The second purpose of the Act was to codify and define application of

43. Pub L No 94 - 583, 90 Stat 2891. Codified at 28 USCA ss 1330, 1332(a)(2),(4), 1391(f), 1441(d), 1602-1611.
44. S 566 (reproduced in (1973) 12 ILM 118) and its 'sister' bill, HR 3493 had been introduced to the 93rd Congress, 1st Session, early in 1973 but 'died' with that Congress. See Mesch, 'Jurisdictional Immunities of Foreign States', (1974) 23 De Paul L Rev 1225 at p 1226.
45. Text of HR 11315 reproduced (1976) 15 ILM 88 at pp 90-101. Section - by - Section Analysis reproduced ibid, pp 102-118.
46. The Act has retroactive effect to cases which were pending on its effective date: *Yessenin-Volpin v Novosti Press Agency* 443 F Supp 849, 851 (1978). Note that the Act applied subject to any existing international agreements to which the United States is a party at the time of enactment: sections 1604 and 1609.
47. Shaw, 'The U.S. Foreign Sovereign Immunities Act 1976', (1978) 128 NLJ 368.
48. The principal alterations and additions are listed in the Dept of Justice and Dept of State Letter of Transmittal, reproduced in 15 ILM 88 at p 89.
49. Ibid.
50. Stated as being broadly 'to facilitate and depoliticise litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation' (ibid, p 88).
51. Ibid, pp 88-89.
52. Eg *Rich v Naviera Vacuba S A*, 197 F Supp 710, affirmed 295 F 2d 24 (1961). See *Martropico Compania Naviera S A v Pertamina* 428 F Supp 1035, 1037 (1977).
53. Mesch, op cit, p 1226.

the restrictive theory of immunity in statutory form. Thus, the bill proposed to ensure that the standards employed in the United States were consistent with those applied in other developed legal systems.[54]

Finally, HR 11315 was designed to replace absolute immunity from execution of judgment with a more limited form of immunity that conforms closely to the restrictive theory of immunity from jurisdiction generally. This includes the establishment of a procedure whereby process may be served upon a foreign state, and measures provided with respect to jurisdiction and venue so as to ensure that it is unnecessary to attach the assets of a foreign state for the purposes of jurisdiction.[55]

1. *Persons Entitled to Immunity Under the Act.*

The Act operates, subject to limitations provided by sections 1604 and 1609, to extend immunity from the jurisdiction of United States courts to foreign states, save in the case of certain stated exceptions.[56] For the purposes of the Act, section 1603(a) defines the term 'foreign state' to include a 'political subdivision of a foreign state or an agency or instrumentality of a foreign state'.[57]

The definition of 'foreign state' may be understood to refer to the central government of a foreign country.[58] In the recent case, *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations*,[59] it was held that the Congo Mission, as the representative of the government of that country, constituted a 'foreign state' within the meaning of s 1603(a).[60]

The expression 'political subdivision of a foreign state' may be understood to include all governmental units inferior to the central government.[61] Thus municipalities and provinces are included within the definition of the expression.[62] Subsection 1603(b) defines an 'agency or instrumentality of a foreign state' to be any entity—

> '(1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country'.[63]

In order to qualify as either an 'agency' or 'instrumentality', the entity must satisfy each of these separate criteria. It is required, to satisfy the

54. See the letter referred to above fn 48.
55. Ibid.
56. Ss 1605, 1610.
57. S 1608 excepted.
58. Delaume, 'Sovereign Immunity in America: A Bicentennial Accomplishment', (1977) 8 Jo of Marit L and Comm 349 at p 353.
59. 443 F Supp 816 (1978).
60. At 819.
61. Section-by-Section Analysis, 15 ILM, p 104.
62. Defined in 28 USC 1332 (c) and (d).
63. List of possibilities provided in Section-by-Section Analysis, 15 ILM, p 105. See H Rep No 94-1487, 94th Congress, 2d Sess, 15-16 (1976); *Edlow International Co v Nuklearna Elektrarna Krsko*, 441 F Supp 827, 831-832 (1977).

first requirement, that the entity constitute a body or corporation which possesses full legal personality under the law of the foreign state where it was established. The entity therefore must be able to sue or be sued; possess full contractual capacity; and be able to purchase and sell property in its own right. Thus, in *Yessenin-Volpin v Novosti Press Agency*,[64] it was held that defendant Novosti had established its existence as a separate 'juridical person' because it had proved that it 'opens bank accounts, acquires and alienates property and concludes contracts in its own name'.[65]

It is essential in order to fulfil the second requirement of subsection 1603(b) that the entity be either the organ of a foreign state (or of a foreign state's political subdivision) or that the majority of the shareholding (or other ownership interest) be owned by a foreign state (or by a political subdivision of that state). The purpose of the definition in subsection 1603(b)(2) is to establish the degree of the foreign state's connection or identification with the entity under consideration. This definition has however already demonstrated that it is ill-suited to concepts which exist in the socialist states of Eastern Europe, where all legal entities engaged in production or trade are controlled by the state.[66]

In the *Yessenin-Volpin* case, the District Court examined in depth the philosophy of ownership within the Soviet Union. The Court concluded that either defendant Novosti was 'owned' by the USSR (or a political subdivision) since in excess of 63% of the property over which Novosti exercised the right of possession was 'owned' by the state; or, that the essentially public nature of the press agency meant that Novosti constituted an organ of that government.[67]

In contrast, in the earlier case *Edlow International Co v Nuklearna Elektrarna Krsko*,[68] the District Court stated that to accept that all property under a socialist system (in this case Yugoslavia) is subject to the ultimate ownership and authority of the state, would be to characterize virtually every enterprise operated under a socialist system as an instrumentality of the state within the terms of the Foreign Sovereign Immunities Act.[69] The *Edlow* court refused to accept that 'a foreign state's system of property ownership, without more, should be determinative on the question whether an entity operating within the state is a state agency or instrumentality under the Act'.[70]

The District Court recommended that two more precise indices of an entity's status as agency or instrumentality of a foreign state were to be

64. 443 F Supp 849 (1978).
65. At 852. The District Court accepted that the second defendant, the Tass Agency, satisfied the requirements of s 1603 and came within the definition of 'foreign state' for the purpose of that section.
66. Eg *Edlow International Co v Nuklearna Elektrarna Krsko*, 441 F Supp 827, 831-832 (1977); *Yessenin-Volpin v Novosti Press Agency* 443 F Supp 849, 852-854 (1978).
67. 443 F Supp 849, 854 (1978).
68. 441 F Supp 827 (1977).
69. At 831.
70. At 832.

preferred. First, that the court should examine the 'degree to which the entity discharges a governmental function'; secondly, the 'extent of state control over the entity's operations'.[71]

It is a requirement of subsection 1603(b)(3) that entities established under either United States law or the law of a third state are outside the scope of the term 'agency or instrumentality of a foreign state'.[72] Therefore, a company established and incorporated under the laws of the State of New York that is owned by a foreign state will be excluded.[73] This provision is explained by the Section-by-Section Analysis on the ground that if a foreign state establishes or acquires a corporation within the United States, it is presumed that such entity has been established or acquired for purposes of a commercial character.

The provision of subsection 1603(b)(3) has been welcomed as providing a 'practical solution to a perennial problem' in enabling the United States courts to evade the problems inherent in determining control of a particular entity.[74] The simple criterion established by the subsection defeats those problems created by such notions as a 'control' test or 'piercing the corporate veil' that have occurred in the transnational field.[75]

2. *General Exceptions to the Jurisdictional Immunity of Foreign States.* Having reaffirmed the principle of foreign sovereign immunity,[76] the Act continues in sections 1605-1607 to state a number of exceptions to the jurisdictional immunity of a foreign state as defined in section 1603. These exceptions represent situations in which a foreign state will not be granted immunity in an American court.[77]

*(i) Waiver.* Subsection 1605(a)(1) operates to deny immunity to a foreign state where immunity has been waived, either explicitly,[78] or by implication,[79] notwithstanding purported withdrawal of that waiver by the

71. Ibid.
72. *Edlow International Co v Nuklearna Elektrarna Krsko* 441 F Supp 827, 831 (1977).
73. Eg *Amtorg Trading Corp v United States* 71 F 2d, 524 (1934).
74. Delaume, op cit, p 353.
75. Ibid.
76. S 1604.
77. *Yessenin-Volpin v Novosti Press Agency*, 443 F Supp 849, 854 (1978).
78. Eg, by treaty. The United States has concluded numerous treaties containing provisions whereby immunity from jurisdiction is waived in commercial cases on a reciprocal basis: Article 24(6), Treaty of Friendship, Commerce and Navigation between the US and Italy, February 2, 1948, US TIAS, 1965; 63 STAT 2255, 2292; 79 UNTS 171, 210; Article 28(3), Treaty of Friendship, Commerce and Navigation between the US and Israel, August 23, 1951, US TIAS 2948; 219 UNTS 237, 276.
See Whiteman, *Digest of International Law*, (1968) vol vi, pp 582-583.
Eg, by contract. A state may waive its immunity in a contract with a private party: Commonwealth of Australia 4¨% Loan of 1960: 'Any dispute between the bondholders, on the one hand, and the Australian Government, arising out of the bonds or coupons of this issue shall be governed by Swiss law and shall be decided by the ordinary courts of the Canton of Bale-Ville subject to appeal to the Federal Tribunal in Lausanne . . . Bondholders shall have also the right to bring their claims and to institute legal proceedings before the Australian Courts, renouncing in this case the jurisdiction of the Swiss Courts' (as translated).
See Delaume, *Transnational Contracts*, (1975) vol ii, para 11.07.
79. Eg (i) where the foreign state has submitted to arbitration in another country;

foreign state, except when in accordance with the terms of the waiver.[80] Waiver on behalf of an agency or instrumentality of a foreign state may be made by such entity or the foreign state itself.

It seems that the Act has clarified the position under United States law in providing for the irrevocable nature of waiver, except where permitted by the agreement between the parties. Formerly, American courts had upheld waiver of immunity as binding,[81] although on other occasions, subsequent to a 'suggestion' of immunity by the Department of State, the courts had permitted a foreign state to revoke its original waiver of immunity from suit.[82] The introduction of section 1605(a)(1) ensures that the United States law conforms with the position in Continental jurisdictions, where waiver of sovereign immunity is understood to be final and irrevocable.[83]

*(ii) Commercial activities having a nexus with the United States.* Subsection 1605(a)(2) denies the foreign state immunity in respect of an action based upon 'commercial activity', and may be regarded as the most important exception to the jurisdictional immunity of a foreign state. The subsection states that a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case,

> '(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.'

It will be convenient at this point, and prior to a consideration of the three situations in which a foreign state will not be granted immunity in respect of an action based upon a 'commercial activity', to consider the Act's definition of that term. It is defined in subsection 1603:

> '(d) A "commercial activity" means either a regular course of com-

---

(ii) where the foreign state has agreed that the law of a particular country should govern the contract;
(iii) where the foreign state has filed a responsive pleading in an action without raising sovereign immunity;
(iv) where the foreign state has descended to the level of an 'entrepreneur': *Et Ve Balik Karamu v BNS International Sales Corp* 204 NYS 2d 971; affirmed 233 NYS 2d 1013 (1960).
See Whiteman, loc cit, pp 671-672, 681, 683-684; Section-by-Section Analysis, 15 ILM, p 106.

80. Parallel to European Convention on State Immunity, Article 2 (reproduced in 11 ILM 470 at p 471).
81. *Victory Transport Inc v Comisaria General de Abastecimientos y Transportes* 336 F 2d 354 (1964), cert denied 381 US 934 (1965); *Petrol Shipping Corp v Kingdom of Greece* 360 F 2d 103 (1966), cert denied 385 US 931 (1966).
82. *Isbrandtsen Tankers v President of India* 446 F 2d 1198 (1971), 1198 (1971), cert denied 464 US 985 (1971); *Rich v Naviera Vacuba SA* 197 F Supp 710, affirmed 295 F 2d 24 (1961).
83. Delaume, *Transnational Contracts*, (1975) vol ii, para 11.07, fn 4, and accompanying text. See Section-by-Section Analysis, 15 ILM, p 107.

> mercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.'

This definition was amplified by the House of Representatives Report, which stated that 'commercial activity' encompasses 'a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct' and added that 'it is the essentially commercial nature of an activity or transaction that is critical'.[84]

The definition has been criticised on the ground that while the courts are to determine the question of commercial or public in relation to the *nature* rather than the *purpose* of the activity, the Act has failed to provide 'further indication as to the factors relevant for the necessary determination', and in consequence, left 'the content of the definition highly uncertain'.[85] It is complained, further, that the failure to include a list of activities to be deemed in all events of a commercial character has effectively surrendered to the judiciary 'the task of making the final pronouncement'.[86] Two points are submitted in reply. First, the Section-by-Section Analysis demonstrates that this was the specific intention of the Departments of Justice and State, who formulated the statute.[87] Secondly, such a list can never be exhaustive and foresee all future possibilities. If an activity can be so clearly characterised as commercial in advance so as to be listed, it is clearly of a commercial rather than a public nature, and therefore, it seems probable that the judiciary will not suffer difficulty in reaching consistent determination in this regard.

The single case in which the definition 'commercial activity' has been considered to date[88] is *Yessenin-Volpin v Novosti Press Agency*.[89] In that case, the plaintiff, 'a persistent defender of the civil and human liberties of the Russian people',[90] sought damages for libel against the TASS Agency, the Novosti Press Agency and 'The Daily World', a newspaper of the Communist Party of the United States. Defendants TASS and Novosti moved to have the action dismissed on the ground, *inter alia*, that they were immune from suit with respect to the acts alleged in the complaint under the Foreign Sovereign Immunities Act of 1976.

The validity of a claim of immunity is dependent upon the court's classification of the cause of action alleged in the complaint. If the court is satisfied that the cause of action falls within one of the exceptions to immunity stated in section 1605, then immunity will not be granted in that

---

84. [1976] *US Code Cong & Admin News*, pp 6614-6615. See also section 1603(e).
85. Delaume, 8 Jo of Marit L and Comm, p 354.
86. Page 355. Compare European Convention on State Immunity, Articles 4-14, 11 ILM, pp 471-474.
87. 15 ILM, p 105.
88. Sheppard's United States Citations, *Statutes and Court Rules*, vol 77, pt. 3, July 1978. See, however, a US National Labor Relations Board decision, *State Bank of India v Chicago Joint Board, Amalgamated Clothing and Textile Workers Union*, reproduced in (1977) 16 ILM 853.
89. 443 F Supp 849 (1978).
90. At 850-851.

instance and the action will continue. In the instant case, the plaintiff alleged acts of libel on the part of the defendants, who were alleged to have published defamatory articles and distributed them within the United States. It was imperative, however, if the plaintiff was to succeed on the basis of subsection 1605(a)(2) that the libel be proven to be 'in connection with a commercial activity of the foreign state'. Thus, the inquiry focused on the specific activity at issue and considered whether it might be characterized as 'commercial'.

The District Court found in the case of defendant Novosti,[91] and assumed in the case of TASS,[92] that both agencies did engage in 'commercial activity' in that they sold articles to foreign media. However, in view of the fact that the four publications, in which the alleged libels had been printed, were prominent organs of the Soviet central government,[93] the court concluded that publication had come about as a result of a 'cooperative arrangement with a governmental agency' and could not therefore be classified as commercial. Defendants Novosti and TASS were accordingly adjudged immune from the court's jurisdiction under the Foreign Sovereign Immunities Act and the complaint dismissed as against them.[94]

In adopting the criterion of determining the character of a commercial activity in relation to the *nature* rather than the *purpose* of that activity, subsection 1603(d) has followed the practice of both American[95] and non-American[96] decisions, and one that is paralleled in the European Convention on State Immunity. Even though it may be claimed that the Act has failed to fulfil its stated ambition of codifying the law of foreign sovereign immunity relating to the restrictive theory,[97] it is apparent also that, because of the free hand given the courts, there may emerge a uniformity of decision.[98]

Subsection 1605(a)(2) refers to three situations in which the foreign state will not be granted sovereign immunity in respect of an action based upon a 'commercial activity'. The first of these is where the commercial activity is carried on in the United States by the foreign state. Thus, in the *Yessenin-Volpin* case, it was stated that the plaintiff was unable to rely upon this ground since the action was 'not based on any commercial activity carried on *inside* the United States by Novosti or TASS since the

91. At 856.
92. Ibid, fn 4.
93. At 856.
94. At 856-857.
95. *Pacific Molasses Co v Comite de Ventas de Mieles* 219 NYS 2d 1018 (1961); *Victory Transport Inc v Comisaria General de Abastecimientos y Transportes* 336 F 2d 354 (1964), cert denied 381 US 934 (1965); *Tringali (ST) Co v Tug Pemex XV* 274 F Supp 227 (1967); *Ocean Transport Co v Government of Republic of Ivory Coast* 269 F Supp 703 (1967); *Amkor Corp v Bank of Korea* 298 F Supp 143 (1969).
96. Eg, *Rahimtoola v Nizam of Hyderabad* [1957] 3 All ER 441 at 463-464, per Lord Denning. For other States, see Delaume, *Transnational Contracts* (1975) vol ii, para 11.05.
97. Delaume, 8 Jo of Marit L and Comm p 355.
98. Ibid.

allegedly offending articles were published outside the country and sent into the United States by means wholly outside the control of either TASS or Novosti'.[99]

The second situation concerns 'an act performed in the United States in connection with a commercial activity of the foreign state elsewhere'. This involves conduct of the foreign state, which although it takes place within the United States, is related either to a 'regular course of commercial conduct elsewhere' or to a 'particular commercial transaction concluded or carried out in part elsewhere'.[1] Application of this provision was considered inapposite in *Yessenin-Volpin* since the alleged acts (the writing and publication of defamatory articles) had not been performed in the United States.[2]

The third situation covered by section 1605(a)(2) arises where an 'act [occurs] outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States'. It was upon this provision that the plaintiff in *Yessenin-Volpin* founded his complaint, alleging that the court had the necessary jurisdiction because acts performed outside the United States had caused a direct effect in the United States, ie injury to the good name and reputation of the plaintiff.

The Section-by-Section Analysis justifies the inclusion of the 'direct effect' test, and the creation of another American long-arm statute, on the basis of the principles enumerated in section 18 of the American Law Institute Restatement of Foreign Relations Law.[3] It might reasonably be expected however, in view of the controversies caused by the application

---

99. 443 F Supp 849, 855 (1978).

1. Section-by-Section Analysis 15 ILM, p 107. Three illustrations of the second situation are offered:
   (i) in the event of an action based upon a representation made in the U.S. by the agent of a foreign state that subsequently results in an action for restitution on the ground of unjust enrichment;
   (ii) where an act committed in the U.S. violates U.S. securities law;
   (iii) where there has been the wrongful discharge in the U.S. of an employee of the foreign state, who has been employed in connection with a commercial activity carried out in a foreign country.

2. 443 F Supp 849, 855 (1978).

3. *Restatement (2d) Foreign Relations Law of the United States* (1965), p 48 (s 18):
   'A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either
   (a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or
   (b) (i) the conduct and its effect are constituent elements of activity to which the rule applies;
   (ii) the effect within the territory is substantial;
   (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and
   (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.'

of other American statutes on an 'effects' basis,[4] that assertion of jurisdiction by the American court as provided by the third situation in section 1605(a)(2) will be the cause of yet further international ill-feeling.

It remains uncertain, because of the current dearth of case law, what degree of connection or nexus between the United States and the commercial activity upon which the action is based will be required in order to justify assertion of jurisdiction by an American court. Section 1603(e) merely states that the American court will have jurisdiction where the commercial activity is 'carried on in the United States by a foreign state . . . and . . . [has] . . . substantial contact with the United States'.

The Section-by-Section Analysis recommends that the term 'substantial contact' in section 1603(e) should be interpreted to include cases founded upon 'commercial transactions performed in whole or in part in the United States'.[5] However, the Analysis excepted, there is little indication of that which might constitute sufficient nexus. One commentator has advised that on the basis of past precedent, it can only be anticipated that mere execution of a contract within the United States will not be regarded as comprising 'substantial' contact, and that beyond this probability, it is impossible to discover a uniformity of decision among the case law.[6] It is to be expected, therefore, that, on the basis of previous and extensive assertion of jurisdiction, American courts will give the Foreign Sovereign Immunities Act an extraterritorial dimension.

This prediction is further supported by the language of subsection 1605(a)(2) that relates to the performance of an act within the United States in connection with a commercial activity of the foreign state '*elsewhere*'; or, where the act is performed *outside* the United States, in connection with a commercial activity of the foreign state '*elsewhere*' where that act causes a '*direct effect*' in the United States.

*(iii) Expropriation Claims.* Subsection 1605(a)(3) operates to deny a foreign state immunity from the jurisdiction of United States courts in a case 'in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an

4. Note that the Foreign Sovereign Immunities Act of 1976 differs from other long-arm statutes (eg the Sherman Act, 15 USCA 1-7) in that under the 1976 Act the Court must determine whether the defendant state is engaged in a commercial activity prior to considering whether the activity is sufficiently connected to the US in order to provide the court with jurisdiction: Delaume, 8 Jo of Marit L and Comm, p 356.
5. 15 ILM, p 105. Numerous examples of such transactions are provided, ibid pp 105-106.
6. Delaume, 8 Jo of Marit L and Comm, pp 356-357. It seems, for example, that jurisdiction has been asserted in the past on the basis of the defendant's presence within the United States at a crucial period during negotiations, even where the contract is to be performed either completely or in part in a foreign state: *National Iranian Oil Co v Commercial Union Insurance Co of New York* 363 F Supp 129 (1973); *National Gas Appliance Corp v AB Electrolux* 270 F 2d 472 (1959), cert denied 361 US 959 (1960); *Republic International Corp v Amco Engineers Inc* 516 F 2d 161 (1975).

agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States'.

It is apparent from the Section-by-Section Analysis that the term 'taken in violation of international law' would exclude from immunity expropriation of property without payment of compensation, or the arbitrary and discriminatory confiscation of property.

*(iv) Immovable, Inherited and Gift Property.* Subsection 1605(a)(4) of the Immunities Act establishes an exception to the general principle of foreign sovereign immunity in a case 'in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue'.

The Section-by-Section Analysis explains that inclusion of this provision permits an American court to adjudicate upon matters relating to ownership or rent of diplomatic or consular property. The District Court in *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations*[7] noted inclusion of this subsection in the Immunities Act but stated that '[e]ven though the court may have the power to establish rights in property . . . there is serious doubt in this Court's mind whether the Congo Mission could be forced to vacate the premises even as a result of an adjudication awarding ownership of that property to another party'.[8] In view of this comment, and the conclusion reached by the House of Representatives,[9] it appears that the Act will permit actions short of attachment or execution; thereby permitting the American Court to adjudicate upon questions of ownership and rent, provided that the foreign state's possession of the premises remains undisturbed.[10]

*(v) Non-Commercial Torts.* Subsection 1605(a)(5) was included in order to cover those noncommercial torts, which were not covered by subsection 1605(a)(2).[11] Subsection 1605(a)(5) prohibits an assertion of immunity in an action 'in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment', save in the event of certain stated exceptions. These exceptions are provided in subsections 1605(a)(5)(A) and (B), and conform closely to those enumerated in the Federal Tort Claims Act,[12] under which the United States Government retains immunity.

Section 1605(a)(5) has been included primarily to provide traffic accident victims with the proper remedies when injured as a result of the

---

7. 443 F Supp 816 (1978).
8. At 822, fn 6. See section 1610(a)(4)(B) which specifically exempts property used 'for purposes of maintaining a diplomatic . . . mission' from execution.
9. [1976] *US Code Cong & Admin News* 6604 at p 6619.
10. This position remains within Article 22(3) of the Vienna Convention on Diplomatic Relations 1963, 500 UNTS 95 at p 108.
11. [1976] *US Code Cong & Admin News* 6604 at p 6619.
12. 28 USC 2680 (a) and (h). *Yessenin-Volpin v Novosti Press Agency* 443 F Supp 849, 855 (1978).

'tortious act or omission' of any 'official or employee . . . [of a foreign state] . . . acting within the scope of his office or employment'. Its broad terms will permit, however, recovery in the event of liability being established in the event of any other tort (subject to the stated exceptions[13]). It might also be noticed that subsection 1605(a)(5) governs suits against only a foreign state (political subdivision, agency or instrumentality) and its officials and employees while they are acting within the scope of their respective office or employment, and does not extend to consular[14] or diplomatic representatives.[15]

*(vi) Maritime Liens.* Subsection 1605(b) provides that a foreign state shall not be immune from the jurisdiction of an American Court in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state; provided the lien is based upon a commercial activity of that state and the conditions of sub-paragraphs 1605(b)(1) and 1605(b)(2) relating to notice, have been fulfilled.

The objective of subsection 1605(b) is to avoid arrest of vessels or cargo belonging to the foreign state as a prerequisite to commencing suit.[16] As a substitute for the *in rem* suit in admiralty, the subsection provides for the instigation of an *in personam* action against the foreign state, in a manner that is analogous to bringing an *in personam* action against the United States Government.

It should be noted, finally, in relation to subsection 1605(b), that the value of the judgment awarded against the foreign state is limited to a maximum equivalent to the value of the vessel or cargo upon which the maritime lien arose. This value is to be determined as of the time notice is served under subsection 1605(b)(1).

*(vii) Counterclaims.* Section 1607 is concerned with counterclaims against a foreign state in any action brought by a foreign state, or in which a foreign state intervenes in an action, in an American Court. This section operates to deny the foreign state immunity in three situations.

Immunity will be denied, firstly, in respect of any counter-claim for which a foreign state would not be entitled to immunity under any part of section 1605 if that claim had been brought in a separate action against the foreign state.[17]

In the second situation, the foreign state will not be entitled to immunity with respect to any counterclaim, which arises out of the 'transaction

---

13. See *Yessenin-Volpin v Novisti Press Agency* 443 F Supp 849, 855 (1978), where it was held that exceptions to the Act did not provide a basis for recovery against foreign agencies for libel since the exception for tort actions does not include libel actions by virtue of subsection 1605(a)(5)(B).
14. Consular officials no longer possess immunity with respect to civil actions brought by a third party for 'damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft': Vienna Convention on Consular Relations 1963, Article 43(2), 596 UNTS 261 at p 298.
15. There is no similar provision in the Vienna Convention on Diplomatic Relations 1963.
16. Section-by-Section Analysis, 15 ILM, p 109.
17. S 1607(a). Cp European Convention on State Immunity, Article I, 11 ILM 470.

or occurrence that is the subject matter of the claim of the foreign state'.[18] This provision is based on the rationale that if a foreign state has filed or intervened in an action, then there is no reason for which it should be permitted to possess the privileges of litigation, and escape any legal liabilities, that may arise from the same transaction or occurrence.

Finally, the foreign state will be denied immunity with respect to any counterclaim to the extent that the 'counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state'.[19] In distinguishing between counterclaims that arise out of a transaction (as to which there is no limitation on the amount of the counterclaim) and any other counterclaim (in respect of which the relief sought cannot exceed the amount sought by the foreign state) section 1607 may be said to reflect the position under American law prior to the introduction of the Act.[20]

3. *Extent of Liability.*

The extent of the liability of a foreign state and a political subdivision of a foreign state is governed by the provisions of section 1606. A foreign state is liable in the same manner and to the same extent as a private individual with respect to any claim for which a foreign state is not entitled to immunity under sections 1605 and 1607. Under the terms of section 1606, however, a foreign state, and political subdivision thereof, cannot be liable for punitive damages, although an exception is made to this general rule in any case where death has been caused. In this event, if the law of the place where the act or omission occurred only provides for damages that are punitive in nature, 'the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought'.

This exemption reflects international practice, whereby it is customary that punitive damages are not assessed against a foreign state.[21] The adoption of this limitation upon the liability of the foreign state and the political subdivision also places both these entities in a position analogous to that of the United States Government, which is similarly privileged by statutory limitations to its tortious liability.[22]

While section 1606 makes special provision for the foreign state and the political subdivision, the position of an agency or instrumentality of the foreign state is that of the private individual. These entities are therefore subject to an assessment of punitive damages in the ordinary manner.

---

18. S 1607(b). Based on section 70(2)(b), *Restatement (2d) Foreign Relations Law of the United States* (1965).
19. S 1607(c).
20. *National City Bank of New York v Republic of China* 348 US 356 (1955); Section-by-Section Analysis 15 ILM, p 110.
21. Hackworth, *Digest of International Law*, (1943) vol v, pp 723-726; Garcia-Amador, 'State Responsibility' (1958), 94 HR 365 at pp 476-481; Whiteman, *Digest of International Law* (1967), vol vi, pp 1214-1216.
22. 28 USC 2674.

4. *Exceptions to the Immunity from Attachment or Execution.*
Section 1609 of the Immunities Act reaffirms the general principle that the property of a 'foreign state' in the United States shall be immune from attachment, arrest and execution. This statement is subject to the exceptions provided in sections 1610 and 1611.

The admittance of exceptions to the general rule of immunity from attachment and execution of judgment represents a significant and progressive development in the law of foreign sovereign immunity. Although enforcement of judgment against the property of a foreign state may be regarded as controversial, inclusion of sections 1610 and 1611 reflects the international trend favouring a limited immunity from execution.[23] Prior to the introduction of the Foreign Sovereign Immunities Act, and despite the 'Tate Letter' of 1952,[24] the United States Courts had prohibited execution of judgment against the property of the foreign state.[25]

*(i) Execution Against Property of Foreign States.* Subsection 1610(a) states that the property of a 'foreign state' within the United States, which is used for commercial activity within that jurisdiction, shall not be immune from either attachment or execution pursuant to the judgment of an American Court, provided that certain requirements are fulfilled. These requirements, established in subparagraphs 1610(a) (1) - 1610(a) (5), correspond to the provisions on jurisdictional immunities stated in subsection 1605(a). Thus, there will be no immunity from attachment or execution with respect to the property of a foreign state where: (a) immunity has been waived;[26] (b) the property has been used for the commercial activity upon which the claim is based;[27] (c) the execution relates to a judgment establishing rights in property taken in violation of international law;[28] (d) execution relates to a judgment establishing rights in property, which has either been acquired by succession or gift;[29] or which is immovable and situated in the United States[30] (subject to the proviso that such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission); (e) there were obligations owed to a foreign state under a policy of liability insurance.[31]

---

23. Lauterpacht, op cit, pp 242-243; Whiteman, *Digest of International Law* (1968), vol vi, pp 709-726.
24. (1952) 26 Dept of St Bull 984.
25. *Dexter and Carpenter Inc v Kunglig Jarnvagsstyrelsen* 43 F 2d 705 (1930); *Bradford v Chase National Bank* 24 F Supp 28, 38 (1938); *Weilamann v Chase Manhattan Bank* 192 NYS 2d 469, 473 (1959). For cases supporting execution of the property of foreign states in other jurisdictions see *Restatement (2d) Foreign Relations Law of the United States* (1965) pp 216-217.
26. S 1610 (a) (1); corresponds to 1605 (a) (1), above fns 78-83 and accompanying text.
27. S 1610 (a) (2).
28. S 1610 (a) (3). This includes property exchanged for property taken in violation of international law.
29. S 1610 (a) (4) (A).
30. S 1610 (a) (4) (B). *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations* 443 F Supp 816, 822 (1978).
31. S 1610 (a) (5). This provision is included in order to facilitate recovery by persons injured as a result of a 'tortious act or omission' (1605 (a) (5)).

*(ii) Additional Execution Against Agencies and Instrumentalities Engaged in Commercial Activity in the United States.* The provisions of the foregoing subsection 1610(a) apply with respect to the property of the foreign state, the political subdivisions and agencies or instrumentalities of the same. Subsection 1610(b) provides further, but only in respect of agencies and instrumentalities, that the property of such entity is not immune from attachment or execution when (a) immunity has been waived by the entity;[32] or (b) the judgment relates to a claim for which the entity would not otherwise be immune from suit.[33] In either event, judgment may be enforced against *any* property owned by the particular entity, wherever in the United States, regardless of whether the property 'is or was used for the activity upon which the claim is based.'[34]

This distinction between the partial non-immunity of the 'foreign state', and the total non-immunity of the agency or instrumentality of the foreign state has been criticised, on the ground that the difference is based upon the *personality* of the foreign party rather than the *nature* of the act. Given the rationale behind the introduction of the Immunities Act, it is the latter criterion that might have been expected.[35]

5. *Certain Types of Property Immune from Jurisdiction.*
Notwithstanding section 1610, the Act provides that there shall remain immunity from attachment and execution with respect to the property of: (a) certain international organizations;[36] (b) a central bank or monetary authority;[37] or (c) that property intended to be used in connection with a 'military activity';[38] which is either of a 'military character';[39] or 'under the control of a military authority or defence agency'.[40]

While immunity from attachment and execution with respect to the property of military and defence agencies is in accordance with past practice,[41] some comments may be made on the immunity granted by the Act in this regard to central banks (or monetary authorities) and international organizations.

*(i) International Organizations.* Subsection 1611(a), relating to the immunity of the property of international organizations, represents an innovation. Notwithstanding the provisions of section 1610, it is provided that the property of international organizations 'shall not be subject to attachment or any other judicial process impeding the disbursement of

32. S 1610 (b) (1).
33. Under s 1605 (a) (2), 1605 (a) (3), 1605 (a) (5) or 1605 (b).
34. S 1610 (b) (2), subject to requirement of notice in 1610 (c).
35. Delaume, 8 Jo of Marit L and Comm, p 361.
36. S. 1611 (a), ie those organizations designated by the President pursuant to the International Organizations Immunities Act, 22 USC 288 a (b). See Whiteman, *Digest of International Law* (1968), vol vi, pp 547-553.
37. S 1611 (b) (1), subject to the waiver provision.
38. S 1611 (b) (2).
39. S 1611 (b) (2) (A).
40. S 1611 (b) (2) (B). See Section-By-Section Analysis, 15 ILM, pp 116-117.
41. Whiteman, *Digest of International Law*, (1968) vol vi, pp 634-635.

funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States'.[42]

The purpose of this rule is explained by the Section-by-Section Analysis as to facilitate the performance of the functions of international organizations, without the hindrance of private claimants seeking to attach the payment of funds to a foreign state.[43] The introduction of this provision has served to deny the possibility that the loans made by international organizations, such as the World Bank and International Monetary Fund, might become attachable funds,[44] and ensures that such loans are beyond the reach of third parties.[45]

*(ii) Central Banks (or Monetary Authorities).* Subsection 1611 (b) (1) provides for the immunity of central bank funds from attachment or execution. In this respect, the subsection represents a new development, for it seems that there is no general rule in international law relating to the immunity of central banks.[46] Continental jurisdictions seem to deny central banks immunity save in those situations where the activity giving rise to the case has occurred in the course of a public function.[47] If, however, the central bank performs acts of a commercial nature, there will be no immunity.[48] United States Courts had maintained the same distinction.[49] Yet, on other occasions, American Courts have refused immunity when the entity involved is legally distinguishable from the foreign state,[50] and granted immunity where the entity is proven to be a branch of the foreign state.[51] The Act has now removed any uncertainty.

The wording of subsection 1611 (b) (1) has been criticised on the ground that in referring to the property owned by a central bank 'held for its own account', no allowance has been made for those situations when funds held by the central bank are intended for commercial purposes. It is submitted that the fact of ownership should not be employed as the criterion to grant immunity in this instance, but that the correct test (the

42. S 1611 (a).
43. 15 ILM p 116.
44. See 'Collection of a Foreign Nation Debt by Attachment of an International Bank Loan' (1969) 69 Col L Rev 897; Delaume, *Transnational Contracts*, (1975) vol ii, para 12.04.
45. See generally, Delaume, 'Public Debt and Sovereign Immunity Revisited: Some Considerations Pertinent to HR 11315' (1976) AJIL 529 at pp 538-542.
46. Whiteman, *Digest of International Law*, (1968) vol vi, pp 593-597, 673.
47. Eg *Martin v Bank of Spain* (1952) 19 ILR 202 (France, Cour de Cassation).
48. *Passelaigues v Mortgage Bank of Norway* (1955) 22 ILR 227 (France, Tribunal Civil de la Seine); *Krol v Bank Indonesia* (1958-II) 26 ILR 180 (Netherlands, Court of Appeal of Amsterdam); *NV Cabolent v National Iranian Oil Co* (1970) 9 ILM 152, (Netherlands, Hague Court of Appeal).
49. *Ulen & Co v Bank Gospodarstwa Krajowego (National Economic Bank)* 24 NYS 2d 201 (1940); *Mirabella v Banco Industrial de la Republica Argentina* 237 NYS 2d 499 (1963).
50. *Ulen & Co v Bank Gospodarstwa Krajowego (National Economic Bank)* (above); *Koster v Banco Minero de Bolivia* 122 NE 2d 325 (1954).
51. *Kingdom of Sweden v New York Trust Co* 96 NYS 2d 779 (1949); *In re Investigation of World Arrangements with Relation to Production, Transportation, Refining and Distribution of Petroleum* 13 FRD 280 (1952); *Banco Nacional de Cuba v First National City Bank of New York* 270 F Supp 1004 (1967).

one consistent with the rationale of the Act) should be the *nature* of the activity performed by the foreign central bank.[52]

Further, it has been suggested that, in the absence of express waiver, section 1611 will operate to deprive litigants of rights of protective attachment to prevent the removal of foreign assets from the jurisdiction of the American Court.[53] This risk is justified by the Section-by-Section Analysis on the grounds that to admit execution against foreign assets held by a central bank, which attachment anticipates, would discourage the deposit of foreign funds in the United States, and, moreover, would threaten significant foreign relations problems.[54]

6. *Filing Suit: Service of Process, Time to Answer and Default.*
Section 1608 of the Foreign Sovereign Immunities Act established procedural provisions, where previously there had been a void in both federal and state law.[55]

*(i) Service on the Foreign State and the Political Subdivision.* Section 1608 (a) provides a hierarchy of four methods by which service of process should be served upon the foreign state and the political subdivision.[56] It is preferred that process be served 'by delivery of a copy of the summons and complaint in accordance with any special arrangement for service' agreed between the parties.[57] In the absence of an arrangement between potential plaintiff and foreign state or political subdivision, two alternative methods of service are established. First, the plaintiff should deliver a copy of the summons and complaint to the foreign state or political subdivision in accordance with an appropriate international convention.[58] If, however, this should prove impossible, these documents and a notice of suit,[59] together with a translation of each in the official language of the foreign state, should be sent by any form of mail that requires a signed receipt to the head of the ministry of foreign affairs of the foreign state concerned by the clerk of the Court.[60]

---

52. Delaume, 8 Jo of Marit L and Comm, pp 363-4.
53. Atkeson, Perkins and Wyatt, 'HR 11315—The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action', (1976) 70 AJIL 298 at p 308.
54. 15 ILM p 116.
55. *Martropico Compania Naviera SA v Pertamina* 428 F Supp 1035, 1037 (1977).
56. By s 1806(c):
    'Service shall be deemed to have been made—
    (1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note: and
    (2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed'.
57. S 1608(a) (1).
58. S 1608(a) (2). In *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations* 443 F Supp 816, 820 (1978), the District Court found that such a convention, to which the US and the Congo were parties, did not exist. The Section-by-Section Analysis recommends the Hague Convention on Service Abroad of Judicial and Extra-Judicial Documents, TIAS 6638 (1965), 15 ILM, p 111.
59. S 1608 (a) (3): ie, 'a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation': S 1608(a).
60. S 1608 (a) (3).

Fourthly, and as a last resort, should it be impossible to make service within thirty days by means of the last method, the Act provides that the plaintiff be assisted by the United States Department of State.[61] The clerk of the Court is required to send (by any form of mail requiring a signed receipt) two copies of the summons, complaint and notice of suit,[62] together with a translation of each in the official language of the foreign state, to the Secretary of State in Washington, to the attention of the Director of Special Consular Services. The Secretary shall then forward one copy of the papers to the foreign state through diplomatic channels, and return to the clerk of the Court a certified copy of the diplomatic note, indicating the date when the papers were transmitted.[63]

Failure by plaintiff to perform service of process in such manner as prescribed by the Immunities Act will have the consequence that the court lacks jurisdiction, and all actions in such court will be void.[64]

*(ii) Service on Agencies or Instrumentalities.* Subsection 1608 (b) provides different requirements for service in respect of the agencies or instrumentalities of a foreign state. First, it is stated that service should be made in accordance with any special arrangement for service in existence between the parties;[65] and that in the absence of such agreement, service should be made by delivery of a copy of the summons and complaint to an agent, authorised by appointment or by law to receive service of process in the United States.[66] It is provided, alternatively, that service should be made in accordance with an applicable international convention.[67]

In the event, however, that service cannot be made by any of these methods, subsection 1608 (b) (3) provides three alternative possibilities. Service may be made upon an agency or instrumentality by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state, either (a) 'as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request';[68] (b) 'by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the Court to the agency or

61. S 1608 (a) (4).
62. This requirement is ambiguous. The phrase '. . . two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state . . . ' (s 1608 (a) (4)) may be understood to require either one or two copies of a notice of suit.
63. See the Department of State Regulations Under the Foreign Sovereign Immunities Act on Notice of Suit (effective January 18, 1977) reproduced in (1977) 16 ILM 159.
64. *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations* 443 F Supp 816, 821-822 (1978) (service on the defendant's secretary inadequate).
65. S 1608 (b) (1).
66. S 1608 (b) (2).
67. Ibid.
68. S 1608 (b) (3) (A).

instrumentality . . . ';[69] or (c) 'as directed by order of the court consistent with the law of the place where service is to be made'.[70]

*(iii) Time to Answer and Default.* By the terms of subsection 1608 (d), the 'foreign state' has sixty days in which to serve answer, or any other responsive pleading, to the complaint. After expiration of such period and provided that the plaintiff has established his 'right to relief by evidence satisfactory to the court',[71] judgment may be entered against the defendant by default. In such a case, a copy of the default judgment will be sent to the foreign state or political subdivision in the manner prescribed for service in subsection 1608 (a).[72]

7. *Some Conclusions on the American Legislation.*

It may be stated generally that the United States Immunities Act is to be welcomed. The presence of certain technical imperfections, such as the Act's failure to define the term 'commercial activity' with greater precision, is unfortunate, but with the passage of time and accumulation of case law, such problems will become solved. There are also a number of inconsistencies in the Act, but these are perplexing rather than a potential source of future confusion.[73]

It has already been demonstrated that the failure to include administrative proceedings within the range of the Immunities Act represents a significant loophole in the statute's provisions.[74] Nevertheless, the tone of any summation must be positive, for whatever points of criticism may exist are outweighed by the advantages inherent in the legislation.

The Immunities Act provides United States nationals, both juridical and natural, with vastly improved rights vis-à-vis foreign public commercial enterprises. The Act has established procedures whereby process may be served on the foreign state, political subdivision, agency or instrumentality, and moreover enables the private claimant to recover against any such entity if successful.

The Act has also been beneficial from the viewpoint of the 'foreign state', which need no longer suffer the expenses and problems associated with attachment in aid of execution prior to judgment.[75] Further, the relevance of political issues is largely removed by abolition of the Department of State's 'suggestion' of immunity.

The Immunities Act has ensured that there is a unitary United States

---

69. S 1608 (b) (3) (B).
70. S 1608 (b) (3) (C). See Section-by-Section Analysis, 15 ILM p 112.
71. S 1608 (e). This is the standard applicable to default judgments issued against the U.S. Government (r 55 (3) FR Civ P).
72. S 1608 (e).
73. Eg (i) the requirement of proof of the intended use of property by the foreign state; (ii) the distinction between property of a foreign state and political subdivisions as opposed to property of an agency or instrumentality.
74. The Act only applies to 'the Courts of the United States and of the States' by virtue of s 1604. See Brower, 'Litigation of Sovereign Immunity Before a State Administrative Body and the Department of State: The Japanese Uranium Tax Case', (1977) 71 AJIL 438.
75. Delaume, 8 Jo of Marit L and Comm, p 365.

standard for determining the law of foreign sovereign immunity.[76] By codifying international law, the Act has brought the position in the United States into line with that in most other jurisdictions, and reflects the trend towards the 'commercialization' of state contracts.[77] In consequence, the way is now open for the United States to participate in an international convention on sovereign immunity.

## V THE UNITED KINGDOM STATE IMMUNITY ACT 1978

The United Kingdom State Immunity Act received the royal assent on June 30, 1978, and will come into force on a date to be specified by an order made by the Lord Chancellor by statutory instrument.[78]

In general, the United Kingdom legislation may be described as a 'tougher' piece of legislation than its American counterpart, the Foreign Sovereign Immunities Act.[79] It may become apparent, however, that there are certain defects in the new law. For example, the United Kingdom legislation will not be retroactive and therefore cannot apply to proceedings in respect of matters that took place at a date prior to that when the Act enters into force.[80] Further, it has been recently suggested that a more serious omission is the Act's failure to include provisions whereby British lending banks could recover loans to foreign governments from monies deposited with them by foreign central banks. The position, is, currently, that, even though the English court[81] might find against the borrower, the lending bank could still remain empty-handed if the borrower should decline to repay.

The State Immunity Act essentially re-affirms the general principle of the jurisdictional immunity of the foreign state,[82] while introducing into United Kingdom law[83] a number of exceptional circumstances, in proceedings in respect of which the foreign state will not be granted immunity.[84]

Prior to a consideration of the State Immunity Act, two further provisions merit comment. Firstly, it is provided that immunities and privileges conferred by the Act in relation to any foreign state may be varied

---

76. *Martropico Compania Naviera SA v Pertamina* 428 F Supp 1035, 1037 (1977). See *Alfred Dunhill of London Inc v Republic of Cuba* 425 US 682 (1976).
77. Delaume, *Transnational Contracts* (1975) Vol ii, paras 11.07 and 12.05.
78. S 23(5).
79. *The Economist*, August 5, 1978, p 79, col 3.
80. S 23(3).
81. By s 22(1): 'In this Act "court" includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.'
82. Ss 1(1) and 1(2). See s 20.
83. The Act applies in respect of the law of the UK (s 1), which is defined so as to include 'any dependent territory' (s 22(4)). S 23(6) states that the Act extends to Northern Ireland, and there are a number of particular provisions in respect of Scotland: see ss 13(6), 17(5) and 23(2).
84. See below pp 54-61.

by Order in Council,[85] subject to parliamentary approval.[86] Such restriction or extension of immunities and privileges may take place whenever it is determined that those accorded by the English Act exceed those accorded by the law of the particular foreign state to the United Kingdom.[87] Alternatively, variation may also occur where the immunities and privileges provided under the English Act are less than those required by any international agreement, to which that state and the United Kingdom are parties.[88]

This provision introduces an element of reciprocity into the law of foreign sovereign immunity. Prior to the introduction of the State Immunity Act, the United Kingdom had been, in a sense, at a disadvantage. While English Courts had upheld the principle of absolute immunity from jurisdiction to the advantage of foreign state-owned commercial enterprises,[89] foreigners had been accorded greater protection within the United Kingdom than perhaps their own Courts would have granted a United Kingdom government-owned, commercial enterprise.[90]

Secondly, it should also be pointed out that the provisions of the State Immunity Act do not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964, or the Consular Relations Act 1968.[91] Therefore, section 4 of the State Immunity Act (relating to contracts of employment) does not apply to proceedings concerning the employment of members of a 'mission' within the meaning of the Vienna Convention on Diplomatic Relations,[92] nor of members of a 'consular post', within the meaning of the Vienna Convention on Consular Relations.[93] Further, section 6(1) (relating to proceedings in respect of ownership, possession and use of property) does not apply to proceedings concerning a State's title to, or its possession of, property used for the purposes of a diplomatic mission.[94]

---

85. S 15(1).
86. S 15(2). Resolution passed in either of the Houses of Parliament will be sufficient to annul such an Order (ibid).
87. S 15(1)(a).
88. S 15(1)(b). Note that it is provided by s 22(5) that any power conferred by the Act to make an Order in Council includes power to vary or revoke a previous Order.
89. For the view that reciprocity should not be regarded as a basis of immunity see Lauterpacht, op cit, pp 245-246.
90. *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 418, per Lord Denning.
91. S 16. Certain other matters are also excluded from the scope of the Act by this section:
    (i) proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular has effect subject to the visiting Forces Act 1952 (s 16(2));
    (ii) those proceedings to which s 17(6) of the Nuclear Installations Act 1965 applies (s 16(3));
    (iii) criminal proceedings (s 16(4));
    (iv) proceedings relating to taxation other than those referred to in s 11 (s 16(5)).
92. Scheduled to the Diplomatic Privileges Act 1964. (S 16(1)(a)).
93. Scheduled to the Consular Relations Act 1968. (S 16(1)(a)).
94. S 16(1)(b).

1. *Persons Entitled to Immunities and Privileges Under the Act.*
Section 14 of the State Immunity Act stipulates that the immunities and privileges conferred by Part 1 (ie sections 1-17 inclusive) shall apply to 'any foreign or commonwealth State other than the United Kingdom.'[95] This phrase may be understood to include a foreign sovereign state or the government of a province of the state, and in this respect reflects the position in English law prior to the introduction of the Act.[96]

It is expressly provided by the section that the term 'State' includes, for the purposes of the Act, the sovereign or head of the foreign state in his public capacity; the government of a foreign state; any department of a foreign government; but not that which is referred to as a 'separate entity'.[97]

Subsection 14(1)(a) provides that the immunities and privileges conferred under the Act shall extend to the 'sovereign or other head of . . . [a foreign] . . . State in his public capacity'. Thus the political or royal leader of a foreign state possesses immunity with respect to his official function in the United Kingdom. This provision represents a significant change in the law of foreign sovereign immunity, for, previously, a sovereign was held to be immune from the jurisdiction of the English courts in both public and private matters, except where he had elected to waive that immunity and submit to jurisdiction.[98]

Subsection 14(1)(b) stipulates that any reference to a 'State' shall be understood to include the government of that state for the purposes of the Act;[99] and subsection 14(1)(c) provides that definition of the term 'State' shall be understood to include any department of the government of a foreign state.

However, under s 14 'any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued' is excluded from definition of the word 'State' as used in the Act.

This exemption is subject to an exception where a 'separate entity' fulfills two criteria. Subsection 14(2) provides that a 'separate entity' will

95. S 14(1). Note s 21(a): 'A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question– . . . whether any country is a State for the purposes of Part 1 of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State.'

96. *Duff Development Co v Kelantan Government* [1924] AC 797; *Swiss-Israel Trade Bank v Government of Salta and Banco Provincial de Salta* [1972] 1 L1 Rep 497. The US Foreign Sovereign Immunities Act employs the term 'political subdivision of a foreign state'. See above fn 61-62 and accompanying text.

97. S 14(1).

98. *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, affd 2 HL Cas 1; *Wadsworth v Queen of Spain; De Haber v Queen of Portugal* (1851) 17 QB 171; *Mighell v Sultan of Johore* [1894] 1 QB 149; *Statham v Statham and the Gaekwar of Baroda* [1912] P 92; *Sayce v Ameer Ruler Sadig Mohammad Abas: Bahawalpur State* [1952] 2 QB 390.

99. This represents the position prior to the enactment of the new legislation. See *Duff Development Co Ltd v Kelantan Government* [1924] AC 797; *Kahan v Pakistan Federation* [1951] 2 KB 1003.

be immune from the jurisdiction of the courts of the United Kingdom where 'the proceedings relate to anything done by it in the exercise of sovereign authority'; and 'the circumstances are such that a State . . . would have been so immune'.[1]

The 'separate entity' is encouraged, even in this instance, to submit to the jurisdiction of the English Court. Subsection 14(3) offers the 'separate entity' ('not being a State's central bank or other monetary authority') the advantages inherent in certain procedural privileges stipulated in section 13 of the Act, which ordinarily would apply only in respect of proceedings involving a state. It is provided that the property of the state's central bank may never be considered as either in use, or being used, for commercial purposes. The Act provides that even in a case where the central bank may be a 'separate entity', the procedural privileges granted the state in subsections 13(1), 13(2) and 13(3) shall extend to the central bank as though it were itself a foreign state.[2]

Subsection 14(2) represents a modification of English law. In the past, determination of the character of an entity, either as 'alter ego or organ' of a foreign government,[3] and thereby entitled to immunity; or, as a separate corporate body, exercising control over its own functions independently of government, and therefore not entitled to immunity, has proved to be a problem of no little difficulty.[4]

2. *General Exceptions to the Jurisdictional Immunity of Foreign States.*

*(i) Waiver.* Section 2 of the State Immunity Act 1978 makes provision for a state to surrender immunity in respect of proceedings in relation to which it wishes to submit to the jurisdiction of the courts of the United Kingdom.[5] The Act provides that the head of the diplomatic mission of the foreign state in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the state in respect of any proceedings.[6] It is stated, in addition, that any person, who has entered into a contract on behalf of and with the authority of a state, shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.[7]

A state may submit to the jurisdiction of the court either after the

1. In the case of proceedings under s 10 (relating to ships employed for commercial purposes) this second criterion should be understood to refer to a state that is not party to the Brussels Convention.
2. S 14(4). See Parliamentary Debates Commons, Parl Deb (HC) 5th Ser, vol 949, cols 417-8.
3. The phrase employed by Lord Denning MR in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529.
4. See *Compania Mercantil Argentina v United States Shipping Board* (1924) 93 LJ KB 816; *Krajina v Tass Agency* [1949] 2 A11 ER 274; *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438; *Mellenger v New Brunswick Development Corp* [1971] 1 WLR 604; *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529; *Czarnikow (C) Ltd v Centrala Handlu Zagranicznego 'Rolimpex'* [1979] AC 351.
5. S 2(1).
6. S 2(7).
7. Ibid. See *The Jassy* [1906] P 270 (unauthorised appearance entered by an agent held not to constitute submission to jurisdiction).

dispute giving rise to the proceedings has arisen, or by a prior written agreement.[8] The Act requires, however, that submission be clearly expressed whenever immunity is waived. Mere provision, therefore, in any 'agreement'[9] to the effect that it is to be governed by the law of the United Kingdom, is not to be regarded as a valid submission to jurisdiction.[10]

It is provided, save in three exceptional situations, that a state will be deemed to have submitted to jurisdiction whenever the state institutes,[11] intervenes, or takes any steps in proceedings.[12] Submission will not be so inferred where the state has intervened, or taken any steps, only for the purpose of claiming immunity;[13] or for the purpose only of asserting an interest in property, in circumstances such that the state would have been entitled to immunity if the proceedings had been brought against it.[14] Finally, a state will not be deemed to have submitted to jurisdiction where it has intervened, or taken any steps, in the proceedings 'in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable'.[15]

The Act also provides, in line with English law prior to the legislation,[16] that submission extends to any appeal,[17] but not to any counter-claim except when it arises out of the same legal relationship or facts giving rise to the claim.[18]

(ii) *Commercial Transactions and Contracts to be Performed in the United Kingdom.* Section 3(1) of the State Immunity Act provides that a state shall not possess immunity with regard to proceedings relating to a 'commercial transaction' into which it has entered.[19] It is provided also that a state is not immune as respects proceedings relating to 'an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom'.[20]

---

8. S 2(2).
9. See s 17(2).
10. S 2(2). In accordance with English law prior to the introduction of the Act: *Kahan v Pakistan Federation* [1951] 2 KB 1003; *Baccus SRL v Servicio Nacional Del Trigo* [1957] 1 QB 438.
11. S 2(3)(a).
12. S 2(3)(b).
13. S 2(4)(a).
14. S 2(4)(b).
15. S 2(5).
16. *Rothschild v Queen of Portugal* (1839) 3 Y & C Ex 594; *Prioleau v United States of America and Johnson* (1866) LR 2 Eq 659; *Strousberg v Republic of Costa Rica* (1880) 44 LT 199; *Hettihewage Siman Appu v Queen's Advocate* (1884) 9 App Cas 571; *South African Republic v La Compagnie Franco-Belge du Chemin de Fer du Nord* [1897] 2 Ch 487; *High Commissioner for India v Ghosh* [1960] 1 QB 134.
17. See *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318.
18. S 2(6).
19. S 3(1)(a).
20. S 3(1)(b). Note that ss 17(3) and 17(4) make special provision with respect to s 3 and s 3(1) respectively.
S 17(3): 'For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the

The term 'commercial transaction'[21] is defined by the Act so as to include:

> '(a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority'.[22]

It is stipulated that section 3(1) shall not apply where the parties to the dispute are both states;[23] where they have so agreed in writing;[24] or, where the contract in question is a contract of employment between a state and an individual.[25] The Act states, in addition, that subsection 3(1)(b) shall not be applicable if the contract (not being a commercial transaction) was made in the territory of the state concerned, and the obligation at issue is governed by the 'administrative law' of that state.[26] It is submitted, however, that the term 'administrative law' is one which is subject to various interpretations, and that this lack of precision may be regretted.[27]

Use of the term 'administrative law' raises a second question to which it appears that the Act has failed to provide an answer. It is, at present, uncertain whether the English Court will determine if a particular obligation is governed by the 'administrative law' of a foreign state in accordance with that which is understood to be 'administrative law' in the United Kingdom; or, whether the court will accept as persuasive, rather than necessarily conclusive, the evidence of a representative of the foreign state that a particular obligation is governed by that area of law known as 'administrative law' in the foreign state.[28]

In general, however, section 3 represents a significant progression, as English law will now provide foreign sovereign immunity with regard to commercial transactions and contracts at a standard that reflects more accurately the requirements of international law. Prior to the introduction of the State Immunity Act, English law had not, with respect to actions *in personam*, distinguished between activities of either a commercial or public nature. Immunity had, in consequence, been granted a foreign

---

United Kingdom is a party to the European Convention on State Immunity.'
S 17(4): 'In . . . (section 3(1)) . . . reference(s) to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.'

21. Compare the term 'commercial activity' used in the United States Foreign Sovereign Immunities Act: above pp 37-41.
22. S 3(3).
23. S 3(2).
24. Ibid.
25. S 3(3).
26. S 3(2). See Schwartz B, *Administrative Law* (1976), pp 1-3; Wade HWR, *Administrative Law* (1977), pp 5-7.
27. See *Ridge v Baldwin* [1964] AC 40 at 72, per Lord Reid; Wade, op cit, p 22.
28. See *Krajina v Tass Agency* [1949] 2 A11 ER 274.

state in respect of proceedings arising out of the trading activities of a foreign government.

It might be said that section 3 of the 1978 Act represents a personal triumph for the innovative qualities of Lord Denning. His Lordship had stated twenty years ago, in the House of Lords decision, *Rahimtoola v Nizam of Hyderabad*,[29] that a foreign state should not be entitled to claim immunity with regard to its commercial transactions. Although the remaining Law Lords had expressly disassociated themselves from the judgment,[30] it should be remembered that Lord Denning had sought to prevent the law of sovereign immunity from becoming 'any more enmeshed in its own net', or as His Lordship put it: 'I have stirred these points, which wiser heads in time may settle'.[31] Lord Denning had repeated his view more recently in *Thai-Europe Tapioca Service Ltd v Government of Pakistan*[32] and *Trendtex Trading Corporation v Central Bank of Nigeria*.[33]

While Lord Denning's approach has on occasions been condemned, and His Lordship criticised for paying insufficient attention to the doctrine of *stare decisis*,[34] it may now be said that Lord Denning's view more nearly represents English law.

(iii) *Contracts of Employment.* Section 4 of the State Immunity Act relates to contracts of employment, and provides that a state is not immune as respects 'proceedings relating to a contract of employment' between the 'State' and an individual, either where the contract was made in the United Kingdom, or where the work is to be wholly or partly performed within that country.

Section 4 will not apply in three situations. The first of these is where the individual is a national of the foreign state concerned, at the time when the proceedings are brought.[35] It is provided, secondly, that the section will not apply if at the time when the contract was agreed, the individual was neither a 'national' of the United Kingdom,[36] nor 'habitually' resident there.[37] Neither of these two provisions will operate to exclude application of section 4, where the work is for an 'office, agency or establishment maintained by the State in the United Kingdom for commercial purposes'.[38]

---

29. [1958] AC 379 at 422-4.
30. At 398, 404, 410.
31. At 424.
32. [1975] 3 All ER 961 at 966. In this case, as in *Rahimtoola*, Lord Denning was in the minority: see at 967, per Lawton LJ; at 969, per Scarman LJ.
33. [1977] QB 529.
34. Eg, Lawton LJ in *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 3 All ER 961 at 967; Stephenson LJ in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 493 at 572.
35. S 4(2)(a).
36. As defined in s 4(5).
37. S 4(2)(b).
38. S 4(3).

Finally, the Act provides that section 4 will not apply when the parties to the contract of employment have so agreed in writing.[39]

(iv) *Personal Injury and Damage to Property.* Section 5 of the Act ensures that a 'State' is no longer immune as regards proceedings in respect of death or personal injury, damage to or loss of tangible property caused by an act or omission in the United Kingdom.[40]

(v) *Ownership, Possession and Use of Property.* Section 6(1) provides that there will not be immunity as respects proceedings relating to any interest of the state in, its possession or use of immovable property in the United Kingdom, or any obligation arising therefrom. It is also provided that a state shall not be immune from the jurisdiction of the English court as respects proceedings relating to any interest in movable or immovable property, which has arisen by way of succession, gift or *bona vacantia.*[41]

Section 6(4) stipulates that the English court shall have jurisdiction in proceedings involving a third party other than a state, even though the proceedings relate to property in the possession or control of a state, or property in which it claims an interest. This will apply only, however, in a case in which the state would not be entitled to immunity had the proceedings been brought against itself; or, in a case in which a state claims an interest in property, if the claim is neither admitted nor supported by *prima facie* evidence.

The section clarifies English law in that it stipulates that the court shall possess jurisdiction to administer the estates of deceased persons; persons of unsound mind; and persons who have become insolvent. The court may also wind up companies and administer trusts, notwithstanding that a state may have, or claim to have, an interest in property.[42]

Although it had been stated by the Privy Council in *Sultan of Johore v Abubakar Tunku Aris Bendahar*[43] that their Lordships did not 'consider that there has been established in England . . . any absolute rule that a foreign sovereign cannot be impleaded . . . in any circumstances', it had never been demonstrated in what instances the plea of immunity would be unavailable. Lord Denning had submitted, in *Thai-Europe Tapioca Service Ltd v Government of Pakistan,*[44] a list of circumstances in which, it was suggested, the general principle of absolute immunity would not apply. While it is true that the English court had previously made a foreign sovereign party to proceedings for the purpose of administering a trust fund;[45] and had ordered the winding up of a company where a foreign

39. S 4(2)(c). Note s 4(4): s 4(2)(c) 'does not exclude the application of . . . (s 4) . . . where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom'.
40. See ss 17(3) and 17(4) (above fn 20): the corresponding provision in the US Act s 1605(a)5 (above pp 42-3).
41. S 6(2).
42. S 6(3).
43. [1952] AC 318 at 343.
44. [1975] 3 A11 ER 961 at 965-966.
45. *Duke of Brunswick v King of Hanover* (1844) 2 HL Cas 1; *Strousberg v Costa Rica Republic* (1880) 44 LT 199; *Morgan v Larivière* (1875) LR 7 HL 423.

state could have had an interest in surplus assets,[46] it is submitted that English law had remained unclear. The element of doubt has now been removed by section 6.

(vi) *Ships Used for Commercial Purposes.* Section 10 of the State Immunity Act has enabled the United Kingdom to ratify the Brussels Convention of 1926, and the protocol to that Convention which was signed at Brussels in 1934. The Act contains provisions relating to both vessels and cargo, and is stated to apply both in respect of Admiralty proceedings and proceedings on any claim which could be made the subject of Admiralty proceedings.[47]

(a) *Vessels.* It is provided in s 10(2)(a) that a 'State' will no longer be entitled to immunity with respect to an 'action *in rem*'[48] against a vessel 'in its possession or control or in which it claims an interest',[49] provided that at the time that the cause of action arose, the vessel 'was in use or intended for use for commercial purposes'.

This provision reflects the decision of the Privy Council in *Philippine Admiral.*[50] The Act has effectively reversed the decisions of the Court of Appeal in the *Parlement Belge*[51] and *Porto Alexandre*[52] and upheld the judgment of Sir Robert Phillimore at first instance in the former case.[53]

In addition to the right of a plaintiff to bring an action *in rem* in such circumstances as those provided by s 10(2)(a), the section permits a litigant to bring an action *in personam* to enforce a claim in connection with a ship in which the state exercises possession or control, or in which it has an interest, where the ship was in use, or was intended to be used, for commercial purposes, at the time when the cause of action arose.[54]

(b) *Cargo.* Subsection 10(4) relates to proceedings with respect to cargo, and corresponds to subsection 10(2), that is concerned with action against a ship. Subsection 10(4)(a) deprives the state of immunity in an action *in rem* against a cargo belonging to that state, where *both* the cargo and the ship carrying it were, at the time when the cause of action arose, either being used, or intended to be used, for commercial purposes. Similarly, subsection 10(4)(b) operates to deny the 'State' immunity in an action *in personam* for enforcing a claim in connection with such a cargo, provided, however, that the ship carrying it was at the time that the cause of action occurred in use for commercial purposes, or destined for such use.

It is to be noted that subsections 10(3), 10(4) and 10(5) do not apply, by virtue of subsection 10(6), in the event that the proceedings are in the

---

46. *In re Russian Bank for Foreign Trade* [1933] Ch 745.
47. S 10(1).
48. S 17(5): in relation to Scotland 'action *in rem*' means such an action only in relation to Admiralty proceedings.
49. S 10(5). See s 10(3).
50. [1977] AC 373. See above p 30.
51. (1880) 5 PD 197.
52. [1920] P 30.
53. (1878) 4 PD 129.
54. S 10(2)(b). See s 10(5).

Admiralty jurisdiction or relate to any claim which could be made the subject of Admiralty proceedings, where certain factors are determined. These subsections are stated to be inapplicable when the state in question is a party to the Brussels Convention[55] and one of a series of circumstances is found also to be present. These are that the claim relates to one of the following:

(a) the operation of a ship owned, or operated, by that state;
(b) the carriage of cargo or passengers on a ship owned or operated by that state; or
(c) the carriage of cargo owned by that state on any other ship.

(vii) *Other Exceptions to the Jurisdictional Immunity of Foreign States.* The United Kingdom State Immunity Act applies to deny the foreign state immunity with respect to proceedings relating to any patent, trade-mark, design or plant breeders' rights belonging to the state, which are registered (or for which registration has been applied) in the United Kingdom. Section 7 provides also that the State will not be immune as respects proceedings relating to an alleged infringement of any of these rights or copyright; or the alleged infringement of the right to use a trade or business name in the United Kingdom.

Section 8 deprives the state of immunity in proceedings relating to its membership of a body corporate, an unincorporated body or partnership, subject to three factors. First, the body or partnership must be composed of members other than states. Secondly, and in addition, the body or partnership must be incorporated or constituted under United Kingdom law, and must either be controlled from, or have its principal place of business within, the United Kingdom. It is required, finally, that the proceedings arise between the state and the body or its other members, or alternatively, between the state and the other partners in the case of a partnership.

Section 8 will not apply where the parties to the dispute had so agreed in writing and where operation of the section has been rejected by the constitution or other instrument establishing or regulating the body or partnership in question.[56]

It is provided by section 9 of the State Immunity Act that where a state has agreed to submit a dispute which has arisen (or may arise) to arbitration, then the state is not immune as respects proceedings in the courts of the United Kingdom, which relate to that arbitration.[57] This provision may be excluded by the parties in their arbitration agreement,

---

55. Note s 21(b): 'A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question . . . whether a State is a party to the Brussels Convention . . .'
56. S 8(2).
57. S 9(1). Note that previously an agreement to submit to arbitration had been held not to constitute waiver of immunity: *Duff Development Co Ltd v Kelantan Government* [1924] AC 797; *Compania Mercantil Argentina v United States Shipping Board* (1924) 93 LJKB 816.

and further is stated not to apply to any arbitration agreement between states.[58]

Finally, section 11 of the Act stipulates that the foreign state is not to be granted immunity as respects proceedings relating to its liability for certain United Kingdom taxes and rates in respect of premises that it has occupied for commercial purposes.

3. *Procedure.*

(i) *Service of Process and Judgment in Default.* The State Immunity Act has established procedures whereby service of process may be made upon the foreign state, as defined for the purposes of the Act in section 14. The Act has provided also that judgment may be entered in the event that the foreign state fails to appear in the proceedings.

The English Act, in common with the procedure formulated under the appropriate section of the American Foreign Sovereign Immunities Act,[59] permits the parties to make their own arrangements as to the manner in which effective service should be made.[60] The Act provides an alternative as a 'fall-back' device, where the parties have omitted to arrange their own procedure, according to which service of process may be carried out.

Subsection 12(1) stipulates that service may be made upon the foreign state through the medium of the United Kingdom Foreign and Commonwealth Office, which transmits the document required to be served to the Ministry of Foreign Affairs of the state involved. Service is deemed to be effective as of the time when the document is received at that Ministry.[61]

Under s 12(2) the foreign state is given a period of two months grace before any time for entering an appearance as prescribed by the court shall begin. This period is to be calculated from the date on which service had become effective. The purpose of the two month delay period imposed by the Act, in addition to any other time stipulated by the court, is that the plaintiff and foreign state are provided with an opportunity to settle their grievance prior to the commencement of litigation, which may save a foreign government from embarrassment and publicity in certain foreseeable circumstances.

The Act provides that judgment in default will be entered against a state only in the event that the requirements of subsections 12(1) (relating to procedure) and 12(2) (relating to the two month period of delay) have been fulfilled.[62] Once the state has appeared in the proceedings, it is estopped from objecting at a later stage on the ground that the requirements of service stipulated in subsection 12(1) have not been met.[63]

---

58. S 9(2).
59. S 1608(a)(1): See above p 48.
60. S 12(6).
61. See s 12(7): s 12(1) is not to be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction; and note s 21(d).
62. S 12(4). Note s 12(6). Where the parties have made their own arrangements as to the manner in which service may be made, the provisions of ss 12(2) and 12(4) are inapplicable.
63. S 12(3).

Where the English court is satisfied that the plaintiff has fulfilled the respective requirements of service of process, whether they be those stated in the Act,[64] or those agreed between the parties,[65] and yet the foreign state has failed to enter an appearance, judgment may be rendered in default. In this event, it is provided by subsection 12(5) that a copy of that judgment should be forwarded to the Foreign and Commonwealth Office, who shall in turn transmit the copy to the foreign ministry of that state. Any period during which an application may be made to have the judgment set aside shall be calculated to run two months after the date on which the copy of the judgment is received at that ministry.[66]

It is to be noticed that the Act provides that section 12 should apply in respect of proceedings against the constituent territories of a federal state.[67] Section 12 will not apply, however, to proceedings against a state by way of counterclaim or to an action *in rem*.[68]

(ii) *Procedural Privileges Granted the Foreign State.* Section 13 of the Act grants states certain procedural privileges. Subsection (1) provides that a state shall not be penalised in respect of any failure or refusal to disclose any document or information for the purposes of proceedings to which it is a party. It is also provided, by subsection 13(2), that 'relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property'. Nor shall the property of a state be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem*, for its arrest, detention or sale.[69]

Two comments may be made in respect of this latter privilege, which operates to protect the property of the state from any process for the enforcement of a decision. Firstly, this provision will not prevent the issue of any process in respect of property which is 'for the time being in use or intended for use for commercial purposes'.[70] Secondly, this provision will only apply in respect of the property of a foreign state, which is party to the European Convention on State Immunity,[71] and in this event in two instances. The process must either be for enforcing a judgment which is 'final'[72] and the state have made a declaration under

64. S 12(1) and 12(2).
65. S 12(6).
66. S 12(5). See s 22(2), and note s 21(d).
67. S 14(5), but note s 14(6) to the effect that if Part 1 of the Act does not apply to a constituent territory by virtue of any order in Council, ss 14(2) and 14(3) shall apply to it as if it were a 'separate entity'.
68. S 12(7). S 12 applies to any proceedings instituted after the Act has entered into force: s 23(4).
69. S 13(2)(b).
70. S 13(4). Note ss 13(5) and 14(4), which provides: 'Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 . . . as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority'.
71. S. 13(4).
72. Within s 18(1)(b), 'that is to say, which is not or is no longer subject to appeal or, if given in default of appearance, (is) liable to be set aside'.

Article 24 of the Convention;[73] or the process must be for enforcing an arbitration award.[74]

Notwithstanding the procedural privileges bestowed upon the state by subsection (2) of section 13,[75] it is open to the state to ensure that it is available to the giving of relief or the issue of any process by expressing its consent thereto in writing. Subsection 13(3) states that such consent, which may be contained in a prior 'agreement',[76] may be expressed so as to apply to a limited extent or generally. A mere provision, however, submitting to the jurisdiction of the English court will not be regarded as an adequate expression of consent for the purposes of this subsection.

The Act stipulates that the head of a foreign state's diplomatic mission in the United Kingdom (or the person for the time being performing his functions) shall be deemed to possess the necessary authority to provide any such consent on behalf of the state.[77]

4. *Judgment Against the United Kingdom in States that are Party to the European Convention on State Immunity.*

(i) *Recognition of Judgments Against the United Kingdom.* It is stated in the Preamble to the State Immunity Act that one purpose of the statute is 'to provide for the effect of judgments given against the United Kingdom

73. S 13(4)(a). Note s 21(c): 'A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question — . . . whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party'.
Article 24 reads as follows:
'1. Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not Party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta jure imperii*).
2. The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the Annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court.
3. The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present Article.
4. The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.'
74. S 13(4)(b).
75. See above p 62.
76. See s 17(2): '. . . references to an agreement include references to a treaty, convention or other international agreement'.
77. S 13(5). Note s 13(6) which makes provision for the application of s 13 to Scotland.

in the courts of States parties to the European Convention on State Immunity'.[78]

Section 18 provides, subject to the exceptions to recognition listed in section 19 and the judgment being one within the definition inherent in subsection 18(1), that a judgment to which the section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action, and may be relied upon by way of defence or counter-claim in such proceedings.[79]

In order to qualify as a judgment within the terms of the section, it is required by subsection (1) of section 18 that three criteria be proved. Firstly, the judgment must be one 'given against the United Kingdom by a court in another State party to the European Convention on State Immunity'. Secondly, it is required that the judgment have been 'given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 . . . [of the English Act] . . . '. The third requirement is that that judgment have been 'final'. The Act explains that this term refers to a judgment 'which is not or is no longer subject to appeal or, if given in default of appearance, [is] liable to be set aside'.[80]

(ii) *Exceptions to Recognition.* Section 19 provides, notwithstanding the general principle of recognition formulated in the preceding section, that the English court need not give effect to foreign judgments within the terms of section 18 in certain circumstances. Section 19 lists eight such situations.

The English Court will not need to give effect to section 18 in the case of a judgment where to do so would be 'manifestly' contrary to public policy. This will include the situation where a party to the proceedings in which the judgment was given had not been provided with an adequate opportunity to present his case. If the judgment had been given without provisions corresponding to those of section 12 of the English Act (relating to procedure for service of process and judgment by default) having been followed, and the United Kingdom has neither entered an appearance, nor applied to have that judgment set aside, then the English court will not be required to give effect to the decision of the foreign tribunal.

It is not required to give effect to section 18 in the case of a judgment where proceedings between the same parties, based on the same facts and having the same purpose, are either pending before a court in the United Kingdom (provided these were the first to be instituted); or are pending before a court in another state party to the Convention, where the foreign

78. Reference to a court in a state party to the Convention includes reference to a court in any territory in respect of which it is a party: s 18(4).

79. S 18(2). The Act states also that this provision 'shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment': s 18(3).

80. S 18(1)(b).

proceedings were the first to have been instituted and may result in a judgment to which that section will apply.

The foreign judgment will not be recognised if the result is found to be inconsistent with that decided in other proceedings between the same parties. This will be the case where the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted, or the judgment of that court was given before the first-mentioned judgment became final.[81] The Act stipulates also that the English court need not give effect to section 18 in the case of a judgment where its result is inconsistent with the result of another judgment given in proceedings between the same parties, when the other judgment is by a court in another state party to the Convention and that section has already become applicable to it.[82]

Where judgment has been given against the United Kingdom in proceedings in respect of which the United Kingdom had not been entitled to immunity because of a provision corresponding to subsection (2) of section 6,[83] the English court need not give effect to section 18 in respect of that judgment in two instances. The first of these will be where the court that gave the judgment would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom.[84] The second instance will be where the court that gave the judgment has applied a law other than that indicated by the United Kingdom rules of private international law, and would have reached a different conclusion if it had applied the law so indicated.[85]

5. *Some Conclusions on the English Act.*

It would be premature to attempt to evaluate the State Immunity Act 1978 at this time. In this paper it is intended rather to make certain observations on the recent legislation.

It would seem, to the detriment of the Act, that the omission of provisions whereby a plaintiff in an English court might have an order for attachment made out against the property of the foreign state, pending judgment, is unfortunate. This omission has been justified on the ground that since the Act serves to enable the United Kingdom to ratify the European Convention on State Immunity, any defendant state party to that Convention will give effect to the judgment, and therefore there is no

81. S 19(2)(b)(i). 'Final' in this subsection is stated to have the meaning of that term as defined in s 18(1)(b).
82. S 19(2)(b)(ii). Note s 19(4). This subsection states that for the purpose of s 19(2) any 'references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party'.
83. S 6(2) reads 'A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia'.
84. S 19(3)(a).
85. S 19(3)(b).

need for execution to be levied. It has also been claimed, with respect to those foreign states which are not parties to the European Convention, that section 13(3) removed immunity from execution to the fullest extent permissible under current international law.[86]

Lord Denning has expressed the 'gravest misgivings' about the recent legislation. The Master of the Rolls is of the opinion that, in its present form, the Act has failed to take account of developments in international law since 1972, and will serve merely to sterilize the position of the law of foreign sovereign immunity in the United Kingdom.[87]

These criticisms notwithstanding, the introduction of the State Immunity Act is to be welcomed. It has been said that the new legislation has a ' . . . part to play in building a body of international law relevant to the needs of the 1970s and 1980s . . . '.[88] As a consequence of the Act, the law of the United Kingdom will conform more closely with the practice of a majority of foreign states, and in particular those that are party to the Brussels Convention and the European Convention on State Immunity.

The Act has served also to restore an element of certainty in this area of English law. The fear had been expressed during consideration of the Bill in the Second Reading Committee, that the then current state of the common law in the United Kingdom, (as a consequence of the *Philippine Admiral*[89] and *Trendtex*[90]) would force those engaged in commerce and finance with foreign states to conduct their transactions in another country. It was feared that much of the work connected with these transactions, which represents an important invisible export and a substantial source of income for the United Kingdom, would be lost to the City of London.[91] Indeed, the City had been threatened by the introduction of the American Foreign Sovereign Immunities Act. The English Act can only serve to preserve and perpetuate the attraction of the United Kingdom as an international commercial centre.

## VI FOREIGN SOVEREIGN IMMUNITY IN AUSTRALIA

The introduction of the United States and United Kingdom legislation constitutes conclusive evidence in statutory form of adoption of the restrictive theory by two countries, which had, until recently, persisted in application of the principle of absolute immunity. Enactment of the State Immunity Act of 1978, in particular, will be of interest to Australian lawyers.

As yet, there have been few occasions when the foreign sovereign immunity problem has been posed before the Australian courts. If, however, as was stated in the last issue of this Yearbook,[92] ' . . . there is a general trend towards acceptance of the restrictive theory, and parti-

86. Parl Deb (HC) 5th Ser, vol 949, cols 410-11.
87. Parl Deb (HL) 5th Ser, vol 388, cols 73-4.
88. Parl Deb (HC) 5th Ser, vol 949, col 405.
89. [1977] AC 373.
90. [1977] QB 529.
91. Parl Deb (HC) 5th Ser, vol 949, col 412.
92. Johnson, 'The Puzzle of Sovereign Immunity', (1978) 6 Aust Yb IL 1, at p 41.

cularly if this trend continues in the English courts, more such cases are likely to arise before the Australian courts also'.

1. *The Australian Decisions.*

The few cases that have arisen in Australian courts will be briefly examined. First, there are those cases in which the plaintiff has sought directly to implead a foreign state: *Van Heyningen v Netherlands-Indies Government*;[93] *United States of America v Republic of China*;[94] *Grunfeld and Another v United States of America and Others*.[95]

The facts in *Van Heyningen* were as follows. The plaintiff had commenced action against the Netherlands-Indies Government, whereupon the latter entered a conditional appearance before Philp J at first instance, applying on summons to have service of the writ set aside and all proceedings in the action stayed. Such application was granted once the court had ascertained from the Department of External Affairs that 'the Netherlands Indies forms part of the territory of the Kingdom of the Netherlands and that the Kingdom of the Netherlands is a foreign State'.[96] Said Philp J delivering a judgment that was later upheld on appeal by the Full Court:[97]

> 'In my view an action cannot be brought in our courts against a part of a foreign sovereign State. Where a foreign sovereign State sets up as an organ of its Government, a governmental control of part of its territory which it erects into a legal entity, it seems to me that that legal entity cannot be sued here because that would mean that the authority and territory of a foreign sovereign would be subjected in the ultimate result to the jurisdiction and execution of this court. Therefore, I hold on this ground alone that the service of the writ should be set aside.'

In *United States of America v Republic of China*,[98] the plaintiff had issued a summons claiming enforcement of a mortgage allegedly given by the Republic to the plaintiff on the ship *Union Star*, which was then lying in the Port of Brisbane. The United States demanded foreclosure or sale; appointment of a receiver in respect of the ship; and sale of the ship by the receiver, so that the plaintiffs could recover moneys due under the mortgage. When the matter came to be heard before Philp J (the judge at first instance in *Van Heyningen* two years previously) counsel for the Republic asked leave to file a notice of motion to have the writ and proceedings thereunder set aside. Having established that the Commonwealth did recognise the National Government of the Republic of China, Philp J set aside the writ on being informed by counsel that the Republic did not consent to submit to the jurisdiction of the court.

---

93. [1948] QWN 19; aff'd [1949] St R Qd 54.
94. [1950] QWN 5.
95. [1968] 3 NSWR 36.
96. [1948] QWN 19 at 24.
97. Ibid. The passage was quoted by Macrossan CJ giving judgment in the Full Court, [1949] St R Qd at 58.
98. [1950] QWN 5.

In *Grunfeld and Another v United States of America and Others*,[99] it seems that the plaintiffs had invested a sum in the region of $100 000 in a business venture, which involved their hiring civilian clothing to United States armed forces personnel on leave in Sydney. The plaintiffs alleged that they had entered a contract with the three defendants, the United States of America, the United States R. & R. Office and the officer commanding that office, one Major Boyd. The instant case arose when the plaintiffs sought declarations that each of the defendants was party to a valid and subsisting contract with them, and injunctions restraining the defendants from purporting to terminate that contract. The defendants applied to the court for the proceedings to be stayed and the originating summons set aside, on the ground, *inter alia*, that the court had no jurisdiction by reason of sovereign immunity.

Street J in granting the stay of proceedings and setting aside the summons, stated (following the House of Lords decision in *Rahimtoola v Nizam of Hyderabad*[1]) that a foreign state cannot be made party to litigation before the courts in Australia against its will. It was held, further, that the second and third defendants (the R. & R. Office and Major Boyd) were within the scope of the foreign sovereign immunity defence since both had been acting as agents of the United States of America.

Two further cases relating to sovereign immunity were distinguished by Street J in *Grunfeld*: *Wright v Cantrell*[2] and *Chow Hung Ching v The King*.[3] In neither of these actions, however, was a foreign state impleaded; and, in both cases, individuals purported to assert immunity from the jurisdiction of local courts on the ground that they were privileged and protected from suit solely by virtue of membership in the armed forces of a visiting foreign power. In contrast, in *Grunfeld*, 'Major Boyd . . . did not act in a personal capacity, and it is clear that what was done through or in the name of the United States R. & R. Office was done for the purposes of the foreign state itself'.[4]

The Australian cases considered so far demonstrate that courts throughout the Commonwealth have followed United Kingdom precedent and consistently upheld the immunity of the foreign state from jurisdiction.[5] These cases, however, were decided prior to the decision of the Judicial Committee of the Privy Council in the *Philippine Admiral*[6]

---

99. [1968] 3 NSWR 36.
1. [1958] AC 379.
2. (1943) 44 SR(NSW) 45.
3. (1948) 77 CLR 449.
4. [1968] 3 NSWR, at 38.
5. Note the comment of Jordan CJ in *Wright v Cantrell* 44 SR (NSW) 45 at 47: 'And it is open to question whether a ship owned by a foreign Sovereign and used by it for the purposes of ordinary trade is entitled to any immunity'. This appears however, as Johnson suggests (op cit, p 43), to have been made in relation to remarks expressed in the *Cristina* [1938] AC 485. See also *Chang v Registrar of Titles* (1976) 8 ALR 285, where the question of the immunity of the foreign state from jurisdiction was left undecided.
6. [1977] AC 373.

and that of the Court of Appeal in the *Trendtex* case.[7] The stance which the Australian judiciary might adopt is therefore uncertain. Professor Johnson, whose article examines both these cases in considerable depth, states that 'it seems reasonable to suppose that an Australian court would be willing to follow the *Philippine Admiral* to the extent of denying immunity to a foreign sovereign State in the case of an action *in rem* where an "ordinary trading ship" owned or operated by that State is concerned: but it is doubtful if an Australian court would follow the Court of Appeal decision in *Trendtex* to the extent of allowing an action *in personam* to proceed against a foreign State or an organ or agency or department of that State'.[8]

2. *An Australian Act*

The present position of the foreign state and its immunity from jurisdiction before the Australian courts must be regarded as uncertain, and therefore unsatisfactory. It has been the experience of both the United Kingdom and the United States of America that the foreign sovereign immunity question requires a legislative solution. This solution too is required in Australia.

Legislation would also have the advantage of providing procedures whereby process may be served on a foreign state. It is interesting to note that the problems of service have arisen in past Australian cases. In *Van Heyningen*, for example, the plaintiff purported to carry out service upon the Netherlands-Indies Government by serving a writ upon a person described as an Inspector First Class of the General Treasury in the employ of the Netherlands-Indies Government, but who had no authority to accept service of process. It was held at first instance by Philp J[9] and by Macrossan CJ in the Full Court,[10] with whose judgment the remainder of the bench did agree, that the writ could have been set aside on the ground that service was defective.

In *United States of America v Republic of China*, service of notice of the writ had been made upon the Chinese consul in Brisbane. Duncan, counsel for the Republic, contended that, since the consul had lacked authority to accept writs on behalf of the Republic, service was therefore nugatory. Although the point did not fall to be decided since Philp J held that the writ issued by the plaintiff directly impleaded a foreign state, and must, on this ground, be set aside, the case serves nevertheless to illustrate the problems that may arise when a plaintiff seeks to enjoin a foreign government as defendant. A similar occurence arose in *Grunfeld v United States of America*.

An Australian legislative solution to the foreign sovereign immunity question should include provisions modelled upon those in the American and British legislation that are regarded as best suited to the Australian context. An Australian statute should, for example, formulate procedures

7. [1977] QB 529.
8. See Johnson, op cit, p 44.
9. [1948] QWN 19 at 24.
10. [1949] St R Qd 54 at 60-1.

whereby service of process might be made upon a foreign state, either according to arrangements agreed as between the parties themselves, or in accordance with statutory 'fall-back' procedures as prescribed by section 1608(a)(1) of the Foreign Sovereign Immunities Act and section 12 of the English statute.[11]

There are several essential requirements to an Australian Act, in addition to such procedural provisions. First, the format of the legislation should re-affirm the principle of the immunity of the foreign state from jurisdiction of the local courts, subject of course to waiver of that immunity by the foreign state and a series of general exceptions to that jurisdictional immunity. This is the basic pattern of both the United States and the United Kingdom legislation.

A second requirement is that of defining those entitled to immunity, covered in section 1603(a) and section 14 of the American and British legislation respectively. It is submitted that the provisions of the United Kingdom State Immunity Act are to be preferred in this respect, on the ground that the criteria required to be satisfied in order to qualify as a 'separate entity' within the terms of section 14(2), are simpler than the three criteria that must be fulfilled in order to qualify as an 'agency or instrumentality of a foreign state' stipulated in section 1603(b) of the American Act. Further, it has already been demonstrated that the definition provided in section 1603(b) of the American Act, to assess the extent of a foreign state's connection or identification with the entity under consideration, is inadequate for the purpose of evaluating practices prevalent in the socialist states of Eastern Europe, where the state controls all legal entities involved in manufacturing and commerce.

Finally, it is submitted that an Australian Act would require provisions relating to attachment and execution of judgment on the lines of section 1610 of the United States Foreign Sovereign Immunities Act. While the American legislation acknowledges the general principle that the property of a 'foreign state' (within the meaning of that statute) and certain other types of property (eg that of a central bank, international organization or military authority[12]) shall be immune from attachment, arrest and execution of judgment,[13] a series of exceptions of considerable practical importance are stipulated in section 1610. The United Kingdom Act, on the other hand, lacks corresponding provisions for reasons that have been explained earlier in this article.[14] It is submitted that it is to be preferred that prospective Australian legislation should imitate the United States model in this regard, for there can be no satisfaction in obtaining judg-

---

11. See above pp 48 and 61.
    Note that problems relating to service upon a foreign state have arisen in the US despite the presence of statutory procedure: *Gray v Permanent Mission of the People's Republic of the Congo to the United Nations*, 443 F Supp 816 (1978), *40D 6262 Realty Corporation v United Arab Emirates Government*, 447 F Supp 410 (1978).
12. S 1609.
13. S 1611.
14. See above p 66.

ment against, say, a foreign government, only to discover that it is impossible to recover as against that defendant.[15]

15. Ibid.