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Amending the Foreign Sovereign Immunities Act: The ABA Position†

I. Introduction

The Foreign Sovereign Immunities Act (FSIA) established a comprehensive and exclusive legal regime for the adjudication in United States courts of claims against foreign states and government agencies.¹ The act transferred responsibility for determinations of sovereign immunity from the State Department to the courts, and it codified the restrictive theory of immunity which permits governments to be sued in foreign courts for

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†Testimony of Mark B. Feldman before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, U.S. House of Representatives, in support of the enactment of H.R. 3137 and H.R. 4592, on May 20, 1986. The author appeared on behalf of the American Bar Association to express the ABA's support for prompt enactment of the amendments. See *Arbitral Awards: Hearing on H.R. 3106, H.R. 4342, H.R. 4592 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 81 (1986) (statement of Mark B. Feldman). (The testimony is modified slightly to adjust his testimony to fit the format of this Journal; Mr. Feldman's presentation, however, was not substantively altered in any way).

For further views by Mr. Feldman on the operation of the FSIA and the proposed amendments, see Feldman, *The Foreign Sovereign Immunities Act of 1976 In Perspective: A Founder's View*, 35 INT'L & COMP. LAW Q. (1986); Feldman, *Foreign Sovereign Immunity in the United States, 1976-1986*, 18 VAND. J. TRANSNAT'L LAW (1986).

1. Foreign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602-1611, 1391 (b) and 1441 (d) (1982)). See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

commercial activities and some other acts that affect the interests of the forum.

This regime has worked reasonably well over the past ten years, but there have been difficulties and uncertainties. The American Bar Association (ABA) supports the amendments proposed in H.R. 3137. These amendments address some of the most serious problems in the present law. They would not change the principles of the FSIA. They would improve the operation of the law and give effect to the intent of Congress by clarifying certain ambiguities and by filling certain gaps in the statutory scheme.

H.R. 3137 includes five separate amendments relating to (1) the definition of commercial activity, (2) the enforcement of foreign arbitral awards, (3) the act of state doctrine, (4) execution of judgment against the commercial assets of foreign states, and (5) prejudgment attachment of property belonging to foreign government agencies engaging in commercial activity in the United States. Each will be discussed in the following. Although the ABA also endorses the amendments to the admiralty provisions contained in H.R. 4592, this comment will not detail its views on that bill.

II. The Five Amendments in H.R. 3137

A. COMMERCIAL ACTIVITY

The first section of H.R. 3137 would clarify the definition of commercial activity in section 1603 of the act to make explicit the intent of Congress, which is clearly stated in the legislative history of the FSIA, that a foreign state is engaged in commercial activity when it borrows money or guarantees repayment of a loan made to another party.² Consequently, the foreign state can be sued on its promise to pay or on its guarantee in a court in the United States, if the other jurisdictional requirements of the FSIA are present. Sovereign immunity does not apply to transactions in financial markets.

This is a technical amendment that does not change the thrust of the act. As stated in the legislative history, the FSIA treats all contracts for the sale of goods or services, including loans, as commercial activities regardless of the purpose of the transaction or the governmental functions involved.³ The sole exception contemplated by the framers of the FSIA

2. H.R. REP. NO. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6615.

3. *Id.* The few cases to the contrary are wrongly decided. See *MOL, Inc. v. The People's Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984); *Practical Concepts, Inc. v. Republic of Bolivia*, 615 F. Supp. 92 (D.D.C. 1985).

is a contract of employment between a government and its own national for service as a government official.⁴

The ABA recommends this particular amendment, because the U.K. State Immunity Act of 1978 expressly states that loans and loan guarantees are commercial transactions.⁵ The banking bar believes the amendment would help avoid adverse comparisons being made between U.S. and U.K. financial markets as regards the security of loans made to foreign sovereigns.

B. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Section 2 of H.R. 3137 would add a new paragraph (6) to section 1605(a) of the act to clarify the jurisdiction of the federal courts to enforce arbitration agreements with and arbitral awards made against foreign states and government agencies. This amendment is needed because the statute enacted in 1976 makes no specific reference to arbitration, and some of the courts are having difficulty discerning the intent of Congress on this important subject. The State Immunity Acts of the United Kingdom and Australia provide for the enforcement of arbitral awards, and the ABA believes the FSIA should also.⁶

The legislative history of the FSIA indicates that Congress expected arbitration awards to be executed against the commercial assets of foreign states under sections 1605(a)(1) and 1610(a)(1) of the act. These provisions authorize the court to act where the foreign state has waived its immunity from jurisdiction or from execution "either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver." Under the FSIA, the waiver of immunity constitutes consent to the jurisdiction of the court. The Report of the Judiciary Committee notes that courts have found implicit waivers of immunity "in cases where a foreign state has agreed to arbitration in another country or where the state has agreed that the law of another country governs its agreement."⁷

The courts have had no difficulty finding an implicit waiver of immunity where the agreement provides for arbitration in the United States,⁸ but some judges have been uncertain whether the same rule applies where

4. See H.R. REP., *supra* note 2, at 6615; *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980); *Tuck v. Pan American Health Organization*, 668 F.2d 547 (D.C. Cir. 1981).

5. State Immunity Act of 1978, Chap. 33, sec. 3(3)(b).

6. *Id.* at secs. 9 & 17.

7. H.R. REP., *supra* note 2 at 6617 & 6627.

8. *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

the agreement provides for arbitration in a third country. In the case most directly in point, *Iptrade International, S.A. v. Federal Republic of Nigeria*,⁹ the court enforced an arbitral award made in Switzerland against Nigeria on the basis of a waiver of immunity implied from Nigeria's agreement that "performance of the contract would be governed by the laws of Switzerland and that any disputes arising under the contract would be submitted to arbitration by the International Chamber of Commerce. . . ."

An important element in the court's decision was the fact that the award fell within the compass of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The United States, Nigeria, and Switzerland are all parties to that convention. Under its terms, the United States is bound to enforce an arbitral award made in the territory of another state party to the convention unless enforcement is excused on limited grounds specified in the convention. Sovereign immunity is not a defense to enforcement specified in the convention.¹⁰

The *Iptrade* decision respects the treaty obligations of the United States and gives effect to the intent of Congress in the FSIA. Unfortunately, there are a number of comments critical of *Iptrade* in cases where plaintiffs have attempted to persuade the courts that a state's agreement to arbitrate in a third country waives immunity from the jurisdiction of a U.S. court to adjudicate, on the merits, a claim for damages for breach of contract.¹¹

As a result of these dicta, there is uncertainty whether the United States courts have jurisdiction to enforce an arbitral award made against a foreign state in a third country even where the United States has a treaty obligation to enforce such an award. This uncertainty is a serious problem for American trade and investment, because arbitration has become the preferred procedure for the peaceful resolution of disputes between private parties and foreign states and government agencies. In the vast majority of cases, American enterprises accept arbitration with foreign states and government agencies in neutral third countries, and they usually do so in expectation that the arbitration award will be enforceable in the

9. 465 F. Supp. 824 (D.D.C. 1978).

10. Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, T.I.A.S. No. 6997, 751 U.N.T.S. 398 at Sec. V.

11. See *Ohntrup v. Firearms Center Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981); *Chicago Bridge & Iron Co. v. Iran*, 506 F. Supp. 981 (N.D. Ill. 1980); *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds* 647 F.2d 320 (2d Cir. 1981), *rev'd and remanded* 461 U.S. 480 (1983). See generally, *Frolova v. U.S.S.R.*, 761 F.2d 370, 377 (7th Cir. 1985).

United States and other countries under the New York Convention or another applicable treaty.

International commercial arbitration is a hybrid process. It depends on the agreement of the parties, but it relies on national courts for enforcement of that agreement. In practice, most sovereign parties respect their obligation to carry out arbitration awards rendered against them, but that tradition rests on expectations that awards are enforceable in court if they are not implemented voluntarily.

The confusion in the U.S. courts as to when an agreement to international arbitration constitutes a waiver of sovereign immunity raises doubts as to the enforceability of awards under arbitration agreements in a great many international contracts and complicates the negotiation of arbitration clauses in new agreements.

H.R. 3137 would solve these problems by specifying certain circumstances where an agreement to arbitrate or an arbitral award is enforceable in the United States courts. Under this amendment, sovereign immunity would not be a defense if (1) the arbitration takes place in the United States, (2) the arbitration is or may be governed by a United States treaty obligation, or (3) the underlying claim could have been brought against the foreign state in a United States court under the jurisdictional criteria prescribed in the FSIA.

To avoid misunderstandings as to the intent of this provision, a few words of explanation may be helpful. First, this amendment does not replace sections 1605(a)(1) and 1610(a)(1) of the act. A court may still hold that a particular agreement to arbitrate constitutes a waiver of immunity and consent to the jurisdiction of the court. For instance, the model arbitration clause recommended by the American Arbitration Association stipulates that "judgment upon the award rendered may be entered in any Court having jurisdiction thereof." Many international contracts provide that "the award may be enforced by any court of competent jurisdiction." Language of this type will support a waiver of immunity.

H.R. 3137 addresses the situation where the arbitration agreement is silent on enforcement. It provides, *inter alia*, for enforcement of foreign arbitral awards which are the subject of a treaty or agreement calling for the enforcement of arbitral awards. In effect, this rule codifies the decision in the *Ipirade* case that agreement to arbitrate constitutes a waiver of immunity even if the award is rendered abroad. The United States is party to a number of multilateral and bilateral agreements that fall within this provision.¹² Perhaps the most important is the New York Convention.

12. *E.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 792 U.N.T.S. 368; the U.S.-Iran Claims Settlement Agreement, Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 75 A.J.I.L. 422.

Under that convention, the United States is obligated to enforce an arbitral award made in the territory of another contracting state. Most arbitration agreements between private parties and foreign states provide for arbitration in a neutral state that is party to the New York Convention or they authorize the arbitrators or an arbitration institution to determine the situs of the arbitration. The amendment is worded to provide for enforcement of the award if the arbitration takes place in a state party to the New York Convention or if the arbitrators were authorized to choose such a situs whether they did so or not. However, if the parties agreed to hold the arbitration in a state that is not party to the New York Convention, the U.S. courts will not enforce the award unless there is another basis for jurisdiction.

The ABA believes this result is consistent with the expectations of parties to arbitration agreements.¹³ Approximately seventy states, including all the established centers of arbitration, are party to the New York Convention. Arbitration institutions invariably locate arbitrations in states that are party to the New York Convention. A number of states that are not party to the New York Convention routinely participate in arbitrations located in countries that belong to the convention. Thus, it is fair to conclude that any government that agrees to arbitration with a foreign party in a location to be determined by a third party has every reason to expect that the proceeding will result in an award which is enforceable under the New York Convention.

The sovereign party expects to have the benefit of the award if it is rendered in its favor.¹⁴ Good faith and mutuality require that the other party has the same advantage. H.R. 3137 will ensure this result and will help attract capital and technology to developing countries by providing security for international transactions.

The argument has been made in some cases that a federal district court is precluded from enforcing an arbitration award made in a foreign state if the defendant is not present in the jurisdiction and the underlying transaction has no connection with the United States.¹⁵ It is claimed that the exercise of jurisdiction in these circumstances would not satisfy the "minimum contacts" required by the due process clause of the Fifth and Fourteenth Amendments of the Constitution.¹⁶

13. See Feldman, *Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association* 40 *ARB. J.* 24, (1985).

14. *La Société Nationale de Recherche (Sonatrach) v. Shaheen Natural Resources*, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd* 733 F.2d 260 (2d Cir. 1984).

15. This contention was not accepted in *Libyan American Oil Company v. Socialist People's Libyan Arab Jamahiriya*, 482 F.Supp. 1175 (D.D.C. 1980), *vacated after settlement*, 684 F.2d 1032 (D.C. Cir. 1981).

16. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

This contention ignores two important considerations. First, constitutional objections to the personal jurisdiction of the court may be waived.¹⁷ Nothing in the Constitution precludes a foreign state from waiving its immunity and consenting to the jurisdiction of a United States court. Second, a federal district court may enforce a judgment or an arbitral award against property within its jurisdiction, even if it would not have jurisdiction to adjudicate the dispute on the merits.

As noted by the Supreme Court in *Shaeffer v. Heitner*,¹⁸ the minimum contacts required by the Fourteenth Amendment before a state court may exercise jurisdiction over a nonresident party in an action for damages are not required to execute a judgment made by the court of another state against property of the defendant in the forum. “. . . there would seem to be no unfairness in allowing an action to realize on that debt in a state where the defendant has property, whether or not that state would have had jurisdiction to determine the existence of the debt as an original matter.”¹⁹ The same logic applies to the execution by a federal court of foreign judgments and foreign arbitral awards. Any other conclusion would impede the United States from discharging its obligations under the New York Convention to enforce foreign arbitral awards.

C. THE ACT OF STATE DOCTRINE

Section 3 of H.R. 3137 would add a new paragraph (b) to section 1606 of the FSIA that would bar application of the act of state doctrine in expropriation, breach of contract and arbitration cases brought under the act. This amendment is necessary to give effect to the intent of Congress in enacting the FSIA, which provides for the adjudication of such claims in the United States courts in prescribed circumstances. A number of decisions in the lower courts have applied the act of state doctrine in circumstances which frustrate the intent of Congress, and the relevant Supreme Court opinions have failed to provide clear guidance as to the continuing validity and scope of the doctrine.

This amendment does not attempt to deal with the act of state doctrine comprehensively. It only addresses certain cases arising under the FSIA. The amendment does not apply to any claim brought against a private party,²⁰ and it does not apply to all claims brought against foreign states

17. See *Shaeffer v. Heitner*, 433 U.S. 186 (1977); see also *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, at 295, n. 10 (1980).

18. 433 U.S. 186 (1977).

19. *Shaeffer v. Heitner*, 433 U.S. at 210, n. 36. In *Transatlantic Bulk Shipping and Saudi Chartering, S.A.*, 622 F.Supp. 25 (S.D.N.Y. 1985) the court declined to confirm a foreign arbitral award where no property of the defendant was present in the jurisdiction.

20. See *Hunt v. Mobil Oil*, 550 F.2d 68 (2d Cir. 1977).

under the FSIA.²¹ The ABA takes no position on application of the act of state doctrine in cases not addressed by the amendment, and it urges the Congress to clearly state its intent that no inferences should be drawn from the amendment with respect to cases that fall outside the scope of the amendment.

The act of state doctrine has several different manifestations in U.S. case law, and it is one of the most controversial issues in the field of foreign relations law. The problem addressed in this legislation derives from the 1964 decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, where the Supreme Court held that the courts would not examine the validity under international law of a taking by a recognized foreign sovereign of property located within its own territory in the absence of a treaty or other unambiguous agreement regarding controlling legal principles.

This particular decision was reversed by Act of Congress in the second Hickenlooper Amendment to the Foreign Assistance Act,²² and subsequent decisions of the Supreme Court have declined to apply the act of state doctrine in various circumstances.²³ However, the Supreme Court has not repudiated the act of state doctrine as such, and the lower courts have construed the Hickenlooper Amendment narrowly.²⁴ As a result, the doctrinal basis for the act of state doctrine has become thoroughly confused. There is no certainty in litigation involving actions by foreign states, and a number of decisions have reached unjust results in circumstances where there was no foreign policy imperative requiring the court to give effect to the damaging act of the foreign sovereign.²⁵

To cite a few of the most egregious examples:

(1) In 1980, in the *Liamco* case, a district court refused on act of state grounds to enforce an arbitration award against Libya relating to its expropriation of American investments in that country.²⁶ This decision was clearly erroneous, because the reasons for the act of state doctrine do not apply where the court is not asked to enter the merits of a controversy. However, the case was settled before the court of appeals could review

21. See *IAM v. OPEC*, 649 F.2d 1354 (9th Cir. 1981).

22. 22 U.S.C. 2370 (e) (2) (1964).

23. *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976); *First National City Bank v. Banco Para El Comercio de Cuba*, 462 U.S. 611 (1983).

24. See, e.g., *Banco Nacional de Cuba v. First National City Bank*, 431 F.2d 394 (2d Cir.), *vacated and remanded on other grounds*, 400 U.S. 1019 (1970), original judgment adhered to 442 F.2d 530 (2d Cir. 1971), *rev'd on other grounds*, 406 U.S. 759 (1972).

25. See generally, RESTATEMENT (SECOND) OF FOREIGN RELATIONS OF THE UNITED STATES (Revised) § 469 (Tent. Draft No. 2, Dec. 5, 1985).

26. *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980).

the matter. Although the opinion of the district court was vacated by the court of appeals,²⁷ it was never formally reversed.

(2) In 1981, the Court of Appeals for the Second Circuit applied the act of state doctrine to bar adjudication of an expropriation counterclaim in an action brought by a Cuban agency against the owner of property confiscated by Cuba. As in *Sabbatino*, Cuba was able to use the United States courts to collect a debt without being required to honor its obligations to the defendant.²⁸

(3) In 1984, the Court of Appeals for the Second Circuit stunned the bar in the *Allied Bank* case by applying a variation of the act of state doctrine, which it labeled "comity," to deny an American bank a judicial remedy to enforce a loan agreement with a defaulting sovereign borrower.²⁹ The court reconsidered this decision at the government's request and ultimately decided that the act of state doctrine did not apply to that loan,³⁰ but the two decisions in the *Allied Bank* case raise further questions as to the scope of the act of state doctrine.

Application of the act of state doctrine in suits brought under the FSIA to enforce the commercial obligations of foreign states frustrates the intent of Congress in providing a remedy for such obligations in section 1605(a) (2) of the act. The Report of the Judiciary Committee recommending adoption of the FSIA clearly endorses the "commercial activities" exception to the act of state doctrine adopted by the plurality opinion of the Supreme Court in *Dunhill v. Republic of Cuba*.³¹ A few decisions have applied the "commercial activities" exception, but most courts appear to regard this as an open issue.³²

H.R. 3137 deals with these issues by eliminating the act of state doctrine as a defense in any action brought under the FSIA for breach of contract or for expropriation in violation of international law. It also ensures that enforcement of arbitration agreements and awards will not be barred by the act of state doctrine.

This amendment will ensure claimants the judicial remedy granted by Congress without burdening the courts unduly. Section 1605 of the act requires substantial contacts with the United States for jurisdiction relating to commercial transactions and expropriation claims. Enforcement of arbitral awards does not require the court to consider the merits of the

27. 684 F.2d 1032 (D.C. Cir. 1981).

28. *Empresa Cubana Exportadora de Azucas v. Lamborn & Co., Inc.*, 652 F.2d 231 (1981).

29. *Allied Bank International v. Banco Credito Agricola De Cartago*, 723 F.2d 23 (2d Cir. 1984) (*Allied Bank I*).

30. 757 F.2d 516 (1985) (*Allied Bank II*).

31. 425 U.S. 682 (1976). H.R. REP., *supra* note 2, at 6619.

32. *Compare Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) with *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985).

dispute and, as a practical matter, requires the presence of property of the defendant in the United States.

The jurisdiction provided for the adjudication of expropriation claims under the FSIA is particularly narrow. Those claims can come before the courts either as counterclaims or under section 1605(a)(3) of the act. That provision establishes jurisdiction of two classes of cases in which "rights in property taken in violation of international law are in issue." In the first class, the property or property exchanged for it is present in the United States in connection with a commercial activity carried on in the United States by the foreign state. In the second class, the property or property exchanged for it is owned or operated by an agency or instrumentality of the foreign state, and that agency or instrumentality is engaged in a commercial activity in the United States.³³

By enacting section 1605(a)(3) in these precise terms, the Congress has made a judgment that the sensitivities of foreign states should not stand in the way of the administration of justice where there is an uncompensated expropriation and the foreign state seeks the benefits of the United States market in the manner contemplated by the statute. Application of the act of state doctrine in those circumstances would frustrate both the administration of justice and the intent of Congress.

D. EXECUTION OF JUDGMENT

Section 4 of H.R. 3137 would amend section 1610 of the act in order to liberalize the provisions on execution of judgment against the commercial assets of foreign states and government agencies. This is one of the most important sections of the bill. Sections 1609-1611 of the FSIA, which govern execution of judgment, are both unduly restrictive and poorly drafted.

As the law stands today, there are few opportunities to execute any judgment against a foreign state unless the foreign state has waived its immunity from execution of judgment. Execution can be made more readily against the assets of a separate agency or instrumentality of the foreign state, but only if the agency liable on the judgment is engaged in commercial activity in the United States.³⁴

One of the main problems with the FSIA as presently drafted is that the language of section 1610(a)(2) of the act limits execution of a judgment based on the commercial activity of a foreign state to commercial property

33. In the second case, the property need not be present in the United States. *Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 660 (W.D. Mich. 1985).

34. 28 U.S.C. § 1610(b) (1982).

which "is or was used for the commercial activity upon which the claim is based." In most cases, it is doubtful that a foreign state will have commercial assets in the United States that are or were used for the commercial activity upon which the claim is based. This possibility is made even more unlikely by the fact that, as presently drafted, the FSIA does not permit prejudgment attachment to secure execution of a judgment unless the claimant obtains an explicit waiver of immunity from prejudgment attachment.³⁵

For instance, suppose the Ministry of Public Works of Patria purchases earth moving equipment from a U.S. manufacturer and fails to pay for the equipment. The American company could obtain a money judgment against the foreign state under section 1605(a)(2) of the act, but it is unlikely that Patria would have commercial assets in the United States related to that transaction.

Take another case. Suppose the Ministry of Mines of Patria exports metals to the United States and the American purchaser subsequently determines that the product delivered is not up to the standard required by the contract. The American firm could obtain a judgment against the foreign state under section 1605(a)(2). However, it would be difficult to execute judgment against Patria unless the claimant could demonstrate that the proceeds of the export had been retained in the United States. In the event the company brings a lawsuit against Patria, the foreign state would have every reason to remove those proceeds from the United States before judgment. Thus, the foreign state can easily frustrate execution of judgment, if it wishes to avoid payment or to negotiate a more advantageous settlement.

There are other serious problems under the present law. Section 1610 of the FSIA does not make any specific provision for execution of a noncommercial tort judgment except where there is an insurance policy for automobile accidents or other liabilities.³⁶ Further, the Act is murky concerning the scope of execution of judgments based on expropriation, an arbitration award, a counterclaim or a maritime lien.³⁷ In each case, the foreign state might argue that the remedy is very restricted or even nonexistent. The legislative history of these provisions is sparse and, where it exists, tends to confuse the issue rather than to clarify it.

There are few relevant cases. In *Letelier v. The Republic of Chile*, the heirs of the former ambassador murdered in Washington obtained a default judgment against the Government of Chile under section 1605(a)(5) of the

35. 28 U.S.C. § 1610(d) (1982).

36. 28 U.S.C. § 1610(a)(5) (1982).

37. See 28 U.S.C. § 1610(a)(1)-(3) (1982).

Act,³⁸ and they attempted to execute that judgment against the assets of the state-owned airline. The district court, believing that Congress would not have established jurisdiction over the foreign state without also providing an effective remedy, ordered execution against the airline.³⁹ The court of appeals reversed on two grounds: the airline was a juridical entity separate from the state that owned it and its assets were deemed not available for execution of a judgment against the state, and even if the district court were correct in disregarding the airline's separate identity on the particular facts of this case, the commercial property of a foreign state is immune from execution of a tort judgment under section 1605 (a) (5) of the act. The Court concluded that "... Congress did in fact create a right without a remedy."⁴⁰

H.R. 3137 would recast section 1610 of the FSIA to provide that any judgment rendered under the act, or any arbitral award enforced under the act, may be executed against any property of the foreign state that "is used or intended to be used for a commercial activity in the United States." This improvement would bring United States law into conformity with recent continental practice and with legislation adopted subsequent to the FSIA by the United Kingdom, Canada, and Australia.

In 1977, in the *Philippine Embassy* case, the Constitutional Court of the Federal Republic of Germany recognized that there is no general rule of international law that prohibits execution of judgment against the assets of a foreign state.⁴¹ Diplomatic and military property are immune from execution, but state-owned property used for commercial activities is not immune from execution if the court had jurisdiction to enter the judgment executed upon.

The most recent legislation on foreign state immunity, the Australian Foreign States Immunities Act of 1985, following the British example, provides that state property "in use. . .substantially for commercial purposes" is subject to execution.⁴² Even the Soviet Union has recognized this practice in trade agreements made with France, Germany, Japan and several developing countries in the postwar period.⁴³

The United States has been slow to permit execution of judgment against the assets of foreign states. Even after the government adopted the re-

38. 488 F. Supp. 665 and 502 F. Supp. 259 (D.D.C. 1980).

39. *Letelire v. Lan Chile*, 567 F. Supp. 1490 (S.D.N.Y. 1983).

40. 748 F.2d 790, 798 (2d Cir. 1984).

41. *In re Republic of the Philippines*, 46 B. Verf GE 342 (1977), 65 INT'L L. REP. 146 (1984).

42. Australian Foreign States Immunities Act, Sec. 32(i) & 3(a).

43. See Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 A.J.I.L. 820, 827-831 (1981).

strictive theory of immunity in 1952,⁴⁴ and permitted prejudgment attachment as a basis of jurisdiction, execution was not allowed. The FSIA opened the door a crack, but its provisions are more restrictive than the laws of many of our trading partners.

This reticence has been due mainly to exaggerated concerns at the Department of Justice that changes in U.S. law may lead to execution of judgment against the assets of our government overseas. Three comments need to be made on this point. First, the principles embodied in H.R. 3137 have been accepted already by many other countries. This measure will not increase the risk in those countries. Second, the exposure of the United States government overseas is extremely limited. The immunity of diplomatic and military property is well-established, and United States' agencies have relatively few assets abroad that are used for commercial activities.

Thirdly, the United States government has a strong interest in ensuring effective legal remedies for Americans who conduct business with foreign states. As the National Association of Manufacturers points out in its letter to the chairman of February 14, 1986, 15 percent of world trade is now carried out by state entities, many of which are based in the Free World. President Reagan attaches great importance to the role of private trade and investment in international economic development. The private sector cannot fulfill that role without a secure legal environment for trade and investment with foreign sovereigns. This bill will improve the remedies available in the United States courts, and the ABA hopes the administration will support positive action by Congress.

Finally, the present law does not indicate clearly whether a claimant may execute judgment against an embassy bank account, if that account is used for commercial activities. In one case, execution has been permitted against an embassy bank account.⁴⁵ This is a difficult problem. If a foreign state is allowed to shelter commercial assets in a diplomatic bank account, it will be able to frustrate the legitimate claims of judgment creditors. Conversely, the attachment of an embassy bank account is likely to interfere with the operation of the diplomatic mission and to cause tensions in United States relations with the country concerned. H.R. 3137 addresses this problem by stipulating that a bank account used to maintain a diplomatic or consular mission, or the residence of a chief of mission, is not subject to execution "unless that bank account is also used for commercial purposes unrelated to diplomatic or consular functions." This

44. See letter from Acting Legal Adviser Jack Tate to Acting Attorney General Philip B. Perlman, 26 DEPT. STATE BULL. 984 (1952).

45. See *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

limitation would apply even where the foreign state has waived its immunity from execution.

Thus, an embassy bank account would retain absolute immunity from execution of judgment, and from prejudgment attachment, notwithstanding the use of the account for commercial activities necessary for the operation of the embassy, such as the purchase of supplies for the diplomatic mission. To this extent the amendment would reverse the District Court decision in *Birch Shipping Co. v. Embassy of the United Republic of Tanzania*.⁴⁶ However, the account would lose its immunity under the FSIA, if the embassy allowed it to be used for business activities conducted by the government or any of its agencies. That would be the case, for instance, if the account was used to receive proceeds from the sale of petroleum or other products in the United States.

This compromise is fair to all parties concerned. It protects the diplomatic interests of the foreign state which has full control over the use of the embassy bank account, and avoids abuse of the account for purposes which are not within the proper functions of a diplomatic mission.⁴⁷ In this particular instance, the act, as amended, would look to the purpose of the activity, not to determine whether the activity is commercial, but to determine whether admittedly commercial activity is related to the diplomatic function.

The principle established in section 1603(d) of the act is not affected by this amendment. The courts have jurisdiction under section 1605(a)(2) of the act over any contract for the sale of goods or services, or any other commercial activity, regardless of the purpose of the transaction. A contract for the purchase of shoes for the army, for the repair of the embassy, or for the export of natural resources regulated by the state is a commercial transaction, *jure gestionis*.

H.R. 3137 makes some additional technical changes in the wording of section 1610. In the existing law, commercial assets available for execution are described as "property used for a commercial activity in the United States"⁴⁸ and as property which "is or was used for" a particular commercial activity.⁴⁹ The words used in the amendment are: "the property is used or intended to be used for a commercial activity in the United States."

Moneys in bank accounts which are used for commercial transactions from time to time should be available for execution. The claimant is not required to show that the foreign state has a specific intention with respect

46. 507 F. Supp. 311 (D.D.C. 1980).

47. *But cf. Republic of Philippines, supra* note 41, n. 35.

48. 28 U.S.C. § 1610(a) (1982).

49. 28 U.S.C. § 1610(a)(2) (1982).

to the future use of the bank account at the time of execution of judgment or of prejudgment attachment. Further, this change is not intended to deprive the courts of their inherent power to look through transfers that are intended to avoid the processes of the courts. The courts retain that power as described in the Report of the Judiciary Committee on the FSIA.⁵⁰ Under the amendment, section 1610(b) of the FSIA appears in simplified form as section 1610(a)(3). The only substantive change is to include a judgment under section 1605(a)(4), if there be any.

The amendment also deletes the reference to insurance policies in section 1605(a)(5) of the act for two reasons. First, the amendment provides a much broader remedy for execution of noncommercial tort judgments that would include the interests described in the present language. Second, section 7(a) of the Diplomatic Relations Act of 1978 provides a direct right of action against the insurer in cases involving liability for personal injury, death or damage to property.⁵¹

Finally, this amendment will bring to the fore an issue which is not fully clarified by the FSIA. Under what circumstances can a government agency with juridical identity separate from the foreign state be held responsible for the actions of the state and vice versa? This question arises with respect to both jurisdiction and execution. Although the definition of "foreign state" in section 1603(a) of the act includes autonomous agencies of the state, the structure of the act and its legislative history make clear that one autonomous agency of the state is not responsible for claims against another autonomous agency of that state.⁵² However, the legislative history is also clear that the FSIA does not address the question when the state is responsible for the actions of its agencies or when the property of an agency may be executed upon to satisfy a claim against the state. The draftsmen regarded this as a question of substantive law beyond the scope of the FSIA.⁵³

The Supreme Court addressed the issue in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,⁵⁴ (Bancec), where the defendant, Citibank, asserted as a counterclaim against the Cuban agency, its claim against the state for the expropriation of its branches in Cuba. The Court held that normally the separate personality of agencies established as distinct and independent entities will be respected. However, equitable principles permit a court to disregard the separate identities of

50. H.R. REP., *supra* note 2, at 6627.

51. Diplomatic Relations Act, Pub. L. No. 95-393, 92 Stat. 808 (1978) (codified as amended at 28 U.S.C. § 1364 (West Supp. 1986)).

52. H.R. REP., *supra* note 2, at 6628.

53. *Id.* at 6610.

54. 462 U.S. 611, 629-30 (1983).

a sovereign and its instrumentalities where the agency "is so extensively controlled by its owner that a relationship of principal and agent is created," where adherence to the corporate form would "work fraud or injustice" or where the separate form is used to defeat legislative policies.⁵⁵

If the ABA amendments are adopted, this question will arise more often, because execution will not be limited to commercial property related to the activity upon which the claim is based. Presumably, the courts would rely on the principles stated in the *Bancec* case to resolve these issues on a case-by-case basis.

E. PREJUDGMENT ATTACHMENT

The problems of execution of judgment under the FSIA are compounded by the statute's restrictions on prejudgment attachment. Section 1610(d) of the act excludes prejudgment attachment, even for the purpose of securing satisfaction of a judgment, unless "the foreign state has explicitly waived its immunity from attachment prior to judgment."⁵⁶ Implicit waivers of immunity, which are permitted with respect to jurisdiction and execution, are not recognized as regards prejudgment attachment. Further, a court of appeals has held that an injunction may not be issued where attachment is prohibited by the FSIA.⁵⁷ Although the Act makes no mention of injunctions, the court concluded it would frustrate the intent of Congress if a restraint prohibited by one means could be achieved by another.

The result is that a claimant has no means of preventing a defendant from removing its property from the United States after a lawsuit is initiated and before judgment is rendered. This limitation is particularly serious where the action is brought against an agency or instrumentality of the foreign state that is engaged in commercial activity in the United States. In that situation, the Act permits execution against any property of the agency of a judgment based on commercial activity, expropriation, noncommercial tort or certain maritime proceedings.⁵⁸ This broad exposure provides an incentive for the foreign state to remove the property of the defendant agency from the jurisdiction. The lack of any means of preventing such action may negate the remedy the FSIA was intended to provide.

The reason for this restriction lies in the history of sovereign immunity in the United States. From 1952 to 1976, the United States permitted

55. See also, *Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia*, 616 F.Supp. 660 (W.D. Mich. 1985).

56. 28 U.S.C. § 1610(d) (1982).

57. *S&S Machinery Co. v. Masinexport-import*, 706 F.2d 411 (2d Cir. 1983).

58. 28 U.S.C. 1610(b).

attachment of the property of foreign states as a means of establishing jurisdiction quasi in rem over sovereign parties that could not be served in the United States. During this period, vessels, aircraft and bank accounts of foreign states frequently were attached, and these attachments often led to problems with the foreign states concerned.

One of the objectives of the act was to eliminate these tensions, and to facilitate the exercise of jurisdiction by the courts in appropriate cases, by establishing jurisdiction on the basis of specified contacts with the United States and permitting service of notice on the foreign state through diplomatic channels, if necessary. With such a "long-arm" statute in place, attachments would no longer be necessary to obtain jurisdiction over a sovereign party, and attachment for that purpose was prohibited by the act.

The draftsmen may have gone too far, however, in excluding attachments for the purpose of securing a judgment. This shortcoming in the statutory scheme became painfully evident when the revolution in Iran threatened the interests of hundreds of American investors, contractors and lenders. Faced with statutory language which, if applied strictly, made the courts helpless to assist American claimants, many judges found a way around the Act by decisions that appear inconsistent with the case law which developed subsequently. That temptation could recur in other situations where the equities are strong.

In these circumstances, the ABA has concluded it would serve the interests of all parties concerned to establish more realistic rules that would permit the courts to protect the interests of claimants, where the facts require provisional measures of relief, under uniform safeguards that will prevent harassment of sovereign parties that are brought before our courts. Accordingly, section 4 of H.R. 3137 would amend section 1610(d) of the FSIA to permit, in certain defined circumstances, prejudgment attachment or injunction to secure execution of a judgment or arbitral award against the property of an agency or instrumentality of a foreign state that is engaged in commercial activity in the United States.

No provisional measures would be authorized by this amendment against the property of the state itself, and the restrictions established elsewhere in the act on attachment or execution against diplomatic, military or central bank assets would remain undisturbed. Further, prejudgment attachment would be permitted under this provision only where the property in question would be subject to execution on a judgment in that case under the FSIA and where the property of a private party would be subject to attachment or injunction in like circumstances.

Further, the party seeking the attachment or injunction would have to show both "a probability of success on the merits" and "a probability that the assets will be removed from the United States." The moving

party also would be required to post a bond of at least 50 percent of the value of the property attached. These are serious limitations that will discourage attachment for purposes of harassment and allow the courts to act where the interests of justice require provisional remedies.

III. Conclusion

In conclusion, the amendments to the FSIA proposed in H.R. 3137 and H.R. 4592, if enacted, would significantly improve the operation of the act without affecting its structure or basic principles. These are perfecting amendments which the ABA hopes Congress will adopt without further delay. There are a number of other problems relating to sovereign immunity and act of state that may require congressional action in the future and the ABA will cooperate in any further work on these issues that may be required.