IMMUNITIES OF FOREIGN STATES

HEARING

BEFORE THE

SUBCOMMITTEE ON CLAIMS AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.R. 3493

A BILL TO DEFINE THE CIRCUMSTANCES IN WHICH FOREIGN STATES ARE IMMUNE FROM THE JURISDICTION OF THE UNITED STATES COURTS AND IN WHICH EXECUTION MAY NOT BE LEVIED ON THEIR ASSETS, AND FOR OTHER PURPOSES

JUNE 7, 1973

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IMMUNITIES OF FOREIGN STATES

THURSDAY, JUNE 7, 1973

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CLAIMS AND
GOVERNMENTAL RELATIONS OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met at 10:45 a.m., pursuant to call, in room 2226, Rayburn House Office Building, Hon. James R. Mann, presiding.

Present: Representatives Mann (presiding), Danielson, Jordan, Butler, Froehlich, Lott, and Moorhead.

Staff members present: William P. Shattuck, counsel; and Peter T. Straub, associate counsel.

Mr. MANN. The Subcommittee on Claims and Governmental Relations is hereby convened for the purpose of considering H.R. 3493 to define the circumstances in which foreign states are immune from the jurisdiction of U.S. courts and in which execution may not be levied on their assets, and for other purposes.

This morning we have a hearing open to the public and we have as witnesses today the Honorable Charles N. Brower, Legal Adviser, Department of State, and the Honorable Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice.

[H.R. 3493 follows:]

93D CONGRESS
1ST SESSION

H. R. 3493

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1973

Mr. RODINO (for himself and Mr. HUTCHINSON) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28, United States Code, as amended—

(1) by inserting after chapter 95 the following new Chapter:

"Chapter 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

"§ 1602. Findings and declaration of purpose

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by United States courts in conformity with these principles as set forth in this chapter and other principles of international law.

"§ 1603. Definitions

"(a) For the purposes of this chapter, other than sec-

tions 1608 and 1610, a 'foreign state' includes a political subdivision of that foreign state, or an agency or instrumentality of such a state or subdivision.

"(b) For the purposes of this chapter, a 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"§ 1604. Immunity of foreign states from jurisdiction

"Subject to existing and future international agreements to which the United States is a party, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in this chapter.

"§ 1605. General exceptions to the jurisdictional immunity of foreign states

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose;

"(2) in which the action is based upon a commercial activity carried on in the United States by the for-

eign 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 has a direct effect within the territory of the United States;

"(3) 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 agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) 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; or

"(5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, caused by the negligent or wrongful act or omission in the United States of that foreign state or of any official or employee thereof except that a for-

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eign state shall be immune in any case under this paragraph in which a remedy is available under Article VIII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

"§ 1606. Immunity in cases relating to the public debt of a foreign state

"(a) A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to its public debt, except if—

"(1) the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose; or

"(2) the case, whether or not falling within the scope of section 1605, relates to the public debt of a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision.

"(b) Nothing in this chapter shall be construed as impairing any remedy afforded under sections 77(a) through 80(b) -21 of Title 15, United States Code, as amended, or any other statute which may hereafter be administered by the United States Securities and Exchange Commission.

"§ 1607. Counterclaims

"In any action brought by a foreign state in a court of

the United States or of any State, the foreign state shall not be accorded immunity with respect to—

"(1) any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(2) any other counterclaim that does not claim relief exceeding in amount or differing in kind from that sought by the foreign state.

"§ 1608. Service of process in United States district courts

"Service in the district courts shall be made upon a foreign state or a political subdivision of a foreign state and may be made upon an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of the United States as defined in section 1332 (c) and (d) of this title by delivering a copy of the summons and complaint by registered or certified mail, to be addressed and dispatched by the clerk of the court, to the ambassador or chief of mission of the foreign state accredited to the Government of the United States, to the ambassador or chief of mission of another state then acting as protecting power for such foreign state, or in the case of service upon an agency or instrumentality of a foreign state or political subdivision to such other officer or agent as is authorized under the law of the foreign state or of the United States to receive service of process in the particular case, and, in each case, by also

sending two copies of the summons and of the complaint by registered or certified mail to the Secretary of State at Washington, District of Columbia, who in turn shall transmit one of these copies by a diplomatic note to the department of the government of the foreign state charged with the conduct of the foreign relations of that state.

"§ 1609. Immunity from execution and attachment of assets of foreign states

"The assets in the United States of a foreign state shall be immune from attachment and from execution, except as provided in section 1610 of this chapter.

"§ 1610. Exceptions to the immunity from execution of assets of foreign states

"(a) The assets in the United States of a foreign state or political subdivision of a foreign state, to the extent that they are used for a particular commercial activity in the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that foreign state or political subdivision if—

"(1) such attachment or execution relates to a claim which is based on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity, or

"(2) the foreign state or political subdivision has

waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"(b) The assets in the United States of an agency or instrumentality of a foreign state or of an agency or instrumentality of a political subdivision of a foreign state, which is engaged in a commercial activity in the United States, or does an act in the United States in connection with such a commercial activity elsewhere, or does an act outside the territory of the United States in connection with a commercial activity elsewhere and the act has a direct effect within the territory of the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that agency or instrumentality if—

"(1) such attachment or execution relates to a claim which is based on a commercial activity in the United States or such an act, or on rights in property taken in violation of international law and present in the United States in connection with such a commercial activity in the United States, or on rights in property taken in violation of international law and owned or operated by an agency or instrumentality which is engaged in a commercial activity in the United States; or

"(2) the agency or instrumentality or the foreign

state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"§ 1611. Certain types of assets immune from execution

"Notwithstanding the provisions of section 1610 of this chapter, assets of a foreign state shall be immune from attachment and from execution, if—

"(1) the assets are those of a foreign central bank or monetary authority held for its own account; or

"(2) the assets are, or are intended to be, used in connection with a military activity and

(a) are of a military character, or

(b) are under the control of a military authority or defense agency."; and

(2) by inserting in the analysis of Part IV, "Jurisdiction and Venue," of that title after

"95. Customs Court.",

the following new item:

"97. Jurisdictional Immunities of Foreign States.".

SEC. 2. Chapter 85 of title 28, United States Code, is amended—

(1) by inserting immediately before section 1331 the following new section:

"§ 1330. Actions against foreign states

"(a) The district courts shall have original jurisdiction of all civil actions, regardless of the amount in controversy, against foreign states or political subdivisions of foreign states, or agencies or instrumentalities of such a state or subdivision, other than agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332 (c) and (d) of this title.

"(b) This section does not affect the jurisdiction of the district courts of the United States with respect to civil actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."; and

(2) by inserting in the chapter analysis of that chapter before—

"1331. Federal question; amount in controversy; costs."

the following new item:

"1330. Actions against foreign states.".

SEC. 3. Section 1391 of title 28, United States Code, is amended by adding a new subsection (f), to read as follows:

"(f) A civil action against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in

section 1332 (c) and (d) of this title may, except as otherwise provided by law, be brought in a judicial district where: (1) a substantial part of the events or omissions giving rise to the claim occurred, or (2) a substantial part of the property that is the subject of the action is situated, or (3) the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality, or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision. Nothing in this subsection shall affect the venue of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."

SEC. 4. Section 1441 of title 28, United States Code, is amended by adding a new subsection (d), to read as follows:

"(d) Any civil action brought in a State court against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, may be removed by the foreign state, subdivision, agency or instrumentality to the district court of the United States for the district and division embracing the place where

such action is pending. Nothing in this subsection shall affect the removal of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."

SEC. 5. Section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state; and

"(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties."

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Mr. MANN. I assume you will proceed first, Mr. Brower, and then Mr. Ristau.

Mr. BROWER. Thank you very much.

STATEMENT OF HON. CHARLES N. BROWER, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. BROWER. The bill, as introduced on January 31, 1973, by Chairman Rodino and Congressman Hutchinson, is identical to the one submitted to the Speaker of the House of Representatives on January 16, 1973, jointly by the Secretary of State and the Attorney General.

This legislation has been prepared and recommended by the administration because the current situation with respect to suits against foreign countries is unsatisfactory and is criticized by plaintiffs and foreign governments alike. There are several reasons for this:

First of all, there is no statutory procedure for service of process by which you may obtain personal jurisdiction over foreign states, so that plaintiffs frequently are compelled to resort to attachment of foreign government assets in the United States in order to gain quasi in rem jurisdiction. Jurisdiction thus can depend on the vagaries of the presence of such assets, and governments brought to court are subjected to the serious inconvenience of attachment, which I might add from personal experience results in considerable foreign relations problems in individual cases.

Second, under present law and practice the plaintiff who obtains a judgment against a foreign state normally cannot execute on the judgment, even in cases where assets of a commercial character have already been attached to establish jurisdiction.

Third, under the present system foreign governments claiming sovereign immunity from jurisdiction, attachment, or execution may request the Department of State to make a formal suggestion that is called a suggestion of immunity to the court, which is binding on the court. Now, while the courts treat these suggestions as binding in deference to the role of the executive branch in conducting our foreign relations and do not make independent findings of law or fact, the Department of State itself has attempted to deal with such requests on the basis of, at least in part, legal analysis, taking into account judicial precedents and the Department has established special adversary procedures intended to provide a fair hearing to all concerned. We at the Department of State are now persuaded—and may I say we have been for some time—that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts rather than by the executive branch. Questions of such moment should not be decided through administrative procedures when the nature of the decision appears particularly appropriate for resolution by the courts. Indeed, State Department involvement can be detrimental because some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations. Consequently, foreign states are sometimes inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision.

H.R. 3493 would deal with these problems as follows in four particular ways:

First of all, a means would be specified in the statute whereby process may be served on foreign states to obtain in personam jurisdiction. This is very significant because it would eliminate the need to attach assets and, thereby, eliminate the necessity of gaining quasi in rem jurisdiction.

Second, foreign states would no longer be accorded such broad immunity from execution on judgments as they now enjoy and their immunity from execution would conform more closely to their immunity from jurisdiction. So that, generally speaking, if you are able to gain jurisdiction and obtain a judgment you would have a reasonable chance of obtaining satisfaction of judgment.

Third, the task of determining whether a foreign state is entitled to immunity would be transferred to the courts, and the Department of State would no longer be in the business of making suggestions of sovereign immunity to the courts. Of course, its ability to make suggestions with respect to other questions would remain unimpaired. Transfer of the decisionmaking process to the courts, I think, will insure that sovereign immunity questions are decided on legal grounds under procedures guaranteeing due process. This in turn should better insure the consistency of decisions and reduce their foreign policy consequences.

Fourth, the restrictive theory of sovereign immunity from jurisdiction, which has been followed by the Department of State and the courts since it was articulated in the familiar letter of Acting Legal Adviser Jack B. Tate of May 19, 1952, would be incorporated into statutory law. This theory limits immunity to public acts, leaving so-called private acts subject to suit. The proposed legislation would make it clear that immunity cannot be claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose.

I would now like succinctly to review the basic provisions of the proposed legislation so that the committee can better appreciate exactly how these four suggested improvements are to be accomplished through statutory language.

Section 1603(a) defines the term "foreign state" to include all levels and subdivisions of government within that state, and their agencies and instrumentalities. It is quite comprehensive.

Section 1603(b) defines commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act." The commercial character of an activity is determined by the nature of the course of conduct or particular transaction or act, rather than by reference to the purpose of the conduct, transaction, or act. For example, a foreign government airline or trading corporation would constitute a "regular course of commercial conduct" and therefore would qualify as commercial activity. A single contract, if of the same character as a contract which might be made by private persons, would ordinarily constitute a "particular commercial transaction or act."

The fact that the goods or services to be procured through the contract are to be used for a public purpose is irrelevant. For example, there would be no immunity with respect to a contract to manufacture

army boots for a foreign government or the sale by a foreign government of a service or product. I realize the courts will have a good deal of latitude in determining what is a "commercial activity." It does seem unwise to attempt a precise definition in this Act, even if that were practicable.

Mr. DANIELSON. May I ask the gentleman a question at this point?

Mr. MANN. Yes.

Mr. DANIELSON. Could you give me an example of an activity by a foreign government corporation, such as you have just been talking about here, like a government-controlled airline, and under what circumstances could his conduct be regarded as a public function rather than a commercial function, for us to invoke an immunity? Can you give me one of those? The other side of the coin?

Mr. BROWER. That is pretty difficult for me to conceive of in the case of an airline, which, while it is controlled or perhaps fully owned by a foreign government, is fundamentally, if not wholly, in the business of transporting air passengers for commercial affairs, and——

Mr. DANIELSON. Well, let's assume, for a moment, that Lufthansa is a West German Government Corporation Airline and assume, further, Lufthansa carried Mr. Brandt over here to speak with Mr. Nixon and his entourage, would that be a public function or a commercial function?

Mr. BROWER. I think Mr. Ristau might have a more precise idea.

Mr. RISTAU. Congressman, in our judgment, the service performed by Lufthansa, the transportation of passengers, is the important facet of your question; the purpose being to transport the head of a state, would, under our formulation, be irrelevant, so that the important question is, what does the company in fact do? It transports passengers. Now we are not talking, Congressman, in terms of permitting suit against the Chancellor of the Federal Republic.

Mr. DANIELSON. Of course.

Mr. RISTAU. That is an altogether different question. We are merely talking now about whether when Lufthansa lands in this country, and the activity connected with the carriage of passengers injures a local citizen, whether the citizen should under these circumstances be able to obtain redress from the German Government through the instrumentality of our courts.

Mr. DANIELSON. To be specific, when such a plane did land at Dulles a month or two ago, suppose in taxiing it, it had brushed against, and severely damaged, a private aircraft sitting there and the owner of that private aircraft, it is contemplated, would then have a right to bring an action against Lufthansa for whatever damage it sustained?

Mr. RISTAU. Yes, Congressman, in the courts of this country because we feel that any damages arising out of that incident should be capable of being adjudicated in the courts of this country. It is here where the accident occurred. It is here where the plaintiff resides. Why should the plaintiff be required to go to Germany in order to litigate that accident, when all of the contacts are with the local forum.

Mr. DANIELSON. Therefore, following your explanation—for which I thank you—this would be true even though the carrier were German—let's assume this: A German Government corporation and it was at that time engaged in, I will call it, a diplomatic mission?

Mr. RISTAU. That is correct.

Mr. DANIELSON. Thank you very much.

Mr. FROELICH. Mr. Chairman, wouldn't that be the fact now? Wouldn't that airline have to submit to the CAB and FAA rules and, as a matter of fact, even without this bill being passed, wouldn't you be able to sue that under those rules in this country in our courts now?

Mr. RISTAU. Congressman, you are absolutely correct as far as airlines are concerned. They are already subject to the jurisdiction of the domestic courts by virtue of the FAA requirements that you have just mentioned, so that the airline perhaps was not the best possible example that we picked.

Mr. FROELICH. Even if it were a government-owned plane?

Mr. RISTAU. That is correct.

Mr. MANN. On the other hand, if it were not a Lufthansa, that would be another matter?

Mr. RISTAU. That is an altogether different matter.

Mr. DANIELSON. Thank you for the thought you have just put in my mind, if I may, Mr. Chairman.

Let's now reverse the coin. Let us suppose a group of Members of Congress were to make a trip to Germany in a U.S. Air Force aircraft and again in landing at the airport at Munich, for example, they brushed against an aircraft, a German aircraft, and damaged it. How would that matter be handled insofar as any claims of the German owner against the United States under present laws? Could you answer that? I am just trying to reverse the situation.

Mr. RISTAU. I most certainly would wish to answer your question precisely, Mr. Danielson. In the particular example that you visualize, I believe the United States at the present time has a treaty arrangement for settling this type of claim. As the committee probably knows, there presently is in existence the so-called North Atlantic Treaty—Status of Forces Agreement, and under that treaty claims against the U.S. Government which arise in Germany are asserted to begin with against the German Government—they adjudicate the claim.

Mr. DANIELSON. Oh, yes, this would be a SOFA arrangement.

Mr. RISTAU. This a SOFA arrangement. If the claimant is successful, we, the United States, then reimburse the Federal Republic for part of the judgment, or the compensation that they have to pay under the circumstances so, specifically, in this area, we do have a number of conventions, treaties, several treaty arrangements that govern this sort of situation.

Mr. DANIELSON. Is Turkey not a part of the SOFA?

Mr. RISTAU. Yes, it is.

Mr. DANIELSON. Can you give me a European country that does not belong to SOFA?

Mr. RISTAU. A what, please?

Mr. DANIELSON. I want to transfer the situs of this accident to a foreign state with which we do not have a Status of Forces Agreement.

Mr. RISTAU. Sweden.

Mr. DANIELSON. All right, Sweden. We land in Stockholm and did the same thing. Now what happens?

Mr. RISTAU. In my opinion, if it were a U.S. Air Force plane, the norms envisaged by this legislation would not govern since it is

essentially the operation of an aircraft belonging to the armed forces of a government and not a "commercial activity" within the purview of this statute.

Mr. DANIELSON. How would the claim of the Swedish national whose aircraft was damaged, how would it be handled?

Mr. RISTAU. Probably, Congressman, through diplomatic channels. That is the traditional means whereby claims of citizens against foreign governments have been adjudicated or settled.

Mr. DANIELSON. I will suspend my questioning here but what I am driving at—and I hope this is a matter on which we can get some information—is that I am interested in the extent to which the proposed legislation would find reciprocity in other countries. Thus if we were to grant certain rights to our citizens against foreign countries here and I would like to know what comparability and obligations exist with respect to our nationals and our properties in foreign countries.

Mr. RISTAU. I shall be pleased to address myself to that.

Mr. DANIELSON. Fine. Thank you for your help.

Mr. BROWER. If I may just answer in one sentence or give a partial answer to that point, the statute has been drafted keeping in mind what we believe to be the general state of the law internationally, so that we conform fairly closely, we believe, to our accepted international standards. So that it is unlikely that we would be subjected to more claims against the United States abroad than we permit in this country and it is also subject, of course, to existing and future international agreements. So that if we have existing treaties of friendship, commerce, and navigation with a country which touch the question of sovereignty, we include such agreements and, in the future, they would take precedent.

Mr. MANN. We hope it would be used as a model for future general international agreements.

Mr. BROWER. That is true. We have done this also conscious of the fact the Council of Europe has prepared and has had signed, I believe, by seven countries, a convention on sovereign immunity and how the question would be handled in countries which are part of it, and we do hope that we have something here in this statute before us that takes into account what is going on in the rest of the world and which could lead us to a broader and more precise agreement throughout the world.

Mr. DANIELSON. May I inquire?

Mr. BROWER. Yes.

Mr. DANIELSON. What is the Council of Europe? What is the present status of the Council of Europe? [1]

Mr. BROWER. I perhaps should submit a more precise statement for the record as to which countries belong to it. At the ministerial level, most West European countries are represented and in various forums, both in the Parliamentary Forum in Strassburg and through the Council of Ministers in various committees they do everything from discussing broader European cooperation in economic matters to very detailed questions like drafting of conventions for the protection of diplomats and on sovereign immunity.

[1] For information on the Council of Europe see State Department Letter on page 49.

Mr. DANIELSON. Is it a formally existing body, or is it a matter of simply cooperation?

Mr. BROWER. No; there is a treaty on the subject.

Mr. DANIELSON. Thank you.

Mr. FROELICH. Could I ask another question?

Mr. MANN. Mr. Froehlich?

Mr. FROELICH. You use as one of your examples, contracts for Army boots, which would be a commercial transaction under this statute?

Mr. BROWER. Yes.

Mr. FROELICH. How about a contract with a U.S. company for guns or specifically something that a government may use for its armed forces or may use for an Olympic team. Is the use of the article going to determine?

Mr. RISTAU. May I tentatively answer the Congressman? The statute is very specific on that in section 1603(b) in defining the term "commercial activity." The statute says, or the proposed statute says, "The commercial character of an activity shall be determined by reference to the nature of the course of conduct of the particular transaction or act, rather than by reference to its purpose."

We inquire only to the nature of the activity. The activity is entering into a contract and——

Mr. FROELICH. Thank you. You have answered my question.

Mr. BROWER. Then let me resume, Mr. Chairman.

Section 1604 establishes the general framework for judicial decision. A foreign state is immune from the jurisdiction of the courts of the United States except as otherwise provided in the statute or in existing and future international agreements to which the United States is party. I should note that the act applies to proceedings in State courts. Under present law, State as well as Federal courts are bound by State Department suggestions of sovereign immunity. Congress in cooperation with the Executive clearly has the constitutional power to establish rules binding on State courts in this area.

Section 1605 prescribes five exceptions to jurisdictional immunity of foreign countries. Since these five exceptions constitute the principal substance of the bill in terms of future legal issues, I should elaborate on them briefly:

First, a State is immune if it has waived its immunity either explicitly or by implication, and a foreign state cannot withdraw a waiver of immunity except within the provisions of the treaty or contract in which the waiver was first made.

Mr. MANN. Pardon me?

Do you intend to state in this section that a State is immune or a State is not immune?

Mr. BROWER. I am sorry. If it has waived it, it is not immune. It should read "not."

The second exception, which dealt generally with commercial activity, has several aspects. There is no immunity with respect to "a commercial activity carried on in the United States" by a foreign state, which could include a cause of action concerning an individual contract of an ordinary commercial character such as a breach of contract to make repairs on an Embassy building. Likewise exempt is an "Act performed in the United States in connection with a commercial activity of the foreign state elsewhere." There is also no immunity

if the case involves "An act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States." This exception would embrace extraterritorial conduct having effects within the United States such as an action for pollution of the air by a factory operated commercially by a foreign state. It is, in fact, a situation which we have had on our borders from time to time.

The third exemption covers cases "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 agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Thus, if property has been nationalized or expropriated without payment of compensation as required by international law it will not be immune with respect to actions in which rights in such property are in issue in our courts under the circumstances described. Since this draft bill deals solely with issues of immunity, it in no way affects existing law concerning the extent to which the "act of state" doctrine may be applicable in similar circumstances.

Mr. DANIELSON. Mr. Chairman?

Mr. MANN. Yes?

Mr. DANIELSON. This exception here on nationalized or expropriated property gives rise to a host of implications. This bill, as I understand it, would be to recognize the right of our courts to have jurisdiction over a foreign state under certain circumstances; therefore, it is procedural in nature, rather than substantive in nature, and my opinion is that it could have a retroactive effect. It would simply allow the litigant to come into court, which he is presently barred from doing.

Let's take the, oh, the Baltic States: Lithuania, Latvia, Estonia, within which many properties were expropriated and nationalized way back at the time of World War II. Your language here says: "Any property exchanged for such property," so let's assume that a person who was a national of Lithuania, and who had property in Lithuania was expropriated and nationalized by the powers which took over Lithuania in 1939 or 1940 or 1941—whenever it was and these properties have now been exchanged for some properties which are here. Would the former Lithuanian be able to bring an action in our American courts against the Soviet Union—I presume it would be—for the properties which are now resident here in the United States?

Mr. RISTAU. Congressman, the important question is, the entity which presently has custody over the property, is it engaged in trade with that property in the United States? In other words, are they trading?

Mr. DANIELSON. This ties back to the commercial nature?

Mr. RISTAU. Are they engaged in commerce in the United States with respect to that particular property? Yes.

Mr. BROWER. Under the statute either of several things need to apply, and you mentioned one; that it has to be present in the United States in connection with a commercial activity carried on in the United States by the foreign state and that means——

Mr. DANIELSON. Wait. How about a ship, a steamship, for example, which is now in New York Harbor with a cargo of something?

Mr. BROWER. I think your question illustrates the complexities of this area of the law, because you are now getting into the maritime area.

Mr. DANIELSON. Well, it brought over a cargo of railroad cars for instance, and those railroad cars are now present in New Jersey. That is no longer maritime, the cargo is now on land.

Mr. BROWER. Okay.

Mr. DANIELSON. I am going to make a suggestion. I think if we are going to have a law like this, we better provide that it is not retroactive, because this could open up a can of worms that you will never be able to close.

Mr. BROWER. Well, I think that is a problem. You are right. I think that certainly in many cases, the passage of a period of time as long as 30 years or more could certainly raise questions as to whether the property present in a country, was, in fact, transferred or exchanged.

Mr. DANIELSON. What about a work of art? It may exist hundreds of years. Hitler confiscated and nationalized unknown quantities of valuable artwork and some of them have shown up elsewhere. I mean, this is not just imagination, you know; it is real.

Mr. BROWER. No; I understand that. I think that is a real point because if, as we intend, one of the principal objects of the statute is to avoid undue foreign relations problems, then we want to be sure it is so drafted as to not raise new foreign relations problems. You put your finger on one that I think is particularly noteworthy. It is a concept, perhaps, behind the statute of limitations as well.

Mr. DANIELSON. I think most of our courts provide, however, that where a statute of limitations is tolled, where the proposed litigant is barred from asserting his remedy, due to a procedural problem——

Mr. BROWER. I see your point. I think we should explore it.

Mr. DANIELSON. I think we should simply provide that it not be retroactive and solve the whole problem.

Mr. BROWER. I think that is very true since the effect of a statute in this particular case is, in fact, not only procedural but substantive to some extent. I think we do need to be particularly careful on how it is drafted.

Now, this fourth exception permits litigation against a foreign state relating to rights in property in the United States acquired by succession or gift, or rights in immovable property situated in the United States.

I think this is a pretty clear exception for estate and real estate matters in this country, in keeping with the law at the present time.

The fifth and final exception is directed primarily to the problem of traffic accidents, but is cast in general terms, applying to all actions for damages—as distinguished from injunctive relief, for example—for personal injury or death, or damage to property or loss of property if the negligent or wrongful act took place in the United States and is

not one for which a remedy is already available; for example, under article VIII of the NATO Status of Forces Agreement.

Now I should draw your attention to section 1606 of the proposed legislation, which gives a foreign state immunity from jurisdiction in any case relating to its public debt, unless that foreign state has waived its immunity, or the complaint relates to the public debt of a political subdivision of a foreign state or of an agency or instrumentality of such a foreign state or subdivision. This exception is intended to facilitate the U.S. role as one of the principal capital markets of the world, which in some ways has dwindled during the past years. Many national governments are unwilling to issue their securities in a foreign country which subjects them to actions based on such securities. Of course, the question of waiver is nonetheless negotiated in most cases among the parties.

Section 1607 deals with compulsory and permissive counterclaims within the meaning of rule 13 (a) and (b) of the Federal Rules of Civil Procedure. It provides that when a foreign state brings an action in a court in the United States, that foreign state shall not be accorded immunity with respect to a counterclaim arising out of the same transaction that is the subject matter of the claim of the foreign state, regardless of amount and, furthermore, it shall not be accorded immunity with respect to any other counterclaim—you might call it permissive counterclaim—insofar as it does not exceed the relief sought by the foreign state. This is basically codification, I think, in statutory form of what we understand to be the existing law on the subject.

Section 1608 would fill a substantial gap in present law by establishing an orderly procedure for service of process in actions against foreign states, thus facilitating the jurisdiction of the court in cases in which sovereign immunity is not applicable. I might say that this has been one of the real problems in the area, inasmuch as under the Federal Rules of Civil Procedure foreign diplomatic and consular missions in this country have been held not to be managing agents of the foreign states, so there is habitually no one upon whom process can be served within a given jurisdiction. And this has, in many cases, been what has encouraged the establishing of quasi in rem jurisdiction through the attachment of assets presently located in one of our states, and these cases have most particularly caused us specially serious problems in our foreign relations from time to time.

The enactment of this section also, of course, would surely benefit the foreign state defendants themselves by ensuring that they would have prompt and adequate notice of all actions brought against them by eliminating the need to attach their property to establish jurisdiction.

Section 1609 prohibits execution and attachment concerning assets of a foreign state in the United States except as provided in section 1610, which specifies two exceptions. Subsection (a) provides in essence that the assets of a foreign state in the United States shall not be immune from execution to the extent that they are used for a particular commercial activity in the United States if the execution relates to a claim based on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity, or if the foreign state has waived its immunity. Thus property used in commercial activities is available for the satisfaction of judgments rendered in connection with those

commercial activities, but there is no execution for Embassies, warships or other foreign government property used for noncommercial purposes.

Mr. BUTLER. Excuse me, we have in many of our States what we call a long-arm statute.

Mr. BROWER. Yes.

Mr. BUTLER. I had thought when I first approached this problem that you would endeavor in some extent to track the long-arm statute as it relates to our foreign relationships.

I see in this regard we are limited to particular commercial activities involved, so that if a person in the United States, for one reason or another, is treated poorly in his contractual negotiation with a foreign state, he is limited to finding commercial assets of the foreign state related to his activity for execution. So that if he is wrongly treated, he has to find commercial assets related to his activity before he can proceed with litigation. On the other hand, if that foreign state is engaged in unlimited commercial activity in this country and has assets all over the United States, this wronged American citizen has no remedy in this country. Now, am I correct in that?

Mr. BROWER. Well, the first part of your statement is fundamentally correct, I think. And I think that the assumption is that any foreign state or entity engaged in commercial operations in this country—doing something in this country which is likely to give rise to a claim—is almost certainly going to have some assets available in connection with that, that would be available for execution.

Mr. BUTLER. Let's assume they do not.

Mr. BROWER. Well, there are obvious exceptions, of course. The case of the painting of the Embassy.

Mr. BUTLER. Right.

Mr. BROWER. That is perhaps one. If you have a contract to paint the Embassy and there is a breach of contract, you cannot put a lien on the Embassy.

Mr. BUTLER. That is correct.

Mr. BROWER. Or if you contract to do work on a warship, you can't attach the warship. There will be some exceptions.

The second part of your question, I didn't hear.

Mr. BUTLER. That brings me to it.

Here is a man who has painted the Embassy and they refuse to pay him and here is the country that has all sorts of commercial activities in this country, and if it were anybody else they could levy on their assets but they can't do that in this case because this is not the particular commercial activity this gentleman was engaged in; am I correct, this legislation would leave him without remedy?

Mr. RISTAU. Congressman, may I please attempt to answer your question? To begin with, Congressman, your statement is right; the underlying theory of this statute is, in effect, a Federal long-arm statute permitting the bringing of suit, in personam action, which you cannot do now, against foreign governments who engage in certain activities in this country where there is a contact with the United States. That is, the traditional basis of the long-arm statutes, as they have been enacted in several states and, most recently in 1970, by the Congress with respect to the District of Columbia——

Mr. BUTLER. Of course.

Mr. RISTAU. Now, what the statute would do in your hypothetical case, it would at least allow the contractor, the painting contractor, to bring a personal action in the courts of this country and, if he prevails, to obtain a judgment against the government, which he cannot now do. He has no remedy at the present time unless in the unusual circumstance where he may be able to find some property of that Government that he may attempt to attach for purposes of obtaining jurisdiction in this one exceptional instance. But, otherwise—and most commonly—he has no means of getting the foreign government before the courts and to litigate his rights in the courts of this country. So, even though he may not be able in a variety of circumstances to obtain execution of the judgment, he will be able to obtain a judgment after having litigated the question fairly and squarely.

May I please also add this one thought: There is on occasion an underlying assumption that you must have the possibility to forcibly execute a judgment before you get something of real substance. I would respectfully question that basic assumption. Take the U.S. Government itself: Of course, you cannot have execution against property belonging to the U.S. Government; yet there are means and ways of obtaining prompt satisfaction of the final judgment which you have against the United States. I will, in a moment—when I have an opportunity—advert to what the U.S. Government does abroad when the shoe fits on the other foot, but I do not believe that we should approach the problem with the assumption that foreign states will not, in fact, satisfy judgments once they have been rendered after a full trial in this country.

Mr. BROWER. As a further background, Congressman, you might look at the slightly different problem that shows why it is important to require that assets to be executed on should be assets bearing a reasonable relationship to the activity on which the claim is based. An increasing number of countries in the world have state trading corporations or do business as we would term it through corporations which are controlled by the state, but which are under the legal regimes of those countries quite separate from each other in ways which are similar to the separation between corporations in our United States. And if, for example, you are dealing with Polish or Rumanian or Chilean or perhaps some African country, perhaps a Yugoslavian state trading corporation, and you have a contract with one, let's say it is for 5,000 pairs of shoes and that is the XYZ shoe foreign trading corporation of that country, it seems reasonable, under our system, that the ABC pocketbook manufacturing state trading corporation of the same country, which is operated by different management and has different assets and is reasonably separate, should not be subjected to liability for that party. I suppose that would be so, that we not encourage a trend whereby American companies or entities abroad would be lumped together. That really is the reason for that.

Mr. BUTLER. Am I correct; is this foreign trading corporation, this foreign state corporation, similar to what we call a corporation here in the States and is it created for a commercial activity? In other words, is that corporation presently immune from suit in this country?

Mr. BROWER. Under present law, in such a case the United States would not suggest that it is immune in the circumstances that you have described.

Mr. BUTLER. All right. Thank you.

Mr. BROWER. Coming back to the question of the possibility of execution on such properties as Embassies or warships, we believe that in the absence of a waiver, it would be inappropriate and probably in violation of international law to allow successful litigants to levy on such assets of a foreign state which are used for governmental and sovereign purposes. I am sure we would not wish our Embassies or our warships abroad executed on. The reason for limiting execution to assets employed in connection with the particular commercial activity out of which the claim arose is that—as I have attempted to describe—is that states, especially those with economies which are predominantly in the public sector and public in character, may engage in a great variety of commercial activities. And, as I have described, I think it would be anomalous under American practice for assets used in connection with a foreign state's program of importation of machine tools, for example, to be available to satisfy a judgment arising out of its commercial telecommunications business.

The second exception to immunity from execution, subsection (b) of section 1610, applies similar principles to execution of judgments against the assets in the United States of an agency or instrumentality of a foreign state or its subdivisions which is engaged in a commercial activity or act in the United States or which does an act outside the territory of the United States in connection with a commercial activity elsewhere but which act has a direct effect within the territory of the United States. Generally speaking, under subsection (b) with respect to subdivisions and agencies and instrumentalities, the rules are slightly looser with respect to what you can do in terms of execution.

Thus any assets of a foreign government agency or instrumentality in the United States may be used to satisfy judgments against that agency or instrumentality arising out of a commercial activity or acts having the specified connection with the United States.

The last section of the proposed legislation which I shall address today is section 1611, which provides and this relates to public debts, that "[n]otwithstanding the provisions" of section 1610 "assets of a foreign state shall be immune from attachment and from execution if (1) the assets are those of a foreign central bank or monetary authority held for its own account; or (2) the assets are, or are intended to be, used in connection with a military activity and (a) are of a military character, or (b) are under the control of a military authority or defense agency." The purpose of section 1611(1) is to prevent in all circumstances attachment of or levy of execution upon these two categories of property of foreign states, even if these relate to the commercial activities of a foreign state and would otherwise come within the scope of section 1610.

Now, I should point out also that the proposed legislation, in the last sections of it, establishes original jurisdiction in the Federal district courts of all civil actions against foreign states regardless of the amount in controversy. Venue is affixed principally in the District of Columbia but also in other districts which have substantial contacts with the matter, and there are appropriate provisions for removal to Federal court of actions commenced against foreign states in State courts.

I have attempted today simply to introduce the provisions of this legislation to the subcommittee. I know as our discussions within the department in preparation for this testimony have indicated and as the

questions asked already this morning clearly indicate, this legislation will require some discussion and some attention to detail. I know that various bar and other professional groups have studied this legislation intensively and they will in due course communicate their formal comments on this proposal to us and to you. We have already been receiving and we have been reviewing a number of informal comments and, undoubtedly, there will be some refinements in the text of this legislation which will be appropriate, and, in some cases, required.

I simply want to say that we will endeavor to work closely with the subcommittee in its consideration of this legislation. This legislation was very long in gestation in the executive branch and it quite clearly covers a very complicated and, in some respects, technical subject.

We stand ready, willing and able to do all in our power to assist you and to work with you so that, together, we can see that this legislation does get on the books.

Thank you very much.

Mr. Ristau might have something to say and we would be glad to answer any questions you have.

Mr. MANN. Thank you, Mr. Brower.

Mr. Moorhead?

Mr. MOORHEAD. I know a few minutes ago, you stated that most of the foreign governments pay their bills when there is a judgment against them but the extensive discussion in the explanation accompanying the communication indicates that there are many instances where they don't. What I am wondering is whether there is any procedure that can be followed when the particular activity that was involved, such as in the example of painting the Embassy, has no attachable or executionable item in connection with it? Whether there is any method these people can follow to collect.

Mr. BROWER. Well, there are lots of methods and I am not suggesting or wishing to suggest any which might interfere with our foreign relations in any particular case. The most obvious one is to raise it through diplomatic channels. In other words, they would come to us—probably to my office in the Department of State—and say, look, we have a $14,000 bill here for doing a first-rate remodeling or painting job on this Embassy, and they simply won't pay. There would be then quite numerous requests and discussions among attorneys. It would then be up to the United States to espouse that claim on behalf of the American national, assuming that it is an American national.

Mr. MOORHEAD. They do then actively get involved in that effort? You do get involved?

Mr. BROWER. Well, the claims of U.S. nationals against foreign governments are frequently taken up and espoused by the U.S. Government as, in effect, a diplomatic claim through diplomatic channels and sometimes they are paid. We have had numerous claims, agreements, with foreign countries in recent years; general claim settlements and such and, also, very specific cases. So that is an option which is a realistic one.

Mr. FROEHLICH. Mr. Chairman?

Mr. MANN. Mr. Froehlich?

Mr. FROEFLICH. Going back to your opening statement, under what authority is your suggestion of immunity constitutional?

Mr. BROWER. Fundamentally, I believe it reflects a judicial feeling that the separation of powers requires it; that the conduct of foreign

relations and diplomatic relations is peculiarly within the province of the executive branch, that when the executive branch says Country x is immune on such claim, that it is honored. That has been the case throughout a fairly long history, and I think that is the fundamental basis.

Mr. FROEHLICH. A citizen who disagrees with the recommendation or suggestion from the Department of State, then has no recourse? There is no way to appeal a decision?

Mr. BROWER. I should say, if I may go back to the first part of your statment: You say there is no recourse with respect to a decision by the Department of State. Of course, the Department of State has been making these decisions pursuant to an internal procedure which permits the litigant and the interested parties involved to have a hearing within the Department and they present written statements and sometimes come in and present oral statements.

Now, I would be less than frank if I were to say that I, as a lawyer, with a number of years in the private sphere and with practical experience, would say that that is the same as having been heard in a court. That is obviously a different kind of framework. And part of the reason for the bill is to get this into the courts so that there will be more due process in the hearing on the subject. The people are heard in the Department. Once the decision is made on the basis of the hearing, you are correct, there is no judicial recourse from it.

Mr. FROEHLICH. Do you have administrative rules and procedures as to the hearing process or is this a helter-skelter type thing?

Mr. BROWER. I would have to say that it is properly described as reasonably informal. When contacted on a case, we communicate with the attorneys, the parties on both sides, and we have a kind of generalized procedure of receiving written comments within a certain number of days and perhaps having oral hearings or oral presentations.

Mr. FROEHLICH. Sort of a pretrial conference, would you say?

Mr. BROWER. There are certain similarities.

Mr. MANN. What has been the frequency of the requests for immunity?

Mr. BROWER. I think it might be useful for us to supply it for the record, sir, to supply an accurate count. I can tell you that at any given time we are considering several. It goes on constantly. And there is at least one attorney in our office who spends virtually his full time handling these kinds of matters and they cut across other lawyers' areas, but it is quite a time-consuming proposition.

Mr. MANN. Mr. Danielson?

Mr. DANIELSON. Could the gentleman supply that and may it be made a part of the record?

Mr. BROWER. Yes, I will undertake to do that.

Mr. DANIELSON. I have a couple of questions here. One is probably technical. On pages 9 and 10 of the bill, H.R. 3493, it is difficult to follow the meaning of the numerical subdivisions.

Mr. BROWER. Congressman, the best explanation we are able to offer at the present time is that the (2) you see on line 17 on page 9 is meant to be the (2) following the (1) which appears on page 1 at line 4. In other words, it starts out: "Be it enacted," et cetera, "that title 28, United States Code, as amended," and then there is (1) and it states: "By inserting after" and then there is all of this new material up through line 17 on page 9——

Mr. DANIELSON. But on page 10 you do a similar thing with lines 14 and 15.

If there is an error, I think we should reprint the bill.

Mr. BROWER. It may be there is some other presentation. I could check it out——

Mr. DANIELSON. Mr. Chairman, if we conclude that there is an error, can we get a reprint?

Mr. SHATTUCK. Mr. Chairman, I believe Mr. Brower is correct on his analysis of how this occurred. The difficulty lies in the fact that there is no break or space in the bill. What you have is an amendment which adds a new section and then immediately following the new section the quotation marks close and there is a semicolon and there is an "and" and then there are these more or less technical amendments that are meant to put new headings in Code sections. So it is very difficult to see in a quick reading of the bill that is how it occurs.

Mr. DANIELSON. After careful reading, if it still is not clear, I just think we ought to correct it.

Mr. MANN. That can be taken care of.

Mr. Ristau?

Mr. RISTAU. If you like, I will proceed.

Mr. LOTT. Mr. Chairman, could I ask one question?

Mr. MANN. Mr. Lott?

Mr. LOTT. Before we leave Mr. Brower——

Mr. MANN. We will not leave Mr. Brower, but I think Mr. Ristau has a statement which is somewhat parallel.

STATEMENT OF HON. BRUNO RISTAU, CHIEF, FOREIGN LITIGATION UNIT, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. RISTAU. Mr. Chairman and members of this honorable committee, my name is Bruno Ristau. I am in charge of the Foreign Litigation Office in the Department of Justice. I very much appreciate the opportunity to help explain, if I can, some of the provisions of this highly intricate bill.

My principal contribution, perhaps, could be this: I believe the members of the committee will be interested to know that in drafting this proposed legislation which, as Mr. Brower has said, has had a very long period of gestation, we have drawn very heavily on the experience of the United States as a litigant abroad. Perhaps the committee knows that, certainly since World War II, the U.S. Government and its various agencies and instrumentalities has been subjected to the jurisdiction of a great many foreign courts; in fact, I believe I am safe in representing to the committee that there probably is no other country that has been required to appear in so many foreign domestic courts in protecting its legal interests before those courts as has the Government of the United States.

At any given time for the past two decades, I would say, we have been engaged in litigation in literally dozens of countries.

I was asked by the Assistant Attorney General only the other day, in how many countries are we currently involved in litigation and the answer is, in 28 different countries. Now, you should also know that the Government does from time to time invoke the aid of the domestic courts of foreign countries, and the protection of its own rights and

interests. We thus appear at times as plaintiff but more frequently we appear as a defendant. As a result of these rather extensive litigation activities abroad, since the beginning of the early fifties, we have what I believe to be a rather unique experience in appearing as a sovereign government in foreign courts and, of course, we have certainly in the early days—when we first got involved in foreign litigation—frequently raised the defense of immunity from suit before foreign tribunals. And the essence of what is in this bill, Mr. Danielson, is in large measure based on our experience as a litigant abroad.

In consequence, perhaps as a partial answer to your earlier question, sir, as to what effect this proposed legislation would have in the converse situation, when the United States or one of its agencies appears as a litigant abroad, I would suggest to you that the effect that we attempt to bring about in the United States is really the reverse. We would like, based on our experience as a litigant abroad to subsume to the jurisdiction of our domestic courts foreign governments and foreign entities who engage in certain activities on our territory to the same extent that the U.S. Government is already at the present time subject to the jurisdiction of foreign courts, when it engages in certain activities on their soil.

Mr. MANN. We will now proceed in an orderly fashion with questions by members of the committee of both witnesses.

Mr. Danielson?

Mr. DANIELSON. Just carrying on from what you said, may I infer what you are really trying to do is to give our own nationals, our own citizens, the people on this side, at least to some measure, the same type of redress or recourse to their commercial interests of foreign states as is afforded to nationals and citizens against our States in the foreign countries?

Mr. RISTAU. That is correct, Congressman. We have certainly witnessed in the past decade abroad a very considerable restriction of the immunities which foreign countries afford not only to the United States but also to other sovereign states who engage in certain activities on their soil. Perhaps the one country that still in large measure adheres to the traditional so-called absolute immunity doctrine is the United Kingdom. There are, however, indications that even the United Kingdom is receding from the traditional 19th century rule, as we call it, the absolute sovereign immunity doctrine. You are absolutely right, Congressman, we would like to afford to our local citizens and entities who deal with foreign governments in the United States effective redress through the instrumentality of our courts. If a dispute arises as a result of an activity which a government carries on in this country, the most appropriate place to resolve such a dispute would be through the courts, which are, after all, designed to do just that: to resolve the dispute which has arisen here.

Mr. DANIELSON. Well, I am very pleased to hear that. I have been fearful for a long time that the balance is the other way around and I would like to see some of it come back this way. So I thank you for your comments there and it will make the bill far more interesting and important, as far as I am concerned.

Now, let's take Sweden, for example, where our diplomatic relations are, at least, sort of bent out of shape. Do the matters of litigation continue to be handled in much the same way as they were tradition-

ally or does a diplomatic situation similar between that of the United States and Sweden, have any impact or effect upon litigation?

Mr. RISTAU. Ideally, Congressman, it shouldn't have any impact, but rather a dispute arising out of a commercial activity ought to be divorced from any diplomatic overtones whatsoever and should be settled through the ordinary processes of the law. A dispute between a painting contractor, to use your own example, and the Government should in no way be affected by whatever the state of the diplomatic relations at any given moment might be. It should be totally divorced.

Mr. DANIELSON. As a practical matter, though, does it have an effect?

Mr. RISTAU. I will defer on that to my brother from the State Department.

Mr. DANIELSON. No; I was really interested in your first answer.

The last question I have has to do with jurisdiction as between Federal and State courts. This bill would apparently vest jurisdiction in the Federal district courts?

Mr. BROWER. Yes.

Mr. DANIELSON. There is a procedure provided for removal in the event action is commenced in a State court and there are a number of exceptions, but, anyway, I am trying to envision how could an action be commenced in a State court if the service or process is to be done by a summons issued by the clerk of the Federal court? How could that happen? How could the State court ever have jurisdiction that would require removal?

Mr. RISTAU. Congressman, may I be permitted to preface my answer with the following observations:

Mr. DANIELSON. Yes.

Mr. RISTAU. We do have a somewhat anomalous situation at the present time in this one respect. As you know, sir, foreign diplomatic personnel are suable only in the U.S. Supreme Court. The Supreme Court of the United States has original and exclusive jurisdiction in suits against foreign diplomats. A somewhat lower echelon of foreign governmental functionaries in this country; namely, consular officials of a foreign government can be sued only in the U.S. district courts. Now, there have been repeated attempts to subsume foreign sovereign governments to the jurisdiction of State courts and, on occasion, by means of attachment, litigants have succeeded in bringing suits in State courts. You do have in the reported cases quite a number of decisions from the courts of the State of New York and other jurisdictions, where a foreign government became a defendant in a State court.

Mr. DANIELSON. What we are simply doing here would be to try to provide a certainty that these can be removed at the request of the foreign state to the U.S. district court?

Mr. RISTAU. Yes, sir, we feel that the question of the suability of a foreign government in the courts of the United States is inextricably intertwined with one aspect of foreign relations. As a result of this, we feel and we are convinced that the Congress has absolute authority to legislate in this area.

Mr. DANIELSON. You have answered my question fully and I thank you.

Mr. BROWER. Excuse me, Congressman, but I thought your question had a different thrust, namely, when this statute is in force and an attachment is no longer available for establishing quasi in rem jurisdiction and since this statute addresses itself, as far as service of process is concerned, to the Federal courts but not to State courts, how then, when this is on the books, will the defendant get jurisdiction in the State courts and——

Mr. DANIELSON. Oh, I think it would be an idle act once this is a law, assuming it becomes law, it would be an idle act to sue them in the State courts, but at least the information that has just come forward makes it clear that any pending actions which are being currently filed, could be removed. But I think once it is law, there is no jurisdiction in the State court.

Mr. BROWER. It is like the old question, where the client asked his lawyer, can Smith sue me? Of course, he can sue you but whether he can properly sue you or not is another question. It seems to me it may be properly brought to the State court and I think the removing procedure would apply only to actions which might be pending at the time this act becomes effective.

Mr. MANN. As Mr. Brower indicated, you could choose the alternative of removal rather than dismissal, in other words?

Mr. BROWER. Right.

Ms. JORDAN. Mr. Chairman, may I just ask a question on this?

We have read recently of a big fertilizer deal between a local company and the Soviet Union. Now that deal sought the assent of the United States. It sought its stamp of approval. Now, if there is a violation on the part of that private corporation here, in failing to fulfill the terms of that contract where the United States has given a stamp of approval, does the action lie in any sense against the Government of the United States?

Mr. BROWER. Having some familiarity with the transaction in question, I trust the answer is no. The document to which you refer I think you could describe more in the nature of an endorsement or an expression of appreciation rather than legal instrument having the effect of entangling the U.S. Government in a legal sense in any potential claims.

The U.S. Government could be involved the other way around, so if there were a claim by the U.S. national involved against the Soviet Union foreign trading corporation, where, for some reason, there was difficulty in having that properly adjudicated. Of course, that potentially might be a claim, depending upon the circumstances. That could also be raised in diplomatic channels. But I don't see any situation in which the United States would be subject to liability for that transaction.

Mr. MANN. Mr. Lott?

Mr. LOTT. Thank you, Mr. Chairman.

As set out in sections 1604, 1605, and 1606, I wonder why a decision was made to start with general immunity and then create these exceptions that are set out, rather than start with no immunity and create the sections which grant immunity. Maybe Mr. Ristau would comment on that?

Mr. BROWER. I suppose you always have a choice in drafting as to which end you start at; whether you make the exceptions the rule or the rule the exceptions. Historically, you started out with absolute immunity and worked your way down to something less than that.

I think to some extent it is a matter of following a historical pattern. I think it also might be considered somewhat undiplomatic for the U.S. Government to pronounce fundamentally foreign governments are not immune. It might seem to them a little bit like saying one is guilty until proven innocent.

Mr. LOTT. In that connection, Mr. Ristau, is that the way it is done in foreign states?

Mr. RISTAU. Congressman, if I may add to what Mr. Brower said: We have considered in some of the original drafts approaching it positively rather than negatively. I think that was the core of your question. We had drawn in our preparatory work also in part on the restatement of the foreign relations law of the United States and the restatement approaches it in this fashion, by starting out with the general proposition of immunity and then listing a series of exceptions to that. It was a drafting choice, Congressman.

Mr. LOTT. One thing that worries me; will we be involved in the continued process of adding one more and then one more exception and so on down the line? I can certainly see problems.

Mr. RISTAU. Conceivably, Congressman, as the law develops and as the practice of states indicates that there should be jurisdiction in the local courts, it may very well then occur that additional exceptions to the general immunity might be carved out by codification.

Mr. BROWER. I think you would have the same problem if it were drafted the other way around, Congressman. In this case, it may be adding exceptions, but in the other case, it might be adding additional cases.

Mr. LOTT. But in the foreign states, generally, they have the absolute immunity?

Mr. RISTAU. No. Forgive me; foreign states generally by now adhere to the restrictive theory of immunity. As I indicated before, I believe the United Kingdom still adheres to some degree to the traditional absolute immunity doctrine but not so, however, on the continent of Europe; not so, however, in South America; and of recent years in Japan, the Philippines, Thailand. They have all gone over to the restrictive theory of immunity. I think by now it is safe to state that the majority of states adhere to the restrictive theory and have backed away from the absolute doctrine.

Mr. BROWER. And they also, I believe, follow our system, namely, that immunity exists unless there is an exception. However, it is incumbent upon the defendant to raise the defense of sovereign immunity rather than the plaintiff being required to establish lack of immunity.

Mr. RISTAU. I should perhaps add, Congressman, an additional answer to your question that, to be sure, I know of no single country that has legislation on the books as we propose in this bill. There is, as Mr. Brower indicated, the proposed multilateral treaty in Europe, the Council of Europe Treaty, which would comprehensively deal with the problem of the jurisdictional immunity of states between the member states of that Council.

This is, in a way, a rather unique proposal in that we are submitting to the Congress to codify as a matter of domestic U.S. law this area of the law. I believe you, sir, suggested earlier or inquired earlier, whether this would not be a fruitful area ultimately for a convention and, to be sure, the answer in my judgment is, yes, we would hope that ultimately this area might be covered by a multi-lateral treaty to make it absolutely uniform between the major states of the world.

Mr. DANIELSON. That would be useful.

Mr. RISTAU. But I believe the Congress can fulfill a unique task in advancing the science of law by codifying these principles as a matter of U.S. law.

Mr. MANN. Ms. Jordan?

Ms. JORDAN. No further questions.

Mr. MANN. Mr. Moorhead?

Mr. MOORHEAD. No questions.

Mr. MANN. Any further questions?

Well, thank you, gentlemen.

This concludes the hearing for today. It is adjourned subject to the call of the Chair.

[Whereupon, at 12 noon, the subcommittee adjourned subject to the call of the Chair.]

[The executive communication transmitted to the Speaker of the House on January 16, 1973, and the accompanying explanation is as follows:]

THE SECRETARY OF STATE,
Washington, D.C., January 16, 1973.

The SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: There is attached for your consideration and appropriate reference a draft bill, "To define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes," which is being submitted jointly by the Department of State and the Department of Justice.

At present the determination whether a foreign state which is sued in a court of the United States is entitled to sovereign immunity is made by the court in which the action is brought. However, the courts normally defer to the suggestion of the Department of State that immunity should be accorded and make their own determination of entitlement to immunity only when the Department of State makes no submission to the court.

The law which is applied both by the courts and by the Department of State is thus the result of the joint articulation of the law by the judiciary and the Department. The views expressed by the courts influence the Department of State, and the views expressed by the Department of State influence the courts. In the process of ascertaining and applying the law, both the Department and the courts rely on precedents and trends of decision in foreign as well as United States courts.

The policy of the Department of State, which has been given effect by the courts as well, was set forth in a letter of May 19, 1952 from the Acting Legal Adviser of the Department of State to the Acting Attorney General. The Department of State asserted that its policy would be thereafter "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." The letter stated,

"According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imerii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories [i.e., of absolute and of restrictive immunity], supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps

consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary."

The effect of the draft bill would be to accomplish four things:

1. The task of determining whether a foreign state is entitled to immunity would be transferred wholly to the courts, and the Department of State would no longer express itself on requests for immunity directed to it by the courts or by foreign states.

2. The restrictive theory of sovereign immunity would be further particularized in statutory form.

3. Foreign states would no longer be accorded absolute immunity from execution on judgments rendered against them, as is now the case, and their immunity from execution would conform more closely to the restrictive theory of immunity from jurisdiction.

4. The means whereby process may be served on foreign states would be specified.

The central principle of the draft bill is to make the question of a foreign state's entitlement to immunity an issue justiciable by the courts, without participation by the Department of State. As the situation now stands, the courts normally defer to the views of the Department of State, which puts the Department in the difficult position of effectively determining whether the plaintiff will have his day in court. If the Department suggests immunity, the court will normally honor the suggestion, and the case will be dismissed for want of jurisdiction. If the Department does not suggest immunity, the court may either take the silence of the Department as an indication that immunity is not appropriate or will determine the question itself, with due regard for the policy of the Department and the views expressed in the past by the courts. While the Department has attempted to provide internal procedures which will give both the plaintiff and the defendant foreign state a hearing, it is not satisfactory that a department, acting through administrative procedures, should in the generality of cases determine whether the plaintiff will or will not be permitted to pursue his cause of action. Questions of such moment appear particularly appropriate for resolution by the courts, rather than by an executive department.

The transfer of this function to the courts will also free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.

Plaintiffs, the Department of State, and foreign states would thus benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question.

The draft bill would give appropriate guidance, grounded in the restrictive theory of immunity, on the standards to be employed. These are consistent with those applied in other developed legal systems. In brief, foreign states would not be immune from the jurisdiction of United States courts when the foreign state has waived its immunity, when the action is based on a commercial activity or concerns property present in the United States in connection with a commercial activity, when the action relates to immovables or to rights in property acquired by succession or gift, or when an action is brought against a foreign state for personal injury or death or damage to or loss of property occasioned by the tortious act in the United States of a foreign state. Special provisions would be made for counterclaims and for actions relating to the public debt of a foreign state.

Under the present law, a plaintiff who is able to bring his action against a foreign state because it relates to a commercial act (*jure gestionis*) of that state may be denied the fruits of his judgment against the foreign state. The immunity of a foreign state from execution has remained absolute. The draft bill would permit execution on the assets of a foreign state if the foreign state had waived its immunity from execution or if the assets were held for commercial purposes in the United States. The plaintiff could thus recover against commercial accounts, but not against those maintained for governmental purposes. The successful plaintiff would also be precluded from levying on funds deposited in the United States in connection with central banking activities and on military property.

Finally, the draft bill would, in addition to specifying the respective jurisdictions of State and Federal courts in actions against foreign states and venue require-

ments, clear up the question of how foreign states are to be served. Service would be made either on the ambassador or other person entitled to receive service, and a copy of the complaint, furnished to the Department of State, would in turn be transmitted to the department of the foreign state responsible for the conduct of foreign relations. The initiation of action through attachment would thus no longer be appropriate.

The ideal arrangement concerning the sovereign immunity of foreign states would be the regulation of the question through a general international agreement. The draft bill is looked upon as an arrangement to be applied until such time as a satisfactory convention is drawn up and the United States becomes a party to it.

The Department of State contemplates that if the draft bill should be enacted, it would propose that the United States file a declaration accepting the compulsory jurisdiction of the International Court of Justice, on condition of reciprocity, with respect to disputes concerning the immunity of foreign states. The resolution of disputed questions of sovereign immunity by the World Court would have the beneficial effect of assuring that the law and practice of this and other countries conform with international law and of imparting further precision to the law in areas where some measure of uncertainty now exists.

The Office of Management and Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the Administration's program.

Sincerely,

RICHARD G. KLEINDIENST,
Attorney General.
WILLIAM P. ROGERS,
Secretary of State.

AN ACT To define the circumstances in which foreign states are immune from the jurisdiction of United States courts and in which execution may not be levied on their assets, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title, 28, United States Code, is amended—

(1) by inserting after Chapter 95 the following new Chapter:

"CHAPTER 97.—JURISDICTIONAL IMMUNITIES OF FOREIGN STATES

"§ 1602. Findings and declaration of purpose

"The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by United States courts in conformity with these principles as set forth in this chapter and other principles of international law.

"§ 1603. Definitions

"(a) For the purposes of this chapter, other than sections 1608 and 1610, a "foreign state" includes a political subdivision of that foreign state, or an agency or instrumentality of such a state or subdivision.

"(b) For the purposes of this chapter, a "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

"§ 1604. Immunity of foreign states from jurisdiction

"Subject to existing and future international agreements to which the United States is a party, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in this chapter.

"§ 1605. General exceptions to the jurisdictional immunity of foreign states

"A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

"(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose;

"(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 has a direct effect within the territory of the United States;

"(3) in which rights in property taken in violation of international law are in issue and that 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 is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

"(4) 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; or

"(5) in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, caused by the negligent or wrongful act or omission in the United States of that foreign state or of any official or employee thereof except that a foreign state shall be immune in any case under this paragraph in which a remedy is available under Article VIII of the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces.

"§ 1606. Immunity in cases relating to the public debt of a foreign state

"(a) A foreign state shall be immune from the jurisdiction of the courts of the United States and of the States in any case relating to its public debt, except if

"(1) the foreign state has waived its immunity explicitly, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose; or

"(2) the case, whether or not falling within the scope of section 1605, relates to the public debt of a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision.

"(b) Nothing in this chapter shall be construed as impairing any remedy afforded under sections 77(a) through 80(b)–21 of Title 15, United States Code, as amended, or any other statute which may hereafter be administered by the United States Securities and Exchange Commission.

"§ 1607. Counterclaims

"In any action brought by a foreign state in a court of the United States or of any State, the foreign state shall not be accorded immunity with respect to—

"(1) any counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

"(2) any other counterclaim that does not claim relief exceeding in amount or differing in kind from that sought by the foreign state.

"§ 1608. Service of process in United States district courts

"Service in the district courts shall be made upon a foreign state or a political subdivision of a foreign state and may be made upon an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of the United States as defined in Section 1332(c) and (d) of this title by delivering a copy of the summons and complaint by registered or certified mail, to be addressed and dispatched by the clerk of the court, to the ambassador or chief of mission of the foreign state accredited to the Government of the United States, to the ambassador or chief of mission of another state then acting as protecting

power for such foreign state, or in the case of service upon an agency or instrumentality of a foreign state or political subdivision to such other officer or agent as is authorized under the law of the foreign state or of the United States to receive service of process in the particular case, and, in each case, by also sending two copies of the summons and of the complaint by registered or certified mail to the Secretary of State at Washington, District of Columbia, who in turn shall transmit one of these copies by a diplomatic note to the department of the government of the foreign state charged with the conduct of the foreign relations of that State.

"§ 1609. Immunity from execution and attachment of assets of foreign states

"The assets in the United States of a foreign state shall be immune from attachment and from execution, except as provided in section 1610 of this chapter.

"§ 1610. Exceptions to the immunity from execution of assets of foreign states

"(a) The assets in the United States of a foreign state or political subdivision of a foreign state, to the extent that they are used for a particular commercial activity in the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that foreign state or political subdivision if

"(1) such attachment or execution relates to a claim which is based on that commercial activity or on rights in property taken in violation of international law and present in the United States in connection with that activity, or

"(2) the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, notwithstanding any purported withdrawal of the waiver after the claim arose.

"(b) The assets in the United States of an agency or instrumentality of a foreign state or of an agency or instrumentality of a political subdivision of a foreign state, which is engaged in a commercial activity in the United States, or does an act in the United States in connection with such a commerical activity elsewhere, or does an act outside the territory of the United States in connection with a commercial activity elsewhere and the act has a direct effect within the territory of the United States, shall not be immune from attachment for purposes of execution or from execution of a judgment rendered against that agency or instrumenttlity if—

"(1) such attachment or execution relates to a claim which is based on a commercial activity in the United States or such an act, or on rights in property taken in violation of international law and present in the United States in connection with such a commercial activity in the United States, or on rights in property taken in violation of international law and owned or operated by an agency or instrumentality which is engaged in a commercial activity in the United States; or

"(2) the agency or instrumentality or the foreign state or political subdivision has waived its immunity from attachment for purposes of execution or from execution of a judgment either explicitly or by implication, nothwithstanding any purported withdrawal of the waiver after the claim arose.

"§ 1611. Certain types of assets immune from execution

"Notwithstanding the provisions of section 1610 of this chapter, assets of a foreign state shall be immune from attachment and from execution, if—

"(1) the assets are those of a foreign central bank or monetary authority held for its own account; or

"(2) the assets are, or are intended to be, used in connection with a military activity and

(a) are of a military character, or

(b) are under the control of a military authority or defense agency.";

and

(2) by inserting in the analysis of Part IV, "Jurisdiction and Venue," of that title after

"95. Customs Court.",

the following new item:

"97. Jurisdictional Immunities of Foreign States.".

SEC. 2. Chapter 85 of title 28, United States Code, is amended—

(1) by inserting immediately before section 1331 the following new section:

"§ 1330. Actions against foreign states

"(a) The district courts shall have original jurisdiction of all civil actions, regardless of the amount in controversy, against foreign states or political subdivisions of foreign states, or agencies or instrumentalities of such a state or subdivision, other than agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332 (c) and (d) of this title.

"(b) This section does not affect the jurisdiction of the district courts of the United States with respect to civil actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."; and

(2) by inserting in the chapter analysis of that Chapter before—

"1331. Federal question; amount in controversy; costs."

the following new item:

"1330. Actions against foreign states.".

SEC. 3. Section 1391 of title 28, United States Code, is amended by adding a new subsection (f), to read as follows:

"(f) A civil action against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title may, except as otherwise provided by law, be brought in a judicial district where: (1) a substantial part of the events or omissions giving rise to the claim occurred, or (2) a substantial part of the property that is the subject of the action is situated, or (3) the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality, or (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision. Nothing in this subsection shall affect the venue of actions against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332(c) and (d) of this title."

SEC. 4. Section 1441 of title 28, United States Code, is amended by adding a new subsection (d), to read as follows:

"(d) Any civil action brought in a court of a State of the United States against a foreign state, or a political subdivision of a foreign state, or an agency or instrumentality of such a state or subdivision which agency or instrumentality is not a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, may be removed by the foreign state, subdivision, agency or instrumentality to the district court of the United States for the district and division embracing the place where such action is pending. Nothing in this subsection shall affect the removal of actions against agencies or instrumentalities or a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States, as defined in section 1332 (c) and (d) of this title."

SEC. 5. Section 1332 of title 28, United States Code, is amended by striking subsections (a) (2) and (3) and substituting in their place the following:

"(2) citizens of a State and citizens or subjects of a foreign state; and

"(3) citizens or different States and in which citizens or subjects of a foreign state are additional parties."

SECTION-BY-SECTION ANALYSIS

Section 1

Adds a new Chapter 97 to title 28, United States Code. The new Chapter incorporates and codifies international law with respect to the immunities of foreign states. Together with a new 28 U.S.C. § 1330 (Sec. 2) establishing original jurisdiction in the federal district courts in civil actions against foreign states, and amendments to 28 U.S.C. § 1391 (Sec. 3) and 28 U.S.C. § 1441 (Sec. 4) concerning venue and removal jurisdiction, the new Chapter establishes a coordinated regime for civil actions against foreign states and their political subdivisions and agencies and instrumentalities. It was felt preferable to bring together the provisions dealing with the immunities of foreign states in a clearly identified Chapter except where, in dealing with jurisdiction, venue and removal it would be clearer if the new provisions for actions against foreign states appeared with related provisions of title 28.

The Act has been drafted as an amendment to the present title 28. It has been influenced, however, by the American Law Institute Draft of the Federal Court

Jurisdiction Act of 1971 introduced in the 92d Congress as S. 1876, and is consistent with that bill. It would be relatively easy to integrate this Act into any new structure patterned after that bill.

Section 1602. Findings and declaration of purpose

This section incorporates the central premises of the new Act, which are that decisions concerning claims of foreign states to immunity are best made by the judiciary on the basis of a statutory regime which incorporates the restrictive theory of sovereign immunity. It has never been clear to what extent the principle of international law governing the sovereign immunity of foreign states in national courts is left to be spelled out by national legislation and by the decisions of national courts. The general immunity seems to be a creation of international law; its further refinement seems to have been left very largely to national courts. There is, however, general acceptance of the restrictive principle of immunity. It is this principle that has been applied by the Department of State and by the courts since the "Tate Letter" of May 19, 1952, 26 *Department of State Bulletin* 984 (1952) and which is incorporated and codified in this Chapter.

The existing case law, both United States and foreign, could be drawn upon in aid of the interpretation and application of the provisions of this Act. As the law develops in other jurisdictions, that law may similarly be relied upon to elucidate the provisions of this Act.

Section 1603. Definitions

This section defines two terms that are used throughout the new Chapter 97, except as the term "foreign state" is used in Sections 1608 and 1610.

Section 1603 (a) defines "foreign state" in terms of all levels of government within that state. The term thus extends from the central government down to the level of municipalities. The traditional view has been that immunity attaches only to the central government of a state and that other subordinate entities, such as states of a federation, provinces, cantons, countries, and municipalities, are not sovereign and are not entitled to immunity. The practice has not been consistent, however, and some courts have found it difficult to contend that purely governmental acts of governmental subdivisions should be subject to scrutiny by foreign courts. In other areas of international law, the central government is responsible for the acts of political subdivisions and they are considered as its own acts. There is no reason to treat these acts differently for purposes of immunity. If those acts are not in fact commercial, then immunity should be granted to exactly the same extent as it would be extended to the central government in the event those acts were directly attributable to it.

An "agency or instrumentality" of a state or of its political subdivision could assume a variety of forms—a state trading corporation, a transport organization such as a shipping line or airline, or a banking activity. The traditional rule was that such agencies and instrumentalities of a foreign government were entitled to the same immunities as the government itself especially if they engaged in clearly governmental activities.

When the principle of the absolute immunity of foreign governments was still dominant, the idea of the separability of certain governmental agencies or instrumentalities was used to exempt certain governmental activities from the rule of absolute immunity. If it could be proven that a particular activity was conducted by a separate entity, this enabled some courts to claim that this was not a governmental activity and that the entity in question was not entitled to immunity. When the trend shifted toward restricted immunity, some courts retained the old distinction as well, thus applying a double standard, namely that there is no immunity if an activity is commercial *or* if it is conducted by a separate entity. In a third category of instances, immunity was abolished only when the transaction was commercial and the entity was a separate one. Thus, a series of treaties of friendship, commerce, and navigation concluded by the United States with the Federal Republic of Germany, Greece, Iran, Ireland, Israel, Italy, Japan, Korea, the Netherlands, and Nicaragua abolished immunity only for government owned or controlled "enterprises" of one state which are engaged in "commercial, manufacturing, processing, shipping or other business activities" in the territory of the other state (6 Whiteman, *Digest of International Law* 582 (1968)).

It would seem proper to extend the immunity rules applicable to central governments on an equal basis, and subject to the same exceptions, to political subdivisions of a foreign state and to all agencies and instrumentalities not only of the foreign state but also of its political subdivisions. It is not likely that this extension of the basic rule would result in a large number of immunity cases, as

most foreign activities of such entities are likely to be commercial and will not be entitled to immunity.

Section 1603(b) defines a "commercial activity." If a foreign state, as defined in the Act (as including, for example, an agency or instrumentality of the state) carries on what is in effect a commercial enterprise—an airline or a trading corporation, for example—this constitutes a "regular course of commercial conduct" and therefore a "commercial activity." If an activity is customarily carried on for profit, its commercial character readily could be assumed. On the other hand, a single contract if of the same character as a contract which might be made by private persons, can constitute a "particular commercial transaction or act." The fact that the goods or services to be procured through the contract are to be used for a public purpose is irrelevant. Such a contract should be considered to be a commercial contract, even if its object is to assist in a public function.

The courts will have a good deal of latitude in determining what is a "commercial activity." It seems unwise to attempt a precise definition in this Act, even if that were practicable. It would include, however, such diverse activities as a contract to manufacture army boots for a foreign government or the sale by a foreign government of a service or product.

Section 1604. Immunity of foreign states from jurisdiction

The new Chapter 97 starts from an assumption of immunity and then creates exceptions to the general principle. So long as the law develops in the form of stating when a foreign state is *not* immune in national courts, the codified law will have to be cast in this way. The articulation of the governing principle in terms of immunity will also protect foreign states in doubtful cases.

The immunity is extended to proceedings in both State and Federal courts. It lies within the powers of the Congress to stipulate that an immunity created under customary international law must be respected in State courts.

This Chapter is not intended to alter existing international agreements to which the United States is a party. The "existing . . . agreements to which the United States is a party" include treaties of friendship, commerce, and navigation and bilateral air transport agreements which contain provisions relating to the immunity of foreign states. If the agreement implicitly or explicitly establishes a higher or lower standard of immunity than that stipulated in this Act, or establishes a different basis for determining the liability of a foreign government, the treaty, whether prior to the enactment of the Act or subsequent to it, will prevail. The enactment of this Act might suggest renegotiation of certain of these provisions in order to bring them into conformity with the stipulations of this Act.

Nothing in this Act will in any way alter the rights or duties of the United States under the status of forces agreements for NATO or other countries having military forces in the United States or alter the provisions of commercial contracts calling for exclusive nonjudicial remedies through arbitration or other technique of dispute settlement.

Section 1605. General exceptions to the jurisdictional immunities of foreign states

This section sets forth the circumstances in which a foreign state, as defined in Section 1603(a) is not entitled to immunity in United States courts.

Section 1605(l) deals with the case in which the foreign state has waived its immunity. It is generally recognized that whatever rule is followed with respect to the granting of immunity to a foreign state, that state may waive its immunity in whole or in part, explicitly or implicitly. A state may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce, and navigation, or a state may waive its immunity in a contract with a private party. In the latter instance, some courts have allowed later unilateral recission of such a waiver, but the more widely accepted view seems to be that a state which has enticed a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, hide behind its immunity and claim the right to revoke the waiver. Courts have also found an implicit waiver in cases where a foreign state agreed to arbitration in another country or where it was agreed that the law of a particular country should govern the contract.

The language "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect after the claim arose" is designed to deal, out of an abundance of caution, with the eventuality that a state may attempt to withdraw its waiver of immunity when a dispute arises. A waiver of immunity, once made by treaty or contract, cannot be withdrawn except within the terms of the treaty or contract.

Section 1605(2) deals with the most important instance in which immunity is denied to foreign states, that in which the foreign state engages in commercial activity. "Commercial activity" is defined in Section 1603(b). The "commercial activity carried on in the United States by the foreign state" may thus be a regular course of business or an individual contract of an ordinary commercial character. Thus a foreign state would not be immune from the jurisdiction of United States courts with respect to an alleged breach of a contract to make repairs on an embassy building.

An "act performed in the United States in connection with a commercial activity of the foreign state elsewhere" looks to any conduct of the foreign state in connection with a regular course of business conducted elsewhere or a particular commercial contract concluded elsewhere. Examples of the causes of action involved would be an action for restitution based on unjust enrichment, a violation of securities regulations, or the wrongful discharge in the United States of an employee of a commercial activity carried on in some third country.

The third category of cases, "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the territory of the United States," would embrace conduct falling within the scope of Section 18 of the Restatement of the Law Second, Restatement of the Foreign Relations Law of the United States (1965), dealing with extraterritorial conduct having effects within the United States. Examples of the causes of action involved would be an action for pollution of the air by a factory operated commercially by a foreign state, an action arising out of restrictive trade practices by an agency or instrumentality of a foreign state, or an action for infringement of copyright by a commercial activity of the foreign state.

In each of these instances the conduct, transaction, or act of the foreign state must have a sufficient connection with the United States to justify the jurisdiction of United States courts over the matter. In this respect the jurisdictional standard is the same for the activities of a foreign state as for the activities of a foreign private enterprise.

Section 1605(3) provides that the foreign state will not be immune from jurisdiction in any case "in which rights in property taken in violation of international law are in issue and that 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 is owned or operated by an agency or instrumentality of the foreign state or of a political subdivision of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." Thus, if property has been nationalized or expropriated without payment of compensation as required by international law it will not be immune when brought into the United States for sale or otherwise in connection with a commercial activity. Similarly, an agency or instrumentality which owns or operates such property and which is engaged in a commercial activity in the United States will not be immune with respect to actions in which rights in such property are in issue. Since this draft bill deals solely with issues of immunity, it in no way affects existing law concerning the extent to which, if at all, the "act of state" doctrine may be applicable in similar circumstances.

Section 1605(4) deals with litigation relating to immovables and to the property of decedents.

It is well established that, as set forth in the "Tate Letter" of 1952, sovereign immunity should not be granted "in actions with respect to real property (diplomatic and perhaps consular property excepted)." It does not matter whether a particular piece of property is used for commercial or public purposes. It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, provides in Article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission are immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate on questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the state and situated or administered in the country where the

suit is brought. As stated in the "Tate Letter," immunity should not be granted "with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary." The reason seems to be that in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

Section 1605(5) is directed primarily to the problem of traffic accidents but is cast in general terms as applying to all actions for damages (as distinguished from injunctive relief, for example) for personal injury or death or damage to or loss of property. The negligent or wrongful act must take place in the United States and must not be one for which a remedy is already available under Article VIII of the NATO Status of Forces Agreement.

While the Vienna Convention on Consular Relations of 1963 expressly abolishes the immunity of consular officers 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," there is no such provision in the Vienna Convention on Diplomatic Relations of 1961. Consequently no case relating to a traffic accident can be brought against a member of a diplomatic mission or against the mission itself.

The effect of Section 1605(5) would be to permit the victim of a traffic accident who has been injured through the wrongful or negligent act of an official or employee of a foreign state to have an action against the foreign state to the extent otherwise provided by law.

This section applies only to torts that are not connected with the commercial activities of a foreign state. Under section 1605(2), no act of a foreign state, tortious or not, which is connected with the commercial activities of a foreign state would give rise to immunity if the act takes place in the United States or has a direct effect within the United States.

Section 1606. Immunity in cases relating to the public debt of a foreign state

Public debts do not fall within the scope of Section 1605. The immunity of foreign states in this respect should be maintained by the United States, in its role as one of the principal capital markets of the world. Many national governments are unwilling to issue their securities in a foreign country which subjects them to actions based on such securities. Where the managing underwriters regard immunity as detrimental to the success of the issue, the foreign government may consent to suit by an express waiver.

While there is no clear definition of "public debt," this concept seems to embrace not only direct bank loans but also governmental bonds and securities sold to the general public through bond markets and stock exchanges.

Section 1606(a)(2) recognizes a distinction which has been made between the public debt of the central government and the public debt of "a political subdivision of a foreign state, or of an agency or instrumentality of such a state or subdivision." It is generally accepted that the immunity of the central government is not shared by subordinate political entities or agencies or instrumentalities. Immunity is denied in these cases, whether or not the activity engaged in is of a commercial character or otherwise falls within the scope of Section 1605.

Section 1606(b) preserves any remedies under the federal securities laws applicable to foreign states.

Section 1607. Counterclaims

This section deals with compulsory and permissive counterclaims within the meaning of Rule 13(a) and (b) of the Federal Rules of Civil Procedure.

It is in no way intended to create immunity with respect to counterclaims which, if originally brought as actions against a foreign state, would not entitle the foreign state to immunity. It deals instead only with claims which would be barred by immunity unless brought as counterclaims under the rule of § 1607.

The state of the law in the United States is that a foreign state which brings an action in a United States court may not assert the defense of sovereign immunity as to a counterclaim not arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state to the extent that the counterclaim does not exceed the amount claimed by the plaintiff foreign state (National City Bank of New York v. Republic of China, 348 U.S. 356 (1955)). There is no square precedent on a counterclaim that *does* arise out of the transaction or occurrence that is the subject matter of the claim of the foreign state. Section 1607(1) is, however, based on the rule laid down in Restatement of the Law Second, Foreign Relations Law of the United States § 70(2) (1965). A foreign state that brings an action grounded in a particular transaction or occurrence should not, on principle,

be allowed to assert its immunity in such a way as to permit it to claim the benefit of the courts of the United States while denying that benefit to the defendant with respect to claims arising out ot the same transaction or occurrence. In the words of National City Bank of New York v. Republic of China, supra, "It (the foreign government) wants our law, like any other litigant, but it wants our law free from the claims of justice" (at 361–2).

"[A]ny counterclaim arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state" is the same terminology as that used in Rule 13(a) of the Federal Rules of Civil Procedure.

Section 1608. Service of process in United States District Courts.

This section is designed to give a foreign state prompt and adequate notice that an action has been brought against it and to provide a method of service of process on foreign states, political subdivisions of foreign states, and their agencies or instrumentalities which are not citizens of the United States.

Service under Section 1608 requires two methods of supplying notification. The first is that a copy of the summons and of the complaint be mailed by the clerk of the court to the ambassador (or if there be none at the time to the charge d'affaires or other chief of mission of that state). In the event of the suspension of diplomatic relations with a foreign state or their interruption in time of war, service may be made in the same way on the ambassador or chief of mission of the state which is then acting as the protecting power for the defendant foreign state. If service is made upon an agency or instrumentality it may sometimes be more appropriate to serve the officer or agent who is authorized to receive service under the law of the foreign state concerned. Accordingly, this method is provided as an alternative way of satisfying the first notification requirement in actions brought against agencies or instrumentalities. Similarly, if a law of the United States or of a State specifies what persons may receive service, service may likewise be made upon such a person in actions brought against agencies or instrumentalities.

The second and concurrent method of providing notification to the foreign state is the sending to the Secretary of State of copies of the summons and complaint. The Secretary of State will then transmit one of these to the ministry of foreign affairs of the defendant state by diplomatic note. In cases where there are no diplomatic relations with the foreign state, a protecting power or other intermediary might be employed to convey the note to the defendant state. This second method of notification will assure that the foreign state is notified even if through some error—such as the receipt of the mailed copy of a summons and complaint by a minor official who fails to bring it to the attention of the ambassador—the foreign state itself does not receive actual notice through the mail.

While both international law and United States law prohibit service of process by a marshal on a foreign ambassador without his consent, it was generally accepted during the drafting of the Vienna Convention on Diplomatic Relations that this prohibition does not apply to service effected by mail.

There has in the past been great uncertainty about the proper mode of service of process on foreign states. The Federal Rules of Civil Procedure contain no stipulation on this subject.

In some cases service has been allowed when the suit was brought in fact against a separate government enterprise. In other cases attempts were made to equate government agencies to separate enterprises and to apply to them the methods of service applicable to foreign corporations. In at least one case the court admitted that there was a gap in the rules and proceeded to fill it under Rule 83, which allows the District Courts in "all cases not provided for by rule" to "regulate their practice in any manner not inconsistent with these rules." Alternatively a district court can authorize a special method of service, as long as the method chosen is consonant with due process. Consequently service by ordinary mail to an office maintained in the United States might be permissible. It has also been suggested that the rules applicable to service abroad might by analogy be applied to foreign governments.

More recently, a number of plaintiffs have obtained jurisdiction over foreign states by attaching property of those states. The Department of State stated in 1959 (see Stephen v. Zivnostenska Banka National Corp., 22 N.Y.S.2d 128, 134 (App. Div. 1961)) that "where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited." The Department noted that in many cases "jurisdiction could probably not be obtained otherwise." It added, however, that property so attached cannot be retained to satisfy a judgment because "the

property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit."

This statement led in several cases to the attachment of various properties of foreign states such as vessels or bank accounts, and to the acquisition by the courts of *quasi in rem* jurisdiction. In other cases a distinction has been made between those assets which are deemed to be subject to attachment because they are used for a commercial activity, even if that particular activity is unrelated to the activity which led to the attachment, and other assets which have been held to be public assets free from attachment. Consequently, difficult questions have been posed with respect to the line between property subject to attachment and that which is not.

It has also been contended that this method of acquiring jurisdiction suffers from a fatal logical flaw, as the very basis of *quasi in rem* jurisdiction is to enable the plaintiff to apply the attached property to the satisfaction of his claim if he prevails on the merits. But the inherent condition of the permission of the Department of State to attach was that such attachment should not lead to execution. This condition destroyed the original premise of this method of acquiring jurisdiction and made it seem nothing more than a technical procedural device with no basis in substance.

In some cases, plaintiffs have attached large sums in many banks, causing confusion and inflicting hardship on the foreign government concerned. Its procedures for payment of its debts may thus have been disrupted, difficulties may have been placed in the way of the functioning of its offices, and in some cases its monetary reserves may have been put in danger. The proceedings relating to the claim of immunity are often prolonged, and during the whole period the financial position of the foreign government is put in jeopardy. Unless the proceeding could be restricted to a temporary attachment which would be dissolved once jurisdiction had been acquired—another negation of the original function of this method—foreign governments might be compelled to remove their funds to other count ies where they would not be subject to attachment.

As this new procedure of attachment is not yet firmly embedded in practice, it should be brought to a halt. The procedure prescribed in this section is designed to replace the stopgaps and artificial devices that have been employed in the past.

The provision for service of process provided in section 1608 is mandatory for actions against foreign states or their political subdivisions and permissive for actions against agencies or instrumentalities of foreign states or political subdivisions which agencies or instrumentalities are not citizens of the United States as defined in section 1332 (c) and (d) of title 28. Actions against foreign states and political subdivisions may be particularly sensitive and this sensitivity suggests a uniform procedure for service of process. With respect to actions against agencies and instrumentalities not citizens of the United States these provisions create an alternate method of service of process.

Agencies or instrumentalities of a foreign state or political subdivision which are incorporated in the United States or elsewhere may be served pursuant to Rule 4 of the Federal Rules of Civil Procedure. Rule 4 provides in pertinent part:

"Service shall be made as follows: * * *

"(3) Upon a domestic or foreign corporation or upon a partnership or other uncorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

It is not wholly clear under Rule 4 whether an unincorporated agency or instrumentality of a foreign state or political subdivision would always be an "unincorporated association which is subject to suit under a common name." It would seem desirable to interpret Rule 4 broadly to include such agencies or instrumentalities, particularly if they have their principal place of business in the United States and would thus be citizens of the United States under section 1332 (c) or (d) of title 28. Such agencies or instrumentalities would not be covered by the provisions of section 608 and as such should be brought under the existing Rule 4.

Section 1609. Immunity from execution and attachment of assets of foreign states

As in the case of Section 1604 with respect to jurisdiction, the matter of immunity is dealt with by an initial prohibition on execution and attachment in this section. The exceptions are then carved out in Section 1610.

Section 1610. Exception to the immunity from execution of assets of foreign states

The traditional view in the United States has been that the assets of foreign states are immune from execution (Dexter and Carpenter, Inc. v. Kunglig Jarnvagsstyvelsen, 43 F. 2d 705 (2d Cir. 1930)). Even after the "Tate Letter" of 1952, this continued to be the position of the Department of State and of the courts. The Department expressed the view "that under international law property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign where there is no immunity from suit" (Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469–73 (Sup. Ct. 1959)). Thus, even after the Department of State and the courts espoused the restrictive theory of the immunity of foreign states from the jurisdiction of United States courts, a plaintiff who prevailed in his action against a foreign state could not levy execution on the assets of that state. This state of affairs led to assertions that the "Tate Letter," reflecting the changed position of the United States, was only an empty gesture.

Section 1610 is designed to meet this objection by partially lowering the barrier of immunity to execution of the assets of foreign states in order to make the law in this respect consistent with that on immunity from jurisdiction. The governing principle, broadly stated, is that property held for commercial purposes should be available for the satisfaction of judgments rendered in connection with commercial activities. There is thus no question of execution on embassies, warships, or other foreign government property used for non-commercial purposes.

A distinction is made between, on the one hand, a foreign state or political subdivision thereof, and on the other, "an agency or instrumentality of a foreign state or of * * * a * * * political subdivision of a foreign state."

Under Section 1610(a) assets used by a foreign state or political subdivision for a particular commercial activity would be available to satisfy judgments arising out of that activity. It would be inappropriate, and probably in violation of international law, to allow the successful litigant to levy on any assets of a foreign state because these may be used for strictly governmental and sovereign purposes as well as commercial ones. Thus, absent a waiver of immunity if a judgment had been rendered against a foreign state or a political subdivision of that state on a commercial contract signed by an agency or instrumentality of the foreign state or its political subdivision (e.g., a state trading corporation), only the assets of the agency or instrumentality would be considered to have been "used for a particular commercial activity" and thus subject to execution. The reason for limiting execution to assets employed in connection with the particular commercial activity out of which the claim arose is that states, especially those with most of the economy in the public sector, may engage in a great variety of commercial activities. It would not be consistent with Section 1610(b) or with the principles obtaining in the American legal system for assets used in connection with a foreign state's program of importation of machine tools to be available to satisfy a judgment arising out of the commercial telecommunications business of that foreign state. All commercially used assets of a foreign state should no more be available for satisfaction of a judgment than all commercial assets of American firms operating in a foreign state should be available for satisfaction of a judgment against one American company. Indeed, allowing execution on assets of a foreign state attributable to an activity other than that out of which the claim arose could expose American enterprises abroad to like treatment.

There is no such problem in connection with assets of agencies or instrumentalities under Section 1610(b), as it can be expected that each such agency or instrumentality will have its own assets and will act as a separate entity, analogous to an American corporation. The standard of commercial activity in the United States which is used in Section 1610(b) is the same as that in Section 1605(2). If the action is one arising out of the "commercial activity" in the United States of an agency or instrumentality, as defined in Section 1603(b)—whether as a course of conduct or an individual transaction or act—then any assets of that agency or instrumentality may be used to satisfy judgments arising out of that activity. The normal situation would be one in which a state trading corporation carries on business in the United States and the claim arises out of that activity. If a commercial agency or instrumentality outside the United States has assets in the United States, these may be used to satisfy judgments arising out of acts occurring or having their impact in the United States, provided the judgments are rendered on actions arising out of the commercial activity of the agency or instrumentality.

Under both sections 1610(a) and 1610(b) property taken in violation of international law and present in the United States in connection with a commercial activity would also be subject to execution.

Sections 1610(a)(2) and 1610(b)(2) concern waivers of immunity from execution. Waivers are governed by the same principles that apply to waivers of immunity from jurisdiction under Section 1605(1). A waiver may result from the provisions of a treaty, a contract, or an official statement, or it may be inferred from certain steps taken by a foreign government in the proceedings leading to execution. Such wavier might be more easily presumed when the assets are used for both public and private purposes but only an explicit waiver would allow execution on property that is clearly public, such as an embassy building. In case of doubt, the question whether a waiver has actually been made is a question to be decided by the court which has jurisdiction over the assets subject to execution.

A waiver on behalf of an agency or instrumentality may be made either by that agency or instrumentality or by the foreign state itself under its powers with respect to the conduct of foreign relations.

There is no clear line of practice in foreign courts on the question of immunity of foreign states from execution, but opinion is not unanimously or predominantly in favor of absolute immunity. A number of treaties of friendship, commerce, and navigation concluded by the United States permit execution of judgments against foreign publicly owned commercial enterprises (e.g. Treaty with Japan, April 2, 1953, art. 18(2), 4 U.S.T. 2063, T.I.A.S. No. 2863). There has been widespread departure from the principle of absolute immunity in connection with the activities of state-owned vessels engaged in commercial activity The widely ratified Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-Owned Vessels, April 10, 1926, 176 L.N.T.S. 199, allows execution of judgments against public vessels engaged in commercial service in the same way as against privately owned vessels. Although the United States is not a party to this treaty, it follows a policy of not claiming immunity for its publicly owned or operated merchant vessels (6 Whiteman, Digest of International Law 570 (1968)). Articles 20 and 21 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, April 29, 1958 (15 U.S.T. 1606, T.I.A.S. No. 5639), to which the United States is a party, recognize the liability to execution under appropriate circumstances of state-owned vessels used on commercial service.

Section 1611. Certain types of assets immune from execution

The purpose of Section 1611(1) is to prevent in all circumstances attachment of or levy of execution upon two categories of property of foreign states, even if these relate to the commercial activities of a foreign state and would otherwise come within the scope of Section 1610.

Section 1611(1) deals with funds of foreign states which are deposited in the United States, not in connection with purchases by the foreign state or other commercial activities but in connection with central banking activity. The purpose of the provision is to encourage the holding of dollars in the United States by foreign states, particularly in times when the United States has an adverse balance of payments. If execution could be levied on such assets, deposits of foreign funds in the United States might be discouraged, thus adversely affecting our balance of payments.

Section 1611(2) provides immunity from execution for assets which are, or are intended to be, used in connection with a military activity and which fulfill either of two conditions; either they are of a military character or they are under the control of a military authority or defense agency. Under the first condition property is of a military character if it consists of munitions in the broad sense—weapons, ammunition, military transport, warships, tanks, communications equipment, etc. Both the character and the function of the property must be military. The purpose of this condition is to avoid embarrassment to the United States in connection with purchases of military equipment and supplies in the United States by foreign governments. The second condition is intended to protect other military property, such as food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations. "Control" is intended to include authority over disposition and use in addition to physical control and a "defense agency" is intended to mean a civilian defense organization such as the Defense Supply Agency in the United States Government. Each condition is subject to the overall condition that property will be protected only if its present or future use is military (e.g., surplus military equipment withdrawn

from military use would not be protected), and both conditions will avoid the possibility that a foreign state might permit execution on military property of the United States abroad under a reciprocal application of the Act.

Section 2. Original jurisdiction of the district courts.

This section would amend title 28 to add a new § 1330 giving the Federal district courts original jurisdiction over civil actions against foreign states or their political subdivisions, agencies or instrumentalities which are not citizens of the United States as defined in section 1332(c) and (d), regardless of the amount in controversy. Original jurisdiction is accorded to the federal courts because certain actions against foreign states, no longer possessed of absolute immunity, may be politically sensitive and may impinge in an important way on the conduct of foreign relations. Moreover, original jurisdiction in the federal courts should be conducive to uniformity of decision, and the federal courts may be expected to have a greater familiarity with international law and with the trend of decision in foreign states than would be true of courts of the States. The plaintiff, however, will have an election whether to proceed in a federal court or in a court of a State.

The present position is that district courts have original jurisdiction in civil actions between citizens of different States "and in which foreign states . . . are additional parties," provided the matter in controversy exceeds the sum or value of $10,000 (28 U.S.C. § 1332). The Federal courts now also have jurisdiction on the basis of a Federal question ("the matter . . . arises under the Constitution, laws, or treaties of the United States") provided the matter in controversy exceeds the sum or value of $10,000. The amount in controversy or other restrictions of these provisions will no longer be applicable in civil actions against foreign states.

An exception is made in the case of "agencies or instrumentalities of foreign states or of constituent units or political subdivisions of foreign states which are citizens of a State." This citizenship of a State would arise out of incorporation in that State or the possession of a "principal place of business" in that State under 28 U.S.C. § 1332(c). The sort of agency or instrumentality which might be expected to be locally incorporated in the United States would be a trading, banking, or transport corporation of a foreign state. If an agency or instrumentality has in effect been "naturalized" by local incorporation, it should be treated like any other citizen of the United States. It is a matter of accepting the burdens of local incorporation together with the benefits. If a foreign "agency or instrumentality" is incorporated in the United States, it is treated in exactly the same way as any other American corporation, incorporated or having its principal place of business in a State.

Section 1330(b) makes it clear that the section does not alter the existing law concerning such agencies or instrumentalities. Section 1330, of course, would also not alter the specialized jurisdictional regimes such as those established by § 1333 dealing with admiralty, maritime and prize cases or by § 1338 dealing with patent and copyright cases. Actions in such areas, even if against a foreign state, would continue to be governed by these special regimes.

It is contemplated that in actions brought in the federal district courts under this new § 1330 or removed to the federal courts under the new § 1391(f), whether state or federal law is to be applied will depend on the nature of the issue before the court. Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal. On the other hand, federal law will be applied if the issue is a federal matter. Under the new Chapter 97 issues concerning sovereign immunity, of course, will be determined by federal law. Similary, issues involving the foreign relations law of the United States, such as the act of state doctrine, should be determined by reference to federal law. Other issues which may arise in actions brought under the new §§ 1330 and 1391(f) may be determined by state law if the issue is one of state law. See IA *J. Moore, Moore's Federal Practice* 3052–57 (2d ed. 1972); Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 *Col. L. Rev.* 805, 820n.51 (1964). *Sec. 3. Venue.* This section would amend 28 U.S.C. § 1391, which deals with venue generally. As amended, venue would lie in any one of three districts in civil actions brought against foreign states, political subdivisions or their agencies or instrumentalities which are not citizens of the United States as defined in section 1332(c) and (d).

First, the action may be brought in the judicial district where "a substantial part of the events or omissions giving rise to the claim occurred." This provision is analogous to 28 U.S.C. § 1391(e), which allows an action against the United

States to be brought, *inter alia*, in any judicial district in which "the cause of action arose." The test adopted, however, is the newer test recommended by the ALI and incorporated in S. 1876, 92d Cong., which does not imply that there is only one such district applicable in each case.

Second, the action may be brought in the judicial district in which "a substantial part of the property that is the subject of the action is situated." No hardship would be caused to the foreign state if it is subject to suit where it has chosen to place the property that may be in dispute. As much of the property of foreign states is in New York, this provision would permit the submission of a large number of cases to the United States District Court for the Southern District of New York, where many immunity cases have arisen in the past and where a particular expertise in such cases is consequently to be found.

Third, if the action is brought against an agency or instrumentality which is not a citizen of the United States as defined in section 1332 (c) and (d) of this title, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. If, of course, an agency or instrumentality is incorporated in or has its principal place of business in the United States then it is a citizen of the United States and venue will be governed by other provisions of title 28. And if the action is brought against a foreign state or political subdivision it may be brought in the United States District Court for the District of Columbia. The District of Columbia provides a fallback venue for actions against foreign states and political subdivisions since it is difficult to say where they "reside" under the corporate standards of "incorporated or licensed to do business or is doing business" used in section 1391(c). Moreover, it is in the City of Washington that foreign states have diplomatic representatives and where it would be easiest for them to defend themselves.

Consistent with Section 2 on jurisdiction an exception is made as to foreign agencies or instrumentalities which are citizens of a State. Actions against such agencies or instrumentalities would, under the terms of the exception, be treated in the same way as actions against wholly domestic corporations.

Nothing in this provision is intended to in any way alter the statutory or common law doctrine of *forum non conveniens*. Thus, actions brought in a particular district under § 1391 could be moved to another district for the convenience of the parties and witnesses and in the interest of justice in accordance with § 1404 of Title 28. Similarly, if the convenience of the parties and witnesses or in the interest of justice would be better served by dismissing the action subject to a court in a foreign State taking jurisdiction the doctrine of *forum non conveniens* would be available for that purpose. See *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F. 2d 633 (Ct. App. 2d. Cir. 1956), *Prack* v. *Weissinger*, 276 F. 446 (Ct. App. 4th Cir. 1960), *Fitzgerald* v. *Westland Marine Corp.*, 369 F. 2d. 499 (Ct. App. 2d. Cir. 1966) and I *J. Moore, Moore's Federal Practice* 1788 (2d ed. 1972).

Sec. 4. This section amends section 28 U.S.C. § 1441 to provide for removal to a federal district court of civil actions brought against a foreign state in the courts of a State. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is of great importance to give foreign states clear authority to remove to a federal forum actions brought against them in the State courts. This section provides such authority in any case which could have been brought originally in a federal district court under the new section 1330 (Sec. 2). It also makes clear that the election for removal may be exercised at the discretion of the foreign state even if there are multiple defendants and one chooses not to remove or is a citizen of the State in which such action is brought. This section, like the new provisions for jurisdiction (Sec. 2) and venue (Sec. 3) would not affect existing removal jurisdiction with respect to agencies or instrumentalities which are citizens of a State of the United States as defined in section 1332(c) and (d) of title 28.

Section 5.

This section amends 28 U.S.C. § 1332 (a)(2) and (3) by striking the phrase "foreign states" from both subsections. Suits against foreign states are comprehensively treated by the new § 1330 and the other provisions of this bill. Accordingly there is no reason to retain the jurisdictional basis of § 1332 in actions against foreign states and to do so may entail confusion as to whether the jurisdictional amount requirement of § 1332 would be applicable. As such, § 1332 has been amended to conform to the structure of the draft bill for actions against foreign states. This change would not affect the applicability of § 1332 to agencies or instrumentalities of a foreign state or subdivision which agencies or instrumentalities are citizens of a state of the United States as defined in section 1332 (c) and (d) of title 28.

[The following letter from the Honorable Charles N. Brower, Acting Legal Adviser of the Department of State, supplied additional information requested at the hearing on June 7, 1973.]

DEPARTMENT OF STATE,
Washington, D.C., July 24, 1973.

Subject: H.R. 3493.
Hon. HAROLD D. DONOHUE,
Chairman, Subcommittee No. 2, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR MR. DONOHUE: In our hearings before your Committee on June 7, 1973, Congressman George E. Danielson asked how an action could be commenced in a state court under the provisions of H.R. 3493 when the bill provides that service of process shall emanate from the federal district court. Our Office would like to supplement the answers which were provided at that time by Mr. Ristau and myself by pointing out that Section 1608 of H.R. 3493 does not provide that service of process shall be exclusively in the federal courts: "Service in the district courts shall be made upon a foreign state . . . by delivering a copy of the summons and complaint by registered mail . . . ." Furthermore, the proposed amendments to Section 1441(d) of Title 28, United States Code, which are found in H.R. 3493, will permit a plaintiff to choose between proceeding in a federal or state court when suit is brought "against agencies or instrumentalities of a foreign state or political subdivision thereof which agencies or instrumentalities are citizens of a State of the United States as defined in Section 1332 (c) and (d)...." As the Section-by-Section analysis, which appears at 100 Cong. Rec. 1300 at 1304 (daily ed. Jan. 26, 1973), makes clear, the purpose of the amended Section 1441(d) is to ensure that such agencies or instrumentalities which have been "naturalized" by local incorporation are treated like any other citizen within that state.

As I suggested in my testimony, I am here forwarding a list of the countries which belong to the Council of Europe: Austria, Belgium, Cyprus, Denmark, France, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Switzerland, Turkey, and the United Kingdom.

During the hearing, Congressman James R. Mann, who was presiding, asked that I supply for the record information concerning the frequency with which foreign states make requests of the Department of State for suggestions of sovereign immunity in cases pending in courts within the United States. Our Office and the Department of Justice have conducted a review of the files concerning sovereign immunity since 1960. We discover that at any one time there are between six to twelve cases which are considered active in our sovereign immunity files. These cases may be in various stages ranging from the time of the initial inquiry to the period of decision making by the Department. (See Whiteman, 6 *Digest of International Law* 553 *passim*, for a discussion of the procedures of the Department of State.)

The great majority of these matters are settled out of court or otherwise disposed before the Department renders a decision. In a small minority of the cases, the Department formally responds to a request for sovereign immunity by making such a suggestion to the court, be declining to so suggest, by writing an amicus curiae letter or brief for the consideration of the court, or by some other action. Below you will find a list of the cases since 1960 in which the Department did receive a request or other communication and took a formal action of some kind. For convenience, the cases are annotated as follows:

S—suggestion of immunity from suit,
A—suggestion of immunity from attachment,
E—suggestion of immunity from execution,
N—no suggestion of immunity.

The list of cases, which may not be exhaustive, is as follows:

1. *Ovidio Manalich* v. *Compania Cubana de Aviacion, S. A.* Sup. Ct. N.Y., Kings Co., Index No. 13735 (1960) (A).
2. *In RE Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (1960)(N).
3. *Banco Nacional de Cuba* v. *Steckel*, 134 So. 2d 23 (Fla. App. 3d Distr. 1961) (N).
4. *Rich* v. *Naviera Vacuba, S. A.*, 295 F. 2d 24 (C. A. 4 1961)(A).
5. *Dixie Paint & Varnish Co., Inc.* v. *Republic of Cuba*, 123 S.E. 2d 198 (Ga. Ct. App. 1961)(S).

6. *Arcade Building of Savannah, Inc.* v. *Republic of Cuba*, 123 S. E. 2d 453 (Ga. Ct. App. 1961) (S) (E).
7. *Harris & Company Advertising Inc.* v. *Republic of Cuba*, 127 So. 2d 687 (Fla. App. 2d Distr. 1961) (E).
8. *Cuban Air Force, F. A. R.* v. *Bergstresser*, 135 So. 2d 752 (Fla. App. 3d Distr. 1961) (E).
9. *Stephen* v. *Zivnostenska Banka*, 199 N.Y.S. 2d 797 (Sup. Ct. N.Y. Co. 1960), aff'd 15 App. Div. 2d 111, 222 N.Y.S. 2d 128 (1st Dept. 1961), aff'd 12 N.Y. 2d 781, 235 N.Y.S. 2d 1 (1962) (A) (E).
10. *Harry M. Johanson* v. *Dominican Republic et al*, Dade County, Florida, Chancery No. 62C13817 (1962) (N).
11. *National Institute of Agrarian Reform* v. *Deckle*, 137 So. 2d 581 (Fla. App. 3d Distr. (1962)) (E).
12. *United States and Republic of Cuba* v. *Harris & Company Advertising Inc.*, 149 So. 2d 384 (Fla. App. 3 Distr. 1963) (E).
13. *William A. Moulton* v. *Pan American Union*, D.C.D.C., Civ. Action No. 20776–63 (1963) (S).
14. *Philip J. Harty* v. *Corporacion Venezolana de Guayana* W.D. Penn. Civ. Action No. 63–325 (1963) (Diplomatic note dated October 23, 1963) (N).
15. *Mirabella* v. *Banco Industrial de la Republica Argentina*, 38 Misc. 2d 128, 237 N.Y.S. 2d 499 (1963), 62AL2d 937 (N).
16. *National Institute of Agrarian Reform* v. *Kane*, 153 So. 2d 40 (1963) (N).
17. *Thomas Melone et al.* v. *Republic of Chad, et al.*, Civ. Ct., Cty of N.Y., Index No. 1287/64 (1964) (S).
18. *Lee Better* v. *Government of Burundi*, Civ. Ct., Cty of N.Y., Index No. 51853/64 (1964) (A) (E).
19. *Cargo and Tankship Management Corp.* v. *India Supply Mission*, 336 F. 2d 416 (CA2 1964) (E).
20. *City of Rochelle* v. *Republic of Ghana*, 255 N.Y.S. 2d 178 (1964) (N).
21. *Flota Maritima Browning de Cuba* v. *Motor Vessel Ciudad*, 335 F. 2d 619 (1964) (N).
22. *Mayan Lines, S.A.* v. *Republic of Cuba*, D.C. Canal Z., Civ. Actions Nos. 2712 and 2713 (1965) (E).
23. *Kendall* v. *Kingdom of Saudi Arabia*, D.C.S.D.N.Y., 65 Adm. 855 (1965) (S).
24. *Victory Transport Inc.* v. *Comisaria General*, 336 F. 2d 354 (1964), cert. den 381 US 934, (1965) (N).
25. *Petrol Shipping Corp.* v. *Kingdom of Greece*, 360 F. 2d 103 (1966) cert. den. 385 US 931 (1966) (N).
26. *Chemical Natural Resources, Inc.* v. *Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864 (1966), cert. den., 385 U.S. 822 (1966) (S).
27. *Hellenic Lines, Limited* v. *Embassy of South Vietnam*, 275 F. Supp. 860 (S.D.N.Y. 1967) (A).
28. *Ocean Transport Co., Inc.* v. *The Govt of the Republic of Ivory Coast*, 269 F. Supp. 703 (1967) (N).
29. *Carpets by Certified, Inc.* v. *Permanent Mission of Ghana*, Civ. Ct., Cty of N.Y., Index No. 50301–68 (1968) (E).
30. *Caribbean Maritime Co., Ltd.* v. *Directorate General of Commerce, Saigon*, D.C.S.D.N.Y., 68 Civ. 801 (1968) (E).
31. *Pruitt* v. *M/V Patgnies* (Diplomatic note dated July 18, 1968) (N).
32. *Clement Cole et al* v. *William Heidtman et al* (Diplomatic note dated January 5, 1968) (N).
33. *Orcor Transportation Co.* v. *Embassy of Pakistan* (Diplomatic note dated January 5, 1968) (N).
34. *Worldwide Carriers* v. *National Bank of Egypt* (Diplomatic note dated October 31, 1968) (N).
35. *French* v. *Banco Nacional de Cuba*, 295 N.Y.S. 2d 433, 23 N.Y. 2d 46, 242NE2d 704 (1968) (N).
36. *New York World's Fair* v. *Rep. of Guinea*, 63 *American Journal of International Law*, 343 (1969) (N).
37. *Leona Towsley* v. *Mexican National Tourist Council, et al.*, Circ. Ct., Cook Co., Ill., No. 69 L 2170 (1969) (S).
38. *Compania Domin. De Avia.* v. *Caribbean Merc. Exp. Corp.*, 218 So. 2d 523 (Fla. App. 3d Distr. 1969) (E).
39. *Pan American Tankers Corp.* v. *Republic of Vietnam*, 291 F. Supp. 49 (1968), 296 F. Supp. 361 (1969) (N).

40. *Morrison, Inc.* v. *Servicio Autonomo Nacional de Acueductos y Alcantarillados* (Diplomatic note dated May 2, 1969) (N).
41. *AMIKOR Corp.* v. *Bank of Korea*, 298 F. Supp. 143 (1969) 25AL3d 322 (N).
42. *Venore Transportation Co.* v. *President of India* (Diplomatic note dated March 19, 1970) (N).
43. *Isbrandsen Tankers, Inc.* v. *President of India*, 446 F. 2d 1198 (C.A. 2 1971) (S).
44. *Shirley S. Laszlo* v. *Republic of Cyprus*, Sup. Ct. N.Y., N.Y. Co., Index No. 1542/72 '(1972) (A).
45. *Heaney v. Government of Spain*, 445 F. 2d 501 (1971) (N).
46. *Premier Steamship Co.* v. *Embassy of Algeria*, 336 F. Supp. 507 (1971) (N).
47. *Bermuda Shipping Corp.* v. *Govt of Pakistan* (Diplomatic note dated December 21, 1972) (N).
48. *Losquardos* v. *Trinidad Mission to the UN*, S.D.N.Y. No. Re 404828 (1972) (N).

It should be noted that in the cases of *New York World's Fair*, *Orcor Transportation*, and *Heaney* sovereign immunity was recognized even though the Department did not forward to the court through the Department of Justice a binding suggestion to that effect. Also I wish to point out that the above list could be enlarged to include other cases, such as *Hellenic Lines Limited* v. *Moore*, 345 F. 2d 978 (1965), which involved service of process issues, where the Departments of State and Justice became involved in litigation which is somewhat peripherial to that contained in a request for sovereign immunity from a narrow definitional point of view. Passage of H.R. 3493 should facilitate the resolution of such cases by our courts as well.

We hope that you will find the above information helpful in evaluating H.R. 3493.

Sincerely yours,

CHARLES N. BROWER,
Acting Legal Adviser.

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