The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States

William N. Eskridge Jr.

Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation

https://digitalcommons.law.yale.edu/fss_papers/3820

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
The Iranian Nationalization Cases:  
Toward a General Theory of Jurisdiction over Foreign States

WILLIAM N. ESKRIDGE, JR.*

During the 1960s and 1970s, the imperial government of the Shah of Iran encouraged foreign investment in Iranian domestic industries. United States firms, attracted by the incentives that the government offered and the friendly political climate, helped organize, finance, and operate Iranian corporations in several sectors of the economy, including banking, insurance, oil drilling, and pharmaceuticals. This mutually advantageous relationship, however, was disrupted by the turmoil which followed the fall of the Shah in early 1979. The new Islamic government nationalized certain major domestic industries and reversed Iran's previously pro-investment policies. In addition, the seizure in November 1979 of the United States Embassy in Teheran precipitated a prolonged crisis in diplomatic relations between the two states.


The author participated with Shack & Kimball, P.C., on the behalf of the Government of Iran and another Iranian entity defendant in the American International Group case, cited at note 3 infra. The views expressed here, however, are his own and do not necessarily reflect those of any party to that claim.

1. Beginning in June 1979, Iran embarked upon a systematic program of nationalization. See, e.g., Law of Nationalization of Banks (Law of June 7, 1979), as translated in LEARNING FROM THE IRANIAN EXPERIENCE: DOING BUSINESS IN HIGH-RISK COUNTRIES 274 (C. Brower & J. Olson eds. 1980); Law of Nationalization of Insurance Corporations (Law of June 25, 1979), as translated in id. at 275. Both laws acknowledged that compensation was due to shareholders. Id. at 274-75. In addition, Iran nationalized all metal production, shipbuilding, automotive, and aircraft industries. Law for the Protection and Development of Iranian Industry (Law of July 5, 1979), as translated in id. at 276-77. The nationalizations were intended (1) to reorder Iranian industry, which was in turmoil after the departure of the Shah; (2) to redistribute wealth and ameliorate the harsher aspects of the capitalistic system; and (3) to remove Iran's dependence upon foreign capital. E.g., Vicker, Iran's Plan for Restructuring its Industry under Islamic Rule Begins to Take Shape, Wall St. J., Dec. 26, 1979, at 10, col. 1.
As a consequence of the disruption of political and economic ties, more than 400 parties, mostly United States corporations, filed lawsuits in United States courts against the revolutionary government and its instrumentalities. Many of these plaintiffs asserted that the nationalization of their interests in Iranian companies constituted an actionable violation of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran (Treaty of Amity)\(^2\) and general international law, because Iran allegedly failed to pay prompt, adequate, and effective compensation for the nationalized interests.\(^3\)

An agreement entered into between the United States and Iran on January 19, 1981, led to the suspension of these suits, pending resolution of the claims by an international tribunal.\(^4\) Several United States courts, however, had already asserted jurisdiction in nationalization cases and had issued substantive rulings granting prejudgment attachments and preliminary injunctions against Iran.\(^5\) In one


\(^3\) The leading nationalization case is American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981). In that case, the plaintiff United States insurance companies held minority equity interests in several Iranian insurance firms, assisted in their management, and entered into contractual relations with them. Complaint at \(\S\) 18–24, American Int'l Group, Inc., v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981). In 1979 Iran nationalized all Iranian insurance companies, and plaintiffs lost their minority equity holdings. Plaintiffs alleged that just compensation was not provided for in the law of nationalization, id. \(\S\) 27, and sued for recovery of the value of their shares. They grounded their causes of action on (1) violation of a treaty, (2) violation of international law, (3) breach of third-party beneficiary rights created by treaty, (4) conspiracy, and (5) conversion.

Other complaints making this specific allegation include Complaint \textit{pursuas}, Ebhnami v. Islamic Republic of Iran, No. 80-3127 (D.D.C., filed Dec. 9, 1980); Complaint at \(\S\) 26–30, Pfizer, Inc. v. Islamic Republic of Iran, No. 80-2791 (D.D.C., filed Oct. 30, 1980); Complaint at \(\S\) 1, 10–12, 14–16, Cabot Int'l Capital Corp. v. Government of Iran, No. 79-3448 (D.D.C., filed Dec. 26, 1979); see Motion for an Order Transferring Related Actions for Consolidated or Coordinated Pretrial Proceedings Pursuant to 28 U.S.C. Section 1407, Exhibit E, In re Litigation Involving State of Iran (Islamic Republic of Iran), No. 425 (J.P.M.D.L., filed May 28, 1980) (compilation of several dozen cases in which plaintiffs have alleged that their property had been nationalized, converted, or seized).


case, partial summary judgment on the merits was entered notwithstanding Iran's claim of sovereign immunity.6

This article analyzes the complex procedural issues presented in those cases arising from Iran's nationalization of United States interests in Iranian companies (Iranian Nationalization Cases).7 Part I shows that the federal courts improperly asserted jurisdiction over Iran and its instrumentalities. At least three procedural defenses which limit judicial authority to adjudicate "foreign" controversies support this conclusion: (1) the requirement of subject-matter and personal jurisdiction now codified in the Foreign Sovereign Immunities Act of 1976 (FSIA),8 (2) principles limiting implication of causes of action under treaties and international law, and (3) the doctrine of judicial abstention from reviewing the sovereign acts of foreign states (the act of state doctrine).

Part II then explores the fundamental policies underlying the defenses noted above. Generally, each defense is a procedural mechanism designed to prevent United States courts from interfering in disputes touching on the territorial sovereignty of foreign states. Moreover, cases interpreting these defenses hold that three quasi-constitutional doctrines — international comity, due process, and judicial avoidance attachment until jurisdictional issues can be decided). Preliminary injunctions preventing Iran from removing assets from the United States that would be needed to satisfy final judgments were issued in American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981); Cabot Int'l Capital Corp. v. Government of Iran, No. 79-3448 (D.D.C. Jan. 2, 1980); and Pfizer, Inc. v. Islamic Republic of Iran, No. 80-2791 (D.D.C. Nov. 26, 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981).


7. The "Iranian Nationalization Cases" concern causes of action based directly on Iran's nationalization of domestic industries. They are to be distinguished from lawsuits in which the United States plaintiffs alleged that they had entered into contracts with Iranian firms, that debts were owing them from the Iranian firms, that Iran subsequently nationalized the firms, and that as a result of the nationalization the firms had repudiated their foreign debts. E.g., Complaint at ¶¶ 27-31, 49, 53, 61, 72, American Express Int'l Banking Corp. v. State of Iran, No. 79-6429 (CLB) (S.D.N.Y., filed Nov. 29, 1979); Complaint at ¶¶ 4, 21, 45-47, Irving Trust Co. v. State of Iran, No. 80-0233 (LFM) (S.D.N.Y., filed Jan. 11, 1980). These cases are also to be distinguished from the even more numerous lawsuits in which United States plaintiffs alleged that their equipment and other property in Iran had simply been confiscated. E.g., Complaint at ¶ 25, Aeromaritime, Inc. v. State of Iran, No. 80-0476 (D.D.C., filed Feb. 15, 1980).

of political questions — provide the theoretical framework upon which all three defenses rest. These doctrines suggest that the Iranian Nationalization Cases present the classic instance in which federal courts should have refused to intervene, since the underlying controversies related to governmental activities immunized from lawsuit, arose from acts committed outside the United States and having no substantial connection with the United States, and involved sensitive political issues traditionally left by courts to the Executive Branch for resolution.

Finally, Part III derives from Parts I and II an analytical approach that can be applied in other contexts. Courts erred in the Iranian Nationalization Cases because they read the FSIA’s jurisdiction provisions with superficial literalism. A better analysis begins with the statutory language of the FSIA, but construes its many ambiguities in light of prior case law and the fundamental policies identified in Part II. This analytical framework is then applied to several examples of expropriation that deviate from the paradigmatic situation presented in the Iranian Nationalization Cases.

I. PROCEDURAL DEFENSES IN NATIONALIZATION CASES

Three procedural defenses should have barred the granting of relief under the facts alleged in the Iranian Nationalization Cases. First, courts lacked jurisdiction under the FSIA because the allegedly unlawful activities were governmental and because there were insufficient contacts between the controversies and the forum. Second, plaintiffs failed to assert a claim for which relief could have been granted; the primary claims for relief, under treaty and international law, do not create causes of action cognizable in United States courts. Third, the act of state doctrine, under which United States courts defer to the official actions of foreign states and refuse to adjudicate issues contrary to the foreign state’s domestic law, suggests that the courts should have abstained from passing on Iran’s various nationalization laws.

9. Section 1330(a) of the Judicial Code provides:

The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330(a) (1976). Section 1330(b) provides that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.” Id. § 1330(b).
A. JURISDICTION UNDER THE FSIA

The FSIA governs jurisdiction over foreign states and codifies rules for service of process, venue and attachment. Section 1604 states the general rule regarding immunity from jurisdiction: subject to existing international agreements, a foreign state sued in a federal or state court may assert the defense of sovereign immunity, except as provided in sections 1605 and 1607. The term "foreign state" is defined to include not only a foreign government and its political subdivisions, but also "agencies or instrumentalities" of a foreign government. In turn, the term "agency or instrumentality" is defined as any entity controlled or owned by the foreign state but organized as a separate legal person.

Section 1605(a) lists the main exceptions to the general rule codified in section 1604 and is therefore the keystone of the FSIA. In paraphrased form, section 1605(a) provides that a foreign state or its instrumentalities will be subject to suit where:

1. The foreign state has waived its immunity,
2. The claim for relief is based upon (i) the foreign state's commercial activity in the United States or (ii) an act by the foreign state in the United States in connection with its commercial activity elsewhere or (iii) an act by the foreign state outside the United States in connection with its commercial activity elsewhere and the act causes a direct effect in the United States,
3. Rights in property located in the United States but claimed by the foreign state in violation of international law are in issue or property taken in violation of international law is transferred.
to a state agency or instrumentality which is engaged in commercial activity in the United States,

(4) rights in property located in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue, or

(5) the plaintiff sues for personal injury or damage to property occurring in the United States and caused by the tort of the foreign state or its agent, with certain exceptions.  

Embedded within these exceptions to immunity are the two main substantive goals of the FSIA.

First, in enacting the FSIA, Congress adopted the modern "restrictive" theory of sovereign immunity, as presently recognized in international law. Under the restrictive theory the sovereign immunity defense is limited to those instances where the foreign state is sued for its public or governmental, as opposed to private or commercial, activities. Thus the exceptions embodied in section 1605(a) describe broad classes of conduct that Congress thought would not be immune under the restrictive theory. On the other hand,

15. See id. § 1605(a).


17. See, e.g., Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 BRIT. Y.B. INT'L L. 220, 250-72 (1951); Letter from Jack Tate (Acting Legal Adviser, Dep't of State) to Philip Perlman (Acting Attorney General) (May 19, 1952), reprinted in 26 DEP'T STATE BULL. 984 (1952) [hereinafter cited as Tate Letter].

Earlier in this century, the United States and most other nations granted foreign states absolute immunity from suit in domestic courts. See, e.g., Betizzi Bros. v. S. S. Pesaro, 271 U.S. 562 (1926); Compania Naviera Vascongado v. S.S. "Cristina," [1938] A.C. 485, 490 (H.L.). By 1952, however, the courts in most developed states had rejected this "absolute" theory and had restricted a foreign state's immunity to cases in which the foreign state was sued for its public or governmental, as opposed to private or commercial, activities. Tate Letter, supra. United States courts lagged behind in embracing the restrictive theory, in part because they regularly deferred to Department of State determinations of immunity. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1945); Ex parte Republic of Peru, 318 U.S. 578, 589 (1943); Note, supra note 8, at 432 n.17. The FSIA made the courts, not the Department of State, the forum for immunity determinations.

18. Thus section 1605(a)'s first exception comes into play when the foreign state has "lowered" itself to private status by a waiver of immunity. 28 U.S.C. § 1605(a)(1) (1976). The second exception concerns claims for relief arising out of the foreign state's "regular course of commercial conduct or a particular commercial transaction or act." Id. §§ 1605(a)(2), 1603(d). The third and fourth exceptions deal with the foreign state's attempt to claim property located in the United States; this is "private" activity because a foreign state has no sovereign power over property in the United States. Id. § 1605(a)(3), (4). See notes 242-44 and accompanying text.
Congress expected the courts to grant immunity when the act giving rise to the suit is, by its nature, "peculiarly within the realm of governments." In applying this test, the courts were expected to derive standards from national and international law.

Second, Congress imposed a minimum contacts jurisdictional requirement for suits brought under the FSIA. In addition to identifying private or commercial acts for which foreign states are not immune, each of the exceptions codifies a class of "contacts" between the foreign state and the forum sufficient to permit United States courts to take personal jurisdiction over the foreign state. This codification is patterned after the "long-arm" statute Congress enacted for the District of Columbia, under which plaintiffs must establish a "nexus" between the forum and the activities giving rise to the cause of action.

infra. Claims in tort are the subject of the fifth exception, with a "discretionary function" exclusion of political decisions. Id. § 1605(a)(3).


20. The FSIA legislative report states: "The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of [the FSIA]. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable." FSIA HOUSE REPORT, supra note 16, at 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6615. The Department of State, which drafted the FSIA, confessed its unwillingness to give much specificity to the commercial activity exception. 1976 FSIA Hearings, supra note 19, at 53. Instead, the Department decided to put its "faith in the U.S. courts to work out progressively, on a case-by-case basis, and using such guidance as has already been developed in the very large body of case law which exists, on the distinction between commercial and governmental." Id. (testimony of Monroe Leigh, Legal Adviser, Dep't of State). See also Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309-10 (2d Cir. 1981) (courts in applying FSIA should look to international and domestic common law to determine what is "commercial activity").

21. Thus a claim can be brought under section 1605(a)(2) only if it relates to the foreign state's commercial activity in the United States (or to commercial activity having a direct and substantial effect in the United States). 28 U.S.C. § 1605(a)(2) (1976). Similarly, for a case to arise under the third or fourth exceptions, the property claimed by the foreign state must be in the United States. Id. § 1605(a)(3), (4). Torts covered by the fifth exception must occur in the United States. Id. § 1605(a)(5). Oddly, the first exception does not, on its face, require a jurisdictional contact, id. § 1605(a)(1), but the courts have inferred such a requirement. See note 193 infra.

22. Civil Jurisdiction and Service Outside the District of Columbia, Pub. L. No. 91-358, § 132(a), 84 Stat. 549 (1970), codified at D.C. CODE ANN. § 13–423 (1973). The District's long-arm statute provides for personal jurisdiction over a person in a claim for relief arising out of that person's tortious or contractual activities within the District of Columbia. Id. § 13–423(a). "When jurisdiction over a person is based solely upon this section, only a claim for relief arising from acts enumerated in this section may be asserted against him." Id. § 13–423(b). Another section, which was not enacted concurrently with section 13–423, provides for personal jurisdiction over persons "doing business" in the District. Id. § 13–422.

Congress, however, did not define in any detail the degree of contacts necessary to satisfy this requirement, instead leaving the problem to judicial development.  

In the Iranian Nationalization Cases, United States claimants argued that (1) Iran had waived its sovereign immunity under the FSIA by acceding to the Treaty of Amity, which contained an immunity waiver clause; (2) Iran's nationalizations were a commercial activity that had a direct effect in the United States; and (3) Iran expropriated property of United States nationals in violation of international law. And, in a leading decision, one court asserted jurisdiction based on the first two of these arguments. Notwithstanding the plausibility of these arguments, however, the doctrines and the common law underlying the FSIA establish that the section 1605(a) exceptions are inapplicable to the Iranian Nationalization Cases.

I. Waiver by Treaty

The first exception in section 1605(a) provides that a foreign state may waive its sovereign immunity either implicitly or explicitly by treaty. In a number of the Iranian Nationalization Cases, plaintiffs argued that Iran waived its sovereign immunity by entering into the Treaty of Amity with the United States, which contains the following "immunity waiver clause" in article XI:

No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, im-
munity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein. 27

Several United States district courts accepted this argument, reasoning that Iran had waived all jurisdictional immunity, since either Iran, its political subdivisions (such as the Iranian Air Force), or its instrumentalities (such as the state central bank or state insurance company) had at some point in time engaged in “some business activities” in the United States. 28

This interpretation of the immunity waiver clause, however, appears far too broad. Examination of the language and purpose of the immunity waiver clause (similar to clauses in thirteen other “friendship, commerce, and navigation” (FCN) treaties negotiated by the United States between 1948 and 1958) 29 suggests that this waiver was meant to apply only to state trading companies owned by one of the Contracting Parties when such companies compete in the markets of the other. 30

By its terms, the immunity waiver proviso in the Treaty of Amity is restricted to an “enterprise of either High Contracting Party” that “engages in commercial, industrial, shipping or other business activities within the territory of the other High Contracting Party.” This language explicitly limits any waiver of immunity in two respects. First, Iran itself waived no immunity, because the immunity waiver

27. Treaty of Amity, supra note 2, art. XI, para. 4.

28. The first major decision on the waiver issue held that Iran had waived immunity against prejudgment attachment of assets. Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979), appeal docketed, Nos. 79-1784 & 78-2529 (3d Cir. June 18, 1979); see Irving Trust Co. v. Government of Iran, 85 F.R.D. 135, 136 (E.D. La. 1980); Electronic Data Sys. Corp. Iran v. Social Security Organization of the Gov't of Iran, No. 79-711 (CLB) (S.D.N.Y. June 13, 1979); American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 526 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981). Although section 1610(d) of the FSIA prohibits prejudgment attachment of a foreign state's property unless there is an explicit waiver of such immunity, the Behring court reasoned that section 1609 (FSIA attachment provisions are "subject to existing international agreements") permits implicit waivers of immunity. Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. at 394. The immunity waiver clause, the court found, is such a waiver because Iranian “enterprises” (construed to mean Iran and its political subdivisions) consented to "other liability" (construed to include prejudgment attachment) to which private parties are subject. Id. at 394–95. But see Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981) (Iran and its executive agencies waive no immunity under the Treaty of Amity). See also cases cited in note 31 infra.


30. A court's approach in construing treaties parallels the approach employed in interpreting statutes: the language of the provision, its legislative history, and the practical interpretation by the Executive are the main sources of guidance. E.g., Arizona v. California, 292 U.S. 341, 359–60 (1934); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 147, 151 & Comment b, 152 (1965).
clause covers only enterprises and not the Contracting Parties themselves.\textsuperscript{31} Second, Iran waived immunity only for state-owned trading companies (viz., "enterprises")\textsuperscript{32} when they compete in United States markets. This narrow interpretation is in accord with the context of the waiver clause in the Treaty of Amity. Article XI exhorts the Contracting Parties to establish "conditions of competitive equality... in situations in which publicly owned or controlled trading or manufacturing enterprises of either High Contracting Party engage in competition, within the territories thereof, with privately owned and controlled enterprises of nationals and companies of the other High Contracting Party."\textsuperscript{33} The waiver clause (paragraph four of article XI) is clearly one means of achieving "competitive equality" between state and private trading companies.

Both the negotiating history and subsequent administrative interpretations of identical immunity waiver clauses in other FCN treaties support this construction. The earliest recorded comment on the clause was a 1949 Department of State annotation explaining the goals of an FCN treaty to Portugal: "The waiver of immunity is only for 'business enterprises'..."\textsuperscript{34} Four years later, during FCN treaty negotiations with The Netherlands, the Department of State repeatedly assured The Netherlands that the immunity waiver clause did not alter the foreign state's immunity from suit.\textsuperscript{35}

\textsuperscript{31} This reasoning alone should have been sufficient to reject the broad waiver argument. See Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980). Indeed, in the prejudgment attachment cases some courts cautioned against abuse of a treaty waiver exception to foreign state immunity, holding that section 1610(d) of the FSIA requires explicit waivers of prejudgment attachment immunity (a standard not met by the immunity waiver clause of the Treaty of Amity). See, e.g., Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 808 n.12 (1st Cir. 1981); E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980); Reading & Bates Corp. v. National Iranian Oil Co., 478 F. Supp. 724 (S.D.N.Y. 1979); Comment, Prejudgment Attachment of Frozen Iranian Assets, 69 CALIF. L. REV. 837 (1981).

\textsuperscript{32} This limitation of the term "enterprise" in the immunity waiver clause to include only separate state trading companies, and not the foreign state itself, tracks the usage of the term "enterprise" in international economic literature during the period when the immunity waiver clause was formulated. See Setser, supra note 29, at 94–97.

\textsuperscript{33} Treaty of Amity, supra note 2, art. XI, para. 3. See also id. art. XI, para. 1 ("enterprises owned or controlled by its Government" should not be allowed unfair advantage in competing for purchases or sales within the territory of the other Contracting Party); id. art. XI, para. 2 (each Contracting Party agrees to accord "the nationals, companies and commerce" of the other Contracting Party "fair and equitable treatment" in awarding government contracts and other commercial opportunities).

\textsuperscript{34} Draft FCN Treaty between the United States & Portugal (April 1949) (Department of State annotation 11, referring to immunity waiver clause) (on file at Harv. Int'l L.J. Library).

\textsuperscript{35} Thus one official remarked that: the Netherlands was not prepared to undertake any general commitment regarding the suitability of the state itself. The U.S. side emphasized that the [immunity waiver] rule was stated in terms of 'enterprises of the state' and not in terms of the state itself, and
The Department of State reiterated this stance on several occasions when asked to interpret the immunity waiver clause. In hearings before Congress, the Department's representatives testified that the immunity waiver provision applies only to "state-owned commercial enterprises."36 Later, in response to questions from the Department of Justice, Herman Walker of the Department of State, one of the negotiators of the FCN treaties, testified: "The key wording was deliberately and carefully chosen, to make quite clear that the [waiver of immunity] does not reach either the Government itself, or the regular Departments of Government, or the sovereign functions of the Government . . . ."37 In a subsequent memorandum, another Department of State official echoed this sentiment:

The treaty rule is designed to provide equality of treatment for private American business abroad. If the United States negotiates treaties with countries that have or may have publicly-owned business entities, it was considered only fair . . . to seek a treaty assertion that if such essentially business entities engaged in business activities in the United States that they could not hide behind the facade of a sovereign immunity claim and thus avoid the obligations which fall upon private business in like circumstances.38

that they did not see that there was any difference in opinion between the two countries as to stipulating a limited rule.

Dispatch from United States Embassy in The Netherlands to Dep't of State, at [5] (Sept. 1954) (on file at Harv. Int'l L.J. Library); see Dispatch from Dep't of State to United States Embassy in The Netherlands, at [2] (Aug. 4, 1953) (the term "enterprise," as used in the immunity waiver clause, was "calculated to exclude from the [waiver of immunity] the State as such and the component elements of the Government in its 'sovereign' capacity (e.g., the Ministry of Justice or the Foreign Services") (on file at Harv. Int'l L.J. Library).

36. Executive Agreements M & R and F, H & I: Hearing Before Subcomm. on FCN Treaties of the Senate Comm. on Foreign Relations, 82d Cong., 1st & 2d Sess. 5 (1952-1953) (statement of Harold F. Linder, Deputy Asst Sec'y of State); see S. Exec. Rep. No. 5, 83d Cong., 1st Sess. 5 (1953) (article incorporating the immunity waiver deals "with the situation arising in a number of countries where governments are taking over activities which in the United States would normally be carried on by private business").


Moreover, in its own practice of determining the immunity of a foreign state in the United States, the Department of State viewed the FCN waiver clause as inapplicable to the state and its political subdivisions. See "Sovereign Immunity Decisions of the Department of State (May 1952 — Jan. 1977)," in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1034, 1039 (1977) [hereinafter cited as "State Dep't Immunity Decisions"].

38. Memorandum from Loftus Becker (Legal Adviser, Dep't of State) to George Leonard (Civil Div'n, Dep't of Justice), at 2 (Aug. 13, 1957) (on file at Harv. Int'l L.J. Library) [hereinafter cited as State Dep't Memo]. See id. at 1-2 ("enterprise" language of immunity waiver clause was designed to exclude foreign state, which remained wholly immune under the Treaty of Amity).
Finally, the Departments of State and Justice urged this view in an amicus brief filed in at least one case involving frozen Iranian assets, arguing that Iran under no circumstances lost immunity under the Treaty of Amity and that its “enterprises” lost immunity only for commercial acts done in the United States.\(^9\) The position of the Executive, entitled to deference in treaty-interpretation,\(^40\) is unquestionably correct, based on the language, history, and consistent prior interpretation of the immunity waiver clause.

In short, the federal courts should not have asserted jurisdiction over Iran based on section 1605(a)(1). A similar result should obtain regardless of whether Iranian state instrumentalities are joined as co-defendants (on the theory that they assisted in Iran’s nationalization of its domestic industries) since the immunity waiver clause relates only to commercial activities within the United States.\(^41\)

---

\(^9\) Brief for the United States as Amicus Curiae at 21–22, Electronic Data Sys. Corp. Iran v. Social Security Organization of the Gov’t of Iran, 610 F.2d 94 (2d Cir. 1979) (“the Contracting States [in the FCN treaty series] . . . did not waive immunity for all of their commercial or private acts, but dealt only with acts of their commercial or business enterprises”).

\(^40\) Indeed, since it drafts and negotiates treaties, the Department of State, even more than Congress, is in a position to know exactly what both states meant when they agreed upon certain treaty language. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961); see Sullivan v. Kidd, 254 U.S. 433 (1921); DuPree v. United States, 559 F.2d 1151, 1154–55 (9th Cir. 1977); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 152 (1965).

\(^41\) As an alternative ground for finding that Iran waived its immunity by the Treaty of Amity, the court in American Int’l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 526 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981), ruled that Iran and its state insurance company were “alter egos” for purposes of the nationalization, that the insurance company lost immunity under the waiver clause, and thus Iran did also. This novel theory is, at best, questionable. The negotiating history makes it clear that the foreign state itself was never to be subject to suit under the immunity waiver clause, see notes 31, 34–35 supra, and that state instrumentalities were to retain immunity when they were acting at the direction of the foreign state pursuing a sovereign activity. See note 210 infra. Thus, Iran was immune under the treaty in any event, and the insurance agency — acting wholly inside Iran (and therefore not “within the territories of the other High Contracting Party”) — also retained immunity for any assistance it might have rendered Iran in nationalizing Iranian insurance companies.

Moreover, the district court’s opinion misconceives the notion of “alter ego” in the sovereign immunity context. Compare Banco Nacional de Cuba v. First Nat’l City Bank, 478 F.2d 191, 193–94 (2d Cir. 1973) (cited by district court in American Int’l Group) with Banco Nacional de Cuba v. First Nat’l City Bank, 270 F. Supp. 1004, 1007 & n.5 (S.D.N.Y. 1967), aff’d, 478 F.2d 191 (2d Cir. 1973) (foreign state and “alter ego” retained immunity from counterclaims exceeding their claims against defendant). The term has been widely used to characterize instrumentalities of states of the United States and foreign states when they are directed by the government to assist in a governmental activity. If they are acting as the “alter ego” of the state, they are entitled to immunity from suit; if they are acting in their own commercial interests they are not. For cases involving states of the United States, see, e.g., Perez v. Rodriguez Bou, 575 F.2d 21 (1st Cir. 1978); DeLong Corp. v. Oregon State Highway Comm’n, 233 F. Supp. 7 (D. Or. 1964), aff’d, 343 F.2d 911 (9th Cir.), cert. denied, 382 U.S. 877 (1965); 13 WRIGHT & MILLER, MODERN FEDERAL PRACTICE § 3524 (1975). For cases involving foreign states and their alter egos for sovereign immunity purposes, see, e.g., Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356 (C.A.); N.V. Cabolent v. National Iranian Oil Co., [1969] N.J. No. 484 (Hof The Hague 1968).
2. Commercial Activity Having a Direct Effect in the United States

The third clause of section 1605(a)(2) provides that a foreign state shall not be immune from suit in United States courts in any case "in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. . . ." Several courts asserted jurisdiction over Iran under this clause, finding that nationalizations in general are "in connection with a commercial activity of the foreign state" and that the economic consequences of such activity for United States shareholders constitute "a direct effect in the United States." This construction was erroneous; the courts again ignored the legislative history and common-law background of the language they were interpreting. A proper evaluation of these factors would have led to dismissal of the claims against Iran.

First, the power to nationalize domestic industries is uniquely sovereign in nature. The district courts found that under the applicable commercial activity exception a nationalization is a private or commercial act since it creates a "monopoly" or otherwise expands the foreign state's role in commerce. But this approach, which focuses on the purpose or result of foreign state actions, would all but eliminate the immunity defense — virtually any governmental act, from war-making to economic regulation, will have commercial purposes or consequences. Congress did not intend to eliminate the immunity

44. See American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 526 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981) ("the failure of defendants to provide compensation to plaintiffs, resulting in an increase of the State insurance monopoly from 25% to 100%, is an act 'in connection with a commercial activity' within the meaning of Section 1605(a)(2)"; Pfizer, Inc. v. Islamic Republic of Iran, No. 80-2791, slip op. at 7 (D.D.C. Nov. 26, 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981) ("this action is based on the nationalization and expropriation of Pfizer Laboratories in Iran, an 'act outside the territory of the United States,' and . . . Pfizer Laboratories continues to be operated by the Iranian ministries, 'a commercial activity of the foreign state elsewhere')."
defense, however. The test Congress contemplated was not whether an act of the foreign state had commercial results or purposes, but instead whether the act is "one which private parties ordinarily perform or whether it is peculiarly within the realm of governments." Under this test, nationalization is clearly a sovereign act. Indeed, this power is one means by which a state exercises its "inalienable right" to choose a suitable economic system. In resolutions adopted between 1962 and 1974, the United Nations, for example, recognized that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." Accordingly, each state has the right:

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the State adopting such measure, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent.


46. Logically, the focus should be on whether the act of the foreign state is essentially public or governmental since the FSIA immunity defense was meant to protect "the interests of foreign states in avoiding the embarrassment of defending the propriety of political acts before a foreign court." Breadbent v. OAS, 628 F.2d 27, 36 (D.C. Cir. 1980). Courts have adopted a realistic interpretation of the FSIA, permitting a foreign state to retain immunity even where its actions have a commercial consequence or benefit the state directly. See Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980); De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 904-05 (E.D. La. 1981); IAM v. OPEC, 477 F. Supp. 553 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981); Carey v. National Oil Corp., 455 F. Supp. 1097 (S.D.N.Y. 1978), aff'd per curiam, 592 F.2d 673 (2d Cir. 1979). See also Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980).

47. 1976 FSIA Hearings, supra note 19, at 53 (testimony of Monroe Leigh, Legal Adviser, Dept of State, responding to Congressional questions as to the "primary test which would be applied to determine what is commercial activity engaged in by the state"); see Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981) ("if the activity is one in which only a sovereign can engage, the activity is noncommercial").


Individuals cannot conduct a program of nationalization; that power is the exclusive prerogative of the sovereign. Thus section 1605(a)(2) should not apply because the “activity” (nationalization) with which the complained-of “act” (failure to compensate) is connected is a public or governmental act.

This view of the nature of nationalizations under the restrictive theory prevailed before European courts in the 1950s and received support in the United States by the early 1960s. Not surprisingly, the first court to apply the FSIA to a foreign nationalization correctly held that “nationalization is the quintessentially sovereign act, never viewed as having a commercial character” and dismissed the complaint. Courts should therefore follow this result in any future cases involving a foreign state's nationalization of its domestic industries.

Regardless of whether the act of nationalization constitutes commercial activity, a second independent requirement — that the effect of the activity in the United States be direct — removes the Iranian Nationalization Cases from the third clause of the second exception. The courts asserting jurisdiction over Iran in these cases found a whole range of direct effects in the United States — United States firms or their subsidiaries lost profits and incurred expatriation expenses, while business ties with the nationalized firms were attenuated or

51. See, e.g., De Republiek Indonesië v. van der Haas, [1959] N.J. No. 88 (Arr. The Hague), aff'd, [1959] N.J. No. 313 (Hof The Hague 1958) (a foreign state’s nationalization of property within its territorial borders is public, and not private, in nature even when just compensation is not paid); Regno di Grecia v. Garnet, 80 Foro It. I 1964 (Corte cass. 1957) (Greece is immune from suit seeking just compensation for assets blocked in pursuance of its public interest); Pauer v. Repubblica popolare ungherese, 80 Foro It. I 240 (Corte cass. 1956) (Hungary is immune from suit under the restrictive theory for nationalizing domestic banks). See also M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 556–57 (1968) (reporting restrictive theory cases in Europe that recognize immunity of foreign states when they nationalize domestic enterprises); Lalive, L'immunité de juridiction des Etats et des Organisations internationales, 3 HAGUE ACADEMY INT'L L., RECUEIL DES COURS 206, 285 (1953) (listing items universally considered sovereign activities, including legislative acts such as a law of nationalization); Ross, Bachrach, Botwinik, Gori-Montanelli, van Heemstra & Weinschenk, Sovereign Immunity & Judicial Remedies Against the Government in the Netherlands, Italy, Belgium & West Germany, 10 INT'L LAW. 439 (1976).

52. The leading restrictive theory case in the United States before 1976 stated that among the categories of inherently governmental acts, "about which sovereigns have traditionally been quite sensitive," are "legislative acts, such as nationalization." Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 356 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). (The Victory Transport decision contained subsequent dicta that the purpose of the act may be critical in drawing the public-private distinction. The FSIA superseded this dicta. 28 U.S.C. § 1603(d) (1976).) The Department of State, which also applied the restrictive theory in its sovereign immunity recommendations in the 1960s, considered expropriations within a foreign state to be governmental acts entitled to immunity from suit. E.g., "State Dept's Immunity Decisions," supra note 37, at 1040 (Cuba is immune from suit for expropriation of United States property in Cuba).

severed. The courts thus equated losses by a United States national with a "direct effect" in the United States. This interpretation of the statutory language is too broad; it subjects foreign states to suit for any act affecting the balance sheets of United States firms. The legislative history of the FSIA, judicial application of the FSIA outside the Iranian Nationalization Cases, and the law developed under state long-arm "effects" provisions confirm that such a broad interpretation is improper.

The legislative history of the direct effect clause suggests that Congress intended it to have a limited scope. While the FSIA does not define "direct effect," Congress understood that this exception to immunity would apply only in cases where a substantial element of the alleged wrong occurred in the United States. Thus it would permit "an action for pollution of the air in the forum state by a factory operated by a foreign state." In such a case, there is an act outside the United States (operating a factory), but a fundamental element of the offense occurs inside the United States (pollution).

A nationalization of domestic industries by a foreign state does not

54. For example, in American Int'l Group, Inc. v. Islamic Republic of Iran, 493 F. Supp. 522, 526 (D.D.C. 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981), the court stated: "Clearly, the failure of defendants to make provision of compensation to plaintiffs at the time of the taking of property has had a 'direct effect' within the meaning of Section 1605(a)(2)." Accord., Pfizer, Inc. v. Islamic Republic of Iran, No. 80-2791, slip op. at 8-10 (D.C.C. Nov. 26, 1980), remanded, 657 F.2d 430 (D.C. Cir. 1981) (extensive administrative and financial interrelationship between Pfizer and its Iranian affiliate is enough to bring nationalization of the latter under the third clause of § 1605(a)(2)).

55. For example, Congress intended that the courts interpret this clause in accordance with section 18 of the RESTATMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). See FSIA HOUSE REPORT, supra note 16, at 19, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6618. Section 18(b) provides that a state has jurisdiction over conduct that occurs outside its territory and causes an effect within its territory if the effect is substantial, direct, and foreseeable. The illustrations to section 18 also demonstrate that the defendant must have intended, either actually or constructively, to have an impact within the forum state. Compare id. Illus. (8) (no direct effect is caused by an agreement consummated outside of state to purchase commodities, even though the agreement will cause cessation of purchases within the state and loss of profits) with id. Illus. (9) (direct effect exists in forum where agreement made outside the forum allocates territory within forum for purpose of selling product within forum).

56. Immunities of Foreign States: Hearing Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 41 (1973) [hereinafter cited as 1973 FSIA Hearing]. Other examples of "direct effects" are "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." Id. Given Congress's reference to section 18 of the RESTATMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965), it is likely that these other two examples would also require an intent by the foreign state to cause effects within the United States, either by restricting trade or by vending copyrighted materials. See note 55 supra.

57. See, e.g., Dogan v. Harbert Constr. Corp., 507 F. Supp. 254, 262 (S.D.N.Y. 1980) (in commercial torts, the place of injury is deemed to be the place where the critical events associated with the dispute took place).
normally fall into this class of activity, since the property is taken within the foreign state's own borders and any failure to set up a compensation mechanism occurs there as well. Economic "effects" in the United States are, at best, indirect.

For the most part, the distinction implicit in the legislative history of the FSIA has been followed in the courts. Instead of focusing on the impact on plaintiffs, courts have focused on the locus of defendant's obligations and actions. For example, in **Carey v. National Oil Corporation**, the Second Circuit declined to assert jurisdiction under the direct effect exception in a suit by a United States corporation (NEPCO) and its foreign subsidiary (PETCO) against Libyan state entities. Plaintiffs alleged injury from the defendants' breach of contracts to supply oil to PETCO outside the United States. In reaching its decision that jurisdiction could not be had over the defendants, the court held that although Libya's breach of contracts to supply oil to PETCO had a substantial impact upon NEPCO because it suffered losses, the effect in the United States was not direct. The court rejected NEPCO's argument that the integration of its operations with those of PETCO meant that the effect was direct and found instead that the only "direct effect" occurred in the place where the contracts were to be performed. Jurisdiction, therefore, cannot be based on indirect consequences felt in the United States merely because the plaintiff is located there.
Further support for this view is derived from judicial construction of state long-arm statutes recognizing jurisdiction based on effects within the forum. This case law indicates that an extraterritorial act has a direct effect in the forum only if the actor’s objectives require a purposeful act within the forum. Accordingly, consequential economic injury related to the act outside the forum is insufficient. Under New York’s “effects” provision, courts have held that jurisdiction “must be based upon a more direct injury within the State and a closer expectation of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled there.”

This principle applies squarely to the Iranian Nationalization Cases. If Iran had an obligation to provide adequate compensation, it arose in Iran, not in the United States; the incidental economic repercussions reflected in corporate balance sheets do not justify the courts’ use of the direct effect clause to assert jurisdiction.

3. Property Taken in Violation of International Law

In addition to other jurisdictional claims, several litigants in the Iranian Nationalization Cases argued that Iran was amenable to the jurisdiction of the courts under the second clause of section 1605(a)(3), which provides that a foreign state shall not be immune to suit in any case:

in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instru-
mentality of the foreign state . . . and that agency or instrumentality is engaged in a commercial activity in the United States. 66

No court in the Iranian Nationalization Cases asserted jurisdiction over Iran under this provision. Although, on its face, the provision could be interpreted to cover certain of the nationalizations in question, at least two obstacles bar its application to the Iranian nationalizations.

First, the requirement that the property have been taken "in violation of international law" arguably was not satisfied. The Iranian nationalizations were neither retaliatory nor discriminatory, and in most instances Iran promised compensation to shareholders. 67 While plaintiffs argued that the procedures followed did not meet the traditional "prompt, adequate, and effective compensation" standard developed under United States law, it appears that the prevailing view in international law rejects that measure. 68 Rather, the law developing under the restrictive theory implicitly recognizes that states may nationalize domestic industries and resources and pay compensation as required under their domestic law. 69 Since Congress codified the restrictive theory in the FSIA, the "takings-in-violation-of-international-law" clause should not be applied to permit suits for just compensation for property taken by the foreign state within its own borders. 70

68. It is true that Congress in 1976 assumed that a taking would be "in violation of international law" if it were done "without payment of the prompt, adequate and effective compensation required by international law." FSIA HOUSE REPORT, supra note 16, at 19-20, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6618. It appears, though, that the majority view in international law rejects the "prompt, adequate, effective" standard for compensation. See note 180 infra. Courts should not view the Congress' incorrect assumption as "freezing" the development of international law as of 1976, and one could argue that Congress accepted the evolutionary approach by using "international law" rather than "prompt, adequate, effective" in the text of the FSIA. As a "statutory regime which incorporates standards recognized under international law," FSIA HOUSE REPORT, supra note 16, at 14, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6613, the FSIA should be interpreted with reference to developments in international law. See Note, supra note 8, at 452–53.
69. See notes 47–53 and accompanying text supra. In this respect, it is significant that neither the U.K. Immunity Act, supra note 16, nor the European Convention, supra note 16, lists an "expropriation exception" to immunity, even though each contains a more detailed account of exceptions than does the FSIA. The reason for this omission is that the restrictive theory does not countenance such an exception, unless the expropriated property is located within the forum. See notes 244, 249 infra.
70. The requirement that "rights in property" be at issue may also reflect a Congressional intent that the third exception apply only to "tangible" goods, such as works of art or cargo, and not to "intangible" claims for compensation. 1973 FSIA Hearing, supra note 56, at 20–22. It has been argued (by reference to the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976)) that contract rights or shareholding interests are not "rights in property" for purposes...
In addition, the second clause of the third exception cannot be applied against Iran; it can only be the basis for suit against the "agency or instrumentality" of Iran to which the property has been transferred. The instrumentality's (not the state's) commercial activity in the United States provides the jurisdictional nexus required by the second clause. And it would be anomalous under the common law for the foreign state itself (acting entirely outside the United States) to be sued on the basis of the contacts of a separate entity. Such was the understanding of Congress. The FSIA's provisions for execution on judgment segregate claims against foreign states from those against their instrumentalities. The FSIA permits execution against the foreign government only for judgments under the first clause of the third exception, which covers property claimed by the foreign state but present in the United States; on the other hand judgments rendered under the second clause may be executed against state instrumentalities. This represents an implicit legislative judgment that foreign governments should not be sued under the second clause.
B. IMPLIED CAUSES OF ACTION

The claimants in the Iranian Nationalization Cases relied on the Treaty of Amity and international law to establish a cause of action for compensation. While it is true that international law and the self-executing FCN treaties are the law of the land, it is not the case, as was assumed by several of the district courts addressing the issue, that this law grants United States nationals an action for damages.

According to prevailing theory, international law is the "law of nations," and treaties are compacts between nations. International law and treaties are therefore normally enforced by nations, through their executive departments. Under this view, the role of United States courts in enforcing international guarantees is a very limited one. Foreign aliens may sue in United States courts to petition the United States to comply with its international obligations, but United States nationals aggrieved by a foreign state's breach of corresponding obligations must first seek relief from the courts of the foreign state and, if unsuccessful in that forum, must then rely on the Executive to pursue their claims through diplomatic channels.

CONG. & AD. NEWS 6604, 6627 (emphasis added). Thus, execution under the FSIA could only be made against the state instrumentality, see 28 U.S.C. § 1610(b)(2) (1976), for claims asserted under the second clause of section 1605(a)(3).

75. See note 3 supra.


77. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) (Advisors Act can be the basis for injunctive action for rescission but does not create damages remedy). By analogy to Transamerica, it might be argued that even if the Treaty of Amity were self-executing and its obligations could be injunctively enforced, see Asakura v. Seattle, 265 U.S. 332 (1924), it does not necessarily create a damage remedy against Iran's nationalizations within its own borders. See Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 795 (E.D.N.Y. 1978), aff'd mem., 614 F.2d 1290 (2d Cir. 1979); REVISED RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 131, Reporters' Notes 1-2, 4 (Tent. Draft. No. 1, 1980).


79. "Because of [international law's] peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 422-23 (1964); see The Head Money Cases (Edye v Robertson), 112 U.S. 580, 598 (1884) (similar rule for treaty enforcement).

This result accords with Supreme Court decisions limiting efforts to imply causes of action under federal statutes: "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." Generally speaking, then, because treaties and international law presume enforcement of rights by the Executive, courts should refuse to establish novel private damage remedies. This rule is particularly persuasive in the Iranian Nationalization Cases, for the Treaty of Amity contains a "compromissory clause" that requires "[a]ny dispute . . . as to the interpretation or application of the present Treaty" to be resolved by diplomacy or, failing that, by international arbitration or decision in the International Court of Justice. When the treaty was examined by the Senate, the Executive explained that in the context of nationalizations the compromissory clause limited injured United States nationals to seeking redress in the courts of the foreign state and then, if unsuccessful, to seeking redress through Executive diplomacy.

82. Under this principle, the United States Circuit Court of Appeals for the District of Columbia recently refused to imply a cause of action under a self-executing treaty, reasoning that "[n]othing in the quoted language indicates that the United States has agreed to be held liable in damages if the treaty is violated" and that "the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom." Canadian Tramp Co. v. United States, No. 77-1693, slip op. at 22 (D.C. Cir. Sept. 5, 1980). Accord, Miller v. United States, 410 F. Supp. 425 (E.D. Mich. 1976), aff’d in relevant part, 583 F.2d 857, 859-61 (6th Cir. 1978); Filler v. Commissioner, 74 T. Ct. No. 28 (May 27, 1980).
83. Treaty of Amity, supra note 2, art. XXI, para. 2. The compromissory clause indicates that the Contracting Parties understood that remedies for wrongful "interpretation" or "application" of the treaty lay in (i) resolution between the two states, or (ii) resort to the International Court of Justice. See Wilson, Property-Protection Provisions in United States Commercial Treaties, 45 Am. J. Int’l L. 83, 104 (1951); cf. Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) (although courts may sometimes enforce duties arising under self-executing treaties, there is "no room . . . for operation of these principles when the corrective machinery specified in the treaty itself is nonjudicial").
84. The Treaty of Amity was presented to Congress for approval along with two other FCN treaties. See Commercial Treaties with Iran, Nicaragua, and The Netherlands: Hearing Before the Senate Comm. on Foreign Relations, 84th Cong., 2d Sess. (1956). Each treaty contained a provision identical to article XXI, paragraph 2 of the Treaty of Amity. See id. at 8. When asked what remedies would be available under these treaties if Nicaragua, for example, expropriated assets of a United States company, a Department of State official replied:

Well, presumably the first position to be taken would be a representation to the Nicaraguan Government pointing out the difference between the action proposed or contemplated and the agreement. If the Nicaraguan Government went ahead in spite of that, then presumably we would continue our representations and seek for an adjudication then in an international tribunal. I would assume that the company would attempt, if the corporation were located there, to exhaust the remedies available to it in the domestic courts, but if a government, say, in Nicaragua, proceeded to nationalize, the chances are that the courts would furnish little or no relief and the Government of the United States would have to intercede in behalf of its nationals.

Id. at 11 (testimony of Thorsten Kalijarvi, Deputy Ass’t Sec’y of State).
In the Iranian Nationalization Cases, sound policy, the overwhelming body of case law, and the text of the FCN treaty itself weighed against recognition of new damage causes of action for alleged violations of treaty and international law. In the future, the courts should reject attempts to expand the scope of federal remedies for nationalizations beyond that provided for by Congress.

C. ACT OF STATE DOCTRINE

In addition to the significant barriers posed by the requirement of jurisdiction and the absence of a recognized cause of action, one other defense — the act of state doctrine — should have precluded United States courts from asserting jurisdiction over the Iranian Nationalization Cases. This doctrine requires United States courts to abstain from determining the validity of the public acts of a foreign state. The courts must accept those acts as the rule for decision in cases, at least where the foreign state acts within its borders. The FSIA does not explicitly address the act of state doctrine, although its legislative history indicates general Congressional approval of the doctrine.

85. Apart from the policy of deference to traditional means of handling treaty and international law violations, a second policy militates against implying damage actions from treaty provisions: a damage action connotes a waiver of the treaty partner’s own sovereign immunity. Such an implicit waiver cannot be inferred by United States courts without violating the principles of judicial restraint and non-interference in the conduct of United States foreign policy. See Canadian Transp. Co. v. United States, No. 77-1693 (D.C. Cir. Sept. 5, 1980).

86. One reason courts may have been so willing to create new causes of action is a fear that traditional remedies would not afford plaintiffs adequate relief. Cf. People of Saipan v. United States Dep’t of Interior, 502 F.2d 90, 97 (9th Cir. 1974), cert. denied, 420 U.S. 1003 (1975) (in deciding whether a treaty is “self-executing” courts may consider efficacy of other remedies). But cf. Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976) (intent of treaty partners is the only consideration in determining rights of private parties under treaties). Regardless of the efficacy of current remedies, courts should not place themselves in the position of second-guessing the likelihood of Department of State success in promoting the claims of United States claimants. Cf. Case Concerning the Barcelona Traction, Light & Power Co., Ltd. (Belgium v. Spain), (1970) I. C. J. 3 (violations of international law do not give rise to individual remedies; individual’s recourse in nationalization rests with Executive).


88. FSIA HOUSE REPORT, supra note 16, at 20 & n.1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6504, 6619 & n. 1 (since the Supreme Court has held the act of state doctrine does not apply when only commercial acts of foreign states are in question, the doctrine is not inconsistent with the FSIA).
Since the enactment of the FSIA, federal courts have properly continued to apply the doctrine.  

_Underhill v. Hernandez_ sets out the traditional rationale for this judicially created rule:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

This statement suggests the three principal policies upon which the act of state doctrine rests. First, it recognizes that certain controversies can best be resolved by the Executive through diplomatic channels. Judicial interference in such instances might frustrate the efforts of the Executive or otherwise embarrass its conduct of foreign relations. Second, the act of state doctrine signifies judicial deference to the political decisions of a sovereign state, deference which is required, in part, by the lack of clear international standards for evaluating political actions. Third, the act of state doctrine embodies conflict of law concerns. Most often, when United States courts adjudicate foreign-based controversies involving foreign states, the applicable substantive law will be that of the foreign state — which normally supports the state's action.

89. See note 197 infra.
90. 168 U.S. 250 (1908).
91. Id. at 252.
94. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it"); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979).
95. See Ricaud v. American Metal Co., 246 U.S. 304, 309 (1918) (foreign law provides the rule for decision in a controversy over goods located in that foreign state); Kirgis, _Act of
All three of these policies suggest that the act of state doctrine should have been applied in the Iranian Nationalization Cases. Before the Iranian cases arose, every United States court addressing the issue held that "[e]xpropriations of the property of an alien within the boundaries of the sovereign state are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by the act of state rubric." Moreover, on their facts, the Iranian Nationalization Cases were governed by Banco Nacional de Cuba v. Sabbatino, which held that the act of state doctrine precluded adjudication of claims alleging, inter alia, that a foreign state's failure to provide for just compensation in an expropriation decree was unlawful. In reaching this result, the United States Supreme Court applied a balancing test, which compelled abstention because there were insufficient standards for courts to evaluate nationalization decrees and adjudication would tend to undermine the diplomatic efforts of the Executive.


98. Id. at 401-08. Perceiving the Sabbatino decision to be contrary to United States interests and responding to the vocal reactions of lawyers and businessmen involved with foreign investment, Congress quickly passed the Sabbatino Amendment, also known as the Second Hicklenooper Amendment. Foreign Assistance Act of 1964, Pub. L. No. 88-63, § 301(d)(4), 78 Stat. 1009, 1013 (1964) (current version at 22 U.S.C. § 2370(e)(2) (1976)). See H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 208 (2d ed. 1976). The amendment reverses the presumptions the Supreme Court established in Sabbatino. Under the amendment, when faced with an expropriation that violates international law, the court should proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would inhibit the conduct of foreign policy. S. REP. NO. 1188, Pt. I, 88th Cong., 2d Sess. 24 (1964). The Executive Branch had opposed the Sabbatino Amendment because United States-owned property expropriated abroad would rarely come within the jurisdiction of the United States courts and because it believed that larger settlements for claimants would result from negotiations on the basis of prompt, adequate, and effective compensation. See H. STEINER & D. VAGTS, supra, at 709. Despite all the controversy, the Sabbatino case on remand, see Banco Nacional de Cuba v. Farr, 243 F. Supp. 957 & 272 F. Supp. 836 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968), appears to be the only instance in which the Sabbatino Amendment has actually been applied to prevent application of the act of state doctrine. See Cooper, Act of State & Sovereign Immunity: Further Inquiry, 11 LOY. CHI. L.J. 193, 219 n.19 (1980).

99. In deciding the case, the Supreme Court applied the following test:

It should be apparent that the greater the degree of codification or consensus concerning
The same reasoning would apply to the Iranian Nationalization Cases.\footnote{100}

In order to avoid the \textit{Sabbatino} rule, litigants argued that the Iranian Nationalization Cases fell within two "exceptions" to the act of state doctrine: (1) a judge created exception for commercial acts by a foreign state and (2) a statutory exception for certain expropriations in violation of international law. Neither exception, however, was applicable to the facts presented by the Iranian Nationalization Cases.

In \textit{Alfred Dunhill of London, Inc. v. Republic of Cuba},\footnote{101} a plurality of the Supreme Court reasoned that the act of state doctrine does not apply to actions arising from the "purely commercial operations" of a foreign state.\footnote{102} Decisions subsequent to \textit{Dunhill} but prior to the Iranian Nationalization Cases suggest that the \textit{Dunhill} exception does not apply to suits arising out of nationalizations. For instance, in \textit{D'Angelo v. Petroleos Mexicanos},\footnote{103} plaintiff sought compensation for a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it. . . . It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.\footnote{104}

\textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398, 428 (1964). Based upon this test, the court held that abstention was proper because international law provided uncertain standards for evaluating foreign takings (especially with respect to payment of compensation) and because even if the confiscation were clearly contrary to international standards, adjudication would impair the ability of the Executive to conduct a unified foreign policy. \textit{id.} at 429–34.

The decision in \textit{American International Group} distinguished \textit{Sabbatino} on two grounds: (i) unlike the Supreme Court in \textit{Sabbatino}, the court was called upon to evaluate the foreign state's failure to provide compensation and not the law of nationalization itself, and (ii) a treaty provision set forth the applicable law in the case. \textit{American Int'l Group, Inc. v. Islamic Republic of Iran}, 493 F. Supp. 522, 525 (D.D.C. 1980), \textit{remanded}, 657 F.2d 430 (D.C. Cir. 1981). The first point was incorrect: the precise claim in \textit{Sabbatino} was that, \textit{inter alia}, Cuba nationalized property without paying compensation. \textit{See Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398, 430–33 (1964). See also notes 181–82 \textit{infra}.

The second point has greater validity, since article IV, paragraph 2 of the Treaty of Amity, \textit{supra} note 2, appears to codify the "prompt, adequate, and effective" compensation standard, and so provides more guidance than general international law. But under the \textit{Sabbatino} balancing test, see note 99 \textit{supra}, the foreign affairs element receives greater weight, \textit{see Alfred Dunhill of London, Inc. v. Republic of Cuba}, 425 U.S. 682, 697 (1976) (opinion of White, J.), and Justice Harlan's opinion in \textit{Sabbatino} itself held that even if it were clear that Cuba's law of nationalization were illegal under international law (because it provided no compensation and was discriminatory and retaliatory), the act of state doctrine would still apply because of the foreign relations ramifications inherent in suits seeking just compensation for a foreign nationalization. \textit{Banco Nacional de Cuba v. Sabbatino}, 376 U.S. 398, 430–33 (1964). See also notes 181–82 \textit{infra}.


\textit{102.} \textit{id.} at 706. This view was joined by Chief Justice Burger and Justices White (who authored the plurality opinion), Powell, and Rehnquist. Justices Brennan, Stewart, Marshall, and Blackmun dissented and rejected the proposed commercial exception. Justice Stevens concurred in the result but expressed no opinion whether there is a "commercial exception" to the act of state doctrine. \textit{See generally Friedman & Blau, Formulating a Commercial Exception to the Act of State Doctrine: Alfred Dunhill of London, Inc. v. Republic of Cuba, 50 ST. JOHN'S L. REV. 666 (1976) ("commercial exception" should be recognized).}

its interests in oil expropriated by Mexico. Relying on the plurality opinion in Dunhill, plaintiff contended that the act of state doctrine was inapplicable because Mexico's expropriation of oil "froze-out" private investors so that the state could enter and monopolize the oil business. The court rejected this invitation to expand the commercial exception by considering the economic ramifications of or motives behind the state's act. Subsequent decisions demonstrate the unlikelihood that any "commercial activity exception" to the act of state doctrine will apply in a nationalization context.

The statutory exception to the act of state doctrine is the "Second Hickenlooper Amendment," which provides:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of the state in violation of the principles of international law . . .

Plaintiffs argued that Iran's alleged nationalization of domestic businesses without adequate provision for just compensation violated international law, and that United States courts therefore could adjudicate plaintiffs' "claim of title or other rights to property" in Iran. The difficulty with this argument is that courts have construed the Second Hickenlooper Amendment very narrowly, holding that it precludes application of the act of state doctrine only in cases where the expropriating state or an instrumentality thereof seeks to market the property in the United States or where the property claimed to be nationalized by the foreign state is located in the United States in the first place. Since the business interests and assets in the Iranian

104. Id. at 1286. The plaintiff also argued that Mexico's procedures for granting compensation were inadequate, but the D'Angelo court held that this, too, was an act of state. Id. at 1291.

105. Hunt v. Mobil Oil Corp., 550 F.2d 68, 72 (2d Cir.), cert. denied, 434 U.S. 984 (1977) (Dunhill's commercial exception does not mandate judicial inquiry into Libya's limitation on oil production and nationalization of United States oil interests); United Mexican States v. Ashley, 556 S.W.2d 784, 786 (Tex. 1977) (expropriation "is a governmental action and not a commercial activity" under Dunhill); Manas y Pineiro v. Chase Manhattan Bank, N.A., 106 Misc. 2d 660, 434 N.Y.S.2d 868 (Sup. Ct. 1980).


107. Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394 (2d Cir. 1970), rev'd on other grounds, 406 U.S. 759 (1972); see French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 242 N.E.2d 704, 295 N.Y.S.2d 433 (1968). This construction of the Second Hickenlooper Amendment has been adopted by every court that has addressed the question. See Empresa
Nationalization Cases were located in Iran, the Second Hickenlooper Amendment would not prevent utilization of the act of state doctrine.\textsuperscript{168}

II. POLICIES LIMITING JUDICIAL INVOLVEMENT IN SUITS AGAINST FOREIGN STATES

The district court decisions in the Iranian Nationalization Cases are unprecedented and with good reason: they decided the main procedural issues (jurisdiction, implied causes of action, and abstention) incorrectly. In their efforts to protect United States claimants against possible injustice, the courts inappropriately applied the FSIA with superficial but sweeping literalism. In doing so, the courts did not give adequate consideration to the common law and policies underlying the FSIA and the Treaty of Amity, or to the doctrines of implication of causes of action and abstention regarding foreign acts of state. Analysis of the Iranian Nationalization Cases is useful both in demonstrating the malleability of the language of the FSIA and in identifying the principles behind the procedural defenses.

Generally, all three procedural mechanisms serve the common goal of preventing United States courts from considering the merits of claims against foreign states which may be inappropriate for judicial determination. The identification of such inappropriate claims, in turn, rests largely upon three fundamental policy considerations. One policy, derived from international comity, is that foreign states should be immune from suit when they act in a governmental capacity. This policy is the basis for the sovereign immunity provisions of the FSIA and act of state abstention and is a major reason courts will not ordinarily imply damage actions pursuant to treaties and international law. A second policy is that foreign-based disputes against foreign governments should not be litigated in United States forums. Implicit in the FSIA's exceptions to immunity and the choice-of-law element of the act of state doctrine, this policy arises out of due process considerations and international standards of fairness to litigants. The third policy, grounded in principles of separation of powers and central

to the implied causes of action and the act of state case law, is that courts should leave politicized cases likely to involve sensitive foreign affairs ramifications to the Executive.\textsuperscript{109}

Since the FSIA and the doctrines of implied causes of action and act of state rest on these considerations, courts should construe these defenses in light of their underlying policies, absent the clearest Congressional intent to the contrary. Using the Iranian Nationalization Cases as a model, this Part analyzes these three policies to develop and illustrate an analytical framework that may be applied in other cases.

\textbf{A. INTERNATIONAL COMITY}

The principle of "international comity" obligates the United States to respect the sovereign acts of other states. As a member of the society of nations, the United States agrees to respect the internationally recognized immunities of foreign states.\textsuperscript{110} Chief Justice Marshall, in \textit{The Schooner Exchange v. M'Faddon},\textsuperscript{111} set forth the basis for this deference:

\begin{quote}
The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.
\end{quote}

\textsuperscript{109} It may be argued that the FSIA is inconsistent with this third policy consideration since one of its central premises is that determinations of sovereign immunity are best made by the judiciary. See FSIA HOUSE REPORT, supra note 16, at 12, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6610; 1976 FSIA Hearings, supra note 19, at 29 (the purpose of the FSIA was to "depoliticize" sovereign immunity determinations).

Yet the drafter of the FSIA chose to allow the act of state doctrine to continue in force, implicitly recognizing that occasions would arise in which deference to executive conduct of foreign affairs would mandate abstention even where the sovereign immunity defense was not available. See IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981);

\begin{quote}
Congress in enacting the FSIA recognized the distinction between sovereign immunity and the act of state doctrine. . . . Indeed, because the act of state doctrine addresses concerns central to our system of government, the doctrine must necessarily remain a part of our jurisprudence unless and until such time as a radical change in the role of the courts occurs.
\end{quote}

\textit{Id.} at 1359–60; cf. Dames & Moore v. Regan, 101 S. Ct. 2972 (1981) (the primary purpose of FSIA is to set up objective standards for immunity determinations, not to deprive the President of his practical powers to conduct United States foreign affairs).

\textsuperscript{110} Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938) (based upon the principle of comity, foreign sovereigns and their public property are held not to be amenable to suit in United States courts without their consent); Loomis v. Rogers, 254 F.2d 941, 943 (D.C. Cir. 1958) (per curiam), \textit{cert. denied}, 359 U.S. 928 (1959).

\textsuperscript{111} 11 U.S. (7 Cranch) 116 (1812).
A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.112

Beyond judicial recognition, FCN treaties guarantee that the Contracting Parties will enjoy immunity for their sovereign acts.113

By operation of the supremacy clause, the principles entailed in international and bilateral comity are "the law of the Land."114 As a consequence, United States courts should "interpret general or ambiguous words in statutes in a manner consistent with international law as understood by them."115 Thus, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."116 This precept also applies to treaties: "courts do not favor repudiation of an earlier international agreement by implication and require clear indications that Congress, in enacting subsequent inconsistent legislation, meant to supersede the earlier agreement."117 Hence, Congress may abrogate the immunity conferred upon foreign states by international or bilateral consensus if it clearly intends to do so; but, absent explicit Congressional direction to the contrary, courts should attempt to reach a result consistent with international law and treaties.

112. Id. at 136-37.

113. Although the FCN treaty immunity waiver clause did not touch the immunity of the foreign state itself, see notes 26-41 and accompanying text supra, it reflected the Department of State’s movement toward the rule of restrictive immunity. See, e.g., Bishop, New United States Policy Limiting Sovereign Immunity, 47 AM. J. INT’L L. 93 (1953); Setser, supra note 29; Walker, Provisions on Companies in United States Commercial Treaties, 50 AM. J. INT’L L. 373 (1956).

114. U.S. CONST. art. VI, cl. 2 ("all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the Land"); The Paquete Habana, 175 U.S. 677, 700 (1900) (international law, like treaties, is the "law of the Land"); The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815); Filartiga v. Peña-Irala, 630 F.2d 876, 886-87 (2d Cir. 1980).

115. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 3, Comment j (1965).


117. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 145, Comment b (1965); see Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 690-91 (1979); Torres v. INS, 602 F.2d 190 (7th Cir. 1979).
The overwhelming majority view in international law and the approach generally taken in treaties to which the United States is a party is that foreign states should be immune from lawsuits based on their public or governmental acts, though not for their private or commercial acts.\(^{118}\) When a foreign state undertakes private or commercial activities, it no longer acts as a co-equal sovereign and therefore is not entitled to an immunity defense premised upon deference to its sovereign status.\(^{119}\) United States courts do not "offend" the sovereignty of a foreign state when that state is not acting in its sovereign capacity.\(^{120}\) There is substantial practical as well as theoretical justification for limiting immunity to governmental acts: state trading companies in the twentieth century have entered the marketplace on an unprecedented scale, and often have improperly used the immunity defense to avoid their commercial obligations.\(^{121}\)

Notwithstanding the clarity of the theoretical distinction between public and private acts, in practice it may be extremely difficult to distinguish between the two. Some guidance, however, can be found in sovereign immunity statutes, international restrictive theory case law, United States act of state cases, and relevant treaties.\(^{122}\) These

---


119. The principle is "that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted." Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824); see Thai-Europe Tapioca Serv., Ltd. v. Government of Pakistan, Directorate of Agricultural Supplies, [1975] 1 W.L.R. 1485, 1491 (C.A.) (when foreign state "enters into the marketplaces of the world... international comity requires that it should abide by the rules of the market"); Rahimtoola v. Nizam of Hyderabad, (1958) A.C. 379, 422 (immunity should be granted for "legislative or international transactions" but not for "commercial transactions" of foreign government). See also Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961) (sovereign immunity for states in United States is justified when the state is sued for basic policy decisions but not for torts of its agents); RESTATMENT (SECOND) OF TORTS § 895B (1979).


121. Tate Letter, supra note 17; see Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356 (C.A.); Lauterpacht, supra note 17; von Mehren, supra note 8.

122. The main codifications of foreign sovereign immunity law follow the restrictive theory by providing "exceptions to immunity" in situations where the foreign state has "lowered" itself to the level of a private party. See 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602–1611 (1976); European Convention, supra note 16; U.K. Immunity Act, supra note 16. See generally Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (opinion of White, J.)
sources suggest three inquiries. First, is the act complained of an "official" act of the foreign state, as opposed to an unauthorized, ad hoc decision? Second, is the foreign state's act an exercise of one of the recognized powers of government to serve the "public" welfare? Finally, is the foreign state's act premised upon a general decision made in a "political" context, as opposed to an act premised upon a particular proprietary decision made in a commercial context? A negative answer to any of the questions should negate the immunity of a foreign state as a matter of international comity.

The first inquiry examines the formal and official trappings of a foreign state's action, since an exercise of sovereign power is ordinarily accomplished through formal channels of government. A statute enacted by the legislature, the decree of an autocrat, and a judicial or executive order are all *prima facie* "official." A nationalization decree, typically ratified at the highest levels of government, is an official act, though isolated acts of confiscation would not be. For example, the Supreme Court in *Dunhill* found that the failure of Cuban interventors (persons named to run nationalized Cuban businesses) to pay commercial debts did not bear the formal indicia of an official "act of state" because there was no formal authorization for their action.

The second inquiry is whether the foreign state's act is an exercise of one of the recognized powers of government to serve the public welfare. United States and European decisions which have applied the restrictive theory of sovereign immunity have identified certain categories of activities (e.g., regulation of business activities, punishment...
of criminal acts, redistribution of wealth within the state, diplomatic and military actions, internal police power regulation, and public financial policies) that are presumptively sovereign in nature, because they are considered essential to each state's self-government. They are "strictly political or public acts about which sovereigns have traditionally been quite sensitive." Nationalization is "the quintessentially sovereign act," because it serves to regulate business and natural resources, to redistribute wealth, and to alter the balance of the private and public power in the economy.

On the other hand, the legitimate pursuit of public welfare is limited to circumstances where a foreign state has sovereign power. Thus, when the state imposes its public policy within the territory of another sovereign and does so against that sovereign's policy, it is not entitled to immunity. For this reason, foreign attempts to confiscate property or commit crimes in the United States are not "public" in nature because they clearly exceed the sovereign power of that foreign state. Also, certain actions of foreign states within their own borders, such as torture and unjust detention, are so universally condemned and so unrelated to any justifiable concept of public welfare that international comity does not require the recognition of immunity.

126. Victory Transp., Inc. v. Comisaría General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965), listed five categories of "public acts"—internal administrative police power regulations, military acts, legislative enactments, diplomatic activities, and repudiation of the public debt. See Lalive, supra note 51, at 285–86. See also Claims Against the Empire of Iran Case, 16 BVerfGE 27 (1963).

Another way of viewing this question is to identify "nonpublic" acts that are, presumably, not so sensitive. 28 U.S.C. §§ 1604, 1605 (1976); European Convention, supra note 16, arts. 1–12. Such an approach is generally consistent with the Victory Transport listing of public acts. See 1976 FSIA Hearings, supra note 19, at 95.


128. "The principle that every State has the right to expropriate private property situated within its territory even if it was owned by foreigners was already generally recognized before 1940. This right flows from the sovereign right of States to determine their own internal affairs." Van Wees, Compensation for Dutch Property Nationalized in East European Countries, 3 Neth. Y.B. Int'l L. 62, 64 (1972). More recent doctrine focuses on the sovereign right of states to regulate the exploitation of their economic and natural resources. See notes 48–51 and accompanying text supra.


130. See Filarciga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (torture by foreign state, even within its own borders, is not a valid "public" act, as it is condemned by all international authorities); Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 795–800 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981) (indeterminate detention of an alien in a maximum security prison without criminal conviction violates international law).
Most important, however, is the third inquiry, which examines the political context of a foreign state's action or inaction. The first two inquiries, which focused on the formal trappings and public welfare functions of foreign state acts, are not sufficient to identify those acts of a foreign states which should be immune from suit. For example, a foreign state's navy, which normally serves public purposes and acts on formal orders, does not always act in a military context. If the navy buys provisions, it acts in an apolitical and specific manner and can therefore be sued for payment; if the navy blockades a port, it is following a policy decision which is clearly political in nature and therefore should be immune. Similarly, when a foreign state passes a law nationalizing an industry located within its borders, it makes a general political decision; any state trading company created out of the nationalized assets, however, would be liable for breaches of contract and torts arising out of its own commercial undertakings.

The context of the state's action in such a situation tends to show that the state conduct in question is linked directly to commercial

---

131. See "The Gul Djemal," 264 U.S. 90, 95 (1924) (rejecting immunity defense of a state-owned vessel: "Although an officer of the Turkish Navy, [the master] was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce . . . ."). See also Horowitz v. United States, 267 U.S. 458, 461 (1925); Becker, The Rolimpex Exit from International Responsibility, 10 N.Y.U.J. INT'L L. & POL. 447, 459 (1978).

132. See I Congreso del Parrido, [1978] 1 Q.B. 500, aff'd, [1980] 1 Lloyd's List L.R. 23 (C.A.). In this case the court upheld Cuba's immunity claim arising out of its foreign relations decision to halt all shipment of goods to Chile, stating:

It is understandable that, where an ordinary trading ship is involved in a collision on the high seas, the sovereign should usually be unable to invoke immunity, because he is then acting as a private citizen can act. But . . . suppose that the sovereign should, for some reasons of state, order one of his trading ships to intercept some other ship on the high seas and a collision should result. It would be very surprising if in such circumstances immunity could not be claimed in respect of a claim arising out of the collision. Id. at 528. See also Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378-81 (5th Cir. 1980); IAM v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981); Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F. Supp. 849, 855-56 (S.D.N.Y. 1978); cf. 28 U.S.C. § 1603(d) (1976) (FSIA looks to the "nature," and not just the purpose, of activity to determine whether it is "commercial"); Timberlane Lumber Co. v Bank of Am., N.T. & S.A., 549 F.2d 597, 605 (9th Cir. 1977) (foreign state's official authorization does not invoke act of state doctrine if the nature of the activity is commercial).

133. Thus the act of state doctrine has been applied to prevent re-examination of a foreign state's law nationalizing interests of United States claimants in the state. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 697 n.22 (1976) (opinion of White, J.). It does not, however, preclude adjudication of subsequent breaches of contracts by officials of the nationalized companies. Id. at 696-98. The FSIA analysis in IAM v. OPEC involved a similar approach: the OPEC states were found to be acting in their status as sovereigns when they regulated the exploitation of irreplaceable natural resources (even though they profited from such regulation), though their activities actually operating oil companies would be in their status as proprietors. IAM v. OPEC, 477 F. Supp. 553, 568 n.14 (C.D. Cal. 1979), aff'd on other grounds, 649 F.2d 1354 (9th Cir. 1981). See also Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371 (5th Cir. 1980).
obligations, though the state or its instrumentality may purport to take formal action in the public interest. Where the so-called "governmental" act is designed to manipulate or avoid commercial obligations, there is no truly sovereign action for which international comity commands deference.\(^{134}\)

**B. MINIMUM CONTACTS**

The due process clause of the fifth and fourteenth amendments precludes United States courts from asserting jurisdiction over defendants lacking "minimum contacts" with the forum that would put them on notice that they might be sued there.\(^{135}\) The Supreme Court in *Shaffer v. Heitner*\(^{136}\) held that the minimum contacts requirement is met only if there is a jurisdictional nexus among the forum, the cause of action, and the purposeful conduct of the particular defendant such that it would be considered "reasonable" for courts of the forum to assert jurisdiction in the case.\(^{137}\) Courts therefore have personal jurisdiction over a defendant only when the defendant has a substantial and continuing presence in the jurisdiction or when the defendant commits a purposeful act in the jurisdiction that is related to the cause of action.\(^{138}\) Since foreign states and their instrumentalities have been found to be "persons" within the meaning of the due process

\(^{134}\) This approach was applied in the "Nigerian Cement Cases." Nigeria purchased a large percentage of the world's supply of cement, but it did not have the facilities to receive the shipments. After its harbor at Lagos became congested, Nigeria officially closed the port and then sought cancellation of the remaining contracts. Even though Nigeria cancelled the contracts through official acts that were directed at the national emergency, the context of the acts was obviously contractual. For this reason, courts throughout the world had no problem in finding that Nigeria had no sovereign immunity defense under the restrictive theory. *E.g.*, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 & n.29 (2d Cir. 1981); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 2 W.L.R. 356 (C.A.). An entirely different question would have been presented if Nigeria had broken off diplomatic and trade relations with the United States, in which case Nigeria could validly assert the defense of sovereign immunity against the commercial claims of plaintiffs. *See C. Czarnikow Ltd. v. Centrala Handlu Zagranicznego Rolimpex*, [1978] 3 W.L.R. 274 (H.L.).


\(^{137}\) *Id.* at 204; *see World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980).

\(^{138}\) *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). Most states have two different personal jurisdiction provisions in their state codes — one that affords the state courts jurisdiction over companies "doing business" in the state and another (the "long-arm" statute) that affords jurisdiction where the cause of action arises out of conduct within the state. *See, e.g.*, D.C. CODE ANN. §§ 13-422, 13-423 (1973) (doing business and cause of action arising in the District of Columbia, respectively).
clause, they too are entitled to the constitutional protection of the minimum contacts requirement. 139

Theoretically, then, suits against foreign states or their instrumentalities would not violate the due process requirement if the defendant state or instrumentality had substantial and continuous commercial contacts with the United States, even though these contacts were unrelated to the cause of action. 140 As a matter of policy with respect to state instrumentalities, and constitutional principle with respect to foreign states themselves, it is, however, reasonable to recognize federal jurisdiction only when the instrumentality's or the state's purposeful actions in the United States relate to the cause of action.

Although the minimum contacts doctrine may not be a barrier, courts should nonetheless hesitate before asserting jurisdiction over a foreign state instrumentality based solely on contacts unrelated to the cause of action. 141 An appropriate assertion of jurisdiction in a national setting can be impractical and unfair in the international context. 142 It may be unreasonable to force a foreign defendant to bear significant expense, inconvenience, and possible bias merely to provide United States claimants with a friendly forum. 143 Indeed, an inter-


140. States in the international community have constant political and commercial interaction that would sometimes justify minimum contacts jurisdiction, at least in theory. For example, Iran made several purchases of military hardware in the United States, see Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979), appeal docketed, Nos. 79-1784 & 79-2529 (3d Cir. June 18, 1979), which might be enough to justify general jurisdiction over the Iranian government. See, e.g., American Continental Import Agency v. Superior Court, 216 Cal. App. 2d 317, 30 Cal. Rptr. 654 (1963). See also National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 637 (S.D.N.Y. 1978), aff'd, 597 F.2d 314 (2d Cir. 1979) (under “doing business” test, many, if not most, foreign nations would have been amenable to suit in New York due to its predominance as an international commercial center).

141. The majority rule is that state courts may, consistent with due process, exercise jurisdiction over non-United States corporations “doing business” in the forum even though the cause of action arises outside the forum. See Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F.2d 231 (9th Cir. 1969); Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41, cert. denied, 389 U.S. 923 (1967); Cose v. Volkswagenwerk Aktiengesellschaft, 88 Wash. 2d 50, 558 P.2d 764 (1977). There is, however, a tendency for courts to apply the “doing business” test very strictly where the defendant is not a citizen of the United States. E.g., H. Ray Baker, Inc. v. Associated Banking Corp., 592 F.2d 550 (9th Cir. 1979). Moreover, when the defendant is a foreign person or corporation and the cause of action arises outside the United States, dismissal on grounds of forum non conveniens is often an appropriate way to avoid procedural unfairness. See, e.g., Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980).


143. See Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981); Carl, supra note 8, at 1062 (United States courts should structure the due process guidelines
national consensus may be emerging against recognizing jurisdiction over foreign entities based solely on their doing business in the forum state.144 As a matter of self-interest, the United States should be wary of exercising jurisdiction more expansively than is suggested by international consensus.145

Aside from the policy considerations developed above, jurisdiction over a foreign state itself based solely on unrelated contacts with the forum disregards the underlying theoretical premise of minimum contacts analysis in the international context.146 The due process rules for suits against nonresidents have their roots in territorial sovereignty. One state can assert jurisdiction over citizens of another based on contacts related to the claim because, as a matter of the first state's sovereignty, it must be permitted to regulate the conduct of "outsiders" when their activities come within the state's territorial jurisdiction. Jurisdiction based upon contacts unrelated to the claim that are "substantial and continuous," however, permits the state to ad-

under the FSIA to respect the perspectives of other states as to what constitutes an acceptable basis for jurisdiction).

144. The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Criminal Matters provides that a foreign judgment may be enforced against a foreign defendant having a commercial "establishment or branch office" in the state of jurisdiction only if the original cause of action arose out of business transacted by such "establishment or branch office." The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Criminal Matters, art. 10(2) (Apr. 26, 1966), reprinted in 5 INT'L LEGAL M'LS. 636, 637 (1966).

Section 5(a) of the Uniform Foreign-Money Judgments Recognition Act permits enforcement of a foreign country's judgment when jurisdiction is based on the defendant's doing business in that state, but only if the cause of action arose "out of business done by the defendant through that office in the foreign country." Uniform Foreign-Money Judgments Recognition Act § 5(a)(5), reprinted in 13 UNIFORM L: ANN. 417, 425 (1980). See Carl, supra note 8, at 1061 (trend in international treaties is against recognition of "doing business" jurisdiction over foreign defendants).


Additionally, the United States' position as a center of trade and finance could be seriously undermined if its courts are perceived to assert jurisdiction over state instrumentalities based on general contacts. See Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981); notes 220-21 and accompanying text infra. In the course of the Iranian Assets Litigation, Deputy Secretary of Treasury Carswell warned that expansive jurisdictional decisions "could affect the perceptions of any government with financial holdings in the United States, and, indeed, the status of U.S. Government assets abroad." Letter of Robert Carswell to the Attorney General (June 12, 1980) (on file at Harv. Int'l L. Library).

146. Note, supra 8, at 439-40; see Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266 (9th Cir. 1981); Kramer Motors, Inc. v. British Leyland, Inc., 628 F.2d 1175, 1178 (9th Cir. 1980), cert. denied, 101 S. Ct. 785 (1981).
judicate lawsuits against nonresidents because they have become "insiders," who are generally subject to the state's sovereignty. Independent states, however, do not give up their inherent right to regulate their internal affairs just by conducting activities outside their borders; at no point do they ever become "insiders" subject to another state's general sovereignty. Although foreign states may do business in the forum state, and can be sued for causes of action that arise from such business, there can be no presumption that they have subjected themselves generally to the forum's sovereignty. For this reason, the sovereign status of a foreign state defendant provides a powerful argument against the assertion of jurisdiction based on general contacts.

Based on the underlying due process policies of the minimum contacts requirement, a court's fairness analysis in suits against foreign states should focus on three inquiries. First, has the plaintiff alleged or established an act committed in the forum by either the foreign state or an agent acting under the direction of the foreign state? Second, is the act a purposeful, substantial, and commercial contact with the forum? Third, is the contact upon which jurisdiction is based


148. One underlying basis for the due process minimum contacts requirement is the constitutional system of federalism; states must respect the limits of their jurisdiction and not infringe on the sovereignty of other states. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980). As a corollary of this precept, states may only be sued in the courts of their sister states for their activities in those states. Hall v. University of Nevada, 8 Cal. 3d 522, 503 P.2d 1363, 105 Cal. Rptr. 555 (1972), cert. denied, 414 U.S. 820 (1973); Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980). On the other hand, there is no instance in which a state of the United States has been sued in the courts of a sister state based on contacts unrelated to the cause of action. Because similar fairness considerations exist when a foreign state (a member of the society of nations) is sued in the United States (also a member of the society of nations), see Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 n.37 (2d Cir. 1981), the foreign state should only be sued for activities it has conducted in the United States.

149. The FSIA reflects this principle by establishing in section 1330(b) a "[f]ederal long-arm statute over foreign states," without creating a federal analogue to state "doing business" statutes. FSIA HOUSE REPORT, supra note 16, at 13, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6612. "The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision. . . . Significantly, each of the immunity provisions in the bill, sections 1605-1607, requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction." Id., reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6612.

The European Convention codifies this same principle. See European Convention, supra note 16. A foreign state loses immunity only when the cause of action arises out of its "private" acts that purposefully invoke the laws and privileges of the forum — instituting proceedings in the forum, id. art. 1; submitting to the forum's jurisdiction, id. arts. 2-3; entering into contractual or commercial activities in the forum, id. arts. 4-8; claiming rights to immovable property in the forum, id. arts. 9-10; committing torts in the forum, id. art. 11; or agreeing to arbitrate in the forum, id. art. 12. The United Kingdom took a similar approach. See generally U.K. Immunity Act, supra note 16.
related to plaintiff's claim for relief? Unless these three questions are answered affirmatively, a United States court should not assert jurisdiction over the state itself.

The initial inquiry simply asks whether the foreign state, as opposed to one of its instrumentalities, is justifiably included as a party defendant. The courts in several of the Iranian Nationalization Cases erred in permitting suits against Iran for the torts and contract breaches of its independent trading companies, based on general allegations that all Iranian entities were alter egos of the government. Fairness requires that courts respect the independent juridical nature of foreign states and their instrumentalities unless substantial proof is presented to overcome the presumption of independence. The common law respects separate corporate forms except where a subsidiary is manipulated by its parent as though the two were a single firm. To exercise jurisdiction over a foreign state based upon the contacts of a state instrumentality and not those of the state itself is thus fundamentally unfair under principles of United States law. Only the state instrumentality may be sued in such cases, a principle recognized in the FSIA as well as the pre-1976 sovereign immunity common law. On the other hand, a foreign state can be sued for the acts


153. United States law clearly provides that where an independent corporate form has been created and actual operations of the parent and the subsidiary are separate, the corporate veil will not be pierced. Walker v. Newgent, 583 F.2d 163, 167 (5th Cir. 1978), cert. denied, 441 U.S. 906 (1979); Steven v. Roscoe Turner Aeronautical Corp., 324 F.2d 157, 161 (7th Cir. 1963); Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150, 1160-61 (N.D. Tex. 1979); Ford Motor Co. v. United States, 9 F. Supp. 590, 600 (Ct. Cl.), cert. denied, 296 U.S. 636 (1935); Ernst-Theodore Arndt, 52 Dec. Comp. Gen. 145 (Sept. 21, 1972); see W. Fletcher, supra note 152, § 43, at 209 ("ownership of all the stock of a corporation does not, however, operate as a merger of the two corporations into a single entity").

154. Kahale & Vega, supra note 8, at 223 n.57; see Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913, 918-19 (2d Cir. 1981) (only if the instrumentality played a "key role" in the action for which the foreign state is being sued will it be deemed an alter ego); National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 673 n.26 (S.D.N.Y. 1978), aff'd on other grounds, 597 F.2d 314 (2d Cir. 1979); C. Czarnekow, Ltd. v. Centrala Handlu Zagranicznego Rolimpex, [1978] 3 W.L.R. 274 (H.L.) (where state instrumentality is independently organized and administered, it will not be considered an "alter ego" of foreign state); cf. FSIA HOUSE REPORT, supra note 16, at 29-30, reprinted in [1976] U.S. Code Cong. & Ad. News 6604, 6628-29 (FSIA presumes that the individuality of foreign juridical entities will be respected).
of a state instrumentality in the United States when the instrumentality has acted at the direction of the foreign state as its agent.\textsuperscript{155} Again, however, this is a determination of fact, which should not be inferred without adequate proof.\textsuperscript{156}

If the court finds that the foreign state is being sued for its own acts in the United States (or for foreign acts having a direct effect there), the court must then determine whether the acts are purposeful, substantial, and commercial. An act will be deemed purposeful if the foreign state knowingly brings itself under the protection and regulation of United States law.\textsuperscript{157} Thus, incidental contacts with the United States (e.g., the encouragement of United States firms to invest in the foreign state) are insufficient because the foreign state is not availing itself of the protection of United States laws.\textsuperscript{158} Likewise, a de minimis contact with the United States, such as a single visit in connection with contract negotiations or an isolated mailing, cannot alone satisfy minimum contacts requirements.\textsuperscript{159} Finally, political


A cognate line of cases involved lawsuits by Cuba's central bank to obtain assets of nationalized firms in the United States; defendants counterclaimed for the value of assets nationalized by Cuba. The Second Circuit held that the "real party in interest as plaintiff was Cuba (which had nationalized the banking industry and transferred it to the central bank) and therefore that the counterclaims were valid. Banco Nacional de Cuba v. First Nat'l City Bank, 478 F.2d 191, 193-94 (2d Cir. 1973); see Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981) (reaffirming Citibank alter ego holding).

\textsuperscript{156} See Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913 (2d Cir. 1981) (courts should not lightly pierce corporate veil or impute agency relationships); Gilson v. Republic of Ireland, 517 F. Supp. 477 (D.D.C. 1981) (refusing to impute agency and alter ego relationships absent specific and concrete proof by plaintiffs); Castro v. Saudi Arabia, 510 F. Supp. 309, 312-13 (W.D. Tex. 1980) (foreign state not liable for acts of employees when they are acting outside the scope of their employment); Electronic Data Sys. Corp. Iran v. Social Security Organization of the Gov't of Iran, No. CA3-79-218-F (N.D. Tex., May 2 1980). (Iran was responsible for the breach of a contract, based on the representations of Iran's own Ministry of Health that the state trading company entered into the agreement at the direction of the Iranian government); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 390-92 (S.D.N.Y. 1978) ("bland assertion" of agency or conspiracy, without supporting facts, will not support jurisdiction over foreign defendant).


\textsuperscript{158} See Gilson v. Republic or Ireland, 517 F. Supp. 477 (D.D.C. 1981) (communications by mail and telex to induce a United States firm to invest in Ireland do not satisfy the due process requirement of minimum contacts with the forum); East European Domestic Int'l Sales Corp. v. Terra, 467 F. Supp. 383 (S.D.N.Y.), aff'd mem., 610 F.2d 806 (2d Cir. 1979).

\textsuperscript{159} See Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247 (9th Cir. 1980) (mailings, telephone calls, and other international contacts do not qualify as purposeful contacts); Waukesha Engine Div'n, Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo, 485 F. Supp. 490 (E.D. Wis. 1980) (no personal jurisdiction where contacts of Mexican bank with Wisconsin were limited to an inspection visit by bank officers and a contract for production of engines in Wisconsin but to be delivered elsewhere); Bueno v. La Compania Peruana de Radio-Difusion, S.A., 375 A.2d 6 (D.C. 1977) (delivery
contacts, such as a foreign state's diplomatic presence in the United States, cannot be used to establish minimum jurisdictional contacts, since the foreign state has every expectation that political and diplomatic actions in the United States will not subject it to suit. On the other hand, a single act can satisfy the due process test. Actions such as agreeing to perform part or all of a contractual obligation in the United States or to arbitrate disputes under United States law would surely be purposeful, since the foreign state is consciously invoking the protection of United States law; substantial, since such agreement would not be casually made; and commercial, since the contacts relate directly to contractual undertakings.

The final inquiry is whether the contact within the forum relates to the cause of action: Is the purposeful, substantial, and commercial act of the foreign state in the United States (or having a direct effect there) an essential fact which plaintiff needs to assert and prove to prevail on his claim for relief? If the jurisdictional contact is not central to the cause of action against the foreign state, an assertion of personal jurisdiction would be unreasonable, since there is no general submission to the sovereignty of the forum state.

Plaintiffs have a natural tendency to try to use unrelated contacts in their attempts to establish personal jurisdiction over a foreign state. Courts should focus on the cause of action itself, however, and disregard other contacts in deciding whether or not to assert jurisdiction. The Ninth Circuit in Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, for instance, held that as a matter of due process a state instrumentality could not be sued for breach of a contract entered into and performed outside the United States, even of contract in the District of Columbia was not sufficient to meet due process requirements for jurisdiction; cf. Republic Int'l Corp. v. Amoco Eng'rs, Inc., 516 F.2d 161 (9th Cir. 1975) (foreign state's dispatch of engineers to California for several months in connection with the contract at suit gave court jurisdiction). See Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981, 989 (N.D. Ill. 1980); Paterson, Zochonis (U.K.) Ltd. v. Compania United Arrow, S.A., 493 F. Supp. 621, 624 (S.D.N.Y. 1980); cf. Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc., 355 A.2d 808 (D.C. 1976) (visits by personnel of nonresident defendant to consult with government officials in the District of Columbia may not be basis for in personam jurisdiction).


163. See notes 147-49 and accompanying text supra.

164. 614 F.2d 1247 (9th Cir. 1980).
though the instrumentality had entered into other contracts with the plaintiff which did have a connection with the forum. As a further example, if a foreign state nationalizes a domestic corporation that has contracts with United States companies, and then transfers the business operations to an independent state instrumentality, which break the contracts, United States courts have no personal jurisdiction over the foreign state in the breach of contract suit. This result is proper because the contract breach is subsequent and unrelated to the nationalization and therefore may not provide a basis for personal jurisdiction over the state itself. Of course, the United States company might be able to sue the state instrumentality in the United States for breach of contract if the broken contract called for payment or performance in the United States; in that instance, the contact with the forum relates directly to the cause of action.

C. AVOIDANCE OF POLITICAL QUESTIONS

The act of state, implied cause of action, and pre-1976 sovereign immunity case law suggest that there is a broad range of controversies involving foreign states that should be left to the Executive Branch without interference from the judiciary. The constitutional underpinning for this policy is the political question doctrine, which is grounded in the Constitution's scheme of separation powers.


168. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). In holding that the scope of the act of state doctrine is a matter of federal, and not state, law, the Court in Sabbatino reasoned that, although "[t]he text of the Constitution does not require the act of state doctrine," the doctrine does, nonetheless, "have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers." Id. at 423; see First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 786-93 (1972) (Brennan, J., dissenting) (political question considerations are basis of act of state doctrine); IAM v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981) (the act of state doctrine is similar to the political question doctrine in domestic law, requiring courts to defer to the Legislative and Executive branches when those branches are better equipped to resolve a politically sensitive question); Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo, 577 F.2d 1196, 1200-01 & n.4 (5th Cir. 1978), cert. denied, 442 U.S. 928 (1979) (act of state doctrine is constitutionally
judiciary has long deferred to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," and has declined or postponed jurisdiction when adjudication might have had a detrimental effect on the foreign affairs efforts of the Executive Branch. A pragmatic basis for this deference is that foreign affairs matters requiring the United States to respond quickly and univocally, or to engage in secret negotiations over time, are likely to be impaired by judicial pronouncements which condemn the foreign state or are contrary to positions taken by the Executive.

Of course, almost any suit against a foreign state could arguably have some potential foreign affairs repercussion, and the FSIA represents a policy decision that the courts should have jurisdiction in most such suits. But the political question doctrine does not require abstention in all cases touching upon foreign affairs. As the Supreme Court indicated in Baker v. Carr, the particular question must be examined "in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." The act of state and implied cause of action cases suggest a three-pronged inquiry in determining whether courts should decline or defer jurisdiction out of concern for the potential impact on foreign affairs. First, has diplomacy by the Executive Branch been the traditional recourse by which injured United States entities seek redress? Second, can United States courts derive objective standards from either international law or applicable treaties in a

compelled by the concept of separation of powers and placement of plenary foreign relations powers in the Executive); United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 257 (N.M. 1980).


171. See Haig v. Agee, 101 S. Ct. 2766, 2774 (1981) (President must be accorded broad foreign affairs powers because of the explosive nature of foreign relations and his superior access to information, especially where Congressional silence connotes acquiescence to Presidential actions).


173. Id. at 211-12; see id. at 217 (six factors for deciding whether a political question is presented).

demonstrably fair and impartial manner? Finally, are there any special circumstances that should preclude adjudication of the issues presented? Unlike the international comity and fairness inquiries, the political question inquiry entails a balancing of the various factors.

The first balancing factor is usually the most important in the political question analysis. If the Executive Branch has a consistent record of resolving certain types of controversies, adjudication of such controversies would infringe on an area committed to the Executive Branch and could disrupt efforts to reach a diplomatic solution. Traditionally, controversies arising out of foreign nationalizations have been addressed through diplomatic efforts. "Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly," and these efforts have resulted in a number of lump-sum settlements over the years. Judicial resolution of the issues of just compensation could well disrupt such diplomatic negotiations — either undermining the bargaining position of the United States with a conservative valuation or irritating the foreign state with a liberal valuation (or even a finding of liability). Other activities of foreign states generally left to the Executive Branch for resolution because they relate to sensitive internal politics of the foreign state are those regulated in the FCN treaties, such as discriminatory laws against United States business interests, violation of diplomatic and consular immunities, and restriction of travel and navigation within the foreign state.

The second balancing factor to be considered focuses on the existence or absence of judicially cognizable standards. Courts should not choose between competing rules of law in areas where the community of nations is itself polarized, since courts would then be performing a political function of selecting a norm rather than an adjudicative function of applying the law. The appearance of judicial objectivity and impartiality would be sacrificed in such a case. This concern is

177. The Treaty of Amity is typical of the FCN and other commercial treaties. The enforcement of these treaty guarantees is found in article XXI, which clearly contemplates that breaches of these guarantees should be redressed through executive negotiation. See notes 83–84 supra. See generally R. Wilson, United States Commercial Treaties and International Law (1960) (describing FCN treaty provisions and their history).
178. Baker v. Carr, 369 U.S. 186, 217 (1962); see id. at 267 (Frankfurter, J., dissenting) (the function of a court is to declare authoritative law with complete detachment and to abstain from injecting itself into the clash of forces in political controversies); IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981).
particularly relevant in foreign nationalization cases, since the question of the proper compensation standard has sharply divided the world community. The position of the United States that "prompt, adequate, and effective" compensation must be paid is now in fact the minority view in international law.\textsuperscript{180} Even that standard (which is codified in the FCN treaties) is fraught with ambiguities. In practice, compensation deemed to be "prompt" has been paid anywhere from five to thirty years after the takings in question,\textsuperscript{181} and the United States has recognized a mere fraction of the value of appropriated property as "adequate and effective" compensation.\textsuperscript{182}

In contrast, cases involving areas of international law where there is substantial consensus have been successfully addressed in domestic

\textsuperscript{179} Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (few issues in international law today are as divisive as the limitations on a state’s power to expropriate the property of aliens); see id. at 429–30 (strong divergence of opinion based upon differences of wealth and social ideology); \textit{Restatement (Second) of Foreign Relations Law of the United States} \S 185 (1965); Muller, \textit{Compensation for Nationalization: A North-South Dialogue}, 19 Colum. J. Transnat’l L. 35 (1981). \textit{But cf.} Banco Nacional de Cuba v. Farr, 383 F.2d 166, 183 (2d Cir. 1967), \textit{cert. denied}, 390 U.S. 956 (1968) (where nationalization is retaliatory in purpose, it is universally condemned in international law).


\textsuperscript{181} The \textit{Restatement (Second) of Foreign Relations Law} specifies that compensation be paid "with reasonable promptness, . . . as soon as is reasonable under the circumstances." \textit{Restatement (Second) of Foreign Relations Law of the United States} §§ 187, 189 (1965). One leading work suggests that "a period of 5 years would seem to be reasonably adequate in most cases." 1 R. LILICH & B. WESTON, supra note 176, at 210. The authors further note that, in actual practice, compensation is not paid for 20 years, on the average. \textit{Id.} at 211. \textit{See also} I. FOIGHEL, \textit{Nationalization: A Study in the Protection of Alien Property in International Law} 120–22 (1957); Metzger, \textit{Property in International Law}, 50 Va. L. Rev. 594, 603 (1964).

\textsuperscript{182} \textit{See} 1 R. LILICH & B. WESTON, supra note 176; Dawson & Weston, \textit{supra} note 180.
courts. For example, international law uniformly condemns torture by governmental authorities.\textsuperscript{183} Commercial and tort law are other areas where principles do not differ materially from state to state and generally may be objectively determined by courts.\textsuperscript{184} Finally, in those cases where the foreign state, through a contract provision or otherwise, has consented to the application of the law of another state, that law obviously provides the necessary objective standards.\textsuperscript{185}

The third balancing factor — special circumstances — is by definition ad hoc and therefore the most difficult to apply. In some instances, courts should defer or refuse jurisdiction so that the Executive Branch can pursue diplomatic initiatives without fear of possibly inconsistent or inflammatory judicial pronouncements. In several of the Iranian Nationalization Cases, for example, the courts imprudently entered attachments and judgments against Iran, in the face of Executive pleas for stays.\textsuperscript{186} The courts' reluctance to grant stays


\textsuperscript{184} Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (opinion of White, J.). In the plurality decision the Court stated:

\textit{There may be little codification or consensus as to the rules of international law concerning exercises of governmental powers, including military powers and expropriations, within a sovereign state's borders affecting the property or persons of aliens. However, more discernible rules of international law have emerged with regard to the commercial dealings of private parties in the international market.}

\textit{Id. at 704 (emphasis in the original).}

\textsuperscript{185} On the other hand, agreements between foreign states and corporations (especially concession agreements) often contain choice-of-law provisions that are not confined to the law of a particular state but refer to international law or general principles of law accepted by civilized nations to provide discernible international standards. \textit{See, e.g.,} B.P. Exploration Co. (Libya) v. Government of the Libyan Arab Republic, 53 I.L.R. 297 (1973) (Lagergren, arb.) (Libyan law applies insofar as it is consistent with general principles of law accepted by civilized nations).

in such cases was particularly objectionable given the Executive's plenary power to take every action necessary to obtain the release of United States nationals detained abroad. Thus, Executive settlement of normally nonsensitive cases can be justified when those cases are part of larger diplomatic tensions with a foreign state. On the other hand, if the Executive Branch indicates that a certain controversy will not have any impact upon United States foreign relations, this would be one factor weighing in favor of exercising jurisdiction, since such indication would tend to negate the foreign relations rationale for abstention.

III. APPLICATION OF THE FUNDAMENTAL POLICIES BEYOND THE IRANIAN NATIONALIZATION CASES

As Part I of this article shows, three procedural defenses, each based on fundamental policies of international and domestic law, should

negotiations with Iran, the district court's decision appears incorrect. See also National Airmotive Corp. v. Government & State of Iran, 499 F. Supp. 401 (D.D.C. 1980).

187. This was a classic instance in which the public interest required maximum deference to the Executive, since the negotiations with Iran required secrecy and the ability to respond quickly and decisively to new developments. The importance of the Executive in resolving such crises was recognized by Congress in 1868, when it vested the President with the authority to "use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of any United States citizen who "has been unjustly deprived of his liberty by or under the authority of any foreign government." 22 U.S.C. § 1732 (1976). Proponents of the law stressed the need to give the President a wide range of alternatives in dealing with a hostage situation. See Dames & Moore v. Regan, 101 S. Ct. 2972, 2985–86 (1981) (Hostage Act ratifies President's broad power to suspend lawsuits against Iran in order to procure the return of hostages).


189. In Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam), the Second Circuit held that the act of state doctrine was inappropriate where the Department of State conveyed its view that the case would have no adverse foreign relations ramifications if it were adjudicated. In First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1973), three members of the Supreme Court accepted the "Bernstein Exception," id. at 765–68 (opinion of Rehnquist, J., joined by Burger, C.J., and White, J.). Justice Powell, concurring separately, criticized the exception but questioned the act of state doctrine enunciated in Sabbatino. Id. at 773 (Powell, J., concurring in the judgment). The other five members of the Court rejected the Bernstein Exception. See id. at 772–73 (Douglas, J., concurring in the result); id. at 782–93 (Brennan, J., joined by Stewart, Marshall & Blackmun, JJ., dissenting). Although the strict Bernstein Exception has not commanded a majority on the Supreme Court and has been convincingly criticized as inconsistent with judicial independence, e.g., Hunt v. Coastal States Gas Prod. Co., 570 S.W.2d 503, 507 (Tex. Civ. App. 1978), aff'd, 583 S.W.2d 322 (Tex.), cert. denied, 444 U.S. 992 (1979); Comment, supra note 87, at 688–91, a statement from the Department of State that decision of a case will not have foreign affairs ramifications is a factor that the court should consider in the Sabbatino balancing test. Cf. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (opinion of White, J.) (Department of State submitted letter indicating adjudication of dispute would have no adverse foreign affairs effect; Court decided not to apply act of state doctrine, but for other reasons).
have precluded the courts from reaching the merits in the Iranian Nationalization Cases. Yet, after taking jurisdiction based on a mechanical application of the FSIA, several United States courts proceeded to issue attachments and preliminary injunctions and, in one case, even to decide the lawfulness of Iran’s nationalization of its domestic industries.

This questionable exercise of jurisdiction demonstrates both the ambiguity of the FSIA and the need for courts to interpret the statute in light of the common-law policies described in Part II. An interpretative process that focuses on such considerations is justified by the general proposition that the common law should guide statutory interpretation when not inconsistent with legislative intent.

The most important substantive ambiguity in the FSIA results from its combination of subject-matter and personal jurisdiction. Case law prior to the FSIA distinguished between the existence of personal and subject-matter jurisdiction over foreign states. By combining sovereign immunity and minimum contacts requirements in the various exceptions, the FSIA has sometimes created confusion. For example, the waiver exception seems to permit personal jurisdiction over a cause of action where the foreign state has no contacts whatsoever with the United States; this result has been criticized as contrary to due process precepts.

A final source of ambiguity is the FSIA’s terminology and lack of adequate definitions. Thus the crucial term “commercial activity” is defined tautologically as “a regular course of commercial conduct or a particular commercial transaction.” Other terms have also produced considerable litigation over what Congress meant.

190. The FSIA has either failed to resolve or has itself introduced a number of procedural, jurisdictional, and definitional uncertainties. Procedural ambiguities include: (1) whether a foreign national can sue in United States courts under the FSIA, see Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320 (2d Cir. 1981) (no); Mashayekhi v. Iran, 515 F. Supp. 41 (D.D.C. 1981) (yes, under some circumstances); (2) whether the FSIA is the exclusive source of federal jurisdiction against foreign states, see Ruggiero v. Compania Peruana de Vapores “Inca Capac Yupanqui,” 659 F.2d 872, 876–78 (2d Cir. 1981) (yes); Rex v. Compania Peruana de Vapores, S.A., 493 F. Supp. 459 (E.D. Pa. 1980), rev’d, Nos. 80-2335 & 80-2336 (3d Cir. Sept. 17, 1981) (no); (3) whether plaintiffs have a right to jury trial in actions against foreign states, see Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981) (no right to jury trials in FSIA cases); (4) whether a foreign state’s assets can be attached absent explicit waivers of immunity, see E-Systems, Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980) (no); Behring Int’l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 (D.N.J. 1979), appeal docketed, Nos. 79-1784 & 79-2529 (3d Cir. June 18, 1979) (yes); and (5) what procedures and burden of proof shall govern the foreign state’s assertion of an immunity defense, see Jet Time Serv., Inc. v. M/V Marsa El Hariga, 462 F. Supp. 1165 (D. Md. 1978).

191. "Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except
case of the FSIA, the fundamental policies (international comity, minimum contacts, judicial avoidance of political questions) are not only consistent with legislative goals, but are in fact incorporated into the standards imposed by Congress. Thus, while the courts must start with the language of the FSIA in assessing whether a foreign state is subject to suit, their analysis is not complete until these underlying principles have been considered.

Fortunately, outside the context of the Iranian nationalizations, the courts have generally employed this mode of analysis. In several instances, courts have even disregarded the apparent meaning of the statutory language or have interpreted it somewhat differently than the legislative history might suggest in order to follow one or more of the common-law policies. For example, the courts have narrowly construed the "implicit waiver" standard of the first exception and have refused to hold that some of the waivers mentioned in the legislative history are appropriate at all. Courts have also been conservative in interpreting the broad language of the second and

when a statutory purpose to the contrary is evident." Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952); see Choctaw & Chickasaw Nations v. Board of County Comm'rs, 361 F.2d 932, 935 (10th Cir. 1966); 2A SUTHERLAND STATUTORY CONSTRUCTION § 53.02 at 344 (4th ed. C. Sands ed. 1973).

192. See notes 20, 24 & 88 supra.


third exceptions. Moreover, even though one purpose of the FSIA was to depoliticize sovereign immunity decisions, courts have continued to recognize the "political" act of state doctrine as a means of avoiding jurisdiction over a foreign state. The judiciary's refusal to accept a mechanical reading of the FSIA in these cases suggests the value of a policy-oriented approach to suits against foreign states: it helps break up the separate questions that are intermixed or ignored in the statute and assists courts in reaching results consistent with broader principles of United States constitutional and common law.

In deciding whether to exercise jurisdiction, then, a court should begin its inquiry with a critical examination of the language of the FSIA, paying particular attention to the specific exceptions upon which the plaintiff relies. The inquiry, however, should not end here. In conducting this examination, due weight should be given to the underlying common law and the fundamental policies discussed above. If the cause of action arises out of purely governmental acts, thus indicating that as a matter of international comity the foreign state should be immune from suit, the court should dismiss the suit for lack of subject-matter jurisdiction. If the suit arises from activities not attributable to the foreign state or conducted by the state wholly outside the territory of the United States, then minimum contacts are lacking, and the court should dismiss the suit for lack of personal jurisdiction. If the political question considerations are particularly

195. 28 U.S.C. § 1605(a)(3) (1976). Only one reported decision has applied the third exception. See De Sánchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 910-12 (E.D. La. 1981). While the wording of the exception is potentially broad (especially that of the second clause), courts have indicated that the exception should only be applied to situations in which the foreign state tries to expropriate goods in the United States, a limitation supported by restrictive theory and act of state case law. Id. at 910 n.10; Carey v. National Oil Corp., 453 F. Supp. 1097, 1102 n.4 (S.D.N.Y. 1978), aff'd per curiam, 592 F.2d 673 (2d Cir. 1979). Moreover, the language of the third exception is similar to that of the Second Hickenlooper Amendment, 22 U.S.C. § 2370(e)(2) (1976), which limits application of the act of state doctrine. See note 106 and accompanying text supra. The Second Hickenlooper Amendment has also been confined to cases where confiscated goods are found in the United States, see Banco Nacional de Cuba v. First Nat'l City Bank, 431 F.2d 394 (2d Cir. 1970), rev'd on other grounds, 406 U.S. 759 (1972); cases cited in note 107 supra, notwithstanding legislative history suggesting a broader reading. See S. Rep. No. 1188, Pt. 1, 88th Cong., 2d Sess. 24 (1964); Hunt v. Coastal States Gas Prod. Co., 583 S.W.2d 322, 329-37 (Tex.) (Steakley, J., dissenting), cert. denied, 444 U.S. 992 (1979).


199. Id. § 1330(b). This section establishes personal jurisdiction over foreign states in all cases where there is no immunity defense and subject-matter jurisdiction exists under section
strong and the analyses focusing on the other two policies are indeterminate, the court should either abstain under the act of state doctrine or find the cause of action inappropriate for judicial treatment.

While this analytical framework is suitable for all civil cases against foreign states and their instrumentalities, this Part demonstrates its application in three contexts involving different permutations of the nationalization paradigm. The three situations which will be examined are (1) suits against a foreign state's central bank arising out of nationalizations or breaches of contract by the state and its instrumentalities, with emphasis on the suits against Iran's Bank Markazi; (2) suits alleging that the foreign state violated a concession agreement when it nationalized a firm owned in whole or in part by the United States shareholders and located and doing business in the foreign state; and (3) suits involving a foreign state's attempt to nationalize property either located in the United States or transferred to a state instrumentality doing business in the United States.

A. SUITS AGAINST BANK MARKAZI IRAN

Several of the lawsuits against Iran or Iranian entities named as a defendant Bank Markazi Iran, an independent government instrumentality which is responsible for the formulation and implementation of the monetary and credit policies of Iran. Plaintiffs made

---

1330(a). Such an assertion of personal jurisdiction, however, should still be tested against the demands of due process. See Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir. 1981). 200. This was the approach taken by the Ninth Circuit in IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981). 201. See generally note supra. 202. Affidavit of Ali Manavi-Rad (Director General of the International and Exchange Control of Bank Markazi Iran) submitted by Bank Markazi, New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980), remanded, 646 F.2d 779 (2d Cir. 1981) (on file at Harv. Int'l L.J. Library) [hereinafter cited as Manavi-Rad Affidavit]. According to the affidavit (which was never rebutted in the litigation), the Bank (i) enjoys a separate corporate personality and legal existence, id. at ¶ 19; (ii) is not governed by rules applicable to government employees, id. at ¶ 20; and (iii) has its own sources of income and does not receive funds from the state, id. at ¶ 21. See Affidavit of Thomas O. Waage (expert in central banking operations) submitted by Bank Markazi, New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120; 28 U.S.C. § 1603(b) (1976) (state instrumentalities presumed to be independent legal entities). See also Krol v. DeBank Indonesia, [1959] N.J. No. 164 (Hof Amsterdam 1958). 203. The Monetary & Banking Law of Iran provides that "Bank Markazi Iran shall be responsible for the formulation and implementation of the monetary and credit policies of Iran with due regard to the general economic policy of the country." Monetary & Banking Law of Iran art. 10(a) (July 9, 1972) (on file at Harv. Int'l L.J. Library) [hereinafter cited as MBLI]. The Bank's specific duties under the MBLI include (a) issuance of currency, (b) supervision of Iranian banks, (c) regulating foreign exchange transactions, (d) controlling gold transactions, and (e) controlling the outflow and repatriation of Iranian currency. Id. arts. 11–12. Pursuant to regulations established under MBLI articles 11 and 42, Bank Markazi is the
at least two arguments in favor of jurisdiction over the Bank. Some plaintiffs claimed that Bank Markazi was subject to the FSIA's second exception to immunity on the ground that it performed commercial activities in the United States, namely, regulating currency exchange transactions and refusing to repatriate assets nationalized by Iran. Most plaintiffs suing the Bank relied on the first exception, arguing either that the Treaty of Amity waived the Bank's immunity (because it was an "enterprise") or that the Bank was the "alter ego" of "enterprises" whose immunity had been waived under the treaty. Although no final judgments were issued against Bank Markazi, several courts issued prejudgment attachments and preliminary injunctions restraining movement of the Bank's assets. The policies discussed above, however, indicate that even these exercises of jurisdiction were unwarranted and politically unwise.

To begin with, Bank Markazi should have been immune from any action or claim arising out of its control over currency transfers and foreign exchange reserves. Courts have uniformly held that a state instrumentality's refusal to repatriate nationalized assets is a public act, just as the nationalization itself is a public act; the instrumentality in such cases is protected by the governmental immunity of the state. Moreover, even where the underlying controversy was not

only Iranian entity which may maintain accounts of foreign currency. Manavi-Rad Affidavit, supra, note 202, at ¶ 8. Under these regulations, another Iranian entity which enters into a purchase contract with a United States corporation must obtain the cooperation of Bank Markazi. The Exchange Transaction Department of the Bank would debit the rial account of the Iranian entity and release dollars from the Bank's reserves in the United States to the corporation. id. at ¶ 10.

204. See, e.g., Complaint at ¶ 12, Pfizer, Inc. v. Islamic Republic of Iran, No. 80-2791 (D.D.C., filed Oct. 30, 1980).

205. See, e.g., Complaint at ¶¶ 11–12, Chase Manhattan Bank v. Iran, No. 79-6644 (TPG) (S.D.N.Y., filed Dec. 4, 1979). Actions brought in New York and based upon alter ego arguments are collected and cited in Brief for Bank Markazi Iran at 172, New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980), remanded, 646 F.2d 779 (2d Cir. 1981) (on file at Harv. Int'l L.J. Library). Of the 23 cases brought against Bank Markazi in the Southern District of New York, at least 16 asserted no acts of the Bank and claimed, instead, that the Bank was the alter ego of other Iranian entities. In six cases, plaintiffs sued Bank Markazi for failing to make a transfer or payment demanded by plaintiffs from other Iranian entities allegedly in breach of their contractual obligations. id. at 173.


207. See, e.g., Pauer v. Repubblica popolare ungherese, 80 Foro It. I 240 (Corte cass. 1956) (in enacting legislation for the nationalization of Hungarian banks, Hungary and its instrumentality had acted in a sovereign capacity, and thus Italian courts were not entitled to exercise jurisdiction); Regno di Grecia v. Gamer, 80 Foro It. I 1964 (Corte cass. 1957) (Greece
a nationalization, the plaintiffs' claims against the Bank were based on its governmental regulation of currency and foreign exchange reserves. Such regulation is expressly authorized by the Monetary and Banking Law of Iran, an activity long recognized as public in nature, and is based on the generalized political decision of the sovereign to centralize currency transactions and reserve maintenance.

Indeed, the FCN immunity waiver clause implicitly recognizes this view, thus rendering any waiver by treaty inapplicable against the Bank. The Contracting Parties did not consider central state banks to be "enterprises" for which immunity is waived unless they are sued for their commercial actions within the forum state. And the negotiating history indicates that a central bank's management of the foreign state's monetary and fiscal policies is a governmental, and not commercial, activity. In short, Bank Markazi should have been immune from — and federal courts had no subject-matter jurisdiction over — lawsuits based either on its role in a nationalization or on its routine governmental functions.
In other lawsuits brought against Bank Markazi, plaintiffs’ unsubstantiated assertions that the Bank was an alter ego of other Iranian entities presented an even weaker basis for jurisdiction. Iran created the Bank as a juridical entity separate and distinct from the state and its other instrumentalities, and its decision regarding the status of Bank Markazi should be respected as the act of a foreign state. Moreover, United States courts presume that jurisdiction over one corporate entity cannot be premised upon the acts of a separate entity, unless the latter is controlled by or acting as the agent for the former. The minimum contacts requirement of the due process clause would be circumvented if this presumption could be overcome by the mere assertion that one entity is the alter ego of the other. Finally, expansive application of the alter ego doctrine against foreign state instrumentalities raises the possibility of political repercussions. Failure of United States courts to recognize the separate juridical identities of foreign state instrumentalities, particularly banks, might encourage foreign courts to retaliate by disregarding the juridical distinctions.


213. See note 202 and accompanying text supra.

214. Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 903, 918 (2d Cir. 1981) (if foreign state instrumentality has been created as a separate and distinct juridical entity under the laws of the state that owns it, the court will normally respect its independent identity); see C. Czarnikow, Ltd. v. Centrala Handlu Zagranicznego Rolimpex, [1978] 3 W.L.R. 274 (H.L.); cf. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1301 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981) (contract between plaintiff and Nigeria cannot be basis for jurisdiction over central bank in letter of credit suit).

215. Consolidated Rock Prods. Co. v. DuBois, 312 U.S. 510, 524 (1941) (parent entity liable for the acts of its wholly owned subsidiary only upon a factual finding that the parent directly intervenes in the subsidiary's management so as to treat it as one of the parent's own departments); Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 903, 918 (2d Cir. 1981) (courts will “ignore the statutory distinction between the state and its instrumentality when the subject matter of the counterclaim assertible against the state is state conduct in which the instrumentality had a key role”). See notes 152 & 154 supra. Courts have held that foreign state central banks are proper parties in controversies against the foreign states when the cause of action arises out of a nationalization in which the bank assisted and received assets, see Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Banco Nacional de Cuba v. First Nat'l City Bank, 478 F.2d 191, 193–94 (2d Cir. 1973), or when the central bank has acted as the commercial agent of the foreign state in negotiation and/or payment of contracts. See Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314–15 (2d Cir. 1981). Since the plaintiffs failed to assert that Bank Markazi played a role in the nationalizations or acted as a commercial agent, it should not have been subject to personal jurisdiction as an alter ego.

216. Rush v. Savchuk, 444 U.S. 320 (1980). Here, the Court stated: "The assertion of jurisdiction over Rush based solely on the activities of [his insurer] . . . is plainly unconstitutional. . . . The requirements of International Shoe, however, must be met as to each defendant over whom a state court exercises jurisdiction." Id. at 331–32; see National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 637 n.26 (S.D.N.Y. 1978), aff'd on other grounds, 597 F.2d 314 (2d Cir. 1979); note 72 supra.
among United States firms, and might discourage foreign financial transactions in the United States. In sum, those actions which failed to assert any contacts of the Bank with either the forum or the litigation should have been promptly dismissed for lack of personal jurisdiction over Bank Markazi.

Even if United States courts could lawfully have assumed personal and subject-matter jurisdiction in cases against Bank Markazi, they should have refrained from attaching its assets, because of the possible adverse diplomatic and economic ramifications. Since foreign governments presently keep substantial sums of money in the United States in the accounts of their central banks, attachments of those funds could easily generate friction between the foreign states and the United States. As Congress recognized in providing special immunity from attachment to central state banks in the FSIA, "deposit of foreign funds in the United States might be discouraged" and "execution against the reserves of foreign states could cause significant foreign relations problems," if broadly sweeping attachments were allowed.

217. See FSIA HOUSE REPORT, supra note 16, at 29-30, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6628-29 ("Section 1610(b) [of the FSIA] will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another unrelated agency or instrumentality. . . . If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.").


219. Thus, Congress found that, in general:

Such attachments can also give rise to serious friction in United States' foreign relations.

In some cases, plaintiffs obtain numerous attachments over a variety of government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

220. See 28 U.S.C. § 1611(b)(1) (1976) (property of a central bank held for its own account shall be immune from attachment unless there is an explicit waiver).

221. FSIA HOUSE REPORT, supra note 16, at 31, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6630. In the Iranian cases the Executive Branch said: "court decisions on
Thus, except where a central bank's own commercial activity is concerned and only its commercial funds are attached, the political question doctrine, as reinforced by the FSIA, strongly militates against attachment of the assets of foreign central banks.

**B. NATIONALIZATION IN VIOLATION OF A CONCESSION AGREEMENT**

The standard concession agreement is a contract entered into by a foreign state or its instrumentalities and a business entity, usually executed and performed within the territory of the foreign state. The foreign state will typically grant the enterprise exclusive rights to exploit certain natural resources or to develop a certain commercial sector. In return, the business entity guarantees that it will create and maintain certain productive facilities and share the revenues from the facilities with the foreign state. In some instances, the foreign state may also agree to refrain from nationalizing the enterprise without the agreement of the contracting parties. At least one scholar has argued that the foreign state's violation of such an agreement should be grounds for a lawsuit under the FSIA's commercial activity exception, contending that the nationalization is a breach of contract, making it "commercial" in nature.

This argument is carefully tailored to the ambiguous language of the second exception and, in fact, shows how the statutory language can be manipulated. But recent decisions on this question hold that...
1981 / Jurisdiction over Foreign States

581

United States courts should not adjudicate suits against foreign states for breach of concession agreements.\textsuperscript{225} The three policies developed above support this result.

In most cases, international comity does not differentiate between a nationalization in violation of a concession agreement and an "ordinary" nationalization. In either instance, the nationalization is a formal act of state, subserves a legitimate public function inherent in modern sovereignty, and is accomplished in a general political context. A contractual provision does not deprive the foreign state of its sovereign powers, and a law of nationalization effectively supersedes any commitments by the foreign state to enterprises and operations within its territorial jurisdiction.\textsuperscript{226} Unless the foreign state conducts the nationalization as a blatant pretext to avoid its contractual obligations,\textsuperscript{227} it remains a sovereign act for which the state is immune, and the incidental commercial ramifications should not be sufficient to bring it within any of the recognized exceptions to immunity. As a consequence, United States courts should not exercise subject-matter jurisdiction.\textsuperscript{228}


\textsuperscript{226} In one case, Libya had waived sovereign immunity, agreeing to an arbitration clause in the deeds of concession, but the district court invoked the act of state doctrine to refuse to confirm the arbitral award. Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya, 482 F. Supp. 1175 (D.D.C. 1980), \textit{vacated as moot}, Nos. 80-1207 & 80-1252 (D.C. Cir. May 6, 1981).

\textsuperscript{227} Accord, European Convention, \textit{supra} note 16, art. 4(1) (foreign state loses immunity only when the state's contractual obligation is to be discharged in the territory of the forum state). International case law also supports this result. After Iran's nationalization of foreign-owned oil concerns in 1952, in violation of its contractual agreement not to annul the concessions unilaterally or expropriate the foreign interests, courts across the world held that the contract could not limit Iran's sovereignty. "[S]ince the Concession Agreement is in its substance a private agreement (an agreement governed by municipal law - not a treaty), the applicants' right and interest thereunder can be expropriated by the Nationalization Law which is a municipal Law of Iran, and the validity of the Nationalization Law cannot be affected by the fact that Iran may be guilty of a breach of contract or possibly of a tort." Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha, 20 I.L.R. 305, 310 (Dist. Ct. Tokyo), \textit{appeal dismissed}, id. at 312 (High Ct. Tokyo 1953) (no official report published); see Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., 76 Foro It. I 719 (Trib. Venice 1953); Anglo-Iranian Oil Co. v. S.U.P.O.R. Co., 78 Foro It. I 255 (Trib. Rome 1954). \textit{But see} Anglo-Iranian Oil Co. v. Jaffrate, [1953] 1 W.L.R. 246 [Aden].

\textsuperscript{228} Cf. Banco Nacional de Cuba v. Farr, 383 F.2d 166 (2d Cir. 1967), \textit{cert. denied}, 390 U.S. 956 (1968) (nationalization that is discriminatory is invalid under international law).

228. A more persuasive argument in favor of von Mehren's contention is that the foreign state voluntarily limits its own sovereign powers when it agrees to an anti-expropriation clause in an "internationalized contract." The United Kingdom has made this argument in the past, Memorial of the United Kingdom, Anglo-Iranian Oil Co. Case, [1952] I.C.J. Pleadings 64,
In contrast, courts would have subject-matter jurisdiction if the contract contained a clause expressly waiving the state’s immunity defense in the event it nationalizes the investment of a United States firm; an express waiver of immunity by the foreign state removes any deference that United States courts need show to its status as a sovereign. Even with such a waiver, however, actions against foreign states should generally be dismissed for lack of personal jurisdiction, since the cause of action would not have sufficient contacts with the United States. Any breach of the agreement would still be an act of the foreign state within its own borders, and at no time would the foreign state have sought either to subject itself to suit in the United States’ laws or to enjoy the benefits of the United States judicial system. The concession agreement alone cannot be considered a purposeful commercial act within the United States. Therefore, even when the foreign state has waived its sovereign immunity, it should not be subject to suit in the United States if the agreement involved no substantial, purposeful, and commercial activities in the United States.

There are two problems with this approach. One problem is that the reasoning appears inconsistent with the concept of sovereignty. If a state can relinquish forever its power to pass laws, e.g., of nationalization, it is doubtful that any meaningful distinction between private and sovereign power remains. Cf. Note, Petroleum Concessions in International Arbitration, 18 Colum. J. Transnat’l L. 259, 278–80 (1979) (the Dupuy notion of “internationalized contract” must be limited, or else sovereignty would become meaningless). A second problem is that the approach logically derives from the old “prompt, adequate, and effective compensation” rule, which has been displaced as the majority view in international law. Id. at 280–81. See note 180 supra. The 1974 Charter of Economic Rights suggests that foreign states have an absolute power to nationalize enterprises within their borders, with compensation the state considers “appropriate.” Charter of Economic Rights, supra note 42, ch. II, art. 2. See notes 42–44 and accompanying text supra.


Cf. Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103 (2d Cir.), cert. denied, 385 U.S. 931 (1966) (even if a foreign state has no immunity defense, it cannot be sued in United States courts unless it engaged in a purposeful act in the United States); Chicago Bridge & Iron Co. v. Islamic Republic of Iran, 506 F. Supp. 981 (N.D. Ill. 1980) (due process requires that there be significant and commercial contacts with the United States forum relating to the cause of action).
Both international comity and minimum contacts problems may be avoided, however, by a clause in the concession agreement providing for binding arbitration in the United States or for enforcement of an arbitration award in the United States in the event of a dispute concerning the concession.\textsuperscript{232} Such a clause would waive immunity and constitute a purposeful, substantial, and commercial act by the foreign state within the United States related to the cause of action.\textsuperscript{233} Thus, in the event of any subsequent lawsuit by the United States firm to compel arbitration or to enforce an arbitral award, United States courts would have subject-matter and personal jurisdiction over the foreign state.\textsuperscript{234}

\textsuperscript{232} Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 655 (2d Cir. 1979); Merrill Lynch, Pierce, Fenner & Smith Inc. v. Lecopulos, 553 F.2d 842, 844 (2d Cir. 1977); In re Maritime Int'l Nominees Establishment v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981). Negotiation of arbitration and choice-of-law clauses is routine in concession agreements, but many agreements omit reference to a specific place of arbitration and elect the law of a neutral state (other than the United States). See von Mehren & Kourides, supra note 230, at 478–83. For the standard arbitration and choice-of-law clause in the Libyan oil concession agreements, see id. at 481–82.


\begin{quote}
in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.
\end{quote}

9 U.S.C. § 204 (1976). This venue provision satisfies the due process concerns but invalidates the result in Ipitrade. See also Kahale, supra note 193, at 45–63 (subsequent decisions have retreated from the broad reasoning of Ipitrade).
But even in this case, the act of state defense might sometimes prevent a United States court from adjudicating the merits of a claim based on the nationalization. A concession agreement does not obviate the problems of potential foreign relations difficulties and the general lack of judicial standards in nationalization cases. Indeed, the validity of long-term concession agreements and the enforcement of provisions prohibiting nationalization within such agreements are vigorously debated in the world community. United States courts are not in a position to establish the United States position on these issues or to evaluate these arguments fairly.

United States courts, on the other hand, would generally be justified in enforcing arbitration clauses, since most developed and developing states recognize the appropriateness of settling their disputes with foreign firms in arbitral forums. If a foreign state refuses to arbitrate, however, political problems may persist. In the past, when such disputes have developed, the Executive has sometimes intervened in an attempt to protect United States interests. Since the Executive Branch is in a better position than the Judicial Branch to evaluate the political considerations and to negotiate a settlement in such a situation, the court should defer to the Executive’s decision. Only if the Executive indicates that the benefits of judicial determination do not outweigh the political costs should the courts refuse to address the merits of a claim concerning arbitration.

235. See Garcia-Amador, supra note 48, at 40–44.
236. See notes 178–80 supra.
237. Over the last several decades, developing states have not only been involved in a number of commercial arbitrations, but they have generally complied with awards rendered against them. See Schachter, The Enforcement of International Judicial & Arbitral Decisions, 54 AM. J. INT’L L. 1 (1960). The Libyan arbitral awards are a recent example of foreign state reluctance or refusal to accede to arbitral awards, but even in that extreme case, Libya settled with corporate claimants after awards were rendered. See generally von Mehren & Kourides, supra note 230.
C. EXPROPRIATION OF PROPERTY IN THE UNITED STATES
AND TRANSFERRING NATIONALIZED PROPERTY TO A
FOREIGN STATE INSTRUMENTALITY

The first clause of the FSIA's third exception provides that United States courts may entertain claims against a foreign state where rights in property taken in violation of international law are at issue and the property is located in the United States. This provision is a rough codification of the common-law rule that where a foreign state seeks to nationalize property in the United States without paying just compensation, courts may adjudicate rights to the property to determine whether its expropriation is consistent with United States public policy.

The analytical framework suggested in this article supports the conclusion that courts may adjudicate controversies concerning expropriated property in the United States. International comity, minimum contacts, and political question considerations indicate that United States courts should give great deference to the actions foreign states perform within their own territories. This territorial limitation on the assertion of jurisdiction, however, does not apply when foreign states attempt to nationalize property located in the United States.


241. Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966); see Zwick v. Kraus Bros. & Co., 237 F.2d 255, 259 (2d Cir. 1956) (Hungary could not seize assets located in the United States, nor could it take assets "indirectly" by asserting control over the firm that controlled those assets).


On the other hand, United States companies, especially banks, might control assets that the foreign state nationalizes, and the foreign state would have to sue the United States firms in United States courts. See, e.g., Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875 (2d Cir. 1981); Banco Nacional de Cuba v. First Nat'l City Bank, 478 F.2d 191 (2d Cir. 1973). Defendants would then counterclaim based on their own losses due to the foreign state's nationalization or based on debts owed to them and related to the assets retained. 28 U.S.C. § 1607 (1976). See generally Banco Nacional de Cuba v. First Nat'l City Bank, 406 U.S. 759 (1972); Banco Para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913 (2d Cir. 1981); Banco Nacional de Cuba v. Chase Manhattan Bank, 505 F. Supp. 412, 459 (S.D.N.Y. 1980), aff'd, 658 F.2d 875 (2d Cir. 1981). In cases where the counterclaim relates to a foreign nationalization, the act of state doctrine precludes any counterclaim unless the property nationalized is located in the United States. See Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231, 237–39 (2d Cir. 1981); notes 87–108 and accompanying text supra.

243. "The protection afforded by the act of state doctrine applies only to a foreign sovereign's
As a matter of international comity, a state cannot enact rules to govern the ownership of property within the borders of another sovereign state. The act of state and restrictive theory case law recognize this precept, finding that an extraterritorial nationalization must be evaluated according to the public policy of the state in which the claimed property is located. Therefore, if such a nationalization violates the public policy of the United States, its courts are not obligated to defer to the foreign state's decree, since it is not a legitimate governmental act. In sum, United States courts would have subject-matter jurisdiction over a claim for property in the United States which has been expropriated by a foreign state contrary to the public policy of the forum (e.g., without payment of adequate compensation).

Moreover, the minimum contacts requirement would not raise significant difficulties in such situations. If the foreign state brings suit to establish its ownership of the property in question, it submits to the jurisdiction of the court. Alternatively, if a plaintiff is suing the foreign state for the title to the property, minimum contacts are exercise of power over property within its own territory. Confiscation decrees affecting property outside its territory have been enforced by United States courts only to the extent that they do not offend the public policy of the forum and are thus rarely upheld. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428, 431 (1964); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 46 (1965).

244. “Under the traditional application of the act of state doctrine, the principle of judicial refusal of examination applies only to a taking by a foreign sovereign of property within its own territory . . . [and so] when property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state ‘only if they are consistent with the policy and law of the United States.’” Republic of Iraq v. First Nat’l City Bank, 353 F.2d 47, 51 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966) (quoting RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 43(2) (1965); accord, Banco Nacional de Cuba v. Chemical Bank N.Y. Trust Co., 658 F.2d 903, 908 (2d Cir. 1981); United Bank, Ltd. v. Cosmic Int’l, Inc., 542 F.2d 868, 872–73 (2d Cir. 1976); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir.), cert. denied, 393 U.S. 924 (1968); De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 910 n.10 (E.D. La. 1981).


present because the property at the center of the dispute is located in the United States and the activities upon which the suit is based took place at least partially in the United States.\textsuperscript{247}

Finally, abstention based on the political question doctrine would be inappropriate: the Executive has generally deferred to the courts in controversies over property located in the United States and claimed by a foreign state,\textsuperscript{248} the standards for decision are easily ascertainable (because the policy of the United States is to be applied), and sensitive political considerations are usually lacking. None of the reasons for invoking the act of state doctrine is present.

In short, a foreign state's attempt to expropriate property in the United States may be successfully resisted through litigation in United States courts. Similarly, tangible and intangible property (such as oil and trademark rights, respectively) expropriated without payment of just compensation (as defined under United States law) and brought into the United States can be recovered by claimants.\textsuperscript{249} The FSIA appears to expand upon this principle. The second clause of the third exception provides that United States courts have jurisdiction to adjudicate rights in property taken by a foreign state in violation of international law and transferred to a state instrumentality that does business in the United States.\textsuperscript{250} It is highly unlikely that the foreign


\textsuperscript{248} Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021, 1029–30 (5th Cir.), \textit{cert. denied}, 382 U.S. 1027 (1972) (applying political question criteria to extraterritorial taking). In a letter dated January 15, 1965, the Deputy Legal Adviser of the Department of State said that "questions regarding the administration of estates and the determination of rights and interests in property in the United States ordinarily are matters for determination by the courts of competent jurisdiction." Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 52 n.5 (2d Cir. 1965), \textit{cert. denied}, 382 U.S. 1027 (1966) (quoting letter from the Deputy Legal Adviser, Department of State, to the Counsel of Defendant First Nat'l City Bank (Jan. 15, 1965)).


\textsuperscript{250} 28 U.S.C. § 1605(a)(3) (1976). One court apparently applied the second clause of the third exception to exercise jurisdiction over a foreign state's central bank, which held funds abroad that were allegedly confiscated by the foreign state. De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 910–11 (E.D. La. 1981). The court should not have exercised jurisdiction, as this article shows in notes 253–57 and accompanying text \textit{infra}.
state itself could be sued in such a case, and Congress apparently assumed that only the state instrumentality would be subject to suit.

The more difficult question is whether a court should adjudicate a suit against the state instrumentality which receives the nationalized assets. It is not clear that a United States court should have subject-matter jurisdiction in many cases. Because international law permits minimal compensation schemes, nationalization will usually be a governmental activity. The instrumentality merely receives the property after it has been nationalized. Unless the instrumentality is sued for its own tort or breach of contract, it should assume the immunity enjoyed by the foreign state.

Moreover, while personal jurisdiction may be constitutionally asserted in such a case, judicial abstention is appropriate. Act of state cases have uniformly held that the courts should not examine the validity of a taking of property by a foreign state within its own territory regardless of the fact that an instrumentality later receives that property. These cases reflect a consensus that nationalizations which do not touch property actually present in the United States are simply too sensitive and politicized for courts to adjudicate and thus that any suit against a state instrumentality which requires evaluation of the nationalization must be dismissed.

---

253. See notes 48–53 & 180 and accompanying text supra.
254. See note 41 supra.
255. See notes 141–46 supra.
256. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (act of state doctrine applied to preclude counterclaims against the state instrumentality to which nationalized bank assets had been transferred); First Nat'l Bank (Int'l) v. Banco Nacional de Cuba, 658 F.2d 895 (2d Cir. 1981); Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231 (2d Cir. 1981); IAM v. OPEC, 649 F.2d 1354 (9th Cir. 1981) (applying act of state doctrine in case where alleged antitrust conduct benefited foreign state oil companies); cf. cases cited in note 107 supra (Second Hickenlooper Amendment applies only to preclude act of state doctrine when expropriated goods are in United States).
257. Del Bianco, supra note 8, at 133 & n.73, suggests that the second clause of the FSIA's third exception makes the act of state doctrine inapplicable to preclude suits against state instrumentalities which have received nationalized property. See also De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 910 n.10 (E.D. La. 1981) (arguing). The problem with this view is that Congress in the FSIA did not intend to disturb judicial development of the act of state doctrine. See FSIA HOUSE REPORT, supra note 16, at 20 & n.1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6619 & n.1. In 1976 the doctrine clearly applied in cases where United States parties had claims or counterclaims against state agencies to which nationalized property had been transferred. See Empresa Cubana Exportadora de Azucar y Sus Derivados v. Lamborn & Co., 652 F.2d 231, 238–39 n.11 (2d Cir. 1981). Even if Congress had not reaffirmed the vitality of the act of state doctrine, the political question underpinnings of the doctrine would have compelled such a strict construction of the FSIA, just as courts have narrowly construed the Second Hickenlooper Amendment. See note 195 supra.
CONCLUSION

The judicial opinions in the Iranian Nationalization Cases constitute precisely the sort of "bad law" that Justice Oliver Wendell Holmes, Jr. found to be generated by an "accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."258 The opinions are questionable in result, and it seems apparent in hindsight that the United States courts should have eschewed any involvement in the cases. The opinions are instructive in their reasoning, however, for they reveal ambiguities within the FSIA, and the errors in their reasoning indicate that reliance upon such cases to protect overseas investment of United States companies is ill-advised.

Taken as a whole, the Iranian Nationalization Cases suggest that in the future a mechanistic application of the FSIA must be avoided and that the law must be applied with reference to the three fundamental policies identified in this article. Considerations of international comity require that foreign states not be sued for their sovereign acts, that is, official governmental decisions serving legitimate public policy interests and made in a political context. Principles of fairness to foreign state defendants dictate that only where a cause of action arises out of a foreign state's own activity in the United States should suit against that state be allowed. Reference to the Executive suggests judicial abstention when issues are highly politicized and may be better resolved by the Executive.

This analytical framework may be useful in determining whether jurisdiction should be asserted in a broad range of lawsuits against foreign states. For example, this analysis suggests that most, if not all, of the actions against Bank Markazi Iran should have been dismissed. Further, it implies that nationalizations in violation of concession agreements should not normally be actionable in United States courts and that neither foreign states nor their instrumentalities should be subject to suit when the state delivers nationalized property to an instrumentality doing business in the United States. On the other hand, application of this analysis indicates that United States courts should adjudicate controversies involving arbitration clauses which have adequate contacts with the United States and disputes over confiscated property located in the United States.

It should be apparent that the framework developed in this article is not merely a tool to be employed by courts in deciding cases against foreign states. It can be a useful planning aid for United States companies in making their foreign investments as well. The above

analysis suggests that United States companies should seek more tangible evidence of a foreign state's promise not to nationalize investments than, say, a stabilization clause in a concession agreement. Rather, United States companies should try to negotiate arbitration clauses that provide for arbitration or enforcement of the award in the United States.

Another strategy available to United States companies investing abroad is suggested by some of the bank cases, which indicate that a firm should seek to formalize the foreign state's guarantee of the firm's investment by a standby letter of credit. Such a letter of credit should be drawn on the funds of the central state bank of that foreign state and should be advised and payable in the United States through a correspondent United States bank. Where a letter of credit has been prepared, nationalization or expropriation of the beneficiary's assets in the foreign state would trigger the beneficiary's collection on the letter in the United States. Moreover, if the foreign state sought to repudiate the letter through its central bank, the beneficiary could bring suit against the foreign state's central bank in the United States to enforce the terms of the letter of credit. This is an efficacious remedy. First, personal jurisdiction exists in that situation because the bank itself has issued the letter of credit as agent for the foreign state. Thus, the letter is payable in the United States, creating a cause of action for anticipatory breach in the United States if the letter is repudiated. Second, subject-matter jurisdiction exists, since a repudiation by the foreign state of a letter of credit is a particularized

259. A letter of credit is a promise by an issuing bank to a beneficiary to honor drafts up to the amount of the credit, upon the beneficiary's compliance with the terms of the letter; the letter is issued by the bank at the request of one of its customers to finance a contract the customer has with the beneficiary. Thus the standard letter of credit is a payment device. The "standby" letter of credit, however, is a guarantee device that directs the bank to pay the beneficiary not for its own performance, but upon the default of the customer. Note, "Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution, 93 HARV. L. REV. 992, 992–93 (1980); see Comment, Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases, 21 HARV. INT'L L.J. 189 (1980). See also Note, The Role of Standby Letters of Credit in International Commerce: Reflections After Iran, 20 VA. J. INT'L L. 459 (1980); Note, A Reconsideration of American Bell International, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979). 19 COLUM. J. TRANSNAT'L L. 301 (1981).

260. In National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), aff'd on other grounds, 597 F.2d 314 (2d Cir. 1979), the Central Bank of Nigeria directed its correspondent in New York to refuse to honor a demand for payment under a letter of credit issued by the central bank and advised by the New York bank. The Court held that the breach of a letter credit (i) with a New York beneficiary, (ii) advised by a New York bank, and (iii) payable in New York, could be the basis for a lawsuit in the United States under the second exception in FSIA section 1605(a). Id. at 639; see Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 547 F.2d 300, 314–15 (2d Cir. 1981). Judge Weinfeld in Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1296–98 (S.D.N.Y. 1980), aff'd on other grounds, 647 F.2d 320 (2d Cir. 1981), ruled that where only the second factor was present (the letter was advised by a New York bank) there was no personal jurisdiction over the customer (a foreign central state bank) in favor of a foreign beneficiary.
state action that is private or commercial, rather than public or governmental, in nature. Hence there is no defense of sovereign immunity. Finally, abstention would be inappropriate because the Executive Branch does not handle commercial transactions involving letters of credit, international law regarding letters of credit is clear and uniform, and ordinarily no foreign affairs ramifications should be expected.

The result reached in the Iranian Nationalization Cases — the exercise of jurisdiction over a foreign state in a classic nationalization situation — is a legal dead end. United States companies should not rely on United States courts to protect them against losses due to a foreign state’s nationalization. Instead, companies should attempt to deal with the problem of nationalization through the development of negotiating strategies prior to their committing resources to foreign-based industries. Obtaining specific guarantees such as a standby letter of credit or an agreement to arbitrate disputes in the United States will better protect their investments when the next “accident of immediate overwhelming interest” occurs.

261. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698–99 (1976) (opinion of White, J.) (under both act of state doctrine and restrictive theory of immunity, repudiation of commercial debt is nongovernmental and so can be basis for lawsuit); see Mirabella v. Banco Industrial de la Republica Argentina, 101 Misc. 2d 767, 770, 421 N.Y.S.2d 960, 963 (Sup. Ct. 1979) (“In the case at bar, we are not dealing with a general regulation or decree, i.e., a public act, but rather with the suspension of payment on letters of credit issued in connection with the specific commercial transaction.”).

A second rationale for the private nature of the repudiation of letters of credit by a foreign state through its central bank is that it is a debt owed in the United States outside the territorial sovereignty of the foreign state, and so any repudiation of the debt without provision for recompense would be unenforceable in the United States. J. Zeeve & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd., 37 N.Y.2d 220, 333 N.E.2d 168, 371 N.Y.S.2d 892, cert. denied, 423 U.S. 866 (1975) (where letter of credit was due in New York, and there was a policy in New York against confiscatory repudiation of letters of credit, decree making letter unenforceable in Uganda would have no force in New York); see De Sanchez v. Banco Central de Nicaragua, 515 F. Supp. 900, 910 & n.10 (E.D. La. 1981); Gonzalez v. Industrial Bank, 12 N.Y.2d 33, 39, 234 N.Y.S.2d 210, 212 (1962) (per curiam) (“no attempted confiscatory act of the Cuban government, thereafter enacted, could diminish plaintiff’s rights in respect to Industrial’s funds at all times located in New York”).
