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EVIDENCE AND BURDEN OF PROOF IN FOREIGN SOVEREIGN IMMUNITY LITIGATION

A Procedural Guide for International Lawyers and Government Counsel

Doctoral Thesis
Dr. Peter Fritz Walter
Abstract

‘Evidence and Burden of Proof in Foreign Sovereign Immunity Litigation: A Procedural Guide for International Lawyers and Government Counsel,’ doctoral thesis by Dr. Peter Fritz Walter, is the first specialized and practically useful analysis of the evidence problems and the burden of proof in matters of foreign sovereign immunity litigation, both regarding jurisdictional immunities and immunity from execution.

The monograph is a comparative law analysis that spans six of the seven existing national statutes on foreign sovereign immunity, starting with the United States’ Foreign Sovereign Immunities Act, 1976, to the Canadian State Immunity Act, 1982.

The study concludes in demonstrating two distinct rules of the burden of proof, for each kind of immunity; the rules are widely uniform, and were corroborated by case law and scholarly opinion in all of the examined jurisdictions. They can be said to form today rules of international law.

The monograph is of high practical value for litigation lawyers and government counsel struggling with evidence problems regarding foreign sovereign immunity. It can be taken as a reference guide for solving the evidence problems in those trials, and as such is a precious asset in any international law library.

The only titles that in scope, depth and size can be compared with the present study are already quite out of date, and they have, if ever, only randomly dealt with the specific procedural problems of evidence and the burden of proof in international sovereign immunity litigation.
To the late Professor Louis B. Sohn

The author’s profits from this book are being donated to charity.
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Two hundred years ago, governments rarely entered the international marketplace for purchasing goods; they manufactured all the goods and materials needed for their governmental purposes. However, this situation changed during the 19th century, with the emergence of world trade. Accordingly, international law has widely changed from about that time.

Contrary to the opinion of many skeptical international law experts, international law has stood trial as to its ability to flexibly adapt to paradigm changes in socioeconomic conditions as well as to the psychology of nations’ sometimes overly sensitive behavior on the international stage.
Are we dealing with a law of sovereigns, or with a law of nations? How did sovereigns behave in the past, and how do our modern nation-states behave? When we look at these questions, we can observe a tremendous shift in international jurisdiction from about the last decade of the nineteenth century. This paradigm shift was being subtly prepared by incidental precedents such as *The Schooner Exchange v. M’Faddon* (1812), 11 U.S. [7 Cranch] 116, 135 (1812) and culminated in a thorough reform of international procedural law.

Hence, we can say that in the domain of international trade, and particularly in case of commercial contracts between private traders and foreign states, a restriction of sovereignty has taken place over the course of the last hundred years.

Before the nineteenth century, sovereigns, or rulers, were considered immune from any jurisdiction other than their own. This was historically and politically a sound concept until the moment when, from about the middle of the 19th century, the young nation states engaged in the growing international market and behaved, as such, like traders.
The moment nation states entered the international marketplace for buying and selling goods, a novelty event on the timeline of human history was set. International law was not prepared to deal with that novelty at first, and could not protect private traders who lost large amounts of money because they had contracted with a foreign state; what happened quite regularly in such cases was that the foreign government would invoke foreign sovereign immunity to escape its liability under the contract. A consequence of the immunity claim was namely that the forum state had to deny jurisdiction over the foreign state, and dismiss the claim because of a ‘procedural handicap.’ When a claim is dismissed on procedural grounds, the court will not enter the substance matter of the case, and thus not rule over the transaction at the basis of the claim. The lawyer would in such a case reason their client that ‘the case cannot be won because of lacking jurisdiction.’

Thus what the new situation created was rampant injustice, and heavy financial losses of large trading companies around the world, as a result of having contracted with a foreign state, or an agency or instrumentality of a foreign state.
One can figure that in the beginning courts were reluctant to affirm jurisdiction over foreign states, while they were well aware of the blatant cynicism of the situation. The novelty was overwhelming them and they found international law had no instrument to deal with the problem. And as the topic was a sensitive one because the principle of national sovereignty was in play, judges tended to be very careful. They did not want to step on the feet of some or the other foreign government, and still less did they want to offend their state department or department of foreign affairs. Some judges however were gaining awareness that a historical break was about to happen and that it was more or less blunt injustice toward the private claimant to grant immunity to a state who voluntarily engaged in the market place and then pleaded sovereign immunity as a defense in an action that did not concern sovereign but commercial activities of that state.

As the business volume of most of those cases is considerable, judges soon found a way to avoid such injustice. They argued that it was not the nature of the person involved, speak the private individual or sovereign ruler or state, that was decisive for the outcome of the immunity question, but the nature of
the activity in question. That was after all a clever move to go around the intricate sovereignty question. ‘We are not going to touch the sovereignty of the state. We look what states are doing, and upon their acting they are judged, not upon their nature, their sovereignty, that thus remains untouched.’ The reasoning was brilliant and all efforts of highly qualified international defense lawyers who worked pro immunitatem eventually failed.

At that point, the law was changing forever. Nobody could prevent the tremendous paradigm shift from happening. In fact, international law was going to get a new face! It was almost a revolution, despite the fact that people other than government consultants and international lawyers had (and have) hardly an idea of these affairs, as they are not catchy topics for the international mass media.

The lawyers who worked on the side of the private merchants argued that if the activity in question is by its nature commercial, the state is to be denied immunity and the foreign court has to affirm jurisdiction. If, however, the act or activity is sovereign, immunity must be granted and jurisdiction is to be denied.
That was indeed a handy, catchy rule that was quickly to become a sort of standard for judging sovereign immunity questions before national tribunals. And the change of international law in this respect demonstrates that international law is well flexible and open to change, when change is needed to uphold justice and avoid flagrant injustice!

International conferencing, while it’s today a popular topic in the international media, is not the primary lever for change in matters of international law. International law changes incrementally, and this most of the time through case law. This is exactly what happened with the development of the restrictive immunity concept.

This concept evolved from the end of the 19th century until today, and this process is still ongoing, and all the details and modifications of this concept were worked out by the jurisprudence in agreement with international lawyers, professors and consultants, not, or only to a minor extent, by international agreements.

In this context, one may imagine, even as a lay person, how important it is to know the allocation of the burden of proof in matters of sovereign immunity.
litigation, for it often is crucial for winning the case. If, for example, the plaintiff bears the full procedural and substantial burden of proving his claim, as it is under general civil law, and common law, then the restrictive immunity theory wouldn’t have much value in practice, as in most cases foreign states could get away with dishonoring commercial agreements, thus causing immense financial losses to the private sector.

Accordingly, the problem who bears the burden of proof in litigations where foreign sovereign immunity is claimed as a procedural defense, is of paramount importance.

The question of the burden of proof is originally not a matter of international law, but of the applicable national substantive law. Needless to add that a case must have the required minimal contacts so that a national tribunal can affirm jurisdiction. Under the United States’ Foreign Sovereign Immunities Act of 1976, this question is stuck together with the question of the burden of proof, as a matter of the legislative wording; however, minimal contacts is quite a different problem.
The interesting question comes up if, as a result of a quite homogenous national range of seven existing immunity laws, international law has been formed in a way so as to encompass today an evidence rule in the field of sovereign immunity? My research resulted in an affirmative conclusion, and time has given me right, as now twenty-four years after my public thesis presentation, we can look back a decade and see that the International Law Commission has codified the matter along the lines of my thesis conclusions, in the United Nations Convention on Jurisdictional Immunities of States and their Property (2004).


We have seen so far that the transition from the paradigm of ‘absolute’ immunity to the new standard of ‘restrictive’ took more than a hundred years. That seems to be a long time but is compared to the whole of human history a tiny event on the timeline of human evolution. And while as such it may have interest only for specialized lawyers, the signal function of the restriction of national sovereignty cannot be underestimated; a restriction namely connotes
something being ‘restrained’ in its scope, power or expression.

We have seen that the once unlimited national sovereignty of nation states now is restrained for the domain of jurisdictional immunities, when the activity in question was of a private, commercial nature.

When such a trend is to be traced, and corroborated by case law, and when the general idea has been accepted that sovereignty is not per se an ‘absolute’ power, but must be restrained when it brings harm to people and to national economies, then we have a situation where, as lawyers say, a ‘precedent was set.’ When a precedent was set, there is a likelihood that a similar constellation or situation will be judged along the same lines because of the similarity of interests or because the values to be protected are of a similar nature.

On the same line of reasoning, the text of the European Convention on State Immunity, 1972, states in its Preamble, that it takes into account ‘the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts.’
The United Nations Convention on Jurisdictional Immunities of States and their Property (2004), contains a similar provision. These clauses are of course very general and have a mere declaratory character, but they are nonetheless important because of their signal function.

We have to keep in mind that only hundred years ago such a clause in an international treaty would have been unthinkable as such a convention wouldn’t have been agreed upon; the majority of states would have thought of such a clause as ‘offending their sovereignty.’

The concept of sovereignty has to be seen historically; the coming up of nation states was a Renaissance endeavor; in the Middle-Ages it would have been unthinkable because of the Church’s absolute power. But when the Church’s power was restrained, the nation states took over the sacrosanct nature of the Church’s absolute domain, and by creating the idea of national sovereignty expressed their claim of almost divine ‘untouchability’, and a set of absolute powers connected with it.

This is actually a good example for showing how cyclic human history is, and now nonlinear. It is cyclic
in the sense that the same problems are put on the stage but in the guise of different actors, until humanity has developed enough consciousness to tackle the problem itself, instead of addressing the actor that embodies it. Not the Church was bad but the concept of total dominion over subjects treated as vassals; not the nation states are bad but again the concept of an absolute, and sacrosanct, sovereignty because it does harm to people, and to the smoothness of international trade, and the communication between peoples.

Thus, we can say that humanity has recognized ‘the problem’ twice, first in identifying the human rights abuses committed by the Church, second by realizing that absolute sovereignty, to see only the commercial sector, brings heavy losses to private traders and a possible scenario of ‘total injustice’ into international trade, that cannot reasonably be tolerated. As the problem of national sovereignty is comparatively larger, and does harm also in other ways than commercially, especially when we think that it is the single most dangerous trigger for wars between nation states, resulting in heavy loss of human life, the signal function given from the commercial sector is not to be overlooked and needs to be carefully
analyzed by international law scholars and world peace organizations!

After all, the slow but steady erosion of national sovereignty is a fact that cannot be overlooked. Currently, we are in a transition phase until about the year 2020 during which the concept of national sovereignty is going to do even more harm, but also where human consciousness will considerably rise to acknowledge the perilous nature of the very construct of sovereignty. This, then, will open the door to a final modification and further restriction of sovereignty in the sense of restraining it by multilateral agreement, relegating a large part of sovereign national power over to a supranational body called ‘world government’ or otherwise.

In sensible matters of this kind, international diplomacy has developed a careful approach of incremental and careful progress that doesn’t offend the main sandbox players, because so doing would only result in regional, national and international setbacks.
The subject matter of the present study is quite of a novelty, for as long as the absolute immunity doctrine was in force, the question who bears the burden of proof in sovereign immunity litigation never came up; it was enough that the foreign state claimed foreign sovereign immunity for having it granted in the forum state.

As sovereign immunity more and more lost its status of an omnia potestas and became a residual concept because of increased state trading during the second half of the 19th century, the upsurge of the restrictive immunity doctrine changed the litigation procedure quite dramatically. The restrictive immunity doctrine makes the grant of sovereign immunity dependent on the qualification of the activity in
question as either private, commercial, or governmental in nature.

At the basis of the legal qualification of the activity, there is a factual problem: which facts determine the outcome of the immunity claim and are therefore crucial for sovereign immunity to be granted, or else denied by the court?

With the establishment of a range of national immunity statutes in the 1970s and 80s, the facts that lead to a denial of immunity were drafted as exceptions to a general rule of immunity.

When we consider now for example a commercial contract between a private company and a foreign state to be at the basis of the claim, we have to ask the question who bears the burden of proof? At this point, two options are possible:

(i) the burden of proof is on the plaintiff for the existence of the contract (proof of a positive fact); or

(ii) the burden of proof is on the foreign state to show that no contract existed (proof of a negative fact).

To put it more generally, does the plaintiff have to prove that the activity in question was of a commercial nature—*de iure gestionis*—or does the
foreign state have to establish that the activity in question had a public or governmental character—*de iure imperii*—? The hope to see this problem clarified by the immunity statutes in the United States (1976), the United Kingdom (1978), Singapore (1979), Pakistan (1981), South Africa (1981), Canada (1982) and Australia (1985) was more or less deceived. Only the American legislator put a revelatory passage in the legal materials, the *House Report*, to the *Foreign Sovereign Immunities Act, 1976*, while, admittedly, for Pakistan, the legal history gives clear indications as to the burden of proof, because rule and exception were not reversed, as with all the other jurisdictions.


This passage, while it is ambiguous, set at least a point of departure that could be taken up by American district courts for further elaboration and refinement. American federal jurisprudence has accomplished this difficult task in an exemplary way, which had a direct impact on the formation and the
development of international law. This is evidently shown by the simple fact that several volumes of Lauterpacht’s *International Law Reports* fully quote American case law on the question of sovereign immunity.

This is so much the more important as American judges have a particular feel for the procedural aspects in sovereign immunity litigation. Evaluating this jurisprudence, I would summarize it by saying that regarding jurisdictional immunities, American judges have an attitude of admitting jurisdiction as a kind of general rule, granting immunity only in exceptional cases. This is obviously in contradiction with the drafting technique of the FSIA (and the other immunity statutes) that poses immunity as the rule and jurisdiction an exception to this rule. But this apparent ambiguity was soon clarified by some leading cases, as for example *Alberti v. Empresa Nicaraguense de la Carne* (705 F.2d 250 (7th Cir. 1983), 22 ILM 835 (1983) and the Supreme Court’s verdict in *Verlinden B.V. v. Central Bank of Nigeria* (461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81, 51 U.S.L.W. 4567, 22 ILM 647 (1983).

Literature and case law came to the conclusion that the drafting technique used for the immunity
statutes had primarily historical reasons. As a result, I had to elaborate the procedural and evidence questions, and especially the question of who bears the burden of proof in these litigations. For that matter, I could not simply take the rule-and-exception principle as a guideline, because for obvious reasons, as a clash between history and law, this solution was a trap, even though some reputed international law scholars fell into it! The only solution, thus, was to really scrutinize the content of this new restrictive immunity doctrine and see what impact it possibly had on the procedural situation in sovereign immunity litigation and, especially, on the burden of proof?

When we look at immunity from execution, we see a different picture altogether, as the two immunities, jurisdictional and executional, have developed differently historically, and for good reasons. Not surprisingly, then, to see that at the end of this study I will get at a completely different conclusion for litigation regarding the property of foreign states than for the establishment of jurisdiction over foreign states.

The subject of this work was difficult to tackle because of the intricate interplay between national
procedural laws, on one hand, and international law, on the other.

To begin with, let me present an example for the interplay between national substantive law and jurisdictional immunity, with respect to the burden of proof. Let’s suppose a private merchant claims damages for the repudiation of a contract signed with a foreign state. In such a case, there is today no question that the claimant bears the burden to proof as to the existence of the title, the contract. But who bears the burden of proof for the facts that determine the outcome of the immunity question?

Obviously, it would be easy if the burden here would also be on the claimant. It would simplify the evidence procedure. But unfortunately, things are not that simple. Even though often the two burdens may coincide, this is not always the case, especially not under the *Foreign Sovereign Immunities Act of 1976 (FSIA)* of the United States.

Theoretically, there are two possibilities to design the burden of proof for substantiating the sovereign immunity claim:

i) the burden is on the plaintiff for the commercial character of the transaction;
ii) the burden is on the foreign state to prove that the nature of the transaction was exceptionally governmental.

Before going into more detail, let me shortly explain the difference between ‘jurisdictional’ and ‘executional’ immunities. It is so basic and common-sense that a lay reader can easily understand it. When you sue a foreign state in your country—which is then called the ‘forum state’—and the state invokes sovereign immunity, we are dealing with ‘jurisdictional’ immunity; if however you are a judgment creditor of that state, having obtained a judgment against the foreign state that entitles you to receiving payment or indemnities, and you seek satisfaction, then we are dealing with immunity from execution.

There is still another important variation of the latter constellation, it’s when you have a claim against a foreign state, for example you have done repairs of their embassy in your country, and they don’t pay the bill, and even before having a judgment against them, you may want to secure your interests by seizing, by act of law, one of the embassy’s bank accounts for your satisfaction, then we are equally dealing with
‘executional’ immunities. The statutes here thereafter examined are:

- The Foreign Sovereign Immunities Act, 1976 (United States)
- The State Immunity Act, 1978 (United Kingdom)
- The State Immunity Act, 1979 (Singapore)
- The State Immunity Ordinance, 1981 (Pakistan)
- The Foreign States Immunities Act 87, 1981 (South Africa)
- The State Immunity Act 1982 (Canada)

My examination and comparison of these national statutes on the subject of foreign sovereign immunity revealed common principles of the allocation of the burden of proof for both immunity from jurisdiction and immunity from execution.

With regard to immunity from jurisdiction, the burden of proof is in principle on the foreign state to show some factual basis of its immunity claim by establishing a prima facie case of immunity. This means the state must provide some evidence, not a full proof, for the court to affirm immunity and deny jurisdiction.

When forwarding evidence for establishing the prima facie case, the foreign state is not obliged to disprove all immunity exceptions, but only the one(s)
the plaintiff relies on. If the plaintiff does not specify the exception(s) he relies on, the foreign state can generally affirm, by affidavit or otherwise, that it falls under the range of the statute, and thus—

—that it is a foreign state within the definition of the statute, and

—that the act in question was of a public, governmental nature.

Once the foreign state has made its case, the evidential burden shifts to the plaintiff to prove the applicability of the exception(s) he relies on. If the plaintiff fails to establish an exception to immunity, immunity has to be granted since the prima facie evidence erects a ‘presumption of immunity.’ If, on the other hand, the foreign state fails to show some prima facie basis of immunity, the ultimate burden or persuasive burden would be with the foreign state and immunity would have to be denied.

This is however only so if the plaintiff, in his pleadings, has given convincing proof for the court to qualify the activity in question as commercial. Since, in this case, no presumption has been erected, and international law does not contain any presumption in favor of immunity or in favor of jurisdiction, the
court cannot, without endangering the sovereignty of the foreign state, deny immunity without further enquiry and only on the basis of the burden of proof. In such a case, the court must namely evaluate the activity in question on the basis of all the evidence the parties have submitted. The court is notably not allowed to refuse immunity only because the foreign state has not entered an appearance or otherwise failed to defend itself. The fact that the restrictive immunity doctrine imposes a certain rule of the burden of proof does not mean that the court is liberated from its obligation to rule _sua sponte (ex officio)_ on the question of immunity.

The statutes slightly differ in the provisions regarding _agencies or instrumentalities_ or _separate entities_ of foreign states. Whereas the American and Canadian statutes assimilate agencies and instrumentalities, for jurisdictional immunity purposes, the British and related statutes discern separate entities from the foreign state and erect a presumption of non-immunity to their effect.

Under the American and Canadian immunity statutes, the burden of proof, without presumption, is the same for agencies or instrumentalities of the foreign state. However, in practice the results of the
two different approaches hardly differ as to the burden of proof, for the foreign state must provide some evidence that the agency or instrumentality in question belongs to it, and is not an entity distinct from it.

It is logical that the privilege of sovereign immunity is never granted to legal entities that are distinct from foreign states. Therefore, in practice, the American and Canadian statutes can also be said to contain presumptions of non-immunity with regard to such distinct legal entities.

With regard to immunity from execution, the old, so-called absolute rule of sovereign immunity has not been altered and stayed intact as a true general rule of sovereign immunity, despite the fact that the statutes concede some exceptions to this rule, notably the absence of immunity if the property in question was used, by the foreign state, for (exclusively) commercial purposes.

Since the rule of immunity from execution is not just a residual concept, as is the rule of immunity from jurisdiction, the foreign state does not need to produce prima facie evidence to erect this immunity rule into a true presumption. The burden of proof for
overcoming the presumption is with the judgment creditor. The normal evidence procedure, since the persuasive burden clearly remains with the judgment creditor, is such that the latter begins to present proof by submitting prima facie evidence that the property in question was used, by the foreign state, for commercial purposes.

If the judgment creditor succeeds in establishing this *prima facie case*, the foreign state, by simply contradicting this proof, can be granted sovereign immunity, since the general rule of immunity from execution is on its side. Even if the foreign state is not able to rebut the prima facie evidence forwarded by the judgment creditor, the latter must prove, by a preponderance of the evidence, the applicability of an exception to immunity from execution. This is the consequence of ordinary rules of statute construction which put the burden of proof on the one who struggles against a *general rule* contained in a statute.

This burden is not met by prima facie evidence, but only by *plain proof* overcoming the presumption established under the general rule.

Thus, the immunity risk in the field of immunity from execution is clearly on the judgment creditor. In
other words, the judgment creditor bears the legal or persuasive burden of proof. In any case of doubt (non liquet), the court must grant immunity. In other words, in matters of immunity from execution, the rule is *in dubio pro immunitatem*.

As to the methodology, this study had to scrutinize national procedural rules and laws; hence it’s a borderline topic. The ultimate objective was to show that in matters of foreign sovereign immunity litigation, a legal standard for evidence production and for the burden of proof can be shown to exist in international law.

There were thus *three fundamental problems* to tackle: the first was to choose the jurisdictions to examine; the solution was to choose only *common law* jurisdictions because they had enacted immunity statutes, while all other jurisdictions only had some case law, and some not even that. This meant to situate the whole thesis within the Anglo-American legal system, which was just another challenge as I am a continental (German) lawyer and presented the thesis to the law faculty of a *continental university* (Geneva), and in French language. This led to the abstruse result that when the time of my public thesis discussion had come, after four years of assiduous
work on this study, my thesis supervisor in Geneva told me that he was unable to understand my work and that a common law specialist had to be invited for the jury, Lady Hazel Fox, Q.C, at the time Director of the British Institute of International Law and Comparative Law in London, England. The thesis presentation consisted of two hours of a question-answer game where I could only exchange with Lady Fox because all Swiss professors and lawyers understood very little of the subject. As a matter of fact, the problems examined in the present study are those of Anglo-American civil procedure, law of evidence and the rules of the burden of proof applied to sovereign immunity litigation.

This is why I dedicated the first chapter to a short elaboration of Anglo-American evidence law, which is usually a terra incognita for a continental lawyer.

The second problem was the method to choose. This is a general problem for every international law study. The method, deductive or inductive, that serves to demonstrate the existence of a certain standard of international law regarding a particular legal question, depends inter alia on the existence or nonexistence of an established rule. Hence, the question is, can we make out any established rule in
international law regarding the burden of proof in sovereign immunity litigation? An international law expert will answer this question, on first sight, in the negative! In fact, a general rule of sovereign immunity, be it of an absolute or restrictive immunity as a rule of international law has so far not been established!

—Sompong Sucharitkul, State Immunities (1959), 313, 326 and Jean-Flavien Lalive, L’immunité de juridiction des États et des Organisations Internationales, 84 RCADI (1953-III), 209, at 254 and Gamal Moursi Badr, State Immunity (1984), 135: ‘Moreover, the existence in customary international law of an autonomous rule requiring the grant of immunity to foreign states is not generally recognized. The rules in this area of international law are but the reflection of the rules of the internal laws of the various states, the most restrictive and the least admitting of immunity among them tending to acquire universality through the ripple effect of reciprocal treatment.’

It would thus be contestable to use the deductive approach in order to derive conclusions from the quite nebulous general principles to be found in international law in this area. In fact, the domain of jurisdictional immunities developed in international law in a jumpy, sometimes dramatic and generally inconsistent manner; it was a controversial topic for a long time. Thus, only the *inductive approach* was suitable here for providing a methodological skeleton for the present work.
By the way, the inductive approach was elaborated in international law, for example, by Georg Schwarzenberger in *The Inductive Approach to International Law* (1965), William E. Butler in *International Law in Comparative Perspective* (1980) and *Comparative Approaches to International Law*, 190 RCADI (1985-I) 9-90, and Bernard Dutoit in *Droit comparé et droit international public* (1976).

The inductive approach is empirical; it examines (i) international law practice, (ii) national laws that regulate international law matters, and (iii) national case law on those matters.

Only when all three methodological pathways lead to the same result can a researcher say to have found a *standard of international law established for the particular question the scrutiny was about*. Contrary to Anglo-American case law with its rule of *stare decisis*, international law is not rigid and inflexible, but in constant flux and development. Most importantly in this context, Lord Denning states in *Trendtex Trading v. Central Bank of Nigeria*, [1977] 1 Lloyd’s Rep. 581, at 592: ‘International Law knows no rule of stare decisis.’ This is why finding standards in international law is a never-ending task, and reminds a bit of Heraclitus’
dictum that you can never step into the same river twice.

What I am going to do is to use the empirical, case law based inductive method for getting at certain results, then, as a counter-test, I will apply the deductive method, measuring if the results I have found are in compliance with the limits of international law. This secures that the result of this study will not be in violation of any of the rules of international law, as for example the principle of sovereignty. For example, in my thesis conclusions regarding jurisdictional immunities, I come to the result that an immunity rule *in dubio contra immunitatem* can be shown to exist in international law. However, a strict application of this rule could lead to a violation of international law.

Thus, by verifying the content of this immunity rule and by considering the limits imposed upon it by international law, we come to a restriction of the restrictive rule: *the rule is not valid for the case that the foreign state does not enter an appearance*. Otherwise, the strict conditions under which a default judgment can be rendered against a foreign state would be flagrantly circumvented and undermined.
The third problem was one of terminology, which is something inherent in any scientific work of a certain scope, and this is especially so in comparative law. As I wrote this thesis in French language, I had to find French equivalents to all the terms used in the law of evidence. For doing this, I was luckily benefited by the bilingual system of Québec, Canada, that issues all codifications, including the one on sovereign immunity, in French and English languages. For the clarity of the French text, I had put the Anglicisms in italics.

Abbreviations of law periodicals follow the Anglo-American quotation style elaborated by Harvard University’s Uniform System of Citation (1982).

The next step in this preliminary assessment of our task is to validate or reject any possible guideline for finding the burden of proof, the so-called rule-and-exception principle, as it was used in the drafting technique on the statutes on sovereign immunity. In fact, initially, there is a natural rule of general jurisdiction for every forum state over all its territory. While this is a worldwide consensus among all nation states, this presumption of jurisdiction was on first sight reversed by the immunity statutes.
After a thorough examination of the rule-and-exception principle and thus the drafting technique of the statutes for allocating the burden of proof, I had to abandon this pathway, for it leads to quite arbitrary results. Subsequently I found that the only way to safely attribute the burden of proof in sovereign immunity litigation is by scrutinizing the content of the new restrictive immunity doctrine. More specifically, the following questions had to be tackled in the course of this study:

- 1/ Is the new restrictive immunity doctrine a new rule of international law, or is it only a limitation of the former absolute rule of sovereign immunity?

- 2/ Does this new doctrine of restrictive immunity, supposed it exists, only grant sovereign immunity to foreign states when the activity in question was of a public, governmental character, thus restoring as it were the original rule of unlimited jurisdiction of the forum state over all of its territory?

- 3/ Who bears the burden of proof for the facts that determine the granting or the denial of immunity; who bears the ‘immunity risk’ or the ultimate burden? And this burden, what does it consist of? And what happens in a non liquet situation? Is there any presumption in dubio pro immunitatem or in dubio contra immunitatem?

- 4/ How is evidence submitted in sovereign immunity litigation? How is prima facie evidence submitted to the court?

- 5/ Who bears the burden of proof in case an organism of the foreign state, but not the foreign state itself is the defendant in the trial? Is the burden of proof different in such a case?
6/ What about the allocation of the burden of proof in cases that involve not jurisdictional immunities but an execution into property belonging to a foreign state? In other words, are the rules different for immunity from execution? If yes, does that mean that the burden of proof also is different?

7/ Where to find the facts to be proved in litigations that involve foreign sovereign immunity?

8/ Which means of proof are usually submitted in sovereign immunity litigation, or more generally put, which kind of evidence is allowed?

It cannot be avoided that this study goes beyond the strict limits of the topic of foreign sovereign immunity; this is because of the quite natural friction between national law and international law that is particularly elucidative for the topic in question here.

Evidence is part of national procedural law. Sovereign immunity is regulated by public international law. So, how do these two spheres of law play together, interact together, and collaborate or conflict in any particular case of sovereign immunity litigation? In India, for example, sovereign immunity is part of national law, §86 of the Code of Civil Procedure. Indian jurisprudence has always considered sovereign immunity as being regulated by national law, and thus refuses the application of any rule of international law to it. In India, we thus encounter what has been called the primacy of national
law over international law for the domain of sovereign immunity. Such a primacy of national law over international law is admitted in international law if the national law respects the limits imposed by the rules of international law.

—See, for example, Karl Joseph Partsch, Die Anwendung des Völkerrechts im innerstaatlichen Recht. Eine Überprüfung der Transformationslehre (1964). According to Charles Rousseau, Droit International Public (1979), Tome I, 43, the monistic conception of international law that grants priority to national law is countered by positive international law. With regard to §86 of the Indian C.P.C., the dualistic approach could equally be considered (see Rousseau, 38-39); from this perspective a will of the Indian legislator could be presumed that wants to regulate the matter in a different way but nonetheless wants to remain in conformity with international law.

Sovereign immunity is a topic regulated by international law; as a result a national law maker must respect the rules imposed by international law. This means in practice that if the national legislator grants jurisdiction over foreign states for cases where international law prohibits such jurisdiction, it would violate international law.

With this rather strict consequence in mind, national law makers tend to be careful when drafting laws that sensibly touch matters regulated by international law. In general, the community of nations is inclined to respect international law. On the other hand, this reflection leads to a mirror effect when interpreting a national legislation or statute. It has been suggested that in cases of doubt about any national law’s conformity with international law, a will of the national law maker to respect international law is to be presumed; this leads to the result that the national law is to be interpreted in conformity with international law.

However, when we apply this general principle to sovereign immunity and the burden of proof, we come to a strange result: national law, and also national evidence law, then, has to be interpreted in conformity with the rules of international law! This is especially the case when the allocation of the burden of proof is difficult to establish because of lacking legal materials or because of ambiguities in the particular case at trial. In such a case, a result can only be found after careful reflection of the rules possibly imposed by international law on the interpretation of national law.
When we consider immunity from jurisdiction and look at the national immunity enactments, we see revolutionary new laws imbedded in an old and established legal landscape. What was to happen? What happened was that the revolution was none. The courts namely curtailed down the lawmaker’s progressive effort quite a bit and rendered the statutes by far more conservative than they looked on first sight. What the courts, and especially the district courts in the United States did was to tailor that new restrictive immunity to the needs of the litigation practice, while respecting international law. That is to say, the courts took a rather protective attitude toward the preservation of sovereign immunity in cases where it appeared the lawgiver wished to grant a total license to (unlimited) jurisdiction—provided of course that minimal contacts were established. This is how case law curtailed the peak of that reformist legislative effort, especially in the United States. In fact, American jurisprudence has virtually nullified a literal interpretation of the House Report on the question of the burden of proof in a non liquet situation. I refer to the Supreme Court ruling in Verlinden B.V. vs. Central Bank of Nigeria (461 U.S. 480,
This was quite a corrective tone set in the land after the joyful law maker seemed to consider sovereign immunity as but a residual concept. Furthermore, American district courts and the Supreme Court have established something like a catalogue of sensible areas that will remain the hard core of sovereignty even in the future, and where the new restrictive immunity doctrine has lost its reformatory spirit.

The question if this catalogue of sensitive political and governmental matters that shall remain untouched by the restrictive immunity doctrine can be considered as a standard of international law is a topic vast and important enough for a further study.

—The question was initially raised by Georg Ress, Les tendances de l’évolution de l’immunité de l’État étranger (1979), and he refers to it also in his later article Entwicklungstendenzen der Immunität ausländischer Staaten, 40 ZaöRV 217 (1980), at 257 ff.
This preliminary chapter was inserted for continental lawyers to hopefully understand my later explanations in matters of evidence and the burden of proof in foreign sovereign immunity litigation.

I shall provide an outline of the common law principles of evidence. After all, I myself received my primary law training within the continental legal system and was thus little familiar with the particularities of Anglo-American civil procedure before I faced the challenge of the present study, and upgraded my knowledge accordingly.
This introduction is useful also because the national immunity statutes examined in this study are all originating from the Anglo-American legal system. We thus have to find out which evidence rules are valid under common law. By the way, I do not use the term common law in this study as an antidote to statutory law, but, as suggested by René David in his study Les Grands Systèmes de Droit Contemporains (1974), §18, as a term that contrasts with the continental legal system, which is also called civil law.

Canada is legally an interesting intersection point of both systems, a situation that is quite unique. As to the rules of evidence, however, Canada’s legislator, as stated in the Uniform Rules of Evidence (U.L.C.C. Report 1982) decided to follow quite closely the American example, ‘without however slavishly conforming to it.’


The term evidence has been defined in the quite authoritative textbooks by Tayer, A Preliminary Treatise on Evidence (1898) and by Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law (1981) as:
—All legal means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation. (Tayer)

—Evidence, then, is any matter of fact that is furnished to a legal tribunal otherwise than by reasoning or a reference to what is noticed without proof as the basis of inference in ascertaining some other matter of fact. (Wigmore)

The law of evidence does not vary much in the six jurisdictions that issued immunity statutes, the United States, the United Kingdom, Singapore, Pakistan, South Africa and Canada. In fact, in this body of law reigns an astounding level of consistency which has not only historical reasons, but is also the fruit of an admirable scientific effort of legal unification.

—Wigmore’s extensive treatise is referenced also in British literature on evidence, not just in American textbooks. See, for example, Cross on Evidence (1979), 88. Another example for this unifying effort is Canada’s law reform on evidence and their elaboration of a new code of evidence, which is inspired by scholarly input from both English and American literature and their respective case law.

To give an example, the Indian Evidence Act (Act I of 1872) that is still in force in India and which was equally adopted by Burma and Pakistan, as well as Ceylon and Bangladesh is entirely based on the British law of evidence. Sarkar’s Law of Evidence (1981) explains:
As the Act is drawn chiefly from the English law, a study of the text books on the subject affords great help toward a thorough grasp of the principles and rules underlying the sections, and is to some extent indispensable. For, the sections being only statements of rules in the form of express propositions, they can be best understood by first inquiring into the reasons of those rules. And this can be only achieved by a previous study of English and American textbooks on the subject. (Id., 16).

This is also valid for British and American case law. Woodroffe & Amer Ali’s *Law of Evidence* (1979) states in the Preface to the 12th edition:

> It is acknowledged generally with some exceptions that the Act consolidates the English law of Evidence. In the case of doubt or ambiguity over the interpretations at any of the sections of the Act, it is profitable to look to the relevant English common law for ascertaining the true meaning.

Sri Lanka even has inserted a new section 100 in their civil procedure code that says that all questions of evidence shall be dealt with in accordance with the English law of evidence. For Nigeria, Aguda writes in *Law and Practice Relating to Evidence in Nigeria* (1980) that until 1945, English law of evidence was applied by all courts in Nigeria as there was no legal regulation yet of that matter.
Jurisdiction and Competence

Cappelletti & Perillo state in Civil Procedure in Italy (1965), that ‘the term jurisdiction is much used and misused.’ For avoiding such a misuse of the term jurisdiction in the present study, I have to clarify what jurisdiction means, and what competence is about. It is true that we can observe in Anglo-American civil procedure a certain ambiguity with regard to the term jurisdiction; this term is often used for actually denoting the competence of a court for ruling a certain case. Hans Smit wrote in his article The Terms Jurisdiction and Competence in Comparative Law (1961):

Nevertheless, the custom to speak of jurisdiction of courts is most inveterate. This phenomenon might not be particularly objectionable if the term jurisdiction in this context were used only to denote the judicial jurisdiction of the state which gave the court the power go hear the controversy.

However, the difficulties inherent in undiscriminating use of the term jurisdiction are further compounded by the fact that it is also used to describe the power of a court to adjudicate a particular controversy. Used in that sense, the term jurisdiction is a synonym for what is more appropriately called competence.

An example for the use of the term jurisdiction when actually denoting competence is to be found in
the United States Foreign Sovereign Immunities Act of 1976. In §1330 of this statute, the conditions are enumerated under which a court possesses competence *ratione materiae* et *ratione personae* (subject matter jurisdiction and personal jurisdiction) over a foreign state. The statute, instead of using the terms subject matter competence and territorial competence, as Cappelletti & Perillo suggest it, replaces the general term competence by the general term jurisdiction. This terminological confusion, while it seems disturbing on first sight, does have a positive and rational side to it, especially when it is seen together with the topic we are talking about here, foreign sovereign immunity.

To begin with, international law talks about *immunity from jurisdiction* and not about ‘immunity from competence.’ Immunity from jurisdiction is an exception to the generally unlimited jurisdiction of a forum state over the whole of its territory.

Second, Smit’s argument, when applied to the subject of foreign sovereign immunity, loses a lot of its persuasive weight because the strict distinction between the judicial jurisdiction of a forum state, on one hand, and the competence of a court to adjudicate a particular controversy are in reality the two sides of
one and the same medal and decide about one and the same question, namely if immunity is to be granted, or not. Hence, the competence of the court depends on the denial of immunity; in other words, the affirmation of the judicial jurisdiction of the forum state is a *conditio sine qua non for the admission of competence*. In this manner, the two problems that are considered generally distinct among law practitioners are in reality intertwined and entangled because of the decisive dichotomy *immunity vel non*. In French civil procedure, a distinction is made between the rules of general competence (*compétence générale*) and specific competence (*compétence spéciale*); the latter is again divided in the fields of territorial competence (*compétence territoriale*) of the court and competence *ratione materiae*. The latter is often called *compétence d’attribution*.

German, Italian and other national civil procedure laws of continental Europe know similar rules and terms.

But obviously, it would be misleading to use in this study terms familiar to the continental legal system, as we are talking here exclusively about statutory legislation from the common law system.
Apart from the confusion this would create in the field of sovereign immunity, it would be a wrong methodological approach even in a general comparative law study.


This is why I am going to use in this study the terms *subject matter jurisdiction* and *personal jurisdiction*, as the American legislator has explained them in the *House Report* to the FSIA 1976, and as they are used in habitual legal practice in the common law system. And as any British or American lawyer, I of course mean competence when I say jurisdiction.

**Statute and Law**

While it has been said by the French lawyer Ernest Lehr in his book *Éléments de Droit Civil Anglais* (1906) that *loi se dit act*, the terms *statute* or *act*, on one hand, and *law*, on the other, are quite distinct. A law, which is the principle legal regulation in the continental system of law, is usually a vast and definite codification. By contrast, a statute or act is a rather secondary, but highly detailed enactment embedded in the so-called *common law*; as such, a statute is a
rather pointed codification that legally regulates a particular situation. Thus, the statute is to be considered primed in relation to common law; in other words, in so far as the statute applies, it overrules any opposing common law. But outside its scope of regulation, common law will still grasp.


While over the last century or so this situation changed as the amount of statutory regulations rose up, this has changed nothing about the principle that common law or case law is the primary source of reference for adjudication with the Anglo-American legal system. Smith and Bailey observe that a statute is basically an occasional regulation of a legal situation compared to a law that represents something like a definite codification of the legal matter or problem. As a result, the interpretation of laws follows different rules than the interpretation of statutes.

Fact in Anglo-American civil procedure, according to Wigmore, means ‘whatever is the subject of perception and consciousness.’


The present study is only concerned with the proof of facts, while generally in litigation rights may have to be proven as well, especially in the case when those rights have been acquired under a legal system different from the one of the forum state.

—The (direct) proof of a legal right must be distinguished from the (indirect) proof of a fact that a legal right is based upon. In the first case, it’s for the court a legal question to decide, while in the second case, it’s a question about facts. In Anglo-American law, foreign law is considered to be a fact and thus the usual rules of evidence are applicable. See Hersch Lauterpacht, International Law (1979), §58, 158.

Facts subject to proof are those that are ‘facts in issue’ and ‘facts relevant to the issue’, or else ‘facts probative to an issue.’


The main facts in issue are those that the plaintiff must prove in a civil action if he is to win, and those that the defendant must prove in order to establish a defense. It is either substantive law or adjective law,
that is, *procedural law*, which determines those facts, or in the words of Phipson and Elliot: ‘It is not the law of evidence’s business to say what those facts are in any particular case. They are determined by the substantive law or by the proceedings.’


In the particular case of this study, the question which law is applicable is a little more tricky, for not only national law is to be considered, but also international law. As a result, the facts in issue are those derived from both national law and international law. To give an example, §1605(a)(2) FSIA enumerates exceptions from a general rule of immunity, §1604, which represent each a potential fact in issue in any sovereign immunity litigation. I italicized all the potential facts in issue; the plaintiff may invoke either of them in his pleadings:

- action is based upon a *commercial activity carried on in the United States*;
- action is based upon an *act performed in the United States in connection with a commercial activity of the foreign state elsewhere*;
- 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*. 

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Or let us look at §1603(d) which defines the term ‘commercial activity’ as either a *regular course of commercial conduct* or a *particular commercial transaction or act*.

The State Immunity Act 1978 of the United Kingdom is still more precise in this respect. It states in its §3(3):

§3 (3)  
In this section ‘commercial transaction’ means -  
(a) any contract for the supply of goods or services;  
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and  
(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

Thus, under the FSIA 1976, a particular commercial transaction may be a fact in issue. By the same token, under the STIA 1978, a contract for the supply of goods and services is a fact that when it is proven will lead to a denial of foreign sovereign immunity and thus will be constituent for the affirmation of jurisdiction over the foreign state.

—See the similar provisions in §5(2)(a) of Singapore STIA 1979, §5(3)(a) of Pakistan STIO 1981, and §4(3)(a) of South Africa FSIA 1981. Under the United States FSIA 1976, such contracts fall under §1603(d) and Canada STIA 1982 defines them in §5.
Burden of Proof

The term burden of proof in Anglo-American law is distinct from the terms ‘charge de la preuve’ or ‘fardeau de la preuve’ in French law, ‘Beweislast’ in Germanic legal systems, ‘carga de la prueba’ in Hispanic legal systems, ‘ónus da prova’ in Portuguese and Brazilian law, or ‘onere della prova’ in Italian law.


—See in general for Spanish Civil Procedure, art. 1214 of the Código Civil Español: ‘Incumbe la prueba de las obligaciones al que reclama su cumplimiento, y la de su extinción al que la opone’. This provision corresponds to art, 1315 of the French Code Napoléon, as cited above in the text. See the comment on the adoption of this article in the Spanish Civil Code from the French Civil Code Brocá/Majada, Práctica Procesal Civil (1979), Tome I, 936 ff. The countries of Middle and South America are equally part of the continental law system. See René David, Les Grands Systèmes de Droit Contemporains (1974), 72 and Phanor J. Eder, A Comparative Survey of Anglo-American and Latin-American Law, New York (1950).
—For Ecuador: See José Alfonso Troya Cevallos, Elementaros de Derecho Procesal Civil (1978), Tomo I, pp. 245-246.

—For Mexico: Art. 281 of the Código de Procedimientos Civiles corresponds to art. 1214 of the Código Civil of Spain, see Carlos Arellano García, Derecho Procesal Civil (1981), 153-155.

—For Peru: See Pedro Sagastegui, Urteaga, Derecho Procesal Civil (1982), Tomo II, 84-91.

—For Chile: Emilio Rioseco Enriquez, La Prueba ante la Jurisprudencia (1982), 59-80.

—For Argentina: Art. 377 of the Código Civil y Comercial de la Nación is drafted after the model of art. 1214 of the Código Civil of Spain, but stipulates more details.


—For Colombia: Hernando Davis Echandia, Teoría General de la Prueba Judicial (1981), Tomo I, 393 ff. It is interesting to note that the German treatise of Rosenberg is quoted here, which has been translated to Spanish, see 450, note 132, which is just another puzzle stone that witnesses for the supranational coherence of evidence laws, also in the continental legal system. See also Gustavo Humberto Rodríguez, Curso de Derecho Probatorio (1983), 70 ff.

—For Bolivia: Art. 375 of the Código de Procedimiento Civil which also is a recapitulation of art. 1214 of the Código Civil of Spain.

—See for Portugal, Varela/Bezerra/Sampio e Nova, Manual de Processo Civil (1984), 430-451, with many references from French, Italian and German evidence law textbooks.

—Augenti, L’onere della prova (1932), Micheli, L’onere della prova (1942), Aurelio Scardacccione, Le Prove (1971), Parte Prima, 3-84, Crisanto Mandrioli, Corso di Diritto Processuale
To begin with, in France, article 1315 of the Code Civil states for the proof of a debt or the payment of a debt:

§1315 Code Civil
Celui qui réclame l'exécution d'une obligation doit la prouver. Réciproquement, celui qui se prétend libéré, doit justifier le paiement ou le fait qui a produit l'extinction de son obligation.

Regarding Canada while the French version of the bilingual text of the Uniform Evidence Act, Livre II, Règles Générales de Preuve, Titre I speaks of fardeau de la preuve, this notion is not identical with the term fardeau de la preuve or charge de la preuve in continental law. Canadian law, as already mentioned, follows the Anglo-American evidence law system, while in Québec the French translation of the English term burden of proof does not reflect the legal content of this notion. It is just what it is, a translation.

Austrian and Swiss civil procedure law, and evidence law, is strongly influenced by German civil procedure law and rules of evidence.

—See, for example for Austria Hans W. Fasching, Lehrbuch des österreichischen Zivilprozessrechts (1984), 417-426, and for Switzerland Max Guldener, Schweizerisches Zivilprozessrecht (1979), 325-327. It has to be noted that procedural law is in Switzerland regionally bound, and every Canton has its own civil procedure code.

Federal evidence law is to be applied when the juridical matter in question is one of federal law; if however the facts at the basis of the case are those of a relationship ruled by Cantonal law, the civil procedure rules of that Canton are to be applied for the case. As to federal law, see for example Art 8 ZGB.


Despite these apparent differences, it is nonetheless possible to derive common parallels from the different notions of the *onus probandi*. For example, like with the Anglo-American notion of the burden of proof, there is a dual nature to be noted also with the continental notions of the burden of proof.
To be true, there are generally two distinct notions, a subjective or affirmative burden and an objective burden that is also called burden strictu senso. The subjective burden or affirmative burden of proof is called ‘Beweisführungslast’ or ‘subjektive Beweislast’ in German civil procedure, ‘charge de la production des preuves’ in French civil procedure, ‘carga de la afirmación de la prueba’ in Spanish civil procedure and ‘onere della prova’ in Italian civil procedure.


—France: Raynaud/Vanel, Répertoire de Procédure Civile (1984), 'Preuve', Section 2 'Charge de la Preuve', §1 'Ordre de la Preuve.'


The objective burden of proof is called ‘Beweislast’ or ‘objektive Beweislast’ in German civil procedure, ‘risque de la preuve’ in French civil procedure, ‘carga de la prueba’ in Spanish civil procedure and ‘onere della prova’ in Italian civil procedure.
Italian civil procedure law does not seem to make this difference as for both notions the same expression, *onere della prova*, is used. However, Cappelletti and Perillo, who have done an in-depth comparison of the Italian notion of *onere della prova* and the Anglo-American term burden of proof, conclude:

The rules governing the burden of proving a fact are intimately related to the rules governing the burden of alleging a fact. As a general rule, the party who has the burden of pleading also has the burden of proof. (Id., 185).

The affirmative burden is applied to the pleadings and establishes a certain order in the probatory procedure; according to that order, the burden shifts from one party to the other. However, the objective burden of proof is not related to the production of
evidence, but decides the litigation in case of a non liquet, that is, an irresolvable doubt regarding any fact in question: the party who carries the objective burden, then, loses the case. This means, practically speaking, that the objective or legal burden enables the judge to render a verdict in a case where the truth cannot be found. It’s the applicable substantive law that attributes the objective burden, which is why Lord Denning’s expression legal burden is particularly fit for denoting this burden. It’s also correct to denote this burden as the ultimate burden, as it does not shift.

These similarities admitted, it would be simplistic, as noted by Cappelletti & Perillo, to use any of the terms for the onus probandi from any of the continental legal systems synonymously with the Anglo-American term burden of proof.

In Anglo-American law, the term burden of proof is used to describe two different burdens. (...) In the Italian non-jury system, this distinction does not exist. Italian law is concerned only with the risk of non-persuasion. Even in the Italian system, however, the question whether the burden of proof has been met is considered in two stages. Unless the panel decides to hear the evidence itself or to remand the case to the examining judge for the further taking of evidence, the examining judge decides when to close the proof-taking stage, thus
preventing the introduction of further evidence. (Id., note 82).

The difference has to be seen as a result of the different ways to litigate. Anglo-American civil procedure is an adversary system where the parties from the start maintain antagonist positions, and it’s a system that works with a jury, and not just a single judge or three judges. James & Hazard note in their book Civil Procedure (1977), §1.2, p. 4. [45]:

A leading characteristic of the Anglo-American procedural system is its adversary nature. In civil disputes it is generally up to the parties, not the court, to initiate and prosecute litigation, to investigate the pertinent facts, and to present proof and legal argument to the tribunal. The court’s function, in general, is limited to adjudicating the issues submitted to it by the parties on the proof presented by them, and to applying appropriate procedural sanctions upon motion of a party.

In any case, for the present study this controversy is not of importance as only Anglo-American statutes are to be examined, for which the Anglo-American law of evidence is to be applied. In fact, because of the particular nature of the adversary litigation system and its bestowal of judicial cognition upon both judge and jury, evidence law in general, and the rules of the
burden of proof, in particular, have a much higher importance under common law than in continental law. Fortunately, the subject has been elucidated by high rank legal scholars and a sheer enormous amount of case law. *Phipson on Evidence* references about 8000 precedents, *Wigmore* even 16000!

It is to note that statutory regulations on civil procedure seldom contain rules of evidence or a precise allocation of the burden of proof, as for example the UK’s Civil Evidence Acts of 1968 and 1972, or South Africa’s Civil Proceedings Evidence Act No. 25 of 1965.


This is systemically sound because the burden of proof is determined by the applicable substantive law, not civil procedure regulations.

There are however presumptions to be found in American civil procedure laws, in the rules No. 301 of the Federal Rules of Evidence (28 U.S.C.A.) and in the Uniform Rules of Evidence, 13 U.L.A. Civ. Proc. 227. A detailed regulation of evidence rules was worked out by the American Law Institute and was inserted
in the *Model Code of Evidence (1942)*. Similar rules are to be found in the California Evidence Code.

Regarding Canada, the Uniform Evidence Act contains not only very detailed provisions regarding the burden of proof, but it also bears the advantage that it’s drafted in a truly bilingual manner (English/French).


The general rule is that the judge adjudicates about legal questions, while the jury decides about the facts, but there are several exceptions to this rule. In addition, it has to be seen that more and more litigations are held without a jury; the judge is said to take over the two functions in one person. However, in principle, the particularities and rules of the burden of proof have not changed for that reason.


Phipson & Elliott write:

Now the trial is usually before the judge alone, the two separate functions remain. The judge performs them
both, but he must take care to keep them separate.

It is important to remember that Anglo-American evidence law has been coined by the particularity of the jury trial, and that is why the strict separation of the functions of judge and jury even applies when the judge decides alone. In the United States, the *Federal Rules of Evidence* detail the evidence procedure in federal jurisdiction. These rules, interestingly, also do not make a distinction between trials with or without jury, as they implicitly hold that for the latter category of trials, the judge performs both functions.


However, the question does not need to be deepened in this study as foreign sovereign immunity litigation is tried without jury. The main difficulty in understanding the Anglo-American concept of the burden of proof results from the fact that the term has more than one meaning.

It was only at the end of the 19th century that, with the classical monograph of J. B. Tayer, *A Preliminary Treatise on Evidence* (1898), the legal profession began to build awareness about the need to clarify the matter. James & Hazard note:

The term burden of proof is used in our law to refer to two separate and quite different concepts. The distinction was not clearly perceived until it was pointed out by James Bradley Thayer in 1898. The decisions before that time and many later ones are hopelessly confused in reasoning about the problem. The two different concepts may be referred to as

1. the risk of non-persuasion, or the burden of persuasion or simply persuasion burden;
2. the duty of producing evidence, or simply the production burden or the burden of evidence.


The two burden have to be distinguished; they are called principle burdens. So far there is unanimity in the literature; on the details, however, the literature greatly vacillates. Cross distinguishes further between provisional and ultimate burdens and between shifting burdens and rebuttable presumptions.

Sometimes even a third burden is added, that is called the burden of pleadings, while in reality this burden is a consequence of the legal burden. And Phipson to add on a forth burdens, the burden of establishing the admissibility of the evidence.


In fact, the admissibility of proof by the judge is of high importance in the adversary trial as lay persons are going to decide about the evidence; as a result, it is crucial which evidence is admitted and which is refused by the judge, whose role is to supervise the trial game with his ‘legal eye’, as juries can be rather unpredictable in their verdicts. But apart from this rather fancy expansion of the system, most authors and the overwhelming number of precedents admit a dualistic system with two principle burdens.


These principle burdens are:

(1) The persuasive burden, legal burden or risk of non-persuasion of the jury; (2) The evidential burden, burden of adducing evidence or duty of producing evidence to the judge.
—Anglo-American law professionals have not lacked fantasy to coin synonyms to these terms; however their fantasy did not necessarily lead to more clarity; and what is needed in matters of terminology is precision. The term ‘risk of non-persuasion of the jury’ is employed by Wigmore, Vol. 9, §2485, Cross on Evidence, 27, Lilly, 41, Phipson & Elliott, 51, Glasbeek, 633 and Curzon, §5, 48. The term ‘legal burden’ is to be found in Halsbury’s Laws of England, §13, Cross on Evidence, 86, Glasbeek, 633. The term ‘burden of persuasion’ is used by Lilly, p. 40, Graham, Rules of Evidence, §310.5, 45 and Graham, Evidence, 755. In addition, you can find the terms ‘persuasion burden’ with Cross on Evidence, 93 and Rothstein, Ch. 2, 107 as well as ‘fixed burden of proof’ with Cross on Evidence, 87. That is not yet all there is. I also found the term ‘general burden of proof’ with Walker and Walker, 613 and Aguda, n. 21-12, the term ‘burden of establishing the case’ with Sarkar on Evidence, §102, 911, ‘onus of proof’ with Cross on Evidence, 97, ‘onus’ with Hoffmann & Zeffert, 386, ‘burden of proof on the pleadings’ with Sarkar’s Law of Evidence, ‘persuasive burden’ with Phipson on Evidence, n. 4-04, ‘ultimate burden’ with Cross on Evidence, 93 and Lilly, 44 or simply ‘burden of proof’ with Cross on Evidence, 86 or ‘burden of proof simpliciter’ with Woodroffe & Amer Ali’s Law of Evidence, Sect. 104, n. 2, 2107.

—The term ‘duty of producing evidence to the judge’ is to be found with Wigmore, Vol. 9, §2486; the term ‘evidential burden’ is employed by Halsbury’s Laws of England, §13; the term ‘burden of adducing evidence’ is used by Lilly, 44 and by Phipson on Evidence, n. 4-04. In addition, the expression ‘onus of proof’ is used for this burden by Sarkar’s Law of Evidence, §102, 912 and §103, 913 and by Woodroffe & Amer Ali’s Law of Evidence, Sect. 104, n. 2, 2107. This is not yet all there is in terminological fantasy. ‘Burden of producing evidence’ as well as ‘burden of production’ are used by Lilly, 44 and Phipson on Evidence, n. 4-04, the expression ‘burden of going forward with evidence’ can be found in the Federal Rules of Evidence, Rule 301, the term ‘production-of-evidence burden’ is to be found with Rothstein, Ch. 2, 99 as well as ‘production burden’
with the same author on 100, ‘evidentiary burden’ can be found with Hoffmann & Zeffert, p. 386, ‘risk of not-adducing evidence’ is coined by Glasbeek, 638, and ‘burden of introducing evidence’ is a term Aguda comes up with on n. 21-16. For avoiding the danger of confusion between the two burdens, Cross on Evidence, 27-28, suggests to not use the expression ‘evidential burden of proof.’

The presentation of evidence is a highly regulated and orderly ritual. It starts with the party who bears the evidential burden to address their proof to the judge. The judge decides if a prima facie case has been made, and then instructs the jury to pronounce the final decision regarding the evidence offered by both parties. This is often expressed in the terms that the parties have to ‘pass the judge and convince the jury.’ It’s in that moment that the persuasion burden comes to play its decisive role.

—See, for example, Phipson and Elliott (1980), 52. The formulation used in two U.S. district court decisions shows the nature of both burdens very well: ‘Burden of proof has two elements, the burden of producing evidence and the burden of persuading the fact finder,’ Abilene Sheet Metal Inc. v. N.L.R.B., 619 F.2d 332 (3d Cir. 1980) and Hochgurtel v. San Felippo, 253 N.W.2d 526, 78 Wis.2d 70 (Wis. 1977).

The Evidential Burden

Introduction
There is a special relationship between the expressions *evidential burden, prima facie evidence* and *standard of proof*. The party that bears the persuasive burden has the right to begin with presenting evidence to the judge, and as a general rule, the evidential burden follows the persuasive or legal burden.

—Cross on Evidence (1979), 29, Hoffmann & Zeffert (1983), 390-391, Phipson & Elliott (1980), 63. If, exceptionally, the legal burden is on the defendant, it’s the defendant who has the right to begin. The right to begin also has been called ‘onus probandi,’ see The English and Empire Digest (1974), §131, Sarkar’s Law of Evidence (1981), §102, 911, Phipson on Evidence (1982), n. 4-07, 47-48.

As in principle the legal burden is on the plaintiff, it’s the plaintiff who usually begins to produce evidence.


For every single issue, evidence is thus produced. This is by the way not a particularity of Anglo-American civil procedure, but a general principle.

Every proof must relate to a specific fact in issue, otherwise it would be off-track and irrelevant. As a result, a burden of proof ‘in general’ is inconceivable.
For every fact in issue, there is a burden of proof that one of the parties is charged with. Cross on Evidence (1979), 29, expresses it this way: ‘In the context of the law of evidence, the expression ‘burden of proof’ is meaningless unless it is used with reference to a particular issue.’ The judge considers the evidence in the light of the applicable standard of proof and decides if a prima facie case was established.

Standard of proof is a measure for the adequateness of the proof presented. All evidence must meet a certain standard to be adequate, to be sufficient; as a result, all evidence has to be evaluated by the judge for meeting the standard of proof applicable in the particular litigation. The term prima facie case or prima facie evidence in Anglo-American civil procedure has nothing in common with the notion of Prima-Facie Beweis in German civil procedure law, while literally translated it seems to be equivalent.

—Frédéric W. Eisner, Beweislastfragen und Beweiswürdigung im deutschen und amerikanischen Zivilprozess, ZZP, Bd. 89, 78-90, pp. 86 ff.

Notion and Function

Cross writes that the concept of the evidential burden is the product of trial by jury and the possibility of withdrawing an issue from that body.

See also the California Evidence Code (1965) which stipulates:

**California Evidence Code (1965)**

§110. ‘Burden of producing evidence’ means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue.

The American Law Institute’s Model Code on Evidence (1942) explains:

**Rule 1. ...**

(2) ‘Burden of producing evidence of a fact’ means the burden which is discharged when sufficient evidence is introduced to support a finding that the fact exists.

In fact, the notion is unknown in continental law systems, and for good reason. It only makes sense in the adversary trial system and when a jury decides about the facts; the judge’s function is in so far one of controlling and instructing the lay persons composing the jury. The burden of producing evidence is not an
obligation or a duty; it simply represents a risk: the risk to not being able to produce evidence satisfactory to the court.

—Cross on Evidence (1979), 91, Phipson and Elliott, Manual of the Law of Evidence (1980), 37, who state: ‘Although the two parts of the tribunal are separate in function, the English system of trial has always been marked by a high degree of control by the judge of the jury. The judge is in control to a much greater extent than in, say, the United States.’ For the instruction about the allocation of the burden of proof, see Phipson and Elliott, Manual of the Law of Evidence (1980), 62, Model Code on Evidence, Rule 1, comment on §§(2) and (3), 73-74: ‘In a jury case this means that the party has to satisfy this burden in order to escape an adverse peremptory instruction as to that fact.’ See Model Code on Evidence (1942), 74 and Curzon, Law of Evidence (1978), 49 under (b): ‘A failure by a party to discharge the evidential burden brings the risk … of that party’s failing on the issue, wholly or in part.’

The judge considers the evidence submitted by the parties and decides if

(i) the evidence has met the standard of proof; or

(ii) the evidence has not met the standard of proof.

The judge considers all evidence, not only the one submitted by the party that bears the evidential burden. This means that the party who bears the onus of proof can profit from proof submitted by the adversary. Cross and Wilkins write:

Although we speak of one party ‘bearing’ the burden of proof, or the burden of adducing evidence, it must be
remembered that he may be able to rely on those parts of his adversary’s evidence which are favorable for him.

—Cross & Wilkins, An Outline of the Law of Evidence (1980), 27. See also Model Code on Evidence (1942), 74: ‘Neither the rules nor the decisions require that the evidence discharging either burden shall have been introduced by the party having the burden.’

**Standard of Proof**

When a *prima facie case* was made by the party who bears the evidential burden, and the judge decides that the evidence meets the applicable standard of proof, this has basically three consequences:

(i) the burden of proof is discharged;

(ii) the burden shifts to the other party;

(iii) the fact is proven if the other party cannot discharge their burden.

—Cross on Evidence (1979), 119-120 remarks that ‘no precise formulae have been laid down with regard to the standard of proof required for the discharge of the evidential burden and, as this is not a matter upon which it can ever be necessary for a judge to direct a jury, there is no reason why it should ever become a subject of formulae.’

The standard of proof regarding the evidential burden is not a matter that the judge must instruct the jury about; only the persuasive burden is. This is so
because the judge alone renders this decision. Cross and Wilkins (1980) explain about the standard of proof for prima facie evidence that it necessitates ‘a finding that the fact is proved if the evidence is uncontradicted.’


It flows from the principle of fair trial that each party must have the possibility to contradict the evidence submitted by the other party. Consequently, when one party discharges their evidential burden, the other party gets the burden. This can be imagined as one party ‘inheriting’ the burden form the other party, or that the burden is ‘passed’ from one party to the other within the litigation game.

—Phipson and Elliott, Manual of the Law of Evidence (1980), 62: ‘It has been seen that the discharge of the evidential burden by one side puts the other side under a similar burden, or, as it is often put, ‘passes’ the burden upon him.’

This also has been called the shifting of the evidential burden, while it has to be seen that the persuasion burden never shifts. The ‘shifting’ is of course a juridical metaphor; the pretended
'movement' of the burden is in reality the idea of an equitable partition of the trial risk.


Eggleston writes:

It is often said that although the legal burden of proof remains throughout the trial where it was at the beginning, the evidential burden may shift from one party to the other. All this really means is that as a case proceeds, one party or the other will produce evidence that, if it remained unchallenged, would entitle the party producing it to a decision in his favour. In this sense he can be said to have shifted the burden of proof to the other party.


Another result that flows out from this system is that when a prima facie case was not refuted or ‘rebutted’, the fact is considered to have been proven. The court has no obligation to arrive at this conclusion, but there is a high probability that the
court decides on the lines of an uncontradicted prima face case.

—While normally the expression ‘rebutting’ is used only for presumptions, I have found it in the literature in one instance. Hoffmann & Zeffert, South African Law of Evidence (1983), 404 ff. speak of ‘rebutting a prima facie case’. In some sense, a prima facie case works like a presumption, while it’s technically speaking not the same. See also Cross on Evidence (1979), 28.

The only case a judge is obliged to render a verdict in a particular way is when a statute puts up a general rule that contains a legal presumption. In case the presumption was not rebutted, the judge’s verdict must follow the general rule stipulated in the statute. Similarly, when the prima facie evidence was not meeting the applicable standard of proof, the judge must render a decision adverse to the burdened party. In this case, one could also speak of the risk of producing evidence satisfactory to the court was realized against the party who was charged with it.


**Incidence**

At the beginning of the trial, the evidential burden is with the party who bears the persuasive burden.
550(b) of the California Evidence Code stipulates: ‘The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to this fact.’ (West’s Ann.Cal.Evid.Code §550, Vol. 29B, 508)

As Cross on Evidence (1979) puts it:

As a general rule, the burden of adducing evidence is borne by the party who bears the burden of proof.


When the evidential burden is discharged, it is said to shift to the other party. Because of this assumed shifting of the evidential burden, and because it is temporarily with one and then the other party, it is also called provisional burden. Lord Denning explains in Brown v. Rolls Royce Ltd.:

**Brown v. Rolls Royce Ltd. (Lord Denning)**

My Lords, the difference between the judges of the Court of Session turned to the onus of proof. (...) The difference of opinion shows how important it is to distinguish between a ‘legal burden’, properly so called, which is imposed by the law itself, and a ‘provisional’ burden which is raised by the state of the evidence. [1960] 1 W.L.R. 210, 215 (H.L.).

As only at the start of the trial the two burdens are united, at any other point in time during the trial a test has to be effected for the determination of who
bears the evidential burden. This test has been inserted in various statutes; here is the one provided by the *California Evidence Code*:

**California Evidence Code**  
§550 Party who has the burden of producing evidence  
(a) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. (West’s Ann.Cal.Evid.Code §550, Vol. 29B, 508).

It is noteworthy in this context that also Nigeria’s Evidence Act details in §136:

**§136 Evidence Act of Nigeria**  
(1) In Civil cases the burden of first proving the existence or nonexistence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, (…)

(2) If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with. (Reproduced in Akinola Aguda, *Law and Practice Relating to Evidence in Nigeria* (1980), n. 21-03).

**The Persuasive Burden**

**Standard of Proof**  
We have already seen that the term *burden of proof*, in the sense to encompass both evidential and persuasive burden, and the term *standard of proof* are
to be distinguished according to their different functions.


The standard of proof, as we have already seen in our discussion of the evidential burden, is the measure for assessing a certain proof being *adequate and sufficient* for proving a certain fact.

Generally put, standard of proof is thus a measure for the adequateness of the proof presented. All evidence must meet a certain standard to be adequate, to be sufficient; as a result, all evidence has to be evaluated by the judge for meeting the standard of proof applicable in the particular litigation.

This is a very important function of the judge and it’s because of this function that the saying is that for a litigation to win, you have to ‘pass the judge;’ the next step, then, convincing the jury is the final or ultimate burden. For example, if a good lawyer on the defendant’s side, who wants to avoid the unpredictable verdict of a jury, can convince the judge
that the evidence presented by the plaintiff is insufficient for meeting the standard of proof, the trial will end right there, and it will be ended not by the jury, but by the judge. The verdict will be that the plaintiff was not able to establish a *prima facie case* for his allegations. That is always an elegant strategy for a lawyer to pursue.

It is to be noted that for establishing a *prima facie case*, the standard of proof in Anglo-American evidence law is lower than, for example, in German law where the conviction of the judge is required.


The standard of proof that is sometimes also called ‘quantum of proof’, in fact requires only a preponderance of probability.


As a general rule, the standard of proof is a preponderance of probability.

—See James & Hazard, Civil Procedure (1977), §7.6, 243: ‘The usual formulation of the test in civil cases is that there must be a preponderance of evidence in favor of the party having the persuasion burden (the proponent) before he is entitled to a
See also Lilly, An Introduction to the Law of Evidence (1978) 41: ‘… in a typical civil case, a party must prove the elements of his claim by a preponderance of the evidence (sometimes expressed by the phrases ‘greater weight of the evidence’ or ‘more probable than not’). The same is stated for Canada in the U.L.C.C. Report 1982, §2.3(a), 23.

Cross on Evidence (1979), op. cit. 111 ff. at 118, speaks of three standards of proof in the American evidence law; if this standard differs from what is recognized as standard of proof in British law, is however not explicated by the author.

Three standards of proof appear to be recognized in the United States, proof by ‘clear, strong and cogent’ evidence laying midway between proof on a preponderance of probability and proof beyond reasonable doubt.

A fact is proved when the proof submitted by one party has a surplus of probability over the proof submitted by the other party, or, in the words of Lord Denning ‘… if the evidence is such that the tribunal can say we think it more probable than not.’ (Miller v. Minister of Pensions, [1947] 2 All E R 372, 373-374).

On the other hand, when the probabilities are equal, the fact is not proven.

In case of a non liquet, a situation where it’s impossible for the judge to make a finding of the fact,
it’s the persuasion burden that as it were renders the decision: the party that bears the persuasion burden will lose the trial. Finding of a fact means ‘determining that its existence is more probable than its non-existence.’

—See Model Code on Evidence (1942), Rule 1(5).

Like the evidential burden, the persuasive burden is always related to a particular issue or fact; that is why we have to distinguish the facts that are at the basis of the action, and those at the basis of the defense. However, this distinction is often simplified when its about the facts that are constituent for the action. For example, Lord Edmund Davis states in the case *Chapman v. Oakleigh Animal Products, Ltd* that ‘the golden rule is that the onus of proof is on the plaintiff.’ [1970] 8 KIR 1063, 1072.

Presumptions are particular in that they link several facts, generally two, as the *Model Code on Evidence (1942)* stipulates in its Rule 701:

1. **Basic Fact**
   Basic fact means the fact or group of facts giving rise to a presumption.

2. **Presumption/Presumed Fact**
   Presumption means that when a basic fact exists the existence of another fact must be assumed, whether or not the other fact may be rationally found from the basic fact. Presumed fact means that fact which must be assumed.
Presumptions influence the burden of proof, however, only the evidential burden; they do not shift the persuasion burden.


Rule 301 of the Federal Rules of Evidence, applicable for proceedings in United States federal courts, stipulate this expressly:

**Federal Rules of Evidence**

*Rule 301. Presumptions in General in Civil Actions and Proceedings*

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on a party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally set.

**Notion and Function**

The persuasive burden represents, for the party that bears it, the *risk of nonpersuasion*, which is the risk of not being able to convince the trier of fact of a certain alleged issue in trial.

Evidence (1942), Rule 1(14), p. 72: ‘Trier of fact includes a jury, and a judge when is is trying an issue of fact other than one relating to the admissibility of evidence.’

It is distinct from the evidential burden in that it never shifts. This is why the persuasive burden is also called fixed burden of proof.


It always stays with the party that bears it due to the applicable substantive law or the pleadings.

—Cross on Evidence (1979), 87. Halsbury’s Laws of England, §13, Phipson on Evidence (1982), n. 4-06. Sometimes, in the literature there is question of a ‘burden of pleadings.’ The expression is awkward as the burden of pleadings can’t be a valid guideline for finding out about the incidence of the persuasive burden, see Schwering, System der Beweislast im englisch-amerikanischen Zivilprozess (1969), 99-100, and 90.

For this reason, it also is called ultimate burden, while we have seen that the evidential burden is a provisional burden. The reason why this burden does not shift is to see in its procedural function; it is not related to the production of evidence but enters the stage after all evidence has been produced: it then allows to render a clear verdict in favor of one party. Cross and Wilkins write:
The burden of proof is crucial when all evidence is in. It makes itself felt at a later stage than the burden of adducing evidence.


Incidence

The general rule is *ei qui affirmat non ei qui negat incumbit probatio*. That means the one who affirms a fact, be it positive or negative, must prove it, and not the one who contests the fact.


It would not be logical to ask for a simple negation to be proven because the latter is the very reason that the initial allegation needs to be proven in the first place. A plaintiff who meets a defendant who fully complies with the demand of the plaintiff, does not need to prove anything. In such a case, not a real litigation takes place but a peaceful settlement. Only
facts that are contested need to be proven. This is a general principle valid for all jurisdictions.

In this simple rule, there are contained actually three different principles:

(1) The one who affirms a fact must prove it;

(2) The one who contests a fact is not obliged to prove his negation of the fact;

(3) The one who affirmatively contests a fact must prove his affirmative defense.

It is both logical and reasonable to put the burden of proof on the party that invokes a right as a lawful consequence of certain alleged facts.

—See Glasbeek, Evidence Cases and Materials (1977), 634: ‘Each party will wish to have certain facts found so that the pertinent substantive law will be applied in his favor. Accordingly, it is logical to place the risk of non-persuasion, i.e. the legal burden, in respect of each fact-in-issue on the party who will fail in his claim if the fact-in-issue is not found to exist.’

This is in the general case the plaintiff or the party that would lose the trial if there was no evidence in court.

—See Cross & Wilkins, An Outline of the Law of Evidence (1980), 28: ‘The question is usually not a particularly difficult one, for a fundamental requirement of any judicial system is that the person who desires the court to take action must prove his case to its satisfaction. This means that, as a matter of
common sense, the burden of proving of all facts to their claim normally rests upon the plaintiff.’ See also Cross on Evidence (1979), 96 and Halsbury’s Laws of England, §14: ‘The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied’, citing Dickinson v. Minister of Pensions, [1953] 1 Q.B. 228, 232, [1952] 2 All E R 1031, 1033. This principle is expressed in the Indian Evidence Act, §101, in the following way: ‘Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies upon that person.’ Regarding Pakistan, which has adopted the Indian Evidence Act, see The Pakistan Code, Vol. II, 1, at 46. Kenya equally has literally overtaken the Indian Evidence Act, see §107 of the Evidence Act of Kenya, Laws of Kenya, Rev. Ed. 1977, Chap. 80, p. 37. For Nigeria, see §134 of the Evidence Act of Nigeria, cited by Aguda, Law and Practice Relating to Evidence in Nigeria (1980), 237.

Regarding sovereign immunity, the question who bears the burden of proof for the facts that are decisive for sovereign immunity to be granted is a procedural question; from this question has to be distinguished who in the trial bears the burden of proof regarding the applicable substantive law. If, for example, the plaintiff sues a foreign state as a consequence of a commercial contract with that state, two different questions regarding the burden of proof have to be asked. The first question regards the contract itself, on which the action is based. The facts that establish this contract have to be proved by the
plaintiff. The second question is who bears the burden of proof for the defense of immunity for jurisdiction, which is a question pertaining to adjective law.

This can be demonstrated more in detail with the example of one of the statutes on sovereign immunity to be discussed further down in this study, the UK’s State Immunity Act 1978, which stipulates that a contract for the supply of goods and services between the plaintiff and the foreign state is one of the exceptions that lead to a denial of sovereign immunity.

The existence of such a contract would establish both the material right of the plaintiff and the procedural right to pursue a legal action against the foreign state party of that contract, because of the denial of sovereign immunity in such a case. We can thus talk about a material and a procedural burden of proof, which in this case coincide, but which also may not coincide.

The burden of proof for the affirmation of a fact also encompasses the burden of proof for the negation of a fact, also called burden of disproof, if the party who bears the burden of proof alleges the nonexistence of a fact, or its negation. This is to say that the burden of
proof is something functional in a trial, and not dependent on the nature of the allegations.

—Cross and Wilkins, An Outline of the Law of Evidence (1980), 28: ‘The rule is sometimes expressed in such maxims as ‘he who affirms must prove’, but this must not be taken to mean that the burden of proof cannot lie upon a party who makes a negative allegation. There are numerous instances in which the plaintiff or prosecutor assumes the burden of proving a negative. (...) In these cases the phrase ‘burden of proof’ includes the burden of disproof’. See also Wigmore, Evidence in Trials at Common Law (1981), Vol. 9, §2484, 288: ‘The burden is often on one who has a negative assertion to prove.’

This also can be demonstrated by an example. In all statutes on foreign sovereign immunity, the conditions under which courts may exert jurisdiction over foreign states are enumerated as exceptions from a general rule of immunity. Hence, if immunity is a defense, the foreign state would bear the burden of proof for the facts the are at the basis of the immunity claim.

This is the basic rule put up by the United States Foreign Sovereign Immunities Act, 1976. But the result of such a construct feels strange: the foreign state would have to disproof all the numerous exceptions in the statute for establishing his claim for immunity. This would put a heavy onus on foreign states in trials involving foreign sovereign immunity.
However, the drafting technique of the statute seems to suggest this outcome. Hence, if sovereign immunity is to be considered as an affirmative defense, the foreign state would clearly bear the burden of proof for the facts that are at the basis of the immunity defense. This is the application of the general rule of evidence that affirmative defenses need to be proven by the party who invokes them.

But the question here, which is a question not of procedural law, but of international law, is if sovereign immunity really is to be considered as an affirmative defense only because of the drafting technique of the statutes on foreign sovereign immunity?

Affirmative defenses need to be specially pleaded in order to be taken in consideration by the court.

—See, for example, Lilly, An Introduction to the Law of Evidence (1978), 42 and Cairns, Australian Civil Procedure (1981), 130

As a result the burden of proof lies on the defendant.

However, this cannot be true because sovereign immunity has to be considered by the court \textit{sua sponte}. While in the \textit{House Report} to the FSIA 1976, it is explicated that sovereign immunity was an affirmative defense, this construction is in contradiction with international law, as it would render sovereignty an illusory concept.

As a result, later jurisprudence, especially, from the United States Supreme Court, made it clear that \textit{sovereign immunity has to be considered by the courts \textit{sua sponte}} and therefore cannot be construed as an affirmative defense because such a construction would be in violation of international law. The legal materials to the FSIA 1976 insofar contain an error and cannot be taken literally.

—The US Supreme Court decided this important question in Verlinden B.V. v. Central Bank of Nigeria (461 U.S.480, 103 S.Ct.1962, 76 L.Ed.2d 81, 51 U.S.L.W. 4567, 22ILM 647 (1983); in that case, the foreign state did not enter an appearance to assert an immunity defense. The Supreme Court ruled that in such a case a district court still must determine that immunity is unavailable under the FSIA, as this is a condition for the court’s jurisdiction (103 S.Ct.1962, 1971, note 20. Hence, the wording of the House Report that sovereign immunity is to be considered as an affirmative defense cannot be taken literally.

In principle, however, it is true that in all cases except affirmative defenses, the burden of proof is on
the plaintiff. In addition, it has to be noted that the burden of proof is on the party who adds a new element to the pleadings.


And to recapitulate it, the evidential burden follows the legal burden insofar. Interestingly so, even for affirmative defenses, the evidential burden follows the legal burden, but that situation both burdens are not on the plaintiff but on the defendant for establishing the affirmative defense.


**Summary**

The rules governing the burden of demonstrating a fact to be true by evidence are intimately related to the rules governing the burden of alleging a fact. As a general rule, the party who has the burden of pleading also has the burden of proof. The affirmative burden is applied to the pleadings and establishes a certain order in the probatory procedure; according to
that order, the burden shifts from one party to the other.

However, the objective burden of proof is not related to the production of evidence, but decides the litigation in case of a non liquet, that is, an irresolvable doubt regarding any fact in question: the party who carries the objective burden, then, loses the case. This means, practically speaking, that the objective or legal burden enables the judge to render a verdict in a case where the truth cannot be found. It’s the applicable substantive law that attributes the objective burden. It’s also correct to denote this burden as the ultimate burden, as it does not shift.

In fact, because of the particular nature of the adversary litigation system and its bestowal of judicial cognition upon both judge and jury, evidence law in general, and the rules of the burden of proof, in particular, have a much higher importance under common law than in continental law.

It is to note that statutory regulations on civil procedure seldom contain rules of evidence or a precise allocation of the burden of proof, as for example the UK’s Civil Evidence Acts of 1968 and 1972, or South Africa’s Civil Proceedings Evidence
Act No. 25 of 1965. This is systemically sound because the burden of proof is determined by the applicable substantive law, not civil procedure regulations.

There are however presumptions to be found in American civil procedure laws, in the rules No. 301 of the Federal Rules of Evidence (28 U.S.C.A.) and in the Uniform Rules of Evidence, 13 U.L.A. Civ. Proc. 227. A detailed regulation of evidence rules was worked out by the American Law Institute and was inserted in the Model Code of Evidence (1942). Similar rules are to be found in the California Evidence Code. As to Canada, the Uniform Evidence Act contains very detailed provisions regarding the burden of proof.

The general rule is that the judge adjudicates about legal questions, while the jury decides about the facts, but there are several exceptions to this rule. In addition, it has to be seen that more and more litigations are held without a jury; in such a case, the judge is said to take over the two functions in one person. However, in principle, the particularities and rules of the burden of proof have not changed for that reason. Phipson & Elliott write: ‘Now the trial is usually before the judge alone, but the two separate functions remain. The judge performs them both, but he must take care to keep them separate.’
It is important to remember that evidence law has been marked by the particularity of the jury trial, and that is why the strict separation of the functions of judge and jury even applies when the judge decides alone. In the United States, the *Federal Rules of Evidence* detail the evidence procedure in federal jurisdiction. These rules, interestingly, also do not make a distinction between trials with or without jury, as they implicitly hold that for the latter category of trials, the judge performs both functions.

The main difficulty in understanding the concept of the burden of proof results from the fact that the term has more than one meaning. It was only at the end of the 19th century that, with the classical monograph of J. B. Tayer, *A Preliminary Treatise on Evidence (1898)*, the legal profession began to build awareness about the need to clarify the matter.

The two burden have to be distinguished; they are called *principle burdens*. So far there is unanimity in the literature; on the details, however, the literature greatly vacillates. Cross distinguishes further between provisional and ultimate burden and between shifting burdens and rebuttable presumptions. Sometimes even a third burden is added, that is called the burden
of pleadings, while in reality this burden is a consequence of the legal burden.

And Phipson to add a 4th burden, the burden of establishing the admissibility of the evidence.

In fact, the admissibility of proof by the judge is of high importance in the adversary trial as lay persons are going to decide about the evidence; as a result, it is crucial which evidence is admitted and which is refused by the judge, whose role is to supervise the trial game with his ‘legal eye’, as juries can be rather unpredictable in their verdicts. But apart from this rather fancy expansion of the system, most authors and the overwhelming number of precedents admit a dualistic system with two principle burdens. These principle burdens are:

(1) The persuasive burden, legal burden or risk of non-persuasion of the jury;

(2) The evidential burden, burden of adducing evidence or duty of producing evidence to the judge.

The presentation of evidence is a regulated and orderly ritual. It starts with the party who bears the evidential burden to address their proof to the judge. The judge decides if a prima facie case has been made, and then instructs the jury to pronounce the final
decision regarding the evidence offered by both parties. This is often expressed in the terms that the parties have to ‘pass the judge and convince the jury’.

It’s in that moment that the persuasion burden comes to play its decisive role.

**The Evidential Burden**

There is a special relationship between the expressions *evidential burden, prima facie evidence* and *standard of proof*. The party that bears the persuasive burden has the right to begin with presenting evidence to the judge, and as a general rule, the evidential burden follows the persuasive or legal burden.

If, exceptionally, the legal burden is on the defendant, it’s the defendant who has the right to begin. The right to begin also has been called ‘onus probandi.’

As in principle the legal burden is on the plaintiff, it’s the plaintiff who usually begins to produce evidence. For every single issue, evidence is thus produced. This is not a particularity of civil procedure, but a general principle. We already learnt that every proof must relate to a specific fact in issue, otherwise it would be off-track and irrelevant.
As a result, a burden of proof ‘in general’ is inconceivable. For every fact in issue, there is a burden of proof that one of the parties is charged with. Cross on Evidence expresses it this way: “In the context of the law of evidence, the expression ‘burden of proof’ is meaningless unless it is used with reference to a particular issue.” (Id., 29).

The judge considers the evidence in the light of the applicable standard of proof and decides if a prima facie case was established. Standard of proof is a measure for the adequateness of the proof presented. All evidence must meet a certain standard to be adequate, to be sufficient; as a result, all evidence has to be evaluated by the judge for meeting the standard of proof applicable in the particular litigation.

Cross on Evidence writes that the concept of the evidential burden is the product of trial by jury and the possibility of withdrawing an issue from that body.

In fact, the notion is unknown in continental law systems, and for good reason. It only makes sense in the adversary trial system and when a jury decides about the facts; the judge’s function is in so far one of controlling and instructing the lay persons composing
the jury. The burden of producing evidence is not an obligation or a duty; it simply represents a risk: the risk to not being able to produce evidence satisfactory to the court.

The judge considers the evidence submitted by the parties and decides if

(i) the evidence has met the standard of proof; or

(ii) the evidence has not met the standard of proof.

The judge considers all evidence, not only the one submitted by the party that bears the evidential burden. This means that the party who bears the onus of proof can profit from proof submitted by the adversary.

When a prima facie case was made by the party who bears the evidential burden, and the judge decides that the evidence meets the applicable standard of proof, this has basically three consequences:

(i) the burden of proof is discharged;

(ii) the burden shifts to the other party;

(iii) the fact is proven if the other party cannot discharge their burden.

The standard of proof regarding the evidential burden is not a matter that the judge must instruct the
jury about; only the persuasive burden is. This is so simply because the judge alone renders this decision. Cross and Wilkins explain about the standard of proof for prima facie evidence that it necessitates a finding that the fact is proved if the evidence is uncontradicted.

It flows from the principle of fair trial that each party must have the possibility to contradict the evidence submitted by the other party. Consequently, when one party discharges their evidential burden, the other party gets the burden. This can be imagined as one party ‘inheriting’ the burden from the other party, or that the burden is ‘passed’ from one party to the other within the litigation game.

This also has been called the shifting of the evidential burden, while it has to be seen that the persuasion burden never shifts. The ‘shifting’ is of course a juridical metaphor; the pretended ‘movement’ of the burden is in reality the idea of an equitable partition of the trial risk. Another result that flows out from this system is that when a prima facie case was not refuted or ‘rebutted’, the fact is considered to have been proven.

The court has no obligation to arrive at this conclusion, but there is a high probability that the
court decides on the lines of an uncontradicted prima face case.

The only case a judge is obliged to render a verdict in a particular way is when a statute puts up a general rule that contains a *legal presumption*. In case the presumption was not rebutted, the judge’s verdict must follow the general rule stipulated in the statute. Similarly, when the prima facie evidence was not meeting the applicable standard of proof, the judge must render a decision adverse to the burdened party.

In this case, one could also speak of the risk of producing evidence satisfactory to the court was realized against the party who was charged with it.

At the beginning of the trial, the evidential burden is with the party who bears the persuasive burden. When the evidential burden is discharged, it is said to shift to the other party. Because of this assumed shifting of the evidential burden, and because it is temporarily with one and then the other party, it is also called provisional burden.

As only at the onset of the trial the two burdens are united, at any other point in time during the trial a test has to be effected for the determination of who bears the evidential burden.
The Persuasive Burden

We have already seen that the term burden of proof, in the sense to encompass both evidential and persuasive burden, and the term standard of proof are to be distinguished according to their different functions.

The standard of proof, as we have already seen in our discussion of the evidential burden, is the measure for assessing a certain proof being adequate and sufficient for proving a certain fact. Generally put, standard of proof is thus a measure for the adequateness of the proof presented. All evidence must meet a certain standard to be adequate, to be sufficient; as a result, all evidence has to be evaluated by the judge for meeting the standard of proof applicable in the particular litigation.

This is a very important function of the judge and it’s because of this function that the saying is that for a litigation to win, you have to pass the judge; the next step, then, convincing the jury is the final or ultimate burden. For example, if a good lawyer on the defendant’s side, who wants to avoid the unpredictable verdict of a jury, can convince the judge that the evidence presented by the plaintiff is
insufficient for meeting the standard of proof, the trial will end here, and it will be ended not by the jury, but by the judge. The verdict will be that the plaintiff was not able to establish a *prima facie case* for his allegations. As a general rule, the standard of proof is a preponderance of probability.

A fact is proven when the proof submitted by one party has a surplus of probability over the proof submitted by the other party, or, in the words of Lord Denning ‘… if the evidence is such that the tribunal can say we think it more probable than not.’ On the other hand, when the probabilities are equal, the fact is not proven.

In case of a *non liquet*, a situation where it’s impossible for the judge to make a finding of the fact, it’s the persuasion burden that as it were renders the decision: the party that bears the persuasion burden will lose the trial. Finding of a fact means ‘determining that its existence is more probable than its non-existence.’

Like the evidential burden, the persuasive burden is always related to a particular issue or fact; that is why we have to distinguish the facts that are at the basis of the action, and those at the basis of the
defense. However, this distinction is often simplified when it's about the facts that are constituent for the action.

Presumptions are particular in that they link several facts, generally two, as the Model Code on Evidence (1942) stipulates in its Rule 701. Presumptions influence the burden of proof, however, only the evidential burden; they do not shift the persuasion burden.

The persuasive burden represents, for the party that bears it, the risk of nonpersuasion, which is the risk of not being able to convince the trier of fact of a certain alleged issue in trial. It is distinct from the evidential burden in that it never shifts.

This is why the persuasive burden is also called fixed burden of proof. It always stays with the party that bears it due to the applicable substantive law or the pleadings.

For this reason, it also is called ultimate burden, while we have seen that the evidential burden is a provisional burden. The reason why this burden does not shift is its procedural function; it is not related to the production of evidence but enters the stage after all evidence has been produced: it then allows to render
a verdict in favor of one party. The general rule is *ei qui affirmat non ei qui negat incumbit probatio*. That means the one who affirms a fact, be it positive or negative, must prove it, and not the one who contests the fact. In this simple rule, there are contained actually three different principles:

(1) The one who affirms a fact must prove it;

(2) The one who contests a fact is not obliged to prove his negation of the fact;

(3) The one who affirmatively contests a fact must prove his affirmative defense.

Only facts that are contested need to be proven. This is a general principle valid for all jurisdictions. It is both logical and reasonable to put the burden of proof on the party that invokes a right as a lawful consequence of certain alleged facts. This is in the general case the plaintiff or the party that would lose the trial if there was no evidence in court.

The burden of proof for the affirmation of a fact also encompasses the burden of proof for the negation of a fact, also called *burden of disproof*, if the party who bears the burden of proof alleges the nonexistence of a fact, or its negation. This is to say that the burden of
proof is something functional in a trial, and not dependent on the nature of the allegations.

In principle, in all cases except affirmative defenses, the burden of proof is on the plaintiff. In addition, it has to be noted that the burden of proof is on the party who adds a new element to the pleadings.

To recapitulate, the evidential burden follows the legal burden. Even as far as affirmative defenses are concerned, the evidential burden follows the legal burden: in that situation both burdens are on the defendant for establishing the affirmative defense.
THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (USA)

Chapter Two

Introduction

The Foreign Sovereign Immunities Act of 1976, quoted in the literature as FSIA, FSIA 1976 or Act represents for the United States the culmination point of a legal history spanning over more than one and a half centuries.


It was officially introduced by the Leigh-Letter, the letter of

It has to be noted in this general context that sovereign immunity is not one single concept but encompasses *two different immunity rules*, namely regarding immunity from jurisdiction, on one hand, and immunity from execution into property, on the other. In accordance with the different legal traditions of these rules, I will carefully distinguish between *jurisdictional immunities*, and *immunity from execution*. While in American textbooks on international law, this distinction is not always made, it is not constructive in my view to refer to sovereign immunity without distinguishing between the different immunity rules.

—The distinction is not always made, for example, in Gamal Moursi Badr, State Immunity (1984), 9-20 and in Ian Sinclair, The Law of Sovereign Immunity, Recent Developments, RCADI (1980-II), 121-128, and 161-170. See also Sompong Sucharitkul, State Immunities and Trading Activities in International Law (1959), 4-14 and Immunities of Foreign States before National Authorities, 149 RCADI (1976-I), 155.

There is more clarity to be found in case law, as even in the earliest of precedents on foreign sovereign immunity, the question which immunity was concerned was case-specific, and generally elucidated
by the court. For example, in *The Schooner Exchange v. M’Taddon*, 11 U.S. (7 Cranch) 116 (1812) or *Berizzi Brothers v. Steamship Pesaro*, 271 U.S. 562, 46 S.Ct. 611 (1926), it was made clear that while at that time sovereign immunity was still meant to be that of a sovereign ruler, in the second precedent, this immunity doctrine was extended to governments. In fact, in the first precedent, the vessel *Exchange* belonged to Emperor Napoleon I, and the vessel *Pesaro* belonged to the government of Italy.

*Berizzi Brothers v. Steamship Pesaro* is a precedent that for the first time informs about the details of how the foreign state has to submit its immunity claim to the court. Namely, in this case, the Italian ambassador made a suggestion that the vessel *Pesaro* belonged to the Italian government. The court however stated that this way to claim immunity was insufficient. Already in *Ex Parte Muir*, 254 U.S. 522, 532-533, the United States Supreme Court rejected an immunity claim that was submitted to the court in the form of a simple statement from the British embassy and said foreign states were held to use official channels for claiming immunity. This meant in clear text that the immunity claim had to be submitted to the State Department.
The verdict was criticized in the international law literature as a voluntary submission of the judiciary under the executive in matters of foreign sovereign immunity, but I do not see the point as the court also expressly stated that there was a second way to claim immunity. This second alternative was that the foreign state send an official delegate to the court who would present the immunity claim in the name of the foreign government. This, then, was confirmed in Compania Española v. Navemar, 303 U.S. 68, 74, however with a modification. In this case, the Secretary of State had refused to grant immunity to the vessel Navemar and the Spanish ambassador chose the second way to submit immunity, directly to the court, and pleaded the vessel belonged to the Spanish state.

More importantly, these precedents that are often taken as examples for a so-called absolute immunity doctrine never absolutized anything in matters of foreign sovereign immunity. Their rulings were strictly case-specific, and in the more renowned international law textbooks, the error is explicitly corrected.

—For the fact that these precedents did not affirm any general immunity rules, see Gamal Moursi Badr, State Immunity
In fact, an absolute doctrine of foreign sovereign immunity was never established. And it didn’t need to be established because as long as states did not engage in the marketplace and behaved like traders, the distinction between sovereign and private activities of a foreign state did not need to be made. Hence, the whole question of the restrictive immunity doctrine could not come up in the first place. As a further result, the very subject of this study would have been obsolete as a burden of proof situation can only come up on the basis of the restrictive immunity doctrine.

More precisely, as to these precedents, it was not even the immunity of a foreign sovereign or government that was concerned in the litigations, but the immunity of a vessel belonging to that ruler or government. Hence, when it is stated in the international law literature these cases were strictly about jurisdictional immunities, this is simply not true. These precedents were about property belonging
to foreign rulers or governments, and thus were concerning for the least as a second reasoning the question of immunity from execution.

**Importance of the Act**

The FSIA was the first national enactment on foreign sovereign immunity, while it was preceded by several international conventions, as for example the *Brussels Convention of 1926* or the *European Convention on Sovereign Immunity of 1972*. The Act also provided an important clarification on the practice of foreign sovereign immunity by the Department of State. Both before this enactment and thereafter, the Department of State issued their legal opinion to courts in pending foreign sovereign immunity litigations.

In *Compania Española v. Navemar*, 303 U.S. 68, 74, the Supreme Court ruled that in case a court grants public character to a foreign vessel, ‘it is then the duty of the courts to release the vessel.’ This precedent was later confirmed in *Ex Parte Peru* and *Republic of Mexico v. Hoffmann*.

—*Ex Parte Peru*, 318 U.S. 578, 589: ‘This practice is founded upon the policy, recognized both of the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relation with a friendly foreign power, are righted through diplomatic
negotiations rather than by compulsions of judicial proceedings.’ Already in the case United States v. Lee, 106 U.S. 196, 209, and with regard to state immunity, the Supreme Court ruled: ‘In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.’

—Republic of Mexico v. Hoffmann, 324 U.S. 30, 35: ‘It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.’

It has to be noted that the practice prior to the FSIA in matters of foreign sovereign immunity was often characterized by a ‘voluntary deference’ of the judiciary under the executive powers of the State Department. This had obvious political reasons. The United States Supreme Court ruled consistently that the judiciary may not interfere in the political decision-making of the department, as matters of wrong-doing by foreign states could be handled better by diplomacy than by the ‘compulsion of judicial proceedings.’

—See the two preceding comments, supra. From the literature, see, for example, Philip Jessup, Has the Supreme Court Abdicated One of its Functions?, 40 AJIL 168-172 (1946). The expression ‘deference’ is to be found in Sweeny/Oliver/Leech, The International Legal System (1981), 300.
From the *Tate Letter of 19 May 1952*, the administrative practice of the State Department became more sophisticated, as the restrictive immunity doctrine was from that moment the official doctrine to be followed by the United States of America in foreign sovereign immunity litigations.

—The Tate Letter introduced the restrictive immunity doctrine by stating: ‘For these reasons it will thereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.’ (Sweeny/Oliver/Leech, The International Legal System (1981), 304).

The application of legal decision-making within administrative procedure was quite problematic from a constitutional point of view. The House Report criticized this practice.

**H. R. Report No. 94-1487**

The Tate Letter, however, posed a number of difficulties. From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review. (H. R. Report No. 94-1487, 1-55, at 8, 15 ILM 1398 (1976), at 1402).
In fact, the State Department was constantly in these affairs under political pressure, as foreign states tried to use diplomacy to influence the Department’s decisions. In addition, the administrative rulings of the State Department, as they were not binding to the courts, were not giving a definite satisfaction to the issue, and their compliance with due process was not assured. The House Report explained the purpose of the Act also with due process considerations.

**H. R. Report No. 94-1487**
A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determination and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. (Id.)

—The legislative materials also noted that ‘[t]he Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.’ (Id., p. 7, 15 ILM 1401).

As to the political importance of the Act, a topic that is quite debated nowadays because of the 2006 Amendment to the FSIA, the United States Supreme Court stated already back in 1981 in *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed 2d 918.
(1981), that the FSIA did not impede the President of the United States from suspending any action pending in a federal court against a foreign state, nor from initiating any court action against a foreign state in any federal court under the International Emergency Economic Powers Act (IEEPA) and the Trading With The Enemy Act (TWEA). In that case, the Supreme Court ruled about actions taken by President Jimmy Carter in 1979 against Iran, subsequent to the hostage taking of American embassy staff in Iran.

Construction of the Act

The FSIA contains two general rules, one regarding immunity from jurisdiction, §1604, and one regarding immunity from execution, §1609. These rules are each followed by exceptions, §§1605, 1606, 1607 and §§1610-1611.

Immunity is granted only when one of the exceptions applies. This is also called the rule and exception principle. §1330(a) entangles the competence ratione materiae of the court, also called original jurisdiction or subject matter jurisdiction, with the decision about immunity, which means that in practice that court is competent to rule over the case
only when an exception to immunity applies, and thus when the immunity claim of the foreign state has been denied.

—Maritime International Nominees Establishment (MINE) v. The Republic of Guinea, 21 ILM 1355, 1360 (D.C.Cir.1982): ‘The Act thereby connects the issue of subject matter jurisdiction to the issue of sovereign immunity: the absence of immunity is a condition to the presence of subject matter jurisdiction.’

From competence *ratione materiae* or subject matter jurisdiction is to distinguish competence *ratione personae* or personal jurisdiction, §1330(b), which requires affirmation of subject matter jurisdiction, §1330(a) and service of process, according to §1608 of the Act.

—The House Report, p. 13, 15 ILM 1398, 1405 (1976) notes: ‘… section 1330(b) also satisfies the due process requirement of adequate notice by prescribing that proper service is made under section 1608 of the bill.’

Thus, sections 1330(a),(b), 1608 and 1605-1607 of the FSIA are all carefully interconnected to a point that in *Maritime International Nominees Establishment (MINE) v. The Republic of Guinea*, the court speaks about ‘the Act’s interlocking provisions governing the separate issues of subject matter jurisdiction, sovereign immunity, and personal jurisdiction’.

—H. R. Report No. 94-1487, p. 14, 15 ILM 1398, 1405 (1976) and Maritime International Nominees Establishment (MINE) v. The

This is how the FSIA entangles substantive law and procedural law, and this is why the whole matter is so tricky! It’s also tricky for the courts because this drafting technique requires the court to state about the whole question of immunity before entering the trial, as without pronouncing itself about its competence, the court is not legally in state to rule over the matter. Thus, for affirming its competence, the court must affirm one of the exceptions, §§1605-1607 of the FSIA.

How does that work in practice? There is case law that can be drawn upon to elucidate the matter. In Upton v. Empire of Iran, 459 F.Supp. 264, 265 (D.D.C.1978), the court stated:

The Immunities Act thereby creates an identity of substance and procedure; that is, it requires the court to examine the underlying claim in light of the immunity exceptions set forth in sections 1605-1607 whenever a jurisdictional sovereign immunity defense is interposed.

Other precedents clarify that the House Report’s idea that foreign sovereign immunity was an \textit{affirmative defense} cannot be taken literally but has to be interpreted in the light of valid international law, which namely requires the court to state about the immunity claim \textit{sua sponte}, and not depending on the pleadings.

\textbf{The House Report}

\textbf{The Burden of Proof}

The initiative to insert a passage in the \textit{House Report} that tries to give some guidance on the difficult problem of the \textit{burden of proof} came from the Committee on International Law of the Association of the Bar of the City of New York.

The Burden of Proof Rule

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff’s claim relates to a public act of the foreign state—that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

Corrective Case Law

In several leading cases, American District Courts have principally affirmed the allocation of the burden of proof the way the House Report proposed it. In Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1378 (5th Cir. 1980), the court stated:

The burden of establishing the applicability of this immunity naturally lays with the one claiming it.
In Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 326 (2d Cir. 1981), the district court held:

The Act retains sovereign immunity as a defense, to be raised by the defendant.

In De Sanchez v Banco Central de Nicaragua, 515 F.Supp. 900, 903 (E.D.La. 1981), the court explained:

First, as is true for all the other exceptions under the FSIA, the burden of demonstrating that the claim does not fall within §1605(a)(2), i.e. the burden of proof that immunity exists, is upon the foreign state.

In Matter of Sedco, Inc., 543 F.Supp. 561, 564, 21 ILM 318 (S.D.Tex. 1982), the court ruled:

Once a basis for jurisdiction is alleged, the burden of proof rests on that foreign state to demonstrate that immunity should be granted.

In Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1002 (D.D.C. 1985), the court held:

In accordance with the restrictive view of sovereign immunity reflected in the FSIA, the burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity.
Evaluation

The wording of the legislative materials is not without ambiguities. The main problem comes from the fact that the court, as a general rule, is obliged to decide *sua sponte* about the affirmation of subject matter jurisdiction. This brings about an obvious contradiction between 28 U.S.C. §1330(a) and §1605(a)(w) FSIA which links together subject matter jurisdiction and sovereign immunity, on one hand, and the construct of sovereign immunity as an *affirmative defense* which would have to be specifically pleaded. The contradiction here is that to construe a defense under 1605(a)(2) as a *conditio sine qua non* for jurisdiction would rule against the general principle that courts have to state about their jurisdiction *before* examining the subject matter of the case.

The United States Supreme Court ruled about this important question in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S.480, 103 S.Ct.1962, 76 L.Ed.2d 81, 51 U.S.L.W. 4567, 22 ILM 647 (1983); in this important precedent, the foreign state did not enter an appearance to assert an immunity defense. The Supreme Court decided that in such a case a district court still must determine that immunity is unavailable under the FSIA, as this is a condition for
the court’s jurisdiction. (103 S.Ct.1962, 1971, note 20). Hence, the wording of the House Report that sovereign immunity is to be considered as an affirmative defense cannot be taken literally.

More clearly even stated the Court of Appeal of the 7th Circuit, in Frovola v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985), that the statement of the House Report is not accurate in this point. Because the absence of sovereign immunity is a prerequisite to subject matter jurisdiction, the question of immunity must be decided about by a district court even though the foreign country whose immunity is at issue not entered an appearance. (Id., 372, 373).

The most interesting leading case that modified the statement of the House Report is perhaps Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 22 ILM 835 (7th Cir. 1983). Here, an expropriation was at the basis of the claim. The conditions under which expropriation had been effected by the Nicaraguan government could not be clarified in the litigation. This was however a decisive question under §1605(a)(3) FSIA which denies sovereign immunity if the expropriation had been done in violation of international law. The court held that the foreign state
was not obliged to disproof all the immunity exceptions enumerated in sections 1605 to 1607 of the Act, but only the ones the plaintiff invoked in support of his allegation that immunity had to be refused. It would be a waste of time, argued the Court of Appeal, to require of the foreign state a detailed and complicated proof, whereas it would be relatively easy for the plaintiff to assert the particular exception on which he bases his claim. As a result, the foreign state could limit its evidence production on the assertion that the activity which gave rise to the claim, was of a public, governmental nature.

**Alberti v. Empresa Nicaraguense de la Carne**

Accordingly, we believe that the purposes of the act will best be served by requiring that the defendant demonstrate that the suit relates to a governmental act of the foreign state being sued, and then placing the burden of identifying the relevant exception by affidavit or otherwise upon the plaintiff. (705 F.2d 250, 256, 22 ILM 835, 839).

This leading case has been discussed by Monroe Leigh, Esq., from Steptoe & Johnson, the former legal advisor of the Department of State, who was in this function the leading figure in the process of preparing and drafting the FSIA. Mr. Leigh insists on the
wording of the *House Report* passage. (77 AM.J.INT’L L. 888 (1983). However, after the Supreme Court decision in the Verlinden case and considering the ambiguities in the wording of the *House Report*, it seems that the Alberti precedent serves better the practice and is more reasonable as to a functional fair play in the evidence procedure, than the strict and inflexible rule established in the *House Report*.

As to a future international law standard on the problem of the burden of proof in the field of sovereign immunity, every skilled observer of international law knows that the construct of sovereign immunity as an affirmative defense would never be accepted by the international community! However, the Alberti standard might be a solution that could be accepted internationally. This seems also to be the general tenor in the international law literature. For example Julia B. Brooke, writes in her article *The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach*:

A strict interpretation of the second element would impose an onerous burden on the foreign state, since the statutory exceptions are numerous, complicated, and often ambiguous. As a result, courts tend to focus on the
ability of the foreign state to disprove the particular exception asserted by the plaintiff. (23 VA.J.INT’L L. 635, 642 (1983).

We can thus conclude that the FSIA did not affect or alter the general rule that the plaintiff bears the burden of proof for personal jurisdiction, minimal contacts, service of process and the prerequisites of a default judgment.

**Procedural Questions**

**Subject Matter Jurisdiction**

The *Foreign Sovereign Immunities Act* is the only statute that grants jurisdiction of the United States judiciary over foreign states, which has been confirmed by case law. For example, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989), the United States Supreme Court held that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in American courts.

We have seen already that, regarding the FSIA, we have to distinguish between the court’s *subject matter jurisdiction*, and *personal jurisdiction*. Here, I would like
to look again at this procedural question, while focusing on the problem of the burden of proof.

This means that we need to have a detailed regard on the interplay of subject matter jurisdiction, §1330, minimal contacts, §§1605(a)(2), 1605(a)(5), and service of process, §1608:

Title 28, Part IV, Chapter 85, §1330
(a) 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 either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal 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.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

There are some tricky points to observe regarding the affirmation of jurisdiction under the FSIA. First, it has to be seen that the FSIA entangles sovereign immunity and subject matter jurisdiction in that the denial of immunity is a condition for jurisdiction.

This leads to the strange result that the court has to clarify the whole quite complex sovereign
immunity matter at the very onset of the trial, as it’s a condition for its jurisdiction or competence, and it goes without saying that the court has to do this *sua sponte*.

Second, as I have already pointed it out earlier in this study, there are terminological difficulties regarding the expressions *jurisdiction*, as it is used in the FSIA, and the term *competence*. There is no doubt, however, that section 1330 FSIA speaks of jurisdiction, but *means* competence—and *not*, for example, minimal contacts. Equally, the statute uses the terms subject matter jurisdiction and personal jurisdiction instead of subject matter competence and personal competence.

Next, it has to be seen that section 1330(b) is a *federal long-arm statute* that subjects foreign states to the territorial jurisdiction of the United States under the condition that due process regulations are strictly followed, which means that there must be minimal contacts between the facts in issue and the territorial scope of the United States of America.

Personal Jurisdiction

The next question that comes up is who bears the burden of proof for personal jurisdiction? The question was asked in *Wyle v. Bank Melli of Teheran, Inc.*, 577 F.Supp. 1148, 1157 (N. D. Cal. 1983), and the court clearly came to the conclusion that the burden of proof for personal jurisdiction follows the general principle, that is, the burden for the facts pertaining to personal jurisdiction rests with the plaintiff:

The legislative history makes clear what the foreign state must prove to establish immunity; that the challenged action is that of a foreign state in its public, noncommercial capacity. The burden of proving the existence of an otherwise actionable (if not barred by sovereign immunity) activity or act within the United States or having a direct effect in the United States would obviously remain with the plaintiff. Simply because the foreign state must plead and prove certain facts necessary to establish its immunity does not mean that the normal burden of proving subject matter and personal jurisdiction is reversed. (577 F.Supp. 1148, 1157 (N. D. Cal. 1983).

Minimal Contacts

There is an abundance of literature and jurisprudence regarding the particular requirements of minimal contacts for the assertion of subject matter jurisdiction in the United States.

With regard to the burden of proof of the minimal contacts for jurisdiction to be established, the district court, in Tigchon v. Island of Jamaica, 591 F.Supp. 765, 766 (W. D. Mich. 1984), held:

Plaintiff correctly notes that once a basis for jurisdiction is alleged, the burden of proof rests on the foreign state to demonstrate that immunity should be granted. However, plaintiff has not alleged the minimal facts necessary in order to establish a basis for jurisdiction.

A comparison of the FSIA’s federal long-arm statute, §1330(b), with the New York Civil Practice Law, §301, the famous doing business clause, shows clearly that the onus can only be with the plaintiff, as shown in Beacon Enterprises v. Menzies, 715 F.2d 757, 762 (2d Cir. 1983).

As plaintiff, Beacon bore the ultimate burden of proving the court’s jurisdiction by a preponderance of evidence.
In this context, Rules 4(d)(7) and 4(e) of the Federal Rules of Civil Procedure are to be observed. They state that the competence of a federal court against any non-resident defendant goes only as far as the applicable long-arm statute of the forum state.

**Service of Process**

The next criterion for affirming personal jurisdiction under §1330(b) FSIA is service of process according to §1608 FSIA.

—The House Report explains under section 1608: ‘Provisions in section 1608 are closely interconnected with other parts of the bill—particularly the ... section 1330 and sections 1605-1607. If notice is served under section 1608 and if the jurisdictional contacts embodied in sections 1605-1607 are satisfied, personal jurisdiction over a foreign state would exist under section 1330(b).’ (H.R. Report, p. 23, 15 ILM 1398, 1410 (1976).

§ 1608. Service; time to answer; default
(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the...
foreign state concerned, or
(4) if service cannot be made within 30 days under paragraph
(3), by sending two copies of the summons and complaint and
a notice of suit, together with a translation of each into the
official language of the foreign state, by any form of mail
requiring a signed receipt, to be addressed and dispatched by
the clerk of the court to the Secretary of State in Washington,
District of Columbia, to the attention of the Director of Special
Consular Services—and the Secretary shall transmit one copy
of the papers through diplomatic channels to the foreign state
and shall send to the clerk of the court a certified copy of the
diplomatic note indicating when the papers were transmitted.
As used in this subsection, a ‘notice of suit’ shall mean a notice
addressed to a foreign state and in a form prescribed by the
Secretary of State by regulation.
(b) Service in the courts of the United States and of the States
shall be made upon an agency or instrumentality of a foreign
state:
(1) by delivery of a copy of the summons and complaint in
accordance with any special arrangement for service between
the plaintiff and the agency or instrumentality; or
(2) if no special arrangement exists, by delivery of a copy of the
summons and complaint either to an officer, a managing or
general agent, or to any other agent authorized by
appointment or by law to receive service of process in the
United States; or in accordance with an applicable international
convention on service of judicial documents; or
(3) if service cannot be made under paragraphs (1) or (2), and if
reasonably calculated to give actual notice, by delivery of a
copy of the summons and complaint, together with a
translation of each into the official language of the foreign
state—
(A) as directed by an authority of the foreign state or political
subdivision in response to a letter rogatory or request or
(B) by any form of mail requiring a signed receipt, to be
addressed and dispatched by the clerk of the court to the
agency or instrumentality to be served, or
(C) as directed by order of the court consistent with the law of
the place where service is to be made.
(c) Service shall be deemed to have been made—
(1) in the case of service under subsection (a)(4), as of the date
of transmittal indicated in the certified copy of the diplomatic
note; and
(2) in any other case under this section, as of the date of receipt
indicated in the certification, signed and returned postal
receipt, or other proof of service applicable to the method of
service employed.
(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

Service to either the foreign state itself or to one of its subdivisions is ruled by §1608(a), whereas service to any agency or instrumentality of a foreign state is stipulated in §1608(b).

Regarding the burden of proof, the House Report contains an explanatory statement only with regard to admiralty actions.

—Admiralty actions, §1605(b) FSIA are not within the scope of the present monograph as they have no parallel to continental law. This restriction however only applies with regard to jurisdictional immunities. Regarding immunity from execution, the seizure of vessels belonging to foreign states is a custom common to all jurisdictions. See, in detail, A.N. Yannopoulos, Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Sovereign Immunities Act, 57 TUL.L.REV. 1274-1342 (1983), Kevin P. Simmons, Admiralty Practice under the FSIA—A Trap for the Unwary, 12 J.MAR.L. & COMM. 109-121 (1980). The House Report states that ‘… the plaintiff must also be able to prove that the procedures for service of process under section 1608(a) or (b) have commenced … (H. R. Report No. 94-1487, p. 22, 15 ILM 1398, 1410 (1976).
It suffices thus to prove the commencement of service and the plaintiff doesn’t need to demonstrate that service has been effectively accomplished. The House Report explains that this means an attenuation of proof for the specific case of admiralty actions and is different under ‘ordinary’ procedural law.’ (Id.) See also Federal Rules of Civil Procedure, Rules 1, 81, 82, 9(h).

For actions under ‘ordinary’ procedural law, not this passage of the legal materials applies, but Rule 4(g) of the Federal Rules of Civil Procedure.

**Rule 4(g) Federal Rules of Civil Procedure**
The person serving the process shall make proof thereof to the court promptly and in any event within the time during which the person served must respond to the process.

**Default Judgment**

Section 1608(e) FSIA rules the default judgment against a foreign state:

**§1608(e)**
(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.
Under section 1608(e) a default judgment can be rendered only if the plaintiff delivers conclusive proof to the court. This clause is filed after Rule 55(e) Federal Rules of Civil Procedure which applies for default judgments against the United States as the defendant.

—Rule 55(e) Federal Rules of Civil Procedure states: ‘Judgment against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactorily to the court.’

This proof is stricter than the one required in Rule 55(a) for the ‘ordinary’ default judgment where it’s enough that the defendant didn’t enter an appearance.

—Rule 55(a) Federal Rules of Civil Procedure states: ‘Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.’

Section 1608(e) FSIA requires even more than that; it requires that the plaintiff also proves his claim with regard to the applicable substantive law. This is so because §1330(a) links the question of subject matter jurisdiction with the applicability of one of the exceptions in sections 1605-1607 to the general rule of sovereign immunity.
This leads to the interesting constellation that, regarding the default judgment, according to section 1608(e) FSIA, the foreign state is not obliged to make a prima facie case of immunity first; the burden is entirely on the plaintiff regarding all the procedural and substantial facts at issue in the action. This is logical, by the way, as the foreign state didn’t enter an appearance and in such a situation typically doesn’t produce any evidence. For the similar provision in Rule 55(e) Federal Rules of Civil Procedure, the precedent Giampaoli v. Califano, 628 F.2d 1190, 1195-1196 (9th Cir. 1980), stated that as the plaintiff has the right to begin with producing evidence, it’s upon him to make the prima facie case, whereupon the evidential burden ‘shifts to the government.’ This shows that the ultimate burden here is clearly with the plaintiff; it also shows that the FSIA did not absolve from the general rules of evidence that impose the burden of proof for the court’s jurisdiction upon the plaintiff. This is both valid for the legal burden and the evidential burden. It’s always the plaintiff who bears the evidential burden for the facts regarding service of process.

—See, for example, Gray v. Permanent Mission of People’s Republic of the Congo in the United States, 443 F.Supp. 816,
This section is drafted after Rule 55(e) of the Federal Rules of Civil Procedure which refers to a default judgment against the United States as a defendant party.

It is obvious that these provisions are more severe than those regarding the ordinary default judgment, that is, Rule 55(a) of the Federal Rules of Civil Procedure, where it is sufficient that the defendant party has failed to plead or otherwise defend itself. It is rather a matter of common sense that the plaintiff bears the burden of proof for the prerequisites of the default.

In the case of 1608(e) FSIA, this is a quite severe burden since the plaintiff must practically prove his entire claim by evidence satisfactory to the court, not only his title, but also the conditions of competence. This means that the plaintiff must prove, by a preponderance of probability, the applicability of one of the exceptions of §§ 1605, 1606 or 1607 FSIA.
—See also Maritime International Nominees Establishment (MINE) v. Republic of Guinea, 21 ILM 1355, 1360 (D. C. Cir. 1982): ‘The Act thereby connects the issue of subject matter jurisdiction to the issue of sovereign immunity: the absence of immunity is a condition to the presence of subject matter jurisdiction.’

Definitions

For purposes of this chapter—
(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
(b) An ‘agency or instrumentality of a foreign state’ means any entity—
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.
(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A ‘commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §§1332(c),(d)
(c) … a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principle place of business …
(d) The word ‘States’, as used in this section, includes the
Territories, the District of Columbia, and the Commonwealth of Puerto Rico ...

We have already seen previously in this study that according to the *House Report* and federal case law that the burden is upon the foreign state to prove that the conditions of §§1603(a),(b) are fulfilled.

—See House Report, §1604, p. 17, 15 ILM 1398, 1407 (1976): ‘...the burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit ...’


—This is a simplification of the facts; the bill that was not paid only amounted to $91,310.00, while the value of the vessel was 24 million dollars!

The owner of the vessel, the *General National Maritime Transportation Company (GNMTC)* from Libya, claimed immunity from jurisdiction alleging it was neither a citizen of the United States under §1603(b)(3) FSIA nor created under the law of a third country, nor else an ‘organ’ of the Libyan government
in the sense of §1603(b)(2) FSIA. This point was a fact in issue as the plaintiff expressly contested the fact that GNMTC fell under §§1603(a),(b).

Hence, the burden of proof was upon the GNMTC for these facts; it presented two affidavits by the Chargé d’Affaires of the Libyan embassy in Washington D.C. that certified the status of the GNMTC and the ownership of the vessel.

The court stated that the burden was upon GNMTC for proving the conditions of its immunity claim and that the affidavits were proper proof and had to be valued accordingly (462 F.Supp. 1165, 1171-1172). In addition, it is interesting to see that the court did not limit the inquiry to the mere evaluation of these affidavits but referring to Carey v. National Oil Corporation, 453 F.Supp. 1097 (S.D.N.Y. 1978), 63 ILR 164, 232 (1982), found from that precedent that the GNMTC was a ‘wholly-owned Libyan entity which has succeeded the General Maritime Transport Organization in 1970.’ It is important to see that despite the burden of the foreign state to produce prima facie evidence for their immunity claim, the district courts will nonetheless inquire sua sponte about these facts, if there is more information available in the records presented at court.
This was also important here in this case because the second affidavit did not fulfill the formal requirements for being evaluated as adequate proof, but was nonetheless appreciated by the court in its quality of a ‘simple statement.’ More importantly, the court held: ‘Moreover, there is authority for the view that a court may take judicial notice of an entity’s sovereign character.’ (462 F.Supp. 1165, 1172).

Now, in such a situation, there is a certain ambiguity as both ideas cannot be true at the same time. Either the burden is upon the foreign state to demonstrate a basis for their immunity claim or there is no such burden because the court must consider all those facts sua sponte. So if the latter is the case, why then the whole plot about the burden of proof? This doesn’t seem to make sense, and the court obviously was conscious of that and elaborated:

Consequently, unlike the situation in Pan American Tankers Corp. v. Republic of Vietnam, 291 F.Supp. 49 (S.D.N.Y. 1968), where the record was devoid of any facts probative as to whether two corporate defendants were ‘creatures of the Republic of Vietnam’, 291 F.Supp. at 52, this Court is able to find that defendant has produced such prima facie evidence of immunity and that plaintiff, then faced with the burden of going forward, has failed to produce evidence establishing that sovereign immunity should not be granted. (Id.)
Pan American Tankers Corp. v. Republic of Vietnam, 291 F.Supp. 49 (S.D.N.Y. 1968), was an arbitrage action under the Federal Arbitration Act, 9 U.S.C. §§4, 8 (1964) against the Vietnamese government and two Vietnamese companies resulting from a navigation contract. The plaintiffs alleged breach of contract by the fact that the Vietnamese government didn’t allow them to discharge the cement from their ships. Vietnam claimed foreign sovereign immunity. The court referred to the House Report that construes sovereign immunity as an *affirmative defense*; in addition, the court explained, Vietnam could have claimed immunity directly with the State Department, and that in that case the suggestion of the American government would have been conclusive for the court.

However, Vietnam had not done that nor had the Vietnamese government offered any evidence to the fact if the two defendant companies were agencies or instrumentalities of a foreign state under §§1603(a)(b) FSIA.

Now, this is really one of the rare cases where at the end the court stays with a *non liquet* situation. Contrary to an older precedent, *Puente v. Spanish National State*, 116 F.2d 43 (2nd Cir. 1940), that was still
ruled before the restrictive immunity doctrine was applied in the United States, the court stated in the present case:

Since the Republic of Vietnam has asserted this plea, which is in the nature of a defense, it would appear to have the burden of proving its privilege of immunity. It is hereby ordered that the defendant The Republic of Vietnam submit such affidavits and other proofs as it may deem supportive of its plea of sovereign immunity. (...) Should the Republic of Vietnam succeed in establishing at least a prima facie case to sustain its plea, the Court may order an evidentiary hearing to further develop the record, on the motion of either party, unless the essential facts are clearly set forth and not disputed. (291 F.Supp. 49, 52-53).

In addition, this case clarifies that the court is obliged to find out \textit{sua sponte} about the governmental character of an agency or instrumentality of a foreign state only if there are significant indices to be found in the pleadings served to the court by the parties.

Because the Court must have ‘full development of the facts’ in order to dispose of the legal issues, ..., the papers to be submitted by both parties should be based on specific facts and events succinctly stated and not accompanied by generalized conclusions. (Id., 53).
The court thus appreciated the proof submitted by GNMTC, admitting its quality to be an organ of the Libyan government under §§1603(a),(b) FSIA and concluded it was adequate enough to establish a *prima facie case* of immunity. Hence, the judge saw the burden of going forward with evidence, or evidential burden, shifting to the plaintiff.

—See also Sugarman v. Aeromexico, 626 F.2d 270, 272 (3d Cir. 1980) that I already discussed and where the Court of Appeals of the 3rd Circuit stated: ‘We agree with the district court that clause two and three of section 1605(a)(2) afford no basis for piercing the immunity which, prima facie, Aeromexico derives from its sovereign parent.’

Subsequent case law confirmed that the burden is upon the foreign state to demonstrate that the conditions of §§1603(a),(b) FSIA apply. In *S & S Machinery Co. v. Masinexportimport (MASIN)*, 706 F.2d 411 (2d Cir. 1983), the appeal was filed by MASIN, a Romanian company, and the Romanian Bank for Foreign Commerce and was about the seizure by S & S of property the defendants maintained in the United States, as well as about the issuing of certain letters of credit. The defendants had not waived their immunity from execution.

Before the Court of Appeals stated about the question of a possible immunity waiver, it examined
the juridical nature of both the Romanian Bank and MASIN.

The Legal Status of Romanian Bank

Regarding the Romanian Bank, the court found the situation clear-cut in the sense that it was an agency or instrumentality of a foreign state. For arriving at that conclusion, the judge was scrutinizing also the Romanian law; such judicial exam of foreign law is rendered necessary under the terms of §§1603(a),(b) and was confirmed by the legal materials.

—H.R. Report, p. 15, 15 ILM 1398, 1406 (1976): ‘... that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name and hold property in its own name.’

Thus the court considered, in particular, Article VII of the Romanian Constitution which clearly states that all banks are state property. The court then concluded:

This evidence alone is sufficient to prove that Romanian Bank is a state-owned instrumentality established to serve the state’s foreign trade goals. (Id.)
In addition, the court considered the proof submitted and came to conclude that Romania had established a prima facie case of immunity under section 1603 and that, as a result, the evidential burden had shifted to the plaintiff. However, S & S failed to discharge this burden.

S & S failed to rebut any of this persuasive evidence, arguing instead that more was required to prove agency or instrumentality status. We disagree. Convincing and uncontroverted evidence established that the Bank is but a cat’s paw of the Romanian government—an instrumentality owned and controlled by the state. (706 F.2d 411, 414).

—The court stated about the evidence: ‘There was additional evidence of the Bank’s state-ownership and its position as a state foreign trade organ. The uncontroverted affidavits of Sava, Consul to the Socialist Republic of Romania, and Radu, the managing director of the Bank, and of Hersovici, an expert in Romanian law, corroborated the Bank’s assertion that it is owned by the state and that it serves the foreign trade goals of the state. Finally, a report published by the United States Department of Commerce characterizes the Romanian Bank in the same terms.’

In First National City Bank v. Banco Para El Comercio Exterior de Cuba (BANCEC), 103 S.Ct. 259 (1983), the United States Supreme Court has stated several important principles that apply in similar cases against organisms of foreign states.
In 1960, the defendant was created by the Cuban government as an autonomous credit institution for facilitating foreign trade operations, and was established as a full juridical person. The facts at issue are quite complicated and I will report here only the conclusion of the Supreme Court regarding what the court calls a ‘presumption of independence’ in favor of organisms of foreign states when they have been properly created and invested with legal person status. In such a case, the Supreme Court ruled, the presumption is rebutted only if the foreign state can be shown to have used its responsibility under international law in a fraudulent manner, so as to benefit of sovereign immunity in front of a United States tribunal.

The Legal Status of MASIN

As to MASIN, the plaintiff argued that already the presumption of state property as it exists in all socialist jurisdictions should give rise to the conclusion that MASIN was an agency or instrumentality of the Romanian state. (706 F.2d 411, 415). However, taking reference to the case Edlow International Co. v. Nuklearna Elektrarna Krsko, 414 F.Supp. 827 (D.D.C. 1977), 63 IRL 100 (1982), S & S
concluded that the state property presumption is not to be considered as adequate proof under section 1603 as there were well also in socialist economies entities that are distinct from the state. The court held that Edlow was not standing against their ruling, as there was additional evidence.

We may assume for present purposes that there is essentially private entities operating within socialist economies. This does not alter our holding that the district court correctly concluded that MASIN is an agency or instrumentality of the state. For unlike ‘Edlow’, where only the presumption of state ownership was relied upon, MASIN established its status as a state-owned and state-controlled trading company with specific evidence. (Id.)

—MASIN had provided an affidavit by the Romanian Consul to the effect that MASIN ‘is a state foreign trade company wholly-owned and controlled by the Romanian Government.’ Regarding this affidavit, the court held: ‘Although S & S belittles this sworn statement as the catechism of a brainwashed functionary, statements of foreign officials—regardless of their political or ideological orientation—have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA. (706 F.2d 411, 415, citing Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F.Supp. 849, 854 (S.D.N.Y. 1978), UN-MAT., 468, 63 ILR 127.

We can thus conclude that according to this precedent, a legal presumption as it was existent in socialist regimes at the time, is not per se an adequate
proof for the governmental status of a foreign state’s organism under section 1603(b) FSIA.

If the governmental status of the foreign organism is not contested by the plaintiff, the proof can be acquitted by affidavit or even a statement delivered to the court by an accredited official of the foreign state. If, however, the plaintiff contests such proof, additional evidence is needed. It is difficult to say how severe this burden is as in the case discussed here, all the proof one can possibly imagine was delivered satisfactorily to the court.

—See 706 F.2d 711, 715: ‘MASIN introduced a variety of material detailing the role of the Romanian state in foreign trade.’

As to the obligation of judges to examine foreign law under section 1603 FSIA, it is important to note that the American judge is not obliged to take notice *sua sponte* of foreign law. This is so because common law considers foreign law as a fact that must be pleaded and proved. This is still the case in the United Kingdom. However, in the United States, there was a certain development of the law with the introduction, in 1966, of Rule 44.1 Federal Rules of Civil Procedure.
Rule 44.1 Federal Rules of Civil Procedure
A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination shall be treated as a ruling on a question of law.

The determination of foreign law is thus considered as a legal question with American district courts. Nonetheless, a district court will take notice of foreign law only if the question has been submitted to the court in the pleadings by the party ‘who intends to raise an issue concerning the law of a foreign country.’ This means that this party in so far bears the burden of proof regarding the particularity of foreign law that it wants to apply to their favor.

—See Thomas A. Coyne, Rules of Civil Procedure for the United States District Courts (1983), Rule 44.1, Practice Comment, p. 543: ‘The Rule imposes a notice burden on a party who intends to raise an issue about foreign law’, citing Commercial Ins. Co. of Newark v. Pacific-Peru Construction Corp., 558 F.2d 948, 952 (9th Cir. 1977). As to the reason for such a restriction of judicial notice of foreign law, Coyne remarks: ‘This would put an extreme burden on the court in many cases; and it avoids use of ‘judicial notice’ in any form because of the uncertain meaning of that concept as applied to foreign law.’ (Id.) See also Stern, Foreign Law in the Courts: Judicial Notice and Proof, 45 CALIF.L.REV. 23, 43 (1957) and Schlesinger, A Recurrent Problem of Transnational Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law, 59 CORNELL L.REV 1 (1973) as well as the whole issue of STAN. J.INT’L L., Spring 1983, entitled Pleading and Proof of
The question of how severe the standard of proof is was more clearly outlined in *O’Connell Machinery Company, Inc. v. M/V Americana*, 566 F.Supp. 1381 (S.D.N.Y. 1983), where addition proof was lacking, except an affidavit of an employee of the Italian embassy in Washington D.C. that swore to the effect that the ship M/V Americana belonged to *Italian Line*, an agency or instrumentality of the Italian state. While in *S. & S. Machinery*, the proof was conclusive, here the court considered the sole affidavit as adequate proof for establishing the *prima facie case* of sovereign immunity.

Plaintiff next argues that insufficient proof has been presented to support defendant’s contention that Italian Line is an ‘agency or instrumentality’ of the Republic of Italy. We have before us, however, the affidavit of Gerardo Carante, ‘Counselor of Commercial Activities of the Republic of Italy’ and ‘Chief Officer of the Commercial Office at the Embassy of the Republic of Italy’, describing the ownership of Italian Line. This affidavit, executed on the letterhead of the Italian Embassy in Washington, states that the majority of the shares of Italian Line is owned by FINAMARE, a ‘subdivision of the *Istituto per la Ricostruzione Industriale (IRI)*’, a government entity which coordinates the management of Italian government enterprises. IRI’s
annual budget and plans, in turn, are approved by a member of the Italian Cabinet and, ultimately, submitted to the Parliament. (...) In our view, this establishes that Italian Line is, indeed, an ‘agency or instrumentality of a foreign state’, as defined in 28 U.S.C. §1603(b). (566 F.Supp. 1381, 1384, citing the House Report, 15-16).

In two other precedents that equally concerned admiralty actions and the pre-judgment attachment of vessels, the burden of proof under section 1603 was scrutinized in all detail. These actions were pending in front of different district courts but concerned the same parties, Outbound Maritime Corporation v. P.T. Indonesian Consortium of Construction Industries (ICCI), 575 F.Supp. 1222 (S.D.N.Y. 1983).

—I shall talk about this precedent as Outbound I, for there are two cases with the same same. Outbound II: 582 F.Supp. 1136 (D.Md. 1984). There was still one more defendant, ICCI/AMF Joint Venture (JV).

Why there were two different actions between the same parties is simply the result of the plaintiff, a corporation founded under New York law and that acts as a ‘non vessel owning carrier (NVOCC), claiming damages for breach of an orally concluded contract, having seized two different vessels belonging to ICCI, one within the district of New York, and the other within the district of Maryland.
In the case *Outbound I*, the evidence defendant was submitting was deemed insufficient by the court, for two reasons.

**Credibility of the Affidavit**

The affidavit did not reveal the facts upon which the nationalization of ICCI was based and the court ruled:

As an affirmative defense however the entity claiming the protection of the statute has the burden of demonstrating, inter alia, that it falls within the statutory definition of a ‘foreign state’ or that it constitutes an entity ‘a majority of whose shares or other ownership interest is owned by a foreign state.’ 28 U.S.C. §1603. Once a defendant presents prima face evidence of this, the burden shifts to the plaintiff to demonstrate that the Act does not apply. (575 F.Supp. 1222, 1224, citing the precedents *Alberti* and *Jet Line*).

This criterion could be called the ‘credibility’ of the affidavit, which in the present case was limiting itself to simply stating that ICCI was fully owned by the Indonesian government.

**Formal Requirements Regarding the Affidavit**

The second criterion that is critical for the affidavit is that it has to be submitted by an official of the
foreign state, which in the present case was not adequately effected.

In this case, ICCI bears the burden of producing evidence to establish its claim of sovereign immunity. At the December 8, 1983 hearing, defendants presented only the affidavit of an officer of ICCI and translated version of a May 5, 1983 Indonesian Presidential Proclamation purportedly nationalizing ICCI. The affidavit merely states in conclusory terms that ICCI is wholly owned by the Republic of Indonesia. I cannot credit the affidavit of the officer of ICCI since it does not state the underlying facts of nationalization nor is it made by an official of the Republic of Indonesia on whose behalf defendants seek to invoke immunity. (575 F.Supp. 1222, 1224).

This is not a new element as it was already considered and stated upon in the before-mentioned precedents O’Connell Machinery and S & S Machinery. However, the judge in the present case also found an additional affidavit inadequate that was rendered by the Consul General of Indonesia to the United States.

I directed counsel to submit competent evidence of the claim of sovereign immunity which necessarily would include the Proclamation, its effective date and further evidence of the interest of the Republic of Indonesia in ICCI. In response, counsel has submitted the affidavit of the Consul General of the Republic of Indonesia sworn to on December 9, 1983 which now forms the only
support for defendants’ claim of immunity. This affidavit simply is not enough. (...) The translation of the asserted Proclamation contains numerous handwritten corrections and is not authenticated. While I intentionally withheld this decision to give defense counsel every opportunity to submit competent evidence of the May 5th Proclamation, counsel has produced nothing but this poor copy, which is so bad that the effective date of the Proclamation, i.e., the date of payment by the Republic of Indonesia to the private shareholders, is not clear. As such, I cannot place much evidentiary value on the proffered submission. (Id.)


These two affairs however only confirm that under the absolute sovereign immunity doctrine, a governmental organism of a foreign state could claim immunity only directly to the State Department. The second possibility, that is, to raise the immunity claim directly in front of the tribunal, was reserved to the foreign state itself, or the ruler of the foreign state. (Victory Transport, 336 F.2d 354, 358). That is why the Court of Appeals, in the case Victory Transport, did
not judge the affidavit of the Spanish Consul in New York as adequate proof:

A consul is supposedly clothed with authority to act for his government only in commercial matters. Since nothing in the record indicates that the Spanish Consul was specially authorized to interpose a claim of sovereign immunity, the affidavit was plainly insufficient. (336 F.2d 354, 358, note 7).

The reason for this meticulous formal handling of the proof submission is that it must be conclusive for the court that not the person who renders the affidavit is the authority that claims immunity, but implicitly the foreign state itself. Hence, there must be some substance for the court to see that the foreign official was acting within the scope of his governmental functions when submitting the affidavit, and not just within the scope of his commercial functions. In the Civil Aeronautics suit, the defendant Italian airline ‘Alitalia’ could address the immunity claim only directly to the State Department, not to the court.

On first sight, these requirements seem to be exaggerated and they may generally contradict to the case law that I was discussing above. But such a general view cannot render an adequate picture of the proof situation in each and every of these precedents.
Thus, the regard here must be rather careful and detailed; the answer cannot be given as a general statement. What can be said is that ‘... statements of foreign officials ... have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA. (O’Connell Machinery, 566 F.Supp. 1381, 1384 (S.D.N.Y. 1983), S. & S. Machinery, 706 F.2d 411, 415 (2d Cir. 1983) and Yessenin-Volpin, 443 F.Supp. 849, 854 (S.D.N.Y. 1978).

This means only that the official character of the witnessing functionary of the foreign state plays a *certain role* in the appreciation of the evidence; this is however not enough. Besides the affidavit itself must appear clear, precise, conclusive and credible, by and large, so as to convince the court that it is the foreign state itself that is really the owner or controller of the foreign organism that claims immunity in front of the court. This, then, is what the court found in the *Outbound I* case.

The affidavit in itself is confusing. It recites that part of defendant ICCI was privately owned but apparently that arrangements were made to transfer all private interest to the government. It is unclear whether this transfer was ever effectuated. It is unclear when it was done, if ever. The defendant JV is not even mentioned. (575 F.Supp. 1222, 1224).
The affidavit was thus evaluated negatively by the court, despite the fact that the court generally held that ‘a letter from the ambassador of a foreign country claiming immunity for an agency or instrumentality of a foreign state has a persuasive quality. (48 C.J.S.2d Intern’l Law, §52, p. 89 (1981), citing the precedents *Harris* and *Yessenin-Volpin*).

While, generally speaking, in all these precedents, we can see a judicial appreciation of the general submission procedure for proving elements of §1603, that is, per affidavit, the judge in *Outbound I* ostensibly esteemed insufficient the content of the submitted consular affidavit. What is perhaps still more astonishing is that the judge also found the quality of the offered prove being inadequate. He concludes the judgement:

> The means of raising a claim of sovereign immunity is fairly well known. 48 C.J.S.2d Intern’l Law §52 (1981), 45 Am.Jur. 2d §54 Intern’l Law (1969). The failure of the counsel for the defendants to submit anything from the United States Department of State or the Indonesian Embassy is simply amazing. Under the circumstances, I find that the single affidavit presented in support of defendant’s claim of immunity is simply insufficient to make out a prima facie case of sovereign immunity. (Id.)
In view of the precedents, this judgment delivers a guideline as to the quality of the proof submitted in these cases; it makes clear that such proof is not just ‘a simple formality’ foreign organisms can use for being granted sovereign immunity in American tribunals. I would even go as far as saying that this judgment lets us see that American district courts really take serious the burden of proof situation and thereby make it rather difficult to foreign organisms to slip in the veil of a ‘governmental garment’ so as to be immune from responsibility as a result of their commercial transactions with private traders. In plain English, the proof to be delivered here must be precise, clear, convincing and authoritative enough to being trusted that the real actor behind the organism on the international stage is the foreign state, and only the foreign state. The District Court of Maryland only at first sight contradicted this conclusion in the case of Outbound II, 582 F.Supp. 1136 (D.Md. 1984).

The plaintiff alleged that the defendants have failed to prove the applicability of the FSIA, that is, that ICCI was owned by the Republic of Indonesia. However, the court esteemed the proof as adequate and sufficient. (582 F.Supp, 1136, 1143). It is interesting to see that we have here a totally different proof
situation, which allows us to get a feel for the standard of proof required under section 1603(b).

To begin with, the court examined an affidavit of the General Consul of Indonesia in New York, and concluded:

The court finds that the evidence submitted establishes that defendants are ‘an agency and instrumentality of a foreign state’ as defined in §1603(b). Courts that have considered the sufficiency of proof required to establish foreign sovereign status under the FSIA have concluded that ‘statements of foreign officials … have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA. (...) Outbound submits no evidence to rebut the persuasive evidence submitted by defendants. (582 F.Supp, 1136, 1144).

In fact, Outbound claimed litispendence because of the affair pending in front of the New York court. They thought that this would foreclose the Maryland court to state about the action. The court rejected the argument of *res judicata* however with the argument that the New York court judgment would not be a ‘final judgment’ in the pending affair. In such a case the *res judicata* rule does not apply. (582 F.Supp, 1136, 1146).
—The court explained: ‘Both rulings by the New York court are interlocutory and subject to revision. Neither ruling is ‘final’ within the meaning of 28 U.S.C. §1291 and hence neither ruling has a res judicata effect.’

Regarding the more important question of the quality of the proof submitted to the court, the Maryland court did not need to doubt in the same way as the New York court, because the affidavit submitted was long, clear, precise and detailed.

In addition, the proof before this court appears to be different than that before the New York court. In its opinion, the New York court noted that the affidavit of the Consul did not mention the defendant, Jv. 575 F.Supp., at 1224. The affidavit before this court states at page 2 ‘JV is a joint venture entered into by ICCI. (…) ICCI owns a majority of the ownership interest in JV. Similarly, the New York court noted that while arrangements apparently were made to transfer all private interests to the government, the affidavit was ‘unclear [as to] whether this transfer was ever effectuated.’ Id. Yet, the affidavit before this court states: ‘The transfer of shares directed in the regulation was effected on June 11, 1983, by payment to the private shareholders of the amounts each paid in to ICCI.’ Affidavit at p. 2. Finally the New York court indicated that the translation of the Presidential Proclamation before the court ‘contains numerous handwritten corrections and is not authenticated …’ and further commented that the copy received by the court was so poor ‘that the effective date of the Proclamation … is not clear.’ Id. The document before this court is entitled
'Regulation of the Government of the Republic of Indonesia Number 19 Year 1983', it does not contain any handwritten corrections, the copy is quite clear, and article 5 of the regulation dealing with the effective date of its enactment quite clearly shows May 5, 1983 as the date of enactment. (...) (582 F.Supp, 1136, 1147).

As to the quality of the witness, the court stated against the distinction that was made in Outbound I, between a General Consul, and an Ambassador, of the foreign state:

Further, the New York court’s reference to the failure of counsel for defendants to submit anything from the United States Department of State or from the Indonesian embassy does not appear significant to this court. First, the legislative history of the FSIA clearly indicates that the Act was intended to withdraw the executive branch from involvement with claims of immunity and place responsibility for such determinations with the judiciary, ‘thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. (...) In this court’s view, an affidavit from the Indonesian consulate is no less an official document than an affidavit from the Indonesian embassy, and is not thereby entitled to any less weight. Also, the cases cited by the New York court in support of its finding that the affidavit of the Consul General was insufficient proof are all pre-FSIA cases, where different
procedures were required to claim and be granted sovereign immunity. (Id.)

The court thus rejected the argument that there was a *difference in quality* between an affidavit rendered by the consulate rather than the embassy of the foreign state. This verdict is indeed covered by the precedents that, regarding the quality of the witness, held that it’s enough that that person is an *official* of the foreign state’s government. Also this ruling finds a confirmation in Rule 902(3) of the Federal Rules of Evidence. This rule also only talks about ‘any foreign official’ and states in addition:

**Rule 902(3) Federal Rules of Evidence**
A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States.

Besides, it is interesting to note that in *Gray v. Permanent Mission of the People’s Republic of the Congo to the United States*, 443 F.Supp. 816 (S.D.N.Y. 1978), the permanent mission of a foreign state to the United Nations was recognized as a ‘foreign state’ under section 1603(a) and not as an ‘agency or instrumentality of a foreign state’ under section 1603(b). The district court held that ‘indeed it is hard
to imagine a purer embodiment of a foreign state than the state’s permanent mission to the United Nations.’ (443 F.Supp. 816, 820).

This distinction is of high practical value because service of process, under section 1608, is different for foreign states, one on one hand, and agencies and instrumentalities of foreign states, on the other. It is for this reason that the legal materials note under section 1603(a) FSIA the fact that for organisms of the foreign state, section 1608(a) is not applicable.

**Conclusion**

The proof of the conditions of §§1603(a),(b) of the Act is upon the foreign state and its agencies and instrumentalities to make a *prima facie case for sovereign immunity*, that is, that it’s a foreign state or an agency or instrumentality thereof under the provisions of that section.

For discharging this burden, the foreign state or its organism must present *prima facie evidence* that is adequate enough to meet the applicable *standard of proof*. After that has been done, the evidential burden shifts to the plaintiff for proving that one of the exceptions to foreign sovereign immunity applies.
under the FSIA. This proof can be delivered in the following ways:

—by rebutting the prima facie case;

—by proving the conditions of an exception to immunity, §§1605-1607, 1610, 1611 FSIA.

Regarding the means of proof, it’s primarily the affidavit that has been utilized in practice for meeting this requirement; exceptionally it may be a simple statement rendered by an official of the foreign state that could be held sufficient for proving the governmental character of the organism in question.

As to the content of the affidavit, as I said above, the applicable case law cannot be generalized because of the complexity of the issue. As all proof, such an affidavit must appear clear, without contradictions, precise, logical, conclusive and credible to the court for meeting the standard of proof required under section 1603.

For avoiding unnecessary risks, the foreign state is advised to not just simply state that the organism was a public and governmentally functional entity of the foreign government, but detail the facts that show this to be true. When this proof has been delivered satisfactorily to the court, the evidential burden shifts
to the plaintiff to either rebut the *prima facie case* by, for example, a *responsive affidavit*.

—In *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980), the court stated: ‘Aeromexico, asserting by way of affidavit that it was a Mexican corporation wholly-owned by the Mexican government … Sugarman filed a responsive affidavit asserting that a New York-based public relations officer of Aeromexico had advised Sugarman’s attorney that Aeromexico ‘was a Mexican corporation and … a New York corporation.’ The relevance of this affidavit was that if, in addition to being a Mexican corporation, Aeromexico had been incorporated in New York, it would have fallen outside the sovereign immunity decreed by the Foreign Sovereign Immunities Act. 28 U.S.C. §§1332(a) and (c) and 1603(b)(3). (…) Thereafter, Aeromexico submitted a further affidavit enclosing a letter from New York’s Secretary of State certifying that Aeromexico was not to be found on the roster of New York corporations.’

In addition, it has to be seen that the presumption of state property that is generally true for socialist regimes, as an isolated form of proof, is not to be considered as *adequate and sufficient* to meet the standard of proof under section 1603(b).
Jurisdictional Immunity

Rule-and-Exception Construction

The *Foreign Sovereign Immunities Act 1976*, as all the other legal instruments discussed in this study is legally construed in a particular fashion. It poses for each of the immunities first an immunity rule, and thereafter a long list of exceptions. The rule for jurisdictional immunities is stated in section 1604 of the FSIA:

**Title 28, Part IV, Chapter 97, §1604**
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

—As to the relation between international treaties and the FSIA, the House Report remarks under section 1604: ‘All immunity provisions in section 1604 through 1607 are made subject to ‘existing’ treaties and other international agreements to which the United States is a party. In the event an international agreement expressly conflicts with this bill, the international agreement would control. Thus, the bill would not alter the rights of duties of the United States under the NATO Status of Forces Agreement or similar agreements with other countries; nor would it alter the provisions of commercial contracts or agreements to which the United States is a party, calling for exclusive nonjudicial remedies through arbitration or other procedures for the settlement of disputes. Treaties of friendship, commerce and navigation and bilateral air transport agreements often contain provisions relating to the immunity of foreign states. Many provisions in such
agreements are consistent with, but do not go as far as, the current bill. To the extent such international agreements are silent on a question of immunity, the bill would control: the international agreement would control only where a conflict was manifest.’ 15 ILM 1398, 1407 (1976).

The major questions to ask at this point are:

(i) Which are the facts that each party in a sovereign immunity litigation must allege?

—This question is about the incidence of the Evidential Burden.

(ii) Which party carries the immunity risk in case the evidence in court is not sufficient to make a decision, when thus the litigation results in a non liquet situation?

—This question is about the incidence of the Persuasive or Legal Burden.

To begin with, and as I have shortly outlined it early in this study, the FSIA does not contain any provision regarding the burden of proof; but there is a quite detailed explanation to be found in the House Report, under section 1604:

**H.R. Report No. 94-1487**

New chapter 97 of title 28, United States Code, starts from a premise of immunity and then creates exceptions to the general principle. The chapter is thus cast in a manner consistent with the way in which the law of
sovereign immunity has developed. Stating the basic principle in terms of immunity may be of some advantage to foreign states in doubtful cases, but, since sovereign immunity is an affirmative defense which must be specially pleaded, the burden will remain on the foreign state to produce evidence that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff’s claim relates to a public act of the foreign state - that is, an act not within the exceptions in sections 1605-1607. Once the foreign state has produced such prima facie evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state. H.R. Report No. 94-1487, 9th Cong., 2d Session, 1, 17, 15 ILM 1398, 1407 (1976).

This passage suggests that foreign sovereign immunity under the FSIA has been construed as an affirmative defense.

This construction would entail, if it is true, a particular procedural consequence. Sovereign immunity would need to be specifically pleaded for the court to take into consideration. Further, the persuasive burden, or immunity risk, would be on the foreign state as defendant of the action. This would further entail, as the evidential burden at the start of the trial coincides with the persuasive burden, that
the foreign state has the right to begin with producing evidence. Thus, the foreign state would need to show that—

(i) it is a foreign state under 1603(a),(b) FSIA; and

(ii) that the action in question was of a public, governmental character.

After the production of such *prima facie evidence*, the evidential burden would shift to the plaintiff to demonstrate that one of the exceptions to foreign sovereign immunity applies. If the plaintiff cannot show satisfactorily to the court that an immunity exception applies, the court *would have to grant immunity* to the foreign state by applying the general rule (§1604). As I pointed out already in the general introduction to the law of evidence, the court is not obliged to follow the prima facie evidence, however in case of a general rule in a statute, as it is the case in the FSIA with sections 1604 and 1609, the *general rule has a decisive impact* on the weight of probability. In such a case, the judge is well obliged to resort to the general rule in any situation of doubt. The *House Report* recognized this general principle to be true for the FSIA, stating that ‘... the basic principle in terms of immunity may be of some advantage to foreign
states in doubtful cases … ‘. If, on the other hand, the plaintiff succeeds to prove that an exception to foreign sovereign immunity applies, the court is obliged to deny immunity to the foreign state. And if, already at the start of the trial, the foreign state is not able to make a *prima facie case* for sovereign immunity, the court is obliged to reject the immunity claim. In this latter case, the plaintiff will not have anything to prove procedurally, but well of course regarding the applicable substantive law.

**The House Report Evidence Rule**

As I have briefly pointed it out already, the incidence of the burden of proof that was explained in the legal materials is highly ambiguous in several respects. Before the United States Supreme Court stated on this important point, district courts seemed to be bewildered by the daring construction of foreign sovereign immunity as an *affirmative defense* and, confused, explained that this could not be true. Courts declared that in contradiction to the statement in the *House Report*, they had to rule about the immunity question *sua sponte*, as a legal necessity within the court’s stating about their competence, right at the start of the trial.
This reasoning was correct, so the clear statement in the legal materials to the very contrary gave rise to a hefty debate both in case law and in the international law literature. And this confusing situation rested for several years.

Needless to add that this controversy was not conducive to my having a good time with writing my doctoral thesis; it was a major matter of confusion and upset, to be true, and I had nobody to ask what was the way to go. I had to find my way out of the maze.

In 1979, three years after the enactment of the FSIA, in *Behring International Inc. v. Imperial Iranian Air Force (IIAF)*, the question was addressed, for the first time, in an *obiter dictum* by the District Court of New Jersey. (Behring International Inc. v. Imperial Iranian Air Force (IIAF), 475 F.Supp 383 (D.N.J.1979), UN-Mat. 479, 63 ILR 261 (1982).

The plaintiff, an American company, was seizing property owned by IIAF as a consequence of not being paid for certain services rendered to IIAF. While the defendant did not expressly claim immunity from jurisdiction, but only immunity from the prejudgment attachment of their property, the court ruled about this point concluding that immunity from jurisdiction
had to be denied. In a note, the court briefly explained the burden of proof situation:

Under the Immunities Act, sovereign immunity is an affirmative defense which must be specifically pleaded. The burden is upon the foreign state to ‘produce evidence at its claim of immunity’. (475 F.Supp, 383, 389).

—In a more recent precedent, Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1002 (D.D.C.1985), the court stated: ‘In accordance with the restrictive view of sovereign immunity reflected in the FSIA, the burden of proof in establishing the inapplicability of these exceptions is upon the party claiming immunity …’

The ambiguity stems from the fact that generally courts have to state *sua sponte* about their competence at the start of the trial.


In fact, the drafting technique of the FSIA and the other immunity statutes was criticized in the international law literature. The main argument was that it was of little use to put up a ‘rule’ of sovereign
immunity, and then undermine it with so many exceptions that virtually nothing is left but a *residual concept*.

Some authors suggest that at least for jurisdictional immunities, it would have been better to state jurisdiction as the rule and stating precisely in which singular case or cases a foreign state still enjoys foreign sovereign immunity. Other authors explain that the drafting technique of the statutes simply followed the historical development of sovereign immunity, and that it had been intentional that here the statutes reflect also the legal history.


I have explained this already in Chapter One—the general introduction to the law of evidence. In fact, the obvious contradiction between §1330(a) FSIA, and the conception of foreign sovereign immunity as an affirmative defense was eventually giving rise for the United States Supreme Court to clarify this point.

In the first precedent, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81,
51 U.S.L.W. 4567, 22 ILM 647 (1983), the Supreme Court stated in a note:

The House Report on the Act states that ‘sovereign immunity is an affirmative defense that must be specially pleaded’. H.R. Rep. No. 94-1487, at 17. Under the Act, however, subject matter jurisdiction turns on the existence of an exception to foreign sovereign immunity, 28 U.S.C. §1330(a). Accordingly, even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act. (103 S.Ct. 1962, 1971, note 20).

In more recent precedents, the question was elucidated in still more precise terms. Taking reference to the Verlinden precedent, the Appeal Court of the 7th Circuit, in Frovola v. Union of Soviet Socialist Republics, 761 F.2d 370, 372-373 (7th Cir. 1985), explained:

The FSIA begins with the presumption that foreign states are immune from suit, subject to specific exceptions. (…) Furthermore, a district court lacks jurisdiction of a suit against a foreign country until it is determined that the defendant does not have immunity. (…) Thus, the statement in the legislative history that sovereign immunity is an affirmative defense which must be pleaded and proven by the party asserting it, H.R. Rep. No. 1487, at 17, 1976, U.S. Code Cong. & Adm. News at 6616, is not entirely accurate. Because the
absence of sovereign immunity is a prerequisite to subject matter jurisdiction, the question of immunity must be considered by a district court even though the foreign country whose immunity is at issue has not entered in appearance.

In reality, the question is merely of a theoretical nature because only rarely a sovereign immunity litigation resulting in a non liquet came up where the court had to rule about the immunity question without sufficient evidence, and thus according to the incidence of the burden of proof. This is why the courts could limit their arguments at repeating the principle in obiter dicta that more or less copied the House Report reasoning on the burden of proof in sovereign immunity litigation under the FSIA.

As I have explained it in the introductory chapter on civil procedure and the rules of evidence, in principle it is the plaintiff who bears the burden of proof for competence ratione materiae (subject matter jurisdiction), and here the FSIA obviously has put this old rule upside-down, imposing the foreign state with the burden of proving its immunity claim satisfactorily to the court.

—See also De Sanchez v. Banco Central de Nicaragua, 515 F.Supp. 900, 903 (E.D.La.1981): ‘This [the incidence of the burden of proof according to the House Report] is in contrast
to the usual rule that upon challenge, the plaintiff bears the burden of proving that subject matter jurisdiction exists over its claim.’ See e.g. Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, 568 F.2d 1074, 1076 (5th Cir. 1978), cert. denied, 439 U.S. 836, 99 S.Ct. 120, 58 L.Ed.2d 13 (1978), Rosemond Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416, 418 (5th Cir. 1972).

But the question is if international law does not put a limit here on the national law maker?

To begin with, a highly interesting precedent was set by the Appeal Court of the 7th Circuit in Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 22 ILM 835 (7th Cir. 1983). In this case, the court stated about the incidence of the burden of proof for an expropriation; the conditions under which this expropriation was undertaken could not be entirely clarified from the evidence in court.

As to the facts, Nicaragua had expropriated the plaintiff of his shareholder rights at Empresa without paying an indemnity, and thereafter acted within these shareholder rights in managing the company. As a response, the plaintiff indemnified himself by ordering products from Empresa that he did not pay. Thus, the question came up if the expropriation was in violation of international law under §1605(a)(3) FSIA.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

Right at the start of the trial, the court stated on the incidence of the burden of proof:

It is uncontested that defendants bear the burden of establishing their immunity from this suit; therefore, the only issue is whether they have met this burden. (705 F.2d 250, 253, 22 ILM 835, 836).

In accordance with the House Report, the court stated that the foreign state has to make a prima facie case on two elements: ‘that it is a foreign state under the definition employed in FSIA, and that the claim relates to a public act’ (Id., p. 256, 22 ILM 835, 839). Once this evidence was submitted, the general rule of immunity in section 1604 would have the effect of a presumption of immunity in favor of the foreign state that the plaintiff had to overcome if he is to win; and he had to do this by proving that one of the exceptions applies.

In the present case there was no doubt as to Empresa being an organism of a foreign state under
§§1603(a),(b) of the Act. It was thus only the question if the activity in question was of a governmental or public nature. This gave rise to the scrutiny of the burden of proof. The judge took the House Report as a point of departure and reasoned that a public act was ‘an act not within the exceptions in section 1605-1607.’

However, the judge reasoned that this would practically imply that the foreign state had to disprove all the exceptions that the Act contains, for having immunity being granted, and that such a situation could not what the legislator had in mind when drafting the FSIA. It would require of the foreign state an almost impossible task to refute all the exceptions under the Act, while it would be relatively easy for the plaintiff to indicate on which exception he relies.

In addition, it would be a sheer waste of time and resources to require from the foreign state such an amount of evidence when it was so easy for the plaintiff to arrest his claim on the specific exception or exceptions that he holds applicable. The court implied with this reasoning of course that the judge in sovereign immunity litigations should consider only the exceptions that the plaintiff invokes, and not all exceptions.
From the foregoing, we have learnt that district courts must state about their competence *sua sponte*, so they have to consider all possible exceptions from foreign sovereign immunity. And insofar the reasoning in the Alberti case cannot be entirely accurate. It is accurate as to its end result however: the court came to the conclusion that for making the *prima facie* case of foreign sovereign immunity, the foreign state could present evidence that shows that the activity in question was public or governmental, and that it was then the plaintiff’s task to see how he can win by proving the applicability of one of the exceptions to the general rule of §1604.

This is nothing new, however, and was already current practice in former precedents. Julia B. Brooke, in her article *The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach*, 23 VA.J.INT’L L. 635, briefly summarized that foregoing case law, and came to concluding on the lines of the Alberti precedent, while affirming that this was more or less the current practice in matters of handling foreign sovereign immunity in United States federal courts.

After these reflections about the burden of proof, the court concluded that the foreign state could limit
its production of evidence to demonstrating, in a general manner, that the act in cause was governmental, and that it could further limit it to the specific exception(s) the plaintiff invokes.

Accordingly, we believe that the purposes of the act will best be served by requiring that the defendant demonstrate that the suit relates to a governmental act of the foreign state being sued, and then placing the burden of identifying the relevant exception by affidavit or otherwise upon the plaintiff. (705 F.2d 250, 256, 22 ILM 835, 839).

I have already mentioned that in a case note, Monroe Leigh, Esq., the acting legal advisor of the State Department at the time of the enactment of the FSIA strongly criticized the Alberti precedent. (77 AJIL 888 (1983). Mr. Leigh, from Steptoe & Johnson in Washington D.C., whom I have met back in 1985 for a discussion about my doctoral thesis, wrote in his case note:

The effect of this protective measure is to place both the responsibility for producing evidence and the risk of nonproduction upon the plaintiff. It should be observed that while the FSIA plan, as explained in the legislative history, may have posed some practical difficulties, the court’s solution departs from the FSIA’s allocation of the burden of proof to the foreign state invoking immunity. At least in this case, where there was no dispute
regarding the fact of nationalization, the court effectively eliminated the foreign state’s burden by requiring only a general statement by defendant to prove a prima facie case of immunity. (77 AJIL 888, 891).

While I have briefly mentioned that discussion above, I will now discuss this interesting point more in detail. In fact, there are three allegations being made in Mr. Leigh’s statement:

(1) The interpretation of the *House Report* regarding the burden of proof that was done by the court in Alberti resulted in raising the burden of proof on the side of the plaintiff. The latter had been charged with both the ‘responsibility for producing evidence’ and the ‘risk of nonpersuasion’;

(2) The FSIA contains a rule regarding the burden of proof called by Monroe Leigh ‘FSIA’s allocation of the burden of proof’, while he admits that the *House Report* statement ‘posed some practical difficulties’;

(3) As there was no dispute regarding the fact of the nationalization itself, the Appeal Court, according to Leigh, reduced the foreign state’s burden of proof by limiting it to a mere ‘general statement’.
For the following reasons I hold Mr. Leigh’s criticism for unjustified, if not erroneous regarding the principles and rules of evidence that it invokes.

Ad (1)

It was not disputed between the parties that the plaintiff bears the evidential burden after Nicaragua established a prima facie case of sovereign immunity regarding the nationalization. The Court of Appeal did not rule on the risk of nonpersuasion here, but only on the incidence of the evidential burden.

The legal burden or risk of nonpersuasion comes to carry only in the moment that the plaintiff, too, has achieved to rebut the prima facie evidence established by the foreign state.

This was however not the case. The plaintiff even failed to respond the submission of the foreign state, and remained completely inactive, let alone submitted any counter-evidence, and this despite the fact that the court asked for it. In this case, it is obvious that the plaintiff did not rebut the prima facie evidence, and thus the legal burden never came to carry in this case.
Ad (2)

It is incorrect to state that the Act itself contained a rule of the burden of proof; there is no provision to this effect to be found in the FSIA. Regarding the legal materials, the Court of Appeals well considered the explanation given therein, but then modified the application of this explanation for the judicial practice. The judge considered the fact that immunity cannot be construed, from a procedural point of view, as an affirmative defense, because courts have to state about their competence sua sponte; abrogating this practice would have repercussions in international law and practice.

As a result, the court adapted the explanation of the House Report to the judicial practice in matters of sovereign immunity litigation. It has to be seen that this modification that the court proposed in Alberti only regards the evidential burden, and not the persuasive burden or risk of nonpersuasion.

Ad (3)

That a nationalization is a public, governmental act was not even contested by the plaintiff, and this fact was admitted by Monroe Leigh in his case note. So why should Nicaragua have been obliged to prove
all the details regarding this public act? It follows from litigation equity that only what is contested needs to be proved. In such a situation, to talk about the court having ‘eliminated’ the burden of proof of the foreign state is untenable.

To summarize, the Alberti precedent represents a sound, logical and practical adaptation of the burden of proof explanation in the House Report to the requirements of judicial practice and procedural equity considerations. As the court, in compliance with the overwhelming majority of international law scholars and international practice, considered a nationalization as ‘a quintessential Government act’, the prima facie evidence that Nicaragua had submitted to demonstrate this fact was sufficient to having the evidential burden shift to the plaintiff for rebutting the presumption of immunity established by the prima facie case. And here is where the case ended, as the plaintiff did not even respond to the submission of the foreign state. The court held:

Defendants having established a prima facie entitlement to immunity it was plaintiff’s obligation to produce support for their position that a statutory exception was applicable. (705 F.2d 250, 256).
As I said above, the foreign state can limit its production of evidence until the plaintiff has contested the prima facie case; only in the latter case would the foreign state bear the full burden of proving that the act in question was of a public, governmental nature. But the plaintiff did not contest the prima facie evidence. The court stated:

It is only when the plaintiff has produced this evidence that the defendant must prove its entitlement to immunity by a preponderance of the evidence. (Id.)

The Immunity Exceptions

Immunity Waiver

§ 1605. General exceptions to the jurisdictional immunity of a foreign state
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; (...)

The House Report explains under section 1605(a)(1):

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(a)(1) Waivers. Section 1605(a)(1) treats explicit and implied waivers by foreign states of sovereign immunity. With respect to explicit waivers, a foreign state may renounce its immunity by treaty, as has been done by the
United States with respect to commercial and other activities in a series of treaties of friendship, commerce and navigation, or a foreign state may waive its immunity in a contract with a private party. Since the sovereign immunity of a political subdivision, agency or instrumentality of a foreign state derives from the foreign state itself, the foreign state may waive the immunity of its political subdivisions, agencies or instrumentalities.

With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern the contract. An implicit waiver would also include a situation where the foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.

The language, ‘notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver’, is designed to exclude a withdrawal of the waiver both after and before a dispute arises except in accordance with the terms of the original waiver. In other words, if the foreign state agrees to a waiver of sovereign immunity in a contract, that waiver may subsequently be withdrawn only in a manner consistent with the expression of the waiver in the contract. Some court decisions have allowed subsequent and unilateral rescissions of waivers by foreign states. But the better view, and the one followed in this section, is that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise.

**General Considerations and Burden of Proof**

We have seen that by and large that in sovereign immunity litigation, foreign states have the right to begin with producing evidence, and accordingly bear the *evidential burden* for their sovereign immunity claim. That means, more precisely, that the foreign state, or its organism, need to establish a *prima facie case* regarding the conditions pointed out in §§1603(a) or (b) FSIA and further, that the exceptions to foreign sovereign immunity that the plaintiff invoked, and that are enumerated in §§1605 to 1607 FSIA, do not apply. We also have seen that the general rules of evidence that require the plaintiff to prove the facts that establish *personal jurisdiction* have not been abrogated by the FSIA.

From the foregoing follows that once the foreign state has submitted prima facie evidence satisfactorily to the court, the evidential burden shifts to the plaintiff to demonstrate that an exception to sovereign immunity applies.
As we have seen already in some detail, the perhaps most common exception that is invoked in sovereign immunity litigation is the ‘commercial activity exception’, §1605(a)(2) FSIA. However, sometimes, in such a situation, when a plaintiff cannot find ground to show that the activity in question was of a commercial nature, he is well advised to try proving that the foreign state has waived their immunity. There are quite a few obvious and less obvious ways how a foreign state may have waived their immunity.

To begin with, in *Harris v. Vao Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), 63 ILR 318 (1982)*, which can be considered a landmark decision as it is quoted in a series of subsequent precedents, we face exactly such a situation. The plaintiff, testamentary executor of an American tourist who was killed in a fire that ravaged the Moscow International Hotel, sued not only the hotel but also the Russian government. The judge considered a simple letter from the Soviet Ambassador sufficient for establishing a *prima facie case* in favor of the defendants. Thereby, the judge ruled, the evidential burden shifted to the plaintiff to show that an exception applies.
The plaintiff invoked the waiver exception, §1605(a)(1) FSIA, but the judge concluded that ‘the statutes and treaties cited by plaintiff, though indicating a capacity of the defendants to sue or to be sued at their option, do not reflect an intention to waive governmental immunity.’ Accordingly, the action was rejected by the court. In *Matter of Rio Grande Transports, Inc.*, 516 F.Supp. 1155 (S.D.N.Y. 1981), 63 ILR 604 (1982), the case was about a claim to exonerate responsibility for an American vessel that was colliding with an Algerian vessel. The defendant, the *Compagnie Nationale Algérienne de Navigation* (CNAN), filed a conditional claim and answer against the American plaintiff. CNAN was recognized by the court to be an ‘agency or instrumentality of a foreign state’ under §1603(b), which proof was delivered by both a letter from the Algerian Ministry of Transportation, and an affidavit filed by the Chargé d’Affaires of the Algerian embassy in the United States.

The interesting question came up if the counterclaim filed by CNAN was to be considered as an *implicit waiver of sovereign immunity* under the terms of §1605(a)(1) FSIA.
After having examined a particularity in American admiralty law, the judge refused to admit an implicit immunity waiver with the argument that the defendant, running the risk to lose their only forum when passing the deadline stipulated in 46 U.S.C. §185 and thus for preserving substantive rights.

—46 U.S.C. §§183, 185. Section 185 stipulates that within six months from service of process, the owner of a vessel can file a counterclaim for reducing its financial responsibility which, in admiralty matters, can be considerable and is usually limited by maritime counterclaims. 516 F.Supp. 1155, 1159: ‘CNAN did everything possible to preserve substantive rights it reasonably expected it would lose if its sovereign immunity claim was denied; its actions cannot be considered an express or implied waiver of its sovereign immunity defense.’

As such, the defendant only acted for preserving their rights but not implied to waive their immunity for that matter. The judge also invoked a Supreme Court precedent, *The Bremen v. Zapata-Off-Shore Co.*, 407 U.S. 1, 19-20, 92 S.Ct. 1907, 1918, 32 L.Ed.2d 513 (1972), where the case was ruled in the same manner. The defendant *Zapata*, an American company, filed a protective limitation proceeding and conditional claim, under 46 U.S.C. §185, as it is regularly done in maritime actions for limiting financial responsibility. In *Ohntrup v. Firearms Center, Inc.*, 516 F.Supp. 1281 (E.D.Pa. 1981), 63 ILR 632 (1982), the explanation
provided by the legal materials regarding implicit sovereign immunity waivers was interpreted and explained. The plaintiff had bought a gun from defendant which did not function correctly and as a result wounded him. Between defendant and the fabricant of the weapon, Makina, a Turkish company, an arbitrage agreement was concluded which the plaintiff interpreted as an immunity waiver. The court held that the contract between Makina and Firearms Center did not rule any torts committed to third parties, and therefore no immunity waiver could be construed from the arbitration clause.

In addition, in International Association of Machinists and Aerospace Workers (IAM) v. OPEC, it was clarified that the only fact to have not responded timely to the action cannot be construed as an implicit immunity waiver.


Such a case is of course different from the case if a foreign state responds to the claim without however claiming foreign sovereign immunity. This is one of the clear-cut situations where the foreign state implicitly waives his sovereign immunity defense.
This was already foreseen by the legal materials that state that an ‘implicit waiver would also include a situation where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity.’

—H. R. Report No. 94-1487, 15 ILM 1398, 1407-1408. See also Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619 (4th Cir. 1964) where the court pronounced the same reasoning.

To conclude as to the general burden of proof allocation under §1605(a)(1) FSIA, we see that the situation is similar to the other exceptions in that here as well, the foreign state must begin to present evidence satisfactorily to the court by filing a *prima facie case* of sovereign immunity, whereupon the burden shifts to the plaintiff to demonstrate that an express or implicit immunity waiver exists, and that this waiver was contained in any contractual relationship that he himself had with the foreign state.

**Arbitration Clauses**

the Chambre de Commerce Internationale (CCI) in Paris, the arbitration clause agreed upon between the parties in a commercial contract, which stipulated that all litigation out of the contract be ruled by Swiss law and by arbitration, was considered as an implicit immunity waiver because this clause could not be revoked unilaterally according to its own terms.

The precedent Ipitrade was confirmed later by the same court in Libyan American Oil Company (LIAMCO) v. Socialist Libyan Arab Jamahirya, 482 F.Supp. 1175 (D.D.C. 1980), 20 ILM 151 (1980), which was an arbitration in relation to an oil drilling concession granted by Libya. After Libya nationalized LIAMCO in 1973/1974, the company sued Libya in an arbitration tribunal. Here the arbitration clause in the concession was qualified by the court as an implicit immunity waiver because it stipulated that arbitration will take place at a location the parties are going to agree about, or a location chosen by the arbiters. While the United States were not mentioned as forum state in this clause, the court considered the clause as broad enough to also cover the United States as forum state for the arbitration.

—Id., p. 1178: ‘Although the United States was not named, consent to have a dispute arbitrated where the arbitrators
might determine was certainly consent to have it arbitrated in the United States.’

A case constellation even more complicated than the present ones came up with *Verlinden B.V. v. Central Bank of Nigeria* which was one of many litigations resulting from what was called, by Lord Denning, the *Nigerian cement catastrophe*.


The Central Bank of Nigeria had granted letters of credit for securing contracts between Nigeria and private merchants from various countries for purchasing immense quantities of cement. After the Nigerian government failed to fulfill their duties under most of these contracts, the Central Bank of Nigeria was sued all over the world; the present case is one of them. As to the question of an implicit immunity waiver through the issuing of the letter of credit, the court scrutinized the arbitration clause in the letter of credit, as the clause was not contained in the purchasing contract itself. The court was thus facing two questions, that is, can that clause contained
in the letter of credit be applied also for the purchasing contract which was at the basis of the claim, and did the parties consent that also the United States are forum state for the arbitration?

—The clause reads as follows: ‘The construction, validity and performance of this contract shall be governed by the Law of the Netherlands and all disputes of any nature whatsoever which may arise under, out of, in connection with, or in relation to this contract shall be submitted to the arbitration of the International Chamber of Commerce, Paris, in accordance with its Rules at the date thereof.’ (488 F.Supp. 1284, 1300).

The result of this exam was that the court refused to apply the clause contained in the letter of credit, to the contract, while regarding the forum provision in the clause, the court provided a rather extensive interpretation. With regard to the first question, the court strictly differentiated between the letter of credit as an obligation engaged in by the central bank, on one hand, and the purchasing contract concluded by the Nigerian government, on the other. The judge noted that the plaintiff must have been conscious of this distinction as well because he preferred to base his claim on the letter of credit rather than the contract. Thus, the court rejected an ‘indirect’ application of the arbitration clause. Here are the quite meticulous reasonings.
By its very definition, the letter of credit is a separate and distinct obligation; in this case it bound only Central Bank, and not the Nigerian government. (...) Nigeria undertook no obligations under the letter of credit, nor Central Bank, under the contract. This is not a hypertechnical distinction. (…) Even if Nigeria’s waiver of immunity under one contract was held to bind its instrumentality under a different obligation, we would nevertheless find no implicit waiver, for Nigeria itself has never implicitly accepted the jurisdiction of American courts. (488 F.Supp. 1284, 1301).

Regarding the second question, the judge would have recognized an implicit waiver if American law, not Dutch law, had been declared as applicable in the clause. He did not find it sufficient that the parties agreed about a ‘third-party-country.’ While the court believed that the legal materials would justify even a more extensive interpretation of the waiver exception, it refused to apply it for other reasons:

Although both of these interpretations may be consistent with the literal language of the single paragraph of legislative history that addresses implicit waivers, there are strong reasons to reject the latter view. By its peculiar mixture of substantive and procedural provisions, the Immunities Act confers personal jurisdiction over all foreign states not entitled to immunity (assuming a valid service has been effectuated). Proof of an implicit waiver absolutely defeats the assertion of sovereign immunity. If the language of the Act is applied literally, the result is
that a foreign sovereign which has waived its immunity can be subjected to the personal jurisdiction of United States courts regardless of the nature or quality of its contacts with the country.

Plaintiff’s view, if adopted, would presage a vast increase in the jurisdiction of federal courts in matters involving sensitive foreign relations: whenever a foreign sovereign had contracted with a private party anywhere in the world, and chose to be governed by the laws or answer in the forum of any country other than its own, it would expose itself to personal liability in the courts of the United States. Verlinden and Nigeria could scarcely have foreseen this untoward result when they signed the contract; and it is unlikely that Congress could have intended it. (488 F.Supp. 1284, 1301-1302)

It seems indeed daring to admit that the parties, in the present case, wanted to include the United States as a forum state for their arbitration, as they expressly stated the applicable law shall be Dutch law. In addition, we already have seen earlier in this study that the affirmation of personal jurisdiction needs minimal contacts to be existent to the territory of the United States.

—in fact, in a side note the judge added this on to his reasoning: ‘88. There is reason to believe that Congress did not anticipate this problem at all. On one hand the legislative history indicates that Congress intended the courts to exercise personal jurisdiction only over foreign states having sufficient contacts with the United States.’ (488 F.Supp. 1284, 1302).
It would have been better systematically if the judge had discussed the matter not only under the waiver exception but if he had directly recurred to the question of personal jurisdiction and the minimal contacts requirement. In fact, the solution could be found only when one was getting a realistic picture in one’s mind of what the parties of the letter of credit wanted when agreeing about the arbitration clause; when you see they chose Dutch law, it is quite far-fetched to assume that simply because the Netherlands was a ‘third-party-country’ to both parties, they would implicitly also have agreed that the United States should be involved as a possible forum state.

This precedent was confirmed in Chicago Bridge & Iron Company v. The Islamic Republic of Iran, 19 ILM 1436 (1980)(N.D.Ill. 1980), 63 ILR 511 (1982), a case that was about a nationalization undertaken by Iran. The court examined arbitration clauses in the contracts between the parties, and came to wonder if they are to be qualified as immunity waivers. Taking reference to Verlinden, the judge refused to qualify the arbitration clauses as immunity waivers.

—19 ILM 1436, 1444: ‘Plaintiff argues, in addition, that the arbitration clauses in the contracts with the Iranians provide
implicit consent to jurisdiction in the United States courts. We requested plaintiff to file copies of these clauses. Having now reviewed them, we categorically reject the arbitration clauses as a basis for jurisdiction.’

However, an implicit immunity waiver was admitted by the court in *Maritime International Nominees Establishment* (MINE) v. Republic of Guinea, 505 F.Supp. 141 (D.D.C. 1981), 20 ILM 669 (1981), UN-MAT., 524, 63 ILR 535 (1982), rev., 21 ILM 1355 (1982)(D.C.Cir. 1982). The plaintiff MINE had founded with Guinea a *Société Mixte de Transports Maritimes* (SOTRAMAR). The failure of this enterprise resulted in arbitration. The contract stipulated, inter alia, the submission of any dispute to a bench of three arbiters, to be chosen by the President of the International Center for the Settlement of Investment Disputes (ICSID) in Washington, D.C.

The court considered this arbitration agreement as an implicit waiver of Guinea in front of American tribunals; this despite the fact that the arbitration clause didn’t specify anything regarding the arbitration forum state. The judge considered the ICSID headquarters and a provision in the *Rules of Procedure for Arbitration Proceedings*, Rule 13, that states that arbitrators *shall meet at the seat of the Centre*; consequently, the judge admitted that the will of the
parties was including the United States as an arbitration forum state.

—505 F.Supp. 141, 143: ‘The only fair construction of the SOTRAMAR contract and the ICSID rules is that the parties contemplated arbitration to be held in the United States.’

Distinguishing the MINE case from the precedents LIAMCO, Ipitrade and Verlinden that we reported already, the court stated that the SOTRAMAR contract had the required nexus with the jurisdiction of the United States, while in those other precedents such a nexus was not as firmly established. Countering the argument of the defendant that the arbitration forum was not enough to assume a will of the parties to embrace American jurisdiction, but that they would have needed to subject the arbitration also to American law, the judge responded that ‘this is too constricted a view.’

However, this judgment was reversed by the Court of Appeals of the District of Columbia, and the Court of Appeals confirmed Guinea’s view that without the parties having chosen American law as the applicable law to the dispute settlement, the required nexus with American jurisdiction could not be affirmed. As a result, the court denied the application of the waiver exception under §1605(a)(1) FSIA.
This comes quite surprising, and there is an interesting *obiter dictum* to be found in *Ohntrup v. Firearms Center, Inc.*, 516 F.Supp. 1281 (E.D.Pa. 1981), 63 ILR 632 (1982) that we already discussed; and it is also interesting that the judge took reference to the MINE district court decision, before it was appealed and reversed. There is much logic in this reasoning, in my view:

While it is reasonable to conclude that an agreement by a foreign country to *either* arbitrate disputes in *or* be governed by the laws of the United States constitutes an implicit waiver of that state of the defense of sovereign immunity in the courts of the United States … (Id.)

There are two options, two possible choices to make for parties of such an agreement. One is to choose the arbitration forum, the other is to choose the applicable law. I do not see why *both* criteria would need to be fulfilled for establishing the necessary *nexus* as a precondition to an immunity waiver. I also do not see why the applicable law should have a stronger nexus than the choice of the arbitration forum. I think that the Court of Appeals in MINE really screwed down the jurisdictional powers of the United States for reasons of ‘political correctness’ while there was hardly any reason for
doing so, given that the legal materials really are liberal in this respect. And the legal materials having been prepared and suggested by the legal advisor of the State Department, these concerns of ‘political correctness’ do not seem reasonable, but exaggerated.

The State Department has given convincing reasons why they wanted to retreat and give sovereign immunity litigation over to the judiciary; in such a case, if the judiciary remains looking up, or looking back, at what might be ‘political will’ and what might not be, it’s not doing its job correctly. To assume that parties of arbitration clauses must agree on both the arbitration forum and the applicable law, as both those criteria must embrace the jurisdiction of the United States, doesn’t make sense as a matter of logic. One of these criteria that ‘grasps’, should suffice for making a valid assumption as to the will of the parties regarding the jurisdiction of the United States, vel non. The last case I am going to briefly review here doesn’t make an exception to this rather disappointing and confusing line of jurisdiction, as in that precedent matters were clear-cut. There was an expressly stated immunity waiver, and thus the court didn’t need long reasonings for assuming that sovereign immunity had been waived. It’s the case
Sperry International Trade v. Government of Israel, 532 F.Supp. 901 (S.D.N.Y. 1982), 21 ILM 1073 (1982), confirmed, 21 ILM 1066 (2d Cir. 1982). At the basis of the action was an arbitration sentence pronounced by the American Arbitration Association. The case didn’t contain any legal difficulties, but of course cannot help to influence the very restrictive doctrine established by MINE, as we are dealing here with an express waiver. I quote the whole clause here as a model for international lawyers and government counsel, because it is ‘safe’ in the sense that the district court judgment was confirmed.

Buyer (Government of Israel) hereby waives any and all rights to claim sovereign immunity in any court of competent jurisdiction within the United States with respect to any suit in equity, action at law, or arbitration proceeding instituted by Seller. Buyer further waives any right to sovereign immunity with respect to any attachment, levy or execution resulting from a decree or judgment of any of the aforementioned courts on its commercial or quasi-commercial property or any funds, liquidated or unliquidated, or securities, negotiable or non-negotiable, deposited in or handed by any banking institution or other entity within the United States. (532 F.Supp. 901, 908-909).

To summarize, and with regard to arbitration clauses, we can observe a reversal in American federal
jurisprudence as to the admission of implicit immunity wavers under §1605(a)(1) FSIA.

While in the beginning, with the precedents *Ipitrade* and *LIAMCO*, the legal situation was rather favorable for the private merchant to sue a foreign state on the basis of an arbitration clause that contained either a nexus to the United States through the forum choice, or the choice of American law, since the *Verlinden* leading case, this argumentation has been restricted severely.

According to the *Verlinden* precedent both criteria must be fulfilled, thus the parties must have agreed *both* on the United States as the forum state, *and* the application of American law to the dispute. This reversal of the former more liberal case law was subsequently confirmed through the precedents *Chicago Bridge* and the MINe Court of Appeals decision, where it was expressly held that the mere choice of the United States as the forum state for the arbitration did not establish a sufficient nexus to the United States jurisdiction, within the court’s decision-making about an implicit immunity waiver according to section 1605(a)(1).
Regarding the *burden of proof*, there is no novelty; the same scheme is valid here that applies to all the other exceptions from sovereign immunity, that is, the foreign state must first establish a prima facie case for supporting its immunity claim, whereupon the evidential burden shifts to the plaintiff to assert and prove the waiver exception to be applied.

To give an example, in the *LIAMCO* precedent, the action was about a nationalization that was done in violation of international law under the terms of §1605(a)(3) FSIA. The court, citing *Hunt v. Mobil Oil Corporation*, 550 F.2d 68, 73 (2d Cir. 1977), cert. denied, 434 U.S. 984, 98 S.Ct. 608, 57 L.Ed.2d 477, stated that expropriations ‘are traditionally considered to be public acts of the sovereign removed from judicial scrutiny by application of the act of state rubric.’ (482 F.Supp. 1175, 1179). After this successful establishment of the prima facie case, the burden shifted to the plaintiff to demonstrate that the expropriation was ‘in violation of international law.’

**International Treaties**

A foreign state can also waive its immunity in an international treaty. This is formulated in §1604 FSIA: ‘Subject to existing international agreements to which
the United States is a party at the time of enactment of this Act, a foreign state …’. Furthermore, the House Report explains:

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With respect to explicit waivers, a foreign State may renounce its immunity by treaty, as has been done by the United States with respect to commercial and other activities in a series of treaties of friendship, commerce and navigation.

This indicates that the repartition of the burden of proof should be similar to the situation that the foreign state has agreed to arbitration in the contract that is at the basis of the litigation.

However, things do not look that clear-cut, and I got the impression after reviewing the pertinent case law that American courts were rather reluctant to derive immunity waivers from international treaties the foreign state is a member of.

This treaty, that regarded military training, was interpreted by the plaintiff as an implicit immunity waiver on the part of Saudi Arabia. However, the court refused to admit an immunity waiver, arguing that just because a state makes a bilateral agreement with another state, the state does not for that matter waive its immunity.

—510 F.Supp. 309, 312: ‘A foreign state does not waive its sovereign immunity by merely entering into a contract with another nation.’

What was required here, the court explained, was an intentional and conscious abandonment, by the foreign state, of a legal right. The contractual obligation of Saudi Arabia under the treaty to indemnify the American government for all financial expenses and to assume the responsibility for the transport of the soldiers, does not represent, according to the court, such an abandonment of a legal right.

Succinctly speaking, this requirement of the court boils down to the situation that only an express immunity waiver in a bilateral treaty can be considered as a valid immunity waiver, under section 1605(a)(1) FSIA. An example for such a clause can be found in Behring International v. Imperial Iranian Air Force.
Regarding the problem of immunity from execution, see further down in this study, and consider that there were two precedents, Behring I, 475 F.Supp 383 (D.N.J. 1979), UN-MAT., 479, 63 ILR 261 (1982), and Behring II, 475 F.Supp. 396 (D.N.J. 1979), UN-MAT., 492. See 475 F.Supp. 383, 389, note 13: ‘It is important to note that the Immunities Act deals both with a foreign state’s immunity from the jurisdiction of United States courts, see 28 U.S.C. §§1604-1607, and with the immunity a foreign state’s property enjoys from attachment and execution. In this case it is the second form of immunity which is the source of the controversy. It is the first form of immunity, however, which is determinative of this Court’s subject matter jurisdiction under 28 U.S.C. §1330(a).’

The plaintiff, an international freight forwarder, contracted with I.I.A.F., the predecessor of the Islamic Republic Iranian Air Force (I.R.I.A.F.), for the transport of merchandise from the United States to Iran. After I.I.A.F. had not paid several bills and the revolutionary troubles started in Iran, the plaintiff tried to seize, by means of a pre-judgment attachment, property belonging to the defendant in the United States.

—The court has also stated about the commercial activity exception, §1605(a)(2), concluding: ‘It is obvious that I.R.I.A.F. was engaged in commercial activity carried on in the United States. I.R.I.A.F. was engaged in using its cargo planes to ship goods purchased in this country to Iran. Its contact with
Behring obliged Behring to prepare those goods for shipment by I.R.I.A.F. The contract was negotiated and executed in New York City; I.R.I.A.F. maintained an office there, and it regularly sent its planes to this country to pick up cargo. Thus, I.R.I.A.F. has waived its jurisdictional immunity by engaging in commercial activity carried on in this country. 28 U.S.C. §§1604, 1605(a)(2). (475 F.Supp. 383, 390).

Examining its competence, the court, inter alia, applied section 1605(a)(1) FSIA with regard to Article XI, §4, of the Friendship Treaty between the United States and Iran of 8 August 1955 which contains an express sovereign immunity waiver.

—This is the text of the article: ‘No enterprise of either High Contracting Party including corporations, associations, and government agencies or 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, immunity therein from taxation, suit, execution of judgment, or other liability to which privately owned and controlled enterprises are subject therein.’

In Chicago Bridge, 19 ILM 1436 (1980)(N.D.Ill. 1980), 63 ILR 511 (1982), a precedent discussed earlier on, we can find another example where an implicit immunity waiver allegedly contained in the same friendship treaty was denied by the court. The court ruled that an expropriation effected by Iran did not fulfill the criterion ‘within the territories of the other High Contracting Party.’ (19 ILM 1436, 1439). In a more
recent case, *Jafari v. Islamic Republic of Iran*, 539 F.Supp. 209 (N.D.Ill. 1982), the same district court interpreted the provision in question as not covering activities ‘of the sovereign itself’, but only those of enterprises that it defines and enumerates. (539 F.Supp. 209, 211-212). The court concluded that the treaty did not contain any implicit immunity waiver of either party of the treaty.

The precedents *Behring* and *Chicago Bridge* differ also under another point of view. While in *Behring*, the judge stated that ‘[s]ection 1604 expressly establishes that existing international agreements to which the United States is a party survive the Immunities Act[.], and that ‘[t]he Treaty of Amity is just such an agreement’ (475 F.Supp. 383, 390), the judge in *Chicago Bridge* denied such a ‘survival’ of the treaty, and concluded that the parties member of the treaty did not have the intention to waive their sovereign immunities. (19 ILM 1436, 1440).

**Conclusion**

We can thus conclude that for an implicit or explicit immunity waiver to be assumed under section 1605(a)(1) of the Act, there must be proof of an unconditional immunity waiver to be contained in
any juridical relation between the private plaintiff and the foreign state. With respect to arbitration agreements, the plaintiff must prove that American law had been chosen to rule any dispute arising out of the agreement in order to establish the necessary nexus between the contract and the jurisdiction of the United States.

An implicit immunity waiver in an international treaty was only affirmed by the courts for the case that the clause in question was clearly pointing to an intentional abandonment of a legal right on the side of the foreign state, defendant of the action. In any other constellation, such implicit immunity waivers were denied to be agreed upon by the parties of international treaties.

The repartition of the burden of proof that is suggested in the House Report and that was partially modified by American federal jurisprudence, is that it’s the foreign states to begin with producing prima facie evidence about two elements, first, that it is a foreign state under §§1603(a),(b) FSIA, and second, that the activity at the basis of the action had a public, governmental character. For proving the second element, the foreign state only needs to disprove any explicit or implicit immunity waiver under
§1605(a)(1) FSIA that the plaintiff has invoked in its claim.

Once the foreign state has produced *prima facie* evidence regarding the two elements, which can by done by affidavit or otherwise, the evidential burden shifts to the plaintiff for proving that the alleged immunity waiver was such that it fulfilled the requirements of §1605(a)(1) FSIA.

**Commercial Activity**

§1605(a)(2) FSIA states that a foreign state shall not be immune from jurisdiction for any case in which the action is based upon:

- §1605(a)(2) FSIA
  - (Clause 1) a commercial activity carried on in the United States by the foreign state, or
  - (Clause 2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or
  - (Clause 3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.

First, of all, it has to be noted that the notions ‘foreign state’, ‘commercial activity’ and ‘United States’ are defined in §1603. This does not require further discussion.
§ 1603. Definitions
For purposes of this chapter—

(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An ‘agency or instrumentality of a foreign state’ means any entity—
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A ‘commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by such state and having substantial contact with the United States.

The interesting legal issue involved here in this so-called *commercial activity exception* is the particular nexus required between the action or act in question, on one hand, and the commercial activity, on the other. To discuss this further in detail I found it useful to divide the statutory ruling into three separate clauses. When you calmly read them, you see that
there is a movement in the sense that the commercial activity moves as it were farther and farther away. When reading this for the first time, I had to think immediately of a passage in the House Report regarding §1330(b), which I discussed already earlier on:

H. R. Report No. 94-1487
(b) Personal Jurisdiction. Section 1330(b) provides, in effect, a Federal long-arm statute over foreign states (including political subdivisions, agencies, and instrumentalities of foreign states). It is patterned after the long-arm statute Congress enacted for the District of Columbia, Public Law 91-358, section 132(a), Title I, 84 Stat. 549. (H. R. Report No. 94-1487, p. 13, 15 ILM 1398, 1408 (1976).

In my view, the commercial activity exception of the Act uses a very similar long-arm clause here to establish the nexus or a minimal contacts provision between the action of the foreign state the litigation is about, on one hand, and the commercial activity, on the other. In clause (3), it is evident that this nexus can be a relatively feeble one, and here, the literature is all but united if such kind of ‘direct effects jurisdiction’ is still constitutional or not.

—See, for example, Johnson & Worthington, Minimum Contacts Jurisdiction under the FSIA, 12 GA.J.INT’L &
Whatever one may think about such a legislative attempt to ‘force jurisdiction’ into one’s nation—which can be problematic under international law—the principle that is unquestioned here is that such a nexus between the suit and the commercial activity must exist, and here the statute is clear-cut in that it requires that the action pending at court be based upon the commercial activity in question.

Clause 1

As to this first clause of the section, there are instructive explanations to be found in a judgment by the Court of Appeals of the 3rd Circuit, in the case Sugarman v. Aeromexico, Inc., 626 F.2d 270 (3d Cir. 1980).

The plaintiff claimed damages from the Mexican government, alleging he had greatly suffered from waiting for his delayed flight to the United States, in a Mexican airport.

The district court had recognized Aeromexico as being an agency or instrumentality of a foreign state under the section. What is interesting to note about
the appeal judgment is that it contains a confirmation of what was to be supposed from the point of view of the burden of proof. The court clearly held that the burden is upon the plaintiff to show the necessary connectivity required by section 1605(a)(2) FSIA.

—The court stated: ‘… if we felt confined by the recitals of the complaint, standing alone, we would acknowledge that the complaint does not provide very sturdy underpinning for the finding that Sugarman’s claim is ‘based upon a commercial activity carried on in the United States’, as called for by the first clause of section 1605(a)(2).’ (626 F.2d 270, 272).

This ruling becomes even more clear when considering Verlinden v. Central Bank of Nigeria, 488 F.Supp. 128 (S.D.N.Y. 1980), where the court held that it’s upon the plaintiff to identify a ‘regular course of commercial conduct’ or a ‘particular commercial transaction or act’ under this section, as well as that the activity has ‘substantial contact(s) with the United States.

—The judgment was confirmed by the Court of Appeals of the 2nd circuit, 647 F.2d 320 (2d Cir. 1981), but the appeal was reversed by the Supreme Court, however for other reasons, 103 S.Ct. 1962 (1983), 22 ILM 647 (1983).
Clause 2

This criterion was interpreted in the case Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982) where the plaintiff, an American citizen, claimed damages based on a commercial contract concluded with the government of Ireland, or an agency thereof. The plaintiff invoked that the government of Ireland had not fulfilled its duties under the contract, and in addition had divulged certain facts that they had to keep secret under the contract. There was no doubt as to the commercial character of the activity in question.

—682 F.2d 1022, 1027, note 20: ‘The district court apparently accepted plaintiff’s assertion that the acts involved were ‘commercial’, and our disposition of the case today does not call for review of this issue.’

Hence, the Court of Appeal only stated about the necessary nexus between the facts at issue and the territory of the United States. Admitting as verified the facts alleged by the plaintiff, the Court in applying clause 2 of §1605(a)(2) and clearly concluded that the burden for proving the minimal contacts required by the clause was upon the plaintiff.

—Appeal courts only revise legal questions. See id., p. 1026 where the court stated: ‘Our conclusion that the district court’s dismissal for lack of jurisdiction was improper is based on our finding that the facts ‘as alleged’—and generously
Clause 3

The third clause of section 1605(a)(2) was subject of the precedents *Upton v. Empire of Iran*, 459 F.Supp. 264 (D.D.C. 1978), 63 ILR 211 (1982), and *Wyle v. Bank Melli of Teheran, Inc.*, 577 F.Supp. 1148 (N.D.Cal. 1983). The Upton suit was initiated by a woman whose husband was killed when, back in 1974, the hall of the international airport in Teheran, Iran, crashed down.

Mrs. Upton as well as two other plaintiffs was claiming damages from the Iranian government and the Iranian Civil Aerospace Department. Here also, the court affirmed that the burden of proof for the necessary *nexus* under the third clause of §1605(a)(2) is upon the plaintiff.

Plaintiffs principally rely upon 28 U.S.C. §1605(a)(2), clause 3, as a bar to the defendants immunity. (…) The court finds that causing injury to American citizens abroad is insufficient to satisfy the requirement of the District of Columbia long-arm statute. The relatively simple statement of plaintiff’s position points up the correctness of this result. They contend that ‘defendant’s acts caused the deaths and injuries to Americans which caused direct effects in the United States. (…) Their own language attenuates the connection between the act and the effect. (…) Inasmuch as section 1605(a)(2), clause 3, is
unavailable to remove defendants’ immunity under section 1605, and plaintiffs are unable to assert jurisdiction under any of the alternative exceptions to sovereign immunity, this court lacks subject matter and personal jurisdiction over these defendants by the terms of 28. U.S.C. §1330. Accordingly, the court dismisses the action. (459 F.Supp. 264, 266).

The court also ruled on the retroactivity of the FSIA which entered in force on the 19th January 1977, and affirmed it (459 F.Supp. 264, 265, referring to Yessenin-Volpin v. Novosti Press Agency, Tass, 443 F.Supp. 849, 851, note 1 (S.D.N.Y. 1978). However, while thus two district courts have initially affirmed the retroactivity of the Act, it was later denied by the Court of Appeals of the 2nd circuit in the case Corporación Venezolana de Fomento v. Vintero Sales, 629 F.2d 786, 790 (2d Cir. 1980). From this precedent onward, a retroactive application of the FSIA was generally denied by the American jurisprudence.

This becomes still more evident in Wyle v. Bank Melli of Teheran, Inc., a suit that was initiated by the bankruptcy attorney of two shipment companies, the Pacific Far East Line (PFEL) and Atlantic Bear Steamship Co. (ATLANTIC), against Bank Melli from Iran, the government of Iran, an Iranian shipment company (Ports and Shipping Organization of Bushire, Iran
(PSO) and the Bank of California. The plaintiff alleged a fraudulent cooperation of the defendants with regard to a letter of credit. In fact, for the navigation of PFEL and ATLANTIC within the Bushire port in Iran, PSO required a letter of credit to be issued by Bank Melli for indemnifying eventual loss or deterioration of the cargo. PFEL offered a letter of credit to the Bank of California for indemnifying Bank Melli for the case that PSO would ask for the letter of credit. After complicated arrangements, Bank Melli claimed from Bank of California the payment of the entire amount guaranteed, pretending PSO had cashed in the letter of credit from PFEL and ATLANTIC who had violated the credit agreement. The plaintiff alleged that there was no reason for cashing the letter of credit as there was no loss or deterioration of any cargo.

With regard to the minimal contacts between the activities of PSO and Bank Melli, the plaintiff invoked the House Report statement where jurisdictional immunity is construed as an affirmative defense. He thus concludes that what is valid for the question of affirming or denying sovereign immunity, and the burden of proof regarding those facts, must equally be valid for minimal contacts. (577 F.Supp. 1148, 1157).
Thus, the plaintiff argued that the burden of proving minimal contacts was on the defendants, but as the latter had not presented proof to the court as a basis of their immunity claim, the plaintiff thought he had been dispensed from presenting evidence. The court did not share the plaintiff’s opinion:

This argument is specious. The legislative history makes clear what the foreign state must prove to establish immunity: that the challenged action is that of a foreign state in its public, noncommercial capacity. The burden of proving the existence of an otherwise actionable (if not barred by sovereign immunity) activity or act within the United States or having a direct effect in the United States would obviously remain with the plaintiff. Simply because the foreign state must plead and prove certain facts necessary to establish its immunity does not mean that the normal burden of proving subject matter and personal jurisdiction is reversed. (Id.)

The burden of proof for the existence of minimal contacts, and implicitly, for the affirmation of subject matter and personal jurisdiction of the tribunal is thus unequivocally upon the plaintiff.

The repartition of the burden of proof in the House Report only regards the immunity question, and did not change the general rule that the plaintiff must
demonstrate and prove the facts that are establishing the competence of the court.

**Expropriation in Violation of International Law**

This exception—§1605(a)(3) FSIA— is a novelty in American law in that contrary to general international law principles, where all nationalizations are considered as sacrosanct in the sense that they are considered as ‘quintessential government acts’, the FSIA allows to sue a foreign state nonetheless when the foreign state has effected the nationalization ‘in violation of international law.’

One of the initiators of this exception was Professor Louis B. Sohn, at the time legal advisor to the State Department, when the Act was in preparation, and who was for twelve years professor of international law at Harvard University. The other person who signed responsible for the introduction of this exception is Monroe Leigh, Esq., who was the acting legal advisor when the FSIA was drafted, and who was for long years a founding member of the law firm Steptoe & Johnson in Washington, D.C.

Section 1605 (a)(3) seems to have been drafted in analogy with the international law of torts, or international torts, and the responsibility of states for
torts committed by one of their officials, which is called in the literature *state responsibility* or *international responsibility*.


In addition, there is a parallel to United States law, the so-called *Hickenlooper Amendment* to the Foreign Assistance Act of 1965.

28 U.S.C. §1605(a)(3)

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States; …

The *House Report* explains for this section:

H. R. Report No. 94-1487

(a)(3) *Expropriation claims*. Section 1605(a)(3) would, in two categories of cases, deny immunity where ‘rights in property taken in violation of international law are in issue.’ The first category involves cases where the
property is present in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for that property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property needs to be present in connection with a commercial activity of the agency or instrumentality.

The term ‘taken in violation of international law’ could include the nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law. It would also include takings which are arbitrary or discriminatory in nature. Since, however, this section deals solely with issues of immunity, it in no way affects existing law on the extent of which, if at all, the ‘act of state’ doctrine may be applicable. See 22 U.S.C. 2370(e)(2). H.R. Report, pp. 19, 20, 15 ILM 1398, 1408 (1976).

We have to distinguish the different clauses in this exception, under the special focus of the repartition of the burden of proof.

**Expropriation in Violation of International Law**

The Court of Appeals of the 7th Circuit, in *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250 (7th Cir. 1983), 22 ILM 835 (1983), a case already discussed
earlier on regarding its important rulings on the burden of proof, is equally interesting with regard to the interpretation of the criterion ‘expropriation in violation of international law,’ under §1605(a)(3) FSIA. As in this case, the expropriation was considered by the court to be a public, governmental act and the defendant state thus established a *prima facie case* to support its immunity claim, the fact at issue was if the expropriation had been effected ‘in violation of international law.’

Plaintiff’s final basis for removing this case from the protection of sovereign immunity rests upon their allegation that the nationalization was in violation of international law. If this is the case then defendant’s immunity is removed by section 1605(a)(3), as the remaining elements are present. To decide this issue we must determine what is required by international law to validate a nationalization and then allocate the appropriate burden of proof. (705 F.2d 250, 255).

The plaintiffs forwarded the view that international law required the prompt payment of an adequate compensation to the property holders. As they had not received such compensation, they thought that the expropriation was in violation of international law.
The defendants, by contrast, argued that international law only required that reasonable and comprehensive provisions had been enacted for a compensation to be paid.

While the court admitted that generally, in the international law literature, prompt, adequate and effective compensation was required to be effected by the nationalizing government, the court admitted that there was little agreement about the precise terms under which such payment must be effected in the particular case.


The court however rejected the argument of the plaintiffs that compensation had to be paid before the nationalization:

We think that international law does not require payment of compensation prior to nationalization. Our position is buttressed by Congress’ adoption of the ‘prompt’, rather than a prior or immediate, payment standard in the legislative history of 1605(a)(3). (...) Prompt payment, by definition, is made within a reasonable time after nationalization. As long as the expropriating nation affords property owners a means of obtaining prompt payment the dictates of international
law have been satisfied. (Id. See also H.R. Rep, pp. 19-20).

As the legal provisions in Nicaragua have indeed foreseen the payment of a prompt, adequate and effective compensation, the court proceeded to state on the burden of proof for this fact at issue. I will cite the entire passage of the judgment here because it exemplarily reveals the repartition of the burden of proof, and its underlying principles, under the Act, and how those principles are to be applied in procedural practice:

In our opinion section 1604 requires a foreign state to establish a prima facie case on two elements: that it is a foreign state under the definition employed in FSIA, and that the claim relates to a ‘public act.’ Once this evidence is produced section 1604 provides a ‘presumption’ of immunity that the plaintiff must rebut by offering evidence that one of the statutory exceptions applies. It is only when the plaintiff has produced this evidence that the defendant must prove its entitlement to immunity by a preponderance of the evidence. Plaintiffs do not contend that defendants have failed to establish that they are both to be treated as foreign states under the FSIA. The question that remains is whether defendants have established that the suit relates to a public act. The only definition of public act appears in the suggestion in the legislative history that a public act is ‘an act not within the exceptions in sections
1605-1607.’ House Report at 6616. This definition, which is circular, would require a defendant to establish the inapplicability of every statutory exception. Common sense refutes this position as it would be a nearly impossible task for a defendant to refute the exceptions before the plaintiff has indicated which one is applicable or, as in this case, how a nationalization was in violation of international law. (…) Defendants having established a prima facie entitlement to immunity it was plaintiff’s obligation to produce support that a statutory exception was applicable. This they did not do; although they were not precluded from adducing affidavits. Instead they failed even to respond to defendant’s motion to dismiss. In this situation, defendants need not disprove a claim that the nationalization was in violation of international law, and we need not consider whether their affidavit was sufficient for that purpose. (705 F.2d 250, 256, 22 ILM 835, 839).


It is interesting to examine if the same repartition of the burden of proof exists under the act of state doctrine? There is namely an exception to the act of state doctrine contained in the Hickenlooper Amendment to the Foreign Assistance Act of 1965 which states that American courts, if the president, for political reasons opposes it, are not supposed to apply the act of state doctrine, except that ‘claim or title or
other right to property … based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law’, 22 U.S.C. §2370(e)(2). Referring to this provision, the district court of the district of Columbia, in the LIAMCO precedent, concluded that ‘[t]he president has made no suggestion in this matter, but petitioner has failed to show that the amendment’s requirements have been met.’ (482 F.Supp. 1175, 1179 (D.D.C. 1980). The conditions namely require that the expropriation was effected in violation of the principles of international law. Hence, the court states that the petitioner ‘has failed to show that the taking was in violation of international law.’

The court applied thus the act of state doctrine, which resulted in an arbitration sentence rendered in Geneva, the 12th of April, 1977, not to be executed within the United States, notwithstanding the fact that the court had refused to grant Libya immunity from suit. In a more recent case, Kalamazoo Spice Extraction Company v. The Provisional Military Government of Socialist Ethiopia, 24 ILM 1278 (W.D.Mich. 1985), the district court equally struggled with factual problems regarding the question if the
nationalization of plaintiff’s company by the Ethiopian government was effected ‘in violation of international law.’

As under §§1330(a),(b) FSIA, jurisdiction requires the absence of immunity, the judge had to deal with all the factual problems regarding the immunity exceptions, before he could state about its jurisdiction. However, before having affirmed its jurisdiction or competence, the court is impeached from entering the examination of the underlying substantive law. This vicious circle, that is a result of the strange drafting technique of the Act, was broken by the court:

When factual issues are determinative of both the jurisdictional question and the merits, as here, a court must assert jurisdiction unless the claim is insubstantial or frivolous. (...) KAL-SPICE’s claims are neither insubstantial nor frivolous. Because plaintiff has made a substantial allegation of a violation of international law, the court must assert jurisdiction. (24 ILM 1278, 1284).

As to the burden of proof of the plaintiff with regard to a violation of international law through the nationalization in question, a substantial allegation was thus considered to be sufficient by the court.
The Minimal Contacts Requirements

We have already outlined the principles of due process being part of the FSIA, which is why a minimal contact or nexus must exist between the facts at issue, and the territorial jurisdiction of the United States.

This is required by a variety of exceptions to the general rule of immunity. Here, §1605(a)(3) requires that the property (or the property exchanged for it) be present in the United States in connection with a commercial activity of the foreign state conducted in the United States, or that the property belongs, or is administered by, an agency or instrumentality of the foreign state, conducting commercial activity in the United States. This latter criterion was examined in De Sanchez, 515 F.Supp. 900 (E.D.La. 1981), a case we discussed earlier on.

The court admitted an expropriation in violation of international law regarding the refusal of Banco Central to pay out to Mrs. Sanchez the amount of the cheque, without the payment of a prompt, adequate and effective compensation. (515 F.Supp. 900, 910, note 10). Then the judge stressed the fact that contrary to section 1605(a)(2), the ‘commercial activity’
exception, §1605(a)(3) did not require that the property be used in connection with a commercial activity, when such activity was conducted by an agency or instrumentality of the foreign state:

Section 1605(a)(3) ... permits a court to exercise jurisdiction over the foreign state so long as the state’s agency or instrumentality holds the property allegedly confiscated, or property exchanged for it, and conducts commercial activities in the United States, even if the property is not used in connection with those commercial activities. (515 F.Supp. 900, 911-912).

Appreciating the evidence submitted by the plaintiff, the court affirmed the existence of commercial conduct by Banco Central in the United States, stating:

From Incer’s testimony, it is clear that Banco Central used the C & S account as part of certain commercial activities conducted in the United States. Checks from the C & S account were used to pay for letters of credit issued through C & S for Nicaragua imports and to pay for principle and interest on credit extended to Banco Central by C & S. Incer at 11-12. The account was also used to collect all other American checks tendered to Banco Central. Id., at 11.’

As to the burden of proof regarding those minimal contacts, we have already seen that as these
criteria are substantial elements of *personal jurisdiction*,
the burden of proof is upon the plaintiff. In the
present case, the court took reference to *Verlinden*, 647
*F.2d* 320 (2d Cir. 1981), 461 *U.S.* 480, 103 *S.Ct.* 1962, 76
*L.Ed.2d* 81, 51 *U.S.L.W.* 4567, 22 *ILM* 647 (1983), and held:

> Although *Verlinden* approached the issue as one of
> personal jurisdiction, which Banco Central contends is
> lacking in this case, the analysis is the same because the
> FSIA makes the court’s personal jurisdiction
coterminous with its subject matter jurisdiction over the
> claim asserted against the foreign state. 28 *U.S.C.*

**In the following note, the court pursued:**

> I acknowledge that Incer’s testimony, standing alone, is
> not particularly strong evidence of the scope and nature
> of Banco Central’s commercial activities in the United
> States. However, because the burden of proof of the
defense of sovereign immunity is upon Banco Central,
... and it has failed to present evidence rebutting Incer’s
testimony, I am compelled to find in favor of Sanchez on
the issue. I also acknowledge that generally the burden
of proof on the existence of personal jurisdiction, like
subject matter jurisdiction, falls upon the plaintiff.

*Familia de Boom v. Arosa Mercantil, S.A.*, 629 *F.2d* 1134,
1138 (5th Cir. 1980), *Product Promotions Inc. v. Cousteau*,
495 *F.2d* 483, 490 (5th Cir. 1974), *Jetco Electronic Industries,
Inc. v. Gardiner*, 473 *F.2d* 1228, 1232 (5th Cir. 1973).
However, because the FSIA incorporates the elements of personal jurisdiction into its grant of subject matter jurisdiction, and the foreign state must bear the burden of proof that subject matter jurisdiction is lacking, a plaintiff suing under the Immunities Act is necessarily relieved from his duty to prove that the defendant foreign state is subject to personal jurisdiction of the court. Therefore, because Banco Central has failed to prove that Sanchez’s claim does not arise under 1605(a)(3), its contention that personal jurisdiction is lacking is also without merit. (Id., note 11).

These revelatory passages in the judgment are in obvious contradiction with the precedents, and with the conclusions I have taken further up in this study. However, the court’s argument that the plaintiff was liberated from his burden of proof regarding personal jurisdiction because the Act has interwoven it with subject matter jurisdiction, is not very convincing.

This circular schema, that results from the drafting technique of the Act, can be broken apart, so that we can well look at the burden of proof for subject matter jurisdiction, on one hand, and for personal jurisdiction, on the other. In addition, it has to be seen that these considerations of the court were but an *obiter dictum*, not relevant for the final decision.

Even if we admit that the plaintiff has to bear the burden of proof for minimal contacts as part of
personal jurisdiction, we can conclude that in the present case the plaintiff has well acquitted this burden, even though the court held it was not ‘particularly strong evidence.’ In other words, Sanchez has well established a *prima facie case* with respect to that fact at issue whereupon the evidential burden shifted toward the defendant, Banco Central. However as the bank failed to present evidence ‘rebutting Incer’s testimony’, the judge actually concluded that the bank failed to discharge this burden, which is why the judge was ‘compelled to find in favor of Sanchez on this issue.’ This is why the developments of the court regarding the burden of proof were not relevant, and therefore *obiter dicta*. In addition, more recent precedents overruled these considerations, that is *Alberti*, 705 F.2d 250 (7th Cir. 1983), 22 ILM 835 (1983), and *Wyle*, 577 F.Supp. 1148, discussed already earlier in this study. In Alberti, the Court of Appeals of the 7th Circuit, affirming the burden of proof of the foreign state for its immunity claim, modified the allocation of the burden of proof, as it was outlined in the *House Report*. The court limited the burden of proof of the foreign state to the *prima facie* demonstration of a public act ‘and then placing the burden of identifying the relevant
exception by affidavit or otherwise upon the plaintiff. (705 F.2d 250, 256).

After this important leading case, we can conclude that the foreign state does not bear the burden of proof for personal jurisdiction; this burden is upon the plaintiff. Hence, the burden of proof for minimal contacts is equally upon the plaintiff, including the necessary nexus required by §1605(a)(3). This criterion is almost identical with clause 2 of §1605(a)(2), for which the burden of proof of the plaintiff was affirmed in Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982).

Conclusion

Thus, to summarize, these precedents reveal that the burden of proof is upon the plaintiff for demonstrating the applicability of any of the criteria employed by §1605(a)(3) and that the burden of proof of the foreign state is limited to two elements, that is, that it is a foreign state or an agency or instrumentality of a foreign state, under §§1603(a),(b) and that the activity in question was of a public, governmental nature. In other words, the examination of section 1605(a)(3) regarding the burden of proof fully confirms our earlier conclusions.
Immovable Property

This exception from immunity— §1605(a)(4)—is ‘classical’ in the sense that is existed already under the absolute immunity doctrine.

—See Hersch Lauterpacht, International Law (1977), 340, 341: ‘There is uniform authority in support of the view that there is no immunity from jurisdiction with respect to actions relating to immovable property.’ See also Sompong Sucharitkul, State Immunities and Trading Activities in International Law (1959), 167.

The refusal to grant immunity for any litigations regarding property of the foreign state situated in the forum state is justified by the fact that foreign states can freely dispose where they want to locate their property, and this decision implies a voluntary submission of their property under the jurisdiction of the states where such property has been located. This could be called an implicit immunity waiver.

—See, for example the Harvard Draft Convention, Art. 9, 26 AJIL 572, 577 (1932 Suppl.), where this is called ‘submission to the jurisdiction of the situs.’ Regarding immunity waivers in general, under the FSIA, see further down in the text.

We could also explain this immunity exception with the consideration that the jurisdiction of a forum state is absolute in the sense that it covers all the
immovable property located in its territory, without regard to who is the owner of such property.

§1605(a)(4) FISA denies immunity from jurisdiction in the case:


(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; (…)

The House Report explains for this section:

H.R. Report 94-1487

(a)(4) Immovable, inherited, and gift property. Section 1605(a)(4) denies immunity in litigation relating to rights in real estate and in inherited or gift property located in the United States. It is established that, as set forth in the ‘Tate Letter’ of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted. 26 Department of State Bulletin 984 (1952). It does not matter whether a particular piece of property is used for commercial or public purposes.

It is maintainable that the exception mentioned in the ‘Tate Letter’ with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication or rights in that property. Thus the Vienna Convention on Diplomatic Relations, concluded in 1961, 23 UST 3227, TIAS 7502 (1972), provides in article 22 that the ‘premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition,
attachment and execution.’ Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state’s possession of the premises is not disturbed.

There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought. As stated in the ‘Tate Letter’, immunity should not be granted ‘with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.’ The reason is that, in claiming rights in a decedent’s estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons. (H.R. Report 94-1487, p. 20, 15 ILM 1398, 1411 (1976).

The general allocation of the burden of proof as it is to be concluded from in the legislative history and the precedents is not just a matter of one single exception, but it principally valid for all exceptions, §§1605 to 1607 FSIA. For the exception under §1605(a)(4), we can distinguish two criteria:

— the material criteria, ‘rights in property acquired by succession or gift’ and ‘rights in immovable property;
—the *procedural* criterion, that is, the necessary nexus to the territorial jurisdiction of the United States, ‘in the United States.’

For the *procedural* criterion, the burden of proof is clearly upon the plaintiff. For the material criteria, if we follow the precedent *Alberti*, the burden of proof is equally upon the plaintiff. Specifically for section 1604(a)(4), there is not yet any precedent that deals with the burden of proof. However, in *Matter of Rio Grande Transport, Inc.*, 516 F.Supp. 1155 (S.D.N.Y. 1981), already discussed earlier in this study, the court briefly explained how to interpret the term ‘immovable property;’ the pleadings here indicate that the court allocated the evidential burden to be upon the plaintiff and confirmed that the burden for the material criteria in §1605(a)(4) is equally upon the plaintiff. In fact, the question was if a limitation fund for limiting naval tort responsibility also is to be considered as ‘immovable property.’ (516 F.Supp. 1155, 1160).

**Noncommercial Tort**

This exception of the Act—§1605(a)(5)—is of particular interest because its existence cannot only be explained with the restrictive immunity doctrine, but
is to be understood rather as a complementary provision to the ‘commercial activity exception’, §1605(a)(2) FSIA.

—The expression ‘noncommercial tort exception’ is to be found in the House Report and in the subsequent federal jurisprudence, see for example, Matter of Sedco, Inc., 543 F.Supp. 561, 566 (S.D.Tex. 1982).

This exception to the general rule of sovereign immunity equally requires a *nexus* between the facts at issue and the territorial jurisdiction of the United States. The tort must have occurred in the United States.


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

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; (…)

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The *House Report* explains:
H. R. Report No. 94-1487

(a)(5) Noncommercial torts. Section 1605(a)(5) is directed primarily at the problem of traffic accidents but is cast in general terms as applying to all tort actions for money damages, not otherwise encompassed by section 1605(a)(2) relating to commercial activities. It denies immunity as to claims for personal in injury and death, or for damage to or loss of property, caused by the tortious act or omission of the foreign state or its officials or employees, acting within the scope of their authority; the tortious act or omission must occur within the jurisdiction of the United States, and must not come within one of the exceptions enumerated in the second paragraph of the subsection.

As used in section 1605(a)(5), the phrase ‘tortious act or omission’ is meant to include causes of action which are based on strict liability as well as on negligence. The exceptions provided in subparagraphs (A) and (B) of section 1605(a)(5) correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act, 28 U.S.C. 1680(a) and (h).

Like other provisions in this bill, section 1605 is subject to existing international agreements (see section 1604), including Status of Forces Agreements; if a remedy is available under a Status of Forces Agreement, the foreign state is immune from such tort claims as are encompassed in sections 1605(a)(2) and 1605(a)(5).

Since the bill deals only with the immunity of foreign states and not its diplomatic or consular representatives, section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state.
In this regard that while article 43 of the Vienna Convention on Consular Relations of 1963, 21 UST 77, TIAS 6820 (1970), expressly abolishes the immunity of consular officers with regard to civil action brought by a third party for ‘damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft’, there is no such provision in the Vienna Convention on Diplomatic Relations of 1961, supra. Consequently, no case relating to the traffic accident can be brought against a member of a diplomatic mission.

The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against a foreign state to the extent otherwise provided by law … ‘ (H.R. Report, pp. 20-21, 15 ILM 1398, 1409 (1976).

When we dissect this provision, we can make out the following system, consisting of four distinct areas, or sets of criteria.

1. **The minimal contacts or nexus** between the facts at issue and the territorial jurisdiction of the United States: ‘occurring in the United States’;

2. **Causality**: ‘caused by the tortious act or omission’;

3. **Scope of Employment**: ‘while acting within the scope of his office or employment.’
(4) *Exception:* ‘except this paragraph shall not apply to … (A) any claim based upon … a discretionary function …

**Minimal Contacts or Nexus**

In the case *Perez v. The Bahamas, 482 F.Supp. 1208 (D.D.C. 1980), 63 IRL 350, 601 (1982)*, the plaintiff claimed damages from the government of the Bahamas for the fact that his son was hurt by a gun shot fired from a patrol boat of the Bahamian naval police. The accident occurred less than half a mile off Great Isaac Bay in the Bahamas.

The decisive question regarding §1605(a)(5) FSIA was the scope of the term ‘in the United States’ under the definition of §1603(c).

—Regarding the ‘commercial activity exception’, §1605(a)(2), the court denied the commercial character of the police action, despite the fact that the patrolling of the police is ultimately founded upon the safeguarding of commercial interests. But the police action itself was of course governmental, not commercial, by nature.

In fact, this provision grasps a part of governmental activity that doesn’t fall under the ‘commercial activity’ exception, which is unequivocal under its terms. The court clearly stated that it is upon
the plaintiff to prove the applicability of the noncommercial torts exception:

Plaintiff advances two interpretations in an effort to place event ‘in the United States’ for jurisdictional purposes. (...) The injury complained of, then, did not occur ‘in the United States’, and the exception in section 1605(a)(5) does not operate to remove The Bahamas’ immunity from jurisdiction. Plaintiffs have failed to show how The Bahamas fits into any of the exceptions to the immunity granted to all foreign states by the FSIA. Accordingly, the court lacks jurisdiction over this action... (482 F.Supp. 1208, 1210-1211).

—The judgment was confirmed by the Court of Appeals of the District of Columbia Circuit, 652 F.2d 186, 189 (D.C.Cir. 1981) who pronounced itself accordingly: ‘Appellant has failed to demonstrate how section 1605(a)(5) or any of the statutory exceptions to sovereign immunity, are applicable to The Bahamas in this case.’

This precedent was confirmed by the precedents McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983) and Olsen by Sheldon v. Government of Mexico, 729 F.2d 641 (9th Cir. 1984). In the McKeel case, the Court of Appeals of the 9th Circuit stated on the appeal of hostages taken in the American embassy in Iran; the appeal was directed against the ruling of the district court that rejected the plaintiff’s claims against both the United States and Iran. The suit was in particular about the question if the hostage taking
occurred ‘in the United States’, §1603(c) FSIA. The court implicitly ruled that the evidential burden for this legal criterion was on the appellants.

Appellants argue that section 1603(c) should be interpreted to embrace ‘all territory and waters’ with respect to which the United States exercises any form of jurisdiction. Inasmuch as United States embassies are subject to the jurisdiction of the United States for certain purposes, appellants argue that events occurring at the embassies fall within the waiver of immunity contained in section 1605(a)(5). (722 F.2d 582, 589).

The same appellate court ruled even more clearly in the precedent *Olsen by Sheldon*. The suit was filed by children whose parents, prisoners held in Mexico, had been killed in the crash of a plane that had taken them from the United States to Mexico. The crash occurred during the landing on Tijuana airport, Mexico.

—Tijuana airport is very close to the American border, and the faulty piloting of the plane occurred while the plane was still over American territory.

With regard to the criterion ‘occurring in the United States’, the court stated that it was sufficient when only a part of the tortious action was occurring in the United States:
In this case, appellants allege conduct constituting a single tort—the negligent piloting of the aircraft—which occurred in the United States. We are satisfied that appellants have alleged sufficient conduct occurring in the United States to bring this case within the non-commercial tort exception as expressed in section 1605(a)(5) and its legislative history. (729 F.2d 641, 646).

This line of reasoning is consistent in later case law, as for example in *Tigchon v. Island of Jamaica*, 591 F.Supp. 765 (W.D.Mich. 1984), where the court held:

Plaintiff correctly notes that once a basis for jurisdiction is alleged, the burden of proof rests on the foreign state to demonstrate that immunity should be granted. However, plaintiff has not alleged the minimal facts necessary in order to establish a basis for jurisdiction. (591 F.Supp. 765, 766).

When I wrote my thesis, back in 1985-1987, the question who bears the burden of proof for the exceptions from sovereign immunity, as pronounced by the FSIA, was hardly ever tackled in the international law literature. In the article by Julia B. Brooke, that I mentioned earlier, the question was shortly mentioned in the notes.

The author defended the opinion that in certain cases, as for example the *Upton* precedent, courts tended to put the *persuasive or ultimate burden* upon the plaintiff. (Id., p. 642, note 23).

As we have to distinguish between the question of the *jurisdiction* of the court, on one hand, and the *applicability vel non of an exception to sovereign immunity*, on the other, the author is inaccurate in her article. —See also Robert von Mehren, The Foreign Sovereign Immunities Act of 1976, 17 COLUM.J.TRANSNAT’L L. 33 (1978) who made that necessary distinction: ‘The plaintiff would still have to show that the commercial act … caused a direct effect in the United States.’ (Id., p. 98).

Contrary to the burden of proof regarding the basis of the sovereign immunity claim, which rests on the foreign state, the burden for proving all the facts regarding the jurisdiction of the court is upon the plaintiff. While subject matter jurisdiction is under the FSIA entangled with the question of immunity *vel non*, this is not the case for the conditions of *personal jurisdiction* where the burden if entirely upon the plaintiff. In a subsequent case that didn’t concern the long-arm statute of the FSIA, but the *New York Civil Practice Law*, §301 which equally requires a nexus of
the facts to territory of the United States; it’s the famous doing business clause.

—N.Y. SCP. Law §301: ‘Jurisdiction over persons, property or status. A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.’ According to the Federal Rules of Civil Procedure, Rule 4(d)(7) and 4(e), jurisdiction of a federal court against a non-resident defendant is ruled by the long-arm statute of the forum state. See also Prejean v. Sonatrach, Inc., 652 F.2d 1260, 1264, note 2 (5th Cir. 1981), with further references.

In the case Beacon Enterprises v. Menzies, 715 F.2d 757 (2d Cir. 1983), the plaintiff, a New York company filed suit against a Californian company for copyright violation.

The Court of Appeals clearly affirmed that the burden of proof for personal jurisdiction is upon the plaintiff.

As plaintiff, Beacon bore the ultimate burden of proving the court’s jurisdiction by a preponderance of evidence.’ (715 F.2d 757, 762).

—The burden of proof is even more severe in a summary action, as the court points out: ‘For a plaintiff to prevail on summary judgment when defendant contests personal jurisdiction, his burden is even greater; he must demonstrate that there is no genuine issue as to any material fact on the jurisdictional question.’ (Id.) See, in general, Diego C. Asencio, Robert W. Dry, An Assessment of the Service Provisions of the Foreign Sovereign Immunities Act of 1976, 8 JOURNAL OF LEGISLATION (Notre Dame Law School) 230-249 (1981). With

Causality

The causal link between the illicit action and the suffered damage is an essential criterion in the law of torts. This causal link, which links the action with the infringement of a legal right of the plaintiff, is thus part of substantive law, the law of torts. As such, the burden of proof is upon the plaintiff, as he must generally prove all the factual elements that the claim is based upon.

The FSIA does not expressly modify the underlying substantive law. Thus, we have to distinguish between the evidence rules that govern the applicable substantive law from those that govern the claim of sovereign immunity.

—28 U.S.C. §1606 FSIA (Extent of Liability) states: ‘As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; (...)’

This distinction has shown to be relevant already in our discussion of the ‘commercial activity’
exception, §1605(a)(2) FSIA. The plaintiff who bases his claim upon a commercial contract with a foreign state, must prove the existence of this contract.


This is also valid for torts; the burden of proof is upon the plaintiff to prove the facts regarding the tort.

—Phipson and Elliott, Manual of the Law of Evidence (1980), 15-16: ‘Thus in an action in tort, it is the law of the tort which prescribes the elements of the tort; these the plaintiff must prove if he is to win.’ While according to Clerk & Lindsell, On Torts (1982), 1-87, ‘the law has not followed a uniform course in casting the burden of proof either on the plaintiff or the defendant[,] the proof for ‘negligence’ or ‘malicious prosecution’ is upon the plaintiff, see Charlesworth & Percy, On Negligence (1983), 5-16 and Salmand & Heuston, On the Law of Torts (1981), p. 13: ‘…, in torts such as negligence or malicious prosecution the onus lies on the plaintiff to show that the conduct of the defendant is legally unjustified.’

However, there is a certain difference between §1605(a)(2) and §1605(a)(5) for in the latter section, there is an additional element, namely the causality requirement. But this difference does not influence the basic separation between procedural law and substantive law. Another argument confirms this result, that is, section 1605(a)(5) is drafted after the United States’ Federal Tort Claims Act (FTCA), 28
U.S.C. §1346, §§2671-2680). This statute, which applies for tort actions against the United States government, contains literally the same causality clause, 28 U.S.C. §1346(b) FTCA.

—28. U.S.C. §1346(b) states: ‘§1346 United States as defendant. (...) (b) Subject to the provisions of chapter 71 of this title, the district courts together with the United States District Court of the District of the Canal Zone and the District of the Virgin Islands, shall have exclusive jurisdiction of civil actions and claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.’

As to this criterion, the burden of proof of the plaintiff has been stated in a number of precedents.


**Scope of Employment**

The arguments brought forward under the criterion ‘causality’ are equally valid for this present criterion, with one distinction; here it is conceivable
that the foreign state bears the burden of proof for rebutting the presumption that the tortious action was committed by the state’s official or personnel ‘within the scope of his office or employment.’ This is so because it is obvious that the employer can much more easily prove this fact than any third party who generally ignores what exactly the professional relationship is between the foreign state as employer, and his employees. In *Castro v. Saudi Arabia*, 510 F.Supp. 309 (W.D.Tex. 1980), that we discussed earlier in this study, Saudi Arabia proved that the soldier had acted outside of his professional duties when he participated in road traffic as a civil person in the United States.

—510 F.Supp. 309, 313: ‘At the adversary hearing, Saudi Arabia proved that there were no flight training activities schedules either on the 16th or the 17th September … and that Al-Quassimie [the soldier] was in civilian clothes at the time of the accident. (…) Applying state law principles of respondeat superior, Williams v. United States, 350 U.S. 857, 76 S.Ct 100, 100 L.Ed. 761 (1955), the court fails to see how the soldier can be said to have been in the course of his employment even while off duty and pursuing an entirely personal matter.’

In such a case, Saudi Arabia argued, the United States government was responsible for the action. In addition, Saudi Arabia put on evidence that
Al-Quassimie was subject to the United States Air Force regulations while at Laughlin Air Force Base.

Thus, it was the United States government who apparently had the right to control the soldier’s behavior in off-duty hours, not the Saudi Arabian government.’

While the court held that ‘[t]he defendant has demonstrated that none of the exceptions in FSIA operate to deprive Saudi Arabia of its immunity from this court’s jurisdiction[,]’ it would be erroneous to see an allocation of the burden of proof in this statement. Apart from the fact that the judge has not used the term ‘burden of proof’ at all, the fact that the foreign state has started to produce evidence is not enough for affirming a conclusive repartition of the burden of proof. In fact, the judge appreciated the evidence produced by the two parties; the burden of proof, as a risk of non-persuasion only comes to bear in a non liquet situation. We can thus admit that the only burden that was in play here was the evidential burden, and that when formulating its statement, the court had this burden in mind. However, the plaintiff did not contest the proof submitted by Saudi Arabia. Instead of contesting the evidence of the defendant foreign state, the plaintiffs argued that Saudi Arabia
was responsible for the soldier for another reason; that it had been obliged to better train the soldier for participating in road traffic in the United States, and that it thus had ‘negligently entrusted the automobile to the soldier.’ (Id.)

This argument was rejected by the court for the simple reason that Saudi Arabia was not the owner of the car and that the soldier had a valid Texas drivers license.’ Thus, there was no litigation about the question of the burden of proof, for this issue is relevant only in case the evidence is contested by the other party.

A recent precedent answers this question even more clearly. It is the case Skeen v. Federative Republic of Brazil, 566 F.Supp. 1414 (D.D.C. 1983), which concerned an assassination attempt against the plaintiff by Antonio Francisco da Silveira, Jr., the grandson of the Brazilian Ambassador to the United States.

The fire was opened in front of a night club in Washington, D.C. The court held:

In order to invoke §1605(a)(5) in this case, plaintiff must demonstrate that da Silveira’s actions were ‘within the scope of his office or employment’. Section 1605(a)(5) is essentially a respondeat superior statute, providing an
employer (the foreign state) with liability for certain tortious acts of its employees. (566 F.Supp. 1414, 1417).

Quoting the Castro, 510 F.Supp. 309 (W.D.Tex. 1980), precedent, the court stated that the decision about the criterion ‘scope of employment’ depended on the applicable state law. (566 F.Supp. 1414, 1417). It is interesting to note that the judge compared the noncommercial tort exception with the Federal Tort Claims Act (FTCA):

This is the choice of law rule applied under an analogous federal statute, the Federal Tort Claims Act (FTCA), which also provides for federal jurisdiction simply on the basis of the identity of the defendant, without regard to the existence of other federal issues in the case. Under the FTCA, the United States waives its sovereign immunity and accepts liability for the tortious acts of its officials committed within the scope of their employment. The statute indicates—and the courts have consistently held—that, with certain statutory exceptions, 28 U.S.C. §2680, the definition of ‘scope of employment’ under the FTCA must be determined by reference to state law. (Id.)

Applying the law of the state of Columbia, the court finally rejected the lawsuit with the argument that Silveira had acted outside the scope of his office or
employment with the Brazilian embassy in the United States. (566 F.Supp. 1414, 1418-1420).

The court’s discussion of §1605(a)(5) and the analogous federal statement resulted in an analogous treatment of the burden of proof; for under the FTCA, regarding the criterion ‘scope of employment’, in §1346(b) FTCA, there is general agreement that the burden if upon the plaintiff for demonstrating that the state employee had acted within the scope of his employment with the United States government.


It is also interesting to see that the court found the scope of responsibility under both statutes ‘nearly identical.’ (566 F.Supp. 1414, 1417, note 5).

Exception

It flows from the drafting technique of this section that the burden of proof for the exception is upon the foreign state. In general, according to statute construction, the exception of an exception recurs to the general rule. Moreover, this argument is confirmed by §§2680(a),(h) FTCA, analogous provision, clarifying that the exceptions from the
exception are construed as affirmative defenses; accordingly, the burden of proof is upon the American government, for proving the factual elements of those defenses.

—28 U.S.C. §§2680(a),(h) state that the provisions of this chapter and section 1346(b) of this title shall not apply to ‘(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government whether or not the discretion involved be abused. (…) (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.’ See also Boyce v. US, 93 F.Supp. 866 (D.C. Iowa 1950), 28 U.S.C.A. §2680, note 75, with further references.

There are also precedents ruled under the FSIA; however, in these cases the burden of proof of the foreign state for the exceptions from the exception have not yet explicitly clarified by the judges, as this was the case for the FTCA. Nonetheless, the analogous character of both statutes in this respect is so striking that the burden of proof situation is almost certainly the same. Before we are going to discuss these cases, it should be clarified what American law understands under a ‘discretionary function’, §2680(a) FTCA and §1605(a)(5) FSIA? In the leading case
Dalehite v. United States, 346 U.S. 15 (1953), the Supreme Court interpreted the term within the framework of §2680(a) FTCA. In the syllabus of this decision, while the syllabus is merely informative, not normative, the long developments of the Supreme Court were condensed as follows:

The ‘discretionary function or duty’ that cannot form a basis for suit under the Act includes more than the initiation of programs and activities; it also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. (Id.)

An indication for the burden of pleading, the evidential burden, regarding §1605(a)(5) FSIA, is to be found in Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980), 19 ILM 409 (1980), 63 ILR 378 (1982), an action where the relatives of Orlando Letelier, Chile’s Minister of Foreign Affairs at the time, claimed damages for the assassination of Letelier through a car bomb in the United States.

—The government of Chile seriously opposed the allegation of the plaintiff to have been involved in the murder but that allegation was not only directed toward the government, but also the other defendants, Michael Vernon Towley, Alvin Ross Diaz, Ignacio Novo Sampol and Guillermo Novo Sampol. The
original judgment, that I will henceforth term Letelier I was a default judgment under §1608(e) FSIA and was affirmed in Letelier II, 502 F.Supp. 259 (D.D.C. 1980) and in Letelier III, 567 F.Supp. 1490 (S.D.N.Y. 1983), which was a litigation involving foreign property, and immunity from execution. The respective penal action is United States v. Sampol, 636 F.2d 621 (D.D. Cir. 1980).

The district court held:

Subject to the exclusion of these discretionary acts defined in subsection (A) and the specific causes of action enumerated in subsection (B), neither of which have been invoked by the Republic of Chile … (488 F.Supp 665, 671, 19 ILM 409, 422).

The court denied sovereign immunity for Chile after having examined §1605(a)(5)(A), (B), arguing that a ‘discretionary function’ was not to be admitted in the present case.

Whatever policy may exist for a foreign country, it has no ‘discretion’ to perpetrate conduct designed to result in the assassination of an individual or individuals, action that is clearly contrary to the precepts of humanity as recognized in both national and international law. Accordingly there should be no ‘discretion’ within the meaning of section 1605(a)(5)(A) to order or to aid in an assassination and were it to be demonstrated that a foreign state has undertaken any such act in this country, that foreign state could not be accorded sovereign immunity under subsection (a) for any tort claims resulting from its conduct. As a
consequence, the Republic of Chile cannot claim sovereign immunity under the Foreign Sovereign Immunities Act for its alleged involvement in the deaths of Orlando Letelier and Ronni Moffitt. (488 F.Supp. 665, 673, 19 ILM 409, 426-427).

In Letelier II, 502 F.Supp. 259 (D.D.C. 1980), 19 ILM 1418 (1980), the court pronounced itself with regard to the evidence requirements for a default judgment under §1608(e) FSIA. The court’s developments here are interesting for they reveal which specific requirements must be met under this section, and who bears the burden of proof for the factual basis of those requirements. The court concluded that the burden of proof is upon the plaintiff and that he must thus establish ‘his claim or right to relief by evidence satisfactory to the court.’

2. Pursuant to the dictates of 28 U.S.C. §1608(e), plaintiffs have produced satisfactory evidence to establish that on or about September 21, 1976, employees of the Republic of Chile, acting within the scope of their employment and at the direction of Chilean officials who were acting within the scope of their office, committed tortious acts of assault and battery and negligent transportation and detonation of explosives that were the proximate cause of the deaths of Orlando Letelier and Ronni Moffitt. Accordingly, a judgment by default as to these claims will be entered in favor of plaintiffs and against the

In a more recent precedent, *Olsen by Sheldon v. Government of Mexico*, 729 F.2d 641 (9th Cir. 1984), which we discussed already earlier on, the court ruled specifically with regard of what it called the ‘discretionary function exception’, §1605(a)(5)(A) FSIA. (729 F.2d 641, 646 ff.).

Section 1605(a)(5)(A) provides an exception to noncommercial tort jurisdiction for claims based upon a state’s discretionary function. Mexico seeks to bring the airplane crash within this exception by contending that the conduct which led to the crash was discretionary. (729 F.2d 641, 646).

Apart from the fact that in both cases, the courts mentioned the advantage the foreign state has under this section, that is, to plead the ‘discretionary function’ as an affirmative defense, in the present case, the comparison that the Court of Appeals makes with the FTCA is relevant and important as to the allocation of the burden of proof:

The FSIA provides considerable guidance as to which sets or decisions constitute discretionary functions. Not only does the language of the FSIA discretionary function exception replicate that of the Federal Tort
Claims Act (FTCA), 28 U.S.C. §2680(a), but the legislative history of the FSIA, in explaining section 1605(a)(5)(A), directs us to the FTCA. House Report at 21. To determine the scope of the discretionary function exception of the FSIA, we therefore turn to the interpretation given the similar FTCA provision. (Id.)

—Such reference to the FTCA was made by American district courts already in Letelier I, 488 F.Supp. 665, 673 and in Matter of Sedco, Inc., 543 F.Supp. 561, 567.

The Court of Appeals thus compared the discretionary function under the FTCA with the one in the FSIA, applying the jurisprudence referring to the FTCA for interpreting the FSIA.

—Apart from the leading case Dalehite v. United States, 346 U.S. 15 (1953), the Court of Appeals quoted the precedents Discroll v. United States, 525 F.2d 136, 138 (9th Cir. 1975), Thompson v. United States, 592 F.2d 1104, 1111 (9th Cir. 1979), and Lindgren v. United States, 665 F.2d 978, 980 (9th Cir. 1982), noting that ‘[o]ver the years, the definition of discretion has been refined and qualified somewhat’, 729 F.2d 641, 647.

In fact, the two statutes are not only similar from an editorial point of view, but also with regard to their legislative objective.

Congress’ intention to model section 1605(a)(5) FSIA after the FTCA was clearly expressed in the legislative history. In addition, the case law that interprets the exceptions, §§1605(a)(5)(A),(B) regularly
references precedents that were ruled under the respective provisions of the FTCA.

Hence, the allocation of the burden of proof that was established under the FTCA can practically be applied to the FSIA, with regard to the factual basis of §§1605(a)(5)(A),(B) FSIA. This was confirmed by the precedents examined here, and regarding the burden of pleadings or evidential burden, with regard to the criterion of ‘discretionary function.’

**Conclusion**

The examination of sections 1605(a)(4) and 1605(a)(5) FSIA confirms the conclusion that we arrived at earlier on in this study. The burden of proof of the foreign state for its immunity defense is limited in the sense that the foreign state, starting to produce evidence, is required to establish a *prima facie case* as a basis for its immunity claim.

Under §1605(a)(5) FSIA, the burden of proof is upon the plaintiff for demonstrating the causal link between the tortious act and the damage suffered, as well as for the criterion that the employee of the foreign state was acting ‘within the scope of his office or employment.’ It follows from this framework, and the drafting technique employed in the FSIA that the
exceptions from the exception, §§1605(a)(5)(A),(B) are affirmative defenses where the burden of proof lies upon the foreign state to demonstrate the applicability of one of those exceptions.

This systematic argument is confirmed by the analogous statute, the Federal Tort Claims Act (FTCA), §2680(a),(h), referenced not only by the legal materials to the FSIA, but also by federal jurisprudence interpreting §1605(a)(5) FSIA.

To summarize, the repartition of the burden of proof under section 1605(a)(5) FSIA is as follows. The plaintiff bears the burden of proof for:

—Minimal contacts;

—Causality between the tortious act and the damage suffered;

—The employee having acted within the ‘scope of his office or employment.’

The burden of proof lies upon the foreign state for the exceptions (A) and (B) to §1605(a)(5) FSIA. With regard to §1605(a)(4), the burden of proof lies entirely with the plaintiff for proving the minimal contacts or nexus requirement, ‘in the United States’ and for the material criteria, ‘rights in property acquired by succession or gift’ or ‘rights in immovable property.’
Core Areas of Sovereign Immunity

Overview

In this part of the study, we shall have a more detailed regard upon the requirements that American federal jurisprudence has found to apply regarding the *prima facie case* to be established by the foreign state.

We will focus particularly upon those actions where jurisdiction was denied, and will try to classify those actions because the analysis will reveal that there are several core areas of sovereign behavior where federal courts have shown to be particularly reluctant to affirm jurisdiction under §1605(a)(2) FSIA (*commercial activity exception*). Contrary to cases where such commercial activity was affirmed by the courts and where the judges could rely on the text of §1603(d) FSIA or the legislative history, the cases we are going to examine, present a different set of facts at issue.

To give the reader a clearer picture of the distinction I wish to establish, let me shortly review what we have in part already seen earlier in this study, but this time under a slightly different perspective. To begin with, the most clear-cut cases
have been shown to be those actions that were dealing with what has been called the ‘Nigerian cement catastrophe’, both in the United States and the United Kingdom, but also in Germany and other countries.


American federal courts, in these affairs, have all rejected the argument submitted by Nigeria that the breach of those purchasing contracts had been effected in Nigeria’s governmental authority, that is, to prevent a national economic catastrophe. The courts also have denied the alleged ‘military character’ of the utilization of the cement, that is, for building and upgrading the country’s infrastructure. Nigeria also forwarded the view that, as the actions
regularly were based upon letters of credit issued by the **Central Bank of Nigeria**, this bank, because of its governmental authority, as per se immune from all actions.

This argument was overall rejected, and was actually a quite twisted one, as of course, it’s not the character of the person or **persona** that acts behind the screens that is the divider under the restricted immunity doctrine, but the character of the **activity** that lies before the court and that gave rise to the action. And in all those cases, the commercial character of the purchasing contracts concluded between the Nigerian government and private merchants was affirmed by the courts—and Nigeria had to pay after all!


Regarding other precedents where the commercial activity exception was affirmed, most of which I have discussed earlier on in this study, American federal courts have been particularly lucid to detect the often hidden *governmental portmanteaux* behind obvious
financially lucrative business transactions conducted by foreign states, and unveiled it as a mask that served to hide the commercial character of those transactions.

For example, in *United Euram v. U.S.S.R.*, 461 F.Supp. 609 (S.D.N.Y. 1978), 63 ILR 228 (1982), the Soviet Union had rendered remunerated services within the United States under a bilateral cultural treaty, which were qualified by the court as commercial in character.

—The judge held that the precedent *Gittler v. German Information Center*, 408 N.Y.S.2d 600 (Sup.Ct.N.Y. 1978), Digest of United States Practice in International Law, 1978, 879-883, was overruled by the FSIA.

Another interesting case is *Jackson v. People’s Republic of China*, 550 F.Supp. 869, 873 (N.D.Ala. 1982), where the judge qualified bonds issued by the Chinese government for building railways in the United States, back in 1911, as commercial, despite a ‘statement of interest’ issued by the American government which claimed ‘to set aside default judgment against China.

Despite this general trend in American post-FSIA case law to interpret ‘commercial activity’ in a broad manner, there is a subtler effort to be made out, when one looks closely at it, to preserve for foreign states a certain core area of governmental action that is and shall be untouched by the restrictive immunity doctrine. These areas could be classified as follows, while they slightly overlap:

a) Foreign Affairs

b) Interior Affairs

- aa) Police and National Security Activities
- bb) Protection of National Resources
c) Budgetary Activity

d) National Defense

**Foreign Affairs**

Just a year after the FSIA entered into force, a district court rendered an important judgment on this matter, a case I already mentioned earlier, *Yessenin-Volpin v. Novosti Press Agency, Tass.*


This interesting law suit was actually improperly filed to the United States Supreme Court, from where the action was removed to the competent district court—S.D.N.Y.—under the terms of §1441(d) FSIA.

—28 U.S.C. §1441(d) reads as follows: ‘Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury …’

The suit was filed as a libel action for alleged defamations against the plaintiff that were published in February 1976, and thus before the FISA had entered into force, in the NOVOSTI magazines
Sowjetunion Heute, and Krasnaya Zvesda, and the TASS magazines Izvestia, and Sovetskaya Russiya, that regularly circulate in the United States.

As already pointed out earlier in this study, NOVOSTI and TASS were qualified by the court as agencies or instrumentalities of a foreign state under §1603(b) FSIA. The plaintiff invoked clause 3 of §1605(a)(2) FSIA and the court examined if the publishing of the articles was ‘based upon a commercial activity carried on in the United States by the foreign state.’ (443 F.Supp. 849, 855).

The plaintiff based his argument upon the fact that in NOVOSTI’s statutes, this agency was assigned the competence to carry out various commercial tasks for the Soviet state within the United States. The court argued that it was not the status of the agency that was the decisive criterion under the Act, but solely the nature of the activity in question:

The plaintiff’s argument is based on the unstated premise that an entity which engages in commercial activity is a commercial entity and thus not entitled to claim sovereign immunity. The Immunities Act does not embody such a principle, however. Rather, it clearly contemplates that a given entity may at some time engage in commercial activities, on which it would be immune, and at other times take actions whose essential
nature is public or governmental, on which it would be immune.’ (Id.)

Consequently, the court had to decide which was actually the activity that the litigation was about, for in that case, this was not obvious, as in so many others. The court did not deny that NOVOSTI ‘does engage in commercial activity’ because ‘it sells articles to foreign media.’ But it was not that activity of the press agencies that the litigation was really about.

The relevant issue in this case, however, is not whether Novosti or Tass engage in commercial activities but whether their alleged libels were ‘in connection with a commercial activity.’ (Id.)

In the following developments, the judge sustained the view that the publishing of the articles was actually a governmental activity; these rather lengthy developments can be summarized in three main arguments.

(1) The four magazines in which the alleged defamations were published, were all official publications of the Soviet state. This was the result of the court evaluating the evidence submitted by the agencies, to make their _prima facie case_ of sovereign immunity. The judge referred to the affidavit
swearing that the header title of the journal *Sowjetunion Heute* indicated that it was a publication by the press department of the embassy of the Soviet Union in Germany, in collaboration with NOVOSTI.

The publication *Krasnaya Zvesda* was equally identified, in this affidavit, as being the central organ of the Soviet Ministry of Defense, and *Izvestia* turned out to be published by the Supreme Soviet of the USSR.

Finally, the magazine *Sovietskaya Russiya* describes itself as the organ of the central committee of the Soviet communist party, the Supreme Soviet and the Council of Ministers.

(2) The second argument the court used to affirm a governmental character of the activity in question was that the libels appeared in all four publications at the same time.

Thus, by collaborating in the publication of stories in these journals, Novosti, as well as Tass, was engaged not in ‘commercial activity’ but in acts of intra-governmental cooperation of a type which apparently constitutes much of Novosti’s (and presumably more of Tass’s) activity. (Id.)

In addition, the court underlined that this activity was not related to any contract, nor any possible
arrangement with a foreign political party, as such arrangements, according to the judge, are ‘commercial in most circumstances.’

(3) In the third argument, a development of the first actually, but more rigorously expressed, the judge considered the ‘cooperative relationship’ of those four agencies, because the libels were published in exactly the same manner in all four publications. The judge saw in this kind of collaboration an intention and held that the libels were actually ‘an official commentary of the Soviet government, ‘an activity whose essential nature is public or governmental.’ The court’s reasoning was thus systematically correct in that the judge scrutinized the nature of the activity in question, under §1603(d) FSIA. For these reasons, the court rejected the actions against TASS and NOVOSTI.

Moreover, it is to be noted that the non-commercial tort exception, §1605(a)(5), discussed earlier in this study, expressly excludes libel actions. This was confirmed by the district court in the present case.

The same district court, but another judge, also decided the case Carey v. National Oil Corporation, 453

—On the plaintiff side was also the ‘New England Petroleum Corporation’ (NEPCO); on the defendant side was in addition the Arab Republic of Libya. The plaintiff CAREY was the trustee of NEPCO’s two affiliates, the ‘Grand Bahama Petroleum Company’ (PETCO) and the ‘Antco Shipping Company’ (ANTCO), these latter companies founded under the law of the Bahamas.

I need to briefly relate the rather complex factual background. There were in total eight suits, both against NOC and Libya itself; here only the 6th and the 7th law suit, directed against Libya itself, are of interest.

NEPCO acquired, through a complicated network of transactions, raw oil from the California Asiatic Oil Company (CALASIA), which had a drilling concession in Libya. In September 1973, Libya nationalized 51% of the drilling concessions, among them CALASIA’s.

—See also the extensive arbitrage decisions regarding NEPCO, TEXACO and LIAMCO against Libya, discussed by an eminent expert on the matter, the Geneva-based international lawyer Jean-Flavien Lalive, in his course Contrats entre Etats ou entreprises étatiques et personnes privés, 181 RCADI (1983-III), 13 ff., 83 ff. I have discussed at the time with Jean-Flavien Lalive, Esq., matters regarding my doctoral thesis, and my conclusions regarding the burden of proof and the evidence problems in foreign sovereign immunity litigation.
As a result, the ‘Chevron Oil Trading Company’ (COT) did not fulfill its contractual obligations with PETCO, invoking the ‘force majeure’ clause contained in the contract. In March 1970, Libya created NOC, a state-owned company, and transferred the nationalized concessions to it. As to the political background of the nationalizations, the judge painted what he called ‘the petroleum picture in the Middle East’ (453 F.Supp. 1097, 1099, ‘Factual Background’), a picture that was quite tainted by the outbreak of the Kippur war in October 1973, that gave rise to a total embargo of the petroleum producing countries against the United States, the Netherlands, and the Bahamas.

All these actions were rejected, for different motifs, but by overall affirming the jurisdictional immunity of both NOC and Libya. The court held that ‘[i]t is beyond cavil that these actions by Libya were not part of a commercial undertaking; rather, they were deliberate weapons of foreign policy, aimed at influencing the conduct of other nations, or at least punishing undesirable conduct.’ (453 F.Supp. 1097, 1102).

The judge thus ruled not only about the nationalization itself, but also what relationship can
possibly be seen between this governmental activity and the foreign policy of Libya. It is interesting in this context that the judge saw something like an *intentionality* here from the side of Libya to use those drastic measures as some kind of weapon. I think there can be hardly an activity by a foreign state where the *core sphere of national sovereignty* is to that point clear-cut and visible, which is why I believe the court made that very transparent in the otherwise brilliant judgment.

This somewhat ‘protective’ attitude of the court here regarding the core area of Libya’s sovereignty means, if one agrees or not, that in the future foreign states will try to construe ‘sovereign purpose’ as a basis for their sovereign immunity defense, which could in principle endanger the restrictive immunity approach that the FSIA has taken. The motivation of a government, or their intentions, was not to be considered, in the first place, by §1603(d) FSIA. Even if such a motivation or intention is governmental, it is a *purpose*, and should not be considered, as this section clearly states that the qualification of the activity as private or governmental should be according to its *nature*, ‘rather than by reference to its purpose.’
These are leading cases in a domain that even after the enactment of the FSIA is still on shaky ground; they may signal a certain tendency in American federal jurisprudence to henceforth apply the Act rather conservatively and to give to foreign states a certain margin for forwarding subtly political motivations and intentions, when those were painting the background of the commercial activity itself.

I may for that reason, as this jurisprudence is post-FSIA, have a short look how this would look under the legal situation prior to the FSIA. The court stated in the eighth action that ‘nationalization is a quintessentially sovereign act, never viewed as having commercial character’ and referred to Victory Transport Inc. v. Comisaría General de Abastecimientos Y Transportes, where the Court of Appeals of the 2nd Circuit already applied, back in 1964, the restrictive theory of sovereign immunity.

The appellee, a division of the Spanish Ministry of Commerce had chartered a vessel from the appellant for transporting wheat to Spain that this Ministry had purchased in the United States. Because of lacking safety in Spanish ports, the vessel was damaged. The court, considering it significant that the State Department had not filed a suggestion for granting immunity, rejected the immunity claim by reference to the Tate Letter (1952), ‘… unless it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive.’ Then the court explains:

Such acts are limited to the following categories:
(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity;

The court further stated that the chartering of the vessel for transporting the wheat ‘is not a strictly public or political act.’ (Id.)
It is obvious that a nationalization falls under the second category of this schema. There are several reasons why for this study, I have chosen a slightly different classification. In addition, it has to be seen that the court’s schema here is not complete, as foreign policy is not mentioned, and there is overlapping in that the third category could well have been merged with the first. And while a nationalization was always considered as a purely governmental act, one could imagine foreign policy regulations that could fall within the second category, and that are not nationalizations in the strict sense.

In addition, the fifth category is not anymore considered sacrosanct and protected. The court took reference to Jean-Flavien Lalive’s article who, in turn, seems to have overtaken the schema from Lauterpacht.


In fact, the classification was published, for the first time, in the article by Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States* (1951), 28 *BRIT.Y.B.INT’L L.* 220-272 (1951). Regarding the fifth category, Lalive notes at p. 286 that ‘it’s a delicate
question while the arguments against immunity seem to prevail in principle.’ As for the United States, after *Jackson v. People’s Republic of China*, 550 F.Supp. 869 (N.D.Ala. 1982), a case I discussed in detail earlier in this study, and where the governmental character of Chinese government bonds that were emitted back in 1911 for construing railways and public buildings in the United States was clearly denied, the fifth category can be seen as obsoleted in the meantime.

**Interior Affairs**

**Police Actions**

In *Perez v. The Bahamas*, 482 F.Supp. 1208 (D.D.C. 1980), 63 ILR 350, 601 (1982), confirmed, 652 F.2d 186 (D.C.Cir 1981), already discussed earlier on, where the action was about a shot fired from a boat of the Bahamian naval police against the vessel of the plaintiff, the district court stated:

The commercial character of an activity is to be determined by the nature of the act or course of activity and not by reference to its purpose, 28 U.S.C. §1603. Police enforcement of Bahamian fishing law does not become commercial because it may have some commercial purpose or goal. (482 F.Supp. 1208, 1210).
In fact, the ultimate reasons behind police actions can be of various kinds, but the action remains an action that is by its very nature governmental and public in nature.

The other action that falls in this present category, is a case ruled by the Court of the Appeals of the 5th Circuit, *Arango v. Guzman Travel Advisors*, 621 F.2d 1371 (5th Cir. 1980), 63 IRL 467 (1982), where DOMINICANA, the national airline of the Dominican Republic, equally a defendant of the action, had collaborating in repelling the Arango family from entering the country for a ‘package tour,’ as they figured on a blacklist of ‘undesirable foreigners;’ they were forcibly placed on board the flight the Dominican flight from Santo Domingo to San Juan, Puerto Rico.

—The fact that DOMINICANA was an agency or instrumentality of the Dominican Republic under §§1603(a),(b) FSIA was not contested by the plaintiff (621 F.2d 1371, 1378).

The judge strictly distinguished between this ‘involuntary re-routing,’ on one hand, and the breach of the ‘package tour’ contract, on the other. Apparently, the court stated about two different questions:
(i) the governmental character of the repulsion taken by the Dominican immigration;
(ii) the governmental character of the assistance DOMINICANA gave to this police action.

ad i)
There was no doubt for the judge as to the governmental character of the expulsion action itself, as it was carried out by Dominican immigration 'pursuant to that country’s laws.’

ad ii)
This second question is way more interesting as the answer may not be as clear-cut. The judge made a fine distinction here between the normal commercial activities carried out by the airline staff, and the exceptional aiding in the expulsion action, where he saw the personnel being compelled to act jointly, as this was a governmental or police action where, in their quality as government employees, they had no right to refuse collaborating and thus had to give their helping hand. For that reason, the judge concluded that also DOMINICANA acted pursuant to Dominican Republic law enforcement, in that particular action. As the FSIA might not have foreseen such a case, or simply left the question open, the precedent is very important.
Actions for the Protection of Natural Resources

Under this category, there is an equally important precedent to report and discuss, *International Association of Machinists and Aerospace Workers (IAM) v. The Organization of the Petroleum Exporting Countries (OPEC)*, 477 F.Supp. 553 (D.Cal. 1979), UN-MAT., p. 503, 63 ILR 284 (1982), Henkin et al., p. 511, conf’d for other motives, 649 F.2d 1354 (9th Cir. 1981), cert. den’d, 454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982).

The facts are relatively simple. The plaintiff, an international trade union, pursued OPEC for damages, arguing that OPEC’s crude oil fix price policy was a violation of American antitrust laws, particularly §1 Sherman Act. I will of course not discuss in this study if that was substantially the case, as we are only interested in the procedural aspect, that is, if OPEC’s fix price policy was to be considered a commercial or governmental activity.

—This case was broadly discussed in the American international law literature, see for example, Don Wallace, Jr., Extraterritorial Jurisdiction, XV L.POL.INT’L BUS. 1099, 1131-1132 (1983), Stanley E. Hilton, The Demise of the Restrictive Theory of Sovereign Immunity and of the Extraterritorial Effect of the Sherman Act Against Foreign Sovereigns (Case Note), 41 U.PITT.L.REV. 841-857 (1980), Russell S. Burman, Restrictive Immunity and the Opec Cartel: A Critical Examination of the Foreign Sovereign Immunities Act and International Association of Machinists v.

With regard to OPEC’s immunity claim, the court, after having reviewed the legal materials, states: ‘If the activity is one in which only a sovereign can
engage, the activity is non-commercial. These standards are somewhat nebulous, however, in the context of a particular factual situation.’ (477. F.Supp. 553, 567).

Right at the start of his developments, the judge took a specific direction for the arguments to follow, by interpreting the ‘commercial activity’ criterion in the following manner:

It has been suggested that in determining whether to define a particular act narrowly or broadly, the court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries. This Court agrees that this ‘commercial activity’ should be defined narrowly. (Id.)

After this point of departure, the court evaluated the nature of the activity in question, by appreciating the specific evidence presented, rather then ruling on a ‘generalized view of the evidence’ and concluded:

From the evidence presented to this Court, it is clear that the nature of the activity engaged in by each of these OPEC member countries is the establishment by a sovereign state of the terms and conditions for the removal of the prime natural resources—to wit, crude oil—from its territory. (Id.)
It is of interest to have a closer look at the evidence the court was examining in this case, for it has played a decisive role for the final judgment, and the court did not take it easy to peruse it. First of all, it has to be seen that the court has stated *against the evidence rule* established in the legal materials.

For this court to have subject matter jurisdiction the defendant must show that the activities engaged in by the defendants are ‘commercial activities.’ (477 F.Supp. 553, 566).

Apart from the obvious redactional error in that statement and the fact that the court can only have meant to say that the ‘plaintiff must show,’ it is rather the foreign state defendant of the action who must establish *prima facie evidence* for the fact that the activity in question had a public, governmental character. In fact, there are only two logical possibilities to resolve the burden of proof question, it’s that either the burden is upon the foreign state to demonstrate that the activity in question was governmental, or the burden is upon the plaintiff to establish evidence that the activity in question was commercial. Obviously, the FSIA chose the first alternative, in that the foreign state has the right to
begin with producing evidence, and the jurisprudence confirmed it over and over. Here, the situation was awkwardly that as the court was in error about the repartition of the burden of proof, and accordingly it did not call upon OPEC to start with producing evidence that the oil price fixing activity was of a governmental nature, but in the contrary the plaintiff who presented expert evidence to the court to demonstrate that said activity was commercial in nature.

However, the court rejected the experts, questioning the expertise of the experts, and nominated *sua sponte* two experts that it gave ‘complete reliance’ because of their academic standing and experience.

—477 F.Supp. 553, 566, note 12: ‘The Court, dissatisfied with the apparent expertise and proposed testimony of the plaintiff’s experts, Dr. Arnold E. Safer, Dr. James R. Kurth, and Dr. Stanley J. Foster, and after consulting the outstanding academic economic authorities in the United States, appointed as its own experts, Dr. M.A. Adelman, Professor of Economics at Massachusetts Institute of Technology, and Dr. Philip K. Verleger, Jr., Senior Research Scientist, School of Organization and Management, Yale University, who until very recently had been working as Special Assistant to the Assistant Secretary for Economic Policy in the Department of the Treasury. Both of the experts were unanimously acknowledged by their peers as the two most outstanding and erudite experts in the field of both World and domestic petroleum economics.’ The judge has the power to call forth evidence and can nominate *sua sponte*

This means more in detail that:

(i) the court based its decision only on the expert evidence produced by its own nominated experts, and not on the evidence of the experts that the plaintiff had proposed;

(ii) the court justified its ruling to grant OPEC immunity on the doctrine of ‘permanent sovereignty over natural resources’, saying that such authority was a principle of international law.

The Price Fixing Procedure

The court did a thorough examination of OPEC’s raw oil price fixing procedure and considered as shown by the evidence the fact that all member states built consensus about what is called the government take. (Id., p. 566). This term designates the amount the governments obtain for each barrel of sold crude oil that is extracted within their territorial boundaries. In the beginning, the states received that take in form of a tax, later by buyback, amount that the drilling
company had to pay. In our days, the government take is effected as a tax, through the very price fixing procedure, and by the control of the production. Within this mechanism, the price fixation was not the most important element, according to the court, but only the most popular aspect of it. This system was rather founded upon the capacity and the will of the OPEC member states to control and govern the whole process of raw oil production. The court concluded:

The control over a nation’s natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes. The defendants’ control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations’ peoples. (Id., p. 568).

The plaintiff, quoting the House Report, forwarded the argument that OPEC’s price fixing procedure was to be seen as a commercial activity; in this process of commercial gain in the patrimonial interest of the states was lying the primary character of the activity, which is why it had to be qualified as commercial.

The court rejected this argument, stating that such a general view of the evidence at court was
inappropriate and that the activity at issue had to be identified first of all:

While it may be true that through their activities as partial or total owners of these companies, the defendant nations do engage in commercial activities, this does not mean, and the legislative intent does not support the conclusion, that all activities, even those remotely connected with these companies, are necessarily commercial. The fact that a nation owns and operates an airline company, does not mean that all government activities regulating the use of airspace, or the ingress and egress of airplanes to and from the nation’s airports, are commercial activities. Accordingly, we must look to the specific activities in which the defendants engage. (Id., pp. 568-569, note 14).

A clear distinction had to be made, according to the court, between the ‘proprietary’ activities of the states and those that are of a governmental character. The activities of OPEC, the court held, were to be qualified as governmental by nature. The court supported this argument also by the fact that the sales conditions for the crude oil were fixated long before its extraction; for that reason a patrimonial interest could not result from it. In addition, even if one would assert such an interest, the court concluded, the governmental nature of the activities would not change, just because the modalities of how the
activities were executed had changed. (Id., pp. 568-569).

Standards of International Law

The court examined Resolution 1803 of the United Nations’ General Assembly and referred to a number of others.

—Id., p. 567: ‘1. The right of people and nations to permanent sovereignty over their national wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.’

The judge did not bother about the juridical validity of such resolutions, in general, nor of Resolution 1803, in particular, but stated:

In determining whether the activities of the OPEC members are governmental or commercial in nature, the Court can and should examine the standards recognized under international law. The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign state has the sole power to control its natural resources. (477 F.Supp. 553, 567).

—This ruling was contrary to, for example, the international arbitration verdict in the Texaco affair, 17 ILM 1 (1978), Steiner/Vagts, Transnational Legal Problems (1982), Case and Documents Supplement, 227 ff.
This conclusion is not really a surprise as this judgment obviously was motivated by political reasons. The apodictic character of the verdict was to be seen already at the onset of the judgment, when the court defined ‘commercial activity’ in a rather restrictive manner, looking at things in a way to be sensibly hostile to the wordings and the intention of the FSIA and its legal materials.

Then, a redactional error, a wrong repartition of the burden of proof, and accordingly, a wrong manner to handle the evidential burden, the reject of the expert evidence produced by the plaintiff without giving a substantial reason for doing so, and finally the summoning of sources of international law that can be said to be controversial to this day, and that are recognized only on the basis of the political value, all this makes for a judgment that is on rather shaky ground. And yet, despite these weaknesses in the judgment itself, the subsequent jurisprudence seems to have fully accepted the direction that was taken in this leading case, and seems to bother little about the procedural details I was mentioning here. This is to be explained with the sensibly political aspect of these litigations.
The Court of Appeals Judgment

The verdict was confirmed by the Court of Appeals, 649 F.2d 1354 (9th Cir. 1981), while the question was looked at from a different legal point of view: the Court of Appeals argued it through with the act of state doctrine as the legal hanger, but came to the same result. This is interesting to note as the act of state doctrine is another legal construct than foreign sovereign immunity. It is namely a way of dealing with the applicable substantive law, not a procedural defense such as sovereign immunity. The Court of Appeals explained the difference as follows:

The doctrine of sovereign immunity is similar to the act of state doctrine in that it also represents the need to respect the sovereignty of foreign states. The two doctrines differ, however, in significant respects. The law of sovereign immunity goes to the jurisdiction of the court. The act of state doctrine is not jurisdictional (...). Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas. Sovereign immunity is a principle of international law, recognized in the United States by statute. It is the states themselves, as defendants, who may claim sovereign immunity. The act of state doctrine is a domestic legal principle, arising from the peculiar role of American courts. It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government. Thus a private litigant may raise the act of
state doctrine, even when no sovereign state is a party of the action. (...) The act of state doctrine is apposite whenever the federal courts must question the legality of the sovereign acts of foreign states. (649 F.2d 1354, 1359).

The Court of Appeals underlined the fact that the two doctrines are independent and that the FSIA only rules the sovereign immunity defense as a procedural handicap, but doesn’t touch the act of state doctrine.

That is why the Court of Appeals validated the motivation of the OPEC member states for price fixing under the act of state doctrine because, obviously, such motivation would not be a valid criterion under the FSIA, where only the nature of the activity in question is to consider under §1603(d). In my view, such an argument appears construed after all, as all those reasonings, valid as they are, were provided by the law giver when drafting the FSIA and its legal materials, and it is therefore a valid question, and was asked in the literature, if not the restrictive sovereign immunity doctrine, as it is subject of the immunities act, has not substantially modified, if not overruled the act of state doctrine?

I cannot give an answer here to that interesting question because it’s outside of this research topic and
thus not part of this study. However, it has to be seen that this question has been fertile and the output that followed up to IAM v. OPEC in the literature is considerable.


However, it is interesting what the Court of Appeals stated with regard to the sovereign immunity question:
While we do not apply the doctrine of sovereign immunity, its elements remain relevant to our discussion of the act of state doctrine. (649 F.2d 1354, 1358).

Despite the fact that the appellant contested the governmental character of OPEC’s price fixing activity, the Court of Appeals limited itself to report the arguments produced by the district court, without criticizing them, but also, without approving of them. The *writ of certiorari* against the Court of Appeals judgment was rejected by the United States Supreme Court. (454 U.S. 1163, 102 S.Ct. 1036, 71 L.Ed.2d 319 (1982).

The OPEC precedent was cited in *Matter of Sedco, Inc.*, equally a case regarding crude oil, where the plaintiff, owner of a drilling platform, filed a suit for exoneration and limitation of responsibility resulting from an oil spill disaster against *Petróleos Mexicanos* (PEMEX), created by the Mexican government back in 1938 as a government agency responsible for the exploitation and the development of the hydrocarbon resources of that country.

PEMEX had used the drilling platform for effecting the extraction of crude oil and claimed sovereign immunity, and the court stated about the repartition of the burden of proof.

Once a basis for jurisdiction is alleged, the burden of proof rests on that foreign state to demonstrate that immunity should be granted. (543 F.Supp. 561, 564).

However, the court only ruled on questions of law, that is, the qualification of the activity in question as governmental or commercial. As in the OPEC case, the court first identified which actually was the activity that was substance of the litigation:

Undeniably, Pemex, as a national oil company, engages in a substantial amount of commercial activity. (…) However, this Court must focus on the specific acts made the basis of the present lawsuit in applying the FSIA. It is whether these particular acts constituted or were in connection with commercial activity, regardless of the defendant’s general commercial or governmental nature that is in issue. (543 F.Supp. 561, 565).

Distinguishing the case from cases where the commercial nature of the activity was rather obvious, the court concluded:
That is to say that every act done by a foreign state which could be done by a private citizen in the United States is ‘commercial activity’ under §1605(a)(2). Such a world view unrealistically denies the existence of other types of governments and economic systems. (Id.)

After having scrutinized the precedents *Arango* and *Yessenin-Volpin*, the judge stated that the existence of a contractual relationship, even if it was not the essential denominator of the action, was often an indicator for the commercial nature of the activity.

—The court also considered the precedents Rio Grande Transport and Harris, already discussed in this study.

The court ruled that PEMEX was totally dependent on its government shadow. For example, the drilling dates were determined long in advance by a governmental regulation and PEMEX had no influence on Mexican petroleum policy, as this was made ‘by higher levels of the government.’ Under Mexican law, PEMEX had the competence to handle information regarding natural resources and to draft programs for executing the governmental resource development policy, which is renewed and updated every six years by various ministries, and approved by the President of Mexico. In addition, there was no contractual relationship with American companies
regarding the extraction of the crude oil, nor with regard to the usage of the drilling platform. Thus, the court concluded:

Acting by authority of Mexican law within its national territory and in inter-governmental cooperation with other branches of the Mexican government, Pemex was not engaged in commercial activity as contemplated by Congress in the FSIA when the IXTOC I well was drilled. (Id.)

Finally, the court, taking reference to OPEC, supported its conclusion further with the argument that also in the present case, the crude oil was a natural resource for Mexico that is why the activities in question were of a public, governmental nature.

The court must regard carefully a sovereign’s conduct with respect to its natural wealth. A very basic attribute of sovereignty is control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature. (Id.)

The last precedent to report and discuss under the present category concerns the exportation of animals that were considered a natural resource of a country. It was Mol, Inc. v. People’s Republic of Bangladesh, 572 F.Supp. 79 (D.Or. 1983). The plaintiff, an American
corporation, filed a law suit for damages against Bangladesh for breach of a licensing agreement regarding the capturing and exportation of Rhesus monkeys from Bangladesh to the United States. As Bangladesh did not enter an appearance, the plaintiff asked for a *default judgment* under §1608(e) FSIA, but the court rejected that motion with the argument that Bangladesh was immune from suit both under the sovereign immunity doctrine, and the act of state doctrine.


The facts are quite interesting. Since India put an embargo on the exportation of rhesus, Bangladesh became the main exporter of these monkeys that are traded on the world market for the purpose of scientific research. In 1976, the plaintiff obtained a licensing agreement from Bangladesh for capturing and exporting those monkeys; however the license was given under certain conditions.

If the licensee did not act according to these conditions, Bangladesh had the right to revoke the license. In 1979, Bangladesh revoked the license,
arguing the licensee had acted contrary to two conditions in the license.

—The licensing agreement required from the licensee to build a breeding farm for the animals in 1978 and it contained in addition a clause that the monkeys ‘shall be used exclusively for the purpose of medical and other scientific research by highly skilled and competent personnel for the general benefit of all peoples of the world.’ (572 F.Supp. 79, 81). The plaintiff failed to construe the breeding farm, and in addition, Bangladesh argued the ‘humanitarian clause’ in the license had been violated when the plaintiff delivered monkeys to the Armed Force Radiobiology Research Institute for Neutron Bomb Radiation Experiments.’ (Id., pp. 81-82).

We have seen earlier in this study that the burden of proof is upon the plaintiff for the conditions of a default judgment under §1608(d) FSIA. That means a default judgment shall by rendered by a district court only if the claimant establishes his claim or right to relief by evidence satisfactorily to the court.

The court argued that this severe burden of proof had political reasons, in that it was set ‘to prevent unwarranted intrusions upon the diplomatic efforts of the United States by private litigants. (Id., p. 82). Despite the fact that the plaintiff had produced affidavits and documents in support of its motion, the judge concluded in accordance with the suggestion of the State Department, acting as amicus curiae.
—Even after the enactment of the FSIA, the State Department can still deliver their opinions to the courts, in their role as amicus curiae. Such a suggestion does not bind the court, however, and sometimes courts do not follow those suggestions, as we have seen in the spectacular case Jackson v. People’s Republic of China.

The State Department argued that the court didn’t have jurisdiction over the case as the activity in question was governmental for reasons of the ‘protection of natural resources of a foreign state.’ Regarding clause 3, §1605(a)(2), that we discussed earlier in this study, the court argued:

I conclude that Bangladesh’s granting of a License to plaintiff in this case was not a ‘commercial activity’, but a sovereign act not subject to suit in the United States courts. The granting of such a license as part of a comprehensive regulation of wildlife under the police power is an action in which the sovereign power is essential. Likewise the granting of an export license, like the power to exclude imports or regulate exports in general, is a power possessed only by sovereigns, not private parties. I find that the activity in suit here is by its ‘nature’ sovereign activity. (572 F.Supp. 79, 84).

The plaintiff objected that the license had after all the objective to bring Bangladesh a commercial profit or material gain and that for that reason it was of a commercial nature. But the report reply that ‘[t]he
purpose of the activity is irrelevant under the statute[,]’ and concluded:

If I were allowed to consider the purpose of the activity, it would clearly indicate that the activity was based upon the ‘public interest’ as perceived by the government of Bangladesh, to conserve wildlife and establish closer control over the exportation of Bangladeshi species. This is true even if Bangladesh receives revenue from the License. The power to tax, or to power to levy a duty upon exports or imports, is a sovereign function designed solely to bolster the fisc by generating state income; yet these activities do not thereby become ‘commercial.’ Even if Bangladesh’s sole purpose in entering in the License was to generate revenue (and the record reveals other goals, including the conservation of wildlife and the meeting of a demand for humanitarian purposes), the granting of the License in this case was not a commercial activity.

However, the purpose of the activity, as opposed to its ‘nature’, is not relevant for immunity purposes. The ‘nature’ of the activity in suit is the regulation of wildlife. This is a sovereign activity not subject to challenge in foreign courts. (Id.)

The plaintiff then argued that the rhesus in question were *ferae naturae* and that therefore, Bangladesh had acted regarding these animals as any other owner of animals would behave.

While the court found this argument positively ‘inventive’, the judge rejected it with the simple
reasoning that this doctrine was not applicable when matters were about governmental activities that regulate wildlife, and the capture or exportation of certain species. The very fact that the plaintiff had needed a license for doing these activities was proving that the rhesus in question were not *ferae naturae*. In addition, the court argued that an exportation license as it was part of the licensing agreement was ‘obviously a governmental, not a proprietary act.’ (Id., p. 85).

Finally, the plaintiff forwarded the view that the power to control the *capture* of animals was a power every animal holder had and that for this reason, it was of a commercial nature. The court, taking reference to the OPEC precedent, concluded:

The power to regulate the taking of game upon land owned by a landowner is an aspect of sovereignty, attached to land and derived from feudal precedent, which is subordinate to the State’s overriding police power. It is clear that Bangladesh is acting as a sovereign in this case. (Id., p. 84).

It has to be seen that under the act of state doctrine, the result would have been the same. What we see here is a certain tendency in American federal jurisprudence to exclude a whole area of government
activity from the possible wide scope of ‘commercial activity’ under §1605(a)(2) FSIA, and this area could be labeled ‘the protection of natural resources of a foreign state.’

While the act of state doctrine leads to the same result in these cases, the sovereign immunity defense has a particular value and should not be confounded with act of state; the two doctrines should be seen within their respective boundaries.

And as the FSIA does not actually incorporate the act of state doctrine, which has been considered by some as a deficiency, the jurisprudence has effectively managed to get those sensibly political areas out of the litigation mill and thereby preserve certain core areas of sovereign activity under the provisions of the FSIA.

**Budgetary Activity**

Under this category we shall further discuss a precedent that we mentioned already earlier up, *De Sanchez v. Banco Central de Nicaragua*.

Here an American federal court had to rule about an activity of Nicaragua’s Central Bank.

—There was no litigation about the fact that Banco Central represented an agency or instrumentality of a foreign state under §1603(b) FSIA, see 515 F.Supp. 900, 902, note 3.

The facts are quite complex. The plaintiff, a citizen of Nicaragua, emigrated to the United States in 1979, during the civil war in her country, and filed suit against Banco Central and C & S Bank, an American commercial bank. Already in 1971, the plaintiff had obtained a certificate of deposit from Banco Nacional de Nicaragua, a commercial bank in Nicaragua, about the amount of $150,000.

Shortly before she departed to the United States, Mrs. Sanchez asked Banco Nacional to pay her out the deposited amount. But as the bank had not enough dollar cash available, it asked Banco Central, where it maintained an account, to deliver the needed cash.

Banco Central charged the account of Banco Nacional with an equivalent amount in cordobas, the national currency, and issued a cheque over $150,000 in favor of Mrs. Sanchez drawn on the account that C & S Bank had with Banco Central. But upon her arrival in the United States, when she wanted to cash the cheque, she got to hear that the Banco Central account
had been closed; after that the bank argued there was some money, but not enough to cover the whole amount; finally the check was returned to Mrs. Sanchez with the imprint ‘Refer to Maker.’ C & S explained that because of the political troubles, all payments by Banco Central had been suspended according to an order by the new president of the bank, who was set in office by the revolutionary regime.

After having scrutinized the term ‘commercial activity’ under §1603(d) FSIA, as well as the legal materials, the court stated about the burden of proof.

First, as is true for all the other exceptions under the FSIA, the burden of demonstrating that the claim does not fall within §1605(a)(2), i.e., the burden of proof that immunity exists, is upon the foreign state. (515 F.Supp. 900, 903).

As it was in the precedents I discussed before, the court in the present case held that the purpose of the activity in question was irrelevant; only the nature of the activity was subject to qualification.

—515 F.Supp. 900, 904: ‘... as both the language of the statute and its legislative history make clear, in determining the existence of immunity, the purpose of the challenged conduct is irrelevant; ….’
The court considered the precedents *Arango*, *Yessenin-Volpin*, *Carey* and *Opec* and then evaluated the evidence.

—515 F.Supp. 900, 905: ‘In this case, both sides have offered sworn statements by officials of Banco Central and the Nicaraguan Government attesting to the governmental or commercial nature of the bank, and to the nature of the particular transaction giving rise to Sanchez’s claim.’

The affidavits submitted by *Banco Central* certified for the official character of the bank.

—Id., pp. 905-906: ‘For example, Gonzalo Meneses-Ocon, chief counsel of Banco Central, stated that the bank was created by the Nicaraguan Congress on August 23, 1960 through Decree N° 525 as the central bank of Nicaragua, with its main objective, as defined in the Decree, “to create, promote and keep monetary exchange and credit conditions favorable to the orderly development of the national economy.” Accordingly, Meneses-Ocon declared, “Banco Central is not a commercial bank and does not operate with a mercantile objective.” Affidavit of Gonzalo Meneses-Ocon at pp. 3, 4.’

The plaintiff responded to this evidence by the testimony of Dr. Roberto Incer, the former president of Banco Central under the Somoza regime who certified that the central bank has also engaged in commercial activity and that, more specifically, the issuing of the cheque had been one of those commercial activities. (Id., p. 906). The judgment cites a passage of the testimony:
Q. In utilizing the C & S account, was Banco Central wearing its commercial hat or its Government hat?

A. This was just a commercial operation, a banking operation. It was not a Government function. (Id.)

The witness also revealed that Banco Central used its account with C & S bank for the payment of expenses that Nicaraguan students incur in the United States, for covering letters of credit for imports and for paying debts with C & S.

Until that point, the judgment really lets us believe, and also the evidence, that the court will recognize the commercial character of the issuing of the cheque by Banco Central. But it took an almost incredible turn and twist and ended up in the contrary conclusion. First, the court declared it was not satisfied with the evidence produced, and the arguments provided here by the court are intriguing:

The problem with regarding these statements as probative to the ultimate issue on this motion is two-fold. First, it is not enough for these witnesses merely to offer conclusory descriptions of Banco Central’s general character or specific conduct. To be sure, reasonable people may disagree over the proper characterization of what Banco Central did; indeed, some commenters have concluded that the governmental / commercial dichotomy in foreign
sovereign immunity law in unworkable because of the conceptual difficulties. But I can decide this motion only upon facts, and not on the basis of a government’s official opinion. To the extent that these statements are simply conclusory, I must disregard them. (Id., p. 907).

The judge found the evidence ‘too general’ for conclusively demonstrating that the specific activity in question was either commercial or governmental. A part of the evidence was indeed not at all about the issuing of the cheque itself.

—Id.: ‘… I cannot decide this motion under §1605(a)(2) on the basis of Banco Central’s general character, for just as a government entity may nevertheless be engaged in a commercial activity and thus be subject to suit, … so may a commercial entity perform a governmental function and avoid liability for claims arising therefrom.’

The court distinguished the case from National American Corporation v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978), 17 ILM 1407 (1978), 63 ILR 63 (1982), conf’d 597 F.2d 314 (2d Cir. 1979), 63 ILR 137, where the breaches of contract arising during the ‘Nigerian Cement Catastrophe’ were qualified as commercial activity, while the Nigerian government had argued that the repudiations of contract had been undertaken ‘for preventing a national economic catastrophe.’ It was only from this point in the
judgment that the real developments took off, namely with the court defining what really was the pertinent activity in question, or the pertinent question to ask:

It seems clear that Banco Central is imbued with general authority over Nicaragua’s financial affairs, and that on occasion it engages in commercial activities through its C & S account; neither facts decides this motion, however. Similarly, whether Banco Central acted to conserve its foreign currency supplies in a time of fiscal crisis when it ordered that Sanchez’s cheque not be honored is nondispositive. Just as Nigeria acted to avoid a national catastrophe by repudiating its obligations in order to stop the flow of cement into its ports, Banco Central may be acting purely in its own sovereign interests by repudiating its debt to Sanchez. But if that debt arose from commercial conduct, as did Nigeria’s, then Banco Central cannot invoke immunity against this suit. (515 F.Supp. 900, 907).

After having clearly peeled out the core juridical question, the judge looked at additional evidence and came to conclude that the issuing of the cheque, in this particular case, was a governmental act effected by Banco Central. It is really intriguing to see that it was the plaintiff who had submitted the evidence that ultimately was in favor of the defendant, Banco Central.
Let me comment here on this particularity of the American law of evidence. In principle, the judge is not impeached from appreciating evidence submitted by one party, in favor of the other. The judge is supposed to regard all the evidence in the record to prove a fact at issue, notwithstanding which party has submitted the evidence to the court. In addition, the judge can ask a witness additional questions, and here as well, it is not relevant which party has presented the witness, or expert evidence, to the court.


We can admit in the present case that Banco Central was not able to establish a prima facie case regarding the governmental character of the activity in question (issuing of the cheque) in order to support its immunity claim, as the judge didn’t find the evidence was meeting the necessary standard of proof.

The result should have been to deny immunity for the defendant. This would have been done by a so-called directed verdict.

However, such is done by the court generally only if the other party has issued a motion for directed
verdict, but there is agreement that that court can issue a directed verdict also *sua sponte*.


However, in the present case, the court did not pursue such an action. The reason is probably the general rule of sovereign immunity contained in §1604 FSIA, taken as a ‘residual presumption’ of immunity for all cases where the evidence results in a *non liquet* situation.

The evidence revealed here in particular that, since September 1978, there were no foreign exchange regulations in Nicaragua, and *Banco Central* and other Nicaraguan banks maintained accounts with American banks in order to facilitate the exchange of cordobas in dollars. Then, because of the decision of the Carter administration to freeze Nicaragua’s access to the international monetary funds, Incer, the *Banco Central* president at that time, decreed a control policy for foreign exchange. The witness also said that decisions regarding foreign exchange were taken ‘at the highest level of Banco Central.’ When *Banco Nacional* asked *Banco Central* to transfer the dollars for
covering the certificate of deposit of Mrs. Sanchez, it was Incer himself who had allowed the transaction.

This precedent offers the great advantage that it contains explicit passages from the witness evidence submitted to the court. As it’s really a very important case, I will publish the decisive last part of the hearing hereafter:

Q. Are you telling me that Banco Central was obliged to buy and sell dollars as desired by the private banks? Is that the point you are making here?
A. The Central Bank was obliged to sell dollars to the private bank when they requested for private transactions.

Q. Banco Central was required to abide by a private bank’s request; is that correct?
A. Yes.

Q. So, the only requests that were not honored were those that were not permitted by law; is that right?
A. That’s right.

Q. Why did you want to know about all these requests?
A. Because of the low level of foreign exchange. There was not enough to meet all the demands that were represented at that time in the Central Bank of Nicaragua.

Q. Why was Banco Central required to honor requests by private banks to buy dollars?
A. Why? Because the Central Bank—just as I say, the Central Bank has to keep a fixed exchange rate between the Cordoba and the dollar, so any excess amount—the Central Bank is obliged to keep a fixed exchange rate within the Cordoba, the national currency of Nicaragua, and the dollar, so any excess supply of dollars that were in the market and the bank did not want to acquire it, they sold it to the Central Bank and the Central Bank had to meet any excess demands that were in the market so that this exchange rate should be kept fixed.

Q. That related to both buying and selling dollars?
A. Yes.

Q. Central Bank’s function is to buy and sell dollars from private banks in order to maintain a stable exchange rate?
A. That’s right.

Q. I believe you told us before that you did not really concern yourself with the relationship between the private bank and the customer in the transaction that created the need for the dollars; is that right?
A. That’s right.

Q. Your sole interest was in the maintenance of the stability of the exchange rate; is that correct?
A. That’s right.

Q. Is that correct?
A. That’s right. (Id.)

The court concluded:
From this testimony, it is clear that Banco Central was not engaged in commercial venture when it exchanged dollars for Cordobas upon the request of Banco Nacional. Clearly Sanchez was not Banco Central’s customer, since her certificate of deposit was held with Banco Nacional and not with it. Banco Nacional earned no fee from the transaction, ..., and as Incer testified it was not even interested in the dealings between Banco Nacional and Sanchez, Banco Central’s function in this matter—the maintenance of foreign exchange rates through regulation of foreign currency transactions - was not commercial, but was governmental. (Id.)

After the judge distinguished the case from National American Corporation, Texas Trading and Verlinden, that we all discussed earlier in this study, the court came to the final conclusion:

However, in those cases, the letters of credit were issued as the culmination of a series of commercial transactions involving the purchase of cement by the Nigerian government. Here, by contrast, although the relationship between Sanchez and Banco Nacional was commercial, Banco Central’s role in that relationship was no different than the role any government plays in facilitating business transactions between its citizens through regulation or licensing. Just as a corporation may not sell shares of its stock without complying with applicable securities laws and obtaining necessary licenses or permits, Banco Nacional could not redeem Sanchez’s certificate of deposit without obtaining Banco Central’s approval to exchange Cordobas for dollars. Banco
Central’s C & S check was a necessary element of the commercial transaction between Sanchez and Banco Nacional, but it was not issued as part of any commercial function performed by Banco Central, and consequently cannot form a basis for suit under §1605(a)(2). (Id.)

After appreciating all the evidence in the record, the court thus came to the conclusion that the issuing of the cheque was a governmental activity of Banco Central, for its role in the complex suite of transactions was solely the regulation of foreign exchange, which is clearly a governmental activity. As a result, the court had to deny the applicability of the ‘commercial activity’ exception under §1605(a)(2) FSIA. The court then applied the exceptions in sections 1605(a)(3) and 1605(a)(5). The Court of Appeals of the 5th Circuit fully confirmed the district court’s reasoning regarding the applicability vel non of the ‘commercial activity’ exception in §1605(a)(2) FSIA. (770 F.2d 1385, 1387 (5th Cir. 1985).

Here, Banco Central’s purpose in selling dollars—namely to regulate Nicaragua’s foreign exchange reserves—was not ancillary to its conduct; instead, it defined the conduct’s nature. Banco Central was not merely engaging in the same activity as private banks with a different purpose; in a basic sense, it was engaging in a different activity. It was performing one of
its intrinsically governmental functions as a Nicaraguan Central Bank. (...) As such, it was wearing its sovereign rather than its commercial hat. If we were to hold that a central bank is subject to suit for its actions in regulating foreign exchange reserves, we would interfere with this basic governmental function and would thereby touch sharply on ‘national nerves’, contrary to the policies underlying the FSIA. (Id., pp. 1393-1394).

The De Sanchez precedent is of paramount importance as to withholding judicial interference in the budgetary activities of foreign states. While the FSIA contains a special provision with regard to foreign central banks, §1611(b)(1), this provision, as we shall see further down in this study, is only applicable for immunity from execution. With regard to immunity from jurisdiction, the protection of the budgetary domain of foreign states was not explicitly stated in the FSIA, and as such, the De Sanchez case serves as an important pillar to interpret the statute in a way that is in accordance with the basic principles of international law and the conduct of states on the international platform.

—In more recent precedents, this interpretation of the FSIA was confirmed and even more fine-tuned, see Wolf v. Banco Nacional de Mexico, S.A., 739 F2d 1458 (9th Cir. 1984), Braka v. Bancomer, S.N.C., 762 F.2d 222 (2d Cir. 1985), 24 ILM 1047 (1985) and Callajo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985), 24 ILM 1050 (1985).
The decision is also elucidative as to how a judge may peel out the decisive question before evaluating the evidence and distinguishing the case from precedents. Wrong judicial acts are often the result of wrong questions asked.

Here, the ambiguous character of the evidence regarding the facts at issue shows with quite some rigor that the evidence problems in foreign sovereign immunity litigation are not to underestimate. It is for that reason so important that the facts are clearly identified, before even thinking of an appreciation of the evidence.

It was notably tempting in this case to look at the relation between Mrs. Sanchez and Banco Nacional and derive conclusions therefrom. But it would have been the wrong question because the cheque was issued by Banco Central, while Mrs. Sanchez had no commercial relation with that bank at all. Hence, the decisive action holder here was the central bank of Nicaragua, and once this was clearly identified, the court only had to see if the exercise of that function was private and commercial, or public and governmental, and to that purpose, the witness evidence was clear-cut and unequivocal.
It also has to be seen that, as actions under the FSIA are ruled without jury, §1441(d) FSIA, the judge exercises the two different functions of judge and jury, united in his or her person.

With regard to the problems of evaluating the evidence in foreign sovereign immunity litigation, the handling of these functions by the judge can at times be extremely difficult. This present case is the best proof to demonstrate that and to show how meticulous judges have to proceed in order to rule those cases in a way that is both efficient and far-sighted enough to not step on the feet of foreign states’ internal powers, thereby creating undesired diplomatic strain and interference.

—One could cite here §2(4) United Nations Charter—the non-interference clause—as a supportive argument for this reasoning.

National Defense

The last category in our schema of sensibly political domains of foreign states will also be exemplified by one single, but very important, precedent; it is Castro v. Saudi Arabia, 510 F.Supp. 309 (W.D.Tex. 1980), 63 ILR 419 (1982), a precedent which we discussed already further up in this study. To shortly reiterate the facts, a relative of the Castro
family was killed in a car accident in the United States, whereupon they sued Saudi Arabia for damages because the driver of the car that caused the accident was a Saudi soldier stationed in the United States under a bilateral military treaty between the two countries. It is important to note that the treaty did not contain any compensation clause for the Saudi services rendered to the United States, and was thus a non-profit agreement.

—We have already discussed the question if such a clause could be interpreted as an implicit immunity waiver.

Evaluating the nature of the treaty, the court found the fact irrelevant that the military services as such had a government character; only the nature of the activity was the decisive criterion for the court to consider under the FSIA. (510 F.Supp. 309, 312).

It is interesting to observe the development of the restrictive immunity doctrine in these cases. Already back in 1923, André Weiss proposed in his course *Compétence ou incompétence des tribunaux à l’égard des états étrangers* (1923), 1 RCADI (1923) 525, to consider the nature of the activity in question as the exclusive criterion for deciding about immunity *vel non*. He wrote:
If he [the judge] has to examine the question [of sovereign immunity], there is only one thing to ask: is the action that the litigation is about, by its nature, such that only a state can do it and that it’s done in the name of the state, which would mean it’s an act of public power, a political action, which couldn’t be revised by a tribunal without infringing upon the sovereignty of the foreign state. In this case, the court has no jurisdiction. By contrast, is the nature of the action such as any private person can do it, such as a contract or a loan, this action, whatever is the purpose or motivation behind it, is by its very nature private, and the foreign court would have jurisdiction over it. (…) It is of little importance that normally people don’t do such large transactions [except when they conclude with foreign states], and or that the objectives are different. It’s a contract, an acquisition, a loan. That is enough. The nature of the contract, not its objective, is what is to consider here. (Id., p. 546, translation mine).

This manner of distinguishing between acts ‘de iure imperii’ and those ‘de iure gestionis’, while it sounds clear and straight, was however often misunderstood and criticized when it’s about contracts that were concluded with specific military purposes.

However, upon analysis, that test merely postpones the difficulty. To what extent is it true to say that contracts made by the state for the purchase of shoes for the army or a warship, or of munitions, or of foodstuff necessary for the maintenance of the national economy, are not immune from the jurisdiction for the reason that they were *contracts* and that an individual can make a contract? For can it not be said that these particular contracts can be made by a state only, and not by individuals? Individuals do not purchase shoes for their armies; they do not buy warships for the use of the state; they are not, as such, responsible for the management of the national economy.

Jean-Flavien Lalive cites Lauterpacht in his article *Contrats entre États ou entreprises étatiques et personnes privées (1983)* and adds:

> This reaction is typical for a private lawyer … for who is today the person that would need to buy for himself the luxury to buy a tank or a torpedo defense system?

—Jean-Flavien Lalive, L’immunité de juridiction des états et des organisations internationales, 84 RCADI (1953-III), 209 ff., 258. (Translation mine). Then he continues that Weiss’ proposition could be managed to be applied for the general practice, while the example that Weiss cites, that is, a warship, was without a doubt ‘little satisfying.’

I cannot see Lalive’s criticism justified. There is not a doubt that a private person can buy army boots or a warship. For example, there are drug barons in quite a
few countries in South America who rule over private armies and militias, and while the number of such military personnel may be smaller than the army of a nation state, it’s basically the same principle.

These private militia need their boots, they need their guns, and ammunition, they need uniforms, food and clothing. And as weaponry can be bought, even against national regulations, in black markets, it is not excluded, but rather the rule that such people also buy heavy weaponry or torpedo boats, to just name these.

Lauterpacht has misunderstood what really means nature of an act or action. The nature of a purchasing contract does not change in any way according to the motivations or goals that are connected to it, that is to say, the whole of the human intentional factor. Lalive fell in the same trap and asks the silly question if it was a luxury or whatever, or how a private person would need to buy a warship or other military equipment? This is simply not the question. When we look at the nature of a transaction, we do not need to know who can possibly engage in it, how big or small the business volume is, or if people have the necessary financial means to afford such a purchase!

All this is strictly irrelevant. What counts is the nature of
the transaction; a contract is a contract, it’s a private, commercial activity.

The FSIA embodies, under the definition of §1603(d), and the legislative materials, exactly the doctrine that Weiss has proposed so many years earlier in his brilliant article. The House Report expressly underlines that ‘a contract by a foreign government to buy provisions or equipment for its armed forces … constitutes a commercial activity.’ (H.R. Report, p. 16, 15 ILM 1398, 1406-1407 (1976). This was confirmed in National American Corporation v. Federal Republic of Nigeria, 448 F.Supp. 622 (S.D.N.Y. 1978), 17 ILM 1407 (1978), 63 ILR 63 (1982), conf’d 597 F.2d 314 (2d Cir. 1979), 63 ILR 137. This case is particularly interesting. Judge Goettel remarked that, already in 1976, when the case was being dealt with by judge Weinfeld (420 F.Supp. 954 (S.D.N.Y. 1976), Nigeria argued that the cement ‘was intended for the use in governmental works and military installations.’ (448 F.Supp. 622, 641). Judge Weinfeld, who had to know this case before the entering into force of the Act, referred to Victory Transport, 336 F.2d 354 (2d Cir. 1964), where immunity was granted ‘for the acts concerned the armed forces.’ Judge Weinfeld admitted that the military objective of the purchasing contract was a
pertinent fact at issue; however he concluded that [t]here was almost a total failure of proof at trial as to the purpose for which the cement was ordered and, certainly, there was no convincing proof that the majority or a substantial portion was secured with a governmental purpose in mind. (448 F.Supp. 622, 641). Judge Goettel, however, who had to try the case under the FSIA, wrote:

Even had this been demonstrated, it would not have materially aided defendants, since the Immunity Act has changed the grounds on which the defense of sovereign immunity rests. (Id.)

After citing §1603(d) FSIA and the legal materials, the judge continued:

This definition eliminates the significance attached by Nigeria to its purported intent to use the cement for military purposes. (Id.)

The judge thus confirmed that it’s only the nature of the action or act in question that has to be taken into account, not its purpose or objective. The latter will not be a relevant fact at issue, while it may have been so before the enactment of the FSIA. Despite criticism, we can thus conclude that the old theory established by André Weiss has merit, so much merit
in fact that it can be said to be the reigning doctrine right now, not only the United States, in sovereign immunity litigation, but also, as we shall see further down, in other jurisdictions that have enacted sovereign immunity statutes. This is particularly true for the United Kingdom’s State Immunity Act 1978, and the precedent Trendtex Trading, and the interesting opinion of Lord Denning in this judgment.


Contrary to this line of reasoning and the precedents discussed, in Castro v. Saudi Arabia, as we saw it already in the OPEC case, the judge performed a rather construed interpretation of the criterion ‘commercial activity’ that obviously tries to restrict the scope and applicability of this exception:

The transaction at issue here could be broadly defined as the ‘sale of services’ and so be deemed ‘commercial’. The activity could also be narrowly viewed as a non-profit agreement between two governments for the training of military personnel. So viewed, the transaction would be public or governmental, and protected by sovereign immunity. In this case, as in the OPEC case, ‘commercial activity’ is best defined narrowly; Saudi Arabia has the sole power to control its armed forces, and proper
training of those forces is an essential ingredient of that control. In addition the fact that the contract is expressly ‘non-profit’ convinces the court that the arrangement between the two sovereigns is not commercial in nature. (510 F.Supp. 309, 312).

Consequently, the judge rejected the action, after also denying the applicability of §1605(a)(5), concluding that ‘defendant has demonstrated that none of the exceptions in FSIA operate to deprive Saudi Arabia of its immunity from this court’s jurisdiction.’

—Id., p. 313. The default judgement previously obtained by the plaintiffs under §1608(e) FSIA had thus to be rendered void, ‘for without subject matter jurisdiction the default judgment is a nullity.’ 510 F.Supp. 309, 312.

This sentence reveals the repartition of the burden of proof. Apart from the evidence submitted by Saudi Arabia as to the exception 1605(a)(5), the court did not need to evaluate the evidence for qualifying the action in question because, at that point, the facts were not contested.

We can see three lines of reasoning in this judgment:

› Fact at issue was not the nature of the Saudi soldier participating in public traffic in the United States, but the bilateral treaty that stationed the soldier in the forum state;
The treaty was governmental because of the exclusive control of Saudi Arabia over its troupes stationed in the United States, and over their training;

The treaty had a governmental character also because the military services rendered by Saudi Arabia to the United States were not remunerated because it was a non-profit agreement.

By these reflections, the court has traced a certain demarcation line that marks certain limits under the Act, and this for protecting the sensible area of internal affairs of a foreign state, which is undeniably governmental activity of that foreign state. In fact, the military treaty discussed in this judgment can be seen as a sort of inter-governmental cooperation. This expression, while the judge did not use it, can relate us back to the precedent Yessenin-Volpin, 443 F.Supp. 849 (S.D.N.Y. 1978), discussed earlier in this study and where the judge had qualified the activities of TASS and NOVOSTI as intra-governmental cooperation with the Soviet government.

With regard to the first line of reasoning, if the judge had focused not upon the treaty, but upon the mere participation of the soldier in the road circulation in the United States, this participation would have had to be considered commercial. However, in focusing exclusively upon the statute of the soldier being stationed in the United States, the
judge has predetermined the outcome in that, incontestably, such a treaty is public and governmental in character.

**Conclusion**

With regard to the allocation of the burden of proof, this judgment thus follows the schema that we have already established to be valid under *Matter of Sedco, De Sanchez* and other precedents, that is, the facts at issue which determine subject matter jurisdiction and personal jurisdiction are to be proven by the plaintiff, and here the proof is particularly severe in case the latter motions a default judgment against a foreign state under §1608(d) FSIA. The precedents discussed here show that vital interests, foreign affairs and internal affairs of a foreign state are sensible areas that American federal courts tend to protect, thereby preserving something like a hard core of foreign sovereignty that federal jurisdiction doesn’t touch upon. To summarize, these areas are the following:

**Foreign Affairs**

Some kind of intra-governmental cooperation between foreign press agencies and the foreign state
(Yessenin-Volpin) or a nationalization, that is effected by the foreign state in such a way that it appears to be a weapon of foreign policy (Carey).

Internal Affairs

Police actions undertaken for protecting fishery laws (Perez) and immigration laws (Arango). Activities of the foreign state that were undertaken for the protection of ‘natural resources’, for example for crude oil (OPEC, Matter of Sedco) or the national wildlife (Mol).

Budgetary Activity

Activities undertaken by foreign central banks in their function as facilitators of foreign exchange and for regulating foreign exchange (De Sanchez).

National Defense

An inter-governmental collaboration for training military troupes under a bilateral treaty between the foreign state and the forum state (Castro).

In all the precedents we thus examined, the judges affirmed that the specific activity for qualifying it as governmental or private, needs to be clearly identified. Here, there is sometimes harsh difficulty to see the
relevancy versus irrelevancy of certain facts at issue, and all the art is to really peel the onion, so as to speak, to see what in fact the particular activity is that is the subject of the litigation. Often, as we have seen, this initial work of the judge in looking at the facts, before appreciating the evidence, leads to a quite clear-cut legal conclusion at the end, and if the situation had been under a slightly different angle, the legal outcome would have swapped to its opposite. This is quite intriguing to observe in all those cases!

Generally speaking, and with regard to the specific criterion ‘commercial activity’, all these cases let us see that courts are careful not to infringe upon the political affairs of foreign states, in cases where there is initially a certain temptation to ‘help’ the plaintiff succeed when the situation is such that it all looks like blunt injustice to grant immunity. However, this cannot and must not entice us to steer off from the legally correct path, as the sovereignty of foreign states needs to be respected when the foreign state has really acted within its public, governmental function.

As to the means of proof, American federal courts have been quite open to accept a range of possible evidence, such as testimony (De Sanchez), affidavit
(Mol), expert evidence (Yessenin-Volpin, OPEC) and even a simple statement by an ambassador of the foreign state (Yessenin-Volpin).

Immunity from Execution

Types of Execution Measures

We have to distinguish basically three types of executional measures:

—The enforcement of a judgment arising from a lawsuit;

—The post-judgment attachment, or attachment in aid of execution;

—The pre-judgment attachment.

A forth type of execution, called ‘arrest’ is mentioned, to be true, in the text of §1609 FSIA, but is not to be found in any of the exceptions from this general rule from immunity from execution contained in §1610 FSIA.

The question logically comes up if that means that for arrests, foreign states enjoy an absolute kind of immunity from execution? As the legal materials are silent with regard to this question, we could ponder what ‘arrest’ actually means, because in American law, there are basically two different definitions of this
term. There is the arrest of a person, and the arrest of a ship, in an ‘in rem’ action.


Sompong Sucharitkul asked this question in his course *Immunities of Foreign States Before National Authorities* (1976), 149 RCADI (1976-I), 93, 122, and concluded as follows.

It is difficult to imagine how a State qua an international legal entity could be subject to arrest or detention. In actual realities, however, the State often acts through its various organs, agencies, instrumentalities or individual representatives. The representatives as individuals, as well as the properties and assets belonging to a foreign State can be the target of arrest or detention.

By a stretch of imagination, the cloak of State immunities may be said to extend to cover many types of State representatives and agencies as well as their properties from the power of local authorities to effect arrest and detention.

The text of section 1609, ‘… the property … of a foreign state … ‘, doesn’t really give room for doubting that only measures of execution against foreign property are meant to fall under this rule. However, the arrest of a ship is no longer possible under the
FSIA. Against such an action ‘in rem’, the foreign state enjoys absolute immunity from execution. On the other hand, an action ‘in personam’ is still possible under the conditions of §1605(b) FSIA.

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In view of section 1609 of the bill, section 1605(b) is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit.

—House Report, p. 21, 15 ILM 1398, 1409 (1976). The problems of such admiralty actions were largely discussed in the literature and the solution under the FSIA was often criticized, if not authors were outright requiring an addendum to be made, or an ‘admiralty sovereign immunities act’ so be drafted, see for example Russell J. Pope, Maritime Arrest Under the Foreign Sovereign Immunities Act: An Anachronism, 62 TEXAS L.R. 511-535 (1983).

The elimination of attachment as a vehicle for commencing a lawsuit will ease the conduct of foreign relations by the United States and help eliminate the necessity for determinations of claims of sovereign immunity by the State Department. (House Report, p. 27, 15 ILM 1398, 1412 (1976).

Sections 1610(a) to (c) of the Act concern the post-judgment attachment. As to the pre-judgment attachment, section 1610(d) provides a peculiar solution. This distinction is justified by the fact that we are facing here different juridical notions; in
addition, it was Congress’ intention to prohibit the pre-judgment attachment for vessels or cargo for commencing a lawsuit against a foreign state.

—Georges R. Delaume notes that there are three major factors that determine the question of execution vel non: ‘These factors relate to: (i) the personality of the borrower (since the rules applicable to foreign states may be different from those applicable to foreign public entities distinguishable from the state itself; (ii) the nature of the property sought to be attached or executed against (since execution is usually possible only against property used for commercial, as opposed to public, purposes; and (iii) the time at which execution is sought (since not all legal systems permit prejudgment attachment and the creditor’s remedies may be limited to post-judgment execution.’ (Transnational Contracts, Vol. II, Booklet 14, XII, Text pp. 1-2).

28 U.S.C. §1610(d)
The property of a foreign state, … , shall be immune from attachment prior to the entry of judgment … , if the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

The Allocation of the Burden of Proof
As for jurisdictional immunities of foreign states, the FSIA provides for immunity from execution a rule-and-exception principle. The rule is stated in section 1609.

28 U.S.C. §1609
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property of a foreign state shall be immune from attachment,
arrest and execution except as provided in sections 1610 and 1611 of this chapter.

The exceptions are stated in section 1610. The formulation of section 1609 is not very clear in this respect, as section 1611 doesn’t contain exceptions to the rule, but exceptions to the exceptions (‘… notwithstanding the provisions of section 1610 of this chapter … ’). Astonishingly enough, there is no remark to be found in the legal materials as to the burden of proof regarding sections 1609, 1610, as this was the case for jurisdictional immunity, while it follows from statutory construction that the exceptions from the exceptions lead back to the rule (§1609), which is noteworthy, as this influences the allocation of the burden of proof.

However, it would not be correct to simply apply the burden of proof rules that apply for immunity from jurisdiction, to immunity from execution. Neither the text of the legislative history regarding sections 1604, 1605-1607, nor its systematic placement within the section by section analysis of the House Report, allow to draw any analogous conclusions for immunity from execution.

Furthermore, it has to be seen that the two immunity rules have had different historical
developments, and have a different legal character. This was already stated in the Harvard Draft Convention (1932)—26 AJIL 453 (1932 Suppl.), Comment on Art. 22, p. 690—was repeated in the legal materials and is general opinion in the literature.


This means that we have to engage a novel scrutiny as to the burden of proof in matters of immunity from execution, under the FSIA. Interestingly enough, in the International Law Association’s Draft Convention, the burden of proof is handled differently for each type of immunity. Here are the rules:

**Art. II (Immunity from jurisdiction)**

In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority i.e. iure imperii. It
shall not be immune in the circumstances provided in Article III.

**Article III (Exceptions)**

Sovereign immunity shall not be granted when the case in question involved a commercial activity of the foreign state.

**Art. VII (Immunity from execution)**

A foreign State’s property in the forum State shall be immune from attachment arrest and execution except as provided in Article VIII.

In the ILA Report of the Belgrade Conference (1980), it is written that Art. II is considered as a ‘somewhat flexible rule’, while Art. VII is held to be stricter, in a way that ‘there should be an absolute rule of immunity unless a particular exception applied.’


It is interesting to note that the two immunity rules are drafted in a different manner. As for jurisdictional immunity, the foreign state is granted immunity only if the activity in question can be demonstrated to have been *jure imperii*. This is exactly how the FSIA handles it in sections 1604, 1605-1607.

This is why we can conclude that the ILA Draft Convention appears to handle the burden of proof for jurisdictional immunities in the same manner as the FSIA. In other words, when this can be seen, then the
other analogy may also be true. When we can say that under the ILA Draft, the rule of immunity from execution is principally absolute, and is pierced only in very particular exceptional circumstances, then we might reflect if under the FSIA, this might also be the case.

Fortunately, we do not need to engage in such a shaky argument, while logically it makes sense; we got some precedents that are explicit and that we shall carefully examine under our particular focus on the allocation of the burden of proof.

The Exceptions

The Waiver Exception

Contrary to the drafting technique regarding immunity from jurisdiction, under §§1604, 1605-1607 FSIA, that applies both for foreign states and agencies and instrumentalities of foreign states, section 1610 clearly distinguishes the case where the property belongs to the foreign state, §1610(a), or to one of its organisms, §1610(b). As to the execution of a judgment or a post-judgment attachment, sections 1610(a)(1) and 1610 (b)(1) state:

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a
commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, (...) 

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of the foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, (...) 

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for commercial activities in the United States, shall be immune from attachment prior to the entry of judgment in any action brought in a court in the United States or of a State, ..., if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, (...).

A particular handling of the pre-judgment attachment is thus provided by §1610(d)(1). Contrary to §§1610(a)(1), (b)(1) where an implicit waiver is admitted, this provision obviously only admits an explicit immunity waiver; thus, conditions are stricter for pre-judgment attachments of foreign property, for obvious reasons. There is case law dealing with defining what an ‘explicit immunity waiver’ is under
these terms. In Libra Bank v. Banco Nacional de Costa Rica, 676 F.2d 47 (2d Cir. 1982), 21 ILM 618 (1982), the Court of Appeals of the 2nd Circuit reversed the district court judgment, holding a waiver for ‘explicit’ that was formulated as follows:

The Borrower hereby irrevocably and unconditionally waives any right of immunity from legal proceedings including suit judgment and execution on grounds of sovereignty which it or its property may now or hereafter enjoy. (676 F.2d 47, 49, 21 ILM 618, 619).

The immunity waiver was contained in promissory notes that Banco Nacional had given out to Libra Bank, but the defendant argued that the terms of the waiver did not cover the pre-judgment attachment as this form of execution was not expressly mentioned in the waiver. The Court of Appeals however rejected this argument, holding that the wording of section 1610(d)(1) ‘does not require recitation of the words ‘prejudgment attachment’ as an operative formula.’ (Id.) Then the court further explained:

This enumeration clearly is not intended to be exhaustive. If anything, it suggests that prejudgment attachment is a form of ‘legal proceedings.’ The waiver is explicit in the sense that it is clear and unambiguous. Banco Nacional certainly intended to reserve no rights of immunity in any legal proceedings. (Id.)
The same Court of Appeals confirmed another interesting case, *Sperry International Trade v. Government of Israel*, 532 F.Supp. 901 (S.D.N.Y. 1982), 21 ILM 1073 (1982), conf’d, 21 ILM 1066 (1982), that we mentioned earlier on in this study, and where the district court had to deal with an arbitration sentence against the Israeli government. While the court denied the applicability of the FSIA, it stated in an obiter dictum that even if he applied the Act, he had to rule that the waiver contained in the contract with the plaintiff was ‘explicit’ in the sense of §1610(d)(1). (532 F.Supp. 901, 908-909, 21 ILM 1073, 1078-1079).

In *S & S Machinery*, 706 F.2d 411 (2d Cir. 1983), a precedent we discussed already, the Court of Appeals of the 2nd Circuit had to decide the question if a clause in the *Agreement on Trade Relations of April 2, 1975* between the United States and Romania was to be considered as an explicit waiver of immunity from prejudgment attachment. (26 U.S.T., T.I.A.S. N° 8159) This clause reads as follows:

**Business Facilitation Clause**

Nationals, firms, companies and economic organizations of either Party shall be afforded access to all courts, and, when applicable, to administrative bodies as plaintiffs and defendants, or otherwise, in accordance with the
laws in force in the territory of such other Party. They shall not claim or enjoy immunities from suit or execution of judgment or other liability in the territory of the other Party with respect to commercial or financial transactions, except as may be provided in other bilateral agreements. (706 F.2d 411, 416-417).

The court subsumed the prejudgment attachment under the term ‘other liability in the territory of the other Party.’ As there were not yet any precedents interpreting this clause, the court looked at a similar passage (… ‘other liability’ …) in the Friendship Treaty between the United States and Iran, of August 8, 1955. As we have seen already earlier in this study, this term was interpreted by case law as to not encompass the prejudgment attachment.

—See for a listing of the precedents, at 417-418 of the judgment. In Behring I, already discussed, such an interpretation of the clause was expressly denied by the court, 475 F.Supp. 383, 392-393 (D.N.J. 1979).

The *House Report* explains under section 1610:

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However, the traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. (…) Even after the ‘Tate Letter’ of 1952, this continued to be the position of the Department of State and of the courts. (…) Sections 1610(a) and (b) are intended to modify this
rule by partially lowering the barrier of immunity from execution, so as to make this immunity conform more closely with the provisions on jurisdictional immunity in the bill. (House Report, p. 27, 15 ILM 1398, 1412-1413 (1976).

Indeed, international practice is far from the ‘ideal’ situation to treat immunity from jurisdiction and immunity from execution in the same manner. Rather the contrary tendency can be made out, and this is so since a considerable period of time.

The ‘partially lowering of the barrier of immunity from execution’ cannot be compared with the situation under sections 1604, 1605-1607, for jurisdictional immunity, where we have a restrictive immunity doctrine that more or less reversed rule and exception, while the Act stated it in the old terms, putting the immunity rule and then the exceptions.

However, for immunity from execution, such a reversal of rule and exception has never taken place, and even the quite liberal statement in the legislative materials starts with saying that ‘the property of foreign states is absolutely immune from execution.’ In reality, this rule is still absolute in the sense that the exceptions are pointed, and few, while for jurisdictional immunities the exceptions are, so to
speak, all over the place, so that there is not much left of that ‘rule of immunity’ in section 1604. This is not my personal opinion but quite general tenor in the international law literature. To quote only Georges R. Delaume, an eminent expert on the matter.

Ideally the rules applicable to immunity from suit and immunity from execution should be coterminous in the sense that there should be no immunity from execution when there is no immunity from suit. In practice, however, this ideal is not always achieved.


After careful study of Anglo-American statutory construction and the law of evidence, we can apply, for immunity from execution, the common law standard of statutory interpretation that sees the general rule as a presumption. It follows that the burden of proof is upon the party that relies on an exception from the general rule.

—See, for example, Phipson and Elliott, Manual of the Law of Evidence (1980), p. 54: ‘The party who relies on an exception (or proviso) to some general rule imposing liability has the burden of proving that the exception applies to the case.’
The burden of proof is thus upon the plaintiff for demonstrating that one of the tight exceptions to the general rule of immunity from execution is applicable in the case.

If the plaintiff fails to prove the exception he relies upon satisfactorily to the court, the general rule acts like a presumption and the court is compelled to dismiss the action because of sovereign immunity from execution.

This is the general schema, and so far, it was principally confirmed by precedents. For example Behring International v. Imperial Iranian Air Force (Behring I), 475 F.Supp. 383, 395, which we discussed already earlier on, the court concluded:

Summarizing my conclusions with respect to the Immunities Act: First, only section 1610(d) curtails the immunity from prejudgment attachment enjoyed by the property of a foreign state under section 1609. Second, Behring has not shown that section 1610(d) is applicable here because it cannot point to any explicit waiver of immunity from such attachments.

—The judge however refused to grand immunity to Iran because he saw an implicit immunity waiver in the Friendship Treaty between the United States and Iran, of August 8, 1955: ‘With respect to the Treaty of Amity, my conclusions may be summarized as follows: First, it survives the Immunities Act. Second, the intent of the parties as of the time of the signing
governs. Third, it is my task to determine that intent in accordance with ordinary rules of construction. Fourth, I believe that the parties intended that they be treated like any private person. Pre-judgment attachment of the property was proper. Defendants motion for the release of restraints is denied’. (Id., 396).

The burden of proof for an implicit or explicit immunity waiver under the terms of §§1610(a)(1), 1610(b)(1), 1610(d) FSIA is thus entirely upon the plaintiff.

Usibus Destinata

Already under the absolute immunity doctrine in the United Kingdom, there are precedents to be found where, regarding measures of execution, courts were looking at what was the usage of the property in question.

d’arrêtes et de détentions par une mesure de justice quelconque ni d’aucune procédure judiciaire ‘in rem.’

When the property had been destined for public, governmental purposes, *usibus publicis destinata*, then it was immune from execution. This was also the traditional legal situation in France, Switzerland, and Egypt.


However, in the United States, the protection of property belonging to foreign states was even stricter compared to that standard, which created an *anomalous situation* as courts affirmed their jurisdiction for a lawsuit, but then declared the property immune from execution—and the plaintiffs had a judgment that was serving them practically nothing. Such divergence has intently been avoided under the FSIA, and the law giver intended to assimilate the requirements of section 1605(a)(4) FSIA, that we have discussed already, with the standard for the execution of a judgment under §§1610(a)(2), 1610(b)(2). The difference is obvious between the
pertinent facts under §1610(a)(2), on one hand, and those for agencies or instrumentalities, under §1610(b)(2), on the other.

Only for property belonging to foreign states themselves, the usage of the property is a relevant fact at issue.

— 28 U.S.C. §1610(a)(2) stipulates: ‘(2) the property is or was used for the commercial activity upon which the claim is based, … ’. 28 U.S.C. §1610(b)(2) stipulates: ‘(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.’

Generally speaking, under international law, the usage, or destination for usage, is a well-known criterion in the law of foreign sovereign immunity regarding the property of foreign states. Here, the repartition of the burden of proof is of particular interest.

The literature is not particularly rich to discuss this problem, or ask the question. One of the rare remarks I found on the subject was uttered by George R. Delaume, in Transnational Contracts, Vol. II, Booklet 14, XII., Text, §12.03, pp. 13, 14. He compared §1610(a)(2) FSIA with section 13(5) State Immunity Act 1978 of the United Kingdom, concluding that to
determine if the property was used for commercial or noncommercial purposes ‘is a delicate one and left open by the Foreign Sovereign Immunities Act. In a side note, Delaume concludes:

In order to anticipate the possible switching of assets and other manipulations §1610(a)(2) subjects to execution property which ‘is or was used’ by the relevant entity in connection with its commercial activity. The intent of this provision is clear. Its implementation, however, may not be free from difficulty since nothing is said about who should bear the burden of proof. (Id., Note 2/ ad §12.03).

In fact, there is no provision in the Act nor in the legislative materials that would indicate the allocation of the burden of proof under this section.

Notwithstanding this difficulty, it is possible to draw some conclusions from the mere drafting of the provisions in the Act, namely the relationship of sections 1609/1610, on one hand, and the relationship between 1610/1611, on the other. In other words, we can exhibit here the following hypothesis:

(1) Relationship between §1609 and §1610
If it is true that the exceptions provided in §1610 did only partially lower the rule of immunity contained in §1609, which is otherwise absolute, then the burden of proof for an exception to this rule, that is, that the
property was destined for commercial usage, is upon the plaintiff.

(2) Relationship between §1610 and §1611

If it is true that, with regard to §1611, the exception to an exception, the burden of proof is upon the foreign state, the burden of proof for the exception (to the general rule in §1609) is upon the plaintiff.

Relationship between §1609 and §1610

The solution of this problem depends on answering the question if immunity from execution, under the FSIA, is equally construed as an affirmative defense, for which the foreign state bears the burden of proof?

We have largely discussed the House Report statement to this effect, for jurisdictional immunities, and we have seen to what extent that original legislative intention was later on modified by federal jurisprudence. We concluded that, after all, the legislative materials were lacking precision to this effect, or even appeared to be ambiguous.

We have discussed already that for immunity from execution, this same statement cannot be taken into account because of its systematic placement in the legislative history. It was clearly to be found within the legal provisions valid only for jurisdictional
immunity of foreign states, §§1604, 1605-1607, and can for that reason not be applied to immunity from execution.

Thus, we have to examine the burden of proof for immunity from execution separately. However, in federal jurisprudence, the problem has not yet been identified to a point that clarity was established with regard to the burden of proof. In De Letelier v. Republic of Chile (Letelier III), 567 F.Supp. 1490 (S.D.N.Y. 1983), that we discussed earlier on, the district court asked if §1610(a)(2) could also be applied for the execution of a judgment under §1605(a)(5) FSIA.

The court concluded that §1610(a)(2) and §1610(a)(5) are not mutually exclusive and stated with regard to the burden of proof:

One would be hard pressed to exaggerate the difficulty of interpreting the Foreign Sovereign Immunities Act. As Judge Kaufmann recently explained, the statute was deliberately left vague, so as to provide only ‘very modest guidance’ on issues of preeminent importance. For answers to these most difficult questions, the authors of the law ‘decided to put [their] faith in the U.S. courts. (...) One point that does emerge clearly from the legislative history, however, is that the burden of establishing FSIA immunity lies with the party claiming it. H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., reprinted

The judge thus applied without hesitation the House Report rule of the burden of proof, that was stated for immunity from jurisdiction, to immunity from execution. However, it has to be seen that the court made that statement as an obiter dictum, because there was no litigation about facts, and the judge only ruled about legal questions. In addition, the question was, if the exception of §1610(a)(2) could be applied in the present case. (567 F.Supp. 1490, 1500-1503).

The apparent divergence of opinions regarding the repartition of the burden of proof shows that we cannot find the solution by only focusing on the relationship between §1609 and §1610 FSIA, but have to consider the relationship between §1610 and §1611 as well. And there is an additional argument that can be drawn from the drafting technique of §1610(a)(2); in my view this leads to imparting the burden of proof upon the plaintiff.

We have to carefully observe how this section is drafted; it is namely not drafted in a way that the usage of the property is to be considered in an abstract manner. The formulation of that section is
quite precise, in that it positively states that when the property ‘is or was used for the commercial activity,’ immunity from execution is to be denied.

Now let us look how its drafted in the Brussels Convention, Art. 3, that I mentioned before. Interestingly enough, we find precisely the opposite solution. The pertinent fact in this article is the governmental usage of the vessel or its cargo, while the rule, contained in Art. 1, states the equality of state ships and private ships.

To come back to the FSIA, when we thus consider that the rule stated in §1609 is not just a residual concept but an inflexible, absolute principle, we are compelled to impart the burden of proof on the plaintiff because he must ‘unblock the judicial pathway,’ so to speak, in overcoming the presumption of the property to being immune under the rule. This is a classical case where in the law of evidence, the one is charged with the burden of proof, who has to overcome the presumption.

To repeat it, this argument could not be forwarded for jurisdictional immunities, under §§1604, 1605-1607 FSIA, because here we have only a residual, restrictive immunity concept put up as the rule, and thus not a
presumption. In addition, it is to be seen that statutes usually only fixate already existing legal principles, and when they create new legal principles, such must be clearly follow from the wording of the statute, or its legislative history. This old principle in Anglo-American law was restated in Broadbent v. Organization of American States (OAS), 19 ILM 208, 212 (D.C.Cir. 1980), where the court quoted Sutherland Statutory Construction (1975), §51.08.

A statute which refers to the law of a subject generally adopts the law on the subject as of the time the law was invoked … including all the amendments and modifications of the law subsequent to the time the reference statute was enacted.

We have already seen that this was precisely the case with the FSIA, which was an enactment of an already existing legal situation that granted only restrictive immunity to foreign states with regard to immunity from jurisdiction. Thus the Act codified, in the terms of the court ‘what, in the period between 1946 and 1976, had come to be the immunity enjoyed by sovereign states—restrictive—immunity. (Id.).

However, with regard to immunity from execution, the Act expressly modified the prior juridical practice, thereby giving an excellent example
how in one statute, the two methods of statutory construction may be used.

Maxwell on the Interpretation of Statutes (1969) states that ‘... [the judge] may also consider whether a statute has intended to alter the law or to leave it exactly where it stood before.’ (pp. 47, 48).

**Relationship between §1610 and §1611**

To arrive at a more convincing argumentation, we need to have a closer look at the relationship between sections 1610 and 1611, but also 1609 of the Act.

**28 U.S.C. §1611**

§1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impending the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid or execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and
   (A) is of a military character, or
   (B) is under the control of a military authority or defense agency.
It is interesting to note that this section excludes without exception the disbursement of funds held by foreign governments with any international organization or monetary fund. This is to protect the functioning of international organizations situated in the United States, and is thereby an important add-on to the *International Organizations Immunities Act* of the United States, 22 U.S.C., §§288 ff.

**22 U.S.C. 288a(b) IOIA**

International Organizations, their property and their assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.

In *Broadbent v. OAS*, 19 ILM 208 (D.C.Cir. 1980), that we already mentioned, the Court of Appeals stated on the appeal of former employees of the OAS Secretary General who claimed damages for breach of contract. They invoked §288a(b) IOIA, ‘… shall enjoy the same immunity from suit … as enjoyed by foreign governments.’ Referring to the FSIA, they argued that jurisdictional immunity was restricted under that statute, which is why, they concluded the immunity of international organizations is equally restricted. The Court of Appeals rejected this argument,
considering the role and the function of international organizations:

An attempt by the courts of one nation to adjudicate the personal claims of international civil servants would entangle those courts in the internal administration of those organizations. Denial of immunity opens the door to divided decisions of the courts of different member states passing judgments on the rules, regulations, and decisions of the international bodies. Undercutting uniformity in the application of staff rules or regulations would undermine the ability of the organization to function effectively. (19 ILM 208, 217).

Within the system of the three sections, 1609, 1610, 1611, the last one is the exception from section 1610 or, in other words, the exception from the exception. This conclusion is inevitable when looking at the drafting technique and the wording, and it is confirmed by the House Report.

—‘Section 1611 exempts certain types of property from the immunity provisions of section 1610 relating to attachment and execution.’ House Report, p. 30, 15 ILM 1398, 1414 (1976).

The question who bears the burden of proof under section 1611 was already asked in federal jurisprudence, and it was answered conclusively; it is the foreign state who bears the burden of demonstrating with evidence to the court that an
exception from the exception applies in the case, thereby granting immunity to the foreign property. The first precedent was Behring International v. I.R.I.A.F. (Behring I), 475 F.Supp. 383 (D.N.J. 1979), UN-MAT., p. 479, 63 ILR 261 (1982), which we discussed earlier, where the question was answered in an obiter dictum. The plaintiff was seeking to attach property of the Iranian Air Force situated in the United States. The defendant invoked section 1611(b)(2)(B) in support of their immunity claim, and the judge held:

As was previously stated …, I have not felt it necessary to address all other arguments raised by I.R.I.A.F. in its moving papers. Most importantly, this opinion leaves unresolved the applicability of I.R.I.A.F.’s third argument, regarding 28 U.S.C. §1611(b)(2)(B) …

Although this argument raises serious questions about whether section 1611 governs in spite of prior international agreements, or is merely a codification of prior law, I need not resolve them now because there has been an utter failure of proof on the issue of who controls the property restrained by I.R.I.A.F. in support of this motion. The Verified Complaint alleges that all of the property now restrained in its warehouse is under Behring’s control and that Behring is neither a military authority nor a defense agency …

I.R.I.A.F., which has the burden of proving a defense of immunity, see n. 16, supra, has offered no testimony
of any other form of proof that contradicts these verified allegations. (475 F.Supp. 383, 395, note 30).

Then, in *Behring II*, 475 F.Supp. 396 (*D.N.J.* 1979), regarding the attachment of this property, the court again stated on the question of the burden of proof, and concluded:

Although I.R.I.A.F. raised its contentions with respect to section 1611(b) of the Act, I refrained from deciding that issue because the record was barren of any facts supporting its claim. In spite of the continued barrenness of the record, which again causes me to conclude that I.R.I.A.F. has not carried its burden of showing that its property is immune, I will address this argument in more detail at this time. (475 F.Supp. 396, 405).

The judge, inter alia, looked at the relationship between sections 1610 and 1611 and reasoned in the manner I have shown it above, concluding that ‘section 1611 applies notwithstanding only the exception to immunity set out within the act in section 1610.’

—The judge also examined the Treaty of Amity between the United States and Iran of August 8, 1955, but concluded that ‘the treaty is silent with respect to whether certain types of property are subject to attachment.’ (Id. 407).
Then, the judge added this important argument which makes sense as to the logic of statutory construction:

Section 1611 standing alone has no effect on those exception from without the Act virtue of the savings clause of section 1609. (Id., 406, note 12).

As to the evidence problems under section 1611(b)(2), the court concluded:

I.R.I.A.F. has not shown that either of these exceptions apply. There is no proof in the record of this case regarding whether the property sought to be attached is of a military character. It is therefore not immune from attachment under section 1611(b)(2)(A). Likewise, there is no evidence contradicting the allegations of Behring’s Verified Complaint and supporting affidavits that the property is in the control of Behring, which is neither a military authority nor a defense agency. The property therefore is not immune from attachment under section 1611(b)(2)(B). The only proof submitted by the defendant which addresses this issue is the affidavit of Colonel Khatami, filed May 4, 1979, at p. 2, to the effect that the materials were purchased for use in connection with I.R.I.A.F. military activities. At most, I.R.I.A.F. has raised an issue of fact with respect to only this last element.

I must conclude that I.R.I.A.F. has not sustained its burden of showing immunity from attachment. (Id., 407-408).
It is interesting to see that a district court, also in the present case, quoted the House Report’s statement which is to be found in the section regarding jurisdictional immunity, thereby implicating that that statement could possibly be, or is possibly valid, also for immunity from execution. To repeat it, my view is that such an analogy cannot and should not be drawn, neither from a point of view of statutory construction, nor under the existing principles of international law because of the different character and development of the two immunity rules.

In a recent precedent, Banque Compafina v. Banco de Guatemala, Desarrollo de Autopistas y Carreteras de Guatemala S.Al, Estoril Associated, Inc. and Devco Development Co., Inc., 583 F.Supp. 320 (S.D.N.Y. 1984), 23 ILM 782 (1984), this attribution of the burden of proof was confirmed with regard to §1611(b)(1) FSIA. Compafina, a Swiss bank, sought confirmation of an order of attachment rendered by the New York Supreme Court. Banco de Guatemala, the central bank of that country, had the action removed to the competent district court, under §1441(d) FSIA. The property in question was Banco de Guatemala’s, situated in the United States. The action was based upon a letter of credit issued by Banco de Guatemala
for securing certain promissory notes of defendant Desarrollo de Autopistas y Carreteras de Guatemala, S.A.

With respect to the relationship between sections 1609, 1610, 1611 FSIA, the district court explained:

Under the FSIA, a foreign state’s property in the United States is generally immune from attachment. §1609. Section 1610 provides some exceptions to this general rule, but §1611(b)(1) overrides these exceptions … (583 F.Supp. 320, 321, 23 ILM 782, 784-785)

The court thus confirmed my hypothesis that §1611 contains exceptions from the exceptions in §1610 FSIA. As to the allocation of the burden of proof, the judge held:

To come within §1611(b)(1), Banco de Guatemala must show that the attached funds were ‘held for its own account’, since Compafina does not dispute that Banco de Guatemala is a central bank within the meaning of §1611(b)(1).


The burden of proof for the fact that the funds were ‘held for its own account’ was thus upon the foreign state, or his agency or instrumentality,
respectively. This corresponds to the ruling in *Behring II*, where the same allocation of the burden of proof was held to exist under §1611(b)(2) FSIA.

It is interesting to observe in which way Banco de Guatemala proceeded to produce this evidence, particularly when you think, to anticipate here a bit, at the analogous provision, §13(5) State Immunity Act 1978, of the United Kingdom. The court took reference to the legal materials and explained regarding the criterion ‘held for its own account’:

> According to the relevant legislative history, funds held for a central bank’s ‘own account’ are ‘funds used or held in connection with central bank activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states. (583 F.Supp. 320, 322, 23 ILM 782, 785).

In order to prove that the funds were used or detained in connection with central bank activities, Banco de Guatemala provided an affidavit of his vice president, Oscar Alvarez that stated under oath:

**Affidavit Oscar Alvarez**

In connection with the central banking activities, Banco de Guatemala maintains certain assets in the United States, including gold reserves deposited with the Federal Reserve Bank of New York and funds on deposit with commercial banks in New York City. (Id.)
The president of the Federal Reserve Bank in New York produced another affidavit, confirming that Banco de Guatemala was the owner of the funds held with the Federal Reserve and that it did not use those reserves in connection with a commercial banking function, or any other commercial activity.

In addition, the president provided an important policy argument by stating that ‘if foreign central banks such as Banco de Guatemala become concerned that their United States assets are subject to attachment by private litigants, they might withdraw their dollar assets from this country, thereby destabilizing the dollar and the international monetary system. In addition, the affidavit stated under oath that ‘[t]he assets the Reserve Bank holds for the account of Banco de Guatemala are held solely for the account of Banco de Guatemala and are not held directly or indirectly for any other party … ‘. (Id., p. 322, 23 ILM 782, 786)

However, Compafina contested this evidence, referring to Alvarez’ affidavit and arguing that Banco de Guatemala regularly negotiated loans for import-export banks of various countries and that for this reason the funds were not held exclusively for the
central bank’s own account. The court carefully examined this argument and concluded:

However, the fact that Banco de Guatemala may receive these loans does not contradict Alvarez’ statement that Banco de Guatemala’s funds in the United States are held ‘[i]n connection with its central banking activities’, … nor does it tend to show that the funds in the United States are used for commercial activities. At his preliminary stage, Banco de Guatemala has established by a preponderance of evidence before the court that the attached funds are held for its own account.


While the court rejected Compafina’s argument from a point of view of civil procedure under the FSIA, it was important to see that the plaintiff can contradict the evidence of the central bank and that the court has to use the ordinary evaluation procedure for the evidence in the record. In this respect, §1611 makes no exception, in other words, central banks do not enjoy a higher level of credibility than any other defendant; this being said, the evidence produced by a central bank for claiming sovereign immunity can be contested by the plaintiff, who then of course bears the evidential burden, while
the legal burden here is upon the foreign state or its central bank for the criteria contained in §1611. Now, it is interesting to have a look at the analogous solution contained in §13(5) of the UK’s State Immunity Act 1978, which stipulates:

**U.K. State Immunity Act 1978**

(5) The head of a State’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State … his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

This provision contains a *proof facilitation* in favor of the foreign state; a simple certificate of the chief of a diplomatic mission, or his representative, suffices for establishing a presumption that the property of the foreign state serves governmental functions.

Hence, the burden of proof is upon the plaintiff for rebutting this presumption (‘unless the contrary is proved’) if he is to succeed with attaching those assets.


Analogous provisions are contained in §15(5) of Singapore’s *State Immunity Act 1979* and §14(4) of Pakistan’s *State Immunity Ordinance 1981*, while
Canada’s *State Immunity Act 1982* provides in §11(4) a solution that is almost identical with the one of the FSIA.

However, South Africa’s *Foreign States Immunities Act 87, 1981*, §§15(3), 14(1),(2) does not allow any attachment of central bank assets, except the bank has explicitly waived its immunity from execution, and that the waiver has been issued in a written document.

Under the FSIA, the formulation used by the court, that the central bank was able to prove, by a preponderance of the evidence, that the assets were held for its own account, shows that the ordinary evidence rules are applicable also for §1611 FSIA, in that a presumption always indicates that the party that must overcome it, bears the burden of proof; this burden is namely not attenuated.

The pleadings show this very illustratively in the present case record. There were no simple certificates around here, as in many precedents that regard immunity from jurisdiction; all that was produced were sworn affidavits from high or top officials of the foreign state or its central bank. This is important to note because it shows a cleavage between the
American and the Canadian immunity statutes, and the others, in this important matter regarding the problems of proof for immunity from execution.

This also confirms my hypothesis that the burden of proof question for immunity from execution needs to be carefully distinguished from the analogous question regarding immunity from jurisdiction, which means the question has to be seen within the legal framework of immunity from execution. The levels of immunity here simply are different and therefore, the two domains need to be carefully distinguished.

To conclude, American federal jurisprudence has clearly unveiled that for immunity from execution, within the framework of sections 1609, 1610, 1611 FSIA, the burden of proof for the exception from the exception, that is, §1611, is upon the foreign state for demonstrating by evidence satisfactorily to the court that the conditions of that section are fulfilled.

As a result, in the whole of the framework of these three sections, regarding to the relationship between the rule, §1609, and the exceptions, §1610, the burden of proof is upon the plaintiff that one of the exceptions to immunity from execution applies.
This is the inevitable result, simply as a matter of statutory logic. But there is another logical consequence: it is that the rule of sovereign immunity from execution, §1609, is a real presumption pro immunitatem, and not like §1604, a mere residual immunity concept.

We can thus conclude that the burden of proof for the usage of the property in question (usibus destinata), as a criterion contained in §§1610(a)(2),(b)(2) FSIA, is upon the plaintiff.

Conclusion

The burden of proof for the facts pertinent to the applicability of an exception to immunity from execution, sections 1609, 1610 FSIA, is principally upon the plaintiff. The general rule of foreign sovereign immunity regarding the execution into property belonging to foreign states, or their agencies and instrumentalities, §1609, is absolute in the sense that it is only partially lowered through the exceptions contained in §1610. This result is confirmed by the fact that for the exceptions from the exceptions, §1611, the burden of proof is upon the foreign state.
If a private merchant, plaintiff in an action against a foreign state, wants to execute a judgment against the foreign state by seizing any property of that state situated in the United States, and is to succeed, he must show by a preponderance of the evidence to the court that one of the exceptions contained in section 1610 is applicable. If the plaintiff fails to produce this evidence, the property of the foreign state is immune from execution, without the foreign state needing to plead any further motion, for the presumption of immunity will do its effect, §1610. That means that the rule is, *in dubio pro immunitatem*, as it was once suggested by Professor Dr. Georg Ress.


It is noteworthy that it was exactly this intriguing question that Dr. Ress asked me to examine, back in 1981, in the course of a seminar on international law held at the *Europa Institute*, Saarland University. Ress was not meeting with uniform acclaim when he voiced his idea that the doctrine of restrictive immunity was going to be limited to jurisdictional immunities and that in matters of execution against
property of foreign states, matters were not going to change. At that time, a real euphoria in international law circles was spreading about restraining the concept of sovereignty as much as possible. In this climate of change and transformation of international law, that was a striking characteristic of the 1970s and 80s, Ress pleaded for restraint, and for a more realistic attitude, often mentioning in his talks with me the late Lord Denning, Q.C., whom he found to be one of those brilliant judges who have marked the way of sovereign immunity restriction, not only in England, but worldwide. And Ress said that it was enough, and that a further restriction of foreign sovereign immunity was not going to be in accordance with the precepts of international law.

He gave me this interesting subject that later on was accepted as a doctoral thesis at the law faculty of the University of Geneva.

Ress was going to be right; his expert opinion, while marginal at the time, was going to become the prevailing doctrine in international law, that is, to not treat jurisdictional immunities and immunity from execution in one and the same manner, as unfortunately many American district judges thought was the correct approach. It was not. And I was
captivated by Ress’ stance on this matter to a point to tackle this immensely difficult problem.

**Conclusion**

**Immunity from Jurisdiction**

Under the *Sovereign Immunities Act 1976*, the burden of proof is principally upon the foreign state, or its agency or instrumentality, to produce evidence in support of their immunity claim.

This means that the foreign state has the right to begin with producing evidence and thus bears the evidential burden, and the legal or persuasive burden for demonstrating that despite the exceptions stipulated in the FSIA, immunity should apply.

However, this burden of proving the facts that are at issue for the immunity claim is not such that the foreign state had to disprove all immunity exceptions, but only those the plaintiff invoked in his complaint. Only on these elements in the record, the foreign state needs to make a *prima facie case*, to demonstrate that the action that is at the basis of the lawsuit before the court was one of a public, governmental character.

The foreign state needs to produce this prima evidence on two elements, that it is:
(i) that it is a foreign state, or an agency or instrumentality of a foreign state, §§1603(a),(b) FSIA;

(ii) that the action under scrutiny, that gave rise to the lawsuit, was of a public, governmental character.

As to the second element, the foreign state or its organism do not need to refute all the exceptions from immunity, but only those that the plaintiff has invoked as a basis of its claim against the foreign state. Once the foreign state has produced such prima facie evidence, the evidential burden shifts to the plaintiff for him to demonstrate that the particular exception, or exceptions, that he invoked, really are applicable, and this proof has then to overcome the *prima facie evidence*, which means the proof must be ‘more probably than not.’ In other words, the facts at issue regarding the applicability of an exception to immunity need to be proven by a *preponderance of the evidence*, satisfactorily to the court.

For all the other elements of the claim, especially personal jurisdiction and minimal contacts, service of process and default judgment, the burden of proof is entirely upon the plaintiff.

**Immunity from Execution**
The burden of proof in matters of immunity from execution is principally with the plaintiff. He can seize the property of a foreign state or one of its organisms only if he can prove, by a preponderance of the evidence, that an exception to the general rule applies.

Contrary to the situation that governs immunity from jurisdiction under the FSIA, here it’s the plaintiff who has the right to begin producing evidence, which means he is charged with the evidential burden, in order to demonstrate that an exception to the general rule of immunity applies.

Here it is thus the plaintiff who needs to establish a prima facie case, which the foreign state or its organism may overcome by invoking one of the exceptions from the exception, under §1611 FSIA. In this case, the burden of proof is upon the foreign state to demonstrate that such an exception from the exception applies.

In all cases of non liquet, that is, when the court doesn’t have enough evidence in the record or the evidence is contradictory to a point that no decision can be made upon it, the ultimate or legal burden, also called persuasive burden, is upon the plaintiff.
In other words, for immunity from execution, the immunity rule is still absolute in the sense that in a *non liquet* situation, the rule *in dubio pro immunitatem* is to be applied by the court.
Introduction

The late Jean-Flavien Lalive, from Lalive Lawyers in Geneva, wrote back in 1953 that much like the United States, the United Kingdom long applied an ‘absolute’ immunity doctrine to foreign sovereigns.


The particular reason for this doctrine, he argued, was that the Crown, under English common law, has a supreme status (‘The King can do no wrong’). In addition, after some leading cases, the doctrine of
stare decisis that is part of English common law, has built an almost insurmountable wall for drawing a foreign sovereign in front of an British tribunal.

The most famous of those precedents, *The Parlement Belge*, [1880] 5 P.D. 197, [1874-80] All. E.R. Rep. 104, is interesting in so far as judge Phillimore was trying to break through this wall, refusing to grant immunity to a postal package belonging to the King of Belgium, which was transported by officers of the Belgian marine, with the argument that the ship had been chartered *for commercial purposes*. However, the judgment was reversed by the Court of Appeals, stating that international comity required that courts had to deny competence ‘over the person of any sovereign or ambassador of any other State or over public property of any State which is destined to public use.’

Sir Ian Sinclair observed that, at first sight, this judgment was not incompatible with the restrictive immunity doctrine, for it was first of all the public usage of the ship that let the court conclude pro immunitatem. Sinclair’s view is not merely speculative in the sense that, if the ship really had been used exclusively for private purposes, immunity would have had to be denied.
This is interesting also from another point of view. Some legal scholars in the United States have quoted precedents in support of an absolute immunity rule, while such a rule was never proven to have existed. To give an example, it is astonishing to see that the very first precedent, *The Schooner Exchange v. M’Faddon and Others, 11 U.S. [7 Cranch] 116 (1812)*, often is quoted in support of an ‘absolute’ doctrine of immunity, while when you really read this brilliant judgment, you see that the very contrary is true. The vessel in question, the ‘Exchange’ first belonged to the defendants John McFaddon and William Greetham, two American citizens. While on high seas, the vessel was captured by officers ‘acting under the decrees and orders of Napoleon, Emperor of the French.’ Upon which the vessel was armed by Napoleon and damaged. When the vessel was in the port of Philadelphia for repair, the two owners tried to attach it, and the action went up to the Supreme Court of the United States. Let me quote here the opinions of Dallas, the district attorney, and Chief Justice Marshall, to show how the evidence situation was in this case:
The Schooner Exchange (District Attorney Dallas)
As to the proof of the public character of the vessel. The flag, the public commission, and the possession of the officer, have always been sufficient evidence. (...) It is proved that she arrived in distress; that she had been sent to a distant mission with a military cargo. (11 U.S. 116, 121).

The Schooner Exchange (Chief Justice Marshall)
In the present state of the evidence and proceedings, ‘The Exchange’ must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact, that she is now a national armed vessel, commissioned by, and in the service of the Emperor of France. The evidence of this fact is not controverted. (Id., p. 146).

There was thus no question about whatsoever ‘absolute’ immunity doctrine. Under the FSIA, the decision would have been exactly the same. The Privy Council stated in The Philippine Admiral, referring to The Schooner Exchange:

It was submitted in argument that if a sovereign engaged in trade he would enjoy no immunity in respect of his trading operations; but the judgment left that question open. (Id., p. 391).

It was only about a hundred years later that American federal jurisprudence changed because back in 1812, ships were generally owned by private
persons, as at that time it was not yet common that nation states behaved like private traders on the public market place. In *Berizzi Brothers v. Steamship Pesaro*, 271 U.S. 562, 46 S.Ct. 611 (1926), the United States Supreme Court distinguished the case from the *Schooner Exchange*, and Judge Van Devanter wrote:

> It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later. The decision in *The Exchange* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships. (271 U.S. 562, 573-574).


The Court of Appeals granted the private German vessel *Porto Alexandre* immunity, despite the fact that the ship had been chartered exclusively for
commercial purposes. The court said it could not distinguish the case from *The Parlement Belge*.

While a certain revision of precedents was proposed by Lords Thankerton and Maugham in *The Christina*, a real change only came with *The Philippine Admiral*, where the Privy Council refused for the first time to follow the precedent *The Porto Alexandre*.

—*The Christina*, [1938] A.C. 484. While Lords Atkin and Wright were in favor of an absolute immunity doctrine, Lord Maugham stated in an obiter dictum that ‘[i]f *The Parlement Belge* had been used solely for trading purposes, the decision would have been the other way …’ (Id., 519). Lord Macmillan held that there was ‘no proved consensus of international opinion or practice in favor of an absolute immunity doctrine for ships that are used entirely or principally for commercial purposes. (Id., 498).

—*The Philippine Admiral*, [1976] 1 All E.R. 78. We have to mention, however, Lord Denning’s brilliant minority opinions that were always in favor of adopting the restrictive immunity doctrine. See, for example, Rahimtoola v. Nizam of Hyderabad, [1957] 3 W.L.R. 884, 903-914, [1938] A.C. 379 and Thai-Europe Tapioca Service Ltd. v. Government of Pakistan et al., [1975] 3 All. E.R. 961.

Thus, if ever we admit something like an absolute immunity doctrine, it was of a *temporary nature* and was abandoned later on, at least for actions *in rem* when vessels belonging to foreign states were exclusively used for private, commercial purposes.

After this precedent, we can thus observe a different handling of actions *in rem* and action *in personam*, in English case law.


One year later, this last anomaly was removed by the important case *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 All E.R. 881, [1977] 2 W.L.R. 356, [1977] 1 Lloyd’s Rep. 581 (C.A.), [1977] 1 Q.B. 529, 16 ILM 471 (1977), 64 ILR 111 (1983). It was through this leading case that the restrictive immunity doctrine was also recognized for actions in personam against foreign states. Exactly eleven months later, on the 13th December 1977, the *State Immunity Bill* was introduced in the House of Lords by the Lord Chancellor. (Hansard, H.L. Debates, Vol. 388, cols 51-78).

—It’s an interesting coincidence that the decision of the German Constitutional Court (Beschluss des Bundesverfassungsgerichts zu Fragen der Staatenimmunität), dates the same day, 38 ZaöRV 242 (1978), 65 ILR 146 (1984).
During the Second Reading, the Lord Chancellor stated:

The Bill represents a major change in our law, and one which I believe to be highly desirable, long overdue and to the benefit of United Kingdom nationals and companies. (Id., col. 52).

There were in fact two reasons why the United Kingdom, a bit hurriedly, passed this bill. There was first of all a commercial interest, as from the moment the United States had the *Foreign Sovereign Immunities Act 1976* in force, the British government had attributed ‘an element of urgency’ to passing a statute on their own.


The FSIA had been considered a legislation favorable to the international commerce and trading between private merchants and foreign states. The main concern of the British government was namely that through this enactment, international financial transactions might shift from London to New York.

—See also Clark C. Siewert, Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the

In addition, the British enactment was considered to enable the United Kingdom to ratify the Brussels Convention of 19 April 1926, as well as the European Convention on State Immunity, of 16 May 1972. This is why the State Immunity Act 1978 entered into force already on the 22nd of November 1978.


—See the Solicitor-General, on the 3rd of May, 1978, Hansard, H.C. Debates, Vol. 949, col. 409. The Convention was ratified by the United Kingdom equally on the 3rd of July 1979, UKTS 74 (1979), Bowman & Harris, id., 362 (Treaty 599).

Construction of the Act

The State Immunity Act 1978 states the general rule of immunity in section 1.(1):

1. General Immunity from Jurisdiction
   (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

The numerous exceptions to immunity from jurisdiction are to be found in sections 2 to 11 of the Act. The rule of immunity from execution is to be found, a bit hidden, under ‘other procedural privileges’, in §13(2) STIA 1978:

(2) Subject to subsections (3) and (4) below –
   (a) relief shall not be given against a State by way of injunction or other for specific performance or for the recovery of land or other property; and
   (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

While an executory measure under §13(2)(a) is only possible with the written consent of the foreign state, §13(3) STIA, section 13(4) provides, with regard to subsection (2)(b), an exception ‘in respect of property which is for the time being in use or intended for use for commercial purposes.’
(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

Contrary to the American Act, the STIA 1978 contains, in section 13(5), a burden of proof rule regarding the usage of the state property in question. As we shall see further down, this section reveals the allocation of the burden of proof.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if –

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of the State’s diplomatic mission in the United Kingdom, or the person for the time being performing this function, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that the property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.
Immunity from Jurisdiction

General Considerations

Contrary to the American Act, there is nothing to be found how the STIA 1978 allocates the burden of proof for jurisdictional immunity; the legislative history is silent and there are no precedents at this point.


It is even doubtful if a British judge can consider the legal materials for interpreting a statute. In principle, all interpretation is based upon the terms of the statute itself; however it seems from what Maxwell on the Interpretation of Statutes (1969) write, the legislative history might be considered as an additional element for the interpretation of a statute:

‘The Court’, said Sir George Jessel, M.R., ‘is not to be oblivious … of the history of law and legislation. Although the Court is not at liberty to construe and Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present
Court, what the object of the legislation was, the Court is to see whether the terms of the section are such as fair to carry out that object and no other, and to read the section with a view to finding out what it means, and not with a view to extending it to something that was not intended. (Quoting Holme v. Guy, [1877], 5 Ch.D. 901, 905).

In the interpretation of statutes, the interpreter may call to his aid all those external or historical facts which are necessary for comprehension of the subject-matter, and may also consider whether a statute was intended to alter the law or to leave it exactly where it stood before. (Maxwell on the Interpretation of Statutes (1969), pp. 47, 48).

**The Rule and Exception Principle**

I have already pointed out for the American enactment that the rule and exception principle, generally considered in common law as a valid argument for finding the burden of proof, is misleading in matters of foreign sovereign immunity litigation because the drafting technique of the immunity acts follows merely historical developments, which is why it is a fallacy to draw any conclusions from it for the allocation of the burden of proof. In so far, the literature speaks about a ‘common drafting technique.’

—See, for example, Georges R. Delaume, The State Immunity Act of the United Kingdom, 73 AJIL 185, 186 (1979), Clark C.
At first sight, it’s of course immunity from jurisdiction that is the rule under §§1(1) STIA 1978 and 1604 FSIA. The exceptions, §§2-11 STIA 1978, 1605-1607 FSIA, are so numerous that there is not much left from the rule. Lord Denning found the opening clause ‘quite out of date;’ he meant the rule of immunity, and qualified it as a ‘residual concept’ which is really a smart formulation for what could be called an anomaly. (See Hansard, H.L. Debates, Vol., 388, col 71 of 17th January 1978). Normally, the plaintiff bears the burden of proof for an exception to a general rule.


But under the FSIA we have seen that this is valid only for personal jurisdiction, not for subject matter jurisdiction, i.e, the absence of sovereign immunity, as it’s the foreign state who bears the burden of proof for its immunity claim, in matters of immunity from jurisdiction.
Hence, it’s not the rule-and-exception schema that provides us any valid answers as to the allocation of the burden of proof in matters of immunity from jurisdiction. In other words, if we applied the rule-and-exception principle for finding the burden of proof, we would have to put the burden of proof squarely upon the plaintiff in all matters of foreign sovereign immunity litigation. It is interesting, in this context, what the Committee on International Law of the Association of the Bar of the City of New York stated:

It is evident that the bill intends that the claim of sovereign immunity be raised as an affirmative defense by the foreign state. Nevertheless, in form, sovereign immunity is codified as the general rule (§1604), with nonimmunity the exception. In the ordinary course, the burden of proving an exception in a statute is on its proponent. It would therefore be appropriate for the reports of the respective House and Senate committees to include clear language stating the intent of the Congress to place the burden of proving entitlement to immunity on the foreign state, notwithstanding the general rule to the contrary. In substance, the initial burden of going forward, as well as the ultimate burden of proof, would rest with the sovereign. Notwithstanding, where the sovereign sustains its initial burden, the burden of going forward would shift to the plaintiff. The shifting burden is the general standard in litigation and should be reflected in the legislative
history as having been embraced by the legislation. (Hearings on H.R. 11315, Jurisdiction of U.S. Courts).

This statement was actually giving the incentive to insert a passage in the House Report to the FSIA, that we extensively discussed previously in this study, while it was also said, which sounded almost like an apology, that ‘[t]he chapter is thus cast in a manner consistent with the way in which the law of sovereign immunity has developed.’ (H.R. Report 11315, p. 17, 15 ILM 1398, 1407 (1976). This was also acknowledged by the American federal jurisprudence.

—See, for example, the decision of the Court of Appeals of the 2nd Circuit in Verlinden v. Central Bank of Nigeria, 647 F.2d 320, 326-327, note 20 (2d Cir. 1981) where the court stated: ‘Some confusion on this point arises from §1604, which is drafted to create a general principle of immunity, not a presumption of amenability which defendant most overcome. The reasons for this aspect of the Act’s structure are historical.’

Now, the United Kingdom enactment doesn’t construe sovereign immunity as an affirmative defense, as the House Report stated it for the FSIA, while even so, it was clarified by later jurisprudence that this formulation was, once again, an overly joyful attempt by the American Congress to attract as many immunity actions as possible to the American forum.
If that had been admitted, a violation of international law would have been probably the result.

—This is why the Supreme Court pulled the handbrake in Verlinden and that is, in turn, why the difference between the FSIA and the other immunity statutes is not as striking as it appears on first sight.

That is why we are concluding here that these arguments cannot provide a valid basis for drawing any conclusions as to the burden of proof under the British Act. The most probable reason why the STIA 1978 was drafted in the same way as the FSIA is that historical and psychological considerations primed over a strictly logical drafting that would more clearly show the allocation of the burden of proof.

Who is to blame? When we see that also all international conventions on sovereign immunity apply the same scheme of rule and exception, we can more easily understand why all national law givers, those who have drafted immunity statutes, applied this same schema.

—See Art. 15 of the European Convention on State Immunity (1972) which states: ‘Un État contractant bénéficie de l’immunité de juridiction devant les tribunaux d’un autre État contractant si la procédure ne relève pas des articles 1 à 14; le tribunal ne peut connaître d’une telle procédure même lorsque l’État ne comparaît pas.’ See also Charles Vallée, A propos de la
They simply wanted to comply with the international standard, which is something not uncommon to realize for the international law expert. States and governments do not behave in a purely logical manner, just as human beings don’t. They are also bound by conventions, habits and customs, and by traditions, and that influences their law making. While to the purely forum-based lawyer, this may sound strangely exotic, it’s the reality of international law. It is interesting, in this context, what Gamal Moursi Badr wrote in *State Immunity* (1984), 133-134:

States of all ideological persuasions have linked immunity to sovereignty for so long that the issue has become for them one charged with emotion. They cannot easily bring themselves to face the fact of the withering away of state immunity. It appears that the very process of negating immunity is helped by continuing to pay lip service to the principle of immunity, as the seven most recent instruments on the subject do in the face of compelling evidence to the contrary.

In addition, there are systemic arguments that speak against an application of the rule-and-exception principle for elucidating the burden of proof in
matters of immunity from jurisdiction. First of all, a general rule of immunity, as a rule of international law, has never been proven. Badr writes:

Moreover, the existence in customary international law of an autonomous rule requiring the grant of immunity to foreign states is not generally recognized. The rules in this area of international law are but the reflection of the rules of the internal laws of the various states, the most restrictive and the least admitting of immunity among them tending to acquire universality through the ripple effect of reciprocal treatment. (Id., 135).

But there is no general agreement on the opposite rule either, that is, that states have total jurisdiction, and that foreign states only enjoy a residual immunity for certain well-defined cases.

Such a ‘positive list’ was in fact favored in the international law literature by Weiss, Lauterpacht, Lalive and other experts on foreign sovereign immunity. The problem was also quite extensively discussed by Sompong Sucharitkul, General Rapporteur for the International Law Commission’s Draft Convention on Immunities of Foreign States and their Property, in his course at the Asser Institute of International Law, Developments and prospects of the Doctrine of State Immunity (1982).
In the first place, a rule of international law on State immunity could start from the very beginning as a rule of State immunity, or it could go back beyond and before the beginning of State immunity. It could trace the origin of State immunity beyond sovereignty and equality of States and even beyond consent to a more basic or more fundamental norm like ‘pacta sunt servanda’ or the ‘undivided and indivisible concept of sovereignty’ and to regard immunity not as a rule, nor less a general rule of law, but more appropriately from the ultimate viewpoint of originality as an exception to a more basic rule of territorial sovereignty.


Hence, with regard to the burden of proof, there is certainly an impact of the drafting technique on its allocation. Dr. Sucharitkul admits that the drafting technique does have an impact upon the burden of proof situation under a convention or statute on sovereign immunity:

Two or three approaches are open. Either starting with exploring cases of nonimmunity or beginning with the attempt to identify sovereign acts covered by immunity, or indeed working simultaneously on both categories until reaching the border-line cases. The priority of undertaking the study of the cases of non-immunity first entails the effect of maintaining the burden of proof
which is in favour of the general rule and rather against
the exception, whereas to shift the emphasis would
mean having to furnish evidence to establish the
existence of State immunity all over again in every case,
a process which has been undergone once over when
formulating the general rule. (Id.)

To start from the proposition of a general rule of State
immunity, is more in line with the established practice,
whereas to require proof of international law for every
type of State activity said to be immune might run
counter to the very concept of sovereignty of States. (Id.,
note 36).

The problem was even more clearly identified by
Rosalynn Higgins in her course at the same
institution. She asked the question empathically:

What is the rule and what is the exception? Is sovereign
immunity still the basic rule, with the exercise of
jurisdiction an (expanding) exception? Or is it really the
other way around?

The European Convention of 1972, the United States
Act of 1976 and the United Kingdom Act of 1978 all
speak of immunity as the basic rule, and indicate certain
exceptions. But as the exceptions increase in scope, the
truth is that we begin to think in other terms. We begin
to think of immunity as not normally being allowed
unless - exceptionally—the acts are acta iure imperii.

—Rosalynn Higgins, Certain Unresolved Aspects of the Law of
There was no doubt, for either Sucharitkul, nor Higgins that, in reality, the rule is the total and unrestrained territorial jurisdiction of the forum state, and immunity is the exception from this rule.

—See Sompong Sucharitkul, Developments and Prospects of the Doctrine of State Immunity. Some Aspects of Codification and Progressive Development, XXIX NETH. INT’L L. REV. 252, 261 (1982): ‘It cannot be gainsaid that the doctrine of State immunity is an exception or a qualification of a more basic norm of jurisdiction or imperium or sovereign power of the State.’

—See Rosalynn Higgins, Certain Unresolved Aspects of the Law of State Immunity, XXIX NETH. INT’L L. REV. 265, 270, 271, note 51 (1982): ‘It is very easy to elevate sovereign immunity into a superior principle of international law and to lose sight of the essential reality that it is an exception to the normal doctrine of jurisdiction. It is a derogation from the normal rule of territorial sovereignty.’

As we have seen, this was actually the point of departure in the classic precedent The Schooner Exchange, 11 U.S. [7 Cranch] 116, 135 (1812), where Chief Justice Marshall explained:

The jurisdiction of the courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the same extent, in that power which could impose such
restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

Contrary to many misleading comments in the international law literature that try to justify the early roots of an assumed absolute rule of sovereign immunity, there is no doubt that, for Chief Justice Marshall, not immunity from jurisdiction was the rule, but the principally unlimited jurisdiction (competence) of the state within its territory, for such jurisdiction is a direct consequence of a state’s sovereignty. Also Wilfried Schaumann and Walter J. Habscheid have shown in their report for the German Society of International law that territorial competence is the rule and immunity from jurisdiction the exception. This result was confirmed by subsequent research.

It is equally of interest what M. Sucharitkul states in a footnote to the text:

To start from the proposition of a general rule of State immunity is more in line with the established practice, whereas to require proof of international law for every type of State activity said to be immune might run counter to the very concept of sovereignty of States. (XXIX NETH.INT’L L.REV. 252, 261, note 36 (1982).

Whatever we may think about this rather theoretical discussion about rule and exception, it doesn’t help much for assessing the burden of proof. The British Act poses immunity as the general rule. This was also the approach of the International Law Commission (ILC) in their United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) and of the other statutes on sovereign immunity to be discussed further down in this study.

It is for this reason perhaps more helpful to take a meticulous and pragmatic stance on the matter, as it was suggested by Francis A. Mann in The State Immunity Act 1978, 50 BRIT.Y.B.INT’L L. 43-62, at 50 (1979):

What the legislator described as exceptions represents a very broad sector of State activity. Its limits should be so drawn as to fit the legislative purpose behind each
provision rather than the drafting technique that the legislator followed. The so-called exceptions are a far-reaching group of provisions which are not subordinate, but equal, to and on the same level as the so-called principle. Hence the rule usually applicable to the construction of exceptions does not fit.

This argument is so much the more convincing when considering the fact that there were no definite reasons why the British Act was drafted in that way, and not the other way around. The principle, it is true, was formulated as a general rule of immunity from jurisdiction, §1(1) STIA 1978, and the admittedly numerous conditions under which courts enjoy competence over foreign states were drafted as exceptions from that rule.

But that does not per se indicate an intention of the law maker to rule on the burden of proof, if such intention cannot be shown to be reflected in the legislative history. While from a point of view of traditional statute construction, the drafting technique in the STIA 1978, as under the other statutes, would indicate that the ultimate burden lies with the plaintiff to demonstrate that an exception to the general rule applies, F.A. Mann shows that this rule is not applicable for the British Act.
In fact, the question is more subtle than that, it is what is to be applied in the case of a non liquet situation, is it in dubio pro immunitatem, recurring to the general rule, or is it in dubio contra immunitatem, because the burden is ultimately upon the state to prove that its immunity claim is founded?

In England it has frequently been a technique of statutory interpretation to say that an exception does not derogate from the principle to a greater extent than the words used strictly require, that, in other words, in case of doubt the principle rather than the exception should be held to apply. But this is not invariably so and should certainly not be so in the present case. (Id.)

We have seen previously, in our discussion of the American Act, that Congress well had foreseen this problem, which is why an explanative passage regarding the burden of proof was inserted in the legislative materials. We also have seen that this rule was later modified by federal jurisprudence. In a more recent American precedent, McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985), the Court of Appeals of the 8th Circuit stated that the FSIA ‘recognizes that sovereign immunity is the exception, rather than the rule, and should be
confined to a foreign sovereign’s truly governmental acts … . (758 F.2d 341, 348).

Under the British Act, the situation can’t be different. While the British parliament has not provided any guidelines as to the burden of proof in the marginal notes, nor is there anything to be found in the parliamentary debates, this lack of evidence of a legislative intention must not lead us to conclude to the opposite, that is, that the allocation of the burden of proof follows the drafting technique.

—The annotated version of the STIA 1978 is to be found in Halsbury’s Statutes if England, 3d ed. Vol. 48 (1979), pp. 85 ff.

As to the parliamentary debates, I have gone through all of them, and have reported earlier on in this text, with precise references, that nothing is to be found in the whole of the legislative history of the STIA 1978.

As Francis A. Mann put it:

Although the marginal note to section 1 speaks of the ‘general immunity from jurisdiction’ and this paper, therefore, speaks of a ‘principle’ and ‘exceptions’, the preceding review proves that it is only a residual immunity which a foreign State can claim in relatively few cases. The denial of immunity is so far-reaching that it is more appropriate to treat the ‘exceptions’ as distinct categories. Accordingly it is submitted that what may be described as the usual rules about proving exceptions should not be applicable. (The State Immunity Act, op.cit., p. 62 (1979)
The Restrictive Immunity Doctrine

For the United States’ *Foreign Sovereign Immunities Act, 1976*, the *House Report* put up something like an evidence rule that contains some guidelines for the burden of proof. Such an interpretative guideline is not to be found for the other statutes examined in this study.

At the time I wrote my thesis on the subject, the literature was completely confused, besides a few marked statements by F. A. Mann, Rosalyn Higgins and Gamal Moursi Badr, but that was not enough to prove an evidence rule that the allocation of the burden of proof in matters of sovereign immunity litigation had became a standard under international law.

Most authors discussed matters along the lines of any real or invented rule-and-exception principle, without seeing that their conclusions were hopelessly circular.

This means in plain English that the *rule-and-exception principle does not help at all for finding the answer to the delicate problem of the burden of proof*. One could in fact legitimize quite arbitrarily the two extreme positions, with a slightly better
argumentation basis perhaps for the statement of jurisdiction as the rule and sovereign immunity as the exception.

As a result I reasoned that to arrive at a clear and unambiguous repartition of the burden of proof in cases involving sovereign immunity, only a scrupulous examination of the restrictive immunity concept or doctrine could serve. If it can be said that this concept only secures, in today’s international law practice, a residual immunity rule which grants immunity only in some exceptional cases, the burden of proof would principally be on the foreign state to show that such an exceptional case of immunity exists.

Contrary to the solution under the FSIA 1976 which comes to exactly this result, the situation is more difficult to decide under the STIA 1978 and the other statutes, which are all more or less closely drafted with the British example in mind, since the legislator was not clarifying this point in the parliamentary debates. But this lacuna is largely compensated by a long list of precedents in English case law where Lord Denning’s carefully drafted minority opinions had powerfully prepared the eventual shift of the English international law
doctrine on sovereign immunity to the modern standard of a restrictive concept. The question to decide is—

(i) Does the restrictive immunity rule grant immunity as a general rule, admitting competence of courts against foreign states only in some exceptional cases?

or—

(ii) Does the restrictive immunity rule rather deny immunity from jurisdiction for foreign states, conceding the protection of immunity only in a quite limited range of activities and for governmental acts in the strict sense?

This is not to confuse with the question of what is the rule and what the exception, formulated in a somewhat different way. I do not proceed examining of what is or what should be the rule and the exception (immunity or competence) in today’s international law practice. What I try to find out is whether there was in English case law, in matters of foreign sovereign immunity, a fundamental shift which could be said to have abandoned a former absolute immunity concept (although this doctrine has never been proved as being a rule of international
law), and adopted a new restrictive immunity concept granting only a residual immunity from jurisdiction, so that immunity is granted only if the foreign state has acted in the form of a public, sovereign act (de iure imperii).

The burden of proof would then principally be on the foreign state to show that *prima facie an act of a public, sovereign nature forms the basis of the action*. In the original thesis work for the University of Geneva, we demonstrated that this fundamental shift indeed occurred in British case law and that it prepared another fundamental shift, the one namely in international law practice. To this end, we examined the following precedents:

Examination of the Precedents

As we have seen that the rule-and-exception principle doesn’t fit to determine the burden of proof, we are suggesting here that the restrictive immunity doctrine might provide the solution in that we may be able to draw direct conclusions from it, for the allocation of the burden of proof.

—As Rosalynn Higgins observes in her course at the Asser institute: ‘The question of burden of proof is of course closely linked to the problem of identifying the underlying basis of sovereign immunity.’ Certain Unresolved Aspects of the Law of State Immunity, XXIX NETH.INT’L L.REV. 265, 270, 271 (1982).

In this pursuit, we need to retrace the formation of the restrictive immunity doctrine in British case law. Lord Denning unveiled as early as in 1958 the problems resulting from the former absolute immunity doctrine in Britain and the unsatisfactory situation of dealing with litigations arising from state trading activities of foreign states, under British law.

—Lord Denning (1899-1999), Master of the Rolls (M.R.) was the President of the Civil Division of the Court of Appeals in England. He was not only a most highly considered jurist and judge in England, but also a renowned writer. The bibliography of his publications extends over a period of more than thirty years. Some examples are Freedom of the Law (1949/1977) and Landmarks of the Law (1984).
Rahimtoola v. Nizam of Hyderabad, [1957] 3 All E.R. 441, [1957] 3 W.L.R. 884, [1958] A.C. 379, was an appeal case where the appellant, at the time High Commissioner of Pakistan in London, was sued by the Nizam and the government of Hyderabad because of a financial transaction he received that was not authorized by the Nizam. Rahimtoola claimed immunity in front of the High Court and the House of Lords was evaluating that immunity claim. The transaction was based upon a contract between Rahimtoola and one of the ministers of the Pakistani government.

The House of Lords granted immunity, but for different motives than the High Court. The majority of the lords followed the absolute immunity doctrine. However, Lord Denning submitted a minority opinion:

If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but, if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own department or agencies or by setting up separate legal entities), and
it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity. ([1958] A.C. 379, 422, [1957] 3 W.L.R. 884, 913.

While Lord Denning’s opinion was isolated at the time in England, it has animated a juridical discussion and prepared for the change that was to come later with the immunity act. Still in 1975, the opinion of Lord Denning in *Thai-Europe Tapioca Service Ltd v. Government of Pakistan, Ministry of Food and Agricultural Directorate of Agricultural Supplies*, [1975] 3 All E R 961, [1975] 1 W.L.R. 1485 (C.A.), 64 ILR 81 (1983), was a minority ruling. The German plaintiffs had chartered a ship to a Polish company for transporting fertilizer from Poland to Karachi, Pakistan. When the ship was discharged in the port of Karachi, it was gravely damaged by a raid of the Indian air force. The plaintiffs asked for an indemnity with the *West Pakistan Agricultural Development Corporation*, for which account the cargo had been effected. Before service of process, the Pakistani government had dissolved the organism; it was replaced by defendant, the department of the ministry of agriculture. Pakistan claimed sovereign immunity. As in *Rahimtoola*, the Court of Appeals granted
immunity unanimously, however Lord Denning, once again, contradicted:

[A] foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if it has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market. [1975] 1 W.L.R. 1585, 1491.

It is interesting to note the number of exceptions that Lord Denning cited in his judgment, and when you look at that, you really get the impression that rule and exception have been reversed over time, and that the putting up of rules of immunity in all statutes and conventions on sovereign immunity has more to do with international diplomacy, tact and courtesy than with responsible and rational law making. In fact, a reversal of the British jurisprudence is clearly to be seen from about The Philippine Admiral and Trendtex.

The Privy Council ruling in The Owners of the Ship Philippine Admiral v. Wallem Shipping (Hong Kong) Ltd. can be said to represent a historical landmark, to
paraphrase Ian Sinclair, an eminent expert on the development of the restrictive immunity doctrine in Britain.


It was an action in rem against the ship Philippine Admiral which belonged to the government of the Philippines. The plaintiff asked for payment of services rendered to the ship. The Privy Council refused to grant the ship immunity for the reason that it had been chartered for commercial purposes. Lord Cross of Chelsea, delivering the judgement of the Lords, stated:

This restrictive theory seeks to draw a distinction between acts of a state which are done jure imperii and acts done by it jure gestionis and accords the foreign state no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head. [1976] 2 W.L.R. 214, 228.

This formulation of the restrictive immunity doctrine doesn’t let us see the burden of proof yet, it is true, but there is a much more interesting passage to be found in the pleadings of the appellee that was not contradicted by the court:
Sovereign immunity from suit will not be granted in proceedings in rem against a ship, even where a foreign Sovereign State is the registered owner of the ship, unless the ship is operated or required to be operated for public or national purposes—publicis usibus destinata. [1977] A.C. 373, 380.

**Examination of the Restrictive Immunity Doctrine**


—In 1975, the Nigerian government ordered about twenty million metric tons of cement from merchants all over the world in order to restore the infrastructure of the country. The cement had to be delivered within a delay of twelve months. However, the average cement importation of Nigeria was about two million metric tons per year. The arrival of ten times this quantity caused a real disaster. All Nigerian ports were full with waiting ships; only in the port of Lagos/Apapa between 300 and 400 ships waited for delivery. This cement crisis provoked a coup d’etat with a change of government in Nigeria. The new military government raised an embargo on the importation of cement and refused to pay indemnities to vessels discharging their load without a particular government certificate. Lord Denning’s minority vote in the Trendtex case gives the best statement of facts. Other cases related to the Nigerian cement catastrophe are: National American

High Court judge Donaldson stated that ‘[t]he onus of establishing this immunity is upon the Central Bank.’ [1977] 1 Lloyd’s Rep. 581, 583, col. 2. Lord Denning’s appeal opinion then reveals the reasons for this particular evidence rule:

(ii) The doctrine of restrictive immunity.
In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its departments of state—or creates its own legal entities—which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have
departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as jure imperii, but no immunity to acts of a commercial nature, jure gestionis.

It is important to note two essential remarks which are contained in this statement:

**A New Restrictive Immunity Rule**

The new restrictive immunity doctrine has replaced the former absolute doctrine. This new doctrine is thus not only a kind of attenuation of the old rule, admitting a further exception to this rule (no immunity for commercial activities), but a new independent rule of international law with a specific content.

**It is a New Independent Rule**

The content of this restrictive immunity rule is that it grants immunity only in the case that the act in question was of a public, governmental nature. It thus reaffirms the old original rule that a forum state waives the jurisdiction it enjoys over its property only in favor of foreign sovereigns or sovereign states acting in their sovereign capacities.
—This rule has already been pointed out in the old precedent
The Schooner Exchange v. M’Faddon (1812), 11 U.S. [7 Cranch] 116, 135 (1812). It has nothing to do with what later has been
called the absolute immunity doctrine, for there is no doubt—
even under the new restrictive immunity rule—that a forum
state is impeded by international law from touching the acts of
a foreign sovereign (state) when these acts are of a public,
governmental nature.

As a result, it can be argued that the new restrictive
immunity rule contains in itself an allocation of the burden
of proof: in order to enjoy the privilege of immunity
the foreign state must make a case that prima facie
there is some basis for its claim of immunity. This rule of
the burden of proof is not an outflow of the
rule-and-exception-system, but inherent in the
restrictive immunity concept itself. It is not surprising
that Lord Denning, in the Parliamentary Debates on the
STIA 1978, stated:

The opening clause is quite out of date. (…) This Bill, it
seems to me, has not taken into account the
developments in the law since 1972. (Hansard, H.L.

This seems in fact a strange situation considering
that the Lord Chancellor during the second reading of
the bill speaks of the statute as providing a major
change in our law. (Id., col. 52).
The STIA 1978 forwards in its Section 1(1) an outdated concept of *General Immunity from Jurisdiction* whereas in reality this so-called general immunity is but an affirmation of a residual concept. Francis A. Mann’s statement on this point speaks for itself:

What the legislator described as exceptions represents a very broad sector of State activity. Its limits should be so drawn as to fit the legislative purpose behind each provision rather than the drafting technique that the legislator followed. The so called exceptions are a far-reaching group of provisions which are not subordinate, but equal, to and on the same level as the so-called principle. Hence the rule usually applicable to the construction of exceptions does not fit. (The State Immunity Act 1978, 50 BRIT.Y.B.INT’L L.43-62 (1979), at 50).

Although the marginal note to section 1 speaks of the general immunity from jurisdiction and this paper, therefore, speaks of a principle and exceptions, the preceding review proves that it is only a residual immunity which a foreign State can claim in relatively few cases. The denial of immunity is so far-reaching that it is more appropriate to treat the exceptions as distinct categories. Accordingly it is submitted that what my be described as the usual rules about proving exceptions should not be applicable. (Id., 62).

The logical conclusion is that the foreign state would principally bear the burden to establish a
primary basis of immunity. As Francis A. Mann concludes in the above cited article:

It is submitted that, throughout, the State claiming immunity has to prove the facts on which it relies. (...) The burden of proof, it would seem, is throughout on the State claiming immunity, though in many cases this may mean proving a negative, viz. the non-existence of one of the exceptions introduced by the Act. (Id.)

_I Congreso Del Partido_

As we have seen that principally the foreign state bears the burden of proof for its immunity claim, let us now examine how the foreign state is going to produce this evidence. We saw already that under the American Act, the foreign state cannot be reasonably forced to refute all the exceptions from sovereign immunity, but only those that the plaintiff invoked in his claim.

Let us consider the commercial activity exception, as an example. Under the FSIA, §1605(a)(2), the foreign state must make a _prima facie case_ that the activity in question was one of public, governmental character. Under the British Act, the foreign state must establish prima facie evidence that none of the exceptions in §§3(3)(a),(b),(c) STIA 1978 applies.
State Immunity Act 1978 (UK)
3. (1) A State is not immune as respects proceedings relating to—
   (a) a commercial transaction entered into by the State;
   (...) 
   (3) In this section ‘commercial transaction means –
       (a) any contract for the supply of goods or services;
       (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
       (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

Now, the question is if the foreign state can benefit from the clause ‘otherwise than in the exercise of sovereign authority’, §3(3)(c), when the activity that gave rise to the suit is the breach of a commercial contract, however this breach of contract being effected in the exercise of sovereign authority? There are namely two possible solutions here—

(i) We see contract and breach of contract as so closely related to each other that the commercial nature of the contract automatically affects the breach thereof;

(ii) We see the breach of contract as an independent activity, which would allow us to qualify it as ‘any other transaction’ in the sense of §3(3)(c) STIA 1978; as a result, we could admit a commercial
activity only in cases where the foreign state did not act in the exercise of its sovereign authority.

In that case the foreign state could escape responsibility under the commercial contract despite of the restrictive immunity doctrine.

This was exactly the intriguing question to solve for the Lord judges in *I Congreso del Partido*, a highly complex and interesting case.


The *State Immunity Act 1978* was not yet applicable for this precedent, as it is not applied retroactively.

—Lord Wilberforce explained: ‘If these matters had arisen as at the present date, they would be governed by the State Immunity Act 1978. This Act, which came into force on 22nd November 1978, introduced, by statute, a restrictive theory of state immunity into English law by means of a number of detailed exceptions to a general rule of State immunity. It was not retrospective. [1981] 2 All E.R. 1064, 1069 (a).

Nonetheless, the case is to be considered of such high importance that it certainly also impacts upon the interpretation of the Act. The factual background is quite complex.
The litigation was about a cargo of Cuban sugar to Chile, effected in 1973, in exercise of a contract concluded between Cubazucar, an organism of the Cuban government, and Chilean merchants. The sugar was transported on two ships, the Playa Larga and the Marble Islands. While the Playa Larga was discharging the cargo in the port of Valparaiso and the Marble Islands was still on high sea, the Chilean government changed because of the coup d’etat by general Pinochet, on September 11, 1973.

The Cuban government decided to sever all diplomatic relations with the new Chilean government, and with Chilean merchants, and ordered the captains of the two ships to return back to Cuba. The diplomatic relations between the two countries were effectively severed later on.

The Playa Larga arrived in Cuba, while the Marble Islands was seized in the Panama Canal, but could escape the seizure and headed toward North Vietnam.

This ship, that belonged to a Liechtenstein company, was then acquired by Cuba. The cargo, discharged at Haiphong, was offered to the people of
North Vietnam within the framework of an aid programme that Cuba entertained with that country. As to this particular fact, Lord Wilberforce noted that Cuba had testified, by a high employee of the ministry of foreign affairs that the donation of ten thousand and eight hundred tons of sugar to the people of North Vietnam was expressly commanded by the Cuban government, in accordance with a law that governs the aid programme concluded between the two countries. (Id., 1076, (e).

In pursuit of damages suffered and as indemnity, the Chilean merchants seized another Cuban ship, the \textit{I Congreso}, and its sugar cargo, in the port of London. Cuba claimed sovereign immunity in the English court. The merchants argued that a foreign state who has entered the world market place and contracted with private merchants could not later on breach their contracts by invoking governmental purposes. Cuba admitted it could not invoke absolute immunity in this case, but that even under the restrictive immunity doctrine, it could invoke such immunity in the present case because the activity in question was not the commercial contract, but its breach, which had been a government act that was to be seen in the framework of Cuban foreign policy.

Judge Goff held that the breach of the contract was derived ‘from an actus jure imperii of the Republic of Cuba.’ [1978] 1 Q.B. 500, 533. The opposite position was taken by Lord Denning, M.R. in the judgment of the Court of Appeals. [1980] 1 Lloyd’s Rep. 23 (C.A.).

He considered as ‘reasonably clear’ the fact that the only criterion to consider in the question immunity vel non was the nature of the activity in question, not its purpose. (Id., p. 30).

According to Lord Denning, the origin of all the complex developments of the case was the original commercial contract, and only that was to be considered. For Lord Denning, it was not correct to divide the contract and the breach of contract into two different activities, or, in other words, he held that a breach of contract automatically shares the nature of the contract itself.

Such an act—a plain repudiation of a contract—cannot be regarded as an act of such a nature as to give rise to sovereign immunity. It matters not what was the purpose of the repudiation. If it had been done for
economic reasons—as for instance, because the market price of sugar had risen sharply—it could not possibly have given rise to sovereign immunity. If it had been done for humanitarian reasons—as, for instance, because the Cuban government were short of sugar for their own people—or wanted to give it to the people of North Vietnam—equally it could not possibly have given rise to sovereign immunity. It was in fact done out of anger at the coup d’état in Chile and out of hostility to the new regime. That motive cannot alter the nature of the act, nor can it give sovereign immunity where otherwise there would be none. It is the nature of the act that matters, not the motive behind it. (Id., p. 31 (§17).

Lord Wilberforce’s judgment assumes a more flexible position and he asks the pertinent question in a subtler manner:

The question is whether the acts which gave rise to an alleged cause of action were done in the context of a trading relationship or were done by the government of the Republic of Cuba acting wholly outside the trading relationship and in exercise of the power of the state. [1981] 2 All. E.R. 1064, 1074 (h).

For rendering this distinction, the judge developed some kind of evidence rule that is based upon the restrictive immunity doctrine:

Under the restrictive theory the court has first to characterize the activity into which the defendant state has entered. Having done this and (assumedly) found it
to be of a commercial, or private law, character, it may take the view that contractual breaches, or torts, prima facie fall within the same sphere of activity. It should then be for the defendant state to make a case that the act complained of is outside that sphere, and within that of sovereign action.


There is hardly any doubt that the purpose behind the repudiation of the contract was of a public, governmental character in the present case. And the context of this action taken to sever the contract was situated within the foreign policy of the Republic of Cuba. It was actually a series of concomitant actions:

— the repudiation of commercial relations with Chile;

— the repudiation of diplomatic relations with Chile;

— the donation of a part of the cargo to the people of North Vietnam within an aid programme, that was governed by a national law of Cuba. Lord Wilberforce argued:

I do not think that there is any doubt that the decision not to complete uploading at Valparaiso, or to discharge
at Callao, was a political decision taken by the government of the Republic of Cuba for political and non-commercial reasons. [1981] 2 All. E.R. 1064, 1074 (j).

The decisive question was thus if the action at the basis of the litigation had been undertaken in the context of a commercial relation, or if it was part of a political measure, thereby being situated completely outside of the commercial relation and within the domain of political, governmental power.

The conclusion which emerges is that in considering, under the restrictive theory, whether state immunity should be granted or not, the court must consider the whole context in which the claim against the state was made, with a view to deciding whether the relevant act(s) on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character, in which the state has chosen to engage or whether the relevant act(s) should be considered as having been done outside that area and within the sphere of governmental or sovereign activity. [1981] 2 All. E.R. 1064, 1074 (c).

With regard to the factual background of the other ship, the Playa Larga, Lord Wilberforce pursued:

If immunity were to be granted if any decision taken by the trading state were shown to be not commercially, but politically, inspired, the restrictive theory would almost
cease to have any content and trading relations as to state-owned ships would become impossible. It is precisely to protect private traders against politically inspired breaches, or wrongs, that the restrictive theory allows states to be brought before a municipal court. It may be too stark to say of a state ‘once a trader always a trader’; but, in order to withdraw its action from the sphere of acts done iure gestionis, a state must be able to point to some act clearly done jure imperii. [1981] 2 All. E.R. 1064, 1075 (f).

In accordance with the Court of Appeals judgment and the other judges of the House of Lords, Lord Wilberforce admitted the appeal of the Chilean merchants and denied Cuba immunity from jurisdiction.

—The other judges were Lord Diplock, id., 1078-1080; Lord Edmund-Davies, id., 1080-1082; Lord Keith of Kinkel, id., 1082 and Lord Bridge of Harwich, id., 1082-1083.

However, regarding the ship *Marble Islands*, the judges were divided into two camps. Lord Wilberforce and Lord Edmund-Davies did not follow Lord Denning’s opinion, and they were put in minority by the other judges of the House of Lords.

Nonetheless, the weight of their opinions on the level of the formation of international law is considerable, and should not be underestimated. Lord
Wilberforce, while generally in agreement that it is the nature of the activity in question that is to be considered, conceded ‘that the purpose … may throw some light on the nature of what was done.’ [1981] 2 All E.R. 1064, 1077 (h).

Lord Edmund-Davies shared this opinion and added that ‘if in these circumstances it be held that the Republic of Cuba cannot rely on state immunity, I find it impossible to imagine circumstances where the doctrine can operate.’ (Id., p. 1082 (c).

In fact, the factual background regarding the Marble Islands does not give any indications that what had been done was done in the context of the original commercial activity, but rather outside of it. This is particularly striking in view of the fact that the cargo was donated to the people of North Vietnam in accordance with Cuban law.

It is difficult to construe a nexus between this governmental action and the original commercial relationship. To say it with Wilberforce’s terminology that puts the divider in terms of ‘spheres’ of action, it can be said that the act of donation was outside the sphere of the commercial transaction.
Now, when we apply this theory, the question of the burden of proof comes up. Dr. Georg Ress formulated it in these terms:

Lord Wilberforce’s opinion leads straight to the question who bears the burden of proof for the nature of the act in question. When there are commercial relations between a state and a particular, the latter can invoke that all breach of contract or illicit action prima facie is within the commercial sphere of the contract. Then the burden is upon the foreign state to produce evidence that its action was exceptionally outside the economic sphere, and as a result, within the sphere of public, governmental action (acta iure imperii).


Simply to invoke public purposes here is not enough for the foreign state to discharge its burden of proof for the fact that the repudiation of the contract was exceptionally outside the commercial sphere, and within the sphere of public, governmental activity.


Ress writes that for discharging this burden, the foreign state must prove really peculiar circumstances that were at the basis of the breach of the commercial
contract and that clearly point to the foreign state having acting within its realm of sacrosanct governmental authority. In *I Congreso del Partido*, it seems, Lord Wilberforce and Lord Edmund-Davies were indeed coming to that conclusion with regard to what was happening with the cargo of the *Marble Islands*. However, the majority of the Lords applied the evidence rule ‘in dubio contra immunitatem.’

This leading case thus is relevant for the interpretation of the STIA 1978. When we follow the minority opinions of Lords Wilberforce and Edmund-Davies, the breach of a contractual relation by a foreign state would be an act independent of the contract itself, to be qualified by its own nature. If the breach of contract was *prima facie* within the commercial sphere of the contract, which is notably the case when a private person could have effected it, the burden is upon the foreign state to demonstrate that its action was within the public, governmental sphere of activity. This means that the act in question must be an *actus iure imperii*.

In addition, we should reflect if splitting off the private, commercial relationship and contract and its subsequent breach is not in basic contradiction with the restrictive immunity doctrine?
This argument was brought forward by Francis A. Mann, in his case note on the *I Congreso* decision.


Mann’s answer in his article is that such a split is not permitted under the restrictive doctrine. Referring to Lord Wilberforce’s opinion, Mann pursued:

When in the past one spoke of acts done *jure gestionis*, then, in the context of contracts, one had in mind the fact that the contract rather than its breach could be so characterized. The ‘act complained of’ was believed to be irrelevant: if a trading contract was frustrated by a sovereign act such as an export prohibition, it was thought to be the contract, the course of action, that had to be looked at for the purpose of the grant or denial or immunity and the circumstances of its breach related to a possible defense, but had nothing to do with immunity. In other words, immunity was believed to depend, not on the act complained of, but to the act to be enforced. (…) It can only be hoped that similar ideas will not find their way into the interpretations of the State Immunity Act 1978, where, indeed, they ought to find no place. (Id., 574).

According to the majority of the Lords in this case, all state action leading to a breach of contract, even though the purposes of the illicit action were
governmental, is forcibly related to the contract itself, and thus participates in the commercial nature of it.

This solution can be described with the formula ‘in dubio contra immunitatem’, and it really embodies the restrictive immunity doctrine that is at the basis of the STIA 1978. As to the allocation of the burden of proof, the I Congreso precedent confirms the principle that we already found, that is, that the burden is upon the foreign state to show that the action in question was one of a public, governmental nature. Analogous to the Alberti case, we can reasonably admit also under the British Act that the foreign state is not obliged to refute all the exceptions to immunity, but only those the plaintiff has invoked in its claim. Hence, the prima facie case the foreign state has to establish in order to meet its burden is limited to addressing only those exceptions the plaintiff relies upon. And of course, the foreign state also has to prove that it is a foreign state in the sense of §14(1) STIA 1978. The proof of this element is facilitated, as we have seen, through §21(a), where it is stated that the certificate of the Secretary of State represents conclusive evidence to this effect.

Consequently, the burden of proof for its immunity claim is upon the foreign state, but for all
other elements in respect to the competence of the court, the burden of proof principally lies with the plaintiff.

The British Act is less ambiguous and convoluted here than the FSIA 1976 as it doesn’t confuse competence and jurisdiction. An example can be found in how the British Act deals with default judgments against foreign states, §12(4) STIA 1978.

—Analogous provisions are to be found in Singapore’s STIA 1979, §14(4), Pakistan’s STIO 1981, §13(4), and South Africa’s FSIA 87, 1981, §13(4). The analogous provision in the Canadian Act, §9(6) doesn’t mention any proof requirement. But as it is with the British Act, the requirement of a valid service of process follows from general procedural principles. It’s upon the plaintiff to prove satisfactorily to the court that all the conditions for the court’s jurisdiction and the additional conditions for a default judgment have been met.

This section namely doesn’t mention that a valid service of process must have been made, as it is stated in §1608(e) FSIA, precisely because of that entanglement between subject matter jurisdiction and personal jurisdiction. §27 of the Australian FSIA 1985 contains an interesting and original provision in that it requires both a valid service of process, §27 (1)(a) and that ‘the court is satisfied that, in the proceeding, the foreign State is not immune.’
—The analogous provision for separate entities of foreign states is §27(2) FSIA 1985 (Australia).

This formulation betrays that immunity *vel non* is a decisive criterion for deciding upon a default judgment. The solution cannot be different than it is for the other acts, that is, the burden of proof here is entirely with the plaintiff to show that the action at the basis of the claim was one of a private, commercial character.

**Separate Entities of a Foreign State**

As the privilege of sovereign immunity is in principle reserved to foreign states, an immunity of legally separate entities of foreign states requires a particular justification.

All immunity acts here examined provide distinct provisions for the immunity of separate entities, or agencies or instrumentalities of foreign states. Another distinction regularly made between foreign states and their separate entities is to be found for service of process, and in matters of immunity from execution.

—For Service of Process, see §1608(a),(b) FSIA and §9(1) STIA 1982 (Canada), for foreign states, and §9(3) STIA 1982, for agencies.
—Regarding Immunity from Execution, further see §§1610(a),(b), 1611(b)(1) FSIA, §§11(1),(2),(3),(4) STIA 1982, as well as §35 FSIA 1985.

However, the STIA 1978 and the acts of Singapore, Pakistan and South Africa grant immunity only to foreign states, denying to apply this rule to separate entities of foreign states.

Section 14(1)(a),(b),(c) STIA was almost literally overtaken by the other statutes.

§14(1) STIA 1978

(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government, but not to any entity (hereafter referred to as ‘separate entity’) which is distinct from the executive organs of the government of the State and capable of suing and being sued.

— The literally identical provisions are §3(1) STIA 1979 (Singapore) and §3(1) STIO 1981 (Pakistan), the almost literally identical provision is §1 FSIA 87, 1981 (South Africa), while the Australian Act treats separate entities like foreign states, §22 FSIA 1985.

The general rule of immunity, §1(1) STIA 1978 is thus not applicable to separate entities of foreign states. This difference to the American and Canadian Acts is explained in the legislative history to the
British Act. In *Trendtex*, [1977] 1 *Lloyd’s Rep.* 581, the High Court decision, Judge Donaldson explained:

The remaining part of this issue involves more complex considerations. What has to be decided is whether the Central Bank is an arm, an organ, an alter ego, a part or an agency of the Nigerian government. (...) It is, therefore, necessary to examine the juridical status and practical working of the Central Bank. This is a matter of evidence. (Id., 584).

The restrictive immunity doctrine does not contain an immunity rule for entities which are legally separate from foreign states. In the contrary is immunity to be granted to those entities if, and only if, there is a nexus between their activity and the governmental activity of the state.

Even under the absolute immunity doctrine, the immunity to be granted to foreign states did not extent to separate legal entities. As under this doctrine the burden of proof was anyway with the plaintiff for any exception to immunity, there was no question that this applies also for the fact that the state organism is a ‘separate legal entity.’ In *Krajina v. Tass Agency et al.*, [1949] 2 *All E.R.* 274 (C.A.), Lord Cohen stated:
It is obvious that the first question we have to decide is whether or not the evidence makes out a prima facie case that Tass was a separate legal entity, for, if it was not, it seems quite plain that the evidence does establish that Tass was a department of the Soviet State, and unless counsel for the plaintiff can establish it to be a separate legal entity, it is not disputed that this appeal, in this court at any rate, must fail. The argument on this point can, I think, be summarized as follows. The burden of proof that Tass is a legal entity rests, it is true, on the plaintiff. (Id., 277-278.

The burden of proof that such a nexus exists now is however upon the separate entity, as Judge Donaldson ruled: ‘The onus of establishing this immunity is upon the Central Bank.’

In the STIA 1978, the criterion of such a link or proximity between the entity and the administration of the foreign state, was abandoned. Instead, section 14(2) states:

**§14(2) STIA 1978**

A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if –

(a) the proceedings relate to anything done by it in the exercise of sovereign authority, and

(b) the circumstances are such that such a State … would have been so immune.

—See literally identical statements in §16(2) of Singapore’s STIA 1979 and §15(2) of Pakistan’s STIO 1981.
The formulation ‘if, and only if’ clearly indicates that the burden of proof is upon the separate entity for their immunity claim. This is in accordance with the legislative history of the British Act which stated competence of the British forum over such entities, with immunity as the exception. When we consider the construction of §14(2) STIA 1978, we can thus talk about a presumption against immunity relating to separate entities of foreign states.


The various immunity statutes differ in this respect. While the American, Canadian and Australian acts let separate entities participate in general immunity as a rule, the other statutes don’t and even reverse the rule-and-exception schema, which leads to a presumption against immunity.

With regard to the British Act, Georges R. Delaume speaks of a ‘general rule of nonimmunity,’ regarding separate entities.

Conclusion

Under the STIA 1978, the burden of proof for jurisdictional immunity is upon the foreign state, and \textit{a fortiori}, upon a separate entity of the foreign state. This result is in accordance with the allocation of the burden of proof under the American Act. The construction of the British act is hardly apt to provide a guideline for finding the burden of proof, as little as the American Act could fulfill this task.

The reason is simply that all statutes on foreign sovereign immunity are drafted with the historical perspective, not the burden of proof, as the primary focus. That is why they posit immunity as the rule, and not the original rule, that assumes the competence of the courts as the rule. As the number of exceptions is so high, the rule of immunity from jurisdiction can rightly be called a ‘residual concept’, which means that in dubio, it is to be decided contra immunitatem. In addition, and equally in accordance with the American Act, the British Act did not change ordinary procedural principles under which the plaintiff must prove all elements for the court’s competence.

From a procedural point of view, as under the American Act, the foreign state has the right to begin
and is thus charged with the evidential burden to establish a *prima facie case* about two elements: that it is a foreign state and that the activity in question was of a public, governmental character.

In case the claim is directed against a separate entity of a foreign state, the STIA 1978 goes farther than the FSIA 1976 in that it erects a *presumption of nonimmunity* that the separate entity must overcome by conclusive proof, not just *prima facie* evidence.

This is thus a higher standard of proof, that makes sense because an entity that is legally setup, and thereby different from the foreign state, must justify why it should be treated like a foreign state and enjoy sovereign immunity.

**Immunity from Execution**

The provisions regarding immunity from execution are to be found, in the British Act, a bit hidden, in section 13, under ‘Other Procedural Privileges.’ The general rule of immunity from execution is stated in §13(2)(b) STIA 1978.

§13(2)(b) STIA 1978

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
Apart from immunity waivers which are governed by §13(3) STIA 1978, the Act provides the following exception to immunity from execution:

§13(4),(5) STIA 1978
(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; (...)
(5) The head of a State’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State … for purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

Two questions are to be asked:

(i) How do we have to understand the criterion ‘for commercial purposes,’ §13(4), when the state property is used both for commercial and governmental purposes?

(ii) Who bears the burden of proof for the fact that the property was used for commercial purposes under the terms of this section?
The questions were tackled by the House of Lords in *Alcom Ltd. v. Republic of Colombia*, [1984] 2 Lloyd’s Rep. 24 (H.L.), 23 ILM 719 (1984), 22 ILM 1307 (1983)(C.A.). *Alcom Ltd.*, a company that provided security equipment to the Colombian embassy acquired a garnishee order over the embassy’s bank account, which was held with a commercial bank in London. The Colombian Ambassador, in accordance with §13(5) STIA 1978, submitted to the court a certificate that stated as follows:

> The undersigned Ambassador Extraordinary and Plenipotentiary of the Republic of Colombia to the Court of St. James’s hereby certifies that:

> The funds deposited by the Colombian Embassy in its bank accounts at the First National Bank of Boston in London are not in use nor intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day to day running of the Diplomatic Mission.

> [Signed] (23 ILM 719, 725).

In the High Court, the plaintiff argued that this proof was not conclusive as the terms of the certificate were contradictory. Expenses incurring ‘in the day to day running’ of an embassy were always commercial, as the definition of the British Act in this respect was rather large.
In fact, §17(1) STIA states that ‘commercial purposes means purposes of such transactions or activities as are mentioned in section 3(3) above.’ However, the plaintiff did not submit any evidence in support of their view, as they thought it was a legal argument only, not a question of fact.

Justice Hobhouse however rejected this argument, stating that in his opinion a bank account used for an embassy ‘is prima facie non-commercial.’ (22 ILM 1307, 1313 (1983).

The judge distinguished between governmental expenses as, for example, the salary of the ambassador and the salaries of the Colombian officials, and commercial expenses. Unfortunately, the account statements did not reveal in which way the particular expenses were used. Consequently, the judge ruled that the seizure of the account was not allowed under international law.

The judges of the Court of Appeals, Sir John Donaldson, M.R., Lord Justice May and Lord Justice Dillon, rendered a more subtle and sophisticated argument, by saying that ‘the purpose of the money in a bank account can never be ‘to run an embassy,’ and that it rather serves ‘only to … pay for goods and
services or to enter into other transactions which enable the embassy to be run.’ (22 ILM 1307, 1314-1315).

As a result, the judges did not consider the objective for which the account was used, as §13(5) STIA requires it (‘use ... for commercial purposes’), but the nature of the potential transactions that the money can be used for. (Id., 1315-1316). And as the nature of those transactions is commercial, the judges admitted the appeal.

However, the House of Lords reversed the appeal and reinstated the High Court decision in a leading case that was going to serve interpreting this crucial criterion in §13(5) STIA 1978. At the start, Lord Diplock explained that British law contained two different rules, followed by a number of exceptions, relative to adjudicative jurisdiction, on the one hand, and to enforcement jurisdiction, on the other.

In creating these exceptions, for which it has recourse to a somewhat convoluted style of draftsmanship providing for exceptions to exceptions which have the effect of restoring in part an immunity which some other subsection would appear to have removed, the Act nevertheless draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom.
Section 2 to 11 deal with the adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction. (23 ILM 719, 721-722 (1984).

After having clarified that the credit on a bank account is ‘property’ under §13(b)(2) STIA 1978, Lord Diplock tackled the decisive question:

My Lords, the decisive question for your Lordships is whether in the context of the other provisions of the Act to which I have referred, and against the background of its subject-matter, public international law, the words ‘property which is for the time being in use or intended for use for commercial purposes’, appearing as an exception to a general immunity to the enforcement jurisdiction of United Kingdom courts accorded by section 13(2) to the property of a foreign State, are apt to describe the debt represented by the balance standing to the credit of a current account kept with a commercial banker for the purpose of meeting the expenditure incurred in the day-to-day running of the diplomatic mission of a foreign state. (Id., 724).

As Judge Hobhouse, so did Lord Diplock address the problem of a *mixed* use of a bank account held for a foreign embassy, and concluded.

The debt owed by the bank to the foreign sovereign State and represented by the credit balance in the current account kept by the diplomatic mission of that State as a
possible subject-matter of the enforcement jurisdiction of
the court is however one and indivisible; it is not
susceptible of anticipatory dissection into the various
uses to which monies drawn upon it might have been
put in the future if it had not been subjected to
attachment by garnishee proceedings. (Id.)

This argument thus led to the conclusion that the
seizure of an account always affects the entire
account, thereby _unduly comprising_ the part of the
credit balance that serves governmental purposes.
This argument is on a same line of reasoning with the
decision of the German Constitutional Court of 13\textsuperscript{th} of
December 1977, the _Beschluss des_
Bundesverfassungsgerichts zu Fragen der
_Staatenimmunität._

―BVerfGE 46, pp. 342 ff. ZaöRV 1978, 245 ff., RIW / AWD 1978,
122 ff., UN-MAT., 297 ff. 65 ILR 146 (1984). See also Ress,
Entwicklungstendenzen der Immunität ausländischer Staaten,
40 ZaöRV 217, 218-222 (1980) and Peter-Fritz Walter, Gibt es
eine Beweislastverteilung bei der Immunität von Staaten? 30
RIW / AWD, 9, 11-14.

After a thorough exam of international
jurisprudence on sovereign immunity, the Court
stated that in principle there was no more absolute
immunity from execution.

When a bank account served diplomatic purposes,
the special regulations regarding diplomatic
immunity would have to be respected. This would mean in practice that there is a rule of non-intervention of the forum state in the function of the foreign embassy. Even if the credit balance in the embassy’s account serves commercial purposes, the principle of non-intervention prohibited any preemptory measure of execution against such an account.

The opposite opinion, the court ruled, would allow it the judiciary to scrutinize foreign bank accounts and to which purposes those accounts would be used; such a procedure was to be considered as an interference into the internal affairs of other states.

However the German court concluded that international law did not prohibit the foreign state needing to certify that the credit on such an account served the running of the embassy. As to the form and content of such a certificate, international law required only that it be rendered by an organ acting in due responsibility for the foreign state.

The requirements of international law, formulated so meticulously, were in fact observed by section 13(5) STIA 1978 and the respective provisions in the
Singapore and Pakistani statutes on foreign sovereign immunity, as these provisions require a certificate, which serves, in its simplicity, as an effective wand for warding off the seizure of bank account credits that serve, at least in part, governmental purposes.

Lord Diplock held that the certificate being sufficient evidence unless the contrary is proved means that the burden of proof is upon the plaintiff or judgment creditor to demonstrate that the credit on the account served exclusively commercial purposes in the sense of §13(4) STIA 1978:

The onus of proving that the balance standing to the credit of the diplomatic mission’s current bank account falls within the exception created by the crucial words in section 13(4) lies upon the judgment creditor. (23 ILM 719, 725 (1984).

The allocation of the burden of proof is thus as follows:

—The schema of rule and exception applies in such a way that the general rule of immunity from execution applies, except that one of the exception to this rule applies. The burden of proof that an exception applies is upon the plaintiff.
—If the foreign state wants to invoke the presumption of immunity, it must provide, by the competent ambassador, the certificate required by §13(5) STIA 1978. This certificate represents conclusive proof that the account in question serves at least in part governmental purposes, except if the plaintiff can prove the contrary.

In *Alcom*, the House of Lords has provided a guideline for the burden of proof under the STIA 1978, in matters of immunity from execution. In accordance with American federal jurisprudence under the FSIA 1976, the House of Lords distinguished between the two immunity rules; as to immunity from execution, the court concluded that the burden of proof lies with the plaintiff or judgment creditor.

One can also come to this conclusion by looking at the drafting technique of sections §13(2)(b)—general rule—and §13(4)—exceptions—and the particular provision of §13(5), which has the function of a *presumption of immunity* that the judgment creditor must overcome (‘unless the contrary is proved’).

It follows ordinary rules of statutory construction that in such a case the burden of proof lies with the
one who struggles against the presumption, which is the judgment creditor.

—See also Browser/Bistline/Loomis, The Foreign Sovereign Immunities Act in Practice, 73 AJIL 200, 211 (1979):
‘Furthermore, the UK Act gives effect to an ambassadorial certificate the specified property is not in use or intended for use for commercial purposes ‘unless the contrary is proved’, section 13(5), whereas U.S. Act makes no presumption.’

Under the STIA 1978, the burden of proof in matters of immunity from execution lies thus with the plaintiff or judgment creditor.

Conclusion

Immunity from Jurisdiction

Just as the American Act, the State Immunity Act 1978 treats jurisdictional immunities and immunity from execution in a different manner, in accordance with their different historical development. As a result, the burden of proof had to be found for both rules separately and distinctively.

While for immunity from jurisdiction, the general rule of immunity pronounced by §1(1) STIA 1978 only grants a residual immunity because, in reality, the vast number of exceptions are rather the regular case in practice, the burden of proof is upon the foreign state,
and *a fortiori*, upon a separate entity of the foreign state, for supporting its immunity claim by *prima facie evidence* to the court. Here, we can talk about an immunity rule ‘in dubio contra immunitatem.’

However, we should ask if there is not a protected core area of sovereign immunity where immunity still prevails? We have seen in our examination of the FSIA 1976 that indeed such a core area or core areas are to be admitted, and have been preserved by meticulous federal case law, in each and every case, when sensitive political areas of foreign states were to be adjudicated by American courts. The question namely comes up if those core areas are not, as Dr. Georg Ress suggested, part of an *international standard of typical governmental activity*?


As we have seen, in American case law, such a standard can be found to be existent and this jurisprudence will most probably have an impact upon the development of international law in that the British, Singaporean, Pakistani, South African, Canadian or Australian judge are likely to follow this guideline.
---It should be noted that three entire volumes of the International Law Reports, Nos. 63, 64, 65, are destined only to the subject of foreign sovereign immunity; volume 63 (1982) contains only post-FSIA American federal case law.

**Immunity from Execution**

As to immunity from execution, the rule stated in §13(2) STIA 1978 represents a veritable *general rule* from which some exceptions §13(3),(4), giving competence to the courts in a limited number of cases. The rule works as a presumption in the sense that it’s upon the judgment creditor or seeker of relief to invoke any of the exceptions, but he bears the burden of proof, both the evidential and the persuasive burden for an exception to immunity from execution to apply. The foreign state only needs to submit the certificate required by §13(5) to activate the presumption in its favor. This certificate is conclusive proof that the active credit on an embassy account serves at least in part governmental purposes.

The plaintiff, in order to overcome the presumption of immunity, must provide full contradictory evidence. It is not sufficient, to this purpose, that the plaintiff just contests the certificate because it might not be clear and transparent under its terms. That is to say, it is not sufficient for the
plaintiff to just make a prima facie case to overcome the presumption, but he must prove satisfactorily to the court, by a preponderance of evidence, that the account has been serving *exclusively* commercial purposes. The wording, ‘unless the contrary is proved,’ is clear and unequivocal.

The American, South African and Canadian Acts do not contain a provision such as §13(5) STIA 1978; however, it’s probable that the British solution will be more in alignment with international law than a more liberal rule regarding execution into bank accounts serving in part governmental purposes.

We do believe that this is going to become the standard of international law in this respect and that judges of those other jurisdictions are likely to interpret these other immunity statutes in accordance with the British solution.
Introduction

In 1979, the Singapore parliament adopted the State Immunity Act 1979 which closely follows the British enactment.


In the parliamentary debates, the Singaporean Minister for Law, Science and Technology, M.E.W. Barker, stated: ‘This Bill is based on the United Kingdom State Immunity Act 1978, but has been modified to suit our needs and circumstances.’
In reality, the modifications were not essential, and the STIA 1979 is almost section by section identical with its UK model. Of course, certain provisions in the British Act that refer to the *European Convention on State Immunity* were not appropriate for Singapore.

—1972 ETS 74, UN-MAT. 156 ff. (English), Rapports Explicatifs, Conseil de l’Europe, Strasbourg, 1972, 52 ff. (French). Mr. Barker stated: ‘As there are certain provisions in the United Kingdom Act which are not appropriate to Singapore, particularly those concerning the European Convention on State Immunity, it is preferable to enact our own legislation so as to preclude the application of the United Kingdom Act to Singapore. (Parl. Deb. id).

### Application of British Case Law

While Singapore drafted their own enactment on foreign sovereign immunity, the application of British case law for interpreting the STIA 1979 is not excluded. For one thing, international law would apply in Singapore even without recurring to British legislation, for the other, such recurrence is expressly stipulated in §5(1) Civil Law Ordinance (CLO) of Singapore:
§5(1) Civil Law Ordinance
In all questions or issues which arise or which have been decided in the Colony with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute. (The Laws of the Colony of Singapore, Edition of 1955, Vol. 1, Chapter 24, 408)

Sovereign immunity litigation is part of mercantile law in the sense of this section and was confirmed to be by the parliamentary debates.


Succinctly speaking, this means that as long as the Singapore statute governs, the British statute recedes; but if there is a lacuna and also for matters of interpretation, the British law still governs, as a consequence of §5(1) CLO.

The Burden of Proof

Immunity from Jurisdiction
The law of evidence in Singapore is governed by the Evidence Ordinance of 1893 (The Laws of the Colony of Singapore, Ed. of 1955, Chapter 4). Evidence rules regarding the burden of proof do not differ from Anglo-American standards; in fact, evidence law in
Singapore is historically based upon the *Indian Evidence Act of 1872*.


The sections relating to the burden of proof are §§102 to 104.

**§102 Evidence Ordinance (1893)**
(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.
(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

**§103 Evidence Ordinance (1893)**
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

**§104 Evidence Ordinance (1893)**
The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided that the proof of that fact shall lie on any particular person.

The burden of proof under the Singapore Act, for jurisdictional immunity, is not easily found. A leading case is lacking so far.

But despite these difficulties, we provided arguments already for the British Act that show how we can find the burden of proof not by looking at the schema of rule-and-exception in the statute itself, but
by inquiring into the nature of the restrictive immunity doctrine. These arguments are equally valid for the Singapore enactment, as a successor to the British Act. The STIA 1979 does not substantially differ from the STIA 1978, the immunity rule being found in §3(1) STIA 1979, the exceptions in sections 4 to 13. Thus, from a point of view of statutory construction, we have almost identical models here.

We have seen already for the British Act, that the schema of rule-and-exception or the drafting technique of the statute does not help for finding the burden of proof. However, we have found a valid allocation of the burden of proof by inquiring directly, and inductively, into the restrictive immunity doctrine. This is recognized in international law as a valid method for interpreting national law ‘in the light’ of international law, or with a particular focus upon international law.

As the Singapore statute has more or less overtaken the British Act, with insignificant modifications, our conclusions regarding the burden of proof are valid also for the Singapore enactment on sovereign immunity. Apart from these considerations, there is another argument; in fact, Singapore, in drafting its immunity statute, has not only ruled
about a question of national Singapore law, but also about a question of international law. It has adopted the restrictive immunity doctrine.

Hence, the principles of international law are equally to consider when interpreting the Singapore enactment. To be sure, we are not facing here the old controversial question if municipal law transforms or incorporates the rules of public international law.


Here, national law has directly stated upon a matter governed by public international law. In such a case, the national lawmaker has theoretically three possibilities:

—it rules the matter in full accord with international law;

— it rules the matter contrary to public international law;

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—it rules the matter in accord with international law, but only rules it partially.

As to the second alternative, it is recognized that such a law would be valid within national law, and even on the level of international law; however the state may incur legal responsibility, and could even be sued for damages in front of the International Court of Justice. Singapore has acted under the third alternative, it has enacted a statute upon a matter governed by international law, but has ruled only partially upon the matter. Succinctly speaking, the Singapore law maker has omitted to state about the allocation of the burden of proof under the STIA 1979. In such a case, the silent will of the national legislator to interpret the statute in conformity with international law is to be presumed, except the legislative history, parliamentary debates or other evidence regarding the enactment speak to the contrary. In the present case, as evidence to the contrary is absent, we can suppose that Singapore wished to enact a statute on foreign sovereign immunity in full accord with international law. Another indication for this will is the positive echo the statute received during the parliamentary debates, where the adoption of the
restrictive immunity doctrine for Singapore was expressly welcomed.

—See, for example, Gamal Moursi Badr, State Immunity (1961), 61.

We can thus conclude that in matters of jurisdictional immunity, the burden of proof is upon the foreign state in support of its immunity claim, which can be met by making a *prima facie case* on two elements, that is, that it is a foreign state, and that the activity in question was one of public, governmental character.

**The Burden of Proof for Immunity from Execution**

As to immunity from execution, the application of British jurisprudence for interpreting the Singapore Act shall be demonstrated with an example, the decision of the House of Lords in *Alcom Ltd. v. Republic of Colombia*, [1984] 2 Lloyd’s Rep. 24 (H.L.), 23 ILM 719 (1984), that we already discussed earlier on. We have seen that in this precedent, the House of Lords examined the relationship between sections 13(4) and 13(5) STIA 1978 and derived from it conclusions for the allocation of the burden of proof. The respective provisions in the Singapore Act,
§§14(4) and 14(5) are literally identical with those of the British Act.

As a result, the burden of proof considerations of the House of Lords in *Alcom* must be equally valid for the STIA 1979. The burden of proof under these sections is upon the plaintiff. The foreign state can limit itself to providing the Ambassadorial certificate required by §14(5) STIA 1979. This certificate has the effect of a presumption of immunity that the plaintiff has to overcome, if he is to win (‘unless the contrary is proved’).
Introduction

The Point of Departure

A brief introduction into the historical development of sovereign immunity in India and Pakistan is indispensable for understanding the burden of proof under Pakistan’s State Immunity Ordinance 1981 because it forms part of a larger body of law, the Civil Procedure Code (C.P.C.) of 1908.

The code was first elaborated for British India in 1908 and later was adopted by Pakistan, after its independence, and based upon the Indian
**Independence Act**, July 1947. Pakistan then drafted a constitution on 23rd of March 1965 through the *Central Laws Ordinance (Statute Reform).*


Not only for historical reasons do we need to consider also the antecedent codes of 1882, 1877 and 1859.

—The analogous provisions are reproduced in part in a synopsis, with those of the C.P.C. 1908, in the decision of the Supreme Court of Pakistan in Qureshi v. Union of Soviet Socialist Republics, PLD 1981, 1, Supreme Court, 377, 409, 413. The decision is also reproduced in 64 ILR 585 (1983) and in 20 ILM 1060 (1981) where the synopsis is to be found on pp. 1076-1078.

Immunity for foreign sovereigns and states under these various statutes merits a brief examination, as the juridical reality today in Pakistan in matters of foreign sovereign immunity, can only be understood through the legislative development of sovereign immunity in both India and Pakistan.

The Supreme Court of Pakistan, in the important and remarkable leading case *Qureshi v. Union v. Union of Soviet Socialist Republics,* PLD SC 408-418, §§36-47, 20 ILM 1060, 1076-1081 (1981) of July 8, 1981, has
proceeded alike, and carefully perused the legislative development of sovereign immunity in Pakistan.

The pertinent provisions in the C.P.C. of 1908 state:

**Civil Procedure Code of Pakistan, 1908 (C.P.C.1908)**

**Section 9.**
The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

*Explanation.* A suit in which the right of property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.


**Section 84. When foreign states may sue.**
A foreign State may sue in any Court of British India:

Provided that such State has been recognized by His Majesty or by the Governor-General-in-Council.

Provided also that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

—Original version. Reproduced in Qureshi, PLD SC 409, 20 ILM 1060, 1076 (1981). The version in the Pakistan Code, the official record of all Pakistani laws, takes into considerations the modifications, such as ‘British India’ being replaced by ‘in the provinces’ through the Adaptation of the Central Acts and Ordinances Order, 1949, and ‘the Governor-General-in-Council’ being replaced by ‘the Central Government’ through the Adaptation of Indian Laws Order (Government of India), 1937.
Section 86. Suits against Princes, Chiefs, Ambassadors and Envoys.

(1) Any such Prince or Chief, and any Ambassador or Envoy of a foreign State, may, with the consent of the Governor-General-in-Council certified by the signature of a Secretary to the Government of India, but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of a specified class of suits, the Court in which the Prince, Chief, Ambassador or Envoy may be sued; but it shall not be given unless it appears to the Government that the Prince, Chief, Ambassador or Envoy—
(a) has instituted a suit in the Court against the person desiring to sue him, or
(b) is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, Ambassador or Envoy shall be arrested under this Code, and, except with the consent of the Governor-General-in-Council certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, Ambassador or Envoy.

(4) The Governor-General-in-Council may, by notification in the Gazette of India, authorize a Local Government and any Secretary to that Government to exercise with respect to any Prince, Chief, Ambassador or Envoy named in the notification, the functions assigned by the foregoing subsections to the Governor-General-in-Council and a Secretary to the Government of India, respectively.

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, Ambassador or Envoy from whom he holds or claims to hold the property.

—Original Version, equally reproduced in Qureshi, PLD SC 411-412, 20 ILM 1060, 1077-1078 (1981). For Pakistan, see The Pakistan Code, pp. 53, 54. ‘Prince or Chief’ was replaced by ‘Ruler of a foreign State’ through Ordinance 22 of 1960, ‘with consent of the Governor-General-in-Council … of India’ was replaced by ‘with consent of the Central Government’, certified by the signature of a secretary to that Government’ through the Adaptation of the Central Acts and Ordinances Order of 1949. Sections 86 and 87 of the C.P.C. were replaced by the State Immunity Ordinance 1981 (section 19), 5 PLD 238 (1981), UN-MAT., pp. 20 ff., Gamal Moursi Badr, State Immunity
Appendix V, with effect of 11 March 1981, see also section 1(3) of the Ordinance in the Gazette of Pakistan, Extraordinary Part I, of 11 March 1981. For India, there is an important modification to note. Through the C.P.C. Amendment Act 104 of 1976, the notion ‘Ruler of a foreign State’ was replaced by ‘foreign State’. This modification is not only of an editorial nature.

Section 9 C.P.C., valid for both India and Pakistan, gives rise to a more detailed exam and must be seen together with the provisions of the code that are relating to foreign sovereign immunity, §§84 to 86 C.P.C. Section 9 C.P.C. states the fundamental principle that civil courts have competence, as a general rule, except such competence is explicitly or implicitly barred.

—Sanjiva Row’s Code of Civil Procedure (Act V of 1908) (1962), 38, 39: ‘The section recognizes the maxim ‘ubi jus ibi remedium’. Any person whose right is infringed, and who has a grievance of a civil nature, has, independently of any statute, a right to institute a suit, unless its cognizance is expressly or impliedly barred.’

Competence is thus stated as the rule, and sovereign immunity as the exception. Before we will derive any conclusions from this schema for the allocation of the burden of proof, we need to have a closer look what competence or jurisdiction means under this section. The commentary of Sanjiva Row interprets this section as follows.
It means the legal authority to administer justice with reference to—
(a) the subject matter of the suit;
(b) the local limits of the jurisdiction of the court;
(c) the pecuniary limits of the jurisdiction of the Court, and
(d) the person sued.

As to (d), the commentary explains: ‘… foreign rulers, ambassadors and envoys can be sued only with the consent of the Central Government; …’. (Id., 41). This means that immunity for foreign sovereigns or foreign states, represents an obstacle, or an exception to the general jurisdiction stated in section 9 C.P.C. In other words, §9 C.P.C. contains a presumption of jurisdiction from which the provisions regarding foreign sovereign immunity, §§84-86 C.P.C. make an exception. This fact also is expressed through the drafting technique employed in section 9 C.P.C., ‘subject to the provisions herein contained.’

§86 C.P.C. thus is an obstacle to the general rule of jurisdiction that is stated in §9 and limits the latter to the extent that §86 applies. As to the allocation of the burden of proof, the formulation of section 9, ‘… the Courts shall have jurisdiction … excepting suits …’ quite obviously favors the conclusion that the burden of upon the defendant foreign state for proving that
an exceptional circumstances that barres jurisdiction, applies.

The burden of proof thus is upon the foreign state under this statutory schema. This is quite interesting as a result when we remember that rather early in this study, the same principle was applied by Chief Justice Marshal, in the *Schooner Exchange (1812)*, which was the perhaps first precedent where in history the restrictive immunity doctrine was applied.

It is quite astonishing that the scrutiny for the burden of proof is much facilitated for India and Pakistan because the rule and the exception were stated in accordance with legal fundamentals, not with concessions to international diplomatic practice.

The commentary of Row states:

[A] Court may have jurisdiction over a suit, if certain circumstances existed, but its jurisdiction may be excluded if certain other circumstances existed; if a plaintiff alleges the former set of circumstances and mentions nothing about the latter set, the Court is bound to take cognizance of the suit: it is for the defendant, if he wants to challenge the jurisdiction of the Court, to prove the latter set and, if he succeeds, the Court would be divested of the jurisdiction and would be bound to dismiss the suit. (Id.)
The commentary then cites precedents that clearly show that the burden of proof is upon the party seeking to oust jurisdiction; in other words, we can speak in such a situation of a presumption of jurisdiction, and under general rules of evidence, it is upon the party who works against the presumption that the burden lies with.

Whether a court has jurisdiction or not has to be decided with reference to the initial assumption of jurisdiction of the court. (Id., 42).

A party seeking to oust the jurisdiction or ordinary civil courts must establish his right to do so. (Id., 43).

Burden on defendant. It is for the party who seeks to oust the jurisdiction of a civil court to establish his contention. (Id., 52. See also Sarkar on Civil Procedure (1979), 17).

It is for the party to oust the jurisdiction to establish his right to do so. (Id., 18, citing Abdul Waheed v. Bhawani, A 1967 SC 576).

A presumption is against the ouster of jurisdiction of the ordinary courts and this presumption has to be overcome. (Id., citing Desikacharyulu v. S., A 1964 SC 807).

In case of doubt as to jurisdiction, court shall lean towards assumption of jurisdiction.
‘Jurisdiction. It is for the party who seeks to oust the jurisdiction of a civil court to establish his contention.’ In addition, see Order 6, Rule 13 of the C.P.C. of 1908:
‘Presumption of Law. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied.’

After having outlined this important point of departure, from a point of view of civil procedure, let us now see what we can find, both in India and Pakistan, with regard to foreign sovereign immunity legislation and development.

Foreign Sovereign Immunity in India

India’s Internal Legislation

In India, section 86 C.P.C. of 1908 is in force in the version of the Amendment Act of 1976, which has replaced the expression ‘Ruler of a foreign State’ with ‘foreign state.’

§86 C.P.C.
(1) No foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government certified in writing by a Secretary to that Government:
   Provided that a person may, as tenant of immovable property, sue without such consent as aforesaid a foreign State from whom he holds or claims to hold the property.
(2) Such consent may be given with respect to a specified suit or to several specified suits or with respect to all suits of any
specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the foreign State may be sued, but it shall not be given, unless it appears to the Central Government that the foreign State—
(a) has instituted a suit in the Court against the person desiring to sue it, or
(b) by itself or another, trades within the local limits of the jurisdiction of the Court, or
(c) is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money damages charged thereon, or
(d) has expressly or impliedly waived the privilege accorded to it by this section.

(3) Except with the consent of the Central Government, certified in writing by a Secretary to that Government, no decree shall be executed against the property of any foreign State.

(…)

(6) Where a request is made to the Central Government for the grant of any consent referred to in sub-section (1), the Central Government shall, before refusing to accede to the request in whole or in part, give to the person making the request a reasonable opportunity to being heard.


To repeat it, this is not just an editorial change, but a real adaptation of the law to the needs of a modern state. Instead of protecting foreign rulers with sovereign immunity, the law then granted the privilege to foreign states.

Furthermore, what is interesting here is that this privilege is granted to foreign states in India’s internal civil procedure law, not as a matter of international law.
When we look more closely at section 86 C.P.C., we can make out a certain schema:

(i) In cases of 2(a) to (d), express consent by the Central Government of India is required for suing a foreign state in any civil court in India;

(ii) in case the plaintiff is a tenant of immovable property, he may file a suit against the foreign state, without such consent, provided he has received, or claims to have received, that property from the foreign state.

Without the consent required in sections 2(a) to (d), the court has to dismiss the suit.

—See Sarkar on Civil Procedure (1979), 208. This is why the consent must be obtained by any plaintiff before filing a suit, as a preliminary action to be taken.

In legal terms, the consent requirement is a formal requisite for the court to try the suit, in other words, a preliminary condition for a court to assert jurisdiction.


It is thus the government of India that decides to grant immunity vel non to a foreign state, both
regarding jurisdictional immunity, and immunity from execution.

That is why the question of the burden of proof in the sense of the ultimate or legal burden does not come up. But it is nonetheless interesting to look at the situation of a potential plaintiff under this system.

The governmental consent has an effect of *unlocking* the suability of a foreign state, which means that when consent is given, the plaintiff enjoys the legal presumption of §9 C.P.C. This is so because in general, the consent ‘… shall not be given, unless it appears to the Central Government that … ‘; this is clearly a rule-and-exception schema as we have seen it at various occasions previously in this study. The rule is thus that despite the presumption of §9 C.P.C. when the defendant is a foreign state, the rule is that such foreign state is immune, except the administrative consent is given.

This sounds familiar somehow, as it resembles the practice of the state department in the United States before the enactment of the FSIA, with the State Department giving ‘suggestions’ to the courts to grant immunity *vel non*. But there is nonetheless an important difference in that Indian law does not leave
it over to ‘political considerations’ if immunity is to be granted, or not, but the law gives precise directives in which cases the administrative consent is to be granted, or denied. There are precisely four exceptions to immunity, so to speak, as in these cases, and only in these cases, the administrative consent is to be granted.

§86(2) C.P.C.
(a) the foreign state has instituted a suit in the Court against the person desiring to sue it;
(b) the foreign state, by itself or another, trades within the local limits of the jurisdiction of the Court;
(c) the foreign state is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money damages charged thereon;
(d) the foreign state has expressly or impliedly waived the privilege accorded to it by this section.

In this schema, the burden of proof, in front of the administrative force, is upon the plaintiff for demonstrating that one of these exceptions is applicable. This result also follows from the fact that the administrative consent is, to repeat it, a key for unlocking the judicial ‘barrenness’ of an action against a foreign state.

While this is not a burden of proof in the strict meaning of the term, it is an analogous situation to the judicial term, only that the plaintiff acts here in front of the administration.
It is for that matter not correct, as sometimes voiced in the literature, that in India actions against foreign states were ‘generally excluded;’ they are possible under the conditional bar of the administrative consent requirement. When consent is given, this consent binds the court.

—See Sarkar on Civil Procedure (1979), 206-207: ‘When the Central Government gives consent to the institution of suits …, such consent cannot be questioned by the court. It is conclusive.’

In addition, §86(6) C.P.C. clarifies that the plaintiff, within that administrative procedure, is to be given a ‘reasonable opportunity to be heard.’

Despite the consent requirement, sovereign immunity in India cannot be said to be an absolute rule, as this is sometimes voiced in the literature. The legislative situation in India can for that matter not be compared with the situation in the United States before the FSIA, while such a comparison is of course tempting. It is true that the State Department filed suggestions to the courts and that courts generally followed them. But the State Department’s decisions were based upon political motives and they were for that reason not predictable, or at least not as predictable as this is the case in India, under §86(2) C.P.C. The
Tate Letter of 1952 did not change this situation for it was but the expression of an administrative goodwill; it just announced a policy change, that is, the political will to follow the restrictive immunity doctrine. That did not per se render the decisions of the State Department more predictable than before, because political considerations were not excluded, not even under the restrictive immunity doctrine.

There is still another difference between the two legal situations. In the United States it was the defendant foreign state that addressed the State Department for immunity to be granted, but in India it’s the plaintiff. In the United States, when a foreign state omitted to plead immunity in front of the administrative, it could be sued without obstacle. In India, however, foreign states are exempt from jurisdiction, except the plaintiff succeeds to be given the administrative consent for suing the foreign state; and to that purpose, the cases enumerated in §86(2) C.P.C. for which consent will be given, are conclusive, and exhaustive.

—Sanjiva Row, Code of Civil Procedure (1962), s. 86, 622: ‘The section relates to a matter of public policy and the express provisions contained herein are imperative and must be observed. The section is exhaustive of cases where consent can be given. Consent cannot be given on any other ground.’
In fact, when we consider the four exceptions to the general rule of immunity, §86(2) C.P.C., we can say they are really ‘classical’ immunity exceptions. In addition, section §86(2)(b) provides an exception for commercial activities of a foreign state, typical for the restrictive immunity doctrine. This alone suffices as conclusive proof that to talk about an ‘absolute’ immunity doctrine in India, is not correct, despite the requirement of administrative consent.

The burden of proof question is particularly interesting under §86(2)(c) C.P.C. for the criterion that ‘the foreign state is in possession of immovable property situated within those limits and is to be sued with reference to such property or for money damages charged thereon.’ First, it’s necessary that the plaintiff be a tenant of such property. The question is who bears the burden of proof for the plaintiff be a valid tenant under this section, that is, the existence of a rental contract between the plaintiff and the foreign state?

When we consider the presumption of jurisdiction in §9 C.P.C., we would have to conclude that the burden is upon the party who seeks to oust jurisdiction, that is, the foreign state. The rental contract would so to speak ‘automatically’ remove
immunity for the foreign state. But under section 86(2) the burden is upon the plaintiff to show that the conditions for any such removal of immunity are fulfilled. So we are facing a paradoxical situation on first sight.

The result would namely be in contradiction with §9 C.P.C. Let me forward two arguments to resolve this riddle. First of all, the plaintiff has anyway to prove the existence of the contract because he derives a legal right from it. Once he can prove that a contract exists, immunity will be removed as a matter of law. But the situation is more complex than that, as the plaintiff also bears the burden of proving, in front of the administrative force, the conditions for the governmental consent under §§86(2)(a) to (d). Second, §86 represents an exception to the general rule of jurisdiction established by §9 C.P.C.

In other terms, §86 C.P.C. is to be considered as a lex specialis for cases where the defendant is a foreign state, which grants the courts competence only under the conditions enumerated by §§86(2)(a) to (d) and when administrative consent is given. Hence, the burden of proof, or ‘immunity risk,’ must be with the plaintiff.
The Relationship between Internal Law and International Law

The relationship between internal law and international law in India, regarding foreign sovereign immunity, merits a brief exam.

We have already seen for the Singapore Act that the question is not the general problem if international law takes effect upon municipal law by either transformation or incorporation; the problem is neither if international law can limit municipal law for any question of sovereign immunity to be granted, or not.

Let me first quote two experts from India on this matter, Prabhas C. Sarkar and Sudipto Sarkar:

The effect of s. 86(1) is thus to modify to a certain extent the doctrine of immunity by International Law for when such consent is granted as required by s. 86(1) it would not open to a foreign state to rely on that doctrine because the municipal courts in India would be bound by the statutory provisions contained in the CP code. (Sarkar on Civil Procedure (1979), 208, quoting Ali Akbar v. U.A.R., A 1966 SC 230).

Sarkar refers to the ‘absolute’ immunity doctrine, supposing that India’s municipal law is different in respect of the statutory regulation of foreign sovereign immunity.
The question is even more complex regarding immunity from execution in India because the law does not contain any exception to that immunity rule. Also, administrative consent is regulated in a different manner regarding immunity from execution; even in a case where administrative consent for the suit is not needed, such consent still must be obtained for any measure of execution of the judgment, into the property of a foreign state.


An interesting leading case was rendered by the Court of Appeals of India in Agrawala v. Union of India, A.I.R. 1980, Sikkim 22, 21 IND. J.INT’L L. 594-600 (1981), which was a suit against the Union of India which was filed already in 1972 in a Sikkim court.

Sikkim was becoming a member of the union only in 1975 and, before that time, had the status of a protectorate of the Union. The Court of Appeals thus had first to decide if the suit could be maintained even after incorporation of the Sikkim, and second, if the Union of India was to be granted immunity from
jurisdiction. The litigation was about a contract concluded between the plaintiff and the Union.

It is important to see, first of all, that the Union of India did not invoke absolute sovereign immunity but argued that the terms of §86 C.P.C. were valid also for the Sikkim, which was an important consideration in the litigation, as administrative consent was not given. The Court of Appeals concluded that before incorporation, India was ‘a foreign state vis-à-vis Sikkim’ and confirmed to maintain the suit as India, by not invoking immunity, had waived its right to immunity.

—A.I.R. 1980, Sikkim 22, 26, IND. J.INT’L L. 594, 595, quoting Lassa Oppenheim, International Law (1905/1955), Vol. 1, 193, who says that a protectorate ‘is not to be considered to be a part of a portion of the protecting State.’

India’s argument, that §86 C.P.C. was valid also for Sikkim, was rejected by the court.


But the most interesting in this leading case was the obiter dictum of the Court of Appeals.

**Agrawala v. Union of India (C.A.)**

7. It should be noted that the doctrine of absolute immunity in favour of foreign States from being sued in the Courts of India has not been accepted in India and
under the provisions of Section 86, Civil Procedure Code, 1908, the only immunity that foreign States enjoy is a limited immunity from being sued without the consent of the Central Government. (Id.)

Indian case law is highly instructive for the interpretation of §86 C.P.C. In 1965, in *Kashani v. United Arab Republics, Civil Appeal No. 220 of 1964, A.I.R. 1966 SC 230, 60 AJIL 861 (1966), 64 ILR 489 (1983)*, the Supreme Court of India ruled that §86(1) C.P.C., which at the time was only embracing ‘Rulers of a foreign state’, applies ‘to cases where suits are brought against Rulers of foreign States and that foreign States fall within its scope whatever be their form of Government.’ Regarding the relationship between municipal law and international law in India, the Supreme Court stated:

The effect of the provisions of s. 86(1) appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international law. It is not disputed that every sovereign State is competent to make its own laws in relation to the rights and liabilities of foreign States to be sued within its own municipal courts. Just as an independent sovereign State may statutorily provide for its own rights and liabilities to sue and be sued, so can it provide for the rights and liabilities of foreign States to sue and be sued in its municipal courts. That being so, it
would be legitimate to hold that the effect of s. 86(1) is to modify to a certain extent the doctrine of immunity recognized by International Law. This section provides that foreign States can be sued within the municipal courts of India with the consent of the Central Government and when such consent is granted as required by s. 86(1), it would not be open to a foreign State to rely on the doctrine of immunity under International Law, because the municipal courts in India would be bound by the statutory provisions, such as those contained in the Code of Civil Procedure. (60 AJIL 861, 862).

It is interesting to observe that the Court of Appeals of India, in *United Arab Republics v. Kashani* (1961), 64 ILR 394 (1983), dismissed the appeal with the argument that ‘international law recognizes the absolute immunity of sovereign independent States from being sued.’ However, the Supreme Court, as we have seen, refused to grant the foreign state an immunity that is ‘more absolute’ than that granted under §86 C.P.C. It is not important to know if such a rule was ever proven to exist in international law, or if both the absolute and restrictive immunity doctrine coexisted for a certain time; what is of interest in this decision is that the Supreme Court held that the municipal law of India *primed over international law*, in that particular question of the scope of the foreign
sovereign immunity to be applied in the courts of India.

—This was the result of Judge Chauhan’s reasoning in the verdict of the Supreme Court of Pakistan in Qureshi v. Union of Soviet Socialist Republics, PLD 1981, 1, Supreme Court, 377, 20 ILM 1060, 64 ILR 585 (1983). We are going to see further down that the Supreme Court of Pakistan, in Qureshi, came to the exact opposite result for Pakistan, where Judge Chauhan admitted proof for a possible absolute immunity rule under international law, which if proof was conclusive, would result, according to the judge, in international law priming over Pakistan’s municipal law. However, as we are going to see, such conclusive proof could not be established even after long and extensive scrutiny by the court.

**Conclusion**

In India, we are encountering, in the opinion of some international law experts a modified ‘absolute’ immunity doctrine, which however, after further scrutiny reveals to be a restrictive immunity doctrine that is enhanced by an administrative consent requirement for most actions against foreign states, or their sovereigns.

§9 C.P.C. starts from a presumption of jurisdiction that is overcome only when a suit is expressly or implicitly barred. The burden of proof for such an exception from jurisdiction is upon the party that wants to have it applied, that is, the defendant. However, contrary to §9 C.P.C. jurisdiction is
generally barred when an action is brought against a foreign state or sovereign; this is a case where suits are expressly barred. However, the bar is conditioned by administrative consent for most cases.

Consequently, when we look at the whole of this statutory construction, we need to conclude that the burden of proof for the immunity claim is *prima facie* upon the foreign state or sovereign.

However, in practice, the plaintiff bears a burden of proof as well, namely for demonstrating in front of the administration that a case if applicable where governmental consent is to be given. In addition, it is to be seen that §86 C.P.C. is *conclusive* in the sense that this *lex specialis* contains the only possible way immunity is granted in the courts of India, and that foreign states cannot invoke any immunity rule derived from international law.

**Foreign Sovereign Immunity in Pakistan**

**Introduction**

In Pakistan, the development of sovereign immunity is still more a matter of historical originality as this is the case with India.
In fact, what we find here is a legislative heritage from India which was then modified by the *State Immunity Ordinance, 1981*, a statute comparable to the United Kingdom’s immunity act, and finally we got a leading case that brilliantly analyzed the whole of this complex situation, to arrive at a clear end result. The decision of the Supreme Court of Pakistan of 8 July 1981 in *Qureshi v. Union of Soviet Socialist Republics*, *PLD 1981, 1, Supreme Court, 377, 20 ILM 1060, 64 ILR 585 (1983)*, which we already mentioned, was a suit filed as early as in 1966, when the plaintiff, a Pakistani resident, claimed damages from the Soviet Union and its commercial representation in Pakistan as a result of breach of a contract providing for commercial services to the Soviet embassy in Pakistan, by the Soviet government. The action was dismissed by the High Court of West Pakistan, whereupon the plaintiff filed the appeal in 1969.

—The High Court held: ‘The overall conclusion, in my humble opinion therefore, cannot be that a foreign State can sue or be sued as a juristic ‘person’ in terms of rules 1 and 3 of Order I, C.P.C.; but that it may sue by virtue of section 84 but cannot be sued as such apart from its Ruler in terms of section 86 C.P.C. This suit is, therefore, not maintainable against defendant No. 1, which is a Foreign State, nor against defendant No. 2, which is the integral part of defendant No. 1 and of its Embassy in Pakistan. Only the Ruler of a Foreign State can be sued, in the name of his State, with the consent of the Central Government.
In this case, the Central Government has admittedly given no such consent’. PLD SC 399, 20 ILM 1066.

The Supreme Court only ruled that appeal in 1981, and thus took 12 years (!) for rendering the judgment that finally gave right to the plaintiff, refusing to grant immunity to the Soviet government. It is quite obvious that the court waited for the enactment of the *State Immunity Ordinance*, which entered into force on the 11th of March, 1981. The judgment followed on the 8th of July that same year! Consequently, the court also had to rule on the question of a law changing during the litispendence of an action and the majority of the judges admitted the retroactive application of the Immunity Ordinance, given that it was not a legal right that was in question, but a mere procedural modification, for which retroactive application is generally admitted both in municipal law and international law.

—PLD SC 420, 421, §50, 20 ILM 1082. See also Sompong Sucharitkul who held in his course Immunities of Foreign States Before National Authorities, 149 RCADI (1976-I) 86, 121: ‘As has been observed, State Immunities are procedural in nature.’

As to the facts, it is important to see that the commercial representation of the USSR was constituted as an integral part of the Soviet embassy in
Pakistan. This was stipulated in a bilateral treaty between the Soviet Union and Pakistan which conferred diplomatic immunity to the commercial representation. As a result, the Soviet Union claimed immunity not only in its quality of a foreign state, but also diplomatic immunity in favor of its commercial representation in Pakistan.

This is quite a unique constellation, as to make it all even more exotic that treaty was concluded as a letter exchange between the directors of the commercial representations of both the USSR and Pakistan, expressly considering the letter exchange to be a bilateral treaty between the two countries. As stated in the judgment:

(2) The functions of the Trade Representative will be to promote trade between the USSR and Pakistan and to represent the interests of the USSR in Pakistan in matters relating to trade between the two countries.

(3) The Government of Pakistan agrees to treat the USSR Trade Representation in Pakistan as an integral part of the USSR Embassy in Pakistan. Consequently the Trade Representative and his Deputies will be entitled to the usual diplomatic privileges and immunities and the premises in which the office of the Trade Representative is located and which will be specified, will enjoy extra-territoriality. No other business premises shall be extra-territorial. (…)

(4) All contracts entered into and signed for or on behalf
of the Trade Representation shall be deemed to have been made in Pakistan and the Trade Representation shall be responsible for their due fulfillment. (PLD SC 389, 20 ILM 1066).

The court first held on the question of diplomatic immunity of the USSR trade representation in Pakistan and refused such immunity under the bilateral treaty.


Diplomatic immunity is not a topic of the present study while there are well certain parallels between foreign sovereign immunity and diplomatic immunity. The problem that was tackled in this decision is of great importance in international law in view of the consistent practice of the USSR to escape from foreign jurisdiction by ‘wearing different hats’, and invoking diplomatic immunity in all possible ways. However, the Supreme Court of Pakistan was clear-cut in refusing the USSR such immunity, and all immunity at that.
Judge Chauhan first outlined in detail the practice of the USSR to invoke immunity in all possible ways to escape its international responsibilities in order to ultimately be responsible only in its own territorial jurisdiction and in front of its own courts. (PLD SC 389, 390, §8, 20 ILM 1066, 1067)

Then, the judge reported international practice that was heading at more and more depriving the USSR of immunity, in applying the restrictive immunity doctrine. In addition, the judge reported the practice of the USSR to conclude bilateral agreements that grant diplomatic immunity to all its trade representatives but also grant those representatives the right to submit to foreign jurisdiction if they deem such doing correct, even if it may be against the ruling doctrine of the USSR.


The judge concluded that in matters of international commercial transactions, ‘the position of a Soviet trade delegation is very much the same as that of private merchants.’ Looking at the bilateral treaty, the judge founded it divided in two parts:
(a) It is divided into two parts. In one part it makes the Trade Representation as an integral part of the USSR Embassy in Pakistan and consequently confirms the usual diplomatic or consular privileges or immunities on the Trade Representative and his two Deputies;
(b) Its other part prescribes the functions of the Trade Representation/Representative viz to promote trade between the USSR and Pakistan, and to represent the USSR interests relating to trade between the two countries;
(c) In that respect it authorizes the Trade Representation/Representative to enter into and sign trade agreements;
(d) It states that all such contracts shall be deemed to have been made with Pakistan.
(e) It further stipulates that the Trade Representation shall be responsible for their due fulfillment, … (PLD SC 389, 392, §13, 20 ILM 1066, 1068).

The judge concluded that diplomatic immunity was only covering the official functions of the trade representative and his two deputies, but not their commercial functions.

—Id., §15. ‘… , but its functions are of a trading and commercial nature, and it can represent USSR in transactions of that type and enter into contracts for that purpose.’

After having affirmed jurisdiction from the arguments provided in (d) and (e), the judge concluded with regard to the treaty:
The Treaty in this case thus combines the diplomatic status of the Trade Representation and its personnel, with the power of local Courts to decide disputes arising from trade operations conducted by it. (Id.)

Finally, Judge Chauhan examined the Vienna Convention on Diplomatic Relations of April 18, 1961 which was both ratified by the USSR and Pakistan, and concluded:

We have gone through the various Articles of the Vienna Convention and we note that to diplomatic agents and envoys they do not grant any jurisdictional privileges and immunity in respect of their commercial transactions which really are not part of their official functions as diplomats, etc.

—PLD SC 389, 396, §21, 20 ILM 1066, 1070. See also Art. 33(1)(c) of the Vienna Convention.

**Historical Development of Foreign Sovereign Immunity**

While sections 86 and 87 C.P.C. 1908 were replaced by the State Immunity Ordinance, 1981, we observe a different development of jurisdictional immunities in Pakistan from what we have seen was such development in India. When Pakistan adopted the Indian Civil Procedure Code, section 86(1) was still in the version of ‘Any Ruler of a foreign State … ‘ and
there was no legal reform comparable to that in India. In addition, the Supreme Court of Pakistan, in the *Qureshi* precedent refused to enlarge the scope of section 86(1) so as to encompass foreign states, staying with the literal wording.

—PLD SC 398, 417-418, §§45-47, 20 ILM 1066, 1080-1081. This question was of course not decisive, but an obiter dictum, as the court applied the State Immunity Ordinance 1981 retroactively to this case.

The conclusion of the Supreme Court was that in such a case, when the text is unequivocal, there is no room for interpretation.

Hence the municipal law of Pakistan did not recognize to grant immunity to foreign states, but only to their sovereigns. The presumption of jurisdiction, §9 C.P.C. could therefore not be refuted by section 86, as this was the case in India. Consequently, the defendant foreign state, seeking to oust jurisdiction, has to overcome the presumption of §9, and cannot for that matter apply any provision of Pakistani law, but only a rule or principle of international law. This is an interesting result as during the validity of the first Civil Procedure Code of 1859, when there was not yet an administrative consent requirement—which was only introduced in
1877—the lacuna in municipal law regarding foreign sovereign immunity was already recognized for British India in *Jwala Pershad and another v. His Highness The Rana of Dholepore* (1963), as reported by judge Chauhan in *Qureshi*.

... wherein it was held that it contained no provision specially exempting an independent Native Chief from the jurisdiction of our courts though immunity was granted to them on the ground of International Law as practiced under British Laws which applied here and whereunder a suit even for recovery of private debt was barred ... (PLD SC 398, 414, §37, 20 ILM 1066, 1079).

This is equally valid for Burma, a country that has adopted the C.P.C. 1908 from British India. In 1948, the High Court of Burma, in *U Kyaw Din v. His Britannic Majesty’s Government of the United Kingdom and the Union of Burma*, 23 ILR 214 (1956), Whiteman’s *Digest of International Law* (1968) writes:

It is significant that while under Section 84 of the Code of Civil Procedure a foreign state may sue in any country [sic] in the Union of Burma, there is no provision in the Code which permits the institution of a suit against a foreign state. It would seem therefore that the authors of the Code of Civil Procedure followed the general law ... (Whiteman, *Digest of International Law* (1968), Vol. 6, p. 560, [1948] Ann.Dig. 137-138 (No. 42).
The Relation between Municipal Law and International Law

The Supreme Court of Pakistan, in Qureshi, developed three arguments of how Pakistani municipal law and international law relate to each other.

(i) The relation between Pakistani municipal law and international law;

(ii) The present state of international law in matters of foreign sovereign immunity;

(iii) The burden of proof in respect to the existence of a rule of jurisdictional immunity under international law.

Contrary to the jurisprudence in India, that we retraced earlier on, the Supreme Court of Pakistan rejected USSR’s argument international law knew an absolute rule of foreign sovereign immunity:

As has been pointed out by my Lord Justice Chauhan section 86 of the Civil Procedure Code does not constitute a bar to a suit against a Foreign State in our country. The question then is whether such a suit is barred by any principle of customary International [Law]. (PLD SC 398, 432, 20 ILM 1066, 1088. (Judge Shah).
It is interesting to observe that this was recognized already in the early precedent *Jwala Pershad* (1863), that we reported already, so that we can speak of a consistency in Pakistani law and jurisprudence to not extend the meaning of §86 C.P.C. and recognize that actions against foreign states are not barred by this provision.

Such consistency namely is lacking in India, or rather, the opposite solution was taken since the precedent *Kashani*, where the old version of the C.P.C. of 1908 was enlarged, first by jurisprudence and later by legislative update, so that foreign states were encompassed by the section.

In their very extensive and well-researched judgments, judges Chauhan and Shah came to the conclusion that international law did not know a rule of ‘absolute’ sovereign immunity.


—Judge Shah equally examined British and American as well as Canadian case law, but also continental jurisprudence, even of the Soviet Union, Eastern European countries and Asian
countries, as well as international conventions on the matter of jurisdictional immunities of foreign states. The judges Haleem and Zullah affirmed, PLD SC 397, §24, 20 ILM 1066, 1070.

Judge Chauhan concluded:

To give our answer straightaway, our study has led us to the conclusion that the grant or acceptance of absolute jurisdictional immunity to a Foreign State has neither been a uniform practice nor a rigid obligatory rule, and there has never been a uniformity of Courts of various countries in this respect, and if at any interval in time in the world it was so considered then it has undergone a tremendous change and has rather entrenched to the contrary. (Id.)

The sum total of the above discussion is that even under the Customary International Law or General International Law a suit of the present kind is not barred. (PLD SC 397, 408, 20 ILM 1066, 1076)

Judge Shah concluded:

A study of the law of sovereign immunity reveals the development of two conflicting concepts, each of which has been widely held and firmly established at one period or another. The upshot, in my view, of this discussion is that:

(1) Section 86 of the Civil Procedure Code does not bar the suit filed by the appellant against the respondents;
(2) That there is no positive rule of Customary International [Law] which can be pleaded as a bar of jurisdiction to the maintainability of the suit. On the other hand, the rule of International Law followed by
most States at present and which rule, in my view, should be followed by the Courts of Pakistan is that acts of a commercial nature are not immune from the jurisdiction of the Municipal Courts. Therefore, the plaintiff’s suit was maintainable … ‘ (PLD SC 397, 453, 20 ILM 1066, 1098).

The Supreme Court of Pakistan decision stands out as an example for the firm establishment of restrictive immunity, a judgment also that has the merit to stand out both in academic scholarship and authority, and last not least in juridical clarity!

And the judgment also is fruitful as to our main question in this study, that is, who bears the burden of proof in such sovereign immunity litigation?

Judge Chauhan stated to this respect that ‘[t]he burden of proving that the rule of absolute immunity was a rigid inflexible rule was on the defendants, and we must say that they have failed to discharge the same … ‘ (PLD SC 397, §24, 20 ILM 1066, 1070).

This conclusion is logical and systemically sound as the rule is not sovereign immunity in Pakistan, but the presumption of jurisdiction, §9 C.P.C. from which immunity is the exception. We can thus say that the court has but affirmed what appeared already to be true under sections 9 and 86 C.P.C., where section 86
is the exception to section 9. This becomes even more obvious when reading the preliminary notes of the judgment that says: ‘Burden of proving ouster of jurisdiction, held, on defendants.’ (PLD SC 379, 20 ILM 1061).

It is to be expected that this judgment will draw wider circles in the international law literature, representing a leading case for future sovereign immunity litigation where the defendant foreign states seeks to invoke a pretendedly ‘absolute’ doctrine of foreign sovereign immunity to exist under international law.

However, with regard to the burden of proof, the Supreme Court of Pakistan has only stated about the burden of proof of a legal rule, not a fact, nor has it decided about immunity from execution.

The Supreme Court has not stated that this burden of proof also applies with regard to the facts at issue for the grant of immunity vel non. It was assumed from the start by the judges that the service contract between the plaintiff and the USSR trade representation was a commercial contract, an action de iure gestionis.
There is no indication to be found either in the later part of the judgment that deals with the *State Immunity Ordinance, 1981*.

However, the burden of proof regarding the facts at issue cannot differ from the burden of proof with respect to the existence of a legal rule, in international law, regarding foreign sovereign immunity. To put it squarely, the burden can only be with the foreign state, which equally follows from the statutory construction of sections 9 and 86 C.P.C., but also from the relationship between the presumption of jurisdiction in §9 C.P.C., and §3 State Immunity Ordinance, 1981.

**The State Immunity Ordinance, 1981**


It is important to note that the STIO has *not* replaced §9 C.P.C., the presumption of jurisdiction. The decisive question, with regard to the allocation of the burden of proof is thus which is precisely the relationship between §9 C.P.C. and §3(1) STIO 1981, which simply reads ‘General immunity from jurisdiction.'
A State is immune from the jurisdiction of the courts of Pakistan except as hereinafter provided.’

From a systematic perspective, the burden of proof derived from the intersectional relationship cannot have changed with respect to the pre-Ordinance legal situation. For the the older legal situation in Pakistan, as well as the analogous situation in India, we have concluded that the burden of proof is upon the foreign state to give a basis for its immunity claim by producing evidence to the effect that it is entitled to such immunity. This argument is valid a fortiori for the new legal situation, as the STIO 1981 has abandoned the requirement of administrative consent.

Let me shortly review the new systematic schema. The presumption of competence in §9 C.P.C. is refuted only when another legal provision expressly says so, ‘… excepting suits of which their cognizance is either expressly or impliedly barred. In the commentary of Sanjiva Row, Code of Civil Procedure (1962), we find that an express bar usually takes the form of another legal provision:

The expression ‘expressly barred’ means barred by virtue of enactment in force; and the cognizance of the entire suit as brought is barred. The section postulates the barring of jurisdiction of a particular class of suits of
a civil nature by a clear intent manifested, or a clear provision made, by a valid and binding statute. Statutes ousting jurisdiction of civil courts are strictly construed. (§ 7, N 7, p. 52).

Now, the general rule of immunity pronounced in §3(1) STIO 1981 is such an express provision that apparently bars jurisdiction of suits filed against foreign states.

But this rule is by no means unconditional; it applies only in the rare cases that none of the numerous exceptions applies. This means that in principle, the foreign state can take recourse to the general rule if none of the exceptions applies. These exceptions are:

STIO 1981
4. Submission to jurisdiction.
5. Commercial transaction and contracts performed in Pakistan.
7. Ownership, possession and use of property.
8. Patents, trade marks, etc.
9. Membership of bodies, corporate, etc.
10. Arbitrations.
11. Ships used for commercial purposes.
12. Value added tax, customs-duties, etc.

That means in practice that the foreign state must show that none of these exceptions applies for being entitled to immunity. That the foreign state thus has
to prove a ‘negative fact’ doesn’t alter the burden of proof.


This argument is valid even *a fortiori* when we compare the new legal situation in Pakistan with the legal situation before the enactment of the *State Immunity Ordinance, 1981*.

The new immunity rule is pierced by so many exceptions that it appears to represent *practically only a residual concept*. Not only is the plaintiff under the new legal situation free from any administrative consent requirement, but he can sue a foreign state on so many grounds that from that there is not much left from that immunity rule. In other words, to grant a state immunity under the Ordinance requires a particular argument or justification.

In addition, the decision of the Supreme Court of Pakistan in *Qureshi* confirms that the burden of proof
for an exception to jurisdiction is upon the defendant foreign state.

As to immunity from execution, Pakistan just as all other jurisdictions examined in the present study, adheres to an absolute immunity rule regarding property that belongs to foreign states, §86(3) C.P.C. There is no indication that the STIO 1981 wanted to change that legal situation, so much the more as the Ordinance in this point is literally identical with the British Act, §15(2) STIO 1981, as we have already seen in the discussion of the STIA 1978.

Hence, the burden of proof, in matters of immunity from execution is upon the plaintiff or judgment creditor to show that an exception to that absolute rule of immunity applies.
The Foreign States Immunities Act 87, 1981 (South Africa)

Chapter Six

Introduction

South Africa, as well as other jurisdictions already reviewed that enacted statutes on foreign sovereign immunity, closely followed up to the British example, and British case law. This can be seen exemplarily in De Howorth v. The SS ‘India’, 1921 CPD 451, a 1921 decision, that was considerably influenced by British case law.

As a result, South Africa also overtook the absolute immunity doctrine from Britain for a while, fully in accord with the Crown on a tight handling of those matters.

However, the remarkable opinion of Lord Denning in *Trendtex Trading*, rendered in 1977, didn’t remain without influence upon the satellites of the British Commonwealth. In South Africa, this important change followed in 1980, with the case *Inter-Science Research and Development Services (Pty) Ltd. v. Republica Popular de Mocambique, 1980 2 SA 111 (T), 64 ILR 689 (1983)*. This decision was the starting point of the restrictive immunity doctrine in South Africa.

The plaintiff, a South African company had concluded a contract with ETLAL, a company from Mozambique, for the surveillance and planning of agricultural development in Mozambique.

After the independence of Mozambique, the new government declared as void all contracts concluded under the old government. The plaintiff claimed damages against the new government of Mozambique in a court in South Africa.
The court, after the South African government certified to have officially recognized the new government of Mozambique, rendered a decision favorable to the plaintiff, denying immunity to Mozambique by applying the restrictive immunity doctrine.

—See, more in detail, the case note of John Dugard, International Law in South Africa: The Restrictive Approach to Sovereign Immunity Approved, 1980 SOUTH AFRICAN L.J. 317.

The precedent *Kaffraria Property Co. (Pty.) Ltd. v. Government of the Republic of Zambia*, 1980 2 SA 709 (E), 64 ILR 708 (1983), goes in the same sense, upon which *Inter-Science* was favorably received by the South-African government. And we may have some right to ask why nonetheless an immunity statute was enacted?

The argument brought forward by the South-African government was that special directives were lacking in that field of the law and a statute would be more obviously informative than case law for certain interested circles who wish to know South-Africa’s precise position in matters of foreign sovereign immunity.
Following this intention, the *Foreign States Immunities Act 87, 1981* (FSIA 87) was enacted and entered into force on the 20th of November 1981. In its structure and drafting technique, the FSIA 87 is ‘for all practical purposes, a copy of its British counterpart.’

—See also Neville Botha, Some Comments on the Foreign States Immunities Act 87 of 1981, XV COMP. & INT’L L.J. SOUTHERN AFRICA 334 (1982), at page 335, note 7: ‘The South African Act has generally been taken over word for word from the British Act.’

**Immunity from Jurisdiction**

**Generalities**

In South-African civil procedure, there is, like in India and Pakistan, a presumption in favor of jurisdiction.

As a result, the burden of proof is upon the party that seeks to oust jurisdiction.


As for the other immunity acts examined in the present study, the question comes up if the rule of
immunity under the FSIA 87 has reversed this presumption of jurisdiction?

The general rule of immunity is to be found in §2 FSIA 87 and is literally identical with the immunity rule in the British act. Also, the immunity exceptions are literally the same as those enumerated in the STIA 1978.


That is why our conclusions on the subject of the British Act can without hesitation be validated also for South Africa’s FSIA 87. The burden of proof cannot differ from the schema that is valid under the British act. Gerhard Erasmus confirms this result:

The Act also creates the impression that the onus throughout will be on the Foreign state to prove the existence of those facts on which it relies for its claim of immunity. Although it starts with a reaffirmation of the principle of immunity, the general tenor is definitely one
of emphasizing the exceptions, i.e. the cases where immunity does not apply. In most instances the reinvocation of immunity will have to take the form of a rebuttal of the existence of one of the exceptions. (Erasmus, op.cit., at 101).

The argument provided by Gerhard Erasmus is similar to what Francis A. Mann wrote about the burden of proof under the British act. As to the rule-and-exception principle in the construction of the FSIA 87, Erasmus noted:

The Act itself contains a few uncertainties, but is relatively well drafted. Despite the fact that it speaks of the ‘general immunity from jurisdiction’ in section 2, the end result is that foreign states can now claim immunity in only a limited number of instances. The denial of immunity is, in fact, so far-reaching that it would be more realistic to treat the exceptions as the rule. (Id., 105).

We can thus conclude that under South Africa’s FSIA 87, 1981, the burden of proof generally is upon the foreign state with regard to the facts that are at the basis of its immunity claim, which in most cases means the proof that the activity in question was one of public, governmental authority.
The Precedent I Congreso del Partido

Section 4(3) FSIA 87
In subsection (1), ‘commercial transaction’ means:
(a) any contract for the supply of services or goods;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such loan or other transaction or of any financial obligation, and
(c) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

In explaining the notion of ‘commercial activity’ in the FSIA 87, Gerhard Erasmus noted:

Even in those cases where the breach of the terms of a commercial contract arises from a sovereign act (including an act of state) such a state will not be entitled to immunity. (Id., 97).

As we have seen earlier in this study, the British precedent *I Congreso* is distinct from previous precedents in that for the first time a breach of contract, and the contract itself, were seen as two separate actions, which could potentially have different natures.

In that case, the breach of the original contract was based upon a government act relating to the foreign policy of the defendant state, the Republic of Cuba, and that action also was based upon a national law of
that country. Thus, that was a quintessential *act of state*. And yet, the judgment of the House of Lords, rendered under the *restrictive immunity doctrine*, confirmed the essential principle of this doctrine, viz. the qualification of the act in question by its *nature*, and not by its purpose, be that purpose sovereign and governmental.

The developments of Gerhard Erasmus show that this precedent is of equal importance for South Africa, and would be decided on the same grounds, that is, a refusal to grant immunity to a foreign state acting in that way.

**Separate Entities**

As under the British act, separate entities of a foreign state enjoy foreign sovereign immunity only under particular conditions. Section 15(1) FSIA 87 states:

**Section 15(1) FSIA 87**
A separate entity shall be immune from the jurisdiction of the courts of the Republic only if:

(a) the proceedings relate to anything done by the separate entity in the exercise of sovereign authority; and

(b) the circumstances are such that a foreign state would have been so immune.

Despite the minimal editorial modification—‘only if’ in the FSIA 87, instead of ‘if and only if’ in the STIA
1978—we can admit here a presumption of jurisdiction, or a rule of nonimmunity regarding separate entities, from which immunity would be the exception. Hence, the separate entity bears the burden of proof to refute the presumption of jurisdiction by conclusive proof that it has acted ‘the the exercise of sovereign authority’ and that ‘the circumstances are such that a foreign state would have been so immune.’

This is a considerably heavy burden, and prima facie evidence will not suffice to discharge it.

**Immunity from Execution**

The general rule of immunity from execution is to be found in section 14(1)(b) FSIA 87. It is literally identical with the analogous rule under the British act, including the exceptions from the rule.

—See, for example, §14(2) FSIA 87 and §14(3) FSIA 87: ‘Subsection (1)(b) shall not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes (usibus destinata).’

However, a provision similar to §13(5) STIA 1978 is lacking in the South-African act. This means that the foreign state does not enjoy the proof facilitation of §13(5) STIA 1978 where a simple certificate from a
head of embassy suffices as proof for the fact that the property, or bank account, was at least in part destined for governmental purposes. Now we might ask what the absence of that provision means?

Does it mean that the foreign state is required to submit more evidence than a simple certificate? Let us begin from the other side and ask if the absence of this provision can possibly have an impact upon the burden of proof? A facilitation of proof, however, only relates to the standard of proof, reducing that standard, but does generally not affect the allocation of the burden of proof.

Under the British act, the Ambassadorial certificate is conclusive proof that the property in questions serves at least in part governmental purposes, ‘unless the contrary is proved.’

The House of Lords, in Alcom Ltd. v. Republic of Colombia, [1984] 2 Lloyd’s Rep. 24 (H.L.), 23 ILM 719 (1984), stated that the certificate erects a presumption that the plaintiff has to overcome if he is to win and seize the property. Thus, the burden of proof is clearly upon the plaintiff. There is no doubt about the importance of this proof facilitation in favor of foreign states, to protect the governmental assets in their
embassy’s bank accounts; this is so because the seizure of an account always hits the whole account, whatever the destination of the credit balance on such an account. That is why a protection by such a proof facilitation is necessary: it serves to keep an embassy running by practically prohibiting the seizure of funds that is destined to serve governmental purposes. This is an accordance with international law.

Such cases are daily practice with international law firms who are specialized in litigating against foreign states, and who are interested to not just get a verdict, but execute that verdict, to actually satisfy their clients. But international law poses a halt in cases where the governmental activity of foreign states would be touched.

To repeat it, as bank account assets cannot be divide in ‘executable’ and non-executable’ because the judgment creditor cannot beforehand know what part of the money is destined for what purpose, the whole account must be protected, and will be so when the Ambassadorial certificate is issued.

There is an exception only for central bank accounts, where the rule is still more absolute.
Property or assets of a central bank are not considered to be destined for commercial purposes, §15(3) FSIA 87. Any measure of execution against those accounts is prohibited.

—See also §14(4) STIA 1978, §16(4) STIA 1979, §15(4) STIO 1981, and compare that with §1611 FSIA and §11(4) STIA 1982.

Apart from that particular case, the lacking of a provision similar to §13(5) FSIA 1978 in the South African enactment is hard to understand. There is no single word on this issue to be found in the parliamentary debates.


In the Singapore act and the Pakistani ordinance, analogous clauses as in the British act are to be found. In view of these facts, there is quite a high probability, in our opinion, that in any such case, South African judges will consider the British leading case *Alcom* and will close this lacuna in the FSIA 87.

As to the burden of proof in matters of immunity from execution, there is not so far a leading case at hand. However, the situation under the FSIA 87 is hardly different from that under the other immunity
enactments that are subject of this study. Contrary to
the domain of jurisdictional immunities, where the
immunity rule is but a residual concept, and where it
is rather the numerous exceptions that represent the
rule, this is not the case in matters of immunity from
execution where the rule is much tighter and
exceptions are few. In fact, there are only two
exceptions to the general rule of immunity from
execution, that is stated in §14(1) FSIA 87:

—written consent to the seizure or attachment,  
§14(2) FSIA 87;

—commercial usage of the property, §14(3) FSIA
87.

—§14(3) FSIA 87 states: ‘Subsection 1(b) shall not prevent the
issue of any process in respect of property which is for the time
being in use or intended for use for commercial purposes
(usibus destinata).’

In all other cases, the general rule of immunity
applies. The burden of proof for an exception to this
rule to apply is upon the plaintiff or judgement
creditor.

The fact that the FSIA 87 does not require an
Ambassadorial certificate, as does §13(5) STIA 1978
does not have an influence on the burden of proof; it
merely affects the standard of proof, representing a
proof facilitation. It does not for that matter affect the burden of proof.

**Conclusion**

The results we have reached in this study earlier on are not to be modified after scrutiny of the FSIA 87. This statute, just as those enacted by Singapore and Pakistan, is tightly drafted after the British model. This fact can be seen in the almost identical texts of those statutes, but is also confirmed by the international law literature; last not least it has been confirmed, expressly, by the South-African legislator. In the parliamentary debates, the Minister of Foreign Affairs and Information explained:

The British Act is particularly illuminating since it not only represents the latest schools of thought on this subject, but is also the first law that tries to regulate the subject of State immunity in its entirety. The principles contained in this Act, have been accepted in a report on the subject (VN DOC A/C/4/323 of 18 June 1979), published at the request of the International Law Commission, as being a guidepost for the future codification of the rules of international law in this field. It is as a result of these considerations that the Bill at present before this House, is cast in the British mould. (Hansard, Republic of South Africa, House of Assembly Debates, 1981, 2R (1st of October, 1981), col. 5387).
For that reason that we can by and large refer to our conclusions under the British act. In addition, the South African juridical literature, discussing the new statute, confirms the result that the burden of proof is upon the foreign state for providing some basis of its immunity claim by evidence to the court. This is a fortiori the case when not the foreign state itself, but a separate entity from such foreign state is the defendant in the suit. Such an entity must produce full conclusive proof to the court that it can benefit from the privilege of foreign sovereign immunity, and prima facie evidence will not suffice for that purpose.

The burden of proof is reversed in matters of immunity from execution. There are only two tight exceptions from the general rule of immunity from execution in the FSIA 87. Consequently, the burden of proof is upon the plaintiff for demonstrating to the court that an exception is applicable.

Property of a foreign central bank is particularly privileged, as no measure of execution can be brought forward against it, even if factually the assets are used for commercial purposes.

In this point, the British, Singapore, Pakistan and South African enactments are identical and distinct.
from how the American and Canadian acts provide for that problem.
THE STATE IMMUNITY ACT, 1982 (CANADA)

Chapter Seven

Introduction

In Canada, foreign sovereign immunity was rather early seen from the specific point of view of the present study, that is, under the procedural angle of who bears the burden of proof for the immunity claim and the facts it is based upon. For that reason it is of particular interest to tightly follow the legislative development of sovereign immunity in Canada, and the course the jurisprudence has taken in that country since the entering into force of the State Immunity Act, 1982.

To begin with, in 1968, an immunity claim of the government of Congo, in Venne c. République
Démocratique du Congo, [1968] Que.R.P. (2) 6 (C.S.), [1969] 5 D.L.R.3d, 128, 64 ILR 1 (1983), was rejected by the Queen’s Bench of the Province of Quebec. The suit was based upon a contract between the plaintiff, a Canadian architect, and the government of the Congo for the construction of the Congo’s national representation on the EXPO 67 in Montreal. The court, applying the restrictive immunity doctrine, stated:

However, today, instead of starting from the principle that every sovereign State enjoy jurisdictional immunity unless the other party can demonstrate some established exception to this rule, I believe we shall reverse the process. Sovereign immunity is a derogation from the general rule of jurisdiction. Any attorney seeking immunity from jurisdiction on behalf of a sovereign State should be called upon to show, to the Court’s satisfaction, that there is some valid basis for granting such immunity. (64 ILR 1, 11 (1983), Judge Owen).

On first sight, this passage points to the repartition of the burden of proof. However, it was just an *obiter dictum* in this judgment, which served the judge to explain, in systematic terms, the content of the new rule of restrictive sovereign immunity, while in previous case law in Canada, the absolute doctrine of sovereign immunity was still applied.
In fact, the defendant did not contest that there was a contractual relation with the plaintiff and that this relation was of a commercial nature. Hence, the question of the burden of proof never came up. This could not happen because the Congo invoked absolute sovereign immunity in its quality of a foreign government, thus an immunity as it were ratione personae.

The passage that we quoted above did not state about the burden of proof but just outlined the scope and the content of the new restrictive immunity doctrine, clearly refusing to apply the older absolute immunity concept. This becomes still more obvious when considering another passage in the judgment:

Mere proof that the party seeking immunity is a sovereign State or any agency thereof and the invocation of the doctrine of absolute sovereign immunity is no longer sufficient. (...) The position taken by the defendant was that it was a foreign sovereign State and that in virtue of the doctrine of absolute sovereign immunity our Courts had no jurisdiction. In my opinion this position is untenable today. (64 ILR 1, 11 (1983).
There was no problem of proof as the facts were not contested by the defendant. The qualification of the contractual relationship was a legal problem. Hence, the appeal of the Republic of Congo was rejected by the court because it qualified the contractual relationship as commercial.

Nonetheless, this passage had a certain prejudicial effect upon the judgement of the Supreme Court of Canada, in La République Démocratique du Congo c. Jean Venne, 1971] R.C.S. 997 (official bilingual collection), [1971] 22 D.L.R.2d 669 (English), 64 ILR 24 (1983), which reversed the Q.B. judgment and granted the Congo immunity from jurisdiction. As to the facts, the Supreme Court could not rely upon the record, explaining:

This record discloses nothing more than that the contract here in question was made in pursuance of the desire of a foreign sovereign state to construct a national pavilion at an international exhibition and to be thereby represented at that exhibition which was registered by the Council of the Bureau of International Exhibitions. (R.C.S. 997, 1002, 64 ILR 24, 27).

In the following developments, the majority of the judges took a quite surprising turn from this point of departure and argued as follows:
Considered from the point of view of the architect, it may well be that the contract was a purely commercial one, but, even if the theory of restrictive sovereign immunity were applicable, the question to be determined would not be whether the contractor was engaged in a private act of commerce, but whether or not the Government of the Congo, acting as a visiting sovereign state through its duly accredited diplomatic representatives, was engaged in the performance of a public sovereign act of state. (Id., 64 ILR 24, 28).

Hence, the court considered as the decisive fact at issue for the determination of immunity vel non not the nature of the contract between the parties, but external circumstances, or motives that were the primary reason for the Congo to engage in this contractual relation.

The majority of the judges gave particular weight to the fact that the request to participate in the EXPO 67 was made by diplomatic representatives of the Congo, as well as by an employee of the ministry of foreign affairs of that country.

It goes without saying that this reasoning is conflicting with the very content of the restrictive immunity doctrine. The purpose of the activity is not relevant under this doctrine, nor is what status those have who have actually contracted with the private merchant, nor else what the motives were for entering
such contractual relation. The restrictive immunity doctrine makes sense only when one admits that a foreign state has two options, that is to either engage in public, governmental activity, *de iure imperii*, or in private and commercial activity, *de iure gestionis*. It is not the quality of the functionary of the contracting government that is decisive for the qualification of the activity as either governmental or private, but the *nature, and only the nature*, of the activity itself. A veritable act of state of government act by the Congo has not be proven in the present case. For that reason, the majority judgment was just another vintage of the absolute immunity doctrine, under slightly different terms.

It is important to see at this point that the court has not given an indication as to the burden of proof, as there was no litigation about facts. It was a mere *obiter dictum*. There is more than a suggestion in the reasons for judgement of the Court of Appeal that in determining whether the act of a foreign sovereign is public or private, the burden of proof lies upon the sovereign to show that the act was a public one if it is to be granted sovereign immunity. As I have indicated, there is no dispute as to the facts in the present case and in my view, to the extent that it may have any bearing on the
determination of this appeal, the question is whether the contract in question was purely private or commercial or whether it was a public act done on behalf of a sovereign state for state purposes, is one which should be decided on the record as a whole without placing the burden of rebutting any presumption on either party.’ [1971] R.C.S. 997, 1003, 64 ILR 24, 28-29, by Judge Ritchie for the majority of the judges).

This passage clarifies that there was no litigation about facts, and that the suggested burden of proof rule is to be taken as an obiter dictum.

In addition, what the court said about a presumption can only refer to a legal presumption, not to a presumption of facts.

The restrictive immunity doctrine has never had the meaning of a legal presumption in favor of jurisdiction in any action against a foreign state. This new immunity doctrine solely qualified as decisive for the question of immunity vel non, the nature of the activity in question. This is a factual assumption, not a legal presumption.

And it is for that reason that it’s a matter of the evidence in the record to decide it, and a matter also of the burden of proof for those facts at issue. If it were a legal presumption, the burden of proof question never would come up in the first place,
because the very notion of the burden of proof is always related to facts at issue, or pertinent facts, not to legal presumptions of any kind.

While a legal presumption may help determine the burden of proof in any particular case where there is no litigation about the facts at issue, the question of the burden of proof never comes up.

It is for that very reason that we consider this judgment not as prejudicial for the later development of sovereign immunity in Canada, as some voices in the Canadian international law literature have suggested.

In the following developments, the Supreme Court, distinguishing the case from the precedent Allan Construction Ltd. v. Government of Venezuela, [1968] Que.P.R. 145, [1968] Que.S.C. 523, introduced a new element in the discussion.

In this case, the construction of the Venezuela pavilion at the EXPO 67 equally comprised the installation of a restaurant in the building.

The court qualified the contract between the architect and the government of Venezuela as commercial, and the Supreme Court, reporting it, concluded that because of the fact that Venezuela sold
alcoholic beverage and products of Venezuela in the restaurant, Venezuela wanted to ‘exploit’ that restaurant for commercial gain, which was not the case for the Congo where no such commercial ‘exploitation’ of the pavilion was planned or conducted. [1971] R.C.S. 997, 1003-1004).

This argument doesn’t convince. A commercial venture does not depend on the fact that direct commercial gain is derived from the commercial activity; it is all kinds of relations that fall in the commercial sphere, because by its nature, a contract is of a private nature, whatever the intended motives are behind such contract, whatever the purpose is for such activity.

The following developments of the court only show that the contract was concluded with the government of the Congo, not an organism of that government, but that doesn’t alter the nature of the activity, otherwise the restrictive immunity theory would be nonsensical.

What the Supreme Court of Canada did in this case was simply to apply the absolute immunity doctrine under the terms of the restrictive immunity doctrine thereby messing up quite a few legal notions
and standards; the court never even touched the decisive question, namely what the nature was of the service contract between the architect and a foreign government for the construction of a building. It is difficult to imagine how the government of the Congo could have used a Canadian architect for effecting an act of state, a governmental act? The very idea sounds absurd.

It is for that matter not surprising that Judges Laskin and Hall rendered important and remarkable minority opinions, rendered by Judge Laskin, [1971] R.C.S. 997, 1010 ff. Judge Laskin referred to international law jurisprudence that describes and explains the restrictive sovereign immunity doctrine, and concluded:

If the immunity claimed herein is to be tested on a restrictive basis, as I think it should be, there is, in my opinion, not enough in the record upon which a ready affirmation of immunity can be founded. The case must certainly proceed further for the claim of immunity to be determined. (Id., 64 ILR 24, 45).

At this point, we need to observe that in Canadian civil procedure law, immunity of jurisdiction is construed as a declinatory exception from the general competence of courts.
For ousting that jurisdiction, foreign states may invoke either §§163, 164 C.P.C., or §165 C.P.C.

§163 C.P.C.
A defendant, summoned before a court other than that before which the suit should be been instituted, may ask that the suit be referred to the competent court within the legislative authority of Québec, or that the suit be dismissed if there is no such court.

§164 C.P.C.
Lack of jurisdiction by reason of the subject matter may be raised at any stage of the case, and it may even be declared by the court on its own motion. The court adjudicates as to costs according to the circumstances.

§165 C.P.C.
The defendant may ask for the dismissal of the action if:
1. There is lis pendens or res judicata;
2. One of the parties is incapable or has not the necessary capacity;
3. The plaintiff has clearly no interest in the suit;
4. The suit is unfounded in law, even if the facts alleged are true.


The Congo, in the Venne precedent, invoked §§163, 164 C.P.C., thereby denying the jurisdiction of the court. Congo did not provide any proof as to its immunity claim, except that it was a foreign state, but the latter proof was even necessary under the absolutely immunity doctrine. To conclude, there was certainly a lack of proof in the record regarding the
quality and nature of the activity in question. This burden, the Congo has not discharged.

Judge Laskin develops:

In viewing the matter from the standpoint of an issue of restrictive immunity, I have taken a broader view of the declinatory exception than its terms, strictly speaking, justify. As set out in the Case of Appeal, the declinatory exception is a peremptory assertion of immunity of a sovereign State. There is nothing in the exception as framed to indicate any claim to immunity based on a restrictive theory. Such a claim might have been open if Congo had invoked art. 165 C.P.C. rather than art. 163 and 164. Had it done so, it would be conceding jurisdiction in the Superior Court to determine whether it was entitled to immunity under a restrictive theory. However, by reason of the way in which Congo proceeded and of the stand it took, this Court is faced, as were the courts below, with an unqualified contention that a sovereign State cannot as such be impleaded regardless of the activity in which it is engaged and out of which a suit against it is brought in a foreign domestic court. [1971] R.C.S. 997, 1024-1025, 64 ILR 24, 46).

That’s why the granting of immunity to the Republic of Congo by the Supreme Court of Canada can only be understood under the assumption that the court has applied the absolute rule of sovereign immunity. The argument that the nature of the activity in question was governmental is untenable
under the restrictive immunity doctrine. Judge Laskin concluded therefore:

To allow the declinatory exception is thus to reaffirm the doctrine of absolute immunity. I have made plain my opinion that the doctrine is spent. If so, it would be wrong to revive it on any view of a deficiency of evidence to overcome any suggested presumption that when a sovereign State acts through an accredited diplomatic representative any ensuing transaction with a private person is for the so-called public purpose. At this stage of the action there is no question of requiring evidence from the plaintiff or from Congo to negate or establish immunity on a restrictive basis. That comes later. Hence, I need not now be concerned with fixing any burden of proof. The only question is whether the action should be throttled at its inception or whether it should be allowed to proceed. [1971] R.C.S. 997, 1025, 64 ILR 24, 46).

This passage brings us back to our question who bears the burden of proof. We already saw earlier that this question was not pertinent in the present case as the facts were not litigated about.

In so far, the opinion of Judge Laskin primes in clarity over the majority judgment. And there is an addition question to ask. There are two obiter dicta on the problem of the burden of proof. The crucial question is if the obiter dictum of the Supreme Court
has refuted or invalidated the one that was brought forward by the Court of Appeals. I will come back to that question further down.

The Canadian Court of Appeals, before the Venne leading case, confirmed its earlier opinion that there is indeed a presumption of jurisdiction in Canadian civil procedure law, from which sovereign immunity is the exception.

This was pronounced in Penthouse Studios, Inc. v. Government of the Sovereign Republic of Venezuela, [1969] 8 D.L.R.3d 686 (C.A.), 64 ILR 20 (1983). The plaintiff, a Canadian company, had sold merchandise to the government of Venezuela for its pavilion at the EXPO 67. After the delivery, the plaintiff desired to have the merchandise returned as it had not been paid. In accordance with its decision in Venne, the Court of Appeals refused to grant immunity to Venezuela.

—in Smith v. Canadian Javelin Ltd. et al, [1976] 68 D.L.R.3d 428 (Ont.H.C.), 64 ILR 47 (1983), the ‘Securities and Exchange Commission’ (SEC) of the United States government, one of the defendants, had filed a suit against Canadian Javelin at a US federal court, because of an alleged violation of American security laws by the Canadian company. The plaintiff, shareholder and director of that company, then filed a suit at the High Court of Ontario with the objective to question the validity of the American judgment. The Court, applying the restrictive immunity doctrine, granted immunity to SEC with the argument that this commission, by invoking American
security laws, had acted within its public, governmental authority.’

Six years after this court’s decision in *Venne*, it definitely applied the restrictive immunity doctrine in *Zodiak International Products Inc. v. Polish People’s Republic*, [1977] 81 D.L.R.3d 656 (C.A.Que.), 64 ILR 51 (1983). Zodiak sued Poland for damages as a result of a contract for distributing Polish films in Canada that the Polish government had repudiated.

The court rejected Poland’s immunity claim, qualifying the contract as being of a commercial nature. Referring to its earlier judgment in *Venne*, the court quoted the obiter dicta from that decision, and the minority opinion of Judges Laskin and Hall which at that early time already were unequivocally in favor of the restrictive immunity doctrine.

In *Re Royal Bank of Canada and Corriveau et al.*, [1980] 103 D.L.R.3d 520 (Ont.H.C.), 64 ILR 69 (1983), the action was about a rental contract that Corriveau, a landlord, had concluded with the Cuban Republic for its embassy in Canada.

Cuba cancelled the lease before the stipulated termination date and the personnel moved out of the building. As a result, the heating system in the villa was damaged because heating pipes were freezing in
the winter. The owner got a default judgment against Cuba that granted him a considerable amount of damages.

As Cuba did not want to pay the damages, the landlord tried to seize the embassy’s bank account. Cuba claimed immunity and was granted immunity from attachment. It was obvious and not contested that the account was held in the name of the embassy of Cuba.

—64 ILR 69, 75: ‘The money in the bank was obviously deposited in the name of the embassy.’

Consequently, the court concluded that the active balance on the account was ‘in possession of the foreign sovereign state.’ Before arriving at that conclusion, the court briefly reflected about the allocation of the burden of proof.

The question of onus or on whom lies the duty of establishing sovereign immunity or exemption from it is something of a problem. (Id.)

The judge referred to the analogous reflections of Judge Ritchie in Venne, but was not considering the question if the question of the burden of proof was relevant at all in the record.
It wasn’t because no facts were contested, not even the question if the active balance on the embassy account might have served commercial purposes.

The judge did not bother and granted immunity to the account as a matter of nondiscrimination. The sole fact that the account was ‘in possession’ of the Republic of Cuba was considered sufficient by the judge for granting immunity from attachment. In fact, the judge only inquired into the maintenance of the embassy and held it was governmental, but not the active balance on the account:

The only record before me shows that the leased premises were for governmental use and that the moneys in the bank were in the ‘possession’ of a foreign sovereign State. For these reasons I must hold that Cuba is entitled to claim sovereign immunity and the execution was improper. (Id.)

Construction of the Act


It is not different from the other, earlier national enactments on foreign sovereign immunity. The jurisdictional immunity rule is to be found in section 3; the rule for immunity from execution is stated in section 12 STIA 1982.

—it is to be noted that the STIA 1982 was amended in 1985, with the result that section 11, that was containing the provisions regarding immunity from execution, became section 12 by virtue of the State Immunity Act, R.S. 1985.

§3 STIA 1982
(1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.
(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

§12 STIA 1982
(1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture except where—
(a) the state has, either explicitly or by implication, waived its immunity from attachment, execution, arrest, detention, seizure or forfeiture, unless the foreign state has withdrawn the waiver of immunity in accordance with any term thereof that permits such withdrawal;
(b) the property is used or is intended for a commercial activity; or
(c) the execution relates to a judgment establishing rights in property that has been acquired by succession or gift or in immovable property located in Canada.
(2) Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.
(3) Property of a foreign state
   (a) that is used or is intended to be used in connection with a
       military activity, and—
   (b) that is military in nature or is under the control of a military
       authority or defense agency is immune from attachment and
       execution and, in the case of an action in rem, from arrest,
       detention, seizure and forfeiture.
(4) Subject to subsection (5), property of a foreign central bank
    or monetary authority that is held for its own account and is
    not used or intended for a commercial activity is immune from
    attachment and execution.
(5) The immunity conferred on property of a foreign central
    bank or monetary authority by subsection (4) does not apply
    where the bank, authority or its parent foreign government has
    explicitly waived the immunity, unless the bank, authority or
    government has withdrawn the waiver of immunity in
    accordance with any term thereof that permits such
    withdrawal.

Organisms of a foreign state are assimilated with
foreign states, for jurisdictional immunities, §2 STIA
1982, except the provisions regarding service of
process, §9 STIA 1982. The same distinction is held for
matters of immunity from execution, §12(1), (3) STIA
1982.

This structure is quite similar to the American act;
in fact, for these matters, the Canadian act follows the
FSIA 1976, not the British Act and those modeled after
it. As to property belonging to a foreign central bank,
the STIA 1982 also adopted the American model,
§12(4) STIA 1982, not the British model. (§14(4) STIA
1978, §16(4) STIA 1979, §15(4) STIO 1981, §15(3) FSIA
Immunity from Jurisdiction

Professor Castel submitted a clear vote for the allocation of the burden of proof regarding *jurisdictional immunity* in Canada, back in 1980:

If we accept the restrictive or relative immunity doctrine, the burden is upon the foreign state to prove its entitlement to immunity. It is not sufficient that it just claims immunity, because sovereign immunity is a derogation from the general rule of the competence of the tribunals. The plaintiff does not have to prove that the activity in question was one jure gestionis. (…) Now, in Québec, we have to start from the principle that nobody is entitled to sovereign immunity, except he can prove to the satisfaction of the court that he is so entitled. (Jean-Gabriel Castel, Droit international privé Québécois (1980), 720 (Translation mine).

This opinion is founded upon the conclusion that immunity is an *exception* from the general rule of the unlimited territorial competence of the courts in the forum state. We have already seen earlier in this study that this point of view gains more and more merits in present international law literature that deals with foreign sovereign immunity litigation. We also have seen the difficulty to derive conclusions regarding the burden of proof when looking at the rule-and-exception principle and the drafting
techniques of the immunity acts because the question is precisely what is the rule and what is the exception?

If we hold that competence or jurisdiction of civil courts in the forum state is the rule, and foreign sovereign immunity the exception, we in a way disregard the historical fact that for more than a century all international law practice and literature was adhering to the opposite rule, that is, that immunity from jurisdiction is the rule, and jurisdiction over a foreign state, the exception.

The confusion can well be seen in the fact that the same Professor Castel wrote, after the entering into force of the STIA 1982 in Canada, a statement in his book *Canadian Conflict of Laws (1986),* 170, that flagrantly opposed his former opinion:

The Act affirms the rule that immunity is to apply notwithstanding the failure of the state to take any steps in the proceedings and sets out the instances in which immunity is to be denied by way of enumerated exceptions from this general grant of jurisdictional immunity. This provision is intended to avoid both the doubts surrounding the need for specially pleading the defense of jurisdiction and the potential dangers an inactive or delinquent foreign state could run. It does not require anything more of a plaintiff than that he establish a prima facie case that one of the exceptions
apply in the circumstances. Thus, in his pleadings he should disclose some basis for the application of one of the exceptions.

Castel thus modified his former opinion, obviously under the spell of the drafting technique of the immunity statute, and its ‘general rule of immunity.’ From this fact and the additional fact that the court has to state on its jurisdiction \textit{sua sponte}, Castel drew the conclusion that the burden of proof was with the plaintiff.

Now let us see what is right and wrong in this argument. First, the fact that the court needs to inquire about immunity vel non \textit{sua sponte} has certainly no impact upon the allocation of the burden of proof. Even for the FSIA, where the legislative history contains a clear statement on the burden of proof for immunity from jurisdiction, the United States Supreme Court has ruled in \textit{Verlinden} that courts have to state about the immunity claim \textit{sua sponte}, even in case the foreign state does not enter an appearance.

This opinion may have some special importance for the rare cases in which the court faces a \textit{non liquet} situation, but it doesn’t free the foreign state from its burden to show some basis for its immunity claim, by
establishing a *prima facie case* of immunity from jurisdiction.

—For an example of such *non liquet*, consider the foreign state has not produced any evidence in support of its immunity claim and the plaintiff has equally not produced any evidence as to the applicability of an exception to sovereign immunity; in such a case, the court cannot simply deny immunity.

In accordance with the Supreme Court of Canada’s *Venne* decision, in a case where we find no proof for the facts at issue, there is namely neither a presumption for immunity, nor a presumption for nonimmunity.

In addition, Castel has not taken into account the fact that all immunity statutes are uniformly drafted that way, with an immunity rule at the top and exceptions that follow, without this drafting technique having any but historical reasons, and certainly not the reason that that structure would say anything about the burden of proof.

As we have seen earlier in this study, this argument really was largely discussed in American and British jurisprudence. And yet, Castel’s opinion seems to have been influenced by this discussion, as he only speaks about the evidential burden, which he sees to be placed on the plaintiff, but not the
persuasive or legal burden. At the end of the day, while on first sight Castel’s view on the burden of proof seems to be in flagrant opposition with the legislative history of the FSIA 1976 as well as American jurisprudence, the terms of his statement could be interpreted in accordance with the *Alberti* precedent, namely that the plaintiff does have a certain burden of the pleadings for pointing to the exception he wishes the court to apply.

However, this does not derogate from the principle that it’s upon the foreign state to begin with producing evidence by establishing a *prima facie case* in support of its immunity claim. It is then upon the plaintiff to prove the applicability of an exception by a preponderance of the evidence.

This is why the two opinions lead to practically the same result. The difference only becomes crucial in case of a *non liquet*, because it’s there where the persuasive or legal burden comes into play, and the judge needs to dismiss the party on which rests this burden.

According to American, British, Singaporean, Pakistani and South African case law, this is the
foreign state; according to Castel it should be the plaintiff.

What we are talking about here is what could be called the ‘immunity risk.’ We have seen that the rule-and-exception principle alone cannot deliver correct results for getting at a conclusive answer as to who bears the immunity risk. I just repeat here the conclusions we have found to be valid when examining this question under the British act. We found that the content of the new restrictive immunity rule is essentially different than the older absolute immunity rule, and that it’s not just a modification or another exception to that rule (commercial activity exception).

We found that it is a genuine new rule and that it replaced the old rule. As to the content of the restrictive immunity doctrine, we found that it basically denies immunity to foreign states, except where the foreign state demonstrates that the activity in question was of a public, governmental character.

In other words, this new restrictive immunity rule principally denies immunity, except in special cases that the defendant foreign state needs to invoke to be granted the privilege of immunity. In still other
words, we can say that this new immunity rule basically got us back to the original pre-immunity rule, which is the total jurisdiction of the forum state.

Now, from these findings flows out a quite certain allocation of the burden of proof; it is basically upon the foreign state to demonstrate that despite the exceptions to restrictive immunity, there is a case of immunity because the activity was a public, governmental act.

This allocation of the burden of proof is thus inherent in the structure of the new restrictive immunity doctrine and its content.

Castel’s pre-statute argument was heading in the same direction. And this argument was not invalidated by the FSIA 1982, despite the ambiguous drafting of the statute, with putting a residual immunity as the opening clause. In fact, two other commentators of the STIA 1982 were not misled by this merely historical drafting technique of the statute. In 1982, James G. McLeod stated:

The question of the onus of establishing the facts necessary to invoke the doctrine is similarly confused. Owen, J.A., in the Quebec Court of Appeal, felt that as immunity was an exception to the general rule, the onus was on the sovereign to establish that he was entitled to
it. [Citing the precedent *Venne v. Congo*] A majority of the Supreme Court of Canada was, however, of the opinion that there was no prima facie assumption. [Citing the Supreme Court judgment in *Congo v. Venne*]. It is difficult to understand this position because the court must have some facts introduced before it is to raise the issue of sovereign immunity. Either the sovereign must prove the act was within his immunity or the plaintiff must prove it was not. Since plaintiffs do not prove or allege in all cases a lack of immunity on the part of the defendant, the onus appears to be, in fact, on the sovereign to at least raise the issue. (…) A rule of law applicable at one time in history may not be applicable today, not because it has never been correct, but because the facts and circumstances which gave rise to it and supported it have ceased to exist. Today, when more and more governments are engaging in ordinary commerce in competition with private traders, the sovereign’s wealth and contacts give him a sufficient advantage without allowing him to avoid liability if, for any reason, he decides not to honour his commitments. The onus should be on the sovereign to show that there is some reason why immunity is required in the circumstances.


Apart from McLeod’s criticism of the Supreme Court decision in the *Venne* case, his way to argue on the grounds of the restrictive immunity doctrine is
basically how we have proceeded in this complex question for finding a valid allocation of the burden of proof, one namely that is independent from any treachery drafting technique or rule-and-exception hassle. In addition, McLeod cites quite a number of precedents where courts placed the burden of proof on the foreign state for its immunity claim. (Id., p. 74, note 112). Brian Douglas Coad, in *The Canadian State Immunity Act, XIV LAW & POL’Y INT’L BUS.* 1179-1220, at 1220 (1982-83), also concluded:

In conclusion, it should be stressed that although the Canadian Act goes far toward restricting immunity and providing the means to satisfy judgments, it fails in one critical aspect - the allocation of the burden of proof on the issue of commercial activity. The issue is crucial to a plaintiff’s success under the Act. If the burden rests on the plaintiff as *Venne* and the structure of the Act suggest, the Act’s effectiveness will be undercut severely because the Canadian plaintiff is in a poor position to obtain evidence to prove a foreign government’s involvement or intention to be involved in commercial activities. It would be preferable to place the burden of proof as to immunity on the foreign state. Such an approach would be more consistent with the stated purpose of the Act - to place Canadian plaintiffs in the best circumstances - and is supported by the view that the Act’s numerous exceptions to immunity create a presumption against immunity.
Future jurisprudence in Canada, especially on the Supreme Court level, will be bound to acknowledge that under all other immunity statutes, the burden of proof, for jurisdictional immunity, is upon the foreign state.

What we are saying in this study goes even beyond; we are holding that a rule of international law has been formed since then that places the burden of proof for matters of jurisdictional immunity upon the foreign state defendant of the litigation.

In addition, the Supreme Court of Canada will have to see that Canadian Appeal Courts have been more progressive, and more lucid, in that respect, and have clearly placed the burden of proof upon the foreign state defendant of the action. Finally, most Canadian international law experts pronounced themselves in favor of this evidence rule. Professor Castel’s idea to place the burden on the plaintiff cannot be taken as a final word, so much the more as he only alluded to the evidential burden and said nothing about the allocation of the persuasive or legal burden.

As evidential burden and legal burden coincide at the start of the action, Professor Castel would have to
go all the way through and claim that the ultimate or legal burden of proof would be equally with the plaintiff. However, we believe that we are leaving the ground of international law if we would want to defend that position. It is simply untenable under the present state of development of the restrictive immunity doctrine worldwide.

It has to be seen also that the Supreme Court of Canada is not bound by the *Venne* precedent as the court had stated there on the burden of proof only in an *obiter dictum*.

Actually the Supreme Court, to repeat it, only guarded against the admission of an *a priori presumption* in favor of either competence or immunity. It is only after the foreign state has made a *prima facie case* for its entitlement to immunity that we can speak of a presumption, not before.

**Immunity from Execution**

In 1980, Professor Castel stated that ‘the domain of immunity from execution is vaster than the domain of immunity from jurisdiction.’ The Canadian Act has not changed that legal situation. The rule of immunity from execution, as well as the three limited exceptions
to that rule, are to be found in section 12(1) of the statute. For organisms of a foreign state, §12(2) contains a special provision:

§12(2) STIA 1982
Subject to subsection (3), property of an agency of a foreign state is not immune from attachment and execution and, in the case of an action in rem, from arrest, detention, seizure and forfeiture, for the purpose of satisfying a judgment of a court in any proceedings in respect of which the agency is not immune from the jurisdiction of the court by reason of any provision of this Act.

This provision, similar to the FSIA 1976 of the United States, puts organisms of a foreign state on the same level of immunity protection as foreign states, which means the burden of proof rules valid for foreign states, also apply to their organisms.

In *Re Royal Bank of Canada and Corriveau et al.*, [1980] 103 D.L.R.3d 520 (Ont.H.C.), 64 ILR 69 (1983), a case we have already discussed, and where the matter was about seizing an embassy bank account, the court granted immunity on the sole ground of the account being ‘in possession’ of the foreign state.

This decision was obviously motivated by the same protective thinking regarding embassy accounts as the House of Lords decision in *Alcom*, where immunity was granted to an embassy bank account.
held in London, and where the burden of proof of the plaintiff was clearly stated.

In fact, the development of immunity from execution in Canada hardly differs from the other countries examined in this study. The field of immunity from execution and the protection of property belonging to foreign states simply follows different rules than jurisdictional immunities, and this distinction is recognized in all the jurisdictions we have examined.

In other words, the field of immunity for property belonging to foreign states is much more protected, and exceptions are fewer.

The FSIA 1982 only allows three exceptions. This result is to be seen confirmed in the Re Royal Bank precedents that is really on the same lines of reasoning as the House of Lord’s decision in Alcom and the decision of the Constitutional Court of Germany of 13 December 1977.

We can thus conclude that in Canada, as in the other jurisdictions previously examined, the rule of immunity from execution is as tight as it was traditionally, and there are only few exceptions that derogate from it. In this sense, the rule is still
‘absolute’, as it functions as a legal presumption *in dubio pro immunitatem*.

Under these conditions, the burden of proof is upon the plaintiff for the applicability of an exception. It is thus upon the plaintiff to begin with producing evidence, and establish a *prima facie case* for the applicability of an exception.

The evidential burden then shifts toward the foreign state to rebut the prima facie presumption. But the persuasion or legal burden is clearly with the plaintiff, which means that in case of a *non liquet*, the court has to grant immunity, as the presumption says so. In other words, the immunity presumption in matters of immunity from execution requires the judge to decide, in all cases of doubt, *in dubio pro immunitatem*.

**Conclusion**

For the *State Immunity Act 1982* of Canada, we found the same allocation of the burden of proof as under the other immunity statutes examined in this study.

In matters of jurisdictional immunity, the burden of proof is upon the foreign state. Once the foreign
state, who begins with producing evidence in support of its immunity claim, establishes a prima facie case on the elements that it is a foreign state and that the activity in question was of a public, governmental nature, the evidential burden shifts toward the plaintiff who needs to rebut the prima facie presumption if he is to win.

In any case, the judge needs to decide on the court’s jurisdiction *sua sponte*; hence, he needs to decide on the immunity claim, as immunity would bar jurisdiction, equally *sua sponte*.

Organisms of the foreign state are assimilated with the latter, under the FSIA 1982. With regard to immunity from execution, the immunity rule is still ‘absolute’ in the sense that only three precise exceptions are permitted.

In that sense, the rule of immunity from execution functions as a presumption *in dubio pro immunitatem*, which impacts upon the burden of proof. From general evidence principles it follows that the burden is upon the party who needs to struggle against the presumption if he is to win; this is the plaintiff or judgment creditor.
In this case, it is the plaintiff who has the right to begin with producing evidence and needs to overcome the presumption of immunity by submitting evidence satisfactorily to the court that one of the three exception applies. One the plaintiff has established a *prima facie case* demonstrating that one of the exceptions applies, the foreign state is charged with the evidential burden to rebut the evidence.

In any case of doubt or non liquet situation, the persuasive, legal or ultimate burden is upon the plaintiff; in other words, the evidence rule to be applied in all matters of immunity from execution is *in dubio pro immunitatem.*
Our comparative analysis of existing immunity statutes in the Anglo-American legal system has clearly revealed concise principles that govern the allocation of the burden of proof in matters of sovereign immunity litigation.

The Burden of Proof for Immunity from Jurisdiction

As for jurisdictional immunity, we can conclude that in principle, the burden of proof is upon the foreign state for submitting evidence qualifying for a \textit{prima facie case}, on two elements, (i) that it is a foreign state, and (ii) that the activity in question was of a public, governmental nature. The foreign state has the right to begin with producing evidence, in other words, the evidential burden is first on the foreign state to submit \textit{prima facie evidence} in support of its
immunity claim. Then the evidential burden shifts toward the plaintiff for rebutting this evidence, by showing satisfactorily to the court that one of the numerous exceptions applies.

As a matter of the logic of pleadings, the plaintiff is supposed to submit to the court in its brief which of the exceptions should be applied; in addition, jurisprudence has repeatedly shown that the foreign state is not obliged to refute all the exceptions to jurisdictional immunity, but only those the plaintiff relies upon.

If the plaintiff’s brief lacks precision on that particular matter, the foreign state can file its *prima facie case* in a general manner, by stating, without further, that the activity in question was of a public, governmental nature.

For effecting this proof, the foreign state can typically submit an affidavit or certificate by one of its officials in the forum state, typically the head of the foreign state’s embassy, to the effect that the activity the litigation bears upon, was of a governmental nature.

Once the foreign state has established such *prima facie evidence*, the evidential burden shifts toward the
plaintiff for rebutting the *prima facie case* by proving that the exception or exceptions it was pointing to in its brief, are applicable. If this proof is found conclusive by the court, immunity will be denied to the foreign state. If the plaintiff fails to produce such evidence, the prima facie evidence works like a presumption *pro immunitatem* and immunity is to be granted.

If the foreign state is unable to establish the prima facie case, the court can in principle refuse to grant immunity. In this case, there is however no presumption in favor of either jurisdiction or immunity. The court is free to weigh the arguments submitted by both parties. However, the court cannot simply deny immunity if the foreign state was not defending itself in court, or did not enter an appearance. In this latter case, the decision must notably be based upon all the pertinent facts, and the court needs to brief the parties for further evidence.

The risk of nonpersuasion, or ‘immunity risk’ is upon the foreign state, in any case of non liquet. In matters of immunity from jurisdiction we can thus talk about an immunity rule in dubio contra immunitatem. This argument is valid *a fortiori* for organisms of a foreign state, either that they are
assimilated to foreign states or their status is a lesser protected one in the sense that there is a presumption of nonimmunity regarding those agencies or separate entities.

**The Burden of Proof for Immunity from Execution**

For matters of immunity from execution, the old absolute immunity rule was *not replaced* by a newer restrictive concept as that was the case for jurisdictional immunities. As a result, this rule is still ‘absolute’ in the sense that only few exceptions are allowed; in other words, it’s a full general rule, not, as in matters of jurisdictional immunities, a residual concept.

This is shown by the fact that this rule really functions like a presumption. In other words, no *prima facie case* to its effect needs to be made; its application is immediate.

The British, the Singapore and the Pakistani Acts even go farther, in reducing the standard of proof to a simple certificate from the head of the foreign mission, sufficient for demonstrating that the property in question serves governmental functions. This is a lesser standard of proof than *prima facie evidence*; it could be called a minimal form of
evidence, and it is easy for the foreign state to produce. The decision of the German Constitutional Court of 13th of December 1977 has clarified that such a certificate is all a foreign state needs to produce, and that requiring further would not be in accordance with international law.

Consequently, the burden of proof for the applicability of one of the exceptions is upon the judgment creditor; it is he who has the right to begin with producing evidence.

In other words, the evidential burden is upon the plaintiff or judgment creditor at the onset of the suit for making a prima facie case on the applicability of one of the exceptions to immunity from jurisdiction.

The burden then shifts to the foreign state who can relatively easily rebut this evidence by demonstrating the before-mentioned certificate. The evidential burden then shifts again to the plaintiff to show, by a preponderance of the evidence satisfactorily to the court that one of the exceptions to immunity from execution applies.

In any case of doubt, or non liquet situation, the ultimate or legal burden comes in play which in this case is upon the plaintiff.
In other words, the rule to be applied in cases of doubt is in dubio pro immunitatem. Hence, the ‘immunity risk’ is upon the plaintiff or judgment creditor.

For certain types of property, for example military property or central bank assets, the statutes are even stricter and differ only in how tightly they protect such property from any measure of execution, for the obvious reason of not discouraging foreign states to invest in property in any forum state, and for reasons of general non-interference in the governmental authority of other states.

The pertinent facts, or facts at issue, are those which are crucial for the decision of granting or denying immunity. It is those facts that are described in the exceptions to both immunity rules.

The foreign state who establishes its prima facie case in support of its immunity claim, can namely invoke to have acted within sensibly political domains that the jurisprudence has recognized both in the United States and Britain. Such a catalogue of sensibly political domains that stay outside of judicial scrutiny was recognized and outlined with sufficient clarity for having become a standard of international law.
**The Means of Proof**

In all jurisdictions examined in this study, all general means of proof are admitted, while a certain preference is given to the *affidavit* in the United States and Canada, and certificates from heads of missions, in the other jurisdictions. In general, it is important to note that different means of proof do not have any impact upon the allocation of the burden of proof.

American federal courts have shown a certain openness as to the acceptance of various means of proof, such as testimony, affidavit, or even a simple statement in a letter of an ambassador of the foreign state. *Testimony* has for example been brought forward in the important precedent *De Sanchez v. Banco Central de Nicaragua*, 515 F.Supp. 900 (E.D.La. 1981), 63 ILR 584 (1982), where the district court had to qualify a monetary exchange activity of the Central Bank of Nicaragua. The interesting detail in this case is that the court used the declarations of a witness of the plaintiff in order to finally decide in favor of the defendant, thus dismissing the claim.

The evidence procedure is very well demonstrated in this case and is a good example to learn how testimony can possibly be offered in foreign sovereign immunity litigations. (515 F.Supp. 900, 907).
The affidavit is the usual means of proof in all foreign sovereign immunity actions. Not only can the foreign state prove its prima facie case with an affidavit, but also the plaintiff can put forward affidavits and documents in support of its motion. See, for example, Mol, Inc. v. People’s Republic of Bangladesh, 572 F.Supp. 79, 82 (D.Or. 1983).

At least in one case, Harris v. Vao Intourist, Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), 63 ILR 318 (1982), the district court held sufficient a simple letter of the Soviet Ambassador in order to establish the necessary prima facie case of immunity for the foreign state. Such a letter, according to the court, has a persuasive quality.


However, there is a certain preference for the affidavit. If an affidavit is to be contradicted, the adequate proof would be a responsive affidavit as has been presented by the plaintiff in the case Sugarman v. Aeromexico, Inc. This is to be seen in the interesting procedure in Sugarman v. Aeromexico, Inc.:

Aeromexico, asserting by way of affidavit that it was a Mexican corporation wholly owned by the Mexican government, … Sugarman filed a responsive affidavit
asserting that a New York-based public relations officer of Aeromexico had advised Sugarman’s attorney that Aeromexico was a Mexican corporation and ... a New York corporation. The relevance of this affidavit was that if, in addition of being a Mexican corporation, Aeromexico had been incorporated in New York, it would have fallen outside the sovereign immunity decreed by the Foreign Sovereign Immunities Act. 28 U.S.C. §§1332(a) and (c) and 1603(b)(3). Thereafter, Aeromexico submitted a further affidavit enclosing a letter from New York’s Secretary of State certifying that Aeromexico was not to be found on the roster of New York corporations. (626 F.2d 270, 272 (3d Cir. 1980).

**Summary Theses**

—The restrictive immunity doctrine constitutes a *new rule of international law*. It has not merely added a new exception, the so-called *commercial activity exception*, to the old, more ‘absolute’ rule of immunity. It has completely replaced that old rule with a new, residual, immunity concept, a doctrine that allows a vast number of exceptions.

—The new *restrictive immunity doctrine* grants sovereign immunity to foreign states only in exceptional cases, namely when the activity in question was of a public, governmental character. It can be said that the new restrictive immunity doctrine has re-affirmed the prior and more general rule which
is the total competence of the courts in any forum state.

—The nature and content of the new restrictive immunity rule has a direct impact upon the burden of proof. In other words, the allocation of the burden of proof follows directly from the restrictive immunity doctrine, not as a result of a shaky and unverifiable rule-and-exception schema.

—In matters of jurisdictional immunities, the burden of proof is upon the foreign state to establish a prima facie case on two elements, (i) that it is a foreign state and (ii) that the activity in question was of a public, governmental nature. The evidential burden if thus upon the foreign state at the start of the trial, and it’s the foreign state who has the right to begin with producing evidence.

—After the foreign state succeeded in establishing a prima facie case, either by affidavit or other means of proof, the evidential burden shifts toward the plaintiff. It is then upon the plaintiff to rebut the prima facie evidence by showing, by a preponderance of the evidence, satisfactorily to the court that the exception or exceptions he relied upon, really applies.
—If the foreign state is not able to establish a *prima facie case*, immunity is to be refused. In case of a *non liquet*, the ‘immunity risk’, the burden of persuasion or legal burden is upon the foreign state. In this case, we may speak of an evidence rule that is ‘in dubio contra immunitatem.’ However, this rule is not without exceptions, for the court can not just simply dismiss the immunity claim if the foreign state does nothing to defend itself or does not enter an appearance.

   In such a case, the court must brief the parties for bringing in more evidence to the record. Besides, a default judgment is only possible if the plaintiff can prove to the satisfaction of the court his full entitlement including the proof that an exception to immunity is applicable. Simple *prima facie evidence* does *not* suffice for meeting that burden.

   —There is a catalogue of sensibly political activities of foreign states, where the jurisprudence both in the United States and the United Kingdom admitted a special protection of foreign states from judicial scrutiny.

   This catalogue basically comprises foreign affairs, interior affairs, budgetary activity and national
defense. In all those cases, immunity was granted to foreign states, while on first sight the nature of the activity in litigation was of a commercial nature. This catalogue, we hold, has become a part of international law and the precedents rendered under this header are to be considered as international leading cases that lawyers, government counsel, jurisprudence and state practice are likely to confirm and consolidate.

In such a case, we may speak of a ‘core area of sovereignty’ that tribunals of various countries have asserted and singularized and where immunity protection is stronger than in the usual case, as courts respect the core areas of foreign state activity, which as it is governmental, cannot be submitted to judicial scrutiny in any forum state without interfering in the internal affairs for foreign states.

—What is valid for foreign states is a fortiori valid for agencies or instrumentalities or separate entities of foreign states. Those enjoy jurisdictional immunity only in case that

(i) the foreign state would enjoy such immunity when at their place; and

(ii) they can prove to the full satisfaction of the court that they have acted in governmental authority
when engaging in the activity that is at the basis of the litigation; for meeting this burden of proof, a simple *prima facie case* is *not* considered to be sufficient.

—The burden of proof regarding immunity from execution is *reversed* in the sense that the rule of immunity from execution is more complete, more integral and tighter than the rule of immunity from jurisdiction. As the two immunity rules have developed historically in a distinct manner, while the rule of jurisdictional immunity was pierced by numerous exceptions and represents but a residual concept, the rule of immunity from execution has remained firmly in place. As a result, the burden of proof for overcoming the presumption the general rule of immunity from execution puts up, is upon the plaintiff or judgment creditor. If he cannot meet this burden, the property of the foreign state is immunity from attachment or seizure. In case of a non liquet, the ‘immunity risk’ is upon the judgment creditor. One may speak about an evidence rule ‘in dubio pro immunitatem’. When the property services military purposes or it is assets or accounts of a foreign central bank, execution is still more severely restricted, if not impossible.
—In principle, all means of proof are admitted and allowed in foreign sovereign immunity litigation, with a certain preference for the affidavit or formal certificates issued by high emissaries of foreign states, typically the heads of foreign missions in the forum state.

The quality of proof offered in support of a foreign state’s immunity claim notably depends on the position of the witness in the internal hierarchy of the foreign state.

According to American federal jurisprudence, certificates and testimony of foreign officials enjoy the status of conclusive evidence to the purpose of affirming a foreign states’ activity was of a public, governmental character, or that property of the foreign state served governmental purposes.
Back in 1986, meeting Thai Ambassador Sompong Sucharitkul in Geneva, I suggested to him in his quality of Special Rapporteur of the International Law Commission (ILC), during an ILC meeting in Geneva, to insert provisions in the ILC Draft Convention pointing to the repartition of the burden of proof for both jurisdictional immunities and immunity from execution.

Dr. Sucharitkul replied shortly that he was not convinced that any such rule could at that time be considered to be a standard of international law.

When I told him that my thesis research clearly demonstrated that there was something like a baseline standard in international law pointing to a
specific burden of proof situation for jurisdictional immunities, and another burden of proof situation for immunity from execution, he told me he found my assertion daring and premature. Some time ago, I contacted him again upon drafting the new edition of my book, but he did not respond to my question repeated to him why in the 2004 ILC Convention on Jurisdictional Immunities of States and their Property, there was no clause dealing with the burden of proof? It seems to me that I am asking the most unasked question.

For writing this book, by translating my original thesis, incorporating it in this book and updating it to today’s legal standard, I perused the amendments to both the FSIA 1976, and the STIA 1982, as well as the Australian FSIA 1985 in its final 2003 version, and I also went again through the international conventions once again, the Harvard Draft Convention, the ILA Draft Convention, the European Convention, and the final ILC 2004 Convention but the research was completely and utterly fruitless. Nothing was to be found on the burden of proof.

From a systematic point of view, and for finding a rule in international law regarding the allocation of the burden of proof in foreign sovereign immunity
litigations, we need to peruse not only existing national statutes on foreign sovereign immunity, but also international conventions and draft conventions. But what to conclude when these legal texts are silent on the question of the burden of proof? From these simple articles of the ILA Draft Convention, no conclusive statements can be derived as to the burden of proof:

**Art. II (Immunity from jurisdiction)**
In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority i.e. iure imperii. It shall not be immune in the circumstances provided in Article III.

**Article III (Exceptions)**
Sovereign immunity shall not be granted when the case in question involved a commercial activity of the foreign state.

**Art. VII (Immunity from execution)**
A foreign State’s property in the forum State shall be immune from attachment arrest and execution except as provided in Article VIII.

The only thing we can safely assert is, it may become apparent that the burden of proof is not identical for jurisdictional immunities and immunity from execution into property belonging to a foreign state.

This has mainly, but not only, historical reasons. The main reason is that seizing property belonging to a foreign state is a quite strong measure, and can, if
going unhindered, deeply disturb diplomatic relations between states.

This is so because most of the property nation states maintain within other states serves diplomatic and consular purposes, and to touch such property for satisfying private creditors could render diplomatic and consular relations unsafe and distressing; it is thus something to be avoided as much as possible in international relations. This is also the reason why historically, the two immunity rules have developed differently, a fact which has already been considered in the Harvard Draft Convention of 1932 and which was decisive for the drafting of the International Law Association (ILA) Draft Convention.

—26 AJIL 453 (1932 Suppl.), Comment on Art. 22, p. 690.

Whereas article II of the Convention (immunity from jurisdiction) was seen as a somewhat flexible rule, the comment on article VII (the rule of immunity from execution) was: ... there should be an absolute rule of immunity unless a particular exception applies. Consequently, the two immunity rules have been drafted differently, so that the burden of proof becomes visible through the formulation.
It is obvious that Art. II is formulated in the way as to make clear that the foreign state enjoys immunity only in the case it has acted as a sovereign, i.e. engaged in a public, governmental activity.

This corresponds practically to the situation under sections 1604 to 1607 of the FSIA. However, under Art. VII of the Draft, the foreign state loses its immunity only in the case one of the exceptions applies and that the plaintiff shows and proofs this fact. The burden of proof, under the ILA Draft, thus can be supposed to be exactly what was found in the present study, that is, the burden is upon the foreign state regarding immunity from jurisdiction, and on the plaintiff as to immunity from execution.

To show that this is grossly stated the current standard of procedural international law in matters of foreign sovereign immunity litigation was precisely the challenge of my doctoral thesis. And my answer was in the affirmative, despite several discussions with ILC expert Sompong Sucharitkul who thought I would never be able to prove such a standard, while both Sir Ian Sinclair and Lady Hazel Fox were affirmative that I might be on the right way.
None of the 1996 and 2004 amendments to the *Foreign Sovereign Immunities Act 1976* nor amendments to any of the other immunity statutes has dealt with the burden of proof. The content of these amendments regarded matters by far outside of the research scope of the present study.

—The Australian Foreign States Immunities Act 1985 is one of the least documented national statutes on foreign sovereign immunity. It is very much alike the acts that were cloned after the British model, the STIA 1978. It doesn’t contain any original or noteworthy provisions other than what has been largely discussed in this study. There is absolutely nothing to be found on the matter of the burden of proof, as if it had escaped Australian legal scholars to even bother about the problem which is of high practical importance. Hence, it was not worth the time and effort to discuss that act in the present book.

Yet despite this lack of explicitness regarding the allocation of the burden of proof in international conventions, and despite the fact that amendments to the existing immunity statutes we examined have not dealt with clarifying the burden of proof, there is sufficient evidence brought forward in this study to assert that a *baseline standard of the burden of proof* has been accepted in international law theory and practice and can be expected to be applied in future jurisprudence and law making on the topic of sovereign immunity litigation.
This has more than one reason. The main reason is that from a practical point of view, the burden or proof issue is of the utmost importance for both government counsel, and international trial lawyers for successfully litigating their way out of court, and for doing the right job when drafting contracts for both governments and private merchants, in their commercial or not so commercial dealings.

The burden of proof is immensely important also from a point of view of efficiency and cost-effectiveness. Costs in such kinds of litigation, including arbitrage litigation, are known to be high and at times extremely high. In such a situation, any kind of measure to reduce cost on both the government and the merchant sides will be welcomed. Producing evidence to a high court or federal court, or even supreme court takes time and involves cost; it also involves expertise, and expensive and highly qualified lawyers.

When the burden of proof is known in advance in any particular situation during the trial, in a jurisdictional immunities suit, or in a suit involving property of foreign states, producing unnecessary evidence can be effectively avoided; thereby costs can be reduced.
This is perhaps not an argument that is of much interest for an international law professor or lecturer, but it is certainly one that is of the *utmost interest* for practicing international lawyers and government counsel.

Today, even governments need to be cost-effective and have a higher responsibility toward their national parliaments to reduce unnecessary cost, and from that point of view, the present study is certainly of high import.
ABBREVIATIONS
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A.B.A.J.
American Bar Association Journal (Chicago, USA)

A 1964 SC 72
The All India Reporter, 1964, Supreme Court

A.C.
Law Reports Appeal Cases, 1891—

A.I.R.
The All India Reporter, Bombay, India

A.I.R. Manual
The A. I. R. Manual, Unrepealed Central Acts, Bombay, India

AJIL
American Journal of International Law

A.L.I.
American Law Institute

3 All E R 441 (1957)


[1948] Ann.Dig. 137 (No.42)
Annual Digest, 1948, pp. 137 ff. (Case No. 42)

BDGVR
Berichte der deutschen Gesellschaft für Völkerrecht
Public Law
Public Law of the United States

Q.B.
Law Reports: Queen’s Bench Division, 1891-1901, 1952 - date

Que.P.R.
Quebec Practice Reports (Canada)

Que.R.P.
Quebec Rapports Pratiques (Canada)

Que.SC
Quebec Official Reports, Superior Court (Quebec), Canada

Rapport C.R.D.C.
Rapport de la Commission de Réforme du Droit de Canada

RCADI
International Law Academy, Collected Cases, Boston, The Hague

R.C.D.I.P.
Revue Critique de Droit International Privé

R.C.S.
Rapports de la Cour Suprême du Canada

1980 (2) SA 709 (E)

1980 (2) SA 111 (T)

S.C.R.
Supreme Court Reports (Canada)

S.Ct.
Supreme Court Reporter (USA)

STAT
United States Statutes at Large

The Pakistan Code

TIAS
Treaties and Other International Act Series, Department of State

Uniform Laws Annotated, Vol. 13, Civil Procedural and Remedial Law

U.L.C.C. Report

UN-Mat.

U.S.
United States Reports (U.S. Supreme Court)

U.S.C.
United States Code

U.S.C.A.
United States Code Annotated

28 U.S.C.A. §1611
United States Code Annotated, Title 28, Section 1611

UST
United States Treaties and other International Agreements, 1950- date

West's Ann.Evid.Code, §110
West's Annotated California Codes, Evidence Code, Vol. 29 B, St. Paul (West), 1977, Section 110

W.L.R.
Weekly Law Reports

ZaöRV
Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht)

ZZP
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*425 U.S. 682 (1986)*

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*A 1966 SC 230*

Allan Construction Ltd. v. Government of Venezuela  
*[1968] Que.P.R. 145, Que.S.C. 523*

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*[1982] 36 O.R.17 (Ont.H.C.), 64 ILR 733 (1983)*
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285 N.W.2d 505, 204 Neb. 765 (Neb. 1979)

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510 F.Supp. 309 (W.D.Tex. 1980), 63 ILR 419

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[1970] 8 KIR 1063

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19 ILM 1436 (N.D.Ill. 1980)

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Commercial Ins. of Newark v. Pacific-Peru Construction Co.
558 F.2d 948 (9th Cir. 1977)

Compania Española v. Navemar
303 U.S. 68, 58 S.Ct. 432, 82 L.Ed. 667.

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See also Wikipedia on the Foreign Sovereign Immunities Act

See also U.S. Code Collection


**Literature**


§ 1330. Actions against foreign states
(a) 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 either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal 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.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1602. Findings and declaration of purpose
The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions
For purposes of this chapter—
(a) A ‘foreign state’, except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An ‘agency or instrumentality of a foreign state means any entity—
(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.
(c) The ‘United States’ includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.
(d) A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
(e) A ‘commercial activity carried on in the United States by a foreign state’ means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;
(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in

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the United States are in issue; (5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or (7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 App. U.S.C. 2405 (j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result.
of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state’s interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo
upon which the maritime lien arose. Such value shall be
determined as of the time notice is served under subsection
(b)(1). Decrees shall be subject to appeal and revision as
provided in other cases of admiralty and maritime jurisdiction.
Nothing shall preclude the plaintiff in any proper case from
seeking relief in personam in the same action brought to
enforce a maritime lien as provided in this section.
(d) A foreign state shall not be immune from the jurisdiction of
the courts of the United States in any action brought to
foreclose a preferred mortgage, as defined in the Ship
Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action
shall be brought, heard, and determined in accordance with
the provisions of that Act and in accordance with the principles
of law and rules of practice of suits in rem, whenever it
appears that had the vessel been privately owned and
possessed a suit in rem might have been maintained.
(e) For purposes of paragraph (7) of subsection (a)—
(1) the terms ‘torture’ and ‘extrajudicial killing’ have the
meaning given those terms in section 3 of the Torture Victim
Protection Act of 1991;
(2) the term ‘hostage taking’ has the meaning given that term
in Article 1 of the International Convention Against the Taking
of Hostages; and
(3) the term ‘aircraft sabotage’ has the meaning given that term
in Article 1 of the Convention for the Suppression of Unlawful
Acts Against the Safety of Civil Aviation.
(f) No action shall be maintained under subsection (a)(7) unless
the action is commenced not later than 10 years after the date
on which the cause of action arose. All principles of equitable
tolling, including the period during which the foreign state
was immune from suit, shall apply in calculating this
limitation period.
(g) Limitation on Discovery.—
(1) In general.—

(A) Subject to paragraph (2), if an action is filed that
would otherwise be barred by section 1604, but for subsection
(a)(7), the court, upon request of the Attorney General, shall
stay any request, demand, or order for discovery on the United
States that the Attorney General certifies would significantly
interfere with a criminal investigation or prosecution, or a
national security operation, related to the incident that gave
rise to the cause of action, until such time as the Attorney
General advises the court that such request, demand, or order
will no longer so interfere.

(B) A stay under this paragraph shall be in effect
during the 12-month period beginning on the date on which
the court issues the order to stay discovery. The court shall
renew the order to stay discovery for additional 12-month
periods upon motion by the United States if the Attorney
General certifies that discovery would significantly interfere
with a criminal investigation or prosecution, or a national
security operation, related to the incident that gave rise to the
cause of action.
(2) Sunset.—
   (A) Subject to subparagraph (B), no stay shall be
   granted or continued in effect under paragraph (1) after the
date that is 10 years after the date on which the incident that
gave rise to the cause of action occurred.
   (B) After the period referred to in subparagraph (A),
   the court, upon request of the Attorney General, may stay any
   request, demand, or order for discovery on the United States
   that the court finds a substantial likelihood would—
   (i) create a serious threat of death or serious
   bodily injury to any person;
   (ii) adversely affect the ability of the United
   States to work in cooperation with foreign and international
   law enforcement agencies in investigating violations of United
   States law; or
   (iii) obstruct the criminal case related to the
   incident that gave rise to the cause of action or undermine the
   potential for a conviction in such case.
(3) Evaluation of evidence.— The court’s evaluation of any
request for a stay under this subsection filed by the Attorney
General shall be conducted ex parte and in camera.
(4) Bar on motions to dismiss.— A stay of discovery under this
subsection shall constitute a bar to the granting of a motion to
dismiss under rules 12(b)(6) and 56 of the Federal Rules of
Civil Procedure.
(5) Construction.— Nothing in this subsection shall prevent the
United States from seeking protective orders or asserting
privileges ordinarily available to the United States.

§ 1606. Extent of liability
As to any claim for relief with respect to which a foreign state
is not entitled to immunity under section 1605 or 1607 of this
chapter, the foreign state shall be liable in the same manner
and to the same extent as a private individual under like
circumstances; but a foreign state except for an agency or
instrumentality thereof shall not be liable for punitive
damages; if, however, in any case wherein death was caused,
the law of the place where the action or omission occurred
provides, or has been construed to provide, for damages only
punitive in nature, the foreign state shall be liable for actual or
compensatory damages measured by the pecuniary injuries
resulting from such death which were incurred by the persons
for whose benefit the action was brought.

§ 1607. Counterclaims
In any action brought by a foreign state, or in which a foreign
state intervenes, in a court of the United States or of a State, the
foreign state shall not be accorded immunity with respect to
any counterclaim—
(a) for which a foreign state would not be entitled to immunity
under section 1605 of this chapter had such claim been brought
in a separate action against the foreign state; or
(b) arising out of the transaction or occurrence that is the
subject matter of the claim of the foreign state; or
(c) to the extent that the counterclaim does not seek relief
exceeding in amount or differing in kind from that sought by
the foreign state.

§ 1608. Service; time to answer; default
(a) Service in the courts of the United States and of the States
shall be made upon a foreign state or political subdivision of a
foreign state:
(1) by delivery of a copy of the summons and complaint in
accordance with any special arrangement for service between
the plaintiff and the foreign state or political subdivision; or
(2) if no special arrangement exists, by delivery of a copy of the
summons and complaint in accordance with an applicable
international convention on service of judicial documents; or
(3) if service cannot be made under paragraphs (1) or (2), by
sending a copy of the summons and complaint and a notice of
suit, together with a translation of each into the official
language of the foreign state, by any form of mail requiring a
signed receipt, to be addressed and dispatched by the clerk of
the court to the head of the ministry of foreign affairs of the
foreign state concerned, or
(4) if service cannot be made within 30 days under paragraph
(3), by sending two copies of the summons and complaint and
a notice of suit, together with a translation of each into the
official language of the foreign state, by any form of mail
requiring a signed receipt, to be addressed and dispatched by
the clerk of the court to the Secretary of State in Washington,
District of Columbia, to the attention of the Director of Special
Consular Services—and the Secretary shall transmit one copy
of the papers through diplomatic channels to the foreign state
and shall send to the clerk of the court a certified copy of the
diplomatic note indicating when the papers were transmitted.
As used in this subsection, a ‘notice of suit’ shall mean a notice
addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or
political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state
Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution
(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or
(2) the property is or was used for the commercial activity upon which the claim is based, or
(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or
(4) the execution relates to a judgment establishing rights in property—
    (A) which is acquired by succession or gift, or
    (B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or
(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or
(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or
(7) the judgment relates to a claim for which the foreign state is not immune under section 1605 (a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a)(2), (3), (5), or (7), or 1605 (b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608 (e) of this chapter.

(d) The property of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605 (d).

(f) (1)

(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign
Missions Act (22 U.S.C. 4308 (f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 App. U.S.C. 5 (b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370 (a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605 (a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

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(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605 (a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall’s office to promptly and effectively execute against that property.

(3) Waiver.— The President may waive any provision of paragraph (1) in the interest of national security.

§ 1611. Certain types of property immune from execution
(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.
(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or
(2) the property is, or is intended to be, used in connection with a military activity and
   (A) is of a military character, or
   (B) is under the control of a military authority or defense agency.
(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

STIA 1978 (UK)

The State Immunity Act, 1978 (UK)


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**United Kingdom**

**STATE IMMUNITY ACT OF 1978**

An Act to make new provision with respect to proceedings in
the United Kingdom by or against other States. to provide for
the effect of judgments given against the United Kingdom in
the courts of States parties to the European Convention on
State Immunity; to make new provision with respect to the
immunities and privileges of heads of State; and for connected
purposes.
[20th July 1978]

PART I. PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction
1.—(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.
(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity
2.—(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.
(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.
(3) A State is deemed to have submitted—
   (a) if it has instituted the proceedings; or
   (b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.
(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of—
   (a) claiming immunity; or
   (b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.
(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.
(6) A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of, the same legal relationship or facts as the claim.
(7) The head of a State’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.
3.—(1) A State is not immune as respects proceedings relating
to—
(a) a commercial transaction entered into by the State or
(b) an obligation of the State which by virtue of a contract
(whether a commercial transaction or not) falls to be
performed wholly or partly in the United Kingdom.
(2) This section does not apply if the parties to the dispute are
States or have otherwise agreed in writing; and subsection
(1)(b) above does not apply if the contract (not being a
commercial transaction) was made in the territory of the State
concerned and the obligation in question is governed by its
administrative law.
(3) In this section ‘commercial transaction’ means—
(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance
and any guarantee or indemnity in respect of any such
transaction or of any other financial obligation; and
(c) any other transaction or activity (whether of a commercial,
industrial, financial, professional or other similar character)
into which a State enters or in which it engages otherwise than
in the exercise of sovereign authority; but neither paragraph of
subsection (1) above applies to a contract of employment
between a State and an individual.
4.—(1) A State is not immune as respects proceedings relating
to a contract of employment between the State and an
individual where the contract was made in the United
Kingdom or the work is to be wholly or partly performed
there.
(2) Subject to subsections (3) and (4) below, this section does
not apply if—
(a) at the time when the proceedings are brought the
individual is a national of the State concerned; or
(b) at the time when the contract was made the individual was
neither a national of the United Kingdom nor habitually
resident there; or
(c) the parties to the contract have otherwise agreed in writing.
(3) Where the work is for an office, agency or establishment
maintained by the State in the United Kingdom for commercial
purposes, subsection (2)(a) and (b) above do not exclude the
application of this section unless the individual was, at the
time when the contract was made, habitually resident in that
State.
(4) Subsection (2)(c) above does not exclude the application of
this section where the law of the United Kingdom requires the
proceedings to be brought before a court of the United
Kingdom.
(5) In subsection (2)(b) above ‘national of the United Kingdom’
means a citizen of the United Kingdom and Colonies, a person
who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section ‘proceedings relating to a contract of employment’ includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which subject as employer or employee.

5. A State is not immune as respects proceedings in respect of—
(a) death or personal injury; or
(b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

6.—(1) A State is not immune as respects proceedings relating to—
(a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or
(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property—
(a) which is in the possession or control of a State; or
(b) in which a State claims an interest, if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima facie evidence.

7.—A State is not immune as respects proceedings relating to—
(a) any patent, trademark, design or plant breeders’ rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;
(b) an alleged infringement by the State in the United Kingdom of any patent, trademark, design, plant breeders’ rights or copyright; or
(c) the right to use a trade or business name in the United Kingdom.

8.—(1) A State is not immune as respects proceedings relating
to its membership of a body corporate, an unincorporated body or a partnership which—
(a) has members other than States; and
(b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.
(2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.
9.—(1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.
(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.
10.—(1) This section applies to—
(a) Admiralty proceedings: and
(b) proceedings on any claim which could be made the subject of Admiralty proceedings.
(2) A State is not immune as respects—
(a) an action in rem against a ship belonging to that State; or
(b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.
(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.
(4) A State is not immune as respect—
(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
(b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.
(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to
property other than a ship as it applies to a ship.

(6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

11.—A State is not immune as respects proceedings relating to its liability for—

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

**Procedure**

12.—(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counterclaim or to an action in rem; and subsection (1) above shall not be construed
as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

13.—(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below—

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of a State’s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

(6) In the application of this section to Scotland—

(a) the reference to ‘injunction’ shall be construed as a reference to ‘interdict’;

(b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph—

‘(b) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a
decree arbitral or, in an action in rem, to arrestment or sale.’; and
(c) any reference to ‘process’ shall be construed as a reference
to ‘diligence’, any reference to ‘the issue of any process’ as a
reference to ‘the doing of diligence’ and the reference in
subsection (4)(b) above to ‘an arbitration award’ as a reference
to ‘a decree arbitral.’

Supplementary Provisions
14.—(1) The immunities and privileges conferred by this Part
of this Act apply to any foreign or commonwealth State other
than the United Kingdom, and references to a State include
references to—
(a) the sovereign or other head of that State in his public
capacity;
(b) the government of that State; and
(c) any department of that government, but not to any entity
(hereafter referred to as a ‘separate entity’) which is distinct
from the executive organs of the government of the State and
capable of suing or being sued.
(2) A separate entity is immune from the jurisdiction of the
courts of the United Kingdom if, and only if—
(a) the proceedings relate to anything done by it in the exercise
of sovereign authority; and
(b) the circumstances are such that a State (or, in the case of
proceedings to which section 10 above applies, a State which is
not a party to the Brussels Convention) would have been so
immune.
(3) If a separate entity (not being a State’s central bank or other
monetary authority) submits to the jurisdiction in respect of
proceedings in the case of which it is entitled to immunity by
virtue of subsection (2) above, subsections (1) to (4) of section
13 above shall apply to it in respect of those proceedings as if
references to a State were references to that entity.
(4) Property of a State’s central bank or other monetary
authority shall not be regarded for the purposes of subsection
(4) of section 13 above as in use or intended for use for
commercial purposes; and where any such bank or authority is
a separate entity subsections (1) to (3) of that section shall
apply to it as if references to a State were references to the bank
or authority.
(5) Section 12 above applies to proceedings against the
constituent territories of a federal State; and Her Majesty may
by Order in Council provide for the other provisions of this
Part of this Act to apply to any such constituent territory
specified in the Order as they apply to a State.
(6) Where the provisions of this Part of this Act do not apply to
a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

15.—(1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State—
(a) exceed those accorded by the law of that State in relation to the United Kingdom; or
(b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties. Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.
(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16.—(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and—
(a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;
(b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.
(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.
(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.
(4) This Part of this Act does not apply to criminal proceedings.
(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17.—(1) In this Part of this Act—
‘the Brussels Convention’ means the International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships signed in Brussels on 10th April 1926;
‘commercial purposes’ means purposes of such transactions or activities as are mentioned in section 3(3) above;
‘ship’ includes hovercraft.
(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.
(3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.
(4) In sections 3(1), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.
(5) In relation to Scotland in this Part of this Act ‘action in rem’ means such an action only in relation to Admiralty proceedings.

PART II. JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION

STATES
18.—(1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State immunity, being a judgment—
(a) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to 11 above; and
(b) which is final, that is, to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.
(2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in such proceedings.
(3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.
(4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

19.—(1) A court need not give effect to section 18 above in the case of a judgment—
(a) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case; or
(b) if the judgment was given without provisions corresponding to those of section 12 above having been
complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.

(2) A court need not give effect to section 18 above in the case of a judgment—

(a) if proceedings between the same parties’ based on the same facts and having the same purpose—

(i) are pending before a court in the United Kingdom and were the first to be instituted; or

(ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply; or

(b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and—

(i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final within the meaning of subsection (1)(b) of section 18 above; or

(ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.

(3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give effect to section 18 above in respect of the judgment if the court that gave the judgment—

(a) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or

(b) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.

(4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III. MISCELLANEOUS AND SUPPLEMENTARY

20.—(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to—

(a) a sovereign or other head of State;
(b) members of his family forming part of his household; and
(c) his private servants, as it applies to the head of a diplomatic
mission, to members of his family forming part of his
household and to his private servants.
(2) The immunities and privileges conferred by virtue of
subsection (1)(a) and (b) above shall not be subject to the
restrictions by reference to nationality or residence mentioned
in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.
(3) Subject to any direction to the contrary by the Secretary of
State, a person on whom immunities and privileges are
conferred by virtue of subsection (1) above shall be entitled to
the exemption conferred by section 8(3) of the Immigration Act
1971.
(4) Except as respects value added tax and duties of customs or
excise, this section does not affect any question whether a
person is exempt from, or immune as respects proceedings
relating to, taxation.
(5) This section applies to the sovereign or other head of any
State on which immunities and privileges are conferred by Part
I of this Act and is without prejudice to the application of that
Part to any such sovereign or head of State in his public
capacity.
21. A certificate by or on behalf of the Secretary of State shall be
conclusive evidence on any question—
(a) whether any country is a State for the purposes of Part I of
this Act, whether any territory is a constituent territory of a
federal State for those purposes or as to the person or persons
to be regarded for those purposes as the head or government
of a State;
(b) whether a State is a party to the Brussels Convention
mentioned in Part I of this Act;
(c) whether a State is a party to the European Convention on
State Immunity, whether it has made a declaration under
Article 24 of that Convention or as to the territories in respect
of which the United Kingdom or any other State is a party;
(d) whether, and if so when, a document has been served or
received as mentioned in Section 12(1) or (5) above.
22.—(1) In this Act ‘court’ includes any tribunal or body
exercising judicial functions; and references to the courts or
law of the United Kingdom include references to the courts or
law of any part of the United Kingdom.
(2) In this Act references to entry of appearance and judgments
in default of appearance include references to any
corresponding procedures.
(3) In this Act ‘the European Convention on State Immunity’
means the Convention of that name signed in Basle on 16th
May 1972.
(4) In this Act ‘dependent territory’ means—
(a) any of the Channel Islands;
(b) the Isle of Man;
(c) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or
(d) any country or territory outside Her Majesty’s dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

(5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

23.—(1) This Act may be cited as the State Immunity Act 1978.
(2) Section 13 of the M8 Administration of Justice (Miscellaneous Provisions) Act 1938 and section 7 of the M9 Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 (which become unnecessary in consequence of Part I of this Act) are hereby repealed.

(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular—
(a) sections 2(2) and 13(3) do not apply to any prior agreement, and
(b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement, entered into before that date.

(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act.

(5) This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument.

(6) This Act extends to Northern Ireland.

(7) Her Majesty may by Order in Council extend any of the provisions of this Act, with or without modification, to any dependent territory.
ANNEX 1

Peter Fritz Walter, Les problèmes de preuve en matière d’immunités de juridiction et d’exécution des états étrangers, Thèse soutenu le 12 décembre 1987 à la Faculté de Droit de l’Université de Genève

Conclusion Générale

L’examen des lois nationales en matière d’immunité des états étrangers a révélé l’existence de principes communs concernant la répartition du fardeau de la preuve.

L’immunité de juridiction

Quant a l’immunité de juridiction, nous pouvons conclure que, en principe, la preuve incombe à l’état étranger par rapport aux faits qui justifient sa
demande d’immunité. L’état étranger commence a produire des preuves concernant l’appliquabilité de la loi d’immunité et l’existence d’un acte gouvernemental (de iure imperii), c’est-à-dire fournir une preuve *prima facie* à cet égard.

Toutefois, l’état étranger n’est pas obligé, pour la production de cette preuve, de réfuter toutes les exceptions à l’immunité de juridiction, mais seulement celles don’t le demandeur s’est prévalues dans sa plaidoirie. Il incombe en effet au demandeur un certain fardeau de démonstration relatif aux exceptions qu’il désire avoir appliquées par la cour. Si le demandeur ne fournit pas une telle base factuelle (*some basis*), l’état étranger peut produire sa preuve *prima facie* de façon toute générale et, sans se référer à une exception particulière, invoquer l’existence d’un acte gouvernemental. Pour ce faire, l’état étranger peut, par exemple, jurer dans un affidavit, fourni par l’un de ces officiels, que l’acte en cause fut revêtu d’un caractère public, gouvernemental.

Si l’état étranger réussit à fournir une preuve suffisante, il s’est acquitté de son fardeau de présentation qui alors se déplace au demandeur. Dans ce cas, il existe une *présomption* en faveur d’immunité de juridiction.
Pour réfuter cette présomption, le demandeur doit démontrer en détail, et prouver, l’applicabilité des exceptions dont il s’est prévalu dans sa plaidoirie. S’il réussit, l’immunité de juridiction sera refusée par la cour. S’il ne réussit pas à réfuter le *prima facie case*, produit par l’état étranger, l’immunité sera accordée.

Si l’état étranger ne réussit déjà pas à fournir une preuve *prima facie*, la cour peut en principe refuser l’octroi de l’immunité. Dans ce cas, il n’existe pas de présomption en faveur de la compétence, puisque le demandeur, à ce stade, n’a que démontré les exceptions dont il se prévaut. Par conséquence, la cour est libre d’estimer le poids des arguments de chacune des parties, et de décider la question d’immunité d’après l’ensemble des faits qui lui ont été soumis par les parties. Toutefois, la cour ne peut pas sans autre dénier l’immunité de juridiction seulement à cause du fait que l’état étranger n’a rien fait pour se défendre ou ne paraît pas dans l’instance. Dans ce cas, la décision devra se baser sur l’ensemble des faits et l’octroi de l’immunité ou son refus dépendront du poids des preuves offertes par le demandeur.

Le fardeau de persuasion, ou le ‘risque d’immunité, en matière d’immunité de juridiction, est
du côté de l’état étranger. Cela veut dire que l’état étranger porte le risque d’être débouté de sa demande d’immunité dans le cas d’un doute subsistant sur un fait litigieux (*non liquet*), une fois que le demandeur a pour le moins établi une preuve *prima facie* par rapport à l’applicabilité d’une exception. Dans ce sens, on peut parler d’une règle de preuve ‘*in dubio contra immunitate*.’

Cette règle de preuve vaut *a fortiori* pour les organismes d’un état étranger, soit parce qu’ils sont assimilés à ce dernier, soit parce que leur immunité est encore plus restreinte que celle des états dans les lois nationales (présomption de compétence ou de non-immunité).

**L’immunité d’exécution**

En ce qui concerne l’immunité d’exécution, la règle dite *absolue* traditionnelle n’a pas été remplacée par une nouvelle doctrine de droit international comme ce fut le cas en matière de juridiction. Par conséquent, cette règle est encore ‘absolue’ dans le sens qu’elle accorde une immunité ‘complète’, et non seulement ‘résiduelle.’

Ceci se montre dans le fait que, pour que cette règle produise son effet de présomption, il n’est pas
nécessaire qu’il existe une base factuelle, une preuve *prima facie*, en sa faveur. Seules les lois britannique, singapourienne et pakistanaise exigent, pour que cette règle s’érigie en présomption, un *certificat d’ambassadeur* témoignant à l’usage non-commercial des biens étatiques en cause.

Pourtant, un tel certificat exige beaucoup moins de la part de l’état étranger que de fournir une preuve prima facie; l’exigence d’un tel certificat fut en outre déclarée conforme aux règles du droit international public par la *Cour Constitutionnelle de l’Allemagne* dans sa décision du 13 décembre 1977. Par conséquent, la preuve des conditions factuelles d’une exception à la règle d’immunité d’exécution incombe au demandeur, de sorte que celui-ci doit fournir une preuve *prima facie* à cet égard.

Si le demandeur réussit à fournir cette preuve, l’état étranger peut, par simplement réfuter celle-ci, parvenir à l’octroi de l’immunité.

Si, par contre, l’état étranger n’arrive pas à réfuter la preuve prima facie, le demandeur doit néanmoins prouver, par une *prépondérance de probabilité* (*preponderance of probability*) l’applicabilité d’une exception, car la présomption d’immunité ne peut pas
être réfutée par une simple preuve *prima facie*. Ainsi, c’est au demandeur qu’incombe le fardeau de persuasion, le ‘risque d’immunité’ proprement dit, dans le cas du *non liquet*, et la propriété de l’état étranger qui sert à des fins gouvernementales est effectivement protégée contre toute mesure d’exécution.

Pour certains types de propriété, par exemple propriété militaire ou propriété d’une banque centrale étrangère, les lois sont encore plus strictes. Elles ne diffèrent que dans la mesure où elles refusent toute exécution, en accordant ainsi une immunité parfaitement absolue, ou elles permettent une exécution très limitée.

Dans tous les cas examinés, les moyens de preuve communs sont admis. Il y a toutefois une certaine préférence pratique pour l’*affidavit* et le témoignage écrit. En ce qui concerne le Canada, une modification est à noter: l’Office de Révision du Code Civil a adopté trois articles sur l’immunité des états. Dans l’un de ces articles, il est prévu que le souverain étranger n’est pas obligé de donner son témoignage. Ce règlement n’aura toutefois pas d’influence sur l’attribution du fardeau de la preuve, puisque le
témoignage est seulement l’un de différents moyens de preuve.

De plus, la répartition du fardeau de la preuve ne dépend pas de la disponibilité de certains moyens de preuve.

Les faits pertinents à prouver sont ceux qui sont énumérés dans les différentes exceptions prévues par les lois d’immunité. L’état étranger, pour la preuve 
prima facie d’un acte public, gouvernemental, peut invoquer notamment d’avoir agi à l’intérieur de l’un des domaines ‘sensiblement politiques’ qui ont été élaborés par la jurisprudence fédérale américaine à la suite du FSIA 1976, et qui forment, dans leur ensemble, un certain noyau à l’intérieur duquel l’immunité de juridiction jouit toujours d’une vaste reconnaissance.

**Thèses**

1. La doctrine restrictive de l’immunité de juridiction constitue une nouvelle règle de droit international public. Il ne s’agit pas seulement d’une atténuation du principe d’immunité absolue, par l’admission d’une exception additionnelle—activité commerciale, mais d’une règle essentiellement différente. Cette règle a remplacé la règle antérieure.
2. La nouvelle règle d’immunité restrictive n’accorde l’immunité de juridiction aux états étrangers que sous la condition que l’activité litigieuse soit de nature publique, gouvernementale. Or, cette nouvelle règle d’immunité rétablit, pour ainsi dire, la règle originale posant la compétence intégrale des cours de l’état du for sur son territoire.


4. Comme la preuve, en matière d’immunité de juridiction, incombe à l’état étranger c’est lui qui commence à fournir des preuves. S’il veut bénéficier de l’immunité de juridiction, l’état étranger doit produire une preuve prima facie (establish a prima facie case) sur deux éléments:

(i) qu’il s’agit d’un ‘état étranger’ (foreign state) selon la définition spécifique de la loi d’immunité (immunity statute) applicable;
(ii) que l’acte en cause fut de nature publique, gouvernementale (de iure imperii).

Pour la preuve de l’élément (ii), l’état étranger n’est pas obligé de réfuter toutes les exceptions prévues par la loi d’immunité, mais il suffit qu’il démontre, de façon plus ou moins générale (par un affidavit ou par d’autres moyens de preuve), l’existence d’un acte gouvernemental. Si le demandeur a précisé, dans sa plaidoirie, les exceptions dont il se prévaut, l’état étranger n’est obligé d’établir sa preuve prima facie que par rapport à ces exceptions.

5. Si l’état étranger a réussi de produire une telle preuve prima facie, le fardeau de présentation se déplace au côté du demandeur (the evidential burden shifts to the plaintiff); celui-ci doit alors prouver les exceptions dont il se prévaut.

6. Si l’état étranger ne réussit pas à réfuter la preuve fournie par le demandeur, l’immunité de juridiction doit être refusée par la cour. Dans le cas d’un non liquet, le ‘risque d’immunité’—fardeau de persuasion ou imputation du risque de la preuve) est du côté de l’état étranger, de sorte que ce dernier sera débouté de sa demande d’immunité une fois que le
demandeur a fourni preuve conclusive par rapport à l’applicabilité d’une exception.

Cette règle ne vaut toutefois pas sans exception; car le cour ne peut pas sans autre refuser l’immunité de juridiction au cas où l’État étranger ne fait rien pour se défendre et, notamment, n’apparaît pas en instance. Dans ce cas, la cour doit fonder sa décision sur l’ensemble des faits et des preuves qui lui ont été soumis par les deux parties. Le résultat de la décision dépendra du poids des preuves. Un jugement par défaut (default judgment) n’est en tout cas possible que sous la condition que le demandeur parvient à prouver ses allégations à la pleine conviction du juge; une preuve prima facie ne suffit pas à cet égard.

7. Ce qui vaut pour l’État étranger lui-même, vaut à fortiori pour ces organismes (agencies; agencies or instrumentalities) ou entités séparées (separate entities). Ceux-ci ne jouissent de l’immunité de juridiction qu’au cas où—

(i) l’État étranger, à leur place, jouirait de l’immunité; et

(ii) ils parviennent à fournir une pleine preuve à l’égard de l’existence d’un acte gouvernemental; une preuve prima facie ne suffit pas.
8. Le fardeau de la preuve est inverse en matière d’immunité d’exécution. Ceci résulte du fait que la règle d’immunité d’exécution garantit une protection pour ainsi dire ‘intégrale’ des biens de l’état étranger, tandis que la règle d’immunité de juridiction n’accorde qu’une immunité ‘résiduelle’ (residual immunity concept).

Dans ce sens, la règle d’immunité d’exécution est toujours ‘absolue.’ Par conséquent, la preuve des conditions factuelles d’une exception à cette règle incombe au demandeur. Si le demandeur ne parvient pas à fournir cette preuve, les bien de l’état étranger jouiront sans autre de l’immunité d’exécution.

Dans le cas du non liquet, le ‘risque d’immunité’ est du côté du demandeur. on peut donc parler d’une règle de preuve in dubio pro immunitate. Une mesure d’exécution par rapport à la propriété d’une banque centrale étrangère ou d’un organisme militaire de l’état étranger est encore plus limitée, voire exclue.

9. Les faits pertinents à prouver par le demandeur sont ceux qui sont énumérés dans les différentes exceptions prévues par les lois en matière d’immunité des états étrangers. Un état étranger, pour prouver prima facie que l’acte en cause fut de nature publique,
gouvernementale, peut notamment invoquer d’avoir agi dans le cadre de l’un des domaines ‘sensiblement politiques.’ Ces domaines, élaborés à la suite du FSIA 1976 par la jurisprudence fédérale américaine, forment, dans leur ensemble, une sorte de noyau dur à l’intérieur duquel l’immunité de juridiction bénéficie toujours d’une vaste reconnaissance.

Annex 2
Gibt es eine Beweislastverteilung bei der
Immunität von Staaten? Artikel von Peter F.
Walter, publiziert in Recht der Internationalen
Wirtschaft, Heft 1, Januar 1984, 30 RIW / AWD
9-14 (1984)

Stichworte
Staatenimmunität / Beweislastverteilung / Staatliche Immunitätsregeln
/ USA / Großbritannien / Bundesrepublik Deutschland /
Beweislastverteilung nach Völkerrecht / Europäische
Immunitätskonvention 1971 / Convention der International Law
Association / International Law Commission

Einleitung
1. Die Fragestellung des vorliegenden Aufsatzes
ist nur denkbar vor dem Hintergrund der
sogenannten ‘beschränkten’ (restriktiven)
Immunitätsdoktrin, die sich seit etwa der zweiten
Hälfte des 19. Jahrhunderts im Zuge steigender
Handelsbetätigung der Staaten aus gewinnwirtschaftlichen Motiven, also letztlich im Zusammenhang mit dem sogenannten ‘Wandel der Staatsfunktionen’ aus der früheren absoluten Immunitätsauflage herausgebildet hat.


Grund dafür ist in erster Linie der Schutz der beteiligten Handelspartner durch die Versagung von Immunität in Fällen, in denen Gegenstand der Klage gegen den betreffenden Staat ein Handelsgeschäft (commercial activity) darstellt, an dem dieser beteiligt war.

—Siehe BVerfGE 16, 27 ff., 34, Ress, ZaöRV 1980, 243 Fn. 7 (Lord Denning) oder auch commercial transactions (Ress, 243, 248).

Die Abgrenzung zwischen Teilnahme am Handelsverkehr (acta iure gestionis) und hoheitlichem Handeln (acta iure imperii) soll nach der Natur des Aktes und nicht nach seinem Zweck—jedenfalls nicht in erster Linie—erfolgen.

Heute folgen nahezu all wichtigen westlichen Handelsnationen der Doktrin der beschränkten Immunität.

—So Zwischenergebnis bei Ress, ZaöRV 1980, 244.

2. Die für die Beweislastverteilung in Fällen, in denen ein Staat im Zusammenhang mit seiner Teilnahme am Handelsverkehr verklagt wird, wesentliche Problematik ist nun, ob es diesem Staat nützt, d.h. ob er letztlich doch Immunität beanspruchen kann, wenn er zwar ‘wie ein Privater’ am Handelsverkehr teilgenommen hat (has entered the market place), dann aber—meist aus (aussen-)politischen Gründen—hoheitlich in das Geschäft interveniert und gerade damit die zu der Klage Anlass gebende Vertragsverletzung begeht. Es
lässt sich schwerlich leugnen, dass hinter einem Vertragsbruch eines rein privatrechtlichen Vertrages zwischen einem Staat und einem Händler durch den beteiligten Staat, also hinter dem vordergründig im Privatrecht angesiedelten Akt (Vertragsbruch, *breach of contract*) ein hoheitliches Handeln bzw. eine hoheitliche Motivation insbesondere ausserpolitischer Art stehen kann.

— Anders aber Lord Denning vom britischen Court of Appeals in der Entscheidung *I Congreso*, zit. nach Ress, 219: ‘When the government of a country enters into an ordinary trading transaction, it cannot afterwards be permitted to repudiate it and get out of its liabilities by saying that it had done it out of high governmental policy or foreign policy or any other policy. It cannot come down like a god on the stage—the deus ex machina—as if it had nothing to do with it beforehand. It started as a trader and it must end as a trader. It can be sued in the courts of law for its breaches of contract and for its wrongs just as any trader can.’ Lord Wilberforce entgegnete dem treffend (*I Congreso*, a.a.O. 1071, Fn.5): ‘If a trader is always a trader, a state remains a state and is capable at any time of acts of sovereignty. … The restrictive theory does not and could not deny capability of a state to resort to sovereign, or governmental action: it merely asserts that acts done within the trading or commercial activity are not immune.’ Auch in der Literature wurde die (Extrem–)Ansicht Lord Dennings zurückhaltend aufgenommen, vgl. Ress, ZaöRV 1980, 218, 271: ‘Diese Entwicklung (also die ‘market-place-doctrine’) führt zum Übergriff in einen vom funktionellen staatlich-hoheitlichen Verständnis der Immunität abgedeckten Bereich und ist daher nicht ohne Risiko für das völkerrechtliche Institut der Immunität überhaupt.’


Das Völkerrecht als überstaatliches Recht kann schon von seinem Geltungsbereich her schwerlich Beweisregeln der Gerichtsbarkeit enthalten. Überdies ist das Immunitätsrecht gewissermassen als Annex zur Jurisdiktionsgewalt eo ipso staatliches Recht.

—Denkbar wären solche zwar im Rahmen der Gerichtsbarkeit des IGH, indessen kann auch das IGH-Statut keine Beweislastregeln enthalten, da solche dem materiellen Recht und nicht dem Verfahrensrecht angehören. Dem ‘materiellen’ Völkerrecht könnten sie lediglich über die von den Kulturstaaten anerkannten allgemeinen Rechtsgrundsätze

Das Völkerrecht begrenzt dies lediglich insoweit, als ein Gericht eines Staates nicht Akte eines anderen Staates als acta iure gestionis—und damit immunitätsfrei—erklären darf, wenn diese Akte ‘nach er von den Staaten überwiegend vertretenen Auffassung zum Bereich der Staatsgewalt im engeren und eigentlichen Sinne gehören.’


Daher müssen für die vorliegende Fragestellung Kriterien des staatlichen Rechts, das heisst im Rahmen des vorliegenden Aufsatzes Beweislastbegriffe des deutschen und angloamerikanischen Rechts herangezogen werden.
I. Beweislastverteilung nach staatlichen Immunitätsregeln

1. USA: Foreign Sovereign Immunities Act (FSIA), 1976

Der FSIA legt Umfang und Grenzen der *restrictive immunity* abschließend fest und entzog damit der Exekutive die ihr vorher auf diesem Gebiet eingeräumte Entscheidungskompetenz.


Der Act enthält unter chapter 97, sections 1609-1611 ein Regel-Ausnahmeverhältnis (*rule and exception principle*) in Bezug auf die Gewährung von Immunität für Eigentum ausländischer Staaten auf dem Territorium der USA. Die Ausnahmen der Gewährung von Immunität sind in sections 1610, 1611 abschließend aufgezählt; im übrigen verbleibt es bei der Immunität als Grundregel (*general rule*) in §1609.

—§1609 bestimmt, dass besagtes Eigentum ‘shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611 of this chapter’. Dabei enthält section 1610(a)(2) insbesondere die hier interessierende Ausnahme
bezüglich Eigentum, das Gegenstand einer ‘commercial activity’ ist. Was das heisst, wird in §1603(d) definiert.

Die Beweislastverteilung stellt sich also wie folgt dar:

a) Liegt keine der Ausnahmen vor, greift die general rule mit der Folge der Immunität ein; der Staat braucht daher in diesem Falle hoheitliches Handeln nicht nachzuweisen.

b) War Gegenstand der Klage eine ‘commercial activity,’ greift besagte Ausnahmebestimmung ein, d.h. es wird keine Immunität gewährt.

c) Fraglich ist nun, ob trotz des Vorliegens einer der Ausnahmen (prima facie betrachtet) der Nachweis hoheitlichen Handels möglich ist und damit vom betreffenden Staat Immunität beansprucht werden kann. Indessen enthält der Act kein tertium (im Sinne einer Ausnahme von der Ausnahme) für den Fall, dass trotz Vorliegens einer ‘commercial activity’ hoheitliches Handeln im Spiele war. Somit kann sich nach der Systematik des FSIA der Staat nur darauf berufen, dass keine der Ausnahmen vorliege, also den Negativbeweis (Nachweis des Gegenteils) antreten mit der Folge, dass ihm dann die general rule wieder zugute käme. Er müsste also nachweisen, dass ein Handeln von vornherein ausserhalb der


Ebenso wie der FSIA enthält der britische Act ein Regel-und-Ausnahme-Prinzip. Dennoch besteht ein bedeutender Unterschied indem bei der Definition der Ausnahme, ‘*commercial transaction*’ unter Art. 3(3)(c) die Rückausnahme … ‘otherwise than in the exercise of sovereign authority’ gerade zugelassen wird.

—(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and by guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.’ (Zitiert nach Ress, ZaöRV 1980, 248, 249, Fn. 94).

Das Beweislastschema ist hier also um folgendes Tertium bereichert: Statt (b) kann der Staat unter (c) bei Nichtbestreiten des Vorliegens einer Handelsaktivität nachweisen, dass er trotz Teilnahme
am Handelsverkehr in Ausübung staatlicher Hoheitsmacht gehandelt hat.

Je nach den Anforderungen, die an den letzteren Nachweis gestellt werden, ergibt die Anwendung dieser Vorschrift eine immunitätsfreundliche oder eher restriktivere Lösung.


Denn hier stellt Lord Wilberforce eben diese Beweislastregel auf—siehe Seite 1072 der Entscheidung—, die, von der restriktiven Theorie
ausgehend, die Handlungsweise des verklagten Staates der privatrechtlichen oder hoheitlichen ‘Sphäre’ zuordnet.

Wenn danach eine unter Privatrecht (iure gestionis) fallende Handlungsweise feststeht, seien Vertragsbrüche oder deliktische Verhaltensweisen prima facie auch innerhalb dieses Bereiches angesiedelt. Sache des beklagten Staates sei es dann zu beweisen, dass die infrage stehende Handlungsweise ausserhalb dieser Sphäre angesiedelt war und eine hoheitliche Handlungsweise darstellte. Diese Regel, die mit der des Act übereinstimmt, legt die Beweislast also dem Staat auf, wenn prima facie eine commercial transaction vorliegt und der Staat sich dennoch auf hoheitliches Handeln beruft.

Die Anforderungen allerdings, die an diesen Beweis gestellt werden, sind fast unerfüllbar hoch. Obwohl Lord Wilberforce zunächst einräumt, dass kein Zweifel an der hoheitlichen und nichtkommerziellen Motivation der Republik Kuba beim Zurückordern der Schiffe bestand, lehnt er einen Act iure imperii ab mit der Begründung, dass alles, was die Republik Kuba im Hinblick auf die Playa Larga getan hat, ebensogut von jedem anderen Schiffseigner hätte vorgenommen werden können. Lord Wilberforce stellt also auf die äußere Natur der fraglichen Handlungsweise ab und gesteht nur denjenigen hoheitliche Qualität zu, die nur von einem Staat, nicht aber von einem Privaten vorgenommen werden können. Um solche kann es sich aber bei Interventionen in Handelsgeschäfte zwangsläufig nie handeln, denn in ein Handelsgeschäft eingreifen heisst immer etwas tun, was auch jeder Händler tun kann. Dies kommt einer Aufhebung nahe, was vorher als Beweisregel statuiert wurde. Denn das einzige, was der Staat in dieser Lage tun kann, ist unter Beweis zu stellen, dass er hoheitliche Zwecke mit seiner Handlungsweise verfolgte.

—Ähnlich Lord Edmund-Davies, p. 1082 der Entscheidung: ‘If in these circumstances it be held that the Republic of Cuba
cannot rely on state immunity, I find it impossible to imagine circumstances where the doctrine can operate.’ Vgl. auch Ress, Les tendances … p. 91: ‘Interpréter, dans ces circonstances, le comportement du Gouvernement Cubain comme un acte de droit privé, revient à appliquer, de façon implicite, la maxime ‘in dubio contra immunitatem.’ Und p. 90: ‘Comment, cependant, le gouvernement peut-il répondre autrement à l’obligation de fournir des épreuves, si ce n’est pas par un renvoi aux fins politiques poursuites par son action?’

II. Beweislastverteilung nach Völkerrecht

1. Rechtsprechung des Bundesverfassungsgerichts


Es ging um die Zulässigkeit der Zwangsvollstreckung in ein Konto einer ausländischen Botschaft bei einer deutschen Bank.

— Vorausgegangen war ein rechtskräftiges Versäumnisurteil, das die Gläubigerin des Ausgangsverfahrens für rückständige Mietzinsen und Renovierungskosten eines an die Botschaft des beklagten Staates vermieteten Hauses erwirkt hatte. Gegen den Pfändungs- und Überweisungsbeschluss legte der fremde Staat Erinnerung ein.

Das Bundesverfassungsgericht hatte als allgemeine Regel des Völkerrechts festgestellt, dass die Vollstreckung unzulässig ist, soweit ein gerichtlicher Titel gegen den fremden Staat über ein nicht-hoheitliches Verhalten vorliegt, die Gegenstände, in die vollstreckt wird (hier also: das Kontoguthaben), aber hoheitlichen Zwecken des fremden Staates dienen.


Den (schützenswerten) Vertragspartner verweist das Gericht auf Vereinbarungen ex ante, insbesondere Immunitätsverzichte.

—Auch dies sollte nach Ress, a.a.O., 222, als rechtspolitische Leitlinie (de lege ferenda) überdacht werden.

Die Interessenlage wird also eindeutig pro *immunitate* beurteilt und steht damit im Gegensatz zur Interessenbewertung in der Entscheidung ‘I Congreso’ des britischen House of Lords.


Es ging hier um eine gerichtliche Pfändung von Forderungen der Nationalen Iranischen Ölgesellschaft (NIOC) auf Bankkonten in der Bundesrepublik Deutschland. NIOC berief sich auf Immunität mit der Begründung, die Forderungen dienten hoheitlichen Zwecken, da sie aus der Erdölproduktion stammten und nach iranischem Recht solche Forderungen and
die Staatshauptkasse bei der Zentralbank des iranischen Staates zu überweisen seien und zur Finanzierung des Staatshaushaltes dienten.

Das im Wege einer Verfassungsbeschwerde angerufene Bundesverfassungsgericht verneinte Immunität auch für den Fall, dass nicht nur die NIOC, sondern sogar der iranische Staat selbst Inhaber der Forderungen wäre.


Auch in diesem Fall sei nämlich in der blossen Anweisung zur Weiterleitung der Guthaben an die iranische Zentralbank kein Akt iure imperii zu sehen.
Denn damit würden ‘allenfalls mittelbar hoheitliche Zwecke’ verfolgt, da nach dem Willen des fremden Staates die Gelder die massgebende Zweckbestimmung (also Finanzierung des Staatshaushaltes) erst dann erzielten, wenn sie in die Verfügungsgewalt der Zentralbank gelangt seien. Zum hier entscheidenden Zeitpunkt der Anweisung der Gelder liege jedenfalls (noch) keine hoheitliche Zweckbestimmung vor.

—Das Bundesverfassungsgericht konnte also weiter offenlassen, ob diese Zweckbestimmung eine hoheitliche (also Immunität auslösende) sei, indem es lediglich den Akt der Anweisung der Gelder (als im Gerichtsstaat vorgenommener Akt) qualifizierte.

Dem Gerichtsstaat komme in einem solchen Fall die Freiheit der Qualifizierung des Aktes als hoheitlich oder nicht hoheitlich zu, weshalb die Frage, ob die Guthaben nach iranischem Recht als hoheitlichen Zwecken dienend anzusehen seien, nicht entscheidungserheblich sei. Nach deutschem Recht aber unterständen die Guthaben als Teil des staatlichen Finanzvermögens dem Privatrecht.


Für die hier zu erörternde Beweislastproblematik ergibt sich hieraus folgendes:

a) Das Bundesverfassungsgericht qualifiziert die Guthaben und damit auch die auf sie bezogene Anweisung auf das Konto der iranischen Zentralbank nach deutschem Recht als nicht hoheitlich.

—Im Gegensatz dazu sei bei Guthaben, die der fremde Staat zu währungspolitischen Zwecken bei Banken im Gerichtsstaat unterhalte, in aller Regel „unmittelbar“ eine hoheitliche Zweckbestimmung gegeben.

b) Die Frage, ob die Gelder nach ihrem Eingang bei der Zentralbank nach iranischem Recht hoheitlichen Zwecken des Iran dienten, erklärt das Gericht für nicht entscheidungserheblich.

Das Bundesverfassungsgericht eröffnet dem Iran also nicht den Nachweis hoheitlicher Zweckbestimmung der Gelder, indem es zum einen

2. Europäische Immunitätskonvention von 1972


Daher kann sich auch hier die Beweisfrage nur auf das Eingreifen oder Nichteingreifen eines der Ausnahmetatbestände der Art. 1–14 beziehen. Beruft sich der Staat also auf Immunität, obwohl *prima facie* einer der Ausnahmetatbestände vorliegt, bleibt ihm nur der Gegenbeweis, also der Nachweis, dass der betreffende Ausnahmetatbestand nicht eingreift.

Wenn der Rechtsstreit also z.B. um ein Patent, Warenzeichen etc. geht, das dem klagenden Staat gehört und das im Forumstaat geschützt ist—für diesen Fall greift der Immunitätsausschluss des Art. 8(a) ein—bliebe dem verklagten Staat nur der Nachweis, die entsprechende Berechtigung falle, aus welchen Gründen auch immer, nicht unter Art. 8(a) mit der Folge, dass dann gemäss Art. 15 Immunität gewährt werden müsste.

Da dieser Nachweis schwierig ist, zeigt gerade das vorliegende Beispiel, denn es ist im Handels- und Rechtsverkehr eindeutig, was als Patent anzusehen ist. Spielraum gibt es lediglich, wenn es um ein ’ähnliches Recht’ geht, obwohl dieser Nachweis auch recht schwer sein wird, als—unter Nichtbestreiten des Vorliegens eines Ausnahmetatbestandes—hoheitliches Handeln, das mit diesem im Zusammenhang steht, nachzuweisen ist. Hoheitliche
Intervention in einen Akt iure gestionis berechtigt den Staat nach der Konvention also nicht, Immunität zu beanspruchen, wenn er den Privatrechtscharakter des Aktes, in den er interveniert, nicht zu bestreiten vermag bzw. den Gegenbeweis nicht erbringen kann. Es gilt also auch hier gleiches wie für den FSIA.

3. Draft Convention der International Law Association


Schon auf der Belgrad-Konferenz wurde die Frage aufgeworfen, ob eine ‘general rule’ mit ‘exceptions’—wie im FSIA und der europäischen Konvention—geschaffen werden sollte, was zur Folge hätte, dass immer dann, wenn eine der Ausnahme eingriff, Immunität beansprucht werden könnte. So hat man
sich zunächst einmal für eine Differenzierung nach Erkenntnis– und Vollstreckungsverfahren entschieden, und für ersteres schliesslich doch eine general rule in Art II. mit exceptions in Art. III statuiert.

—A.a.O., 329; im übrigen kein neuer Gedanke. Zuerst hatte man erwogen hatte, die general rule wegzulassen und nur die Ausnahmefälle zu statuieren. Art. II lautet: ‘In general, a foreign State shall be immune from the adjudicatory jurisdiction of a forum State for acts performed by it in the exercise of its sovereign authority, i.e. iure imperii. It shall not be immune in the circumstances provided in Article III.’ Art. III schliesst Immunität u.a. aus für ‘a commercial activity carried on wholly or partly in the forum State by the foreign state.’

Weiterhin hat man die Beweislast gerade entgegengesetzt geregelt, um im Erkenntnisverfahren eine somewhat flexible rule,’ im Vollstreckungsverfahren dagegen eine strikte Immunitätsregelung zu erzielen.

—A.a.O., 329, Fn. 45. ‘… there should be an absolute rule of immunity unless a particular exception applied. (Id.)

Das zeigt am anschaulichsten ein Vergleich der beiden Grundregeln, also Art. II und Art. VII. Schon der Wortlaut offenbart hier m.E. sehr deutlich die unterschiedliche Beweislastregelung. Nach der strikten Regel des Art. VII verbleibt es bei Nichtvorliegen einer Ausnahme des Art. VIII bei der
Immunität, ohne dass der Staat noch besonders hoheitliches Handeln nachzuweisen hätte.

—Art. VII lautet: ‘A foreign State’s property in the forum State shall be immune from attachment, arrest and execution except as provided in Article VIII.’

Die Beweislast für das Vorliegen einer Ausnahme trägt der Vertragspartner des Staates, also der Kläger, wenn er sich auf diese ihm günstige Tatsache beruft. Kann er diesen Nachweis nicht führen, wird Immunität ohne Nachweis hoheitlichen Handelns gewährt; für letzteren Nachweis obliegt dem Staat also keinerlei Beweislast.

—Dies wurde bei den Ausführungen zum FSIA und zur europäischen Immunitätskonvention nicht explizit gesagt und sei hiermit nachgetragen. Es ergab sich aber auch daraus, dass von ‘Gegenbeweis’ die Rede war. Mit diesem ist natürlich jede Prozesspartei ‘belastet’; die eigentliche Beweislast trägt in diesem Fall aber der Kläger und nicht der beklagte Staat.

Ganz anders die Regelung in Art. II. Hier lautet es schon einleitend: ‘In general …‘ und dann vor allem einschränkend ‘for acts performed by it in the exercise of its sovereign authority, i.e. iure imperii.’ In den Fällen, in denen ein Ausnahmetatbestand des Art. III eingreift, ist das Schema wie oben. Liegt aber keine der Ausnahmen vor, bzw. kann der Vertragspartner des Staates als Kläger eine solche nicht nachweisen,


Andererseits—dies ist das Entscheidende—schliesst die Regelung aber auch den Fall nicht aus, dass trotz Vorliegens einer Ausnahme der Staat sich auf hoheitliches Handeln beruft, wie es im Falle ‘I Congreso’ gerade der Fall war. Zwar schliesst Art. III Immunität für die angeführten Ausnahmefälle aus, diese sind aber Ausprägungen von Handlungsweisen iure gestionis. Die Möglichkeit, das Vorliegen eines Aktes iure imperii über Art. II nachzuweisen, wird also nicht durch Art. III ausgeschlossen. Die bei Nichtvorliegen eines Ausnahmetatbestandes einschränkend wirkende Fassung des Art II. (Beweislast), wirkt bei Vorliegen einer Ausnahme erweiternd; es wird—wie beim britischen Act—ein
tertium zugelassen, das dem beklagten Staat gestattet, trotz Vorliegens einer immunitätsausschliessenden Ausnahme den Nachweis hoheitlichen Handelns (also z.B. hoheitlicher Motivation zu vertragsbrüchigem Eingriff in ein Privatrechtsgeschäft) anzutreten.

Für diesen Nachweis trägt der beklagte Staat dann wiederum die Beweislast. (Art. II), obwohl es hier, wie gezeigt, entscheidend auf die Anforderungen ankommt, die an diesen Nachweis gestellt werden.

4. Bemühungen der International Law Commission


Artikel 6 enthält eine ‘general rule’ und legt das Prinzip der Staatenimmunität fest. Der für die vorliegende Fragestellung einschlägige Artikel 7 wurde nach mehreren heftigen Diskussionen nicht angenommen.

—Article 6 State Immunity: 1. A State is immune from the jurisdiction of another State in accordance with the provisions of the present articles. 2. Effect shall be given to State immunity in accordance with the provisions of the present articles.’

Article 7 Rules of Competence and Jurisdictional Immunity: 1. A State shall give effect to State immunity under article 6 by refraining from submitting another State to its jurisdiction, notwithstanding its authority under its rules of competence to conduct the proceedings in a given case. Alternative A 2. A legal proceeding is considered to be one against another State, whether or not named as a party, so long as the proceeding in fact impleads that other State. Alternative B. 2. In particular, a State shall not allow a legal action to proceed against another State, or against any of its organs, agencies or instrumentalities acting as a sovereign authority, or against one of its representatives in respect of acts performed by them in their official functions, or permit a proceeding which seeks to deprive another State of its property or of the use of property in its possession or control.’ (Yearbook of the International Law Commission 1981, Volume I, 56.

Dies verwundert nicht, geht die Regelung doch an der eigentlichen Problematik vorbei, indem sie zum
einen Jurisdiktionsgewalt, Verantwortlichkeit der Staaten für ihre Organe und zum dritten die Frage der Immunität in einem Artikel behandelt und zum anderen das Problem der Immunität selbst—also insbesondere die Abgrenzung von Akten, für die keine Immunität beansprucht werden kann, von Hoheitsakten—nicht eingehend regelt.

Hier beschränkt sich nämlich die Vorschrift in Alternative B auf das Postulat: ‘Keine Jurisdiktion über hoheitlich handelnde Staaten,’ dies ist nichts Besonderes und war seit jeher anerkannt.

—Es handelt sich hier recht besehen nicht um Alternativen, da in beiden völlig unterschiedliches geregelt wird.


In der Tat erscheint die Regelung des Art. 7 verunglückt infolge Vermischung verschiedener Fragestellungen in einem einzigen Artikel, der Überbetonung der Jurisdiktionsfrage, der unpräzisen
Fassung und des Fehlens von Ausnahmetatbeständen für Staatenimmunität im Zusammenhang mit acta iure gestionis. Die Arbeit der ILC ist jedoch noch nicht abgeschlossen und eine Revision durch den Special Rapporteur wird vorgenommen.

**Schlussbetrachtung**


Die einzelnen Regelungen unterscheiden sich lediglich darin, dass der beklagte Staat bei Vorliegen eines der Immunität ausschliessenden Tatbestandes entweder nur diesen bestreiten oder aber einen gesonderten Nachweis hoheitlicher Zweckbestimmung seines Handelns führen kann. In beiden Fällen trägt er dafür aber die Beweislast.
Die angeführte Rechtsprechung geht—ohne dies immer im Detail explizit auszuführen—im Grunde auch von dieser Beweislastverteilung aus.

Im einzelnen bestehen jedoch je nach Bewertung der konkreten Interessenlage graduelle Unterschiede hinsichtlich der Anforderungen, die an den Nachweis hoheitlicher Zweckbestimmung geknüpft werden.

Dabei ist die allgemeine Tendenz zu verzeichnen, entweder durch eins ehr hohes Ansetzen der Beweisanforderungen, oder ein weitgehendes Einschränken des Beweisthemas, die Staatenimmunität im Bereich staatlicher Handelsaktivitäten nur noch in Ausnahmefällen zu gewähren, bzw.—allgemein gesprochen—das Institut der Staatenimmunität langsam aus diesem Bereich zu verdrängen.
