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ARTICLES

Confusion in the Harbor: Compulsory Pilots Collide with the Motorship *FSIA*

*Robert M. Jarvis**

INTRODUCTION

Since its adoption in 1976, the Foreign Sovereign Immunities Act (FSIA)¹ has been the subject of extensive debate.² Much of the debate

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¹ Pub. L. No. 94-583, 90 Stat. 2891-2897, codified at 28 U.S.C. §§ 1330, 1332 (a)(2), (4), 1391 (f), 1441 (d) and 1602-1611 (1982). All section references are to Title 28 unless otherwise indicated.

² Long before the passage of the Foreign Sovereign Immunities Act (FSIA), numerous commentators had discussed the need for such an act. See, e.g., Lowenfeld, *Claims Against Foreign States — A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901 (1969), which, after tracing the development of the United States law of sovereign immunity, proposed a "solution" to the problem. During the years leading up to the eventual enactment of the FSIA, numerous false starts were made in the Congress. An early proposal, known as Senate Bill 566, was withdrawn after it became clear that it could not win adoption. For a discussion of S. 566, see Note, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S. 566*, 67 AM. J. INT'L L. 745 (1973); Note, *The Immunity of Foreign Sovereigns in U.S. Courts — Proposed Legislation*, 6 N.Y.U.J. INT'L L. & POL. 473 (1973); Note, *The Statutory Proposal to Regulate the Jurisdictional Immunities of Foreign States*, 6 VAND. J. TRANS. L. 549 (1973). Following the withdrawal of S. 566, a new measure was introduced into the House as H.R. 11315. For a discussion of H.R. 11315, see Atkeson, *H.R. 11315 — The Revised State-Justice Bill on Foreign Sovereign Immunity: Time for Action*, 70 AM. J. INT'L L. 298 (1976); Note, *Public Debt and Sovereign Immunity Revisited: Some Considerations Pertinent to H.R. 11315*, 70 AM. J. INT'L L. 529 (1976). Shortly after H.R. 11315 was enacted, it began to

has been spawned by the often careless drafting of the Act's language, a fact which has been repeatedly commented upon.³ With the approach of the tenth anniversary of the Act's passage, numerous amendments are being put forth for consideration by Congress.⁴ In the main, these proposals focus on correcting language which has proven to be problematic in practice.⁵ Some of the proposals seek to reopen old battles that were fought, and lost by one side or another, prior to the Act's initial approval. A few have gone so far as to suggest scrapping the Act entirely and starting over.⁶

The purpose of this article is neither to exhaustively review the legislative history of the Act,⁷ nor to comment on the various amendments

draw criticism. See Note, "The Foreign Sovereign Immunities Act of 1975" [sic]: *Reflections on Old Problems in a New Bill*, 5 BLACK L. J. 270 (1977); Note, *Sovereign Immunity — Limits of Judicial Control — The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L. J. 429 (1977); Roberts and Warren, *The Foreign Sovereign Immunities Act: Where Did Our Remedies Go?*, 3 MAR. LAW. 155 (1978). This criticism led to calls for amending the Act. See, e.g., Smit, *The Foreign Sovereign Immunities Act of 1976: A Plea for Drastic Surgery*, 74 AM. SOC. INT'L L. PROC. 49 (1980). Other commentators, who were more favorably inclined to the Act, merely sought to formulate guidelines to supplement the Act. See Kahale, *Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity*, 14 N.Y.U. J. INT'L L. & POL. 29 (1981); Comment, *Suing a Foreign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976*, 1 NW. J. INT'L L. & BUS. 657 (1979); Note, *Effects Jurisdiction Under the Foreign Sovereign Immunities Act and the Due Process Clause*, 55 N.Y.U. L. REV. 474 (1980); N.Y.U. J. INT'L L. & POL. 29 (1981); Note, *Suits by Foreigners Against Foreign States in United States Courts*, 90 YALE L. J. 1861 (1981).

³ See, e.g., Delaume, *Sovereign Immunity in America: A Bicentennial Accomplishment*, 8 J. MAR. L. & COM. 349 (1977); Dellapenna, *Suing Foreign Governments and Their Corporations: Sovereign Immunity (Parts I-V)*, 85 COM. L. J. 167, 228, 298, 364, 497 (1980). See also Smit, *supra* note 2.

⁴ On August 8, 1984, the American Bar Association's House of Delegates approved proposed amendments to the FSIA which had been recommended by the Association's Section of International Law and Practice. For a discussion of the ABA's proposals, see Burrows and Newman, *Proposed Amendments Foreign Sovereign Immunities Act of 1976*, N.Y.L.J., Mar. 22, 1985, at 1, col. 1.

⁵ The Maritime Law Association of the United States, for example, has suggested an amendment which would make the Ship Mortgage Act of 1920, 41 Stat. 1000, 46 U.S.C. § 911-984 (1982), mesh with the FSIA. Under the proposed change, mortgages on foreign state-owned vessels would be permitted to be foreclosed in accordance with the Ship Mortgage Act. The Maritime Law Association of the United States, *Document No. 657* at 8169, 8170 (Nov. 2, 1984).

⁶ The International Law Association, for example, has suggested that the subject of foreign sovereign immunity should be handled on an international, rather than national, basis. To that end, the Association has prepared a Draft Convention on Foreign Sovereign Immunity. See International Law Association, *Draft Articles for a Convention on State Immunity* (1983), in International Law Association, *Report of the Sixtieth Conference* (1982), reprinted in 22 INT'L LEGAL MATERIALS (1983). The Convention is discussed in Note, *The International Law Association Draft Convention on Foreign Sovereign Immunity: A Comparative Approach*, 23 VA. J. INT'L L. 635 (1983).

⁷ For a discussion of the FSIA's legislative history, see McDowell, *Contemporary Practice of the United States Relating to International Law*, 71 AM. J. INT'L L. 337 (1977); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day In Court*, 46 FORDHAM L. REV. 543 (1977); Note, *Sovereign Immunity*, 17 VA. J. INT'L L. 491 (1977); Recent Developments, *Foreign*

and corrections which have been put forth. Instead, this article focuses on one small problem contained in one discrete section of the Act. The provision which forms the basis of this article is § 1605(b),⁸ and the problem that will be discussed is the rule announced in that section which prohibits the arrest of a vessel owned by a foreign sovereign. Because much has been written about the arrest provisions of the FSIA,⁹ this article will approach the section from a perspective not previously discussed: torts committed while the vessel is under the command of a compulsory pilot.¹⁰

The article will begin with a discussion of what compulsory pilots are and the general legal rules applicable to them. The article will then examine whether the FSIA modifies the usual compulsory pilot rules and, if so, the consequences of that modification. It will be argued that

Sovereign Immunities Act of 1976 — Judicial Predominance, 4 BROOKLYN J. INT'L L. 146 (1977).
See also *supra* note 2.

⁸ Section 1605(b) states:

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; but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit — unless the party was unaware that the vessel or cargo of a foreign state was involved, in which event the service of process of arrest shall be
- (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 subsection (b)(1) of this section 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.

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state which at that time owns the vessel or cargo involved: *Provided, That* a 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 to be determined as of the time notice is served under subsection (b)(1) of this section.

⁹ The seminal article on this subject is Simmons, *Admiralty Practice Under the Foreign Sovereign Immunities Act — A Trap for the Unwary*, 12 J. MAR. L. & COM. 109 (1980). See Roberts and Warren, *supra* note 2; Comment, *The Use of Procedure to Effect Equity: Section 1605(b) of the Foreign Sovereign Immunities Act of 1976*, 10 FLA. ST. U. L. REV. 129 (1982); Note, *Maritime Arrest under the Foreign Sovereign Immunities Act: An Anachronism*, 62 TEX. L. REV. 511 (1983).

¹⁰ In maritime parlance, a pilot is a person who is taken aboard a vessel at a particular place for the purpose of conducting the vessel from or into a port. A. PARKS, *THE LAW OF TUG, TOW AND PILOTAGE* 1004 (2d ed. 1982). The term "compulsory pilot" refers to a pilot who is required by law to be employed by an incoming or outgoing vessel. For accounts which portray the life and work of pilots, see J. MARVIL, *PILOTS OF THE BAY AND RIVER* (1965); R. EASTMAN, *PILOTS AND PILOT BOATS OF BOSTON HARBOR* (1958). One of the few law review articles on compulsory pilots is Hunter, *Liability of Vessel for Negligent Act of Compulsory Pilot*, 8 J. MAR. L. & COM. 87 (1976).

although Congress probably did not intend the FSIA to change the rules regarding compulsory pilots, it may well have done so inadvertently. The uncertainty caused by this possibility forces a claimant, and ultimately, a court, to guess what Congress may have had in mind. If one reads the statute literally, it seems clear that, whether intended or not, Congress did change the rules regarding compulsory pilots. The change effected is a significant one, for it prohibits claimants from bringing any type of suit against foreign sovereigns and their instrumentalities when the compulsory pilot rules apply.

Faced with the possibility that a claimant may be denied the right to bring a suit against a foreign sovereign because of Congress' inadvertent change, a court may be tempted to read the statute in a way which preserves the status quo. Since both of these alternatives — prohibiting a claimant from suing or reading the statute in a manner divorced from the language used — are unacceptable, this article will conclude by calling for a redrafting of § 1605(b). Given the current interest in amending the Act, such a change could easily be added to the many proposals now being suggested.

I. THE LAW OF PILOTAGE

A. A Short History of Pilotage

As vessels enter and leave ports, their captains and crews must be most vigilant. Unlike the times when a vessel is at open sea, navigation in and out of local waters poses special risks to a seagoing ship. This is true for several reasons. First, the amount of running room a ship has is restricted. Sudden turns, adjustments to course, and short stops can be made, if at all, only at great risk. Second, there are a number of obstructions which are found only in a harbor. Such obstructions include buoys, channel markings, cable lines, and navigational lights. Although these items are designed to help the mariner, they also act as an obstacle course which must be navigated around. Third, the number of boats near a maneuvering ship is greatly increased. Not only are there other seagoing ships coming into or leaving the harbor, but there are other vessels—tugs, barges, fireboats, ferries and local patrol boats—which will never be encountered except in the harbor. In addition, pleasure crafts, many of them steered by casual or weekend boaters with little or no experience in the rules of the road, will be present. Because of their small size, many of these vessels will never venture far from land and are therefore unknown in ocean traffic. All of these ships, from the ferry boat engaged in her usual run, to the yacht cruising up and down the shore, have the potential for causing a collision with an ocean-going ship trying to leave or

enter local waters. Finally, there are natural conditions which make navigating in a harbor difficult and potentially dangerous. Sandbars, which can quickly ground a ship, are just one example of a local condition not found in open water. Indeed, some local conditions vary so much from the norm that special rules, which completely contradict settled shiphandling practice, have been adopted in some places.¹¹ Although these local conditions will be marked on nautical charts, a captain of a seagoing vessel will not be familiar with them, and is therefore apt to misjudge their location or the danger that they pose.¹²

Since it is likely that the crew of an ocean going vessel will not realize—let alone fully appreciate—the dangers posed by a port's local conditions, there has developed a system of pilotage. Pilots are local mariners who, because of their familiarity with a port, are able to assist ships entering and leaving the harbor. The history of pilotage is very old, stretching back to Roman times.¹³ Modern pilotage evolves from the chartering of Trinity House in 1514 by King Henry VIII.¹⁴ Trinity House, which is still in existence today, is the body responsible for the bulk of English pilotage.¹⁵

¹¹ In G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 7-13, at 514-15 (2d ed. 1975), a number of such customs are collected. See *Union Oil Co. v. Tug Mary Malloy*, 414 F.2d 669 (5th Cir. 1969) (approving of the custom that vessels proceeding down the Intracoastal Waterway give right-of-way to vessels in the Neches River which are preparing to enter the Canal); *The Luzerne*, 204 F. 981 (2d Cir. 1913) (recognizing the custom that vessels coming out of the Harlem River yield to westbound vessels in the East River); and *The Transfer No. 21*, 248 F. 459 (2d Cir. 1917) (following the local custom that on a flood tide at Hell Gate a starboard to starboard passing, rather than the usual port to port pass, was proper).

¹² A thorough discussion of the problems and perils of navigating in and out of harbors and ports is contained in A. QUINN, *DESIGN AND CONSTRUCTION OF PORTS AND MARINE STRUCTURES* (1961).

¹³ In *Ex parte McNiel*, 80 U.S. 236, 239 (1871), the Court wrote:

The obligation on the captain to take a pilot, or be responsible for the damages that might ensue, was prescribed in the Roman Law. The Hanseatic ordinances, about 1457, required the captain to take a pilot under the penalty of a mark of gold. The maritime law of Sweden, about 1500, imposed a penalty for refusing a pilot of 150 thalers, one-third to go to the informer, one-third to the pilot who offered, and the residue to poor mariners. By the maritime code of the *Pays Bas* the captain was required to take a pilot under a penalty of 50 reals, and to be responsible for any loss to the vessel. By the maritime law of France, ordinance of Louis the XIV, 1681, corporal punishment was imposed for refusing to take a pilot, and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from stranding. In England (3 George I, ch. 13), if a vessel were piloted by any but a licensed pilot, a penalty of £20 was to be collected for the use of superannuated pilots, or the widows of pilots.

¹⁴ Trinity House's charter was reconfirmed by Edward VI, Queen Mary and Queen Elizabeth. In 1604 James I expanded upon it. The charter was dissolved in 1647 but was renewed by Charles II following the end of the Restoration. A. PARKS, *supra* note 10, at 1003.

¹⁵ Recently, however, Trinity House and her members have experienced economic difficulties because of a fall in vessel traffic caused by the generally depressed state of worldwide shipping. In response, the English government has introduced legislation which would reduce the number of pilots. Such legislation has been strongly opposed by the pilots. See Mott, *Ship Pilots Plan from Trinity House*, *Lloyd's List*, May 30 1985, at 1, col. 1. In Canada, the pilotage authority with re-

In the United States, pilots were well known by the time the First Congress met in 1789. Finding that numerous state statutes were already regulating local pilots, Congress passed legislation which approved the continuation of state regulations until such time as Congress might otherwise declare.¹⁶ This legislation was later expanded to include state regulation which regulated pilotage on any body of water which bounded two states.¹⁷

Congress' decision to leave pilotage regulation to the states was challenged in the landmark case of *Cooley v. The Board of Wardens of the Port of Philadelphia*.¹⁸ Some years earlier, the Supreme Court had held that pilotage was within the admiralty jurisdiction of the federal judiciary.¹⁹ As such, it was an open question whether state — rather than federal — regulation of pilots was constitutional.

The Court ruled that the State of Pennsylvania²⁰ did have the power to require ships in interstate and foreign commerce to take on local pilots when entering or leaving the Port of Philadelphia. Interestingly enough, the Court chose to look upon the case as one involving commerce rather

sponsibility for eastern Canada has made money, lowered rates, and hired additional pilots while the pilotage authority for western Canada has lost money and not hired any new pilots. *Canada Pilotage Unit Scraps Tariff Schedule*, J. of Com., July 8, 1985, at 1B, col. 3.

¹⁶ Originally passed as An Act of Congress of August 7, 1789, 1 Stat. 54, the statute read:

And be it further enacted that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

The current version of the law is codified at 46 U.S.C.A. § 8501(a) (West 1985).

¹⁷ The addition read:

The master or commander of any vessel coming into or going out of any port situate upon waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on said waters, to pilot said vessel to or from said port; any law, usage or custom, to the contrary notwithstanding An Act of Congress of March 2, 1837, ch. 22, 5 Stat 153 (current version at 46 U.S.C.A. § 8501 (b) (West 1985)).

This provision proved somewhat difficult to interpret, since it was not clear whether the waters had to be the actual boundary which separated the two states. When the issue was presented to the courts, they opted for a strict interpretation. See *Leech v. Louisiana*, 214 U.S. 175 (1909); *The Swift Arrow*, 292 Fed. 651 (D. Mass. 1923); *The Glencarne*, 7 Fed. 604 (D. Ore. 1881).

¹⁸ 53 U.S. (12 How.) 299 (1851).

¹⁹ *Hobart v. Drogan*, 35 U.S. (10 Pet.) 108 (1836). The holding of *Hobart* was reaffirmed in *Ex parte Hagar*, 104 U.S. (14 Otto) 520 (1881) and *Ex parte Pennsylvania*, 109 U.S. 174 (1883). For a recent lower court case which followed *Hobart*, see *Campos v. Puerto Rico Sun Oil Co., Inc.* 536 F.2d 970 (1st Cir. 1976).

²⁰ Although the suit was brought to challenge the State law, the defendant was the Board of Wardens of the Port of Philadelphia. As A. PARKS, *supra* note 10, at 1086, has explained:

The legislatures of all the coastal States have, by statute, created boards or commissions to govern the operation of pilots of their respective states; for the appointment and licensing of such pilots; and, frequently, for the fixing of rates of rates for pilots. Such boards and commissions are administrative agencies and, as such, are creatures of statute.

than one involving admiralty or maritime law.²¹ The Court justified its decision by relying upon the local nature of the regulated subject matter.²² For many years following the *Cooley* decision, the Court relied on a national-local subject matter analysis to determine whether a particular instance of State regulation of interstate commerce was permissible.²³ Although this method of analysis had been abandoned by the mid-1940s,²⁴ it has reappeared in the Court's decisions from time to time.²⁵

Despite the fact that *Cooley* approved of state pilotage systems in clear and unequivocal terms, and was itself reaffirmed on a number of occasions,²⁶ state pilotage systems were unable to function from 1852 to 1871 because of the passage of a federal statute which made it illegal for

²¹ As has been pointed out by a leading commentator, "No note was taken of such subtleties as whether or not a statute which affects commerce but is motivated by a goal anterior to commercial regulation should be deemed to regulate commerce." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 324 n.2 (1978). Professor Tribe points out that "*Cooley* was foreshadowed by a line of cases which focused on the nature of the regulated subject matter rather than on the considerations that motivated the regulation." *Id.*

²² The Court stated that the port conditions which gave rise to the creation of pilotage statutes were "local peculiarities" properly regulated by the States. 53 U.S. (12 How.) at 319.

²³ See, e.g., *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886); *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713 (1866). In *Wabash*, the Court struck down an attempt by Illinois to regulate intrastate railway rates, finding that if every state were to follow Illinois' lead, the cumulative effect would overwhelm interstate commerce. Congress responded to the Court's decision by creating the Interstate Commerce Commission to set railway rates. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (current version at 49 U.S.C. §§ 10101 (1982)). For a maritime application of *Wabash*, see *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). *Jensen* held invalid a New York workmen's compensation statute which provided compensation for longshoremen injured in the course of their employment. The Court ruled that the Act was unconstitutional because it violated the principle of national uniformity by subjecting vessels travelling in interstate commerce to different obligations depending upon the port in which they were anchored. Ten years later, Congress responded by enacting the Longshoremen's and Harbor Workers Compensation Act of 1927, Pub. L. No. 803, ch. 509, 44 Stat. 1424 (1927). The Act was substantially amended in 1972 and, as revised, now appears at 33 U.S.C. § 901-950 (1982). For a discussion of the *Jensen* case which places it in its historical perspective, see Jarvis, *Richardson v. Foremost Insurance Company: A New Opportunity For Industry to End State Regulation of Coastal Oil Pollution*, 19 GONZ. L. REV. 265, 281-83 (1984).

²⁴ In place of the national-local analysis, the Court substituted a two-part test which focuses on the legitimacy of the end to be achieved by the State regulation and the importance of the regulation vis-a-vis the burden that it puts on interstate commerce. See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 770-71 (1945); *Cities Service Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950).

²⁵ The best known instance of this happening came in *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). In that case the Court upheld the Detroit Smoke Abatement Code by writing that "the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government." *Id.* at 442. See *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973), which upheld a Florida anti-pollution statute despite claims by shipowners that doing so would open the door to a multitude of confusing and conflicting state statutes.

²⁶ See, e.g., *Olsen v. Smith*, 195 U.S. 332 (1904); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912); *Jackson v. Marine Exploration Co.*, 583 F.2d 1336 (5th Cir. 1979).

ocean-going ships to employ as a pilot any person who did not hold a federal license.²⁷ State pilots, as their name implies, hold only a state-issued license.²⁸ In *Pacific Mail S.S. Co. v. Joliffe*,²⁹ however, the Supreme Court ruled that the statute did not cover local pilots.³⁰

B. Compulsory Pilotage

In some ports, ships are free to decide whether to take on a pilot.³¹ In other ports, however, legislation requires ships to take on local pilots.³² In a few ports, ships are permitted to travel without a pilot, but only if they tender a fee.³³

Despite their knowledge of local conditions, pilots occasionally have collisions while commanding an inbound or outbound vessel. At such times, the pilot is liable for any damage that he negligently causes.³⁴ But because pilots routinely turn out to be judgment proof, this liability is more imaginary than real.³⁵ Attempts were made to hold liable the pilot

²⁷ For a discussion of this threat to state pilotage, see A. PARKS, *supra* note 10, at 1013-15.

²⁸ The licensing of pilots is discussed *id.* at 1011-20. See 46 U.S.C.A. § 8501-8503 (West 1985).

²⁹ 69 U.S. (2 Wall.) 450 (1864).

³⁰ The result reached by the Court has been termed a "rescue" by A. PARKS, *supra* note 10, at 1013. As Parks points out, the statute made no exception which could be construed as permitting state licensed pilots to operate. Thus, the Court had to read into the statute the exception that it found. Such Herculean efforts by the Court were, as it later turned out, unnecessary, because Congress repealed the offending Act in 1871. In its place, Congress substituted a new Act which clearly excepted state pilots. Some years later Justice Hughes wrote that with this new Act, "[t]he existing state laws respecting port pilotage again became operative." *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 197 (1912).

³¹ Parks defines voluntary pilotage as referring "to jurisdictions which, by statute, permit the owner or master of the vessel to pilot his own vessel, there being no provision requiring him to take on a licensed pilot, or to pay . . . for not doing so." A. PARKS, *supra* note 10, at 1031.

³² Although such legislation is said to make a pilot "compulsory," courts have differed as to what constitutes compulsory pilotage. Most courts have held that if the only choice which an owner or master has is to either take the pilot or pay as if a pilot had been taken, the pilotage will be considered compulsory. See, e.g., *The China*, 74 U.S. (7 Wall.) 53 (1869). A minority of courts, however, have held that a pilotage is compulsory only if a fine is attached to a refusal to take a pilot. See, e.g., *Martin v. Hilton*, 50 Mass. (9 Met.) 371 (1845).

³³ In some jurisdictions, the fee to be paid is equal to 100% of the compensation which the pilot would have received had his services been accepted. In other ports, half-pilotage (meaning 50%) must be tendered. See *Steamship Co. v. Portwardens*, 73 U.S. (6 Wall.) 31 (1867).

³⁴ Such instances of pilot negligence have received harsh judicial rebuke. The earliest reported English case against a pilot for negligence appears to be *Re Rumney and Wood*, Act Book, No. 128, Aug. 1, 1541. The two pilots — Jacob Rumney and John Wood — were each barred from ever serving as pilots again and were imprisoned for a year. They had allowed their respective vessels to go aground on the shoals called the Isle of Peytewe. A. PARKS, *supra* note 10, at 1003-04. It should be pointed out that if the vessel which the pilot is guiding is involved in a disaster through no fault of the pilot, the pilot will be exonerated. See *Andros Shipping Co. v. Panama Canal Co.*, 298 F.2d 720 (5th Cir. 1962); *Dampskibsselskabet Atalanta v. United States*, 31 F.2d 961 (5th Cir. 1929).

³⁵ See A. PARKS, *supra* note 10, at 1030-31; G. GILMORE & C. BLACK, *supra* note 11, § 7-16, at 521.

associations to which the guilty pilot belonged, but such attempts failed.³⁶ Lawsuits brought against the port authority which required the taking of a pilot have proven to be somewhat more successful.³⁷

If the pilot who caused the damage had been voluntarily taken on, both the shipowner and the vessel would be liable for any resulting damage, regardless of the liability of the pilot.³⁸ If, however, the pilot was a compulsory pilot, the shipowner would not be liable. This result has been thought to be fair because it was felt that the *respondeat superior* nexus between the shipowner and the crew had been broken by the presumably unwanted presence of the compulsory pilot.³⁹ This rule was firmly established just after the beginning of the 20th Century in the case of *Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique*.⁴⁰ It was also held in that case, however, that the vessel's liability was not relieved by the fact that she was under the command of a compulsory pilot at the time of the accident.

Thus, at the time of the adoption of the FSIA in 1976, the rules relating to compulsory pilots were fairly straightforward: a collision (or other damage) caused by a compulsory pilot resulted in no liability for the shipowner, but did result in liability for the ship. Although a ship's captain had the right (which was later elevated to the status of a duty) to take away control of the ship from a clearly incompetent pilot, even if the pilot was compulsory,⁴¹ a failure to do so (or a failure to not do so soon

³⁶ *Guy v. Donald*, 203 U.S. 399 (1906) is the leading case on the question. In *Santiago v. Morgan*, 21 F. Cas. 417 (N.D. Cal. 1851) (No. 12,331), a pilot association was held liable for the negligence of one of its members because the bills for pilotage were made out in the name of the association and collected by the association. The court concluded that the association was a partnership which was liable for the acts of its "partners." For a case which followed the reasoning of *Guy*, see *Port of Seattle v. M/V Maria Rubicon*, 404 F. Supp. 302 (W.D. Wash. 1975).

³⁷ See, e.g., *United States v. Port of Portland*, 147 Fed. 865 (D. Ore. 1906), *aff'd*, 176 Fed. 866 (9th Cir. 1910). Cf. *State of Washington v. M/V Dilkara*, 470 F. Supp. 437 (W.D. Wash. 1979) (more than mere licensing and regulation of pilots is required for imputing pilot negligence to the State).

³⁸ See *Logue Stevedoring Corp. v. The Dazellance*, 198 F.2d 369 (2d Cir. 1952); *The Helen*, 5 F.2d 54 (2d Cir. 1924).

³⁹ See G. GILMORE & C. BLACK, *supra* note 11, § 7-16, at 520.

⁴⁰ 182 U.S. 406 (1901). Although the case was concerned only with the common law liability of the shipowner — as opposed to the liability resulting under maritime law — the case has always been understood as barring both liabilities. See *The Abangarez*, 60 F.2d 543-44 (E.D. La. 1932). It should be noted that the owner will escape liability only if the owner did not himself cause or contribute to the accident. *The China*, 74 U.S. (7 Wall.) 53 (1869).

⁴¹ The master's duty to intervene was first stated in *The China*, 74 U.S. (7 Wall.) 53, 67 (1869), where it was said that, "It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity. . . ." In *The Oregon*, 158 U.S. 186, 194-95 (1895), the Court wrote:

While the pilot doubtless supersedes the master for the time being in the command and navigation of the ship, and his orders must be obeyed in all matters connected with her navigation, the

enough), would not cause the shipowner to lose his immunity from suit.⁴²

II. SECTION 1605(b) OF THE FSIA

Section 1605(b) of the FSIA was enacted as a compromise between foreign sovereigns⁴³ and United States claimants. The section regulates *in rem* suits against foreign sovereigns. To understand the section, one must understand that admiralty claims proceed by means of one of two different types of suits. Claims against a shipowner proceed by means of

master is not wholly absolved from his duties while the pilot is on board, and may advise with him, and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is a sufficient watch on deck, and that the men are attentive to their duties.

Although the master is under a duty to interfere, this duty only comes into being when the pilot is patently incompetent or clearly incapacitated. In *The "Hans Hoth,"* [1952] 2 Lloyd's Rep. 341, 349, the court explained that if the duty to intervene was not so tempered, "[i]t would be, in my judgment, putting too much upon a master, and would be asking him to exercise more than ordinary care . . . a master exercising ordinary and reasonable care is entitled to rely on the guidance which he obtains from the local pilot."

⁴² The owner will be held liable if the cause of the collision was a deficiency of his own making. In *Hogge v. SS Yorkmar*, 434 F. Supp. 715 (D. Md. 1977), for example, the shipowner was held liable despite the fact that the vessel had been under the command of a compulsory pilot at the time of a bridge collision. The cause of the collision was determined to be an inoperable radio transmitter, which made the vessel unseaworthy.

⁴³ It is difficult to say what qualifies as a foreign sovereign for purposes of the FSIA. Although 28 U.S.C. § 1603 contains a number of definitions, it does not include a detailed definition of the term "foreign state," the term used by the Act. Section 1603 does say that a foreign state includes its agencies and instrumentalities; it also defines the United States as including all territory and water subject to the jurisdiction of the United States. The lack of a detailed definition of a foreign state could become problematic if a plaintiff attempted to sue a foreign "state" which was not diplomatically recognized by the United States government. While the plaintiff would argue that the FSIA did not apply, the defendant would claim that it was entitled to assert all of the protections and defenses afforded by the Act. This could become very important if, for example, the plaintiff had arrested a vessel belonging to a foreign state which did not have diplomatic recognition. Under § 1605(b), arrests of vessels owned by a foreign state are prohibited, and the plaintiff who arrests such a vessel automatically loses all of its rights against the defendant. See *Simons, supra* note 9. Whether the arrest would be proper, thereby allowing the suit to continue, or improper, thereby ending the suit, would turn on whether the foreign state was a FSIA foreign state. A similar problem may be encountered if it is unclear which of several political factions represent the government of a particular state. During the recent hijacking of TWA flight 847, the American government reported that one of its biggest problems in negotiating the release of the hostages was that there did not exist a single entity which appeared to have control over the situation. See *Kifner, Again, the Man to See In Lebanon Is in Syria*, N.Y. Times, July 7, 1985, at 2E, col. 3. Although no cases to date have considered the question of what is a foreign state, a few have considered what is an instrumentality of a foreign state. See, e.g., *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978). The case is commented upon in *Recent Developments*, 5 BROOKLYN J. INT'L L. 191 (1979). For a discussion of this subject in connection with the International Law Association's Draft Convention on Foreign Sovereign Immunity, see *Vargès, Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention*, 26 HARV. INT'L L. J. 103 (1985). For a discussion of the general problem of whether as well as when to recognize a foreign government, see J. SWEENEY, C. OLIVER and N. LEECH, *CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM* 736-840 (2d ed. 1981).

in personam suits. Claims against a ship, by contrast, proceed by means of *in rem* suits. *In rem* suits are brought to enforce maritime liens, which are claims against a vessel. According to § 1605(b)(2):

Whenever notice is delivered under subsection (b)(1) of this Section, the maritime lien shall thereafter be deemed to be an *in personam* claim against the foreign state which at the time owns the vessel or cargo involved. Provided, 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. . . .

This section creates two quirks in the case of a collision caused by a compulsory pilot while aboard a commercial ship that is owned by a foreign sovereign.

The first quirk caused by § 1605(b) is that the ship's *in rem* liability is converted into *in personam* liability against the foreign state. Section 1605 does not, however, convert the claim into a pure *in personam* suit. One of the distinguishing features of an *in personam* suit is that, unlike an *in rem* suit, any judgment received in an *in personam* suit can be enforced against all of the assets of the defendant, up to the full amount of the judgment. A judgment rendered in an *in rem* suit, however, may only be satisfied out of the proceeds of the ship itself, which is sold at a judicial sale in order to raise funds to satisfy the judgment. If the sale does not bring in enough money to satisfy the judgment creditor, the creditor has no recourse.⁴⁴

The distinction between *in personam* and *in rem* suits is the result of an admiralty doctrine known as "personification." Under personification, a ship is a juridical person which can sue and be sued and is capable of committing wrongs. Personification separates the ship's interests (and hence liabilities) from those of her owner, so that a claim against the vessel does not also automatically result in a claim against the owner. The doctrine of personification runs throughout the history of admiralty, and has been judicially accepted in the United States,⁴⁵ although not elsewhere.⁴⁶

⁴⁴ In the normal case, no judicial sale of the ship is held. Instead, the owner of the ship puts up a bond which takes the place of the ship. If the plaintiff's suit is successful, execution of the judgment will be had against the bond. See *infra* text following note 50.

⁴⁵ The concept of personification made its first appearance in *The Little Charles*, 26 F. Cas. 979 (C.C.D. Va. 1819) (No. 15,612), a decision delivered by Chief Justice Marshall while riding circuit. The first Supreme Court decision to recognize the doctrine of personification was *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827). For a further discussion, see Note, *Personification of Vessels*, 77 HARV. L. REV. 1122 (1964).

⁴⁶ In England, for example, the doctrine of personification has not been accepted. Although it is recognized that ships cause damage and that they may be arrested, the defendant is the shipowner. English law is reviewed in Stewart-Richardson, *Liens on Ships and Their Priorities*, 1960 J. BUS. LAW 44 (1960).

Section 1605 represents a hybrid of the traditional *in personam* — *in rem* system. Like the *in personam* suit that the statute provides, the claim is against the ship's owner, and not the ship. But unlike an *in personam* suit, the successful litigant can only recover up to an amount equal to the value of the ship, regardless of the size of the judgment. Although the FSIA does retain the plaintiff's traditional right to bring an *in personam* suit to supplement the *in rem* recovery,⁴⁷ this right does not come into play where the compulsory pilot rules apply because under *Homer Ramsdell* there is no right to proceed *in personam*.

To understand the second quirk caused by the Section's hybrid language, it must be explained that in the normal situation where a party has a claim against a vessel, the suit against the vessel begins by arresting the vessel. This arrest accomplishes two purposes: first, it provides the plaintiff with security for its claim, and second, it establishes personal jurisdiction over the vessel in courts having territorial jurisdiction over the place where the arrest is effectuated. In the normal course of events, the shipowner, who receives no notice prior to the arrest,⁴⁸ quickly moves in after the arrest to free the ship, which is taken into the custody of the United States marshal following the arrest and is not allowed to leave the port while the arrest is in effect. In order to free the ship, the shipowner posts a bond (or a letter of undertaking given by the shipowner's insurance underwriter or bank).⁴⁹ Although by statute the arrest is not lifted until the shipowner posts a bond in an amount twice that of the plaintiff's claim,⁵⁰ in practice such a large bond is never posted. Instead, the plaintiff and the defendant agree on a lower sum, which is usually equal to the plaintiff's claim plus interest.

The bond or letter takes the place of the ship, and the defendant must keep it in effect throughout the pendency of the lawsuit. Thus, the

⁴⁷ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 22, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6621.

⁴⁸ Despite a number of Supreme Court cases in the 1970s which increased the amount and type of notice required to be given to a defendant prior to the seizing of property, these cases have been held inapplicable to admiralty procedures. For a recent article which collect the cases and reviews a proposal to thoroughly revise the admiralty rules, see Culp, *Charting A New Course: Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment*, 15 J. MAR. L. & COM. 353 (1984).

⁴⁹ Plaintiffs are always wary when a letter of undertaking is proffered, because a letter, which puts up no money, is only as good as the underwriter or bank which issues the letter. On the other hand, defendants always seek to put up a letter, which costs nothing to keep in effect.

⁵⁰ 28 U.S.C. § 2464 (1982). Because of the ability of parties to a maritime suit to agree on appropriate security, this section has become nearly obsolete. The most recent use of the statute appears to have come in *The Lotosland*, F. Supp. 42 (E.D.N.Y. 1933), a case in which the court allowed the release of a vessel despite the fact that the bond was in an amount less than that called for by the section.

first reason for the arrest (security) remains in place with the giving of the bond. The second reason for the arrest (jurisdiction) is no longer needed, since the appearance of the shipowner in the suit acts to confer personal jurisdiction in the court.

Returning to § 1605(b), what is important to note is that it does not require (or even make any provision for) the posting of a bond by a foreign sovereign who, except for its sovereign capacity, would be required to put up a bond. The consequence of this result is twofold. First, steamship lines run by foreign sovereigns are given a competitive advantage over private steamship lines. As has been pointed out on numerous occasions, the maritime industry is a capital-intensive industry.⁵¹ As such, steamship lines are in a constant struggle to maintain and improve their cash flow positions. This has become even more important in recent years, when excess tonnage, high interest rates, and a depressed world economy have combined to cause severe cash flow problems for shipowners.⁵² Under § 1605(b), private shipowners must put up and keep in place large bonds while the underlying lawsuits take years to resolve. This expense is not suffered by foreign sovereign steamship lines, which are not required to provide bonds. As a result, state-owned steamship lines are in a better cash position and have the option of offering lower freight rates to their customers.⁵³

The other consequence of § 1605(b) is that it places litigants who suffer damage as a result of a foreign sovereign-owned ship in a different position than that occupied by litigants who suffer harm caused by a privately owned ship. While the latter type of plaintiff has its security from the outset of the suit, the former must depend on the fiscal integrity of the foreign government. Moreover, it is not the foreign sovereign's

⁵¹ G. GILMORE AND C. BLACK, *supra* note 11, § 9-51(a), at 702 have written, for example, "that shipping is a perhaps uniquely risky enterprise, as vulnerable to the perils of the market-place as the ships themselves are to the perils of the sea." Professors Gilmore and Black note that the U.S. government was eventually forced to provide federally insured ship financing because the risk factor made it impossible to attract private financing for shipbuilding.

⁵² The shipping industry has suffered more in recent years than at any time in the past fifty years. Bankruptcies have become commonplace, with such large companies as Hellenic Lines and Saleninvest having fallen victim. See Hayman & Glass, *The Hellenic Inheritance*, 13 SEATRADE 3 (1983); *Sweden's Saleninvest Announces Bankruptcy*, J. of Com., Dec. 20, 1984, at 1A; As a result of the dismal state of the market, many banks have cut off their funding of the industry, causing further problems. See Porter, *Heavily Indebted Shipping Sector Faces Slowdown in Bank Lending*, J. of Com., Jan. 7, 1985, at 1A, col. 3-5.

⁵³ Whether state-owned steamship lines are actually lowering their freight rates is difficult to say. It is possible that such shipping lines have not felt the need to lower their rates, because of the favorable position they occupy as to travel to and from their home countries. It is also possible that they have not lowered their freight rates because their central banks are in need of foreign currency, and shipping provides an important avenue for obtaining such currency.

fiscal integrity at the time the damage occurs which is important. Rather, it is the fiscal integrity of the foreign government at the time the suit is finally concluded and the plaintiff seeks to enforce its judgment. When one includes time for appeals, the time between the inquiry and attempts to enforce the judgment can easily be five years. During that time, a foreign government can suffer a downturn in its economy, can institute a policy of nationalization or remove its United States-based assets, or be overthrown and replaced by a revolutionary government which refuses to accept responsibility for injuries caused by the prior government.⁵⁴

Despite these concerns, some might argue that the plaintiff who sues a foreign sovereign is in at least as secure a position, if not in a better position, than the plaintiff who sues a private defendant. Such proponents argue that the likelihood of the foreign sovereign disappearing before the end of the lawsuit, although a possibility, is far less likely to occur than the reverse: a private defendant disappearing, either through bankruptcy or dissolution. This argument, however, is more illusory than real for two reasons.

First, the plaintiff who sues a private defendant need not worry about whether the defendant survives to the end of the lawsuit. This is because, whether the defendant remains in business or not, the security (either the ship, bond or letter) will survive the lawsuit. Since a foreign sovereign puts up no security, the best that can be said for a plaintiff who sues a foreign sovereign is that it may be in no worse a position than a plaintiff who sues a private steamship line.

The second reason why the argument is illusory is because a plaintiff who receives a judgment against a public defendant has to do extra work to enforce the judgment. While the plaintiff who sues a private defendant can enforce its judgment simply by moving against the bond (or other security), the plaintiff who wins against a foreign sovereign must go through the normal enforcement processes. While this may not be a problem if the sovereign willingly satisfies the judgment, it can become a very expensive and time consuming exercise if the defendant decides not

⁵⁴ Following the fall of the Pahlavi government in Iran, the new Revolutionary government refused to honor many of the contracts which had been concluded by the previous regime. When President Carter ordered the U.S.-based assets of Iran to be frozen following the taking of American hostages, numerous suits involving those assets were brought under the FSIA. The various suits are collected and discussed in McGreevey, *The Iranian Crisis and U.S. Law*, 2 NW. J. INT'L L. & BUS. 384 (1980). The claims were later transferred to the Hague for resolution before a panel of arbitrators as part of the terms agreed to by the United States in return for the release of the hostages. See Comment, *Dames & Moore v. Regan — Rights in Conflict: The Fifth Amendment Held Hostage*, 31 AM. U. L. REV. 345 (1982).

to cooperate.⁵⁵

III. COMPULSORY PILOTS AND THE FSIA

The general rules applicable to compulsory pilots have been modified by § 1605(b), although this change was certainly unforeseen by Congress.⁵⁶ As will be recalled, a compulsory pilot who negligently operates a vessel and thereby causes damage subjects the vessel to *in rem* liability. But such acts on the part of the compulsory pilot do not subject the shipowner to *in personam* liability. Whether this rule remains intact with the adoption of the FSIA is an open question, since the Act converts *in rem* suits into *in personam* suits. Put another way, could a foreign sovereign, whose ship has been involved in a collision while under the command of a compulsory pilot, plead that it has no *in personam* liability because damages caused by compulsory pilots lead to only *in rem* liability, which the FSIA eliminates?

The answer to this question would seem to be an affirmative one, because the FSIA changes *in rem* suits into *in personam* suits. As such, the only liability which exists after enactment of the FSIA is *in personam* liability. Of course, shipowners, including shipowners who are foreign sovereigns, have no *in personam* liability if the cause of the plaintiff's damages is a compulsory pilot.

The foregoing argument, if accepted, would leave a plaintiff without any remedy. A plaintiff confronted with such a defense would undoubtedly argue that the intent of Congress in passing the FSIA could not possibly have been to leave plaintiffs without any recourse. In support of its argument, the plaintiff would turn to the legislative history of the Act. But the legislative history of the FSIA is not helpful. The House Report which accompanied the FSIA states that the Act does not change the substantive law of liability.⁵⁷ In considering the question, the Third Circuit concluded that the FSIA neither provides a cause of action nor dictates substantive rules of liability.⁵⁸

⁵⁵ FSIA § 1610 does authorize a limited number of circumstances in which a successful plaintiff may attach property owned by a foreign sovereign in order to execute a judgment. The property which may be so attached, however, must be in the United States. If the foreign state has no assets in the United States, the FSIA provides no assistance to a judgment creditor.

⁵⁶ Nothing in the legislative history of the FSIA even remotely suggests that Congress understood the effect that § 1605(b) would have on the compulsory pilot rules.

⁵⁷ H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6610.

⁵⁸ *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 818 (3d Cir. 1981), cert. dismissed, 455 U.S. 929 (1982). In *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983), the Supreme Court agreed with this position by writing: "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the

The difficulty, of course, is that it is not clear from this legislative history which substantive law remains unchanged. Is it the substantive law of *in rem* suits that is untouched by the FSIA, or only the substantive law of *in personam* suits that is unaffected? Of course, it could be argued that the FSIA simply does not create any new causes of action, but does abolish previous causes of action. The real problem, for present purposes, is that the legislative history speaks only of the Act's effect on "substantive" law. The rule of *Homer Ramsdell* that no *in personam* remedy can be had against the shipowner is, however, not technically a rule of substantive law. It is, instead, a rule of procedural law, since it determines who may be sued, rather than the basis on which liability will be assessed against a wrongdoer. As such, even if the FSIA does not affect the substantive law of liability, this statement does not help to resolve the outcome of cases governed by the compulsory pilot rules.

If, despite the language of the FSIA and the House Report, one were inclined to argue that the plaintiff could maintain its suit, one would have to argue that the conversion of the suit from an *in rem* to an *in personam* suit has to be seen from the perspective of the compromise struck by Congress. Looked upon as a political solution to a difficult problem, one could argue that an *in rem* action could still be maintained because the foreign sovereign itself is the equivalent of the bond that a private defendant would have to put up. The problems with this argument, as pointed out above,⁵⁹ are that foreign sovereigns receive an unfair competitive advantage over private defendants and may turn out to be less judgment worthy than a private defendant who is forced to put up security.

IV. RETHINKING § 1605(b) IN LIGHT OF THE OBJECTIVES OF THE FSIA

The problems discussed above are the result of the curious language employed by the draftsmen of the FSIA. In order to assess how the problems should be resolved, it is useful to recall the reasons why the FSIA was enacted.

The FSIA was designed to accomplish three objectives. First, it was meant to codify the restrictive principle of sovereign immunity. Under the restrictive principle of immunity, a foreign state is immune from suits

liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." The Court repeated this position in *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983): "The Act codifies the standards governing foreign sovereign immunity as an aspect of federal substantive law. . . ."

⁵⁹ See *supra* text accompanying notes 51-55.

only when the acts involved are public acts (*jure imperii*). No immunity is granted for commercial or private acts (*jure gestionis*).

The rise of the restrictive theory of immunity followed the fall of the doctrine of absolute immunity. During the colonial period, of course, the King was immune from suit.⁶⁰ Various rationales were put forward to explain why the Crown could not be sued. Some argued that the King, endowed with divine guidance, could do no wrong.⁶¹ Others contended that although the King could do wrong, no court had the power to hear suits against the sovereign. This view had two underpinnings, one practical, one theoretical. Practically speaking, if a court were to render a judgment against the Crown, the Crown could retaliate by tightening the purse strings, thereby shutting down the courts. Theoretically speaking, suits against the Crown were not entertained because it was thought improper for a sovereign to be judged in its own court by its own judges.⁶² A final concern, with both practical and theoretical overtones, was the fear that if a judgment were rendered against the King, the judgment would be unenforceable without the assistance of the Crown.⁶³

The doctrine of absolute immunity was applied to the federal government following the end of English rule. It is surprising that this should have been the case, given the fact that the Revolution was fought because of perceived abuses by the Crown of its prerogatives.⁶⁴ The probable explanation lies in the fact that without such immunity, the fledgling government would have had its limited treasury exhausted.⁶⁵ In 1796,

⁶⁰ For a discussion of the historical development of sovereign immunity, see J. MATTERN, CONCEPTS OF STATE, SOVEREIGNTY AND INTERNATIONAL LAW (1928); C. MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU (1900); see also J. SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963).

⁶¹ For a discussion of this principle, see Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Parker, *The King Does No Wrong — Liability for Misadministration*, 5 VAND. L. REV. 167 (1952); Borchard, *Governmental Responsibility in Tort*, 36 YALE L.J. 1 (1926).

⁶² See *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907).

⁶³ A stark example of just how weak judicial power can be in the face of a sovereign who refuses to cooperate came in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). Despite a clear contrary holding by the Court, President Jackson pushed forward with his plans to move the Cherokee Indians from their homes in Georgia to the West. See W. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 16 (1981).

⁶⁴ It has been written that, "[t]hough the notion of sovereign immunity might seem best suited to a government of royal power, the doctrine was nevertheless accepted by American judges in the early days of the republic. . . ." W. PROSSER & W. KEETON, THE LAW OF TORTS § 131, at 1033 (footnote omitted) (5th ed. 1984).

⁶⁵ Indeed, it was not until 1887 that the United States government felt confident enough to enact the so-called Tucker Act, ch. 359, 24 Stat. 505 (1887) (current version at 28 U.S.C. § 1491 (1982)), the first statute to generally waive the defense of sovereign immunity in actions against the United States.

the enactment of the eleventh amendment extended the defense of sovereign immunity to state governments.⁶⁶

It was against this background that the United States Supreme Court decided *The Schooner Exchange v. M'Faddon*.⁶⁷ In the suit, two American citizens had sought to establish their ownership of a French warship, which had been seized in United States waters. The federal government filed a suggestion that the vessel should be released, because it belonged to a nation with which the United States had friendly relations. The district court agreed, and ordered the suit dismissed. The Circuit Court reversed the district court's decision. On appeal, the Supreme Court agreed with the district court and ordered the vessel released. The Court explained that its decision was grounded in public international law, under which foreign warships cannot be arrested while at anchor in the ports of friendly nations.⁶⁸ Within the next few years, the Supreme Court extended the immunity of warships to privately owned ships which had been commissioned by foreign governments to act as privateers,⁶⁹ and to the armed vessels of recognized belligerents.⁷⁰ This was followed by a general widening of the immunity by lower federal courts.⁷¹

In *Berizzi Brothers Co. v. Steamship Pesaro*,⁷² the Supreme Court extended the immunity that it had granted to warships in *The Schooner Exchange* to commercial ships owned by foreign sovereigns.⁷³ The Court did note, however, that Congress could change the rule by treaty or statute.⁷⁴ Following the *Pesaro*, lower courts routinely held that an American citizen could not arrest a foreign owned vessel.⁷⁵

Finally, in 1952 the State Department announced, in a statement

⁶⁶ The eleventh amendment was enacted to counter the effect of the Supreme Court's ruling in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the Court allowed two citizens of South Carolina to sue the State of Georgia. The decision and the amendment are discussed in C. JACOBS, *THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY* (1972).

⁶⁷ 11 U.S. (7 Cranch) 116 (1812).

⁶⁸ Warships continue to be immune from jurisdiction, and indeed enjoy special privileges in peacetime. These privileges are continued in Articles 29-32 of the recently concluded United Nations Convention on the Law of the Sea (UNCLOS III). See 17 Third U.N. Conference on the Law of the Sea Official Records 151, U.N. Doc. A/Conf. 62/122 (1982), reprinted in 21 INT'L LEGAL MATERIALS 1261 (1982).

⁶⁹ See *L'Invincible*, 14 U.S. (1 Wheat.) 238 (1816).

⁷⁰ See *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822).

⁷¹ See *The Pizarro v. Matthias*, 19 F. Cas. 786 (S.D.N.Y. 1852) (No. 11,199); *Walley v. Schooner Liberty*, 12 La. 98 (1838).

⁷² 271 U.S. 562 (1926).

⁷³ *Id.* at 574.

⁷⁴ *Id.*

⁷⁵ If a plaintiff could keep the State Department from issuing a recommendation for sovereign immunity, the plaintiff could arrest a foreign sovereign's vessel. But even if the plaintiff cleared this hurdle and then won its suit, it could not execute on the foreign sovereign's vessel to satisfy the

which later became known as the "Tate Letter,"⁷⁶ that it would henceforth adhere to the restrictive theory of immunity. Under the restrictive theory, only vessels engaged in the public service of a foreign nation would be entitled to claim sovereign immunity.⁷⁷ The Tate Letter, however, was undermined by the State Department, which continually intervened into lawsuits to urge that a particular defendant be allowed to assert sovereign immunity despite the fact that it was not entitled to do so under the restrictive theory.⁷⁸ Finally, enough support was mustered in Congress to codify the Tate Letter and remove the State Department from its decision making role.⁷⁹

The second objective of the Act was to provide, for the first time, a statutory procedure for making service upon, and obtaining *in personam* jurisdiction over a foreign state. Doing so made the previous practice of

judgment. See *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955).

⁷⁶ Letter of Jack B. Tate, Acting Legal Advisor of the Department of State, to Acting Attorney General Philip Perlman (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952).

⁷⁷ One problem which received much consideration in the law reviews during this period was the nature of a vessel engaged in the public service of a foreign socialist or communist nation that did not recognize public/private distinctions in property distribution. For representative thinking during this period, see Timberg, *Sovereign Immunity, State Trading, Socialism and State Trading*, 56 NW. U. L. REV. 109 (1961). This problem became a reality following enactment of the FSIA, when socialist defendants argued that they were immune from prosecution because they were in the service of their state. See *Edlow International Co. v. Nuklearna Elektrarna KRSKO*, 441 F. Supp. 827 (D.D.C. 1977). The case is reviewed in Recent Developments, *Foreign Sovereign Immunity — The Status of Legal Entities in Socialist Countries as Defendants Under the Foreign Sovereign Immunities Act of 1976*, 12 VAND. J. TRANS. L. 165 (1979).

⁷⁸ See Recent Decisions, *Sovereign Immunity — The State Department's Decision to Recognize and Allow the Claim of Sovereign Immunity Is Binding upon the Courts and Is Not Subject to Review Under the Administrative Procedure Act*, 4 GA. J. INT'L & COMP. L. 488 (1975); Note, *The American Law of Sovereign Immunity Since the Tate Letter*, 4 VA. J. INT'L L. 75 (1964). For cases in which the political concerns of the State Department played a role in the decision whether to allow a foreign sovereignty engaged in commercial operations to plead sovereign immunity, see *British Transp. Comm'n v. United States*, 354 U.S. 129 (1957); *The Sao Vicente*, 260 U.S. 151 (1922); *The Pesaro*, 255 U.S. 216 (1921); *The Carlo Poma*, 255 U.S. 219 (1921); *Ex parte Muir*, 254 U.S. 522 (1921); *The Fletero v. Arias*, 206 F.2d 267 (4th Cir. 1953).

⁷⁹ One of the points most often urged in support of the enactment of the FSIA was the need to remove the State Department from playing any role in deciding whether to allow a foreign state to plead sovereign immunity. See, e.g., Note, *Sovereign Immunity — Proposed Statutory Elimination of State Department Role*, 15 HARV. INT'L L.J. 157 (1974). It was argued that by allowing the State Department to play such a role, the Executive Branch was intruding into a sphere reserved for the Judiciary, thus upsetting the delicate balance struck by the constitution's separation of powers. See Comment, *Proposed Draft Legislation on the Sovereign Immunity of Foreign Governments: An Attempt to Revest the Courts with a Judicial Function*, 69 NW. U. L. REV. 302 (1974). Shortly after the FSIA was enacted, some commentators began to suggest that the Executive Branch should have at least a limited role to play in any litigation brought under the Act. See, e.g., Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L. J. 1009 (1979).

seizing the property of the foreign state unnecessary, and so reduced a source of considerable friction between the United States and foreign sovereigns.

The final goal of the FSIA was to provide a remedy for a judgment creditor if the foreign state fails to satisfy a final judgment. The remedy's usefulness, however, is limited by the extent that the foreign sovereign has assets in the United States.

V. MARITIME LIENS UNDER THE FSIA

In light of the objectives stated above, one cannot help but realize that the purposes of the FSIA are not served if a sovereign is able to completely avoid liability when its ship causes damage through a compulsory pilot. The crucial issue, of course, is whether an action under § 1605(b) is an *in personam* suit or is an *in rem* suit dressed up to resemble an *in personam* suit. To answer this question, one must focus on the concept of maritime liens as expressed in § 1605(b).

A maritime lien is a substantive right in and of itself.⁸⁰ Historically, maritime liens have been enforced through *in rem* actions. The issue therefore is whether a maritime lien can exist without an *in rem* action. If it can, then the FSIA's command that the plaintiff's maritime lien will be enforced through an *in personam* action is not problematic. But if maritime liens can only be enforced through *in rem* actions, then the lack of an *in rem* action under the FSIA is fatal.

Courts have never been able to decide whether maritime liens can exist where no *in rem* suit is possible. Consider, for example, the Fourth Circuit's leading opinion *Amstar Corp. v. S/S Alexandros T.*⁸¹ The court first stated that a maritime lien did not depend upon the existence of an *in rem* suit:

This procedure [arresting a vessel], moreover, was used long before it was embodied in the rule. Its purpose has always been to provide a means for enforcing a maritime lien, which is the central element of an *in rem* proceeding. *Maritime liens, however, are not created by the rule. They are an integral aspect of substantive, rather than procedural, maritime law.*⁸²

In the next paragraph, however, the court contradicted itself:
The vessel itself is viewed as the obligor whether or not the owner is also

⁸⁰ For a discussion of maritime liens, see Hebert, *The Origin and Nature of Maritime Liens*, 4 TUL. L. REV. 381 (1930); Ryan, *Admiralty Jurisdiction and the Maritime Lien: An Historical Perspective*, 7 WESTERN ONT. L. REV. 173 (1968); Toy, *Introduction to the Law of Maritime Liens*, 47 TUL. L. REV. 559 (1973); Comment, *Developments in the Law of Maritime Liens*, 45 TUL. L. REV. 574 (1971).

⁸¹ 664 F.2d 904 (4th Cir. 1980).

⁸² *Id.* at 908 (emphasis added).

obligated. Substantive maritime law confers on the holder of a maritime lien a sufficient interest in the vessel to detain it for security and ultimately to subject it to condemnation and sale for satisfaction of the lien. The arrest of the vessel in the proceeding *in rem* [sic] is to accomplish this end. "*The lien and the proceeding in rem are, therefore, correlative—where one exists, the other can be taken, and not otherwise.*"⁸³

Research does not resolve whether a maritime lien can be enforced without an *in rem* action. Except for a single instance, however, there appears to be no example of a maritime lien being enforced through anything other than an *in rem* suit. The exception is contained in the Suits in Admiralty Act of 1920 (SAA).⁸⁴

The SAA embodies the United States' waiver of the defense of sovereign immunity in admiralty cases. The Act provides that no vessel owned or under the control of the government may be sued by means of an *in rem* proceeding.⁸⁵ Instead, the SAA states that a claimant may maintain an *in personam* proceeding against the United States for any claim which, except for the bar of sovereign immunity, could be pursued by either an *in personam* or *in rem* suit. Despite the rather exceptional nature of the SAA, a leading commentary on maritime law explained the SAA's treatment of *in rem* suits by blandly stating that: "First, no *in rem* process is available; this is, of course, of complete unimportance, since the maritime lien is a security device, and the government's credit is good."⁸⁶

The FSIA does not purport, either by its own terms or in the House Report, to have patterned § 1605(b) on the SAA, and to conclude otherwise would be a mistake for two reasons. First, unlike a foreign sovereign, the United States will be found to be amenable to jurisdiction in every case arising under the SAA, since the United States government can be found everywhere. The same cannot be said for any foreign sovereign. Second, the United States government will always have assets in the United States. Again, the same can not be said about a foreign sovereign. Thus, while discussions about the government's credit may be useful in considering the SAA, they miss the point when the focus shifts to the FSIA. In a FSIA suit, it is not the credit of the foreign government which is at stake (although, of course, one would prefer a creditworthy foreign state). What is at stake is the ability to reach, both in the short run and in the long run, whatever that credit is based on. In the short run a plaintiff must be able to reach the foreign government to establish

⁸³ *Id.* at 909 (emphasis added).

⁸⁴ 41 Stat. 525-28, 46 U.S.C. §§ 741-752 (1982).

⁸⁵ 46 U.S.C. § 741 (1982).

⁸⁶ G. GILMORE & C. BLACK, *supra* note 11, § 11-11, at 982.

jurisdiction, while in the long run the foreign sovereign must be reached in order to satisfy the judgment. Put simply, the SAA's *in rem* procedures (or lack thereof) cannot be the basis of the FSIA's *in rem* procedures because, unlike the United States government, no foreign sovereign will always be available in the United States.

Since, save for the SAA, there has always been an *in rem* procedure available wherever there has been a recognized maritime lien, it would seem fair to say that a maritime lien cannot exist where no *in rem* action can be maintained. If this is so, then the FSIA must take away *in rem* suits based on the acts of compulsory pilots, since § 1605(b) states that all *in rem* suits must proceed as *in personam* suits. This result is disturbing, however, because, as noted above,⁸⁷ the House Report states that the FSIA does not change the substantive maritime law.

A large part of the problem with § 1605(b) stems from the words that it uses. It says that after proper notice has been given to the defendant sovereign, "the maritime lien shall thereafter be deemed to be an *in personam* action." The culprit here is the word "deemed." Black's Law Dictionary defines the word deem as: "To hold; consider; adjudge; believe; condemn; determine; treat as if; construe."⁸⁸ Moreover, in *China National Chemical Import & Export Corp. v. M/V Lago Hualaihue*,⁸⁹ a District Court in Maryland wrote that "1605(b) was designed to provide a substitute for the usual *in rem* proceeding. . . ."⁹⁰

Taken together, the dictionary definition and the *China National* case would appear to support reading § 1605(b) as having done away with the usual *in rem* proceeding and replacing it with an *in personam* proceeding. Testimony regarding § 1605(b) prior to the passage of the FSIA, however, does not support such a reading. In a statement prepared by the District of Columbia Bar, it was argued that: "Section 1605(b) is not intended to deprive litigants of any substantive rights, but instead to provide a new method of enforcing maritime liens without seizure of vessels of foreign states."⁹¹

Of course, this statement is merely opinion, and as such it is questionable whether, under normal rules of statutory construction, it may be considered. As Justice Holmes so bluntly wrote years ago in a slightly different context: "[W]e do not inquire what the legislature meant; we

⁸⁷ See *supra* note 57.

⁸⁸ BLACK'S LAW DICTIONARY 374 (rev. 5th ed. 1979).

⁸⁹ 504 F. Supp. 684 (D. Md. 1981).

⁹⁰ *Id.* at 689.

⁹¹ *Jurisdictions of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Government Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 69 (1976).*

only ask what the statute means.”⁹²

Section 1605(b) as presently drafted is undeniably ambiguous. One commentator has argued that the ambiguity is the result of Congress’ desire to avoid the arrest of foreign sovereign-owned vessels while preserving the *in rem* proceeding: “The obvious solution was to preserve the maritime lien but convert it to an *in personam* [sic] claim in order to keep intact the policy of avoiding jurisdictional attachments of foreign states’ property.”⁹³

VI. A PROPOSED SOLUTION

It has been suggested that the complexities of maritime law make it desirable to have a separate FSIA just for admiralty.⁹⁴ Although the merits of such a scheme could be argued at length, for present purposes such a radical restructuring of the FSIA is unnecessary. Instead, the solution lies in redrafting § 1605(b).⁹⁵

In the redraft of the section, a foreign sovereign’s vessels would still be free from arrest. However, when a plaintiff brought a suit which, under normal circumstances, would require a non-sovereign defendant to post bond, a foreign sovereign would be required to put up a bond (or irrevocably pledge some other form of acceptable security). The amount of the bond would be equal to 125% of the plaintiff’s claim, so that the plaintiff would be assured of collecting on its claim with interest. Although the foreign sovereign would probably put up a standard bond, it could put up any other security which the court having jurisdiction

⁹² O. HOLMES, *The Theory of Legal Interpretation*, COLLECTED LEGAL PAPERS 207 (1920), quoted in 2A SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 45.07, at 30 n.1 (N. Singer, rev. 4th ed. 1984).

⁹³ Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155, 217 (1981).

⁹⁴ Yiannopoulos, *Foreign Sovereign Immunity and the Arrest of State-Owned Ships: The Need for an Admiralty Foreign Sovereign Immunity Act*, 57 TUL. L. REV. 1274 (1983).

⁹⁵ The redrafting of § 1605(b) could be accomplished by replacing the language which appears after subsection (2) with the following language:

- (3) Within ten days of having received the notice specified in either subsection (1) or (2) of this section, a foreign state shall be required, 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, to post a bond or other security acceptable to the court, in an amount equal to 125% of the plaintiff’s claim. Such bond or security shall be maintained by the foreign state throughout the pendency of the lawsuit, and, in the event of a judgment being entered in the plaintiff’s favor, may be executed upon in the manner and terms prescribed in section 1610 of this chapter. An allegation of a counterclaim by the foreign state does not relieve the operation of this section, although the court hearing the matter may, in its discretion, require the plaintiff to put up such security as it deems necessary to secure the counterclaim. A failure without sufficient cause to post the required bond within fifteen days of service will entitle the plaintiff to summary judgment. If summary judgment is granted, the foreign state may not appeal the judgment unless it first posts the required bond.

over the suit found acceptable. In the event that a foreign sovereign refused to post security, the court would be empowered to treat the failure as an admission of liability and enter a default judgment against the sovereign. Further, the sovereign would not be allowed to appeal the decision until it had posted security. Such a provision would allow a plaintiff to immediately seek redress of its damages.

With it possible to bring an *in rem* suit against a foreign sovereign, the curious hybrid language of § 1605(b) could be eliminated. Since the bond would take the place of the foreign state's ship, the action against the foreign sovereign would duplicate an *in rem* action against a non-public defendant. In cases where no *in personam* liability exists, such as compulsory pilot cases, courts would not be faced with the difficult choice of having to decide whether § 1605(b) preserves *in rem* suits.

In addition to benefitting United States plaintiffs, the requirement that a foreign state post a bond would take away the unfair advantage enjoyed by state-owned shipping lines. Under the redraft, the only difference between an *in rem* suit against a foreign sovereign and a private shipowner would be that a foreign sovereign's vessel could not be arrested. Of course, it would not matter that a foreign sovereign's vessel could not be arrested, because the foreign sovereign would still be required to post a bond just as if its vessel had been arrested. Thus, the only advantage a foreign sovereign would enjoy over a private shipowner is that its ships would not be arrested. Since, in the usual case, the time between a ship's arrest and her release because adequate security has been arranged is very short (often less than twenty-four hours), the advantage enjoyed by a foreign sovereign would be slight at best. Such a small advantage can certainly be justified in light of the Congress' overriding sense that the arresting of a foreign sovereign's vessel, even for short periods of time, seriously impairs the success of the United States' foreign policy.

VII. CONCLUSION

The FSIA was enacted to codify the restrictive theory of sovereign immunity and resolve problems which had developed in the *ad hoc* administration of the theory. Ten years later, we are learning that problems still exist with the Act. As we conclude a decade of living under the FSIA—and prepare ourselves for the next ten years—we should take the time to eliminate the problems which ten years of practice have revealed. One of the problems which must be addressed is the ambiguous language of § 1605(b), especially in light of the compulsory pilot problem. Although no court to date has passed on the relationship

between the FSIA and the compulsory pilot rule, there is a case pending in the Southern District of New York which does raise the issue.⁹⁶ Regardless of that suit's resolution,⁹⁷ Congress should be the one to decide such fundamental questions as whether the FSIA allows *in rem* proceedings.⁹⁸

⁹⁶ *Flota Mercante Grancolombiana, S.A. v. French-Polish Shipping Co., Polish Ocean Lines, and the M/V Kazimierz Pulaski*, No. 84 Civ. 1478 (DNE) (S.D.N.Y. filed Mar. 1, 1984). The *Pulaski* regularly makes trips into and out of Port Newark. On a recent trip out of Newark, and while under the direction of a pilot, the *Pulaski* struck a rock, puncturing an oil tank and resulting in a two-mile oil spill. Reid, *Crews Clearing Up Oil Spilled by Ship Off S.I.*, N.Y. Times, Sept. 18, 1985, at B4, col. 1.

[Until May 1985, this author was associated with the law firm representing the defendants French-Polish, Polish Ocean Lines, and the M/V *Pulaski*.-Ed.]

⁹⁷ If properly decided, the Court should hold there is no *in rem* or *in personam* liability. As to the former, there is no liability because of the rule of *Homer Ramsdell*. As to the latter, the Court should decide that there is no liability by construing the ambiguity of § 1605(b) against the drafters of the statute and in favor of the foreign state. Although doing so works to the disadvantage of the particular plaintiff, it conforms to the language of the Act. Section 1604 states that "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 and 1607 of this chapter." Since the purpose of § 1604 is to invest in foreign states absolute immunity subject to the specific exceptions created in §§ 1605 and 1607, any doubt as to whether a particular situation qualifies for immunity should be resolved by resorting to the broad language of § 1604 rather than the narrow language of §§ 1605 and 1607.

⁹⁸ FSIA § 1602 states that "claims of foreign states to immunity should henceforth be decided by the courts. . . ." This, however, should not be read as authority for allowing judges to decide whether, in accidents involving compulsory pilots, *in rem* liability still exists. This is because what is at stake is not the mere adjudication of a case, but rather, the setting of policy. When policy setting is involved, it is preferable for Congress, rather than the courts, to take the lead. The Supreme Court recognized and applied this principle in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), when it ruled that whether a right of contribution existed among joint tortfeasors in admiralty was a policy question best left to the wisdom of Congress.