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FSIA Retroactivity Subsequent to the Issuance of the Tate Letter: A Proposed Solution to the Confusion

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I. INTRODUCTION

For centuries, nations granted full immunity from suit to foreign sovereigns in all aspects of their relationships.[1] Today, however, the United States, like most nations, requires foreign sovereigns to account for their commercial activities that occur in or affect the United States.[2] Although the Foreign Sovereign Immunities Act of 1976 ("FSIA")[3] clearly incorporates this requirement, considerable confusion has ensued regarding the statute's retroactive application. This Comment attempts to clear this confusion and to provide a solution to the issue of FSIA retroactivity.

The FSIA, which sought to clarify the instances in which foreign states may be sued in U.S. courts,[4] codified the restrictive theory of sovereign immunity, which the executive branch had formally adopted in 1952 when it issued the Tate Letter.[5] In the Tate Letter, the State Department publicly took the position that henceforth it would recommend to U.S. courts that as a matter of policy, a foreign state should be granted immunity only for its sovereign or public acts, and not for its private acts.[6]

Accordingly, the FSIA sets forth the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States,"[7] and then lists several specific exceptions to the general rule.[8] These exceptions encompass the *jure gestionis* (private acts) referred to in the Tate Letter,[9] and they now provide the sole basis for state and federal

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1 This practice derives from the ancient doctrine of *Rex non potest paccare* ("the King can do no wrong"). BLACK'S LAW DICTIONARY 1188 (5th ed. 1979). For a review of the doctrine's history, see R. KLEIN, SOVEREIGN EQUALITY AMONG STATES—THE HISTORY OF AN IDEA (1974).

2 For a listing and comparison of sovereign immunity legislation in various countries, see generally B. BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW (1984).

3 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) [hereinafter FSIA]. The FSIA is codified in 28 U.S.C. §§ 1330, 1332(a)(2)-1332(a)(4), 1391(f), 1441(d), and 1602-1611. For convenience, the provisions of the FSIA will be referred to by their respective U.S. Code section numbers.

4 *See infra* notes 105-131 and accompanying text.

5 "According to the . . . restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) [hereinafter Tate Letter]. The doctrine of restrictive sovereign immunity differs from the doctrine of absolute sovereign immunity, which has no exceptions.

6 *Id.*

7 28 U.S.C. § 1604.

8 These exceptions, such as expropriation claims and commercial activities, are outlined at *infra* note 110 and accompanying text.

9 Tate Letter, *supra* note 5.

court jurisdiction over suits against foreign states.[10]

Although this restrictive theory of sovereign immunity was adopted in the Tate Letter, the theory as codified in the FSIA differs substantially from prior practice both substantively and procedurally.[11] Thus, there has been considerable debate concerning the retroactive effect of the FSIA—that is, whether the statute applies to claims which arose before the statute was enacted.

Three recently decided cases discuss the retroactive application of the FSIA to pre-1952 claims—*Carl Marks & Co. v. Union of Soviet Socialist Republics*,[12] *Jackson v. People's Republic of China*,[13] and *Slade v. United States of Mexico*.[14] These cases have conclusively established that the FSIA is not to be applied retroactively to pre-1952 events—*i.e.*, to claims arising prior to the issuance of the Tate Letter.[15] They do not resolve the issue of retroactive application of the FSIA to post-1952 events, however, and this issue is currently engulfed in confusion.[16]

This Comment attempts to resolve this confusion and propose a solution to the retroactivity problem. Section II delineates the retroactivity issue, while Section III discusses the history of sovereign immunity and describes the FSIA in detail. Section IV outlines the sources of confusion in the area of FSIA retroactivity and identifies four basic principles which may be applied to circumvent the confusion. Finally, Section V proposes a retroactivity solution arrived at through the application of these principles.

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10 Verlinden B.V. v. Central Bank of Negeria, 461 U.S. 480 (1983). *See infra* note 121 for a more extensive list of citations.

11 *See infra* notes 128-131 and accompanying text.

12 665 F. Supp. 323 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 26 (2d Cir.), *cert. denied*, — U.S. —, 108 S. Ct. 2874 (1988).

13 596 F. Supp. 386, *aff'd*, 74 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

14 617 F. Supp. 351 (D.C.D.C. 1985), *aff'd*, 790 F.2d 163 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1032, *reh'g denied*, 480 U.S. 912 (1987).

15 *See infra* notes 132-152 and accompanying text.

16 Upon initial observation, it appears that because the FSIA has now been in effect for more than a decade, applicable statutes of limitations would moot the FSIA retroactivity issue. The *Jackson*, *Slade*, and *Carl Marks* cases, however, are proof that claims upon such grounds as the repudiation of international debt may remain viable forever because no statute of limitations bars claims against international debt obligations. As one prominent author noted: "There is no statute of limitations as to international claims," and "[g]overnments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well-founded, every principle of natural equity, of sound morals, requires it to be paid." J. MOORE, DIGEST OF INTERNATIONAL LAW §§ 1052, 1003 (1906).

II. THE RETROACTIVITY ISSUE

A. Applicable Definitions

Before undertaking this discussion of retroactivity, it is necessary to define the underlying concepts. In fact, the failure to identify the proper definition of the word "retroactive" is a major source of confusion in discussions of retroactive application of the law.[17]

Courts discussing FSIA retroactivity commonly use the term "retroactive" in two senses. On the one hand, the term refers to the broad proposition that all new laws apply to past events to some extent.[18] This sense of retroactive will hereinafter be referred to as "preactive."[19] On the other hand, the term also refers to the more specific proposition that some new laws apply to past events and change the consequences of these events.[20] This latter sense is considered the "legal" definition of the term, and it refers to laws which take away, impair, or change rights acquired under existing laws with respect to transactions already past.[21]

From a legal viewpoint, a statute is not generally regarded as operating retroactively simply because it relates to antecedent events.[22] Thus, this Comment will rely on the legal definition of retroactive rather than the preactive definition of the term. Although the term "retroactive" may also encompass notions of "retrospectivity,"[23] for the purposes of this Comment, any subtle distinctions between the two terms are insignificant.[24] Therefore, this Comment will treat the terms as synonymous, as

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17 Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216 (1960) [hereinafter Slawson].

18 Comment, *Retroactive Application of Statutes: Protection of Reliance Interests*, 40 ME. L. REV. 183 (1988) [hereinafter *Retroactive Application*].

19 This term is coined by this Comment.

20 This latter sense of "retroactive" also embodies a historical antipathy to such laws due to the fact that these laws commonly disrupt settled expectations. *Retroactive Application*, *supra* note 18, at 183. *See also* Smead, *Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936) (tracing the development of this rule from ancient Greek and Roman codes to U.S. jurisprudence) [hereinafter Smead]; *infra* text accompanying notes 28-39.

21 Sturges v. Carter, 114 U.S. 511 (1885).

22 Ubeda v. Zialcita, 226 U.S. 452 (1913). For example, it has been held that a statute which only codifies common morality and fairness and introduces no new rule is not retroactive in any sense. *Id.*

23 Retrospectivity, unlike retroactivity, directly relates to a law or statute changing the legal consequences of prior events. When the events occurred, certain legal consequences resulted, and a retrospective statute gives new legal consequences to these prior events. *See* DeMars, *Retrospectivity and Retroactivity of Civil Legislation Reconsidered*, 10 OHIO N.U.L. REV. 253, 254-257 (1983) [hereinafter DeMars].

24 These distinctions remain insignificant even though commentators have frequently attempted to shed light upon the nuances between "retroactive" and "retrospective." *See, e.g., id.* at 254-57 (distinguishing retroactivity from retrospectivity and noting that treating the terms as synonymous "obfuscates differences which may hinder the accomplishment of important legislative and societal

do the vast majority of courts.[25]

As a result, for purposes of this Comment, a "retroactive" and/or "retrospective" statute is defined as "one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute."[26] A "preactive" statute, on the other hand, is defined more broadly as one which merely gives legal effect to pre-enactment conduct. Finally, a "prospective" statute is legislation which gives legal effect to post-enactment conduct—*i.e.*, it applies to the future.[27] All retroactive statutes therefore apply "preactively" to pre-enactment conduct, whereas a "preactive" statute need not apply retroactively. Moreover, because nearly every statute applies prospectively, most retroactive and preactive statutes likewise apply prospectively. It is thus the *change* in legal effects of pre-enactment conduct that is at the heart of "retroactive" statutes under this definition.

B. Historical Objections to Retroactive Law

There are no objections to either the preactive or purely prospective application of statutes. On the other hand, a strong historical hostility exists toward the retroactive application of statutes.[28] The Constitution of the United States expressly prohibits the passage of ex post facto laws,[29] bills of attainder,[30] and laws impairing the obligation of contract,[31] which are all characterized by retroactivity. A bias against retroactive laws has also extended to other types of retroactive statutes not

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goals"); Slawson, *supra* note 17, at 217-18 (defining and distinguishing between "method retroactivity" and "vested rights retroactivity"); Smith, *Retroactive Laws and Vested Rights* (pt. 1), 5 TEX. L. REV. 231, 232-33 (1927) (describing three different ideas behind the term "retrospective") [hereinafter Smith (pt. 1)].

25 *See* 2 SUTHERLAND STATUTORY CONSTRUCTION § 41.01 (C. Sands 4th ed. 1973) [hereinafter SUTHERLAND], where it is stated that: "The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably .... Characterization thus may do nothing more than reflect a judgment concerning validity or interpretation, arrived at on other grounds."

See also BLACK'S LAW DICTIONARY, *supra* note 1, at 1184 (" 'retroactive' or 'retrospective' laws are generally defined from a legal viewpoint as those which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past").

26 Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 692 (1960) [hereinafter Hochman].

27 For a delineation of the retroactive and prospective concepts, see Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 n.2 (1975) [hereinafter Beytagh].

28 In fact, retroactive laws have been disfavored since the times of ancient Greece and Rome. Smead, *supra* note 20, at 775.

29 *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3.

30 *Id.*

31 *Id.* art. I, § 10, cl. 1. *See also* Smith, *Retroactive Laws and Vested Rights* (pt. 2), 6 TEX. L. REV. 409, 412-13 (1928) [hereinafter Smith (pt. 2)].

expressly banned by the Constitution.[32] One commentator has even suggested that retroactivity must be isolated from its "evil associations" rooted in "political philosophy" before it can be properly evaluated as a legal principle.[33]

The most fundamental objection to retroactive laws is that such laws are unjust. Legal vehemence arises because of the perceived and actual unfairness of legislation which changes the legal consequences of events which have occurred prior to the enactment of a statute.[34] Implicit in such belief is the notion that "notice or warning of the rules" which are to be applied to determine the affairs of people should be given to them in advance of their actions.[35] In addition, retroactive laws disrupt the certainty of the past, because settled matters become open to reinterpretation.[36] Moreover, a legislative body may pass a retroactive law with knowledge of exactly who will be affected, rather than with the detached concern of a policy-maker.[37]

Despite these historical biases against retroactive laws, many laws are in fact retroactively applied. Apart from the specific provisions already cited, the Constitution contains no express prohibition of retroactive legislation.[38] Indeed, it is well established that the legislature may enact a statute having retroactive effect.[39] Consistent with the common law's antipathy toward retroactive application, however, courts interpret statutes as applying prospectively, absent clear indication of legislative intent to the contrary or other grounds that nullify this antipathy.

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32 Justice Story called such retroactive statutes "generally unjust." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1398 (1851).

33 Smith (pt. 2), *supra* note 31, at 414.

34 In many cases, actions challenging these laws allege violations of substantive due process. There is also a procedural due process aspect in that the one challenging the retroactivity may be able to assert that there was not sufficient notice of the change or knowledge of the new law. Agustin v. Quern, 611 F.2d 206, 211 (7th Cir. 1979). *See also* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS TO THE MAKING AND APPLICATION OF LAW 642-644 (Cambridge Tent. ed. 1958).

35 2 SUTHERLAND, *supra* note 25, § 41.02, at 247. This conclusion is an aspect of both substantive and procedural due process. *See supra* note 34.

36 Hochman, *supra* note 26, at 692-93.

37 Smith (pt. 2), *supra* note 31, at 417. This knowledge not only goes against the common law tradition of the legislator as a prescriber of future, impersonal policies, but it also, if instituted judicially, goes against the common law tradition of the judge as an impartial decisionmaker regarding known parties. *Id.*; Hochman, *supra* note 26, at 693.

38 Johannessen v. United States, 225 U.S. 227 (1912); Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911); League v. Texas, 184 U.S. 156 (1902); Blount v. Windley, 95 U.S. 173 (1877).

39 This principle embodies a historical presumption in favor of legislative sovereignty. Smead, *supra* note 20, at 778.

C. Differing Methods of Interpretation

Various methodologies have evolved to determine whether a statute overcomes the historical antipathies toward retroactive application when the legislature has failed to state clearly whether the law is to be applied retroactively. These methodologies fall within four groups: (1) general legislative intent analysis; (2) the vested rights approach; (3) definitional analysis; and (4) the *Linkletter/Stovall* test.[40]

General legislative intent analysis involves the consultation of a wide variety of statutory materials, and the ranking of such materials in a hierarchical fashion, to ascertain the original intent of the legislators as to retroactive application.[41] If the text of a statute does not disclose such intent, extrinsic sources, "such as the statutory history, the circumstances of enactment, contemporaneous, related statutes, and the legal meaning of statutory terms," are consulted.[42]

The problem with using such a general mode of analysis to determine the retroactivity of a statute is that it creates too many opportunities for a court to read its own policy preferences into the statute.[43] Where the language of a statute is ambiguous and/or the legislative intent is uncertain, legislative intent analysis can easily lead to a decision for either side. To base retroactive application solely on general legislative analysis without a more definitive answer in these circumstances conflicts with the well-settled principle against retroactive application absent *clear* legislative intent. Thus, where there is no clear legislative intent, the court should turn to other more meaningful methodologies in order to arrive at the proper conclusion regarding retroactivity.

The "vested rights" approach[44] to determining retroactivity is founded upon the following principle: statutes which take away vested rights come within the general rule disfavoring the retroactive operation of statutes and therefore may not be retroactively applied.[45] Under this approach, the court resolves the issue of retroactivity by determining whether a statute affects "vested rights."[46]

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40 Although the *Linkletter/Stovall* test traditionally has been applied to judicial rulings to determine their retroactive effect, its application has at times tangentially involved statutes (as where determination has been made of the retroactivity of case decisions interpreting statutes). *See infra* notes 57-76.

41 *Retroactive Application*, *supra* note 18, at 189.

42 *Id.*

43 *Id.*

44 This approach has also been referred to as the "vested right-remedial scheme." DeMars, *supra* note 23, at 274.

45 Sturges v. Carter, 114 U.S. at 511. *See also* 73 AM. JUR. 2D *Statutes* § 354 (1974).

46 Numerous courts have employed this "vested rights" analysis. For a table of cases espousing this principle, see SUTHERLAND, *supra* note 25, § 41.06, at 378-80 n.1.

The vested rights methodology is often criticized. For instance, one author stated:

> Judicial opinions are full of standards which purport to govern decision[s] concerning the legality of retroactive application of new law. On close examination most of them turn out to be little more than ways to restate the problem. Probably the most hackneyed example of such a rule is to the effect that a law cannot be retroactively applied to impair vested rights. But the statement of that proposition does nothing more than focus attention on the question concerning what circumstances qualify a right to be characterized as "vested."[47]

Commentators have long recognized the impossibility of clearly defining a vested right and have instead relied upon the circuitous definition that "a right is vested when it is immune to destruction, and . . . is not vested when it is liable to destruction, by retroactive legislation."[48] Likewise, the term "vested right" has been used by the courts in circuitous fashion.[49] The conclusory nature of the vested rights analysis is a product of the impossibility of defining "vested rights." Instead of arriving at a clear definition, courts are forced to define the term in terms of itself, or, in other words, to "beg the question." One court, recognizing the conclusory nature of this analysis, stated:

> "Vested" rights may not be retroactively impaired by statute; [yet] a right is "vested" when it is so far perfected as to permit no statutory interference. The tautology is apparent. As was pointed out by Justice Holmes, "for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that [the public] force will be brought to bear upon those who do things said to contravene it . . . ."[50]

As a result, the employment of the "vested rights" approach to determine retroactivity is as problematic as the employment of the general legislative intent analysis where no clear intent is apparent. The conclusory nature of the vested rights approach does not provide for a meaningful analysis of the implications of retroactively applied law, because it merely rests the resolution of the issue of retroactivity upon the illusory definition of "vested rights."

Nevertheless, a third methodology has grown out of the vested rights approach through the recognition of what is *not* included within

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47 *Id.* § 41.05, at 364-65.

48 Smith (pt. 2), *supra* note 31, at 231.

49 *See, e.g.*, Campbell v. Holt, 115 U.S. 620 (1885), where the Supreme Court stated that this term is used as implying interests which it is proper for the state to recognize and protect and of which the individual could not be deprived arbitrarily without injustice. For a compilation of examples from the case law of what rights have been considered vested and nonvested, see SUTHERLAND, *supra* note 25, § 41.06, at 376-77.

50 Gardner v. Gardner, 300 N.C. 715, 719, 268 S.E.2d 468, 471 (1979) (*quoting* Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918)).

the definition of "vested rights." This approach to retroactive interpretation is the "definitional analysis."[51] Because it has become firmly established that there is no vested right in any particular mode of procedure or remedy,[52] the definitional approach involves the determination of whether the statute under consideration is substantive or procedural. Procedural or remedial statutes, on the one hand, are not within the general rule against retroactive operation and thus are generally held to operate retroactively.[53] On the other hand, if a statute is substantive, retroactive application is denied.[54]

Problems with this definitional analysis arise out of the difficulty in distinguishing between a substantive and procedural statute or provision.[55] The general rule is that "laws which fix duties, establish rights and responsibilities among and for persons, natural or otherwise, are 'substantive laws' in character, while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are 'procedural laws.' "[56] Although trouble arises in borderline cases, this methodology nevertheless holds up where a statute is clearly procedural or remedial.

The final methodology the courts have employed to determine the retroactive application of law is the *Linkletter/Stovall* test. Although this test was initially formulated to determine the retroactive application of judicially created rules of law, employment of the test has also tangentially involved statutes.[57] In order to provide for a more meaningful analysis of retroactivity, this Comment proposes that the *Linkletter/Stovall* test, which has successfully and widely been used to determine

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51 *See Retroactive Application*, *supra* note 18, at 190-92.

52 *See, e.g., Ex parte* Collett, 337 U.S. 55 (1949); Hopt v. Utah, 110 U.S. 574 (1884); Henley v. Myers, 76 Kan. 723, 93 P. 168 (1907), *aff'd*, 215 U.S. 373 (1910).

53 Ohlinger v. United States, 135 F. Supp. 40 (D.C. Idaho 1955). *See* Spicer v. Benefit Ass'n of Ry. Employees, 142 Or. 574, 21 P.2d 187 (1933) (no person has a vested right in any particular mode of procedure or remedy; accordingly, a cause must be tried under the rules of procedure existing at the time of the trial); Lewis v. Pennsylvania R.R., 220 Pa. 317, 69 A. 821 (1908) (no one can claim to have a vested right in any particular mode of procedure for the enforcement or defense of his right).

54 *See Retroactive Application*, *supra* note 18, at 191.

55 This encompasses a whole area of law in itself. *Id.* at 192.

56 BLACK'S LAW DICTIONARY, *supra* note 1, at 1083. *See* State *ex rel.* Blood v. Gibson Circuit Court, 239 Ind. 394, 157 N.E.2d 475 (1959).

57 For instance, in determining the retroactivity of holdings interpreting statutes and the rules springing from such holdings, employment of the test often involves the analysis of statutes. *See, e.g.*, United States v. LePatourel, 593 F.2d 827, 831-32 (8th Cir. 1979) (examining the purpose of the statute of limitations for the Federal Tort Claims Act); Rudolph v. Wagner Elec. Corp., 586 F.2d 90, 94 (8th Cir. 1978) (examining the purpose of the Civil Rights Act of 1964); Novak v. Harris, 504 F. Supp. 101, 105 (E.D.N.Y. 1980) (examining the purpose of Social Security Act).

the retroactivity of judicial rulings, should likewise be used to determine the retroactivity of statutes.

As is the case with the enactment of a new statute that changes prior practice, the judicial creation of a new rule of law also raises the essential question of whether such rules should be applied retroactively. In *Linkletter v. Walker*,[58] the Supreme Court outlined various principles which ultimately set the stage for a new methodology to answer this question.[59] The Court first concluded that the way to approach retroactivity was to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."[60] The Court also considered the degree of reliance on the prior standards and the consequences retroactivity would have on the administration of justice.[61]

Nevertheless, what has often been referred to as the *Linkletter* test was actually solidified in *Stovall v. Denno*,[62] a case decided two years after *Linkletter*. In *Stovall*, the Supreme Court transformed the three elements of purpose, reliance, and effect into a foundation upon which the future retroactivity analysis of the Supreme Court would proceed.[63] This test involves a balancing of the purpose of the new rule, the reasonableness and extent of reliance on the overturned law, and the effect of a retroactive application of the new rule on the administration of justice.[64]

In considering the first prong of the *Linkletter/Stovall* test, a court must search for the purpose of the new rule and the impact retroactivity would have upon that purpose.[65] For example, in *Linkletter* the Court held that the exclusionary rule announced in *Mapp v. Ohio*[66] was inapplicable to cases in which convictions had become final before the date *Mapp* was decided, because the deterrent purpose of *Mapp* would not be served by retroactive application.[67] In other words, the purpose of the new rule involved deterrence, and one can not deter what has already

58 381 U.S. 618 (1965).

59 *See* Beytagh, *supra* note 27; Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. 745 (1983) (criticizing the *Linkletter* doctrine on the basis of confusion and inconsistencies present in lower federal court decisions) [hereinafter Corr].

60 *Linkletter*, 381 U.S. at 639.

61 *Id.* at 637-38.

62 388 U.S. 293 (1967).

63 *See* Corr, *supra* note 59, at 747. *See also* Beytagh, *supra* note 27, at 1556.

64 While both *Linkletter* and *Stovall* concerned criminal defendants, the Supreme Court made it clear in 1971 that this doctrine regarding retroactivity was to be applied in civil cases as well. Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

65 *Chevron*, 404 U.S. at 106-07; *Linkletter*, 381 U.S. at 629. *See also* Hankerson v. North Carolina, 432 U.S. 233, 241-43 (1977).

66 367 U.S. 643 (1961).

67 *Linkletter*, 381 U.S. at 618.

been done.[68]

In considering the second prong of the test, a court searches for reliance on the old rule of law.[69] The cases show, however, that the mere possibility of reliance is not enough to prevent retroactive application. Instead, there must have been actual reliance before retroactivity will be denied. The party seeking relief from retroactivity under the test must therefore demonstrate that he or she actually depended upon the existing state of the law—that he or she took some action, or refrained from taking some action, in compliance with what he or she believed the law to be. For example, in *Of Course, Inc. v. Commissioner*,[70] a corporation was unable to resist the retroactive application of an unfavorable new rule because it was "plain that the taxpayer was not influenced in any action taken by [the old rule]. Its decision to liquidate and the procedure followed would have been the same whether [the old rule] prevailed or not."[71]

Finally, under the third prong of the test, a court must make a determination as to the equities involved or the effect of retroactivity upon the administration of justice.[72] This effect factor usually weighs in favor of retroactivity if the court is unable to identify a consequence that is

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68 In addition, as previously mentioned, when a law-changing judicial decision affects a statute (*e.g.*, by changing its interpretation or by striking some portion of the statute as unconstitutional), courts frequently must also look beyond the purpose of the decision to the purpose of the underlying statute. In Travis v. Trust Company Bank, 621 F.2d 148 (5th Cir. 1980), for example, the plaintiff alleged that the defendant had failed to disclose the assignment of a security interest as required by statute. Initially, the pivotal question was whether the item assigned was a security interest. While the case was pending, the court ruled in a separate case that the item was a security interest. The focus of *Travis* therefore became the retroactivity of the intervening decision. The court examined the purpose of the statute and found that the purpose included the attempt to deter sharp lending practices and to ensure that lenders did not take unfair advantage of debtors. The court thereby concluded that the purpose factor of the *Linkletter/Stovall* test weighed in favor of retroactivity, and decided in favor of retroactive application. *Id.* at 150-51.

For other cases looking toward the purpose of the statute under consideration to resolve the question of a decision's retroactivity, see United States v. LePatourel, 593 F.2d 827, 831-32 (8th Cir. 1979); Rudolph v. Wagner Elec. Corp., 586 F.2d 90, 94 (8th Cir. 1978); Novak v. Harris, 504 F. Supp. 101, 105 (E.D.N.Y. 1980).

69 Notice how this prong incorporates the historical antipathies toward retroactive laws.

70 499 F.2d 754 (4th Cir. 1974) (en banc).

71 *Id.* at 759-60. Similarly, in Aiello v. City of Wilmington, 470 F. Supp. 414 (D. Del. 1979), *aff'd*, 623 F.2d 845 (3d Cir. 1980), the City of Wilmington argued against the retroactive application of a law-changing decision on the ground that the new law, subjecting cities to legal as well as equitable remedies for civil rights violations, was a drastic departure from precedent. The court rejected the argument because the city was unable to show that "the earlier decision established a rule of substantive conduct on which the municipality relied." *Id.* at 418. *See also In re* Spell, 650 F.2d 375 (2d Cir. 1981).

72 The *Linkletter* court pondered the implications of retroactivity on the judicial system, whereas the *Chevron* court described the third factor as "the inequity imposed by retroactive application." *Linkletter*, 381 U.S. at 637; *Chevron*, 404 U.S. at 107.

either fundamentally unfair or is laden with real-world implications for the operation of administrative or judicial bodies.

The *NLRB v. Lyon & Ryan Ford*[73] case is an example of a court's inability to identify a fundamentally unfair consequence resulting from retroactive application of a rule. The case involved a new rule promulgated by the National Labor Relations Board which provided back pay for unlawfully discharged striking employees who had not asked for reinstatement to their jobs.[74] Holding in favor of retroactivity, the court said:

> [R]etroactive application will not create substantial injustice or undue hardship for either party. The Board finds no valid reason for distinguishing between the status of an unlawfully discharged striker and of an unlawfully discharged working employee. Contrary to the Company's claim, the rule enforced here does not provide a windfall to striking employees but merely places the burden of undoing the wrong on the wrongdoer, where it seems properly to belong.[75]

Other cases have denied retroactivity through addressing the potential adverse administrative impacts of retroactivity.[76]

Although the second and third prongs of the *Linkletter/Stovall* test may be difficult to measure, this test articulates a more meaningful basis for considering the problem of retroactive application of statutes than the alternative methodologies discussed above.[77]

III. Changing Concepts of Sovereign Immunity Under U.S. Law

A. Absolute Sovereign Immunity

To understand the concepts the FSIA and Tate Letter encompass, it is helpful first to delineate the evolution of foreign sovereign immunity in U.S. courts. Although Article III of the Constitution expressly includes

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73 647 F.2d 745 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981).

74 *Id.*

75 *Id.* at 757.

76 *See, e.g.*, Gosa v. Mayden, 413 U.S. 665 (1973) (refusing retroactive application of O'Callahan v. Parker, 395 U.S. 258 (1969), because such a result would produce significant judicial and administrative costs); Novak v. Harris, 504 F. Supp. 101 (E.D.N.Y. 1980).

77 The only other methods discovered in the course of my research which are used to interpret the retroactive implications of statutes are the "due process" and "reliance" approaches, which have been incorporated into the above four methodologies, and the "curative" approach, which is not applicable to the FSIA and thus is not considered by this Comment. Slawson, *supra* note 17, at 216; Comment, *Release of Joint Tortfeasors—Virginia Code Section 8.01-35.1 and Its Retroactive Application*, 18 U. Rich. L. Rev. 829, 846 (1984) [hereinafter *Release of Joint Tortfeasors*]; Rogers v. Keokuk, 154 U.S. 546 (1918) ("curative" acts operate on conditions already existing and, in a sense, can have no prospective operation; so long as such acts do not interfere with contract rights, they must be given retroactive effect).

suits against "foreign states" within the subject matter jurisdiction of the federal courts,[78] the Supreme Court held in 1812 that foreign sovereigns were immune from suits in U.S. courts in *The Schooner Exchange v. McFadden*.[79] For more than a century and a half following this case, the United States generally granted foreign sovereigns complete immunity from suit under this doctrine of "absolute sovereign immunity." Nevertheless, signs of strain with respect to this doctrine began to emerge in the first quarter of the twentieth century.

In *Berizzi Brothers Co. v. S.S. Pesaro*,[80] the Supreme Court relied on the *Schooner Exchange* holding to extend immunity in an action against a merchant ship owned and controlled by the Italian government.[81] In reaching its decision, the Court declined to adhere to the State Department's view that "government-owned merchant vessels . . . employed in commerce should not be regarded as entitled to . . . immunit[y]."[82] Thus, the Court refused to recognize what is now the "commercial activity" exception to sovereign immunity, even though the State Department promoted such recognition.

Differences of opinion on the issue also existed within the executive branch as early as 1918, as evidenced by an exchange of letters between the Attorney General and the Secretary of State.[83] By the 1940s, the Supreme Court leaned toward a policy of deference to the executive branch on a case-by-case basis: "It is therefore not for the courts to deny

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78 "The judicial Power shall extend to all Cases . . . between a State, or the Citizens thereof, and *foreign States*, Citizens or subjects." U.S. CONST. art. III, § 2 (emphasis added).

79 11 U.S. (7 Cranch) 116 (1812). This doctrine of absolute sovereign immunity was later explained more fully in United States v. Diekelman, 92 U.S. (7 Cranch) 520 (1875), as follows:

> A sovereign cannot be sued in his own courts without his consent. His own dignity, as welll as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself.

For other reasons underlying this early doctrine of absolute immunity, see Comment, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA-ALASKA L. REV. 343, 347-48 (1975).

80 271 U.S. 562 (1926).

81 *Id.* at 572.

82 The Pesaro, 277 F. 473, 479-80 n.3 (S.D.N.Y. 1921) (quoted in Republic of Mexico v. Hoffman, 324 U.S. 30, 38 (1945)).

83 Whereas the Attorney General asserted that foreign merchant vessels were entitled to immunity, the Secretary of State asserted that such vessels were not so entitled. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69, at 211 (1965) [hereinafter RESTATEMENT].

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."[84] This policy alleviated some of the differences between the Supreme Court and the State Department. It was the State Department's ordinary practice, however, to request immunity in all actions against friendly foreign sovereigns,[85] while the Supreme Court applied deference only in cases where the State Department had certified the entitlement to immunity.[86] Eventually, the doctrine of absolute sovereign immunity slowly began to lose momentum, and in 1952 it gave way to restrictive sovereign immunity.

B. Restrictive Sovereign Immunity and the Issuance of the Tate Letter

The theory of absolute sovereign immunity was abandoned in 1952 when the State Department issued the well-known "Tate Letter" announcing that the Department would no longer assert immunity on behalf of friendly foreign sovereigns in suits arising from private or commercial activity.[87] Thereafter, this restrictive theory of sovereign immunity became the prevailing law in the United States.[88] Under the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."[89]

Numerous problems arose with regard to the application of the new restrictive theory of sovereign immunity. First, the executive branch often made determinative suggestions to the judiciary as to whether immunity should be granted in a particular case, based on politics or current foreign relation policies.[90] Thus, decisions regarding immunity

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84 Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945). *See* Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983) (citing *Ex Parte* Republic of Peru, 318 U.S. 578 (1943)); RESTATEMENT, *supra* note 83, at 212-13.

85 *Verlinden*, 461 U.S. at 486.

86 *See supra* note 84.

87 Tate Letter, *supra* note 5. Because the federal courts defer to an assertion of sovereign immunity made by the Department of State on behalf of a foreign sovereign, the Department's definition of the scope of sovereign immunity was determined to be controlling. *See* Pugh & McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. REV. 25, 55-64 (1966) [hereinafter Pugh & McLaughlin].

88 Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976).

89 Tate Letter, *supra* note 5.

90 *See* Oetjen v. Central Leather Co., 246 U.S. 297 (1918). The Court stated that: "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.* at 302. *See also* Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974) (example of political pressure often involved in

under the newly announced standards were often arbitrary and inconsistent.[91] As the Supreme Court noted in the *Jackson* case,

> After the Tate Letter the executive, acting through the State Department, usually would make "suggestions" on whether sovereign immunity should be recognized by a court, and courts generally abided [by] these suggestions. This proved troublesome, because foreign nations at times placed diplomatic pressure on the State Department, and political considerations led to suggestions of immunity where it was not available under the restrictive theory. . . . Moreover, foreign nations did not always make requests to the State Department, and responsibility fell to the courts to determine whether sovereign immunity existed. With two different branches involved the governing standards were neither clear nor uniform.[92]

Second, vast problems regarding implementation of the restrictive doctrine arose, including the courts' difficulty in interpreting the distinction between public and private acts. In the absence of a clear method for determining whether a given act of a foreign government should be considered public or private, employment of the restrictive theory often begged the question of immunity, rather than answering it.[93]

Courts and commentators formulated several tests to distinguish between commercial and governmental acts. Some tests focused on the "nature" of the act, classifying as sovereign those acts which could only be performed by the sovereign,[94] whereas others preferred the "purpose" test, under which an act would be considered sovereign if performed for a public purpose.[95]

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granting of sovereign immunity); Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358-59 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) (stating that if the State Department failed to determine a petition for immunity, the court was authorized to do so itself).

91 *See* Comment, *Federal Jurisdiction Over Foreign Citizens' Nonfederal Claims Against Foreign Sovereigns Held Constitutional*, 14 SETON HALL L. REV. 598 (1984) [hereinafter *Federal Jurisdiction Over Foreign Citizens' Nonfederal Claims*]. Commentators have criticized the political undertones of the State Department's then-existing system of determining sovereign immunity issues and the inconsistent results which were produced by having both the executive and judiciary branches involved. *Id.* at 614.

92 *Jackson*, 794 F.2d at 1493 (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983)).

93 Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 901-09 (1969).

94 *See* Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D.2d 927, 233 N.Y.S.2d 1013 (App. Div. 1962).

95 *See, e.g., In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

In Victory Transport, Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), the court adopted yet another test which declared that a foreign goverment should be immune from suit for acts that fell within 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; and (5) public loans." The court observed that under the "nature" test, certain activities traditionally considered exclusively within

Third, under the Tate Letter's theory of sovereign immunity, there was no clear way to secure *in personam* jurisdiction over a foreign state. Because the assertion of jurisdiction inherently involved the imposition of judicial power over the party,[96] a claimant could not "simply serve . . . process on the physical embodiment of the foreign government, because such embodiment—an embassy or consulate—is inviolable. Service on an ambassador or minister of a foreign state [was] not only void, but under a federal statute dating back to 1790 [was] a crime . . . ."[97]

Thus, proceedings against a foreign government could be commenced only by an attachment against the government's property within the United States.[98] *In rem* jurisdiction, involving claims to title of the attached property, or *quasi in rem* jurisdiction, such as attaching a bank deposit, were therefore the "ultimate recourse open to private litigants" because of the "lack of *in personam* jurisdiction against foreign sovereigns."[99] Unfortunately, in the international arena, the reliance on *in rem* and *quasi in rem* jurisdiction has a major drawback—the attachment of such property is an irritant in U.S. foreign relations.[100]

Fourth, the right to sue a foreign sovereign in U.S. courts under the Tate Letter in many cases was essentially "a right without a remedy." Despite the Tate Letter's adoption of the restrictive theory as to the right to sue a foreign sovereign, the absolute theory continued to apply to the execution of judgments. As one commentator noted: "A private litigant might have defeated a defense of immunity from suit in a purely commercial action against a foreign state, only to be frustrated in its efforts to

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the realm of governments, such as the purchase of bullets or shoes for an army, would be characterized as commercial. The "purpose" test was considered even more unsatisfactory, "for conceptually the modern sovereign always acts for a public purpose." *Id.* at 359-60. This test was subsequently followed in a number of decisions. *See, e.g.*, Sea Transp. Corp. v. The S/T Manhattan, 405 F. Supp. 1244, 1246 (S.D.N.Y. 1975); Rovin Sales Co. v. Socialist Republic of Romania, 403 F. Supp. 1298, 1302 (N.D. Ill. 1975).

96 *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). *See generally* F. JAMES & G. HAZARD, CIVIL PROCEDURE 622-30 (2d ed. 1977).

97 Lowenfeld, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 49 N.Y.U. L. REV. 377, 384 (1974) (footnotes omitted).

98 *See* Pugh & McLaughlin, *supra* note 87, at 28-33.

99 Delaume, *Three Perspectives on Sovereign Immunity*, 71 AM. J. INT'L L. 399 (1977); Note, *Jurisdictional Immunities of Foreign States*, 23 DE PAUL L. REV. 1225, 1239 (1974).

100 *See* von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 46-47 (1978) [hereinafter von Mehren]. As the Congress has stated: "Such attachments can give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments." H.R. REP. No. 1487, 94th Cong., 2d Sess. 27, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6615 [hereinafter H.R. Rep. No. 1487].

collect upon the resulting judgment."[101] The State Department made this clear in a letter filed with the court in *Weilamann v. Chase Manhattan Bank.*[102] Judgments against a foreign sovereign thus merely formed a basis for possible enforcement outside the United States, or for a request that the Department of State present a diplomatic claim to the foreign government on behalf of the plaintiff.[103] In any case, the recovery of the award granted was dependent upon the goodwill of the foreign government.[104]

C. The FSIA and the Codification of Restrictive Sovereign Immunity

Hoping to eradicate the problems that plagued the application of the Tate Letter, Congress enacted the FSIA in 1976.[105] Viewed broadly, the FSIA[106] encompassed four basic purposes or strategies[107] designed to clarify the instances in which foreign states[108] may be sued in U.S. courts. These four purposes, although solving the problems inherent in

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101 Kahale & Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 217 (1979) [hereinafter Kahale & Vega].

102 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. Westchester County 1959). The State Department maintained that the property of the foreign goverment should be "immune 'from execution or other action analogous to execution.' " *Id.* at 1088, 192 N.Y.S.2d at 472.

103 von Mehren, *supra* note 100, at 43.

104 Kahale & Vega, *supra* note 101, at 217.

105 The FSIA became effective on January 19, 1977, 90 days from the date it was signed by President Ford. In his statement on signing the bill into law, the President said: "This statute will . . . make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes. In this respect, the Foreign Sovereign Immunities Act carries forward a modern and enlightened trend in international law." 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

106 The basic structure of the FSIA in Title 28 of the U.S. Code is as follows:

§ 1330: Actions against foreign states (jurisdiction)
§ 1602: Findings and declaration of purpose
§ 1603: Definitions
§ 1604: Immunity of a foreign state from jurisdiction
§ 1605: General exceptions to the jurisdictional immunity of a foreign state
§ 1606: Extent of liability
§ 1607: Counterclaims
§ 1608: Service; time to answer; default
§ 1609: Immunity from attachment and execution of property of a foreign state
§ 1610: Exceptions to the immunity from attachment or execution
§ 1611: Certain types of property immune from execution

A detailed section-by-section analysis of the FSIA was provided in the House Report prior to its enactment. H.R. Rep. No. 1487, *supra* note 100, at 12.

107 *See* H.R. Rep. No. 1487, *supra* note 100, at 45 (in their letter of transmittal, the Departments of State and Justice commented on the proposed legislation and outlined these strategies). Legislative history also points to a fifth purpose of the FSIA—to not affect the substantive law of liability. *See infra* note 139 and accompanying text.

108 The FSIA defines "foreign state" to include the foreign state itself, its political subdivisions, and its agencies or instrumentalities. 28 U.S.C. § 1603(a). The term "political subdivisions" includes "all governmental units beneath the central government, including local goovernments." H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6613.

the Tate Letter, also resulted in major changes to prior practice which are at the heart of the debate concerning FSIA retroactivity.

First, the primary purpose of the FSIA was to codify the restrictive theory of sovereign immunity enunciated in the Tate Letter. Accordingly, the FSIA sets forth the general rule that "a foreign state shall be immune from the jurisdiction of the courts of the United States,"[109] and then lists several specific exceptions to that rule.[110] The largest and most important of these exceptions is the so-called "commercial activity" exception.[111] Under this exception, the determination as to whether a particular act is commercial or governmental is to be made by reference to the nature of the act and not to its purpose.[112] By selecting the "nature of the act" test to distinguish between acts *jure imperii* and acts *jure gestionis*, the FSIA thus dissipated much of the confusion plaguing this portion of the prior law,[113] and helped to alleviate the difficulty the courts previously encountered in distinguishing between private and public acts.[114]

The second major objective of the FSIA was to depoliticize the issue of sovereign immunity by placing the responsibility for its resolution exclusively in the hands of the judiciary.[115] Thus, under the FSIA, private litigants will no longer be forced to compete with the foreign policy interests of the United States through the politicizing of the State Department.[116] As a result, the problems associated with having two branches

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109 28 U.S.C. § 1604.

110 28 U.S.C. §§ 1604-1607. Such exceptions include: (1) noncommercial torts; (2) litigation concerning gift and inherited property; (3) waiver by the sovereign; (4) expropriation claims; and (5) commercial activity. *Id.*

111 28 U.S.C. § 1605(a)(2).

112 28 U.S.C. § 1603(d). *See* H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615.

113 This confusion is dissipated irrespective of the merits of the test selected. *See supra* note 95.

114 *See supra* notes 93-95 and accompanying text. Although the FSIA does not provide a precise definition of "commercial activity" (this term is defined broadly as "either a regular course of commercial conduct or a particular commercial transaction or act"), certain activities of a foreign state—such as the sale or service of a product, leasing of property, borrowing of money, engagement of employees, or investment in U.S. corporations—would now clearly constitute commercial activity under the restrictive theory. H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615.

115 H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6615. As the FSIA declares:

> 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 . . . . 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.

28 U.S.C. § 1602.

116 The State Department itself will no longer be expected by a foreign government to accommo-

of government decide the immunity issue are dissipated.

The third purpose of the FSIA was to fill a gap in the prior law by providing well-defined rules for service of process upon foreign states, thus creating a basis for asserting *in personam* jurisdiction over foreign states. Accordingly, the FSIA established a long-arm statute containing service provisions to reach foreign sovereigns.[117] In providing a basis for *in personam* jurisdiction, the commercial activity exception denies immunity with respect to any claim based upon: (1) a commercial activity "carried on in the United States;" (2) an act within the United States "in connection with" a commercial activity elsewhere; or (3) an act outside the United States "in connection with" a commercial activity elsewhere if the act causes a "direct effect" in the United States.[118] Thus, when a foreign state engages in commercial activity anywhere, and that activity has a "direct effect" in the United States, the foreign state can be subject to suit under the FSIA.

Moreover, the FSIA not only provides bases for *in personam* jurisdiction, it makes such jurisdiction the exclusive form of jurisdiction available. Indeed, the FSIA precludes all attachments of assets of foreign states for jurisdictional purposes.[119] As one commentator noted, the FSIA "is a rare example of a common law state abandoning *in rem* and *quasi in rem* jurisdiction in favor of exclusive *in personam* jurisdiction."[120] Accordingly, the District Court in the *Carl Marks* case stated that "the FSIA is now the exclusive basis for federal court jurisdiction over suits against a foreign sovereign, and a court lacks . . . personal jurisdiction over the sovereign unless one of the exceptions . . . applies."[121] This aspect of the FSIA not only provides the means to obtain

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date its interests, while trying to uphold the legal principles espoused in the Tate Letter for a U.S. citizen.

117 28 U.S.C. § 1330(b). As a congressional committee reported:

> [Section 1330(b) of the FSIA] provides, in effect, a Federal long-arm statute over foreign states .... The requirements of minimum jurisdictional contacts and adequate notice are embodied in the provision.... [E]ach of the immunity provisions ... requires some connection between the lawsuit and the United States, or an express or implied waiver by the foreign state of its immunity from jurisdiction. These immunity provisions, therefore, prescribe the necessary contacts which must exist before our courts can exercise personal jurisdiction. Besides incorporating these jurisdictional contacts by reference, section 1330(b) also ... prescrib[es] that proper service be made under section 1608 .... Thus, [these sections] are all carefully interconnected.

H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6620.

118 H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6620.

119 28 U.S.C. §§ 1609, 1610(d). Property of a foreign state may be attached prior to judgment only if it is used for a commercial activity in the United States, the attachment is for security purposes, and the foreign state has expressly waived its immunity from such attachment. *Id.* After judgment, attachment is allowed in aid of execution.

120 von Mehren, *supra* note 100, at 46 (footnotes omitted).

121 *Carl Marks*, 665 F. Supp. at 335. The *Jackson* court likewise noted: "Both subject matter jurisdiction and personal jurisdiction turn on application of the substantive provisions of the FSIA.

in personam jurisdiction over a foreign sovereign which were absent under prior practice, it also eliminates an unnecessary source of friction between the United States and foreign governments by eliminating *in rem* and *quasi in rem* jurisdiction.[122]

The final objective of the FSIA was to rectify the inconsistency which existed between the rules of immunity from suit and the ability to obtain execution of judgments.[123] As mentioned, prior to the enactment of the FSIA, the absolute immunity theory continued to apply to the execution of judgments, despite the Tate Letter's adoption of the restrictive immunity theory as to the right to sue a foreign sovereign.[124] The FSIA substantially changed this. Property of a foreign state used for a commercial activity in the United States became subject to execution or attachment in aid of execution under the circumstances set forth in the statute.[125] "Attachment in aid of execution" includes "attachments, garnishments, and supplemental proceedings available under applicable Federal or State law for satisfaction of judgment."[126] Thus, with respect to suits against foreign states, restrictive sovereign immunity no longer gives a "right without a remedy."[127]

As previously mentioned, these four purposes of the FSIA, although solving the problems inherent in the Tate Letter, also resulted in major changes to prior law. The three most important changes[128] brought about by the FSIA were:

1) The elimination of *in rem* and *quasi in rem* jurisdiction, and the establishment of a federal long-arm statute with service of process provisions which provided the exclusive bases for asserting *in personam* jurisdiction

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If none of the exceptions to sovereign immunity set forth in the Act applies, the court lacks both statutory subject matter jurisdiction and personal jurisdiction." *Jackson*, 794 F.2d at 1493 (citing Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 485 n. 5 (1983).

This exclusive form of personal jurisdiction under the FSIA is further solidified by the undisputed fact that the FSIA now provides the sole basis for suing foreign sovereigns. *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Verlinden, 461 U.S. 480; Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2d Cir. 1981); Rex v. Compania Peruana de Vapores, 660 F.2d 61 (3d Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); Williams v. Shipping Corp. of India, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 445 U.S. 982 (1982); McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984); Goar v. Compania Peruana de Vapores, 688 F.2d 417 (5th Cir. 1982).

122 *See* quotation from H.R. Rep. No. 1487, *supra* note 100.

123 *Id.*

124 *See supra* notes 101-104 and accompanying text.

125 28 U.S.C. §§ 1609-1611.

126 H.R. Rep. No. 1487, *supra* note 100, U.S. CODE CONG. & ADMIN. NEWS at 6627.

127 *See supra* note 101 and accompanying text.

128 The FSIA also adopts certain technical and procedural provisions designed to eliminate punitive damages against foreign sovereigns, to clarify venue matters, and to require that the claimant establish his claim by evidence satisfactory to the court, even in the event of default.

over foreign sovereigns;[129]
2) The vesting of exclusive authority to determine whether a particular foreign sovereign is immune from suit in the judiciary;[130] and
3) The establishment of the ability to obtain execution of judgment against specified properties of foreign sovereigns.[131]

Because the essence of the issue of retroactivity is the imposition of change on the legal effect of pre-enactment conduct, these changes to prior practice are at the heart of the present FSIA retroactivity controversy.

IV. RETROACTIVITY AND THE FSIA

A. Pre-1952 Retroactivity—*Jackson*, *Slade*, and *Carl Marks*

In holding that the FSIA may not be applied retroactively to pre-1952 claims, the courts in *Jackson*, *Slade*, and *Carl Marks*[132] followed similar rationales. After noting the common law antipathies to retroactive laws,[133] and finding no clear legislative intent promoting retroactivity,[134] these three courts employed two methodologies to determine whether the FSIA should be retroactively applied—general legislative intent analysis and the vested rights approach.[135]

In employing general legislative intent analysis, all three courts agreed that the FSIA should be denied retroactive application. As the court in *Carl Marks* stated: "[T]he plain language and legislative history of the statute provide thrusts against, rather than for, a congressional intent that the FSIA be applied retroactively."[136] The courts also noted that the prospective nature of the FSIA was expressly evidenced both by language providing that "claims of foreign states to immunity *should henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter,"[137] and by the fact that Congress delayed the effective date of the FSIA for a ninety-day period to give foreign states advance notice of the FSIA's new provisions.[138] Moreover,

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129 28 U.S.C. §§ 1608-1611.

130 *Id.* § 1602.

131 *Id.* § 1610.

132 All three cases involved class-action suits initiated by U.S. plaintiffs against foreign sovereigns who had repudiated public debt obligations. The retroactivity issue concerned whether the jurisdictional provisions of the FSIA could apply to pre-1952 claims.

133 *Jackson*, 596 F. Supp. at 387; *Slade*, 617 F. Supp. at 356; *Carl Marks*, 665 F. Supp. at 336. *See supra* notes 28-39 and accompanying text.

134 *Jackson*, 596 F. Supp. at 388; *Slade*, 617 F. Supp. at 357; *Carl Marks*, 665 F. Supp. at 336.

135 *See supra* notes 41-46 and accompanying text.

136 *Carl Marks*, 665 F. Supp. at 337.

137 28 U.S.C. § 1602 (emphasis added).

138 *Id. See Jackson*, 596 F. Supp. at 388-89, 794 F.2d at 1497; *Slade*, 617 F. Supp. at 357; *Carl Marks*, 665 F. Supp. at 336-37.

the courts noted that legislative history conclusively established that the FSIA was "not intended to affect the substantive law of liability" and that "[r]etroactive application of the Act would repudiate the immunity of foreign sovereigns for transactions predating 1952 and thus be inconsistent with Congress' intent not to affect the substantive law of liability."[139]

Perhaps realizing the drawbacks inherent in general legislative intent analysis,[140] the three courts also applied another methodology. Unfortunately, the courts' choice was the vested rights approach. The court in *Carl Marks* explained the vested rights analysis of the FSIA as follows:

> If the FSIA is merely remedial, it can be applied retroactively. To say that a statute is remedial is simply to say that it does not prejudice antecedent rights. Thus, if absolute sovereign immunity is not a matter of right, the FSIA is merely remedial and can be applied retroactively to sovereigns' commercial activities, because sovereigns had no antecedent right not to be sued for the consequences of such activities.[141]

Although "antecedent right" has taken the place of the term "vested right" in this passage, and the word "remedial" is used to identify a statute that does not affect such rights, the approach used is essentially the vested rights approach, and its circular reasoning is obvious.[142] The court merely has shifted the issue to the question: What is an antecedent right? Nevertheless although the courts in these three cases failed to define antecedent rights, they did latently apply prongs of the *Linkletter/Stovall* test in their analyses.[143]

For example, in explaining why retroactive application of the FSIA to pre-1952 transactions would affect foreign sovereigns' antecedent

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139 *Slade*, 617 F. Supp. at 357.

140 *See supra* note 43 and accompanying text. For alternate interpretations of the language of the FSIA, *see infra* note 197 and accompanying text.

141 *Carl Marks*, 665 F. Supp. at 337.

142 When the court spoke of "antecedent rights," it was referring to "vested rights," and not merely to rights existing prior to the enactment of the FSIA. Preceding the quoted explanation, the court had analyzed the plaintiff's contention that "a statute may be applied retroactively . . . if its retroactive application would not interfere with 'substantive' or 'vested' rights." *Id.*, at 336. The portion of the opinion containing the term "antecedent rights" continued from this analysis and likewise referred to vested rights. *Id.* at 337. *See also Jackson*, 596 F. Supp. at 389 ("a statute shall not be retroactively applied to alter antecedent rights"), and *Slade*, 617 F. Supp. at 358 ("to apply the FSIA [here] would clearly prejudice the antecedent rights of Mexico"), for examples of similar use of the term "antecedent rights."

Other courts have used the term "antecedent rights" in FSIA retroactivity discussions such that the term similarly implied more than a temporal meaning. *See, e.g.*, Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 n.1 (S.D.N.Y. 1978); Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne, 605 F.2d 648, 654 (2d Cir. 1979).

143 *See supra* notes 57-76 and accompanying text. The definitional analysis, *supra* notes 51-56, was of no help here because the establishment of jurisdiction in these cases was clearly not merely procedural or remedial.

rights, the three courts determined the reasonableness and extent of reliance on the overturned law, and the effect of retroactive application of the new rule on the administration of justice.[144] As the *Jackson* court stated:

> At the time of the issuance of the bonds in 1911 up until the date of their maturity in 1951, China relied on the well-founded expectation that the then extant, almost universal doctrine of absolute sovereign immunity governed all interactions between her and the United States and the citizens of the two respective countries. Concomitantly, China had no expectation of being haled into a court in the United States to answer for any default of the bond issue.[145]

Similarly, the *Slade* court stated:

> [T]o apply the FSIA to the underlying transactions would clearly prejudice the antecedent rights of Mexico. Between 1922 and 1951, the government of Mexico could safely assume that the then existing doctrine of absolute immunity governed any commercial transaction between it and the United States or its citizens. Mexico could therefore not reasonably anticipate being haled into court in the United States for defaulting on public debt instruments. . . . The Court finds that because Mexico may have reasonably relied on these factors in structuring its conduct prior to 1952, it would be inequitable to divest Mexico of the absolute immunity it enjoyed in 1922 by applying the FSIA to this case.[146]

Thus, the conclusive establishment by *Jackson*, *Slade*, and *Carl Marks* that the FSIA should not be retroactively applied to pre-1952 events stands up to the principles promoted by this Comment as the correct principles to apply in clarifying the retroactive application of the FSIA.[147] Although these principles are developed in further detail in Section IV(B)(2) of this Comment, they deserve a brief mention at this point in relation to pre-1952 claims. First, because every provision in the FSIA changes the pre-1952 doctrine of absolute sovereign immunity, there is no confusion with regard to the definition of terms.[148] Second, there is no need to consider the non-jurisdictional provisions separately to determine their retroactive application,[149] because lack of jurisdiction precludes the retroactive application of other provisions of the FSIA to pre-1952 events.[150] Last and most importantly, although the courts in

144 *See supra* notes 69-76 and accompaning text (*i.e.*, the second and third prongs of the *Linkletter/Stovall* test).

145 *Jackson*, 596 F. Supp. at 389.

146 *Slade*, 617 F. Supp. at 356 (footnotes omitted). *See also Carl Marks*, 665 F. Supp. at 339.

147 *See infra* notes 181-83 and accompanying text.

148 Such is the case because the FSIA did not codify any part of the pre-1952 absolute sovereign immunity doctrine. Thus, no provision applies merely preactively to pre-1952 claims to cause confusion in the definition of terms. *See infra* notes 166-68 and accompanying text.

149 *See* the second principle enunciated, *infra* notes 169 and 182 and accompanying text.

150 Recognition of the third principle enunciated (the "double-edged sword" effect) is actually

these three cases purportedly relied only on the general legislative intent analysis and the vested rights approach,[151] they also employed aspects of the *Linkletter/Stovall* test. Thus, the decisions are in accordance with the fourth principle this Comment promotes.[152] These four principles will be described in further detail in Section IV(B)(2).

B. Post-1952 Retroactivity

1. A State of Confusion

Although *Jackson*, *Slade*, and *Carl Marks* conclusively established that the FSIA could not be retroactively applied to claims arising prior to the issuance of the Tate Letter,[153] the three cases did not resolve the issue of FSIA retroactivity with respect to claims arising subsequent to the issuance of the Tate Letter. As the court in *Carl Marks* stated: "We need not . . . reach the question whether the FSIA applies to claims that arose between 1952 and 1977, because the claims presently at issue arose well before 1952."[154]

Courts that have reached the question, instead of resolving the issue, have exhibited considerable confusion and uncertainty. Whereas some courts have held the FSIA to be retroactively applicable to pre-FSIA events, other courts have held to the contrary, denying retroactive application in similar situations.

For example, the court in *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne*[155] stated that it was not the "manifest intention of the legislature" to apply the FSIA retroactively, and that "applying the Immunities Act . . . [would] prejudice very substantial antecedent rights of

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beyond the scope of this Comment, because the question whether the *denial* to apply the FSIA retroactively to pre-1952 claims would take away rights of plaintiffs is not analyzed here (this Comment only shows that the retroactive application of the FSIA to pre-1952 events would take away rights of sovereign defendants). Nevertheless, because it is fairly safe to predict that such denial would not adversely affect plaintiffs' claims, it will be assumed that the principle is not applicable here.

151 Application of the definitional analysis, *supra* notes 51-54 and accompanying text, is unnecessary here because each provision of the FSIA implied more than mere procedural changes to the pre-1952 absolute sovereign immunity doctrine. Of course, an entirely different situation arises with respect to changes made to the post-1952 restrictive sovereign immunity doctrine. *See infra* notes 201-07, 221-22 and 234-36 and accompanying text.

152 *See infra* notes 176-83 and accompanying text.

153 These three cases constitute existing case law in its entirety on the subject of pre-1952 FSIA retroactivity. As the *Carl Marks* court stated: "The only cases relevant to the present inquiry are *Slade* . . . and *Jackson* . . . ." *Carl Marks*, 665 F. Supp. at 348 (dismissing other cases cited by the plaintiff as involving post-1952 retroactivity).

154 *Carl Marks*, 665 F. Supp. at 323. *See also id.*, 841 F.2d at 26.

155 605 F.2d 648 (2d Cir. 1979).

the appellees."[156] In contrast, the court in *Yessenin-Volpin v. Novosti Press Agency*[157] concluded that because the FSIA did not create new rights of immunity, but merely codified the restrictive principle of sovereign immunity, applying the substantive provisions of the FSIA to an action commenced before its effective date would *not* interfere with such rights of the parties.[158] The *Yessenin-Volpin* court found that "applying the Immunities Act to the instant case [would] give effect to the congressional intent and [would] not interfere with the antecedent rights of the parties . . .."[159] The *Yessenin-Volpin* court also stated that, "insofar as the Immunities Act alters the rights of parties, it does so by expanding the ability of plaintiffs to obtain satisfaction of judgments against foreign states."[160] Revealing similar inconsistencies, although numerous courts have given retroactive effect to various provisions of the FSIA,[161] under like circumstances, numerous courts have also *declined* to give retroactive effect to the same provisions.[162]

Moreover, other courts have applied the FSIA to claims arising prior to its enactment without even discussing the problem of FSIA retroactivity. For instance, in *Schmidt v. Polish People's Republic*,[163] the court found that it had jurisdiction under the FSIA's commercial activity exceptions, noting that the "FSIA gives the Court jurisdiction over any non-jury civil action against a foreign state as long as the defendant is not

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156 *Id.* at 654.

157 443 F. Supp. 849 (S.D.N.Y. 1978).

158 *Id.* at 851 n.1.

159 *Id.*

160 *Id.*

161 *See, e.g.*, Banco para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913 (2d Cir. 1981), *aff'd*, 462 U.S. 611 (1983) (assuming FSIA could be applied retroactively); Upton v. Empire of Iran, 459 F. Supp. 264 (D.D.C. 1978), *aff'd*, 607 F.2d 494 (D.C. Cir. 1979) (applied the FSIA retroactively, thereby concluding that the "direct effect" test had not been satisfied and the foreign state was immune from suit); National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) (retroactively applied a provision of the FSIA that created a new basis for asserting *in personam* jurisdiction over a foreign sovereign); and the cases cited therein.

162 *See, e.g.*, Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 791 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (concluded that the Congress did not intend for the FSIA to confer subject matter jurisdiction retroactively); Ohntrup v. Firearms Center, Inc., 516 F. Supp. 1281 (E.D. Pa. 1981), *aff'd*, 760 F.2d 259 (3d Cir. 1985) (declined to give the provisions governing subject matter jurisdiction retroactive effect); Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 428 F. Supp. 1035, 1037 (S.D.N.Y. 1977) (refused to apply the FSIA retroactively because "the very wording of section 1330(a) that the 'district courts *shall have* original jurisdiction' is prospective") (emphasis in original); Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Buma Negara, No. 77 Civ. 263 (S.D.N.Y. Mar. 7, 1977) (memo endorsement) (refused to grant retroactive application); and the cases cited therein.

163 579 F. Supp. 23 (S.D.N.Y.), *aff'd*, 742 F.2d 67 (1984).

entitled to sovereign immunity."[164] The court reached this conclusion without any discussion of the retroactive effects of the FSIA, even though the operative events in the claim at issue occurred no later than 1966.[165]

As a result of these inconsistencies in the case law, the extent to which the FSIA may be retroactively applied to claims arising subsequent to the issuance of the Tate Letter, yet prior to the enactment of the FSIA, remains unresolved.

2. *Understanding the Confusion and the Development of Principles to Clear the Confusion*

To resolve the confusion regarding FSIA retroactivity, it is first necessary to understand the confusion. This Comment suggests that such confusion is a product of the courts' systematic failure to:

(1) develop and apply a coherent and workable definition of retroactivity and other related concepts;
(2) recognize that whereas some sections of the FSIA may apply retroactively, other sections should not (*i.e.*, retroactivity is not an "all or none" proposition);
(3) recognize that because of the FSIA's "sole basis" characteristic, nonretroactive application of certain sections nevertheless ultimately results in retroactive application; and
(4) apply methods of interpretation other than the conclusory "vested rights" analysis.

As to the first item, a major source of confusion in discussions of retroactive law is the failure to define the underlying concepts. Courts discussing FSIA retroactivity with regard to post-1952 events commonly speak of the statute as "retroactive" in nature, even when it is obvious that the portions of the FSIA under consideration are merely preactive.[166] For example, the court in *Yessenin-Volpin* concluded that the FSIA should be given "a retrospective operation" to determine immunity in the case, even though the court recognized that:

> [T]he Act does not purport to create new rights of immunity but to "codify the so-called 'restrictive' principle of sovereign immunity . . . [which] was adopted by the Department of State in 1952 and has been followed by the courts and the executive branch ever since." . . . Indeed, insofar as the

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164 *Schmidt*, 579 F. Supp. at 26 (quoted in *Carl Marks*, 665 F. Supp. at 348).

165 *Id. See Carl Marks*, 665 F. Supp. at 348. Other courts likewise have applied the FSIA to pre-enactment events without a corresponding discussion of FSIA retroactivity. *See, e.g.*, Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Asociacion de Reclamantes v. United Mexican States, 561 F. Supp. 1190 (D.D.C. 1983), *aff'd*, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985).

166 No such problem is encountered when dealing with pre-1952 events because the FSIA is entirely retroactive in such instances. *See supra* note 148 and accompanying text.

> Immunities Act alters the rights of parties, it does so by expanding the ability of plaintiffs to obtain satisfaction of judgments against foreign states.[167]

Thus, the court stated that it gave the FSIA "retrospective" (*i.e.*, retroactive) effect, even though the case involved no change to prior law—it did not involve the satisfaction of judgment. Such inconsistent use of the terminology surely adds to the confusion in this area.[168]

Closely associated with this inconsistency is the next source of confusion—the failure to recognize that whereas some sections of the FSIA may apply retroactively, others may not. Some sections of the FSIA merely codify the restrictive theory of sovereign immunity and involve no change to prior law. Courts that broadly declare that the FSIA should or should not be applied retroactively without distinguishing between the different provisions are therefore painting with too broad a brush.[169] Because FSIA retroactivity is not an "all or none" proposition, any meaningful analysis of retroactivity must consider each provision on an individual basis.

Regarding the third source of confusion, it is undisputed that the FSIA is now the sole basis for suing foreign sovereigns in U.S. courts.[170] When this "sole basis" characteristic is coupled with changes the FSIA makes to prior law, FSIA retroactivity operates as a double-edged sword in certain instances. In other words, not only is the statute "retroactive" if the courts expressly apply its provisions to pre-enactment claims, under certain circumstances, it is also "retroactive" if the courts expressly *decline* to apply its provisions to pre-enactment claims.

Consider, for example, the changes the FSIA makes to prior law concerning jurisdiction. The statute restricts jurisdiction over a foreign sovereign to *in personam* jurisdiction, thus eliminating *in rem* and *quasi in rem* jurisdiction. Although *in rem* and *quasi in rem* jurisdiction were available and exercised under the Tate Letter, there was no clear way to secure *in personam* jurisdiction over a foreign state prior to the enactment of the FSIA—in effect, such jurisdiction was unavailable.[171] The FSIA changed this by establishing a federal long-arm statute which provides several bases for asserting *in personam* jurisdiction over a foreign

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167 *Yessenin-Volpin*, 443 F. Supp. at 851 n.1 (citation omitted).

168 For other examples of inconsistent use of the term "retroactive" in FSIA cases, *see* Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281, 1283 (E.D. Pa. 1981); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

169 *See, e.g.*, Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne, 605 F.2d 648 (2d Cir. 1979); Banco para el Comercio Exterior de Cuba v. First Nat'l City Bank, 658 F.2d 913 (2d Cir. 1981), *rev'd*, 462 U.S. 611 (1983).

170 *See supra* note 121.

171 *See supra* notes 96-100 and accompanying text.

state.[172]

Several arguments can be made against the retroactive application of this *in personam* jurisdiction. Prior to the FSIA, foreign sovereigns with assets located within the United States could reasonably expect they might be subjected to suit via *in rem* or *quasi in rem* jurisdiction. They had no reason to expect, however, that they might be called on to defend an action via *in personam* jurisdiction if they had no property in the United States. Had they been aware of this possibility, foreign sovereigns affected by the *in personam* provision would have had the opportunity to alter their behavior. In addition, it may be argued that retroactivity should be denied with regard to this jurisdictional provision because it creates a new cause of action.

Thus, the application of this jurisdictional provision to pre-enactment claims would retroactively affect the rights of foreign defendants as shown above. The *denial* of such application, however, would also retroactively affect the rights of U.S. plaintiffs.[173] This is true because the jurisdictional provision in the FSIA eliminates the bases of jurisdiction that existed prior to its enactment. Because *in personam* jurisdiction is now the sole basis for asserting claims under the FSIA,[174] if plaintiffs are denied the ability to assert *in personam* jurisdiction to claims arising after 1952 but pre-FSIA, they are thereby denied a cause of action previously available to them.[175]

The resulting elimination of such causes of action certainly involves retroactive effect to pre-FSIA claims, even though it results from an attempt to circumvent another retroactive effect—*i.e.*, the imposition of a new form of jurisdiction upon foreign sovereigns. As a result, the ques-

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172 *See supra* notes 118-20 and accompanying text.

173 *See infra* note 186 and accompanying text.

174 *But see* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989). The Second Circuit in *Amerada Hess* held that a court may have jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 (1982), over claims against foreign governments for violations of international law. The court concluded that such claims were not barred by the FSIA even though they do not fall within an FSIA exception. *Id.* This holding is truly novel, however, and is inconsistent with the rulings of the vast majority of courts. *See* Comment, *Foreign Sovereign Immunity After Amerada Hess Shipping Corp. v. Argentine Republic: Did It Go Down with the Hercules?*, 11 FORDHAM INT'L L.J. 660 (1988). Moreover, the holding was recently reversed by the Supreme Court. *See* 488 U.S. 428 (1989).

175 The court in National American Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979), recognized this "double-edged sword" effect in holding that the FSIA was applicable retroactively to afford the plaintiff a basis for acquiring *in personam* jurisdiction over the foreign sovereign defendant. As the court pointed out, "once jurisdictional attachments have been eliminated, *in personam* jurisdiction under the Act would be the only means of asserting jurisdiction, regardless of whether the events underlying the suit occurred prior to the effective date of the Act." *Id.* at 639.

tion here is not merely whether the jurisdictional sections of the FSIA should apply preactively because such application entails retroactive consequences, but, as shown above, one must also recognize that the failure to apply these sections also may entail retroactive consequences. The courts therefore cannot merely take the position that retroactivity is evil and deny one choice or the other since both choices involve retroactivity.

The final source of confusion is the courts' failure to employ all available methods of interpretation in determining whether the FSIA is to be applied retroactively to post-1952 claims.[176] Although the courts apparently recognize the drawbacks of general legislative intent analysis,[177] they have relied primarily upon the conclusory "vested rights" approach, rather than applying other methods of retroactive interpretation.[178] As previously discussed, the vested rights approach rests upon circuitous definitions and precludes the employment of other more meaningful analyses.[179] Although the definitional analysis occasionally shows up in post-1952 FSIA retroactivity discussions, no court has expressly employed a *Linkletter/Stovall*-type test to determine retroactivity.[180]

Four guiding principles with regard to retroactive, preactive, and prospective application of the FSIA therefore may be distilled from these observations of the sources of confusion in this area.[181] These principles, which should be followed by courts attempting to decide the issue of FSIA retroactivity, are as follows:

(1) The development and application of a coherent and workable definition of the retroactivity, preactivity, and prospectivity concepts is necessary to arrive at the proper conclusion.

(2) The recognition that FSIA retroactivity is not an "all or none" proposition (*i.e.*, that some sections should be applied retroactively, whereas other

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176 Such methods include: (1) general legislative intent analysis; (2) the vested rights approach; (3) definitional analysis; and (4) the *Linkletter/Stovall* test. *See supra* notes 40-76 and accompanying text.

177 *See supra* note 43 and accompanying text.

178 *See, e.g.*, National Am. Corp. v. Federal Republic of Nigeria, 448 F. Supp. 622, 639 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648, 654 (2d Cir. 1979); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786, 790-91 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981); Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 (S.D.N.Y. 1978).

179 *See supra* notes 47-50 and accompanying text

180 Of the 54 reported federal cases discussing FSIA retroactivity, not one court has applied the *Linkletter/Stovall* test. This Comment thus proposes use of not only the definitional analysis, but also the *Linkletter/Stovall* test, when confronted with these issues of statutory retroactivity.

181 In fact, these principles are actually reformations of these observations because they constitute ways to circumvent the confusion by applying the converse of the source of the confusion.

sections should not) is necessary to arrive at the proper conclusion.[182]
(3) Recognition of the "double-edged sword" effect of the FSIA, which results from its "sole basis" characteristic coupled with the changes made to prior law, is necessary to arrive at the proper conclusion.
(4) Application of all methods of retroactive interpretation, including the definitional analysis and *Linkletter/Stovall* test, is necessary to arrive at the proper conclusion.[183]

V. A Proposed Solution

By applying the four principles enunciated above to various sections of the FSIA, this Comment now attempts to arrive at sound answers to the question of FSIA retroactivity.

A. Retroactivity of FSIA Sections Codifying Maxims of Sovereign Immunity

Whereas some sections of the FSIA drastically change the existing law of sovereign immunity,[184] other sections merely codify aspects of restrictive sovereign immunity embodied within the Tate Letter.[185] A primary purpose of the FSIA was to codify the restrictive theory of sovereign immunity. In accordance with this purpose, the sections of the FSIA that exclude foreign sovereign immunity with respect to claims arising out of commercial or proprietary actions do not impose new liability upon foreign sovereigns. Indeed, they only clarify liability which has existed since 1952.[186]

Applying the first principle advanced in the previous section (the proper definition of concepts), it becomes evident that the question of retroactivity is nonexistent with regard to these sections. A statute that merely codifies existing law is not retroactive according to the legal definition of the term. Because no change in prior law is involved in the

182 FSIA prospectivity, for instance, *is* an "all-or-none" proposition, for it is not disputed that all sections of the FSIA should and do apply prospectively.

183 The inadequacies of the "vested rights" approach have already been extensively discussed, *see supra* notes 47-50 and accompanying text. Because of such inadequacies, the "vested rights" approach is not considered a meaningful method of retroactive interpretation by this Comment and thus will not henceforth be applied.

184 *See supra* notes 129-131 and accompanying text.

185 *See supra* notes 109-114 and accompanying text.

186 As the Court stated in *Alfred Dunhill*:

> Although it had other views in years gone by, in 1952, as evidenced by [the Tate Letter] attached to this opinion, the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time . . . .

Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 699 (1976).

sections codifying the existing restrictive theory of sovereign immunity, it is illogical to speak of "retroactive" implications. Thus, the sections of the FSIA that codify Tate Letter maxims without change should apply preactively to post-1952 actions, and there is no question of retroactivity to be resolved in relation to these sections.

This process of isolating the provisions of the FSIA that do not change prior law is consistent with the second principle advanced in the previous section (recognition that FSIA retroactivity is not an "all or none" proposition). By considering these provisions separately, we have left open the question whether other sections of the FSIA may be retroactive. The third and fourth principles (recognition of the "double-edged sword" effect and employment of all methods of retroactive interpretation) do not apply because such principles concern retroactivity, not mere preactivity as is involved here.

B. Retroactivity of Sections Altering Maxims of Sovereign Immunity

In contrast to the sections of the FSIA which merely codified the existing maxims of sovereign immunity under the Tate Letter, other sections of the FSIA drastically changed the rules of sovereign immunity. Specifically, the FSIA imposed three major changes to prior law: (1) jurisdictional changes; (2) authoritative changes; and (3) executionary changes. Applying the first principle advanced (the proper definition of concepts) to the sections of the FSIA that brought about these changes, "retroactivity" issues abound.[187] Application of the second principle (recognition that FSIA retroactivity is not an "all or none" proposition) allows us to distinguish the sections involving retroactive implications. Thus, in order to resolve the issue of retroactivity as it relates to these sections of the FSIA, it is necessary to apply the third and fourth principles (recognition of the "double-edged sword" effect and employment of all methods of retroactive interpretation) to these sections. After such application, it will become clear which sections should be retroactively applied,[188] and which sections should merely be prospectively applied.[189]

1. Jurisdictional Changes

The first major change the FSIA makes to prior practice is jurisdictional. As previously discussed, the FSIA eliminates *in rem* and *quasi in*

187 *See* the applicable definitions, *supra* notes 24-27 and accompanying text.

188 This retroactivity encompasses not only preactivity but also prospectivity since it is not disputed that all sections of the FSIA apply prospectively.

189 As will be shown, all three major changes thus should apply retroactively to post-1952 events. *See supra* notes 129-131 and accompanying text.

rem jurisdiction for suits against foreign sovereigns, and it creates bases for asserting *in personam* jurisdiction over foreign sovereigns through the establishment of a federal long-arm statute with service of process provisions.[190] The retroactive consequences concerning these changes have already been noted in the explanation of the "double-edged sword" effect.[191] Application of the third principle (recognition of the "double-edged sword" effect) thus shows that retroactive implications are encountered even when this change to prior law is held to not apply to pre-enactment conduct.[192] One must look, therefore, toward meaningful methods of interpretation for an answer to the question of the retroactivity of these jurisdictional sections. Reliance upon the historic antipathies toward retroactive laws is no way out.[193]

In applying the fourth principle promoted (employment of all methods of retroactive interpretation) to these jurisdictional changes, it is necessary to consider the various methods of interpretation.[194] The drawbacks of general legislative intent analysis have already been outlined.[195] Nevertheless, three prominent indications of legislative intent appear from the face of the statute and its legislative history. These clues point, however, in opposite directions.

First, the FSIA's preamble states that "[c]laims of foreign states to immunity should *henceforth be decided* . . . in conformity with the principles set forth in this chapter."[196] This wording seems to suggest that all claims, regardless of when they have accrued, should, if decided subsequent to the effective date of the statute, be subject to its provisions. Thus, the language appears to point toward retroactive application.[197] Second, the legislative history explains that the FSIA was to take effect

190 28 U.S.C. §§ 1608-1611.

191 *See supra* notes 170-75 and accompanying text, demonstrating that retroactive consequences result whether the new *in personam* jurisdiction provisions of the FSIA are applied or not applied to actions arising prior to the enactment of the FSIA yet subsequent to the issuance of the Tate Letter.

192 *Id.*

193 For a list of these historical antipathies, *see supra* text accompanying notes 28-39.

194 If such differing methods point to opposite results, the *Linkletter/Stovall* test retains priority because it constitutes the most meaningful analysis. *See supra* note 77 and accompanying text.

195 *See supra* note 43 and accompanying text.

196 28 U.S.C. § 1602 (emphasis added).

197 *See* Comment, *Foreign Sovereign Immunities Act—Retroactive Application—Liability of People's Republic of China for Defaulted Railway Bonds*, 79 AM. J. INT'L L. 456, 457 (1985), where the author states: "Some courts have interpreted this language to authorize application of the FSIA's provisions immediately upon the effective date of the Act, thereby allowing application to actions pending on that date or instituted thereafter regardless of the dates of the underlying events." For examples of this interpretation, see Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978); Corporacion Venezolana de Fomento v. Vintero Sales Corp., 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). In the latter case, the court concluded that the "henceforth" language was applicable only to the substantive immunity provisions of the FSIA, and not to

90 days after its enactment since "[a] 90-day period [was] deemed necessary in order to give adequate notice of the act and its detailed provisions to foreign states."[198] This provision, contrary to the preamble, indicates that Congress did not intend for the FSIA to apply to causes of action accruing prior to the enactment of the FSIA, because "[s]uch a postponement of a statute's effective date is evidence of the legislature's desire that it be given prospective application only."[199] Finally, the legislative history also shows that "[t]he [FSIA] bill [was] not intended to affect the substantive law of liability."[200]

Taking these manifestations of intent together, it becomes obvious that Congress was not clear as to the retroactive effect of the FSIA. The first and second indications of legislative intent appear to point to opposite results, whereas the third indication points to a "Catch-22" situation. As shown by the "double-edged sword" effect, if both the application and inapplication of the FSIA jurisdictional provisions result in retroactive effects, the "substantive law of liability" *must* be affected. Thus, general legislative intent analysis provides no solution here. We must therefore turn to another methodology.

Employment of the definitional analysis to the jurisdictional provisions of the FSIA requires a determination as to whether these provisions are merely procedural changes to prior practice. According to the definitional analysis, if such changes are merely procedural, they may be retroactively applied.[201] Upon first impression, the changes imposed by the new service of process sections appear to be merely procedural. It is difficult to imagine, however, that the elimination of *in rem* and *quasi in rem* jurisdiction, and the creation of bases for *in personam* jurisdiction under the FSIA's long-arm statute, are procedural changes only. Nevertheless, the Supreme Court in *McGee v. International Life Insurance Co.*[202] allowed the retroactive application of a state long-arm statute on the ground that the legislation was "remedial . . . and neither enlarged nor

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the jurisdictional section, as to which "[t]he Preamble [of the FSIA] does not purport to say anything about the retroactive application . . . ." *Vintero Sales*, 629 F.2d at 790 (footnote omitted).

On the other hand, some courts have interpreted the "henceforth" language to imply merely prospective effect. *See, e.g., Jackson*, 794 F.2d at 1497; *Slade*, 617 F. Supp. at 357; *Carl Marks*, 665 F. Supp. at 336. For an explanation of these alternate interpretations of the language of the FSIA, *see supra* notes 136-139 and accompanying text.

198 H.R. Rep. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6632.

199 Buccino v. Continental Assurance Co., 578 F. Supp. 1518, 1527 (S.D.N.Y. 1983). *See* Ocean & Atmospheric Science v. Smyth Van Line, Inc., 446 F. Supp. 1158, 1159 (S.D.N.Y. 1978).

200 S. REP. No. 1310, 94th Cong., 2d Sess. 11 (1976); H.R. REP. No. 1487, *supra* note 100.

201 *See supra* notes 51-54 and accompanying text.

202 355 U.S. 220 (1957).

impaired substantive rights."[203]

The FSIA long-arm statute, however, can be distinguished from that in the *McGee* case on several points. The Court in *McGee* justified its retroactive application as follows:

> [E]xpanding the permissible scope of state jurisdiction . . . is attributable to the fundamental transformation of our national economy over the years . . . . With this increasing nationalization of commerce has come a great increase in the amount of business . . . across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[204]

Applying the same logic to the FSIA, it is true that there has been a fundamental transformation of the international economy over the years. Accompanying the increasing internationalization of commerce has been a great increase in the volume of business across national lines.[205] In addition, modern transportation and communication have made it much less burdensome for a foreign sovereign to defend himself in a country where he engages in economic activity. However, the same justifications of ease in communication and transportation or the increased flow of business are simply not present to the same degree between a state and foreign government. Moreover, as indicated by the quoted passage, the Court in *McGee* was obviously thinking primarily in domestic terms when it retroactively applied the long-arm statute.[206] Thus, the factors involved in *McGee* are sufficiently different from those applicable to the FSIA so that the decision should not be construed as binding precedent. Nevertheless, although *McGee* may not be controlling, it is persuasive in promoting the retroactive application of the FSIA's jurisdictional provisions via the definitional analysis.[207]

Finally, employment of the *Linkletter/Stovall* test to determine the retroactivity of the FSIA jurisdictional provisions requires the assessment and balancing of three factors—purpose, reliance, and effect.[208] In consideration of the first prong of this test, a court must search for the purpose of the new law and the impact retroactivity would have upon

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203 *Id.* at 224.

204 *Id.* at 222-23.

205 *See generally* Maier, *The Politics of Productivity: Foundations of American International Economic Policy After World War II*, 31 INT'L ORG. 607 (1977).

206 For example, the Court referred to "our national economy" and "state lines." *McGee*, 355 U.S. at 222-23.

207 Commentators have criticized the substance-procedure distinction the definitional analysis employs. *See, e.g.*, Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 COLUM. L. REV. 1105, 1117-19 (1963) [hereinafter *Retroactive Expansion*].

208 *See supra* notes 57-64 and accompanying text.

that purpose.[209]

Of the five purposes of the FSIA previously discussed in this Comment, the third and fifth (to provide well-defined rules for service of process and to create bases for asserting *in personam* jurisdiction, and to not affect the substantive law of liability) are relevant here. As is readily apparent, the jurisdictional changes made to prior law were a product of the third purpose, and their retroactive application would be consistent with such purpose, thereby filling the gap in prior law. However, because foreign defendants could thus be held liable in situations where they were not previously capable of being held liable (*i.e.*, in situations where jurisdiction could be imposed via the *in personam* jurisdictional provisions), retroactive application of the provisions is in conflict with the fifth purpose of the FSIA. Specifically, such retroactive application would affect the substantive law of liability. Nevertheless, when one considers the "double-edged sword" effect and realizes that the *denial* to apply the provisions retroactively would also affect the substantive law of liability, the fifth purpose becomes insignificant. Thus, the purpose prong of the *Linkletter/Stovall* test weighs in favor of retroactive application.

As to the reliance prong of the test, the party seeking relief from retroactivity must demonstrate that he or she actually depended upon the existing state of the law and took some action, or refrained from taking some action, in compliance with what that party believed the law to be.[210] Under the Tate Letter, only *in rem* or *quasi in rem* jurisdiction could be successfully asserted over a foreign sovereign.[211] Thus, prior to the enactment of the FSIA, foreign sovereigns had no reason to expect that they might be called on to defend an action in a state where they had no property. Theoretically, there is a strong possibility that foreign sovereigns relied on the old rule of law. Thus, upon initial examination, it appears that the second factor of the test weighs against retroactive application.

Upon closer examination, however, one realizes that there is also a

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209 As this Comment has previously noted, the FSIA explicitly encompassed four basic purposes: (1) to codify the restrictive theory of sovereign immunity as embodied within the Tate Letter; (2) to depoliticize the issue of sovereign immunity by placing the responsibility for its resolution exclusively in the hands of the judiciary; (3) to fill a gap in the prior law by providing well-defined rules for service of process upon foreign states and to create bases for asserting *in personam* jurisdiction over foreign states; and (4) to rectify the logical inconsistency formerly existing between the rules of immunity from suit and execution. *See supra* notes 106-127 and accompanying text. In addition, legislative history also reveals a fifth purpose of the FSIA—to not affect the substantive law of liability. *See supra* note 139 and accompanying text.

210 *See supra* notes 69-71 and accompanying text.

211 *See supra* notes 96-100 and accompanying text.

strong possibility that U.S. plaintiffs relied upon the old rule of law. Potential plaintiffs who dealt with foreign sovereigns with assets located within the United States had reason to believe that they could bring suit against such foreign sovereigns for commercial activity. Again, recognition of the "sole basis" holding and the "double-edged sword" effect points to the fact that if retroactive application of the new *in personam* jurisdictional provisions is denied, U.S. plaintiffs will be left without a cause of action. Thus, upon closer examination, it appears that the second factor of the test may also favor retroactive application. Nevertheless, because it is nearly impossible to prove actual reliance upon the old law as the second prong requires, and because it is likely that the actions of both U.S. plaintiffs and foreign sovereign defendants would have been the same whether the old rule prevailed or not, the second factor of the test appears to be neutral.

Lastly, in considering the effect prong of the test, a court must make a determination as to the equities involved or examine the effects of retroactivity upon the administration of justice.[212] One commentator has summarized the possible injustice resulting from the retroactive application of a long-arm statute:

> [A]s the relationship between defendants and the state becomes more attenuated, thereby reducing the state's need to protect its citizens, and as the likelihood of the defendants' reliance on the prior lack of jurisdiction increases, situations may arise in which exercise of jurisdiction so opposes "traditional notions of fair play" that due process is violated.[213]

Although this reasoning brings out possible inequities associated with the retroactive application of the FSIA's jurisdictional provisions, it is unlikely these inequities exist. In fact, as will be shown, the equities favor retroactive application.

First, the "direct effect" requirements of the FSIA's long-arm provisions ensure that the relationship between the U.S. plaintiff and the foreign sovereign defendant is not highly attenuated.[214] Second, as discussed under the consideration of the second prong of the *Linkletter/Stovall* test, the defendant's reliance upon the old law not only is speculative, but is neutralized by the plaintiff's corresponding reliance upon the old law.[215] Third, the plaintiff in FSIA suits most likely is the party who has been wronged because he or she is the party that seeks help from the judicial system. Based on these observations and the fact that no real-

212 *See supra* notes 72-76 and accompanying text.

213 *Retroactive Expansion, supra* note 207, at 1123. Note how the reliance and effect prongs of the *Linkletter/Stovall* test are greatly intertwined.

214 *See supra* notes 111-114 and accompanying text.

215 *See infra* notes 210-11 and accompanying text.

world implications appear to indicate adverse impact on the administration of the new jurisdictional provisions, the equities weigh in favor of retroactive application here.

As a result, the provisions of the FSIA which eliminate *in rem* and *quasi in rem* jurisdiction and provide bases for asserting *in personam* jurisdiction over foreign sovereigns through the establishment of a federal long-arm statute should be retroactively applied to claims arising subsequent to the issuance of the Tate Letter. As shown, the definitional analysis promotes retroactivity here, as does employment of the *Linkletter/Stovall* test.[216]

2. *Authoritative Changes*

The second major change the FSIA makes to prior practice is that it vests exclusive authority in the judiciary to determine whether a particular foreign sovereign is immune from suit.[217] Application of the third principle (recognition of the "double-edged sword" effect) to these authoritative provisions has no cognizable effect. The failure to apply these new provisions to pre-enactment conduct would not result in a retroactive effect as would, for instance, the failure to apply the new jurisdictional provisions to pre-enactment conduct.[218] The judicial determination of sovereign immunity was already available under the prior practice, and the enactment of the new provision did not disregard an existing immunity determination with the corresponding imposition of a new one.[219]

In applying the fourth principle (employment of all methods of retroactive interpretation) to the authoritative changes, it is again necessary to consider the differing methods of interpretation.[220] Under the definitional analysis, it appears that these authoritative changes are entirely procedural in nature because they merely change the process by which it is determined whether a particular foreign sovereign is immune from suit. To a large extent, however, these provisions of the FSIA might also

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216 Although the second prong (reliance) was proven to be neutral in this instance, both the first (purpose) and third (effect) prongs of the test weigh in favor of retroactive application.

217 28 U.S.C. § 1602 (1976).

218 *See supra* notes 191-92 and accompanying text.

219 That is, the enactment only made the existing immunity determination by the State Department unavailable to foreign sovereigns.

220 The three prominent indications of legislative intent were brought out in the application of the legislative intent analysis to the jurisdictional changes. *See supra* notes 196-200 and accompanying text. The same general discussion and conclusion that this analysis provides no solution likewise applies here.

be characterized as creating substantive or fundamental rights that greatly affect the positions of the parties.

Under the prior procedures, a foreign government could employ its diplomatic resources to seek a recommendation from the State Department that the court should dismiss a particular case on the ground of sovereign immunity.[221] With the enactment of the FSIA, however, these diplomatic channels have been closed. Determination according to objective judicial standards is now the exclusive means of immunity determination available to foreign sovereigns. It may be argued that the substitution of judicial determination only for judicial determination plus State Department influence affected much more than "mere modes of procedure." Employment of the definitional analysis thus is not conclusive with respect to the retroactivity issue as it relates to these authoritative changes.

Finally, employment of the *Linkletter/Stovall* test to the FSIA authoritative provisions requires the assessment and balancing of the purpose, reliance, and effect factors.[222] As to the purpose prong of the test, only the second purpose of the FSIA—to depoliticize the issue of sovereign immunity by placing the responsibility for its resolution exclusively in the hands of the judiciary and thereby providing a unitary determination of claims[223]—is relevant here. It is readily apparent that the retroactive application of the authoritative changes would be consistent with this purpose. Such application not only depoliticizes the determination of immunity, but it also provides for a uniform system of determination.[224] Thus, the first prong of the *Linkletter/Stovall* test weighs in favor of retroactive application.

In considering the reliance prong of the test, a court must search for reliance on the old rule of law, which allowed a foreign government to employ its diplomatic resources to obtain immunity from suit.[225] Even if the new FSIA provisions precluding this diplomatic resourcefulness are declared to be mere procedural changes, it is important to recognize that procedural laws may induce reliance. Nevertheless, as was the case with the jurisdictional provisions, because it is nearly impossible to prove actual reliance upon the old law, and because it is likely that foreign sover-

221 *See supra* notes 90-92 and accompanying text.

222 *See supra* notes 57-64 and accompanying text.

223 *See supra* note 209.

224 This reasoning seems to lie on the borderline of circuitousness. Nevertheless, consideration of the first prong of the test may be accomplished only through using this single relevant purpose. The fifth purpose is not relevant here since retroactive application of the authoritative provisions in no way changes the substantive law of liability.

225 *See supra* notes 90-92 and accompanying text.

eign defendants' actions would have been the same whether the old rule prevailed or not,[226] the second factor of the test appears to weigh in as neutral.

Two other important factors, however, tip the balance. First, by eliminating the role of the State Department in determinations of immunity, the FSIA "[brought] the United States into conformity with the immunity practice of virtually every other country."[227] Because the United States abided by the restrictive theory of sovereign immunity and, in general, the restrictive theory does not allow for such politicization in immunity determinations, foreign sovereigns had reason to believe that this inconsistency was not likely to last forever.[228] Second, although the executive branch often did make determinative suggestions to the judiciary on immunity issues under the prior practice, such suggestions in no way constituted a right held by foreign sovereigns. If the State Department failed to present a recommendation for immunity in a case, the judicial determination prevailed.[229] Thus, the standards for granting immunity which existed prior to the FSIA—involving two different branches of the government—"were neither clear nor uniform."[230] Surely a foreign sovereign would not place a great amount of reliance upon these unclear and irregular standards of determination. Thus, the reliance prong of the test favors retroactivity.

Lastly, as to the effect prong of the test, retroactivity is favored if the court is unable to identify a consequence that either is fundamentally unfair or is laden with real-world implications for the operation of administrative or judicial bodies.[231] With respect to the consequence of unfairness, although it may be inequitable to foreign sovereigns to eliminate existing diplomatic channels, it was and would continue to be more inequitable to U.S. plaintiffs to allow the existence of such channels. By bas-

226 It is difficult to believe that a foreign sovereign would not engage in commercial activity in the United States merely because it was afraid that if it were sued based upon such commercial activity, it could not pressure the government of the United States to shield it from liability.

227 Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 428 F. Supp. 1035 (S.D.N.Y. 1977) (citing H.R. REP. No. 1487, *supra* note 100, 1976 U.S. CODE CONG. & ADMIN. NEWS at 6605-06.

228 *See Jackson*, 794 F.2d at 1493, where the Court said of these suggestions: "This proved troublesome, because foreign nations at times placed diplomatic pressure on the State Department, and political considerations led to suggestions of immunity where it was not available under the restrictive theory . . .." (citing Verlinden, B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983)).

229 *See supra* notes 90-92 and accompanying text.

230 *See Federal Jurisdiction Over Foreign Citizens' Nonfederal Claims*, *supra* note 91, at 598. Commentators have criticized the political undertones of the State Department's then-existing system of determining sovereign immunity issues and the inconsistent results which were produced by having both the executive and judiciary branches involved.

231 *See supra* notes 72-76 and accompanying text.

ing determinative decisions of sovereign immunity on politics or current foreign relation policies, the objective and independent characteristics of the judiciary are abandoned. Moreover, the plaintiff in FSIA suits is likely to be the party who has been wronged. Thus, the equities involved appear to weigh in favor of retroactive application.

As to the second possible consequence, although retroactive application does not have adverse implications as to administration, the denial of retroactive application may have such implications. Under the old practice for determining immunity, two branches of government were involved, and the governing standards were "neither clear nor uniform." It may thus be argued that the operative complications in having two branches make the immunity determinations and the inconsistent standards that emerge properly point toward retroactive application. Therefore, the effect prong seems to favor retroactivity.

In sum, the provisions of the FSIA that vest exclusive authority in the judiciary to determine whether a particular foreign sovereign is immune from suit should be retroactively applied to claims arising subsequent to the issuance of the Tate Letter. Although employment of the definitional analysis provides no clear solution to the issue of retroactivity with respect to these provisions, employment of the Linkletter/Stovall test conclusively establishes that retroactive application of these provisions is the correct result.

3. Executionary Changes

The third major change the FSIA makes to prior practice is that it permits the execution of judgment against commercial property of foreign sovereigns.[232] The third principle (recognition of the "double-edged sword" effect) is inapplicable to these executionary provisions. The failure to apply these new provisions to pre-enactment conduct results in no change to prior law since execution of judgment was not available under the prior practice. In other words, if the provisions are not retroactively applied, plaintiffs are in the same position after the FSIA's enactment as they were before the FSIA's enactment; execution would not be possible.

In applying the fourth principle (employment of all methods of retroactive interpretation) to these executionary changes, it is necessary as before to consider the differing methods of interpretation.[233] Under the

232 28 U.S.C. § 1610 (1976).

233 The first and second indications of legislative intent again appear to point to opposite results. *See supra* notes 196-200 and accompanying text for a discussion of these indications. The third indication of legislative intent (*i.e.*, the legislative intention not to affect the substantive law of liability) weighs against retroactive application of the executionary provisions. To supply a remedy where

definitional analysis, it appears at first that these executionary changes are entirely remedial in nature, because in providing for the execution of judgment, they merely affect the remedies available to the plaintiff. Closer examination, however, again may lead to a different result.

For instance, as the court in *Nevins v. Revlon, Inc.*[234] stated: "Where a statute may greatly affect the position of the parties, it will not be construed retrospectively .... [T]o supply a remedy where previously there was none of any kind is to create a right of action."[235] Analogously, the executionary provisions of the FSIA supply a remedy where the realization of the plaintiff's award previously was dependent upon the goodwill of the foreign government involved.[236] Thus, the executionary provisions appear to create a right of action, and therefore, they should not be retroactively applied. This result conflicts with the first observation that such changes appear to be merely remedial in nature. This conflict, taken together with the fact that this new mode of execution is severely restricted (as will be discussed further), indicates that the definitional analysis of retroactivity is inconclusive, producing a neutral result.

Finally, the *Linkletter/Stovall* test must be applied to determine the retroactivity of the FSIA executionary provisions. In considering the purpose prong of this test, the fourth and fifth purposes of the FSIA (to rectify the logical inconsistency formerly existing between the rules of immunity from suit and execution, and to not affect the substantive law of liability) are relevant here. As is readily apparent, the executionary changes made to prior law are consistent with the fourth purpose, and their retroactive application would be consistent with this purpose.

However, because foreign defendants could ultimately be forced to account for judgments in situations where they were not previously obligated to do so, retroactive application of the provisions appears to be in conflict with the fifth purpose of the FSIA. In actuality, though, the creation of such a right to execution of judgments does not affect the substantive law of liability, because all liabilities imposed under the new law already could have been imposed under the prior law.[237] The new

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previously there was none of any kind is to create a right of action. This provision thereby has a perceptible impact on the substantive law of liability. Thus, general legislative intent analysis appears to weigh against retroactivity.

234 23 Conn. Supp. 314, 182 A.2d 634 (Super. Ct. 1962).

235 *Id.* at 317, 182 A.2d at 636.

236 *See supra* note 104 and accompanying text.

237 This is true unless, of course, the new *in personam* jurisdictional changes provide for the imposition of liability in a situation where it was impossibile to impose such liability before. *See supra* notes 170-175 and accompanying text. Nevertheless, as the discussion of these jurisdictional

provisions carry out this liability only by providing for recovery of an award granted upon a finding of such liability. Thus, the purpose prong of the test favors retroactive application.

As to the reliance prong of the test, foreign sovereigns with assets located within the United States previously had no reason to expect that such assets could be seized for the satisfaction of judgments against them. Despite the Tate Letter's adoption of the restrictive theory as to the right to sue a foreign sovereign, the absolute theory continued to apply to the execution of judgments after its issuance.[238] The executionary provisions of the FSIA substantially changed this by making property of a foreign state used for a commercial activity in the United states subject to execution or attachment under the circumstances set forth in the statute.[239] As with the jurisdictional provisions, there is therefore a theoretical possibility that foreign sovereigns relied on the old rule of law.[240] Due to this possible reliance, the second prong weighs against retroactive application.

In addition to the defenses against this tendency brought out in the jurisdictional and authoritative provisions discussions,[241] however, two other factors point toward retroactive application. First, as already mentioned, the new executionary provisions rectified the logical inconsistency that existed between the application of restrictive immunity rules to immunity from suit, and absolute immunity rules to the execution of judgments.[242] Foreign sovereigns had reason to believe that this inconsistency was not likely to last forever. Moreover, even under the Tate Letter, execution of judgment was allowed against certain foreign sovereigns according to the terms of a number of U.S. treaties which permitted the execution of judgments against corporations owned by foreign sovereigns.[243] The Geneva Convention on the Territorial Sea and the Contiguous Zone[244] also recognized the liability to execution, under appropriate circumstances, of sovereign-owned vessels used for commercial activity. It must be noted that aside from these specific situations, the United States prior to the enactment of the FSIA had taken the posi-

changes shows, the "double-edged sword" effect neutralizes any effects on the substantive law of liability.

238 *See supra* notes 101-104 and accompanying text.

239 28 U.S.C. § 1610.

240 *See supra* notes 210-11 and accompanying text.

241 *Id.*

242 *See supra* notes 101-104 and accompanying text.

243 *See, e.g.*, Treaty of Friendship, Commerce, and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

244 Geneva Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, arts. 20 & 21, 15 U.S.T. 1606, T.I.A.S. No. 5639 516 U.N.T.S. 205 (effective Sept. 10, 1964).

tion that property of foreign sovereigns was absolutely immune from execution.[245] Nevertheless, these two factors strongly weigh against the reliance of foreign sovereigns on the prior law. Thus, the second prong of the test favors retroactivity here.

Lastly, applying the effect prong to the FSIA's executionary provisions, it seems unfair to subject property of a foreign sovereign to execution or attachment in aid of execution when the property previously was not subject to such execution. Two factors, however, overcome this apparent unfairness. First, when one looks at the actual requirements surrounding this execution, much of the bite is taken out of any apparent inequities. For instance, in determining whether execution is permissible under the FSIA, certain types of property continue to be immune from execution. Funds of a foreign central bank held for its own account in the United States are exempt from execution,[246] as is property of a foreign state if it is "of a military character" or "under the control of a military authority or defense agency."[247]

Moreover, for execution to be allowed, the property must fall within one of five specific categories. These five categories are: (1) property over which the defendant state has waived immunity against execution;[248] (2) property which was used for the commercial activity that gave rise to the claim upon which the judgment is based;[249] (3) property which was taken in violation of international law, or which was exchanged for property taken in violation of international law;[250] (4) real property that is the subject of an action determining rights in the property, where the property was acquired by gift or succession and was used by the foreign state in commercial activity;[251] and (5) proceeds of liability insurance policies owned by foreign states.[252] In examining these five exclusive categories, no fundamental unfairness appears to result from their retroactive application.

The application of the first category to pre-enactment events does not even involve retroactivity because execution in such instances was

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245 Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931); Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469, 473 (Sup. Ct. Westchester County 1959).

246 28 U.S.C. § 1611(b)(1).

247 *Id.* § 1611(b)(2).

248 *Id.* § 1605(a)(1).

249 *Id.* § 1605(a)(2).

250 *Id.* § 1610(a)(3).

251 *Id.* § 1610(a)(4)(A).

252 *Id.* § 1610(a)(5).

already available under pre-FSIA law.[253] With regard to the third exception, which involves property associated with a violation of international law, it would be difficult to think of a situation where the equities would weigh in favor of the sovereign defendant that committed the violation. The same difficulty would result with respect to the fourth and fifth categories. As to the fourth category, such property would be the subject of a determination that the property properly belonged to the plaintiff. As to the fifth category, the equities also weigh in favor of the plaintiff due to the plaintiff's injury and the fact that execution on a liability insurance policy does not involve taking property directly from the foreign sovereign.

Thus, only the second category remains available to shift the equities in favor of foreign sovereigns. It seems, though, that the reasons favoring retroactivity which were brought out in the reliance discussion relating to the executionary provisions apply equally to making the commercial property which is the subject of the suit against the foreign sovereign subject to execution. This category involves only property that had not been subject to execution previously because of inconsistency in the law,[254] or that was specifically included within existing international agreements.[255]

Moreover, as in the jurisdictional provisions, the plaintiff in FSIA suits most likely is the party who has been wronged. Property falling under the second category will be subject to execution only where a trier of fact has already found that the plaintiff has been wronged. By applying this portion of the FSIA retroactively, U.S. plaintiffs no longer will merely have a "right without a remedy."[256] Adding in these two factors, the third prong of the test clearly favors retroactivity.

As a result, the provisions of the FSIA that permit the execution of judgment against commercial property of foreign sovereigns should be retroactively applied to claims arising subsequent to the issuance of the Tate Letter. As shown, although the definitional analysis produces a neutral result, employment of the *Linkletter/Stovall* test conclusively establishes that retroactive application of these provisions is the correct result.[257]

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253 *See supra* notes 101-04 and accompanying text. *See also* the applicable definition of "retroactivity," *supra* note 26 and accompanying text.

254 *See supra* notes 242-47 and accompanying text.

255 *See supra* notes 243-45 and accompanying text.

256 This was the case under the Tate Letter. *See supra* notes 101-04 and accompanying text.

257 The first (purpose), second (reliance), and third (effect) prongs of the test all weigh in favor of retroactive application.

VI. CONCLUSION

The issue of FSIA retroactivity with respect to claims arising subsequent to the issuance of the Tate Letter is currently engulfed with uncertainty and confusion. This Comment has attempted to resolve this confusion and to provide a solution to the issue of FSIA retroactivity. Through the delineation of the sources of the confusion, four basic principles which may be applied to circumvent the confusion were identified. These principles encompass: (1) the proper definition of concepts; (2) recognition that FSIA retroactivity is not an "all-or-none" proposition; (3) recognition of the "double-edged sword" effect; and (4) application of all methods of retroactive interpretation. When such principles are systematically applied to various provisions of the FSIA, the proper conclusions as to which sections should be retroactively, preactively, or merely prospectively applied to claims arising subsequent to the issuance of the Tate Letter become clear.

This application establishes that provisions of the FSIA which do not alter maxims of sovereign immunity, but which merely codify portions of the Tate Letter, should be preactively and prospectively applied. This is because such provisions concern no change to prior law, and thus, no retroactivity issue is involved. Regarding the provisions of the FSIA which do change existing maxims of sovereign immunity, application of the four principles strongly favors retroactivity. Thus, the provisions of the FSIA which:

1) eliminate *in rem* and *quasi in rem* jurisdiction and provide exclusive bases for asserting *in personam* jurisdiction over foreign sovereigns through the establishment of a federal long-arm statue with service of process provisions;[258]
2) vest exclusive authority in the judiciary to determine whether a particular foreign sovereign is immune from suit;[259] and
3) permit the execution of judgment against specified properties of foreign sovereigns[260]

should be retroactively applied to claims arising subsequent to the issuance of the Tate Letter.[261]

This Comment not only suggests that courts applying the FSIA should acknowledge these principles so that less conclusory and more meaningful analyses of FSIA retroactivity may be applied, but it also suggests that all courts should acknowledge such principles when con-

258 28 U.S.C. §§ 1608-1611.
259 *Id.* § 1602.
260 *Id.* § 1610.
261 The provisions should likewise be prospectively applied. Preactive application is also presumed by the retroactive application. *See supra* notes 26-28 and accompanying text.

fronted with issues of statutory retroactivity. Proper definition of the underlying concepts, recognition of the "all-or-none" proposition and "double-edged sword" effect, and applying methods of retroactive interpretation other than the "vested rights" approach, such as the *Linkletter/Stovall* test, would all enable courts to arrive at consistent and conclusive solutions.

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