RECENT DEVELOPMENTS

FOREIGN SOVEREIGN IMMUNITY—COMMUNIST AND SOCIALIST ORGANIZATIONS—EFFECT OF STATE'S SYSTEM OF PROPERTY OWNERSHIP ON DETERMINATION OF AGENCY OR INSTRUMENTALITY STATUS UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976.

In 1970 plaintiff,[1] Edlow International Company, obtained a supply of uranium for a Yugoslavian nuclear power plant operated by defendant Nuklearna Elektrarna Krsko, a "workers organization"[2] created under Yugoslavian law. For its services, plaintiff was to receive a brokerage fee which defendant refused to pay.[3] Plaintiff brought suit in United States District Court for the District of Columbia to recover on the alleged agreement. Defendant moved for dismissal on jurisdictional grounds, claiming that the court lacked diversity jurisdiction.[4] Defendant also contended that subject matter jurisdiction did not exist because the organization did not satisfy the definition of an agency or instrumentality of a foreign sovereign according to the Foreign Sovereign Immunities Act of 1976.[5] Plaintiff countered this assertion by claiming that

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[1] A District of Columbia corporation acting as a broker in connection with sales of nuclear fuels.

[2] CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA, Art. XXXV defines the work organization as follows: "An independent self-managing organization of workers linked in labor by common interests and organized in basic organizations of associated labor."

[3] In order to reap certain tax benefits, plaintiff billed defendant for its services through its Bermuda subsidiary, Edlow Resources Ltd. Defendant then refused to pay claims on grounds that plaintiff had not been a party to the sale of uranium.

[4] Defendant attacked diversity jurisdiction based on 28 U.S.C. 441 at 829 § 1332(a)(2) (1970) which states:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between - (2) citizens of a state and citizens or subjects of a foreign state.

Plaintiff's claim of a $24,000 brokerage fee satisfied the jurisdictional amount required, but defendant asserted that since the real plaintiff was Edlow Resources, Ltd., a Bermuda corporation, the court lacked diversity jurisdiction because no citizen of states were involved in the litigation.

[5] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11 (1976) [hereinafter the Act]. The Act defines an agency or instrumentality of a foreign state as follows:

> Any entity which is a separate legal person, corporate or otherwise, and which is

defendant met the definitional requirements of an "agency or instrumentality of a foreign state"[6] according to the Act, and that the Act granted jurisdiction to the district court.[7] *Held*, dismissed. A foreign state's system of property ownership, without more, should not be determinative on questions of whether an entity operating in such state is a state agency or instrumentality under the Foreign Sovereign Immunities Act. *Edlow International Company v. Nuklearna Elektrarnna Krsko*, 441 F. Supp. 827 (D.D.C. 1977).

In the second case plaintiff,[8] Yessenin-Volpin, brought a libel action in the New York Supreme Court claiming that defendants, Novosti Press Agency (Novosti),[9] TASS Agency (TASS),[10] and The Daily World, a newspaper of the Communist Party of the United States, had printed materials injurious to him. Defendants Novosti and TASS filed a petition for removal to the United States District Court for the Southern District of New York, which was granted. Defendants Novosti and TASS then moved for dismissal, asserting that under the Foreign Sovereign Immunities Act of 1976 they were agencies or instrumentalities of foreign states[11] and therefore immune from jurisdiction. In light of the

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an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and which is neither a citizen of a state of the United States . . ., nor created under the laws of any third country.

28 U.S.C. § 1603(b)(1)-(3) (1976).

[6] *Id.*

[7] 28 U.S.C. § 1330(a) (1976) states:

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

[8] An outspoken defender of the civil and human liberties of the Russian people.

[9] Novosti Press Agency (hereinafter Novosti) is an information agency of Soviet public organizations. It is organized under Articles 125 and 126 of the Constitution of the U.S.S.R. which guarantees freedom of the press through control of mass media facilities and the right to organize other public organizations such as Novosti. Novosti has fixed assets of 1.7 million roubles and the free use of property owned by the government valued at 3 million roubles. Novosti's charter states that "no Soviet state organ bears responsibility for the business activities and financial obligations or any other financial obligations or any other actions of the Agency." Novosti Statute § III(10), *quoted in* Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978).

[10] Tass Agency (hereinafter TASS) is an organ of the government of the U.S.S.R. whose full name is the Telegraph Agency of the Soviet Union of the U.S.S.R. Council of Ministers. *Id.* at 852.

[11] *See* note 5, *supra.*

evidence and case law,[12] plaintiff conceded TASS's claim of immunity, but countered Novosti's motion by asserting that defendant was not an agency of a foreign state according to the Act because the Soviet state was not responsible for defendant and that defendant was not an organ of the state. *Held*, dismissed. Defendants, being essentially public in nature, may claim immunity. *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978).

The practice of granting immunity to foreign sovereigns is "founded on an implied consent on the part of all sovereigns, as a matter of comity, to a relaxation of the complete jurisdiction which each naturally enjoys while within his own territory."[13] Under the theory of absolute sovereign immunity, a foreign sovereign, without his consent, could not be brought into court regardless of the nature of his act.[14] This theory of sovereign immunity quickly developed to cover all acts of a sovereign. However, as early as 1812 Chief Justice Marshall recognized[15] that

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[12] The evidence primarily consisted of affidavits from Anatoliy Dobrynin, the Soviet Ambassador, which certified that TASS was an organ of the Soviet State. The British case law relied upon was Krajina v. The Tass Agency, [1949] 2 All E.R. 274 (C.A.).

[13] Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S. 2d 201, 204 (1940).

[14] As of this writing, only the United Kingdom and the socialist states of Eastern Europe and Asia accept the absolute theory of sovereign immunity. The socialist countries' position is described in N. LEECH, C. OLIVER & J. SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 308 (1973), which states:

> Socialist states are committed to the "absolute theory" of sovereign immunity and claim international law requires that it be granted even in cases where the litigation arises from commercial activities. In many states in Western Europe and elsewhere, however, the courts apply the "restrictive theory" and deny immunity to socialist states—and other states—in litigation arising from such activities. Socialist states look upon the denial of immunity in these cases as unwarranted interference with the conduct of their trade abroad through state monopolies.

The United Kingdom signed the Council of Europe's European Convention on State Immunity and Additional Protocol on May 16, 1972 which adopted the restrictive theory of sovereign immunity. Even so, one author says that "the United Kingdom has not, however, at this time finally adopted the restrictive theory, notwithstanding significant recent decisions by courts leaning in that direction." von Mehren, *Foreign Sovereign Immunites Act of 1976*, 17 COL. J. TRANSNAT'L L. 33, 39. (1978). *But see* Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 AM. J. INT'L L. 423 (1977), which states that Britain accepts the restrictive theory in *in rem* proceedings. *See* Trendtex Trading v. Central Bank of Nigeria, [1977] 2 W. L. R. 356; *see also* The Phillipine Admiral, [1975] 1 W. L. R. 1492.

[15] The Schooner Exchange v. McFaddon, 11 U.S. (7 Crnch) 116 (1812).

although absolute immunity was the norm,[16] there might be times when a sovereign would undertake activities, such as the purchase of real estate in a foreign state, that place him within the jurisdiction of the courts of the land.[17] In 1891 the Institut de Droit International recognized that there should be a distinction between a state's acts as a trader and its acts as a sovereign.[18] This idea, together with the trend of the case law in the first half of this century, was expressed as the restrictive theory of sovereign immunity. It was labeled the restrictive theory because it granted immunity to foreign sovereigns with regard to public acts only. If a foreign sovereign was involved in a suit arising from private or commercial activity, he was not accorded immunity and could be brought into court. The trend toward the restrictive theory began developing quickly among the European community for three main reasons: 1) the increasing respect in civilized states for the rule of law;[19] 2) the expanding practice on the part of governments of engaging in commercial activities;[20] and 3) the emergence of the U.S.S.R. and its communist economy.[21]

Until 1952, the United States had followed a policy of applying the absolute theory of foreign sovereign immunity and allowing the Department of State, rather than the courts, to decide questions of foreign sovereign immunity.[22] In that year the Depart-

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> One sovereign being in no respect amendable to another; and being bound by obligations of the highest character not to degrade the dignity of his nature by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent Sovereign station, though not expressly stipulated, are preserved by implication, and will be extended to him.

Id. at 137.

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> A prince by acquiring private property within a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual.

Id. at 145.

[18] Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution*, 27 MICH. L. REV. 751 (1929).

[19] von Mehren, *supra* note 14.

[20] *Id.*

[21] E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS, CHIEFLY IN CONTINENTAL EUROPE, 431 (1933) *cited in* Et Ve Balik Kurumu v. B.N.S. International Sales Corp., 25 Misc. 2d 299, 204 N.Y.S. 2d 971, 977 (1960)), *aff'd*, 17 App. Div. 2d 1013 (1960). *See also* Hervey, note 18, *supra* at 751.

[22] *See* von Mehren, note 14 *supra* at 41.

ment of State issued a bulletin,[23] commonly refered to as the "Tate Letter," announcing the adoption of the restrictive theory. The State Department continued to determine questions of sovereign immunity; however, ocassionally courts had an opportunity to rule on sovereign immunity in cases in which the State Department was neutral[24] or remained silent.[25] In doing so, problems arose as to the classification of certain foreign enterprises. One such problem which confused courts deciding the question whether an enterprise was an agency or instrumentality of a foreign sovereign was the nature of the enterprise's organizational structure. In *Krajina v. TASS Agency*,[26] a British court was faced with the claim by TASS that it was an agency or instrumentality of the U.S.S.R. and therefore immune from suit. The statute creating TASS stated in one clause that TASS had "all the rights of a juridical person,"[27] but in another clause stated that TASS was "an organ of the U.S.S.R."[28] The court held for TASS despite the contradictory statute on the basis of the Soviet Ambassador's certification of TASS as a department of the Soviet state and the lack of evidence to show that TASS was a separate entity. Another judicially perplexing problem was that of determining what constituted commercial activity for the purpose of applying the restrictive theory.[29]

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[23] 26 DEP'T STATE BULL. 984 (1952). The "Tate Letter" was a letter from the acting legal adviser of the Department of State to the Attorney General stating that in future the State Department would use the restrictive theory for its decisions regarding sovereign immunity. The letter noted the trend towards the restrictive theory and stated:

> [T]he Department feels that the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in court. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

Id. at 985.

[24] Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S. 2d 201 (1940).

[25] Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

[26] [1949] 2 All E.R. 274 (C.A.).

[27] *Id.* at 277.

[28] *Id.* at 276.

[29] *See* Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964). In that case, the court noted that the "Tate Letter" adopted the restrictive theory of sovereign immunity, but offered no guidelines for differentiation between public and private acts of a sovereign. In order to clear up the resulting confusion, the court established categories under which acts should fall if they are to be deemed public acts. These categories are as follows:

1. Internal Administrative acts, such as expulsion of an alien.

In the United States, after 1952, courts began taking different and sometimes inconsistent approaches to these problems.[30] Confusion concerning what constituted commercial activity prompted the court in *Victory Transport Inc. v. Comisaria General De Abastecimientos y Transportes*[31] to set guidelines as to what activities could be classified as public activities in which the foreign sovereign would be immune from suit.[32]

One difficulty in distinguishing those enterprises which have immunity from those that do not arose when an enterprise, chartered under the laws of a communist country, claimed sovereign immunity from suit. In these countries the state is theoretically the sole owner of the means of production,[33] there being no private ownership of property.[34] This makes every organization, in effect, an agency of the foreign sovereign possessing the opportunity to attain sovereign immunity.[35] Generally courts have been hesitant to declare such across-the-board immunity. In *Stephen v. Zivnostenska Banka National Corp.*,[36] the court questioned whether the enterprise was a "corporate jural

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2. Legislative acts, such as nationalization.
3. Acts concerning the armed forces.
4. Acts concerning diplomatic activity.
5. Public loans.

The Act, *supra* note 5, defines commercial activity in this way:

> [A] regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* [emphasis added] of the course of conduct or a particular transaction or act; rather than by reference to its purpose.

28 U.S.C. § 1603(d) (1976).

[30] In Petrol Shipping Corp. v. Kingdom of Greece, Ministery of Commerce, Purchase Directorate, 360 F.2d 103 (2d Cir. 1965), *cert. denied*, 385 U.S. 394 (1966), Greece's Ministry of Commerce claimed immunity from lawsuit or contract for purchases and shipment of grain, but immunity was denied. But in Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 103 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971), the court upheld sovereign immunity in an action based on a contract for grain shipments. The two cases were similar, but the results opposite. For a fuller discussion, *see* Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543 (1977).

[31] 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

[32] *See* note 29 *supra*.

[33] G. GUINS, SOVIET LAW AND SOCIETY 96 (1954). Guins described all legal entities and their relation to the state as follows: "With few insignificant exceptions, the socialist state is the sole owner of all means of production and is a trade monopolist. It is evident that all legal entities in the Soviet Union are government enterprises though organized on a commercial basis."

[34] "In a sense, the theory of communism may be summed up in the single sentence: Abolition of private property." K. MARKS & F. ENGELS, THE COMMUNIST MANIFESTO (1848).

[35] *See* note 33 *supra*.

[36] 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961).

entity, separate and distinct from the Republic of Czechoslovakia"[37] and answered affirmatively. In *Rovin Sales Corp. v. Socialist Republic of Romania*,[38] Romania set up an enterprise, Vinexport, to sell and export wine. It was sued by Rovin for breach of contract and Romania moved to dismiss on jurisdictional grounds, claiming immunity. The court failed to consider the potential ramifications of Romania's system of public ownership of property, and held that the enterprise was a foreign sovereign engaged in commercial activity, and therefore not immune to suits on its contracts.[39]

In order to clarify the subject of foreign sovereign immunity and codify pre-existing case law, Congress enacted the Foreign Sovereign Immunities Act of 1976.[40] The purpose of the Act was "to define jurisdiction of the United States in suits against foreign states, the circumstances in which foreign states are immune from suit, and in which execution may not be levied on their property."[41] Specifically the Act defined "foreign state," set up the scope of jurisdiction over these states, detailed immunity and its exceptions, outlined the procedures for service of process on foreign states, and codified pre-existing case law incorporating the restrictive theory of sovereign immunity. The Act shifted the responsibility for decisions on sovereign immunity from the State Department to the courts,[42] thus attempting to remove the potential influence of political considerations, and providing both parties an opportunity to be heard by a court of competent jurisdiction.

The *Edlow International* and *Yessenin-Volpin* cases are the first two post-Act cases in which the courts have grappled with the problem of whether an organization founded in a communist or socialist country is an agency or instrumentality of a foreign state because of that country's system of public ownership of property. The plaintiff in *Edlow International* attempted to establish subject matter jurisdiction by showing that defendant is an agency or instrumentality of the Socialist Federal Republic of Yugoslovia (Yugoslavia) under § 1603(a) of the Act. In order to

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[37] 15 App. Div. 2d 120, 222 N.Y.S.2d at 137.

[38] 403 F. Supp. 1298 (N.D. Ill. 1975).

[39] *Id.* at 1302.

[40] 28 U.S.C. §§ 1330, 1602-11 (1976).

[41] *Id.*

[42] H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* 15 INT'L LEGAL MAT'LS 1398 (1976).

qualify as an agency of a foreign state under § 1603(a) of the Act the entity must pass a three-part, cumulative test: first, it must be a "separate legal person;" second, it must be an organ of a foreign state or owned by a foreign state; and, third, it must be neither a citizen of the United States nor organized under the laws of any third country.[43] In *Edlow International*, defendant was a workers' organization which, under the constitution of Yugoslavia,[44] is neither state owned nor privately owned, but is "held and used in trust by the work organization for the general social good of all the Yugoslav people."[45] The plaintiff countered with the argument that in a socialist country all property is ultimately owned by the state and, therefore, NEK should be considered a state agency. The court rejected plaintiff's contention that Yugoslav public ownership of property was determinative on questions of state agency status on the grounds that such an argument was tantamount to categorizing all enterprises as agencies of the state. The court felt that it was Congress' intent that the definition of an agency or instrumentality of a foreign state should be construed broadly, but "there is no suggestion [in the Act] that a foreign state's system of property ownership, without more, should be determinative on the question whether an entity operating within the state is a state agency or instrumentality under the Act."[46]

To determine defendant's status the court examined two factors: first, the degree to which the defendant entity discharges a governmental function, and, second, the extent of government control of the operations of the entity.[47] The court noted that the role of a workers' organization in the Yugoslav economy is comparable to a corporation's role in the United States. To the extent that this analogy is valid, defendant must be discharging a private, commercial activity. The plaintiff next attempted to show that the Yugoslav government, through its pervasive set of rules and regulations, completely controls defendant to such a degree that it must be considered an agency of the government. It was noted, however, that the United States Supreme Court has ruled in domestic sovereign immunity cases that the degree of government regulation is not a conclusive determinant of an agency's

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[43] 28 U.S.C. § 1603(b) (1976).

[44] CONSTITUTION OF THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA, Art. XXXV.

[45] 441 F. Supp. at 831.

[46] *Id.* at 832.

[47] *Id.*

status as a subdivision of the government.[48] The defendant showed persuasively that, although the Yugoslav government exercised restriction over certain aspects of its operations, the government did not interfere with the day-to-day affairs of the work organization, and therefore it could not be considered subject to governmental control.

Since defendant did not meet the requirements for being an agency of a foreign state under the two tests derived from the Act,[49] the only other means by which it could be deemed an agency of the Yugoslav government would be a determination that the government owned at least fifty per cent of the entity by virtue of the state's ownership of property. The court summarily rejected this contention, holding that "this premise, however valid it may be in political theory, is not present to confer jurisdiction under the Foreign Sovereign Immunities Act."[50] Since defendant was not an organ of the Yugoslav state and was not owned by the state, the court found that it lacked subject matter jurisdiction under the Act.

In *Yessenin-Volpin*, defendants were trying to establish agency status for the purpose of obtaining immunity from suit by claiming that they were owned by the state according to the provisions of the Act.[51] The court took a step-by-step approach in comparing the case with the Act. First, the definition of "foreign state"[52] was closely examined to determine whether defendants might avoid the exceptions to immunity within the Act. The court was persuaded by affidavits of the Soviet Ambassador[53] and previous British case law determining similar issues that TASS was a foreign agency under the Act. Novosti's position was, however, not so clear. Both plaintiff and defendant agreed that Novosti was a separate legal entity and that it was not organized under the laws of any third country.

Having passed two of the three steps of the cumulative test for determining status as a "foreign state," the only question remaining was that of ownership. The determination of ownership and

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[48] United States v. Orleans, 425 U.S. 807, 815 (1976).

[49] 28 U.S.C. §§ 1330, 1602-11 (1976).

[50] 441 F. Supp. at 832.

[51] 28 U.S.C. § 1603(b) (1976).

[52] *Id.*

[53] Anatoliy F. Dobrynin, the Ambassador of the Soviet Union of the U.S.S.R. Council of Ministers.

[54] *See* Krajina v. The Tass Agency, [1949] 2 All E.R. 274 (C.A.).

control of Novosti was made much more difficult by the problem of translating the Soviet concept of property under a socialist system into the language of the Act. The court noted that sixty-three percent of Novosti's assets were "owned"[55] by the state and that public organizations such as Novosti are traditionally owned by the state under Soviet law. The question of ownership was further clouded by the distinction which must be made between government ownership and enterprise ownership. A detailed examination of the Soviet Constitution reveals that with few exceptions the state is the sole owner of the means of production.[56] The court found there to be little doubt that Novosti was an agency or political subdivision of the Soviet government.[57]

Generally, foreign states are accorded immunity unless their acts fall within the scope of one of the exceptions to immunity in the Act.[58] Under the commercial activities exception, plaintiff must prove that the act had a direct effect in the United States, done in connection with the commercial activity of the foreign agency.[59] Under the Act, "the commercial character of the activity shall be determined by reference to the *nature* of the course of conduct rather than by reference to its purpose."[60] The court found that Novosti had engaged in commercial activity but that the alleged libel was not committed in connection with such commercial activity. In this case the libel was printed in intra-governmental publications and not through commercially oriented

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[55] To figure the percentage of the government's ownership of Novosti, the court concluded that property valued at 2,941,500 rubles which was owned by the government and used by Novosti should be counted as the government's contribution to the ownership. This assumption may not be valid because the government still retains complete ownership of the assets and only lets Novosti use them. At best it could be claimed that the government was contributing an amount equal to the rental value of the property; at worst it could only claim a fair rate of depreciation on the property, which with appreciating land values or severe inflation could be negligible. At any rate, the government should not be able to include the property in the calculation of ownership rights when it has only given up the right to use the property and not the property itself.

[56] G. GUINS, note 2 *supra*, at 96.

[57] 443 F. Supp. at 854.

[58] 28 U.S.C. § 1605 (1976).

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> A foreign state shall not be immune from the jurisdiction of the courts of the United States or the States in any case . . . in which the action is based upon . . . an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605 (1976).

[60] 29 U.S.C. § 1603(d) (1976).

media.[61] The case was dismissed because plaintiff could not defeat Novosti's claim of sovereign immunity.

In many cases, after applying the restrictive theory of sovereign immunity, it will not matter whether an enterprise is classified as an agency of a foreign state if it is found to engage in commercial or private activity. Thus the plaintiff need not obtain subject matter jurisdiction over the agency under the Act, but instead can rely upon diversity jurisdiction over the foreign agency.[62] However, in cases such as *Edlow International*, where diversity jurisdiction is not available, classification of the enterprise will make a difference. Usually enterprises will attempt to show agency status in order to obtain immunity, so this classification should not be taken lightly.

The problem with communist and socialist countries is that, although political theory suggests that all property is owned and controlled by the state,[63] in reality some enterprises appear to be independent.[64] The court in *Yessenin-Volpin* took into consideration the Soviet Union's system of public ownership of property, whereas the *Edlow International* court found this factor nondeterminative. Complicating this problem is the fact that some enterprises are deemed by their charters to be separate entities, yet in another part of the same document, they are characterized as organs of the state.[65] Due to these contradictions, it is very difficult to apply the Act's definition of an agency or instrumentality of a foreign state to enterprises of socialist states.

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[61] The alleged libelous remarks were printed in several intergovernmental newsletters, including *Krasnaya Zveda*, the Central Organ of the Ministry of Defense of the U.S.S.R., *Izuestra*, the "Organ of the Soviets of Working Peoples Deputies," published by the Presidium of The Supreme Soviet of the U.S.S.R., and *Sovetskaya Rossia* (or *Russiya*), the "Organ of the Central Committee of the Communist Party of the Soviet Union, The Supreme Soviet of the Russian Federation of Socialist Soviets Republics (RSFSR) and the Council of Ministers of the RSFSR." (As translated from defendants affidavits and exhibits). The court seemed to place a great deal of weight on the fact that these intergovernmental publications should be privileged much as our Congressmen enjoy a conditional privilege when performing the duties of their office, and not within the definition of commercial activity. Noticeably absent, however, was mention by the court of the extent of abuse required to lose this privilege.

[62] 28 U.S.C. § 1330(a) (1976).

[63] *See* notes 33 and 34 *supra*.

[64] This point is illustrated by defendant in the principal case of *Edlow International*. Defendant for all intents and purposes was a separate entity similar to a corporation or other private organization. It was set up to be a "workers' organization," separate from the government of Yugoslavia. Despite the socialist form of government, defendant appeared on paper to be uncontrolled by the Yugoslav government. *See* note 2 *supra*.

[65] *See* note 26 *supra*, and accompanying text.

The superior approach to the problem was taken by the court in *Edlow International*. The court avoided the difficulty of applying the Act's definition to the socialist enterprise by holding that a country's system of property ownership, standing alone, is not determinative on the question of agency status. In deciding whether the socialist enterprise was an agency of the Yugoslav government, the court adopted two tests: a "governmental function" test and the control test. Although the degree to which the entity discharges a governmental function is an important fact to consider, it is not of itself wholly dispositive of agency status. The better test is that of control, because it is best fitted to these socialist enterprises. The control test avoids discussion of the political theory underlying communist or socialist systems and focuses on what should be the most important criterion in determining agency status—how much the daily operations of the enterprise are controlled by the government. By using the test on a case-by-case basis, courts can base determinations of immunity solely upon the ultimate question of whether the enterprise is engaging in commerical or private activity.

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