NOTES AND COMMENTS

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

April 15, 1987

Almost every issue of the *Journal* carries an article or a comment that involves the Foreign Sovereign Immunities Act.

When the bill that became the Act was before the Foreign Affairs Committee of the House, representatives of the Department of Justice, the Department of State and the American Bar Association testified with firm convictions in favor of the legislation and the exclusive prerogative of courts in sovereign immunity cases. A lone voice in the wilderness pleaded with and warned the members of the committee to step warily into a regime that would prevent courts from receiving messages from the executive branch concerning the propriety and desirability of grants of sovereign immunity in politically sensitive situations (*see Hearings on H.R. 11315*, 94th Cong., 2d Sess. (1976)). The reasons had been elaborated in published commentaries and need not be repeated here.

Since the Act was passed, suggestions of immunity from the Department of State have all but disappeared. That makes it all the more interesting to note *Jackson v. People's Republic of China* (596 F.Supp. 386 (N.D. Ala. 1984), 794 F.2d 1490 (11th Cir. 1986)), in which the Departments of State and Justice filed a "statement of interest" and presented an amicus brief and argument (*see* 81 AJIL 214 (1987)). The gist of the Government's presentation was that a default judgment against the People's Republic should be set aside "in the interest of bilateral relations between the two nations." It urged that the motion of the People's Republic to set aside the default judgment should be heard and that the Chinese representatives should be given an opportunity to have "a day in court" to argue that sovereign immunity rules the case. The courts granted the motion.

Is that action by the courts an abdication of prerogative to a usurper, or is it recognition by the courts of the exercise of a prerogative of the executive branch, even a constitutional prerogative? True, the Departments filed a "statement of interest," not a "suggestion of immunity," which before the FSIA the courts *always* accepted. But is a "suggestion" by another name any sweeter?

To the objector who in 1976 testified against the effort to deprive the courts of political advice in sovereign immunity cases, there is nothing surprising or objectionable in the decision by the Government to give that advice in this case. Congress was warned that the day would come when U.S. "foreign policy interests" would require executive branch intervention in order to prevent offense to a "friendly" foreign government. How fortunate for those interests in China that the strictures of the Foreign Sovereign Immunities Act did not deter the Department of State from fearlessly exercising its traditional prerogative.

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