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# LITIGATION AGAINST A STATE TRADER - A NO-WIN CONTEST

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A litigant who sues a state trading corporation for eight years through two trials,[1] four appeals,[2] and three certiorari denials,[3] and then finally wins a judgment for $411,203.72, but is unable to collect on his judgment, might feel a little discouraged about the fairness of a principle of law that denies him a right to recovery.[4] The principle is "sovereign immunity;" a sovereign state and its property, without its consent, are immune from the adjudicative processes of the courts in another sovereign state.[5] In traditional international law, it does not matter what kind of activity the state is engaged in; the mere fact that it is a sovereign state entitles it to immunity regardless of what it does.[6]

The state trading corporation (hereinafter "state trader") is the agency of a state's government that engages in commercial trading, but is also organized in a manner comparable with private business enterprises in the United States. It is entitled to the immunity of its principal, the sovereign state.

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1. Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 300 F. 891 (S.D.N.Y. 1924); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 299 F. 991 (S.D.N.Y. 1924).

2. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195 (2d Cir. 1929); Kunglig Jarnvagsstyrelsen v. National City Bank, 20 F.2d 307 (2d Cir. 1927); Kunglig Jarnvagsstyrelsen v. United States, 19 F.2d 761 (2d Cir. 1927).

3. Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 282 U.S. 896 (1931); Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 280 U.S. 579 (1929); Kunglig Jarnvagsstyrelsen v. National City Bank, 275 U.S. 497 (1927) (per curiam).

4. A negotiated settlement for $150,000 was accepted by the Swedish government in 1933. However, this settlement was a matter of grace made in acknowledgment of Sweden's sovereign immunity, not a matter of right in acknowledgment of the jurisdiction of American courts or their judgments.

5. *See, e.g.*, Berizzi Bros. Co. v. Steamship *Pesaro*, 271 U.S. 562 (1926); The Schooner *Exchange* v. M'Faddon, 11 U.S. (7 Cranch) 478 (1812); Aerotrade, Inc. v. Republic of Haiti, 376 F. Supp. 1281 (S.D.N.Y. 1974). *See generally* 45 AM. JUR. 2d *International Law* § 46 (1969); Annot., 25 A.L.R.3d 322 (1969).

6. Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, 869, *cert. denied*, 385 U.S. 822 (1966). The basic principle of the absolute independence of states has long been an established principle of law. *See, e.g.*, The Parlement Belge, 5 P.D. 197 (Ct. App. 1880).

The sovereign immunity principle is consistent with United States law.[7] The consequences of the defense of immunity in litigation are that a sovereign state does not have to accept service of a complaint or respond to a complaint against it or its agents. Nor, absent the state's permission, may its property be attached at the outset of litigation to obtain in rem jurisdiction.[8] Nor does it have to produce evidence in a trial, thereby preventing adjudication.[9] Finally, its property may not be attached for sale in a levy in execution of a judgment against it.[10] A plaintiff who has this principle applied at any stage of litigation against a state trader has been denied justice because his complaint has not been heard, has been dismissed, has not been considered on its merits for lack of evidence or has not been redressed for proven damages since the state's property is exempt from execution.

This article will show that current law applied in adjudicating wrongdoing by state traders against American citizens denies justice by failing to provide a means to enforce judgments. The failure exists in spite of legislation and court decisions attempting to eliminate the unfairness. These failures indicate there is a need for some kind of action. Since legislative action or a reformation of judicial thinking in the United States will not be adequate to solve a problem of such international dimensions, executive action through the Department of State will be necessary. There is no way to avoid an inadequacy of justice without prior executive action through international negotiation. Three propositions are accepted as fundamental causes for past failures, and as imperatives for executive action. The first is accepted as a practical requirement for fairness in any adjudication, and the second and third are historically established, unavoidable facts of international relations. First, fairness in any judicial proceeding requires that the plaintiffs be able to recover damages or have some other remedy for wrongful actions by state

7. *See* Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966).

8. *Ex parte* Republic of Peru, 318 U.S. 578 (1943). The Court stated that the question in such cases was "whether the jurisdiction which the court had already acquired . . . should have been relinquished in conformity to an overriding principle of substantive law." *Id.* at 588.

9. *See* Montship Lines, Ltd. v. Federal Maritime Bd., 295 F.2d 147 (D.C. Cir. 1961).

10. Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 299 F. 999 (S.D.N.Y. 1924). *See* notes 1-4 *supra* and accompanying text.

traders causing them damage or injury. Second, a sovereign state, including its agencies, is legally equal to all other sovereign states.[11] Third, a sovereign state and its agencies may not be compelled by another sovereign state to do anything except by consent, either in a treaty or some other form of agreement. The third proposition is a consequence of the second, and in both cases the state trader is considered to be an agency of the state, whether organized as a corporation or in any other form.

The courts, Congress, the Department of State and commentators have been trying for many years to eliminate the unfairness which these principles work on injured parties by developing rationalizations for holding foreign states liable in our courts without their express consent. The rationalizations have generally sought to show that consent is somehow to be implied in certain cases, such as where the principle has become part of the general body of international law, other parts of which the state has consented to abide by. Another rationale is that in those cases where a state engages in nongovernmental acts such as commercial trading, either directly, or through a state trader, it is no longer acting in a sovereign capacity and is therefore no longer entitled to immunity.[12] The proponents of this "restrictive theory" of sovereign immunity argue that the maintenance and advancement of economic welfare by a state in time of peace is sufficiently lacking in public purpose to be nongovernmental and reduces the sovereign, in so far as it engages in commercial activity, to the status of a nonimmune private person who becomes subject to the judicial power of another state. According to this view, the state's commercial activities are not entitled to the protection of the second and third propositions noted above.

The Supreme Court has dealt with this argument and has rejected

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11. This proposition is proclaimed as a principle in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 122-24, U.N. Doc. A/8028 (1970).

12. *See, e.g.*, Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 357-62 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). A more restrictive theory had been suggested earlier in The Schooner *Exchange* v. M'Faddon, 11 U.S. (7 Cranch) 478, 488 (1812):

> [T]here is a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power, and maintains the dignity and the independence of a nation.

it, at least as to state-owned ships.[13] In the principal case, the S.S. *Pesaro* was engaged in commercial transport,[14] and the plaintiff was suing for damages to a shipment of olive oil incurred while en route to the United States. The plaintiff sought jurisdiction at the outset of his case, as well as some assurance of collecting on any judgment by a libel in rem against the ship. The ship was owned and operated by the Italian government. After acknowledging the commercial character of the activity, the Court responded to arguments that the sovereign immunity doctrine did not apply to the facts by noting:

> We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.[15]

The Court concluded that the principles of sovereign immunity "are applicable alike to all ships held and used by a government for a public purpose."[16] State traders strongly endorse this view, since they believe there is no nonpublic activity by a government; there is no nongovernmental act by government. They believe that to say otherwise is a contradiction.[17]

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13. Berizzi Bros. Co. v. Steamship *Pesaro*, 271 U.S. 562 (1926).

14. In The Schooner *Exchange* v. M'Faddon, 11 U.S. (7 Cranch) 478 (1812), the Court found the *Exchange* entitled to sovereign immunity. However, since the *Exchange* had been converted into a warship of the French navy, the status of commercial vessels was left undetermined.

15. Berizzi Bros. Co. v. Steamship *Pesaro*, 271 U.S. 562, 574 (1926).

16. *Id.*

17. The rationale is that immunity applies because government property is not subject to litigation and under international law is immune from execution. This represents the official Department of State position. For example, see the exchange of telegrams concerning the seizure of the Cuban vessel *Las Villes* in Bilder, Christenson, Cohen, Huang, Kerley, Nilsen, Reis & Rubin, *Contemporary Practice of the United States Relating to International Law*, 56 AM. J. INT'L L. 526, 528 (1962), and the decision respecting two Cuban aircraft flown to Florida by defecting pilots. *Id.* at 529. Section 7 of the Suits in Admiralty Act, 46 U.S.C. § 747 (1970), authorizes the Secretary of State to direct consuls to claim immunity for United States' vessels or cargoes, under the purview of sections 1-4 of that Act, which are seized, arrested or attached by the process of a foreign court. The section also states that nothing in it shall prejudice or preclude a claim of immunity "from foreign jurisdiction in a proper case." At least until the qualifying phrase "in a proper case" is judicially defined, the law appears to commit the United States to the principle of sovereign immunity with respect to seizures of government property by foreign sovereigns, provided that there is no overriding treaty arrangement.

The position of the state traders simply reflects a realistic appraisal of international relations. Sovereign immunity is not a concept that may be split into two theories of "absolute" and "restrictive" immunities and then forced upon the community of nations. It is a historically established fact of international power that is not susceptible of being dealt with argumentatively. It is a facet of national integrity that may be disregarded only at the risk of disagreeable consequences to the United States and therefore must be dealt with by negotiation, rather than by taking a stand backed up by arguments to justify redefining sovereign immunity. The foundation of sovereign immunity derives

> from the consideration, that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic, rather than legal discussion. . . .[18]

Individual national efforts at eliminating the unfairness by a reclassification of sovereign activity based on perceived differences between commercial and nongovernmental private acts and public acts are misdirected because they are directed at unilateral action and fail to involve the express consent of foreign states that retain the power to retaliate against the imposition of any rule of law to which they have not given their express consent. The only way the problem has ever been resolved successfully has been by negotiated consent.[19] While this may not result in ideal solutions, it must be

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18. The Schooner *Exchange* v. M'Faddon, 11 U.S. (7 Cranch) 478, 489 (1812).

19. *See, e.g.*, Treaty of Friendship, Commerce and Navigation with Italy, 63 Stat. 2255, 2291-92 (1948), which provides:

> No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

*See also* Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, [1956] 2 U.S.T. 1839, T.I.A.S. No. 3593. It has been reported that in the ten-year period beginning in 1948 fourteen treaties with similar provisions were made by the United States. The practice was discontinued after 1958 because of the fear that such provisions would endanger the United States' ability to plead sovereign immunity in foreign courts. *See* Stetser, *The Immunity Waiver For State-Controlled Business Enterprises*

recognized as a practical necessity. The various types of unilateral action adopted to date espousing the restrictive theory have not been successful in enabling litigants to collect any money in response to a judgment as a matter of right, either by compelling payment of damages or by seizing and selling a foreign state's property without its consent in the same way that a private citizen may be forced to pay a judgment. Arguments have been made, adjudications have been accomplished, judgments have been rendered and arbitration has been compelled, but nothing has been paid under compulsion.[20] Efforts thus far have avoided the necessity of using political action to negotiate and obtain the consent of foreign states, so that their state trading agencies could be required to submit to court decrees and admit an unqualified obligation to respond in damages for adjudicated wrongdoing.[21]

Attempts at relief from the unfair effects of sovereign immunity have been accomplished when the foreign nation in question has had attachable property in the United States, by a finding that the right has been waived.[22] The waiver is found when there is, in effect, a consent to be sued, or where the sovereign is not really a party,[23]

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*in United States Commercial Treaties,* 1961 AM. SOC. INT'L L. PROC. 89, 90.

Short of agreement, section 5 of the Public Vessels Act, 46 U.S.C. § 785 (1970), attempts to encourage reciprocation by forbidding suits brought by foreigners in American courts against United States ships "unless it shall appear to the satisfaction of the court in which suit is brought that said [foreign] government, under similar circumstances, allows nationals of the United States to sue in its courts." State traders suing in American courts would be subject to this law.

20. Victory Transp., Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964).

21. *But see* the legislation proposed in *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary,* 93d Cong., 1st Sess., ser. 10 (1973). Section 1602 of the proposed law provides:

> [U]nder international law, states are not immune from the jurisdiction of foreign courts in so far as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgment rendered against them in connection with their commercial activities. . . .

Section 1601 of the law would exclude the non-commercial assets of a foreign state from execution, including certain bank deposits and military funds. *Id.* at 10-11.

22. *See, e.g.,* Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103 (2d Cir.), *cert. denied,* 385 U.S. 931 (1966); Flota Maritima Browning v. Motor Vessel Ciudad, 335 F.2d 619 (4th Cir. 1964); Victory Transp., Inc. v. Comisaria General, de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964). *Petrol Shipping* and *Victory Transport* involved arbitration agreements.

23. *See, e.g.,* Stephen v. Zivinostenska Banka Nat'l Corp. 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961). The court found that some of the assets which were the subject of the

or where an interpretation of the Federal Rules of Civil Procedure leads to a qualification of the immunity.[24]

Another successful and best known line of relief has been the Department of State's practice of advising courts of its opinion as to the merits of a particular claim by a foreign government to sovereign immunity for its agents. In *Ex parte Republic of Peru,* the Supreme Court described the practice and the principles involved in obtaining the approval of the Department of State.[25] A foreign ship had been seized to enforce a court award. The Court found that seizure of the property of a friendly foreign nation is such an affront to its dignity, and may so affect our friendly relations with it, that the courts must accept the executive determination on the question of immunity. While the foreign sovereign may present its claim of immunity to the court, it may also make the same presentation to the Department of State. The court held that upon recognition and allowance of the claim by the Department of State and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libellant to the relief obtainable through diplomatic negotiation.[26] While the Department's advisory procedure is referred to as making a "suggestion of immunity," the judicial branch follows the action of the political branch for the wise, but unstated reason that the political branch controls both the armed forces and the foreign service personnel. These are the agencies that exercise power in the interna-

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litigation were not within the ambit of the sovereign's immunity and that the transfer in Czechoslovakia of assets located in the United States was invalid. *Id.* at 137. *See also* United States v. Deutsches Kalisyndikat Gessellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Wolchok v. Statni Banka Ceskoslovenska, 15 App. Div. 2d 103, 222 N.Y.S.2d 140 (1961).

24. Kane v. Union of Soviet Socialist Republics, 267 F. Supp. 709 (E.D. Pa. 1967). *See also* Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965), in which a mandamus action was brought to compel Moore, a U.S. marshal, to serve process on the Tunisian ambassador in a libel in personam action against the Republic of Tunisia; Note, *Amenability of Foreign Sovereigns to Federal in Personam Jurisdiction,* 14 VA. J. INT'L L. 487 (1974).

25. 318 U.S. 578 (1943).

26. Southeastern Leasing Corp. v. Stern Dragger Belogorsk, 493 F.2d 1223 (1st Cir. 1974). The ship was ordered released and the action dismissed after a suggestion of immunity by the Department of State. Executive action was held not reviewable even in face of an allegedly arbitrary executive decision. In Spacil v. Crowe, 489 F.2d 614 (5th Cir. 1974), it was held that a suggestion of immunity is not only binding on the courts, but is not subject to review under the Administrative Procedure Act, 5 U.S.C.A. § 552 (Cum. Supp. 1976). The case is discussed in 15 VA. J. INT'L L. 215 (1974).

tional field. In *Ex parte Republic of Peru,*[27] Peru presented its claim by its ambassador through the Department of State, but in other cases foreign governments have intervened directly in the litigation.[28]

The Department of State's practice in the intervention cases was not consistent at first and the results often seemed quite unfair. For example, a woman passenger injured on a Soviet ship libeled the ship for her damages, but on the Ambassador's presentation of a claim of sovereign immunity submitted by the Department of State, the district court dismissed the case without even an inquiry into the facts of ownership of the vessel involved.[29] In response to later questions about the immunity of Soviet ships, and recognizing the unfair result for the injured passenger, the Department of State, on April 9, 1948, announced it was reconsidering its policy in handling requests for immunity for foreign-owned and operated ships. After four years of reconsidering, the Department, on May 19, 1952, established its new policy in a letter by its Acting Legal Advisor addressed to the Acting Attorney General[30] (the letter has become known as the "Tate Letter" for its author, Jack B. Tate), asserted that the Department had "now reached the conclusion that such immunity should no longer be granted in certain types of cases."[31] The reference to "such immunity" was to immunity from suit accorded foreign governments made defendants in the courts of the United States without their consent, but the types of cases were not defined other than to be cases involving commercial activity. The use of the word "granted" suggests that the Department thought it was conferring or withholding a privilege rather than informing the courts about a power relationship between the United States and foreign states. The letter referred to "the existence of two conflicting concepts of sovereign immunity each widely held and firmly established,"[32] and concluded "it will hereafter be the Department's pol-

27. 318 U.S. 578 (1943).

28. Renchard v. Humphreys & Harding, Inc., 381 F. Supp. 382 (D.D.C. 1974). The court allowed Brazil to be joined as a defendant, after the Department of State decided not to suggest immunity be given. *See also* Compania Espanola de Novagacion Maritima v. Navemar, 303 U.S. 68 (1938).

29. Low v. Steamship *Rossia*, 1948 A.M.C. 814 (S.D.N.Y.).

30. 26 DEP'T STATE BULL. 984 (1952).

31. *Id.* at 984.

32. *Id.*

icy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."[33] The Acting Attorney General was advised that future practice would be "to advise you of all requests by foreign governments for the grant of immunity from suit and the Department's action thereon."[34] The Acting Legal Advisor may have labored the obvious when he stated that the "shift in policy by the executive cannot control the courts . . . ." The letter formalized what had been done before, with the added element that thereafter the Department would volunteer an opinion to the courts as to whether the claimant foreign state was engaged in a private or public activity. If the activity was found to be private, the Department would recommend that the foreign state not be entitled to immunity. Presumably, the Department of Justice would then present its view and the courts would adjudicate the question with the Department of State's position as a premise. The letter had the defect of trying to be helpful by giving the appearance of acting in response to a problem, while not really doing much of anything except stimulate more argument.[35] The effectiveness of the Department of State's new procedure was quickly tested in litigation.

Post-Tate Letter cases have shown that the system of obtaining Department of State approval on sovereign immunity questions is

33. *Id.* at 985.

34. *Id.*

35. Arguments abound. Brandon, *Sovereign Immunity of Government-Owned Corporations and Ships,* 39 CORNELL L.Q. 425 (1954). It is argued that between the rival theories of absolute and restrictive (qualified) sovereign immunity the latter is better and that *Pesaro* is based on "increasingly dubious grounds." *Id.* at 425. *See* Fensterwald, *Sovereign Immunity and Soviet State Trading,* 63 HARV. L. REV. 614, 641 (1950), which suggests a reformation of judicial thinking. In Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court,* 67 HARV. L. REV. 608 (1954), it is asserted that in view of the subtleties of language used by the Department of State in communicating with the courts, it would be advisable for the Department to have an internal adjudicative proceeding to decide if a sovereign public act is involved. In Fensterwald, *United States Policies Toward State Trading,* 24 L. & CONTEMP. PROB. 369 (1959), the author notes there is a "schizophrenia within the executive family" between the Department of State and the Justice Department because the latter hopes "to have its cake and eat it too" by sticking to the absolute theory while the Department of State espouses the restrictive theory. *Id.* at 388-93. It was proposed in Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises: A Proposed Solution,* 27 MICH. L. REV. 751 (1929), that Congress expressly declare a resumption of jurisdiction over both the agents and property of foreign states used in the furtherance of commercial undertakings in the United States. *Id.* at 773-75. *See* notes 18 *supra* and 49 *infra.*

ineffective. In one case,[36] a longshoreman sued the U.S.S.R. for disabling injuries sustained aboard one of its ships in port in Philadelphia. Service was made on its agent and, later, on the Black Sea State S.S. Line through its local husbanding agent. No one appeared for Black Sea and default judgment for $49,231.92 was rendered. The Department was asked to help in obtaining effective jurisdiction so that the disabled longshoreman could collect on his judgment. Nevertheless, and even though the court held service was valid and jurisdiction was obtained over Black Sea, "[the plaintiff] has been unable to collect this judgment or any part thereof."[37]

Further proof of the ineffectiveness of the State Department approval process came when a ship operator sued to recover for damages caused by a Korean government lighter during unloading at Pusan. The operator sought to attach Korean funds in New York banks.[38] Korea's Ambassador to the United States asked the Department of State to tell the Department of Justice to tell the court that Korea's funds were immune from attachment. State's letter to Justice " 'requested that a copy of the note of the Ambassador be presented to the court and that the court be informed of the Department of State's agreement with the contention of the Ambassador that property of the Republic of Korea is not subject to attachment in the United States.' "[39] While the judge called this statement an "unequivocal" position with respect to Korea's claim of immunity,[40] the letter seemed to contradict any such inference. In fact, the Department also wrote that it " 'has not requested that an appropriate suggestion of immunity be filed, inasmuch as the particular acts out of which the cause of action arose are not shown to be of purely governmental character.' "[41] These circumlocutions seem to mean only that as far as the Department of State was concerned the acts had not been shown to be either governmental or commercial. The result of the Department's failure to take a definite position was

36. Kane v. Union of Soviet Socialist Republics, 267 F. Supp. 709 (E.D. Pa. 1967), *aff'd*, 394 F.2d 131 (3d Cir. 1968).

37. Kane v. Union of Soviet Socialist Republics, 394 F.2d 131, 132 (3d Cir. 1968).

38. New York and Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

39. *Id.* at 685.

40. *Id.*

41. *Id.*

that Korea's funds were immune, just as surely as if Korea had been granted sovereign immunity in the matter.

A 1961 in rem proceeding illustrates the inappropriateness of a system of justice that ties litigation in particular suits to timely political considerations.[42] The M.V. *Bahia de Nipe,* a Cuban ship within the definition of a state trader, was on its way to the U.S.S.R. with a cargo of sugar. The master and ten of the crewmen seized control on the high seas and directed the ship into Hampton Roads, Virginia, where they sought political asylum. While the ship was tied up at Norfolk, three claimants libelled the ship for monetary claims. Two longshoremen had unsatisfied judgments against Naviera Cuba, a shipping company now owned and operated by the Cuban government as a state trader; another judgment creditor had a $500,000 claim and an American company claimed as the uncompensated owner of the sugar on board. The Department of State asked that the ship be released and the court immediately agreed. The facts showed a perfect case of commercial activity justifying nonimmunity and therefore, not subject to release under the terms of the Tate Letter and the Department's restrictive theory. Added was the element of the power of possession *vis-a-vis* a small, unrecognized and disliked state. The district court dealt with the plaintiffs' contention of inconsistency as follows: "The short answer to these contentions is that no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive."[43] Then the court added this cryptic statement: "In one final word we must recognize that rapidly changing events in the world of today compel the executive to take action involving international affairs which in the eyes of the public may seem a bit strange."[44] The statement was cryptic and the action of the Executive strange only because the Secretary of State's communication before the court was less than forthcoming in failing to include all the relevant facts. Contemporaneous with these proceedings was the front page news that a hijacked Eastern Airlines Electra aircraft was on the ground in Cuba and the Executive had been negotiating for its release. However, in a later case, when Cuba had no bargaining

42. Rich v. Naviera Vacuba S.A., 197 F. Supp. 710 (E.D. Va.), *aff'd,* 295 F.2d 24 (4th Cir. 1961).

43. *Id.* at 724.

44. *Id.* at 726.

tokens, immunity was denied.[45] There is nothing wrong with this shifting of positions, if viewed in the context of the international considerations which the Department of State must consider; what is wrong is tying judgments in particular law suits to international considerations.[46]

Courts are well aware of the difficulties in the Department of State's efforts to be helpful. In *Victory Transport,* it was noted by the court: (1) that the Tate Letter "offers no guide-lines or criteria for differentiating between a sovereign's private and public acts;" (2) that courts or commentators have not "suggested a satisfactory test" and (3) that "conceptually the modern sovereign always acts for a public purpose."[47] To these difficulties must be added the

45. Flota Maritima Browning v. Motor Vessel *Ciudad,* 335 F.2d 619 (4th Cir. 1964). A Cuban ship was proceeded against in a Baltimore shipyard and the court rejected a motion by Cuba through the Czechslovakian ambassador claiming immunity. The court found that by entering a general appearance and filing objections, Cuba had waived immunity and acknowledged jurisdiction. Cuba had waited three years after the complaint was filed before requesting immunity and the Department of State never suggested immunity be granted.

46. In Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), the Department of State, for no readily apparent reason, failed to follow the restrictive theory of sovereign immunity. The Department suggested immunity be granted to what was obviously a state trader, when Isbrandtsen Tankers sued the President of India for damages for extra expenses caused by delays in unloading shipments of grain in India under a charter agreement. By the terms of the charter, disputes between the parties were to be litigated in the United States District Court for the Southern District of New York and immunity was waived. Notwithstanding both the agreement and the commercial nature of the transaction, the Department of State certified a claim of immunity as requested by the Indian government. Conclusive effect was given to the immunity suggestion in a holding by the court that certification precluded any inquiry into the question of waiver. *See, e.g.,* Holden v. Australia, 369 F. Supp. 1258 (N.D. Cal. 1974). *But see* Petrol Shipping Corp. v. Kingdom of Greece, Ministry of Commerce, 360 F.2d 103 (2d Cir. 1966) (order compelling arbitration issued when contract had a waiver clause); Victory Transp., Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964) (order compelling arbitration issued in response to a similar clause in a voyage charter signed by the Spanish General Consul on behalf of the appellant, a branch of the Spanish Ministry of Commerce).

An unfortunate effect of the Tate Letter was the creation of a false belief among plaintiff's lawyers that something effective was being done, with resulting empty victories and wasted expense. *See, e.g.,* Hellenic Lines Ltd. v. Moore, 345 F.2d 978, n.7 (D.C. Cir. 1965); McCanahy v. City of London Corp., 381 F. Supp. 728 (D.N.J. 1974), in which the city of London was declared to be a corporation whose "ancient rights . . . are assured to it by Art. 13 of the Magna Carta. . . ." *Id.* at 729. The court ridiculed the suggestion that it was practical to bring this sovereign before the court: "It is plain to this court that if the Lord Mayor of London may exclude Elizabeth II . . . from crossing the Temple Bar, he may equally exclude the U.S. Marshal, the clerk and the U.S. Postal Service, whether the entry be actual or constructive." *Id.* at 730.

47. 336 F.2d at 359.

nonlegal issues encountered in dealing with foreign nations, dictating inconsistent application of the theory. No matter how the issues are resolved nationally, foreign states will continue to assert their established power to compel recognition of immunity rights.[48]

The reality of the Department's failures to consistently apply its policy has been apparent enough for Congress to try its hand at solving the problem of bringing state traders to account in United States courts for any wrongdoing, but no legislation has been enacted yet. While a bill was proposed in the ninety-third Congress and hearings were ordered, the bill was never enacted.[49] The 1973 bill was drafted by the Departments of State and Justice, and transmitted jointly by the Secretary of State and Attorney General to Congress. It would have transferred to the courts responsibility for determining whether a state trader is entitled to immunity. There would have been no more Tate Letter advice or "grant" of immunity from the Department of State.[50] The transmittal letter acknowledged that legislation is an interim arrangement. "The ideal ar-

48. To trace the line of cases holding that foreign state-owned corporations are not entitled to immunity *see, e.g.*, S.T. Tringali Co. v. Tug *Pemex XV*, 274 F. Supp. 227 (S.D. Tex. 1967); Plesch v. Banque Nationale, 273 App. Div. 224, 77 N.Y.S.2d 43 (1948); The *Beaton-Park*, 65 F. Supp. 211 (W.D. Wash. 1946); The *Uxmal*, 40 F. Supp. 258 (D. Mass. 1941); Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S.2d 201 (1940); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Coale v. Societe Co-Operative Suisse des Charbons, 21 F.2d 180 (S.D.N.Y. 1921); Molina v. Comision Reguladora, Mercado de Henequen, 91 N.J.L. 382, 103 A. 397 (1918). *Contra*, Mason v. Intercolonial Ry., 197 Mass. 349, 83 N.E. 876 (1908); Bradford v. Director General of Railroads, 278 S.W. 251 (Tex. Civ. App. 1925); Dunlap v. Banco Cent., 41 N.Y.S.2d 650 (Sup. Ct. 1943); United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944); Miller v. Ferrocarrill del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688 (1941); F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945); Isbrandtsen Co. v. Netherlands East Indies Gov't, 75 F. Supp. 48 (S.D.N.Y. 1947). While the decisions can be explained by differing fact situations, these are largely rationalizations with little relevance to the essential issues, leaving the decisions hopelessly in conflict. In a third line of cases the courts elected to subject the issue of immunity to examination by a referee. *See, e.g.*, Telkes v. Hungarian Nat'l Museum, 265 App. Div. 192, 38 N.Y.S.2d 419 (1942); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940).

49. S. 566, 93d Cong., 1st Sess. (1973). Senator Hruska, in introducing the bill, stated the objective was "to regulate the jurisdictional immunities of foreign states. . . ." 119 CONG. REC. 2213 (1973).

50. The transmittal letter referred to freeing the Department of State "from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity." *Id.* at 2215. It continued: "Plaintiffs, the Department of State, and foreign states would thus benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question." *Id.*

rangement concerning the sovereign immunity of foreign states would be the regulation of the question through a general international agreement."[51] The 1973 bill was "looked upon as an arrangement to be applied until such time as a satisfactory convention is drawn up and the United States becomes a party."[52] While the objective of such legislation is worthy, the need to get foreign states to consent to the results of an adjudication will remain. Moreover, these nations will continue to assert rights they undoubtedly have under international law to be dealt with as equals by the political agencies of our government, not the judiciary. Another problem with such legislative solutions is that they limit effectiveness to achieve fair results by providing for the continued immunity of assets of foreign states from execution and attachment. Political considerations will continue to play an important role. The U.S.S.R., in fact, has authorized retaliation against foreign states that do not respect Soviet sovereign immunity.[53]

On the other end of United States trading routes, adjudications set in foreign nations are often bound up with considerations of national interest.[54] The capacity of judicial agencies of socialist

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51. *Id.* at 2215.

52. This viewpoint seems to be at variance with the reported opposition to using international agreements to relinquish claims of immunity for publicly owned or controlled commercial activities. *See* note 19 *supra.*

53. *See* FRIEDMANN, LISSITZYN & PUGH, INTERNATIONAL LAW 655 (1969). The U.S.S.R. law provides:

> The bringing of a suit against a foreign state, the [provision of] security for the suit, and execution upon a foreign state's property within the Union of Soviet Socialist Republics are permissible only with the consent of the competent organs of this [the foreign] state.

*Id.* Soviet writers substantiate the absolute immunity position of the U.S.S.R. as follows:

> Bourgeois theory and . . . the jurisprudence of various states explain the basis of the principle of state immunity, which they recognize, in different ways. Some . . . look upon immunity as a rule of customary law, which arises from its longstanding application in fact. Others . . . see in it an expression of a fundamental principle of international law—the sovereignty of states. In our opinion, the second basis is the only correct one. . . . Some bourgeois writers maintain that the rule of immunity implies a denial of justice. . . . One cannot agree with this assertion. The state can be sued in its own courts, but in the courts of a foreign state only with its consent.

*Id.* at 653. Except for the references to "bourgeois" theory, this statement represents the view in the United States as well.

54. For example, in Delek Israeli Fuel Corp. & Jordan Investments Ltd. v. Soiuzneftexsport, 13 ARB. J. 159 (1959), the plaintiff, an Israeli company, claimed a failure to deliver oil as provided by contract and damages in excess of two million dollars. The claim was arbi-

states to adjudicate commercial disputes impartially is particularly limited. The judges are apt to be state employees responsive directly to the administrative heads of state, and who have little independence as we know the concept since they are answerable for deviations from orthodox political views or international political requirements. Arbitrators will be bound to uphold official policy. Because of the cultural differences and a history of failures by socialist nations to honor their commercial obligations,[55] it is not expected that consent by treaties with Soviet or eastern European nations will come easily or soon. We have deluded ourselves long enough. Revised theories, difficult to apply either by the courts as noted in the *Victory Transport* case,[56] or by the Department of State as in its struggles with Cuba, will not produce fair results in settling disputes. There must be express, advance consent as to the procedures and principles to be followed. The real source of unfair results is the conduct of foreign states which obtain sovereign immunity in commercial contexts by either abusing or threatening to abuse the power they enjoy outside United States jurisdiction.

The differences between western states and socialist states with respect to a state's responsibility to its citizens and with respect to wrongdoing and confiscation of property may well defy compro-

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trated in the U.S.S.R. before its Foreign Trade Arbitration Commission. The failure to deliver and consequent damages were established as a result of a withdrawal by the Ministry of Foreign Trade of an export license after partial deliveries had been made. Performance was affected by the war between Israel and Egypt in November of 1956 and political considerations intruded since the Israeli importer was the government of Israel. The Soviets considered Israel's actions in the mideast to be aggression and cancelled the contracts in reliance on *force majeure. Id.* Under the United States view of contract law, inconvenience or dislike of another party's political acts is not a justification for breach of contract.

No Soviet witness was allowed to testify on questions of fact at the trial. The Israeli attorneys were prevented from proving the circumstances as grounds for their claims, an essential requirement under the Arbitration Commission's rules of procedure. They were thus denied the opportunity to prove that under Soviet law it is the seller's duty to carry out the contract under any circumstances. Domke, *Arbitration of State-Trading Relations,* 24 L. & CONTEMP. PROB. 317, 324 (1959).

The case is not to be regarded as isolated or atypical. Rather, it is a precedent for what may be expected again and again if political pressure or inconvenience is great enough on state trading nations. J. COM., Nov. 21, 1974, at 330-32.

55. The history of this problem dates back to the Lend-Lease agreements of the second world war. Defaulted payment claims were re-negotiated, but the U.S.S.R. has suspended payments on the final settlement of their World War II Lend-Lease debt. NEWSWEEK, Jan. 27, 1974, at 33.

56. 336 F.2d 354 (2d Cir. 1964).

mise.[57] Nevertheless, the needs of commerce create pressures for accommodation. There are several actions that can be taken.

If consent by treaty is not possible for the time being, one way to progress is to bypass the intractable issue of sovereign immunity with all its overtones of national interests. Such a way has been suggested in the statement of *Basic Principles of Relations Between the United States of America and the Union of Soviet Socialist Republics* wherein the parties agreed to "encourage" contracting enterprises to acquiesce in arbitration outside either country.[58] There is ample precedent for such activity.[59] The practical effect is that state traders are now encouraged to use arbitration clauses in all contracts.[60] To make the agreements effective, damage funds or security deposits in foreign banks should be established.

Another approach to the problem is to proceed as before, with a continuation of litigation in United States courts and with the courts and lawyers struggling with the issues of sovereign immunity as they have always been doing, but requiring the Department of State to take an active role in enforcing judgments. The issues would be resolved in accordance with existing precedents including the various applications of the absolute and restrictive theories. After final judgment, the Department of State would be directed to take speedy, affirmative action to collect any amount of assessed damages against a foreign state through negotiation or set-off

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57. Freeman, *Some Aspects of Soviet Influence on International Law*, 62 AM. J. INT'L L. 710, 718 (1968).

> The subject of compensation for confiscation of foreign-owned private property is, of course, part of the larger topic of state responsibility and the diplomatic protection of citizens abroad. Here the gulf between Western nations and the Soviet group is so huge as to defy any compromise. . . . Soviet writers have defined an international delinquency creating responsibility as the commission by a state or its officials, and also by its citizens with the connivance of its government, of acts violating the rules of international law and the rights and interests of other states and their citizens.

*Id.*

58. 11 INT'L LEGAL MAT. 756 (1972).

59. Domke, *Arbitration*, 24 L. & CONTEMP. PROB. 317 (1959); Domke, *The Enforcement of Maritime Arbitration Agreements with Foreign Governments*, 2 J. MAR. L. & COM. 617 (1971).

60. The Supreme Court has held that American companies that have signed arbitration agreements abroad cannot bring their charges into United States courts, but must submit to foreign arbitration. Scherck v. Alberto-Culver Co., 417 U.S. 506 (1974). This case interprets the Arbitration Act of 1925, 9 U.S.C. § 1 *et seq.* (1970), and the "full disclosure" provisions of the Securities Act of 1933, 15 U.S.C. § 77 (1970). *See also* Amtorg Trading Corp. v. Camden Fibre Mills, Inc., 304 N.Y. 519, 109 N.E.2d 606 (Ct. App. 1952).

against any funds payable by the United States to foreign states when collection is otherwise impossible. Exceptions would be made when the Department is willing to certify that the best interests of the United States require allowing a default, giving the reasons for such a conclusion. Amounts collected in response to judgments would be paid to winning litigants by the United States government through the adjudicating court. Under this program the Department should take an active role in helping persons who have relied on the judicial process for effective and fair adjudication. If United States courts adjudge someone liable for damages the entire resources of the government should be available to assure collection and there should be a determined pursuit of assets until the rights of successful litigants are paid in full. The present stand-off attitude is not appropriate.

A third suggested solution also by-passes the immunity issue by having claims assumed by the United States and prosecuted by the Department of State through negotiation. This method avoids all the issues of relative equality between states and private citizens when they have to plead on terms of equality before our courts. Claims would have to be evaluated, but once a claim is found to be valid, evaluation could be made in the ensuing negotiations as facts are developed.

Whatever way is chosen, it should be clear that judicial efforts are bound to be less than satisfactory if immunity is an issue. This is so because only the Department of State, as an agency of national power, can negotiate effectively with a foreign nation. Now is the time to move if the United States is to take advantage of the detente with socialist countries particularly in view of the increase in commercial activity. If a Trade Act is enacted, a slow increase of mutual interest in commercial exchanges is inevitable.[61] As commercial ex-

61. 19 U.S.C.A. § 2101 *et seq.* (Cum. Supp. 1976). Mr. George Kennan, a former ambassador to the U.S.S.R., has written:

> Dealings by American firms with a foreign governmental trade monopoly require constant scrutiny and a minimal degree of governmental regulation to assure that they do not proceed to the detriment of the national interest. Such is the fragmentation of authority within the Executive Branch that our government is today poorly constituted to meet this responsibility. The firms need and deserve a single authoritative center somewhere in the government where they can be told promptly and consistently what they can and cannot do in dealing with the Russians. This center should be located in

changes with state traders increase, there will be an increase in conflict over performance of transactions, and a better means must be found to resolve the conflicts. A dispute settlement procedure is as important to commerce as sales efforts, financing and document processing. The main thought behind this article is that the sooner the United States gets away from disputes over principles and finds a practical way to settle commercial disputes, the sooner conflicts will be settled with fairness to all parties involved. The Department of State should be the authoritative center in this effort. Far from being free from pressures by foreign states, the Department of State should be the focal point of such pressures; and far from removing the issue from the realm of discretion, it should be a responsibility of the Department to use its discretion in deciding where the nation's interests are in these controversies.

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> the Department of State, as the agency with the widest and deepest responsibility for the conduct of our foreign relations. . . .

The Washington Post, Dec. 18, 1974, § A, at 14, col. 3.