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COMMENT

Suing a Foreign Government Under the United States Antitrust Laws: The Need for Clarification of the Commercial Activity Exception to the Foreign Sovereign Immunities Act of 1976

Today, more than at any time in history, foreign states,¹ and their agencies and instrumentalities,² are engaged in activities traditionally performed by private parties that directly affect trade and commerce.³ In so doing, a sovereign state theoretically can become involved in most

¹ The term "foreign state" as used herein will mean "[a] foreign country or nation," BLACK'S LAW DICTIONARY 1578 (4th rev. ed. 1968). For an analysis of the meaning of "foreign state" under the Foreign Sovereign Immunities Act of 1976, see notes 19-23 and accompanying text *infra*.

² See notes 28-33 and accompanying text *infra*.

³ "The words 'trade' and 'commerce,' when used in juxtaposition impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit, and into which the elements of bargain and sale, barter, exchange, or traffic, enter." BLACK'S LAW DICTIONARY, *supra* note 1, at 1665 (citation omitted). The term "trade and commerce" will be used sometimes in this comment to describe the full range of activities in which a foreign state could be engaged that have the potential to constitute antitrust violations. For a discussion of the meaning of the phrase "trade and commerce," as used in the Sherman Act, see U.S. ATT'Y GEN'L, REPORT OF THE NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 62 (1955). With respect to the involvement of foreign states and their agencies in trade and commerce, see generally *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976); R. VERNON, SOVEREIGNTY AT BAY 33-37, 53-59 (1971); Carson & Losco, *Who Are the Capitalists Now in Europe*, VISION, May 1976, at 71; *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 DEP'T STATE BULL. 984 (1952) (letter from Jack B. Tate, Acting Legal Advisor of Dep't of State to Phillip B. Pearlman, Acting Att'y General (May 19, 1952)) [hereinafter cited as Tate Letter]; Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614 (1950); *Growing Shadow of the Public Sector*, VISION, Feb. 1978, at 17; Kostecki, *State Trading in Industrialized and Developing Countries*, 12 J. WORLD TRADE L. 187 (1978); Menzies, *U.S. Companies in Unequal Combat*, FORTUNE, April 9, 1979, at 102.

of the restraints of trade proscribed by the antitrust laws of the United States.⁴

Increased state involvement in trade and commerce has manifested itself in a variety of ways, including the growth of producer cartels with sovereign states as members,⁵ state monopolization of the sale and production of certain products,⁶ the nationalization of industry in peacetime and the concomitant growth of public corporations,⁷ and the partial or complete ownership by sovereign states of private corporate entities.⁸ The widespread participation of governments in activities of an arguably private nature, especially in view of the Foreign Sovereign Immunities Act of 1976,⁹ raises a question of growing practical importance: to what extent are the "commercial"¹⁰ activities of sovereign governments, their agents, or their instrumentalities subject to the U.S. antitrust laws?

⁴ As used in this comment, the term "antitrust laws" will generally refer to the provisions of the Sherman Act, 15 U.S.C. §§ 1-7 (1976), the Clayton Act, 15 U.S.C. §§ 12-27 (1976), and the Federal Trade Commission Act, 15 U.S.C. § 5 (1976). See also U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS (rev. ed. Mar. 1, 1977), reprinted in [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 799, at E-1, and [1977] 2 TRADE REG. REP. (CCH) No. 266, at 1 [hereinafter cited as ANTITRUST GUIDE]. See generally Baker, *Antitrust Remedies Against Government Inspired Boycotts, Shortages and Squeezes: Wandering on the Road to Mecca*, 61 CORNELL L. REV. 911 (1976).

⁵ See generally *International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), appeal docketed, No. 79-3673 (9th Cir. Oct. 24, 1979); Fine, *Sovereign Immunity and the Nation-State Cartel*, 51 L.A. B.J. 283 (1975); Weintraub, *The Example of OPEC and the Possibility of Other Producer Cartels*, 24 AM. U.L. REV. 1097 (1975); Note, *Nonfuel Mineral Cartels—United States Economic Policy and Changing World Resource Patterns*, 7 LAW & POL'Y INT'L BUS. 863 (1975). For an example of a uranium cartel, in which foreign states were allegedly involved but have not been named as defendants in an action, see *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978).

⁶ See generally BIG BUSINESS AND THE STATE (R. Vernon ed. 1974); CENTRE EUROPEËN DE L'ENTREPRISE PUBLIQUE, LES ENTREPRISES PUBLIQUES DANS LA COMMUNAUTÉ ÉCONOMIQUE EUROPEËNE (1967); W. ROBSON, NATIONALIZED INDUSTRY AND PUBLIC OWNERSHIP (2d ed. 1962); S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); THE PUBLIC CORPORATION (W. Friedmann ed. 1954); Carson & Losco, note 3 *supra*; Fensterwald, note 3 *supra*; *Growing Shadow of the Public Sector*, note 3 *supra*; Hazard, *State Trading in History and Theory*, 24 LAW & CONTEMP. PROB. 243 (1959); Kostecki, note 3 *supra*; Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109, 109-11 (1961); Zakariya, *State Petroleum Companies*, 12 J. WORLD TRADE L. 481 (1978).

⁷ See generally W. THORNHILL, THE NATIONALIZED INDUSTRIES (1968); Carson & Losco, note 3 *supra*; Kostecki, note 3 *supra*; Timberg, note 6 *supra*; Zakariya, note 6 *supra*.

⁸ See generally Carson & Losco, note 3 *supra*; *Growing Shadow of the Public Sector*, note 3 *supra*; Kostecki, note 3 *supra*; Menzies, note 3 *supra*; *The Diverse National Approaches to Oil*, N.Y. Times, Feb. 4, 1979, § 12 (N.Y. Times Int'l Econ. Survey), at 23, col. 1.

⁹ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602-1611 (1976)).

¹⁰ See 28 U.S.C. § 1603(d) (1976). See also notes 34-46 and accompanying text *infra*.

To aid one's understanding of this subject, the following discussion will consider the current quantity, form, and nature of "state trading"¹¹ and the antitrust implications of state trading by foreign states and their agencies. Also, the evolution of the law of sovereign immunity in the United States will be described, as well as the primary tests that courts and commentators have developed over the years to distinguish the commercial and sovereign activity in which a government is engaged. The lack of clarity and consistency in this area of the law will be analyzed and it will be shown that the standards for the determination of "commercial activity" under § 1605(a)(2) of the Foreign Sovereign Immunities Act of 1976 are unnecessarily vague, ideological, and ethnocentric.

THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

The passage of the Foreign Sovereign Immunities Act of 1976 manifested a concern of both the executive branch¹² and the Congress¹³ about the use of the sovereign immunity defense by foreign governments involved in commercial activities.¹⁴ Although it is an important

¹¹ For a definition and discussion of the term "state trading," see note 58 and accompanying text *infra*.

¹² When President Ford signed the Foreign Sovereign Immunities Act on October 22, 1976, he stated that the Act would "make it easier for our citizens and foreign governments to turn to the courts to resolve ordinary legal disputes." 12 WEEKLY COMP. OF PRES. DOC. 1554 (1976). The Act was introduced in accordance with the recommendations of an executive communication that was transmitted to Congress by the Departments of State and Justice, and its passage was recommended by both Departments. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as HOUSE REPORT].

¹³ See generally HOUSE REPORT, note 12 *supra*; S. REP. NO. 1310, 94th Cong., 2d Sess. (1976) [hereinafter cited as SENATE REPORT]; *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess., (1976) [hereinafter cited as *House Hearings*]; *Immunity of Foreign States: Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973).

¹⁴ See generally Brower, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 200 (1979); Delaume, *Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 AM. J. INT'L L. 399 (1977); Delaume, *Sovereign Immunity in America: A Bicentennial Accomplishment*, 8 J. MAR. L. 349 (1977); Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 63 (1977); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORDER 1 (1976); Note, *International Law: Act of State Doctrine: Foreign Sovereign Immunities Act of 1976*, 18 B.C. INDUS. & COM. L. REV. 318 (1977); Note, *The Foreign Sovereign Immunities Act of 1976: Judicial Predominance*, 4 BROOKLYN J. INT'L L. 146 (1977); Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 543 (1977); Note, *Sovereign Immunity: Limits of Judicial Control: The Foreign Sovereign Immunities Act of 1976*, 18 HARV. INT'L L.J. 429 (1977).

piece of legislation which has been widely litigated,¹⁵ the Immunities Act does not dramatically alter sovereign immunity determinations. On the contrary, in many respects it merely has codified trends in the case law which have been developing for decades. The Act also provides for certain procedural innovations which streamline and simplify litigation against allegedly sovereign parties. An understanding of the Act is of course central to an analysis of the potential antitrust liability of foreign states, their agents, and their instrumentalities.

The stated purpose of the Immunities Act was "to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."¹⁶ The legislation was considered urgently needed, because "foreign state enterprises are every day participants in commercial activities,"¹⁷ and there existed "no comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state."¹⁸

The Immunities Act provides that a foreign state,¹⁹ and its agencies or instrumentalities,²⁰ shall be immune from the jurisdiction of U.S. courts unless one of five exceptions are applicable. Section 1605(a)(2) of the Act, which provides the "commercial activity" exception to blanket jurisdictional immunity, is the most important, controversial, and unclear exception and, therefore, is a major focus of this comment.²¹ This exception provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act

¹⁵ For an extensive list of cases which discuss the Immunities Act, see Brower, Bistline & Loomis, *supra* note 14, at 213-14.

¹⁶ HOUSE REPORT, *supra* note 12, at 6.

¹⁷ *Id.* at 7.

¹⁸ *Id.*

¹⁹ The Immunities Act provides that a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. § 1603(a) (1976). The term "political subdivision" includes all governmental units beneath the central government, including local governments. HOUSE REPORT, *supra* note 12, at 15.

²⁰ 28 U.S.C. § 1603(b) (1976). For a discussion of the phrase "agency or instrumentality of a foreign state," see notes 28-33 and accompanying text *infra*.

²¹ The attempts by courts and commentators to interpret and define "commercial activity" are discussed at notes 34-46 and accompanying text *infra*. The other exceptions to jurisdictional immunity, which are of limited importance to this comment, can be found at 28 U.S.C. §§ 1605(1), (3)-(5) (1976).

causes a direct effect in the United States.²²

The Act thus expressly provides that sovereign immunity will not be granted in cases involving the commercial or private acts of a "foreign state" or "the agency or instrumentality of a foreign state," where the cause of action is based upon a commercial activity "carried on" in the United States, or an act performed in the United States, or an act causing a "direct effect"²³ in the United States.

Although jurisdictional questions are of great importance, especially in the antitrust field,²⁴ the question whether an activity is "carried on" in and causes a "direct effect" in the United States will not be discussed.²⁵ For purposes herein, the discussion regarding the Immunities Act will relate solely to the legislative and judicial meaning of the phrases "foreign state," "agency or instrumentality of a foreign state," and, particularly, "commercial activity."

The Immunities Act defines "foreign state" as the sovereign state itself, including political subdivisions, agencies or instrumentalities.²⁶ "Political subdivisions" are defined as "all governmental units beneath the central government, including local governments."²⁷ This phrase is fairly straightforward, as evidenced by the fact that it has not yet been the subject of litigation under the Act.

The phrase "agency or instrumentality of a foreign state," while not unclear, is more prone to be litigated. The Immunities Act provides that "agency or instrumentality of a foreign state" means any entity which is:

²² 28 U.S.C. § 1605(a)(2) (1976).

²³ For a discussion of the term "direct effect," see *Carey v. National Oil Co.*, 453 F. Supp. 1097 (S.D.N.Y. 1978). In this case, a Libyan state oil company allegedly cancelled contracts for the delivery of crude oil to a refinery company in the Bahamas which was a subsidiary of a New York corporation. In a suit for breach of contract by the New York corporation against the Libyan state oil company, the court held that because the oil was sold through the Bahamas instead of directly to the United States, the breach did not have a "direct effect" in the United States. *Id.* at 1101-02. Accordingly, the court dismissed the suit for lack of jurisdiction under section 1605(a)(2) of the Immunities Act. *Id.* at 1102.

²⁴ For commentary regarding the controversy surrounding the appropriate extraterritorial application of the U.S. antitrust laws, see ANTITRUST GUIDE, *supra* note 4, at 6-8; K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD (1958); W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS, §§ 2.1-23 (2d ed. 1973); J. RAHL, COMMON MARKET AND AMERICAN ANTITRUST: OVERLAP AND CONFLICT 54-89 (1970); Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16 (1974); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974).

²⁵ It should be noted that the House Report regarding the Immunities Act specifically indicates that: "Neither the term 'direct effect' nor the concept of 'substantial contacts' embodied in section 1603(e) is intended to alter the application of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, to any defendant." HOUSE REPORT, *supra* note 12, at 19.

²⁶ 28 U.S.C. § 1603(a) (1976).

²⁷ HOUSE REPORT, *supra* note 12, at 15.

- (1) a separate legal person, corporate or otherwise, and
- (2) 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
- (3) neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.²⁸

The legislative history of the Immunities Act clarifies the definition. "Separate legal person is intended to include a corporation, association, foundation, or other entity which under the law of the foreign state where it was created can sue or be sued in its own name, contract in its own name or hold property in its own name."²⁹ Furthermore, an entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership shares are held by a foreign state or its political subdivision.³⁰ Lastly, entities such as corporations which are either organized and incorporated under the laws of one of the United States,³¹ or created under the laws of third countries, are excluded from the definition of "agency or instrumentality of a foreign state" because it is presumed that if a foreign state establishes or acquires a company or other legal entity in a foreign nation, the entity is "presumptively engaging" in activities that are either commercial or private in nature.³² In clarification, it was explained that an "agency or instrumentality of a foreign state" could include a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency, or a department or ministry which acts and is suable in its own name. Thus far courts have found little difficulty in determining which entities fall within the meaning of agency or instrumentality of a foreign state.³³

²⁸ 28 U.S.C. § 1603(b) (1976).

²⁹ HOUSE REPORT, *supra* note 12, at 15.

³⁰ *Id.*

³¹ See *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934).

³² HOUSE REPORT, *supra* note 12, at 15.

³³ Several recently decided cases have interpreted the phrase "agency or instrumentality of a foreign state." *Herzberger v. Compania de Acero del Pacifico, S.A.*, No. 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978), involved a suit against a Chilean corporation, *Compania de Acero del Pacifico* (CAP), engaged in the mining of iron ore and the production of steel products. CAP was 95% owned by the Chilean Corporación de Fomento de la Producción (CORFU), a Chilean governmental agency created by Chilean law, designed to foster economic development by assistance to and direct control of various domestic industries. The court held that CAP fell squarely within the definition of agency or instrumentality of a foreign state because it had a separate corporate personality and the majority of its shares were owned by a foreign state or a political subdivision of a foreign state.

In *Carey v. National Oil Co.*, 453 F. Supp. at 1100-01, *National Oil Company* (NOC), which was 100% owned by the Libyan government, was held to be a "foreign state" under §§ 1603(a) and

It is the controversial “commercial activity” exception³⁴ to jurisdictional immunity under the Immunities Act which is the most important, yet the most unclear of the five exceptions. Neither the language of the Immunities Act nor its legislative history provide much guidance as to what is meant by “commercial activity” or as to when a “foreign state” should be subject to the jurisdiction of U.S. courts by virtue of its having engaged in commercial activity.

The Immunities Act defines commercial activity as “either a regular course of commercial conduct or a particular commercial transaction or act.”³⁵ The legislative history expands somewhat on the meaning of these phrases, but ultimately it provides the reader with little guidance as to what is meant by these terms.

As an example of “a particular commercial transaction or act” the legislative history pointed out “a single contract, if of the same character as a contract which might be made by a private person.”³⁶ It also noted that “a regular course of commercial conduct” would include the carrying on of such activities as those of a mineral extraction company, an airline, or a state trading company. Other examples of commercial activity included a foreign government’s sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation.³⁷ The legislative history also noted that “certainly, if an activity is customarily carried on for profit, its commercial nature can be readily assumed.”³⁸

These definitions, clarifications, and examples point the courts in a general direction; they fail, however, to provide the courts with any useful means of differentiating or categorizing various types of state activity. Initially, the reader may feel that these examples are helpful and capable of logical application. Upon closer analysis, however, one finds that it is not at all clear what these examples were intended to represent. Are they examples of commercial activity because they employ a private or public corporate structure, or because they could be performed by a private party, or because they are customarily carried on for profit? Unfortunately, one is not told in any kind of specific or

(b)(2) of the Immunities Act, because NOC was a corporation, a majority of whose shares were owned by a foreign state or political subdivision of a foreign state.

³⁴ 28 U.S.C. § 1605(a)(2) (1976).

³⁵ 28 U.S.C. § 1603(d) (1976).

³⁶ HOUSE REPORT, *supra* note 12, at 16.

³⁷ *Id.*

³⁸ *Id.*

readily applicable way what it is about the cited examples that makes them commercial activity. As a result, the examples are of limited benefit.

Consider the statement, mentioned above, that a contract, if of the same character that might be made by a private person, would be regarded as "a particular commercial transaction or act." We are told, for example, that a contract by a foreign government to purchase provisions or equipment for its armed forces or to construct a government building would constitute commercial activity.³⁹ This is presumably one contract that could be made by a private person. It is difficult to imagine today many contracts, if indeed there are any, that could not be made by a private person. A government could contract for nearly all services which are traditionally regarded as sovereign functions. For example, it is not inconceivable that a government could provide for its defense, including the procurement of troops, by contracting out the responsibility. Even certain legislative functions, such as the appropriation of funds, could theoretically be performed by contract.

Does the legislative history actually indicate that such activity, if done by private contract, is commercial? One might reason that because nearly all government activities could be performed by private contract, the presence of a contract is *per se* evidence of commercial activity. The legislative history, however, certainly does not go that far, and one may doubt whether it was the intent of Congress to do so. The government—private person distinction, therefore, provides little assistance in analyzing the meaning of commercial activity.⁴⁰

The statement that activities "customarily carried on for profit" have a commercial nature is also ambiguous and often difficult to apply. No definition of profit is offered, and in today's world the meaning is not self-evident. For example, the term has little practical significance in the socialist bloc, where there are no profits or corporate structure as in the West.

The legislative history of the Immunities Act indicates that the language in the bill was purposely left imprecise. It was stated that: "The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable."⁴¹ Also noted was the opinion of the State Depart-

³⁹ *Id.*

⁴⁰ For a critique of the "governmental—non-governmental distinction" in tort law, see notes 182-84 and accompanying text *infra*.

⁴¹ HOUSE REPORT, *supra* note 12, at 16.

ment that it was best to defer to the courts in the determination of whether an activity is commercial or governmental. In fact, Monroe Leigh, legal advisor to the Department of State, stated that the officials at the Department realized that they

probably could not draft legislation which would satisfactorily delineate that line of demarcation between commercial and governmental. . . . We have decided to put our faith in the U.S. courts to work out progressively, on a case-by-case basis, and using such guidance as has already developed in the very large body of case law which exists, on the distinction between commercial and governmental.⁴²

Mr. Leigh did point out, however, that the drafters sought to provide the courts with a starting point in their analysis, namely, that the commercial character of an activity should be determined, "not based on the purpose for which an activity occurred, but rather on its nature."⁴³ The courts would inquire, he noted, "whether the activity in question is one which private parties ordinarily perform or whether it is peculiarly within the realm of governments."⁴⁴ The resultant language in the Immunities Act states that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."⁴⁵ This means that it is irrelevant that the goods or services procured through a contract are to be used for a public purpose. The commercial nature of the activity is the critical factor.⁴⁶

THE USE OF GOVERNMENT INTEREST FACTORS IN ANTITRUST CASES INVOLVING THE SOVEREIGN IMMUNITY DEFENSE

It should be noted that the mere stating of a preference for one test over another, with little indication as to how the test should be applied, does not provide courts with sufficient guidance for their sovereign immunity decisions. Moreover, it is neither easy, nor wise, to divorce completely the underlying purpose of a government activity from its commercial nature. Nature and purpose are not mutually exclusive. Many dealings in which governments are involved are complicated mixtures of commercial enterprise and sovereign activities. The participation by a nation in a producer cartel is one example. Cartel members engage in management functions similar or equivalent to private corporations. At the same time, if the cartel's product is a vital natural

⁴² *House Hearings*, *supra* note 13, at 53.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ 28 U.S.C. § 1603(d) (1976).

⁴⁶ *HOUSE REPORT*, *supra* note 12, at 16.

resource, the government activity may also serve a legitimate and important public purpose. In such cases, courts should not simply compare the government activity to a common commercial transaction. Instead, a more sophisticated, sensitive, and truly international analysis is necessary. Such an analysis should take into consideration the sovereign interests of a foreign government by looking to a variety of factors that could bear upon and amplify the nature of the transaction in question. These factors, which will be referred to in the following discussion as the "government interest factors," include the following:

- (1) the legal form used by the foreign government to engage in the transaction;
- (2) comity between the United States and the foreign government;
- (3) the representations made by the foreign government, the United States Government and other relevant persons regarding the vital national interests of the foreign government involved in the transaction;
- (4) the temporal and political context of the transaction;
- (5) the likelihood of enforceability, or retaliation, by the foreign government; and
- (6) the status of the transaction under the law of the foreign government.

Recent world developments, including the heightened activity of OPEC and the creation of the uranium cartel, suggest that dramatic new means of managing the economic and political affairs of state are being employed by foreign governments. The sensibilities of foreign governments and the changing conceptions of the proper role of the sovereign in the economic and political affairs of state require a less ideological and ethnocentric approach to the determination of the commercial character of an activity. If the commercial nature of a government activity is determined with reference to the government interest factors and in conjunction with an analysis of the indicia of commerciality present in the transaction, the resultant decisions will be fairer and more easily applicable by future courts.

Since the legislative history indicates that Congress was purposely imprecise in its treatment of the definition of "commercial" activity, the responsibility falls to the courts to clarify the problem areas. In the three years since the passage of the Immunities Act, however, the courts which have confronted the issue have failed to develop a workable test.⁴⁷ In the section which follows, the quantity, form, and nature

⁴⁷ See, e.g., *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (antitrust case against Polish state trading agency that exports golf carts); *Herzberger v. Compania de Acero del Pacifico, S.A.*, No. 78 Civ. 2451 (S.D.N.Y. Aug. 17, 1978) (suit against Chilean mining corporation, a majority of whose shares were owned by a Chilean governmental agency); *Yessenin-Volpin*

of state trading in the world today, as well as its antitrust implications, will be considered.

FOREIGN STATE INVOLVEMENT IN TRADE AND COMMERCE:
QUANTITY, FORM, AND NATURE

One of the most significant developments of the past century has been the increasing participation of sovereign governments in domestic and foreign trade and commerce. Today, virtually all foreign states are engaged in some form of state trading⁴⁸ or commercial activity.⁴⁹

One commentator has reported recently that "[s]tate-controlled companies, whether or not the government owns a majority of the shares, have become a powerful presence on the international business scene."⁵⁰ State-controlled companies in the non-Communist world produce 85% of the oil, 40% of the copper, and 33% of the iron ore and bauxite and manufacture 54% of the steel, 35% of the polyethylene, and 20% of the autos.⁵¹ A recent report indicated that the state is involved in 40 of the top 100 European industrial enterprises.⁵² An important share of the foreign trade in many developing Middle Eastern, Asian, South American, and Black African nations is conducted by the government or its agents.⁵³ Numerous developed nations, including Australia, Canada, New Zealand, and South Africa, operate food marketing boards.⁵⁴ In the Council for Mutual Economic Assistance (COMECON) nations⁵⁵ of the socialist bloc, which account for approximately one-tenth of international trade,⁵⁶ the state transacts all business with the outside world, and regulates all internal economic affairs

v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978) (libel action against official Soviet State press agency and semi-autonomous Soviet press agency).

⁴⁸ See generally Kostecki, *supra* note 3.

⁴⁹ For reasons stated above, the use of the term "commercial activity" does not connote a legal conclusion by the author with respect to the imprecise definition of "commercial activity" within the meaning of the Immunities Act.

⁵⁰ Menzies, *supra* note 3, at 103.

⁵¹ *Id.*

⁵² Carson & Losco, *supra* note 3, at 71.

⁵³ Kostecki, *supra* note 3, at 192.

⁵⁴ *Id.*

⁵⁵ The founding members of COMECON included the USSR, Bulgaria, Czechoslovakia, Hungary, Poland, and Rumania. Albania was admitted in 1949, but ceased participation in 1961. Other states which have gained admission include Cuba (1972), the German Democratic Republic (1950) and Mongolia (1962). In 1964, Yugoslavia concluded an agreement with COMECON by which Yugoslavia would participate in the work of some COMECON bodies. Angola, Laos, North Korea, and Vietnam participate in various bodies as observers. There are operative agreements with Finland, Iraq, and Mexico. THE STATESMAN'S YEARBOOK 1978-79, at 52 (J. Paxton ed. 1978).

⁵⁶ Kostecki, *supra* note 3, at 187.

by means of a national economic plan.⁵⁷

Nevertheless, an acceptable definition of state trading is not easy to formulate.⁵⁸ For purposes of this comment, it will be convenient to consider collectively all of the trade and commerce in which a foreign government could be engaged. Therefore, state trading will be defined herein as conduct by a state, or its agencies, of trade or commerce which serves a national interest. It is intended that this definition will include the three common forms of state trading, *i.e.*, majority state ownership of private corporations, state ownership of public corporations, and state trading by government ministries or agencies. Each form is unique, having its own advantages and disadvantages, depending on the objectives of the foreign state. Furthermore, with respect to the first of the government interest factors mentioned above, "the legal form used by the foreign government to engage in the transaction," one should keep in mind the level of interest that a government manifests in a particular transaction when it utilizes each of the three forms.

State Ownership of Private Corporations

Ownership of a private corporation is becoming a frequent vehicle for foreign governments desirous of engaging in state trading. Typically, governments will either offer shares for sale to the public in a state-owned entity or simply purchase shares of a corporation through private markets.

Private corporations normally have commercial attributes such as limited liability, the ability to sue and be sued, a separate legal personality, the motivation to realize a profit, and the ability to contract in their own name with other persons for goods and services. These attributes are important when considering whether a transaction involving a private corporation is a commercial activity under the Immunities Act.

In Europe, some of the largest, most powerful, and well-known private industrial firms are at least 50% state-owned and are engaged in commercial activities which include ship-building, the refining of steel

⁵⁷ See generally Berman, *The Legal Framework of Trade Between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482 (1952); Berman & Bustin, *The Soviet System of Foreign Trade*, 7 LAW & POL'Y INT'L BUS. 987 (1975); Fensterwald, *supra* note 3; Spulber, *The Soviet-Bloc Foreign Trade System*, 24 LAW & CONTEMP. PROB. 420 (1959).

⁵⁸ Professor Kostecki notes that "[i]t is virtually impossible to give a clear-cut and meaningful definition of state trading which could please everybody." Kostecki, *supra* note 3, at 188. Professor Allen states that "state trading is by no means crystal-clear in conception, and its ambiguity in operation is even more pronounced." Allen, *State Trading and Economic Warfare*, 24 LAW & CONTEMP. PROB. 256, 257 (1959).

and petroleum, the mining of coal, and the sale and production of motor vehicles, chemical products, paper and wood products, and tobacco.⁵⁹ These private corporations are predominantly commercial entities. The nature of a private corporation has induced many governments to utilize the private corporate form. An autonomous, corporate-minded management with a strong profit incentive is just one of the advantages. Government ownership, however, even if it represents a controlling or majority interest, does not confer any kind of sovereign immunity on the private corporation.⁶⁰ Typically, private corporations are subject to the corporate laws of the jurisdiction in which they are incorporated or are doing business, and receive no special treatment by virtue of their government affiliation.⁶¹

Due to the commercial nature of their activities and autonomous private corporate form, private corporations would seem to have little claim to immunity from the jurisdiction of U.S. courts. This is notwithstanding the fact that a majority of their shares may be owned by a foreign government and they qualify as an "agency or instrumentality of a foreign state" under the Immunities Act. Furthermore, if a sovereign state has a vital interest that it wishes to protect, it seems that this interest can be advanced more effectively by utilizing a legal form whereby the government can exercise greater control. Therefore, a court employing the government interest factors would likely deter-

⁵⁹ It should be noted that determining state ownership of private enterprise is not easy, because "many firms either do not know or do not care who owns their shares." Carson & Losco, *supra* note 3, at 72. The following well-known examples, cited in Carson & Losco, *supra* note 3, at 73-74, and in Menzies, *supra* note 3, at 104, include Renault, the automobile manufacturer, which is 75% owned by the French government. In Great Britain, the government owns a majority of the shares of Rolls-Royce and British Leyland and a 48% interest in British Petroleum, Ltd. The West German government holds a majority position in several industrial giants, including Salzgitter, a steel refining and shipbuilding concern, Saarbergwerke, a coal mining and petroleum refining company, and VIAG, an aluminum refining firm. Volkswagenwerk, the huge German auto company, is 40% state-owned. The Italian government owns a majority of an auto manufacturer, Alfa Romeo, and a steel refiner, Italsider. In Spain, the government owns a majority of the shares of Tabacalera, which produces tobacco, and ENSIDESA, which produces steel. In Sweden, the Statsföretag Group, a conglomerate which, among other things, produces paper and wood products and mines iron ore, is 100% government-owned.

Government ownership of private industrial companies is prevalent outside Europe as well. For example, the Chilean government owns a majority of CODELCO-CHILE, a copper and metal mining company. The Steel Authority of India has majority government participation. The Zambia Industrial and Mining Corporation, which mines and refines copper and other metals, is also controlled by the government. The South African government owns the majority of equity in South Africa Iron and Steel.

⁶⁰ See *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929).

⁶¹ For information regarding the Amtorg Trading Corporation, a New York corporation utilized by the Soviet Union to engage in state trading in the United States, see note 91 and accompanying text *infra*.

mine that the private corporate form suggests a limited government interest.

State Ownership of Public Corporations

Another legal form commonly utilized by governments to effectuate their state trading is the "public corporation." A public corporation, although in some respects autonomous, is really an arm of the state that creates it—by nationalization or otherwise. In fact, one author has recently noted that "the public corporation is today a worldwide phenomenon. There are very few states in which the public corporation does not play a significant, indeed an indispensable role in their economic life."⁶²

Although they exist in very different legal systems, economies, and cultures, one commentator has noted that public corporations have the following common features:

- (1) they are separately established by statute;
- (2) each has a separate legal personality;
- (3) their administration is in the hands of a governing board appointed by the government;
- (4) their employees are not civil servants;
- (5) the basis of their finances is not parliamentary appropriation but permanent revenue earning assets. Some of them with ministerial approval can raise loans. They have to balance revenue and expenditure and any profits generally have to be ploughed back into the development of the enterprise. They are commercially audited;
- (6) they are responsible to the government through the appropriate minister and subject to his general direction; and
- (7) in their day-to-day operations they are like any other private entities. They are fully liable in law, and do not enjoy any of the legal privileges and immunities of government.⁶³

The above characteristics indicate the ambiguous, even contradictory, nature of public corporations. Although they possess characteristics of both government departments and private corporations, legally and analytically, they cannot be regarded as either.⁶⁴ For example, while public corporations operate on behalf of the government, they are separate legal entities, possess their own funds, and have many of the legal and commercial attributes of private corporations.⁶⁵ Furthermore, while public corporations are largely autonomous in their man-

⁶² Zakariya, *supra* note 6, at 487.

⁶³ *Id.* at 489-90.

⁶⁴ *See id.* at 490.

⁶⁵ Friedmann, *A Comparative Analysis*, in *THE PUBLIC CORPORATION*, *supra* note 6, at 541.

agement, they are subject to some direction by the government,⁶⁶ often by way of a semi-independent governing board appointed by the executive.⁶⁷ These hybrid organizations reside somewhere between the pure public authority and the private commercial entity, "clothed with the power of government but possessed of the flexibility and initiative of a private enterprise."⁶⁸

Numerous vital industries in nations throughout the world have been nationalized and their ownership interest transferred from private to public corporate ownership.⁶⁹ In certain Western European countries today the aerospace,⁷⁰ aluminum,⁷¹ computer,⁷² automobile,⁷³ and steel⁷⁴ industries have been nationalized and are presently run as public corporations.⁷⁵ Outside the U.S., the petroleum industry is largely run by state petroleum companies.⁷⁶ Moreover, powerful state holding companies exist in Spain, Great Britain, Italy, and Sweden.⁷⁷

In the United States, the federal government operates over a hundred public corporation-type enterprises⁷⁸ which engage in activities including the production and distribution of radioisotopes, the production of electric power, insuring, lending and borrowing, the holding of timber lands, the ownership of grain, the operation of warehouses, the operation of railroads, and the operation of the post office.⁷⁹ At the state level, individual U.S. states have public corporations which operate public utilities, transportation and communications.⁸⁰

It is difficult to say exactly why a government would use the public corporation to conduct a particular state trading activity. Part of the reason must be that the activity is regarded as too important a business to be left entirely to private interests.⁸¹ Likewise, the activity may be too important to be left solely to a government department. Through

⁶⁶ *Id.*

⁶⁷ Zakariya, *supra* note 6, at 490.

⁶⁸ *Id.* at 489.

⁶⁹ See W. ROBSON, note 6 *supra*; W. THORNHILL, note 7 *supra*.

⁷⁰ See Hochmuth, *Aerospace*, in *BIG BUSINESS AND THE STATE*, *supra* note 6, at 145.

⁷¹ See Mikdashi, *Aluminum* in *BIG BUSINESS AND THE STATE*, *supra* note 6, at 170.

⁷² See Jequier, *Computers*, in *BIG BUSINESS AND THE STATE*, *supra* note 6, at 195.

⁷³ See Wells, *Automobiles*, in *BIG BUSINESS AND THE STATE*, *supra* note 6, at 255.

⁷⁴ See Hayward, *Steel*, in *BIG BUSINESS AND THE STATE*, *supra* note 6, at 229.

⁷⁵ See generally CENTRE EUROPÉEN DE L'ENTREPRISE PUBLIQUE, note 6 *supra*.

⁷⁶ See generally Zakariya, note 6 *supra*.

⁷⁷ *Growing Shadow of the Public Sector*, *supra* note 3, at 17-18.

⁷⁸ See Stason, *AEC Production and Distribution of Radioisotopes: State Trading in a Free Enterprise Economy*, 20 VAND. L. REV. 369 (1967).

⁷⁹ *Id.* at 369, 374-77.

⁸⁰ Zakariya, *supra* note 6, at 488-89.

⁸¹ *Id.* at 482.

the public corporation form, a government can reap the benefits of semi-private management⁸² and yet retain a greater degree of direct government control as compared to a private corporation.⁸³ In Great Britain, for example, a minister who is authorized to appoint the members of the boards of public corporations can, after consultation, give directives of a general nature to the corporations.⁸⁴ Such prerogatives would not be available in a private corporate form.

Whatever the specific reason why a state chooses the public corporation form, it can be said that the creation of a public corporation to manage a particular activity reflects a judgment by a government that the activity is of great importance to the state.⁸⁵

From a juridical point of view, the government interest manifested by the creation of a public corporation, instead of the acquisition of shares of a private corporation, should be recognized. The Immunities Act, however, does not prescribe or even suggest a different legal treatment for a foreign state depending upon the form of state involvement in trade or commerce. In fact, under the Act, private and public corporations alike—assuming a majority of their shares are owned by a foreign state or a political subdivision of a foreign state—as well as government ministries or agencies, are similarly treated.⁸⁶

When determining the nature of an activity in which a state is engaged, the courts, although they have thus far declined to do so, should take into account the governmental interest of the foreign state in engaging in a particular activity. In other words, if a state has chosen to manage a vital natural resource by way of a public corporation, this would indicate a higher degree of interest in the activity than if the government left the activity to be operated privately, even if the government retained stock in the corporation. Accordingly, this government interest factor, in conjunction with a consideration of the other government interest factors mentioned above, and a traditional analysis of the indicia of commerciality present in the transaction, suggest that immunity should be granted because the nature of the transaction

⁸² *Id.* at 490-91.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Equally suggestive of the high degree of interest that the government must have in an activity that it places under the aegis of a public corporation is the high risk of loss or nominal return typical of public corporations. Today, due in part to mismanagement and financial difficulties, nationalized industries throughout Europe are suffering heavy losses. See Goldsborough, *Giscard's New French Revolution: Capitalism*, FORTUNE, Apr. 9, 1979, at 66; *Growing Shadow of the Public Sector*, *supra* note 3, at 17.

⁸⁶ 28 U.S.C. §§ 1603(a)-(b) (1976).

is not truly commercial.⁸⁷

*State Trading Administered by Government
Ministries or Agencies*

A third form which may be used by governments to engage in trade or commerce is direct state trading by a government ministry or agency. While some definitions classify such entities as having separate legal personalities,⁸⁸ for purposes herein it will be assumed that they do not have a separate corporate identity. They have few of the characteristics of corporations, private or public, and they enjoy few of their advantages. Their operations are conducted by government ministers and other "civil servants" directly in the employ of the government. All of their funding is provided by the government and they are responsible only to the government. Although they deal with private parties, no private persons control their day-to-day operations. In short, government ministries or agencies, as defined herein, are the sovereign itself.

Direct state trading by government ministries or agencies is infrequent today, even in many of the socialist nations.⁸⁹ In fact, Soviet trade delegations have not carried on trade directly with foreigners since 1935.⁹⁰ Moreover, many Western nations, like the United States, have attempted to avoid a sovereign immunity confrontation with a government ministry or agency engaged in state trading. For example, in 1924, some nations, including the United States, insisted that the Soviet Union state trading entity incorporate under the laws of the local jurisdiction.⁹¹

⁸⁷ Under such an analysis, if the foreign state was a member of the socialist bloc, where the private corporate form is virtually non-existent, the court could take this structural element into consideration and, at its discretion, give the presence of a public corporate form less weight.

⁸⁸ Kostecki, *supra* note 3, at 189.

⁸⁹ Quigley, *Soviet Foreign Trade Agencies Abroad: A Note*, 37 LAW & CONTEMP. PROB. 465, 469-73 (1972). One commentator has noted:

[I]n modern times . . . as the state was called upon to fulfill ever-increasing functions of a predominantly social and economic nature, it became evident that the conventional government departments were not adequately equipped to handle such new functions which, more often than not, were of a very specialized and highly technical nature. Besides, the inherent defects of departmental administration — the bureaucracy — had been under constant attack for some time. This district of "government by civil service," was also a significant factor in the emergence of a policy of public administration through separate agencies which would operate largely according to business principles and be separately accountable.

Zakariya, *supra* note 6, at 487. See also Friedmann, *A Comparative Analysis*, in THE PUBLIC CORPORATION, *supra* note 6, at 547-52.

⁹⁰ Quigley, *supra* note 89, at 469.

⁹¹ As a result, in the United States the Soviet trading arm, the Amtorg Trading Corporation, took the form of a New York corporation, the shares of which were owned by Soviet Foreign

A sovereign immunity conflict also can be avoided by an advance waiver of immunity. Nations such as the Soviet Union enter into trade treaties by which they waive sovereign immunity and subject their trade delegations to the jurisdiction of local courts for commercial obligations undertaken abroad.⁹² If a dispute were to arise, however, it could be resolved under the Immunities Act. The Act provides that a government ministry or agency is a "foreign state."⁹³ Jurisdiction most likely would be based upon § 1605(a)(2) of the Immunities Act, the "commercial activity" provision.⁹⁴

A determination, however, of whether the activities of state ministries or agencies is commercial is a difficult one.⁹⁵ All government departments are closely integrated with the sovereign and there is a greater presumption that their activities are of a more political and governmental nature. At present, it is fair to say that the courts have not clearly resolved the question of whether the mere existence of a defendant, which is a government ministry or agency, is determinative of whether an activity is a commercial activity.⁹⁶

It seems sensible for courts to treat state trading administered by government departments as having more of a public nature than that conducted by public or private corporations. The government interest of this form is evident. Government agencies or ministries offer maxi-

Trade Ministry officials. Subject to all New York laws, Amtorg could not hope to gain immunity. See Hazard, *State Trading in History and Theory*, 24 LAW & CONTEMP. PROB. 243, 248-49 (1959).

⁹² "Thus," notes one commentator, "the practical significance of the Soviet claim of immunity for the trade delegation is not great, both because of the customary treaty waiver and because of the infrequency with which trade delegations contract in their own name." Quigley, *supra* note 89, at 470.

⁹³ The Immunities Act, at 28 U.S.C. § 1605(a)(1) (1976), provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication

See also notes 5-6 and accompanying text *supra*; *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (1978).

⁹⁴ Under that section, if the activity of the governmental department falls within one of three clauses, the party is denied immunity and the action proceeds. 28 U.S.C. § 1605(a)(2) (1976) provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case

(2) In which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

⁹⁵ See *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (1978). For a brief discussion of this case, see notes 190-94 and accompanying text *infra*.

⁹⁶ See Baker, *supra* note 4, at 931.

mun control over the state trading activity. In view of the advantages of other forms, the use of a government department further suggests the high degree of government interest involved.

THE DEVELOPMENT OF THE LAW OF SOVEREIGN IMMUNITY: THE
APPLICATION OF THE RESTRICTIVE THEORY IN THE
UNITED STATES

The foreign sovereign immunity doctrine, which has been developed in fields other than antitrust,⁹⁷ was initially formulated in the U.S. over seventy years prior to the passage of the Sherman Act.⁹⁸ Surprisingly, however, there exist only a small number of decided antitrust cases in which the sovereign immunity defense has been invoked.⁹⁹ As a result, in determining the application of the sovereign immunity doctrine to antitrust situations, the principles and precedents which have

⁹⁷ Maritime claims dominated the early cases and continued to be important as late as 1945. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965). See also *W. FUGATE*, *supra* note 24, at § 3.10.

The state action doctrine, a court-created exemption which arose purely under the antitrust laws, argues that the antitrust laws were intended to apply only to restraints imposed by private parties and that they are inapplicable to restraints imposed by U.S. states acting as sovereigns. For a discussion of the state action doctrine as it relates to sovereign immunity, see Note, *American Antitrust Liability of Foreign State Instrumentalities: A New Application of the Parker Doctrine*, 11 CORNELL INT'L L.J. 305 (1978). In that note, the author states that "although domestic application of the antitrust laws cannot parallel international application perfectly, future development in international antitrust law may involve application of current domestic [e.g. the state action] doctrines." *Id.* at 309-10 (citation omitted). The author continues, stating:

The pattern of development in this area has been for the Court to decide first whether a particular governmental body may bring suit under the antitrust laws, and then whether it may also be sued. Compare *Georgia v. Evans*, 316 U.S. 159 (1942) (state may bring suit) with *Parker v. Brown*, 317 U.S. 341 (1943) (state may not be sued); compare also *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906) (city may bring suit) with *City of Lafayette v. Louisiana Power & Light Co.*, 98 S. Ct. 1123 (1978) (city may be sued). If this pattern continues, the Court, following its decision in *Pfizer*, may eventually have to decide whether foreign governments may be sued under U.S. antitrust laws. It is likely to base its decision on cases involving the antitrust liability of domestic governmental bodies.

Id. at 310 n.38. It is conceded that the courts may consider the state action cases in future antitrust cases involving the sovereign immunity defense. However, this author believes that the primary cases to which courts will look will be sovereign immunity cases, particularly those involving antitrust actions. This is especially likely in view of the Immunities Act. Moreover, in discussing sovereign immunity, the *Antitrust Guide* refers exclusively to sovereign immunity cases. ANTI-TRUST GUIDE, *supra* note 4, at 7-8, 50-62.

⁹⁸ See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

⁹⁹ See *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 849 (D. Del. 1978); *In re Grand Jury Investigation of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.D.C. 1952); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929).

evolved over the years in non-antitrust cases must be analogized and heavily relied upon.

The development of the doctrine of foreign sovereign immunity in the United States has been characterized by a marked shift in recent years from the traditional or "absolute" theory to the newer or "restrictive" theory. The absolute theory maintains that a sovereign cannot be made a respondent in the courts of another sovereign. This theory was developed at a time when the functions of government were essentially diplomatic and military; state-trading and government involvement in commercial activities were quite rare. Accordingly, the underlying concept in international law that no state should be subjected to the jurisdiction of another state was reasonable and relatively uncontroversial.¹⁰⁰

The absolute theory received its first expression in U.S. courts with Chief Justice Marshall's landmark decision in *The Schooner Exchange v. McFadden*.¹⁰¹ In *Schooner Exchange*, Justice Marshall considered the question of whether, in an American court, an American citizen could assert title to an armed vessel in the service of Napoleon. Marshall, in upholding the French plea of immunity, relied in large part on the law of nations. "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute," he noted.¹⁰² But, due to the mutual interest of nations in promoting intercourse between them, "all sovereignties have consented to a relaxation in practice . . . of that absolute and complete jurisdiction within their respective territories. . . ." ¹⁰³ The result, Marshall concluded, is that a sovereign "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" that immunity from jurisdiction will be extended to him.¹⁰⁴

World War I and the Russian Revolution created a new economic environment in which nationalization and active state involvement in commercial activity were more commonplace.¹⁰⁵ As litigation by private parties against sovereign states for contractual breaches and tort claims increased, the justification for the absolute theory weakened.

¹⁰⁰ See T. GIUTTARI, *THE AMERICAN LAW OF SOVEREIGN IMMUNITY* 3-8 (1970).

¹⁰¹ 11 U.S. (7 Cranch) 116 (1812). Some commentators think that Marshall's decision represents the first systematic analysis of governmental immunities in an English-speaking country. See T. GIUTTARI, *supra* note 100, at 27-28.

¹⁰² 11 U.S. (7 Cranch) at 136.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 137.

¹⁰⁵ Sucharitkul, *supra* note 6, at 16.

National courts began to reexamine the doctrine.¹⁰⁶ The result was a trend, in the United States and abroad, toward the adoption of the "restrictive" theory of sovereign immunity. Under this theory, courts decline to take jurisdiction only when the sovereign or public acts—*jure imperii* or "acts of the sovereign"—of a state are at issue.

Today, the restrictive theory is accepted by the great majority of national courts.¹⁰⁷ The United States, one of the last major countries¹⁰⁸ to recognize the restrictive theory, finally did so with the writing by the State Department in 1952 of the famous "Tate Letter."¹⁰⁹ Today, the restrictive theory is widely accepted by U.S. courts,¹¹⁰ the Congress,¹¹¹ and by the relevant agencies of the Executive, including the Departments of State¹¹² and Justice.¹¹³ Indeed, one of the primary purposes of the Foreign Sovereign Immunities Act of 1976¹¹⁴ was to codify the restrictive theory as recognized in international law and the Tate Letter.¹¹⁵

While the Tate Letter served as a watershed in the development of the restrictive theory in the U.S., it merely stated a general principal that the sovereign ought not be immune from jurisdiction when "en-

¹⁰⁶ For example, the courts of Italy and Belgium began adoption of the restrictive theory around the turn of the century. See T. GIUTTARI, *supra* note 100, at 4.

¹⁰⁷ See generally *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 69 (1965) [hereinafter cited as RESTATEMENT]; T. GIUTTARI, *supra* note 100, at 4. Even Great Britain, which until very recently had refused to adopt the restrictive theory, finally did so in 1975 and has adhered to it since then. See *The Philippine Admiral*, [1975] 2 W.L.R. 214 (P.C.); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1975] 2 W.L.R. 356 (C.A.). See also Delaume, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979).

¹⁰⁸ The United States has traditionally adhered to the absolute theory. See 26 DEP'T STATE BULL. 984 (1952).

¹⁰⁹ In the Tate Letter, note 3 *supra*, Jack B. Tate, Acting Legal Advisor of the State Department, advised the acting Attorney General that in the future the State Department would recognize sovereign immunity with regard to the sovereign's public acts, but not in cases involving a sovereign's private or commercial acts. Prior to the writing of the Tate Letter the State Department over the years had made a practice of advising the lower courts as to its interest, if any, in the granting of immunity to a particular party. See *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). *Peru* and *Hoffman* demonstrated the confusion and inconsistency that resulted from excessive reliance on the perceived will of the State Department. The cases acted as an impetus for the acceptance by the Department of the restrictive theory in the Tate letter.

¹¹⁰ See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976). In that case, the Supreme Court stated: "Indeed, it is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in this country." *Id.* at 703.

¹¹¹ See HOUSE REPORT, *supra* note 12, at 3. See also 28 U.S.C. § 1605(a)(2) (1975).

¹¹² Tate Letter, note 3 *supra*.

¹¹³ ANTITRUST GUIDE, *supra* note 4, at 8; HOUSE REPORT, *supra* note 12, at 6.

¹¹⁴ For a discussion of the Immunities Act, see notes 13-46 and accompanying text *supra*.

¹¹⁵ HOUSE REPORT, *supra* note 12, at 7.

gaging in commercial activities" or, more broadly stated, private acts—*jure gestionis*. But the letter offered no standard for differentiating between a sovereign's public and private acts.¹¹⁶ Various commentators, courts and the drafters of the Immunities Act have attempted to devise standards with limited success.¹¹⁷ Today, the courts have yet to establish a clear test for the determination of "commercial activity" under section 1605(a)(2) of the Act. This is due in part to the inherently difficult task of categorizing commercial activity in a broadly applicable manner. One leading commentator has noted that:

[T]he main argument in favour of absolute immunity from jurisdiction has been the view that what has been considered the only alternative to absolute immunity—namely, exercise of jurisdiction based on the distinction between acts *jure gestionis* and acts *jure imperii*—is impossible of definition and, therefore, of application.¹¹⁸

There is considerable evidence that, under the restrictive theory tests, both U.S. and foreign courts have treated essentially the same kind of activity in different ways.¹¹⁹ The operation of a railway, for example, was held to be commercial activity by a Belgian court¹²⁰ and sovereign by American,¹²¹ French,¹²² and German¹²³ courts. Purchasing supplies for army use has been held commercial by American¹²⁴

¹¹⁶ *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 359 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

¹¹⁷ *Id.* at 359-60. For a discussion of the various standards of application which have been developed under the restrictive theory, see notes 142-201 and accompanying text notes *infra*.

¹¹⁸ Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 222. Professor Lauterpacht reasons that "the law on the subject should—and can—be placed on a footing different from either the [then] existing doctrine of absolute immunity or the concession of immunity, by reference to the traditional distinction, in matters *jure imperii* as distinguished from those *jure gestionis*." *Id.* at 225-26. He suggests a third alternative under which foreign sovereigns would be subject to the jurisdiction of domestic courts in contract and tort actions as if they were the domestic sovereign. *Id.* at 226-27.

¹¹⁹ See E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 30-31 (1933); Harvard Law School Research in Int'l Law, Draft Convention on the Competence of Courts in Regard to Foreign States (1931) [hereinafter cited as Harvard Draft Convention]; Lauterpacht, *supra* note 118, at 222-23; Timberg, *Sovereign Immunity and Act of State Defenses: Transnational Boycotts and Economic Coercion*, 55 TEX. L. REV. 1, 15-16 (1976).

¹²⁰ See Harvard Draft Convention, *supra* note 119, at 389 (citing *Société Anonyme des Chemins de Fer Liégeois-Luxembourgeois c. Etat. Néer-Landais*, [1903] *Pasicrisie Belge* 1.294).

¹²¹ See *Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925); *Bradford v. Director General of Rys. of Mexico*, 278 S.W. 251 (Tex. App. 1925); *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N.E. 876 (1908).

¹²² See Harvard Draft Convention, *supra* note 119, at 389 (citing *Carretier c. Chemin de Fer d'Alsace-Lorraine*, [1885] D.P. 1.341).

¹²³ See Harvard Draft Convention, *supra* note 119, at 389 (citing *Bardorf g. Belgischen Staats u. Eisenbahnfiskus*, 62 Ent. des R.G. in 165 (1905)).

¹²⁴ See *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), *aff'd*, 17 App. Div. 2d 941, 233 N.Y.S.2d 971 (1962). An American court, in *Kingdom of Roumania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir.), *cert. denied*, 246 U.S. 663 (1918), also held

and Italian¹²⁵ courts and sovereign by French¹²⁶ courts. The operation of a government trading monopoly was held commercial activity by Belgian¹²⁷ and Roumanian¹²⁸ courts and sovereign by American¹²⁹ and British¹³⁰ courts.

In numerous instances American courts have treated functionally indistinguishable sovereign activity differently.¹³¹ One example in the antitrust area is *United States v. Deutsches Kalisyndikat Gesellschaft*.¹³² In this case, the United States brought an action to enjoin violations of the U.S. antitrust laws by the Societe Commerciale des Potasses d'Alsace, a French corporation which was eleven-fifteenths owned by the French government, and which administered potash mines in Alsace-Lorraine. The French ambassador, who intervened in the suit, argued that the defendant was a government instrumentality, created and controlled by the Republic of France for governmental purposes, and, therefore, that the suit was equivalent to a suit against the Republic of France. The court held that the defendant company was not equal to the French Government and therefore was not immune from suit. Although the court acknowledged that the sovereign and his agents are immune when engaged in commercial activity, it noted that neither comity nor law required granting immunity to a foreign corporation with private shareholders which was a separate legal entity under French law. The court refused to take into account the alleged public purpose served by government administration of the potash mines stating that it was only to be considered in determining whether property within the jurisdiction of the court had been devoted by a foreign state to a public use.¹³³

In *In re Investigation of World Arrangements*,¹³⁴ an antitrust action

as sovereign the purchase of army supplies, but this contra-indicative decision came before the adoption of the restrictive theory in the United States. See notes 107-18 and accompanying text *supra*.

¹²⁵ See Harvard Draft Convention, *supra* note 119, at 390 (citing *Stato di Romania c. Trutta*, I *Monitore dei Tribunali* 288 (1926)).

¹²⁶ See Harvard Draft Convention, *supra* note 119, at 390 (citing *Gouvernement Espagnol c. Lambège et Pujol*, 1849 D.P. 1.5, and *Luchmann et Cahn c. Heymann*, 1871 D.P. 2.208).

¹²⁷ See Harvard Draft Convention, *supra* note 119, at 389 (citing *Peruvian Guano Co. c. Dreyfus et consorts*, [1881] *Pasicrisie Belge* 2.313).

¹²⁸ See Harvard Draft Convention, *supra* note 119, at 389 (citing *Banque Roumaine c. Etat Polonaise*, 50 *Clunet* 663 (1923)).

¹²⁹ See *French Republic v. Board of Supervisors*, 200 Ky. 18, 252 S.W. 124 (1923).

¹³⁰ See Harvard Draft Convention, *supra* note 119, at 389 (citing *Smith v. Weguelin*, L.R. 8 Eq. 198 (1869), and *Twycross v. Dreyfus*, 36 T.L.R. 752 (1877)).

¹³¹ See *Timberg*, *supra* note 119, at 15-16.

¹³² 31 F.2d 199 (S.D.N.Y. 1929).

¹³³ *Id.* at 200-03.

¹³⁴ 13 F.R.D. 280 (D.D.C. 1952).

some twenty years later involving similar facts, the court gave effect to the public purpose of the activity involved and reached a contrary conclusion. In this case, Anglo-Iranian Oil Company moved to quash a subpoena *duces tecum* arguing that it was a unit of the British government and therefore immune from the jurisdiction of the court. Anglo-Iranian, the court found, was an instrumentality of the British government. The court looked to the fact that the government "controlled" the company by virtue of its majority ownership of the voting stock. It also emphasized that the object and purpose of the corporation, "to insure a proper supply of petroleum, crude oil, and other products for the British fleet," was "certainly a fundamental government function serving a public purpose."¹³⁵ The court concluded that Anglo-Iranian was "indistinguishable from the Government of Great Britain."¹³⁶

The court in *World Arrangements* distinguished *Deutsches Kalisyndikat Gesellschaft* arguing that, in the latter case,

the French Government was involved in a commercial venture, entirely divorced from any governmental function. There is a vast distinction between a sea faring island-nation maintaining a constant supply of maritime fuel and a government seeking additional revenue in the American markets and causing a direct injury in the United States to our domestic commercial structure.¹³⁷

This distinction is of little merit, although certain "acts concerning the armed forces" have traditionally been regarded as strictly sovereign and political acts.¹³⁸ The purchase, through a British corporate entity, of petroleum for the British navy would seem to be no more sovereign than the purchase, through a similar French corporate vehicle of potash for the French government. It also can be maintained that the purchases of potash and oil were equally commercial in nature. In both cases, a separate corporate entity, which could be sued under local law, was used to effectuate the purchases. Majority stock ownership by the government of a private corporation was present in both cases. Standard commercial contracts were involved in both cases. In short, the "vast distinction" between the purchases described by the *World Arrangements* court is difficult to discern.¹³⁹

¹³⁵ *Id.* at 290.

¹³⁶ *Id.* at 291.

¹³⁷ *Id.* The court's decision was influenced by a letter read in open court from the British Minister of Fuel and Power, that ordered the company not to produce documents, which were not in the United States, without the authority of the British Government. *Id.* at 289.

¹³⁸ *Victory Transport Inc. v. Comisaria General*, 336 F.2d at 360. See also Lalive, *L'immunité de Jurisdiction des États et des Organisations Internationales*, 84 RECUEIL DES COURS 205, 285-86 (1953).

¹³⁹ See W. FUGATE, *supra* note 24, at § 3.10; Timberg, *supra* note 119, at 15-16. Practically, the distinction presents less of an antitrust enforcement problem today because the Justice Depart-

It is unlikely that *World Arrangements* would be decided today as it was in 1952. The subsequent adoption in the Tate Letter of the restrictive theory and the passage of the Immunities Act make it probable that the transaction in that case would be held to be "commercial" activity and that the sovereign purpose emphasized by the court would be ignored. Moreover, it should be noted that the Department of Justice specifically rejects the holding in *World Arrangements*, stating that it "seems inconsistent with the later [*Dunhill*] case and the sovereign immunity statute, [and] we do not rely on it in our enforcement actions."¹⁴⁰

Nevertheless, the inconsistency of results in sovereign immunity cases is extremely problematic from a national as well as international point of view. So long as courts continue to decide sovereign immunity cases without developing a fairly specific test of commerciality, the problem will persist, and, even worse, decisions will continue to lack a principled basis. Therefore, U.S. courts must endeavor, in spite of the acknowledged difficulties, to develop a workable "commercial activity" test which conforms to the general mandate of the Immunities Act while adhering to a set of sound and equitable legal principles. Such a test might develop a list of criteria which evidence commercial conduct—such as the existence of a commercial arbitration clause in a contract, the use of a private corporate form to effectuate a transaction, or the existence of a profit motivation.

A commercial activity test must be sufficiently flexible so that it is not unreasonably rigid or ethnocentric only for the sake of uniformity. Understandably, in determining whether sovereign immunity should be granted, national courts tend to develop definitions of sovereign immunity based upon ideologically biased concepts of the appropriate role of the sovereign. While such an approach may produce greater consistency of result, it is often likely, especially in the antitrust context, to anger foreign sovereigns and their subjects because they view their conduct as perfectly appropriate sovereign behavior according to their national values, laws, and ideology. Consequently, there have been repeated examples in the past several decades of friendly nations such as Canada, Great Britain, and the Netherlands passing "blocking statutes"¹⁴¹ designed to prevent the extraterritorial application of U.S.

ment has specifically rejected *World Arrangements*. See ANTITRUST GUIDE, *supra* note 4, at 8; Davidow, *U.S. Antitrust, Free Trade and Nonmarket Economies*, 12 J. WORLD TRADE L. 473, 475 (1978). The position of the Justice Department, however, does not necessarily affect private antitrust actions.

¹⁴⁰ ANTITRUST GUIDE, *supra* note 4, at 8 n.21.

¹⁴¹ For a discussion regarding blocking statutes, see Stanford, *The Application of the Sherman*

laws.

TESTS DEVELOPED UNDER THE RESTRICTIVE THEORY

Since the adoption of the restrictive theory, courts have found it difficult to establish tests to distinguish governmental and commercial activity. Despite the difficulties presented by categorization, a number of U.S. courts have tried to develop standards, and three major tests have emerged. The tests are: (1) the "purpose of the transaction" test, that provides that sovereign acts are those that are performed for a public purpose; (2) the "*Victory Transport*" test, adopted by the Second Circuit in *Victory Transport Inc. v. Comisaria General*,¹⁴² that establishes a list of five strictly political or public acts in the exercise of which a party is immune from the jurisdiction of the court; and (3) the "nature of the transaction" test that provides that sovereign acts are those that cannot be performed by an individual.

In the Immunities Act, Congress did not make specific reference to any of these tests. As mentioned previously, Congress expressly provided for a "nature" rather than a "purpose" formulation when it stated, in section 1603(d), that "[t]he commercial character of an activity shall be determined by reference to the nature of the conduct or particular transaction or act, rather than by reference to its purpose."¹⁴³

In general, adoption of this "nature" formulation has produced fair results in the few cases involving "commercial activity" that have arisen under the Immunities Act.¹⁴⁴ Courts generally, however, have failed thus far to examine critically the underlying assumption of the Immunities Act, that the commercial character of an activity can be logically or consistently determined by referring to the "nature" of the activity. As discussed below, the "nature" of a transaction often cannot be easily discerned. As a result, in many instances, especially those involving alleged antitrust violations by foreign governments, the government interest factors must be considered in order to determine accurately the nature of a transaction.

Act to Conduct Outside the United States: A View from Abroad, 11 CORNELL INT'L L.J. 195, 204 (1978).

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

¹⁴³ 28 U.S.C. § 1603(d) (1976).

¹⁴⁴ See, e.g., *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978) (antitrust suit against Polish state-owned golf cart exporting firm); *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978) (suit against Soviet Ministry of Culture for breach of contract to provide artists and give concert performances); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978) (libel action against official Soviet press agency and semi-autonomous Soviet press agency).

The Purpose of the Transaction Test

In the early decades of the twentieth century, some courts in the United States¹⁴⁵ and abroad¹⁴⁶ developed a test which granted jurisdictional immunity to sovereigns only when they engaged in activities "for public purposes" or "destined to public uses"—*publicis usibus destinata*. In other words, sovereign activity with an underlying public purpose was considered to be immune, while sovereign activity lacking a public purpose was deemed to be private, and, therefore, was denied immunity.

The foremost Supreme Court case which adheres to the purpose test is *Berizzi Bros. Co. v. Steamship Pesaro*.¹⁴⁷ In this case, an action was brought to attach a ship owned and operated by the Italian government that was engaged solely in the commercial transport of goods between Italy and other foreign ports, including the United States. In *Berizzi Bros.*, Justice Van Devanter, emphasizing the activity in which the sovereign was engaged, as well as the actor engaged in the activity, held:

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that war ships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of the people in time of peace as any less a public purpose than the maintenance and training of a naval force.¹⁴⁸

The sovereign is immune not merely because he is the sovereign, as is the case under the absolute theory, but because the activity in which he is engaged advances a public purpose. Under the absolute theory, as

¹⁴⁵ *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Kingdom of Roumania v. Guaranty Trust Co.*, 250 F. 341 (2d Cir.), *cert. denied*, 246 U.S. 663 (1918); *The Maipo*, 259 F. 367 (S.D.N.Y. 1919); *The Maipo*, 252 F. 627 (S.D.N.Y. 1918); *Briggs v. Light Boats*, 93 Mass. (11 Allen) 157 (1865).

¹⁴⁶ See *De Howorth v. S.S. India*, [1921] S. Afr. L.R. 451 (C.P.D. III). In that case, which involved ownership by the South African government of a commercial shipping line, the court stated:

[A]ny use of a vessel for the purpose of obtaining revenue for the state is a public purpose, just as its use for the protection of the state is public. By means of revenue obtained from trading the State is assisted in providing for its army and navy.

Id. at 464. See also E. ALLEN, *supra* note 119, at 234-39 (citing *Governo Austriaco v. Fisola*, Corte cass. (Oct. 12, 1893)) (contract with the Austro-Hungarian government to construct fortifications).

¹⁴⁷ 271 U.S. 562 (1926).

¹⁴⁸ *Id.* at 574. Ironically, it is the lower court opinion of Judge Julian W. Mack, 277 F. 473 (S.D.N.Y. 1921), which was later reversed by the Supreme Court, that is still regarded as one of the most learned and well reasoned opinions on the subject. See T. GIUTTARI, *supra* note 100, at 66-70.

expressed by Justice Marshall in *Schooner Exchange*, the focus is on the *actor* rather than the activity engaged in.¹⁴⁹

In *Berizzi Bros.*, the court makes no attempt to explain what public purpose might suffice before immunity would be granted. “[P]roviding revenue for its treasury”¹⁵⁰ and the “advancement of the economic welfare of a people in time of peace”¹⁵¹ are cited as clear public purposes. If these broad categories would satisfy the *Berizzi Bros.* court, it would seem that nearly any activity in which the sovereign is engaged may be assumed to have a public purpose by virtue of the sovereign’s having undertaken the activity. At this point, the purpose test begins to resemble the absolute theory. This analysis serves to point out the great difficulty of separating the various sovereign immunity tests and theories.

In a pair of nearly identical cases both entitled *The Maipo*,¹⁵² which were relied upon by the court in *Berizzi Bros.*, the question of determination of public purpose was more directly addressed. In *The Maipo*, actions in libel were brought against a vessel owned by the Chilean government that had been chartered to a private party engaged in international commerce. In the first case, the court held that the ship was immune from process. Despite the charter of the ship to a private party for commercial use, the court acknowledged the argument that “the vessel was used for a governmental purpose in so far as it enabled Chilean shippers to export their products to the United States and to bring back from here to Chile commodities needed by the people there.”¹⁵³ The broad definition of public purpose in the first *Maipo* case, *i.e.*, supplying commodities to the Chilean people, is reminiscent of the reasoning in *Berizzi Bros.* A year later, the second *Maipo* court squarely addressed the public purpose question saying:

If the Republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to government property, then we must say so through diplomatic channels, and not through the

¹⁴⁹ In *Schooner Exchange*, 11 U.S. (7 Cranch) at 137, the Court noted that:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, 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 reserved by implication, and will be extended to him.

¹⁵⁰ 271 U.S. at 574.

¹⁵¹ *Id.*

¹⁵² 259 F. 367 (S.D.N.Y. 1919); 252 F. 627 (S.D.N.Y. 1918).

¹⁵³ 252 F. at 629.

judiciary.¹⁵⁴

According to the second *Maipo* case, a governmental function would be anything that the sovereign says it is, and public purpose would be assumed from the government's involvement in the activity. This analysis effectively eliminates the restrictive immunity test, and the public purpose category merges into the absolute theory. Interestingly, the second *Maipo* case may support a "government interest" analysis, to the extent that the court gives effect to the importance of the transaction to the Chilean Government. This once again points out the overlap and potential for confusion between the sovereign immunity categories and tests.

While the purpose test attempted to provide a rational basis for distinguishing types of sovereign activity, it has been rejected by courts and commentators for several reasons. First, it can be said that *all* activity engaged in by the sovereign has an underlying public purpose.¹⁵⁵ In *Victory Transport* the court noted that the purpose test was "unsatisfactory, for conceptually the modern sovereign always acts for a public purpose."¹⁵⁶ This point has been advanced by a leading scholar as well.¹⁵⁷ If it is conceded that all sovereign activity has a public purpose or the sovereign would not have engaged in the activity, then the purpose test ceases to make any distinctions between public and private activity at all and is, as previously stated tantamount to absolute immunity.

Second, the concept of "public purpose" is extremely ideological and U.S. courts generally do not like to impose their ideas of what is or is not a proper state purpose or function, particularly when a foreign government has made a specific representation to the contrary.¹⁵⁸ British courts are similarly disinclined.¹⁵⁹ These courts are aware of the comity implications of describing a state trading activity as proper or improper. They are also aware of the relative nature of the concept of public purpose in state trading. For example, the operation by the government of all national exports may be deemed an essential function by

¹⁵⁴ 259 F. at 368.

¹⁵⁵ *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir.), *cert. denied*, 381 U.S. 934 (1964). *See also* *Indian Towing Co. v. United States*, 350 U.S. 61, 67 (1955). In *Indian Towing*, which involved a tort action against the U.S. Coast Guard for the negligent operation of a lighthouse, Justice Frankfurter, speaking for the Court, noted that, "all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* at 67.

¹⁵⁶ 336 F.2d at 359.

¹⁵⁷ S. SUCHARITKUL, *supra* note 6, at 168.

¹⁵⁸ *See, e.g., United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 203 (S.D.N.Y. 1929); *The Maipo*, 259 F. at 368.

¹⁵⁹ S. SUCHARITKUL, *supra* note 6, at 168, 175-78.

one sovereign and regarded by another as an interference in the private sector.¹⁶⁰ Whether or not a foreign government has made a statement to the court, the public purpose test requires a court to make a value judgment as to the proper functions in which a sovereign should engage. Courts generally would prefer to avoid placing themselves in such a position.

Third, any inquiry by a court into the purpose of a sovereign activity may violate the act of state doctrine. That doctrine, which is related to the sovereign immunity doctrine,¹⁶¹ expresses the strong belief of the courts that if they were to pass on the validity of foreign acts of state it "may hinder rather than further pursuit of goals [by the United States] both for itself and for the community of nations as a whole in the international sphere."¹⁶²

It can be argued that when a court inquires into the alleged public purpose of a sovereign activity it necessarily passes on the validity of a foreign act of state. Originally, out of respect to the foreign sovereign,¹⁶³ and more recently, in deference to the executive branch,¹⁶⁴ United States courts have traditionally chosen not to "sit in judgment" on the acts of foreign sovereigns.

The "Victory Transport" Test

In the years following the State Department's endorsement of the restrictive theory in the Tate Letter, numerous courts were faced with cases involving the allegedly commercial activities of foreign states and their agencies.¹⁶⁵ Although the State Department had made it clear that its policy was to grant immunity for the public, not private, activities of foreign governments, the Department had not provided any guidelines describing how courts should differentiate between public and private sovereign acts. In *Victory Transport, Inc. v. Comisaria Gen-*

¹⁶⁰ See Friedmann, *The Growth of State Control Over the Individual, and its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT'L L. 118, 126 (1938).

¹⁶¹ See generally H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 672-728 (2d ed. 1976).

¹⁶² *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

¹⁶³ See *Underhill v. Hernandez*, 168 U.S. 250 (1897). In that case, regarded as the classic formulation of the act of state doctrine, the court said: "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 252.

¹⁶⁴ See *Timberline Lumber Co. v. Bank of America*, 549 F.2d 597, 605 (9th Cir. 1976).

¹⁶⁵ See *National City Bank v. Republic of China*, 348 U.S. 356, *rehearing denied*, 349 U.S. 913 (1955); *New York and Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955); *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 App. Div. 2d 941, 233 N.Y.S.2d 1013 (1962); *Harris and Co. Advertising, Inc. v. Republic of Cuba*, 127 So.2d 687 (Fla. App. 1961).

eral de Abasdecimientos y Transportes,¹⁶⁶ the Second Circuit created a classification of political and public acts that were to be the only acts for which foreign sovereigns and their agencies were to be granted immunity. The criteria set forth in the case are elements of what is known as the “*Victory Transport*” test.¹⁶⁷

In *Victory Transport*, the Spanish Minister of Commerce chartered a private American vessel for the purpose of transporting a cargo of wheat from the United States to Spain. The charter agreement provided for final and binding arbitration of all disputes. The ship sustained hull damage while discharging its cargo in the Spanish port, and the Minister of Commerce failed to pay for the damages or submit to arbitration. Plaintiffs sued and the Spanish Consul, appearing on behalf of the Minister, asserted that the Minister was an arm of the Spanish Government and immune from suit.

The court referred to the Tate Letter, noting that it charted a general course in favor of a restrictive theory of sovereign immunity but provided few guidelines for its implementation.¹⁶⁸ In order to establish a test for measuring strictly political or public acts that would immunize the sovereign, the court adopted a classification that had been presented by Lalive, a Swiss attorney and commentator.¹⁶⁹ Those public acts, the court said, fall into 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; or
- (5) public loans.¹⁷⁰

In applying these factors to the activity of the Spanish Minister of Commerce, the court concluded that the chartering of the vessel “partakes far more of the character of a private commercial act than a public or political act.”¹⁷¹ The court noted that the charter arrangement had the “ earmarks” of a commercial transaction and emphasized the facts that the wheat was consigned to and shipped by a private commercial concern and that the parties had included a private commercial arbitration clause.

A factor which the *Victory Transport* court weighed heavily in its decision was that the State Department had failed or refused to suggest

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

¹⁶⁷ Joelson & Griffin, *The Legal Status of Nation-State Cartels Under United States Antitrust and Public International Law*, 9 INT'L LAW. 617, 625 (1975).

¹⁶⁸ 336 F.2d at 359.

¹⁶⁹ *Id.* at 360. See Lalive, *supra* note 139, at 285-86.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

jurisdictional immunity for the Spanish Minister of Commerce. The court clearly implied that it would have followed a suggestion of immunity by the State Department.¹⁷² It stated, however, that absent such a suggestion, it would be "disposed" to deny a claim of sovereign immunity unless the activity in question clearly fell within one of the categories of "strictly political or public acts."¹⁷³ The *Victory Transport* test was approved and followed by a number of courts. Courts seemed to welcome a test that could be used to implement the restrictive theory.

In *Isbrandtsen Tankers, Inc. v. President of India*,¹⁷⁴ the Government of India entered into a voyage-charter for the transportation of grain to India. The voyage-charterer sought damages for unreasonable detention of its vessels. The State Department intervened to recommend that immunity be granted to the Government of India. The Second Circuit followed the suggestion, but quoted extensively from its decision in *Victory Transport* and said that absent the intervention by the Department of State, it would have adhered to the *Victory Transport* classifications and might well have found the actions of the Indian Government to be "purely private commercial decisions."¹⁷⁵

In *Petrol Shipping Corp. v. Kingdom of Greece*,¹⁷⁶ the Greek Ministry of Commerce entered into a voyage-charter for transportation of surplus wheat and agreed that disputes were to be referred to arbitration. In contrast to its position in *Isbrandtsen*, the Department of State rejected the defendant's claim of sovereign immunity. The court proceeded to apply the *Victory Transport* classifications, and, upon finding the activity did not fall within any of the categories, issued an order compelling arbitration.¹⁷⁷

Since the passage of the Immunities Act, "legitimate questions

¹⁷² *Id.* at 358-59. *But see* *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971).

¹⁷³ 336 F.2d at 360.

¹⁷⁴ 446 F.2d 1198 (2d Cir. 1971).

¹⁷⁵ *Id.* at 1200.

¹⁷⁶ 360 F.2d 103 (2d Cir.), *cert. denied*, 385 U.S. 931 (1966).

¹⁷⁷ 360 F.2d at 110. Several district courts have followed the approach and guidelines established by the *Victory Transport* court, and the case continued to form the basis for many sovereign immunity decisions until the passage of the Immunities Act in 1976. *See, e.g.*, *Sea Transport Corp. v. The S/T Manhattan*, 405 F. Supp. 1244 (S.D.N.Y. 1975) (government transport of food for citizens did not fall within *Victory Transport* categories); *Rovin Sales Co. v. Socialist Republic of Romania*, 403 F. Supp. 1298 (N.D. Ill. 1975) (operation of wine distributorship did not fall within *Victory Transport* categories); *Pan American Tankers Corp. v. Republic of Vietnam*, 296 F. Supp. 361 (S.D.N.Y. 1969) (contract with arbitration clause for the transportation of cement did not fall within the *Victory Transport* categories); *Ocean Transport Co. v. Gov't of the Republic of the Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967) (contract for delivery to government of a fishing boat did not fall within *Victory Transport* categories).

have arisen as to the continuing validity of the *Victory Transport* classifications.”¹⁷⁸ The Immunities Act established a classification of “commercial acts” and presumed immunity, unless an act falls within this definition or another of several unrelated clauses. *Victory Transport*, on the other hand, established a class of “political and public acts” and presumed immunity if an act falls within its classifications. Because of this, one commentator has suggested that “*Victory Transport* is no longer of significant value in determining whether a foreign sovereign is entitled to jurisdictional immunity.”¹⁷⁹

Nevertheless, in view of the success of the *Victory Transport* categorization approach to distinguishing private and public acts, it is surprising that no court has attempted, as was recommended above, to construct a similar commercial activity classification under the Immunities Act. A non-exclusive list of the characteristics of commercial transactions or acts which a court could apply in particular cases would be a welcome and stabilizing addition to the present *ad hoc* approach.

The Nature of the Transaction Test

The nature of the transaction test provides that all acts which are capable of being performed by an individual are private and not immune from the jurisdiction of the court. Only acts which an individual could not perform are regarded as public and are granted immunity. The nature test which existed before the passage of the Immunities Act maintains that the nature of a transaction, rather than its underlying purpose, should govern the question of whether immunity should be granted.¹⁸⁰ This test is reflected in the Immunities Act where, as previously stated, Congress expressly stated that the commercial character of

¹⁷⁸ Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 97 (1977).

¹⁷⁹ *Id.* at 98.

¹⁸⁰ For an early and cogent explication of the nature of the transaction test which had considerable international influence, see Weiss, *Compétence ou Incompétence des Tribunaux à l'égard des Etats Etrangers*, I RECUEIL DES COURS 525, 546-47 (1923). See also Harvard Draft Convention, *supra* note 119, at 386-91. Article 10(f) of the Draft Convention states that a State may be made a respondent in a proceeding instituted in a court of another State:

when, in the territory of another State, it engages in an enterprise which may be engaged in there by private persons, and the proceeding instituted against it is based on or arises out of such enterprise. This provision shall not be interpreted to allow a State to be made a respondent in relation to the contracting of State loans.

But see Lauterpacht, *supra* note 118, at 222-26. The author notes that the Weiss “nature” test “merely postpones the difficulty.” *Id.* at 225. See generally *ADM Milling Co. v. Republic of Bolivia*, 14 I.L.M. 1279 (D.D.C. 1975); *Renchard v. Humphries and Harding, Inc.*, 381 F. Supp. 382 (D.D.C. 1974); *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143 (S.D.N.Y. 1969); *Ocean Transport Co. v. Republic of the Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967).

an activity should be determined by reference to the nature, rather than the purpose of the transaction.¹⁸¹

Those who favor this test believe that it is relatively easy to apply, that it affords the most just remedy to private persons or firms who have had their rights violated by foreign states or their agents, and that it increases predictability and consistency of result. In fact, the test does provide some of these advantages. Nevertheless, while it may appear clear-cut, the nature of the transaction distinction is actually quite complicated and raises difficult conceptual and practical problems.

Justice Frankfurter addressed this problem in an insightful domestic tort decision involving the liability of the United States Coast Guard under the Federal Tort Claims Act for the negligent operation of a lighthouse. In *Indian Towing Co. v. United States*,¹⁸² the United States Government argued that the Coast Guard should be treated the same as a municipal corporation, with tort law applicable to both entities. Adoption of the government's position, noted Justice Frankfurter, "would thus push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations."¹⁸³ Justice Frankfurter stated:

Under the Government's theory, some of these acts of negligence would be actionable, and some would not. . . . The acts were different in time and place but all were done in furtherance of the officer's task of inspecting the lighthouse and in furtherance of the Coast Guard's task. . . . [I]f the United States were to permit the operation of private lighthouses—not at all inconceivable—the Government's basis of differentiation would be gone and the negligence charged in this case would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicated liability on such a completely fortuitous circumstance—the presence or absence of identical private activity.¹⁸⁴

When applied to the law of sovereign immunity, Frankfurter's point retains much of its forcefulness. An unyielding test that relies too heavily on an elusive factor such as whether an activity can be performed by a private person, will inevitably produce unfair results. This can be avoided to some extent if courts recognize the problem in advance and, in particularly difficult cases, apply the relevant government interest factors.

Since the passage of the Immunities Act, several cases have dealt

¹⁸¹ 28 U.S.C. § 1603(d) (1976).

¹⁸² 350 U.S. 61 (1955).

¹⁸³ *Id.* at 65.

¹⁸⁴ *Id.* at 66-67.

with the commercial activity exception and courts have attempted to apply the nature of the transaction test. *Outboard Marine Corp. v. Pezetel*¹⁸⁵ involved an antitrust suit by Outboard Marine Corp., an American manufacturer of gas and electric golf carts, against Pezetel Foreign Trade Enterprise of the Aviation Industry, an agency or instrumentality created by and responsible to the Peoples' Republic of Poland, which exports golf carts manufactured in Poland to the United States under the brand name Melex, and against others including Melex, USA, Inc., a company wholly owned by Pezetel and incorporated in Delaware. The court, in attempting to better understand what Congress intended by its express preference for a nature of the transaction-type test, examined the legislative history, which explained that [a]ctivities such as a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers . . . or its investment in a security of an American corporation, would be among those included within the definition [of commercial activity.]¹⁸⁶

The court reviewed the activity alleged in the complaint, the "involvement in the manufacture and sale of golf carts,"¹⁸⁷ and concluded beyond question that Pezetel was engaged in commercial activity and was not immune from suit under the Immunities Act.¹⁸⁸

The facts in *Pezetel* did not present a difficult case for the court to decide. Pezetel quite plainly was engaged in the golf cart business. It was manufacturing and selling common commercial products for profit, directly and aggressively competing in the United States market, and using commercial contracts and a commercial subsidiary to effectuate its purpose. There did not appear to be any evidence of a special interest by the Polish government in Pezetel's affairs, and the export of golf carts does not seem to be vital to the Polish economy, either in reality or by representation of the Polish government. In this case, the fact that Pezetel had some organic relation to its government was merely formalistic, a function of Poland's socialist economic structure. Therefore, with respect to the government interest factors presented above, it should not be presumed, especially in the absence of a statement to that effect by the Polish government, that Poland consciously created Pezetel to serve a vital state need or that it has a particularly strong interest in Pezetel's affairs.

In spite of this reasoning, *Pezetel* does little to explain the meaning

¹⁸⁵ 461 F. Supp. 384 (D. Del. 1978).

¹⁸⁶ *Id.* at 395 (citation omitted).

¹⁸⁷ *Id.* at 396.

¹⁸⁸ *Id.*

of "commercial activity" under the Immunities Act. Unfortunately, the court did not analyze the relevant portions of the House Report or the Act itself, nor did it clearly explain the basis for its decision. The recitation of examples from the House Report of what would constitute commercial activity, without more, provides little insight into the meaning of commercial activity. A better approach would have considered, for example, the intended meaning of the phrase "foreign government's sale of a service or product."¹⁸⁹ This analysis could have outlined the elements of Pezetel's activities and compared them with the examples in the legislative history of the Immunities Act.

*Yessenin-Volpin v. Novosti Press Agency*¹⁹⁰ proved more enlightening than *Pezetel*. This case involved a libel action against TASS, the official Soviet news agency, and Novosti, a semi-autonomous state press agency. In its attempt to determine whether the alleged libels were "in connection with a commercial activity," within the meaning of section 1605(a)(2) of the Immunities Act, the court seemed torn between looking to indicia of commerciality, such as the use of commercial contracts, and the legal form of the particular defendants.

Although the court held that both TASS and Novosti were immune, the reasoning was somewhat different with respect to each defendant. The court seems to have granted immunity to TASS in large part because it was a government agency.¹⁹¹ Novosti, on the other hand, which engaged in the same activity, seems to have gained immunity in part because of its affiliation with TASS.¹⁹² The court found that TASS and Novosti had collaborated with agencies of the Soviet government in the publication abroad of stories in Soviet journals, and, in so doing, "Novosti, as well as TASS, was engaged not in 'commercial activity' but in acts of intra-governmental cooperation of a type which constitutes much of Novosti's (*and presumably more of TASS's*) activity."¹⁹³

¹⁸⁹ *Id.* at 395. Compare *United Euram Corp. v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978). In that case, the State Concert Society of the U.S.S.R., *Gosconcert*, breached a contract, established pursuant to a cultural exchange agreement between the United States and the U.S.S.R., to provide concert performances in the United States. The court rejected defendant's argument that the concerts were "artistic" and "governmental," not "commercial," for two reasons. First, the cultural purpose of the activities was irrelevant in determining its commercial character. Second, the contracts required the plaintiff to pay a fee in cash to *Gosconcert*, as well as the salaries of the artists and the expenses of the tour. The receipt by the Soviet society of a fee in cash led the court to conclude that *Gosconcert* was engaged in the "sale of a service," which the House Report named as a "commercial activity."

¹⁹⁰ 443 F. Supp. 849 (S.D.N.Y. 1978).

¹⁹¹ *Id.* at 852.

¹⁹² *Id.* at 852-54.

¹⁹³ *Id.* at 856 (emphasis added).

Novosti Press Agency is instructive in several respects. Unlike *Pezetel*, the case provides some fairly concrete criteria that courts can apply to determine whether an activity is commercial. The court noted that the activities of Novosti and TASS were not "in connection with a contract . . . [that] would be found commercial under most circumstances."¹⁹⁴ Therefore, although it was dictum for the case involved no contract, the court in *Novosti Press Agency* does say that the presence of a contract usually would be evidence of the commercial character of an activity.

Moreover, the court holds that intra-governmental cooperation, absent a contract, is not commercial activity, and is therefore immune. The distinction the court drew between TASS and Novosti is premised upon the assumption that an organ of the government is likely to be involved in intra-governmental cooperation. This seems to give effect to the form utilized by the foreign state to engage in a particular activity and is evidence that government interest factors should be utilized.

In *Carey v. National Oil Corp.*,¹⁹⁵ the National Oil Corporation (NOC), a Libyan state oil company wholly owned by the Libyan Government, allegedly cancelled contracts for the delivery of crude oil to a refinery company in the Bahamas that was a subsidiary of a New York corporation. In a suit for breach of contract by the New York corporation against NOC, the court held that because the oil was sold through the Bahamas instead of directly to the U.S., the alleged breach did not have a "direct effect" in the United States.¹⁹⁶ Accordingly, the court dismissed the suit for lack of jurisdiction under section 1605(a)(2) of the Immunities Act.¹⁹⁷

In dismissing the action, Judge Duffy made a number of important and highly controversial statements about the alleged commercial nature of the acts of the Libyan Government and NOC. Arguing that the contractual breaches complained of arose out of the nationalization in 1973 of certain oil concessions by the Libyan Government, Judge Duffy, citing *Victory Transport*, held that the defendants were immune because "nationalization is the quintessentially sovereign act, never viewed as having a commercial character."¹⁹⁸

Judge Duffy also seemed to be heavily influenced by the foreign

¹⁹⁴ *Id.*

¹⁹⁵ 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

¹⁹⁶ 453 F. Supp. at 1101.

¹⁹⁷ The court also said that the case failed to establish the "certain minimum contacts" required by *International Shoe v. Washington*, 326 U.S. 310, 316 (1945). 453 F. Supp. at 1101.

¹⁹⁸ 453 F. Supp. at 1102. The view that nationalization is a sovereign act when made in breach of an express agreement has been strongly challenged. See Brower, Bistline & Loomis, *supra* note

policy implications of the case. The court noted that "[t]he petroleum picture in the Middle East was . . . tremendously complicated by the outbreak of the 'Yom Kippur War' in October of 1973."¹⁹⁹ In response to a claim that Libya induced NOC's alleged breach of the 1973 oil contracts, the court noted:

It is beyond cavil that these actions by Libya were no part of a commercial undertaking; rather, they were deliberate weapons of foreign policy, aimed at influencing the conduct of other nations, or at least punishing undesirable conduct.²⁰⁰

The implications of the court's statements regarding nationalization and foreign policy are far-reaching. The *Carey* court seems to be saying that a breach of contract, which would ordinarily be regarded as a commercial activity, becomes sovereign if it occurs pursuant to an essentially sovereign act, such as nationalization or economic warfare. This suggests that the "nature" of a transaction is not fixed, and can change depending upon the temporal and political context of the act.

Judge Duffy's treatment of the nationalization and foreign policy aspects of the *Carey* case reflects a consideration of all the factors which contributed to the acts of the Libyan Government and NOC. Instead of merely looking to the indicia of commerciality, which in a case like *Pezetel* may be sufficient, Judge Duffy has realized that the facts of *Carey* were so unusual that a broader inquiry was necessary.

Application of the government interest factors can be quite useful in a case such as *Carey* and is consistent with Congress' intent to grant immunity in a transaction where the presence of considerable sovereign activity—such as nationalization and economic warfare—renders an activity political or public in nature. The legal form of NOC, a public corporation, manifested a strong interest in the transaction by the Libyan government, particularly since NOC was created pursuant to nationalization. The proximity in time of the alleged contractual breach to the outbreak of the Yom Kippur War and the subsequent oil embargo places the transaction in a highly political context, making the existence of a contract less dispositive of the commercial nature of the contract than if the transaction had had fewer political overtones. Other factors, including retaliation, enforceability, and comity with the United States, suggest that the suit could have impaired the relations between the United States and Libya, ultimately harming United States citizens and interests. Moreover, the intervention by the Libyan Gov-

14, at 205-06; Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANS-NAT'L L. 33, 57-58 (1978).

¹⁹⁹ *Id.* at 1099.

²⁰⁰ *Id.* at 1102.

ernment in the case to secure immunity for NOC should be accorded weight not only because of the comity implications but also because such intervention frequently indicates that a government views the outcome of the case as affecting a vital national interest.

The effect of all of these factors and others that logically flow from them may convince a court that, despite the potential unfairness to the plaintiffs, the actual character of the actions of the Libyan Government is not commercial and therefore ought to be granted immunity. If, however, a court does not find the government interest factors convincing or applicable in a particular case, it should not consider them. They merely provide a specific list of criteria, much like section 40 of the *Restatement (Second) of the Law of Foreign Relations of the United States*,²⁰¹ to which a court can turn if it cares to engage in a broader investigation of the nature of a transaction.

The likelihood of continued state trading, and the formation of even more nation-state cartels,²⁰² raises serious and urgent questions about how U.S. courts will treat antitrust suits against foreign states and nation-state cartels. There is little doubt that private²⁰³ and state-owned²⁰⁴ corporate cartel members are subject to the United States an-

²⁰¹ The *Restatement* provides:

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

- (a) vital national interests of each of the states,
- (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
- (c) the extent to which the required conduct is to take place in the territory of the other state,
- (d) the nationality of the person, and
- (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

RESTATEMENT, *supra* note 107, at § 40.

²⁰² See, e.g., *Cartel Phobia*, NEWSWEEK, Jan. 28, 1974, at 60; *Nations with Raw Materials—Can They Gang Up on U.S.?*, U.S. NEWS & WORLD REP., May 6, 1974, at 76; *OPEC for Oil, CIPEC for Copper. What Next—A BAUPEC for Bauxite?*, FORBES, Feb. 15, 1974, at 49; *The New Export Cartel*, TIME, Apr. 29, 1974, at 94 (Union of Banana Exporting Countries).

²⁰³ See *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. Watchmakers of Switz. Info. Center, Inc.*, [1963] TRADE CAS. ¶ 70,600 (CCH)(S.D.N.Y. 1962), *order modified*, [1965] TRADE CAS. ¶ 71,352 (CCH)(S.D.N.Y. 1965); *United States v. Bayer Co.*, 135 F. Supp. 65 (S.D.N.Y. 1955); *United States v. Holophane Co.*, 119 F. Supp. 114 (S.D. Ohio 1954), *aff'd*, 352 U.S. 903 (1956); *United States v. Imperial Chem. Indus., Ltd.*, 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. General Elec. Co.*, 82 F. Supp. 753 (D.N.J. 1949); *United States v. General Elec. Co.*, 80 F. Supp. 989 (S.D.N.Y. 1948); *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); *United States v. General Dyestuff Corp.*, 57 F. Supp. 642 (S.D.N.Y. 1944).

²⁰⁴ See *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929). *The Antitrust Guide*, *supra* note 4, at 9, states that "in general, foreign firms, including state-owned

titrust laws. Until recently the question of direct suit against foreign government cartel members was quite unclear.²⁰⁵ The decision in *International Ass'n of Machinist and Aerospace Workers v. Organization of Petroleum Exporting Countries (IAM v. OPEC)*,²⁰⁶ which is the first antitrust case to involve a direct suit against a foreign government, provides an important pronouncement on the antitrust liability of the member states that comprise OPEC.

In *IAM v. OPEC*, IAM, a 900,000 member labor union which purchases and uses oil and petroleum products in the course of its business, charged that the well-known and powerful consortium of thirteen petroleum producing states²⁰⁷ violated section 1 of the Sherman Act by conspiring to fix the price of crude oil, oil, and petroleum derivative products sold in the United States.²⁰⁸ IAM claimed that it had been injured because the artificial increase in the price of crude oil, oil, and petroleum derivative products "has been passed directly without reduction to plaintiff and others in the United States through the use of cost plus contracts, marketing arrangements and schemes, regulations and other various means."²⁰⁹ IAM sought monetary and injunctive relief,²¹⁰ begins its jurisdictional claim upon the "commercial activity" exception to the Immunities Act, section 1605(a)(2), as well as upon the Sherman and Clayton Acts.²¹¹

The district court held, *inter alia*, that the activity in which the OPEC member states²¹² were engaged was not commercial activity

or controlled firms, will be expected to observe the prohibitions of our antitrust laws." See also § 1603(d) of the Immunities Act, 28 U.S.C. § 1603(d) (1976).

²⁰⁵ See, e.g., Remarks of Joel Davidow, Chief Foreign Commerce Section, Antitrust Division, U.S. Dep't of Justice, concerning the Extraterritorial Application of U.S. Antitrust Law in a Changing World, before the Symposium on Private Investments Abroad, Southwestern Legal Foundation (June 15, 1976). For a view that suits against OPEC and other nation-state cartels would succeed under the antitrust laws, see Fine, *supra* note 5. But see Baker, *Antitrust Conflicts Between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165, 182 (1978).

²⁰⁶ 477 F. Supp. 553 (1979), *appeal docketed*, No. 79-3673 (9th Cir. Oct. 24, 1979).

²⁰⁷ The members of OPEC named in *IAM v. OPEC* included the Democratic and Popular Republic of Algeria, the Republic of Ecuador, the Gabonese Republic, the Republic of Indonesia, the Imperial Government of Iran, the Republic of Iraq, the State of Kuwait, the Libyan Arab Republic, the Federal Republic of Nigeria, the State of Qatar, the Kingdom of Saudi Arabia, the State of the United Arab Emirates, and the Republic of Venezuela.

²⁰⁸ Complaint at 19, *International Ass'n of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 447 F. Supp. 553 (1979).

²⁰⁹ *Id.*

²¹⁰ IAM asked for damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), and injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26 (1976), specifically requesting the court to enjoin the price-setting activities of the defendants. 477 F. Supp. at 558-59.

²¹¹ *Id.* at 559.

²¹² Early in the proceedings, OPEC, itself was dismissed from the suit because it had not been properly served under the Immunities Act, which only applies to foreign sovereignties. *Id.* at 560.

within the meaning of section 1605(a)(2) of the Act and that it consequently lacked subject matter and personal jurisdiction to try the suit.²¹³ The court characterized the nature of the activity in which the defendants were engaged as “the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource—to wit, crude oil—from its territory.”²¹⁴ The court then cited cases and resolutions from domestic²¹⁵ and international²¹⁶ law that it believed supported the conclusion that efforts by governments to control their natural resources are sovereign acts. Regarding the activities of the OPEC governments, the court stated: “The defendants’ control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue producing resource, is crucial to the welfare of their nations’ peoples.”²¹⁷ As a result, the court concluded that the price fixing activity complained of was not commercial activity and that the defendants, therefore, were immune from the jurisdiction of the court.

In reaching its decision, the court in *IAM v. OPEC* distinguished between the various actions of the OPEC member states. It recognized that “through their activities as partial or total owners of these [oil] companies, the defendant nations do engage in commercial activities.”²¹⁸ The court continued, however, and stated that “this does not mean . . . that all activities, even those remotely connected with these companies, are necessarily commercial.”²¹⁹ The court concluded that the price fixing activities of the OPEC member states were “in their status as sovereigns, not in their status as proprietors.”²²⁰ The court left open the possibility that under a different set of facts the OPEC states might be subject to its jurisdiction.

The *OPEC* court seemed unsure of the difference between nature and purpose, admitting that the standards under the Immunities Act and its legislative history are “somewhat nebulous.”²²¹ The court rea-

²¹³ *Id.* at 569. Additionally, the court held that a foreign nation is not a “person” under § 1 of the Sherman Act and, therefore, cannot be sued under the antitrust laws. *Id.* at 570-72.

²¹⁴ *Id.* at 567.

²¹⁵ *Id.* at 568 (citing, *inter alia*, *Parker v. Brown*, 317 U.S. 341 (1943)).

²¹⁶ *Id.* at 567-68 (citing, *inter alia*, United Nations Resolution 1803 (XVII) § 1(1), the adopted version of which declares: “The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”). G.A. Res. 1803, § 1(1), 17 U.N. GAOR, Supp. (No. 17) 15, U.N. Doc A/5217 (1963).

²¹⁷ *Id.* at 568.

²¹⁸ *Id.* at 568 n.14.

²¹⁹ *Id.* at 568-69 n.14.

²²⁰ *Id.* at 569 n.14.

²²¹ *Id.* at 567.

soned that when sovereigns are engaged in activity designed to control their natural resources, such activity is of a sovereign *nature*. Is it not equally true, however, that the *purpose* of such sovereign activity is to manage the exploitation of vital natural resources? The inherent circularity of this argument may be, as mentioned above, as much a function of the relative invalidity of the nature/purpose distinction as of the failure of the court's reasoning. Still, the court fails to recognize the problems inherent in the nature formulation and does not attempt to clarify them. The court does mention that a commercial activity is one that normally could be engaged in by a private party.²²² But it fails to explain, although it might have done so convincingly, why the price fixing activities of the OPEC member states were of a uniquely sovereign nature, incapable of performance—at least with an equal degree of legality or authority—by a private party.

The use of the government interest factors would have aided the court in reaching its decision. In fact, the court seems to give effect to various of the factors in a less systematic and structured fashion. In its decision the court makes several references to matters which would be relevant to a government interest analysis such as the legal form of the transaction,²²³ comity,²²⁴ the representations of amici curiae²²⁵ and various experts,²²⁶ the complex political environment surrounding the case,²²⁷ and the status of the government price fixing under the laws of the various governments.²²⁸ Additional reliance on the government interest factors might have improved the decision and provided a more sound and readily applicable framework for future courts to follow.

The court's holding regarding jurisdiction in *IAM v. OPEC* is far reaching and very important. The court could have decided the case upon narrower grounds, such as on the fact that the plaintiff, as an indirect purchaser, was precluded from seeking damages under the doctrine established in *Illinois Brick Co. v. Illinois*.²²⁹ Instead, it chose

²²² *Id.*

²²³ The Court states, for example, that the defendants are "partial or total owners of these [oil] companies." *Id.* at 568 n.14.

²²⁴ See generally *id.* at 576 (appendix A).

²²⁵ See, e.g., *id.* at 567 (reference to the amicus curiae brief for the Indonesia-United States Business Committee for the Indonesian Chamber of Commerce).

²²⁶ See, e.g., *id.* at 568 (quotation from the testimony of court-appointed expert, M.A. Edelman).

²²⁷ See generally *id.* at 575.

²²⁸ See, e.g., *id.* at 568 (excerpt from testimony of M.A. Edelman in which he states that the OPEC governments "began their price fixing role by levying taxes on foreign companies operating within their borders.").

²²⁹ 431 U.S. 720 (1977). The *OPEC* court discusses *Illinois Brick* in 447 F. Supp. at 560-64.

to go to the heart of the sovereign immunity question. In doing so the court seems to be saying that price fixing activities by governments *qua* government are necessarily sovereign acts, repugnant perhaps, but clearly beyond the reach of United States courts under the Immunities Act. The resolution of such disputes must be pursued through diplomatic channels between governments, not in the courts.²³⁰ The implications of the *OPEC* holding, if upheld without considerable modification, will have a profound and lasting impact on the law of sovereign immunity and antitrust.

CONCLUSION

The trends in state trading in the world today which have been discussed make it extremely likely that foreign states, their agencies, and their instrumentalities will continue to engage in various types of trade and commerce that have the potential to violate the antitrust laws of the United States. The passage of the Immunities Act facilitates suit against foreign states and further increases the likelihood of litigation in this area. As a result, courts must develop a logical, fair, and readily applicable set of criteria for the determination of whether foreign states and their agencies are engaged in "commercial activity" within the meaning of the Immunities Act. It has been argued herein that there is a serious need for such criteria and that courts must, in clarifying the meaning of "commercial activity," not only establish a set of specific indicia of commerciality, but also give effect to the government interests of foreign sovereigns. To this end, a list of government interest factors has been presented that can be applied by courts in appropriate cases. It is believed that the combination of the development by courts of a specific, non-exclusive, list of indicia of commerciality, in conjunction with the utilization of the government interest factors, will improve judicial decision making in this important area of the law.

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²³⁰ See *id.* at 575. For a cogent presentation of a similar point of view, see Stanford, *supra* note 141, at 201.

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