

UCLA

National Black Law Journal

Title

Note: "The Foreign Sovereign Immunities Act of 1975": Reflections on Old Problems in a New Bill

Permalink

<https://escholarship.org/uc/item/08s7k71c>

Journal

National Black Law Journal, 5(2)

Author

Peay, T. Michael

Publication Date

1977

Copyright Information

Copyright 1977 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

Note, "The Foreign Sovereign Immunities Act of 1975": Reflections on Old Problems in a New Bill

T. Michael Peay*

Within the last half century, a substantial number of governments in the world have come to recognize the "restrictive theory" of foreign sovereign immunity from suit in the courts of another country.¹ The earlier theory of "absolute" immunity from suit has gradually given way to the theory of limited or "restrictive" immunity, in recognition of "the widespread and increasing practice on the part of governments of engaging in commercial activities."²

The restrictive theory of immunity rests upon the premise that a sovereign's immunity from suit will be recognized where the sovereign's acts are found to be public or governmental in character (*jure imperii*) rather than commercial or private in character (*jure gestionis*).

This theory gained formal recognition within the United States following the transmittal and subsequent implementation of the much-publicized "Tate Letter."³ Under existing practice in the United States, it is the Department of State, rather than the judiciary, that has primary jurisdiction to determine questions of immunity from suit. However, a bill entitled "The Foreign Sovereign Immunities Act of 1975," recently introduced in the U.S. House of Representatives as H.R. 11315 and co-sponsored by the Departments of State and Justice,⁴ would with-

* Director, Africa Legal Assistance Project of the Lawyers' Committee for Civil Rights Under Law; A.B., Coppin State College (with honors), 1968; M.A., Johns Hopkins, School of Advanced International Studies, 1970; J.D., Harvard Law School, 1973; Member, District of Columbia Bar; Member, American Society of International Law.

1. See, e.g., Garcia-Mora, *Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 Va. L. Rev. 335 (1956); Setser, *The Immunities of the State and Government Economic Activities*, 24 Law & Contemp. Prob. 291 (1959); Letter of Acting Legal Adviser, Jack B. Tate, to Department of Justice, May 19, 1952, 26 Dept. of State Bull. 984 (1952) (hereinafter "Tate Letter").

2. "Tate Letter," *supra*.

3. See n.1, *supra*.

4. A version of this bill was first introduced in Congress in January, 1973. The text of the bill, although it appeared in identical form in several companion bills (*i.e.*, S. 566, H.R. 3493, S. 567 and S. 771, 93rd Cong. 1st Sess. (1973)), came to be symbolically referred to as S. 566. The bill died, however, following hearings thereon, but succeeded in generating a number of law review articles. See, e.g., Sklaver, *Sovereign Immunity of the United States: An Analysis of S. 566*, 8 INT'L LAWYER 403 (1974); Delaume, *Public Debt and Sovereign Immunity: Some Considerations Pertinent to S. 566*, 67 AMER. J. INT'L L. 745 (1973); Note, 15 HARV. INT'L L.J. 157 (1974); Note, *The Immunity of Foreign Sovereigns in U.S. Courts—Proposed Legislation*, 6 N.Y.U.J. INT. INT L. & POLITICS 473 (1973).

The Department of State and the Justice Department are joint sponsors of such a bill because of the established procedure for asserting a plea of sovereign immunity which sometimes involves both agencies; the Department of State examines the plea initially and, once it reaches a decision one way or the other, then requests the U.S. Attorney in the judicial district in which the case is pending to make known to the district court the State Department's suggestion of immunity or non-immunity. Alternatively, a sovereign respondent may by-pass the "suggestion of immunity" procedure and, instead, enter a plea for sovereign immunity for resolution solely by the court. See e.g., *Ex parte Muir*, 254 U.S. 522 (1921); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68

draw from the State Department its current primacy in determining questions of immunity. Instead, the bill would give exclusive jurisdiction over such questions to the courts. Additionally, H.R. 11315 would establish a comprehensive set of rules⁵ governing sovereign immunity consistent with the restrictive theory of immunity.

A central concept in the restrictive theory of immunity is "commercial activity." That concept is defined in § 1603(d) as:

either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

This definition of "commercial activity" affords a timely opportunity to re-examine that concept within its restrictive theory of sovereign immunity framework.

A threshold question which must be posed in this regard is whether the courts, by applying strict legal analysis and excluding foreign policy considerations, can make the "restrictive" theory of foreign sovereign immunity a more workable doctrine. A subsidiary question is whether, as hoped for under H.R. 11315, the courts can divorce themselves from foreign policy considerations previously attendant to administering this doctrine and demonstrate that the public/private distinction is a viable one, from the standpoint of its practical and legal application. This note will attempt to explore these issues.

The practical application of the restrictive theory of sovereign immunity has been the subject of much debate among commentators which centers primarily upon how to delineate "commercial activity" from "public or governmental activity."⁶ To a certain extent, courts too have wrestled with the elusive commercial/public distinction. For instance, in *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), the court noted the "conceptual difficulties involved in formulating a satisfactory method of differentiating between acts *jure imperii* and acts *jure gestionis*,"⁷ and further noted that "the 'Tate Letter' offers no guide-lines or criteria for differentiating between a sovereign's private and public acts,"⁸ and that "many commen-

(1936); *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964). *See, e.g.*, Fellder, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INTL. L. 83 (1931); Note, 50 YALE L.R. 1088 (1941).

5. The operative provisions of H.R. 11315 relate to: Immunity of a foreign state from jurisdiction (§ 1604); General exceptions to the jurisdictional immunity of a foreign state (§ 1605); Claims involving the public debt (§ 1606); Counterclaims (§ 1607); Service of process, time to answer and default (§ 1608); Immunity from attachment and execution of property of a foreign state (§ 1609); Exceptions to the immunity from attachment or execution (§ 1610); and Certain types of property immune from execution (§ 1611). In addition to setting forth comprehensive rules governing foreign sovereign immunity. H.R. 11315 also prescribes the jurisdiction of United States district courts in cases involving foreign states, and, accordingly, proposes amendments to 28 U.S.C. §§ 1330, 1332, 1391, and 1441.

6. *See, e.g.*, Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 AM. L. INTL. L. 566 (1928); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 1951 BRIT. Y.B. INTL. L. 220; Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 INS. COUNSEL J. 11 (1954); Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U.L. REV. 109 (1961); Dobrovir, *A Gloss on the Tate Letter's Restrictive Immunity Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968); Leigh, *Sovereign Immunity—The Case of the 'Imias'*, 68 AM. J. INT'L L. 280 (1974); Schweitzer, *Sovereign Immunity and the Foreign-State Enterprise in Alaska*, 4 UCLA-ALASKA L. REV. 343, 358 (1975).

7. 336 F.2d at 360.

8. *Id.* at 359.

tators . . . declare that the distinction is unworkable."⁹

This latter sentiment may be somewhat premature, given that few courts have had the opportunity to do what H.R. 11315 would have them do—namely, analyze claims of sovereign immunity from a purely legal basis, unfettered by State Department intervention or by notions of foreign policy embarrassment. On the other hand, it could well be that the “conceptual difficulties” (*Victory Transport, supra*, at 360) experienced under the State Department’s hegemony in this area make it sufficiently clear that, regardless of who the decision maker might be, the commercial/public distinction presents inherent, irresolvable problems of manageability.

This latter point of view finds support in a number of cases that could be cited. In *Victory Transport, supra*, for instance, a leading case in their field, the court commented at length upon the dilemma of having to choose between two unsatisfactory criteria for adjudging the commercial character of a given transaction, namely, whether to look to the “nature” or the “purpose” of the sovereign’s act. (*Id.* at 359)

In an effort to ameliorate this perplexity, that court made an attempt to fashion criteria for distinguishing between the commercial and private conduct of a sovereign, and proffered the following five categories of “strictly political or public acts about which sovereigns have traditionally been quite sensitive” (*Id.* at 360):

1. internal administrative acts, such as expulsion of an alien;
2. legislative acts, such as nationalization;
3. acts concerning the armed forces;
4. acts concerning diplomatic activity; and
5. public loans.

While the *Victory Transport* court might have viewed these criteria as more or less exhaustive,¹⁰ in point of fact, they should be viewed as only minimum standards. To illustrate, in a recent case which involved the attachment of funds representing foreign exchange reserves belonging to the central bank of Viet-Nam held on deposit in three banks in San Francisco, California, the Department of State, upon request, caused a suggestion of immunity to be communicated to the court for the reason, *inter alia*, that “the National Bank of Viet-Nam is performing a traditional governmental function, i.e., the regulation of the use of foreign exchange.”¹¹ Query: is “foreign reserves regulation” a governmental function which the *Victory Transport* court contemplated for inclusion in the “internal administrative acts” category,¹² or does it fall within an unenumerated category of “traditional governmental functions?”¹³

9. *Id.* at 360, and *see* authorities there cited.

10. The court stated, “We do not think that the restrictive theory . . . requires sacrificing the interests of private litigants to international comity in other than these limited categories.” (336 F.2d at 360)

11. 1973 *Digest of United States Practice in International Law* (1974) at 230.

12. 336 F.2d at 360. This is the only one of the five categories enumerated in the *Victory Transport* opinion that could conceivably be applicable. *Cf. Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971), wherein it was stated that the “diplomatic activity” category was to be construed “in the broad sense of the word and was not meant to be limited to the activities of diplomatic missions.” (at 503, n.3.)

13. Otherwise stated, should the courts view the five *Victory Transport* categories of governmental functions as all-encompassing or should they attempt to refine those criteria or devise new ones for differentiating between “public” and “commercial” acts? See, in this connection, the discussion *infra* at 21-23.

Another case which even more aptly illustrates the inherent problems of managing the public/private test of immunity is *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.) cert. denied, 404 U.S. 985 (1971). *Isbrandtsen*, like *Victory Transport*, involved a purchase of grain by a sovereign authority, but the outcome of that case was different because the State Department had filed a suggestion of immunity therein.

Isbrandtsen involved a cause of action for damages for delay in discharging cargo from a vessel. The purchase of the grain took place as part of a massive effort on the part of the Indian government to end a food shortage, resulting from an extreme drought in 1965 and 1966. In contrast to *Victory Transport*, however, nothing in the statement of the facts as reported in *Isbrandtsen* indicated that "presumptively wheat [would] be resold to [the sovereign's] nationals"¹⁴; nor did the facts indicate that the purchasing authority "acted much like any private purchaser of wheat."¹⁵ Rather, the facts in *Isbrandtsen* reflect a crisis-oriented situation giving rise to protective governmental action consistent with traditional governmental conduct under similar circumstances of national emergency or distress, such as war.¹⁶

The court in *Isbrandtsen*, however, intimated that, if left to its own discretion on the matter, it might have deemed the acts by the Indian government's agency to be "purely private commercial decisions"¹⁷ warranting a denial of immunity.¹⁸ But even the court in *Isbrandtsen* evinced an awareness of the pitfalls of simplistic reasoning when applying the public/private test. For, as the court noted,

It is true that the mere fact that a contract with a private commercial interest is involved does not automatically render the acts of the foreign government private and commercial. As this court recently noted:

The view that all contracts, regardless of their purpose, should be deemed "private" or "commercial" acts would lead to the conclusion that a contract by a foreign government for the purchase of bullets for its army or for the erection of fortifications do not constitute sovereign acts—a result we viewed as "rather astonishing" in *Victory Transport*, 336 F.2d at 359. [*Heaney v. Government of Spain*, 445 F.2d 501 p.504 (2d Cir., 1971).]

446 F.2d at 1200.

Thus, *Victory Transport* and *Isbrandtsen*, as well as other American cases,¹⁹

14. *Victory Transport*, *supra*, 336 F.2d at 361.

15. *Id.*

16. In this connection, see *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281, (S.D.N.Y. 1974), wherein Judge Weinfeld noted in a dictum that:

[R]escue operations for civilians after a flood, Medivac missions for civilian personnel who are ill and located in inaccessible parts of the country, and missions in support of the customs agency to prevent smuggling into and out of Haiti are not unusual for a military unit in time of peace and are governmental acts. If our military forces were used to aid civilians in disaster areas and military plans were used to carry out such missions of mercy, it would be no less a political or governmental act than if the military forces and planes were engaged in actual combat against a foreign country. (at 1284) [Footnote omitted].

17. *Isbrandtsen*, *supra*, at 1200.

18. It may not necessarily follow, however, that foreign policy considerations, rather than strict legal analysis, accounted for the State Department's decision to suggest immunity or that the court and the State Department shared the same view of the case. The Department's Legal Advisor's Office might simply (indeed could) have concluded on independent legal grounds that a suggestion of immunity was proper.

19. Compare, e.g., *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) (sale of military equipment to Haiti is a transaction "concerning the armed forces," thereby warranting

reflect the intrinsic practical (and sometimes vexing) difficulties encountered in trying to apply the public/private distinction. The difficulties and inconsistencies encountered within the American context have, of course, been encountered in other jurisdictions that have also accepted the restrictive theory of immunity, notably in Europe.²⁰ In fact, the court in *Victory Transport* characterized as "astonishing" the holdings of some European courts that "purchase of bullets or shoes for the army, the erection of fortifications for defense, or the rental of a house for an embassy, are private acts." (336 F.2d at 359)

Hence to reiterate, the threshold question remains whether, upon enactment of H.R. 11315, the courts will be capable of rendering the case-by-case application of the public/private distinction a more judicial and consistent process. If there is any hope that this might happen, then several comments and suggestions are in order.

First on the list is the need to expunge from judicial thinking the previous preoccupation with possible "embarrassment" to the executive's foreign policies.²¹ This concern has been substantially discredited by the State Department's proposal, in H.R. 11315, to transfer decision-making authority on sovereign immunity questions to the courts.²² As the Department explained during testimony on S. 566, a previous version of what is now H.R. 11315,

While the courts treat these suggestions [of immunity] as binding in deference to the role of the Executive Branch . . . and do not make independent findings of law or fact . . . [t]he Department of State is now persuaded that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts. Questions of such moment should

immunity) with *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S. 2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D. 2d 927, 233 N.Y.S. 2d 1013 (1962) (purchase of meat supply for sovereign's army held *not* to be a public act, therefore immunity denied).

And compare *Isbrandtsen, supra*, with *N.Y. Cuba Mail Steamship v. Republic of Korea*, 132 F.Supp. 684 (S.D.N.Y. 1955).

20. *E.g., Takhovsky v. Gouvernement federal suisse et Regnier*, *Journal du droit International* 179 (Clunet) (Court of Appeal, Paris 1921) (holding that Switzerland was entitled to immunity in a suit arising from its charter of ships to transport cocoa for the Swiss chocolate industry during World War I because the venture was not exclusively commercial); *Etienne v. Gouvernement neerlandais*, *Dalloz* 84 (1948), *Annual Digest*, Case No. 30 (Tribunal Commercial de la Rochelle 1947) (holding that a ship requisitioned and operated by the Dutch Government to transport wheat for the reprovisioning of the Netherlands was a political rather than a commercial act). *Cf. Victory Transport* at 362, n.18. However, as noted by the court, these cases are decisions of courts of France and there is uncertainty as to whether French courts can be included among courts from other jurisdictions which have firmly adopted the restrictive theory of immunity. *Id.*

21. The number of cases in which this concern has been invoked are too numerous to cite, *but see e.g., National City Bank of New York v. Republic of China*, 348 U.S. 356, 361 (1955); *Victory Transport, supra*, at 357; *New York & Cuba Mail Steamship Co. v. Republic of Korea*, 132 F. Supp. 684, 686 (S.D.N.Y. 1955); *Renchard v. Humphreys & Harding, Inc.*, 381 F. Supp. 382, 383, 384 (D.D.C. 1974)

One commentator has stated that the American rationale for the sovereign immunity doctrine, namely, to avoid embarrassment to the executive in the conduct of foreign relations, is "one of the most overrated arguments in the annals of American legal history." Leigh, *New Departures in the Law of Sovereign Immunity*, 1969 *AM. SOC'Y INT'L L. (Proc.)* 187, 192. In this same vein, another commentator expressed the view that, "The State Department not only has no special competence for deciding questions of international law and making quasi-judicial factual determinations, but labors under heavy disadvantages as compared to the courts." Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 *Nw1 U.L. REV.* 100, 115 (1961). These comments appear to have been vindicated by the finding in § 1602 of H.R. 11315 that "the determination by United State courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts."

not be decided through administrative procedures when the nature of the decision appears *particularly appropriate* for resolution by the courts. Indeed, State Department involvement can be detrimental because some foreign states may be led to believe that since the decision can be made by the Executive Branch it should be strongly affected by foreign policy considerations . . . Transfer of the decision-making process to the courts will ensure that sovereign immunity questions are decided on legal grounds under procedures guaranteeing due process. This in turn should better ensure the consistency of decisions and reduce their foreign policy consequences. Testimony of Charles N. Brower, Acting Legal Advisor of the Department of State, Before Subcommittee II of the House Judiciary Committee on June 7, 1973, *1973 Digest of United States Practice in International Law* (1974) at 220-221 [Emphasis added].

It is not submitted here that the bill intends nor that practice will permit absolute indifference by the courts to *in extremis* situations in which the State Department might seek to have a court temper an impending decision with sensitive foreign policy considerations. Under such extraordinary circumstances, it can safely be assumed that most courts will feel impelled by "separation of powers" or "Supremacy Clause" considerations to yield to the indicated foreign policy sensitivities. But courts should not be preoccupied with such concerns unless expressly requested to do so by the State Department in those rare circumstances which might from time to time arise.²³

A second comment relates to the *nature* of the sovereign's act as opposed to the *purpose* of its act. The second sentence in § 6103(d) of the proposed bill, which defines "commercial activity," provides that:

The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction of act, rather than by reference to its *purpose*. [Emphasis added]

In the Section-by-Section Analysis of H.R. 11315, the following passage appears as a statement of legislative intent:

As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces²⁴ or to construct a government building²⁵ constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function. (at 8)

It is submitted, however, that this "either/or" approach to determinations of "commercial activity" is too rigid. There are indeed occasions on which a court

23. It is interesting to note, however, that H.R. 11315 does not appear to make provision for such extraordinary State Department intervention. Nor does the Section-by-Section Analysis of the bill allude to such an eventuality or the means by which such intervention could occur consistent with the provisions of H.R. 11315. Indeed, the Section-by-Section Analysis states at page one that,

It [the bill] is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions *exclusively* to the courts, thereby discontinuing the practice of judicial defejence to "suggestions of immunity" from the Executive Branch [Emphasis added]

Hopefully, greater light will be shed upon this question during hearings on the bill.

24. Thus, H.R. 11315 would in effect overrule the decisions in *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) and *Kingdom of Roumania v. Guaranty Trust Co.*, 250 F. 3, (2d Cir.), *cert. denied*, 246 U.S. 663 (1918).

25. Similarly, H.R. 11315 would reverse the outcome in *Renchard v. Hemphreys & Harding, Inc.*, 381 F.Supp. 382 (D.D.C. 1974)

might find it helpful or relevant to its decision to inquire into both the purpose and the nature of a given act or transaction. That the *Victory Transport* court apparently believed an examination of the "purpose" of the transaction there involved was relevant to its decision is reflected in its statement that:

Appellant [the sovereign defendant] does not claim that the wheat will be used for the public services of Spain; presumptively the wheat will be resold to Spanish nationals. 336 F.2d at 361.

A similar relevance as to the "purpose" of a sovereign's act was noted by the court in *Heaney v. Government of Spain*, 445 F.2d 501 (2d Cir. 1971), wherein it was observed that,

The view that all contracts, *regardless of their purpose*, should be deemed "private" or "commercial" acts would lead to the conclusion that a contract by a foreign government for the purchase of bullets for its army or for the erection of fortifications do not constitute sovereign acts—a result we viewed as "rather astonishing" in *Victory Transport*, 336 F.2d at 359.²⁶ [Emphasis added]

The utility of inquiries into the "purpose" of a sovereign's acts was similarly foreseen in *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1281 (S.D.N.Y. 1974) (Weinfeld, J), wherein it was observed that:

There may be cases where the terms of the contract are so ambiguous or the nature of the commodities involved so general, or where the identity of the contracting party is in such doubt that further inquiry, such as the actual use to which the foreign sovereign put the items, would be justified in order to decide the issue. (*Id.* at 1285)²⁷

Moreover, it may well be inconsistent with basic due process safeguards for a court to disallow the taking or submission of evidence as to the purpose of the sovereign's transaction. Thus, if the nature/purpose distinction is worth retaining at all, the courts should view its two components as being, at least in some circumstances, complimentary rather than mutually exclusive; a wooden application of either the "nature" or the "purpose" test should be eschewed by the courts.

A third matter that should be of concern to the courts is the erroneous practice by some courts of associating the question of whether sovereign immunity should be granted with the question of whether the sovereign respondent has friendly or unfriendly relations with this country.

In *Victory Transport* the court stated that:

Through the "Tate Letter" The State Department has made it clear that its policy is to decline immunity to *friendly* foreign sovereigns in suits arising from private or commercial activity. (at 359) [Emphasis added]²⁸

It is quite possible that such references to friendly and unfriendly governments intend nothing more than to distinguish between countries with which we are at "peace" and countries with which we are actually at war. However, references to friendly or unfriendly governments, when used in this sense, is

26. 445 F.2d at 503-504.

27. At 1284, n.9 of the *Aerotrade* decision, the court expressed the further view that, Moreover, goods need not be of an exclusively military nature (i.e., weapons) for the contracting sovereign to be entitled to a grant of immunity, as long as they are for the use of its armed forces.

This statement is further evidence of the need for a discriminating and deliberative application of the nature/purpose distinction.

28. For other judicial references to the "friendly/unfriendly" sovereign distinction, see, e.g., *Ex Parte Peru*, 318 U.S. 578, 588 (1943); *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974).

rather superfluous, for the reasons that: 1) it is most unlikely that a nation with which we are *actually* at war will have occasion or will hazard to enter a plea of sovereign immunity in a U.S. court; and 2) "friendly" nations (including our Cold War antagonists) are not impeded, either in principle or in practice, from asserting sovereign immunity pleas and having them duly recognized and allowed.²⁹ But more importantly, there is no basis whatever in the "Tate Letter" for differential treatment as between the sovereign immunity claims of friendly and unfriendly powers.

Thus, inasmuch as the friendly/unfriendly distinction has the tendency to import political and foreign policy reasoning into judicial determinations of sovereign immunity—something which H.R. 11315 is specifically designed to prevent³⁰—the courts should scrupulously avoid both casual and intentional references to that distinction.

Moreover, such caution would be particularly reassuring to the smaller, developing nations of the world which might otherwise be inclined to perceive actual or assumed prejudice in the disposition of their sovereign immunity claims, as compared to, say, the disposition of European claims. On balance, however, it would seem that most foreign sovereigns, including those from developing countries, would welcome H.R. 11315's proposal to transfer exclusive decision-making authority on sovereign immunity questions to the courts, for all of the reasons set forth in the statement of Acting Legal Advisor Brower, *supra*, at 13. This view is *a fortiori* valid with respect to African and other developing nations whose economies, to a large extent, are state-controlled, and who therefore have a greater number of sovereign agencies and instrumentalities potentially subject to suit.

Fourthly, upon passage of H.R. 11315, the American judiciary should resort and be encouraged to resort to apposite decisions from other jurisdictions which also adhere to the restrictive theory of sovereign immunity.³¹

29. See, e.g., *Deep, Deep Ocean Products, Inc. v. Union of Soviet Socialist Republics and Sovrybflot*, Civil Action 73-2887-T (D.Mass. 1973), reported in *1973 Digest of U.S. Practice in International Law* at 224-225; *Arcade Building of Savannah, Inc. v. Republic of Cuba*, 123 S.E.2d 453 (Ga.Ct. App. 1961). *But see* *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S. 2d 971 (Sup. Ct. 1960), *aff'd*, 17 A.D. 2d 927, 233 N.Y.S. 2d 1013 (1962).

30. In the Section-by-Section Analysis of § 1602 (Findings and Declaration of Purpose) of the bill, it is stated that the central premise of the bill is "that decisions on claims by foreign states to severign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law." (at 5)

31. The *Victory Transport* case affords an example of at least one American court that has drawn upon helpful foreign law, to wit: *Egyptian Delta Rice Mills Co. v. Comisaria General de Madrid*, 55 *Bulletin de legislation et la jurisprudence egyptiennes*, 114 (1942-1943), quoted in Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *BRIT. Y.B. INT'L L.* at 255. See, *Victory Transport Inc. v. Comisaria General*, 336 F.2d 354, 361-362 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

In a recently reported case, *Owners of the Ship "Phillipine Admiral" v. Wallem Shipping (Hong Kong) Limited* (Privy Council App. No. 13) (Nov. 5, 1975), reported in *15 International Legal Materials*, No.1, January, 1976 at 133, the British Privy Council referred extensively to American judicial precedents and other authorities on the restrictive doctrine of immunity. The *Phillipine Admiral* may well be a landmark case, as it seems to indicate a clear, or at least a substantial, break by British judicial authorities away from Britain's prior adherence to the theory of absolute immunity of a foreign sovereign from suit. The Privy Council concluded, after an extensive review of leading case authorities on restrictive immunity, that the *Phillipine Admiral*, though owned by the Republic of the Phillipines, was nonetheless "a mere trading vessel" that was not destined for public use and therefore not entitled to sovereign immunity. *15 International Legal Materials, supra*, at 144.

Within the last half century governmental activity has filtered into an ever-expanding range of endeavors, some of which could be viewed as commercial, and others non-commercial, for sovereign immunity purposes. These developments have begun to impose considerable stress and strain upon the effective operation of the restrictive theory of sovereign immunity.

If, for example, a foreign sovereign enters into a contract with a U.S. private party under which the sovereign agrees to purchase parts or machinery essential for the sovereign's construction of a satellite tracking station (comparable to a NASA tracking station), how should such a transaction be denominated—as a commercial or governmental activity? It is generally known that such facilities can perform both governmental (*e.g.*, surveillance) as well as commercial (*e.g.*, telecommunications) functions. Would it be relevant to examine the *purpose* of such a contract as well as its *nature*?

Would the outcome be affected by a change of the above facts so as to involve a contract between the same two parties under which the private party agrees to undertake certain scientific and technological research and development in connection with the construction of the same tracking station facility?³² Is the criterion that was considered but then rejected in *Victory Transport (i.e., that "particular contracts in some instances may be made only by states"*)³³ irrelevant in all cases? Or should the operation of the restrictive theory of immunity evolve toward a system under which a court could apply not just a single criterion, but a number of them, through a balancing process, in order to test the commercial or public character of a governmental act?

CONCLUSION

It could well be, as some have forcefully argued,³⁴ that the governmental-commercial distinction, so basic to the restrictive theory of immunity, is simply unworkable and the theory should accordingly be replaced. However, as argued earlier herein,³⁵ this view might be somewhat premature in view of the fact that American courts have not yet been given an unfettered opportunity, as would supposedly exist under H.R. 11315, to demonstrate the workability of the doctrine when administered under a purely judicial regime.

If the judiciary fails in demonstrating the efficacy of the restrictive doctrine, there is always the possibility of reverting to the classical doctrine of absolute immunity from suit for foreign sovereigns. But until the judiciary devises more

32. See *Deep, Deep Ocean Products, Inc. supra*, at 19, n.29, which involved a claim of sovereign immunity from an order of attachment against a vessel of the Soviet Union (the *Belogorsk*) that was engaged in a program of scientific research at Woods Hole, Massachusetts. The plaintiffs were seeking compensation for damages to fishing gear alleged to have been caused by fishing vessels of the Soviet Union. The Department of State made a suggestion of immunity on the ground that the *Belogorsk* was engaged in research "being carried out under international agreements concluded between the USSR and the United States for the purpose of expanding cooperation in the field of fisheries and establishing procedures to minimize and prevent disputes." 1973 *Digest of U.S. International Law Practice* at 224.

33. 336 F.2d at 359. The court went on to state that, "For example, any individual may be able to purchase a boat, but only a sovereign may be able to purchase a battleship. Should the purchase of a yacht be equated with the purchase of a battleship?" *Id.* at n.9.

34. See, *e.g.*, Brandon, *The Case Against the Restrictive Theory of Immunity* 21 *INS. COUNSEL J.* 11 (1954); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 *BRIT. Y.B. INT'L L.* 220, 225-226 (1951); Fitzmaurice, *State Immunity from Proceedings in Foreign Court*, 14 *BRIT. Y.B. INT'L L.* 101, 123-124 (1933); Comment, *The Jurisdictional Immunities of Foreign Sovereigns*, 63 *YALE L.J.* 1148, 1161-1162 (1954).

35. *Supra*, at 6.

manageable criteria for implementing the restrictive theory, or until someone devises an ingenious, new doctrine that could replace the restrictive doctrine, we are left with little choice except to continue with the inadequacies of the restrictive doctrine trusting that more often than not the outcome will be both just and justifiable.

Finally, irrespective of how Congress acts upon H.R. 11315, if the Department of State is serious about expediting the day of exclusive judicial competence on questions of foreign sovereign immunity, then the Department should simply go out of the business of making suggestions of immunity or non-immunity. By so doing, it could indirectly achieve the transfer of decision-making power on immunity questions to the courts, which is where the Department believes such authority belongs in the first instance.