COMMENTS

SOVEREIGN IMMUNITY MADE EASY: CURBING LITIGATION WITH ADVISORY OPINIONS

When the courts of one nation attempt to influence the interests of another sovereign, that sovereign may deny the jurisdiction and actions of those courts.[1] This concept, sovereign immunity, has been the catalyst for heated debate ranging from its definition, to its origin and application. Sovereign immunity stems from the ancient philsophy *par non habet in parem imperium.*[2] Traditionally, there are two distinct theories defining the scope of sovereign immunity: *Jure Imperii* and *Jure Gestionis. Jure Imperii,* also called the classical theory, sets forth the principle that any act by a nation is "public" in character and is granted complete immunity.[3] *Jure Gestionis,* usually referred to as the restrictive theory, established the proposition that those acts by a nation which are of such a "private" character that an ordinary citizen could perform them will not be granted immunity.[4]

If the act is classified as *Jure Imperii* and thus accorded absolute immunity, a nation may waive its sovereign immunity. This waiver may occur either by a clause in a commercial contract[5] or by a voluntary appearance in court.[6] Even if the act is considered as *Jure Gestionis* and usually subject to adjudication, the nation may, upon the request, be granted immunity by the Department of State.[7] The State Department may intervene

1. 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 393 (1941).

2. "An equal has no authority over an equal." H. BRIGGS, THE LAW OF NATIONS 442 (2d ed. 1952).

3. *See* Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States,* 28 BRIT. Y.B. INT'L L. 220 (1951). *See also* Fensterwald, *Sovereign Immunity and Soviet Trading State,* 63 HARV. L. REV. 614, 616-20 (1950).

4. *See* Restatement (Second) of Foreign Relation Laws of the United States § 69 (1965). *See also* Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L L. 93 (1953).

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

6. National City Bank v. Republic of China, 348 U.S. 356 (1955).

7. Isbrendtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied,* 404 U.S. 985 (1971).

by filing a Suggestion of Immunity[8] which "requests" the court to grant sovereign immunity and is usually given conclusive effect.[9] Immunity has been suggested in cases involving both tort and contract actions.[10] The suggestion may be forwarded at any time during the judicial process.[11] The Department of State has intervened in cases concerning private as well as public acts,[12] and instances involving a specific waiver of immunity by the nation.[13] In essence, a corporation or other private party has no assurance whether a nation is protected by sovereign immunity until the State Department acts or specifically refuses to act, or an appeal to a higher court is denied.

This Comment will examine Suggestions of Immunity and their effect on litigation involving contractual or tort actions between domestic corporations and foreign sovereigns.[14] An essential ingredient to a discussion on sovereign immunity is an examination of the case law and pertinent proposals dealing with this problem.

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8. A Suggestion of Immunity is the formal means by which the Executive Branch of the government, through the Department of State, makes a recommendation concerning a nation's sovereign immunity to the court. This suggestion is communicated to the Attorney General who instructs the local United States Attorney General to make the appropriate representations to the court. *See* Fuller, *Procedure in Cases Involving Immunity of Foreign States in Courts of the United States*, 25 AM. J. INT'L L. 83, 86 (1931).

9. *Ex Parte* Republic of Peru, 318 U.S. 578 (1943); F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945).

10. *See* 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).

11. *See* Weilaman v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959), for a case involving a Suggestion of Immunity at the beginning of trial; *see* State National Institute of Agrarian Reform v. Dekle, 137 So.2d 581 (Fla. 1962), for a case involving a suggestion forwarded during appeal.

12. *See* Hellenic Lines, Ltd. v. Embassy of South Vietnam, 275 F. Supp. 860 (D.C.N.Y. 1967), a case involving a Suggestion of Immunity forwarded when nature of the act was private, and Chemical Natural Resources v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864, *cert. denied*, 385 U.S. 822 (1966) for a Suggestion of Immunity forwarded when the nature of the act was public.

13. Isbrendtsen Tanker, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971).

14. *See* Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 INT'L AND COMP. L.Q. 452 (1958); García-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 VA. L. REV. 335 (1956) for an excellent comparative study of international case law involving sovereign immunity.

I. THE CASE LAW

The acceptance of the doctrine of sovereign immunity by United States courts was heralded by Chief Justice Marshall's opinion in *The Schooner Exchange v. McFadden*.[15] In that case, the plaintiffs, American shipowners, sought to reclaim their public armed vessel seized from them on the high seas by the French. The ship had entered a U.S. port where it was attached. In subsequent litigation a Suggestion of Immunity was filed by a United States Attorney and Marshall concluded that public armed vessels of a sovereign were immune from jurisdiction of another sovereign. While the Court indicated the suggestion might be of some importance, there was no evidence of its conclusiveness on the issue of sovereign immunity.[16]

While *The Exchange* dealt with acts of the sovereign itself, the Supreme Court later saw fit to extend the rational of this case to situations involving ordinary commercial claims. In *Berizzi Brothers Co. v. S. S. Pesaro*,[17] a breach of contract action was dismissed solely on the ground that the vessel, though privately operated, was owned by the government of Italy.[18] The Court's decision was at odds with the State Department "suggestion" that no immunity be granted because the nature of the act was private instead of public. This decision indicates private vessels working for their country fall within the principles established by *The Exchange*.

The Suggestion of Immunity was of primary significance in *Ex Parte Peru*,[19] where the plaintiff attached a ship belonging to the Republic of Peru for its failure to carry a cargo of sugar from Peru to New York as required by the contract. Peru requested and received a Suggestion of Immunity from the Department of State. The Court found this suggestion "a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct

15. 11 U.S. (7 Cranch) 116 (1812); while there were earlier cases dealing with sovereign immunity, *see* United States v. Judge Peters, 3 U.S. (3 Dall.) 96 (1795) and Ketland Qui Tam v. The Cassius, 2 U.S. (2 Dall) 318 (1796), *The Exchange* is considered the leading case.

16. *Id.* at 147. However, in United States v. Lee, 106 U.S. 196 (1882) at 209 the court in dicta states, "[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction."

17. 271 U.S. 562 (1926).

18. *Id.* at 574.

19. 318 U.S. 578 (1943).

of our foreign relations."[20] *Ex Parte Peru* became the first case to treat the Suggestion of Immunity as conclusive; a view that has continued to the present day.[21]

In *Mexico v. Hoffman*[22] a tort action brought by an American corporation against Mexico, the Department of State did not issue a Suggestion of Immunity. The Court in declining to grant Mexico immunity said, "[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."[23] The view of *Hoffman* was that sovereign immunity will be granted only when suggested by the Department of State, a position in direct conflict with *Pesaro*.[24]

A memorandum, the now famous "Tate Letter," attempted to clarify the problems surrounding the concept of sovereign immunity.[25] As acting legal adviser for the Department of State, Mr. Tate indicated that in the past the United States had followed the classical theory of sovereign immunity[26] and therefore had accorded all nations complete immunity from suit in United States courts. He indicated that this practice was at variance with the United States foreign policy position which allowed other countries to maintain actions in their own courts against the United States. The letter concluded:

> [F]or these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity [*Jure Gestionis*] in the consideration of requests of foreign governments for a grant of sovereign immunity.[27]

The Tate Letter seems to have been a formal statement as to the Department's position on sovereign immunity.[28] This is con-

20. *Id.* at 589.

21. *See* Isbrendtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971); Rich v. Naviera Vacuba, S.A. 295 F.2d 24 (4th Cir. 1961); F.W. Stone Eng'r Co. v. Petroleos Mexicanos, 352 Pa. 12, 42 A.2d 57 (1945); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (1966), *cert. denied*, 385 U.S. 822 (1966).

22. 324 U.S. 30 (1945).

23. *Id.* at 35.

24. The court in Hoffman when referring to Pesaro simply said, "[t]his salutory principle was not followed in *Berizzi Bros. Co. v. The Pesaro* . . . ." 324 U.S. at 35 n.1.

25. 26 DEP'T. STATE BULL. 984 (1952).

26. For a discussion of the classical theory of sovereign immunity, *see* text accompanying note 3 *supra*.

27. 26 DEP'T. STATE BULL. 985 (1952).

28. For earlier statements by the Department see, 2 G. HACKWORTH, DI-

sistent with the Department's actions regarding requests for immunity in two cases prior to its issuance, *Pesaro* and *Hoffman*. As previously indicated, both cases involved "private" acts and therefore fell under the restrictive theory of sovereign immunity. If this theory had been followed many of the current problems would have never developed.

But, less than ten years after the issuance of the Tate Letter, the Department began to vacillate as to its position on granting immunity.[29] An analysis of case law subsequent to the Tate Letter lends support to this statement. In *Rich v. Naviera Vacuba, S.A.*,[30] a vessel was taken over by its Cuban crew. The crew entered a United States harbor and requested asylum. Numerous actions were brought against the ship, and one involved a prior judgment and waiver of immunity in a lower court. In this action, plaintiffs sought to enforce the lower court's judgment and obtain the damages which had been awarded. The Department of State filed a Suggestion of Immunity which the court granted stating:

> We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.[31]

The Department's apparent position was that regardless of the Tate Letter, when a Suggestion of Immunity is deemed necessary it will be forwarded. However, the Department seemed to revert to the dictates of the Tate Letter in three subsequent cases: *Pacific Molasses Co. v. Comite De Ventas De Miles*,[32] *Victory*

GEST OF INTERNATIONAL LAW 429 (1941). The Department has reaffirmed its position on sovereign immunity as late as 1961. *See generally*, 56 AM. J. INT'L L. 526 (1962).

29. *See* Weilaman v. Chase Manhattan Bank, 21 Misc. 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

30. 295 F.2d 24 (4th Cir. 1961).

31. *Id.* at 26.

32. 30 Misc.2d 560, 219 N.Y.S.2d 1018 (Sup. Ct. 1961). In this case, the plaintiff corporation and defendant entered into a contract involving the sale of molasses. The contract contained a clause stating:

> any controversy or claim arising out of or relating to, this contract, or for the breach thereof, shall be referred to the courts having jurisdiction in accordance with international law, provided no agreement is reached between the parties for a settlement out of court.

Id. at 562. The court held there had been a valid waiver of sovereign immunity by contract. The decision seemed to rest upon three major factors: the United States position as set forth in the Tate Letter, the waiver by contract of sovereign

Transport, Inc. v. Comisara General,[33] and *Petrol Shipping Corp. v. Kingdom of Greece*.[34] These cases involved acts which may properly be classified as *Jure Gestionis* and thus not immune from court action.

The principle of the Tate Letter was abandoned once again in the recent case of *Isbrandsten Tankers, Inc. v. President of India*.[35] A ship owner instituted suit against the defendant seeking damages resulting from an alleged delay of its vessels during October and November, 1966, near the port of Calcutta, India. Plaintiff and defendant had entered into a charter agreement in July, 1966 for the transportation of grain to India. The shipment was part of a massive effort on the part of the Indian Government to end a food shortage resulting from extreme drought in 1965 and 1966 and the charter contained a clause waiving immunity.[36] The court indicated that such a waiver would be binding in the absence of an executive recommendation.[37] The Department of State issued a Suggestion of Immu-

immunity, and the absence of a suggestion of immunity from the Department of State.

33. 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 281 U.S. 934 (1964). In this landmark case, the court held an arbitration clause to be valid and ordered arbitration to proceed. The appellant, a branch of the Spanish Ministry of Commerce, chartered the S.S. Hudson to transport a cargo of wheat from the United States to Spanish ports. The agreement contained a clause providing:

> [s]hould any dispute arise between Owner and the Charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement shall be made a rule of the Court. The Arbitrators shall be commercial men.

Id. at 356 n.2. The Hudson was delayed and sustained damages in the Spanish ports, upon failure to arbitrate, court action was instituted by the Victory Transport, Inc. In the absence of a suggestion of immunity, the court apparently decided the case upon the question of whether the acts were *Jure Imperii* or *Jure Gestionis*. It adopted the view that *Jure Imperii* acts would be limited to the following:

(1) Internal administrative acts, such as expulsion alien.
(2) Legislative acts, such as nationalization.
(3) Acts concerning the armed forces.
(4) Acts concerning diplomatic activity.
(5) Public loans.

Id. at 360. Utilizing this criteria, the court came to the conclusion the acts were private and ordered arbitration. The court superficially discussed the arbitration clause only in the context of a jurisdictional problem, not one dealing with a waiver by contract of sovereign immunity.

34. 360 F.2d 103 (2d Cir. 1966). *See also*, Pan American Tankers Corp. v. Republic of Vietnam, 296 F. Supp. 361 (D.C.N.Y. 1969).

35. 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 485 (1971).

36. *Id.* at 1199 n.3.

37. *Id.* at 1201.

nity even though the act was clearly *Jure Gestionis* and the court saw fit to follow it.

Existing case law seems to indicate that a Suggestion of Immunity may be forwarded when the activity is classified as *Jurie Imperii* or *Jure Gestionis*,[38] and it may be requested and honored even when the country has specifically waived its sovereign immunity in a contract.[39] A United States corporation, left to rely on case law in negotiating with a foreign nation, has no reliable means of predicting probable sovereign immunity.

There is one source which provides a reliable guide in determining the status of a nation's amenability to court action. Several Treaties of Friendship, Commerce and Navigation[40] waive sovereign immunity as to activities carried on between the contracting states by insertion of a clause which reads:

> No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.[41]

If treaties of this nature were enacted with every nation, the problem as to the status of the nation's sovereign immunity might be solved. However, in a more recent Treaty of Friendship,

38. *See* note 12 and accompanying text *supra.*

39. *See* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 485 (1971).

40. The following list contains a number of Treaties of Friendship, Commerce and Navigation. The treaties below are examples of those which include in the immunity clause key words similar to the following: "including all Corporation, Associations, and government agencies and instrumentalities." Treaty with Japan on Commerce and Navigation, April 2, 1953, art. XVIII, para. 3, 4 U.S.T. 2063, T.I.A.S. No. 2863 (effective Oct. 30, 1953); Treaty with the Federal Republic of Germany on Commerce and Navigation, Oct. 29, 1954, art. XVIII, para. 2, 7 U.S.T. 1839, T.I.A.S. No. 3593 (effective July 14. 1956); Treaty with the Republic of Korea on Commerce and Navigation, Nov. 28, 1956, art. XVIII, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3949 (effective Nov. 7, 1957); Treaty with Kingdom of the Netherlands, on Commerce and Navigation, Mar. 27, 1956, art. XVIII, para. 2, 8 U.S.T. 2043, T.I.A.S. No. 3942 (effective Dec. 5, 1957).

41. *See* treaties listed note 40 *supra.*

Commerce and Navigation with Pakistan,[42] the waiver of immunity clause was conspicuously absent, possibly signaling a new United States attitude.[43] At present the status of a nation's sovereign immunity may be said to rest upon a number of factors ranging from reliable treaties to inconsistent Suggestions of Immunity given by the Department of State.

II. EXISTING PROPOSALS: INSUFFICIENT ANSWERS TO THE PROBLEM

A. Criteria for Analysis

The issue of sovereign immunity lends itself to a qualitative breakdown for analytical purposes. The following criteria aid the evaluation of any proposal attempting to clarify problem areas associated with litigation involving a sovereign: *Practicability, Separation of Powers, Effectiveness Within Existing Organization,* and most important *Avoidance of Litigation.*

1. Practicability.—Any proposal must be practical as well as legally sound. Therefore any solution dealing with this problem should consider the influence of United States foreign policy while being adaptable to business realities.[44]

2. Separation of Powers.—An acceptable solution must provide a means of allowing the Executive to carry on foreign relations without limiting the power of the courts to determine any factual issues or rules of law arising from a contractual or tort action.[45] The problem therefore is maintaining the separation of powers required by the Constitution[46] in a situation which involves foreign affairs as well as the interpretation of existing law.

3. Effectiveness Within Existing Organization.—A corollary to practicability is ease of effective implementation of any proposed solution. Any proposal which requires major structural reorganization or the addition of new procedures does not meet

42. Treaty with Pakistan on Commerce and Navigation, Nov. 12, 1959, 12 U.S.T. 110, T.I.A.S. 4683 (effective Feb. 12, 1961).

43. While the subject of treaties is important to this problem, it is sufficient for purposes of this Comment to simply note their existence and influence.

44. While foreign policy may change unexpectedly, it is suggested that corporations desire stability when dealing with other parties.

45. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

46. The Constitution impliedly embodies this principle of the separation of governmental powers by creating, in the first three Articles, a legislature, an executive, and a judiciary. *See* U.S. CONST. arts. I, II, and III.

this requirement. It is suggested in foreign relations, any proposal will be looked upon with suspicion and only those calling for very minor changes have any chance of success. Therefore, a proposal which involves additional expense, drastic change in organization or the enactment of special legislation might be considered too burdensome for implementation.

4. Avoidance of Litigation.—The primary goal of a viable proposal is the avoidance of litigation. The reasoning behind such a requirement is to allow the attorney to plan in such a manner that he can forecast whether a particular course of action will be considered valid or will result in litigation. A realistic assessment of the problem area will disclose the impossibility of avoiding all litigation. Any proposed solution, however, should at least diminish the number of times that the issue of sovereign immunity is raised in the trial court and on appeal.

B. Existing Proposals

The abundance of articles on sovereign immunity is a clue to the confusion with which this area is fraught. These articles may be classified into four major areas according to the various proposals they espouse: the enactment of a statute, hearings by the Department of State, complete judicial control, and separation of executive and judicial functions. A brief examination of these schemes will determine the varying degrees in which they conform to the criteria established above.

1. Legislation: Enactment of a Statute.—A special statute would emphasize the question: does a given transaction—contractual or delictual—have sufficient relation to a physical location to allow a claim arising out of that transaction to be triable in that location?[47] The advantages of such legislation are apparent: the problem of obtaining jurisdiction over foreign sovereigns would be greatly simplified, and the Department of State's participation in the judicial process would be eliminated. The statute would grant courts the specific power to try cases based upon contracts to be performed in the United States and torts committed by another upon United States citizens regardless of location.

These advantages are offset by several disadvantages. The

47. *See* Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of U.S. Laws*, 44 N.Y.U.L. REV. 901, 914 (1969).

enactment of legislation does not avoid litigation. It is an after-the-fact remedy which may be utilized only when the parties are ready to go to court. Further, the proposal overlooks the possibility that in certain situations, it may be in the interest of foreign affairs for the Department of State to intervene. It does not seem realistic to assume that the State Department would be willing to relinquish all of its influence with the courts in this area. Although this proposal was first advocated in 1969,[48] and most recently in 1972,[49] no action has been taken on this matter by Congress or the Department of State.

2. *Hearings by the Department of State.*—Pre-trial hearings by the Department would allow the plaintiff his day in court.[50] When a nation requests a Suggestion of Immunity from the State Department, this proposal would allow the plaintiff to appear at a hearing conducted by the Department and present arguments in support of his position. A determination as to the status of the nation's sovereign immunity would then be made by the Department based upon the results of this hearing. The advantages to this proposal center on the elimination of the possibility of violating a citizen's right of due process under the law. It is argued, that since any suggestion from the Department would be given conclusive effect by the courts, the plaintiff would be denied his opportunity to be heard unless he was present at this hearing.[51] Additionally, the hearing and resulting recommendations could be utilized as guidelines by the court in all cases where sovereign immunity is claimed. While such a plan may quiet the fears of the due process advocates, it is still open to criticism. State Department hearings would be held after there has been an alleged breach of contract or commission of a tort, so avoidance of an adjudication would not be achieved. The utilization of the State Department to determine legal issues is contrary to the concept of separation of powers and the judicial function of the courts as triers of legal questions.

3. *Complete Judicial Supremacy.*—Foreign sovereigns would be accountable for valid claims against them in a manner similar to that in which a state is subject to the laws administered by its

48. *Id.*
49. Note, 46 TUL. L. REV. 841 (1972).
50. *See* Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).
51. *Id.* at 613.

own courts.[52] The advantages of judicial supremacy are numerous: accepting such a concept would eliminate the distinction between "public" and "private" act and would establish a single standard for all sovereigns. However, the shortcomings of this proposal are apparent; it is another after-the-fact solution which would not decrease litigation, and it underestimates the importance of contemporary foreign relations. The greatest obstacle to such a proposal is its certain rejection by the family of nations.

4. *Separation of Political and Judicial Functions.*—This proposal would allow the courts to make a determination of the legal issues while the Department of State would resolve the political issues,[53] which is its inherent advantage. It allows the court to make the final determination of law. The court would give effect to a suggestion from the State Department only when the Department has proved that the administration of foreign relations is affected.[54] The grounds for criticism are numerous. Unless other criteria are suggested this proposal is in essence a reiteration of the Tate Letter with all of its shortcomings. This proposal shares the same fallacy as the other approaches discussed: it does not avoid litigation.

These solutions illustrate the problems inherent in the concept of sovereign immunity. While each proposal has certain advantages, each fails to avoid litigation. The need for a solution which will avoid litigation is paramount. Applying the criteria of *Practicability, Separation of Powers, Effectiveness Within Existing Organization,* and *Avoidance of Litigation* to these proposals demonstrates that while they attempt with some success to solve the problems inherent in sovereign immunity, none of them allow the corporation to preplan its activities and thus avoid litigation.

C. Precautionary Measures

An attorney may naturally ask, "is there any course of action which I may advise my client to pursue that will diminish the possibility of loss when entering into a contract with a for-

52. *See* Jessup, *Has the Supreme Court Abdicated One of its Functions?* 30 AM. J. INT'L L. 772 (1946).

53. *See* Franck, *The Courts, The State Dept. and National Policy: A Criterion for Judicial Abdication,* 44 MINN. L. REV. 1101 (1960).

54. *Id.*

eign nation?" At present, there are certain precautionary measures available to the attorney which merely circumvent the known problems rather than solving them.

The first and most obvious alternative is the requirement of payment in advance. If practicable, this alternative should be pursued. Of course, it is likely that the contracting nation will not submit to such a requirement. A second alternative is the issuance of a Straight Financial Guarantee Surety Bond. The purpose of such a bond is to insure against financial loss caused by a breach of contract. In this manner the American corporation may include the price of such a bond as part of the contract price and still retain its profit margin. The problem here is the possibility of keen competition from other parties for the desired contract. This might prevent inclusion of a bond in its contract price in order to keep the bid competitive. Assuming these alternatives are available, it should be remembered that they will only indemnify a loss associated with a breach of contract.[55] They will not insure the party against loss resulting from the commission of a tort. However, the issuance of a General Fidelity Bond to insure the contracting party's property may be a means to protect an interest in case of tortious conduct.

The final alternative afforded the corporation is to include an arbitration clause in its contract.[56] Such clauses typically provide that each contracting party will appoint one member to the arbitration board. Thereafter the two designated members agree between themselves upon the selection of a third member.[57] The case law concerning waiver of sovereign immunity by inclusion of an arbitration clause has already been discussed.[58] An analysis of the court's reasoning in the principal cases, *Victory Transport, Petrol Shipping*, and *Pan American Tankers*, indicates these decisions were not based solely on the existence of an arbi-

55. THE SURETY ASSOCIATION OF AMERICA, RATE MANUAL OF FIDELITY, FORGERY, AND SURETY BONDS § 60. However, this is merely a form of risk shifting and in the event of a breach of contract by a nation afforded immunity, the bonding corporation would incur the loss rather than contracting corporation.

56. *See* Summers, *Arbitration and Latin America*, 3 CALIF. W. INT'L L.J. 1 (1972-73) for an excellent discussion of international arbitration; *see also* the forthcoming article by Professor Summers in 4 CALIF. W. INT'L L.J. (1973-74) which will examine private arbitration.

57. For an example of a typical arbitration clause, *see* note 33 *supra*.

58. *See* notes 32, 33 and 34 *supra*.

tration clause.[59] However, when such a clause is present, the Department of State has refused to forward a Suggestion of Immunity. It may be suggested that the reason arbitration clauses are given effect is that the final determination of a dispute does not rest with an official branch of the United States Government, but rather with the arbitration board selected by the contracting parties. The Department of State's silence in these cases is an indication that interference in a private matter will not be encouraged. Thus, it has become apparent that the State Department is not inclined to honor a request for a Suggestion of Immunity in cases with arbitration clauses while it is willing to forward a suggestion in similar factual situations which did not benefit by the presence of an arbitration clause.[60]

III. ADVISORY OPINIONS

A. Background

Clearly there is a need for a permanent solution to remove the uncertainty of a nation's possible immunity in a contractual dispute. The proposed remedies discussed above do not appear to have forwarded a tenable answer to the problem, therefore it is necessary to explore a new avenue of thought in an attempt to arrive at a workable alternative.

Prior to discussing the possibility of utilizing advisory opinions by the Department of State, some understanding is necessary of the present use, scope, and theory underlying their current employment by the federal and state governments. Essentially, advisory opinions are rulings issued to governmental departments by an official legal adviser of the various executive branches of the state and federal governments.[61] The basic purpose of such opinions is to provide guidelines to governmental agencies as to interpretation of existing laws and their effect.[62] The legal advisor is usually the State or Federal Attorney Gen-

59. In all three of these cases, while the court held such clauses effective the central issue seemed to be the lack of a Suggestion of Immunity and the nature of the activity.

60. *Compare* Victory Transport, Inc. v. Comisara General, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965) with Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971), *cert. denied*, 404 U.S. 985 (1971).

61. *See* Nealson, *The Opinion Function of the Federal Attorney General*, 25 N.Y.U. L. REV. 825 (1950).

62. *See* 28 U.S.C. § 512 (1966).

eral.[63] While these opinions are not "the law," federal and state courts accord them a certain degree of preference.[64]

There is one specific instance where a private citizen may request and receive an advisory opinion from the federal government. The Internal Revenue Service issues rulings which may properly be classified as advisory opinions.[65] These rulings specifically state the government's position in regard to the taxation consequences of a prospective transaction.[66] The stated purpose for issuing such rulings is the furtherance of sound tax administration.[67] Prudent use of these rulings by the taxpayer will allow him to plan his acts with a degree of certainty as to the tax consequences of those acts.

At present, the Office of the Legal Advisor, Department of State does not issue advisory opinions. However, a survey of certain sections within Title 22 of the United States Code indicates the Secretary of State may have the power to authorize such opinions.[68]

It may be postulated that there are certain disadvantages to the use of advisory opinions by the State Department. One of the primary disadvantages is that the international situation may

63. At present, such opinions are issued by the United States Attorney General and by various state Attorney Generals. The authority of the United States Attorney General to issue advisory opinions is found in 28 U.S.C. § 351 (1966); for an example of a typical state statute authorizing the state Attorney General to issue such opinions, see CAL. GOV'T CODE § 12519 (West 1945). Additionally, Art. II § 2 of the United States Constitution provides the President with the power to call for written opinions from all his principle officers.

64. *See* First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946); Smith v. Anderson, 63 Cal. Rptr. 391, 62 C.2d 636, 433 P.2d 183 (1967).

65. Internal Revenue Service, Rulings and Other Specific Matters, 26 C.F.R. § 601.201 *et. seq.* (1970).

66. 26 C.F.R. § 601.201(b)(1) (1970).

67. *See* I.R.S., *supra* note 65.

68. The pertinent sections of the United States Code read as follows:

22 U.S.C. § 2654. There is established in the Department of State the office of legal advisor . . . . 22 U.S.C. § 2658: The Secretary of State may promulgate such rules and regulations as may be necessary to carry out the functions now or hereafter vested in the Secretary of State or the Department of State, and he may delegate authority to perform any of such functions including if he shall so specify the authority successively to redelegate any of such functions, to officers and employees under his direction and supervision. 22 U.S.C. § 842; The Secretary shall, except in an instance where the authority is specifically vested in the President, have authority to prescribe regulations not inconsistent with the Constitution and the laws of the United States in relation to the duties, functions, and obligations of officers and employees of the Service and the administration of the Service.

change from the issuance of these opinions to the time of breach of the contract. Therefore the opinion might not be binding upon either party since the Department of State may be required, in the interest of sound foreign policy, to change its position to reflect the new political situation.

Recent political occurrences may necessitate reversal of a previously issued opinion. Since the reasons for a reversal of policy may not be publicly disclosed the Department of State might be placed in an awkward public position without being able to explain its decision. The Department may be engaged in long range negotiations. Such opinions might be adverse to the objective the United States is attempting to achieve by the continued negotiations. It is possible that advisory opinions may alienate the foreign power conducting negotiations with the United States.

Although Suggestions of Immunity are given conclusive weight by the courts,[69] an argument can be made that these advisory opinions would not be binding on the courts. If issued prior to the execution of the contract it may be argued that they are intended to be advisory rather than conclusive. Additionally, since many new factors may develop after the issued opinion, the courts may consider it necessary to vitiate the conclusive effect of the opinions.

Another argument in opposition to advisory opinions is that the United States must have flexibility to adjust to new developments in foreign relations. Since the opinions could be modified due to changes in the political situation, they would not be binding upon the department or anyone else who desired to utilize them. Such opinions, arguably, might cause a "flood of requests" which the Office of the Legal Adviser could not possibly handle within its present table of organization.

Although the above-mentioned disadvantages of the use of advisory opinions in this area are numerous, few if any of them are likely to occur in reality. It is a major contention that the political situation may change thereby rendering such opinions worthless. However, an examination of the history of international and national affairs will reveal that the situation has changed very little in the great majority of cases under discus-

69. *See Ex Parte* Republic of Peru, 318 U.S. 578 (1943).

sion.[70] Any time the international situation has changed in a manner that might effect the outcome of the case, the court has noted it in the record.[71] It is also asserted that the necessity of secrecy in the conduct of foreign affairs makes advisory opinions unacceptable; there may be information which for reasons of national security should be kept from the general public. It is suggested that a citizen's right to be informed is rapidly being elevated to the status of a fundamental right.[72]

The problem of interference with long range negotiations is in reality non-existent.[73] Since the State Department and the nation involved would probably be in communication, the advisory opinion would merely reflect the position the Department is going to take or has taken in respect to this nation. It is difficult to understand how this would effect either short or long range negotiations. If the negotiations were at a delicate stage, the opinion could reflect the country's own position as to the suit; in this manner there could be no possible objection from the nation.[74]

The argument that advisory opinions would not be binding upon the courts overlooks the effect such opinions would have upon the use of Suggestions of Immunity. Since the Department would have already indicated its position on the status of a nation's sovereign immunity in the advisory opinion, it would no longer be necessary to file a Suggestion of Immunity. In the absence of a Suggestion of Immunity, there would be no reason for the courts to deny a conclusive effect to the advisory opinion. It

70. *See generally* INTERNATIONAL EVENTS OF THE MONTH, CURRENT HISTORY (1924-Present), which discusses each nation separately and the international situation as a whole. *See also* SURVEY OF INTERNATIONAL AFFAIRS published by the Royal Institute of International Affairs, London, England.

71. *See* Pan American Tankers Corp. v. Republic of Vietnam, 296 F. Supp. 361 (D.C.N.Y. 1969) where the court brings into the record the fact of the "Tet Offensive."

72. *See* Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787 (1959); Hennings, *The Executive Privilege and the People's Right to Know*, 19 FEB. B.J. 1 (1959); Comment, *Access to Governmental Information in California*, 54 CALIF. L. REV. 1650 (1966).

73. It must be noted that many negotiations of this nature may be delicate and troublesome. However, it is suggested that the proper use of advisory opinions will allow each nation to predict the consequences of their actions. This may provide a means by which existing tensions may be lessened.

74. Even if the opinion was adverse to present United States interests, it is submitted that this procedure is still more advantageous than suggestions of immunity. The use of advisory opinions allows the corporation to preplan its actions, while suggestions of immunity offer no such alternative.

should be remembered that these opinions relate only to the matter of a nation's immunity. If the opinion states the nation should be granted immunity, the courts may take this as a recommendation from the Department of State that such immunity is in the interests of sound foreign relations. When the opinion states no immunity will be granted, the courts may consider this as a statement by the Department that such a nation is subject to suit within the United States.[75]

The Department of State would be free to revoke a prior opinion when such action is required due to changed circumstances in foreign affairs. In the absence of such a change, there would be no reason for the Department to alter its stance on this issue and the initial opinion would be binding upon the courts.

The final objection to advisory opinions concerns the possibility of a "flood of requests" which the Office of the Legal Adviser could not handle. This argument lacks substance since the number of requests would not overburden the Office's capabilities considering the vast resources available to the Office through the Department of State.

B. Do They Meet the Criteria?

Avoidance of unnecessary litigation is the goal of any proposal in this area. Advisory opinions allow the individual to plan his course of action. If the opinion indicates immunity will be granted, the corporation will bargain on that basis with the knowledge that it must forego litigation in the event of a breach of contract. Thus the corporation may either "assume the risk" in dealing with the sovereign or refuse any offered contract. The receipt of such a ruling by the nation confirms its immunity from suit. However, if the opinion indicates no immunity will be granted, the corporation may proceed with the contract on the assumption that legal remedies will be available for any breach of contract. The nation will be informed that it will be held accountable for any unfulfilled obligations and therefore may be induced into full performance of the contract or payment of damages in an out-of-court settlement. Granted, many nations may still apply for a suggestion of immunity and argue that recent developments in the international situation justify a

75. While courts are conservative they traditionally bow to the official desires of the executive in the field of foreign affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

reversal of the advisory opinion. However, the status of the nation in relation to the United States as reported by various official publications would be a heavy factor against reversal of such opinions.[76]

Such opinions, of course, would not avoid all litigation. However, as time passes, and the courts, nations, and corporations involved begin to accept the validity and permanence of such opinions, costly appeals would be reduced. Where the injured party desires to pursue legal action to redress an alleged wrong, the number of appeals from lower court decisions will be lessened as appellate courts refuse to grant a hearing when the issue concerns the nation's immunity.

For a solution to be practicable, it must be realistically adoptable. At present, advisory opinions are utilized not only as guidance for governmental agencies, but for use by private citizens. Advisory opinions are presently employed in other areas and there is no apparent reason to preclude their use in determining the immunity of a nation to private litigation.[77]

The separation of judicial from executive functions is one of the basic elements in our form of government. The use of advisory opinions might conceivably interfere with this separation of powers. However, no difficulty has been encountered by the Treasury Department in this area and numerous opinions are given by the Internal Revenue Service.[78] In addition, the determination of immunity would be made prior to any court action. The only cross over into the realm of the judiciary would be the use of such opinions during trial. Since the opinion was rendered before the trial, the court would be free to make its decision without interference from the State Department. The fact that the court's holding would be influenced by such opinions does not by itself imply a subordination of the judiciary's power. If the advisory opinion recommended a grant of immunity, courts should accept this as a valid determination by the State Department that immunity was essential to the interests of

76. There are numerous publications which the nation or corporation may be referred to: U.S. DEP'T STATE BULL., U.S. DEP'T STATE BACKGROUND NOTES, U.S. DEP'T STATE CURRENT FOREIGN POLICY, U.S. DEP'T STATE, BUREAU OF PUBLIC AFFAIRS NEWS RELEASES, and daily news recorded in newspapers, etc.

77. While there is a difference between issuing opinions which affect an individual's tax consequences and one affecting the relations between nations, it is suggested the principle is the same.

78. 26 C.F.R. § 601.201(c)(1) and (b)(1) (1971).

the United States in the field of foreign relations. However, if the opinion indicated that a Suggestion of Immunity will not be forwarded, the court would be free to examine the controversy as it relates to established legal principles without reference to the possible intervention by the Department of State. Since the question of the nation's immunity has already been answered by the advisory opinion, there would be no need to adjudicate the issue.

Acceptance of any solution will depend upon its ability to be integrated into the existing organization without major changes. The Office of the Legal Advisor is presently in existence and the responsibility for such opinions logically should be delegated to it.[79] Furthermore, there is no need for additional legislation, as such opinions may draw their authority from existing statutes.[80] In essence, all that would be required is for the Secretary of State to issue a policy statement to act as a guideline for departmental use.[81]

C. Guidelines for Utilizing Advisory Opinions

The following are suggested guidelines which the Legal Advisor might utilize when issuing the proposed advisory opinions. International commercial contracts probably involve prolonged negotiations between the contracting parties. This would allow the corporation sufficient time in which to submit a request to the Office of the Legal Advisor.

It is suggested that the request contain the following specific information: a copy of the proposed contract, the estimated time it will take before completion, the facts surrounding the formation of the contract, and a request for an advisory opinion. This information is important in that it allows the Legal Advisor to place the contract in the proper perspective to the present international situation. Any examination of the issues would be conducted internally within the Department concerning the foreign relations implications of the nation's immunity.

79. 22 U.S.C. § 2654. It should be noted that while the responsibility for rendering such opinions may be delegated to the Legal Advisor, the actual decision making process may and probably will include other individuals, sections, departments and in some rare and extremely sensitive cases the Secretary of State.

80. 22 U.S.C. § 842 (1946).

81. 22 U.S.C. § 2658 (1956).

The response from the legal advisor would basically involve a determination that under the facts stated, a subsequent request for immunity by the nation, after a breach of contract, would or would not be granted. In addition, if the Department indicated that immunity would be extended, regardless of any waiver in the contract, the reply could include specific reasons why it reached such a decision.[82]

The Legal Advisor may phrase his opinion in such a manner as to still allow him a great degree of flexibility. A statement that the opinion is subject to revocation due to a change in the present international political situation would be sufficient for this purpose. The word *present* both binds and gives flexibility to such opinion. Any subsequent grant or denial of immunity would be based upon a change in the international situation. If in fact a change in the relations between nations necessitated a modification of a previous opinion, the Department of State would be free to issue a new advisory opinion with detailed reasons for the change.[83]

IV. CONCLUSION

The uncertainty of a nation's sovereign immunity has had an impact on numerous American corporations who are engaged in contractual dealings with foreign nations. The present utilization of Suggestions of Immunity with the resulting injustice and loss of revenue to United States corporations necessitates a solution. Any proposal must allow the Department of State to conduct effective foreign relations, while preserving the judiciary's right to determine issues of law and fact. The history and method of using advisory opinions has been examined and criticized in this Comment. The feasibility of utilizing such opinions as a method of determining the status of a nation's sovereign immunity has been presented. The Office of the Legal Advisor of the Department of State is the logical source for such advisory opinions. It is suggested that the use of these opinions by a corporation entering into a contract with a foreign sovereign will provide adequate notice of the status of the nation's sovereign immunity. Therefore, unnecessary litigation of the issue of sovereign immunity will be avoided since each party will enter into con-

82. *See* text accompanying note 72 *supra.*
83. *See* notes 65 and 72 *supra.*

tractual obligations with a reasonable amount of certainty regarding a sovereign party's immunity from legal action in the United States.[84]

Paul Harvey Wallace

84. Recently the International Law Section of the American Bar Association proposed an amendment to Rule 4(d) of the Federal Rules of Civil Procedure for service of process on a foreign state. On Jan. 16, 1973 the Secretary of State and the Attorney General submitted a draft bill to Congress which, essentially, would give the courts complete authority to determine the issue of immunity within the guidelines of the Tate Letter. The Department of State is proposing to make no more Suggestions of Immunity. *See* 2 ABA, THE INTERNATIONAL LAW NEWS, No. 2 at 5 (April, 1973).