UNITED STATES POLICIES TOWARD STATE TRADING*

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INTRODUCTION

The first several drafts of this article had added to the title ("United States Policies Toward State Trading") the subtitle: "Mild Schizophrenia." Certainly the various "policies" of the United States toward "state trading" almost defy logical arrangement. If they had been dreamed up by a single individual rather than a single government, that individual would doubtless be classified as suffering from a split personality.

The basic policies of the United States fall into three categories: political, economic, and judicial. There is an inseparable intertwining of these three elements—in fact, the political and economic are so closely related that they are dealt with simultaneously in part one of this paper; the judicial policies, however, are dealt with separately in part two.

Throughout, there is an underlying theme of "Do as I say, not as I do." For example, the United States Government's official "line" has always strongly favored free trade and strongly opposed state trade. Yet, the United States engages in state-trading activities whenever it is to its advantage to do so. But despite the example which it sets, the United States often tries to discourage its friends and allies from engaging in similar activities.

As another example, consider the question of sovereign immunity for state-trading entities. Foreign state-trading entities rarely receive immunity from jurisdiction in American courts. At the same time, however, the Justice Department has no hesitancy in pleading sovereign immunity for United States state-trading entities when they are sued abroad.

Before beginning an analysis of American policies toward state trading, it is necessary to devote a few words to the problem of what is encompassed in the term "state trading." The term obviously has different meanings for different people. One apt way to describe state trading, however, would be to say that in its pure form, it would be found at the opposite end of a spectrum of international trade from what is classically called free trade.

There is probably no such thing left in the world today as a pure free-trade country—a country where the government exercises virtually no controls over ex-

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ternal trade. There was a time in the nineteenth century when the largest international trader of them all, Great Britain, approached pure free trade. But none of the major traders of the globe today is anywhere near this end of the spectrum.

Conversely, there is a whole bloc of countries today where the external trade not only is completely controlled by the government, but is also conducted by agencies of the government. This is, of course, the Sino-Soviet bloc. These countries would represent the other end of the spectrum from the now nonexistent free-trade countries.

Between these extremes lie all sorts of variants. During the nineteenth century, the United States approached free trade, with tariffs being the only important governmental interference with private international trade. During the twentieth century, however, owing in large part to two World Wars, the United States has moved much nearer the other end of the spectrum. Thus, today we have (in addition to higher tariffs) a host of methods of interference by the Government. There are any number of restrictions, both economic and financial, upon exports and imports. In addition, the United States Government has itself entered the commodity markets in a large way. Although we are still a long way from the Soviet position, we are equally far from the nineteenth-century concept of free trade.

That we, in fact, engage in considerable state trading, however, is probably not as important as the fact that we do so in a highly defensive manner. Our attitudes—and, indeed, our policies—toward state trading reflect a guilty feeling. We would do well to try to rid ourselves of this approach.

The chances are very great that we shall engage in progressively more state trading in the future. If it is to produce the best results for us, we must realize that such trading is nothing new; that there is nothing inherently "bad" about it; that state trading and free enterprise not only are compatible, but also can be complementary; and that state trading can fulfill certain national interests that cannot be served by private trading.

How far we must progress toward realistic self-interest in our attitudes and policies is revealed in the present inconsistent manner in which we approach state trading—by ourselves and by others.

I

POLITICAL AND ECONOMIC POLICIES

A. Policies of the United States toward State-Trading Activities of Its Own

1. *What We Say*

The titular head of the United States Government has officially said that this country is not a state trader. In a speech before a joint session of the Canadian Parliament, on July 9, 1958, President Eisenhower typified our Government's ap-

proach to the subject of state trading, when he discussed the question of the imbalance of trade between the two countries. The President said:[1]

> The United States and Canada are not state traders. All the products of industry manufactured in the United States and sold to customers abroad are sold through the enterprise of the private seller. These articles come to you here in Canada only because of the desire of the individual Canadian consumer to buy a particular piece of merchandise. The United States Government does not place goods in Canada as part of a state-directed program.

Again, an official denial of state-trading activities was voiced by the President in his correspondence of this past summer with Nikita Khrushchev, Chairman of the Soviet Union's Council of Ministers. After saying that expanded trade between the United States and the Soviet Union could be of mutual benefit, the President emphasized the free-trade status of the United States by stating:[2]

> As you know, United States export and import trade is carried on by individual firms and not under government auspices. There is no need, therefore, to formalize relations between United States firms and Soviet trade organizations. Soviet trade organizations are free right now, without any need for special action by the United States Government, to develop a larger volume of trade with firms in this country.

In general, then, the official policy of the United States is to deny the existence of state-trading activities by the Government. In searching hundreds of statements and speeches by public officials, and most especially press releases made available by the State Department on speeches delivered by its top-drawer personnel, any number of appeals were found for "new confidence in the free enterprise system and confidence in the trading system that has made us the envy of the world."[3]

2. *What We Do*

Despite the glowing references of official spokesmen to "private enterprise," "noninterference with commerce," "free trade," and other such antipodes of state trading, the political and economic policies of the United States are—most naturally and rightfully—aimed at achieving the largest measure of security and well-being for the American people. These policies are energetically conducted in the direction of fostering a strong base for American industry and agriculture, and finding outlets for

[1] Address of the President to the Members of the Senate and the Commons, House of Commons Chambers, Parliament Buildings, Ottawa, Canada, July 9, 1958. Quoted from an official White House Release of the same date.

[2] Letter from the President to Nikita Khrushchev, Chairman of the Council of Ministers, Union of Soviet Socialist Republics, July 14, 1958, in reply to a letter from Mr. Khrushchev, dated June 2, 1958. Quoted from an official White House Press Release of the same date.

[3] Address by C. Douglas Dillon, Deputy Under Secretary of State for Economic Affairs, before the National Machine Tools Builders' Association, Chicago, Ill., April 24, 1958. Dep't of State Press Release No. 209, April 23, 1958, p. 8. It should be noted that the State Department is required to report certain state-trading activities to GATT (under art. XVII), but the Department defines state trading very narrowly. Included in the report are certain programs of the Bureau of Mines, Atomic Energy Commission, and General Services Administration; omitted are such huge activities as those carried out by the Commodity Credit Corporation.

this continuously expanding economy. In achieving and maintaining these policies, the United States has probably become the largest state trader in the world, outside the Sino-Soviet bloc.[4]

State trading, in the modern concept of the term, is not necessarily limited to governmental participation within the framework of international commerce in direct competition with private enterprise. Put more simply, because of their size, some of the commercial projects undertaken by the United States Government would be beyond the normal scope of private industry. This does not prevent the activity, nonetheless, from being state trading. By the same token, the term is not distorted by referring to state trading by the Soviet Union and the fact that there is no private international trade in that country's economy with which the Government could compete.

a. *Agricultural commodities.* By all odds, the largest and most active government trade enterprise of the United States is the Commodity Credit Corporation (CCC), which is organized and operated within the general framework of the Department of Agriculture, but which has prominent liaison with many other sections of the executive branch. Among these are the General Services Administration (GSA), International Cooperation Administration (ICA),[5] Office of Civil and Defense Mobilization (OCDM), United States Information Agency (USIA), and most of the executive agencies.

The Commodity Credit Corporation, through its price-support program, acquires stocks of various farm and dairy products. These stocks amounted to something over $5,000,000,000 on January 31, 1958.[6] The CCC is continuously seeking useful outlets for the disposition of its holdings. Some are sold in the United States; some are sold on the export market—both for dollars and foreign currencies; some are turned over to government agencies for emergency disasters, such as drought and floods; some are used to feed the armed forces, and some are bartered for foreign raw materials and manufactured products. Substantial quantities are donated to needy people in the United States and overseas.

From a profit-and-loss angle, the Commodity Credit Corporation, despite its huge volume, which has averaged about $5,300,000,000 per year since 1953,[7] could not stay in business as a private concern. For the single year ending June 30, 1958, its books showed a loss of over $1,000,000,000.[8]

Although the Commodity Credit Corporation had, during the past, engaged in

[4] Attention is invited to COMMODITY CREDIT CORPORATION, U.S. DEP'T OF AGRICULTURE, REPORT OF FINANCIAL CONDITION AND OPERATIONS (1958).

[5] The International Cooperation Administration is a semiautonomous agency, but within the Department of State for organizational purposes.

[6] Published statement by Commodity Stabilization Service, U.S. Dep't of Agriculture, Washington, D.C., April 1, 1958.

[7] U.S. DEP'T OF AGRICULTURE ANN. REP.: ORDERLY LIQUIDATION OF STOCKS OF AGRICULTURAL COMMODITIES HELD BY COMMODITY CREDIT CORPORATION AND THE EXPANSION OF MARKETS FOR SURPLUS AGRICULTURAL COMMODITIES (1958).

[8] COMMODITY CREDIT CORPORATION, *op. cit. supra* note 4, at 10.

limited export activity, the passage of the Agricultural Trade Development and Assistance Act of 1954[9] boosted it into the mainstream of international trade.

Title one of this Act authorizes the President to carry out a program for the sale of United States surplus agricultural commodities under agreements with friendly nations or organizations of friendly nations. In essence, this provides for the sale of agricultural surpluses by payment in foreign currencies. These currencies accrue to the credit of the Commodity Credit Corporation, but at the same time, they are available to the Government generally, to be used for a large variety of purposes, as stipulated in the Act.

Title two of this Act is of a humanitarian nature—which Senator Hubert Humphrey, of the Senate Agricultural Committee, called "a clear and specific give-away program."[10] It has little to do with state trading, except in the political concept of trading food for friendship.

Title three is usually referred to as the barter provision of the Act, and generally speaking, it enables the Commodity Credit Corporation to dispose of surpluses, taking in exchange strategic materials which are needed by this country for stockpiling purposes. It is under this provision that the General Services Administration, Office of Civil and Defense Mobilization, and Department of Defense, among other agencies of the Government, acquire materials for national and supplemental stockpile inventories.[11]

b. *Government financing of trade.* Another major facet of United States state trading is the huge international banking business in which the United States Government engages and which underlies international trade. The direct or indirect effect of the various banking activities upon international trade varies from program to program. The Export-Import Bank was established to promote directly an increase in United States overseas trade, and despite the provision in the Export-Import Bank Act of 1945 that prohibits it from competing with private investors, some quarters feel that, in actuality, it does offer considerable competition to private investment.[12] Other programs (such as mutual security programs, ICA, Development Loan Fund, etc.) have other ends in view than promotion of United States trade, but they, too, constitute financing for a huge amount of such trade which would not take place without them.[13]

[9] 68 STAT. 454, as amended (codified in scattered sections of 7 U.S.C.).

[10] *Hearings Before the Senate Committee on Agriculture and Forestry on Policies and Operations Under Public Law 480* (83d Congress), 85th Cong., 1st Sess. 3 (1957).

[11] The Office of Civil and Defense Mobilization does not conduct procurement operations for strategic materials itself. Purchases are made through the General Services Administration, and barter proposals are handled by the Barter and Stockpiling Division, United States Department of Agriculture. OCDM (Executive Office of the President) Press Release No. 644, Sept. 3, 1958.

[12] The charge that public lending has contributed to an unfavorable climate for foreign investment has neither been proved nor disproved. There have been two advertised governmental attempts to evaluate United States policy toward continuation of its international loan assistance—namely, the Randall Commission in 1954, and the Second Hoover Commission in 1955. *Cf.* 59 STAT. 527, 12 U.S.C. § 635b (1952).

[13] The International Bank for Reconstruction and Development (IBRD), and its sister organization, the International Monetary Fund (IMF), are multilateral banking facilities established under the Bretton-

Our ideological preoccupation with free enterprise has resulted in a lack of cohesion or direction in these various state-banking activities. Sometimes our preoccupation with economic ideology results in serious political deficits. Compare, for example, the statements by a United States official and a Soviet official. Albert J. Powers, a Commerce Department trade consultant, who headed a United States delegation to the 1955 International Industrial Exposition in Bogota, Colombia, gave the following reply to a Colombian reporter who asked if there was any hope of getting money from Washington for development projects:[14]

> It is the policy of my government not to intervene in the financing of activities which should properly be promoted by private enterprise. It is up to your people to create business and industrial opportunities which will attract investment capital from the United States. Remember, too, that you must offer the possibility of greater profits than can be obtained at home. This is a time of exceptional inducements in my country for domestic financial ventures.

Consider now this statement delivered by the Soviet representative at the Afro-Asian Peoples' Solidarity Conference at Cairo, in December, 1957:[15]

> We are ready to help you as brother helps brother, without any interest whatever, for we know from our own experience how difficult it is to get rid of need. Tell us what you need and we will help you and send, according to our economic capabilities, money needed in the form of loans or aid.

This *laissez faire* attitude, which has been crystallized during the past five years among some officials of the present administration, is in sharp contrast to the policies formed by still other United States Government departments; and the result is an opportunity for the Soviet Union to point up case after case of schizophrenia in policy among United States agencies and departments responsible for state-trading activities.

c. *PX's.* Another segment of government operations, which has been looked upon with increasing disfavor by the American business community, as well as some foreign governments, is in the nature of unappropriated funds organizations. The most important of these are the multitudinous military "PX's" which are strung around the globe.[16]

Basically, the purpose of the military exchange is to provide merchandise and services at reasonable prices for the health, comfort, and convenience of military personnel, their dependents, and, in some cases, civilian employees of the armed forces. Receipts in excess of expenditures derived from the operation of these exchanges are

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Woods Agreement. Both have their permanent headquarters located in Washington, D.C. They are not official United States departments, although this country is a prominent member nation in both the Bank and the Fund, and holds sufficient shares to command a position of power in both organizations.

[14] Waldo, *Why Latin America Distrusts Us,* Harper's Magazine, Nov. 1958, p. 86.

[15] Quoted from Dep't of State Press Release No. 96, March 3, 1958, p. 2.

[16] Reference is made to Memorandum prepared in response to a request by the Japanese Embassy in Washington, on behalf of the Supreme Court of Japan, for information and data relating to unappropriated fund activities in the United States. U.S. Dep't of Justice, April 4, 1958.

required to be used to supplement appropriated funds provided by Congress. These functions have been held to be instrumentalities of the United States Government and immune from the jurisdiction of the courts of the United States.[17] Indeed, this is not a small nor a simple operation of the government. During the year 1956, some 365 exchanges were operated, and gross receipts of over $520,122,000 were realized in the domestic system alone.[18]

In most cases, the Government buys direct from the manufacturer at jobber prices and sells below wholesale in its vast chain of outlets, ranging from department stores to snack bars. Hundreds of associations and merchants' organizations have gathered force to block and curtail this "competitive advantage" of government operation over the private retailer—but this "giantism" of government sales continues to expand, with ninety additional exchange outlets opening and some 400 employees being added in fiscal year 1956.[19]

Traditionally, armed forces exchanges are perhaps more appropriately classified within the military segment of government and at most only on the fringe of state trading. But in the past few years, millions of dollars have been spent in oversea areas where our military operations are located to procure indigenous wares and services. These transactions are made through United States official channels. The program has been such a success that there is a desire to improve it even more—make it better, more important, bigger, by such volume-building effects as offering credit and charge accounts. This merchandising mushroom of the Government has been such a giant that it is affecting our national economy and those of foreign countries as well.

Naturally, no one goal provides a complete guide to governmental policy in economic matters. In an economy such as ours, where changes are rapid and far-reaching, the accent of policy shifts according to the logic of events. As outlined above, the Government has established itself in many business operations traditionally reserved for the private sector. Such action has been necessary, but it does not alter the fact that the Government has emerged as a major competitor of huge proportion. Even though the United States officially prefers not to be classified as a state-trading national entity, the logic of events prove it to be a state trader on a great many occasions.

3. *Explanation of this discrepancy between words and deeds*

The President's remarks before the Canadian Parliament when he said the two countries were not "state traders" were made with measured and purposely chosen words. Thus, he said:[20]

[17] Brodhead v. Boothwick, 174 F.2d 21 (9th Cir. 1949).

[18] *Hearings Before a Special House Subcommittee on Military Exchange Matters*, 85th Cong., 1st Sess. 3334 (1957).

[19] Statement issued by National Retail Dry Goods Association, Washington, D.C., July 10, 1957.

[20] White House Press Release, *supra* note 1. (Emphasis added.)

All the products of *industry* manufactured in the United States and sold to customers abroad are sold through the enterprise of private sellers.

He significantly avoided any reference to products of *agriculture* which orginate in the United States and which enter the world market. If the term "agriculture" had been used in the President's speech, it would have hit an extremely tender nerve with the Canadians, because both nations have homogeneous farm surpluses to be disposed of in foreign markets.

When the President said that "the United States and Canada are not state traders," he was rather speaking in relative terms. Neither country is a state trader in the sense that the Soviet Union is. In neither country is the bulk of international trade carried out by the government. However, in both cases, there are severe governmental restrictions and controls over virtually all foreign trade. And, from a volume standpoint, as has been noted above, the United States Government itself is probably the world's largest state trader outside the Sino-Soviet bloc—*i.e.*, the United States Government buys and sells more than any other free-world government. Of course, this still represents only a small percentage of United States overseas trade.

There is an obvious reason for this discrepancy between words and deeds of the United States Government—this seemingly apparent case of schizophrenia. The United States rejects the tag of "state trader" primarily for ideological or philosophical reasons. As the leading power in the noncommunist world, we feel that it is necessary officially to assume a position as the unequalled bastion of free enterprise.

The Government disposes of its commodities by way of various channels, as discussed above in this article, but the Congress has always inserted a provision for private enterprise to have a hand in the transactions. Actually, this does not detract substantially from the state-trading aspect. For example, all agreements for the sale or other means of disposal of government-owned agricultural commodities are approved, rejected, or modified by an interagency staff of the executive branch.[21] The various private export firms that handle the shipping details are frequently only entrepreneurs for the Government. The goods are transferred to them by government loan and often sold by approval of one government to another government. This is not too unlike the twenty-odd trading agencies which operate as the specialized concerns for importing and exporting Soviet commodities. In other words, the free-enterprise aspects are basically only window-dressing.

The defensive attitude of governmental officials is really unnecessary, however, as state-trading activities frequently complement private enterprise rather than displace it, although it is difficult to determine the line at which government activity ceases to supplement and complement private industry and begins to compete with it.

[21] Full explanation of this operation is offered in *Hearings, supra* note 10.

B. Policies of the United States Toward Trading Activities by Its Own Citizens with Foreign State-Trading Entities

1. *No over-all policy of encouragement or discouragement*

There is no abstract, over-all governmental policy of encouragement or discouragement of trade between private United States citizens and foreign state-trading organizations. However, the very lack of encouragement is itself a dampener upon such trade. This is well illustrated by the exchange of correspondence last summer between Mr. Khrushchev and President Eisenhower. This now famous correspondence was initiated by the Soviets, and it was a classic example of "heads I win, tails you lose" diplomacy.

The Soviet Union claims to want an expansion of trade with the United States, and this may be a major point in the switch in Soviet strategy. The beginning of this "new look" in the Soviet economic offensive dates from sometime around the year 1953, and roughly corresponds with the appearance of new faces among the leadership in the Kremlin, following the death of Joseph Stalin. The new Soviet "administration," headed by Khrushchev, has emphasized trade and aid as a part of their intensive diplomatic campaign. They have sought and found points of weakness in the free world and have concentrated heavily on these points with vigor and determination.

The President reminded the Soviet Chairman that there is still much room for expansion of trade under current regulations without undertaking any new procedures. Had his answer been one of a flat negative nature, it would have been a propaganda victory for the Soviet Union. At the same time, his reply was an attempt by the United States to minimize Soviet gains from the ploy. Although Mr. Eisenhower rather deftly batted the ball back into the Soviet court, it was clear that there is no real desire on the part of the United States Government to increase trade with the Soviet bloc. And the high-sounding statements favoring more trade in the Eisenhower reply induced very few, if any, American businessmen to seek new Soviet customers.

Despite the political difficulties discouraging trade between the United States and the large state traders of the world, who, coincidentally, are primarily Sino-Soviet-bloc countries, there are a number of other difficulties standing in the way. There are the obvious difficulties with such things as patents, copyrights, royalty payments, and trademarks, which the Soviets do not necessarily recognize or respect.

In the Soviet Union, there are some twenty-three or twenty-four trade organizations which operate in specialized commodities and with which American businessmen may deal. China and other communist countries have similar organizations for foreign trade. In addition, most countries permit the embassies of communist countries to include trade delegations among their regular staff. This personnel is transferred around from capital to capital and generally handles much of the mer-

chandise channeling with the Soviet Union. One major exception to this rule is the United States. At the time of the United States's recognition of the Soviet Union in 1933, it was agreed that the Soviet trading agency established in New York City in 1925 would continue as the official trading agency here. This firm, known as Amtorg, is a corporation which is organized under the laws of New York and is wholly-owned by the Soviet Union. It is with this corporation that most American businessmen deal in their transactions with communist countries.

2. *The Cold War*

The "cold war" has resulted in a substantial check upon trade with the Sino-Soviet bloc and has, accordingly, imposed severe restrictions on trade with most of the world's state traders.

About ten years ago, the United States Government instituted controls over the flow of strategic goods to the Soviet Union, the European satellites, and Communist China. Upon the outbreak of the Korean War in mid-1950, an embargo was immediately placed on exports to North Korea. The export control policy toward Communist China increased in its restrictiveness, and a complete embargo was ordered in December 1950, after the Chinese directly participated against United Nations' forces in Korea. In the spring of 1951, general export licenses to European countries of the Sino-Soviet bloc were revoked, and the requirement of prior approval by license was extended to cover all goods shipped to the Sino-Soviet bloc. Since 1954, this policy has been liberalized to cover only strategic goods with respect to East European nations; but the embargo against Communist China has stood.

Imports from North Korea and Communist China have been under license control since December 17, 1950, by the Foreign Assets Control Regulations of the Treasury Department. The Trade Agreement Extension Act of 1951 withdrew benefits of trade agreement concessions from the Soviet Union and its satellites, and an embargo was imposed on the importation of certain items from the Soviet Union.[22] There is a complete embargo on the importation of all goods from Communist China. United States trade with Sino-Soviet-bloc countries amounts to a very small fraction of our total foreign trade. For example, in 1957, exports to the Sino-Soviet bloc were only four-tenths of one per cent of total United States nonmilitary exports, and imports from this bloc represented five-tenths of one per cent of all United States imports.[23]

One of the most active battlegrounds of the cold war is emerging in the neutral underdeveloped nations. The prime weapons will be trade and assistance. The strategy of the new Soviet leadership, both internal and external, will center on an

[22] WORLD TRADE INFORMATION SERVICE, U.S. DEP'T OF COMMERCE pt. 3, at 1-8 (1958). *Cf.* STAT. 73, 19 U.S.C. § 1362 (1952).

[23] The following countries are listed by the Department of Commerce as constituting the Sino-Soviet bloc: the Soviet Union (including Estonia, Latvia, and Lithuania), Albania, Bulgaria, Czechoslovakia, East Germany, Hungary, Poland, and Rumania, in addition to Communist China, Outer Mongolia, North Korea, Manchuria, Inner Mongolia, and Tibet.

economic offensive. The trade drive will bring raw materials into the orbit, especially into Czechoslovakia and East Germany, for manufacturing. And as a consequence of the increasing industrialization of the Soviet Union itself, state trading with non-industrialized areas will become easier.

Keeping this in mind, the United States must meet the challenge of this Soviet economic drive, but this can only be done on a governmental basis. The private sector could not finance the operation or take the risk. For example, the Soviet Government is freely offering loans at 2½ per cent, whereas United States private business must have considerably more. Even the United States Government's asking rate stands at 3½ per cent.[24] The only answer may be more state trading on the part of the United States in the field of finance.

3. *Unreliability of state trading*

There is one strong advantage in favor of the free-enterprise system which the United States must continue to emphasize. That is, business with a state-trading corporation is unreliable and unpredictable. Frequently, it is based on war-economy reasons. State traders often upset markets by spot sales. These may be made without relation to the cold war. The Soviets have recently been in and out of the tin and aluminum markets. In the case of tin, Soviet dumping kicked the bottom out of free-world tin prices this past fall. The International Tin Council countered by buying at a stabilizing price, but its funds ran out and the price plunged more than ten per cent, causing heavy losses to tin-producing nations such as Bolivia, Malaya, and areas of Africa.[25] Here, again, "Good ole Uncle Sam" rushed to the rescue by buying for his stockpile. In the spring of 1958, dumping prices on high-grade Soviet aluminum caused a ten-cent-per-pound cut in price by Canada's Aluminium Limited, and United States concerns were forced to follow with price cuts in order to compete on the world market.[26] The Soviets could easily have based their activities on a combination of a need for dollars and a surplus of tin and aluminum; political objectives could have been secondary. But this might have also been a "show of strength."

All the blame for the unreliability and unpredictability of state trading cannot be blamed on the Soviets, however. In the 1957 hearings held by the United States Senate, United States exporters complained bitterly about the allegedly irrational decisions handed down by various government agencies concerned with selling United States surplus commodities.

The unreliability of trade with state-trading corporations would probably not greatly bother some of our larger corporations, such as General Electric or Ford Motors, but it would be of prime concern to a smaller company whose objectives

[24] Attention is invited to the statement and testimony of C. Douglas Dillon, Under Secretary of State for Economic Affairs, in *Hearings Before the Subcommittee on Foreign Trade Policy of the House Committee on Ways and Means,* 85th Cong., 2d Sess. 3 (1958), also published as Dep't of State Press Release No. 726, Dec. 1, 1958.

[25] See Time, Sept. 29, 1958, p. 87.

[26] REYNOLDS METAL CO., WORLD TRADE AND THE ALUMINUM INDUSTRY 30-35 (1958).

would be dislocated by spot trading. In the past, the Soviets have not sought permanent markets for their goods, and did not wish to rely on foreign sources—their apparent goal being self-sufficiency for the supply of most items. Most of their trading has consisted of spot sales and purchases, and this has made for inherent difficulties in international trade, the large bulk of which is based on permanent commodity markets.

4. *Psychological blocks*

There are psychological impediments weighting on most American businessmen which disinclines them to deal with communist state traders, even if the United States Government had no objections. Regardless of formal government statements, there is a general feeling in the American business community that the United States Government frowns at any and all trade with the Sino-Soviet bloc. This is true despite the lack of any specific act by the Government in discouraging trade in the nonstrategic items, and despite such things as the Eisenhower-Khrushchev exchange of letters. There are a number of reasons for this feeling in the business community.

The general political and emotional atmosphere and bias of the cold war is a psychological impediment to the businessman. The men who make the policy decisions for their firms are affected by the whole anticommunist feeling of the country. One State Department official said, "If I were a United States businessman, I would not deal with a Soviet state-trading corporation." He said further, "Businessmen are right in concluding that the United States Government does not, in fact, want any expansion of trade with the U.S.S.R."

American businessmen are, in fact, most reluctant to deal with Sino-Soviet-bloc trading corporations. They do not want to have to explain to a congressional committee why they sold something to the Soviets, whether or not they are required to have an export license. They do not want to be barred from contracts with the United States Government because of sales to the Soviet Union or its satellites. They do not want to be subjected to unusual FBI checks. They want to be thought of as "good Americans."[27]

One might recall the troubles of Douglas Aircraft when it sold war planes to the Japanese before Pearl Harbor. The corporation and Mr. Douglas personally were subjected to great criticism, despite the fact that they asked, and received, the permission of the United States Government to ship the planes.

Another central fact of importance to businessmen in dealing with state-trading countries—and one which cannot be overemphasized—is that this bloc economy is set apart as a closed system, feeding on paced industrialization and developed in isolation from the world market. Prices and costs are not measured in the terms of the free world. The usual concepts of trade lose their conventional meaning

[27] Of course, these statements are made in broad terms, as there is a small group of American business representatives in Moscow, the majority of whom were admitted following the Eisenhower-Khrushchev letters.

when applied to this type of economy. Very few businessmen can afford to gamble in such a market.

Technically, then, American businessmen are free to carry on business with the Soviet state-trading agencies, other than in strategic goods, without fear of direct prohibition by the United States Government. This is not true of Communist China, where there is a total United States embargo in effect, but this is a political question rather than one of economics and will be discussed below. But the psychological impediment—when added to the other difficulties—is too great to expect any volume of trade between the United States and the Soviet bloc in the near future.

C. Policies of the United States toward State-Trading Activities of Third Countries

1. *Do as I say*

From a philosophical, ideological, propaganda standpoint, we are all for free trade and against state trade, but this is basically, "Do as I say, and not as I do." For there are times when the hard facts of necessity make themselves felt in high government circles.

One of these "fact" statements was made before a gathering of business leaders by a State Department officer. In explaining the sale of American agricultural surplus commodities abroad, he said:[28]

> Regardless of whether exports are commercial or handled under the economic aid or Public Law 480, it is important that they be competitive in price. The Commodity Credit Corporation has the authority, and uses it, to make exports of commodities acquired through price export operations competitive in foreign markets. This authority must be used wisely and with scrupulous care because *it is a matter of a government decision on prices, in competition with private business, or government in other countries.* We define this as a matter of making our exports competitive.

Some third countries are unfeeling enough to point out that we are selling abroad at a lower price than we are at home and that we are subsidizing exports. When other countries do this same thing in our market, we call it "dumping," and our normal reaction is to apply additional duties. "Thus, there are many international problems connected with action by the *Government to sell products competitively with other producers,*" explained the State Department official.[29]

Looking back to March 30, 1954, when President Eisenhower issued his general foreign economic policy based on the Randall Commission report, he admitted that our farm products were not competitive and that production was out of balance with demand. He then warned that the huge holdings of the United States in many commodities was "such as to be capable of demoralizing world commodity markets

[28] Address by Willis C. Armstrong, Deputy Director, Office of International Trade and Resources, United States Department of State, *Policies of the Department of Agriculture As Related to the Disposal of American Agricultural Surplus Commodities,* before the joint Annual Meeting of the Texas Federation of Cooperatives, the Texas Cooperative Ginners' Association, and the Houston Bank for Cooperatives, Austin, Texas, Feb. 7, 1956. Dep't of State Press Release No. 66, Feb. 7, 1956, p. 7. (Emphasis added.)

[29] *Ibid.* (Emphasis added.)

should a policy of reckless selling abroad be pursued . . . ," but, "the United States cannot accept the responsibility of limiting its sales in world markets until other countries have disposed of their production." He then promised that the United States "will offer its products at competitive prices," and would not "impair the traditional competitive position of *friendly* countries by disrupting world prices of agricultural commodities."[30]

As one of the leading news periodicals has recently summed up, "Successful and effective United States foreign policy is measured in our ability to deal with each small problem before it becomes a major offensive and that the ultimate ideal policy goal would be to wrap up the political, economic, military and moral meanings of the United States into a grand plan."[31] State trading, perhaps, has been a small problem to the United States, but, with the Sino-Soviet economic offensive underway, it is fast becoming a major problem for us. The policy which the United States has followed has been far from standardized, and there is, indeed, a need to wrap this subject into a comprehensive plan, because state trading is an all-inclusive operation with political, economic, and military overtones and undercurrents.

2. *The new Soviet offensive*

In November 1957, Mr. Khrushchev, in a conversation with a well-known American publisher, made the following statement:[32]

> We declare war upon you—excuse me for using such an expresssion—in the peaceful field of trade. We declare a war we will win over the United States. The threat to the United States is not the ICBM, but in the field of peaceful production. We are relentless in this and it will prove the superiority of our system.

The United States and other free-world countries have been so preoccupied since World War II with the Soviet military menace that they have only recently grasped the growing threat presented by Soviet economic power. For example, the total exports of the Sino-Soviet bloc to the free world in 1957 amounted to $3,100,000,000. This is relatively small in comparison to export figures of the United States, the United Kingdom, or West Germany; but the important thing is that it is an increase of seventy per cent in four years. There is no reason why this figure could not double or triple in the next few years. Trade—meaning state trade, of course—is *the* new instrument for communist penetration. As a general proposition, then, it can be concluded that the free-world economy and private traders must reckon with the hard realities of the growing state-trading economy of the Soviets. The urgency of these problems has increased because of the expansion of the Soviet economy and the growing national power of the Soviet Union.

[30] Major policy statement issued by the White House at the time the President signed Executive Order of September 9, 1954, delegating responsibility for Public Law 480. (Emphasis added.)

[31] *The Course of Cold War*, Time, Jan. 5, 1959, p. 21.

[32] Address by C. Douglas Dillon, Deputy Under Secretary of State for Economic Affairs, *Mr. Khrushchev's Trade Challenge—Will We Meet It?*, before Economic Club, Detroit, Mich., Jan. 27, 1958. Dep't of State Press Release No. 30, Jan. 24, 1958, pp. 1-2. (It is interesting to note that the official Soviet version of this statement for the Soviet press eliminated references to the word "war.")

Whereas it has been stated above that communist exports to the free world in 1957 amounted to $3,100,000,000, the combined value of trade both ways totaled nearly $6,300,000,000 in that same period. This is a new postwar high, being an increase of 14.4 per cent above the 1956 total—but only about three per cent of total world trade.

One way in which East-West trade has been minimized—and hence international state trade has been minimized—is through a United States-sponsored organization known as COCOM.[33] This fifteen-nation organization, the letters of which stand for Cooperating Committee, was established after the outbreak of the Korean War for the purpose of standardizing a list of strategic materials which were not to be exported to the Sino-Soviet bloc. The organization did not have the result of decreasing East-West trade a great deal, since such trade was at a low ebb in the early 1950's. It did, however, have the effect of keeping this trade at a very low level and of denying strategic goods to our communist enemies in the Korean conflict.[34]

After peace was established in Korea, there was much pressure on the part of many members of COCOM to revise downward the list of embargoed materials. Such revisions were made in 1954 and 1958 over American protests. However, as the COCOM list is the lowest common denominator, these revisions have not caused any great change in American restrictions on East-West trade. Furthermore, each of the other COCOM nations is influenced by United States policy as expressed in the Mutual Defense Assistance Control Act of 1951, as amended, which denies foreign aid to any nation which sends strategic materials into the communist bloc that would aid them in their capacity as a military foe.[35]

3. *Soviet tactics*

Centralized economic planning and control, as well as the state-trading monopolies that characterize the communist system, facilitate the manipulation of foreign trade. Quick decisions can be made without legislative authorization. Pricing and product selection can be made without regard for economic considerations. This gives the impression that communist-bloc programs have great flexibility and are conducted efficiently and expeditiously. By deliberate manipulation of markets, the Soviets have offered overly favorable deals to countries facing marketing difficulties, such as Burma with a rice surplus, and Egypt with a cotton surplus. And they are inclined to make things even more difficult for the international market when those same items might be sold or dumped again at the option of the Soviet state-controlled trading system.[36]

[33] COCOM's membership: Belgium, Canada, Denmark, West Germany, France, Greece, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Turkey, United Kingdom, and the United States.

[34] U.S. DEP'T OF STATE PUB. No. 6684, STATISTICAL REVIEW OF EAST-WEST TRADE, 1957, at 31-34 (1958).

[35] 65 STAT. 645, 22 U.S.C. § 1611 (1952).

[36] U.S. DEP'T OF STATE PUB. No. 6632, THE SINO-SOVIET ECONOMIC OFFENSIVE IN THE LESS DEVELOPED COUNTRIES, at 20 (1958).

Examples of communist trading with neutrals such as Egypt and Burma are one thing, but the squeeze put on anticommunist nations is something else. Japan is the best case of a power friendly to the United States being given strong competition by the Sino-Soviet bloc, using economic means for political ends. The Chinese Communists have increased their share of the Far East market by as much as eighty-four per cent in some commodities to force Japan to accept recognition of their regime and to weaken Japan's ties with the United States. To enable the Chinese Communists to undercut their lowest competitor by at least ten per cent and to facilitate Communist Chinese dumping activities, thousands of native Chinese workers are being exploited—thus, these transactions are spoken of as "hunger exports." The primary weapons which the United States has available to counter this trade offensive are its own program of bilateral trade agreements and its participation in the General Agreement on Tariffs and Trade (GATT), which increase world trade levels and help the affected areas to maintain their private-enterprise economies without resorting to retaliation by state-trading activities of their own.[37]

4. *Warning to small countries*

We also discourage (quietly and covertly) small, weak, and especially one-crop countries from getting too deeply involved in trade with state traders, because such trade can have both political and economic consequences of a disastrous nature, despite its superficial attractiveness.

Finland's recent troubles are a good case in point. Since this past summer, the Soviet Union has been conducting a relentless campaign of economic war against its small Baltic neighbor. This pressure stems from a desire to force the appointment of Finnish Communists to the coalition cabinet. The Finns built up a huge shipbuilding and railroad car industry to pay Soviet World War II reparations. And with this debt paid, they are now dependent upon the Soviets to continue to buy these products. The recent Soviet actions of freezing Finland's rubles in Moscow, of refusing to honor purchase agreements, and of offering unwanted or unneeded commodities in exchange have caused great hardship in Finland and have forced the Finns to seek new markets. Their economic survival depends on it.[38]

Iceland, too, presents a good example of a small, one-commodity nation being ensnared into Soviet economic dependence. Last year, Iceland's disagreement with Great Britain over fishing rights reached the boiling point, and Britain cut off further purchases of fish from Iceland. The Soviet state fish monopoly immediately contracted to purchase a large percentage of Iceland's fish. The result of this, of course, has been improved Icelandic-Soviet relations and deteriorating Western connections in that country. The United States reputedly urged the Icelanders to go slowly in accepting the Soviet offer, but our State Department had to do so very quietly, because the United States had no intention of buying the fish.

[37] See U.S. DEP'T OF STATE PUB. No. 6629, THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1958).
[38] See editorial, *Squeeze on Finland*, Washington Post & Times Herald, Dec. 3, 1958, p. A-14, col. 1.

Again, Egypt's economy is dependent on exports of cotton. The Soviets have been heavy buyers of this commodity since the Suez war in 1956. The United States refused to sell Egypt surplus commodities because of that country's close ties with the Soviet Union. This strategy of the United States is now being re-evaluated in the light of the new Soviet moves, and on December 24, 1958, the United States agreed to sell the United Arab Republic $25,000,000 worth of wheat for Egyptian pounds. This is the first of many Egyptian applications to be approved by this country since the Egyptian-Soviet approachment began.[39]

The United States has not only been revamping its policy toward these smaller one-crop nations being wooed by the Soviet Union, it has also begun to show interest in dealing with small nations within the Soviet orbit. Poland is the most prominent example in this group. Early last year, the State Department announced that an agreement had been reached with Poland for shipment of agricultural commodities, other raw materials, and various types of machinery and equipment, with credit to be advanced by the Export-Import Bank and payment to be accepted in Polish zlotys.[40]

In addition to the examples discussed above, the Soviets have tried a barter tie-in with the Sudan for cotton, paying them prices above the world market, and have made offers for Uruguayan wool and Colombian coffee.[41] Many of these offers are being accepted because of resentment at restrictive features of free-world commercial policies as exploited by communist propaganda and tactics.

D. The Future

The United States may be forced into more state trade in the future than in the past. For example, there is the probability of increased commodity controls on a world-wide basis. There are international "arrangements" with respect to a number of agricultural and raw material commodities today. The United States participates in both the International Wheat and Sugar Councils. It may be both necessary and advantageous for the United States to join in the control of other commodities in the future if world markets of these commodities become too unstable. Furthermore, the Soviet trade offensive—if it is to be successfully countered—may require more state-trading activities by the United States and its allies.

There have been serious attempts on the part of noncommunist countries to regroup their economic positions in order to establish a workable system whereby free traders and state traders might proceed without the unbridged gulf which now separates the two systems. The most prominent of these attempts was the proposed International Trade Organization (ITO), whose charter would have established a parallelism between the rules of conduct governing privately-conducted trade

[39] See Evening Star (Washington), Dec. 24, 1958, p. A-8, col. 3.

[40] 38 DEP'T STATE BULL. 349 (1958).

[41] Statement by C. Douglas Dillon, Deputy Under Secretary of State for Economic Affairs, before the Foreign Relations Committee of the Senate, published in Dep't of State Press Release No. 96, March 3, 1958, pp. 8-9.

and those governing state trade.[42] The ITO was advocated in many major speeches out of the State Department, but the program died when the United States was unable to join because of adverse congressional reaction. There is considerable evidence that one of the most objectionable features of the ITO charter to Congress was its state-trading provisions.

Yet, the United States not only participates in a huge volume of state trading, it does some of this state trading on a government-to-government basis. An example of this are the wheat deals of the early 1950's with the Union of South Africa. Dr. Bok, Manager of the Union of South Africa's Wheat Control Board, has refused to deal on any basis other than government-to-government—not even through the commercial shipping agents of the United States. A new agreement on the same basis with South Africa is now under consideration by the United States Government. When queried on this state-trading activity, a spokesman said, "We feel that with our huge supplies, it is better to sell on a government-to-government basis than lose the sale. After all, they can buy from Canada and Argentina on the same basis."

This would appear to be sound, both economically and politically. Furthermore, it points up the necessity for the United States to rethink its political and economic attitudes toward state trading in general.

At the moment, the United States does not engage in state trading to the same degree as do the Sino-Soviet-bloc countries, where state monopolies control all trade. However, the United States does engage in state trading when it is to its advantage; and there are a number of reasons to expect that in the future, the percentage of state trading in United States trade—not to speak of the rest of world trade—will increase considerably. It will, therefore, be prudent to adopt attitudes and political and economic policies which are not based on the current theme of "Do as I say, not as I do."

II

JUDICIAL POLICIES

The inconsistency of our political and economic attitudes is also carried over into the juridical field. The most important legal problem with respect to state trading is immunity from jurisdiction for state-trading entities. Under our system of separation of powers, it might be logical to assume that the attitude of courts would be relatively immune from the effect of the inconsistencies prevailing in the other branches of government. This, however, is not so.

Under the classic or absolute theory of sovereign immunity, a foreign sovereign cannot be sued in our courts regardless of the activity which gave rise to the suit. This theory seems to have been generally accepted by all branches of our Government until early in this century. But with the continual growth of world trade, and more specifically the growth of state trading, there has been a growing move-

[42] See WILLIAM ADAM BROWN, JR., THE UNITED STATES AND RESTORATION OF WORLD TRADE 211-13 (1950).

ment among the community of nations toward what is called the restrictive theory. Under this latter theory, the foreign sovereign is not immune if the activity which gave rise to the suit was a private or commercial activity, as contrasted with a public or governmental activity.

Until very recently, the United States supported the classic or absolute theory. At the same time, however, our courts adopted several exceptions to this theory. Furthermore, since World War II our executive and legislative branches have entered into and consented to treaties waiving immunity in commercial cases. But in opposition to this "modern" trend, the Justice Department has continued its unrelenting support of the absolute theory. The over-all result of these conflicting attitudes, therefore, is to make our law in this area far from clear.

A closer analysis of these elements may help to clarify our present position regarding the subject of sovereign immunity and also indicate where we are going and how we may get there.

This confusion which we find in our law is not unique. Many nations of the world seem to be suffering from much the same difficulty. Whenever a nation varies from the absolute theory, it inevitably encounters a certain amount of confusion. This is true even where the shift has been completely to the restrictive theory. The basic difficulty lies in determining what acts are governmental in nature and what acts are commercial in nature. Yet, these nations realize that expanding world trade, with most governments taking an active part, requires some methods of enforcement of contract and tort rights—enforcement which is ruled out under the classic rule. To accomplish this and to maintain competitive equality for free-enterprise traders, our State Department has negotiated several multilateral agreements and a series of bilateral agreements which contain provisions waiving or limiting sovereign immunity.

A good example can be found in the Status of Forces Agreement, which provides that tort cases against a foreign force stationed in the country as a part of NATO defenses are to be assimilated to claims against the local sovereign.[43] Therefore, the local sovereign defends the suit and must pay twenty-five per cent of any judgment. The foreign government involved pays the remaining seventy-five per cent.[44]

Since 1949, the United States has entered into bilateral treaties with Italy, Ireland, Japan, Germany, Israel, Greece, Iran, the Netherlands and Korea,[45] each of which contains language similar to the following:

[43] North Atlantic Treaty on Status of Forces Agreement, June 19, 1951, art. VIII, para. 5, [1953] 4 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953).

[44] Mr. George Leonard, First Assistant, Civil Division, United States Department of Justice, in an address before the Convention of the American Society of International Law, Washington, D.C., April 25, 1958, indicated that the implementation of this provision of the Agreement has not been quite clear and that many technical points of interpretation remain unsolved.

[45] Treaty With Italy on Friendship, Commerce, and Navigation, Feb. 2, 1948, 63 Stat. 2255, art. XXIV, para. 6, T.I.A.S. No. 1965 (effective July 26, 1949); With Ireland, Jan. 21, 1950, art. XV, para. 3, [1950] 1 U.S.T. & O.I.A. 785, T.I.A.S. No. 2155 (effective Sept. 14, 1950); With Japan, April 2, 1953, art. XVIII, para. 2, [1953] 4 U.S.T. & O.I.A. 2063, T.I.A.S. No. 2863 (effective Oct. 30, 1953);

No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

The State Department has made similar agreements with Denmark, Colombia, Nicaragua, Haiti, and Uruguay.[46] It appears that future commercial treaties will contain similar provisions.

The existence of these provisions in multilateral and bilateral treaties negotiated by the State Department and approved by the Senate show in black and white a definite policy trend away from the absolute theory philosophy. The State Department and Senate have recognized the moral responsibility of our Government to respond to suits which arise from activities which are not traditionally governmental. Such provisions also indicate a desire to protect American businessmen who must deal more and more with foreign governments in the process of foreign trade.

A. The Case of State v. Justice

On the basis of these treaties which have been negotiated by the State Department, one would assume that our executive branch had decided upon a clear-cut policy toward sovereign immunity. Nevertheless, nothing could be further from the actual situation. The State Department adheres to the restrictive theory—lock, stock, and barrel—and, thus, the above treaty provisions. Conversely, the Justice Department and many other government departments and agencies (particularly the Defense Department) adhere to the absolute theory as staunchly as ever—in fact, more staunchly than in the past. This difference follows reasonably from the varying responsibilities of the departments. However, eventually this difference must be ironed out and a single policy adopted.

This schizophrenia within the executive family began as early as 1918, when the State Department took the position that commercial merchant vessels owned and operated by a foreign state should not be entitled to immunity.[47] The Justice De-

With the Federal Republic of Germany, Oct. 29, 1954, art. XVIII, para. 2, [1956] 7 U.S.T. & O.I.A. 1839, T.I.A.S. No. 3593 (effective July 14, 1956); With Israel, Aug. 23, 1951, art. XVIII, para. 3, [1954] 5 U.S.T. & O.I.A. 550, T.I.A.S. No. 2948 (effective April 3, 1954); With Greece, Aug. 3, 1951, art. XIV, para. 5, [1954] 5 U.S.T. & O.I.A. 1829, T.I.A.S. No. 3057 (effective Oct. 13, 1954); Treaty With Iran on Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, art. XI, para. 4, [1957] 8 U.S.T. & O.I.A. 899, T.I.A.S. No. 3853 (effective June 15, 1957); With the Netherlands, March 27, 1956, art. XVIII, para. 2, [1957] 8 U.S.T. & O.I.A. 2043, T.I.A.S. No. 3942 (effective Dec. 5, 1957); With Republic of Korea, Nov. 28, 1956, art. XVIII, para. 2, [1957] 8 U.S.T. & O.I.A. 2217, T.I.A.S. No. 3947 (effective Nov. 7, 1957).

[46] Treaty With Republic of Nicaragua on Friendship, Commerce, and Navigation, art. XVIII, para. 2, Jan. 21, 1956, T.I.A.S. No. 4024 (effective May 24, 1958); With Denmark, art. XVIII, para. 3, S. Exec. I, 82d Cong., 2d Sess. (1951); With Colombia, art. XVIII, para. 2, S. Exec. M, 82d Cong., 1st Sess. (1951); With Haiti, art. XVIII, para. 2, S. Exec. H, 84th Cong., 1st Sess. (1955); With Uruguay, art. XVIII, para. 5, S. Exec. D, 81st Cong., 2d Sess. (1949).

[47] 2 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 529-30 (1940).

partment opposed this position, and the battle lines were formed. The Secretary of State exchanged letters with the Attorney General in an attempt to persuade him to adopt the restrictive theory, but with the Supreme Court decision in the *Pesaro* case,[48] the State Department yielded to the Justice Department.

After this unpleasant brush with the Supreme Court, which must have been embarrassing, the State Department adopted a policy of automatically suggesting immunity. Then, in 1945, the Supreme Court handed down its decision in the *Hoffman* case.[49] The opinion said that the Court would give great weight to the view of the State Department toward the grant or denial of sovereign immunity in a particular case, and "it is therefore not for the courts to . . . allow an immunity on new grounds which the government has not seen fit to recognize."[50] Justice Frankfurter, in a concurring opinion, said he agreed with the majority opinion if it meant that immunity should not be granted unless another appropriate part of the Government "explicitly asserts that the proper conduct of these [foreign] relations calls for judicial abstention."[51]

The Supreme Court had now adopted what looked like an "after you Alphonse" attitude. It seemed to be saying if the State Department does not agree to the immunity of a foreign government in a particular suit, then the Court should not grant immunity. This, in so many words, left the State Department carrying the ball as to sovereign immunity. As a result, forces within the State Department once again undertook a campaign to have the restrictive theory adopted by the whole executive branch. This attempt failed, as had the attempt in 1918. However, these forces were successful in obtaining a formal pronouncement by the State Department, as formulator of United States foreign policy, that it would follow the restrictive theory in the fulfillment of its responsibilities.

1. *The Tate Letter*

This pronouncement was contained in the famous Tate Letter, which was sent by Mr. Jack B. Tate, Acting Legal Advisor, to the Acting Attorney General on May 19, 1952. After a discussion of the two theories, the letter stated:[52]

> For these reasons it will hereinafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.
>
> It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the government charged with responsibility for the conduct of foreign relations.

The State Department, in taking this public stand in favor of the restrictive theory, undoubtedly relied not only on the *Hoffman* case as judicial support, but also on

[48] Berizzi Brothers Co. v. S. S. Pesaro, 271 U.S. 562 (1926).
[49] Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).
[50] *Id.* at 35.
[51] *Id.* at 42.
[52] 26 DEP'T STATE BULL. 984 (1952).

several other cases where the courts had whittled away at the absolute theory by finding exceptions. The whole idea of sovereign immunity, even that of the United States from suits by its own citizens, has fallen more and more into disfavor. The view that governments should be answerable for their misdeeds has become prevalent. Although our courts have approached this issue with some caution, most of the contemporary writers who discuss the subject of sovereign immunity advocate cutting down the immunity of states in accordance with the restrictive theory. Therefore, the State Department doctrine, as set out in the Tate Letter, has a great deal of support. The Department has continued to hold to this position and has done what it can to implement the restrictive theory. It is, of course, difficult to document the Department's efforts, since it naturally does not wish to publicize its refusals to suggest immunity when a request is made by a foreign sovereign. However, no case can be found where it has suggested immunity for a state-owned "commercial enterprise" since 1952.

The Justice Department has never accepted the restrictive theory as laid down in the Tate Letter. In fact, the Department never even replied to the letter. The Justice Department has taken the position that the letter is merely an interdepartmental memo, a unilateral declaration by the State Department of its position, having no binding effect on the other parts of the executive branch. Not only has the Justice Department consistently opposed the restrictive theory, it has also continued to support actively the classic or absolute theory. It has pleaded sovereign immunity in almost every suit brought against the United States abroad where it thought the plea would be accepted under the laws of the forum. Whenever asked by an American court to comment on the question of immunity, the Justice Department advocates the application of the absolute rule. The Justice Department is not required to consult with the State Department in such matters, even though a foreign government is before the court which is seeking advice.

This conflict of views between the State Department and the Justice Department bubbled along under the surface for years. However, on April 25, 1958, it was brought out into the open in an address delivered by Mr. George S. Leonard, the Justice Department official dealing with the matter.[53]

The basic reasons for this divergence of views is easily ascertained from the varying roles and responsibilities of the two departments. The State Department has the primary function of conducting our foreign relations, and an important aspect of its task is the development of international law. On the other hand, the Justice Department is the United States' lawyer, and it is concerned with defending our Government in law suits. Most other government agencies have only limited contact with the question of immunity, and that is normally when they are being sued abroad. Therefore, they tend to support the Justice Department's position, because it helps to keep them out of litigation. Conversely, most private American citizens engaged in international trade back the State Department's position, because it gives

[53] *Supra* note 44.

them greater protection in their dealings with foreign nations, which are more and more involved in international marketing as buyers or sellers.

2. Have its cake—eat it too

By sticking to the absolute theory, the Justice Department hopes to have its cake and eat it, too. International law provides that a sovereign may bring suit in the courts of any other nation.[54] Therefore, the Department of Justice has no trouble pursuing the claims of the United States against the nationals of foreign governments. At the same time, under the absolute rule, the Justice Department can plead immunity in all suits against the United States brought in foreign courts. From a lawyer's viewpoint, this is perfect; his client can sue, but not be sued.

A number of nations have adopted the restrictive theory, and, as a result, the Justice Department must defend certain suits against the United States in those countries; the Department also must defend suits on the merits in those nations where the United States has waived immunity by treaty. Such suits require a great deal of time and energy, plus the possibility that they may be lost. Therefore, it is only natural that the Justice Department should advocate the absolute theory, which requires only a single pleading and which results in a sure win. The Justice Department hopes to foster the retention of this situation. To succeed, it must steer the United States back toward the absolute rule. Otherwise, more immunity will be waived by treaty; and, if the United States courts adopt the restrictive theory, the courts of other nations will be less prone to grant sovereign immunity when it is pleaded by the Justice Department.

This problem has become increasingly serious to the Justice Department during the past few years. Where, in the past, certain agencies and departments defended themselves, the Justice Department now defends all cases against the United States. More important, the United States has become extremely active overseas with the establishment and continued operation of military bases; with the work of ICA, CCC, USIA, and GSA; and with the development of many other fields of governmental operation. Because of this development, the United States, as of April 1958, had fifty-eight suits pending against it in thirteen countries.[55]

In view of all these factors, it is not at all surprising that the Justice Department continues to insist on the absolute theory as United States policy. It should be noted that the Department, in supporting its position, utilizes all the standard arguments favoring the absolute theory and, in addition, adduces the practical difficulties of applying the restrictive rule. These difficulties are at least twofold—first, the difficulty in distinguishing between commercial acts and governmental acts; and second, the unenforceability of judgments. As to this latter point, it must be kept in mind that the restrictive theory only subjects the sovereign to the jurisdiction of the court to render a judgment; it does not subject property of the sovereign, which is immune

[54] H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW § 115a (7th ed. 1948).

[55] See address of Mr. George S. Leonard, *supra* note 44.

to levy and execution. In this area, a particular problem arises if a judgment is obtained against the United States in a foreign court—*i.e.*, usually there are no funds to pay foreign judgments, and if they are to be paid, Congress must act first.

It is difficult to reconcile the foreign judicial policy advocated by the Justice Department toward the immunity of the United States in foreign courts with our domestic policy toward sovereign immunity. However, the policy advocated by the State Department seems to fit well with our domestic policy, as evidenced by the liability of the United States under such laws as the Court of Claims Act[56] and the Tort Claims Act.[57]

Despite their conflict, the State Department and the Justice Department can and do operate rather harmoniously, with each following its individual views in this area. This is possible for a number of reasons.

1. There are relatively few cases involving sovereign immunity for state-owned commercial enterprises. This is attributable primarily to the fact that most of our international trade is with nations of the Western world that engage in a minimal amount of state trading. It is interesting to note that the waiver provisions in the bilateral commercial treaties referred to above have never been relied upon in a single reported case.
2. The absolute theory has a number of classic exceptions that make the two doctrines less disparate in practice than they are in theory.
3. The State Department and the Justice Department operate at different levels and in different ways, which helps to avoid direct conflict.[58]

A standard United States policy toward sovereign immunity in the executive branch can only be established by affirmative action on the part of the President.

[56] 36 STAT. 1136 (1911) (codified in scattered sections of 28 U.S.C).

[57] 60 STAT. 842 (1946), 28 U.S.C. §§ 1346, 2671-80 (1952).

[58] *In United States courts:* When a suit is filed against a foreign sovereign, the State Department is usually approached by the diplomatic representative of the sovereign if the sovereign intends to claim immunity. The diplomatic representative will ask the State Department to suggest immunity to the court. The State Department, following the restrictive theory, may or may not suggest immunity, depending on the nature of the activity involved. If the State Department refuses to suggest immunity, the sovereign is still free to raise this defense in the court. The Justice Department may then become involved in the case if the judge asks the Attorney General for an opinion on the plea of sovereign immunity. From all indications, the Attorney General would adhere to the absolute theory and suggest dismissal if there were no question of the status of the defendant as a sovereign, or if the case did not fall within one of the classic exceptions.

In foreign courts: When a suit is filed against the United States in a foreign court, the federal agency or department receiving notice of the suit would usually, and in any case should, inform the Justice Department. The Justice Department would then inform the State Department and normally request the State Department to consider making a plea of sovereign immunity through diplomatic channels. The State Department would then determine whether there should be a diplomatic request for immunity, and it would probably reach its decision in accordance with the restrictive theory, regardless of the theory followed in the foreign jurisdiction. If the State Department refuses to request immunity, then the Department of Justice may plead immunity in the foreign court through the lawyers retained by the Justice Department to represent the United States in the suit. However, before it makes this plea, it would determine the probable success of the plea, which would depend, to a great extent, upon the theory followed by the foreign court and the facts of the particular case. If the case is one of an extraordinary nature, and if a plea of immunity might have serious consequences for our foreign relations, the Justice Department would probably withhold the plea at the request of the State Department.

As we have seen, there is complete disagreement between cabinet members. Even though we have managed to get along with the two conflicting views, it would be most helpful to our American merchants and to the conduct of foreign policy if a standard executive policy were established, so that the State Department and the Justice Department could work together as a team in this area. The Justice Department, apparently, is dissatisfied with the language found in the waiver provisions of the multilateral and bilateral treaties. If the restrictive theory were formally adopted as White House policy, then it would be incumbent on the Justice Department to assist the State Department in drafting such provisions as could eliminate the objections. It would, indeed, be a step forward if the President were to resolve this issue.

B. The Attitude of the Judiciary in the United States

Some indication as to the attitude of the United States judiciary toward sovereign immunity has already been revealed. At the present time, the Court gives great weight to the views of the organ of the Government in charge of foreign relations (State Department). As pointed out by the Supreme Court in the *Schooner Exchange* case,[59] a sovereign is entitled to immunity in the courts of another sovereign only because of the consent of the latter. Such consent is given because of the recognition of the equality of sovereigns and because of comity. Therefore, since the basis of the immunity of foreign sovereigns is consent of the territorial sovereign, who would be in a better position to determine consent in this area of foreign affairs than that organ of government charged with the conduct of foreign relations?

The question of sovereign immunity has always been looked upon as a legal question, but it is so entwined with political issues that it is very difficult, in the final analysis, to separate it from international politics. In this respect, the individual case should not be subject to political considerations. There must be certainty in international law if international trade is to flourish. Yet, the general law or rule should not be totally void of political considerations. Therefore, it is only proper that our courts should give great weight to the position of the State Department.

The most recent expression of the Supreme Court in this area can be found in the *Republic of China* case.[60] The Republic of China had brought suit against the National City Bank of New York on a bank deposit. The Bank filed a counterclaim for an affirmative judgment on defaulted treasury notes of the Republic. The Bank later reduced its counterclaim so that it did not exceed the original claim of the Republic. The Republic claimed sovereign immunity to the counterclaim, since it was not based on the same transaction as the original claim. The Court found that if the Bank had brought an original suit on the defaulted treasury notes, there would, without doubt, be immunity. This would be true even under the restrictive theory, as there is no purer form of governmental activity than issuing

[59] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) *116 (1812).
[60] National City Bank of New York v. Republic of China, 348 U.S. 356 (1955).

treasury notes. Therefore, the decision in this case does not go directly to the question of which theory is to be followed in our courts. However, it is interesting to note that both the Court's opinion and the dissenting opinion expressed a disposition toward following the State Department in such questions.

Justice Frankfurter, in the Court's opinion, said:[61]

> A sovereign has freely come as a suitor into our courts; our State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with the Republic of China.

Thus, the Court insinuated that if the State Department had taken a position, the result might have been different. Justice Reed, in the dissenting opinion, had this to say:[62]

> International relations are pre-eminently a matter of public policy. Judicial views of supposed public interests are not the touchstone whereby to determine the law. The change from a generous to a parsimonious application of the principle of sovereign immunity should come from Congress or the Executive. Our courts possess great powers and have solemn obligations. Our country allots power to the judiciary in the confidence that, in view of the separation of powers, judicial authority will not undertake determinations which are the primary concern of other branches of our Government. Differences of view exist as to the desirable scope of sovereign immunity and the necessity for non-judicial determinations. But surely it is better that the decisions be left to those organs of Government that have the responsibility for determining public policy in carrying out foreign affairs. The establishment of political or economic policies is not for the courts. Such action would be an abuse of judicial power. It is only by a conscious and determined purpose to keep the functions of the various branches of government separate that the courts can most effectively carry out their duties. I would leave this question of the jurisdictional immunity of foreign sovereigns to the other branches.

The Court, by the following reasoning, held that the Republic had waived its immunity:[63]

> It is recognized that a counterclaim based on the subject matter of a sovereign's suit is allowed to cut into the doctrine of immunity. This is proof positive that the doctrine is not absolute, and that considerations of fair play must be taken into account in its application. But the limitation of "based on the subject matter" is too indeterminate, indeed too capricious, to mark the bounds of the limitations on the doctrine of sovereign immunity. . . . No doubt the present counter claims cannot fairly be deemed to be related to the Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and the petitioner may be regarded as aspects of a continuous business relationship. The point is that the *ultimate thrust of the consideration of fair dealing* which allows a setoff or counterclaim based on the same subject matter reaches the present situation.

Therefore, the Court found a waiver of immunity when there was no suggestion from the State Department to the contrary, because of the "ultimate thrust of the

[61] *Id.* at 364.
[62] *Id.* at 364-65. (Emphasis added.)
[63] *Id.* at 370-71.

consideration of fair dealing." In view of the extent to which the majority went in this case to find a waiver, the unfavorable attitude of the majority toward sovereign immunity is quite evident. Because our modern federal pleading allows any claim to be filed as a cross-claim,[64] the Court has been able to broaden the doctrine of waiver of immunity so that, apparently, if a sovereign brings suit, the defendant can raise any claim as a defense. As Justice Reed says in the minority opinion: "It seems to me that the Court sanctions a circuitous evasion of the well-established rule prohibiting direct suits against foreign sovereigns."[65]

The attitude of the minority, coupled with the holding of the Court, makes it appear quite probable that if the Court is faced with deciding the issue between the absolute and the restrictive theory, it will follow the State Department's lead and adopt the restrictive theory in the United States. This is a reasonable conclusion when one realizes that in certain respects, the case here goes even further than the restrictive theory in cutting down the doctrine of sovereign immunity. For under this case, if a foreign sovereign brings suit in the United States, the defendant can purchase at par or discount any claim against that sovereign, even one of the highest public character (such as was found in this case) and use it as a defense to offset the sovereign's claim. This, in every sense, is equal to a right to sue the sovereign in our courts and is, in many ways, more effective, in that there is no need to collect the judgment, as it offsets a debt owed to the sovereign.

From a reading of all the cases in this area, from the *Schooner Exchange* case down to the *Republic of China* case, it appears that much of the courts' difficulties in this area stems from their failure on occasion to analyze thoroughly the mixture of political and legal issues involved in the question of whether to grant immunity. On certain related issues, the courts have long followed the practice of letting the State Department make the determination. For example, on the question of the right of a foreign sovereign to sue in our courts—that is, whether a certain government is sovereign—the determination is left to the State Department.[66] Immunity, however, is a more complex question. It contains both political and legal elements. It falls across the separation between our executive and judicial branches, and it is very difficult to deal with these elements independently. Accordingly, the rocky course sovereign immunity has followed is understandable.

The present policy or attitude of the Supreme Court to look to the State Department to set our national policy on this question is probably the better judicial course, because the question of sovereign immunity has a significant and direct bearing on our foreign relations as well as on our foreign trade, which is an integral part of our foreign relations.

[64] FED. R. CIV. P. 13.

[65] National City Bank of New York v. Republic of China, 348 U.S. 356, 372 (1955).

[66] *Cf.* Chase National Bank v. Director General of Postal Remittances and Savings Bank, 278 App. Div. 935, 105 N.Y.S.2d 923 (1st Dep't 1951); Republic of China v. Pong Tsu Mow, 201 F.2d 195 (D.C. Cir. 1952); Japanese Government v. Commercial Casualty Insurance Co., 101 F. Supp. 243 (S.D. N.Y. 1951).

C. Our Policy Today and Tomorrow

Today, the policy of the United States toward sovereign immunity is unsettled. The judicial branch is inclined to follow the lead of the executive branch. However, this is difficult, because the executive branch is torn between the two different theories of immunity. While a decision could be reached by the White House as to which theory to follow, it is very doubtful that the present administration will take the initiative. Although a number of advantages would obtain from a resolution of the problem, there is no crying need for a solution at this time. We can continue to drift, as we have been doing for some time, without any disastrous consequences.

Eventually, however, it seems probable that the restrictive theory will win out, because the continued expansion of state trading in the world places an unfair burden on American businessmen if they cannot bring suit against state traders here in the United States. As long as this unfair burden exists, more American businessmen will shy away from transactions with foreign governments and will thus hamper the expansion of foreign trade—which is a concomitant of international peace. Our policies must progress to meet the challenge.

Congress could enact legislation adopting either theory of jurisdiction for United States courts. However, research indicates that not a single bill has ever even been introduced on this subject. The only indication of congressional policy or views in this area has been the senate approval of treaties containing immunity waivers in commercial cases.

The best solution would be for Congress and the executive branch to act together in the adoption of the restrictive theory, because in this way, a procedure could be established to give American businessmen their day in court in the determination of whether the activity giving rise to the suit was commercial or governmental. If the executive branch alone adopts the restrictive theory and the courts continue to look to the executive branch to determine the question of immunity, then such determination would be made solely by the State Department, without a hearing in which the American plaintiff could set forth his side of the case.

Despite the problems involved, and our confusing and halting course, we are, in the writer's view, approaching a national policy of adherence to the restrictive theory of sovereign immunity.

POSTLUDE

Although there is no urgency in working out a solution to the juridical problem of sovereign immunity and state trading, the same cannot be said for our political and economic attitudes with respect to such trading. The importance of rethinking our attitudes was stressed in an address by Under Secretary C. Douglas Dillon delivered just after the recent departure from this country of Soviet Deputy Premier Anastas Mikoyan. Mr. Dillon concluded:[67]

[67] Address before the Mississippi Valley Trade Council, New Orleans, La., Jan. 27, 1959. Dep't of State Press Release No. 65, Jan. 27, 1959.

When the Soviet Government engages in economic assistance, it uses the resources of its entire economy, because there is complete identity between the economy and the government. We have no wish to emulate Soviet patterns of organization or behavior. However, during times of crisis in our past, private enterprise has formed an effective working partnership with Government. We are now living in a time of continuing crisis. We must find ways to forge a new working partnership to meet the challenge of our time.

Such a partnership must be based on a realistic understanding that there is nothing incompatible between state trading and free enterprise.

Of course, we should—and will—continue to favor free-enterprise trading when it is possible to do so. However, we must also use state-trading techniques and instrumentalities when it is advantageous to do so. And, more important, we must use them admittedly, with malice aforethought, and without apology, if they are to be effective against the increasingly threatening Soviet economic offensive. Our foreign economic policies must be based on self interest, not on sentiment and nineteenth-century slogans.