THE FOREIGN SOVEREIGN BEFORE UNITED STATES COURTS

WILLIAM HARVEY REEVES*

I. INTRODUCTION

The legal maxim, "there is no right without a remedy," is a statement of a legal ideal, a goal to be achieved, rather than an assurance of the existence of a perfect system of jurisprudence. The law, as a man-made institution, must continuously attempt to provide justice in perpetually changing social and economic conditions. A nation's jurisprudence, therefore, must never be judged by a single instance of "rank injustice," for such a socially unacceptable decision may only be proof that existing law is insufficient to create a socially desirable result, and that a change is necessary. However, when a situation which contradicts the ancient maxim long continues, it is already past time to seek a "remedy."

There exists today a type of legal claim, sounding both in contract and in tort, an undoubted "right," for which the "remedy" by judicial adjudication is so indefinite, so uncertain, as frequently to be nonexistent. This is a claim against a foreign sovereign for breach of contract with a United States national or for damages caused by a tort committed within the United States by a foreign sovereign's accredited agent.

II. ANALYSIS OF THE CONCEPTS OF SOVEREIGN IMMUNITY AND SOVEREIGN CONSENT

Traditionally, an attribute of a state's sovereignty has been its immunity from judicial coercion both in its own courts and in the courts of other nations. The immunity's source differs, however, depending upon the situs of the claim. A sovereign's immunity in its own courts is one of right. In foreign courts, however, such immunity is not a right which can be enforced, but a privilege granted politically.

* Member of the New York Bar.
1. "Sovereign" as used herein means the politically recognized government of a country, or the executive branch of such government. The word "Sovereign" may sometimes connote and be synonymous with the "State," but here the "Sovereign" will be considered the active agent of the "State," enforcing laws, collecting revenue, and making all national and international commitments for or in the States' name.
2. See Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812) where Chief Justice Marshall stated: "One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Id. at 136.
The United States has made and continues to make a claim of immunity, and recognizes this attribute of sovereignty in all other sovereigns. However, the United States, without admitting any diminution of its sovereign right not to be sued, has given its consent to suit in most circumstances. Specifically, it has permitted, in its own courts, judicial determination of both citizen and foreigner contract and tort claims against it. The United States’ consent to submit to its domestic courts is embodied in a series of statutes.

In contracting with a foreign government, a United States businessman, individual or corporate, should have judicial protection similar to that which he now has in contracting with his own government. Moreover, anyone who suffers a damaging tort in the United States at the hands of a foreign government’s agent should have the opportunity for judicial redress. Long ago, Chief Justice Marshall observed the practical limitations self-imposed on sovereign prerogative:

All sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

Justice Marshall based his conclusion to enforce or relax jurisdiction on the establishment of the good offices which humanity dictates and its wants require.

If foreign governments have found that their “wants require” business dealings with United States businessmen, then they must be presumed to have agreed to refrain from any effort to plead sovereign immunity in either contract or tort cases. A commercial contract is not a “peculiar

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3. The United States Government still adheres to the rule that it may not be sued without its consent. This disclaimer of jurisdiction is still occasionally used when a suit against the United States Government is not brought under a congressional act permitting suit. Except for consent, “[t]he universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-12 (1821). Reciprocal attributes of other nations’ sovereignty have been recognized by United States courts or by “suggestions of immunity” by the State Department. See Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938); Beers v. Arkansas, 61 U.S. (20 How.) 527, 529 (1858).

4. Specific consent embodied in statutes permitting suits against the United States is discussed in this article. See text accompanying notes 10-22 infra. “The Court of Claims is available to foreign nationals (or their governments) on a simple condition: that the foreign nation’s government can be sued in its courts on claims by our citizens.” National City Bank v. Republic of China, 348 U.S. 356, 363 (1955).

The Act of July 27, 1868, ch. 276, § 2, 15 Stat. 243 contained the above limitation on suits by foreigners. However, that Act was confined to claims against the United States arising out of the Civil War. The limitation was omitted from the later Act of March 3, 1887, ch. 359, § 1, 24 Stat. 505. For a reiteration of limitations see text accompanying notes 14-22 infra.

5. See text accompanying notes 10-22 infra.

circumstance” justifying a “relaxation” of the exercise of jurisdiction. Foreign governments can and have sued United States businessmen in United States courts on just such contracts. With this is the case, the foreign sovereign’s “consent” to be sued may be implied. The right to sue and to be sued are correlative. Also, foreign courts have assumed jurisdiction over the United States in suits by foreign nationals against the United States. With regard to tort, “humanity dictates” that the same responsibility be imposed upon a foreign government for a tort committed by an agent, whether engaging in a diplomatic function or in that foreign sovereign’s commercial business in the United States.

The first, and perhaps the most important, criterion for establishing guidelines relating to the use of immunity can be gleaned from the United States’ conduct. Surely it would be unreasonable to require a foreign sovereign to subject itself to United States courts and have applied to it remedies in matters where the United States Government, in similar circumstances, has refused to consent to jurisdiction. Consequently, the progression by which the United States subjected itself to the determination of its liability by its own courts should be examined.

**A. Statutes of the United States Limiting Its Own Sovereign Immunity**

Since 1863 the United States has gradually lessened its right and privilege to sovereign immunity for commercial acts and for torts committed by its agents. But even before it had actually consented to be sued,

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7. A number of suits could be cited as illustrative. One may stand as representative. By an agent, a foreign government contracted in the United States to purchase meat to feed both its army and civil populations. Controversy arose and the foreign government's agent sued the seller in the United States but pleaded sovereign immunity against a counterclaim arising out of the subject matter of the suit. The plea was disallowed and an affirmative judgment entered against the sovereign's agent. Et Ve Balık Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960), aff'd, 17 App. Div. 2d 927, 233 N.Y.S.2d 1013 (1st Dep't 1962). For limitations on counterclaims in suits by a sovereign, see text accompanying notes 11 & 12 infra.


9. Foreign courts have exercised their jurisdiction over the United States in tort matters. In a suit against the United States in an Austrian court for damages inflicted by a car owned by the United States and driven by a United States embassy agent, the court entered judgment against the United States. One reason for not granting immunity was that: "There exists no doubt that the foreign government could sue a local citizen in a local court for damages to its vehicle arising out of an accident. ... The matter lies differently with a local citizen. The latter would be left remediless vis-à-vis the foreign State ..." Holoubek v. United States, 2 Ob. 243.60, 84 Juristische Blätter 43 (Sup. Ct. of Austria 1961).

10. Act of March 3, 1863, ch. 92, § 2, 12 Stat. 765. This act, described as an amendment to the Act of February 24, 1855, ch. 122, 10 Stat. 612, was really the first act permitting direct suits against the United States.
the United States had taken certain steps not only foreshadowing this final step but also assuring that a suit instituted by itself, an all-powerful government, against one of its own citizens would be conducted fairly.

The first United States statute placing a limitation on the federal government’s absolute immunity became law on March 3, 1797. This statute permitted any defendant sued by the United States for taxes, breach of contract, or for any other reason, to plead in mitigation of the liability claimed any counterclaim or setoff he might have against the government. Such a counterclaim was defensive only. The defendant could have no affirmative judgment against the United States if the government’s obligation to him were larger than the government’s claim against him. If this recognition of a counterclaim was not a “consent” to be sued, it was at least a step in that direction, and indicated a willingness on the government’s part to make a trial fair between it and the defendant.

The next step came on February 24, 1855. The Act of that date established a procedure by which a person having a claim against the United States could present evidence of this claim and actually have the issue determined. He could secure a statement declaring that the government was liable to him, and specifying the amount of the liability. The government, however, made no representation concerning this procedure and satisfaction of liability was not assured.

The first true consent to suit, limited to obligations on contract, was enacted on March 3, 1863. When one considers that the nation was then in the midst of civil war, it is remarkable that Congress turned its attention to any act which permitted the United States to be sued on allegations of liability in contract.

11. An Act to provide more effectually for the Settlement of Accounts between the United States and Receivers of public Money, ch. 20, 1 Stat. 512 (1797). This Act was interpreted to apply to anyone who owed money to the United States.

12. The courts have always construed this statute very liberally. They have held for a defendant who asserted by counterclaim that the United States had an obligation to him which should be adjudged at the same time as the complaint against him. United States v. Wilkins, 19 U.S. (6 Wheat.) 135 (1821). But see Cunningham v. Macon & Brunswick R.R., 109 U.S. 446 (1883).

13. An Act to establish a Court for the Investigation of Claims against the United States, ch. 122, 10 Stat. 612 (1855). It may be noted that this device is now being used by the Foreign Claims Settlement Commission for claims against Cuba. Cuba has neither consented to be sued nor to pay for the property of United States nationals it confiscated. However, machinery has been set up so that the aggrieved person may present evidence of his claim. The United States, therefore, will be advised of the validity and amount of each claim and the aggregate of all claims. However, this is an ex parte, not an adversary proceeding. No representative of Cuba is present. 22 U.S.C. §§ 1643(a)-(h) (1964).


15. The schoolboy stories concerning the homespun honesty of Abraham Lincoln find their mature fruition in his earnest sponsorship of this act. Of this, at a later date, Mr. Justice
The trend, once commenced, continued, and the laws relating to the method and the scope of suits against the United States were broadened by the Tucker Act of March 3, 1887.21

The First World War plunged the United States into the business of owning and operating merchant vessels. Two statutes, one of March 10, 192017 and the other of March 3, 1925,18 were subsequently enacted. They dealt with the United States' liability for the operation of state owned ships (either owned directly or by a corporation whose stock was owned by the United States).19 These acts were significant because the United States Government could now be sued in tort for the operation of its ships, which was important for claims in admiralty are apt to be large. In spite of the comprehensiveness of these statutes, the government specifically refused its consent to actions in rem, and claimed absolute immunity for its vessels from attachment, execution, and other liens. The United States, therefore, consented to be sued in personam only. In the later statute, the United States reiterated its position with respect to the limitation of suits against it by foreigners:

That no suit may be brought under this Act by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.20

Two further significant statutes were enacted, both in the same year. On June 11, 1946, the United States adopted "An act to improve the adminis-

Frankfurter made the following comment: "Even while the Civil War was raging Lincoln deemed it important to ask Congress to authorize the Court of Claims to render judgments against the Government. He did so on the score of public morality. It is, wrote Lincoln in his First Annual Message, 'as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.'"

Kennecott Copper Corp. v. Tax Comm'n, 327 U.S. 573, 580 (1946) (dissenting opinion).


17. An Act Authorizing suits against the United States in admiralty, suits for salvage services, and providing for the release of merchant vessels belonging to the United States from arrest and attachment in foreign jurisdictions, and for other purposes, ch. 95, 41 Stat. 525 (1920) (codified at 46 U.S.C. § 741 (1964)).

18. An Act Authorizing suits against the United States in admiralty for damage caused by and salvage services rendered to public vessels belonging to the United States, and for other purposes, ch. 428, § 5, 43 Stat. 1112 (1925) (codified at 46 U.S.C. § 785 (1964)).

19. United States vessels were operated by the United States Shipping Board, Emergency Fleet Corporation.

20. An Act Authorizing suits against the United States in admiralty for damage caused by and salvages services rendered to public vessels belonging to the United States, and for other purposes, ch. 428, § 5, 43 Stat. 1112 (1925) (codified at 46 U.S.C. § 785 (1964)).
One puzzling question remains: Why did the United States wait so long in its national history before, by an act of Congress, it consented to be sued? The statutory consent for a judicial determination of liability on contract was first given 74 years after the adoption of the Constitution, and recognition by the United States of its tort liability, as judicially determined, was not given until 159 years after the founding of the Republic. When we consider that the United States Government, at its inception, was the most democratic government then seen in the modern world, that it derived its “just Powers from the Consent of the Governed,”23 that its Declaration of Independence had stated that all men were created equal and had demanded that citizens be protected against the arbitrary acts of an absentee British Government, that subsequently, the then newly created government of the colonies was described as a “government of the people, by the people, for the people,”24 there must have been some reason for this delay in granting consent to be sued. An answer to this puzzling question can be found in the orthodox economic beliefs and the accepted legal concept of government and its functions that were prevalent at the time the United States was formed.

Two men, two books, will give the answer. Sir William Blackstone, the law giver, (W. Blackstone, Commentaries on the Laws of England (1765)),25 and Adam Smith, the economist, (A. Smith, The Wealth of Nations (1776)),26 both believed that current economic theory failed to

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25. The date of the first edition of the Commentaries appears to have been 1765. However, Blackstone had been lecturing at Oxford since 1758. Several editions were published in the United States after the last English edition. These were annotated to United States laws and conditions.
26. Smith’s work was the first comprehensive treatise (in English) on national economic policies or political economy. The author was professor of moral philosophy at Glasgow University and the book was apparently written to prove that current ideas were unsound—particularly, that private vices were public benefits because they create employment.
create either prosperity or justice, but that sound economic theory,
enforced by law, would establish national welfare. Neither Blackstone nor
Smith recognized, however, that England was experiencing a rapid change
in social relationships as it left the feudal farming and guild-dominated
handicraft stages and entered an industrial age marked by the use of me-
chanical power, the rise of a new non-agrarian social class (the factory
worker), and the distribution of goods by worldwide trade supported by
colonization. Erroneously, both writers believed that there was only one
“true” theory of economics and system of “natural” laws. If these golden
mesnes could be found they would be changeless, prosperity with justice
would inevitably follow. Whatever their shortcomings, or perhaps short-
sightedness, each supported the other and together they created or con-
formed the system of legal and economic principles upon which the United
States itself was founded and by which it lived for many years. Thus
began in the United States the era of laissez faire (characterized by free-
dom of contract, emphasis on the protection of an unregulated use of
private property, the self-sustaining family unit, and unrestrained compe-
tition) as the foundation of law and orthodox economic principles.

Blackstone viewed government—democratic government—as a corpo-
ration.27 He did not originate this idea.28 It was as old as imperial Rome.29
English nobles had fought for a limitation of the autocratic power of the
king and had won, in the Magna Carta, a restriction of sovereign power
for a limited number—the Barons. This document was interpreted to mean
that the “law makes the king,” not that the king makes the law. The king,
therefore, as the epitome of government, had no sovereign authority except
that which had been granted to him by law. (Subsequently, the principle
was broadened to include the populace, i.e., the king’s subjects generally.)
Thereafter, this ideal was lost.30 Centuries later Lord Coke was accused

27. 1 W. Blackstone, Commentaries *469-70.
28. The concept that government is a corporation was accepted in America prior to the
adoption of the Constitution. The Articles of Confederation, in effect during the revolution,
were adjudged to create a corporate form of government. Respublica v. Sweers, 1 U.S. (1
Dall.) 41, 44 (Pa. Sup. Ct. 1779). Also, after the Constitution it was stated that: “This great
corporation was ordained and established by the American people . . . .” United States v.
Maurice, 26 F. Cas. 1211, 1216 (No. 15747) (C.C.D. Va. 1823).
29. 1 W. Cook, Corporations 5 (8th ed. 1923).
30. “The Divine Right of Kings” was still a theory of British Government accepted by
many at the time of the restoration of the monarchy. See T. Hobbes, Leviathan 120-28
(1935). Blackstone referred to the doctrine as “wild and absurd.” 1 W. Blackstone, supra
note 27, at *209. He stated of the king’s prerogatives that they “stretcheth not to the doing
of any wrong.” Id. at *238. And that the king can create no injury, for his power “is
created for the benefit of the people, and therefore cannot be exerted to their prejudice.” Id.
at *246.

It is somewhat surprising to find Justice Oliver Wendell Holmes, as late as 1907, defending
by the king of treason for having, in English, expressed to the king this principle, which Bracton, in Latin, had stated 400 years earlier. The principle was adopted, one may say revived, in Blackstone and is the basis of Blackstone's pronouncement that "the king can do no wrong," since the king himself is a corporation and, as such, has not been given the power to do anything but good. This did not mean that offenses could not occur. When they did, they were due to the mistakes or wrongs of unworthy administrators for the crown. It was, therefore, useless to sue the head of government, for the king was not liable at all. He had committed no wrong. Other means, some rather clumsy, were approved by Blackstone as methods of redress. This same system, that the government of the country could only exercise the powers granted to it, and therefore, should have immunity, was also recognized in the United States during the period 1789 to 1863.  

C. Illustration and Analysis of the Concepts of "State" and "Government"

As previously mentioned, the United States still follows the universally accepted principle that the state cannot be sued without its consent. The government's immunity from suit without its consent by adopting the Hobbsian theory: "Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. . . . A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (citation omitted).

31. Bracton declared: "Ipse autem rex non debit esse sub homine sed sub Deo et sub lege, quia lex facit regem." 1 W. Blackstone, Commentaries 240 n.2 (G. Sharswood ed. 1886). Translated this means that: "However, the king himself ought not to be under [any] man but [only] under God and under the law, because the law makes the king." "Coke answered in the words attributed to Bracton, that the king ought not to be under any man but under God and the law." R. Pound, The Spirit of the Common Law 61 (1921). For a detailed discussion of the long conflict between Coke (the common law is supreme) and King James (the King by divine right makes the laws), see H. Lyons & H. Block, Edward Coke, Oracle of the Law (1929). Blackstone, throughout his first book, quotes with approval several passages from Bracton both in the original Latin and English translations. Included is the last phrase from the quotation mentioned, "lex facit regem" and "the law maketh the king." 1 W. Blackstone, supra note 27.

32. 1 W. Blackstone, supra note 27, at *469. That Blackstone referred to an institution, not a man, is clearly shown by his statements: "The king never dies," Id. at *249, and, "The king, for instance, is made a corporation to prevent in general the possibility of an interregnum or vacancy of the throne . . . ." Id. at *470 (emphasis omitted).

33. Id. at *243-46. The remedies include petition to the king and trial of the ministers alleged to be guilty of oppression. The section contains a cautious reference to Parliament's power, and a still more cautious reference to a possible change of government.

34. See, e.g., Poindexter v. Greenhow, 114 U.S. 270, 290 (1885); text accompanying notes 11-22 supra. The Poindexter case, along with seven others, are commonly known as the Virginia Coupon cases.
Initially, United States courts also agreed that wrongs when committed were only due to mistakes and the malfeasance of officials. But the existence of a king as the visible living symbol of both state and government was lacking, and United States courts seem to have found it difficult to pronounce the conclusion, "the United States of America can do no wrong," as the reason for the state's immunity from suit. The courts soon observed what had been made abundantly clear in the documents on which the country was founded, namely, that the United States was governed by a group of officials who had limited powers. The government was possessed, therefore, of only those powers which had been granted to it by the "sovereign people," a circumstance which, lacking human error, might support the conclusion of an "infallible" state. But the courts also recognized that the President was only the elected executive head of the government. Even that he might do wrong was feared, as was indicated by the Constitutional provision that he was subject to impeachment. Furthermore, the executive branch was only one of the three branches, having coordinative authority, which collectively made up the government.

It was not surprising, therefore, that some inconsistencies in judicial decisions arose respecting rights of citizens when state action was involved, and that there were indirect efforts to sue the several states or the United States for grievances. Nevertheless, the federal state continued to be immune from suit until 1863, when by permitting suit for damages, the Congress admitted the possibility that the United States, or at least its government, lacked perfection and might commit an actionable wrong in breach of contract for which it should be liable.

Although the early court decisions are not wholly consistent, one should be examined to illustrate that its reasoning stemmed from Blackstone's contention that "the King can do no wrong."

When the several states bound themselves together by the Constitution, and erected a central government, they voluntarily gave up some of their sovereign prerogatives. Among them was the right to impair the obligation of a contract. Obviously if a state cannot impair the obligation of a contract, nothing that the government of that state could do validly, would impair the obligation of a state contract. The Government of Virginia, however, had purported to do just that. It had repudiated state bonds, a contract between the state and every purchaser. The state tax collector thereupon sued some of the bondholders for taxes undoubt-

37. See cases cited notes 47-49 infra.
edly due, but refused to accept the bonds of Virginia as payment. The state did not appear in the case. Of course, because of the state's immunity no suit could have been begun against it to compel payment. The suit ultimately came to the United States Supreme Court on the question of whether or not the tax collector could collect the tax and refuse to accept the bonds in payment.\textsuperscript{39} The Court decided that the tax collector must accept the bonds in payment. Several excerpts from the Supreme Court's opinion will indicate its reasoning:

The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and, within the sphere of the agency, a perfect representative; but outside of that, it is a lawless usurpation. ... That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States is not the word or deed of the State but is the mere wrong and trespass of those individual persons who falsely speak and act in its name.

... And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of the wrong, whenever they interpose the shield of the State?\textsuperscript{40}

The Court also took occasion to excoriate the government for the scheme by which the state, by its government's official, not only endeavored to collect taxes, but also eliminated the issue of the wrong its government had committed by repudiating the state's bonds, an act forbidden by the Constitution:

The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and


\textsuperscript{40} Poindexter v. Greenhow, 114 U.S. 270, 290-91 (1885). In the different viewpoints regarding the nature and legal basis of the conflict within the United States from 1861-1865 this same legal reasoning and interpretation is exemplified. The Northern view was that the United States was an indissoluble union of sovereign states, each of which remitted its sovereignty to the extent necessary to form a central government. Among the rights waived was the right to withdraw from the Union. The declarations of secession were void, therefore, and, as such, not valid acts of state. Hence, in the Northern view, the conflict was a "civil war," an effort to change the United States Government. See Encyclopedia of American History 229, 232 (R. Morris ed. 1953).

The Southern view was that the United States was a union created by the voluntary action of the several sovereign states, each of which retained its sovereign right to withdraw from the Union. Therefore, the act of secession was a valid act of state. Hence, in the Southern view, the conflict was not a "civil war," since the officers purporting to speak for each state were operating within their proper authority as officials of a sovereign state. It was a "war between the states." Id. at 228.

This distinction in nomenclature is popularly retained even today in the different sections of the country.
The minority opinion in a related case decided at the same time favored the state on the ground that the action was really one against the state, which as a matter of right was immune from judicial coercion. The minority treated the tender of bonds for payment as a counterclaim or setoff, and thus, as a direct claim against the state for the collector's refusal to receive the bonds.\textsuperscript{42}

By the congressional action of 1863, and subsequently, the United States expressed its disbelief in the Blackstonian attempt to justify the immunity of the king or state. It affirmed that the state itself \textit{could}, and sometimes \textit{did}, commit a wrong by breach of a contract and commission of a tort. For both a breach of contract and commission of a tort, therefore, the United States should properly respond in damages. Thus, the Blackstonian thesis not only was abandoned but was also shown to be a mere rationalization, an effort to explain once again a phenomenon with a continuous history, the beginnings of which were veiled in the past.\textsuperscript{43}

But when one has cleared away the debris of rationalizations to explain this phenomenon of state immunity, one is confronted with the question: Is there any reason now in the twentieth century why any sovereign should be granted immunity in contract or in tort?

\textbf{D. Changes in the Functions of Government and The Increasing Vicarious Liability of Corporations Renders Sovereign Immunity in Contract and Tort Obsolete}

Is an “agreement” in which one party is immune from enforcement of his promise while the other party, usually the weaker in economic bargaining, is held to full performance or liable for damages for non-performance really a contract by definition?

\textbf{1. Functions of Government}

Our Founding Fathers established a laissez faire system of government, \textit{i.e.}, that government governs best which governs least. The functions of a laissez faire government did not include state trading.\textsuperscript{44} That the king,

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  \item 41. Poindexter v. Greenhow, 114 U.S. 270, 291 (1885).
  \item 42. Marye v. Parsons, 114 U.S. 325, 333 (1885) (dissenting opinion).
  \item 43. Among the reasons given were the “Divine Right of Kings,” and the older formula of the chain of authority which applied to the feudal state, \textit{i.e.}, “par in parem non habit imperium.” Translated this means that “an equal has no authority over an equal.”
  \item 44. Compare Duke of Brunswick v. King of Hanover, 9 Eng. Rep. 993 (H.L. 1848) with Munden v. Duke of Brunswick, 116 Eng. Rep. 248 (Q.B. 1847). These two cases distinguish between a head of state’s official act and one in which he acts individually and not for the state. In the first instance, sovereign immunity is granted. In the second, sovereign immunity
\end{itemize}
as the executive head of government, did not engage in state trading was supported by Blackstone both directly and indirectly. Directly, Blackstone noted that the king's connection with trade was merely to designate the market places, to establish the rules under which trade might occur, and to enforce those laws designed to encourage business.46

The indirect reasons why the king was not a trader can be found in the limitation which Blackstone placed upon the king's prerogatives according to the particular activity in which the king engaged:

By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. . . . And hence it follows, that it must be in its nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer.47

Very early in United States history, it became the law that when a sovereign joined in a business venture with its subjects, it had to abide by the same rules that governed its subjects. For example, in 1824, the State of Georgia participated with others in the ownership and operation of a bank. When that bank was sued on a matter arising out of its banking activities, the bank pleaded immunity for its acts because of the participation of the Sovereign State of Georgia.47 The United States Supreme Court, however, held that Georgia's participation in a commercial enterprise deprived it, and the organization in which it participated, of any immunity from suit. Georgia had descended into the market place and had to be bound by the rules of the market place. Similarly, state owned railroads48 and corporations49 or railroads in which the state participated were not accorded immunity from suit.

is not granted. The more modern question when a head of State engages in trade not for himself but for the state is how should he be treated. The precedents do not cover such a situation.

45. 1 W. Blackstone, supra note 27, at *274.
46. Id. at *239.
48. Railroad Co. v. Tennessee, 101 U.S. 337 (1879); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872). See also United States v. California, 297 U.S. 175 (1936), where the Court stated: "We think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity." Id. at 183.
49. For a recent case holding that a vessel owned by a corporation wholly owned by the Republic of Mexico was not immune from attachment and from sale in satisfaction of a judgment, see S.T. Tringali Co. v. The Tug Pemex XV, 274 F. Supp. 227 (S.D. Tex. 1967). In that case, the court stated: "The vessels of Petroleos Mexicanos, however, are not considered as being owned by the Republic of Mexico, but by an independent corporation en-
Blackstone, again the authority, stated that in international trade the
king, even as the figment of the whole government, had no prerogatives;
for even as the domestic law "makes the king" so the law merchant was
the ruler of international commercial relations:

[T]he affairs of commerce are regulated by a law of their own, called the law mer-
chant, or *lex mercatoria*, which all nations agree in and take notice of.60

Thus, in mercantile questions, such as bills of exchange and the like; in all marine
causes, relating to freight, average, demurrage, insurances, bottomry, and others of a
similar nature; the law-merchant, which is a branch of the law of nations, is regularly
and constantly adhered to.61

In these and other passages Blackstone is most careful to confine the
king's special prerogatives to the realm over which he ruled.62 Thus,
although every nation may change for itself the rules of international
law, at least diplomatically, the concept, even if not enforceable, is that
every civilized nation is bound by its tenets to every other nation and its
citizens, but in all other respects, bound by the local law.

2. Theory of Business Corporations

Neither Blackstone nor Adam Smith knew or even imagined the future
economic importance of the business corporation. At that time, municipal
and religious corporations had long been recognized as entities, but few
business corporations existed. Business corporations were mentioned by
both writers but, in contradistinction to their treatment of guilds, they
considered local business corporations as mere extensions of individual
businesses.63 The very few corporations which might be termed big
businesses had all been created by special acts of Parliament, and prac-
tically all had established operations outside of England. These were
the great exploring, colonizing, and trading companies; all of which had
as many attributes of government as of business.64

50. 1 W. Blackstone, supra note 27, at *273.
51. 5 W. Blackstone, supra note 27, at *67 (footnote omitted).
52. 1 W. Blackstone, supra note 27, at *273-74.
53. The following brief quotation from Blackstone will indicate the narrowness of his
view of a corporation's powers and obligations: "It [a corporation] can neither maintain
nor be made defendant to, an action of battery . . . for a corporation can neither beat, nor
be beaten. . . . It cannot be executor or administrator, or perform any personal duties; for it
cannot take an oath for the due execution of the office. It cannot be seized of lands to the
use of another [trusts]; . . . for such kind of confidence is foreign to the end of its institu-
tion." Id. at *476 (footnote omitted).
54. One of the best known was the British East India Company which governed parts of
India. Its sovereign activities were later transferred to the British crown. 2 W. Cunningham,
The liability of corporations in tort to their employees and for the acts of their employees was extremely limited, as the laissez faire doctrine placed great emphasis on individual responsibility. Also, a corporation’s liability without fault was not a recognized principle compatible with freedom of contract and individual responsibility as expressed in the Constitution. It did not become so until the 1917 Supreme Court decision upholding the New York Workman’s Compensation Law.55

It is not surprising, therefore, in view of these historical facts, that a government, a corporation itself, did not have liability for any tort committed by an agent outside of its own realm. However, a federal law should express what has long been recognized by many, that there is at present no reason, historic or economic, to grant to domestic or foreign sovereigns immunity from their contract and tort liabilities. The doctrine still generally adhered to by the United States—that neither a domestic nor a foreign sovereign is subject to suit without its consent—may be preserved as a continuity with the past if one recognizes that state trading, along with vicarious liability for one’s agent, is a new phenomenon. It is time that the United States not only declare officially that whenever a foreign government contracts with a United States national that government has consented to have its obligations determined judicially, but also establish the procedure whereby such determination can be made. The United States has already taken such a position for itself. Also, the United States should demand that whenever a foreign government places its agents within the United States, either for the purpose of furthering its diplomatic representation or to conduct commercial business, it has consented to assume a liability for that agent’s acts. Such an attitude is in accord with expressed judicial dictum:

Both the United States and the States are immune from suit unless they agree to be sued. Though this immunity from suit without consent is embodied in the Constitu-

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55. See New York Central R.R. v. White, 243 U.S. 188 (1917). Previously, a corporation's liability to its employees was circumscribed by various legal concepts including “assumption of the risk,” “contributory negligence” and “frolic and detour.” But see the ruling in Parris v. St. Johnsbury Trucking Co., 395 F.2d 393 (2d Cir. 1968), where the court held that where an employee caused serious injury to others by driving recklessly, the corporation was liable for compensatory damages only, not punitive damages. The corporate officers did not order, participate in or ratify the employees' misconduct to this extent.
tion, it is an anachronistic survival of monarchical privilege, and runs counter to
democratic notions of the moral responsibility of the State.56

III. THE PRESENT POSITION OF FOREIGN SOVEREIGNS
BEFORE UNITED STATES COURTS

Considering the United States’ decision to waive its immunity from
judicial determination of contract and tort claims, it is surprising to find
that such immunity is still granted to foreign countries.

It was not until 1921 that any judicial or other government effort was
made to curtail a foreign sovereign’s immunity from such commercial
liability. In a case involving such liability for the operation of commercial
ships owned by a foreign government, a sagacious federal court judge
held that the plea of sovereign immunity would not be recognized as a
valid defense.57 However, the Supreme Court severely criticized this
decision. It held, in another case, that commercial ships operated by a
foreign sovereign had complete immunity even though they were com-
peting directly with American and other privately owned ships.58

A. The Tate Letter

In 1952, the United States Department of State took a very advanced
position on the matter of sovereign immunity for foreign sovereigns. A
letter from the Acting Legal Advisor of the State Department to the
Acting Attorney General stated that: “The Department has now reached
the conclusion that such immunity should no longer be granted in certain
types of cases.”59 In the same letter the Department pointed out that to
grant immunity to a foreign sovereign “is most inconsistent with the
action of the Government of the United States in subjecting itself to
suit in these same courts in both contract and tort and with its long
established policy of not claiming immunity in foreign jurisdictions for
its merchant vessels.”60 The Department also pointed out that foreign
governments were engaging more in commercial activities and that this
fact made necessary a practice which would “enable persons doing
business with them to have their rights determined in the courts.”61

This letter, although not a congressional enactment but an expression
of policy by the State Department, was hailed as a great advance, since

56. Kennecott Copper Corp. v. State Tax Comm’n, 327 U.S. 573, 580 (1946) (dissenting
opinion).
57. The Pesaro, 277 F. 473 (S.D.N.Y. 1921).
59. Letter from Acting Legal Advisor Jack B. Tate to Acting Attorney General Philip B.
Perlman, June 23, 1952, in 26 Dep’t State Bull. 984 (1952) [hereinafter cited as Tate Letter].
60. Id. at 985.
61. Id.
it came from the government department charged with the obligation of maintaining international relations for the United States, and the very one which had the power of issuing to the courts a "suggestion of immunity."

The Tate Letter, in an informal but nevertheless semi-official way, made current in the judicial language of the United States two previously alien phrases. Each expressed a new concept of sovereign acts and of the foreign sovereign's liability or immunity before United States courts. The two phrases were *jure gestionis* and *jure imperii*. Translated, the former means that certain sovereign acts are under the law of business, *i.e.*, those acts of state which are or should be governed by general commercial law. While the latter means that other sovereign acts are under the law of sovereignty, *i.e.*, those acts of state which are or should be governed by sovereign law which relates only to the use of sovereign power exclusive of acts of trade. The United States had never before made such a distinction as to its lawful acts. The only distinction previously made had been between constitutional and unconstitutional acts.

Thus, the State Department adopted, and the courts have since followed, not only a new nomenclature but also a division of the acts of state into types. These types were to form the basis for determining whether a United States court could take jurisdiction over a foreign sovereign to determine its contract or tort liability or to grant immunity.

Consequently, the United States Government consented to be sued in its own courts for acts that were *jure gestionis*, but not for acts *jure imperii*. The State Department in the Tate Letter clearly indicated that it was prepared to use these categories as its basis for determining whether it would, at the request of a foreign government, grant a "suggestion of immunity." In short, it was ready to use this civil law concept as the standard on which to find express or implied consent. Also, it was prepared to apply the equitable rule that consent had been given because equity considered done that which ought to be done. Thus, the old concept—that no nation subjected itself to jurisdiction without consent—and the new one—that no immunity would be granted for sovereign acts *jure gestionis*—were reconciled. They are the policy of the United States and of all countries which have adopted the restrictive theory of sovereignty. It now remains for Congress, by legislation, to make this rule United States law. Henceforth, there should exist in every contract between a

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62. The Tate Letter indicated that influential centers in the civil law countries were a major factor in the development of the restrictive theory of sovereignty which classified certain sovereign acts as "jure gestionis."
63. For congressional acts permitting suits against the United States see text accompanying notes 14-22 supra.
foreign sovereign and a United States national an unrebuttable presumption that all acts of state which come within the definition of *jure gestionis* are justiciable by United States courts. In determining what acts are within the definitions, the courts should consider the relatively modern phenomena of state trading and corporate law, which includes vicarious liability of a corporation for its agents' torts.

The first case in which this new policy was tested, and undoubtedly, in which it had great weight, involved a foreign sovereign that sued a United States bank to recover a bank account. The bank, after pleading a series of affirmative defenses, interposed two counterclaims, neither of which arose out of the same transaction on which the suit was brought. One of these counterclaims, to use the designation contained in the Tate Letter, was based on a *jure gestionis*, a business act. It arose from a contract made and to be performed in the United States. It involved a loan of money to a corporation which had been hired by the foreign sovereign and whose commercial obligations were guaranteed by the sovereign. However, both principal obligor and guarantor defaulted. The other counterclaim was purely on an obligation of the sovereign created *jure imperii*. The obligation involved state bonds sold within the jurisdiction of the sovereign nation and purchased by the defendant when issued, but subsequently defaulted. On motion of the plaintiff sovereign the lower court dismissed the counterclaims. The circuit court of appeals unanimously affirmed with, however, some indication that although the law required dismissal of the counterclaims such procedure was unfair to the bank. The Supreme Court, in a closely divided decision, restored both counterclaims as valid pleadings in limitation or elimination of the claim against the bank. Thus, in 1955, shortly after the publication of the Tate Letter, a foreign government was required to accept liability as to counterclaims, but to no greater extent than the United States had accepted for itself by statute in 1797.

In holding that debt emanating from a sovereign's bonds was a proper counterclaim to a suit by that sovereign, the Supreme Court altered the measure of damages. It recognized that these bonds, owned by the defen-

64. National City Bank v. Republic of China, 348 U.S. 356 (1955). In the Bank's main brief was a section which indicated that some half-dozen European countries had already judicially held some foreign country to be liable. Brief for the Petitioner at 37, National City Bank v. Republic of China, 348 U.S. 356 (1955). Attached to the brief was an appendix containing excerpts from the courts of these various European countries and a translation of each excerpt. These excerpts supported the State Department's conclusions that a plea of sovereign immunity by foreign sovereigns in commercial cases had not been a bar to an action to fix the sovereign's liability. Id. at Appendix B.
dant, and offered in mitigation of the sovereign's claim, were part of the sovereign's public debt. And this, in turn, meant that they were issued as an act of state within the sovereign's territory and, as such, were a *jure imperii.* The Court imposed limitation was that the amount of the valid counterclaim based on these bonds was the amount which the defendant bank had *actually paid* for them, *i.e.*, its actual loss, *not* the *face value* of the bonds, the amount which the sovereign had promised to pay.

The precedent relating to counterclaims has been followed in later cases. A resolution adopted by the International Bar Association in 1960 contained a section on counterclaims imposed in a suit by a sovereign. This section was based on the Harvard Studies of 1932, but modified by the ruling in the above case to read as follows:

A State, by instituting a proceeding in a Court of another State, submits to the jurisdiction of that Court in respect of all counterclaims which are permitted in civil actions by the laws of the State wherein the action has been commenced, but no judgment on counterclaim may be enforced beyond the amount of recovery of the State in the action unless the counterclaim states a cause of action in which a State may be made a respondent in the Court of another State . . .

However, the encouragement which the Tate Letter and this case gave to those in the business community who dealt with foreign sovereigns soon gave way to disappointment.

B. Direct Suits Against a Foreign Sovereign

Permitting a defendant to impose all counterclaims against a foreign sovereign did not answer several questions. How may anyone with a commercial claim against a sovereign compel that sovereign to submit to the jurisdiction of a United States court? How may one injured by a representative of a foreign government secure redress? Significantly, subsequent efforts by United States business corporations to sue foreign sovereigns with whom they have dealt commercially have not been very successful.

Because the businessman has been unsuccessful, it is widely believed that the State Department itself, or perhaps the United States executive departments collectively, have annulled the Tate Letter. This view of United States jurisprudence appears also to be held by some in foreign countries.

67. See, e.g., Banco Nacional v. First Nat'l City Bank, 270 F. Supp. 1004 (S.D.N.Y. 1967). There is no higher authority at this time.


69. Int'l B. Ass'n, Eighth Conference Report, Resolution relating to the immunity of sovereigns when engaged in commercial activity outside of their own domain, at 9 (Austria, 1960).

70. See, e.g., cases cited notes 96-97 infra.
For example, the highest court of Germany, the Constitutional Court,71 considered the problem of an individual businessman's rights within Germany against a foreign sovereign with whom he had done business. The case before the court involved an effort to compel a foreign government to pay for the installation of certain improvements which had been ordered for the foreign government's embassy in Germany. The issue was sharply drawn, the contractor claiming a right to adjudication and a means of compelling payments, the foreign government insisting on its immunity. The Constitutional Court advised the lower court that it could and should entertain the action against the foreign sovereign. Before deciding the question, however, the court reviewed such efforts by private citizens in other countries and found that, while there was no unanimity on the question, there was considerable precedent for holding foreign sovereigns liable in local courts for their commercial contracts. But, in reviewing the position of United States courts on this question, the German court (in spite of the Tate Letter which was specifically mentioned)72 found that basically the United States still adhered to the doctrine of sovereign immunity in the classical manner, i.e., the absolute theory of sovereign immunity for foreign sovereigns.

Perhaps one of the great difficulties in applying the principles set forth in the Tate Letter lies in the fact that it is merely a policy pronouncement of one department of government. The department itself has admitted that it neither has the authority to direct the courts to refrain from exercising jurisdiction73 nor the authority to require the courts to assume jurisdiction over a foreign sovereign.

Then too, some of the language in the Tate Letter is rather unfortunate. The letter speaks of refusing to grant immunity in United States courts to foreign sovereigns sued without their consent. Moreover, the United States has consistently stated that it cannot be sued in its own courts without its consent. The letter also states that the “immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis).”74 But, in United States

73. Tate Letter, supra note 59, at 985.
74. Id. at 984.
jurisprudence all lawful acts in the name of the state by the government of the state are public acts. Even though these inconsistencies are more apparent than real, they, with other and more cogent reasons, tend to show that only the Congress can enact law consistent with both the United States’ practice and with that of other governments. Consequently, Congress can and should pass a comprehensive law governing adjudication of commercial claims against foreign sovereigns. Only then can the goal expressed by the State Department be achieved:

The Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts.76

C. Rights and Procedures in Any Action Involving a Foreign Sovereign

For the commencement and successful prosecution of any legal action there are three necessary steps. First, the offending person, in our present consideration a foreign sovereign, must be brought before a court which has the right to exercise jurisdiction over it77 and has jurisdiction over the subject matter of the complaint. Since the waiver of immunity is not necessarily applicable to all possible claims, the second step is to determine the applicability of the sovereign defendant’s defensive plea that it be free from jurisdiction because of its sovereignty. Such a plea, which only a government can make, does not eliminate any pleas to the court’s jurisdiction available to other litigants. The third step is, of course, assurance for, or procedure to compel satisfaction of a judgment adverse to the foreign sovereign.

The mere fact that a foreign sovereign will be involved in the proposed litigation before United States courts raises new questions which must be resolved. Specifically, the courts must know the basis on which to proceed and any limitations that are involved. In short, as in any litigation, there are two distinct elements to be considered. One is the litigant’s right to certain basic concepts of law, i.e., rights, powers, privileges and immunities. The other is how may these be brought before a court for adjudication. Both substantive and adjective law relating to a foreign sovereign, therefore, must be defined.

To consider those issues likely to arise in litigation involving a foreign sovereign and to provide for them in advance will promote better international relations and save much litigation. What rights, therefore, which

75. Id. at 985.
76. Jurisdiction quasi in rem is not here considered as a method of obtaining jurisdiction over a foreign sovereign. For a discussion of methods of service on a foreign sovereign see text accompanying notes 92-108 infra.
have been asserted in the past by sovereigns are still retained by them, and what alleged sovereign prerogatives have been lost?

1. Statute of Limitation

The Supreme Court has long held that a statute of limitation was available as a defense to an action brought by a foreign sovereign. Therefore, the foreign sovereign party to a commercial contract must begin an action, as would any foreign corporation, within the time limited by United States law. Failure to commence a timely action would subject a foreign sovereign's complaint to the same demurrer or motion to dismiss that would apply to any corporation.

2. Estoppel

The prohibition against a change of position or representation by one party to a contract to the detriment of the other must also apply to a sovereign in commercial matters. The doctrine that estoppel does not run against a sovereign, that it can take a different and final legal position as late as the moment of suit, must be considered obsolete. This would, of course, be itself a grant of immunity from liability.

3. Pacta Sunt Servanda

These Latin words, frequently applied to a contract, are easy to translate, but their legal interpretation is apt to change in different circumstances. Therefore, they must be defined anew as applied to a contract to which a sovereign is a party. In one interpretation these words mean that

77. Guaranty Trust Co. v. United States, 304 U.S. 126 (1938). The U.S.S.R.'s claim was barred by the statute of limitations and the suit by the United States as assignee was dismissed.

78. But see Railroad Co. v. Tennessee, 101 U.S. 337 (1879). There Tennessee, as a sovereign state, pleaded sovereign immunity although on the date the contract was made the law permitted suits against the sovereign state. At the date of suit, however, this privilege had been withdrawn. This was obviously a change of position. However, the Court pointed out that a judgment against the sovereign state, which was scarcely more than an "audit" for execution, could be prevented.

Among claims against the hijacked steamship Bahía de Nipe was a judgment against the Republic of Cuba in which, as alleged, that State had waived immunity and consented to execution but objected to subjecting the ship to the judgment. However, no judicial decisions were reached in the case as the ship was released from United States jurisdiction by a "suggestion of immunity" from the State Department. Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710 (E.D. Va.), aff'd, 295 F.2d 24 (4th Cir. 1961).

79. Black's Law Dictionary 1263 (4th ed. 1951) gives the following definition of a phrase somewhat expanded from the one given here but embodying the same principle: "Pacta Conventa Quae Neque Contra Leges Neque Dolo Male Inita Sunt Omni Modo Observanda Sunt." The phrase means that: "Agreements which are not contrary to the laws nor entered into with a fraudulent design are in all respects to be observed."
the terms of a written contract cannot be changed or modified except by
the written consent of all parties affected or, in some cases, by the judg-
ment of a court. Thus, the obligations of a written contract (as the terms
may be judicially interpreted) are binding and may not be changed by one
of the parties unilaterally to the detriment of the other. Liability will be
fixed according to the terms of the contract.

There is another interpretation sometimes heard that by entering into
a written contract the parties have surrendered their wills to the instru-
ment so that the agreement is the “law” of the contract. Irrespective of
whether this interpretation is ever a proper one, it is always improper
when applied to a sovereign party to a contract, particularly for con-
tractual acts to be performed or permitted within the sovereign’s own
territory. Such an interpretation is not so much a remedy for the breach
of contract as it is a denial of sovereignty. A sovereign’s liability in con-
tract is not a denial of sovereignty when the liability takes the form of
money damages. But a decree of specific performance, an injunction or
mandamus particularly if the performance had to be carried on within
its own borders, would be a denial of sovereignty. This is the United
States’ position. Its “consent” to be sued extends only to the entry of a
money judgment against it.

4. Renegotiation of Contracts

The United States Government has, on several occasions, renegotiated
contracts when it has found that unanticipated or unknown facts have
made the contract unfavorable to it as a sovereign government or so lucra-
tive to the other party as to make that party a “profiteer” at the public’s
expense. This differs somewhat from the old remedy of reformation in
equity which usually applied only to mistakes of fact, to fraud, or to ob-
vious or patent ambiguities. A foreign government would most likely rene-
gotiate an agreement in the area of the concession contract or the license
tantamount to monopoly. Usually it would wish renegotiation where im-
portant facts, unknown at the execution of the contract, thereafter became
apparent. For instance, consider the example of a foreign government that
wished to induce a United States company to explore certain areas for
mineral products. Even the best survey cannot indicate in advance the

80. For “pacta sunt servanda” as applied to concession contracts, see Ray, Law Govern-
ing Between States and Foreign Nationals, in Proceedings of the 1960 Institute on Private
Investments Abroad 50 (1960).

81. Any judgement against the United States other than a money judgment, such as
injunction, mandamus, etc., would cause a governmental official to do or refrain from doing
in the name of the United States some act. Thus, indirectly the courts would be performing
actions for the United States contrary to the will of the executive department. See Larson v.
cost of exploration, the amount of the find, and the price to be received for the product in
the local or world market. Such a contract, therefore, must offer very
generous terms to induce the private party to expend the necessary money.
Certainly anyone who enters into such a contract has a right to expect and
enjoy generous terms. But, the United States and other countries have
found that some contracts would not have been entered into if the long
term result could have been originally foreseen. Indeed, a popular outcry
is apt to arise that the government is being exploited by a foreign corpo-
ration. This raises a political issue as to a government's perpetual sover-
eignty over its economic resources,\(^8\) and may ultimately result in a
popular demand for confiscation. However, the United States company
because of its duty to its stockholders, cannot usually consent to a revision
of the contract lowering corporate income. While some companies are apt
to rely on \(pacta sunt servanda\) and aver that there never was a concession
contract which initially fair became unfair, one can use as precedent the
United States' criterion and expect other countries to act similarly whether
justified or not.

The contracts for the early aviation routes throughout the United States
may be used as an illustration. To induce some companies to enter into
contracts, the federal government granted mail subsidies. This was neces-
sary because the risk of unprofitable operation was great and equipment
was costly. But eventually, the United States unilaterally cancelled the
contracts and submitted them again for bids on the ground that the for-
mer contracts were collusive and unfair.\(^8\) Thus, foreign countries in such
a situation have the precedent which they can use—a remedy of self-help
by confiscation.

One cause of action, therefore, for a foreign state would be to demand
renegotiation. This may be considered as a broadening of the older cause
of action—a reformation in equity. It would enable United States courts
to review all the evidence to determine whether the contract continued to
be "fair" and to adjust the terms if it found otherwise. The foreign govern-
ment would have its day in court, and happily, the company which had ex-

\(^{8}\) President Roosevelt . . . ordered annulment, of all existing domestic air-mail con-
tracts and directed the army to fly the mail during the emergency created by his act." N.Y.
Times, Feb. 10, 1934, at 1, col. 8. "[T]he major point involved.... is admitted to turn on
whether an American government can ever justify confiscation in advance of trial. In this
instance the Roosevelt administration officials who are handling the air-mail cases are certain
that it can be." Id. Feb. 18, 1934, § 4, at 1, col. 2.
IV. THE EXECUTION AND BREACH OF CONTRACTS BY A SOVEREIGN AS AN ACT OF STATE

The action of a foreign sovereign in entering into a contract with a United States national and subsequently breaching that contract must be considered an official act (actus rerum). Otherwise, such an act would be a nullity, as an act, in corporate terms, ultra vires. Whether great or small, all such acts binding on the state are included in the comprehensive definition, “act of state.”

A. Authority to Execute a Valid Contract

A government’s executive department is the state’s agent in the execution of a contract. Under United States law, only a government recognized by the United States as the legitimate government of a country can make a valid contract with a United States national.\(^8\) Lack of political recognition means, therefore, that the ostensible government, no matter how complete its control over the country, cannot bind the foreign state. But, mere recognition by the United States of the foreign government in power is not sufficient. That government must have proper authority generally, and by particularized officers, to enter into the contract. The country’s constitution and laws will spell out the authority of its government officials. Frequently, in addition to the representations of the government officers or the written laws of that country, the opinion of an attorney of that country is desirable. Whether or not a particular contract is binding on a state or on the private company should be a justiciable issue.

B. Authority to Breach a Contract

A breach of a contract validly entered into by a recognized government is an “act of state.”

Of course, government action, either by the United States or a foreign government, may make impossible the fulfillment of a contract, but the possibilities of international conflict, cold war or hot war, are beyond the scope of this article. Suffice it to say that whether the contract is breached by the government which entered into it or by its successor government—whether recognized or not—a breach has occurred, and the remedies of adjudication provided under United States law should be available to the United States national.

V. STATE TRADING AS A CUSTOMARY FUNCTION OF GOVERNMENT

Whereas, prior to the nineteenth century, governments were not normally international traders in the name of the state, that activity is now so generally recognized as a proper governmental function that it is

surprising that state trading was ever thought to be unusual. However, past attitudes toward state trading still exist today. For instance, although state trading is presently considered *jure gestionis*, some courts have attempted to divide state trading into acts *jure imperii* and acts *jure gestionis*. These courts have classified several international contracts with a foreign national into one of the categories depending on the type of goods or services contracted for by the foreign sovereign. By this division, therefore, a contract for army artillery and one for army shoes might fall into different categories. In this regard, Blackstone's principle still applies—that the king's prerogative covers only those functions which he alone can perform. This might cause one to conclude that since only a sovereign government could buy certain foreign goods that contract would be *jure imperii*, while food, clothing or other things civilians could purchase abroad would be *jure gestionis*. Depending on whether the foreign government purchased the food and clothing for its civilian population to avert a famine, or to sustain an army, could also change the category. For the latter contract, the state would have judicial immunity in a foreign country, but not for the former. Loans, too, could fall under this same artificial classification. Loans avowedly for one purpose might be considered loans to a government for acts *jure imperii* and, therefore, be classified as part of the "public debt," while others would be considered loans for commercial purposes. Thus analyzed, it now appears that this type of reasoning is merely applying to the new phenomenon of state trading the old concepts of the limited functions of government. It matters not, however, to the United States contractor for what purpose the goods or services supplied by him are to be used by the foreign government. The foreign government makes that decision for itself. Thus, a rule applicable to the new governmental function, state trading, must necessarily be recognized. The United States contractor should not have to decide at his peril whether the goods ordered from him are those which only a sovereign may own or use, or how ordinary trade goods are to be used. The law must consider that every valid contract made by a foreign state with a United States national is made in its sovereign capacity, and for all, the state is liable. Otherwise, it is not a binding contract on the state.

VI. HICKENLOOPER AMENDMENT: AN ACT OF STATE IN VIOLATION OF INTERNATIONAL LAW, EFFECT AS BREACH OF CONTRACT

The Hickenlooper or "Sabbatino" Amendment to the Foreign Assistance Act was passed by Congress in 1964 and slightly amended in 1965.

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86. See Kingdom of Roumania v. Guaranty Trust, 250 F. 341 (2d Cir. 1918).
It has been interpreted generally to mean that a United States court may find that a confiscatory act of state by a foreign sovereign is invalid and of no effect to transfer title to a foreigner's property within the country which executed the decree purporting to affect foreign property. A breach of a commercial contract by a foreign sovereign might, in some instances, be made by just such a confiscatory act or such an act might accompany a breach of contract.

It should be recognized that, in addition to the exceptions expressed in the law, two further exceptions have been made to the Amendment, and both by the Congress which passed the Act. A third exception may now be necessary. The first exception Congress expressed in amending the Act in 1965. It stated that nothing in the Act would prevent a bank or an insurance company from pleading the act of state as a valid transfer of property, and thus, as a defense to avoid double liability. The second exception is found in the amendment to the Foreign Claims Settlement Act. There, Congress provided for the filing and adjudication of claims of United States nationals against Cuba, particularly for its confiscatory acts (the very ones involved in the law and decision of the Sabbatino case). Under the Foreign Claims Settlement Act those subject to confiscatory decrees may file their claims on the basis of the full value of their confiscated property in Cuba. In this manner, Congress reverted in principle to the older rule that a confiscatory act could, in determining damages, be considered a "forced sale" which would, of course, carry with it the property's title. Now, a third exception must be established to recognize that a breach of contract by, or accompanied by, a confiscation should be treated as a breach of contract, and the forceful transfer of title to any property recognized as one of the elements of damages.

VII. JURISDICTION AND SERVICE OF PROCESS

With respect to jurisdiction, the initial question is: What is the basis on which a United States court can acquire jurisdiction in contract and tort over a foreign sovereign when the foreign sovereign must be considered an entity (corporation) whose head office is outside the United States and whose property within the United States might not be attachable?

88. Id.

89. In S. Rep. No. 170, 89th Cong., 1st Sess. 19 (1965) it was stated that the amendment's purpose was "to make it clear that the law does not prevent banks . . . from using the act of state doctrine as a defense to multiple liability upon any contract or deposit . . . where such liability has been taken over or expropriated by a foreign state . . . ."


For many years the Supreme Court case of Pennoyer v. Neff\textsuperscript{92} determined the limitation of the exercise of a state court's jurisdiction. This case laid down the rule that (absent consent or voluntary appearance in a case) a state court's power over a defendant was imperfect; it could not enter a judgment against one (a) who was not served with process within the state or (b) whose property in the state had not been brought under judicial control and a lien imposed upon it prior to the service of process and statutory notification.

In 1945, and thus before the Tate Letter, the issue of jurisdiction again came before the Supreme Court. The Court held that the limitations prescribed in Pennoyer were too narrow and unrealistic to meet the conditions of modern trade over state boundaries and that, in definitely prescribed areas, depending upon the relation of the parties, a state court could properly exercise jurisdiction where the precedent conditions required in Pennoyer could not be met.\textsuperscript{93} The Court also found that the strict requirement of the older rule might prevent the meting of substantial justice, and that justice and the concept of fair play should be the basis of due process of law. The foundation of jurisdiction in this new dispensation rested chiefly on the \textit{economic contacts} which the parties or their actions had with the state in whose courts the plaintiff sought relief.

Some half-dozen states in the United States have adopted the Supreme Court doctrine. These states have permitted their courts, under certain circumstances, to assume personal jurisdiction over foreign corporations.\textsuperscript{94} And so \textit{pari passu} with the change and increase of governmental activities in conducting state business internationally has come recognition of courts' personal jurisdiction over foreign nationals.

While no suit in federal or state courts based upon a foreign sovereign's tort has yet been allowed, various states have provided the means to bring suit. Perhaps, the most common tort committed by a citizen of one state upon a citizen of another involves automobile accidents. Here, the party liable is not a citizen of the state, nor is his car licensed in the state where the accident occurred. Such a person may very well have left the state in which the accident took place long before the potential plaintiff could serve him with process or meet the other requirements established in Pennoyer. Again, a number of states have passed laws which make the bringing of a foreign registered car into the state a privilege.\textsuperscript{95} Of course, no state can prevent a citizen of another state from entering, but it can and has restricted the use of the foreigner's automobile to the condition

\begin{footnotesize}
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\item \textsuperscript{92} 95 U.S. 714 (1877).
\item \textsuperscript{93} International Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).
\item \textsuperscript{94} E.g., N.Y. C.P.L.R. 302 (1963).
\item \textsuperscript{95} E.g., N.Y. Veh. & Traf. Law § 253(1) (1960).
\end{itemize}
\end{footnotesize}
that if he drives on that state's highways he has subjected himself to that state's jurisdiction, and has appointed someone, usually the secretary of state, to accept service on his behalf. These laws create an unrebuttable presumption that for the privilege of operating an out of state vehicle, the owner or operator has consented to the state court's jurisdiction. There is no reason why these automobile statutes should not be expanded to other torts committed within the state and apply to a foreign sovereign.

Valid service of court process on a foreign sovereign by service on his duly authorized agent, an official of that state's government, is, of course, necessary for a court to acquire jurisdiction over that foreign sovereign. The problem, therefore, is not whether the court has jurisdiction, but the manner in which service may be effected. An action can never be perfected in personam unless the defendant has received the court's process (actually or constructively) advising him that an action has been or is being commenced against him and giving him the opportunity to acquire all information necessary to demur, make an appropriate motion, or defend the action. Due process of law permits nothing less.

In the United States, lack of a prescribed method of service of process on a foreign sovereign for breach of a commercial contract is probably the greatest stumbling block to suit. The Tate Letter purported to deprive a sovereign of the defense of sovereign immunity for any wrong committed in the inception and operation of a commercial contract. This deprivation is meaningless, however, unless the court already has jurisdiction over the sovereign. On a number of occasions, United States businessmen have unsuccessfully attempted to serve a foreign sovereign.96 The mistakes of the past should not be repeated. Therefore, it is well to observe what should not be done so that a method by which service on a foreign sovereign may effectively be accomplished can be created. First, then, let us consider methods that should not be attempted.

A. Service Should Not be Attempted On an Ambassador.

Such service has been tried and has failed.97 It is also contrary to the general immunity which ambassadors have enjoyed since before the days of the Roman Empire,98 and may be contrary to United States law.99 Then,

98. 1 W. Blackstone, supra note 27, at *252-54.
99. See 22 U.S.C. § 252 (1964) which states that: "Whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any ambassador or public minister of any foreign prince or State, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void."
too, from a practical standpoint, a foreign government has complete discretion over whether to make its ambassador a commercial agent for the service of process. Also, the United States State Department has indicated that service on an ambassador is not the proper way to commence a suit against a foreign sovereign. For example, a foreign shipping company (Greek) desired to sue in United States courts the Tunisian Government. The basis for suit was that a Greek ship had been damaged in a Tunisian port because of the alleged carelessness of the Tunisian authorities. Service was attempted on the Tunisian Government by service on the Tunisian ambassador. The Tunisian Government argued that the service was invalid and that the suit should be dismissed. The State Department expressed a similar view in a letter from its Legal Adviser to the court of appeals. It stated:

The maintenance of friendly foreign relations between the United States and the sending state concerned would certainly be prejudiced by service of process on an ambassador against his will. The sending state might well protest to the Department that the United States had failed to protect the person and dignity of its official representative, and might complain particularly that service was by an officer of the United States Government, namely, a United States Marshal. Other governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice.

The court agreed and dismissed the suit.100

B. An Action May Not be Commenced by Attachment

This, too, has been attempted and has failed. Assuming that sovereign property used for diplomatic purposes is, and should be, immune from attachment, the question arises whether sovereign property used for trading purposes should have this same immunity. Two cases are illustrative, but disappointing, as an answer to the question of how jurisdiction can be obtained over a sovereign who has consented, impliedly or actually, to the jurisdiction of United States courts in a controversy arising out of a contract or the commission of a tort. These two cases may be digested as follows:

In 1955, a federal district court dismissed the complaint in the case of New York & Cuba Mail Steamship Co. v. Republic of Korea101 because of lack of jurisdiction due to invalid service. The S. S. Virginia City Victory owned by the New York Mail & Steamship Co. had carried a


load of rice to the port of Pusan, Korea, and in the process of unloading had been damaged by a lighter belonging to the Republic of Korea. The Republic of Korea had alleged that the cargo of rice had been acquired by it—not for sale, resale, barter or exchange—but for free distribution to its civilian population and military personnel in Korea. The allegations seem irrelevant unless they are presumed to indicate that the transaction was not a commercial one. But the transaction was certainly commercial to the owner of the carrying ship. The owner of the damaged ship first endeavored to commence an action by personal service on the Korean Consul General in New York. This was dismissed on an affidavit asserting sovereign immunity, and that the Consul General was not authorized to accept service. The owner then attached property which it alleged belonged to the Republic of Korea. At the request of the Korean Government, the United States then filed a “suggestion of immunity” which stated that:

[U]nder international law property of a foreign government is immune from attachment and seizure, and that the principle is not affected by [the Tate Letter] . . . .\textsuperscript{102}

However, the State Department also explained that it had not requested that the sovereign be granted immunity because the particular acts out of which the cause of action arose were not shown to be purely governmental in character. Thus, the State Department recognized that while the sovereign’s property was immune, the sovereign was not. The State Department, therefore, attempted to reiterate its position in the Tate Letter. Based on this communication, the court decided that since jurisdiction rested upon seizure under the writ of attachment, it need not determine whether Korea was immune from such a cause of action. The court vacated the attachment.

Here was an instance of a possible right. Certainly the State Department did not deny it to be a right. But, there was no apparent way of securing jurisdiction to determine the sovereign’s alleged liability because there was no way to make valid service.

The other case, Weilammann v. Chase Manhattan Bank,\textsuperscript{103} was an action to recover from the Union of Soviet Socialist Republics (U.S.S.R.) on its promise to pay in installments an amount alleged to be due for the acquisition of mines in Northern Europe. To obtain jurisdiction over the sovereign, two bank accounts maintained with the Chase Manhattan Bank were attached. One such account was carried under the name “State Bank of the Union of Soviet Socialist Republics,” and the other, “Bank for Foreign Trade of the USSR.” The action was initiated by the

\textsuperscript{102} Id. at 685.
\textsuperscript{103} 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).
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judgment creditor to secure satisfaction from these two bank accounts. In short, it was an action in aid of attachment. The U.S.S.R. requested from the Department of State a “suggestion” that the bank accounts attached were immune from seizure under the warrant of attachment by which the court had acquired jurisdiction. The Department of State recognized the Russian claim and filed a suggestion of immunity. It indicated that the U.S.S.R.’s property was immune from execution and other action analogous to execution, and that the court should proceed to release any property attached. The resulting release caused the court to lose jurisdiction.

C. Service Should be Made On the Government Itself or Appropriate Agency at the Capitol of that Government

The precedent for this opinion may be found in two cases, *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*[^104] & *Petrol Shipping Corp. v. Kingdom of Greece*.[^105] The facts of these cases were very similar. Both were actions for a breach of charter party where the sovereign government involved had agreed to arbitration (consent) and later had refused to fulfill its obligations under the agreement. In each case only judicial relief was possible. Under the consent to arbitration the courts had jurisdiction. They would also have had jurisdiction under a New York statute. Under the consent and the statute, service extra-territorially would have been permitted. The New York statute in question was identical in purpose and similar in its draftsmanship to those adopted by several other states. They are popularly known as “long arm statutes.” The New York law reads as follows:

§ 302. Personal jurisdiction by acts of non-domiciliaries

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

(i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

(ii) expects or should reasonably expect the act to have consequences in the

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state and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state.\textsuperscript{108}

The Department of Justice had reviewed service under the long arm statute in an earlier case in which the validity of service was upheld and a petition for certiorari denied.\textsuperscript{107} The United States Solicitor General pointed out in an amicus brief the decision's importance. Without taking a position as to the correctness of the lower court's decision, he said:

Since the decision below will govern all similar contracts in the New York area—a center of international commercial activity—it has great importance.\textsuperscript{108}

But there is, of course, no reason why one state or group of states, although centers of international commercial activity, should have this particular advantage. It would seem, therefore, that a federal statute should be enacted which directs that service be made on a foreign government by registered mail, similar to the manner of serving private foreign corporations under the long arm statutes.

VIII. Nonprocedural Matters Relating to, or Defining, National Policy Which Must be Decided by Congress With the Advice of the Various Departments of Government

Assuming that the method of bringing a foreign sovereign into court on commercial matters is, or will be, strictly in accord with due process, attention must be turned not to procedural matters but to substantive matters of policy.

A. Shall the Relief of Suit Against a Foreign Sovereign be Limited to United States Nationals?

United States courts are generally open to foreign nationals for suits against the United States Government.\textsuperscript{109} In addition, many treaties\textsuperscript{110} exist between the United States and other countries which grant to the citizens of those other countries “national treatment.” This means that while the citizens of that country are within the United States they have the same rights and privileges in United States courts that a United

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\textsuperscript{107} See note 108 infra.
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States national enjoys. The question here is: Shall the privilege be granted of suing in United States courts a sovereign foreign both to the alien plaintiff and the United States? Also important is whether it might be possible for some foreigner to attempt to sue his country in United States courts, lacking that privilege in his own domestic courts. This matter, therefore, should be seriously considered if the United States Courts' jurisdiction is based upon the foreign country's actual or implied consent. Then it cannot be assumed that the foreign country has also consented to be sued in United States courts by someone who is not a United States national. Consequently, the refusal to permit an alien to sue in United States courts, if that be determined, should be based upon the general policy of the United States and the terms of the contract, rather than upon the general rights of a foreigner to litigate in United States courts.

An alien endeavoring to sue a foreign country in United States courts under the principles of the Hickenlooper Amendment as interpreted in Banco Nacional v. Farr\textsuperscript{111} is an illustration of what might occur. In Farr, the Amendment was construed in favor of a United States national who claimed ownership to a quantity of sugar confiscated by Cuba. The United States court, which had the sugar's paid-in purchase price within its control, awarded it to the United States national on the ground that, since the confiscation was contrary to international law, title did not pass but remained in the United States national. A Belgian company,\textsuperscript{112} whose concession for mining copper had been confiscated in Katanga issued a general notice in the United States declaring that if any copper was imported to the United States from that foreign usurper, the copper would be claimed by the Belgian company. This, of course, would have made any contract between the American copper importer and the foreign government ineffective or would subject the United States importer to double payment. It would also deprive the American market of any future shipments of such copper. Congress did not intend by passing the Hickenlooper Amendment to permit foreign companies to affect adversely United States foreign trade. Yet, this would be the result if the copper company was permitted by suit to carry out its threat.

Another reason why the United States might wish to limit to United States nationals the privilege of suing a foreign country in United States

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\textsuperscript{112} "Union Minière du Haut Katanga threatened legal action against purchasers of products from a provisional Congolese operating mineral company. Union Minière issued the warning in response to seizure of its assets and properties in the Congo by the government of the African state on New Year's Day." Wall St. J., Jan. 4, 1967, at 4, col. 3.
courts can be expressed in the form of a question: Would the United States wish to become a collection agency for foreign nationals against foreign countries, particularly when the foreign national could not get such relief in his own country? Such a possibility was recognized by a court of appeals judge in a suit against a foreign sovereign:

In the circumstances here—where both parties to the basic suit are foreign to this country, and the respondent is a foreign sovereign government, where the acts alleged to have given rise to the claim occurred wholly outside the United States, where the witnesses to such acts all appear to be located outside this country, where any money judgment rendered against the foreign state would be unenforceable in this country in the absence of a showing that there is property of the sovereign which could be attached—it is clear that no American interest is involved.\footnote{3}

Also, it should be noted that the aforementioned long arm statutes would frequently not be applicable because the requisite economic contacts with the United States were lacking.

B. \textit{Shall the United States by its State Department Retain the Privilege of Granting a Suggestion of Immunity in a Particular Case?}

The answer is no. By the law here suggested the United States will have announced its policy of \textit{no immunity} to a foreign sovereign in a commercial matter. It is the courts' function to interpret the law. They should determine on the facts before them whether under the law the foreign government has breached a contract or committed a tort within the United States, and, if so, whether the sovereign is amenable to our courts.

C. \textit{Shall the United States by its Department of Justice Retain the Right to Appear Amicus Curiae to Present the United States Interest in the Case?}

The answer is yes. The principal purpose of the United States Government is to defend and protect its citizens. The police powers of any state are broad, and the "public interest" must have a champion.

It may be considered as settled that so much of the royal prerogatives as belonged to the King in his capacity of \textit{parens patriae}, or universal trustee, enters as much into our political state as it does into the principles of the British constitution.\footnote{4}

The United States' obligations to its citizens and the public interest generally have not changed.


D. In any Case wherein a State Court has Jurisdiction, shall Removal Statutes apply to give Federal Courts Jurisdiction?

Any federal law which grants to federal courts jurisdiction over a foreign sovereign in commercial cases should decree that such courts have exclusive jurisdiction in personam over that defendant. But, to that general statement there must be exceptions where the state court would have exclusive jurisdiction of the subject matter of the action. Here, the state courts should retain jurisdiction. The courts themselves, both federal and state, can make the proper decision under the present removal statute.

E. Shall the Statute of Limitations be Retolled for any case arising after the Date of the Tate Letter (1952) where the Complainant Failed to Secure Jurisdiction?

Many believed that the State Department initially induced a hope by the Tate Letter that contracts thereafter entered into with a foreign sovereign would be enforceable, and then, by subsequent “suggestions of immunity,” showed that the hope was, indeed, a false one. If congressional action is taken in this matter then the courts will be empowered to decide whether or not a case can be decided under the new law. Where a commercial suit against a foreign sovereign has been dismissed for lack of jurisdiction, the courts should have the discretion, consistent with United States policy, to determine if that case may again be prosecuted notwithstanding the running of the statute of limitations.

F. May a Case be Reinstated where a United States Businessman Claims a Breach of Contract by Reason of the Unwarranted Use of Exchange Controls Imposed upon Him After the Contract was Made?

The problem here is a very simple one, but of the utmost importance in international relations. Suppose a businessman has entered into a contract and has sold goods to a foreign government. The foreign government has agreed to pay a certain amount in the United States in dollars, but has breached the contract. Assume then that the foreign government invokes a foreign exchange law or a rationing under existing foreign exchange regulations and refuses to license payment in dollars of the amount of damages. In effect, the foreign government has refused to pay and has pleaded, when sued, the Bretton Woods Agreement. Under

115. For a discussion of actions involving a sovereign government under state law see text accompanying notes 125 & 126 infra.
117. Articles of Agreement of the International Monetary Fund (Bretton Woods Agree-
the Agreement countries party to it recognize the validity of each other's exchange regulations. This would be an effective breach of contract which would leave the plaintiff without a remedy. Justice Holmes pointed out that the performance of a legal act for the ulterior purpose of hurting another is an unlawful act.\textsuperscript{118} The question for Congress then is: Shall a court, on finding that the foreign exchange regulations had been used by the foreign sovereign to save itself from the obligation of an unprofitable or improvident contract, adjudge that the contract had been broken by an unwarranted use of foreign exchange regulations? Other ways of expressing the question are: Must United States courts uphold uncritically the imposition and operation of foreign exchange controls and not examine the purpose for which, in a particular case, they were invoked? Should these courts weigh and consider the fact that the very sovereign which entered into the contract is the one which has made the contract impossible to perform by the imposition of exchange controls or the refusal to grant a license?

IX. ITEMS FOR THE PROTECTION OF FOREIGN SOVEREIGNS

A. \textit{What Evidence may a Foreign Nation be Compelled to Give, and What Penalties may be Imposed for not Producing Evidence?}

In a commercial action, a foreign country may consider relevant evidence to be of great importance and, in order to protect its own national interest, may not be willing to produce it. Should a sovereign be compelled to do so? What should be done if the foreign sovereign refuses? Obviously, a sovereign would never produce evidence it deemed confidential or permit its diplomatic officers to testify in court on such matters. Therefore, to protect international relations, federal law should declare a foreign country not guilty of contempt of court if it declined, in certain circumstances, to produce certain types of evidence. However, in such an instance the court should have its normal judicial power to continue the action with the usual evidentiary inference as to lack of testimony. It may also stay the proceedings, assess damages, enter a judgment, dismiss the action, or take other measures justice requires to protect the private businessman.

B. \textit{A Judicially Enforceable Obligation of a Foreign Sovereign Should not Include the Public Debt}

There is one obligation assumed by every sovereign which, it is suggested, should not be subject to an enforceable cause of action in another

\textsuperscript{118} American Bank & Trust Co. v. Federal Reserve, 256 U.S. 350, 358 (1921).
country's courts. This is an action to compel the payment of a sovereign's public debt. To compel a foreign country to pay its public debt is generally considered, and here conceded to be, an invasion of its sovereignty. But what is the public debt? There are two kinds of debts which any corporation can incur, and that is true of every sovereign as well. The corporation can "go public" and sell its securities on an open market, subject to whatever regulations may exist as to a corporate assumption of such obligations. Similarly, a government may offer bonds on itself in its own territory or abroad which may be purchased by a citizen or a foreigner. These are the obligations which are the public debt. In addition, both corporations and governments can incur other types of debt. One type consists of private borrowings from foreign banks or syndicates of banks. Many foreign governments have incurred such obligations within the United States. Another type is incurred when governments guarantee an obligation of a private company in whose work the governments have a national interest. It is suggested that these national obligations be considered as private commercial transactions. Frequently, a foreign sovereign, in borrowing money from a lender within the United States, may find that the lender is not willing to rely on its naked promise. In such an instance, the foreign government may agree to waive sovereign immunity, or offer pledges, or other security to induce the granting of a loan. In such an instance, *pacta sunt servanda* may be applied, and the courts should assume jurisdiction and enforce the contract.

The various types of public debt are well exemplified and discussed in a French code proposed a number of years ago.\(^\text{110}\) Significantly, the above distinction is made. The public debt is limited to those government obligations in the form of bonds sold either nationally or abroad on the basis of national credit.\(^\text{120}\) However, a government's borrowings from the domestic banks of another country are considered to be commercial loans *jure gestionis* and should only receive the protection that other commercial transactions receive.

C. Possible Limitation of Liability of a Foreign Sovereign in Tort

The reason often given why a foreign sovereign having diplomatic representatives in the United States should not be liable in tort, and why this immunity should extend to the diplomats themselves, their agents and servants, is that diplomatic officers must be free of the annoyance...
of claims and suits. The fallacy in this argument is that this “annoyance” can be avoided without invoking the doctrine of sovereign immunity. Specifically, the foreign sovereign can enter into a treaty with the United States limiting its liability to a certain agreed amount. This amount may then be covered by liability insurance.

Limitation of liability is not a new idea. Indeed the Warsaw Convention\(^1\) can be used as an illustration. If the liability can be limited to a reasonable amount and be covered by insurance, then justice can be done to the United States citizen who has been damaged by a foreign diplomatic officer. At the same time, that foreign country’s agents, protected by a contract of insurance, will be free from the distractions which are considered, in diplomatic language, as a reason for demanding no liability at all.\(^2\)

X. SHALL COMMENCEMENT OF AN ACTION AGAINST A FOREIGN SOVEREIGN IN CONTRACT OR IN TORT BE PERMITTED ONLY BY COURT ORDER?

Any law on the subject of enforcing a foreign sovereign’s liability in contract or in tort should include in it the method for commencing such an action. It should also define how service of process is to be made. Our question here, however, is what, in addition, must be done as preliminary to commencing action by “service.” Must the potential plaintiff first make an application to a court and secure an order permitting the commencement of such an action? This again is a question of national policy as it affects foreign sovereigns. Admittedly, there are both advantages and disadvantages to permitting the commencement of an action without court permission.

It must be recognized that any action against a foreign sovereign is fraught with both national and international significance. Perhaps, shortly, actions involving government state trading will be so commonplace that they will be of no greater significance than suits against foreign corporations. However, since there are many petitions by foreign governments to the State Department requesting immunity from suit, presently a suit against a foreign sovereign is an extraordinary exercise of judicial power by United States courts.

The advantages of a court order for the commencement of an action against a foreign sovereign are obvious. The very petition for this per-

\(^1\) The Warsaw Convention, Oct. 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876.
\(^2\) Bailey v. City of Knoxville, 113 F. Supp. 3 (E.D. Tenn. 1953). The court stated that: “Sovereign immunity means only that the sovereign may not be sued without its consent. Implied in that immunity is the power to consent. In this State, the carrying of liability insurance is construed as a limited consent, or waiver of the immunity.” Id. at 6.
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mission and the order granting it, if delivered to the foreign sovereign, would give more information to the sovereign as to the action commenced and the claim on which it is founded than the mere service of a summons or even a summons and complaint. Also, the order would direct the method of service, while the filing of proof of service with the court would give some assurance of compliance with United States laws. In addition, addressing a court for permission is an indication that the claimant is making a serious effort to secure judicial determination of a controversy. Such permission and service under a court order would not, of course, in any way diminish the foreign sovereign’s rights in such a controversy.

The disadvantages of such a requirement are also obvious. It would make the type of action an extraordinary one, and, under certain circumstances, due to the delay necessary in making the petition and securing an order, possibly prejudice the plaintiff. Service itself would be more cumbersome, and probably more expensive. The problem is raised here without specific recommendation other than to say that the problem is proper for consideration and legislative decision.123

XI. ACTIONS INVOLVING A SOVEREIGN GOVERNMENT UNDER STATE LAW AND JURISDICTION

The courts of each state have exclusive jurisdiction over certain claims, e.g., when the principal question concerns the ownership of property within the court’s jurisdiction. It is suggested that where the suit commenced against the foreign government relates to its rights or interests in or use of immovable property, the foreign government be recognized to possess the rights and liabilities of any business corporation which held or claimed such an interest.124 Moreover, the procedure to determine those rights and liabilities should be the same as that applied to any foreign business corporation. Here, however, certain immunities should be granted. Diplomatic property should be immune from attachment and execution for commercial debts not specifically related to such property. But, foreign governments should not be immune from the foreclosure of a mortgage or an action to collect rent or other obligation taken in connection with it. In fact, such an immunity is frequently to the disadvantage of a foreign sovereign whose financial resources are limited. Indeed, many lenders are loathe to advance money or rent suitable property to foreign governments because of the whole question of sovereign immunity. This is particularly true when the property in question is not used for

123. The proposed Lemmon Code suggests that suit against a sovereign could be commenced only under court permission. See note 120 supra.
124. See Tate Letter, supra note 59, at 985.
commercial purposes but solely for purposes classified as official acts of state \textit{(jure imperii)}. If the mortgage were treated as any other commercial mortgage with agreements for extension if necessary and final foreclosure if payments were not met, mortgage money would be more readily available. Mechanic’s liens imposed upon a foreign government’s property because of its default of an obligation also should be treated as if they were liens on property owned by a private person.

Similarly, with regard to liens and pledges, it is advantageous to a foreign country in raising capital funds to assure the lender that the normal procedures and liabilities will attach to its pledged property within the United States, even if that pledged property be monetary gold, or gold reserves. Again, the right to proceed against pledged property would be limited to property within the United States’ jurisdiction.\textsuperscript{125} Otherwise, the foreign country’s sovereignty would be prejudiced.

Foreign countries receive surprisingly large numbers of legacies under wills and gifts of property which are subject to the United States’ jurisdiction. Here, also is an area in which a foreign government, as a beneficiary of a legacy or gift, should be treated as any other legatee or donee and be subject to the same processes that exist in the state court which has jurisdiction over the estate. In all such proceedings, however, some additional time might properly be given to a government to appear or answer. The procedure set up for service by mail outside the jurisdiction of the United States might very well be adapted to the procedure of our state courts in administering estates and trusts. In short, the procedure of the Surrogate’s, Prothonotary’s, or Orphan’s Court should be followed subject to any supplementary process as to service or notice which may be thought necessary.

XII. Execution

The final important question is: How may a judgment against a foreign sovereign be satisfied? Here the United States’ attitude will give us no help. It has been consistently held that its “consent” to suit does not include consent for execution to be levied on its property under any judgment against it.\textsuperscript{126} No method whatsoever has been provided to compel satisfaction of a judgment against the United States. The United States has taken this same position as to its property in other countries.

\textsuperscript{125} A person or corporation in possession of pledged property or property normally available for setoff, can commence an action of liquidation or setoff to cause a foreign sovereign to sue if it claims an impropriety in the original action. This would force the foreign sovereign to submit to jurisdiction to determine the right to liquidate or setoff. But the private party’s right should not depend upon this circumstance merely because the contract was with a sovereign.

\textsuperscript{126} See statutes cited notes 14, 16, 22 supra.
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and has extended like immunity to the foreign sovereign's property within the United States. The satisfaction of any judgment against a sovereign is one of national honor. In this respect, the United States' record is good. Judgments against the United States are paid.

The problem of payment is not new. In a treatise published in 1688 on the question of a citizen's rights against a sovereign, it was said:

Although no king in his senses will refuse to pay his honest obligations if he considers that his security and honor rest upon his standing by his agreements, and that it is unworthy of him who is given his position in order to mete out justice, deliberately to trample it underfoot.

Although the United States' record is good, even exemplary in regard to its own obligations, the problem here does not relate to judgments against the United States, but rather those which in the future may be entered against another country. Is the honor of every foreign sovereign sufficient assurance that a judgment rendered against it will be voluntarily paid? Must the United States refrain from instituting some method to compel payment? Is all litigation against a foreign sovereign based on a mere hope that the sovereign will recognize and honorably meet its judicially determined obligations? Private defendants, or their officers appointed to defend actions brought against them, do not always, perhaps even often, admit the accuracy of the judgment against them. In many litigated cases a defendant feels he should prevail, or, at least, that he is not liable for the full amount which the plaintiff claims.

But legislation which is to hold out a remedy to United States businessmen injured by a foreign government may be more a delusion and a snare than an aid if ultimately the successful plaintiff is unable to enforce the judicial decision.

Reviewing various decisions at home and abroad, dicta as to what has been, or may be done, and various actions which have been taken to secure satisfaction, some authority may be found for the following suggestions:

1. All pledged and mortgaged property would be held subject to the satisfaction of a judgment on the ground that the sovereign had consented to such foreclosure as a condition of contract;

2. In


128. 2 S. Pufendorf, De Jure Naturae et gentium Libri Octo 1345 (1934) (footnote omitted).

admiralty, all rules relating to actions commenced in rem, or if in personam in which a seizure in rem is an inherent part of the action, shall be enforced and all liens held valid. The res will be retained under court jurisdiction unless released on the posting of a bond, or other assurance, or dismissed by a court for reasons which would apply to privately owned property. Perhaps, assurance by the foreign government that it would pay any judgment rendered against it would be sufficient; (3) Where a foreign government is state trading through a state owned corporation, the corporation's assets held under its name would be available on execution in satisfaction of a judgment against the corporation; (4) Although not incorporated, any entity, such as a buying commission, which has a fund to carry on its business for the state will have its assets subject to its obligations as in the preceding suggestion; (5) If a foreign sovereign has made an agreement at the time of incurring the obligation, or at any time thereafter, as to the manner in which that obligation will be met, or any fund out of which it will be paid, the court would have full authority to enforce, as a sovereign act, that which the sovereign had agreed to do.

It must be recognized that frequently some sort of coercion is needed for the satisfaction of any judgment. Here, perhaps, the court could exercise its power under the authority of a federal statute, and, while a duly entered final judgment remains unsatisfied, enjoin the foreign sovereign from exercising its economic privilege of state trading in the United States. It is suggested that such coercion should be left wholly to diplomatic agencies.

These are suggestions only and before any legislation is offered to effectuate the Tate Letter by expanding or implementing it, many suggestions should be made, both by United States governmental departments and by United States nationals who have dealt with foreign governments. Suggestions are necessary so that the purpose of the Tate Letter be accomplished, i.e., so that one who deals with a foreign sovereign, or is injured by a foreign sovereign, has his judicial “remedy” for a committed “wrong.”

XIII. Conclusion

The act of state trading, that new phenomenon in commercial intercourse, must be made legally as well as morally responsible. In addition, sovereign governments, as international corporations, must be liable for their agents' tortious acts.