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Sovereign Immunity v. Execution of Judgment: A need to Reappraise Our National Policy

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SOVEREIGN IMMUNITY VS. EXECUTION OF JUDGMENT: A NEED TO REAPPRAISE OUR NATIONAL POLICY

In the United States the doctrine of sovereign immunity has often frustrated the legitimate expectations of private litigants engaged in disputes with foreign governments and has created a recurring problem for American courts. In such disputes, the courts are disposed to follow the determinations of the State Department regarding the extent of immunity to be accorded foreign governments.[1] Since the State Department distinguishes between the immunity of foreign governments from *jurisdiction* and the immunity of their property from *execution* to satisfy adverse judgments, foreign sovereigns are often immune from execution of judgments even where immunity from suit has been denied.[2] Thus, application of the doctrine of sovereign immunity often precludes the right of a litigant to recover against a foreign government and renders the judicial decree a nullity. Further, the ever-increasing governmental control of commercial activity throughout the nations of the world will mean an increase in the number of clashes between the litigant's right to full adjudication of his claim and the foreign sovereign's right to immunity.

This comment will examine the development of the concept of the inviolability of foreign sovereigns and the interrelationship of the Executive and Judicial branches of our government in this area. The permissive trend of courts that allow attachment in aid of *jurisdiction* will then be examined in light of continuing judicial reluctance to sanction the *execution* of judgments secured against foreign sovereigns. Finally, the implications of eventual American trade with China will be discussed in light of the sovereign immunity-execution of judgment problem. The comment concludes that a reappraisal of our national policy in this unsettled area is urgently needed.

I. The Background: Absolute vs. Restricted Immunity

While the principle of sovereign inviolability is well settled in this country, its limits have never been adequately defined by the courts. The landmark case of *The Schooner Exchange v. M'Faddon*[3]

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[1] "The Executive and Judiciary seem to agree on the policy that questions of immunity arising in actions commenced by a private individual and involving the property of a friendly foreign Government should be adjusted rather through the diplomatic channel than by the compulsion of judicial process." Lyons, The Conclusiveness of the "Suggestion" and Certification of the American State Department, 24 Brit. Y.B. Int'l L. 116, 146 (1947) [hereinafter Lyons].

[2] This State Department position is clearly stated in a letter from the Secretary of State to the Attorney General of the United States, June 22, 1959, reprinted in Stephen v. Zivnostenska Banka, Nat'l Corp., 15 App. Div. 2d 111, 116, 222 N.Y.S.2d 128, 134 (1961). Cf. 45 Dep't State Bull. 275, 278 (1961); Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

[3] 11 U.S. (7 Cranch) 116 (1812).

serves as the judicial touchstone for the doctrine of sovereign immunity. In that case, United States citizens brought an action against an armed vessel of the French navy. Plaintiffs alleged that they were the true owners of the ship and that it had been illegally confiscated by the defendant and converted to an armed vessel. However, the Court held that, since the ship was claimed and possessed by the French government as a war vessel at the time of arrest, the vessel was immune from the jurisdiction of the Court. Speaking for a unanimous Court, Chief Justice Marshall articulated the principle:

> The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its want requires, 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.[4]

In *Berizzi Brothers Co. v. Steamship Pesaro*,[5] the Court extended the rule of *The Schooner Exchange* to include merchant ships of the foreign sovereign. In *Pesaro* a libel in rem was brought against a merchant ship owned and operated by the Italian government for trade purposes. The plaintiff claimed damages as a result of the defendant's failure to deliver certain goods. Although the ship had not been part of the Italian naval or military force at the time of arrest, the Court sustained the defendant's claim of immunity since the vessel was controlled and possessed by Italy. Justice Van Devanter, speaking for the majority, stated that:

> We think the principles [of sovereign immunity] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying of trade, they are public ships in the same sense that war ships are.[6]

The *Pesaro* decision represents the "absolutist" approach to sovereign immunity, wherein "a sovereign cannot, without his consent, be made respondent in the courts of another sovereign."[7]

Although *The Schooner Exchange* did not involve the commercial dealings of a foreign government, the Court in *Pesaro* did not hesitate to extend the sovereign's protection to that class of activity.

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[4] Id. at 135.
[5] 271 U.S. 562 (1926).
[6] Id. at 574.
[7] 6 Digest of International Law 553 (Department of State publication, M. Whiteman ed. 1968).

The Court reasoned that the decision in *The Schooner Exchange* was not necessarily restricted to war ships since, at the time of its writing, merchant ships were operated only by private owners and the prospect of governments engaging in such activity had not been contemplated.[8] However, dicta in *The Schooner Exchange* clearly suggests the contrary:

> Without indicating any opinion on this question, it may safely be affirmed that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern.[9]

Ignoring this reasoning, the *Pesaro* Court saw no basis for placing twentieth century governmental commercial activity into a category separate from the traditionally privileged types of sovereign activity.

After *Pesaro*, however, some courts began to adopt a restrictive theory of sovereign inviolability, whereby immunity was accorded to a sovereign's traditional governmental acts, but not to its private or commercial activities. In *Hannes v. Kingdom of Roumania Monopolies Institute*,[10] plaintiff attached monies owned and deposited by defendant in New York banks. Finding that the defendant was an autonomous corporate entity, wholly owned and controlled by Roumania, and formed to exploit certain monopolies and engage in international loans, the *Hannes* court denied the defendant's claim of immunity and defined the restrictive classification:

> The development of the practice of states undertaking commercial activities has led to a distinction in considering the question of immunity between acts of a private nature said to be *jure gestionis* as contrasted with acts of a public nature which are *jure imperii*.[11]

However, it was not until 1952 that the most dramatic reversal of the *Pesaro* doctrine occurred, when the Executive branch, not the Judiciary, formally departed from the absolutist theory of sovereign immunity. In a letter addressed to the Acting Attorney General of the United States—popularly known as the *Tate Letter*—the State Department announced its policy of adhering to the "restrictive

[8] 271 U.S. at 573.

[9] 11 U.S. (7 Cranch) at 145.

[10] 260 App. Div. 189, N.Y.S.2d 825 (1940).

[11] Id. at 196-97, 20 N.Y.S.2d at 833.

theory" of sovereign immunity.[12] The change in policy was prompted by the inconsistency which the State Department saw in granting immunity to foreign governments in our courts while the United States government subjected itself to suit in these same courts as well as those of foreign jurisdictions. Further, the State Department determined that increasing governmental intrusion into commercial activities necessitated recognition of the rights of private persons doing business with foreign sovereigns. For these reasons, the *Tate Letter* was issued with the intent of abating the continued application of the absolutist theory.

The State Department believed that the *Tate Letter* was the most effective means of assuring judicial application of the restrictive theory of sovereign immunity since the Department "felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so."[13] Prior to the issuance of the *Tate Letter*, the Supreme Court had established the practice of deferring to pronouncements of the Executive on matters of sovereign immunity. In *Republic of Mexico v. Hoffman*,[14] a libel was instituted against a Mexican vessel for damages arising out of a collision. Since the Mexican government owned the vessel, which was operated by a privately owned and operated Mexican corporation, the Mexican Ambassador filed a claim of sovereign immunity. The Court held that mere government title in the ship, without governmental possession, was not sufficient to entitle the vessel to immunity. The Court rested its decision on the fact that the State Department had chosen not to suggest that the vessel was immune from suit, even though there had been ample opportunity to do so:

> We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize . . . .[15]

Notwithstanding an admission in the *Tate Letter* that the shift in policy from the "absolutist" to the "restrictive" theory of sovereign immunity "by the executive cannot control the courts,"[16] the Supreme Court continues to acknowledge the propriety of State Department determinations of sovereign immunity "to avoid adju-

[12] The Tate Letter, from Jack B. Tate, the Acting Legal Advisor of the United States Department of State, to Philip B. Perlman, the Acting United States Attorney General, reprinted in 6 Digest of International Law, supra note 7, at 569-71.

[13] Id. at 571.

[14] 324 U.S. 30 (1945).

[15] Id. at 38.

[16] 6 Digest of International Law, supra note 7, at 571.

dications which might affront the dignity of a sovereign and thus embarrass the executive."[17] In *National City Bank of New York v. Republic of China*,[18] an action was instituted by the Republic of China for the payment of monies deposited by an agency of that government with the National City Bank. The bank counterclaimed and sought an affirmative judgment on defaulted Treasury Notes of China owned by the bank. Despite the Republic of China's claim of immunity, the Supreme Court permitted the counterclaim and, noting the State Department's silence, stated that "the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit. Its failure or refusal to suggest such immunity has been accorded significant weight by this Court."[19] Commenting specifically on the restrictive theory pronouncement of the *Tate Letter*, the Court in *National City Bank* stated that the State Department correspondence represented a broad denial of immunity for the commercial activities of foreign sovereigns, notwithstanding the rejection of such a distinction in *Pesaro*.[20] Thus, while the Supreme Court did not specifically overrule *Pesaro*, it effectively vitiated the reasoning of that decision by following the Executive's policy determination in the Tate correspondence.

Lower courts have also shown a readiness to adopt and apply the restrictive theory of sovereign immunity. In *Chemical Natural Resources, Inc. v. Republic of Venezuela*,[21] the foreign sovereign was sued in assumpsit. Plaintiff attached a merchant ship, allegedly owned by the Republic, to gain jurisdiction over the sovereign, whereupon a "suggestion of immunity" was filed by the State Department. In upholding the claim of immunity, the Pennsylvania Supreme Court adopted the United States Supreme Court's regard for State Department pronouncements in this area. The court also noted that the *Tate Letter* stated "in clear and unmistakable language that the Department has abandoned its long established principle of *absolute* governmental immunity."[22] Thus, courts now look upon the restrictive approach embodied in the *Tate Letter* as the authoritative guide in sovereign immunity cases.[23] Without having been reversed in fact, the absolutist approach of *Pesaro* has been effectively abandoned by the courts for reliance upon a policy position of the State Department in which foreign sovereigns are no longer immune from the jurisdiction of American courts in every situation.

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17 Lyons, supra note 1, at 146.

18 348 U.S. 356 (1955).

19 Id. at 360.

20 Id. at 361.

21 420 Pa. 134, 215 A.2d 864 (1966).

22 Id. at 159, 215 A.2d at 875.

23 Cf., National Institute of Agrarian Reform v. Dekle, 137 So. 2d 581 (Fla. 1962); Republic of Cuba v. Dixie Paint and Varnish Co., 104 Ga. App. 854, 123 S.E.2d 198 (1961).

II. Inconsistency in the State Department Policy

Although the *Tate Letter* indicated that protection of the rights of private persons doing business with foreign governments was a major concern of the State Department, existing Department policies continue to frustrate such protection. This problem is caused by the distinction drawn by the State Department between immunity of a foreign sovereign from jurisdiction and immunity of its property from execution:

> The Department is of the further view that, where under international law a foreign government is not immune from suit, attachment of its property for the purpose of *obtaining* jurisdiction is not prohibited. In many cases jurisdiction could probably not be obtained otherwise. But property so attached to obtain jurisdiction over the defendant government cannot be retained to *satisfy* a judgment ensuing from the suit because in accordance with international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit.[24]

Thus, a judgment secured against a foreign sovereign provides empty relief for the private litigant in such disputes and renders the judicial decree devoid of any real force or effect. Furthermore, the "jurisdiction-execution" distinction is inconsistent with the *Tate Letter* purpose of protecting the rights of private persons doing business with foreign governments since it enables sovereigns to avoid responsibility for their commercial obligations.

Nevertheless, the State Department's view has been accepted by the courts. In *Three Stars Trading Co. v. Republic of Cuba*,[25] plaintiff was allowed to attach debts owed to Cuba by persons in the United States. The court reasoned that since the foreign government is permitted to make money through commercial activities in the United States, it should be required to respond in our courts to disputes arising from those commercial contracts. However, the court noted that Cuba could successfully claim immunity from execution by "appropriate subsequent proceedings."[26] In *Flota Maritima Browning de Cuba v. Motor Vessel De La Habana*,[27] a libel was brought against a vessel in 1959. In 1960, the Republic of Cuba entered the case claiming ownership of the ship and, in 1962, the Republic claimed immunity with respect to the seized vessel. The court

[24] Stephen v. Zivnostenska Banka, Nat'l Corp., 15 App. Div. 2d 11, 116, 222 N.Y.S. 2d 128, 134 (1961) (emphasis added).

[25] 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961).

[26] Id. at 6, 222 N.Y.S.2d at 678. The court was referring to the sovereign's request for a "suggestion" of immunity from the State Department in any subsequent action brought by the plaintiff to enforce execution of the judgment against the sovereign.

[27] 218 F. Supp. 938 (D. Md. 1963).

found an implied waiver of immunity by Cuba since the plea had not been timely or properly made. However, the court also stated that:

> [A] foreign state should be allowed to reserve its claim of execution immunity while waiving jurisdictional immunity and joining issue on the merits. It ought not to be under any obligation to reserve in any way its right to assert immunity of its unrelated, unarrested property from execution when it appears generally and waives its jurisdictional immunity.[28]

These cases indicate that, notwithstanding possible inequities to private litigants in actions involving the property of a foreign sovereign, the issue of "immunity from execution" should be determined through diplomatic channels rather than through judicial proceedings.

The inconsistency of a policy distinguishing between "immunity from jurisdiction" and "immunity from execution" is highlighted by the fact that, in most cases where immunity from suit is denied, jurisdiction over the foreign government can be obtained only by attachment of the sovereign's property. In *Purdy Co. v. Argentina*,[29] an action on a contract for the sale and delivery of goods was brought against Argentina and the department which owns and operates the steel industry of that country. Service of process was made on the Argentine Consul in Chicago. The court held that service on the consul was insufficient to establish in personam jurisdiction over the sovereign since he "was not by law or specific appointment the agent . . . for service of process."[30] However, the court indicated that the doctrine of restrictive immunity could "otherwise have full recognition and application"[31] in this case if the plaintiff obtained quasi in rem jurisdiction by attaching property of the sovereign.

Ambassadors have similarly been held not subject to service of process. In *Hellenic Lines, Ltd. v. Moore*,[32] a libel was filed in personam against the Republic of Tunisia. A summons in this suit was addressed to the Tunisian Ambassador in the United States. When the defendant, a United States Marshal, declined to deliver the summons on grounds of diplomatic immunity, the plaintiff brought a mandamus action to compel service. In dismissing the action, the court relied upon a "suggestion" by the State Department that such service "would prejudice the United States' foreign relations and would probably impair the performance of diplomatic functions."[33]

It should be noted that not all attempts to gain in personam jurisdiction will fail. In fact, a recent federal court decision denied

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[28] Id. at 944.
[29] 333 F.2d 95 (7th Cir. 1964).
[30] Id. at 97.
[31] Id.
[32] 345 F.2d 978 (D.C. Cir. 1965).
[33] Id. at 980.

in rem jurisdiction where it was possible to gain in personam jurisdiction. In *Prelude Corp. v. F/V Atlantik*,[34] the United States District Court for the Northern District of California denied the attachment of a Soviet freighter which had been seized in order to gain jurisdiction. The plaintiff, a Massachusetts corporation engaged in lobster fishing, sought to recover damages from the U.S.S.R. for alleged interference with the plaintiff's fishing activities off the Atlantic Coast. In an attempt to gain jurisdiction over the U.S.S.R., the plaintiff attached the Soviet ship *Suleyman Stalskiy* in San Francisco. However, the court denied attachment on the presentation of the U.S.S.R. that the owner of the attached freighter, the Far East Steamship Corporation (FESCO), was a juridical entity sufficiently independent from the government under Soviet law to bear responsibility for its obligations. The court further based its ruling on the fact that, even if FESCO were a direct instrumentality of the Soviet government, Soviet agents or representatives were available for service of process, thereby precluding attachment as a means of gaining jurisdiction. In *Victory Transport, Inc. v. Comisaria General*,[35] service of a petition to arbitrate, pursuant to Section 4 of the United States Arbitration Act,[36] was made by mail to a branch of the Spanish Ministry of Commerce. The Court of Appeals for the Second Circuit found that there was in personam jurisdiction based upon the parties' consent to arbitrate in New York. Nevertheless, the court recognized that while there is no bar to in personam jurisdiction over a foreign sovereign, "in most cases jurisdiction . . . is obtained in an in rem proceeding."[37]

Although the "immunity from execution" of a foreign sovereign's property is recognized by the State Department and followed by most courts, it has not been granted in every case. In *Stephen v. Zivnostenska Banka, Nat'l Corp.*,[38] a suit was brought in New York to recover sums of money deposited in a nationalized bank of the Republic of Czechoslovakia. Despite a "suggestion of immunity" filed by the State Department, the court affirmed a lower court order restraining various American banks from transferring property of the defendant. The court reasoned that the suggestion did not "assume to determine disputed issues of title"[39] regarding the property since such a determination "necessarily involves the legal effect and implications of the final judgment herein . . . . The suggestion of immunity from execution of the property of the Republic of Czechoslovakia does not avail the defendant and has no application to its property."[40]

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[34] Civil No. C-71 1123 (N.D. Calif., June 15, 1971).
[35] 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).
[36] 9 U.S.C. § 4 (1970).
[37] 336 F.2d at 363.
[38] 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961).
[39] Id. at 119, 222 N.Y.S.2d at 137.
[40] Id. at 120, 222 N.Y.S.2d at 137-38.

In *National City Bank of New York v. Republic of China*,[41] where the court permitted a counterclaim against the Republic of China on a matter unrelated to the original action, the defendant-bank was permitted to setoff its claim against that of the sovereign. The court felt that implicit in the concept of sovereign immunity is the notion "that considerations of fair play must be taken into account in its application."[42] However, *National City Bank* cannot be construed as a sweeping attack on the "jurisdiction-execution" inconsistency, since the "fair play" consideration was narrowly applied to the facts of the case. The court reasoned that it would be unfair to allow the Republic of China to avail itself of the benefit of bringing suit in an American court, only to deny the right of counterclaim to the defendant in the same action. Further, the court limited the defendant's recovery to a setoff against the sovereign's claim. The *Stephen* decision is similarly narrow since the court was concerned with the issue of title to property and rejected the State Department's "suggestion of immunity" only upon a finding that the sovereign never owned the property in the first place. Thus, these cases do not substantially depart from the State Department policy; rather, they merely represent specific exceptions to that policy.

III. Reevaluation of "Immunity from Execution"

It seems clear that denial of the right to execution of judgments in their favor accords empty relief to private persons doing business with foreign sovereigns[43] and, in light of the time and expense involved in litigation, deprives them of the fruits of their efforts.[44] The argument that the conduct of diplomatic relations necessitates this inequitable treatment is unrealistic since the "restrictive" application of sovereign immunity is predicated upon the theory that sovereigns engaged in commercial ventures must accept the obligations which attach to such activity, and that, therefore, they should not be immune from suit. This theory indicates that the business relationships of sovereigns should be created and maintained on the basis of commercial expertise, rather than on considerations of national dignity.[45]

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[41] 348 U.S. 356 (1955).

[42] Id. at 364.

[43] "[T]o refuse jurisdictional immunity only to subsequently allow immunity from execution amounts to making the exercise of jurisdiction a purely nominal act . . . ." García-Mora, The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications, 42 Va. L. Rev. 335, 359 (1956). See also International Law—Sovereign Immunity—Seizure of Property Under Restrictive Immunity Doctrine, 54 Mich. L. Rev. 1008 (1956); and Lauterpacht, The Problem of Jurisdictional Immunity of Foreign States, 28 Brit. Y.B. Int'l L. 220 (1951).

[44] Mann, State Contracts and International Arbitration, 42 Brit. Y.B. Int'l L. 1, 30-31 (1967).

[45] It is doubtful that this assumption applies to the Peoples Republic of China since under its "system of state monopoly of foreign trade, the citizens of the [Peoples Republic of China] are themselves denied the right to do private business with foreign countries . . . ." Therefore, "as sole owner of all business corporations and productive

Thus, enforcement of foreign sovereigns' commercial obligations by American courts should not be a source of embarrassment to the Executive branch in its conduct of foreign affairs. For these reasons, it is submitted that the State Department's "jurisdiction-execution" distinction should be reexamined and a new national policy formulated which would effectuate the intent of the *Tate Letter* to protect the rights of private American enterprise. Specifically, in actions instituted by private parties against foreign governments arising from the private or commercial activities of the latter, the State Department should no longer mechanically recognize immunity of the sovereign's property from execution in all situations.

This policy, which would serve to insure a just result in such disputes, finds ample precedent in the law of many countries. In *Kingdom of Greece v. Julius Bär & Co.*,[46] an action was brought by a Swiss bank to redeem a bond issued by the Greek government. The Federal Tribunal of Switzerland rejected the claim that the foreign sovereign's immunity from execution should be absolute. The Tribunal reasoned that the presence of a foreign state before a Swiss court to determine the rights and obligations of the foreign government implicitly requires the execution of any judgment against that sovereign:

> If that were not so, the judgment would lack its most essential attribute, namely, that it will be executed even against the will of the party against which it is rendered. It would become a mere legal opinion. Moreover, while its effects would be less directly felt than those of measures of execution, such an opinion would also affect the sovereignty of the foreign State. If, therefore, measures of execution against a foreign State were prohibited in order to safeguard its sovereignty, logically the exercise of jurisdiction would likewise have to be prohibited.[47]

In *Government of Peru v. S. A. Sociedad Industrial Financiers Argentina*,[48] the Argentine Supreme Court entered a judgment against Peru on a debt owed to an industrial financial society. The court allowed the execution of this judgment stating that:

> In view of the fact that the plaintiff State voluntarily submitted to the jurisdiction of the Court in the original action, it must be presumed that the State will also comply with whatever proceedings are necessary for the performance of the Court's decision, provided that said proceedings are

property, the state simply cannot treat foreign nationals on an equal footing . . . ." Hsiao, Communist China's Trade Treaties and Agreements (1949-1964); 21 Vand. L. Rev. 623, 645 (1968).

[46] [1956] I.L.R. 195 (Federal Tribunal, Switzerland).

[47] Id. at 198-99.

[48] 26 I.L.R. 195 (Supreme Court, Argentina 1958).

> compatible with the norms and principles of international law. Compliance with the judgment by the legal representative of the foreign State at his official residence in no way constitutes an infringement of his privileges and immunities; rather is it conducive to the realization of a just settlement of the disputes between the parties.[49]

There is a cautionary note in the Argentine Supreme Court's decision that execution of a judgment against a foreign sovereign must be "compatible with the norms and principles of international law."[50] This indicates that denial of "immunity from execution" in such disputes will not obtain in every case, but only where the dignity of the sovereign is not threatened. For this reason, in the courts of many countries, the nature of the property sought to be used in satisfaction of a judgment is determinative of a foreign sovereign's right to "immunity from execution."[51] If the property is in the sovereign's possession by virtue of that government's character as a public authority, then the property is immune. However, if the sovereign acquires and maintains the property in the course of its commercial activities, then it is not immune. In *British Government and the Municipality of Venice v. Guerrato*,[52] a wrongful death action was instituted in Venice against the British government. Judgment was entered against the government and the plaintiff sought to execute that judgment by an action to levy distress on a building in Venice owned by Britain. The Ministry of Justice of Italy acknowledged its disfavor with the practice of denying private litigants the right to satisfaction of judgments against sovereigns, but declined to allow execution in this case because the property was an integral part of Britain's governmental function.

The Egyptian courts follow a similar policy, but allow "immunity from execution" in one other situation—where the property sought to be used to satisfy a judgment against a foreign government is located in the sovereign's territory. In *Egyptian Delta Rice Mills Co. v. Comisaria General de Abastecimientos y Transportes de Madrid*,[53] the plaintiff-company had contracted to sell rice to the Spanish Comisaria General. A court order was subsequently obtained directing the defendant to pay the overdue balance of the purchase price. When the plaintiff sought to use the defendant's funds, located in Egypt, to satisfy the order, the Commercial Tribunal of Alexandria dismissed the defendant's plea of "immunity from execution" and stated that:

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[49] Id.

[50] Id.

[51] For a listing and discussion of the countries which follow this practice see, Restatement (Second) of Foreign Relations Law of the United States § 69, Reporter's Note 2 at 216-18 (1965).

[52] 28 I.L.R. 156 (Tribunal of Venice, Italy 1959).

[53] [1943] Ann. Dig. 103 (No. 27) (Commercial Tribunal of Alexandria, Egypt.

> As regards the execution of the judgments, although a foreign State can claim immunity from execution this immunity applies only where the execution takes place on the territory of that State or when the assets which it is proposed to attack are held by the State in virtue of its character as a public authority. On the other hand, where, as in the present case, the assets which are the object of the execution are on Egyptian territory and are in fact funds which belong to the Comisaria General not as a public authority but as the directing power over a group of undertakings, all of a commercial character, the execution must be authorized.[54]

A policy similar to that of Egypt is well suited to meet the conflicting concerns of the United States Department of State regarding disputes between private litigants and foreign sovereigns. As noted, the conflict is that of protecting the litigant's rights, on the one hand, versus "embarrassment to the executive arm of Government in conducting foreign relations,"[55] on the other. The Egyptian policy circumvents this problem since it entitles the private party to recover in all situations except those which would truly "embarrass" the Executive.

IV. Effecting the Change

If a policy similar to that of Egypt is to be effected in the United States, it will probably have to be introduced by the Executive since, as noted, the Judiciary accords great weight to State Department determinations in this area. However, this does not mean that the courts are necessarily bound to perpetuate this practice. In the *Tate Letter*, which formally introduced the Department's adoption of the restrictive theory of sovereign immunity, it was recognized, in clear and unmistakable language, that a "shift in policy by the executive cannot control the courts."[56] Explicit in this statement is an admission that a jurisprudential shift by the courts cannot be controlled by the Executive.

In fact, while there is little precedent in the area of sovereign immunity for such judicial "initiative," some courts have refused to abide by the State Department's "suggestion of immunity." *United States v. Harris and Co. Advertising, Inc.*[57] is the first case in which a court declined to follow the Department's suggestion that the property of a foreign sovereign was immune from execution. In *Harris*, the plaintiff-advertising company had recovered a judgment against the Republic of Cuba and had levied execution on three

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[54] Id. at 104.

[55] Ex parte Republic of Peru, 318 U.S. 578, 588 (1943).

[56] See text at note 16 supra.

[57] 149 So. 2d 384 (Fla. 1963).

Cuban airplanes located in Florida. Subsequent to the execution sale of the planes, the State Department filed a "suggestion of immunity" as to the proceeds from the sale. The Third District Court of Appeals of Florida denied immunity since the plea was not timely. The court further held that:

> The pleas cannot reach the proceeds of the execution sales because the proceeds of said sales are not the property of the Republic of Cuba . . . but . . . of the judgment creditor . . . . The attempted pleas coming after the expiration of the power of the trial judge to interfere with the chattel of a foreign nation, the reason for the doctrine of sovereign immunity no longer existed and, therefore, there was no reason to apply the doctrine."[58]

As in *Stephen* and *National City Bank*, the Florida court limited its decision to the facts of the case and did not make a sweeping attack on the injustice of the State Department's policy of granting immunity from execution to foreign sovereigns, even where immunity from suit did not obtain. However, it is submitted that these decisions represent the embryonic stage of judicial discontent with the existing inequities of the State Department policy, and should be regarded as a premonitory sign of expanding judicial refusal to perpetuate that policy. Where the property sought to be used in satisfaction of a judgment against a foreign government is situated outside the sovereign's territory and is not related to its public functions, the American courts could effectively overrule the State Department's position by ignoring the Department's suggestion of immunity in disputes involving the commercial activities of a foreign nation.

However, notwithstanding the courts' increasing willingness to rectify the inequitable treatment accorded private persons doing business with foreign governments, it is hoped that the State Department will initiate the required policy change. This approach would avoid possible conflicts between the Executive and Judiciary and would lend support to the principle that "[i]n our dealings with the outside world, the United States speaks with one voice and acts as one. . . ."[59]

It is further suggested that the strong possibility of in-depth trade relations with the Peoples Republic of China presents an excellent opportunity for introducing the desired change in our State Department policy. Owing to inevitable international interest regarding current developments in diplomatic and trade relations between the United States and China, the State Department would be provided an international forum for presenting the policy change to the nations of the world. In addition, the suggested denial of immunity from execution would offer a necessary protection to private American enterprises in their dealings with Chinese corporations. The need for

[58] Id. at 385-86.

[59] United States v. Pink, 315 U.S. 203, 242 (1942).

such protection is based on the fact that Communist China owns and operates all of the commercial activity within its territorial boundaries, and its "system of state monopoly of foreign trade simply does not permit private or nongovernmental transactions. . . ."[60] Consequently, under existing State Department policy, private persons would never be entitled to satisfy judgments secured against Chinese corporations. Thus, prior to the commencement of extensive commercial dealings with China, the Executive branch should put the world trading community on notice that those who enter the field of international commerce with this country enter on a par with private enterprise, subject to the courts of this nation and to their processes.

Conclusion

The present United States policy regarding the perplexing problems posed by the doctrine of sovereign immunity is far from settled and the potential for inequity to American litigants is great. While the *Tate Letter's* restrictive application of that doctrine was intended to protect the rights of such litigants and to hold foreign governments to their commercial obligations, these aims are frustrated by the refusal to enforce judgments levied against sovereigns. Placing trading nations on a par with private enterprise would substantially resolve the inconsistencies of the present policy and would adhere to the general commercial policy of this country. The doctrinal basis for such an approach was established in 1824 when Chief Justice Marshall stated that:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.[61]

The principle seems no less sound that when a sovereign takes the "character of a private citizen," its commercial obligations should be enforceable in the courts of the United States.

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[60] Hsiao, supra note 45, at 631.

[61] Bank of United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 907 (1824).