the immunity of the MV *Imias* from the jurisdiction of the United States courts for the purposes of arrest, attachment, suit, or any other legal process. . . ." No reasons were given for the Department's position and it may be assumed that this omission was deliberate. However, one paragraph of the letter of October 25, 1973 recited that the Department had been informed that the *Imias* belonged to the Government of Cuba and that Cuba requested the grant of immunity.

Thereafter the legal denouement followed step by step in rapid sequence. On October 26, 1973 the Department of Justice caused to be filed in the District Court for the District of the Canal Zone a suggestion of immunity. The suggestion cited the letter of the Department of State and argued that such suggestions of immunity must be accepted by the court as conclusive. *Ex Parte Peru*,[12] *The Navemar*,[13] *The Schooner Exchange*,[14] and *Rich v. Naviera Vacuba*[15] were cited.

The case was argued on October 31, and on the following day the District Court issued an order dismissing with prejudice the suit and all proceedings filed thereunder and directed the release of the *Imias*. Attorneys for the Chilean plaintiffs secured a stay of the order pending appeal to the Fifth Circuit. Nevertheless, attorneys for Cuba sought and secured from the Fifth Circuit a writ of mandamus directing the District Court to release the vessel.[16]

The case of the *Imias* raises a number of issues of absorbing interest. In the first place there is the question of the scope of the policy of the Tate letter. Is that policy to be applied when the issue of sovereign immunity arises in a commercial dispute in which the defendant and at least one of the plaintiffs are government-owned commercial corporations? Or, put another way, can a government-owned enterprise ever successfully sue a state trading enterprise?

In the second place, there is the question whether the jurisdictional contacts present in the case of the *Imias* were sufficient to justify exercise

[12] 318 U.S. 578 (1943).

[13] Compania Espanola de Navegacion Maritima S.A. v. The Navemar, 303 U.S. 68 (1938).

[14] 11 U.S. (7 Cranch) 116 (1812).

[15] 295 F.2d 24 (4th Cir. 1961).

[16] The writ of mandamus, which is dated November 13, 1973, cites the same cases as those cited by the government in the suggestion of immunity and promises that a full opinion will be forthcoming. At the time this comment was prepared, the full opinion of the Fifth Circuit had not appeared. One of the issues briefed and argued by counsel for the Chilean plaintiffs in its memorandum in opposition to the writ of mandamus was the issue of administrative due process. To what extent was the State Department free to disregard the policy laid down in the Tate letter? To what extent was the State Department free to issue the suggestion of immunity without making public the factual basis and the reasons for its findings?

On February 13, 1974 Judge Wisdom handed down the opinion of the Court, holding "that the executive's decision to recognize and allow a claim of foreign sovereign immunity binds the judiciary, and that no further review of the executive's action is dictated by the Administrative Procedures Act." Spacil v. Crowe, No. 73-3599 (5th Cir., filed Feb. 13, 1974).

Unfortunately, the important issue of administrative due process cannot be discussed in this note because of limitations of space.

of United States jurisdiction. And who should decide whether such contacts were sufficient, the Executive or the Judiciary; the Department of State or a U.S. District Court?

Finally, there is the more fundamental question whether it is reasonable to expect the Executive Branch to exercise the juridical function of applying the law of sovereign immunity free from the distorting effect of political considerations. These three questions are briefly discussed in the remaining portions of this note.[17]

THE SCOPE OF THE TATE LETTER

There is in the Tate letter no textual provision indicating that the policy of applying the restrictive theory of sovereign immunity was to be set aside in cases in which one of the complainants was also a foreign state trading corporation.[18] There is no indication that the defendant in an intergovernmental commercial dispute was to be treated as the beneficiary of the old policy of absolute immunity. Nor in the view of this writer is there any theoretical reason why such disputes should be considered outside the jurisdiction of national courts. Indeed, it seems clear that the development of international trade and commerce is more likely to be encouraged if disputes between state trading entities are subjected to resolution before the courts rather than through diplomatic exchanges. The Tate letter itself states that "the widespread and increasing practice on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts." At any event, there appears to be no theoretical reason why the policy of denying sovereign immunity to foreign states engaged in commercial activities should be different simply because the plaintiff happens to be an entity owned by another foreign state.

WERE THE JURISDICTIONAL CONTACTS ADEQUATE?

At the State Department hearing, counsel for Cuba contended vigorously that the most "authoritative statement by the State Department as to the proper scope of the doctrine of sovereign immunity is set forth" in the proposed legislation[19] recommended by State and Justice and that this statement should "govern the instant controversy," since the views of the State Department on this issue are controlling in the absence of contrary legislation.

There are several problems in accepting this type of argument. First, it should be noted that when counsel were invited to appear before the ad hoc panel, the Department stated that the standard to be applied was

[17] For purposes of this note it is assumed, as does the Tate letter, that sovereign immunity is a matter for decision under international law. This note does not consider alternative formulations such as the position that sovereign immunity is merely a question of comity. Nor does it consider whether the resolution of this controversy should depend on the special status of the Panama Canal in international law.

[18] *Supra* note 2.

[19] *Supra* note 3.

the Tate letter. Second, the assumption that proposed legislation immediately supersedes the existing declarations of policy is at least suspect. It is equivalent to saying that proposed rulemaking supersedes the existing rule. Finally, it is not even clear that the interpretation placed on the proposed legislation by counsel for Cuba is correct.

For other and different reasons this question of the scope of the proposed legislation is important. Under §1604 of the pending bill, foreign states are to be immune unless their activities fall within the exceptions in §1605. It may be true, as counsel argued, that the case of the *Imias* does not appear to fall within any of the exceptions listed. There has been no waiver [§1605(1)], unless the reference in the bill of lading to the U.S. Carriage of Goods by Sea Act be so construed. This is arguable perhaps but not fully persuasive. There has been no expropriation [§1605(3)], and §§1605(4) and 1605(5) obviously do not apply. The only exception which might conceivably apply is §1605(2), which in so far as relevant to this inquiry reads as follows:

> A foreign state shall not be immune . . . in any case
>
> . . . . .
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act has a direct effect within the United States.

There appears to be no "direct effect" in the United States so the last of the three clauses of §1605(2) does not apply. But what about the first clause? Is the suit based upon a commercial activity in the United States? Is Mambisa carrying on such a commercial activity in the Canal Zone by virtue of the fact that it is operating a merchant vessel through the Canal? Perhaps, if it can be said that the suit is based on such Canal Zone commercial activity. But the initial breach of the contract of affreighment and the conversion occurred in Chile.

So we are driven to the second clause. Is this an action based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere?" Can it be said that a continuing breach of the affreightment contract and the conversion occurred in the Canal Zone? Certainly not with respect to the activities of the *Imias*; they had nothing to do with the breach or the conversion. On the other hand, the court record shows that the *Marble Island* did pass through the Canal and presumably the *Playa Larga*, did also, although this does not appear in the record. Thus it could have been argued by counsel for the Chilean companies that the legal action was based upon "an act performed in the United States," *i.e.*, continuing breach and conversion. Accordingly, even if one accepted the rather dubious proposition that the decision of the Department of State on immunity was governed by the pending legislation, there was no reason to concede that its application would assure immunity for Mambisa and the *Imias*.

Two other questions of greater importance are raised by Cuba's argument. The first is: What effect will enactment of the pending legislation have on existing concepts of admiralty jurisdiction? The section-by-section analysis prepared by the State Department and submitted with the proposed bill states with respect to §2, which would amend the Judicial Code so as to give the District Courts "original jurisdiction of all civil actions against foreign states" or agencies thereof, that this section would not alter "the specialized jurisdictional regimes such as those established by §1333 dealing with admiralty, maritime and prize cases . . . ." [20] If, however, the interpretation advanced by counsel for Cuba is accepted, the conclusion is inescapable that the traditional admiralty jurisdiction will be curtailed upon enactment of §§1604 and 1605(2) of the bill. That jurisdiction will also be curtailed by the enactment of §§1609 and 1610, which make the property of a foreign state and its agencies immune from the type of *quasi in rem* attachment which was obtained in this case (*i.e.*, for the purposes of obtaining jurisdiction). This result is intended, as is made clear in the Secretary of State's letter transmitting the proposal to Congress. Undoubtedly, the question of curtailment of traditional admiralty jurisdiction will be the subject of considerable debate.

The second question prompted by the argument of counsel for Cuba is more fundamental: Who should decide whether the jurisdictional contacts present in this case were sufficient to justify the exercise of jurisdiction invoked by the foreign plaintiff's complaint? There was no American interest in the controversy. The ship and the parties were foreign. The breach of contract and conversion had no direct effect in the United States. There was nothing but the presence of the ship and the reference in the bill of lading to the U.S. Carriage of Goods by Sea Act.

On the question of jurisdictional contacts, a voluminous jurisprudence exists in the decisions of the Supreme Court and the lower federal courts as well as in courts abroad. In general, where the admiralty jurisdiction has been invoked between aliens, the tendency has been to recognize the jurisdiction [21] but to acknowledge the discretion of the court to decline to exercise the jurisdiction [22] unless an American interest is present.[23] Frequently, the decision depends on the doctrine of *forum non conveniens*.

In the view of this writer it would have been improper for the State Department to base its suggestion of immunity on doubt as to the adequacy of jurisdictional contacts. Even if the Department's lawyers had major doubts on this score, the proper course would have been to deny immunity and allow the District Court to pass on the adequacy of jurisdictional contacts in the light of precedents already developed by the judiciary.

It is a curious fact that no case precisely like the *Imias* has arisen in the District Court in the Canal Zone or in any other District Court. However,

[20] 119 CONG. REC. S1304 (daily ed., Jan. 26, 1973).

[21] *The Belgenland*, 114 U.S. 355 (1885) (Opinion per Bradley).

[22] Canada Malting Co. v. Paterson Steamships, 285 U.S. 413 (1932) (Opinion per Brandeis).

[23] Swift & Company Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950) (Opinion per Frankfurter).

the District Court has regularly asserted the right to attach foreign vessels passing through the Canal Zone. In fact, the *Imias* was the seventeenth such vessel to be attached in 1973. Undoubtedly the jurisdictional contacts for some of these were no greater than those relevant to the case of the *Imias*. Prior to the informal hearing, the State Department advised Cuba that the practice of attaching vessels was "widely recognized under international law" and "under the law of admiralty is recognized throughout the world and is applicable to the commercial ships of all nations." For these reasons, it seems unlikely that doubt as to the adequacy of jurisdictional contacts was the basis of the Department's decision.

THE POLITICAL CONSIDERATIONS

Since the letter of the Department of State suggesting immunity carefully refrains from stating the reasons, there is no way of knowing what considerations were decisive. In the light of the preceding analysis, it seems unlikely that the controlling consideration was either the scantiness of the jurisdictional contacts or the fact that one of the plaintiffs was a Chilean government-owned enterprise. What seems more probable is that diplomatic and political considerations were deemed to be of overriding importance.

Counsel for Cuba strongly argued that this was a political dispute between Chile and Cuba, overlooking the fact that one of the Chilean plaintiffs was almost wholly a privately owned company. More particularly, he argued that the cause of action arose out of political acts in Chile, namely, the alleged menacing acts in Valparaiso harbor and the Cuban decision to order the *Playa Larga* to head for international waters in defiance of the order of the captain of the port. This argument has cogency but it may be premature. If the case had been permitted to proceed to trial on the merits, the defense of Mambisa predictably would have been that its breach of the contract of affreightment was caused by the interruptive acts of the Government of Chile. The fact that the cause of the breach was political does not mean that the dispute could not be adjudicated in a court. The admiralty courts have been adjudicating such issues for hundreds of years. There is no reason to think that the District Court in the Canal Zone could not have sorted out many, if not all, of the elements of this dispute in the light of the revelant contract clauses as to *force majeure*, insurance, assumption of risk, etc. It is difficult to believe that exercise of jurisdiction by the court in this way would have created diplomatic problems of any significance for the United States. It is also difficult to believe that an award to the private Chilean plaintiff for conversion of the cranes would have created diplomatic problems.

There is much truth in the contention made by counsel for the Chilean plaintiffs that this dispute became political because the Government of Cuba chose to make it political.[24] It may be recalled that in 1961, in

[24] Panama may have contributed to the same result. It delivered a note to the United States protesting the attachment of the *Imias*. In the past the Republic of

Rich v. Naviera Vacuba, S.A.[25] Cuba, by insisting on sovereign immunity, secured the release of a commercial vessel which had been taken over by its crew and diverted into the harbor at Norfolk, Virginia. There is every reason to suppose that the Cuban Government exerted strong political pressure in this case through the Czech Ambassador. When the *Rich* case arose in 1961, the United States and Cuba had just entered into an agreement for the mutual return of hijacked ships and planes. The submissions made to the Court made clear that concern for performance of this agreement was the principal basis for the suggestion of immunity.

Although there is no comparable expression of concern in this record, it is a fact that in February of 1973 an agreement was made between Cuba and the United States under which each undertook either to prosecute hijackers in its own courts or to return them to the other country for prosecution.[26] The securing of such an agreement was a long term objective of the United States. It seems probable that the Cuban Government took steps to create apprehension as to the continued effectiveness of this 1973 agreement if its demand for immunity should be denied.

CONCLUSION

There seems no doubt that just as *Rich v. Naviera Vacuba* in 1961 represented a retreat by the Kennedy Administration from Tate letter principles, so also the *Imias* represents a further retreat by the Nixon Administration. In each case it would appear that the policy decision was predominantly based on political and diplomatic considerations. In the view of this writer, so long as the power of decision with respect to immunity is lodged in a political agency such as the State Department, political considerations are likely to prevail over considerations of international law in the hard cases.

Fortunately, there is an escape from this pessimistic judgment. The State Department, after twenty years experience with the Tate letter and the decisionmaking role which the courts have thrust upon it, has recommended that the Congress transfer this function back to the courts. At the same time, it has recommended that Congress codify by statute the restrictive theory of sovereign immunity. These recommendations of the State Department deserve the support of all members of the international legal community.

MONROE LEIGH

Panama has claimed that the Panama Canal does not constitute part of the territory of the United States but rather is an "international public utility" maintained and protected by the United States. Statement of the Representative of the Republic of Panama to the United Nations, 19 UN SCOR, 1086th Meeting 4–14 (Jan. 10, 1964); *cf.* Convention between the United States and Panama, Art. iii, 33 Stat. 2234, T.S. No. 431.

[25] 197 F.Supp. 710 (E.D. Va. 1961), 295 F.2d 24 (4th Cir. 1961); application for stay was denied by the Supreme Court.

[26] TIAS 7579, 67 AJIL 619 (1973); 12 ILM 370 (1973).