

BREAKING OUT OF THE CAPITALIST PARADIGM: THE SIGNIFICANCE OF IDEOLOGY IN DETERMINING THE SOVEREIGN IMMUNITY OF SOVIET AND EASTERN-BLOC COMMERCIAL ENTITIES

I. INTRODUCTION

A significant problem arising in commercial transactions between private United States entities and Communist or Socialist entities¹ is the subtle differences between Capitalist and Socialist ideologies.² Ideological differences are not mere isolated political and economic oddities that can be avoided by generalized and flexible legislation. They are fundamental to any legal transaction because ideology cradles and gives meaning to the legal terms of a transaction.

The primary distinction between capitalism and socialism in the

1. For purposes of this comment, *communism* will be defined as a particular historical application of the Socialist theory. Both socialism and communism imply that individuals or private enterprise should not own productive property. Communism, as it exists in the U.S.S.R., will be subsumed under the generic term *socialism*, but the terms must be distinguished by their implications of *who* should own or control the means of production and property—the government (socialism) or the common people (communism). Notably, therefore, communism is not exhaustively defined as the particular totalitarian regime in the U.S.S.R.; it can also refer to the withering away of the state and law in the final stage of Marx's revolution. Moreover, socialism also has a technical Marxian connotation as that stage in the revolution between capitalism and communism.

2. Ideology here refers to a system of definite views, ideas and conceptions adhered to by a society. In Soviet terms, it is always a "reflection of the economic system predominant at any given time." Hunt, *The Importance of Doctrine*, in *CRISIS AND CONTINUITY IN WORLD POLITICS* 139-49 (G. Lanyi & W. McWilliams eds. 1966) (citing a Soviet philosophical dictionary (FILOSOFICHESKII SLOVAR)). It should be noted that this definition of *ideology* is consistent with modern Soviet theory but not traditional Marxian notions. Soviet writers often cite the rivalry between the two major ideological systems in the world today—capitalism and socialism. See, e.g., R. KOSOLAPOV, *PROBLEMS OF SOCIALIST THEORY* 9 (J. Riordan trans. 1974). The two ideologies are, of course, the "revolutionary ideology of the working class and the reactionary ideology of the bourgeoisie." N. BOGOMOLOVA, "HUMAN RELATIONS" DOCTRINE: IDEOLOGICAL WEAPONS OF THE MONOPOLIES 7 (K. Judelson trans. 1973). This generalized use of the term *ideology*, practically synonymous with the world view, has been severely criticized by orthodox Marxists. See, Yakhot, *The Marxian Notion of Ideology*, 20 *STUD. IN SOVIET THOUGHT* 43, 44-45 (1979). In modern Soviet thought, however, ideology is a central notion, and discussions often refer to "greater ideological clarity in Marxist philosophy," the "activists on the ideological front," or the "ideological conflict." *Id.* at 47-48. The term *ideology* is used throughout this comment in this sense, e.g., to identify the legal and jurisprudential perspective of a particular politico-economic system. This is only problematic for those readers accustomed to the orthodox Marxian notion of ideology as a negative phenomenon.

area of foreign trade is that capitalism is usually associated with a relatively free market economy, while socialism (and the communism prevailing in the U.S.S.R. and its satellites) is associated with a centrally-planned economy. In a free market economy, a deep respect for the exercise of free economic competition persists, and the government basically preserves and encourages competitive pricing, profit-based decision-making, and individual or corporate rights to own productive property and to contract freely.

In a centrally-planned economy, on the other hand, the major means of production are typically nationalized, individual property and contract rights are secondary to the interests of the national community, and economic decisions are made according to an administrative plan that may or may not be profit-oriented. Despite the growth of governmental interference through regulation in Capitalist states, and the appearance of many "capitalistic" elements such as profit-motivated industry and limited private ownership of agricultural lands in Socialist states, the distinction remains crucial because the ideological foundation and the basic legal concepts rooted therein are often antithetical.

The Foreign Sovereign Immunities Act of 1976 [1976 Act]³ reflects a desire to discontinue the competitive advantages often gained, through immunity from lawsuits, by sovereigns engaged in state trading or other commercial enterprises.⁴ A problem occurs, however, in the unsuitability of the 1976 Act's criteria for immunity when applied to Socialist state entities.⁵ In determining whether an entity is an agency of the state, the Act does not account for the contradiction between the Socialist political suggestion that all property is owned and controlled by the state and the legal reality that many Socialist enterprises are practically autonomous in their transactions with the free world.⁶

Controversial opinions in two recent cases⁷ have attracted much attention regarding interpretation of the commercial activities excep-

3. 28 U.S.C.A. §§ 1602-1611 (West Supp. 1980). The 1976 Act sets forth a commercial activities exception wherein the commercial entities of a state do not qualify for sovereign immunity. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1980). See generally Carl, *Suing Foreign Governments in the American Courts: The United States Sovereign Immunities Act in Practice*, 33 Sw. L.J. 1009 (1979).

4. See Gordon, *Trends*, 13 INT'L LAW. 167 (1979).

5. Refer to section IV *infra*.

6. See Note, 9 GA. J. INT'L & COMP. L. 111, 120 (1979); See also Note, 1 N. CAROLINA J. INT'L & COM. REG. 75, 78 (1975).

7. Edlow International Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977) [hereinafter cited as Edlow]; Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849 (S.D.N.Y. 1978) [hereinafter cited as Novosti].

tion⁸ and the determination of governmental agency status⁹ under the Act. Separately, each decision appears proper. Together, the two opinions reflect distinct analytical approaches to determining immunity of Socialist organizations.¹⁰ Both approaches are similar in their recognition of the Socialist contexts in which the defendant organizations exist,¹¹ yet divergent considerations prompt the courts in their final determinations.¹² The two decisions appear only to reveal the ambiguities in the Act, rather than supply any interpretive guidelines.

In disputes between United States and Socialist state entities, U.S. federal courts are confronted with two radically different sets of legal concepts, yet receive little guidance from the 1976 Act in determining immunity.¹³ The danger of inconsistent court-created criteria is imminent. The purpose of this comment is to demonstrate the need for an amendment to the 1976 Act in recognition of the political and economic realities of the modern world.¹⁴

This comment focuses on the 1976 Act and its inability to accommodate a Socialist perspective on sovereign immunity. Section II briefly discusses two other major legislative efforts in which ideological conflicts have surfaced. The General Agreement on Tariffs and Trade (GATT) and the 1972 U.S.-U.S.S.R. Trade Agreement serve as examples of legislative awareness of ideological differences (between socialism and capitalism) as well as a corresponding attempt to account for such differences in the terms of the agreements. Section III focuses on two terms in the 1976 Act—"commercial activity" and "agency or instrumentality"—that are ambiguous in the context of trade between United States and Socialist entities. In section IV, an analysis of two recent cases illustrates the ambiguities inherent in the 1976 Act; the courts' isolated attempts to supplement and explicate the terms of the 1976 Act result in two distinct approaches to immunity of Socialist entities. Section V explores the necessity of incorporating ideology into the 1976 Act and includes brief discussions of Soviet trade entities, Social-

8. Refer to section IV A. & B. *infra*; section III B. *infra*; note 93 *infra*.

9. Refer to sections IV A. & B. & III C. *infra*.

10. Refer to notes 139-75 *infra* and text accompanying. See Brewer, Bistline, & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT'L L. 201 (1979). The authors suggest that, given this potential split of authority, "an attorney involved in a transaction with a socialist state enterprise may be well advised to include a favorable venue selection clause in any agreement." *Id.* at 203 n.23.

11. Note that both courts looked at the Constitution of the states, *Novosti* more than *Edlow*, to define "organization" and "ownership" in that context. 443 F. Supp. at 852-54; 441 F. Supp. at 831.

12. Refer to section IV C. *infra*.

13. Refer to sections V D. & VI *infra*.

14. Refer to sections V B. & VI *infra*. With the exception of setting forth certain critical contours, the precise draft of an amendment is outside the scope of this study.

ist legal principles, and the relationship of Socialist planning to sovereign immunity. The conclusion suggests that an amendment to the 1976 Act would best incorporate ideology and ensure uniformity in the context of commercial transactions between United States and Socialist entities.

II. OVERVIEW OF IDEOLOGICAL CONFLICT

A. *Limitations on U.S.-U.S.S.R. Normalization*

As a result of the decline of the U.S. dollar and the foreign demand for U.S. goods, the United States is experiencing a steady rise in exports.¹⁵ Moreover, Communist-bloc states particularly are looking to the West to finance purchases of technology necessary for their growth.¹⁶ Although political barriers separate the Communist and Capitalist world systems, economic pressures appear to be driving the systems together.¹⁷ The possibilities of mutual economic benefits and a more favorable climate in which to resolve political questions suggest the need for expanded trade relations with the U.S.S.R. and its satellites.¹⁸ Although the demand for Soviet-made goods is minimal in the West, the U.S.S.R. welcomes trade and investment to assist in its own industrial development.¹⁹ The growth in trade and desire to normalize commercial relations with all of the Eastern European states are at the same time evident in both the private and public spheres of the United States.²⁰

Prospects of trade with Socialist entities must be qualified by political realities.²¹ Trade and investment opportunities are inevitably con-

15. Anderson, *A Boom in U.S. Exports*, NEWSWEEK, Sept. 10, 1979, at 58. A major customer of the U.S. is the Soviet Union; Soviet grain purchases in 1979 doubled 1978 totals. *Id.*

16. *East-West Credit Links Grow*, N.Y. Times, Sept. 29, 1979, at 25, col. 3.

17. *Id.* at 26. Rapid economic development has driven Eastern European nations to seek Western economic links.

18. Stevenson, *Detente and Dollar Diplomacy*, 9 INT'L LAW. 733, 734 (1975).

19. *Id.* Senator Stevenson observed that the U.S. is virtually excluded from the Soviet consumer market. Assistance to the U.S.S.R., however, may not provide any long-term U.S. benefits, and it may in actuality create a dangerous ability to compete with Western goods in the future. *Id.* But see May, Coleman, Nelson, & Beam, *The Red Tycoons*, NEWSWEEK, April 17, 1978, at 84-85. In the last decade, the Soviets have engaged in a program of worldwide marketing of vodka, oil, machine tools, tractors, and jet aircraft, primarily to earn hard currencies with which to buy Western goods and technology. *Id.* at 84. Nevertheless, the Soviet Union is basically a buyer in the U.S. market; Soviet tractor sales are expected to be a mere 1% of the market in the U.S. Part of the reason is that it is difficult to "lure" an American away from his own country's product to a Soviet one. *Id.*

20. Stevenson, *supra* note 18, at 739. For example, from 1967 to 1975, Polish imports to the U.S. increased over 250%; from 1977 to 1978, imports grew 33% from Poland, 46% from Hungary, and 55% from Czechoslovakia. Note, 127 U. PA. L. REV. 217, 219 n.15 (1979).

21. Stevenson, *supra* note 18, at 734. The Soviet invasion of Afghanistan in late 1979 severely affected U.S.-U.S.S.R. trade relations. President Carter's first major reactions to the

trolled by non-economic considerations in a Socialist state.²² It is notable that since the 1972 Trade Agreement with the U.S.S.R.,²³ a spirit of optimism regarding the possibility of trade with the Soviets has pervaded business in the United States.²⁴ The spirit of *détente* of the last decade, however, is merely a spirit of cooperation on certain matters in the midst of ideological warfare.²⁵

Values are often opposite and hostile between the United States and the U.S.S.R.²⁶ Regardless of the apparent normalization in limited arenas such as trade, relations with the United States, in the Soviet perspective, essentially reflect the class struggle between capitalism and socialism.²⁷ Commercial friendship is necessarily intertwined with political and diplomatic normalization.²⁸

Two documents which exemplify the importance of ideology in trade between Socialist and non-Socialist entities will be discussed in the next two subsections. The first, the 1972 U.S.-U.S.S.R. Trade Agreement, squarely confronts the essential differences between the states-parties' legal and political systems, and is thus an admirably realistic document. The second, the General Agreement on Tariffs and Trade (GATT), illustrates the importance of a document which has been locked into a particular economic and political perspective. Un-

invasion were new stringent licensing requirements for high-technology export items, curtailment of fishing privileges for Soviet fleets, and, most important, a grain embargo. See 45 Fed. Reg. 1883 (1980); 45 Fed. Reg. 3027 (1980); See also FORTUNE, Feb. 26, 1980, at 72-80. For background information on the grain trade generally, see D. MORGAN, MERCHANTS OF GRAIN, reviewed in NATION, Jan. 19, 1980, at 55.

On April 24, 1981, President Reagan ended the grain embargo, as he had promised to do during his 1980 campaign. KNT News Service release, April 25, 1981. See *Grain to the Soviets*, NEWSWEEK, May 4, 1981, at 24-25. Notably, the present comment is applicable not only to U.S.-U.S.S.R. trade, but trade between the U.S. and any Socialist or Eastern-bloc nation.

22. *Id.* Of course, trade in Capitalist countries at times grows out of political or other motives; examples would include trade relations toward political friendship or military alliance, or even foreign aid and humanitarian efforts to a developing nation.

23. Agreement with the Union of Soviet Socialist Republics Regarding Trade, Oct. 18, 1972, in 67 DEP'T STATE BULL. 595 (1972). See also U.S.-U.S.S.R. Agreement on Trade, 11 INT'L LEGAL MATERIALS 1321 (1972). Nineteen hundred and seventy-two was a turning point in Soviet-United States relations. For a list of the series of agreements concluded that year, see Osakwe, *Legal Aspects of Soviet-American Trade: Problems and Prospects*, 48 TUL. L. REV. 536, 536 n.1 (1974). Besides a general agreement on basic principles, accomplishments included strategic arms limitations, high seas and outer space agreements, and cooperative agreements in science, medicine, and environmental protection. *Id.*

24. *Id.* at 536-37; refer to note 21 *supra*.

25. Osakwe, *supra* note 23, at 537.

26. *Id.* (quoting Secretary of State Henry Kissinger, U.S. NEWS AND WORLD REPORT, Jan. 7, 1974, at 64).

27. Osakwe, *supra* note 23, at 537 (quoting Dr. Georgi Arbatov).

28. *Id.* at 539. Adlai Stevenson observed in 1975 that the U.S. attempted after 1972 to influence the foreign policy of the U.S.S.R. and other nations by offering access to U.S. capital or markets. Stevenson, *supra* note 18, at 733. The same sort of influence was attempted by President Carter by the grain embargo. Refer to note 21 *supra*.

fortunately, the 1976 Foreign Sovereign Immunities Act, as we shall later see, more closely resembles the GATT in its failure to consider ideological differences.

B. *The 1972 U.S.-U.S.S.R. Trade Agreement*

The 1972 Trade Agreement with the Soviet Union acknowledged the dissimilarities between the two economic systems.²⁹ Three major differences received full attention for the first time:³⁰ (1) Soviet trade is controlled by an economic plan that sets the needs of Soviet society; (2) there is no true *market* in the Soviet Union;³¹ and (3) Soviet traders are government agencies, bound by and acting for governmental policies.

Significant mutual concessions in the legal frameworks of the United States and the U.S.S.R. were required by the 1972 Agreement.³² Trade with the U.S.S.R. has a history of difficulties, and these concessions reflected a realistic desire for success and security in trade relations.³³ Notably, the Agreement set up a regime where each nation's laws were operative to some degree in legal disputes and settlements; each nation's laws were competent, for example, to determine the status of its legal persons.³⁴

Despite the Soviet Union's repudiation of the 1972 Trade Agreement in January 1975,³⁵ the Agreement reflected a favorable climate for increasing trade with the U.S.S.R.³⁶ The political atmosphere was at least partially normalized, and the volume of trade between the two

29. Grzybowski, *United States-Soviet Union Trade Agreement of 1972*, 37 LAW & CONTEMP. PROB. 395, 396 (1972).

30. *Id.*

31. The significance of this factor is the new meaning (or lack of meaning) given to the most-favored nation status in the Soviet context. *See id.* at 404-06 for a discussion of potential new meaning; refer to note 44 *infra*.

32. Grzybowski, *supra* note 29, at 396-97. United States citizens, for example, can only conduct business in the area of foreign trade under Soviet law. *Id.* at 397. Although United States law allows foreign nationals to engage in business in the U.S., Soviet nationals may not make an import or export contract in the U.S. *Id.*

33. *Id.* Grzybowski's extended discussion of the Joint U.S.-U.S.S.R. Commercial Commission, Trade Representation Offices in Washington and Moscow, and Trade Organizations serves as an overview of the proposed mechanism of trade. *Id.* at 397-404. *See also* Starr, *A New Legal Framework Between the United States and the Soviet Union: The 1972 US-USSR Trade Agreement*, 67 AM. J. INT'L L. 63 (1973).

34. Grzybowski, *supra* note 29, at 404.

35. *See* 72 DEP'T STATE BULL. 193-240 (1975). The repudiation was due to the freedom of emigration provisions, popularly known as the Jackson-Vanik Amendment (proposed by Senator Henry Jackson and Representative Charles Vanik), which require countries seeking financial credits and most-favored nation status from the U.S. to meet "humanitarian" standards in the area of emigration. *See Note, A Roadmap to the Trade Act*, 8 LAW & POL'Y IN INT'L BUS. 125, 179-82 (1976). These were, of course, political and not economic objectives. *Id.* at 179. *See also* Note, 1 N. CAROLINA J. INT'L & COM. REG. 75, 82 (1975).

36. Note, *supra* note 35, at 182.

nations increased immediately.³⁷ The recognition in the Agreement of intrinsic differences between the economic systems of planned economy states and free enterprise states represented a realistic attempt to establish mutually beneficial commercial relations.³⁸

C. *The GATT and Ideology*

The conceptual differences between centrally planned and market economies were also recognized in the drafting of the General Agreement on Tariffs and Trade (GATT).³⁹ Two separate Charter articles were proposed by the United States to deal with state-trading enterprises—one designed for state-owned enterprises in market economy countries, and one designed for “complete” state monopolies, i.e., centrally planned economies.⁴⁰ Because the Soviet Union, a non-participant, was thought to be the only important state to maintain a complete monopoly on trade, and when no other centrally planned economy state participated in the initial tariff negotiations, the latter article was deleted by the preparatory committee.⁴¹ The remaining proposal eventually became Article XVII and provides the only basis for fitting centrally planned economies into the GATT system.⁴² Although the remaining provision can be applied in a dispute, the GATT is concep-

37. Osakwe, *supra* note 23, at 540.

38. *Id.* at 543. Osakwe, however, posits the question whether the parties to the 1972 Trade Agreement contemplated the same thing when they, for example, agreed to conclude contracts on terms customary in international commercial practice.

39. The General Agreement on Tariffs and Trade grew out of transnational awareness that trade relations should be conducted with a view toward raising standards of living, ensuring full employment, fully developing resources, and expanding production and exchange of goods. Preamble, GATT (1947), reprinted in K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 391 (1970). See generally General Agreement on Tariffs and Trade (1947, as amended), reprinted in J. JACKSON, *DOCUMENTS SUPPLEMENT TO THE LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (1977). The initial awareness of conceptual differences between East and West is noted in K. DAM, *supra*, at 316. The United States' suggestions for the Havana Charter, a similar attempt at an international trade agreement growing out of the 1948 Havana Conference, are contained in *Suggested Charter for an International Trade Organization of the United States*, U.S. DEPT. OF STATE PUB. 2598, COMMERCIAL POLICY SERIES 93 (1946), at 22. For a list of contracting parties to the GATT as of 1976, see GATT Press Release, GATT/1184 of September, 1976, reprinted in J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 410, 411 (1977).

40. K. DAM, *supra* note 39, at 316.

41. *Id.* at 316-17.

42. *Id.* at 317. Article XVII, entitled “State Trading Enterprises,” requires that such enterprises make their purchases and sales

solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

GATT art. XVII (1)(b) (1947). This provision is obviously at odds with the practices of centrally planned economies.

tually impoverished and does not really capture the types of problems that occur in trade with a non-market economy state. In the context of growing East-West trade, the failure to include a provision for Soviet and Eastern-bloc style economies robs the GATT of its intended universality, and the GATT is therefore unable to play a significant role in fostering the new trade relationships.⁴³

The GATT tariff system thus presupposes that all trade is conducted by profit-motivated firms in a free market economy, and its function is to limit governmental influence on decisions made in that sphere; this assumption is simply not applicable to centrally planned economies.⁴⁴ Tariff rates are not nearly as significant when there is a *plan* setting forth levels or origin of imports—the tariff determination under such conditions is political, not commercial.⁴⁵ While planning, state-trading, and price regulation also exist in Western countries, the difference between these factors and total planning remains crucial: consumers' preferences and the conditions of supply and demand are subject to manipulation by the planning authorities in centrally planned economies.⁴⁶ Competitive pricing is largely insignificant; the government's plan determines the volume of imports in virtual isolation from the world market.⁴⁷

D. Other Examples of Ideological Conflict

The significant differences in U.S. trade relations with another free market economy state as compared to trade with a centrally planned economy are accentuated in several other areas of international commercial law:

(1) Dumping, which occurs when a producer sells his goods in a foreign country at less than fair value, customarily constitutes an unfair

43. K. DAM, *supra* note 39, at 317. Czechoslovakia was a GATT party before it adopted Socialist institutions and its participation has since been limited. *Id.* Yugoslavia's and Poland's roles have been similarly limited, while Hungary and Romania have observer status. *Id.*

44. *Id.* at 318. Traditional most-favored nation treatment, an integral part of the GATT (art. I), loses its value when factors other than cost and tariffs influence the state-trader's decisions. See Hazard, *Editorial Comment: Commercial Discrimination and International Law*, 52 AM. J. INT'L L. 495 (1958). The customs regime of the Soviet Union is deceptive in that it is set up to protect home production from competition. VASSILEV, *POLICY IN THE SOVIET BLOC ON AID TO DEVELOPING COUNTRIES* 39-40 (1970), *reprinted in* 2 EAST-WEST TRADE 351 (D. Loeber ed. 1976).

45. K. DAM., *supra* note 39, at 318-19. Currency factors also make it difficult to fit centrally planned economies into GATT. *Id.*

46. *Id.* at 320. Dam acknowledged trends toward giving greater autonomy over pricing to firms in Eastern European states, but the fundamental guidelines are nevertheless laid down by foreign trade ministries whose notions as to the appropriate sources of foreign goods are binding. *Id.* at 320-31.

47. *Id.* at 325, 329.

international trade practice.⁴⁸ The normal tests for determining injury and the "anti-dumping duty" (which, when added to the sales price, will eliminate the competitive advantage) presuppose a free market where supply and demand determine prices.⁴⁹

(2) As state ownership replaces private property in Communist regimes, recourse to civil courts is seen as *bourgeois* and inferior to the system of arbitration in settling disputes.⁵⁰

(3) Fundamental legal and ideological problems surround cooperation agreements and joint ventures between U.S. firms and commercial entities in Yugoslavia, Romania, and Hungary.⁵¹

(4) The proposed United Nations Moon Treaty, to which the United States and the U.S.S.R. are parties, reflects the conflict between Capitalist and Socialist philosophies concerning the exploitation of space resources; the Moon Treaty, by setting up barriers to the entry of free enterprise into space ventures, is conceptually loaded in favor of Soviet and socialistic Third-World countries.⁵²

The Foreign Sovereign Immunity Act of 1976, upon which this comment focuses, was passed in an atmosphere of sensitivity to the differences between free market and centrally planned economies.⁵³ Although it fails to deal effectively with the conflict, the Act is an

48. Note, 128 PA. L. REV. 217, 221-22 (1979).

49. Fair value or foreign market value is determined in the ordinary instance by the price in the home market, the price at which the goods are sold to nations other than the U.S. (or the country in which the goods have originated), or a price is constructed by computing the cost of production plus general expenses and profits. *Id.* at 218-19. The utility of these three tests disappears in a centrally planned economy where home market prices are fixed by the state and need not reflect the true costs of production. *Id.* at 222. Under the new U.S. Treasury Regulation of 1978, 19 C.F.R. § 153.7 (1979), a solution is attempted by computing the constructed value from cost and price data in a market economy country at a stage in development comparable to the exporting Socialist country. *Id.* at 230-31.

50. Orban, *The Challenge to the Enforcement of Socialist Arbitral Awards*, 17 VA. J. INT'L L. 375 (1977). The focus is shifted in dispute resolution from vindication of individual rights in settling conflicts between state enterprises to minimizing disruption of the central economic plan. *Id.*; see Ayre, *Negotiating Commercial Contracts with the Soviets*, 61 AM. B. ASSOC. J. 835 (1975). "With respect to provisions governing the settlement of contract disputes, the Soviets strongly prefer arbitration over litigation." *Id.* at 839.

51. Note, 21 AM. J. COMP. L. 752, 753-55 (1973). "While as a firm principle the bulk of the means of production must be owned by the state, a private sector of secondary significance is tolerated." *Id.* at 753.

52. See Dula, *Free Enterprise and the Proposed Moon Treaty*, 2 HOUS. J. INT'L L. 3 (1979). The Soviet view that only states may engage in space activities is based on the supposition that all celestial bodies and their natural resources are the "common heritage of all mankind." *Id.* at 8. Although the Moon Treaty allows scientific research by private enterprises, it prevents private commercial development and thus gives Soviet and Third-World countries political control over the use of outer space. *Id.* at 24. Since "common heritage" is interpreted as "common ownership," *id.* at 19, the Soviet State could commercially develop space in the name of mankind and avoid the appearance of selfish exploitations. (The text of the Moon Treaty is published as an appendix in *id.* at 25-33).

53. H.R. REP. NO. 94-1487, 94th Cong., 2nd Sess. 15-16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6614. See Note, 18 HARV. INT'L L.J. 429, 438 (1977).

exemplary document for a study in the area of trade with Socialist States, since the history of the concept of sovereign immunity is easily traceable, and the past and potential difficulties of trade with Socialist States were discussed in the decades prior to the Act.⁵⁴

The following sections will concentrate on the problems inherent in the 1976 Act. Even though this legislation was meant to be flexible with regard to political and economic forms,⁵⁵ the resulting ambiguities appear to work to the disadvantage of U.S. firms in litigable disputes with Socialist States.⁵⁶ Also, despite the careful attention given to Socialist forms of business and law by the courts, recent litigation under the 1976 Act only complicates the ambiguities therein.⁵⁷

III. AMBIGUITIES IN THE 1976 FOREIGN SOVEREIGN IMMUNITIES ACT

A. Historical Background

The problems inherent in commercial transactions with the sovereign Soviet State and its trading companies were recognized several decades before the 1976 Act.⁵⁸ The state is the only international trader in the Soviet Union, and its satellite countries fashioned their own foreign trade monopolies after it.⁵⁹ Although the theory of sovereign immunity historically allowed states to request immunity from the jurisdiction of foreign courts, the first half of this century revealed no general agreement concerning the extension of immunity to a state's industrial, trade, and transport activities.⁶⁰

The traditional theory of absolute immunity has now been largely rejected in favor of a qualified or "restrictive" doctrine of sovereign immunity.⁶¹ According to this view, a state should be granted immunity from jurisdiction only when its acts are of a public (*jure imperii*) and not a private (*jure gestionis*) nature.⁶² The past sentiment in favor

54. Refer to text of section III *infra*.

55. H.R. REP., *supra* note 53.

56. Refer to text of section III *infra*. This discussion is limited to the commercial activity exception and the concepts of agency and ownership as they relate to trade and litigation with Socialist States. Other important aspects of the Act, *e.g.*, service of process and execution of judgment provisions, will not be dealt with here. See generally Note, *supra* note 53, at 443-51.

57. Refer to text of section IV *infra*.

58. Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614 (1950).

59. *Id.* at 614-15.

60. *Id.* at 614, 616.

61. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978). The doctrine of absolute immunity was in the past followed by the U.S., Great Britain, Germany, and the Netherlands. Fensterwald, *supra* note 58, at 617.

62. Fensterwald, *supra* note 58, at 616; von Mehren, *supra* note 61, at 33. The basic

of the absolute doctrine was in conflict with the U.S. objective of putting free enterprise on parity with state-trading and nationalized enterprise.⁶³ The need for the U.S. to develop a coherent economic, administrative, and international philosophy on the subject of sovereign immunity, together with the problematic policy of deference (by the courts) to the U.S. State Department on questions of immunity, led to the drafting of the Foreign Sovereign Immunities Act of 1976.⁶⁴

The Foreign Sovereign Immunities Act became effective on January 19, 1977, and sought to establish a predictable and substantive basis for determinations of sovereign immunity.⁶⁵ Remaining uncertainties that signal the need for an amendment will be examined in the following sub-sections.

B. *The Commercial Activities Exception*

The 1976 Act carried into effect the restrictive doctrine of immunity, *i.e.*, in *commercial* matters a foreign state cannot claim the defense of sovereign immunity.⁶⁶ Despite this significant clarification of U.S. law, an important issue remains open—what is the meaning of “commercial activity” as a primary basis or classification for the denial of immunity from suit?⁶⁷ Initial content is given the term in the Act’s

jurisprudential thesis of absolute immunity is that the state is one. Fensterwald, *supra* note 58, at 616. The acts of a state are necessarily in the public interest. Since all acts of a state are public, there can be no isolated private or commercial act for which the state can be held liable. This view finds support in customary international law, political practicality, and the growth of socialism as a form of government. *Id.* at 616-17. The doctrine of absolute immunity was historically followed in the U.S. in theory, but as early as 1945 an indication of the U.S. courts’ willingness to adopt a qualified theory appeared in dictum in *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945), cited in Fensterwald, *supra* note 58, at 618. Even though earlier cases had avoided the logical consequences of absolute immunity with strained concepts of corporate agency or indirect suits *in rem*, the trend toward acceptance of the theory of qualified immunity (which culminated in the 1976 Act) gained support only in the last several decades. *Id.* at 618-20.

63. Timburg, *Sovereign Immunity, State Trading, and Self-Deception*, 56 Nw. U. L. Rev. 109, 127 (1961). The famous Tate letter, reprinted in 26 DEP’T STATE BULL. 984 (1952), emphasized the extreme need to provide citizens access to the courts.

64. Timburg, *supra* note 63, at 127-28. Examples of deference to the U.S. State Department include *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945), *Ex parte Muir*, 254 U.S. 522 (1921), and *National City Bank of New York v. Republic of China*, 348 U.S. 356, 360-61 (1955). The Act now transfers determinations of sovereign immunity from the executive branch to the judiciary. Note, *supra* note 53, at 430. This has been called the “de-politicization” of sovereign immunity. *Id.* at 436. An important question which is not addressed in this study is the extent to which political and Executive pressures still impose themselves on the courts. Political difficulties with certain nations may influence a judge’s grant of immunity even without formal State Department directives. Refer to note 113 *infra*.

65. See Brewer, Bistline & Loomis, *The Foreign Sovereign Immunities Act of 1976 in Practice*, *supra* note 10.

66. Von Mehren, *supra* note 61, at 33; 28 U.S.C.A. § 1605(2) (West Supp. 1980). The drafters thought that the commercial activities exception was the most important instance in which foreign states were denied immunity. H.R. REP., *supra* note 53, at 18.

67. Von Mehren, *supra* note 61, at 48. Section 1605 of the 1976 Act sets forth the gen-

definition section:

A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature of the course of conduct or particular transaction rather than by reference to its purpose*.⁶⁸

With respect to non-market economies, where nearly all trading activities may be considered *public* in purpose, the Act seems to restrict opportunities for successful invocation of the sovereign immunity defense.⁶⁹ Moreover, it is hoped that interpretive problems associated with the traditional *imperii/gestionis* (public/private) distinction will be ameliorated by the substitution of the nature/purpose distinction.⁷⁰

Considerable freedom, however, remains with the courts in their determination of a "commercial activity."⁷¹ Congress considered it unwise to attempt an "excessively" precise definition of the term.⁷² Selling a service or product, leasing property, borrowing money, engaging of employees, and investing in a United States corporation are to be included in the definition.⁷³

Prior to the 1976 Act, the leading case involving commercial activities of a foreign sovereign was *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*.⁷⁴ A branch of the Spanish Ministry of Commerce, in this case, chartered a vessel to transport wheat; since this activity was seen as commercial and private, sovereign

eral exceptions to § 1604. The latter provides immunity from jurisdiction of the courts of the United States for foreign states. 28 U.S.C.A. §§ 1604-1605 (West Supp. 1980). Section 1605(a)(2) is the codification of the restrictive doctrine of immunity:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States 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 causes a direct effect in the United States.

28 U.S.C.A. § 1605(a)(2) (West Supp. 1980).

68. 28 U.S.C.A. § 1603(d) (West Supp. 1980). For a brief discussion of "direct effect" in 28 U.S.C.A. § 1603(d) (West Supp. 1980), see Note, *supra* note 53, at 438-40.

69. Note, *supra* note 53, at 438.

70. *Id.* Only when the juridical nature of the act is such that a state alone could perform it will immunity be conferred. See von Mehren, *supra* note 61, at 49.

71. Von Mehren, *supra* note 61, at 49. See H.R. REP., *supra* note 53, at 16. A recent decision in a federal district court in California appears to conflict with this intention. In *Int'l Assoc. of Machinists v. Organization of Petroleum Exporting Countries*, [1979] TRADE REG. REP. (CCH) ¶ 79,002, Judge Hauk declared that the term "commercial activity" should be defined narrowly. *Id.* Establishing terms for the removal of a prime natural resource from its territory (by OPEC member nations) was seen not to be a commercial activity. *Id.*

72. H.R. REP., *supra* note 53, at 16.

73. *Id.*

74. 336 F.2d 354 (2d Cir. 1964), *cert. denied* 381 U.S. 934 (1965).

immunity was denied.⁷⁵ The court then classified five types of "political and public" acts which would entitle a sovereign to claim immunity.⁷⁶

Although this scheme found support in later decisions,⁷⁷ the 1976 Foreign Sovereign Immunities Act adopts a considerably different approach.⁷⁸ Instead of classifying the acts which would entitle a sovereign to claim immunity as in the *Victory Transport* decision, the Act establishes a classification of "commercial acts" which serve as *exceptions* to sovereign immunity.⁷⁹ It is clear that Congress has rejected the *Victory Transport* test—that which is "commercial" under the 1976 Act (e.g., buying supplies for the military) cannot be "political and public."⁸⁰

75. *Id.* at 360-61.

76. 1) Internal, administrative acts
 2) Legislative acts
 3) Acts concerning the armed forces
 4) Acts concerning diplomatic activities
 5) Public loans

Id. at 360.

77. See von Mehren, *supra* note 61, at 51-53. Von Mehren discusses *Isbrandsten Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971), *cert. denied* 404 U.S. 985 (1971), and *Petrol Shipping Corporation v. Kingdom of Greece, Ministry of Commerce, Purchase Directorate*, 360 F.2d 103 (2d Cir. 1966), *cert. denied* 385 U.S. 931 (1966).

78. Von Mehren, *supra* note 61, at 53.

79. 336 F.2d at 354-60.

80. Von Mehren, *supra* note 61, at 53. It is interesting to note von Mehren's observation that "when a state contracts with private parties for the development of its natural resources, the state is engaged in a commercial activity." *Id.* at 54. The holding of *Int'l Assoc. of Machinists v. Organization of Petroleum Exporting Countries* would seem to militate against this interpretation of the 1976 Act. Refer to note 71 *supra*. This leads inevitably to the question of what law judges will apply when ruling on claims of sovereign immunity. Subsequent international treaties and agreements will supersede the Act in conformity with the supremacy clause, U.S. CONST. art. VI., but the 1973 provision to decide claims of immunity under "other principles of international law" was deleted in the final version of the 1976 Act. See Note, *supra* note 53, at 451. Courts are left with a detailed scheme which suggests that judges need to look no further than the statute itself and U.S. precedent. *Id.* at 452.

Two problems persist in this construction: First, a statutory scheme with such great international implications should be fluid and sensitive to international developments. *Id.* at 452-53. Broad interpretations of the term "commercial activity" by a court, however, could easily reach beyond the intentions of the legislature to construe that term somewhat narrowly. On the other hand, unfavorable response to the United States' policy or trade activity abroad could provoke U.S. courts into an unexpectedly restrictive interpretation of the term "commercial activity." Thus it is unrealistic to expect the 1976 Act to be exhaustive or final. *Id.*

Next, conflicting U.S. precedent may be of limited utility in adjudicating sovereign immunity pleas. *Id.* at 438. Reference to international sources will probably be essential to explicate the terms "commercial activity" and "direct [economic] effect" in the absence of State Department determinations, acceptable precedent, and specific guidelines in the 1976 Act itself. *Id.* at 438-40, 452-53. Courts should have the freedom, therefore, to align U.S. sovereign immunity law with international practice, and the judiciary should have at its disposal the body of international law to "infuse the legislatively designed standards with meanings." *Id.* at 453.

C. Agency or Instrumentality of a Foreign State

A second ambiguous term appears in the definition section⁸¹ of the Act: "agency or instrumentality of a foreign state."⁸² The roles of governmental agencies are significantly different in market and non-market economies, and the Act's definition seems tailored to market economies. "Agency" is defined in the Act as any entity:

- 1) which is a separate legal person, corporate or otherwise, and
- 2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
- 3) which is neither a citizen of a state of the United States . . . , nor created under the laws of any third country.⁸³

The first criterion was intended to include any entity which can sue, be sued, contract, or hold property in its own name.⁸⁴ The second criterion, which creates difficulties in the context of trade with Socialist states, requires that the entity be an *organ* of the foreign state or *owned* (at least primarily) by a foreign state or its political subdivision.⁸⁵ Because of the Socialist principle that all productive property is owned by the state or the people, *ownership* is meaningless in the Socialist context, and thus the amorphous term "organ" must be the standard for immunity determinations. The rationale surrounding the third criterion is simply that an entity is presumptively engaging in commercial or private acts when it establishes a company in a foreign country.⁸⁶ The House Report on the 1976 Act suggests that typical agents or instrumentalities of a foreign state should include state trading corporations, mining enterprises, transport organizations, steel companies, central banks, export associations, government procurement agencies, or a ministry that acts and may be sued in its own name.⁸⁷

D. Interplay of Commercial Activity and Agency Determinations

It is readily apparent that a foreign state may escape jurisdiction under the Act either by establishing its act was *not commercial* in nature, or by showing that the actor was *not an agent or instrumentality* of

81. 28 U.S.C.A. § 1603 (West Supp. 1980).

82. *Id.* at § 1603(b).

83. *Id.*

84. H.R. REP., *supra* note 53, at 15.

85. *Id.* The ambiguity of the term "organ" and the meaninglessness of the term "ownership" in the Socialist context are discussed in sections IV C. and V D., *infra*, respectively.

86. *Id.*

87. *Id.*

that state.⁸⁸ In the commercial activities exception,⁸⁹ which is probably the most important reason for denying immunity under the 1976 Act, "agency or instrumentality" is included in the meaning of the term "foreign state."⁹⁰ Therefore, the three commercial situations in which immunity will be denied—a commercial activity by a foreign state *in* the U.S.; an act performed in the U.S. *in connection* with a foreign activity elsewhere; and an act which has a *direct effect* in the U.S.—all imply a determination of agency before the Act's denial of immunity comes into play.⁹¹

The interplay and ambiguities in the terms "commercial activity" and "agency or instrumentality" are illustrated by two recent cases involving Socialist entities as defendants in U.S. federal courts.⁹² An analysis of these two cases in the next section reveals latent problems in the 1976 Act requiring the attention of Congress, the courts, and planners of commercial transactions with Socialist states.

IV. RECENT LITIGATION UNDER THE 1976 ACT

A. *Edlow International Co. v. Nuklearna Elektrarna Krsko*

In *Edlow International Co. v. Nuklearna Elektrarna Krsko*,⁹³ a Bermuda corporation which acted as broker in the sale of uranium fuel sued the defendant Yugoslav nuclear power plant for broker's fees.⁹⁴ The defendant's motion to dismiss on jurisdictional grounds⁹⁵ was granted for two reasons: (1) the court lacked diversity jurisdiction since the Bermuda corporation could not *shift* its cause of action as a broker to a counterpart corporation in the United States; and (2) the court lacked subject matter jurisdiction under the 1976 Act since the defendant was not an agency or instrumentality of a foreign state under the Act.⁹⁶

The plaintiff Edlow learned in 1975 of a Yugoslav utility in need

88. This latter criterion was the issue in *Edlow Int'l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (D.D.C. 1977), to be discussed in section IV A *infra*.

89. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1980).

90. *Id.* at § 1603(b)(2).

91. *Id.* at § 1605(a)(2).

92. *Edlow International Co. v. Nuklearna Elektrarna Krsko*, *supra* note 88; *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978).

93. 441 F. Supp. 827 (D.D.C. 1977), noted in 4 N. C. J. INT'L L. & COM. REG. 76 (1978); 5 BROOKLYN J. INT'L L. 191 (1979); 9 GA. J. INT'L & COMP. L. 111 (1979); 12 VAND. J. TRANSNAT'L L. 165 (1979).

94. 441 F. Supp. at 827-28.

95. See 28 U.S.C.A. §§ 1330, 1332, 1391, 1441 (West Supp. 1980).

96. 441 F. Supp. at 828-32. Edlow did not meet its burden, in the court's eyes, of removing its status as an alien and shifting its primary residence to Washington, D.C.; therefore the court lacked subject matter jurisdiction by reason of diversity. *Id.* at 830-31.

of uranium oxide for use as a nuclear fuel.⁹⁷ Edlow found a United States supplier and telexed the Paris representative of a French nuclear concern regarding the potential transaction and its brokerage fee.⁹⁸ The Paris representative conveyed the information either to the defendant or to Metalka, a workers' organization which served as the defendant's export-import agent.⁹⁹ In early 1976 the defendant entered into a contract for uranium oxide, and the Bermuda-based Edlow Resources firm submitted a brokerage invoice for \$24,000.¹⁰⁰ During the next six months, Edlow attempted to collect its fee and was ultimately notified that the defendant would not pay since the contract was concluded without the participation of the plaintiff.¹⁰¹

The jurisdictional basis under the 1976 Act failed because the defendant "work organization" was not an "organ" of the Yugoslav state.¹⁰² Article 35 of the Yugoslav Constitution defines a "work organization" as independent and self-managing, at least in its day-to-day operations.¹⁰³ The plaintiff had argued that under a Socialist system all property is subject to the ultimate ownership and authority of the state, and is therefore *owned* by the state.¹⁰⁴ The legislative history of the Act, however, reveals an intent to read broadly the terms "agency or instrumentality" to encompass a "variety of forms;" there is simply no suggestion that the system of property ownership alone should be determinative of the question.¹⁰⁵ Rejecting the property-system test, the court focused on (1) the degree to which the entity discharges a government *function* and (2) the extent of state *control* over the entity's operation.¹⁰⁶ Despite the appearance of complete state *own-*

97. *Id.* at 829.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 831. The other two criteria of the 1976 Act, that the organization have a separate legal identity and not hold U.S. citizenship or be organized under the law of any nation save the foreign state in question, were easily met. *Id.* Note that the plaintiff was in the interesting position of arguing *for* the defendant's status as a foreign state to *gain* jurisdiction.

103. *Id.*

104. *Id.* The defendant replied that "social property" in Yugoslavia is neither state-owned nor privately owned, but rather held in trust for the general social good of the people. The court rejected the plaintiff's argument and deemed it a mistaken characterization that every enterprise in a Socialist system would be an "agency or instrumentality" under the terms of the 1976 Act.

105. *Id.* at 831-32 (citing H.R. REP., *supra* note 53, at 15-16).

106. 441 F. Supp. at 832. Since the work organization generated and distributed power much like a large private corporation in the U.S., the court was persuaded that it had a nongovernmental function even in Yugoslavia. There was no governmental subsidy, control on the board, or interference in daily management operations—all crucial factors in the court's *control* test. The plaintiff's reference to strong governmental regulation was met with an analogy that even in the U.S. regulation is not *control* of detailed physical performance.

ership in the perspective of a political theorist, alone it is insufficient to confer jurisdiction in the terms of the 1976 Act.¹⁰⁷

B. *Yessenin-Volpin v. Novosti Press Agency*

A second recent case under the Foreign Sovereign Immunities Act, *Yessenin-Volpin v. Novosti Press Agency*,¹⁰⁸ provides a significant contrast with the approach in *Edlow*. Plaintiff Alexander Yessenin-Volpin brought a libel action against two Soviet entities, TASS (Telegraph Agency of the Soviet Union of the U.S.S.R. Council of Ministers) and Novosti Press Agency.¹⁰⁹ Each was found to be a "foreign state" for the purpose of immunity, and the commercial activities exception did not apply to bar such immunity.¹¹⁰ The suit was dismissed for want of jurisdiction.¹¹¹

The court in *Novosti* recognized the value of the 1976 Act in providing a plaintiff with a forum to obtain a ruling on the existence of immunity; if immunity does not attach, the plaintiff may then secure an adjudication and satisfaction of his claim.¹¹² A court's initial focus should thus be whether the entity is a "foreign state" and thereby entitled to invoke the protections of the Act.¹¹³

The plaintiff argued that Novosti was not entitled to that status even though it met two of the necessary criteria (separate legal identity and not a U.S. citizen) for an "agency or instrumentality of a foreign state."¹¹⁴ The key determination, therefore, became whether the defendant Novosti was *owned* by the U.S.S.R. or a political subdivision thereof.¹¹⁵ The court, in the person of Judge Tenney, noting that this inquiry (designed to establish the degree of the state's identification with the entity) was ill-suited to the concepts of ownership which operate in Socialist States,¹¹⁶ embarked on an ideological odyssey in search

Control has as its focus the "daily operations" and not the ultimate policy decisions of the state.

107. *Id.* Note that the 1976 Act requires majority ownership by the state before an organization is considered an agency or instrumentality of that state. 28 U.S.C.A. § 1603(b)(2) (West Supp. 1980). This points to a failure in the Act or a misconception by Congress with regard to the property laws and concepts in Socialist systems of government. Although there was an effort to remain flexible in the Act's definitions, the Act is ill-suited to the concept of socially-owned property. 443 F. Supp. at 852. Refer to notes 122-24 *infra* and text accompanying.

108. 443 F. Supp. 849 (S.D.N.Y. 1978).

109. *Id.* A third libel action against *The Daily World*, a newspaper of the Communist Party in the United States, was not discussed in the opinion.

110. *Id.* at 851-56.

111. *Id.* at 856-57.

112. *Id.* at 854.

113. *Id.* at 851-52.

114. *Id.*

115. *Id.*

116. *Id.*

of a criterion applicable to litigation with Socialist organizations.¹¹⁷

The Soviet Constitution, in guaranteeing freedom of the press to citizens through citizen control of communications facilities, authorizes the existence of organizations such as the Novosti Press Agency.¹¹⁸ Novosti is an information agency which enters into contracts with foreign-owned media to supply material for a fee or in exchange for desired foreign materials.¹¹⁹ The state provides free use of buildings and communications equipment, while Novosti possesses its own assets and leases some property from the state.¹²⁰ The Soviet Constitution also provides that land, minerals, banks, transport facilities, farms and *means of communication* are state property (i.e., belong to all people), yet Novosti's charter makes it clear that no State organ bears responsibility for the activities and obligations of the Agency.¹²¹ The plaintiff argued that this charter provision "conclusively" demonstrated that Novosti is not an agency of the state, and hence cannot bootstrap the free use of real estate into an ownership interest.¹²² The court labeled this argument a misconstruction of the legal, social, and economic organization of the U.S.S.R., but quickly admitted that the 1976 Act, by phrasing its test for agency in terms of ownership, did not simplify application of the Act to Socialist entities.¹²³

The court additionally questioned whether a "right" to possession can exist in a state economic enterprise which merely exercises an economic and administrative function delegated to it by the state.¹²⁴ The self-administering, financially responsible state enterprise *controls*, but does not *own*, its property—all legal entities (especially commercial organizations) in the Soviet Union are government enterprises.¹²⁵

117. *Id.* at 852-56.

118. *Id.* at 852 (citing KONSTITUTZIYA arts. 125-26 (U.S.S.R.)).

119. 443 F. Supp. at 852 (citing Novosti Statute § I(2)(b)&(c)). "Novosti's organizational structure consists of three bodies in ascending size and descending responsibility which govern the organization." These bodies consist of delegates elected from "sponsors," e.g., Union of Journalists, Union of Writers, and Union of Societies for Cultural Relations with Foreign Countries. *Id.*

120. *Id.*

121. *Id.* at 853 (citing Novosti Statute § III(10)).

122. 443 F. Supp. at 853.

123. *Id.*

124. *Id.* Novosti, although not an economic enterprise, is nevertheless directed by the Communist Party and in the service of the State. *Id.* The court concluded that "there is no real difference between the other economic enterprises and 'voluntary associations' organized pursuant to Article 126." *Id.* at 853 n.2 (citing G. GUINS, SOVIET LAW AND SOVIET SOCIETY 97 (1954)). Whether Novosti is constructively an economic entity because of its sales, or a "voluntary association" in the terms of the Soviet Constitution, is not really dispositive of the case. "It is evident that all legal entities in the Soviet Union are government enterprises though organized on a commercial basis." 443 F. Supp. at 854 (quoting G. GUINS, *supra* at 96). The court was obviously having difficulty classifying Novosti.

125. 443 F. Supp. at 853-54.

Whether one looks to the state's majority ownership of Novosti's property, or to the public nature of all organizations such as Novosti, one must conclude that it is an organ "owned by the U.S.S.R."¹²⁶ Moreover, the statement by Soviet Ambassador Anatoliy F. Dobrynin that Novosti is an instrumentality of the state was to the court highly persuasive of Novosti's status as an agency and, as such, its immunity from suit.¹²⁷

The cause of action in *Novosti* stemmed from allegedly defamatory articles which were published in two periodicals apparently distributed in the United States.¹²⁸ Two potential bases of jurisdiction in the 1976 Act were presented by the facts: (1) section 1605(a)(5) covering noncommercial torts, but specifically excluding claims arising out of libel;¹²⁹ and (2) section 1605(a)(2) setting forth the "commercial activities" exception. The plaintiff relied on that portion of the latter exception which applies to an act committed outside the United States having a direct effect inside the United States.¹³⁰

The plaintiff's argument, the court surmised, was based upon an assumption that any entity which engages in a commercial activity is commercial and thus not immune.¹³¹ The 1976 Act, however, contemplated that a given entity's activities may sometimes be private and sometimes governmental and public in nature.¹³² Both the 1976 Act¹³³ and its legislative history¹³⁴ contemplate that an activity carried on for profit or a single contract of the character that might be made by a private person are both assumed to be commercial in nature.¹³⁵ Doubtless *Novosti* is a commercial activity in its sales to foreign media—the critical issue is whether the libel was in connection with a commercial

126. *Id.* at 854.

127. *Id.* (citing *Krajina v. The Tass Agency*, [1949] 2 All E.R. 274 (C.A.)). This argument, it seems, is hardly persuasive of their status as an agency. It may be argued that this was an unwarranted intrusion from the Executive realm and thus in conflict with depoliticization goals of the 1976 Act. Refer to note 64 *supra* and text accompanying. If the U.S. State Department is not to interfere in the determination of immunity of foreign state organs, surely a Soviet executive department should not be deferred to by the court. This is, of course, a moot point since the plaintiff "admitted" the immunity of TASS.

128. 443 F. Supp. at 854-55.

129. 28 U.S.C.A. § 1605(a)(5)(B) (West Supp. 1980).

130. 443 F. Supp. at 855. The court rejected the notion that any act or activity had been carried on *in* the United States. *Id.* The writing and publication in the U.S.S.R. was the *act*, and injury to the plaintiff's reputation the alleged *effect*. *Id.*

131. *Id.*

132. *Id.* (citing H.R. REP., *supra* note 53, at 16). The court noted that a sale of a product to a United States citizen would clearly constitute a commercial act. 443 F. Supp. at 856. The periodicals in question in this suit were probably sold, perhaps even to United States citizens. Is the court looking to the purpose, *i.e.*, service to the Communist Party, and not the nature, *i.e.*, a sales transaction, of the act?

133. 28 U.S.C.A. § 1603(d) (West Supp. 1980).

134. H.R. REP., *supra* note 53, at 16.

135. 443 F. Supp. at 855-56.

activity.¹³⁶ Since the publications in question were essentially from organs of the Communist Party, Novosti's collaboration was found to be an instance of intragovernmental cooperation and therefore not in connection with a commercial activity.¹³⁷ The court refused to "reach around the various organs of the Soviet government which actually published the alleged libels" and subject the Novosti Press Agency to its jurisdiction.¹³⁸

C. *The Judicial Approaches Compared*

Discovering that the ownership interest test of the 1976 Act was poorly adapted to Socialist enterprises, the *Novosti* and *Edlow* courts felt compelled to supplement the Act; unfortunately, each court chose a different method.¹³⁹ The *Novosti* court observed that 63% of the Novosti Press Agency's assets were owned by the state; this fact, combined with the ultimate state ownership of all property in a Socialist economic system, demonstrated state *ownership* despite Novosti's limited daily control over the state's assets.¹⁴⁰ In the alternative, Novosti also was found to be an *organ* of the state due to its "essentially public nature."¹⁴¹ The first test (ownership) employed by the court fails to account for a significant political fact: Soviet law distinguishes state-owned property from "Socialist property" which may be state-owned or owned by collective farms and public and cooperative organizations.¹⁴² This framework contemplates a mode of ownership which is neither governmental nor private.¹⁴³ The court seemed unsure whether

136. *Id.* Would not TASS also be commercial in nature at times? Did the court defer to an executive determination and thus deny the plaintiff an objective determination of their status? Refer to note 113 *supra*.

137. *Id.*

138. *Id.*

139. See Note, 12 VAND. J. TRANSNAT'L L. 165, 181 (1979).

140. *Id.* at 181-82; 443 F. Supp. at 853; 28 U.S.C.A. § 1603(b)(2) (West Supp. 1980).

141. Note, *supra* note 139, at 182; 443 F. Supp. at 854; 28 U.S.C.A. § 1603(b)(2) (West Supp. 1980).

142. Note, *supra* note 139, at 182 (citing FUNDAMENTALS OF CIVIL LEGISLATION OF THE U.S.S.R. AND THE UNION REPUBLICS art. 20 (1961)).

143. The significance of such distinctions may not be readily apparent. One should first note that Western States continually confront a dualistic notion of property ownership: property is usually publicly- (or state-) owned or privately-owned by citizens. Citizens, of course, may band together and *own* property as a cooperative unit. The Soviet Union's property system, however, is unfamiliar to Western eyes, for it envisions only a very minor *private* sector, a cooperative sector of perpetual property rights, and a complex "Socialist" sector where the state or various people's organizations may *own* Socialist property. This alone is fairly comprehensible, but one must qualify the above framework by placing it into a particular stage in the historical evolution of the state. Thus, in the early stages of communism, the state may *own* and control nearly everything. In a mature Communist society, on the other hand, the people will have organized themselves into cooperative entities while the monolithic state withers away. Refer to section IV D. *infra*. If United States citizens and corporations are to do business with Socialist entities, they must be prepared to deal with unfamiliar legal concepts. Likewise, the courts must be prepared to face unique arguments

Novosti was completely controlled and *owned* by the state, as the quotations from Stalin,¹⁴⁴ Berman,¹⁴⁵ and Guins¹⁴⁶ suggest, or whether the decisive factor was the 63 % *ownership* by the state set against 37 % *ownership* by the agency itself.¹⁴⁷ If the latter was the heart of the court's opinion, then the inspirational quotations regarding total state ownership and control in Socialist states¹⁴⁸ were nothing more than interesting political theory and not really helpful in the court's interpretation of the 1976 Act. The possibility of an intermediate *public* ownership apart from the state was not considered.¹⁴⁹

The second test adopted by the court, establishing organizations with an essentially public nature as *organs* of the state, appears to contravene the intent of Congress to allow an agency or instrumentality to assume a variety of forms regardless of its commercial or governmental nature.¹⁵⁰ Once again, it is unclear whether the court would consider all organizations immune which could muster a public reason for their existence—an easy test in Socialist states—or whether the court recognized that an organ of a state may at times be commercial and nongovernmental in terms of the 1976 Act.¹⁵¹ By setting forth its holding on the issue of agency in terms of an either/or proposition,¹⁵² the court does not make it clear whether the 63% ownership by the state or the public character of the agency was decisive on the issue of “agency or instrumentality.”¹⁵³

While the court in *Novosti* considered the system of ownership in the U.S.S.R. crucial, the *Edlow* court found this factor nondeterminative.¹⁵⁴ There are two potential explanations for the *Edlow* court's inattention to Socialist forms of ownership. One view is that the Yugoslav

from Socialist entities regarding their status of immunity. The legislature surely has a duty in this situation to anticipate such arguments in order to protect both sides of any conflict.

144. 443 F. Supp. at 854.

145. *Id.* at 853.

146. *Id.*

147. *Id.* at 853-54.

148. Refer to notes 144-46 *supra* and text accompanying. The court was unwilling to lay down a standard in cases like this.

149. Refer to note 143 *supra*.

150. Note, *supra* note 139, at 182; see H.R. REP., *supra* note 53, at 15-16.

151. See Note, *supra* note 139, at 171.

152. 443 F. Supp. at 854.

Thus, whether one relies on the fact that more than 63% of the property over which Novosti exercises the rights of possession and use is actually 'owned' by the state, or whether one looks to the essentially public nature of all organizations such as Novosti in the Soviet Union, one must conclude that Novosti is either an organ of the U.S.S.R. or 'owned' by the U.S.S.R. or its political subdivisions.

Id. Following this holding is a quotation from Stalin proclaiming *public* ownership “sacred and inviolable;” the court does not distinguish this from state ownership. Refer to note 133 *infra* and text accompanying.

153. Note, 5 BROOKLYN J. INT'L L. 200 (1979).

154. 441 F. Supp. at 832, 9 GA. J. INT'L & COMP. L. 111,121 (1979).

system of property ownership is unique and quite distinct from, for example, that found in the Soviet Union; it emphasizes social rather than state ownership, and thus stands somewhere between East and West on the politico-economic spectrum.¹⁵⁵ In this perspective, Yugoslavian legal theory is ideologically emancipated from traditional Soviet interpretations of Marx and Lenin, and the economic system is decentralized with no binding plan.¹⁵⁶ Work organizations such as the defendant Nuklearna Elektrarna Krsko eventually become self-managing and similar to Western corporations.¹⁵⁷

This could explain the court's hesitance to let Socialist political theories of state ownership determine the status of the defendant organization.¹⁵⁸ The court chose instead to emphasize the degree to which the defendant discharged a governmental function and the degree to which the government controlled its operations.¹⁵⁹ One may conclude either that the court rejected identification of a state's property law system as a viable *test* of the status of a state's organizations, or that the court was intentionally sensitive to an ownership system which, although socialistic in political terms, is in actuality closer to Western legal conceptions of private control of property.¹⁶⁰ This latter rationale brings the *Edlow* decision into harmony with *Novosti*, with the *Edlow* court setting forth principles applicable to trade with Yugoslavia, and the *Novosti* court limiting its analysis to public organizations of the U.S.S.R. Under this view, the Foreign Sovereign Immunities Act is admirably flexible in that it allows the determination of entitlements to immunity regardless of the political and economic context.¹⁶¹

Another possible explanation of the *Edlow* decision is based upon

155. Note, *supra* note 153, at 203, supports this view. The *Edlow* court observed that social property, being neither state-owned nor privately-owned, is held "in trust" by a work organization for the general social good of Yugoslavians. 441 F. Supp. at 831. This represents a radical departure from the traditional Soviet interpretation of Marxism-Leninism. Note, *supra* note 153, at 203. See Pejovich, *The Yugoslav System of Contractual Self-Management and its Implications*, 37 REV. OF SOC. ECON. 225 (1979).

156. Note, *supra* note 153, at 203. Pejovich, *supra* note 155, calls the Yugoslav system "market socialism" because it abolishes administrative planning but keeps public ownership. *Id.* at 225-27.

157. Note, *supra* note 153, at 203-04.

158. 441 F. Supp. at 831-32.

159. *Id.* at 832.

160. Note, *supra* note 153, at 205. Note that the court analogized determination of the defendant's status with the inquiry in *United States v. Orleans*, 425 U.S. 807 (1976), a decision under the Federal Torts Claims Act; there the court examined whether a federally-funded community action agency was an agency of the federal government. 441 F. Supp. at 832.

161. Note, *supra* note 153, at 205-06. "If a court has difficulty in determining the owner of a foreign entity because of ambiguity in the State's system of property ownership, it may instead ascertain whether the entity is an organ of the state." *Id.* at 206.

the disadvantageous position of the court when compared with *Novosti*.¹⁶² Yugoslav law does not define "Socialist property." In contrast, Soviet law clearly outlines the ownership of "Socialist property," even though the terms are not necessarily compatible with Western concepts of ownership.¹⁶³ In both Yugoslavia and the U.S.S.R., social property is the principal means of production, but the court in *Edlow*, lacking a clear Yugoslav definition, substituted a concrete *control* test for the amorphous *ownership* test.¹⁶⁴

This equation of ownership with control in determining agency, however, indicates a dangerous disregard of the radical differences in systems of ownership.¹⁶⁵ Although Yugoslavia's economic system is distinguishable from the Soviet system, it is also not a market system easily analogized to that of the United States.¹⁶⁶ Moreover, Congress adopted the majority-ownership test precisely to relieve the courts from a determination of control by the state.¹⁶⁷

The *Edlow* court, therefore, seems to have added a new test to the 1976 Act because of its inability to explicate the Yugoslav system of property ownership.¹⁶⁸ Unfortunately, the focus on an entity's public or governmental nature to determine its status as an organ of the state circumvents, in the same manner as *Novosti*, the legislative intentions of the 1976 Act.¹⁶⁹ Under the analysis in this section, the Foreign Sovereign Immunities Act is badly in need of an amendment to aid courts in litigation involving organizations of Socialist States.¹⁷⁰ The *Edlow* "control" test, with its disregard of property concepts, may actually be a superior approach because it avoids ideological inquiry and dogmatically categorizes Socialist legal concepts.¹⁷¹ Yet the danger of conflicting criteria in the determination of an organization's agency status remains.¹⁷²

162. Note, *supra* note 139, at 182.

163. *Id.* The Yugoslav Constitution does, however, define "contractual self-management" as state ownership of capital goods while workers participate in management and profits. See Pejovich, *supra* note 155, at 226.

164. Note, *supra* note 139, at 182-83.

165. *Id.* at 183. The court concluded that Congress did not intend for a state's constitutional claim of ownership to render every entity in the land a governmental organ. *Id.*

166. Yugoslavia's "market socialism," (refer to notes 155-56 *supra* and text accompanying), is as distinguishable from U.S. capitalism as it is from soviet communism. Public ownership of productive property remains a legal principle, despite the rejection of central governmental planning. Workers participate in management, but industry is not privately owned as in the United States.

167. *Id.*; see 28 U.S.C.A. § 1603(b)(2) (West Supp. 1980).

168. Note, *supra* note 139, at 183.

169. *Id.*; refer to note 150 *supra* and text accompanying.

170. *Id.* at 184.

171. *Id.*; Note, *supra* note 6, at 122.

172. Note, *supra* note 139, at 184.

The result in *Novosti* is perhaps more open to question than *Edlow* because the business of publication, including sales and distribution, can easily be conceived as commercial in nature.¹⁷³ The court seemed to be examining the *purpose* of the publication when it noted that it was intra-governmental and in the service of the Communist Party.¹⁷⁴ The result of this interpretation may be a test upon which Socialist business enterprises can easily establish their public "nature" and corresponding immunity. The fact of Soviet ownership and service to the party is descriptive of all agencies and organizations in the U.S.S.R. Under the *Novosti* test, the defendant work organization in *Edlow* could have easily qualified as an agency if that would have been to their advantage.¹⁷⁵ The *Novosti* decision, in its interpretation of the 1976 Act, unwittingly may give an upper hand to Socialist nations. Together with *Edlow*, the opinions demonstrate a need to re-examine our tests of immunity under the 1976 Act in terms of Soviet and Socialist ideology.¹⁷⁶

V. INCORPORATING IDEOLOGY

A. *The 1976 Act: Depoliticization or Repoliticization?*

The Foreign Sovereign Immunities Act reflects an intentional de-

173. Certainly the dissemination of information is for the public good in terms of freedom of speech and thought. The court cited the Soviet Constitution and the fact that the press is the servant of the people. 443 F. Supp. at 852.

174. Obviously, the publication and distribution of periodicals is a business enterprise. The fact that it is not for private "profits" should not alter the commercial nature of such activity, or every enterprise in Socialist nations could claim immunity on that basis. The act is certainly one that could be engaged in by a private person. 443 F. Supp. at 856. A more recent case under the 1976 Act, *United Euram Corporation v. Union of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D.N.Y. 1978), refused to grant immunity to the Soviet State Concert Society (*Gosconcert*) on the basis of its artistic and governmental character. A contract under which the U.S.S.R. would send artists to the U.S. and Great Britain was breached by the U.S.S.R., and the plaintiff sued under the commercial activities exception to the 1976 Act. *Id.* at 610. The Court ignored the unprofitable character and diplomatic *purpose* of the contract, and deemed the *nature* of the transaction to be a "sale of a service." *Id.* at 611. When contrasted with the *Novosti* case, this rationale appears more attentive to the intentions of the 1976 Act. Of course, the fact that the commercial act was a typical breach of contract made the determination easier in light of the 1976 Act. Refer to text accompanying note 74 *supra*.

175. Recall that their property was held in trust for all the people, and certainly their production of electrical power for the people was public in purpose and even in nature under the simplistic *Novosti* test.

176. Another recent decision, relevant in this context, is disconcerting in its construction of the term "commercial activity." *Int'l Assoc. of Machinists, supra* note 71, involved a complaint by the labor union that OPEC was engaged in price-fixing which artificially raised prices and restrained trade in the oil market. The court narrowly construed the term "commercial activity," and held that the establishment by a foreign state of the terms and conditions for removal of a prime natural resource from its territory is clearly a governmental and not a commercial activity. Once again, the distinction between purpose and nature falters; the court looked at the purpose—saving resources—instead of the nature—producing and selling oil.

politicization of the issues surrounding sovereign immunity.¹⁷⁷ Unfortunately, it may be necessary to specifically account for the legal, economic, and political bases of Socialism in legislation and interpretation thereof. Because Congress chose to leave the 1976 Act politically flexible,¹⁷⁸ the courts are left with the task of inquiring into the legal context of a Socialist state involved in litigation.¹⁷⁹

As the *Novosti* and *Edlow* decisions indicate, the Act's ambiguities have already resulted in supplementary tests for determination of a Socialist organization's status.¹⁸⁰ Moreover, the *Novosti* determination that the defendant agency was not engaged in a commercial act when it published the alleged defamation may be viewed as providing a loophole for Socialist enterprises to avoid jurisdiction.¹⁸¹ It should be noted that the *Edlow* and *Novosti* courts were neither ignorant of nor insensitive to ideological distinctions—both attempted to *place* the defendants in their legal and political contexts before determining their relationship with the state and the nature of their activities.¹⁸² Thus it is not additional ideological sensitivity, but a workable statutory standard, that is required in the context of sovereign immunity determinations under the 1976 Act.

B. Amending the 1976 Act

One possible solution to the present ambiguities in the 1976 Act would be an amendment which specifically lists and classifies exemplary acts as governmental or commercial. This approach appears to be exemplified in Great Britain's State Immunity Act of 1978.¹⁸³ Like the United States' 1976 Act, it codifies the restrictive theory of sovereign immunity by conferring immunity on foreign states in all cases unless there is a waiver or the proceedings are of a commercial, industrial, financial, professional, or contractual nature.¹⁸⁴ In addition to

177. There are two aspects to this depoliticization: First, the transfer of sovereign immunity determination from the executive branch to the judicial branch was an attempt to eliminate political motivations and inconsistent standards. Note, 18 HARV. INT'L L.J. 429, 436 (1977). Second, the interpretation of the court in *Edlow*, discussed in Section IV A. *supra*, made it clear that premises valid in political theory will not automatically be operative in the legal sphere. 441 F. Supp. at 832.

178. H.R. REP., *supra* note 53, at 16. "The courts would have a great deal of latitude in determining what is a 'commercial activity' for purposes of this bill." *Id.*

179. This is clear from the inquiries in *Edlow*, *supra* notes 93-107 and text accompanying, and *Novosti*, *supra* notes 108-38.

180. Refer to notes 139-76 *supra* and text accompanying.

181. Refer to notes 174-75 *supra* and text accompanying.

182. 443 F. Supp. at 852-54; 441 F. Supp. at 831-32.

183. See Gordon, *supra* note 4, at 172 n.11. See also Bierhuize, *The Principle of Sovereign Immunity and International Contracts: Recent Developments in English Case-Law and American Legislation*, 25 NETHER. INT'L L. REV. 345, 351-52 (1978).

184. Gordon, *supra* note 4, at 172 n.11 (citing Great Britain's State Immunity Act 1978,

these exceptions, the Act specifically precludes immunity in a variety of circumstances including employment contracts, property damage or personal injury, British real estate transactions, estate and trust disputes, and patent and trademark cases.¹⁸⁵ This approach, although helpful, does not squarely confront the problem of managing two antithetical legal systems; it is also doubtful whether this detailed list of litigable arenas would have significantly helped the courts in *Novosti* and *Edlow*. Regardless of the number of listed activities, it is possible to *interpret* the activity as primarily governmental and therefore unfit for such private legal categories. The difficulty is not reducible to merely predicting all the possible future situations and classifying them in advance. The problem is deeper: Congress seems oriented to Western or free market conceptions of commercial or governmental *purposes* and *natures*. The use of these classifications (nature and purpose) as bases breaks down in a political system (i.e., socialism) where perhaps no commercial activity can be truly non-governmental and every act of a commercial *nature* has a constitutionally public *purpose*.

A more realistic approach to the difficulties inherent in Socialist-Capitalist litigation may be to incorporate ideological distinctions into the Act by amendment. This approach concedes at the outset that the 1976 Act may be unwittingly locked into a capitalistic perspective or *paradigm*.¹⁸⁶ It is evident that Congress presupposed that its distinctions between commercial and governmental, and nature and purpose, were universal for all practical purposes.¹⁸⁷ The drafters of the 1976 Act did not ignore the possibility of litigation with Socialist States,¹⁸⁸

effective October 26, 1978). See also Bird, *The State Immunity Act of 1978: An English Update*, 13 INT'L LAW. 619, 619-43 (1979).

185. *Id.*

186. See T. KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-22 (2d ed. 1970). In his history of Western physical science, Kuhn uses "paradigm" to refer to accepted examples of scientific practice (the "normal science" of any era) including the group of theories, beliefs, and preconceptions into which scientists are locked until a revolution creates a new paradigm. *Id.*

187. An excellent example of a socio-legal study identifying the legal ideology pervading a particular piece of legislation is Ferguson, *Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes*, 4 BRIT. J. L. & SOC'Y 18 (1977). His conclusion is that

the commercial law codes [late 1800s in Great Britain] were viewed as serving the needs of commerce and realizing the interests of commercial groups by those who brought about their enactment, but this view of the matter was made possible only by the existence of a jurisprudential ideology which should not be seen merely as an "expression" of commercial interests.

Id. at 18-19.

188. The repeated reference to potential disputes with "foreign state trading companies" in the statement introducing the House Report obviously anticipates growing trade with the Soviets and other Socialist states. H.R. REP., *supra* note 53, at 6-7.

yet the U.S. Congress' House Judiciary Committee and their aides may have been affected by the popular modern notion that the ideological conflict between the U.S. and the U.S.S.R. is lessening.¹⁸⁹ This outlook finds support, practically speaking, in the 1972 U.S.-U.S.S.R. Trade Agreement¹⁹⁰ and the growth in U.S.-U.S.S.R. trade,¹⁹¹ but is discredited on a more fundamental level by the controversial judicial analyses in *Novosti* and *Edlow*. In the context of litigation under the 1976 Foreign Sovereign Immunities Act, radical ideological differences surface between Capitalist and Socialist concepts of ownership, governmental control, and commercial activity.¹⁹² Attention must therefore be given to the possibilities of accounting for traditional and future Socialist legal concepts in legislative and judicial efforts.

C. Trade Entities in the U.S.S.R.

In the early 1920s, the newly formed Soviet Union's foreign trade policy allowed a "private sector" to exist via licensing, yet individuals and corporations acting therein were required to deal exclusively through branches of the *Commissariat* of foreign trade.¹⁹³ The state thus retained complete control as the overseas broker.¹⁹⁴ By the 1930s, the private sector was squeezed out by autonomous state-owned import-export corporations which had power to contract independent of any trade delegation control.¹⁹⁵ Import-export corporations are even today separate legal entities, according to the Soviets, and rarely is immunity claimed for them.¹⁹⁶

Compared with the corporate structures in the United States, however, such organizations are similar to Congressionally created and government-owned and controlled corporations.¹⁹⁷ Their indepen-

189. This view is typified in Note, *Effects of Soviet Ideology on the Legal Framework and Policy of US-USSR Trade*, 1 N. C. J. INT'L L. & COM. REG. 75 (1975); it is not an altogether unwarranted view. Trade relations have improved vastly over the past 15 years, and the climate remains favorable with the exception of the recent conflicts in Afghanistan and their effect on U.S.-U.S.S.R. relations. *Id.*; See NEWSWEEK, Jan. 28, 1980, at 40-46; NEWSWEEK, Jan. 21, 1980, at 22-28; note 21 *supra*.

190. Refer to note 23 *supra*.

191. Refer to notes 21-24 *supra* and text accompanying.

192. Refer to section IV *supra*.

193... Fensterwald, *supra* note 58, at 627-28.

194. *Id.* at 628.

195. *Id.* The delegations had supervisory and informational functions much like a consular official. *Id.*

196. *Id.* at 629. Even under Soviet law these corporations, also known as Foreign Trade Organizations (FTOs), are not immune from suit. Neither does the state pay the FTOs' debts or judgments. See Stratakas, *Sovereign Immunity, Enforceability of Judgments and Related Matters*, in BUSINESS TRANSACTIONS WITH THE U.S.S.R. 190 (R. Starr ed. 1975). There should probably be no question as to the status of a governmental agency falling within the commercial activity exception in the case of an FTO.

197. Fensterwald, *supra* note 58, at 631.

dence is therefore somewhat illusory, and the foreign trade mechanism is flexible enough that the Soviet Union can make use of the Ministry of Foreign Trade or an export-import corporation in a business transaction.¹⁹⁸

The most visible instrumentalities of the modern Soviet trade monopoly are the Foreign Trade Organizations (FTOs),¹⁹⁹ of which import-export corporations are included. Unlike Trade Representations (*diplomatic* entities), FTOs are juridical entities which may own property, produce a profit, and can sue or be sued independently of the Soviet Union.²⁰⁰ They engage in foreign trade transactions or services, each FTO having a particular function in terms of product, geographic market, or type of service.²⁰¹ Despite their special juridical capacity, government regulations determine all aspects of their organization and activities, including the scope of their legal personality, separate property status, responsibilities, and relationship with the Ministry of Foreign Trade.²⁰² A significant victory for the United States negotiators in the 1972 U.S.-U.S.S.R. Trade Agreement was the inclusion of a provision that FTOs "shall not claim or enjoy . . . immunities from suit or execution of judgment or other liability with respect to commercial transactions."²⁰³

The defendant public organization in *Novosti*, a press agency, was not a state economic enterprise (*e.g.*, an FTO), and yet the difference between public organizations and economic enterprises is negligible in terms of independence and ultimate control by the Communist Party.²⁰⁴ The property of the state, collective farms, cooperative orga-

198. *Id.* Fensterwald observes that the Soviets may take advantage of the idiosyncrasies of the laws of various countries; for example, in dealing with England prior to 1934, it would have been wise to have the *trade delegation* sign a contract in its own name to insure immunity or at least limit the British party's remedy to arbitration. *Id.* The trade delegation is not a legal entity, yet it may draft and enter trade agreements, and will invariably claim immunity; the 1972 US-USSR Trade Agreement, *supra* note 23, art. 5, par. 3, denies the trade delegations the right to carry on trade, although they are welcome to have an office in the United States. Stratakas, *supra* note 196, at 189.

199. Berman & Bustin, *The Soviet System of Foreign Trade*, in BUSINESS TRANSACTIONS, *supra* note 196, reprinted in JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 1048 (1977). There were 61 early in 1974. *Id.*

200. *Id.* at 1048-49. Berman and Bustin observe that FTOs are notoriously undercapitalized. BUSINESS TRANSACTIONS, *supra* note 196, at 43.

201. JACKSON, *supra* note 199, at 1049.

202. Grzybowski, *supra* note 29, at 410. The state is not liable on the liabilities of FTOs, and FTOs are liable only to the extent of their assets. *Id.* Note that while an FTO may not claim immunity, it is nevertheless fully controlled by the state, so the degree of control seems to be a very poor standard for determining immunity.

203. Art. 6 par. 2, 1972 Trade Act, cited in Osakwe, *supra* note 23, at 546. Of course, the *Novosti* decision accentuates the ambiguity of the term "commercial activity," and may cloud the purported victory of this provision. Refer to notes 140-47 *supra* and the text accompanying.

204. 443 F. Supp. at 853, (citing G. GUINS), *supra* note 124, at 97.

nizations, and trade unions together comprise "Socialist property."²⁰⁵ The "owner," whether the state or a public organization, has powers of possession, use, and disposal as in a Western democracy.²⁰⁶ It should be noted that state *economic* enterprises, while they possess "Socialist property" as managers, do not own "socialist property" as do *public* organizations.²⁰⁷ This is because the state exclusively owns all forms of production and economically productive property, while a public organization pursues non-economic goals.²⁰⁸ Thus, in terms of ownership, a *public* organization would seem to be more autonomous, less a governmental organ, and less entitled to immunity than an economic organization. This was, of course, the plaintiff's argument in *Novosti*.²⁰⁹ The inapplicability of the *control* test, which the *Edlow* court considered a more precise indicia of agency or instrumentality, becomes evident in the Soviet context.²¹⁰

D. Socialist Legal Principles

Socialist law, and particularly the present legal system of the U.S.S.R., is an integral part of the political transition between the Capitalist era and the ideal Communist society.²¹¹ Soviet law has retained

205. Note, *supra* note 139, at 173.

206. *Id.*

207. *Id.* at 174. This is interesting since the *public* realm has more ownership than the economic realm in the U.S.S.R.; it is a complete reversal of the United States' system where most economic entities are privately owned and public entities are often government owned. Similarly, there is greater governmental control in the public realm than in the private in the U.S., while the Soviet system reverses this. Of course, it is actually more complicated, because the Soviets posit a realm of public ownership which is not really equivalent to any United States property law concept, and it is that concept which is set against the state as the *other* realm. Paradoxically, the two realms are both *owned* by the people and *controlled* by the state in present day Russia; thus they are not set against each other like the public and private spheres of the United States. Are the *people* the very state which is claiming immunity? Is the *public* realm somewhat equal to the governmental as in the U.S., or is the public realm more like the *private* in the U.S.? The *Novosti* court was certainly unclear on this point.

208. *Id.*

209. 443 F. Supp. at 853. Refer to section IV B., *supra*. Note also that "socialist property" may be held in common by the state and a public organization; it is likely that most "socialist property" assets of public organizations are state property. Note, *supra* note 139, at 174-75.

210. 441 F. Supp. at 832; refer to note 209 *supra*.

In contrast, ownership of social property remains a confusing and unanswered question under Yugoslav law. Note, *supra* note 139, at 177. Neither the Yugoslav Constitution nor civil law explicitly defines the term "social property." *Id.* at 176. "Social property," the exclusive means of production, is both part of state property and yet separate from it. *Id.* Workers have an absolute right to use and manage social property, yet it is neither state nor private or personal property. *Id.* at 176. It was the daily freedom from governmental control which impressed the court in *Edlow* when the general proposition that the State owns and controls all organizations in Socialist states proved unfruitful. 441 F. Supp. at 832.

211. R. DAVID & J. BRIERLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 129 (1968). See generally V. CHKHIKVAZDE, THE SOVIET STATE AND LAW (1969); V. LENIN, 25 COLLECTED WORKS 456-74 (5th ed. 1966).

the terminology of Romanist laws, but the affinity is merely formal in the Socialist perspective; since law is merely a reflection of a more fundamental economic structure, the difference between the legal systems of Socialist and non-Socialist states is as radical as their political differences.²¹² Whatever common terminological heritage the two systems share, fundamental differences persist because Socialist legal words and concepts often have a meaning unique to their political and economic context.²¹³

Soviet law, and the legal framework of much of the Socialist world,²¹⁴ is dominated by Marxism-Leninism, a doctrine which confidently explains the world and indicates the path to a better one.²¹⁵ The *infrastructure*, or economic basis, is truly decisive and actually conditions society, whereas law, along with religion and morality, is *superstructure*, and dependent upon the *infrastructure*.²¹⁶ Law is closely identified with the state, and is an instrument which safeguards the interest of the ruling class.²¹⁷ In the Marxist-Leninist perspective, the world history of class antagonism will end when private ownership is abolished. In the resulting Communist society man will be transformed while law and the state will become useless and disappear.²¹⁸ The Socialist state, or dictatorship of the proletariat, is the intermediate phase between capitalism and socialism.²¹⁹ In this transition period, law, like the state, is a means of transforming and guiding society—Soviet leaders admit that they are simply another ruling class, but claim to be enlightened, at least, by Marx and Lenin, and thus further advanced on the road of progress.²²⁰ Law is subordinated to the economic policies of socialism, and has no absolute value in itself; it is not binding on the Supreme Soviet.²²¹ In this mixture of present and future, of state control and *people's* dictatorship, of legal rules and a

212. DAVID & BRIERLY, *supra* note 211, at 120.

213. *Id.*

214. One-half the world's population and one-third of the world's industrial production are under Socialist government control. *Id.* at 121.

215. *Id.* at 122-23.

216. *Id.* at 124. See generally J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM 3-9 (1962). The Soviets are not anxious to admit that the state controls everything—the U.S.S.R. is in a merely transitional phase toward true democracy.

217. DAVID & BRIERLY, *supra* note 211, at 125.

218. *Id.* at 126-27. See J. HILDEBRAND, THE SOCIOLOGY OF SOVIET LAW 37-43 (1972).

219. DAVID & BRIERLY, *supra* note 211, at 128. See generally C. Baroch, The Soviet Doctrine of Sovereignty (The So-called Brezhnev Doctrine), at 7-9, A.B.A. PAMPHLET, (1970).

220. DAVID & BRIERLY, *supra* note 211, at 129-30. "Your judicial practice," said Lenin, "is nothing more than the will of your class made into laws applicable to all." *Id.* at 131. See H. BERMAN, JUSTICE IN THE U.S.S.R. 268 (1963); see also HILDEBRAND, *supra* note 218, at 8-9.

221. DAVID & BRIERLY, *supra* note 211, at 154-58. See also JUSTICE AND THE LEGAL SYSTEM IN THE USSR 21 (R. Conquest ed. 1968). Legal definitions are subject to a change-

state-less/law-less society, it is no surprise that Socialist defendant organizations can manipulate U.S. courts and assume the most advantageous "status" which the limited U.S. immunity statute provides.

Many Western legal and commercial concepts change meaning in the context of the dictatorship of the people and corresponding collectivization of the economy.²²² The concept which has completely changed, in the Soviet perspective, is that of ownership.²²³ The manner in which property is appropriated is foundational to the economic structure which conditions the law itself.²²⁴ Three regimes exist in Soviet property law: personal ownership, cooperative ownership, and Socialist ownership.²²⁵ The first regime allows satisfaction of personal needs, i.e., consumer goods, and is much like private property in Capitalist countries.²²⁶ Cooperative ownership, the second regime, is a concept unique to Socialist law, and is exemplified by the perpetual right to exploit the land (in cooperative farms or *kolkhozes*).²²⁷ Socialist ownership, the third regime, prevails in the industrial sector, and includes land, buildings, and structures on the one hand, and raw materials and products on the other.²²⁸ The first category of the third regime is permanent and for exploitation while the second is intended for disposal.²²⁹

To find the *owner* of these properties is a difficult and confusing task; it is the state, i.e., a defined territory under the control of a government, or the people, or better yet the nation of which the state is the provisional representative.²³⁰ Any comparison with Capitalist countries is unsatisfactory.²³¹ Even the concession of assets to certain enterprises can always be unilaterally modified by the authorities in a Socialist state, so the enterprise has no right which can prevail over the state itself.²³² The transfer and exploitation of property is obviously

able political context. *Id.* Law serves the interests of the state, and is not protective of individual interests or even objective norms. *Id.*

222. DAVID & BRIERLY, *supra* note 211, at 213.

223. *Id.*

224. *Id.* at 214.

225. *Id.* at 215.

226. *Id.* See KONSTITUTZIYA art. 13 (U.S.S.R.) (1977), reprinted in THE SOVIET LEGAL SYSTEM: LEGISLATION AND DOCUMENTATION 3-32 (W. Butler comp. and trans. 1978).

227. DAVID & BRIERLY, *supra* note 211, at 216. See KONSTITUTZIYA art. 10, *supra* note 226.

228. *Id.*

229. *Id.*

230. *Id.* at 211; See KONSTITUTZIYA art. 11, *supra* note 226.

231. DAVID & BRIERLY, *supra* note 211, at 217.

232. *Id.* In a sense this is always true—the state as sovereign may create and remove rights in any legal system. The Soviet perspective, however, subordinates the law and even legal norms such that there is no appeal to any rights independent of the sovereign state. Economic profitability frequently does not play a role in that decision.

much more important than the specification of an *owner*—Socialist ownership has very little to do with ownership as it is understood in Capitalist countries, even though the word is retained in both contexts.²³³ In a sovereign immunity suit involving a Socialist state defendant and a United States plaintiff, the court is faced with a floating concept of ownership which ranges from a simple private/state distinction to a tri-level private/cooperative/social property system, and includes all intermediate possibilities depending upon the stage of transition which that Socialist state is experiencing.

E. Socialist Planning and Sovereign Immunity

In the area of foreign trade, the extent of Soviet economic planning cannot be overemphasized.²³⁴ The execution of contracts is a matter of public order—it follows an administrative decision which is the primary *reason* for the contract.²³⁵ Soviet enterprises do not contract with foreigners; they make their desires known to the administration.²³⁶ The Office of Foreign Trade may consider price and the potential of profit, but it is likely that political or other non-economic motives would be operative.²³⁷ The people's republics of Eastern Europe are developing the same concepts of law and state as the U.S.S.R.²³⁸ Yugoslavia, in its criticism of the U.S.S.R., emphasizes self-management in the industrial sphere.²³⁹ This is not to be construed, however, as a similarity with the West—it is justified as an even stricter adherence to the Marxist-Leninist doctrine of removing the state for the benefit of democratic society.²⁴⁰

Socialist states have traditionally preferred an absolute theory of sovereign immunity to the now popular restrictive theory.²⁴¹ They have a distinct advantage under the absolute theory: because a political or trade organization is in essence the state, such entities can easily qualify for immunity.²⁴² The Foreign Sovereign Immunities Act, as

233. *Id.* at 217-18.

234. *Id.* at 218.

235. *Id.* at 219-20.

236. *Id.* at 225.

237. *Id.* at 226. The meaninglessness of most-favored nation status with the U.S.S.R. is discussed in DAVID & BRIERLY, *supra* note 211, at 224-26. The authors observe that customs duties and taxes are collected by the same state administration that is the only trader with foreigners; it is "no more than a simple matter of accounting." *Id.* at 226.

238. *Id.* at 227.

239. DAVID & BRIERLY, *supra* note 211, at 223-43.

240. *Id.* at 241-42. Yugoslavia is proud to have avoided the Soviet-style bureaucratization of the state. *Id.* at 243-45.

241. N. LEECH, C. OLIVER, & J. SWEENEY, *THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS* 308 (1973).

242. *Id.* In *Krajina v. The Tass Agency*, a British Court of Appeals decision, *supra* note 127, the plaintiff argued that the defendant agency was a separate juridical entity and not a

earlier discussed, attempts to curtail this opportunism by clarifying that entities engaged in commercial acts will not qualify for immunity in those transactions.²⁴³ This depoliticized criterion was intended to be applicable to all entities without regard to the economic system from which they emerged.²⁴⁴ The standard will doubtless suffice when the act giving rise to litigation is obviously "commercial" in nature by *Western standards*. Contracts by a government agency to sell goods serve as clear examples.²⁴⁵ Yet the plaintiffs in *Novosti* and *Edlow* were faced respectively by the ambiguities of the terms "commercial activity" and "[governmental] agency."²⁴⁶

American attorneys practicing in the area of trade with Socialist states may rely not only on their own experiences and that of others, but have at their disposal both extensive commentaries on the peculiarities of non-Western economic systems²⁴⁷ as well as important documents translated into English.²⁴⁸ Yet a similar close attention to Socialist law is virtually absent in the 1976 Foreign Sovereign Immunities Act.

VI. CONCLUSION AND PROPOSAL

It bears reiterating that ideological differences²⁴⁹ are not mere political and economic fascinations which can be ignored in the concrete legislative process. Ideologies surround and give meaning to the legal terms of any international transaction. The court in *Edlow* was able to interpret the status of the defendant organization in Western terms by an appeal to an analogous federally-funded organization in the U.S.²⁵⁰ The *Novosti* court was necessarily more sensitive to the

department of government. Reprinted in LEECH, OLIVER, & SWEENEY, *supra* note 241, at 309. The court looked at Soviet law in its determination of the nature of the activity, and conceded that a state may give its governmental department the status of a juridical entity without its losing immunity. *Id.* at 310-11.

243. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1980).

244. H.R. REP., *supra* note 53, at 16.

245. *Id.*

246. Refer to section III B. and C. *supra*.

247. See BUSINESS TRANSACTIONS, *supra* note 196.

248. See EAST-WEST TRADE: A SOURCEBOOK ON THE INTERNATIONAL ECONOMIC RELATIONS OF SOCIALIST COUNTRIES AND THEIR LEGAL ASPECTS (D. Loeber comp. and ed. 1976). This four volume work contains excerpts from thousands of critical documents, commentaries, and diagrams—all in English—which comprehensively elucidate the area of trade with most Socialist States. See also W. STRENG, INTERNATIONAL BUSINESS TRANSACTIONS TAX AND LEGAL HANDBOOK 622-36 (1978).

249. Ideology here refers to a system of definite views, ideas, and conceptions adhered to by a society. In Soviet terms, it is always a "reflection of the economic system predominate at any given time." Hunt, *The Importance of Doctrine*, in CRISIS AND CONTINUITY IN WORLD POLITICS 139-49 (G. Lanyi & W. McWilliams eds. 1966) (citing a Soviet philosophical dictionary (FILOSOFICHESKII SLOVAR)).

250. 441 F. Supp. at 832. This was somewhat easier with Yugoslavia's form of socialism

radical differences between Western and Soviet legal concepts, and admitted at the outset that the 1976 Act's "ownership" criterion only complicated its application to Socialist entities.²⁵¹ Rather than criticizing the courts' desperate attempts to find a standard, we should look instead to the inadequacy of the 1976 Act.

The impracticality of listing all the situations where entities will be denied or awarded immunity has been discussed;²⁵² this approach, moreover, fails to comprehend the fundamental ideological limitations of the terms of the 1976 Act. A more realistic approach would be to *repoliticize* the Act by identifying the crucial differences in perspective between the two major politico-economic systems in the world today. To argue that there are not two major systems but rather a continuum of politico-economic systems is to miss the point.²⁵³ The 1976 Act presupposes an ability to distinguish commercial from non-commercial acts by their *nature* and not their *purpose*.²⁵⁴ As the *Novosti* decision demonstrates, this distinction falters where an ideological premise that all acts have a public non-profit purpose exists—that purpose surrounds the act and changes it from a formally commercial act to an act in the service of the party and thus intra-governmental in nature.²⁵⁵ Similarly, a Socialist public agency may never *own* enough of its assets to be considered independent of its government.²⁵⁶ Since the United States can anticipate growing trade relations with Socialist state agencies, as well as an accompanying interaction on cultural and political grounds, the 1976 Act must account for these differences to assure U.S. citizens of their litigable rights.²⁵⁷

An amendment setting forth a particular set of criteria applicable to Socialist state entities would not unnecessarily complicate determinations of immunity as Congress imagined.²⁵⁸ It would instead relieve the courts of the duty to create their own standards and ensure relative uniformity in the area of East-West trade.

A two-level criterion for immunity could be integrated into the

than it would have been with a similar Soviet work organization. Refer to notes 212-218 *supra* and text accompanying.

251. 443 F. Supp. at 853.

252. Refer to notes 184-86 *supra* and text accompanying.

253. Certainly the European, Islamic, African, and Oriental legal systems have distinctive characteristics, and cannot be classified simply as "Western" or "Eastern." See generally DAVID & BRIERLY, *supra* note 211.

254. 28 U.S.C.A. § 1603(d) (West Supp. 1980).

255. Refer to notes 173-76 *supra* and text accompanying. The Communist Party, even though it is the ruling class and therefore governmental, is also a group of people not unlike U.S. consumers. Are their acts, then, truly governmental?

256. Refer to notes 124-25 *supra* and text accompanying.

257. H.R. REP., *supra* note 53, at 6.

258. *Id.* at 16.

1976 Act by amendment. An initial identification of the political-economic perspective would precede the legal determination of immunity. If the context of the dispute was a free market economy, even if it involved state-trading agencies, the present contours of the Act would suffice. If, on the other hand, the dispute involved a confrontation with a centrally planned economy, a new set of criteria recognizing the ambiguity of terms such as "ownership" and "agency" could be advanced. Congress may wish to formulate the issues in the manner of the *Novosti* court,²⁵⁹ or artificially draw parallels and analogies with Western entities, thereby *translating* the central planning framework into free market legal concepts as did the *Edlow* court.²⁶⁰ Either option would reduce ambiguities and place partners of U.S. entities on notice as to their status in United States courts, although the *Edlow* approach per-

259. The *Novosti* court recognized the radically different politico-economic context in the U.S.S.R. and attempted to set forth a criterion for the determination of immunity in Socialist states. Initially, the court observed that there was a category of property-control in Socialist states which is less than ownership but more than mere supervision of another's property. 443 F. Supp. at 853-54. However, no attempt was made to define this realm of "social property," and the criterion itself wavered between majority ownership of property and total state ownership as the reason for granting immunity. The court, meanwhile, bolstered its holding with the Ambassador's verification of *Novosti's* status as an instrumentality of government. *Id.* at 854. The initial approach, however, is significant: Property is not in Socialist states either private *or* state owned; in fact, both concepts lose their significance, and two realms of *public* property, owned by the "people", replace them. An amendment to the 1976 Act could remedy future ambiguities by making it impossible to waver between ownership by the state and ownership by the people: The Act would simply acknowledge the unsuitability of the criterion of ownership, and place a heavier emphasis on whether the subject of the litigation was commercial or noncommercial in nature. No reference need be made to majority ownership, the degree of state control, or the purpose of the act or activity. Notably, no reference need be made to status as an "organ" of the state, since this term is equally ambiguous in Socialist states. With a renewed emphasis on the commercial nature of an act or activity, the definition of the term "commercial" could be expanded to include any act which would typically be done for profit in a free market economy or toward the establishment of a profit-making enterprise, or an act which would typically result from the activities of a Western profit-making enterprise.

260. In this approach, the various realms of Socialist ownership could be analogized or equated with familiar Western concepts. For example, the *Edlow* court tried to determine whether the defendant work organization would have been considered a federal agency or a large public company subject to federal regulation. Similarly, all cooperative organizations could be considered corporations, since they are analogous to our corporations. The approach in *United Euram*, *supra* note 174, is exemplary of this solution. Since the defendant Gosconcert was engaged in the sale of a service, it was treated like a Western commercial enterprise. *Id.* at 611. Although the outcome of *United Euram* suggests an admirable flexibility of the 1976 Act, the contractual nature of the dispute was easily translated into terms familiar to the Capitalist context.

The amendments suggested above and in note 259, *supra*, would require only minor changes in the Act. Footnotes or parentheticals to several of the Act's definitions and provisions would give notice to the courts that they should shift their focus away from government control and ownership, both ambiguous in the Socialist context, and look even more closely at the commercial nature of the act. A warning could be given that "nature" does not mean philosophic essence, which would suggest the true purpose or meaning of the activity, but means type or form of activity irrespective of its true value, intention or beneficiaries.

petuates the myth that analogies are easily established between Socialist and Western entities.

Instead of ignoring the fundamental differences and attempting superficial analogies, Congress should identify the ideological conflict and admit that the discernible gulf will not permit a synthesis. From that starting point, an amendment could establish in advance which types of Socialist entities will be considered agents and which *types* of their activities will be considered commercial. No analogies need be drawn, and no opportunity for ideological debate or historical interpretation need arise in the court. Such discussions would start and end with the draftsmen and their experts in the legislative process.

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