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William W. Bishop, Jr.

Edwin D. Dickinson

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Foreword

It is a privilege and an honor to be invited to introduce the following collection of articles on State Trading. In planning and organizing this symposium, the *Vanderbilt Law Review* has chosen to deal with an important factor in contemporary economic life—a factor which has widespread ramifications in both domestic and international law. The included articles cover a wide variety of subjects, and represent viewpoints which differ considerably. They have the common quality of clear and full presentation of information about current problems, while at the same time suggesting further lines for investigation. Each article offers much of interest and value for those lawyers whose practice brings them into contact with various aspects of state trading. In addition to that important group, it should be valuable to those who are concerned with the broader subject of the way in which legal institutions are developed to cope with new economic patterns and problems.

In some ways the most familiar ground may be found in Dean-Emeritus Stason's discussion of the Atomic Energy Commission's production and distribution of radioactive isotopes—a discussion which shows how an agency of our own government carries on highly specialized state trading in the familiar private-enterprise economy. His article further reminds us of the surprising extent to which government (especially the federal government) is already involved in commercial operations in the United States. His mention of the United States Government as a producer of electric power, insurer, lender and borrower, holder of timber land, owner of grain, warehouse operator, aiding agency for better housing, operator of the Alaska and Panama Railroads, and the like, well demonstrates that many business-type activities are carried on by our government. On the local level, one could mention city transportation, supply of water, occasional production and supply of electricity, state sale of intoxicating liquors, and many other types of business in which a governmental unit engages in activities which elsewhere in the United States are in the province of private enterprise. The problems of

state trading are not, therefore, exclusively foreign or strange to the American scene.

Some of the articles deal with state-trading problems in particular countries or regions where state-trading is especially important. Thus, Professor Amerasinghe of Ceylon discusses some of the legal problems of state trading in Southeast Asia, while the methods and machinery for carrying on Communist China's foreign trade are treated by Dr. Hsiao. And Professor Szászy gives a full account of Hungary's national law and international arrangements concerning its state-trading activities. Professor Mestmäcker carefully examines the position of state-trading monopolies within the European Common Market, analyzing in detail the interpretation and application given especially to Article 37 of the Rome Treaty of 1957 establishing the European Economic Community, which requires Member States to "gradually adjust any State trading monopolies so as to ensure that, when the transitional period expires, no discrimination exists between the nationals of Member States as regards the supply or marketing of goods." Professor Harold Berman and John Garson of Harvard Law School write about the United States law concerning trade with the state-trading economies of the Communist world. Particular treatment is given to the effects of the proposed East-West Trade Relations Act, which is designed to provide a framework helpful for American entrepreneurs conducting trade with Communist state-trading organs. They make a good case for the early enactment of such a statute by the Congress.

Professor Clive Schmitthoff of London analyzes the role of commercial treaties and trade agreements in "East-West trade." He points out that commercial treaties between countries of free-market economies form the public law framework within which private enterprises (and any state-trading organizations of such countries) conduct their trade,[1] the necessary private-law contracts and arrangements being negotiated subsequently and separately. Indeed, such treaties do at times take account of state-trading, as in provisions abolishing sovereign immunity for state enterprises engaging in commerce,[2] or in provisions requiring government offices and enterprises to make purchases and sales involving imports or exports solely in

1. Concerning such treaties, see HAWKINS, COMMERCIAL TREATIES AND AGREEMENTS: PRINCIPLES AND PRACTICE (1951); WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960); Hynning, *Treaty Law for the Private Practitioner*, 23 U. CHI. L. REV. 36 (1955); Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958).

2. Typical of the post-World War II treaties of the United States is that with Italy, signed February 2, 1948, which states on this point:

> No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping

accordance with commercial considerations.[3] In countries of "planned economies" and predominant state trading, international agreements must often take the place of private contracts as well. Questions concerning supply, orders, prices, terms of delivery, and the like, become more important in international agreements, especially in those involving two or more state-trading nations. The most difficult problems arise, of course, in regard to international agreements between countries having different types of economies.

Closely related to the problems of state trading are those which arise between a private enterprise operating in a foreign country and the government of that country when the latter makes the transition to a state-trading economy and nationalizes the enterprise's property within its territory. In his elaborate and thoughtful discussion of the *Sabbatino* case[4] and the Sabbatino Amendment,[5] Mr. W. H. Reeves of the New York Bar presents a viewpoint which needs to be considered, whether one agrees with the conclusion of the majority of the Supreme Court or that of the Congress.

Earlier discussions of the impact of state-trading upon the law[6] have often stressed the notion that when a government enters trade it should give up any sovereign immunity as to such trade.[7] Inter-

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or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

Treaty of Friendship, Commerce, and Navigation with Italy, Feb. 2, 1948, art. XXIV, para. 6, 63 Stat. 2255, 2292, T.I.A.S. No. 1965.

3. See Treaty of Friendship, Commerce and Navigation with Germany, Oct. 29, 1954, art. XVII, [1956] 7 U.S.T. & O.I.A. 1839, 1858, T.I.A.S. No. 3593.

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies; (b) the awarding of concessions and other government contracts; and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

4. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

5. Foreign Assistance Act § 301(d)(4), 78 Stat. 1013 (1964), as amended, 22 U.S.C. § 2370(e)(2) (1965).

6. See, especially, the issues devoted to state trading in 24 LAW & CONTEMP. PROB. 241-528 (1959).

7. See, *e.g.*, ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933); SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL

national law, and the practice of many countries, has gone far in this direction. The United States has wisely taken steps to limit the sovereign immunity of foreign governments and their instrumentalities to activities which are not commercial,[8] just as at an earlier time our courts had decided that when a municipality or state goes into business it should be subject to suit just like its commercial competitors. In the perhaps obsolescent international law of neutrality, state-trading may impose different duties on the neutral from those imposed when private activities are involved. War-time state trading, as a part of the operations of economic warfare, calls for more complete investigation than it has received; in the case of the United States, it might be fruitful to examine the World War II operations of the United States Commercial Corporation, which was in many ways the corporate "alter ego" of the Foreign Economic Administration. Furthermore, there may well be somewhat different standards of state responsibility when aliens are injured by a state-trading activity rather than by the (formerly) more usual operations of government. Lawyers are thinking and writing about the legal status of government trading organizations, both domestically and on the international scene.

These and many other interesting problems involving state trading and the law may come to the minds of the readers of this symposium; but they do not form its central theme. What the articles here assembled do seek to accomplish is to paint a picture of the way in which different types of state trading actually function, the legal problems which arise, and the way in which the law provides more or less satisfactory solutions to these problems. This the articles do well.

Wm. W. Bishop, Jr.,
Edwin D. Dickinson
University Professor of Law,
University of Michigan

Law (1959); Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 Harv. L. Rev. 614 (1950); Harvard Research in Int'l Law, *Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l L. Supp. 451, 597 (1932); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Yb. Int'l L. 220 (1951); Setser, *The Immunities of the State and Government Economic Activities*, 24 Law & Contemp. Prob. 291 (1959); Sweeney, *The International Law of Sovereign Immunity*, U.S. Dep't State Policy Research Study (Oct. 1963).

8. See Letter from Jack B. Tate, Acting Legal Adviser to the United States Attorney General, May 19, 1952, in 26 Dep't State Bull. 984 (1952), commented upon in 47 Am. J. Int'l Law 93 (1953). See also National City Bank v. Republic of China, 348 U.S. 356 (1955); Victory Transport, Inc. v. Comisaria General, 336 F.2d. 354 (2d Cir. 1964).