

THE DEVELOPMENT OF SOVEREIGN IMMUNITY LAW IN THE UNITED STATES

A. A HISTORICAL INTRODUCTION*

1. The Classical View

The traditional rule concerning the immunity of a foreign sovereign to civil suit was stated by Chief Justice Marshall at the beginning of the nineteenth century in *The Schoonere Exchange v. McFadden*.¹ In that case, plaintiffs sought to reclaim a vessel that they alleged belonged to them but had been seized on the high seas by agents of Napoleon. The Supreme Court, starting from the point of view that the dignity of the sovereign-typically a king or prince- must not be degraded, concluded that public armed vessels of the sovereign were immune from the jurisdiction of a friendly sovereign state - even when the issue in the case involved title to the very property against which the suit was brought.

The Schooner Exchange by its terms applied only to warships of a foreign sovereign; however, first English and then American cases extended the rule of immunity to other vessels owned by a foreign sovereign, and eventually, by implication, to other kinds of property as well.² In *Berizzi Brothers Co. v. The Pesaro*,³ The United States Supreme Court had before

* Portions of this introduction, as well as some of the questions at the end of this section, are adapted from the author's article "Claims against Foreign States - A Proposal for Reform of United States Law," 44 N.Y.U.L.Rev. 901 (1969).

¹ 11 U.S. (7 Cranch) 116, 3 L.Ed. 287 (1812).

² *The Parlement Belge* [1880] 5 P.D. 197; *The Porto Alexandre* [1920] P. 30; *Oliver American Trading Co. v. Mexico*, 5 F.2d 659 (2d Cir. 1924).

³ 271 U.S. 562, 46 S.Ct. 611, 70 L.Ed. 1088 (1926).

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it an ordinary commercial claim, based on the failure of a merchant vessel to deliver a cargo accepted in Italy for carnage to New York. The Court upheld dismissal of the action, however, on the sole ground that the vessel was owned by the government.

We think the principles [stated in *The Schooner Exchange*] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenues for its Treasury, a government acquires, mans, and operates ships in the carrying of trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a Naval force.⁴

The *Pesaro* case rested entirely on the Supreme Court's understanding of international law and precedent, without any reference to considerations of foreign policy or the desires of the United States Government. Indeed, in the *Pesaro* case itself, the State Department had argued that immunity should not be granted to a commercial vessel in a claim arising out of a commercial transaction, but the Justice Department had disagreed and had declined to submit the State Department's opinion to the Court.⁵

The issue of immunity of merchant vessels in cases arising out of commercial claims came before the Supreme Court again in 1943. In *Ex parte Peru*⁶ the Court affirmed its prior holding that vessels owned by a foreign government were immune from suit in the United States, even if both the vessel and the claim were commercial. This time, however, the State Department had formally "recognized and allowed" the claim of immunity made on behalf of the Government of Peru, and the Court, in an opinion written by Chief Justice Stone, reefed its decision on. that determination. Thus the Court dismissed the claim and granted immunity not on the basis of its understanding of formal principles of international law, but solely on the basis that the State Department's certificate and request

⁴ Id. At 574, 46 S.Ct. At 612.

⁵ *The Pesaro*, 277 Fed. 473, 479-80 n. 3 (1921); 2 Hacksworth, Digest of International Law 429-30, 438-39 (1941).

⁶ 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014 (1943).

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must be accepted by the courts as a conclusive determination by the political arm of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.⁷

Two years later, in *Republic of Mexico v. Hoffman*,⁸ the Supreme Court, again in an opinion by Chief Justice Stone, denied immunity to a merchant vessel belonging to the Mexican Government. Though Mexico owned the ship, it appeared to be “in the possession, operation and control of a private company under a contract with the government.” Further, and apparently more important, the State Department had declined to express any opinion as to the claim of immunity on the basis of ownership without possession. The Court wrote:

It is ... not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicial seizure of property of a friendly state may be regarded as such an affront to its dignity and so may affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the Executive determination that the vessel shall be treated as immune. But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our international interests and for recognition by other nations.⁹

⁷ Id. At 589, 63 S.Ct. at 800.

⁸ 324 U.S. 30, 65 S.Ct. 530, 89 L.Ed. 729 (1945).

⁹ Id. at 35-36, 65 S.Ct. at 532-33.

2. *The Tate Letter*

On the basis of the Supreme Court's statements in *Ex parte Peru* and *Mexico v. Hoffman*, the State Department considered that it had a substantial amount of leeway both in enunciating the doctrine of immunity to be applied in United States courts, and in deciding particular cases. There were obvious defects and injustices in a theory which depended upon such tenuous concepts as the distinction between ownership and possession of a vessel.¹⁰ Even more compelling, there seemed little justification for extending to foreign governments choosing to do business in the same way as private enterprises an immunity from suit that had been based on an earlier conception of the dignity of the sovereign. After several years of study of the relevant practice, both in the United States and abroad, the State Department came to the conclusion in 1952 that immunity from suit should not be granted in cases involving what it- called "private" or "non-public" acts as contrasted with "sovereign acts."

In a letter to the Acting Attorney General of May 19, 1952, the Acting I - gal Adviser of the Department of State, Jack B. Tate, wrote:

According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).

[T]he Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be te Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

The Tate Letter concluded:

It is realized that a shift in policy by the executive cannot control the courts but is felt that the counes are leas likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.... "

3. *The Tate Letter in Practice*

¹⁰ See Frankfurter, J., concurring in *Mexico v. Hoffman*, 324 U.S. at 39-40, 65 S.Ct. at 534-35.

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The Tate Letter, as far as it went, was a partial success. It places the United States on the side of those countries that refused to grant immunity to governments simply because they were governments, without inquiring into the basis of the claim. At the same time, the Tate doctrine was sufficiently in accord with prevailing international practice so that there was no serious protest from foreign nations. Most countries, with the exception of Great Britain, some of the Commonwealth countries, and the Communist states, had already imposed some kind of limitation on the granting of sovereign immunity. The Tate Letter, however, did not and could not really succeed in establishing a workable and effective law governing claims against foreign states.

First, the Tate Letter made no attempt to define the distinction between the activity of a state *jure imperii* and activity *jure gestionis*. One of the difficulties with the Tate Letter was how such a distinction should be worked out in practice. For example, is the purchase of grain by a government for distribution to needy persons a private or governmental act? What if the grain, instead of being distributed gratis, is resold by the government at a profit? Or what if the grain is purchased from the United States Government pursuant to one of the surplus agricultural disposal programs? It was apparent that while the basic distinction of the Tate Letter was sound, modern states were engaged in a great many activities not contemplated when the sovereign immunity doctrine was developed. Not only was the articulation of the distinction between governmental and private acts difficult, the distinction often seemed irrelevant in deciding the actual cases. For instance, in the example of the purchase of grain by a foreign government, why should the conditions under which the defendant vessel was carrying its own cargo make any difference to a person claiming injury as the result of a collision at sea? 11. 26 Dep't State Bull. 984 (1952).

A second, equally vexing problem arising out of the Tate Letter combined with the Supreme Court's views in *Ex parte Peru* and *Mexico v. Hoffman*, was who should make the difficult determination called for by the *jure gestionis, jure imperii* distinction. The Supreme Court had suggested that the State Department's decision was to be conclusive on the courts. But the new policy appeared to depend less on political judgment regarding the effect of litigation on foreign relations than on a detailed analysis of particular facts bearing on the classification of the activity on which the claim was based. Determination of whether an activity was *jure gestionis* or *jure imperii* seemed, under the Tate approach, to be more a judicial than a State Department function, yet the State Department apparently was free to decide the issue, at least in those cases where the foreign government so desired.

A third difficulty with the Tate doctrine was that even where the activity on which the claim was based was clearly one not entitled to immunity under the restrictive theory, it was not clear how a suit against a foreign sovereign was to be initiated. Personal service of process on ambassadors or public ministers had been void and, indeed, subject to criminal penalty since 1790.¹¹ All of the sovereign immunity cases to come

¹¹ Codified as 22 U.S.C. §§ 252-253, repealed by Pub.L. 95-393 (1978).

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before the Supreme Court had arisen out of claims against vessels. According to the Tate Letter, if a plaintiff could find and libel a government-owned ship against which it had a claim, such libel would, assuming the immunity plea was defeated, be effective to confer jurisdiction on the court to adjudicate the claim. But if the plaintiff court not find the vessel in question in a United States port, or if the claim did not involve a ship, the Tate Letter might well avail the plaintiff nothing unless property of the defendant state could be attached.

The question then arose whether jurisdiction could be obtained over a foreign sovereign by attaching unrelated property—so-called “*quasi in rem*” jurisdiction.¹² In the first case to raise the issue, *New York & Cuba Mail S.S. Co. v. Republic of Korea*,¹³ the court, following the suggestion of the State Department, held that property of the Republic of Korea was immune from attachment, and that attachment of bank deposits of the Korean Government in New York must fail, even though the underlying claim was one arising out of a commercial activity. Subsequently, the Department modified this position, and drew a distinction between attachment for purposes of obtaining jurisdiction, which was permitted, and attachment for purposes of execution of judgments, which was denied.¹⁴ (1st Dep’t 1961), *aff’d*, 12 N.Y.2d 781, 235 N.Y.S.2d 1, 186 N.E.2d 676 (1962).

¹² See Chapter III, section III A.

¹³ 132 F.Supp. 684 (S.D.N.Y. 1955).

¹⁴ See, e.g., letter from Legal Adviser to Attorney General in *Weilamann v. Chase Manhattan Bank*, 21 Misc.3d 1086, 192 N.Y.S.2d 469 (Sup.Ct.1959), quoted in 6 Whiteman, *Digest of International Law* 709 (1968). See also *Stephen v. Sivnostenska Banka, Nat. Corp.*, 15 A.D.2d 111, 116, 222 N.Y.S.2d 128, 134

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It might have been argued that this distinction carried within itself a fatal contradiction, since the basis of *quasi in rem* jurisdiction was supposed to be the possibility that plaintiff, if successful on the merits, could apply the thing attached (in which he had no particular interest) to the satisfaction of his claim against the defendant. But that argument appears not to have been made. A further refinement made by the State Department, though not formally announced, was that the property to be attached, even for purposes of jurisdiction, must itself be put to the test of whether it was "governmental" in which case it would be immune—or "commercial"—in which case it could be attached. This further distinction ran into difficulty, however, because properties, and particularly money, can have a variety of uses. For example, an account at a commercial bank in New York or Washington maintained by a foreign state and used for purchasing supplies would generally not be considered immune from attachment. It turned out, however, that a number of countries maintained a single bank account used both for a state purchasing mission and, for instance, for paying the salaries of embassy personnel or for dealings with the World Bank and the International Monetary Fund.¹⁵ L.Rev. 377, 405-407, (1974), describing the practice of the National Bank of Haiti.

Foreign states faced with a suit in the United States had two alternatives. Some sovereign defendants immediately sought relief from the State Department, usually by diplomatic note. If the State Department agreed with the application, it would send a "Suggestion of Immunity" to the Attorney General with a request that it be transmitted to the court.¹⁶

¹⁵ See, e.g., *Hellenic Lines, Ltd. v. Embassy of South Viet Nam*, 275 F.Supp. 860 (S.D.N.Y.1967), where a shipping line attempted unsuccessfully to bring a claim arising out of delays in the port of Saigon by attaching the account of the South Vietnamese Embassy at the First national City Bank of New York. See also, e.g., Lowenfeld, "Litigating a Sovereign Immunity Claim—The *Haiti* Case," 49 N.Y.U.

¹⁶ A typical letter would read:

Dear Mr. Attorney General:

Reference is made to the action of *X v. Patria*, presently pending in the U.S. District Court for the Eastern District of Pennsylvania, commenced by attachment of the S.S.

Paulina in the harbor of Philadelphia. This is to inform you that the Department of

State recognizes and allows the claim of the Government of Patria for immunity of the attached vessel and its cargo from the jurisdiction of United States courts.

Accordingly, you are requested to instruct the appropriate United States attorney to file with the United States District Court for the Eastern District of Pennsylvania a suggestion of immunity in this case.

Secretary of State, For the

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Other sovereign defendants, or their counsel, preferred to make their pleas directly to the court, both because an unfavorable decision could be appealed.¹⁷ finally determine claims

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The Legal

Adviser

¹⁷ It might be thought that a decision denying immunity, being a decision in favor of jurisdiction, would not be appealable before judgment; however, it has been uniformly held that a decision is appealable as a final order within the meaning of 28 U.S.C. § 1291 under the so-called “collateral order” doctrine, i.e., belonging to what the Supreme Court called “that small class which

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