Michigan Law Review

Volume 63 | Issue 4

1965

Sovereign Immunity Restricted to Noncommercial Activity-*Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*

Michigan Law Review

Sovereign Immunity Restricted to Noncommercial Activity—*Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes**

Although frequently criticized,[1] the established doctrine of absolute sovereign immunity has long prevented suits in the courts of the United States against foreign nations without their consent.[2] The Court of Appeals for the Second Circuit, however, in *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*,[3] recently approved a theory of restrictive sovereign immunity limiting a foreign nation's immunity from suit to acts of a noncommercial nature. This action affirmed a district court order compelling arbitration between an American shipowner and the Spanish Ministry of Commerce in accordance with the terms of a contract to carry wheat from Alabama to Spain.[4] Although the Spanish Consul asserted that the Ministry, as a branch of the Spanish government, was immune from suit in American courts, the court classified the transaction as commercial and permitted the suit.

Although *Victory Transport* represents the first formulation of the theory of restrictive sovereign immunity at the federal appellate level,[5] the doctrine of "absolute immunity" has been limited in previous cases. In *Republic of Mexico v. Hoffman*,[6] the United States Supreme Court held that immunity did not extend to a ship controlled and operated by a private Mexican corporation, even though owned by the Mexican government.[7] A more far-reaching limitation to the doctrine of absolute immunity, however, was indicated by the Court in *Hoffman* when it declared that the judiciary should defer to the position taken in each instance by the State Department.[8] Thereafter, the State Department announced, in the Tate Letter,[9] its de-

* 336 F.2d 354 (2d Cir. 1964).

1. *E.g.*, Flota Maritima Browning de Cuba v. Motor Vessel Ciudad, 335 F.2d 619, 623-24 n.10 (4th Cir. 1964); SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW 299-304 (1959).

2. The doctrine of absolute immunity was first established in American law when immunity was granted to an armed vessel in the services of a friendly sovereign. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

3. 336 F.2d 354 (2d Cir. 1964).

4. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 232 F. Supp. 294 (S.D.N.Y. 1963).

5. But *cf.* The Pesaro, 277 Fed. 473 (S.D.N.Y 1921), *vacated sub nom.* Berizzi Bros. Co. v. S.S. Pesaro, 13 F.2d 468 (S.D.N.Y.), *aff'd*, 271 U.S. 562 (1926); Harris & Co. Advertising, Inc. v. Republic of Cuba, 127 So. 2d 687 (Dist. Ct. App. Fla. 1961); Pacific Molasses Co. v. Comite De Ventas De Mieles, 219 N.Y.S.2d 1018 (Sup. Ct. 1961).

6. 324 U.S. 30 (1945).

7. See also United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929), where immunity was denied a wholly owned government corporation which was conducting a commercial business as a private entity.

8. 324 U.S. at 35.

9. 26 DEP'T STATE BULL. 984 (1952). See generally Bishop, *New United States Policy*

cision to suggest immunity only if the act of the sovereign was noncommercial. In *National City Bank v. Republic of China*,[10] the Supreme Court further restricted the doctrine of absolute immunity by allowing a permissive counterclaim against a sovereign plaintiff. In dicta, the Court declared that immunity was not absolute[11] and indicated approval of the State Department's policy of restricted immunity.[12]

The original justification for granting absolute immunity—fear that the exercise of authority by one sovereign over another would "vex the peace of nations"—passed with the era of personal sovereignty.[13] Apprehension that judicially created limitations on immunity would embarrass the State Department has been the more recent explanation for the doctrine.[14] This position seems doubtful, considering the State Department's policy pronouncement in the Tate Letter.[15] It has also been argued that the United States position as a litigant abroad is strengthened by adherence to the absolute doctrine.[16] Although this motive is legitimate, it is, in fact, not very significant since the United States has consistently declined to claim immunity for its own ships in foreign courts.[17]

Similarly, the restrictive theory of sovereign immunity has been attacked by many as unworkable because of the difficulty in distinguishing private from public acts.[18] Although one cannot deny the classification problems which will be encountered,[19] the difficulty in making a specific factual determination should not dictate

---

Limiting Sovereign Immunity, 47 AM. J. INT'L L. 93 (1953); Comment, 60 MICH. L. REV. 1142 (1962).

10. 348 U.S. 356 (1955).

11. *Id.* at 364.

12. See *id.* at 361.

13. See SUCHARITKUL, *op. cit. supra* note 1, at 4-5; Comment, 63 YALE L.J. 1148, 1169-70 (1954).

14. See National City Bank v. Republic of China, 348 U.S. 356, 361 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

15. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 358 (2d Cir. 1964).

16. See Leonard, *The United States as Litigant in Foreign Courts*, in PROCEEDINGS OF AMERICAN SOC'Y OF INTERNATIONAL L. 95 (1958), where this argument is advanced by a member of the Justice Department, its major proponent.

17. See Flota Maritima Browning v. Motor Vessel Ciudad, 335 F.2d 619, 623-24 n.10 (4th Cir. 1964); 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 439 (1941); Brandon, *Sovereign Immunity of Government-Owned Corporation and Ships*, 39 CORNELL L.Q. 425, 429 (1954).

18. See, *e.g.*, Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 INS. COUNSEL J. 11 *passim* (1954); *cf.* New York v. United States, 326 U.S. 572, 583 (1946).

19. The courts of countries that have previously adopted a theory of restrictive immunity have had a great deal of difficulty in making this classification. See the examples cited in SUCHARITKUL, *op. cit. supra* note 1, at 320-25; SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 26-44 (1963); Bishop, *supra* note 9, at 103-05.

rejection of a rule of law founded on economic reality and fairness.[20] With states becoming active participants in sectors of the economy customarily considered private, it is evident that foreign trade will be deterred if absolute immunity of the foreign sovereign is continued.[21] Moreover, by opening the judicial process to claims against foreign sovereigns, the restrictive theory will eliminate some present inequities toward the private trader.[22]

In addition, both consistency with our domestic policy and international practice seem to call for an adoption of restrictive immunity.[23] Absolute immunity appears particularly inappropriate in the United States, which has, in its domestic affairs, largely waived this immunity.[24] Moreover, restrictive immunity has been adopted by a majority of foreign nations.[25] In 1926, twenty nations signed the Brussels Convention, which limited sovereign immunity in maritime commerce to noncommercial transactions.[26] Between 1948 and 1958, the United States became a party to fourteen bilateral treaties that waived sovereign immunity for business activities.[27] This acceptance of restrictive sovereign immunity seems especially significant since treaty and custom are major sources of international law.[28]

The implementation of the restrictive theory of sovereign immunity is, however, dependent upon the solution of certain procedural problems presently confronting the private litigant. In addition to the problem of service of process in an in personam action,[29] accentuated because it is a federal statutory crime to serve process

20. See Timberg, *Sovereign Immunity, State Trading, Socialism and Self Deception*, 56 NW. U.L. REV. 109, 125-26 (1961).

21. Fensterwald, United States Policies Toward State Trading, 24 LAW & CONTEMP. PROB. 369, 396 (1959).

22. See Fensterwald, *supra* note 21, at 396; Timberg, *supra* note 20, at 109-10.

23. See RESTATEMENT, FOREIGN RELATIONS LAW, Explanatory Note § 72, at 232 (Proposed Draft, 1962).

24. See, *e.g.*, Court of Claims Act, 28 U.S.C. § 1491 (1958); Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674 (1958); Suits in Admiralty Act § 2, 41 Stat. 525 (1920), 46 U.S.C. § 742 (Supp. V, 1964); Public Vessels Liability Act § 1, 43 Stat. 1112 (1925), 46 U.S.C. § 781 (1958). See generally Reeves, *Good Fences and Good Neighbors: Restraints on Immunity of Sovereigns*, 44 A.B.A.J. 521, 523 (1958); Timberg, *supra* note 20, at 126.

25. See SUCHARITKUL, *op. cit. supra* note 1, at 162-256; Timberg, *supra* note 20, at 118.

26. International Convention for the Unification of Certain Rules Concerning the Immunities of Government Vessels Concluded at Brussels on April 10, 1926, reprinted in ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 303-08 (1933). See generally SUCHARITKUL, *op. cit. supra* note 1, at 92-100.

27. *E.g.*, Treaty of Friendship, Commerce, and Navigation with Italy, Feb. 2, 1948, art. 24, para. 6, 63 Stat. 2292, T.I.A.S. No. 1965. See generally Setser, *The Immunity Waiver for State-Controlled Business Enterprises in United States Commercial Treaties*, in PROCEEDINGS OF AMERICAN SOC'Y OF INTERNATIONAL L. 89 (1961).

28. The Paquete Habana, 175 U.S. 677 (1900); STAT. INT'L CT. JUST. art. 38.

29. See generally Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790 (1960); Comment, 60 MICH. L. REV. 1142, 1148 (1962).

on the ambassador of a foreign nation,[30] the problems of attachment in aid of obtaining jurisdiction[31] and of execution on property of the foreign sovereign[32] have not clearly been settled. Whereas the question of service of process on an ambassador in an action arising out of commercial activities is presently being litigated,[33] the court in *Victory Transport* proposed a different solution by equating a commercial branch of a foreign government with a foreign corporation, thereby permitting service of process by registered mail under "single act" or "doing business" long-arm statutes, which are available in many states.[34] Although it seems that American courts would recognize a waiver by contract of these procedural restrictions,[35] in general these problems will have to be solved if restrictive immunity is to be meaningful.

It appears that the adoption of restrictive immunity has been impeded by the fear of the judiciary that such a doctrine would require a political decision, in violation of the constitutional requirement of separation of powers.[36] Although the Constitution does require the judiciary's dependence on the executive for a determination of those sovereigns entitled to claim immunity,[37] the making of factual determinations of whether acts are commercial is essentially a judicial function, only practicable on a case by case basis.[38] For example, in *Victory Transport* the grain was purchased for resale to Spanish nationals, private channels of trade were ex-

30. REV. STAT. §§ 4063, 4064 (1875), 22 U.S.C. §§ 252-53 (1958).

31. In New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955), the court held that the Tate Letter had no effect on the customary rule that the property of a foreign sovereign is free from attachment. See also Loomis v. Rogers, 254 F.2d 941 (D.C. Cir. 1958). The State Department, however, now appears to recognize specifically attachment in aid of jurisdiction. See Letter from Loftus Becker, Legal Advisor to the State Department, to Attorney General William Rogers, June 22, 1959, quoted in Stephen v. Zivnostenska Banka, 15 App. Div. 2d 111, 116, 222 N.Y.S.2d 128, 134 (1961).

32. See Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930) (execution not permitted); Brandon, *supra* note 17, at 429. *But see* Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (1939). Several continental European countries have allowed attachment of a foreign sovereign's property to execute a judgment. See Sacobelge et Etat belge v. Etat hellenique, 79 JOURNAL DU DROIT INTERNATIONAL 244 (1952).

33. The order of the district court for the District of Columbia in *Hellenic Lines Ltd. v. Moore* not permitting the service is unreported. See generally Griffin, *Adjective Law and Practice in Suits Against Foreign Governments*, 36 TEMP. L.Q. 1, 11-14 (1962).

34. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 363 (2d Cir. 1964).

35. See *id.* at 364; Farr & Co. v. Cia Intercontinental De Navegacion, 243 F.2d 342 (2d Cir. 1957).

36. See Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

37. See *id.* at 34-36; *cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); National City Bank v. Republic of China, 348 U.S. 356, 357 (1955); Guaranty Trust Co. v. United States, 304 U.S. 126, 137-38 (1938).

38. See SUCHARITKUL, *op. cit. supra* note 1, at 281-83. *But see* Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790, 799 n.27 (1960).

clusively employed, and an arbitration clause acknowledged the commercial nature of the charter party.[39] As similar activities have been held commercial in those countries that have adopted the restrictive theory,[40] the court easily made the factual determination that a commercial activity was involved. The court, however, went beyond the immediate factual situation to enumerate categories of state activities that it considered to be public, rather than commercial, in nature and entitled to immunity.[41] This is an apparent attempt to establish guidelines for the solution of the difficult classification problems which have faced the courts of nations that have previously adopted the doctrine of restrictive immunity.[42] Even so, the Court indicated that should the State Department subsequently define "commercial activity," it would abide by that definition.[43]

It is strongly arguable that combining restrictive immunity with deference to a State Department determination in a particular case is unwise except in the very limited situation in which an incident is particularly crucial to foreign relations.[44] One of the significant factors leading to the adoption of restrictive immunity was the desire to provide the private litigant with a "day in court."[45] It was felt that once the judiciary has made a factual determination that the controversy is of a commercial nature,[46] the plaintiff should be able to maintain his suit.[47] Combining the restrictive theory of immunity with judicial deference to the State Department, whose

---

39. 336 F.2d at 356 n.2.

40. See SUCHARITKUL, *op. cit. supra* note 1, at 322-25.

41. 336 F.2d at 360, where the enumeration is as follows: (1) Internal administrative acts, such as expulsion of an alien; (2) Legislative acts, such as nationalization; (3) Acts concerning the armed forces; (4) Acts concerning diplomatic activity; (5) Public loans.

42. See note 19 *supra*.

43. 336 F.2d at 360.

44. See Rich v. Naviera Vacuba S.A., 295 F.2d 24 (4th Cir. 1961), where the court followed the suggestion of the State Department and released a ship which was owned by the Cuban government and had been attached by United States citizens. This took place during the "Cuban crisis," shortly following a release by the Cuban government of an airplane owned by a United States citizen.

45. 336 F.2d at 358. See Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

46. See generally Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461, 474 (1963). *But see* Timberg, *supra* note 20, at 128.

47. Of course, unless the State Department first determines that the defendant is a true sovereign, no immunity will be granted. Once true sovereignty is determined, immunity may also attach to subdivisions or agents of the sovereign. Sullivan v. State of Sao Paulo, 122 F.2d 355 (2d Cir. 1941); Isbrandtsen Co. v. Netherlands E. Indies Gov't, 75 F. Supp. 48 (S.D.N.Y. 1947) (immunity granted upon a showing that defendant government was "part of" the Netherlands government). *Cf.* Comment, *The Act of State Doctrine after Sabbatino*, 63 MICH. L. REV. 528 (1965). *But cf.* Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923), where an unrecognized government was granted the act of state privilege.

proceedings are ex parte and lack certain legal safeguards,[48] militates against this goal. Legal scholars have long criticized broad judicial deference to the State Department,[49] but it is even less defensible with the adoption of the restrictive theory of sovereign immunity.

---

48. Timberg, *supra* note 20, at 122-24.

49. See Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 COLUM. L. REV. 453, 462-63 (1940); Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168; Timberg, *supra* note 20, at 128.