Michigan Law Review

Volume 60 | Issue 8

1962

International Law-Soverign Immunity-The First Decade of the Tate Letter Policy

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INTERNATIONAL LAW—SOVEREIGN IMMUNITY—THE FIRST DECADE OF THE TATE LETTER POLICY—On May 19, 1952, the State Department announced in the Tate Letter[1] a new policy with regard to the filing of suggestions of immunity in suits against foreign sovereigns. The letter indicated that the Department would begin to follow a restrictive theory of sovereign immunity.[2] This meant that it would file a suggestion of immunity if the case arose from acts of the foreign government or its agents which were of a purely governmental character (*jure imperii*), but would deny immunity in instances where the acts engaged in were of a commercial or proprietary nature which could be carried on by any individual or corporation (*jure gestionis*). It is the limited purpose of this comment to summarize executive and judicial treatment of this policy, to point out some of the problems involved in implementation of the restrictive theory of sovereign immunity, and to suggest changes which might help to alleviate some of these difficulties.

I. APPLICATION BY THE STATE DEPARTMENT

A survey of the relatively few recent cases involving the question of immunity of a foreign sovereign suggests that the State Department has not followed the principles enunciated in the Tate Letter as closely as it might have. While there are instances where the State Department has specifically considered the nature

1 The announcement of the State Department's decision to follow a restrictive theory of sovereign immunity was made in a letter from Acting Legal Adviser Jack Tate to the Attorney General. See 26 DEP'T STATE BULL. 984 (1952), Letter of Jack B. Tate, Acting Legal Adviser, to the Acting Attorney General Phillip B. Perlman, May 19, 1952.

2 Once before, in 1918, the State Department made a similar pronouncement. See Letter of Secretary of State Lansing to Attorney General Gregory, Nov. 8, 1918, 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 429 (1940). However, the policy that Secretary of State Lansing set forth in that letter was not followed by the Supreme Court as it declined to apply the restrictive theory of sovereign immunity in Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926).

of the transaction involved and concluded that it was *jure gestionis*,[3] other cases suggest that it has apparently considered it unwise to apply the doctrine of restrictive sovereign immunity in situations where it might have done so.[4]

In *New York & Cuba Mail S.S. Co. v. Republic of Korea*[5] and in *In re Grand Jury Investigation of the Shipping Indus.*,[6] the State Department specifically characterized the acts of foreign sovereigns as commercial in nature. In the *Republic of Korea* case, libelant's steamship was damaged by a Korean government ship which was aiding in unloading operations in the port of Pusan. The Republic of Korea claimed sovereign immunity, but the State Department refused to file a suggestion of immunity from suit on the grounds that "the particular acts out of which the cause of action arose are not shown to be of purely governmental character."[7] Likewise, in the *Investigation of the Shipping Indus.* case the State Department refused to suggest immunity in a proceeding involving the Philippine National Lines, an instrumentality of the Philippine government. In a reply to the Philippine Embassy's request for immunity the Department concluded: "Since it appears to the Department that the Philippine National Lines is engaged in commercial activities, the Department of State regrets that it cannot take the action requested in your note."[8]

State Department action in these two cases indicates that it is at least willing to apply the restrictive theory of sovereign immunity. However, other cases suggest that it is not as firmly wedded to the restrictive theory as its action in these cases might suggest.

In *Weilamann v. Chase Manhattan Bank*[9] the State Department declined to apply the restrictive theory of sovereign immunity when it conceivably might have done so.[10] In this case the plaintiff

3 See, *e.g.*, *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298 (D.D.C. 1960); New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

4 See, *e.g.*, Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); Stephen v. Zivnostenska Banka, 155 N.Y.S.2d 340 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 958, 157 N.Y.S.2d 903 (1956), *aff'd*, 3 N.Y.2d 862, 166 N.Y.S.2d 309 (1957), *appeal dismissed*, 356 U.S. 22 (1958). For later developments in the *Stephen* case, see 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961).

5 132 F. Supp. 684 (S.D.N.Y. 1955).

6 186 F. Supp. 298 (D.D.C. 1960).

7 132 F. Supp. at 685.

8 186 F. Supp. at 318.

9 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959).

10 For a discussion of the State Department's treatment of this case, see Drachsler,

was suing to recover on a Soviet Union state note which had been issued to pay for equipment purchased from a British mining corporation. Although the transaction was one that could have been classified as "non-governmental" or "commercial" in nature, the State Department ignored this fact and suggested that the Soviet Union's request for immunity from attachment be honored. Similarly, in the protracted litigation of *Stephen v. Zivnostenska Banka*[11] the State Department declined to apply the Tate Letter doctrine. A judgment restraining the transfer of assets of Zivnostenska and Statni Banka held in New York financial institutions was entered and the Czechoslovak government claimed sovereign immunity with respect to the assets held in the name of Statni Banka. In a June 4, 1952 letter, the Department requested the Attorney General to instruct the United States Attorney to present "without argument or comment" the position of the Czechoslovak government.[12] Although it passed on the request for immunity without comment, the State Department might have, as did Referee Hays in his handling of the same case,[13] characterized certain acts of Statni as commercial in nature and refused the request as to assets arising out of commercial transactions.

The actions of the State Department in the four cases considered above suggest that foreign policy considerations weigh heavily with the Department when it is passing on requests for immunity. In the two cases where the State Department expressly characterized the acts of a foreign sovereign as commercial in nature, the nations were Korea and the Philippines, both nations with whom we have had fairly amicable relations during recent years. On the other hand, the two cases where the Department refused to characterize acts as commercial in nature involved Iron Curtain governments with whom relations are generally strained. In circumstances such as these the political effect of granting or denying a request for immunity might well be considered to out-

Some Observations on the Current Status of the Tate Letter, 54 AM. J. INT'L L. 790 (1960).

11 155 N.Y.S.2d 340 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 958, 157 N.Y.S.2d 903 (1956), *aff'd*, 3 N.Y.2d 862, 166 N.Y.S.2d 309 (1957), *appeal dismissed*, 356 US. 22 (1958).

12 Quoted in Stephen v. Zivnostenska Banka, 15 App. Div. 2d 111, 113, 222 N.Y.S.2d 128, 130-31 (1961).

13 In his handling of the case Referee Hays did characterize certain acts of Statni Banka as commercial in nature and refused to allow sovereign immunity with respect to these transactions. See Record of Report of Referee Hays at 203.

weigh the benefit of uniformity of treatment which would result from a more consistent application of the restrictive immunity theory. Thus, although it is difficult to generalize from only four cases, it seems that the restrictive theory of sovereign immunity tends to be a fair weather doctrine which is applied by the State Department only when it is politically expedient. This is not to say the Tate Letter policy has been ineffective. Although relatively few recent cases have dealt with the problem, it is possible that the Tate Letter policy has had a greater effect than might be apparent. Foreign commercial agencies may have refrained from raising the issue of sovereign immunity either because of respect for the new policy of restrictive immunity, or because the possibility of success in requesting immunity no longer outweighs the possible detriment to business relations with their customers.

II. APPLICATION BY THE JUDICIARY

If the State Department makes no suggestion for immunity the judiciary may still decide for itself whether the proper requisites for granting immunity exist.[14] And, in dealing with cases involving a question of immunity the courts seem willing to apply the restrictive theory independent of a suggestion by the State Department. For example, in *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*,[15] a New York supreme court applied the restrictive theory to deny immunity to an agency of the Turkish government when there was no suggestion of immunity filed by the State Department.[16] More recently, a selling agency of the Dominican Republic was denied the defense of sovereign immunity on the ground that it was a "business agency of the Government of the Dominican Republic" and that the contract sued upon was a "commercial agreement."[17] And, in a suit against the Republic of Cuba for failure to perform a contract, the restrictive theory of immunity

14 See, *e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34-35 (1945), where the Court noted that "in the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist."

15 25 Misc. 2d 299, 204 N.Y.S.2d 971 (Sup. Ct. 1960).

16 *Cf.* Loomis v. Rogers, 254 F.2d 941 (D.C. Cir. 1958).

17 Pacific Molasses Co. v. Comite De Ventas De Mieles, 30 Misc. 2d 656, 219 N.Y.S.2d 1018 (Sup. Ct. 1961).

was used by the court to allow attachment of debts owed by persons in the United States to Cuba.[18]

When the State Department applies the restrictive theory of sovereign immunity, it is possible that its policy might be thwarted by a refusal of the judiciary to give effect to denials or suggestions of immunity. However, this seems most unlikely since the well-established attitude of the courts is one of judicial deference to the State Department, based on a policy of avoiding embarrassment to the Executive.[19] But there are limits on the effect that a suggestion of immunity will have; courts are properly reluctant to let a suggestion by the Executive determine matters which are truly judicial in character. For example, in the *Zivnostenska* litigation the court indicated that it would determine matters involving the question of ownership of assets claimed by a foreign sovereign.[20] Furthermore, the New York judiciary has reminded the State Department that a court is the proper body to make the final determination of whether any legal rights of a foreign sovereign are actually involved[21] or whether the sovereign has consented to be sued.[22] Despite their show of independence there is nothing to indicate that there is a hostile attitude on the part of the judiciary which stands in the way of effective implementation of the restrictive theory of sovereign immunity. There are, however, major problems involved in the enforcement of the Tate Letter doctrine which remain to be considered.

18 Three Stars Trading Co. v. Republic of Cuba, 222 N.Y.S.2d 675 (Sup. Ct. 1961).

19 See, *e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35-36 (1945); *Ex parte* Peru, 318 U.S. 578, 588-89 (1943).

20 See Stephen v. Zivnostenska Banka, 15 App. Div. 2d 111, 222 N.Y.S.2d 128, 138 (1961), where the court held: "We find that the suggestion of immunity does not preclude judicial determination of title to the assets of the defendant in the custody of the court allegedly transferred in fraud of creditors of Statni Bank or the Republic of Czechoslovakia."

21 See Frazier v. Hanover Bank, 204 Misc. 922, 923, 119 N.Y.S.2d 319, 321 (Sup. Ct.), *aff'd*, 281 App. Div. 861, 119 N.Y.S.2d 918 (1953), *appeal denied sub nom.* Frazier v. Foreign Bondholders Protective Council, Inc., 283 App. Div. 655, 127 N.Y.S.2d 815 (1954), where the court noted that the State Department statement "means no more than that Peru is recognized by the State Department as a foreign sovereign which has and should be accorded such immunity from suit as a sovereign has under international law, and that there hence is still open for judicial determination the question whether or not this particular action actually does require an adjudication of a claim against a sovereign. . . ."

22 United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).

III. PROBLEMS IN IMPLEMENTATION OF THE DOCTRINE

A. *Difficulties in Characterization*

It has been suggested that one of the reasons why a restrictive theory of sovereign immunity could not be effectively implemented is the difficulty in characterizing acts as "commercial" or "non-commerical."[23] Various ways of distinguishing the two classes of governmental activities have been proffered[24] but all have been criticized as failing to provide a formula that will resolve all cases without question or doubt. At best they provide only a rough guide for the troublesome cases, and it seems that the problem of resolving doubtful, borderline questions of fact and law cannot be avoided. The problem then becomes one of determining what body is best equipped to decide the hard cases. Since the State Department's determination is made without formal hearing, without the benefit of advocacy, and without any of the other procedural safeguards that are the essence of a judicial proceeding, there is reason for concern over the lack of a more or less mechanical formula that could be readily applied by the Department. If, however, the judiciary were to decide the question these procedural safeguards would apply. Moreover, the judiciary has had considerable experience in similar legal characterization problems, and the fact that the theory chosen for distinguishing between commercial and non-commercial acts could not be applied without difficulty should not be a serious handicap to the implementation of a restrictive theory of sovereign immunity. The lack of an automatic rule of characterization should cause no more trouble here than it does in any other area of the law, and indeed one might expect that a reasoned case-by-case development by the judiciary of the principles involved would result in more refined rules of characterization.

B. *Attitude of the Justice Department*[25]

Since the United States' attitude toward the immunity of a foreign sovereign is likely to affect the way in which our govern-

23 See, *e.g.*, Lauterpacht, *The Problem of Jurisdictional Immunities for States*, 28 BRIT. YB. INT'L L. 220 (1951).

24 For a brief discussion of alternative methods, see Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 103-06 (1953).

25 For a more detailed discussion of the problems raised in this section see Timberg,

ment is treated in foreign courts, it is natural that the Justice Department, the main agency responsible for defending our government in foreign courts, would oppose the restrictive theory and perhaps create pressures within the Administration against its implementation.[26] If the State Department and the judiciary rigorously adhered to a restrictive theory of sovereign immunity, the Justice Department might be in an awkward position when it pleaded sovereign immunity to suits against our government arising out of acts which were essentially commercial in nature. Thus, the attitude of the Justice Department is likely to be a built-in limitation on a vigorous application of the restrictive theory of sovereign immunity.

C. *Procedural Problems*

1. *Notice and Service of Process*

Assuming that both the State Department and the judiciary were willing to enforce the restrictive theory of immunity, there are procedural problems with respect to notice and service of process which might make actual implementation difficult. In rem admiralty actions seem to provide little problem of adequate notice.[27] For example, if a government ship engaged in commercial activities is involved in a tort, the injured party is entitled to a maritime lien on the ship. There is no problem of getting jurisdiction over the sovereign, for the court is only adjudicating rights in the ship[28] and process does not need to be served.

However, the question of how one satisfies the requirement of service of process becomes important in in personam actions. The ambassador of the foreign nation cannot be served, for the *United States Code* makes this a crime.[29] Furthermore, in *Oster v. Domin-*

Sovereign Immunity, State Trading, Socialism and Self-Deception, 56 NW. U.L. REV. 109 (1961).

26 See Leonard, *The United States as a Litigant in Foreign Courts,* [1958] AM. SOC'Y INT'L L. PROC. 95.

27 However, it should be noted that in a non-admiralty in rem or quasi-in-rem action there may be problems in satisfying the forum's procedural requirements if notice by publication is required.

28 When the libelant gets a maritime lien on the ship, he becomes, in theory, a part owner of the vessel. The suit then becomes an action in the nature of a suit to quiet title.

29 REV. STAT. §§ 4063, 4064 (1875), 22 U.S.C. §§ 252, 253 (1958).

ion of Canada[30] in which an attempt was made to serve process on the Dominion by delivering a copy of the summons and complaint to the Consul General of Canada, the court held that service in this manner was insufficient to obtain jurisdiction over the defendant. If the ambassador or the consul cannot be served with process to obtain in personam jurisdiction, one is faced with the problem of who may be served. As a practical matter if a nation is carrying on commercial activities, a government agency or corporation will probably be involved. Thus, service might be made on the head of the agency or corporation.[31] However, this would still not solve the problem of service of process in a case like *Oster* where there is no government agency or corporation. If in personam suits against foreign governments are to be practical, it seems that the requirements for service of process should be relaxed.

One of the most important purposes of service of process is to give notice of the litigation and of the charges being made. In the case of a sovereign there is no question of his whereabouts, and there is no difficulty in making sure that he receives fair notice. This means that the formal requirements which are necessary to make it more likely that a private defendant receives actual notice are not as applicable in the case of suits against a state. Thus, when dealing with a foreign sovereign or its agencies, it might be appropriate to relax the formal requirements of service of process and to say that as long as the sovereign received actual notice the technical method of imparting the information is immaterial. Alternatively, courts might be willing to accept a rule which would allow service to be made in the same way it is made when the sovereign is sued in its domestic courts. Although the exact method of serving process would vary according to the nation being sued, the procedural requirements of the forum would be satisfied if the plaintiff followed the procedures required by the defendant's domestic law.

2. *Seizure of the Res*

In *New York & Cuba Mail S.S. Co. v. Republic of Korea*[32] the State Department refused to suggest that the Republic of Korea

30 144 F. Supp. 746, (N.D.N.Y.), *aff'd*, 238 F.2d 400 (2d Cir. 1956).

31 *Cf.* FED. R. CIV. P. 4(a)(6) relating to the service of process on a "state or municipal corporation or other governmental organization . . ." and providing that service may be made on the chief executive officer.

32 132 F. Supp. 684 (S.D.N.Y. 1955).

was immune from suit, but it did note that the Tate Letter had no effect on the rule of international law that the property of a foreign sovereign was immune from attachment and seizure.[33] Thus, the refusal to allow immunity from suit was of no practical consequence because the jurisdiction of the court was based on the seizure of the Republic's ship under a writ of attachment. As long as the State Department adhered to the view that there could be no attachment in aid of obtaining jurisdiction, there could be no in rem or quasi-in-rem proceedings brought against a foreign sovereign.

However, this view was modified in a June 22, 1959 letter from Loftus Becker, Legal Adviser to the State Department, to Attorney General William Rogers in which Mr. Becker noted:

> "The Department is of the further view that, where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited. In many cases jurisdiction could probably not be obtained otherwise.[34]

It now seems clear that the State Department has backed away from the stand that it took in the *Republic of Korea* case and recognizes attachments in aid of obtaining jurisdiction. However, it is also clear that the Department still adheres to its view that property of a foreign sovereign is immune from execution. The June 22 letter goes on to say:

> "But the property so attached to obtain jurisdiction over the defendant government cannot be retained to satisfy a judgment ensuing from the suit because in accordance with international law the property of a foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit."[35]

It would seem as though the policy expressed in Becker's letter would remove the barrier that was created to suits in rem and quasi-in-rem. This would be especially true in in rem proceedings where the court is merely adjudicating rights in the property and, except in the special case of admiralty, does not use the

33 See 132 F. Supp. 684, 687 n.7 (S.D.N.Y. 1955).

34 Quoted in Stephen v. Zivnostenska, 15 App. Div. 111, 116, 222 N.Y.S.2d 128, 134 (1961).

35 *Ibid.*

property to satisfy a judgment against any individual or government. On the other hand, the basic nature of a quasi-in-rem proceeding is that a defendant's interest in property is used to satisfy part of the judgment rendered in the proceedings. There would seem to be little point in allowing a quasi-in-rem action if the property is not subject to execution and the proceeds of the execution cannot be used in satisfaction of the judgment. Thus, even though the State Department now allows attachment quasi-in-rem in aid of obtaining jurisdiction, there do not seem to be any cases where a court has allowed quasi-in-rem attachment for the purpose of obtaining jurisdiction when they knew that the property could not be sold in execution of the judgment. But, even though the State Department refuses to allow execution on the property of a foreign sovereign, the fact that it allows a judgment to be reached can be helpful.[36] This judgment could at least be used as the basis of negotiation between foreign offices; and, as a practical matter, most foreign governments would pay a judgment rendered against it in order to avoid political disputes that would result from the plaintiff's government pursuing the claim.

IV. SUGGESTED CHANGES

This brief survey of the recent treatment of the Tate Letter doctrine suggests several changes that could be made to bring about a more effective implementation of a restrictive theory of sovereign immunity. The most important are:

(1) The judiciary should accept as a general rule of law the proposition that there is no immunity for suits against a foreign sovereign arising out of transactions that are purely commercial in nature. This principle is favored by the State Department in the Tate Letter, is followed in many foreign countries,[37] and

[36] For example, in Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 299, 307, 204 N.Y.S.2d 971 (Sup. Ct. 1960), the court noted: "It may be urged that an affirmative judgment against a foreign sovereign should not be permitted to be sought by a domestic litigant because such a judgment cannot be collected and thus the court may be placed in the embarrassing position of issuing an unenforcible decree. I would not be impressed with such a contention, were it presented."

[37] For discussions of the restrictive theory of sovereign immunity in other nations, see SUCHARITKUIL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); Castel, *Immunity of a Foreign State from Execution: French Practice*, 46 AM. J. INT'L L. 520 (1952); Lauterpacht, *The Problem of Jurisdictional Immunities for States*, 28 BRIT. YB. INT'L L. 220 (1951); Lalive, *L'immunité de jurisdiction des Etats et des Organisations internationales*, 3 HAGUE ACADEMY INT'L L, RECUEIL DES COURS 205 (1953). See also

seems to be accepted by American courts who have recently dealt with the sovereign immunity question.[38]

(2) The courts and not the State Department should decide whether an action is commercial or non-commercial. If a foreign sovereign feels that he is entitled to sovereign immunity, he should plead sovereign immunity as a defense and let the court decide if the underlying transaction is commercial in nature. If it is commercial, the foreign sovereign would be automatically subject to suit. The practical effect of this change would be that the *ex parte* administrative determination by the State Department would be turned into a judicial hearing with all the benefits of advocacy and the safeguards of a judicial proceeding.

(3) Although a foreign sovereign would be automatically subject to suit if a court found that the underlying transaction was commercial, the State Department should have a veto over actually allowing the action to proceed against the sovereign. If the State Department felt that there were overriding political factors involved, it could stop the litigation from proceeding on the merits.[39]

(4) The requirements of service of process should be relaxed so that it would be easier to impart legal notice to a foreign sovereign. The most logical solution would seem to be one that allows service of process on the consul general, who presumably represents the commercial interests of his country abroad. Other possibilities would be to allow service on officials of government buying and selling agencies or to allow service in the same manner that the sovereign is served in his home country.

(5) If suit is allowed against a foreign sovereign, the property of the sovereign should be subject to execution.[40] This is espe-

Rahimtoola v. Nizam of Hyderabad, [1958] A.C. 379 (treatment of the problem of sovereign immunity in England).

38 See, *e.g.*, Three Stars Trading Co. v. Republic of Cuba, 222 N.Y.S.2d 675 (Sup. Ct. 1961); Pacific Molasses Co. v. Comite De Ventas De Mieles, 20 Misc. 2d 560, 219 N.Y.S.2d 1018 (Sup. Ct. 1961); Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 25 Misc. 2d 229, 204 N.Y.S.2d 971 (Sup. Ct. 1960).

39 The State Department's veto power would arise only after the judiciary had determined that the acts were commercial in nature.

40 Perhaps the commonest argument for allowing execution on the property of a foreign sovereign is that whenever a government engages in commercial activities, it should be willing to accept the risks that go with these undertakings. One of these risks is that a judgment will be rendered against it and its property subject to execution. For a discussion of the degree to which European courts permit execution upon judgment or attachment against foreign sovereigns, see [1958] AM. SOC'Y INT'L L. PROC. 81, Panel II.

cially true in the case of quasi-in-rem actions where a judgment makes little sense if the property before the court cannot be used to satisfy the judgment. In such actions there would be few practical problems in the actual execution if the property is actually before the court. However, there seem to be potential problems in execution in the case of an in personam judgment where the judgment creditor has to seek out and levy on the property of the foreign government.[41] Thus, it might be reasonable to distinguish between actions where the property is before the court and actions where it is not by at least allowing execution in the former class of actions.

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41 For example, seizure of a government plane carrying diplomatic representatives to the nation of the forum might lead to an embarrassing international incident.