

January 1965

Sovereign Immunity: The Right of the State Department and the Duty of the Court

Penelope Dalton

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [International Law Commons](#)

Repository Citation

Penelope Dalton, *Sovereign Immunity: The Right of the State Department and the Duty of the Court*, 6 Wm. & Mary L. Rev. 70 (1965), <https://scholarship.law.wm.edu/wmlr/vol6/iss1/7>

Copyright c 1965 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

SOVEREIGN IMMUNITY: THE RIGHT OF THE STATE DEPARTMENT AND THE DUTY OF THE COURT

The Second Circuit Court of Appeals in *Petrol Shipping Corp. v. Kingdom of Greece*¹ granted absolute immunity from suit to the Kingdom of Greece, which had agreed to arbitrate all contract claims arising from the transaction. The Court ignored the State Department's 1952 "Tate Policy"² and resorted to the 1940 *Puente v. Spanish National State*³ case to settle the issue. The "Tate Policy," introduced by the State Department, advocates the theory of restrictive immunity from suit and provides the correct procedure by which the question may be raised. In the current case, Justice Clark dissented strongly saying, "Had this ever been the law and common practice it is surely not so now."⁴

A diversity of opinion exists as to the necessity and practicality of State Department guidance. As international relations fluctuate, it should be the right of the State Department to advise, and the duty of the court to inquire and listen. The practice has been favorably accepted for the past twelve years, but cannot yet be said to be settled procedure. Consequently, an historical review of the problems attached to the *Petrol* case and other immunity cases will show the wisdom of continuing the "Tate Policy."

THE SUBSTANTIVE ISSUE

Historically, the rule of sovereign immunity may be traced to the Roman law maxim "par in parem non habet iudicium"⁵ and to the maxim of English law, "the King can do no wrong." In 1576, after the Reformation, the first explicit formulation of the doctrine of sovereignty was expressed in the *De Republica* of Jean Bodin.⁶ Sovereignty for Bodin was an essential principle of internal political order; the sovereign *per se* was to be a constitutional ruler subordinate to

1. *Petrol Shipping Corp. v. Kingdom of Greece*, 326 F.2d 117 (2d Cir. 1964).

2. Letter from Acting Legal Advisor Jack B. Tate to the Acting Attorney General Philip B. Perman, May 19, 1952, in 26 Dept. State Bull. 984 (1952).

3. *Puente v. Spanish National State*, 116 F.2d 43 (2d Cir.), *cert. denied*, 314 U.S. 627 (1940).

4. *Supra*, note 1 at 119.

5. An equal has no authority over an equal.

6. BRIERLY, *THE LAW OF NATIONS*, 1-93 (6th Ed. 1963).

the fundamental law of the state. Bodin could not foresee that federation would divide sovereign powers without producing chaos.⁷

Political philosophers in the promulgation of their ideas have in fact varied the original doctrine in two major respects. One is the identification of sovereignty as an absolute power above the law; the other, that powers, privileges, rights and immunities, originally attributes of a personal ruler, became the attributes of the State in its relations with other states.⁸

The United States, influenced by writers advocating various theories of government, was eclectic when facing the problem of applying any of the above principles to a democracy. In a democracy, if one accepts the premise that a sovereign is omnipotent, who then is the sovereign? All the people cannot rule; if the majority rules and is all powerful, there is a denial of the rights of the minorities, except those rights which the majority allows.⁹

Hamilton proposed that each State of the Union, still possessing attributes of sovereignty, be immune from suit, without consent, unless there has been surrender of the immunity in the plan of the convention. ". . . The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no rights of action independent of the sovereign will."¹⁰

The United States Constitution clearly implies that consent to be sued is required of the sovereign.¹¹ This unanimously accepted doctrine¹² was not restricted by the Eleventh Amendment.¹³

Influenced by many theorists—and not encumbered by stringent Constitutional provisions, the United States Judiciary has relied on different arguments for the granting of absolute immunity from suit. Among

7. *United States v. Lanza*, 260 U.S. 377, 382 (1922), Taft, C.J., "two sovereignties, deriving power from different sources, capable of dealing with the same subject matter (sc prohibitions) within the same territory."

8. BRIERLY, *op. cit. supra*, note 6.

9. *Ibid.*

10. The Federalist No. 81 (Hamilton), quoted in *Lynch v. United States*, 292 U.S. 571 (1934).

11. U.S. CONST. ART. III § 9.

12. *Accord*, *People of Puerto Rico v. Rosaly*, 227 U.S. 270 (1913); *United States v. Lee*, 106 U.S. 196 (1882); *Anderson v. Speyer*, 115 N.Y.S.2d 132 (1952); *Hassard v. United States of Mexico*, 61 N.Y. Supp. 939 (1899).

13. U.S. CONST. AMEND. XI. See, discussion of Constitutional provision in *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1933).

these are: the equality and dignity of each state,¹⁴ reciprocity,¹⁵ privilege,¹⁶ and comity.¹⁷ The practical reasons advanced are lack of jurisdiction, as execution or seizure may not be levied,¹⁸ and the need to avoid embarrassing the executive.¹⁹ However, the natural result of granting absolute immunity is a reluctance by private traders to deal with states.²⁰ In a contract with a state, the private individual in the event of breach is left without "his day in court."

Following the First World War,²¹ the change created in national economies by the emergence of state-owned commercial enterprise competing with private industry necessitated²² a more definite policy regarding immunity. Thus, to place reasonable limits on State immunity, the courts began to draw distinctions between acts *jure gestionis* (private sovereign acts) and *jure imperii* (public sovereign acts).

One hundred years prior, in the *Schooner Exchange* case,²³ the foundation had been established when the Court first distinguished acts

14. *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812). *Accord*, *Nankivel v. Omsk All-Russian Gov't*, 237 N.Y. 150, 142 N.E. 569 (1928) [Granting of immunity was not limited to recognized governments.], *Kawananakea v. Polybank*, 205 U.S. 349 (1907) [Granting of immunity not confined to powers sovereign in the full sense of juridical theory, but extended to actual administrations.], *Telkes v. Hungarian National Museum*, 38 N.Y.S.2d 419 (1942) [The existence of war did not operate as a bar to immunity.].

15. *The Beaton Park*, 65 F. Supp. 211 (W.D. Wash. 1946), discussed but immunity not granted for other reasons. See, generally, Evans, *Should Sovereign Immunity be Governed by Reciprocity?* 1958 PROC. AM. SOC. INT'L L. 85.

16. *Lynch v. United States*, 292 U.S. 571 (1934); *Valarino v. Thompson*, 7 N.Y. 576 (1853).

17. *The Adriatic*, 258 Fed. 902 (3rd Cir. 1919); *The Janko (The Norsetank)*, 54 F. Supp. 241 (E.D.N.Y. 1944); *Sullivan v. State of Sao Paulo*, 36 F. Supp. 503 (E.D.N.Y. 1941); *The Augustine*, 8 F.2d 287 (S.D.N.Y. 1924); *Anderson v. N.V. Transandine Handelmaatschappig*, 289 N.Y. 9 (1942).

18. Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. YB INT'L L. 220 (1951).

19. *United States v. Lee*, 106 U.S. 196 (1882). *The Athanasios*, 228 Fed. 558 (S.D. N.Y. 1915); *Weilman and McCloskey v. Chase Manhattan*, 192 N.Y.S.2d 469 (1959); *Associated Metals and Minerals Corp. v. Petroleos Mexicanos*, 43 N.Y.S.2d 829 (1943).

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

21. Hervey, *The Immunity of Foreign States When Engaged in Commercial Enterprises*, 27 MICH. L. REV. 751 (1928).

22. Borchard, *Governmental Responsibility in Tort*, 36 YALE L. J. 1, 3 (1926), reflecting criticism of U. S. policy: "Only in democratic England and republican America do we find the absolutist metaphysics of divine right and sovereign immunity arrayed in the full regalia of their theological vestments, reincarnating for a twentieth century society the ancient credo of Bodin and Hobbes."

23. 7 Cranch 116 (1812).

jure gestionis from acts *jure imperii*. The rules of comity and expedience outlined therein became applicable in admiralty or in regular law courts to all suits involving foreign states, their property and agents, *in rem* or *in personam*. The courts from 1818-1918 granted immunity to ships in public service,²⁴ to agencies for public service,²⁵ to contracts made for the public good,²⁶ but denied immunity when a government became a partner in a trading corporation.²⁷

In 1918 the State Department made its first attempt to provide some substantive guideline for the courts, expressing the view: "where (government-owned) vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade, if they were to enjoy its benefits and profits." Secretary Lansing offered the following reasons:

(1) when a sovereign enters into business, he submits himself to the conditions thereof, (2) if merchant vessels owned and operated by foreign governments are immune from process in United States Courts, added force would be given to the claim of neutral Governments who are taking over their merchant marine . . . that they should be also immune from the operation of municipal regulations in United States Ports, (3) if the claim of immunity were granted, American citizens as well as foreigners would be left without recourse in the Courts for such just claims as they might have against the vessels concerned, and their only means for obtaining satisfaction would be through political channels—either through Congress or through diplomacy.²⁸

The Attorney General refused to adopt the suggestions of the State Department,²⁹ and for the next eight years the courts vascillated be-

24. *The Roseric*, 254 Fed. 154 (D. N.J. 1918); *Briggs v. Light-Boats*, 93 Mass. 157 (1865); *The Parlement Belge*, L. R. 5 P. D. 197 (1880). But immunity denied a public ship in violation of our neutrality: *The Santissima Trinidad*, 7 Wheat. 283 (1822).

25. *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N.E. 876 (1908).

26. *Kingdom of Roumania v. Guaranty Trust Co.*, 250 Fed. 341 (2nd Cir. 1918).

27. *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824). Justice Marshall: "It is, we think a sound principle that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself and takes the character which belongs to its associates, and to the business which is to be transacted."

28. Letter from Secretary Lansing to Attorney General Gregory, Nov. 8, 1918, M.S. Dept. of State, file 195/229a.

29. Letter from Mr. Gregory to Mr. Lansing, Nov. 25, 1918, M.S. Dept. of State, file 195/236.

tween absolute immunity³⁰ and the restrictive immunity³¹ which the foreign courts were advocating.³²

The Supreme Court in 1926 ultimately adopted the rule of absolute immunity in *Berizzi Bros. Co. v. Pesaro*.³³ In this case, a ship owned and possessed by a friendly government was utilized in the carriage of merchandise for hire in the interest and service of the nation and was therefore held to be a public ship immune from arrest under process in an *in rem* action by a private suitor. Although some courts followed this principle,³⁴ other courts preserving the logic of *jure gestionis*, denied absolute immunity.³⁵ Proposals of writers and jurists³⁶ had not estab-

30. Merchant vessels: *The Carlo Poma*, 259 Fed. 369 (2nd Cir. 1919), *The Augustine*, 8 F.2d 287 (S.D. N.Y. 1924); *The Rodgay* (spelling varies), 279 Fed. 130 (N.D. Cal. 1920); *The Maipo*, 252 Fed. 627 (S.D. N.Y. 1918), *aff.*, 259 Fed. 367 (S.D. N.Y. 1919). Public service vessels: *The Western Maid*, 257 U.S. 419 (1921). Governmental functions (railroads): *Oliver American Trading Co. v. Gov't of U. S. of Mexico*, 5 F.2d 659 (2nd Cir. 1924); *Bradford v. Dir. Gen. of RR's*, 278 S.W. 251 (1925). Governmental corporations: *Dunlap v. Banco Central del Ecuador*, 41 N.Y.S.2d 650 (1943); *U.S. Grain Corp. v. Phillips*, 261 U.S. 106 (1922).

31. Merchant vessel: *The Florence H.*, 248 Fed. 1012 (S.D. N.Y. 1918). Governmental corporation: *Molina v. Comision Reguladora del Mercado de Henequen*, 91 N.J.L. 382, 103 Atl. 397 (1918). Partially controlled governmental corporation: *Coale v. Sociere Co-Operative Suisse des Charbons, Basle*, 21 F.2d 180 (S.D. N.Y. 1921). Government entering into contracts: *Royal Italian Gov't v. National B. and C. Tube Co.*, 294 Fed. 23 (2nd Cir. 1923).

32. *E.g.*, *Mixed Courts of Egypt 1910-1930*; Comprised of jurists from leading European-Anglo-Saxon Countries. *Dame Marigo Kildani Veuve Nicolas Bey Hagggar contre Jean Gregoriou Nicolas Elipoulos, le Ministre des Finances du Gouvernement Hellinque*, May 9, 1912, *Bulletin*, Vol. 24, p. 330, *Gazette*, Vol. II, p. 161, generally from the Hague Court, the late President Lodec quoted by Phillimore, "Immunite des Etats", *Academie de Droit International, Recueil des Cours*, 1925, Vol. III, p. 468.

33. 277 Fed. 473 (S.D. N.Y. 1921), 255 U.S. 216 (1921), 13 F.2d 468 (S.D. N.Y. 1926), 271 U.S. 562 (1926).

34. Public vessels: *Compania Espanola v. Navemar*, 303 U.S. 68 (1938); *United States v. Jardin*, 81 F.2d 745 (5th Cir. 1935); *In re Investigation of World Arrangements*, 137 F.R.D. 280 (D.C. 1952) (dictum); *The Janko* (The Norsetank), 54 F. Supp. 241 (E.D. N.Y. 1944); *The Ljubica Matkovic*, 49 F. Supp. 936 (S.D. N.Y. 1943); *The Frederick*, 43 F. Supp. 1015 (E.D. N.Y. 1942); *Stone Engineering Co. v. Petroleos Mexicanos of Mexico*, 352 Pa. 12, 42 A.2d 57 (1945). Museum: *Telles v. Hungarian National Museum*, 38 N.Y.S.2d 419, 265 App. D. 992, 39 N.Y.S. 986 (1942). Professional services: *Puente v. Spanish National State*, *supra*, note 2.

35. Merchant vessels: *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1944); *The Beaton Park*, 65 F. Supp. 211 (W.D. Wash. 1946). Government stockholder in corporation: *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934); *Hanncs v. Kingdom of Roumania Monopolies Institute*, 20 N.Y.S.2d 825, 24 N.Y.S.2d 994, 260 App.D. 189 (1940); *Ulem and Co. v. Bank Gospodarstwa Krajawego*, 24 N.Y.S.2d 201, 25 N.Y.S.2d 1002, 261 App.D. 838 (1940).

36. *E.g.*, proposed by the Harvard Research in International Law in 1932: "A State

lished a logical basis for the distinction between public and private acts by a sovereign. Should the nature or the purpose of the act be the distinguishing feature?³⁷ The transaction may be public or private depending upon whether or not the state is socialist, communist or capitalist. These variations in economic structures make obscure the differentiation of private from public acts.

THE TATE LETTER

With a further increase of State trading and nationalization of enterprise, after the Second World War the United States needed a definitive policy regarding immunity. Thus in 1952 the State Department, for the second time, in an advisory capacity, concluded that absolute immunity should not be granted in certain types of cases. The facts influencing this decision were set forth in the Tate Letter. First, the United States, although not a signatory party to the treaty, had nevertheless ratified the Brussels Convention of 1926 under which immunity for government-owned vessels was waived. More important, Greece, Belgium, Italy, France, Switzerland, Austria, Peru, Denmark, Egypt and Roumania have renounced the theory of absolute immunity and are following the restrictive theory. Schools of influential writers favoring the restrictive theory were also observed in countries still favoring the classical absolutist theory. The view of juridical writers in a civil law country is a major factor in the development of the law.³⁸

The State Department feels that continued full acceptance of the absolute theory finds little support except in the United Kingdom and the Soviet Union and its satellites.

Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the government of the United States in subjecting itself

may be made a respondent in a proceeding in a court of another state, when in the territory of such other state, it engages in an industrial, commercial, financial, or other business enterprise in which private persons may then engage or does an act there in connection with such enterprise wherever conducted and the proceeding is based upon the conduct of such enterprise or upon such act."

37. The "nature test" e.g., would categorize all purchases of goods as commercial, because private parties are able to perform these actions. The "purpose test" applies if the government is not purchasing for profit or resale, but to benefit the people. See, generally, Bishop, *New U. S. Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953). *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148 (1954).

38. Letter from Acting Legal Advisor Jack B. Tate to the Attorney General, Philip B. Perman, May 19, 1952 in 26 Dept. State Bull. 984 (1952).

to suit in these same courts in both contract and tort, and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the wide-spread and increasing practice on the part of governments of engaging in commerce makes necessary a practice which will hereafter be the 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.³⁹

It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less 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.⁴⁰

The Tate Letter has had notable results, and to understand these effects, the role of the State Department in relation to the judiciary must be examined.

THE ROLE OF THE STATE DEPARTMENT

The Act of 1789,⁴¹ from which the present statute⁴² is derived, empowers the Legal Advisor of the Department of State to furnish advice concerning all legal problems involving either domestic or international law which arise in the course of the Department's work. The Legal Advisor is appointed by the President with the advice and consent of the Senate.⁴³ The courts defer to the Department of State in two types of situations: (1) Where the Department speaks essentially as the President's agent in executing foreign policy⁴⁴ and (2) Where the Department speaks primarily as an administrative agency with special expertise in the field of foreign relations and International Law.⁴⁵ As early as

39. *Id.* at 985, and see, discussion: Leonard, *The U. S. as a Litigant in Foreign Courts*, 1958 PROC. AM. SOC. INT'L L. 95.

40. *Supra*, note 38 at 985.

41. ACT OF JULY 27, 1789, 1 STAT. 28.

42. R. S. 202 (5 U.S.C. 156).

43. Bilder, *The Office of the Legal Advisor*, 56 AM. J. INT'L L. 633 (1962).

44. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Terlinden v. Ames*, 184 U.S. 270 (1902); *Jones v. United States*, 137 U.S. 202 (1890); *United States v. Lee*, 106 U.S. 196 (1882); *Briehl v. Dulles*, 248 F.2d 561 (D.C. 1957).

45. Recognition of foreign governments: *Larvian State Cargo and Passenger Line v. McGrath*, 188 F.2d 1000, 342 U.S. 816 (1951); *Guaranty Trust Co. v. United States*,

1803, Justice Marshall, describing foreign affairs powers as executive and beyond judicial control in *Marbury v. Madison* said, "The subjects are political. They respect the nation, not individual rights and being intrusted to the executive the decision of the executive is conclusive."⁴⁶

PRESENTATION OF THE ISSUE

In addition to raising the substantive issue of restrictive immunity, the Tate Policy raises the procedural point of how immunity is best presented to the courts.⁴⁷ An understanding of the procedural problem in presentation is necessary to appreciate the current position of the State Department.

Since 1796, the accepted practice of the State Department has been the filing of a suggestion of immunity by the Attorney General of the United States or a law officer acting under his direction.⁴⁸ Otherwise,

304 U.S. 126 (1938); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Kenneth v. Chambers*, 14 How. 38 (1852); *National Union Fire Ins. Co. v. Republic of China*, 254 F.2d 177 (4th Cir. 1958); *Bank of China v. Wells Fargo Bank and U. T. Co.*, 92 F. Supp. 920 (N.D. Cal. 1950); *The Penza*, 277 Fed. 91 (E.D. N.Y. 1921). Foreign Governments bringing suit: *Banco Nacional de Cuba v. Sabbitino*, 84 S. Ct. 923 (1964); *Colombia v. Cauca Co.*, 190 U.S. 524 (1903); *The Sapphire*, 11 Wall 164 (1870); *Calderone v. Naviera Vacuba*, 325 F.2d 76 (2nd Cir. 1963); *Pang-Tsu Mou v. Republic of China*, 201 F.2d 195 (D.C. 1952); *Compania Ron Bacardi v. Bank of Nova Scotia*, 193 F. Supp. 814 (S.D. N.Y. 1961); Unrecognized government cannot bring suit: *Clark v. Allen*, 331 U.S. 503 (1947); *Doe ex dem Clark v. Braden*, 16 How. 635 L.E. 1090 (1853); *Ivanceric v. Arrukovic*, 211 F.2d 565 (9 Cir. 1954). Acquisition of new lands: *Wilson v. Shaw*, 204 U.S. 24 (1907). Resolution of disputed sovereignties: *In re Cooper*, 143 U.S. 472, (1892). Regarding the Immigration Act: *Carlson v. Landor*, 342 U.S. 524 (1952); *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663 (D.C. 1960). War crimes: *Koki Hirota v. McArthur*, 33 U.S. 197 (1949); *Bernstein v. N. V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). Allocation of international airway: *Chicago and Southern Airline v. Waterman Steamship Corp.*, 333 U.S. 103 (1948). Miscellaneous: *P and E Shipping Corp. v. Banco Para El Comercio Exterior de Cuba*, 307 F.2d 415 (1st Cir. 1962); 14 SYRACUSE L. REV. 517 (1963); *Wolchok v. Stalni Banka Ceskoslovenska*, 222 N.Y.S.2d 140, (1961); *Anderson v. N.V. Transandine Handelmaatschappig*, 289 N.Y. 9 (1942). See generally, *Federal Intervention in Private Actions Involving Public Interest*, 65 HARV. L. REV. 319 (1961).

46. *Marbury v. Madison*, 1 Cranch 137, 166 (1803).

47. *Supra*, note 38 at 985: ". . . In order that your Department, which is charged with representing the interests of the government before the Courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon."

48. *Schooner Exchange v. McFaddon*, *supra*, note 23; *The Cassius*, 2 Dall. 635 (1796); *The Attulita*, 238 Fed. 909 (4th Cir. 1916); *Hassard v. U. S. of Mexico*, 61 N.Y. Supp. 939 (1899); *contra*: *Molina v. Comision Reguladora, Mercado de Henequen*,

the State Department merely certified the person making the suggestion as an accredited diplomatic official.⁴⁹

The first authoritative disapproval of the latter practice was *Ex parte Muir*, decided by the Supreme Court in 1921.⁵⁰ In a libel suit against the vessel for damage from collision, the counsel for the British Embassy appeared as *amici curiae* and suggested the process be quashed as the British Government had requisitioned the ship. The suggestion was overruled and the ship's master applied to the Supreme Court for a writ of prohibition to prevent the District Court from proceeding with the suit. The basis of the Court's decision was the discretionary issuance of a writ of prohibition. However, in a powerful and often quoted dictum, the Court referred to the *amici curiae* procedure as:

. . . a marked departure from what theretofore had been recognized as the correct practice and in our opinion the libelant's objection to it was well taken. The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightly due to it and tends to promote harmony of action and uniformity of decision.⁵¹

To raise the question properly the foreign State or its authorized representative must appear as a suitor,

. . . and if there was objection to appearing as a suitor in a foreign court, it was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic representation to the end that, if that claim was recognized by the Executive Department of this government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General or some law officer acting under his direction.⁵²

91 N. J. L. 382, 103 Atl. 397 (1918) (counsel for corp. not qualified); Gul Djemal, 296 Fed. 563 (S.D. N.Y. 1920) (master of ship not qualified); *The Anne*, 3 Wheat 435 (1818) (consul not qualified).

49. *Amici curiae*: *The Roseric*, 254 Fed. 154 (D.C. N.J. 1918). *Charge d'Affairs: The Maipo*, 252 Fed. 627 (S.D. N.Y. 1918). Consul accompanied by a certificate of the Russian Ambassador and the State Dept.: *The Rogday* (spelling varies), 279 Fed. 130 (N.D. Cal. 1920). See generally, Feller, *Procedure in Cases Involving Immunity of Foreign State in Courts of the United States*, 25 AM. J. INT'L L. 83 (1931).

50. *Ex parte Muir*, 254 U.S. 522 (1921).

51. *Id.* at 533.

52. *Id.* at 532, this dicta was the basis of the decision in the *Pesaro* case, *supra*, note 33.

The request claiming immunity is submitted to the State Department by the party or his home government.⁵³ After State Department action, the suggestion⁵⁴ is filed by the Justice Department. The courts have given varying effects to the State Department advice, considering it a conduit,⁵⁵ an instruction,⁵⁶ a recognition and allowance,⁵⁷ or a conclusive determination.⁵⁸ Since 1937, most courts have considered the State Department's voice a conclusive determination of the policy. Of course, the courts have been free to determine issues not affecting international or diplomatic relations.⁵⁹ When the State Department refused to act the Court has relied on an accredited representative.⁶⁰ The fluctuations of the court in allowing an accredited representative,⁶¹ rather than adhering to the *Ex parte Muir* procedure,⁶² frustrated some actions. In addition, several New York courts felt the action would not lie if the petition did not affirmatively assert the sovereign's consent to the suit.⁶³

53. Deak, *The Plea of Sovereign Immunity and the New York Court of Appeals*, 40 COL. L. REV. 453 (1940); *Judicial Deference to the State Department on International Legal Issues*, 97 U. OF P. L. R. 79 (1948).

54. Suggestion was first mentioned in *United States v. Peters*, 3 Dall. 121 (1795).

55. *Piascik v. British Ministry of War Transport*, 54 F. Supp. 487 (S.D. N.Y. 1943); *Lamont v. Travelers Ins. Co.*, 284 N.Y. 633, 29 N.E.2d 939 (1940). *The Augustine*, 8 F.2d 287 (S.D. N.Y. 1924). *The Sao Vicente*, 260 U.S. 151 (1922). *Ex parte Muir, supra*, note 50.

56. *Sullivan v. State of Sao Paulo*, 36 F. Supp. 503 (E.D. N.Y. 1941).

57. Treated as recognition and allowance but denied effect: *Ulem and Co. v. Bank Gospodarstwa Krajawego*, 24 N.Y.S.2d 201, 25 N.Y.S.2d 1002, 261 App. D. 838 (1940).

58. *Chicago and Southern Airlines, Inc. v. Watermans Steamship Corp.*, 333 U.S. 103 (1948); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1944); *Ex parte Republic of Peru*, 318 U.S. 578, (1943); *The Maret*, 145 F.2d 431 (3rd Cir. 1944); *The Navemar*, 103 F.2d 783 (2nd Cir. 1939); *Erwin v. Quintanilla*, 99 F.2d 935 (5th Cir. 1938); *Miller v. Ferrocarril Del Pacifico de Nicaragua*, 137 Me. 251, 18 A.2d 688 (1941); *United States of Mexico v. Schmuck*, 294 N.Y. 265, 62 N.E. 264 (1945); *Associated Metals and Minerals Corp. v. Petroleos Mexicanos*, 43 N.Y.2d 829 (1943); *Fields v. Predionica Thanica* 31 N.Y.S.2d 739, 263 App. D. 155 (1941); *Stone Engineering Co. v. Petroleos Mexicanos of Mexico*, 352 Pa. 12, 42 A.2d 57 (1945); *Westchester County v. Ranollo*, 67 N.Y.S.2d 31; *New Rochelle City Ct.* (1948).

59. *E.g.*, *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); *In re Investigation of World Arrangements*, 13 F.R.D. 280 (D.C. 1952).

60. *Compania Espanola v. Navemar*, 303 U.S. 68 (1938).

61. *The Ljubica Matkovic*, 49 F. Supp. 936 (S.D. N.Y. 1943); *Government of France v. Isbrandtsen-Moller Co.*, 48 F. Supp. 631 (S.D. N.Y. 1943); *The Frederick*, 43 F. Supp. 1015 (E.D. N.Y. 1942); *Federal Motorship Corp. v. Johnson and Higgins*, 77 N.Y.S.2d 52 (1948); *De Simone v. Transportes Maritimos Do Estado*, 191 N.Y. Supp. 864, 200 App. D. 82, 192 N.Y. Supp. 815 (1922).

62. *E.g.*, *Societa Commerciale Italiana Di Navigazione v. Mara Nav. Co.*, 280 Fed. 334 (4th Cir. 1922); *United States of Mexico v. Rusk*, 4 P.2d 981, Cal. (1931); *Holzer v. Deutsche Reichsbahn Gessellschaft*, 289 N.Y. Supp. 943, 160 Misc. 597 (1936).

63. *Petrol Shipping Corp. v. Kingdom of Greece, supra*, note 1; *Puente v. Spanish*

In other jurisdictions when the sovereign institutes the suit, he is considered a private suitor, thus subject to counterclaims.⁶⁴

When formulated, the Tate Letter advocated a change in the existing immunity from suit. Alteration of the existing policy of absolute immunity from attachment, execution and seizure was not intended.⁶⁵ According to the early construction of the Letter, the State Department considered acts *jure gestionis* not entitled to immunity, and funds could not be attached for jurisdiction; consequently actions were dismissed.⁶⁶ This interpretation rendered the Tate Letter illusory, so in the 1961 *Stephen v. Zivnostenska Banka* case a communiqué was issued allowing attachment of property to obtain jurisdiction over a foreign nation.⁶⁷ However, on the basis of comity, attachment was not extended to execution for judgment.⁶⁸ Some critics feel the State Department should have further strengthened the Tate Policy;⁶⁹ others feel the judicial limitation by the State Department was unwarranted.⁷⁰ The vast majority of courts, however, have accepted the doctrine in toto, acceding to the procedural aspect and thus to the substantive policy.⁷¹

National State, *supra*, note 2; *Adatto v. United States of Venezuela*, 181 F.2d 501 (2d Cir. 1950), *aff'd*, on authority of *Puente* case; *Landley v. Republic of Panama*, 31 F. Supp. 230 (S.D. N.Y. 1940).

64. E.g., *National City Bank of New York v. Republic of China*, 348 U.S. 356, (1954); *Claudy, The Tate Letter and the National City Bank Case*, 1958 Proc. AM. Soc. INT'L L. 80; *United States v. National City Bank of New York*, 83 F.2d 236, 299 U.S. 563 (1936); *United States v. The Thekla*, 266 U.S. 328 (1924); *Republic of China v. American Express*, 195 F.2d 230 (2d Cir. 1952). When immunity is waived it may not be later asserted in the same suit: *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44 (1916); *Kunglig Jarnvagsstyrelsen v. Dexter and Carpenter*, 300 Fed. 891, 43 F.2d 705 (2d Cir. 1930).

65. *Re, Nationalization and the Investment of Capital Abroad*, 42 GEO. L.J. 44 (1953).

66. *New York and Cuba Mail Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D. N.Y. 1955); *Weilaman and McClosky v. Chase Manhattan*, 192 N.Y.S.2d 469 (1959).

67. 222 N.Y.S.2d 128 (1961).

68. *Rich v. Naviera Vacuba*, 197 F. Supp. 710, *aff'd*, 295 F.2d 44 (E.D. Va. 1961), DUKE L.J. 582 (1962); 13 SYRACUSE L. REV. 492 (1962); *Three Stars Trading Co. v. Republic of Cuba*, 222 N.Y.S.2d 675 (1961), 13 SYRACUSE L. REV. 494 (1962). The State Department intervened at the appellate court level: *Republic of Cuba v. Arcada Building of Savannah, Inc.*, 123 S.E.2d 453 (Ga. 1961); *Republic of Cuba v. Dixie Paint and Varnish Co.*, 104 Ga. App. 854, 123 S.E.2d 198 (1961); *State ex rel. National Institute of Agrarian Reform v. Dekle*, 137 So.2d 581, Fla. (1962). Plea is too late if entered after execution sales: *United States v. Harris and Co. Advertising*, 149 So. 384 (Dist. Ct. App. 1963).

69. *The First Decade of the Tate Policy*, 60 MICH. L. REV. 1142 (1962).

70. 61 MICH. L. REV. 396 (1962).

71. *Banco Nacional de Cuba v. Sabbitino*, 84 Sup. Ct. 923 (1964), *National City Bank of N. Y. v. Republic of China*, 348 U.S. 356 (1954); *Republic of China v. Mayan Lines*, 145 So.2d 679 (4th Cir. 1962); *Flota Maritima Browning v. Motor Vessel Ciudad*,

THE ACT OF STATE DOCTRINE

Another applicable tenet of immunity, introduced in the 1796 *Waters v. Collot*⁷² case, was promulgated by the Supreme Court in *Underhill v. Hernandez*.⁷³

Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁷⁴

Known as the Act of State Doctrine, well entrenched since 1918,⁷⁵ this principle applies⁷⁶ even when the action of the foreign state is illegal under municipal law.⁷⁷

Two basic reasons for this doctrine are: (1) the peaceful intercourse

218 F. Supp. 938 (D. Md. 1963); *Rich v. Naviera Vacuba*, 197 F. Supp. 710, *aff'd*, 295 F.2d 44 (E.D. Va. 1961); *New York and Cuba Mail Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D. N.Y. 1955); Fla.: *National Institute of Agrarian Reform v. Kane*, 153 So.2d 40, (Fla. 1963); *United States v. Harris and Co. Advertising*, 149 So. 2d 384 (Dist. Ct. App. 1963); *State ex rel National Institute of Agrarian Reform v. Dekle*, 137 So. 2d 581 (Fla. 1962); *Banco Nacional de Cuba v. Steckel*, 134 So.2d 23 (Fla. 1961); *Harris and Co. Advertising v. Republic of China*, 127 So.2d 687 (Fla. 1961); Georgia: *Republic of Cuba v. Arcada Building of Savannah*, 123 S.E.2d 453 (Ga. 1961); *Republic of Cuba v. Dixie Paint and Varnish Co.*, 104 Ga. App. 854, 123 S.E.2d 198 (1961); New York: *Mirabella v. Banco Industrial de la Republic Argentina*, 237 N.Y.S.2d 499, 38 Misc.2d 128 (1963); *Three Stars Trading Co. v. Republic of Cuba*, 222 N.Y.S.2d 675 (1961); *Stephen v. Zivnostenska Banka*, 222 N.Y.S.2d 128 (1961); *Pacific Molasses v. Comite de Ventes de Mieles*, 219 N.Y.S.2d 1018 (1961); *Weilaman and McClosky v. Chase Manhattan*, 192 N.Y.S.2d 469 (1959). *Contra*: *Petrol Shipping Corp. v. Kingdom of Greece*, *supra*, note 1; *Knocklong Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (1957).

72. *Waters v. Collot*, 2 U.S. (2 Dall.) 246 (1796).

73. 168 U.S. 250 (1897).

74. *Id.* at page 252 and 457.

75. *Ricaud v. American Metal*, 246 U.S. 304 (1918).

76. *Pons v. Republic of Cuba*, 294 F.2d 925 (D.C. Cir. 1961); *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940). Administration no longer in power, principle applied unless the State Department indicates a contrary intention: *Bernstein v. Van Heyghen Freres*, 163 F.2d 246 (2d Cir. 1947), *cert. den.*, 332 U.S. 772. Not a *de jure* Gov't.: *Saliminoff v. Standard Oil Co.*, 262 N.Y. 220 (1933).

77. *Banco Nacional de Cuba v. Sabbitino*, 84 Sup. Ct. 923 (1964). *Lillich, A Pyrrhic Victory at Foley Square, The Second Circuit and Sabbitino*, 8 VILL. L. REV. 155 (1963). *The Extent to Which the Act of State is and Should Be Applied in U. S. Courts*, 44 B.U.L. REV. 86 (1964). *Contra*: (because Nazi acts were considered in flagrant disregard of our public policy) *Bernstein v. N. V. Nederlandsche Amerikaansche Maatschappij*, 173 F.2d 71 (2d Cir. 1949).

of states can best be predicated on the basis of respect for other sovereigns, and (2) the established practice of judicial deference to the State Department in matters involving public policy.⁷⁸ No adverse effect on foreign relations has been noticed between countries who do not apply the doctrine; thus, the most valid attack of the former reason is based on reciprocity.⁷⁹ "There is no evidence of any diplomatic protest against a judicial decision which failed to adhere to it (Act of State Doctrine)."⁸⁰ In addition to matters of public policy, courts should defer to the State Department questions involving international territorial disputes, recognition, exclusion and expulsion of aliens, interpretations of treaties and immunities.⁸¹ In these situations, the Court may not have all the facts or the diplomatic channels through which to obtain them. The State Department should have the right to apply the Act of State Doctrine consistently.⁸² This practice would be more equitable to private suitors⁸³ and consonant in theory with the Tate Letter.

THE PETROL CASE

In *Petrol Shipping Corp. v. Kingdom of Greece*,⁸⁴ the influential Second Circuit Court of Appeals totally ignored the Tate Policy. As the court sits in a commercial capital of the world, it is especially regrettable since foreign representatives may question whether the United States is reverting to the absolute immunity policy of the twenties. Twelve years after the formulation of the Tate Policy, the majority prejudicially based their decision on the 1940 *Puente* case.⁸⁵ They made no criticism of the Tate Policy, but in effect they criticised in the safest manner—silence.

In the *Petrol* case, petitioner moved for an order directing the Greek Ministry of Commerce to proceed to arbitration of damages arising

78. See generally, Sims, *Act of State v. International Law*, 13 MERCER L. REV. 370 (1962); Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 826 (1959); *Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607 (1962).

79. *The Extent to Which the Act of State Doctrine is and Should be Applied in U. S. Courts*, 44 B.U.L. REV. 86 (1964); Hyde, *The Act of State Doctrine and the Rule of Law*, 53 AM. J. INT'L L. 635 (1959).

80. Mann, *International Delinquencies Before Municipal Courts*, 70 L.Q. REV. 181, 198 (1954); Mann, *Sacrosanctity of Foreign Acts of State*, 59 L.Q. REV. 42 (1943).

81. Dickinson, *The Law of Nations as National Law*, 104 U. OF P. L. REV. 451 (1956).

82. *Accord: National Institute of Agrarian Reform v. Kane*, 153 So. 2d 40 (1963).

83. Cardoza, M. H., *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

84. *Petrol Shipping Corp. v. Kingdom of Greece*, *supra*, note 1.

85. *Puente v. Spanish National State*, *supra*, note 2.

from respondent's charter of petitioner's tanker to transport grain to Greece. Appearing specially, the Greek Ambassador to the United States suggested want of jurisdiction to sue a sovereign without consent. The lower court sustained respondent's motion and the petitioner appealed. There is every indication the State Department would have declared the acts *jure gestionis* and not supported the defense, particularly as the proceeding was not to seek the enforcement of a final decree but merely to require the respondent to appoint an arbitrator. The affirmance of immunity by the Second Circuit Court of Appeals accords to Greece a privilege that would not be extended to the United States in Greek courts.⁸⁶ Furthermore, the decision repudiates the progress in thinking and logic of the last forty years.

CONCLUSIONS

Various criticisms of the Tate Policy have been advanced: the State Department has usurped the judiciary power;⁸⁷ the plaintiff is left without a formal hearing, without the benefit of advocacy, and without procedural safeguards. In addition, delays by the State Department may be costly to the plaintiff. Furthermore, the Department may not take action in cases of severed diplomatic relations or unrecognized states. An ever-present possibility is conflict with the United Nations Treaties.⁸⁸

Critics and dissenting courts must be made aware of the two basic problems the policy is seeking to remedy. In foreign policy today: (1) the United States must speak with one voice and that voice must be the most qualified; (2) the determination of the issues must be expedient and harmonious with the accepted rules of International Law.⁸⁹

Unhampered by procedural practices of resolving immunity, the State

86. Greek courts have assumed jurisdiction in actions involving state activities (*jure gestionis*). Consular Premises (Greece case), Annual Digest 1931-1932, case no. 187, Soviet Republic (Immunity in Greece) case, Themis, vol. 40, p. 486, Annual Digest 1927-1928, case no. 109. Greece is also mentioned in the Tate Letter as reversing in the 1920's their support of absolute immunity to embrace the restrictive theory.

87. See, generally, Cardoza, M. H., *Recognition of Prerogatives or Abdication to Usurper*, 48 CORNELL L.Q. 461 (1963). Contra: Jessup, *Has the Supreme Court Abdicated One of its Functions?* 40 AM. J. INT'L L. 168 (1946).

88. See, Ehrenfeld, *United Nations Immunity Distinguished from Sovereign Immunity*, 1958 PROC. AM. SOC. INT'L L. 88.

89. E.g., The United States has signed a Convention which clearly rejects the absolutist theory as to maritime vessels, Convention of the Territorial Seas and the Contiguous Zone, U.N. Doc. No. A/Conf. 13/L. 52 (1958), reprinted in 52 Am. J. Int'l L. 834 (1958).

Department is able to analyze actual business relations and consider the effect of the problem and resolution on existing or non-existing diplomatic relations with the sovereign in question.

Provisions for a hearing with the Legal Advisor and his staff would guarantee a formal hearing, the benefit of advocacy, and procedural safeguards.

When unwilling to express an opinion, the State Department should immediately advise the court. This practice would negate complaints of unnecessary delay and the possibility of misunderstanding the position of the State Department.

The courts have not abdicated their power to the State Department, nor has the State Department usurped the function of the courts. Never has there been a policy affecting international relations that the executive in his wisdom could not change. Thus, it is the duty of the judiciary to allow the State Department to exercise its right of flexibility. "Flexibility, not uniformity must be the controlling factor in times of strained international relations."⁹⁰

Penelope Dalton

90. *Rich v. Naviera Vacuba, Hoffman*, 197 F. Supp. 710, 724, *aff'd*, 295 F.2d 44 (1961).