military support, for the states now clamoring against them are unable to assume the responsibility.

Self-determination is a noble ideal, and worth working for; it has failed in the past because of the lack of an international law or organization able to apply it. With the United Nations, it becomes possible to work out criteria and methods; there is no more important and urgent task before the United Nations today. But the criteria established must be based upon justice and upon common sense, and little respect has been shown to either in the current debates. It is not merely the people concerned, but the community of nations, which has an interest; reckless application of the principle could easily lead to great dangers for the community of nations. A new field of international law is being opened up; it deserves the most serious study by the most responsible persons upon whom the United Nations can call.

CLYDE EAGLETON

NEW UNITED STATES POLICY LIMITING SOVEREIGN IMMUNITY

A new United States position with respect to the immunity from jurisdiction of the local courts enjoyed by foreign governments engaged in commerce was demonstrated in the letter of May 19, 1952, from the Acting Legal Adviser of the Department of State to the Acting Attorney General.[1] In this letter Acting Legal Adviser Jack B. Tate wrote:

> The Department of State has for some time [2] had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. . . .
>
> A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. 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*).[3] . . .

[1] Department of State Bulletin, Vol. 26 (June 23, 1952), p. 984.

[2] On April 9, 1948, a press officer of the Department of State announced that the Department was reconsidering the policy of requesting immunity for foreign government-owned and government-operated merchant vessels in view of the increasing tendency of such vessels to engage in commercial operations. The New York Times, April 10, 1948, p. 27, col. 3. This announcement was issued in response to questions concerning the grant of immunity to the Soviet vessel *Rossia*, 1948 A.M.C. 814 (S.D.N.Y., April 6, 1948).

[3] Mr. Tate added: "There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary."

> . . . The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. 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 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 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 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.

Through this action the Department is taking a position in accord with the practice of many countries. In Mr. Tate's letter,[4] it was stated that the "classical" theory of virtually absolute sovereign immunity had generally been followed in the courts of the United States, the British Commonwealth of Nations, Czechoslovakia, Estonia, and probably Poland. It was said that the decisions of courts in Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal might also be deemed to support this theory, if one or two old decisions in each country, prior to the development and adoption of the more limited theory, would form a sufficient basis for such determination. He reported that the newer or restrictive theory of sovereign immunity had originated in Belgium and Italy, had then been adopted by the courts of Egypt and Switzerland, and had more recently been embraced by the courts of France,[5] Austria,[6] and Greece. Apparently it is also being followed by Rumania and Peru, by the lower courts in The Netherlands, and possibly by Denmark. These conclusions of the Department of State as to the prevalence of restricted immunity in foreign courts appear to be amply supported. Indeed, it may be noted that, although on the basis of repeated decisions of lower courts [7] Mr. Tate follows the usual opinion in classifying the British Commonwealth as giving absolute immunity, nevertheless in *The Cristina,* [1938] A.C. 485,[8] three of the five judges sitting in the House of Lords stated their belief that the law of England was *not* settled in favor of granting immunity to foreign merchant vessels merely because they were owned and operated by foreign govern-

[4] Based upon an elaborate survey of national court decisions throughout the world.

[5] *Cf.* J. G. Castel, "Immunity of a Foreign State from Execution: French Practice," this JOURNAL, Vol. 46 (1952), p. 520.

[6] See note by Paul Abel, this JOURNAL, Vol. 45 (1951), p. 354.

[7] *The Parlement Belge,* 5 P.D. 197 (Ct. App., 1880); *The Porto Alexandre,* [1920] P. 30 (Ct. App.); *The Jupiter,* [1924] P. 236 (Ct. App.).

[8] Reprinted in this JOURNAL, Vol. 32 (1938), p. 824.

ments.[9] These views are particularly significant since the House of Lords has never actually decided in favor of immunity for commercial operations of foreign governments, and it would seem quite possible that in an appropriate case the highest British court would decide in favor of restricted rather than absolute immunity.

With so many states denying the existence of immunity when the foreign government engages in commerce, one could hardly maintain that customary international law today requires that immunity be granted. As the Permanent Court of International Justice observed in the case of the *S.S. Lotus*, P.C.I.J., Series A, No. 10, p. 29:

> as municipal jurisprudence is thus divided, it is hardly possible to see in it an indication of the existence of the restrictive rule of international law. . . .

There seems no doubt that the adoption by the United States of its new policy restricting sovereign immunity is fully in accord with the obligations of international law. There appears to be little, if any, generally accepted international law today with respect to the immunity of foreign governments when they go beyond traditional governmental activities. No international arbitral or judicial decision on the point can be found.

The only treaties in the field appear to be ones which provide that immunities need not be granted when the government operates merchant

[9] Lords Thankerton, Macmillan and Maugham, in their respective opinions stated that they felt free to reconsider the question of *The Porto Alexandre*. Lord Macmillan specified that "I should hesitate to lay down that it is a part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign State, for such a principle must be an importation from international law and there is no proved consensus of international opinion or practice to this effect. On the contrary the subject is one on which divergent views exist and have been expressed among the nations. . . . I recognize that the Courts of this country have already . . . gone a long way in extending the doctrine of immunity; but the cases which have gone furthest have not been hitherto considered in this House." [1938] A.C. 485, 498.

Lord Maugham said that there was "neither principle nor any authority binding this House to support the view that the mere claim by a Government or an ambassador or by any of his servants would be sufficient to bar the jurisdiction of the Court, except in such cases as ships of war and other notoriously public vessels or other public property belonging to the State." [1938] A.C. 485, 516. Criticizing conclusions drawn from *The Parlement Belge* and subsequent cases in the Court of Appeal, he added: "I have indicated my unwillingness to follow what I must admit to be the recent current of authority in our Courts as regards State-owned trading ships. In what follows I shall merely be indicating the opinion I have formed—one which I believe is shared by many judges and by nearly all persons engaged in maritime pursuits—that it is high time steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to our own nationals." *Ibid.* 521.

See also the language of Viscount Simon for the Privy Council in Sultan of Johore *v.* Abubakar Tunku Aris Bendahar, [1952] A.C. 318, digested *infra*, p. 153, recognizing that the majority of the court in *The Cristina* reserved the case of a government-owned ship engaged in ordinary commerce.

vessels or engages in commercial undertakings. Indeed, in the Brussels Convention of April 10, 1926 (to which the United States is not a party), it was agreed that merchant vessels owned or operated by foreign governments, and the cargoes on board, should be subject to the same rules of liability, the same obligations, and the same procedures as would be applicable in the case of privately owned merchant vessels.[10] Mr. Tate's letter points out that among the nations frequently classified as following the absolute theory of sovereign immunity, Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, and Sweden are parties to the Brussels Convention and thus have relinquished an important part of the immunity which they might claim under the classical theory. Besides the Brussels Convention, it may be recalled that the treaties of peace ending World War I provided that if the ex-enemy "Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."[11] Futhermore, various bilateral treaties expressly adopt the rule of restricted immunity; for example, the Treaty of Friendship, Commerce and Navigation between the United States and Italy, signed February 2, 1948, provides:

> No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned or controlled enterprise is subject therein.[12]

Most of the contemporary writers who discuss the subject advocate cutting down the immunity of states in accordance with the restrictive theory, or maintain that this is already the law.[13] Twenty years ago the Harvard

[10] See 2 Hackworth's Digest of International Law 463; 176 League of Nations Treaty Series 199; 3 Hudson, International Legislation 1837; 6 *id.* 868.

[11] Treaty of Versailles, Art. 281; Treaty of St.-Germain-en-Laye, Art. 233; Treaty of Trianon, Art. 216.

[12] Treaties and Other International Acts Series, No. 1965, Art. 24, par. 6. Similar provisions are included in the more recent treaties of the United States. Compare the arrangements elaborated in various agreements with the Soviet Union, such as the Temporary Commercial Agreement between the United Kingdom and the U.S.S.R., signed Feb. 16, 1934, 149 League of Nations Treaty Series 445.

[13] See R. D. Watkins, The State as Party Litigant (1927), pp. 189–191; E. W. Allen, The Position of Foreign States before National Courts, Chiefly in Continental Europe (1933); P. Shepard, Sovereignty and State-owned Commercial Enterprises (1951); Jasper Y. Brinton, "Suits against Foreign States," this JOURNAL, Vol. 25 (1931), p. 50; J. W. Garner, "Immunities of State-owned Ships Employed in Commerce," 1925 British Year Book of International Law 128; J. G. Hervey, "The Immunity of Foreign States when Engaged in Commercial Enterprises: A Proposed Solution," 27 Michigan Law Review (1929) 751; Note, "Sovereign Immunity for Commercial Instrumentalities of Foreign Governments," 58 Yale Law Journal (1948) 176; Bernard Fensterwald, "Sovereign Immunity and Soviet State Trading," 63 Harvard Law Review (1950) 614.

See, however, G. G. Fitzmaurice, "State Immunity from Proceedings in Foreign Courts," 1933 British Year Book of International Law 101.

Research in International Law, in its Draft Convention on Competence of Courts in Regard to Foreign States,[14] declared in favor of the restricted immunity, although in his Comment as Reporter, Professor Jessup then said that "the exception to immunity here specified is highly controversial."[15] With the increase in nationalization of enterprises and state trading during the last two decades, and with the adoption in state after state of the rule denying immunity to foreign governments with respect to their business activities, the once controversial denial of immunity is rapidly becoming accepted.

The views of the Department of State prior to the decision of *Berizzi Bros. Co.* v. *S.S. Pesaro,* 271 U. S. 562 (1926), had been that governments were not entitled to sovereign immunity when they engaged in commerce or "non-sovereign" functions.[16] It will be recalled that in the *Pesaro* litigation the Supreme Court disregarded the views expressed by the Department of State to the Federal District Court and to the Italian Ambassador, and held that vessels owned, possessed and operated by a foreign government were entitled to immunity regardless of the fact that they were used for commercial purposes instead of as warships or for other purposes for which public vessels have more traditionally been used.[17] Although the Supreme Court adopted the view that the purpose or function for which a vessel or other property was used (and apparently the type of activity in which the government was engaged) did not prevent the foreign government from being entitled to the immunities traditionally accorded, yet, in cases prior to and since *Berizzi Bros. Co.* v. *S.S. Pesaro,* courts in the United States have considerably limited the immunities enjoyed by foreign states and their ships through denying immunity when ships or other property were not in the possession of the foreign government,[18] when the separate entity of

[14] This JOURNAL, Supp., Vol. 26 (1932), p. 451, at 597 ff.

[15] *Ibid.,* p. 606.

[16] See Secretary Lansing to the Atty. Gen., Nov. 8, 1918, 2 Hackworth's Digest of International Law 429; the Department of State to the Italian Embassy, March 31, 1921, *ibid.* 437; the Solicitor for the Department of State (Nielsen) to Judge Julian W. Mack, Aug. 2, 1921, *ibid.* 438–439, also quoted in *The Pesaro,* 277 Fed. 473 (S.D.N.Y. 1921); Secretary Hughes to American diplomatic and consular officers, Jan. 11, 1923, 2 Hackworth's Digest 439–440; Secretary Hughes to the Minister to Portugal, Aug. 26, 1924, *ibid.* 441. The Department took a corresponding position, asserting that no principle of international law would be violated if a municipality imposed taxes on property belonging to a foreign government and acquired for commercial purposes. Secretary Lansing to the Italian Ambassador, April 2, 1918, 2 Hackworth's Digest 465; Acting Secretary Polk to the Russian chargé d'affaires, March 6, 1919, *ibid.* 467.

[17] Reprinted in this JOURNAL, Vol. 20 (1926), p. 811.

[18] See *The Davis,* 10 Wall. 15 (U. S. 1870); Long *v. The Tampico,* 16 Fed. 491 (S.D.N.Y. 1883); *The Johnson Lighterage No. 24,* 231 Fed. 365 (D.N.J. 1916); *The Navemar,* 303 U. S. 68 (1938); Ervin *v.* Quintanilla, 99 F. 2d 935 (C.C.A. 5th 1938); Republic of Mexico *v.* Hoffman, 324 U. S. 30 (1945). *Cf. The Carlo Poma,* 259 Fed. 369 (C.C.A. 2d 1919).

a government-owned corporation was involved,[19] or where immunity was not properly claimed.[20]

Furthermore, the action now taken is in harmony with the Acts of Congress adopted in 1916, 1920, and 1925, under which sovereign immunity is waived and proceedings may be brought against the United States in its own courts for wrongs done by its vessels,[21] as well as with the policy of the Federal Tort Claims Act of 1946.[22]

It seems clear that the adoption of this new policy, restricting sovereign immunity to situations in which foreign states are performing functions generally recognized to be governmental, is highly desirable from the standpoint of the United States. It removes an element of unfairness toward private enterprise. As Chief Justice Marshall said long ago,

> 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.[23]

In *The Pesaro*, 277 Fed. 473 (S.D.N.Y. 1921),[24] Judge Julian Mack gave among the reasons for denying immunity to a merchant vessel owned and operated by the Italian Government, that:

> To deprive parties injured in the ordinary course of trade of their common and well-established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sover-

[19] Coale *v.* Société Co-operative Suisse des Charbons, 21 F. 2d 180 (S.D.N.Y. 1921); United States *v.* Deutsches Kalisyndikat Gesellschaft, 31 F. 2d 199 (S.D.N.Y. 1929); Ulen & Co. *v.* Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S. (2d) 201 (1940); *The Uxmal*, 40 F. Supp. 258 (D. Mass. 1941); Plesch *v.* Banque Nationale de la République d'Haiti, 273 App. Div. 224, 77 N.Y.S. (2d) 43 (1948); Hannes *v.* Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S. (2d) 825 (1940).

[20] Ex Parte Muir, 254 U. S. 522 (1921); *The Pesaro*, 255 U. S. 216 (1921); *The Sao Vicente*, 260 U. S. 151 (1922); *The Gul Djemal*, 264 U. S. 90 (1924).

[21] See Act of Sept. 7, 1916, waiving immunity of U. S. Shipping Board vessels, 39 Stat. 728, 730, later repealed; Suits in Admiralty Act of March 9, 1920, 41 Stat. 525, 46 U. S. Code §§741–752; Public Vessels Act of March 3, 1925, 43 Stat. 1112, 46 U. S. Code §§781–799.

[22] 60 Stat. 842. See also 28 U. S. Code § 1346.

[23] Bank of the United States *v.* Planters' Bank of Georgia, 9 Wheat. 904, 907 (U. S. 1824). Of course Marshall's statement related to one of the States of the United States, rather than to a state in the international law sense, and he was concerned with a corporation owned by such a State (in which case immunity is generally refused on the basis of the distinction between the corporation and its stockholders); but the reasoning seems apposite.

[24] Judge Mack's opinion, which seems far sounder than that of the Supreme Court in Berizzi Bros. Co. *v.* S. S. Pesaro, 271 U. S. 562 (1926), is worth careful study. It is the chief American decision in which the court adopted the restricted view of sovereign immunity now espoused by the Department of State.

> eigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands.[25]

Likewise in his opinion in *The Cristina,* cited above, Lord Maugham asked:

> . . . Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and shipowners in the markets of the world? Doing so, is it consistent to set up the immunity of the sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or, for that matter, is international comity being followed, in permitting a foreign government, while insisting on its own right to immunity, to bring actions *in rem* or *in personam* against our own nationals? [26]

Furthermore, in many, if not most, instances it would appear that controversies involving government-owned merchant vessels and other commercial functions of foreign governments would be settled more expeditiously and with fewer political repercussions if they could be dealt with by the courts which are accustomed to dealing with such cases, rather than handled through diplomatic channels between the foreign office of the nationality of the plaintiff and that of the state involved as defendant. In his supplemental opinion in *The Pesaro,* cited above, Judge Mack well added:

> it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the Pesaro would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed, it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern.

As a practical matter, what are the immediate consequences of this action likely to be? How far will the courts be guided by the expression of views of the Department of State? The Acting Legal Adviser writes:

[25] In *The Porto Alexandre,* [1920] P. 30, 38–39, Lord Justice Scrutton felt constrained by precedent to uphold the immunity of a Portuguese government-owned merchant vessel from salvage proceedings, but he said: "no one can shut his eyes, now that the fashion of nationalisation is in the air, to the fact that many states are trading, or are about to trade, with ships belonging to themselves; and if these national ships wander about without liabilities, many trading affairs will become difficult. . . . But there are practical commercial remedies. If ships of the state find themselves left on the mud because no one will salve them when the state refuses any legal remedy for salvage, their owners will be apt to change their views. If the owners of cargoes on national ships find that the ship runs away and leaves them to bear all the expenses of salvage, as has been done in this case, there may be found a difficulty in getting cargoes for national ships."

[26] [1938] A.C. 485, 513, at 521–522; also this JOURNAL, Vol. 32 (1938), p. 824, at p. 847.

> 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.

In *Ex parte Republic of Peru,* 318 U. S. 578, 588–589 (1943), Chief Justice Stone said:

> Upon recognition and allowance of the claim by the State Department and certification of its action presented to the court by the Attorney General, it is the court's duty to surrender the vessel and remit the libelant to the relief obtainable through diplomatic negotiations. . . .
>
> The certification and the request that the vessel be declared immune 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.[27]

In *Republic of Mexico* v. *Hoffman,* 324 U. S. 30, 35 (1945), this JOURNAL, Vol. 39 (1945), p. 585, Chief Justice Stone again said for the Court, this time in denying immunity to a government-owned merchant vessel not in the possession of the foreign government, when the Department of State had communicated a request for immunity from the Mexican Government but had taken no stand on that request:

> It is therefore 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.[28] The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of

[27] Reprinted in this JOURNAL, Vol. 38 (1944), p. 132. Despite the usual practice in the United States of denying immunity to corporations owned or controlled by foreign governments, in Stone Engineering Co. *v.* Petroleos Mexicanos, 352 Pa. St. 12 (1945), and in Matter of United States of Mexico *v.* Schmuck, 293 N.Y. 264 (1944), the courts felt themselves bound to accord immunity to such a corporation because the Department of State informed the courts that it "recognized and allowed" the immunity claimed. See also A. B. Lyons, "The Conclusiveness of the 'Suggestion' and Certificate of the American State Department," 1947 British Year Book of International Law 116.

[28] "This salutary principle was not followed in Berizzi Bros. Co. *v. The Pesaro,* 271 U. S. 562, where the court allowed the immunity, for the first time, to a merchant vessel owned by a foreign government and in its possession and service, although the State Department had declined to recognize the immunity. The propriety of thus extending the immunity where the political branch of the government had refused to act was not considered.

"Since the vessel here, although owned by the Mexican Government, was not in its possession and service, we have no occasion to consider the questions presented in the Berizzi case. It is enough that we find no persuasive ground for allowing the immunity in this case, an important reason being that the State Department has declined to recognize it." [Footnote by the Court.]

> the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru, supra,* 588. 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 national interests and their recognition by other nations.

In a concurring opinion, joined in by Black, J., Mr. Justice Frankfurter said:

> It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations," or of course Congress, explicitly asserts that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial processes. (324 U. S. 41–42.) [29]

As practice has developed, our courts pay great attention in this field to the views of the Executive. At least with respect to the current problem, it is believed that this should be the case. Insofar as the courts treat questions of immunity as matters of foreign policy rather than questions of law, and seek to avoid embarrassment to the Executive, they should certainly follow in the future this newest expression of the policy of the Department of State restricting sovereign immunity. If, on the other hand, the courts believe that they are dealing with questions of law (ultimately depending on rules of international law), this current statement by the Department of State should be strong evidence that the present-day rules of international law do not require that immunity be accorded a foreign state and its property when commercial functions are involved.[30]

[29] In an editorial entitled "Has the Supreme Court Abdicated One of its Functions?" this JOURNAL, Vol. 40 (1946), p. 168, Prof. Jessup criticizes the approach of the Court in Mexico *v.* Hoffman, as requiring that "the State Department must also determine the basic legal principle governing the immunity," and prefers that the question be treated as one of law rather than one of respect for policy of the Department. The same position is taken by Ruttenberg in a note in 97 U. Pa. Law Review (1948) 79. An opposite view is taken by E. D. Dickinson and W. S. Andrews, "A Decade of Admiralty in the Supreme Court of the United States," 36 Cal. Law Review (1948) 169, 215.

[30] There would be obvious advantages if international agreement on the extent and limitations of sovereign immunity could be reached by treaty. In the absence of treaty, some have suggested that the change in American policy to the restrictive concept of immunity should be effected by concurrent action of Congress as well as by executive statement. See J. G. Hervey, "The Immunity of Foreign States when Engaged in Commercial Enterprises: A Proposed Solution," *loc. cit.*, at pp. 774–775 (1929); Note, "Sovereign Immunity for Commercial Instrumentalities of Foreign Governments," *loc. cit.*, at p. 182 (1948). Although perhaps desirable, such legislation would not appear to be at all essential.

Does this change in attitude of the Department of State, and its probable consequences in the courts of the United States, mean that in the future we may expect to see the properties of foreign states seized and sold by way of execution of any judgments rendered against them by our courts? Although no explicit answer is given in Mr. Tate's letter, there is little reason to believe that the change is intended to interfere with existing immunities from execution and seizure. As was said in *Dexter & Carpenter* v. *Kunglig Jarnvagsstyrelsen,* 43 F. (2d) 705, 708 (C.C.A. 2d, 1930), this JOURNAL, Vol. 25 (1931), p. 360, with respect to attachment on execution of property belonging to a government which had waived its immunities by instituting suit and then answering to the counterclaim on which judgment went against it,

> . . . consenting to be sued does not give consent to a seizure or attachment of the property of a sovereign government. The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered.[31]

Even if it cannot be enforced by execution process, however, the judgment against a foreign state may have great value in determining the facts of its liability, and may strongly influence it to make payment.[32] It is possible that in time we may see the courts developing a rule like that proposed by the Harvard Research in International Law, under which judgments against the foreign state might be enforced against its property within the jurisdiction of the forum, when that property is either real property (not used as diplomatic or consular property), or property used in connection with a commercial enterprise or commercial function.[33]

Once it is accepted that sovereign immunity should be restricted and that a foreign state should be subject to the jurisdiction of the local courts when

[31] Certiorari denied, 282 U. S. 896 (1931). For comments on this case, see notes in 29 Michigan Law Review (1931) 894, and this JOURNAL, Vol. 25 (1931), p. 335. Payment was eventually made by the Swedish Government of a sum in settlement of the judgment; see 2 Hackworth's Digest 480; Kuhn, "Immunity of the Property of Foreign States against Execution," this JOURNAL, Vol. 28 (1934), p. 119.

In accord with the Dexter & Carpenter case, see the British case of Duff Development Co. *v.* Kelantan, [1924] A.C. 797; and the German case of Von Hellfeld *v.* Imperial Russian Government, translated in this JOURNAL, Vol. 5 (1911), p. 490.

[32] See, however, G. G. Fitzmaurice, "State Immunity from Proceedings in Foreign Courts," *loc. cit.*, at p. 124, stressing the immunity from execution and declaring that therefore "The truth is that states can never be *effectively* sued against their will."

[33] See views expressed by the Harvard Research in International Law, Draft Convention on Competence of Courts in Regard to Foreign States, Art. 23, this JOURNAL, Supp., Vol. 26 (1932), p. 700 *et seq.*

Compare the French practice discussed by Castel, "Immunity of a Foreign State from Execution: French Practice," this JOURNAL, *loc. cit.* See also E. Loewenfeld, "Some Legal Aspects of the Immunity of State Property," 34 Grotius Society Transactions (1949) 111.

engaging in certain activities, there still remains the problem of delimiting clearly the field in which sovereign immunity will survive from those cases in which the state may be sued. The Department of State letter distinguishes the two categories as "sovereign or public acts (*jure imperii*) of a state," and "private acts (*jure gestionis*)." However it does not tell us clearly whether this distinction is to be drawn according to the ideas of the forum, or the notions of the foreign state concerned, or according to internationally accepted fixed standards (if they can be found). Obviously, if the distinction is to have any meaning, it can *not* be drawn according to the views of the foreign state seeking immunity; otherwise there would be no restriction of immunity in the cases where the new policy intends to restrict it.[34]

Reliance upon internationally accepted distinctions between the "sovereign" and "non-sovereign" activities of governments would be best, *if* there were lines drawn which are really accepted by all (or most) countries; but in this age of national economies varying from primarily private enterprise through various degrees of socialism and state supervision to an almost complete conduct of economic activities by the state or state agencies, one cannot say that any sharp division between sovereign and non-sovereign activities is recognized throughout the world. In some fields, such as state-owned vessels (and aircraft or railways?) operated to carry passengers or goods "for hire," it has been possible to agree on a category of activities which fall outside the restricted notion of immunity.[35] Yet in view of our

[34] Apparently accepting the idea that the state conducting the activity would decide its sovereign or private character, Fitzmaurice writes: "In this respect it is noticeable that the distinction between sovereign and non-sovereign acts breaks down in the very cases in which it is most desired to apply it. It is usually said that a sovereign act is an act which only a government can perform and that a non-sovereign act is any act which any private citizen might have performed. In a country such as Soviet Russia, however, private citizens are forbidden by law to perform acts which in other countries private citizens can normally carry out. All commercial activities are by law government monopolies and are carried out by virtue of the state's *imperium*. It is, therefore, clear that whenever the Russian Government or one of its trade delegations enters into a commercial transaction, it is acting by virtue of its *imperium* and is performing a sovereign act, at any rate in the sense of an act which under Russian law only the State can perform and which private Russian citizens are forbidden to carry out. It seems to follow, therefore, that even in those countries where a distinction is drawn between sovereign and non-sovereign acts, the Soviet Government could not properly be sued in respect of any commercial activity. Yet this is the very type of case which the distinction in question was intended to meet." ("State Immunity from Proceedings in Foreign Courts," *loc. cit.*, p. 123.)

[35] In the case of the Brussels Convention, *supra*, the rule is laid down that "Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments." This is in the most general terms, and then it is stated that "The provisions . . . shall not be applicable to

usual belief that the provision of public highways is a "sovereign" function of the State, and our familiarity with State-owned auto ferries, would most Americans readily accept the idea that a State-owned auto ferry was liable to suit under the newer idea of restrictive sovereign immunity? Turning to other fields, courts in some countries have held that the operation of a government-owned railway was a non-sovereign function,[36] while others have held it to be as much a sovereign function as the provision of ordinary roads.[37] Purchasing munitions and supplies for military use has in some courts been treated as a non-sovereign function and the foreign government given no immunity;[38] while elsewhere the attitude is that expressed by Judge Ward:

> It seems to us manifest that the Kingdom of Roumania in contracting for shoes and other equipment for its armies was not engaged in business, but was exercising the highest sovereign function of protecting itself against its enemies.[39]

It should at least be clear that there is no universal agreement on the "proper" sovereign functions of a government, nor upon how widely or for how long a time governments must have engaged in a particular activity before it comes within the category of "sovereign function" as viewed by any international standard.[40]

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ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service."

[36] See such classic cases of the restrictive theory of immunity as the Belgian case of Société anonyme des chemins de fer Liégeois-Luxembourgeois *c.* État néerlandais, 1903 Pasicrisie Belge 1.294; and the Italian case of Ferrovie Federali Svizzere *v.* Commune di Tronzano, 1929 Foro Italiano I.1145. See also Harvard Research in International Law, Competence of Courts in Regard to Foreign States, *loc. cit.*, p. 669 *et seq.*

[37] See Mason *v.* Intercolonial Railroad of Canada, 197 Mass. 349, 83 N.E. 876 (1908); Bradford *v.* Director General of Railways of Mexico, 278 S.W. 251 (Tex. 1925); and the French and German cases cited by the Harvard Research in this JOURNAL, Supp., Vol. 26 (1932), pp. 609–610.

[38] See Italian case of Stato di Romania *c.* Trutta, 1926, Monitore dei Tribunali 1.288.

[39] Kingdom of Roumania *v.* Guaranty Trust Co. of N.Y., 250 Fed. 341, 345 (C.C.A. 2d, 1918). See also this JOURNAL, Supp., Vol. 26 (1932), p. 610 *et seq.*

[40] Regarding the difficulties in distinguishing "sovereign" and "non-sovereign" functions of foreign states, see, *inter alia*, E. D. Dickinson, "The Immunity of Public Ships Employed in Trade," this JOURNAL, Vol. 21 (1927), pp. 108, 110; G. G. Fitzmaurice, "State Immunity from Proceedings in Foreign Courts," *loc. cit.*, p. 123; W. T. R. Fox, "Competence of Courts in Regard to 'Non-Sovereign' Acts of Foreign States," this JOURNAL, Vol. 35 (1941), pp. 632, 636–640.

The *Institut de Droit International* in its 1891 Project specified that actions could be brought against a foreign state when they "relate to a commercial or industrial establishment or a railway operated by the foreign state within the territory" of the forum, apparently assuming that there would be little difficulty in determining what was covered by "commercial or industrial." *Annuaire de l'Institut de Droit International, 1889–1892*, p. 437.

Note again the language of Judge Mack in *The Pesaro*, 277 Fed. 473, 475, 482

Finally, then, we are left to the views of the forum (in this case the United States) as to what acts are "sovereign or public" and what are "private." It would appear that this is the only workable test in many fields of state action. And is this test to be made according to the *nature* of the transaction, or according to its *purpose*? For example, will we lump together as "commercial transactions" the acts of a foreign government in buying in the United States (a) tobacco for retail sale by a government tobacco monopoly, (b) cotton for its clothing manufacturers who, for want of foreign exchange, cannot buy through normal commercial channels, (c) aircraft for its government-owned commercial airlines, and (d) artillery and army shoes for its fighting forces? Will all of these transactions be thought of as "buying goods" and thus acts *jure gestionis*? Or will a distinction be drawn according to the purpose for which the goods will be used (or indeed the motivation for government purchase rather than for direct private dealings with the American suppliers)? Perhaps enough has been said to suggest that even when we proceed by the criteria of the forum's distinction between public and private activities the task will not be easy.

In what remains the most satisfactory attempt to give precision to the concept of "non-sovereign" activities of a foreign government, the Harvard Research in International Law proposed in 1932 the rule that:

(S.D.N.Y., 1921): "in dealing with an unsettled problem in the application of sovereign immunity, the court must not only consider history and logic; it must also look behind and beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes. . . .

"In many phases of our law to-day it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

"The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private."

Somewhat similarly, Prof. Hyde suggested that: "If the law of nations is to remain flexibly responsive to the requirements of international intercourse, definite principles should be enunciated and agreed upon, and these should be designed to safeguard and promote, rather than jeopardize and retard the commercial transactions of private concerns with foreign States. To that end, the commission of particular acts by such States, rather than phrases purporting to be descriptive of the legal aspect of their conduct, should be declared to be productive of such waivers of immunity from the local jurisdiction as are sought to be obtained." 2 Hyde, International Law 849 (2d ed., 1945).

> A State 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 there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.[41]

As the Executive Branch of our government and our courts go about the task of giving concrete expression to this newly adopted policy of restricting sovereign immunity, this suggested definition should be borne in mind. In many instances it will separate the cases calling for immunity from those which do not; but with the complexities and diversities of national economies throughout the world, classification will not be as simple as it would seem. In dealing with the harder cases, it may be hoped that our courts, lawyers and government officials will pay close heed to the decisions and the reasoning of the courts in other countries which have been drawing this distinction for many years and which will continue to have occasion to do so. On the basis of such a comparative approach, and taking into account the internal-law distinctions which our own courts have drawn in the fields of municipal corporations' liabilities to suit and inter-governmental immunities from taxes, we may expect the new practice to work out more satisfactorily than could any present attempt to give it precision in words. Eventually it may be hoped that the United Nations International Law Commission will achieve some success in the much needed work of "codification and progressive development" of international law on this subject.

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THE CONTRACTUAL AGREEMENTS WITH THE FEDERAL REPUBLIC OF GERMANY

The unique and unprecedented situation created by the unconditional surrender of the German armed forces in 1945, by the legally doubtful status of "occupied Germany"[1] and by the political developments since 1945, have now led to a further provisional step: the Contractual Agreements with the Federal Republic of Germany. They consist of the short

[41] Art. 11, Draft Convention on Competence of Courts in Regard to Foreign States, this JOURNAL, Supp., Vol. 26 (1932), p. 597 *et seq.* It will be observed that the quoted language would limit the notion of acts *jure gestionis* to cases in which the foreign state either conducted the "commercial" enterprise within the territory of the forum state, or else performed within that territory some act in connection with such enterprise conducted elsewhere. The denial of immunity in such cases might more easily be justified on the theory of *waiver* (by conducting the enterprise or performing the act within the territory of the forum), than if the immunity is to be refused where there is no such connection with the forum state. The Department's letter does not appear to limit the field of liability to suit to those cases in which "private" acts of the foreign state are performed within the United States.

[1] See Josef L. Kunz, "The Status of Occupied Germany: A Legal Dilemma," in The Western Political Quarterly, Vol. 3, No. 4 (Dec. 1950), pp. 538–565.