The Limits of Sovereign Jurisdictional Immunity: the Petrol Shipping Corporation and Victory Transport Cases

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The clearly discernible, although somewhat erratic, movement in Anglo-American jurisprudence toward a restrictive interpretation of sovereign jurisdictional immunities has in recent years met a number of vicissitudes of fortune. A general feeling that immunities should depend on the interest of function rather than that of status, and that, in particular, immunities in respect of commercial acts (*jure gestionis*) can no longer be widely justified in the new political and economic context of State trading activities, has become manifest in much judicial and juristic comment.[1] Yet both Britain and the United States have found difficulty in breaking away from the classical nineteenth century doctrine of absolute immunity, founded upon respect for the dignity of the foreign sovereign and the equality of nations, which was established in an age when the rôle and function of government was limited and predictable.[2] The process of a reformulation of doctrine, has, however, met with greater success

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[1] See, *inter alia*, *Kahan* v. *Federation of Pakistan*, (1951) 2 K.B. 1003; *Sultan of Johore* v. *Abubaker Tunku and Others* (1952) A.C. 318; *Baccus S.R.L.* v. *Servicio Nacional del Trigo* (1957) 1 Q.B. 438; *Rahimtoola* v. *Nizam of Hyderabad* (1958) A.C. 379; Hersch Lauterpacht, *"The Problem of Jurisdictional Immunities of Foreign States"*, in (1951) 28 B.Y.B.I.L. 220; Clive M. Schmitthof, *"The Claim of Sovereign Immunity in the Law of International Trade"*, in (1958) 7 *International and Comparative Law Quarterly*, 452-467. On the U.S. position, see : Notes, *"Jurisdictional Immunity of Foreign Sovereigns"* and *"Sovereign Immunity for Commercial Instrumentalities of Foreign Governments"*, in (1954) 63*Yale L.J.* 1148 and (1948) 58*Yale L.J.* 176 respectively; Timberg, *"Sovereign Immunity, State Trading, Socialism and Self-Deception"*, in *Essays on International Jurisdiction*, (1961) p. 40 ff (also Aron in the same volume, at p. 21 ff); P. C. Jessup, *"Has the Supreme Court Abdicated One of Its Functions ?"*, in (1946) *A.J.I.L.*, 168.

[2] See : M. Brandon, *"Sovereign Immunity of Government-Owned Corporations and Ships"*, in (1954) 39 *Cornell* L.Q. 425; Richard A. Falk, *"The Role of Domestic Courts in the International Lagal Order"* (1964), Chap. VII ("Sovereign Immunity : A Discourse on Recent Havoc") p. 139 ff.; W. Friedmann, *"The Changing Structure of International Law"*, (1964), pp. 343-346; Timberg, *"Expropriation Measures and State Trading"*, in (1961) 55 *Proc. Am. Soc. Int. L.* 113, 118.

in the United States than it has in Britain. Since the so-called "Tate Letter" of 1952 there has been a marked shift in U.S. executive policy toward an adoption of a restrictive theory of sovereign immunity in the consideration of requests of foreign governments for grants of sovereign immunity.[3] The Federal courts have shown themselves less likely to allow a plea of sovereign immunity where the executive has declined to do so. The archaic and inflexible character of the classical doctrine has frequently been emphasised and condemned; in some cases, particularly in *National City Bank* v. *Republic of New York (1955)*[4], there has been evidence of a judicial desire to rethink the *rationale* of sovereign immunity and to strive to ensure, wherever possible, a substantial parity of treatment between sovereign and private litigants.

Some recent decisions, however, indicate that the movement is once again entering into a period of difficulty and uncertainty. Language used in the majority opinion of the Supreme Court in *Banco Nacional de Cuba* v. *Sabbatino*[5] (1964), where the Court refused to allow an examination of the validity of the expropriation of alien property, situate in its own territory, by the Government of Cuba, although the foreign act had been characterised as violative of international law by the State Department, may lead to a blurring

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[3] *Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, 26 *Dept. State Bull.* 984 (1952). The "Tate Letter", addressed by the then Acting Legal Adviser of the State Department, Professor Jack B. Tate, to the U.S. Attorney General, concluded, after a comparative review of the application of the restrictive theory of immunity in the practice of a number of foreign States, that, with the possible exception of the United Kingdom, little support could be found (except for Soviet bloc countries) for the continued full acceptance of the absolute theory : "... 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... the Department feels that the wide spread and increasing practice on the part of governments in 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."

[4] 348 U.S. 356 (1955). See : Claudy, *"The Tate Letter and the National City Bank case: Implications"*, in (1958) 52 *Proc. Am. Soc. Int. L.* 80, K. R. Simmonds, *"Implied Waiver of Immunity: Permissible Counterclaims against a Sovereign Plaintiff"*, in (1960) 9 *International and Comparative Law Quarterly*, 334, 341-2.

[5] 376 U.S. 398 (reported also in (1964) 58 *A.J.I.L.* 779); see the critical literature referred to in note 71 *infra*.

of the distinction between the doctrines of act of state and sovereign immunity. Executive reaction to the litigation in another "Cuban" case, *Rich* v. *Naviera Vacuba, S.A.*[6] (1961) (the *Bahia de Nipe* case) has been thought to indicate a withdrawal from the guide-lines laid down in the "Tate Letter" and the exaggerated judicial deference toward the exercise of executive discretion shown in this case has been condemned as supporting the promotion of *ad hoc* executive policy in the immunity context.[7]

To add to these difficulties comes the case of *Petrol Shipping Corporation* v. *Kingdom of Greece, Ministry of Commerce, Purchase Directorate*[8] (1964), the first of the two cases which I intend to examine in this article. The facts were simple and only marginally in dispute. The respondent had chartered the petitioner's tanker *Atlantis* to carry a cargo of grain from Texas to Greece pursuant to the *Agricultural Trade Development and Assistance Act*[9]. This was an "Aid cargo", and, as is well known, 50% of such cargoes must be shipped in American bottoms. On arrival at the port of Piraeus, Greece, the *Atlantis* was directed by the respondent, an agency of the Kingdom of Greece, to a berth at which the vessel could not safely lie afloat. The *Atlantis* suffered damage and the respondent disclaimed responsibility. The Charter Party contained an arbitration clause[10]; the Petrol Shipping Corporation appointed its own arbitra-Ambassador, appearing specially, suggested lack of jurisdiction to sue a sovereign State without its consent. Judge Dawson dismissed the motion for want of jurisdiction and the petitioner appealed to the Court of Appeals for the Second Circuit, *alleging that the District* tor and moved the court of first instance (the District Court for the Southern District of New York) for an order directing the respondent to appoint an arbitrator also.[11] In the District Court the Greek *Court erred in accepting the unsupported suggestion of the Greek Ambassador and should have required the respondent to establish its claim to immunity through the usual State Department channels.*

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[6] 197 F. Supp. 710 (E.D.A. 1961); 295 F. 2d 24 (4th Cir. 1961). See also: *State ex rel. National Institute of Agrarian Reform* v. *Dekle*, 137 So. 2d 581, (Fla. 1962) and *Dade Drydock Corp.* v. *The M/T Mar Caribe*, 199 F. Supp. 871 (S.D. Texas 1961). An extended *critique* of the *Bahia de Nipe* case is given by Falk, *op. cit.*, pp. 145-164; cf. M. H. Cardozo, *"Judicial Deference to State Department Suggestion: Reeognition of Prerogative or Abdication to Usurper"*, in (1963) 48 *Cornell* L.Q. 461, 464-468.

[7] Falk, *op. cit.*, pp. 156-158.

[8] 326 F. 2d 117.

[9] 7 U.S.C.A.S. 1691 *et seq.*

[10] The arbitration clause provided that "for the purpose of enforcing any award, this agreement may be made a rule of the Court", 326 F. 2d 117, note 2.

[11] 232 F. Supp. 294 (S.D.N.Y. 1963).

The Court of Appeals upheld the plea of sovereign immunity and affirmed dismissal of the action for want of jurisdiction (Judge Clark dissenting). The Court regarded the narrow issue presented by the appeal as falling within *Puente* v. *Spanish National State* (1941.[12] In that case, a suit for legal fees, the Court took judicial notice of the sovereignty of the Spanish National State, after considering a letter from the Spanish Ambassador declining to accord consent to jurisdiction, and dismissed the suit. Judge Clark, giving the judgment of the Court on that occasion, said:

> "In this action, *where there is no vestige of apparent jurisdiction*, there would seem to be no reason why the plaintiff must not proceed in the usual way to show jurisdiction by alleging and proving defendant's consent to be sued; nor why, for lack thereof, the court, acting on its own motion or an appropriate suggestion under Rule 12(h) should not dismiss... Courts take judicial notice of the sovereign character of a defendant and, in case of doubt, address their own inquiries to the executive."

A little earlier, however, he had distinguished another line of authority, stemming from *Ex parte Muir*,[13] where, *if a court had the elements of jurisdiction in an action* (e.g. jurisdiction over a vessel against which a foreign State laid claim), he had held that:

> "...it is not improper to require of even a sovereign who would oust it of that jurisdiction that he furnish due proof to support his claim." [14]

Judge Clark referred back to his own judgment in *Puente* in the course of his dissenting judgment in *Petrol Shipping Corporation*. His *caveat* in *Puente* with respect to those cases where the Court had the elements of jurisdiction should not be taken to refer to a rule limited to particular instances. Further more he regarded it as necessary for the Court to recognize the "controlling importance" or State Department pronouncements on national policy with respect to immunity claims,[15] particularly those springing from State com-

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[12] 116 F. 2d 43, *cert. denied* 314 U.S. 627 (1914); cf. *Ex parte Republic of Peru*, 318 U.S. 578 (1943).

[13] 254 U.S. 522 (1921). See also : *The Belgenland*, 114 U.S. 355, 368-369; *The Pesaro*, 271 U.S. 562 (1926); *Compania Espanola de Navegacion Maritima* v. *The Navemar* 303 U.S. 68 (1938).

[14] 116 F. 2d, 43, 44-45 (emphasis supplied); see F. Déak, *"The Plea of Sovereign Immunity in the New York Court of Appeals"*, in (1940) 40 *Col. L. Rev.* 453.

[15] 326 F. 2d 117, 118; cf. Judge Clark's judgment in *Sullivan* v. *State of Sao Paulo*, 122, F. 2d 355 (1941) and *U.S. ex rel. D'Esquiva* v. *Uhl* 137 F. 2d 903, 906-907 (1943). In *Republic of Mexico* v. *Hoffman*, 324 U.S. 30 (1945) Stone, C.J., giving the opinion of the Supreme Court, said, refusing to recognise immunity from suit of a vessel owned but not possessed by a foreign State : "We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect

mercial activities. Since the "Tate Letter" it had been the common practice of the courts "to seek or await" State Department advice before making a grant of this or related forms of immunity. He was of the view that the District Court in the present case had, without seeking or awaiting such advice, accorded the Kingdom of Greece "a special privilege" which was contrary to recent practice:

> "This circumstances of consent to the arbitration of what appears clearly to be a commercial transaction suggest a good possibility that the Department which has the responsibility (as we do not) for control of our foreign relations will not support the defense of immunity here." [16]

His criticism of the District Court was severe; it had interfered "most discriminatorily" in matters (of "delicate foreign relations") not entrusted to its responsibility.[17] It was important that the State Department's position be known; the decision of the Court below should therefore in his opinion be reversed and the case remanded.

The respondent applied for a re-hearing by the full Court sitting *en banc*. This was granted, and, on 25 May, 1964, after considering a brief submitted by the State Department as *amicus curiae*, eight judges of the Court of Appeals, with one judge dissenting, decided that the judgment of the District Court should be vacated and the case remanded to that Court with instructions to take evidence relevant to the contentions of the parties and to make a furher determination in the light of such evidence and arguments put forward.[17] The brief for the United States as *amicus curiae* was concerned only with an examination of the proper procedures involved in the presentation of a plea of sovereign immunity; although of great interest it is therefore outside the ambit of our present discussion. No opinion was expressed as to the effectiveness of service of process in order to obtain personal jurisdiction over the appellee, as to the possible applicability of the doctrine of "Act of State", or as to whether the State Department would have supported a claim of sovereign immunity if the Greek Government had applied directly to it.[18] The brief recommended that the case be remanded for development of the facts bearing upon the suggestion of sovereign immunity, and, as has been noted, the Court followed this advice. Nevertheless, the brief stressed that the ultimate resolution of the immunity problem was far from

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it,, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize" (*ibid.*, p. 38).

[16] 326 F. 2d 117, 119.

[17] *Ibid.* Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 307 F. 2d 845, 855-858 and Falk, *op. cit.*, 118 ff.

[18] Brief for the United States as *amicus curiae*, p. 4, note 3. I am indebted to Mr. J. Blair and to Mr. G. W. Haight for their courtesy in making available to me many of the papers in this case.

clear and that, unless further facts were forthcoming, the Court could not proceed to determine (i) whether or not there had been a waiver of immunity, derived from entry into the arbitration agreement or the subsequent conduct of the Greek Government, (ii) whether or not the distinction between acts of a public and acts of a private character was to be followed and applied in the present case, (iii) whether, if this distinction were applied, the Charter Party was to be construed as a private act — *jure gestionis*, or (iv) whether the damage caused to the *Atlantis* was properly a matter falling under the arbitration agreement or was the result of an independent public act of the appellee.

Up to the time of writing no further developments have been reported in the *Petrol Shipping Corporation* case. This is undoubtedly because of the emergence of a parallel case, *Victory Transport Inc.* v. *Comisaria General de Abasteciemientos y Transportes* [19] (the *Victory Transport* case) where an application has recently been made to the Supreme Court for a writ of *certiorari*.[20] Oral argument in this case was heard in the Court of Appeals only two days before the same Court granted a re-hearing in the *Petrol Shipping Corporation* case. *Victory Transport* was also on appeal from the District Court for the Southern District of New York and involved substantially similar issues. In this case the appellant, an agency of the Spanish Government, had chartered a vessel, the *Hudson*, from the appellee in order to transport a cargo of surplus wheat from Alabama to certain Spanish ports. The wheat had, as in the *Petrol Shipping Corporation* case, been purchased under the *Agricultural Trade Development and Assistance Act*. The *Hudson* was delayed and suffered damage whilst discharging her cargo and the appellee argued that the ports were unsafe. The Charter Party contained a clause (the "New York Produce Arbitration Clause") which provided for the reference of any dispute between the parties to three arbitrators ("commercial men") in New York.[21] Their decision was to be treated as final, and, as in the earlier case, the agreement was to be treated as rule of the Court for the sake of enforcing any award. The appellant failed to pay for the damage to the vessel or to submit the dispute to arbitration. The appellee instituted proceedings to compel arbitration and secured an *ex parte* order from the District Court permitting service of its petition by registered mail to the Madrid office of the appellant. Service

[19] 336 F. 2d 354.

[20] 33 LW 3295 (March 9, 1965). The Solicitor General has been invited to file a brief expressing the views of the United States.

[21] 336 F. 2d 354, 356 note 2. Proceedings were instituted under s. 4 of the U.S. Arbitration Act (9 U.S.C.S. 4).

was effected but the appellant later moved the District Court to vacate the service as extraterritorial and unauthorised by statute.[22] Counsel for the appellant, appearing specially, pleaded lack of jurisdiction and immunity from suit as the appellant was a Government agency. In the District Court, on 15th October, 1963, Judge Murphy rejected this contention; in his view the plea of sovereign immunity was not appropriate to a foreign Government in a case concerned with, as here, a commercial operation. Accordingly, he held that the Court had *in personam* jurisdiction and entered an order compelling arbitration.[23] The Court of Appeals, on 9 September, 1964, affirmed this order, upheld *in personam* jurisdiction, denied sovereign immunity and found "Act of State" irrelevant.[24]

Judge Joseph Smith, giving the opinion of the Court, addressed himself directly to the problem of the restrictive theory of sovereign immunity.[25] He devoted much of a careful and well documented opinion to a review of the decline of the absolute theory of immunity and to an assessment of the distinction between acts *jure imperii* and acts *jure gestionis* as seen through the eyes of contemporary U.S. courts:

> "... Because of the dramatic changes in the nature and functioning of sovereigns, particularly in the last half century, the wisdom of retaining the doctrine has been cogently questioned... Growing concern for individual rights and public morality, coupled with the increasing entry of governments into what has previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory." [26]

Since the end of the Second World War the United States had been a party to a number of commercial treaties in which provisions had obligated each contracting party to waive its sovereign immunity in respect of state-controlled enterprises engaged in business activities within the territories of other signatories. To this must be added the effect of the "Tate Letter", which was indicative of the State Department's adherence to the *jure imperii* and *jure gestionis* distinction.[27] The court would naturally show deference to a pronouncement by the State Department in any case, and, following *Republic of Mexico* v. *Hoffman*,[28] would deny a claim of immunity where the State

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[22] 232 F. Supp. 294.

[23] *Ibid.*

[24] 336 F. 2d 354, 361-2, 363.

[25] *Ibid.*, 357-362.

[26] *Ibid.*, 357.

[27] *Ibid.*, 358.

[28] 324 U.S. 30, 35 (1945): "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". Cf.: *Na-*

Department had indicated, either directly or indirectly, that immunity need not be accorded, or would allow a claim of immunity where the Government saw fit to suggest it.

Judge Smith was careful to add that it must not be assumed that the courts would not grant immunity unless specifically requested to do so by the State Department. Claims of immunity could properly be presented to the courts either by way of the Department's suggestion or directly by a duly accredited and recognised representative of the foreign sovereign concerned.[29] In the present case there was no communication from the State Department. In the District Court the plea of immunity was merely supported by an affidavit from the Spanish Consul in New York; the Court of Appeals had before it a letter from the Spanish Ambassador and a motion that he be allowed to appear specially. Judge Smith, without deciding whether or not this procedure was adequate, treated the claims as properly presented and granted the motion.[30] However, he held that it was the duty of the court to decide for itself whether or not it was the "established policy" of the State Department to recognise a claim of this type.[31] Upon what guidance could the court rely? The "Tate Letter" gave no guide-lines or criteria to assist the courts in working out the distinction between acts *jure imperii* and acts *jure gestionis;* but the State Department very clearly intended that the courts should apply the distinction.[32] Judge Smith found no satisfactory guidance in the decisions of municipal courts or the works of commentators. The theory that the *nature of the transaction* should be looked to, and that public sovereign acts were those which could not be performed by individuals, had in practice produced "rather astonishing results" and could not cover those contracts which by their nature *had* to be negotiated by States.[33] The *purpose of the transaction* theory he found to be even more unsatisfactory since conceptually the modern sovereign State always has a public purpose to its activities.[34] If a purely *functional* test were to be

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tional City Bank of New York v. *Republic of China*, 348 U.S. 356, 360-361 (1955) and Comment : *"The Jurisdictional Immunity of Foreign Sovereigns"*, in (1954) 63 Yale L.J. 1148, 1157-1158.

[29] 336 F. 2d 354, 358.

[30] *Ibid.*, 359, note 7.

[31] *Ibid.*, 359.

[32] *Ibid.*, 360.

[33] See :Draft Convention on the Competence of Courts in Regard to Foreign States, *Harvard Law School Research in International Law*, 386-391 (1931); Lauterpacht, *op. cit.*, 225; S. Sucharitkul,*State Immunities and Trading Activities in International Law*, 265-276 (1959); and other authorities gathered at 336 F. 2d 354, 359, notes 8 and 9.

[34] 336 F. 2d 354, 359-360 and notes 10, 11; cf. C. M. Schmitthoff, *op. cit.*, 455.

applied to the activity in question then the court might easily project its own subjective ideas about the "proper realm of State functioning". Judge Smith advanced no theory of his own to justify or explain the distinction, but one may suspect that he found sympathy with those commentators who hold the distinction ultimately to be unworkable.[35]

Nevertheless, such a distinction, whatever its basis or *rationale*, had to be applied to the facts of the present case. In the most significant part of the opinion, which followed, Judge Smith attempted to re-define the restrictive theory of immunity and to re-state its scope:

> "The purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interests of foreign governments in being free to perform political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts. *Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases.* Since the State Deparment's failure or refusal to suggest immunity is significant, we are disposed to deny a claim of sovereign immunity that has not been "recognized and allowed" by the State Department unless it is plain that the activity in question falls within *one of the categories of strictly political or public acts about which soverigns have traditionally been quite sensitive. Such acts are generally limited to the following categories*:
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> (1) *internal administrative acts, such as expulsion of an alien*
> (2) *legislative acts, such as nationalization*
> (3) *acts concerning the armed forces*
> (4) *acts concerning diplomatic activity*
> (5) *public loans.*" [36]

If diplomacy required an extension of these categories, then the State Department should file a suggestion of immunity; if the categories were too extensive then the State Department should issue a new policy pronouncement.

In the light of this definition Judge Smith had no difficulty in finding that the chartering of the *Hudson* by the Comisaria General was not a "strictly political or public act" but had "all the earmarks of a typical commercial transaction".[37] He regarded the inclusion of the arbitration clause as "one of the most significant indications of the private commercial nature" of the Charter Party.[38] The purchasing activity of the Comisaria General had been conducted through

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[35] *Ibid.*, 360; see: Lauterpacht, *op. cit.*, 225-226; G. G. Fitzmaurice, "*State Immunity from Proceedings in Foreign Courts*", in (1933) 14 B.Y.B.I.L., 101, 123-124.

[36] *Ibid.*

[37] 336 F. 2d 354, 360.

[38] *Ibid.*, 361.

normal private trade channels and was an act *jure gestionis* if the restrictive theory were applied. In support of this conclusion he referred, *inter alia*, to a recent decision of the French Court of Appeal [39] and to a decision of the Commercial Tribunal of Alexandria declining to grant immunity over twenty years ago to the Comisaria General in a suit arising from a purchase of wheat intended for consumption in Spain during the course of the Second World War.[40] He also cited the State Department's communication to the Court in *New York and Cuba Mail S.S. Co.* v. *Republic of Korea* in 1955.[41] In that case the Korean Government was alleged to have been responsible for damage caused to a vessel which was unloading a cargo of rice despatched as a gift to Korean civilian and military personnel during the Korean War:

> "Though suggesting that Korea's property was immune from attachment, the State Department refused to suggest immunity "inasmuch as the particular acts out of which the cause of action arose are not shown to be of a purely governmental character". If the wartime transportation of rice to civilian and military personnel is not an act *jure imperii, a fortiori* the peacetime transportation of wheat for presumptive resale is not an act *jure imperii.*" [42]

The appellant's "Act of State" contention, rightly, found short shrift with Judge Smith, who likened it to an attempt to "enter the sanctuary of soreveign immunity through the side door".[43] The contention that "Act of State" applied to the actions of the Comisaria General was "considerably wide of the mark". Following the definition of the doctrine adopted by the Supreme Court in *Sabbatino*,[44] he found that it applied only to the public acts of a foreign sovereign. Designating safe ports for the *Hudson* was not a public act of the Spanish Government, did not become an "Act of State" simply because performed by a State instrumentality, and was not performed in any case within the territory of Spain.[45]

On the issue of the Court's *in personam* jurisdiction, Judge Smith, when confronted by the appellant with the panel decision in the *Petrol*

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[39] *Myrtoon Steamship Co.* v. *Agent Judiciaire du Trésor*, in (1957) 24 *Int. Law Rep.*, 205, 206.

[40] *Egyptian Delta Rice Mills Co.* v. *Comisaria General de Madrid, (1942-3) 55 Bulletin de Législation et de Jurisprudence Egyptiennes*, 114; see Lauterpacht, *op. cit.*, (note 1), p. 255.

[41] 132 F. Supp. 684, 685 (S.D.N.Y. 1955).

[42] 336 F. 2d 354, 362.

[43] *Ibid.*

[44] 376 U.S. 398, 401.

[45] 336 F. 2d 354, 363; the designation of the discharge ports was done by the appellant's shippers at Mobile, Ala. and entered there on the bill of lading.

Shipping Corporation case,[46] held that the Comisaria General must be deemed, by agreeing to arbitrate in New York, where the U.S. Arbitration Act makes such agreements specifically enforceable, to have consented to the jurisdiction of a court in New York that could compel arbitration proceedings.[47] To hold otherwise would have made the arbitration clause a nullity. In the recent *Farr* [48] and *Orion Shipping* [49] cases the Court of Appeals had held that 4 of the U.S. Arbitration Act gives *in personam* jurisdiction for the District Court to order foreign corporations which had agreed to arbitration in New York to submit to such arbitration:

> "Unless the arbitration clause in this charter differs significantly from the arbitration clauses specifically enforced in the Farr and Orion cases, it is clear that the court has *in personam* jurisdiction, *for we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation.*" [50]

No such significant difference between the wording of the arbitration clauses in *Farr* and *Orion Shipping* cases and that in the instant case could be observed. Thus the agreement to arbitrate contained an implicit consent to an enforcement of that agreement.[51] Judge Smith also rejected the appellant's argument as to an alleged impropriety of extraterritorial service and affirmed the finding of the court below that, since consent to jurisdiction was established, the authorisation of service by the District Court did not violate due process.[52]

Both the *Petrol Shipping Corporation* and *Victory Transport* decisions give cause for concern. *Petrol Shipping Corporation* raises, in a neat form, the question of whether an agreement by a State to submit disputes to arbitration may be treated as a waiver of sovereign

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[46] 326 F. 2d 117, 118. See : *Kunglig Jarnvagsstyrelsen* v. *Dexter & Carpenter,* 300 F. 891 (S.D.N.Y. 1924), *affirmed* 32 F. 2d 195 (2 Cir. 1929).

[47] 336 F. 2d 363.

[48] *Farr & Co.* v. *Compania Intercontinental De Navegaeion,* 243 F. 2d 342 (2 Cir. 1957).

[49] *Orion Shipping & Trading Co.* v. *Eastern States Petroleum Corp. of Panama,* 284 F. 2d 419 (2 Cir. 1960).

[50] 336 F. 2d 363 (emphasis supplied).

[51] *Ibid.,* 364.

[52] *Ibid.* See : *Federal Rules of Civil Procedure,* Rules 4(*d*) (3), 4(*d*) (7) and 4(*e*).

immunity in an arbitration proceeding. *Victory Transport* re-opens the "implied waiver" issue and links it with the application of the *jure imperii/jure gestionis* distinction. The *rationale* of the restrictive theory of sovereign immunity applied by the Court in *Victory Transport* is difficult to identify and the categorisation adopted of "public" State activities is open to objection on several counts.[53]

(i) *The restrictive theory in Victory Transport*

One writer has commented that the *Victory Transport* decision represents in effect an abandonment of the State Department attitude toward the restrictive theory; in future sovereign immunity will be allowed only in exceptional circumstances.[54] On the other hand, the decision has been welcomed as "... the first formulation of the theory of restrictive sovereign immunity at the federal appellate level ..." [55] The Court, as has been noted, acknowledged the difficulty of applying the "Tate Letter"; however, the State Department had at least indicated then that it favoured the grant of immunity on the basis of function, and, in the absence of a Department suggestion, the Court was free to make its own characterisation of the State activity in question. In order to establish, subject to the policy direction of the "Tate Letter", what Friedmann has called "a resasonable equilibrium" between State and individual rights and obligations, the Court examined the activity of the Comisaria General with the object of ascertaining whether any derogation from "the normal exercise of jurisdiction" was justifiable.[56] It is significant that the Court regarded such a derogation, in the absence of a State Department suggestion, as exceptional and, in any case, only appropriate where "public activities", as categorised by itself, were in question. There is no trace, in *Victory Transport*, of the old attitude that some commercial and economic operations may be as much a proper Governmental activity as any of the more traditional functions.[57] Nor did the Court, in deciding whether or not, at the outset, it was the "established policy" of the State Department to recognise a claim of the type presented by the Comisaria General, appear to pay much heed to the

[53] The case is discussed in a perceptive Note by Craig S. Bamberger, in (1965) 6 *Harvard Int. Law Club Journal*, 203, esp. 215-218.

[54] *Ibid.*, 215.

[55] Case Note in (1965) 63 *Mich. L. Rev.*, 708.

[56] 336 F. 2d, 354, 360. See : W. Friedmann, *"The Changing Structure of International Law"* (1964), 343-346, at 346.

[57] Cf. *Berizzi Bros. Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1926); *New York* v. *United States*, 326 U.S. 572 (1946) (the *Saratoga Springs* case).

frequently cited proposition that immunity need only be granted when the executive branch would be embarrassed if it were not.[58] Instead, the Court used the "Tate Letter" as sufficient evidence of a policy designed to enforce the distinction between acts *jure imperii* and acts *jure gestionis,* and, without regard to State Department policy in particular cases,[59] proceeded to define the former category in its own terms. Those terms are not novel. The list of "public activities" put forward by Judge Smith is similar to that proposed by Lalive in a course of lectures at the Hague Academy of International Law in 1953.[60] Lalive, in turn, was seeking to modify a list of rules advanced by Lauterpacht in the article referred to above.[61] Lauterpacht had advanced the proposition that Governmental immunities should, in principle, be abolished and that foreign States should be subjected to the jurisdiction of the forum in the same way and to the same extent as the sovereign of the forum. The "safeguards" or qualifications he was prepared to admit would grant immunity to legislative acts, executive acts on the territory of the foreign State, certain administrative acts, and would preserve the traditional immunities of diplomatic property and warships. Governmental contracts would, in this view, be subject to the conflict of laws rule of the forum.[62]

Both the Lalive and Lauterpacht listings may be criticised on their inclusions and exclusions.[63] However, it is not necessary here to enter into the merits of the individual categories but rather to focus attention upon the central problem of their *rationale.* As has been pointed out by Sucharitkul,[64] an enumeration of acts which are exempt from jurisdiction merely transposes the problem of establishing a realistic distinction between "governmental" and "commercial" activities; we are left with what is in effect a new version of the distinction between acts "*jure imperii*" and acts "*jure gestionis*" — a distinction which Lauterpacht with much justification considered unworkable. The cogency of this argument is reinforced if we look at

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[58] The judgment of Stone C.J. in *Republic of Mexico* v. *Hoffmann,* (324 U.S. 31, 35 (1945) has been cogently criticised by Falk, *op. cit.,* 160 and Jessup, *op. cit.,* 168-172. See also : F. Deak, *"The Plea of Sovereign Immunity and the New York Court of Appeals"*, in (1940) 40 *Col. L.R.* 453-465.

[59] Bamberger, *op. cit.,* 207-209.

[60] J.-F. Lalive, *"L'immunité de Juridiction des Etats et des organisations internationales"* in (1953) 84 *Recueil des Cours,* 205, 285-286.

[61] Lauterpacht, *op. cit.,* 237; cr. Sucharitkul, *op. cit.,* 284.

[62] Lauterpacht, *op. cit.,* 237-238.

[63] See : D. P. O'Connell, *International Law* (1965), Vol. 2, 916-919; Sucharitkul, *op. cit.,* 233 ff.; Bamberger, *op. cit.,* 215-218.

[64] Sucharitkul, *op. cit.,* 284.

the pronouncement of the Court in *Victory Transport.*[65] The Court gives us a list of "strictly political or public acts" and claims that the list reflects traditional areas of activity about which States have demonstrated "sensitivity". The list, by itself, tells us little about the *rationale* of restrictive immunity or about the development of future judicial attitudes. How are the categories to be interpreted? How do they relate to the exercise of executive discretion and the formulation of executive policy? The Court is aware, as is evident from its criticism of the functional test,[66] of the danger of judicial arbitrariness or an excessively subjective approach when a municipal court has to consider the delimitation of foreign governmental activity. Yet perhaps a greater danger lies in over-formalisation, since, as the recent Cuban cases have convincingly demonstrated,[67] any distinction between governmental and commercial activities cannot be static in the changing social and economic circumstances of contemporary international society. Even assuming that the categorisation proposed in *Victory Transport* were to be considered as adequate, any constructive future interpretation of the categories must depend upon a prior re-thinking of the *rationale* of the grant of sovereign immunity. *Victory Transport* does not proceed on the lines of Lauterpacht's basic proposition — the assimilation of foreign sovereign immunities to those of the domestic State — but, after the categorisation of "public activities", reverts to a consideration of the *nature* and the *function* of the purchasing activity of the Comisaria General.[68] The reliance upon the *New York and Cuba Mail S.S. Co.* case, and upon the French and Egyptian authorities cited, seems to indicate that in fact, contrary to its express words, the Court was applying at least a qualified functional test to the state activity in question.[69] Thus the apparent preciseness and predictability of the suggested categorisation is, it is submitted, largely illusory. The establishment of at least a minimum international consensus upon a narrower doctrine of sovereign immunity can only be achieved if there is first a re-examination of the reasons for, and the function of, external (State to State) deference today.[70] In the United States, of course, external

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[65] 326 F. 2d 354, 360.

[66] *Ibid.*, 359.

[67] See especially the *Bahia de Nipe* litigation — *Rich* v. *Naviera Vacuba, S.A.* 197 F. Supp. 710 (E.D.A. 1961), 295 F. 2d 24 (4th Cir. 1961) — and Falk, *op. cit.*, 145 ff. Cf. American Law Institute, *Draft Restatement of Foreign Relations Law* (1962), 212 ff., esp. at 230-232.

[68] 326 F. 2d 354, 361.

[69] *Ibid.*

[70] See : O'Connell, *op. cit.*, Vol. 2, 913 ff.

deference cannot be studied in isolation from the problem of internal (Judiciary/Executive) deference.[71] That is why the most optimistic feature of the *Victory Transport* decision may perhaps be found in the Court's preparedness, even eagerness, to decide for itself how, in the absence of a specific State Department suggestion, a doctrine of restrictive immunity should be applied.[72]

(ii) *Prior waiver of immunity in Petrol Shipping Corporation.*

The recent *Draft Restatement of the Foreign Relations Law of the United States*[73] contains the following rule :

> (73) "(*i*) A state may waive the immunity to which it is entitled... Waiver may be made by international agreement or by contract in advance of any action being brought against the state concerned. A waiver of immunity from suit by a state does not, in the absence of a clear indication to the contrary, imply a waiver of immunity from execution."[74]

The reporters, however, note that no U.S. cases have been found to support the suggested rule as to prior waiver of immunity by contract, although "it is believed that the courts in the United States would apply it *in view of the general development regarding agreements between states and private parties*".[75] Both *Petrol Shipping*

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[71] Falk, *op. cit.*, 164 ff.; cf. K. R. Simmonds, "*The Sabbatino Case and the Act of State Doctrine*", in (1965) 14 *International and Comparative Law Quarterly*, 452, at 461-2, 468-470, 477-479, 483-484, 487-488 and authorities there cited.

[72] Fears aroused in some quarters by an excessive "spirit of judicial abdication" (with respect to internal deference), such as that evidenced in *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945), may therefore be somewhat assuaged by *Victory Transport*.

[73] *Op. cit.*, 239.

[74] Comments in this article are of course restricted to the problem of sovereign immunity from *jurisdiction*. Immunity from *execution*, even where there is no immunity from suit or there is a consent to jurisdiction, is firmly established by *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F. 2d. 705 (2d Cir. 1930); *Bradford* v. *Chase National Bank*, 24 F. Supp. 28, 38 (D.C. S.D. N.Y. 1938); *New York & Cuba M.S.S. Co.* v. *Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955) and *Weilamann* v. *Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (1959).

[75] *Draft Restatement*, 242 (emphasis supplied). Art. 8 of the Harvard Research *Draft Convention on Competence of Courts in Regard to Foreign States* (1932) provided : "A State may be made a respondent in a proceeding in a court of another State : *a)* When it gives express consent at the time the proceeding is instituted; or *b)* When, after notification of the proceeding, it takes any steps relating to the merits in that proceeding before asserting its immunity; or *c) When, by the contract upon which the proceeding is based, it has previously consented to the institution of such a proceeding;* or *d)* When, by treaty with the State in whose Court the proceeding is brought, it has previously consented to the institution of such a proceeding; or *e)* When it has previously, by law

Corporation and *Victory Transport* present contracts where prior waiver was alleged, at least in so far as submission to arbitration was concerned. In *Petrol Shipping Corporation,* especially, the Court was pressed with the argument that the arbitration clause consenting to the Court's jurisdiction for the purpose of enforcing any arbitration award *included* consent to the appointment of an arbitrator.[76] This, it was suggested, made the case readily distinguishable from *Puente* v. *Spanish National State* [77]; the Court, however, as has been noted, rejected the submission and regarded *Puente* as decisive.[78]

It is argued that waiver of immunity from suit may alike be traceable to the express or implied consent of the foreign State; once that consent is established the State should not be allowed "to blow hot and cold" with the jurisdiction. The English rule, however, is that submission to the jurisdiction, or waiver of immunity, must be made in face of the court and at the time the court is asked to exercise jurisdiction.[79] Thus, even should there be a contract in existence providing for submission, the foreign State may still resile from it and claim sovereign immunity. Neither prior assent to an arbitration clause [80] nor the presence of a motion to set aside the award of an arbitrator [81] have been held, in English courts, to amount to submission to the jurisdiction. It might be expected that the U.S. rule would be less severe;[82] the little authority that does exists suggests that this is not so.[83] The position of pre-suit waiver in the U.S. before the instant cases was that no court had

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or regulation or declaration in force when the claim of the complainant arose, indicated that it would consent to the institution of such a proceeding". (Emphasis supplied).

[76] *Petrol Shipping Corporation* v. *Kingdom of Greece, Appellant's Petition for Re-hearing,* 1-2.

[77] 116 F. 2d 43. It may be noted that *Puente* has not been cited in the Supreme Court and has only rarely been relied upon in lower Federal courts — unlike *Sullivan* v. *State of Sao Paulo,* 122 F. 2d 355 (1941).

[78] 326 F. 2d 117, 118.

[79] *Mighell* v. *Sultan of Johore,* [1894] 1 Q.B. 149; *Duff Development Co.* v. *Government of Kelantan* [1924] A.C. 797; *Kahan* v. *Federation of Pakistan* [1951] 2 K.B. 1003; see, for a general survey, E. J. Cohn, "Waiver of Immunity" in (1958) 34 B.Y.B.I.L. 260.

[80] *Duff Development Co.* v. *Government of Kelantan,* [1924] A.C. 797.

[81] *Compania Mercantil Argentina* v. *U.S. Shipping Board,* (1924) 40 T.L.R. 601.

[82] See : M. Chase Waring, "Waiver of Sovereign Immunity", in (1965) 6 *Harvard Int. Law Club Journal,* 189, 197-199.

[83] Cf. *Railroad Co.* v. *Tennessee,* 101 U.S. 337 (1879) and *Lamont* v. *Travelers Ins. Co.* 281, N.Y. 362, 365 (1939).

held that, in consequence of a prior contract, a sovereign was bound to submit a dispute to the jurisdiction of an American court or American arbitrators. Neither in *Petrol Shipping Corporation* nor in *Victory Transport* was the court prepared to face the issue of waiver. Whether this was due to the absence of authority, or to the persuasive pressure of the English line of decisions, is difficult to say. It has been suggested that the characterisation of the "private" State activity in *Victory Transport* was itself "little more than an application of implied waiver of immunity".[84] This argument is tenuous; the characterisation of a State activity as "private", "commercial", or simply "non-public" as in *Victory Transport*, disposes of the issue of jurisdictional immunity, although litigation thereafter may of course still be affected in a number of ways by the sovereign status of one of the parties. The refusal of the State Department to express a view on the issue of prior waiver as presented in *Petrol Shipping Corporation* is thus, in view of the state of the law, understandable.[85] On certain aspects of the law relating to waiver of sovereign immunity, in particular those concerned with counterclaims or "set-offs" against foreign soverings, the U.S. courts have recently shown initiative and resource.[86] Express or implied prior waiver by contractual agreement appears, however, despite the prognostications of the *Restatement* reporters, to be in advance of contemporary judicial thinking.

It has been only possible in the space of a short article to point to some of the most notable features of the two cases discussed.[87] The immediate combined effect of *Petrol Shipping Corporation* and *Victory Transport* will surely be to exacerbate existing high feeling in commercial, as well as legal, circles against "the archaic and disfavored" plea of sovereign immunity, as it was styled in *National City Bank* v. *Republic of China*.[88] Since both of the cases concerned

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[84] Waring, *op. cit.*, 197, 199; see also 200, 201.

[85] *Petrol Shipping Corporation, Brief for the United States as Amicus Curiae*, 4 note 3.

[86] See : *National City Bank of New York* v. *Republic of China* 348 U.S. 356 (1955); *Et Ve Balik Kurumu* v. *B.N.S. International Sales Corp.*, 204 N.Y.S. 2d 971 (1960), and articles cited in note 4 *supra*.

[87] The manner of presentation to U.S. courts of claims of sovereign immunity has, for instance, not been discussed. See : *Petrol Shipping Corporation, Brief for the United States as Amicus Curiae*, 6-10.

[88] 384 U.S. 356, 359.

"Aid cargoes", many American ship-owners and underwriters may understandably express their resentment at being denied redress by arbitration in U.S. courts for claims arising from Charter Parties containing agreed dispute clauses.[89] Promises of diplomatic intervention may do little to alleviate this situation, which could have an important bearing upon the development, as well as the implementation, of the Foreign Aid programme. Yet the long-term problem is not simply one of avoiding, as the Court said in *Victory Transport*, the sacrifice of private litigants in the interests of international comity.[90] It is rather a problem of totally revising our conception of the modern State and its activities, and re-thinking the purposes which sovereign jurisdictional immunities are intended to serve. The doctrine of absolute immunity cannot, it is suggested, survive such examination. An abolition of all jurisdictional immunities can hardly be expected at the present time. If a restrictive theory that is both predictable and flexible is to emerge, it can do so, in the writer's view, only if State activities are characterised by municipal courts according to their function. To rely upon what is fundamentally an artificial distinction between State "public" or "private" acts may be as disastrous as to abdicate responsibility in favour of the province of diplomatic negotiation. The role of the municipal court in the United States, recently the subject of an admirable study by Falk, is limited by executive policy and pronouncements. The evaluation of immunity claims when the executive is silent, as in *Petrol Shipping Corporation* and *Victory Transport*, is carried out by the court within the context of policy statements, such as those made in the "Tate Letter". If the court is willing, as in *Victory Transport*, to decide for itself how the restrictive immunity policy should be applied, then it should also be willing to examine the claim before it by reference to its functional justification.[91]

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[89] See, for example, the report of the *Petrol Shipping Corporation* case in *U.S. Journal of Commerce*, January 10, 1964.

[90] 336 F. 2d 354, 360.

[91] Since this article was prepared for the press, a memorandum for the United States as *amicus curiae* in the *Victory Transport* case, on petition for a writ of certiorari to the Court of Appeals for the Second Circuit, has been published (May, 1965). The tone is cautious and the memorandum is substantially devoted to a criticism of the manner in which the issues were framed by the petitioner. On the decision of the Court of Appeals in *Victory Transport* the comment is made (p. 5): — "While we believe the decision to be correct... this is the first time that a federal court has unequivocally upheld the restrictive theory of sovereign immunity". *Victory Transport* marks"... the first clear-cut departure by an American federal court from the so-called absolute theory of sovereign immunity upheld in *Berizzi*... (p. 7) *(Berizzi Bros. C.* v. *Comite De Ventas de Cieles*, 219, N.Y.S. 2d. 1018; *Three Stars Trading Co.* v. *Republic of Cuba*, 222

N.Y.S. 2d. 675, and *Harris & Company Advertising Inc.* v. *Republic of Cuba*, 127 So. 2d. 687 (Fla.), The comment is also made (p. 7) that this is apparently the first federal case to uphold and *in personam* action against an objecting foreign soverign or its unincorporated agency or department.

The Comisaria General had, however, expressly disavowed reliance upon the "absolute" theory of sovereign immunity in its petition (reply brief, p. 3) and had asked (i) whether it could be held, by executing the agreement to arbitrate, to have consented to the subsequent assertion of *in personam* jurisdiction to enforce arbitration of a dispute arising under the agreement, and (ii) whether the method of service of process was proper and permissible. On the first of these points the *amicus* memorandum takes the view (pp. 8-12) that the alleged distinction between actions directly against a foreign Government and actions begun by seizing the property of a foreign Government is unsound but sufficiently supported by authority to be worthy of consideration by the Court of Appeals *if argued along with the fundamental issue as to whether sovereign immunity extends to transactions such as that involved in Victory Transport.* It is noteworthy that the memorandum comments (p. 11) that the "assumption" that sovereign immunity does not extend to commercial transactions should not be allowed to enter into the body of the law "without thorough examination of the question" — This seems to rest upon an over-cautious interpretation of existing authority. On the second point raised by the petitioner, the comment is made that there is no reason, apart from considerations of sovereign immunity, why an agency of a foreign Government should not be treated as a foreign corporation for purposes of service.

The Solicitor General's conclusion is that certiorari should be granted if the petitioner presents, in addition to the two points above, the fundamental issue of the scope of sovereign immunity in commercial transactions.