NOTES AND COMMENTS

SOVEREIGN IMMUNITY — WAIVER AND EXECUTION: ARGUMENTS FROM CONTINENTAL JURISPRUDENCE

Sovereign immunity from both jurisdiction and execution has traditionally been accorded foreign sovereigns by domestic courts in the United States, England and Europe, as a result of judicial views of the requisites of international law and of international relations. Although these immunities — rejected in theory by Vattel and Bynkershoek even before their crystallization in judicial doctrine — have been increasingly circumscribed by European and American courts, the constricted boundaries of immunity that have emerged are often criticized as too inclusive. In the United States, execution against the property of a foreign sovereign is all but impossible, and jurisdictional immunity remains a major barrier to the judicial determination of the obligations of foreign states to private parties. It may not be politically or judicially feasible at present to redefine the scope of sovereign immunity, but it is possible to relax the rules governing the application of immunity. The adoption of a permissive rule of waiver of sovereign immunity from both jurisdiction and execution, and the sanction of judicial execution against the property of a foreign state in all cases where that state is amenable to jurisdiction would enable American courts not only to shape their doctrine to the form prevalent among the majority of countries today, but also to pioneer in subverting a doctrine rapidly becoming an anachronism.

SOVEREIGN IMMUNITY — DOCTRINE AND POLICY

Sovereign immunity in its absolute form entitles a foreign state to immunity from jurisdiction and execution in all disputes before domestic courts. This doctrine, formulated in the middle of the nineteenth century, was shortly found unsatisfactory by many states, and has been subjected to widespread criticism.

1. Vattel, Le Droit des Gens (1758) (sovereigns and diplomatic agents are immune from suit in foreign countries only insofar as their public and official acts are concerned); Bynkershoek, Traité du Juge Compétent des Ambassadeurs (1737) (the rationale behind the jurisdictional immunity granted ambassadors does not apply to personal sovereigns or to states).

2. The first judicial expression of this doctrine is to be found in The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812). The doctrine was developed most fully, however, in English law. The Porto Alexandre, [1920] P. 30 (C.A.). See Fitzmaurice, State Immunity from Proceedings in Foreign Courts, XIV Brit. Yr. Int'l L. 101, 124 (1933).

by courts and scholars. The creators of the superseding rule of restrictive immunity — which delimits areas in which the foreign sovereign, notwithstanding its express reluctance, is held subject to the jurisdiction of domestic courts — recognized that the template of classical immunity was not suited for the new mold of state activities, which have expanded to embrace the whole of international commerce. But they failed to provide the doctrinal foundation necessary to support a judicial policy in harmony with contemporary political and economic realities; in fact, for traditional state activities, where immunity was to continue, the principle behind classical immunity was retained intact.

Historically, the immunity of the foreign state was derived both from the immunity of its ambassadors and from the state's sovereign nature. Logic was thought to require that the state which appoints the ambassador enjoy immunity coextensive with that of its diplomatic agent. The inadequacy of this argument was recognized as early as the eighteenth century:

The immunity of the diplomatic agent subjects his creditors to only moderate inconvenience: they can always sue the ambassador in the country he represents; . . . [his immunity lasts] only as long as his mission. If [the ambassador] . . . abuses his privilege, they can have recourse to the sovereign on whom he is dependent. But when the State refuses [to submit to] foreign jurisdiction, it is an immeasurable inconvenience for its creditors: its tribunals are suspect because they are both judge and party; its immunity is not for a period, but forever; while the State watches over [its] ambassador [and] . . . prevents the abuse of his immunity, nothing superior to the State controls and moderates its [exercise of this privilege].


Despite this criticism, the classic doctrine has retained far more vitality than the laissez-faire economic order in which it was established. The classic doctrine in its original form still prevails in England. See SWEENEY, POLICY RESEARCH STUDY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (Bureau of Intelligence and Research, U.S. Dep't of State) (Oct., 1963), 38-39. It was not officially renounced by the United States Department of State until 1952. Tate Letter, 26 DEP'T STATE BULL. 984 (1952).


7. de Lapradelle, La Saisie des fonds russes à Berlin, 6 REVUE DE DROIT INTERNATIONAL PRIVÉ 779, 780-88 (1910). The immunity of the state can be traced most directly, of course, to that of the personal sovereign, whose immunity was derived, in turn, from that of his ambassadors and from his very nature as a sovereign.

8. Id. at 780.

9. Id. at 781 (author's translation).
Moreover, while diplomatic immunity is often justified on the ground that legal proceedings interfere with the performance of the diplomatic mission and constitute an intolerable inconvenience, such considerations do not apply in the case of a foreign state.\footnote{10} Nor does the amorphous concept of sovereign nature give rise to more persuasive arguments for immunity.\footnote{11} Initially, the appeal to sovereign dignity raises an archaic specter given little credit today and incapable of providing a rational basis for immunity. It hardly seems consistent with sovereign dignity for a state “to acquire a tramp steamer and to compete with ordinary shippers ... in the markets of the world.”\footnote{12} With the expansion of state participation in economic affairs, the sovereign is more and more frequently soiling its hands in such undignified activities.\footnote{13} Even apart from such practical considerations, it is arguable that the dignity of a state is no more impaired by its being subject to foreign law than by its subjection to its own law.\footnote{14}

The doctrine of the equality and reciprocal independence of foreign states\footnote{15} — no state is superior to another and all states are absolutely independent of one another — is likewise an unsatisfactory basis for sovereign immunity. The equality of states requires only the same privileges for all states; it does not determine the number and extent of these privileges.\footnote{16} The recognition of sovereign immunity, moreover, thwarts rather than furthers attainment of the desired equality. Acquiescence in the foreign state's claim to immunity merely shifts the burden of sustaining the economic loss to the private party and, in most cases, eventually to the forum state.\footnote{17} The independence of a state, in addition, is a relative concept, at least without its borders.\footnote{18} To rely

\begin{itemize}
\item \footnote{10} Id. at 782.
\item \footnote{11} See, e.g., the argument of the “first defendant” as expressed by the court in Socobelge v. Etat hellénique, Tribunal Civil de Bruxelles, April 30, 1951, [1953] S. IV. 1, 2-10 (Bel).
\item \footnote{12} Compania Naviera Vascongada v. S.S. Cristina, [1938] A.C. 485, 521.
\item \footnote{13} “The participation of States in foreign trade is by no means an unprecedented phenomenon. Before the nineteenth century sovereigns and States had participated in international trade on an extensive scale. It was only during the nineteenth century that State-trading reached a low ebb.” Sucharitkul, \textit{op. cit. supra} note 4, at 14.
\item \footnote{14} Both the United States and England have waived immunity from suit in their own courts for a broad variety of disputes. Federal Tort Claims Act, 28 U.S.C. §§ 2671-77 (1958); Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44. See Comment, 63 \textit{Yale L.J.} 1148, 1160 n.72 (1954). France, Belgium, and Italy also permit suits against the government in their administrative tribunals (France) and courts (Belgium and Italy), Allen, \textit{op. cit. supra} note 3, at 149, 187-89, 221.
\item \footnote{15} This doctrine is often referred to in Roman guise: \textit{par in paren non habet imperium}.
\item \footnote{16} de Lapradelle, \textit{supra} note 7, at 783.
\item \footnote{17} See, e.g., Socobelge v. Etat hellénique, Tribunal Civil de Bruxelles, April 30, 1951, [1953] S. IV. 1, 7 (Bel).
\item The economic loss will not affect the economy of the forum state, however, if the activities of the private party are in no way connected to the economy of the state in which suit is prosecuted.
\item \footnote{18} Id. at 9.
\end{itemize}
on the reciprocal independence of states is to ignore a correlative principle of 
reciprocity of more-than equal importance today — the interdependence of 
states. The encouragement of legal and economic interactions between states 
is an interest common to all states. The maintenance of these interactions, 
however, becomes impossible if international transactions are not subject to 
ordering principles. Until international tribunals are given sufficient authority 
by states to apply such principles, the international activities of sovereigns 
must be governed by the rules of international law — private and public — 
as applied by national courts. The concept of interdependence thus requires 
that the independence of states be viewed as limited rather than absolute. 
And the doctrine of sovereign immunity which would place each state beyond 
the jurisdiction of every other state is inconsistent with this prevalent concept 
of limited independence.

The historical justifications for sovereign immunity, then, fail to provide 
adequate support for the doctrine. Sovereign immunity, moreover, is in con-
tradiction to the emergent principle of legality. This principle, which requires 
that states as well as individuals be subject to the rule of law, is based in large 
part on considerations of equity and justice. The acceptance of this principle 
is illustrated by the fact that domestic sovereign immunity has atrophied to 
the point where the individual can enforce substantial legal rights against 
the state in its own courts. The growing recognition of the individual as a 
subject of international law and of a broad application of the principle of 
legality to problems concerning respect for and protection of the rights of 
the individual, implies the admission by states of legal responsibility for 
their acts before all tribunals with jurisdiction over the subject matter of the 
controversy. Only the total subordination to legality — “the transformation 
from l’Etat-Puissance to Etat de droit” — can negate the initial and unavoid-
able imbalance in any confrontation between a state and a private party.

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World Public Order passim (1960).
20. Lalive, supra note 4, at 214-22. See also Lauterpacht, supra note 4, at 232-36.
21. See note 14 supra.
22. One of the “Purposes of the United Nations” is:

To achieve international cooperation in solving international problems of an eco-

nomic, social, cultural, or humanitarian character, and in promoting and encourag-
ing respect for human rights and for fundamental freedoms for all without distinc-
tion as to race, sex, language or religion . . . .

U.N. Charter art. 1, § 3. See also U.N. Charter art. 13, § 1 and art. 62, § 2. The broad 

purposes evidenced by the Charter are incompatible with a state’s avoiding the adjudica-
tion of claims against it by means of sovereign immunity. See also Jessup, A Modern Law 
of Nations 94-122 (1948).

23. Sovereign immunity, unlike the immunity afforded a private party because of some 
nation’s “acts of state,” is an immunity from jurisdiction over the person — a status immu-
nity. See Lyders v. Lund, 32 F.2d 308, 309 (N.D. Cal. 1929). Cf. Falk, The Role of 
Domestic Courts in the International Legal Order 139-45 (1964).

24. Carabiber, L’arbitrage international entre gouvernements et particuliers, 76 Re-
cueil des Cours 217, 222 (1950).
The current doctrine of restrictive immunity, prevalent in Continental jurisdictions and formally endorsed by the United States Department of State in the Tate Letter, may be seen as a partial response to the principle of legality. This doctrine is concerned not with compelling universal submission to jurisdiction, but with delineating situations in which immunity is not to be granted; the absolute doctrine is not ignored, but merely viewed from a different perspective. Restrictive immunity postulates that the fundamental relationship of states is not one of reciprocal independence, but one of mutual respect for sovereignty. Continental courts, utilizing a narrow definition of "sovereignty" have established a broad, if poorly defined, class of activities (jure gestionis) in which the state is said to be acting as a private party rather than as a sovereign, and is therefore not entitled to immunity. In its public activities (jure imperii) the state retains its immunity.

Because restrictive immunity relies in large part on the concepts underlying absolute immunity, it is subject to many of the criticisms applicable to the absolute doctrine. For example, the immunity granted by the restrictive theory is premised upon a respect for sovereignty; but any immunity is inconsistent with the respect for the individual demanded by the principle of legality. Moreover, although the restrictive theory reflects an awareness of the desirability of encouraging economic and legal interdependence among states, it

25. The United States formally adopted the restrictive theory in 1952. In a letter to the Attorney General, the Acting Legal Advisor to the State Department, Jack B. Tate, stated:

The reasons which obviously motivate state trading countries in adhering to the [absolute] theory with increasing rigidity are most persuasive that the United States should change its policy. . . . [T]he 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.

26. DEP'T STATE BULL. 984, 985 (1952). The Supreme Court, however, has yet to make any pronouncement with respect to restrictive immunity.

26. By its very terms, the restrictive theory seeks only to delimit the class of state activities which fall outside the competence of domestic courts. In recent years, this class has been considerably narrowed. The purchase of rice by a foreign government for free distribution to its civilian population and military personnel during time of war has been held to be a nonsovereign act. New York and Cuba Mail Steamship Co. v. Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). See also Société immobilière v. Etats-Unis, Cour d'Appel de Paris, March 16, 1960, 89 CLUNER 132 (1962) (Fr.).

27. Socobelge v. Etat hellénique, Tribunal Civil de Bruxelles, April 30, 1951, [1953] S. IV. 1, 9 (Bel.).


29. See note 6 supra and accompanying text.
fails to achieve fully this goal. In the late nineteenth and early twentieth centuries when the restrictive theory was first developed, the definitional basis of this theory — sovereign or nonsovereign activities — was susceptible of easy application and served to distinguish the commercial from the noncommercial activities of the state. At that time, the theory was in accord with the goal of maintaining and encouraging economic interactions on an international level. But with the increasing economic role of the state, the public-private distinction has become correspondingly more difficult to draw, and it no longer seems germane to the characterization of the state's activity as commercial or noncommercial. Finally, the prerequisites for a well-functioning international economy are independent of the personages who engage in international commercial transactions; the accident of public control of commercial operations cannot confer a privileged status through exemption from legal responsibility if interdependence is to be realized. No one doubts that a state is competent to enter into commercial obligations. Once bound by contract, the parties should be able to act in reliance on their mutual promises. A commercial transaction worthy of the confidence of its parties must create genuine shared expectations as to performance, and as to fair and certain remedy in case of breach. Similarly, when a foreign government commits a tort in connection with a commercial activity, the injured party must be able to rely on recovery or he will abstain from all commercial activities where the possibility of such harm is great.

30. During the laissez-faire era, states seldom engaged in commercial activities. The limited activities of states outside of the traditional governmental functions of preserving order, safeguarding the homeland and the like made relatively easy the demarcation of acts jure imperii and jure gestionis.

31. Lauterpacht, for one, thinks the distinction entirely unworkable. Lauterpacht, supra note 4, at 222-26. See also Sucharitkul, supra note 4, at 267.

The distinction between the public and private activities of a state for the purposes of suit is by no means a new one. Puehl in Roman Empire, where governmental authority was exalted to the highest degree, the state in its property relationships was suable in the courts. Setser, The Immunities of the State and Government Economic Activities, 24 LAW & CONTEMP. PROB. 291, 293 (1959). The most important of the recent doctrinal approaches are summarized in Lalive, supra note 4, at 257-72.

32. Concentration on the metaphysical question of when a sovereign is not a sovereign has obstructed a serious examination of whether or not the activity involved should be immune. In Société Bauer-Marchal v. Ministre des Finances de Turquie, Cour d'Appel de Paris, Jan. 29, 1957, 84 CLUNET 392 (1957) (Fr.), a French company sued for a sum due on bonds issued by the City of Constantinople and guaranteed by the Imperial Ottoman government. The court allowed the guarantor immunity for its "public act" and did not stop to consider whether the act of signing as guarantor constituted a waiver of sovereign immunity. See text at notes 52-82 supra. The case was reversed by the Cour de Cassation on the grounds that the lower court did not state why the guaranty of the loan was a public act. Cour de Cassation, Dec. 19, 1961, [1962] Gazette du Palais 186 (March 17-20).


34. "The fact that [the state] . . . may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts." Perry v. United States, 294 U.S. 330, 353-54 (1935).
Despite the fact that the logical extension of the principle of legality and the needs of international commerce would be the abolition of sovereign immunity, other policy considerations, shared in by all states, may dictate the granting of immunity. Immunity might be thought desirable, for example, where necessary for the continued maintenance of friendly relations between the forum state and the foreign state; where considered advisable as a measure to support the stability and functioning of the foreign government; and where necessary to protect the lives, property and welfare of citizens of the forum state.

Waiver of Sovereign Immunity from Jurisdiction

Closely related to the question of how much immunity is to be accorded the foreign sovereign is the question of what conduct of the foreign sovereign will constitute an irrevocable waiver of immunity or, phrased alternatively, will be treated as a binding consent to jurisdiction. Anglo-American and European courts have consistently held that the immunity of the foreign sovereign from jurisdiction may be waived, either expressly or tacitly. Often the ex-
istence of such waiver, though not necessarily the extent thereof, is determined by the relevant procedural rules of the applicable domestic law. Thus, in the United States a foreign sovereign waives immunity by bringing an action, by entering a general appearance, "or by acts or conduct inconsistent with a special appearance entered solely for the purpose of raising a jurisdictional issue . . . ." The Supreme Court has also held that a sovereign, which has entered a general appearance and submitted itself to the jurisdiction of the court, cannot later "reverse the action invoked by it and . . . come in and go out of court at its will . . . ."

Despite the agreement of states that immunity may be waived by a general appearance, there is still some controversy concerning the possibility of waiver of sovereign immunity — by contractual agreement or other acts — prior to the commencement of judicial proceedings. Continental courts, utilizing the rule of prorogatio fori, whereby jurisdiction over private parties otherwise lacking is created by voluntary submission, have uniformly held that binding waiver of immunity — express or implied — can be agreed upon in advance between a foreign state and a private party. Such waiver vests jurisdiction

23, 1933, [1933] S. I. 249 (Fr.). It is interesting to note that communist countries, while agreeing with England that sovereign immunity should be absolute, may allow prior waiver. Zourek, Quelques observations sur les difficultés rencontrées lors du règlement judiciaire des différends nés du commerce entre les pays à structure économiques et sociales différentes, 86 CLUNET 638, 652, 658-62 (1959).


While a court may have no power to enforce an affirmative judgment against a sovereign state, still if, as a defense to a suit instituted by a sovereign state, a counterclaim or set-off is asserted, it would seem only proper that the court determine all issues fairly before it, even though it involves a finding that the plaintiff state was indebted to the defendant.
The question of affirmative judgment on a counterclaim against a sovereign plaintiff was not before the Supreme Court in National City Bank v. Republic of China, supra, and the Court has not considered this question since its liberal holding in that case. See text at notes 88-91 infra.

42. The Ucayali, 47 F. Supp. 203, 205 (E.D. La. 1942).


44. Cohn, supra note 39, at 263-64. The doctrine of express waiver existed in Europe even before the era of restrictive immunity.

[I]f the principle of the independence of States permits a foreign government to take exception to the competence of French tribunals even over the performance of obligations entered into by . . . [the foreign government] in France with a French national, it is still open to that government to accept this jurisdiction, and the power of the court to execute a judgment, and even to submit to it in advance at the time of the contract; such a stipulation constitutes an essential element of the contract, and, once given, cannot be withdrawn at the whim of . . . [the government].

Rochard-Dahdah v. Gouvernement tunisien, Tribunal Civil de la Seine, April 10, 1888, 15 CLUNET 670, 671 (1888) (Fr.) (author's translation).
in the state to whose courts the parties have agreed to submit their disputes. The English rule, diametrically opposed to the Continental one, is that a prior waiver is not binding on a foreign sovereign.45 The leading recent English case on prior waiver is Kahan v. Pakistan Federation.46 Kahan, a British citizen, entered into a contract with Pakistan for the supply of Sherman tanks. The contract contained the following clause:

The interpretation and effect of this agreement shall be construed and governed by English law . . . . The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English courts.47 Kahan brought suit for breach of the contract, and the Pakistani government issued a summons to set aside the writ insofar as it was impleaded. The Court of Appeal held:

[A] mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction . . . will suffice.48

It should be noted, however, that the English rule denying binding effect to waivers inter partes is not applied only to foreign sovereigns, but is a procedural rule applicable to all litigants before the English courts.49

Because of the paucity of decisions considering prior waiver of jurisdictional immunity,50 and because much of what has been said is dicta,51 there is no controlling American doctrine on this question. In the context of transactions wholly between private parties, American law — like Continental but unlike English law — gives binding effect to prior consent to jurisdiction.52 To the extent that in both English and Continental tribunals the law governing the effect of a foreign sovereign's prior waiver of immunity is derived from rules of procedure applicable to suits between private litigants, it would seem that

47. Id. at 1003. There was also a provision for service of process in London on the High Commissioner for Pakistan in the United Kingdom. In common-law jurisdictions it is almost impossible to obtain in personam jurisdiction over a foreign state without consent to service. See text at notes 77-82 infra.
48. [1951] 2 K.B. at 1012.
49. Cohn, supra note 39, at 263.
50. One of the few cases decided on this question follows the English rule. Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (1939). But more recent cases do not cite either Lamont or the English cases.
American jurisdictions should follow the Continental practice. Additional reasons for the adoption of the Continental position by American courts may be found in the fact that prior waivers in public loan agreements and treaties are given binding effect by the courts of most countries. Since the Netherlands loan of 1945, Continental and American courts have held binding contractual waivers of immunity by borrower governments in international commercial loan agreements. The necessity for according binding effect to such waivers is demonstrated by the fact that such waivers are demanded by international lenders. It would be anomalous if prior contractual waiver in the area of public loans, traditionally denominated as immune, should be held binding, whereas waiver in the context of other commercial transactions more easily characterized as jure gestionis may be rescinded at the will of the sovereign. Similarly, contractual waiver of immunity for the benefit of private parties by treaty or other international agreement is not uncommon. It has never been suggested that a signatory to such an agreement, or indeed a state which merely unilaterally declares its intention not to claim immunity — as did the United States with respect to commercial shipping — may when sued reverse its position and claim immunity.

Not only authority, but also policy requires that waiver prior to proceedings be held binding on the foreign state. The same principles of equity and justice which forbid a state to assert immunity once it has been waived by general

53. 1961 PROCEEDINGS, AMERICAN SOCIETY OF INTERNATIONAL LAW 131-36. As early as 1888, some European courts upheld as binding a contractual consent to jurisdiction in a government loan agreement. See, e.g., Rochaid-Dahdah v. Gouvernement tunisien, Tribunal Civil de la Seine, April 10, 1888, 15 CLUNET 670 (1888) (Fr.).

54. Cohn, supra note 40, at 272-73.

55. E.g., Economic agreement between Germany and the Soviet Union, Oct. 12, 1925, cert. 7, 53 L.N.T.S. 85, at 101 (No. 1257) (1926); Agreement with the Netherlands, June 19, 1953, [1953] 4 U.S.T. 1610, T.I.A.S. No. 2828; Brussels Convention, April 10, 1926, art. 1, 176 L.N.T.S. 201, at 205 (1937); Agreement between France and the Soviet Union, Dec. 29, 1945, art. 11, 36 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 468, 471 (1947); Agreement between Hungary and Switzerland, June 27, 1950, art. 15, 82 Entscheidungen Des Schweizerischen Bundesgerichtes [hereinafter cited as S.B.G.] 75, at 87 (1956) (Swit.). The United States has entered into a number of treaties of friendship, commerce and navigation. A representative clause in the treaty with Greece states:

No enterprise of either Party which is publicly owned or controlled shall, if it engages in commercial . . . or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.


56. See note 25 supra.

57. The United States did not sign the Brussels convention because it claimed it had already adopted the practice of not claiming immunity for its commercial ships. SUCHARIT-KUL, op. cit. supra note 3, at 98-99.
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appearance seem applicable in the case of waiver prior to suit. In addition, the foreknowledge by parties to a contract that a waiver of jurisdictional immunity embodied in the agreement binds the contracting state will provide greater security and will presumably lead to increased commercial transactions between states and individuals.

The effective use of waiver as a doctrine to curtail immunity has been made possible not only by holding waiver irrevocable, but also by broadening the class of acts said to constitute waiver. Indeed, on the Continent the transition from absolute to restrictive immunity was largely accomplished by means of the doctrine of implied waiver of immunity. Continental courts found, at an early date, an actual intention to submit to jurisdiction, from the very nature of the activities of the trading state. Then, as pressure further to constrict sovereign immunity increased, the courts became more willing to imply waiver as a matter of law regardless of intent. As the patterns of behavior equivalent to waiver became established, the parties engaging in such behavior did so with notice, and the line between implied in law and implied in fact waiver became blurred. For example, European courts have long held that a foreign sovereign with an ownership interest in immovables within the forum state has automatically waived immunity with respect to disputes concerning that interest.

In the United States, there seems to have been no judicial recognition of implied prior waiver, either in law or in fact. But a recent Second Circuit case portends the adoption of implied waiver of immunity as an American as well as a European doctrine. In Victory Transport, Inc. v. Comisaría General de Abastecimientos y Transportes, the Comisaría General, a branch of the Spanish Ministry of Commerce, voyage-chartered the S.S. Hudson from its owner, Victory Transport, to carry a cargo of surplus wheat from a safe United States Gulf port to one or two safe Spanish ports. The wheat was

58. Cohn, supra note 40, at 260-61.
60. E.g., Etat roumain v. Société A. Pascalet, Tribunal de Commerce de Marseille, Feb. 12, 1924, [1924] Dalloz Hebd. 260 (Fr.). A French company brought an action for moneys owing to it under a contract of sale by which Roumania had purchased diverse merchandise destined to be resold to its inhabitants. The court, characterizing the act as a private rather than a public one, held that tacit waiver of immunity from jurisdiction could be deduced from the fact that the foreign state contracted in France with a French citizen. As additional indicia of waiver, the court cited the facts that both the bonds to ensure payment for delivery and the supplementary bonds stipulating payment in pounds outside of Roumania were signed in Paris. In cases such as this, the line between implied in law waiver and no immunity at all is so faint as to be practically indistinguishable.
consigned to and shipped by a private commercial concern. The ship sustained severe hull damage during the discharge of its cargo at the Spanish ports. Victory Transport, claiming that the damage sustained was caused by the Comisaría General's breach of the charter party's safe port/safe berth warranty, demanded payment of its claims, and, thereafter, the submission of the dispute to arbitration in accordance with the standard New York arbitration clause contained in the agreement. This clause provided:

Should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at New York ... their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.

When the Comisaría General failed to comply with Victory Transport's demands, the latter brought proceedings to compel arbitration under Section 4 of the United States Arbitration Act. Victory Transport, pursuant to an ex parte order of the district court, served process by registered mail at the Comisaría General's Madrid office. The Comisaría General moved to dismiss the petition claiming invalid service of process and sovereign immunity.

63. The wheat was sold pursuant to the Agricultural Trade Development and Assistance Act, 68 Stat. 454, 7 U.S.C. §§ 1691-1724 (1954). The effectuation of the sale through private trade channels, as was done in this case, is specifically envisaged and encouraged by the act. 68 Stat. 455, 7 U.S.C. § 1701(b).

64. 336 F.2d at 356 n.2.

65. A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure, ...

61 Stat. 671 (1947), as amended, 9 U.S.C. § 4 (1958). It is important to note that the suit did not concern the enforcement of an arbitration award. If there were no further appeal of the case, and the Comisaría General continued in its refusal to appoint arbitrators, Victory Transport might apply to the court to appoint arbitrators for the Comisaría General. 61 Stat. 671, 9 U.S.C. § 5 (1958). No case has been discovered in which a United States court has acted to appoint arbitrators for a foreign sovereign or its official agency.

This case raises the interesting question, not discussed by the court, of whether the United States Arbitration Act was intended by Congress to apply to foreign states or their agencies. Cf. Lauritzen v. Larsen, 345 U.S. 571 (1953) (The Jones Act does not apply to a foreign seaman injured on a foreign ship in a United States port.); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963) (The jurisdictional provisions of the National Labor Relations Act do not extend to the maritime operations of foreign ships employing foreign seamen.). The United States Arbitration Act has been applied however, to foreign private corporations. Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, 243 F.2d 342 (2d Cir. 1960); Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 284 F.2d 419 (2d Cir. 1960).

66. The Comisaría General also argued that the designation of the ports as safe was an official Act of State and could not be examined by the court. Brief for Respondent-Appellant, pp. 5-7, Victory Transport, Inc. v. Comisaría General de Abastecimientos y Trans-
After an adverse decision in the district court, the Comisaria General appealed to the Second Circuit. The opinion of the circuit court proceeded as follows: the Comisaria General, as a state instrumentality, is a member of the class of juristic entities entitled to claim sovereign immunity. The execution of the charter party and the warranty of the Spanish ports as safe, however, were commercial and nonsovereign acts for which the Comisaria General was not entitled to immunity from jurisdiction under the terms of the restrictive theory. The court therefore found it unnecessary to consider whether the charter party by its terms implied a waiver of sovereign immunity. The court then found that the district court had obtained in personam jurisdiction through the plaintiff's valid service of process. In reaching this conclusion the Second Circuit found an implied consent to jurisdiction for purposes of service of process, which is conceptually similar to the implied waiver of jurisdictional immunity developed by the Continental courts. According to the court, the tacit consent to service of process was embodied in the arbitration clause in the charter party and in the federal statute governing ar-

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67. Continental courts applying the restrictive theory normally deny sovereign immunity from jurisdiction to state trading agencies. E.g., Union des Républiques Socialistes Soviétiques v. Association France-Export, Cour de Cassation (Chambre des Requêtes), Feb. 19, 1929, [1930] S. I. 49, 51 (Fr.) (Immunity denied to the Soviet Trade Delegation in France). The rationale behind this doctrine has been cogently stated by Niboyet in a Note to a recent French case.

All international commerce would become impossible if the subject matter of these activities were necessarily reserved for the tribunals of the interested State. This has been well understood by the Soviet Union which, while nationalizing its foreign trade, has recognized the competence of the tribunals [of the country] where its trade delegations are established.

État Roumain v. Aricastre, Cour d'Appel de Bourdeaux, June 16, 1949, [1950] S. II. 141 (Fr.) (note Niboyet) (author's translation). The criteria for immunity applied to state agencies by the European courts is that the agency not possess a legal personality distinct from that of the state, or, even if such distinction exists, that the agency perform a delegated act of sovereignty. Passelaïgues v. Banque hypothécaire de Norvège, Tribunal Civil de la Seine, June 16, 1955, [1956] Dalloz Sommaire 39 (Fr.).


American courts have traditionally made use of one criterion alone — whether the state agency is incorporated. Coale v. Société Co-operative Suisse des Charbons, 21 F.2d 180 (S.D.N.Y. 1921); United States v. Deutches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D. N.Y. 1929). New York state courts, however, have taken a more liberal view. "[I]t is of no actual importance whether [defendant] be called ... [a corporation] or not. It has all the characteristics of a corporation. For present purposes the most significant fact is that the Bank is described in its own charter as 'a distinct legal person.'" Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S.2d 201, 205 (1940). See also Hannes v. Kingdom of Roumanie Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940).

68. See notes 5 and 26 supra and accompanying text.
Given the particular facts of the case, the court's holding of implied consent seems justified. Although the arbitration agreement did not itself constitute an express or implied consent to service of process in an action for its enforcement, it served two important functions: it constituted an agreement to submit all disputes to arbitration in New York, and it provided that "for the purpose of enforcing any award, [the] agreement may be made a rule of the court." When these stipulations of the arbitration clause are read in conjunction with the venue provision of the United States Arbitration Act making the promise to arbitrate enforceable in the federal district court for the district in which arbitration was agreed to be held, it seems no large step to find, as did the Second Circuit, consent to service of process.

Although the court in Victory Transport found consent to jurisdiction for purposes of service of process, it implied that waiver of sovereign immunity is a separate question. In footnote 20 of its opinion the court stated:

Since in our view sovereign immunity does not apply, we find it unnecessary to consider whether the agreement to arbitrate constituted an implied waiver of sovereign immunity.70

Analytically, it is possible to distinguish between a foreign state's waiver of its general immunity from the jurisdiction of an otherwise competent United States court and its consent to service of process effective where the foreign state does not benefit from jurisdictional immunity. An agreement by a foreign state not to assert immunity after it has been brought into court need not logically embody a submission to the power of a particular court which would relax the due process requirements of service of process. But rather than focus on this analytic distinction, the court in Victory Transport changed its characterization of the Comisaría General from a governmental agency to a private foreign corporation. The court was thus able to rely on past decisions concerning a private foreign corporation's consent to service of process in order to find valid in personam jurisdiction.71 Implicit in the court's reasoning may be the belief that a foreign sovereign can only waive immunity but cannot consent to service of process. But if a sovereign, as litigant, is ever subject to in personam jurisdiction, then there is no reason why it, unlike private litigants, should be found incapable of consenting to service of process prior to arbitration.69

69. The purpose of the United States Arbitration Act was to overcome the commercial inconvenience occasioned by the refusal of the Federal courts to give effective common-law or equitable relief for breach of promises to arbitrate. Cavac Compania v. Board for Validation of German Bonds, 189 F. Supp. 205, 208 (S.D.N.Y. 1960).

In a suit against a private foreign company which had also agreed to the New York arbitration clause the court held that "the parties are presumed to have contracted with notice of [the United States Arbitration Act]." Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, 243 F.2d 342, 346 (2d Cir. 1957). There seems to be no reason why the presumption of notice should not apply here also. But see note 65 supra.

70. 336 F.2d 354, at 362 n.20.

to suit. It would be incongruous to recognize as binding a waiver of immunity prior to suit and at the same time to deny the possibility of consent to service of process.\footnote{72} Although an analytic distinction can be drawn between waiver of jurisdictional immunity and consent to service of process, the conduct and contractual language which explicitly or implicitly constitute such waiver or consent are generally identical. In practice, no specific distinction is made by the foreign state between the two types of consent, and the possible theoretical difference is further blurred by the fact that the same facts serve to establish both. Thus a typical agreement may only provide that all disputes be settled in the courts of a specified jurisdiction.\footnote{73} Such an agreement, if it is sufficient to constitute a consent to service of process, as was the arbitration clause and statute in \textit{Victory Transport}, should establish \textit{pro tanto} a waiver of immunity — the more general consent to jurisdiction. Likewise, a waiver of jurisdictional immunity may be presumed to comprehend an implied consent to jurisdiction for service of process.

Because of the practical identity of consent to service of process and waiver of sovereign immunity from jurisdiction, \textit{Victory Transport} represents the first major step toward the judicial recognition of binding prior waiver by American courts. That the Second Circuit held binding the consent to service of process implies that had the Comisaria General been entitled to immunity under the restrictive theory, this privilege would have been found to have been waived. In addition, the fact that the consent held binding in \textit{Victory Transport} was tacit requires \textit{a fortiori} that express waiver also be held binding. \textit{Victory Transport} also raises the important policy issue of the extent to which the doctrine of waiver should be used to undercut sovereign immunity. The consent to service of process by the Comisaria General, derived from the arbitration clause and the United States Arbitration Act, may be characterized as implied in fact. Whether the American courts will further emulate their European counterparts by utilizing implied in law waivers has yet to be seen. If this further step is taken, American courts will be able to evade the strictures

\footnote{72}{Had the court's initial characterization of the Comisaria General been that of a private corporation, then the question of sovereign immunity would not have entered the case. Even before the United States adopted the restrictive theory, state-owned corporations were uniformly denied sovereign immunity. United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940). Perhaps the court was afraid that prior consent of any sort is not binding on a foreign sovereign. If a private litigant is to rely on the contractual waiver of immunity of a foreign state agency, it should not be necessary for him first to ascertain whether the foreign agency may be characterized as implied in fact. Whether the American courts will further emulate their European counterparts by utilizing implied in law waivers has yet to be seen. If this further step is taken, American courts will be able to evade the strictures.}

\footnote{73}{See, \textit{e.g.}, text at note 47 supra.}
of the doctrine of restrictive immunity whenever it is thought that the sovereign should be amenable to jurisdiction. Such use of the fiction of implied in law waiver, however, is suspect for two reasons: it may be thought undesirable to do away with restrictive immunity, and, even if not, jurisprudential considerations may militate against so doing by means of an indirect attack using this fictional device. But regardless of the desirability of using implied in law waiver to attack the restrictive theory, within the framework of that theory express and implied in fact waiver can serve several useful functions. Most important, where the restrictive theory would otherwise grant immunity — *i.e.*, in cases where the sovereign acts *jure imperii* — waiver is the only path to jurisdiction. Even where the sovereign is not immune under the restrictive theory, waiver of immunity may still be important in establishing consent to service of process. Finally, in cases where the test of the restrictive theory — public or private act — is difficult to apply, a finding of waiver will conveniently moot that problem.

The decision in *Victory Transport* lends force to the doctrine of waiver not only directly by recognizing as binding a foreign sovereign's tacit contractual consent to jurisdiction, but also indirectly by holding valid extra-territorial service of process at the Madrid office of the Comisaría General. The implication of this latter portion of the court's opinion is that the domestic procedural rules of service of process are applicable to foreign sovereigns, and that in personam jurisdiction over the sovereign can be obtained by means of service of process similar to those employed in domestic cases. Whereas waiver of jurisdictional immunity and the performance of activities designated by the restrictive theory as *jure gestionis* subject the foreign state to the substantive rules of the forum, under prior case law the spirit of restrictive immunity and the effectiveness of waiver had been frustrated by the virtual impossibility of serving process on a foreign sovereign. The difficulty is well illustrated by *Oster v. Dominion of Canada*, decided several years ago by a federal district court in New York. Oster brought suit for damages to his property from a rise in the level of Lake Ontario occasioned by the construction of a dam on the Canadian side of the St. Lawrence River. Congress had approved the plans for the Canadian-built dam subject to the following condition, which was formally accepted by Canada:

That if the construction and operation of the said dam shall cause damage or detriment to the property of any ... citizens of the United States,

75. Such use of factual waiver does not result in undercutting the doctrine of sovereign immunity in the same sense as does implied in law waiver. Where waiver is express or implied in fact, the sovereign itself, not jurisprudential magic, dissolves the shield of sovereign immunity.
76. See note 31 supra.
the government of Canada shall pay such amount of compensation as may... be awarded the said parties in the proper court of the United States...\textsuperscript{79}

Since a judicial determination by a United States court of any amount owing to an injured party would necessitate Canada's appearance as a party, Canada's acceptance of the condition would appear to be a tacit consent to both jurisdiction and service of process. Notwithstanding the international agreement, however, the district court held ineffective the attempt to acquire in personam jurisdiction over Canada by delivery of a copy of the summons and complaint to the Consul General or his office in New York.

The court in Victory Transport departed from the apparent principle of Oster by taking advantage of the fact that the Comisaria General is a state agency rather than a foreign state itself. The court was thus able to characterize the Comisaria as a private corporation and to hold it subject to the procedural rules governing service of process on such entities. The opinion of the court with its shifting reference from a sovereign to a corporate defendant gives the appearance of shaping the facts to fit the available rules of service of process. While the result reached seems desirable, the danger in the court's treatment is that the basic problem — the lack of statutory techniques for service of process on foreign sovereigns — is obscured. An alternative reading of the case, however, might view the court as adopting a flexible interpretation of the statutory rules to fit the actual facts. Of the juristic entities specified by the Federal Rules for purposes of service of process,\textsuperscript{80} the foreign corporation is most similar to the Comisaria General. The court accordingly can be viewed as holding that the method provided for service of process on foreign corporations was applicable to the Spanish state agency as well.\textsuperscript{81} This latter alternative, indeed, is one of two possible strategies — albeit the less desirable — to insure that a sovereign as well as its agent is not accorded practical

\textsuperscript{79} Id. at 747.

\textsuperscript{80} FED. R. CIV. P. 4(d).

\textsuperscript{81} The result reached in the case is noteworthy not only for its break with precedent, but also for the added force it gives to the Tate Letter and the doctrine of restrictive immunity in the United States. The Tate Letter does not consider the question of service of process on a foreign State. Under current law, there seems to be no way to acquire in personam jurisdiction over a foreign State unless the State willingly makes a general appearance in court. The law prior to Victory Transport was clear that in personam jurisdiction could not be acquired by personal service on a government official even if that government had waived its sovereign immunity. "Consent to the jurisdiction of ... [a] court over the person... does not embody or imply consent to the service of process in any manner or in any territory." Berlanti Constr. Co. v. Republic of Cuba, 190 F. Supp. 126, 127 (S.D.N.Y. 1960). See also Purdy Co. v. Argentina, 333 F.2d 93 (7th Cir. 1964); Letter of Aug. 10, 1964 from Acting Legal Advisor Leonard Meeker to Assistant Attorney General John Douglas, 59 AM. J. INT'L L. 110-11 (1965).

In Continental courts, more permissive (in the context of sovereign immunity) jurisdictional requirements alleviate the problem of service of process on a foreign state. See, e.g., République Arabe Unie v. dame X, Bundesgericht, Feb. 10, 1960, 86 S.B.G. I. 23, 25 (Swit.).
immunity from service of process. A creative reading of the Federal Rules of Civil Procedure might correct the omission of provisions specifically applicable to foreign nations by permitting service in ways analogous to those provided for service against private entities, local governments, or the United States. A more rational approach, however, leading to greater certainty and to the avoidance of the necessity of having to color facts in order to fit existing rules, would be to amend the Federal Rules to provide specifically for service of process on a foreign sovereign and its agents. Of course, amending the rules would not dispense with the due process requirement of minimum contacts, and where such contacts do not exist consent to service will still be necessary. But beyond this limitation, rules facilitating the service of process on a foreign state would greatly alleviate the need to find consent to service of process.

EXTENT OF WAIVER OF SOVEREIGN IMMUNITY

Optimum realization of the potential of the doctrine of waiver of sovereign immunity to increase the competence of domestic courts is a function not only of the latitude employed in finding certain acts to constitute waiver, but also in the breadth accorded the waiver once found — e.g., to how broad a class of disputes will the waiver apply. Those courts and commentators which have accepted the doctrine of prior waiver of immunity have never questioned the ability of a foreign sovereign to limit its express contractual waiver to specified disputes as it sees fit. In such cases the problem of scope of waiver is reducible to one of contractual interpretation. It is in those cases where a sovereign has entered a general appearance as plaintiff or defendant or where a state has tacitly waived its immunity prior to suit that the greatest difficulty in measuring the scope of waiver arises. This issue has been most frequently discussed in American and European courts in the context of counterclaims against a foreign sovereign plaintiff. Although the courts of Belgium and France have on occasion allowed indirect counterclaims — "a counterclaim arising out of facts or transactions extrinsic to those upon which a complainant’s claim is

82. For a suggestion that consul generals ought to be subject to service of process for the purpose of obtaining in personam jurisdiction over a foreign State see Comment, 42 CORNELL L.Q. 521, 534 (1957).

[T]here is no general rule of international law, or United States law, expressly or impliedly prohibiting service of process upon a diplomatic agent so long as he is not required to appear in court or is otherwise not prevented from performing his duties.

Griffin, supra note 77, at 12.

83. See cases cited in Harvard Research in International Law, Competence of Courts in Regard to Foreign States, 26 AM. J. INT'L L. SUPP. 455, 509-26 (1932).

84. See, e.g., L'Etat de Perou v. Kreglinger, Cour d'Appel de Bruxelles, Aug. 13, 1857, [1857] P.B. II. 348 (Bel.); Letort v. Gouvernement Ottoman, Tribunal Civil de la Seine, April 24, 1914, 5 REVUE JURIDIQUE INTERNATIONALE DE LA LOCOMOTION AERIENNE 142 (1914) (Fr.). The two cases cited here are noteworthy in that the court in each gave affirmative judgment for the counterclaimant against the foreign state. See note 41 supra and accompanying text.
Continental practice often limits the claims which may be asserted against a sovereign plaintiff to those arising out of the transaction upon which suit is brought. The argument for restricting counterclaims has been strongly stated by Anzilotti:

It is, in effect, absurd that the State which brings an action can find itself exposed... in the same proceedings... in such a manner that any unilateral request can open the way to indefinite and unforeseeable disputes.

The United States Supreme Court, in contrast to the European courts, has endorsed a broad doctrine of scope of waiver in *National City Bank v. Republic of China*. China sued the Bank to recover $200,000 deposited by the Shanghai-Nanking Railway Administration, an official agency of China. The Bank counterclaimed for $1,600,000 due it on two treasury notes in default. Although the Court recognized that fiscal management is within the category of immune activities reserved by the Tate Letter, it dismissed this consideration as irrelevant in view of the fact that the State Department had not indicated that recognition of the counterclaim would embarrass our friendly relations with China. To limit counterclaims to those based on the subject matter of the sovereign's suit — the former American rule — was thought by the Court to be too indeterminate and capricious. On the grounds of "fair dealing" — the Bank should not be required to pay its debts to China so long as China does not pay its debts to the bank — the bank's counterclaim was allowed to offset China's recovery.

The holding in *National City Bank* would seem to imply that the essential rationale of sovereign immunity is avoidance of the harassment of being brought before a foreign court. Only this view of the doctrine of immunity would allow the adjudication of a claim to which the sovereign would normally be immune. By the very terms of the restrictive theory, however, the question

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86. *Id.* at 523-26.
87. Anzilotti, *La demande reconventionnelle en procédure internationale*, 57 CLUNIÉ 857, 870 (1930) (author's translation). Anzilotti argues for the admissibility of the counterclaim only when the connection between it and the principal claim is so close that justice requires the determination of both claims simultaneously.
89. The *National City Bank* case presents a bizarre reversal of the roles of the judiciary and the executive. The doctrine of restrictive immunity was developed by a judicial process in the Continental courts. As applied, both in Europe and in the United States, the executive is often allowed the prerogative of overruling the assertion of jurisdiction demanded by the doctrine of restrictive immunity. In this case, however, the Court refers to the judicial doctrine by reference to the Tate Letter — a pronouncement of the Department of State — but overrules its application on policy grounds: essential justice and foreign relations. Moreover, the exceptions traditionally made by the Department of State are by way of restraining the Court from its exercise of jurisdiction. In no case has the State Department acted in a converse manner, nor should it be permitted to do so. And for a court so solicitous of foreign policy and friendly relations between nations, the statement of China's position is somewhat surprising: "It wants our law free... from the claims of justice." 348 U.S. at 361-62.
of immunity is dependant upon the character of the dispute as well as the fear of harassment. Moreover, if the implications of the Court's opinion were carried to their logical conclusion, as no court has yet done, the results would be wholly inconsistent with the concepts of restrictive immunity and waiver. The ability of the sovereign to condition its prior waiver of jurisdictional immunity would be nonexistent: a sovereign limiting its waiver of immunity to disputes arising from commercial shipping activities would be held to have consented to jurisdiction over a claim on an unrelated sales contract, and even on a public loan. In addition, a plaintiff who obtained jurisdiction over a foreign sovereign with respect to claims arising from a private act would be allowed to amend his complaint to include claims based upon public acts, even though immunity would normally protect the sovereign in these latter activities.

That the sovereign in each of the preceding hypotheticals appears as a party defendant rather than as a plaintiff should make no theoretical difference if the overriding concern is, as is expressed by the Court in National City Bank, justice and fair dealing. It might be argued that a distinction should follow from the fact that a sovereign plaintiff willfully invokes the jurisdiction of the Court. But the proposition that this willful submission to jurisdiction is also a willful submission to the adjudication of all claims to which the foreign sovereign may be subject is a fiction: the bringing of an action should be read as a willful waiver of immunity only to the extent necessary to determine the sovereign's claim and other claims based upon the underlying transaction. Nor is there any reason why a prior waiver of immunity should be subject to qualification and a waiver by general appearance not. The Supreme Court is saying, in effect, that a state may not enter an appearance in court "free from the claims of justice," but that it may by its prior conduct effectively limit the extent of its waiver.

The result reached in National City Bank may be desirable if somehow limited so as not to include more remote counterclaims involving activities jure imperii. But as stated the result only lends confusion to the application of and the theoretical bases for the restrictive doctrine of the Tate Letter. Unless the Supreme Court is able to limit the scope of the submission to adjudication resulting from a suit by a foreign state, the restrictive doctrine will be severely undermined. An alternative approach to the issue of extent of waiver, suggested by the Harvard Research in International Law, would

90. Moreover, cross actions might be asserted with third party plaintiffs allowed to appear in any action in which jurisdiction over a foreign sovereign was established.
91. In one sense the suit brought by China can hardly be termed willful; there was no other way to get the money purposely withheld from it.
92. Although foreign policy is important, restrictive immunity is a judicial doctrine to be applied by the courts, and the doctrine must — even if it is to be subject to exceptions imposed by the State Department — be reasonably certain.
93. In the context of diplomatic immunities, it has never been seriously asserted that a foreign diplomat who brings suit in a domestic court on a private matter waives his immunity with respect to unrelated cross actions.
94. Harvard Research in International Law, supra note 83, at 517-18.
allow counterclaims against a foreign sovereign not only when they relate to the transaction central to the original suit, but also when they relate to acts jure imperii with respect to which immunity has been waived, and to any acts with respect to which the foreign sovereign is not entitled to claim immunity. Such a rule would avoid both confusing and undermining the restrictive immunity doctrine, and it would obviate the necessity to resort to fictional notions of consent apparent in the National City Bank decision.

The extent of any waiver of sovereign immunity can be measured not only in terms of the different disputes with respect to which immunity from jurisdiction has been waived, but also in terms of the extent of immunity waived within a single dispute — is immunity from execution waived along with immunity from jurisdiction? The doctrine of sovereign immunity has traditionally incorporated a distinction between immunity from jurisdiction and immunity from execution. In general the restrictive theory has been confined to immunity from jurisdiction; immunity from execution has been considered absolute, although, in the words of one commentator, the justification for such special treatment “bears no relation to any logic of a strictly juridical order.” Absolute though it may be, immunity from execution, like its jurisdictional counterpart, is susceptible to waiver. Questions of waiver of sovereign immunity from execution, of course, may arise independently from questions of waiver of jurisdictional immunity, and in such cases the principles for determining the existence and extent of each are the same. A more difficult problem, however, is posed by the cases where an initial waiver of immunity from jurisdiction is alleged to import a waiver of immunity from execution.


97. Implied waiver of immunity from execution is usually found in the context of actions concerning rights in immovables. Continental courts have not hesitated to hold that an interest in real property in the forum state represents in itself an implied waiver of immunity from execution — provided the property is not used for diplomatic purposes. See, e.g., État de Suîde v. Petrocochine, Tribunal Civil de la Seine, Oct. 30, 1929, [1930] Dalloz Hebd. 15 (Fr.). For a case illustrating tacit waiver of immunity from execution in a commercial context, see État Roumain v. Société A. Pascalet et Cie, Tribunal de Commerce de Marseille, Feb. 12, 1924, [1924] Dalloz Hebd. 260 (Fr.). English courts do not recognize tacit waiver of jurisdictional immunity and, therefore, take a similar approach to immunity from execution. See notes 45-46 supra and accompanying text.

The Tate Letter recognizes that a foreign state is not immune with respect to rights in real property, but it is not clear whether this denial of immunity is meant to apply to immunity from execution as well as from jurisdiction. See Tate Letter, 26 DETROIT STATE BULL. 984 (1952). In a well-known decision, a New York court adopted the English rather than the Continental position before the United States espoused restrictive immunity. Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (1939).
This problem of dual waiver was recently considered by the Fourth Circuit in Flota Maritima Browning de Cuba, S.A., v. Motor Vessel Ciudad De La Habana. Flota Maritima entered into a lease-purchase agreement with Banco Cubano Del Comercio Exterior, a Cuban corporation organized by the Republic of Cuba for the advancement of her foreign trade; this agreement was, in effect, a bareboat charter of eight vessels owned by Banco. Subsequently, Banco, aware that Flota Maritima considered it to be in breach of their agreement, sold the vessels to the Cuban government on June 9, 1959. A few days later, Flota Maritima filed a libel in rem against one of the ships, the Habana, at the time in a Baltimore shipyard, and a libel against Banco in personam with a clause for foreign attachment of the Habana. On October 27, 1960, the Republic of Cuba appeared in the action, claimed ownership of the Habana, and filed an answer to the libel. Neither Banco nor the Cuban government filed any paper with the district court raising or suggesting the defense of sovereign immunity until May 11, 1962 — almost three years after the initial filing of Flota Maritima’s libel.

Although requested to do so, the State Department presented no suggestion of immunity. The Court of Appeals interpreted this failure to act as an indication that in adjudicating the dispute the court would not be “venturing into a sensitive area in which its possible decrees might gravely embarrass the Executive’s conduct of the Nation’s foreign affairs.” The court, affirming the district court, then held that by entering a general appearance in 1959 unaccompanied by a claim of immunity, Cuba had waived its sovereign immunity from jurisdiction and manifested consent to suit. Moreover, despite the fact that the court recognized the distinction between immunity from execution and jurisdictional immunity, and, notwithstanding the position of the State Department that the property of a foreign state is always immune from execution, the court held that the Republic of Cuba had implicitly waived its immunity from execution. The failure prior to a general appearance to protest or to reserve a right to protest the seizure of property attached in order to obtain jurisdiction implied a waiver of immunity from both jurisdiction and execution.

The Fourth Circuit’s finding of waiver of immunity from execution was based upon a radical departure from the limited function previously accorded attachment for purposes of jurisdiction by the courts and the executive. American courts, guided by the State Department, have recently taken the position, in two important cases, that absolute immunity from execution obtains even where execution is sought on property previously attached for purposes of jurisdiction. In Weilamann v. Chase Manhattan Bank, plaintiff brought

98. 335 F.2d 619 (4th Cir. 1964).
99. The court does not state when the request was made to the State Department, nor when, if ever, the State Department responded to the request. 335 F.2d at 623.
100. Ibid.
suit upon a note issued by the Soviet government as part of a commercial agreement. The case first arose in 1955 when the State Department apparently denied a request of the Soviet government for a suggestion of immunity from attachment for the purpose of conferring jurisdiction over funds of the Soviet Union on deposit with the Chase Bank. The USSR did not appear in the action and a default judgment was entered. Then, in 1957, Weilamann brought a second action in a New York court to obtain possession of the funds previously attached. The New York Civil Practice Act does not clearly demarcate what stages of in rem proceedings constitute jurisdiction or execution, and the court, acting on the State Department's suggestion of immunity from execution, dismissed the complaint. In *Stephen v. Zivnostenska Banka, Nat'l Corp.*, another New York case, the court relied on a State Department letter to the Attorney General:

The Department is of the ... view that, where under international law a foreign government is not immune from suit, attachment of its property for the purpose of obtaining jurisdiction is not prohibited. In many cases jurisdiction could probably not be obtained otherwise. But property so attached ... cannot be retained to satisfy a judgment ... .

The Fourth Circuit, however, departed from the doctrine represented by these cases and introduced a wholly new approach to this area of sovereign immunity:

> It is quite immaterial to [the question of waiver of immunity] ... that, should the libellant ultimately prevail on the merits, the court's decrees can be enforced only through a sale of the ship. The immunity of the sovereign's property, if it exists, is from seizure; there is no immunity of such property from sale following a seizure which was, at the time or later became, unobjectionable and unassailable. The seizure, of course, was for the purpose of execution as well as of jurisdiction, and the right to assert immunity in both aspects was lost when the general appearance was entered without mention of it.

Whatever the analytic validity of the propositions advanced by the court, they are unprecedented in prior law, and Cuba could not have foreseen that absent timely protest it would be held to have waived immunity from execution with respect to the attached property. For this reason, the court's finding of waiver of immunity is a fiction — particularly invidious because the court neither recognized nor articulated it as such. Insofar as execution is to be favored, a court might make known a policy of finding waiver following certain conduct and require the foreign sovereign to take positive steps to avert waiver; alternatively, a court might modify directly the doctrine of absolute immunity from execution, perhaps along the lines of the restrictive theory. At the least, if the court in *Flota Maritima* wanted to render execution coextensive with

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104. 15 App. Div. 2d at 116, 222 N.Y.S.2d at 134.
105. 335 F.2d at 627.
attachment for purposes of jurisdiction, it should not have done so without first considering the underlying question of the propriety of execution in general.

**Sovereign Immunity from Execution**

The American doctrine of absolute immunity from execution, as developed by case law, not only is mechanically applied, but also is often self-contradictory and inconsistent with its underlying principles. Indeed, the result in the leading American case on absolute immunity from execution, *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, ignored the accepted rationale for the doctrine. The Royal Administration of the Swedish State Railways, an entity indistinct from the Swedish government, brought a damage action for breach of a contract to sell coal. The seller, counterclaimed on the same contract and received judgment in its favor. The district court vacated an order of attachment following execution, and the Second Circuit affirmed: "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." The policy behind immunity from execution has long been the maintenance of good international relations by not depriving the sovereign of resources necessary to ensure the operation of its public services and the performance of its public engagements. *Dexter & Carpenter, however, in which execution was directed in part against moneys deposited in a New York bank specifically to cover the payments for the coal* is on these facts inconsistent with the implications of this policy. It is wholly consonant with a sovereign's control of its essential resources to allow, in a suit on a contract, execution against those assets which the sovereign has earmarked for the performance of that contract. Indeed, England, which follows the absolute theory in an almost devout manner, has allowed suit and execution in similar circumstances where the agent holding the property for the sovereign rather than the sovereign itself, was named as defendant in the action.

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106. 43 F.2d 705 (2d Cir. 1930).
107. *Id.* at 708. The approach employed in this case to establish the doctrine of absolute immunity from execution has been facetiously referred to by more than one commentator as a "nose-counting" approach. Such an approach is not totally without authority; Chief Justice Marshall recommended it in Thirty Hogsheads of Sugar *v.* Boyle, 13 U.S. (9 Cranch) 191 (1815): "The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this." *Id.* at 198. Whatever the validity of such an approach at the time of the decision of the Boyle case, its applicability today must be questioned in view of the fact that many Continental courts allow execution today.
108. 43 F.2d at 706. The bank holding the Swedish agency's funds was also made a defendant, but execution against these funds was, nevertheless, not allowed.
109. Léémonon suggests that the earmarking of assets in such a manner constitutes an implied in fact waiver. Léémonon, *L'immunité de juridiction et d'exécution forcée des États étrangers*, 44 *Annuaire de L'Institut de Droit International* 1, 5, 24 (1952).
One limit which American courts have placed on absolute immunity from execution and which has resulted in the mechanical application of the doctrine, is the rule that property does not constitute a "part of the sovereignty" and is subject to execution unless it is actually possessed as well as owned by the sovereign. Possession has been held, however, to include domestic bank accounts in the name of the sovereign. And the sovereign's acquisition of possession may take place within United States territory if accomplished without violation of local law. On the other hand, property owned by the sovereign but possessed by an autonomous corporate entity — even if that entity is owned and controlled by a foreign state — is not entitled to immunity from execution if held in a private or commercial capacity rather than by the corporation as agent for the state in a governmental or public capacity. Yet it is questionable whether the fact of actual possession in the name of the government ought to be the decisive factor in questions of immunity from execution. If a ship owned by a sovereign is seized and sold to satisfy a debt of the sovereign, the effect on the sovereign will be the same whether that ship is operated by a private concern or government-owned company, or by seamen who draw their pay directly from the government itself. Nor, on the other hand, is it at all clear why funds deposited in a private bank for commercial purposes are deemed to be in the possession of sovereign and therefore immune from execution, whereas funds turned over to a government corporation may be used to satisfy a judgment against the corporation, or indeed the sovereign.

111. See, e.g., The Davis, 77 U.S. (10 Wall.) 15 (1869); Compania Espanola v. The Nave Mar, 303 U.S. 68 (1938); Mexico v. Hoffman, 324 U.S. 30 (1945).
113. Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938).
115. It has been argued that if a ship is owned by a government corporation, or by a trading agency that functions like a corporation, there exists an implied waiver of immunity from execution. "The device of the trading enterprise as a separate legal entity was to be understood as separating, for purposes of legal liability, that enterprise from the general status of government." FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 350 (1964). This approach was applied in principle in Swiss Fed Rys. v. United States, 112 F. Supp. 357 (Ct. Cl. 1953), where the Court had to consider the ability of the plaintiff, a branch of entity of Switzerland, to bring suit in United States courts. "True, it is not a government corporation in the same form that we have them, but it has practically the same powers [under Swiss law], including the right to sue and be sued." Id. at 362. It is surely no less reasonable to argue that the use of property for commercial purposes, no matter what the organizational practice, imports implied submission of the property to execution as well as jurisdiction of appropriate courts.
116. In contrast to its treatment of noncorporate agencies and commercial bank accounts of foreign sovereigns, the United States has taken a liberal view with regard to political subdivisions of a foreign state. In Molina v. Com. Reg. Del Mercado de Henequen, 91 N.J.L. 382 (1918), the Department of State refused to recommend immunity from execution for the defendant, for the reason that political subdivisions of a foreign government engaging in ordinary commercial transactions must be regarded as subjecting themselves to the
A more rational theory of immunity from execution and one consistent with the underlying policy would result from recourse to the principles of restrictive immunity. If a foreign state conducting commercial activities is to be subject to the jurisdiction of national courts because of the overriding interests of justice between the parties, the economic welfare of the forum state, and the needs of international commerce, then it must be further acknowledged that these same interests require that at least the commercial assets of the foreign state also be subjected to the laws of national courts. Mere adjudication without remedy is a sorry way to protect interests such as these.

As a major European case allowing execution has stated:

Whereas confidence is the essential condition of international as well as national transactions, the course of the former cannot but find itself advantageously affected by the fact that a judgment . . . [enforces such a transaction] and assures, moreover, the execution on foreign assets which are in Belgium. One should not lose sight of the fact that if [foreign assets] . . . can be seized here, it is because of transactions which . . . [the foreign state] has thought it expedient to carry on here.

A test looking to whether the intended or actual use of the assets in question is commercial or noncommercial would, of course, entail definitional difficulties similar to those encountered by the courts in applying the restrictive theory of immunity from jurisdiction. But if a workable distinction is developed, both the interests of private parties and those of states in international trade will be safeguarded with minimum interference to the sovereign's use of its essential resources.

Authority and practical considerations found in the current practice of states can also be marshalled in support of a policy which allows execution, at least obligations arising from commercial transactions if they are also to reap the benefits and enjoy the rights of trade.

Id. at 385. There seems to be no reason why the same considerations of international relations and noninterference with government, or sovereign, functions should not militate in favor of immunity in the case of political subdivisions as well as in the case of unincorporated state trading agencies. The Continental courts have, in fact, taken the sensible position of applying the same criteria to both political subdivisions and sovereign states themselves. See, e.g., Feldman v. Etat de Bahia, Cour d'Appel de Bruxelles, Nov. 22, 1907, [1908] P.B. II. 55 (Bel.); Etat de Ceara v. Dorr, Cour de Cassation, Oct. 24, 1932, [1933] Dalloz Périodique I. 196 (Fr.).

117. A judgment against a foreign state without execution does possess more than moral value. The foreign state is under great pressure in today's world to pay its just debts. See notes 20-22 supra and accompanying text. Even if the state does not willingly settle the claim, the private judgment creditor may be able to enlist the aid of his own state to secure payment of the judgment through diplomatic channels. Unfortunately, such a solution possesses serious disadvantages. The decisions made by the claimant state — how hard to press the claim of its national, or whether to press it at all — are based in large part on internal and external political considerations totally alien to the merits of the private judgment creditor's claim. See Carabiber, Le Concept des immunités de juridiction doit-il être revisé et dans quel sens?, 79 CLUNET 440, 474 (1952).

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against commercial assets.\textsuperscript{119} Numerous bilateral treaties,\textsuperscript{120} conventions\textsuperscript{121} and national statutes\textsuperscript{122} provide for execution against the property of a foreign state in certain circumstances, possibly including assets devoted to public purposes. In addition, many European courts have allowed execution where the sovereign is acting in a commercial capacity itself\textsuperscript{123} or as agent for one of its nationals.\textsuperscript{124} Although United States courts, with one notable exception,\textsuperscript{125} have not permitted forced execution against the property of a foreign sovereign without a finding of waiver, they have allowed affirmative nonmonetary relief. In \textit{Mexico v. Rask},\textsuperscript{126} for example, Mexico brought an action to recover possession of a patrol boat owned and used by it in its sovereign capacity. Rask, who had possession, claimed that he was entitled to a lien on the vessel until he was paid for the repair work which he had performed. The boat was returned to Mexico on bond and the lien enforced.

If the decisions vesting in a private litigant ownership or an ownership interest in a sovereign's property have not caused great international strife — and they have not\textsuperscript{127} — there seems to be no reason why assets held by the foreign sovereign in the forum state for commercial purposes should not be subject to execution.\textsuperscript{128} Where execution has been carried out against com-

\textsuperscript{119} See generally \textit{Sweeney}, \textit{op. cit. supra} note 4, at 46-51.

\textsuperscript{120} \textit{E.g.}, Treaty between Hungary and Switzerland signed at Budapest, June 27, 1950, art. 15 of which is quoted at [1956] I. S.B.G. 87; Treaty between France and Russia, Dec. 29, 1945, arts. 8, 10, 11, 36 \textit{Revue critique de droit international privé} 468, 470-71 (1947).

\textsuperscript{121} \textit{E.g.}, Brussels convention, April 10, 1926, art. I, 176 \textit{L.N.T.S.} 199, 205 (1937).

\textsuperscript{122} \textit{E.g.}, Greece, the \textit{Law of Necessity} 1519) 1938, art. 1, § 1, 3 \textit{Revue hélénique de droit international} 331 (1950). For a discussion of the role of national statutes in Switzerland, see \textit{Royaume de Grèce v. Banque Julius Bar & Cie.}, Bundesgericht, June 6, 1956, [1956] 82 (I) S.B.G. 75 (Swit.). See also \textit{Allen}, \textit{op. cit. supra} note 4, at 262-63 n.66.


\textsuperscript{124} See, \textit{e.g.}, Procureur Général v. Vestwig, Cour de Cassation, Feb. 5, 1946, [1947] S. I. 137 (Fr.).

\textsuperscript{125} A Florida state court has held that property of a sovereign which is not directly related to activities \textit{jure imperii} is subject to execution.


\textsuperscript{127} To clarify the intentions of the parties, multilateral or bipartite treaties such as the ones prevalent on the Continent today might be entered into. See note 120 \textit{supra}.
mercial property in Europe — even without formal treaty sanction — no disruption of international relations seems to have resulted. Thus in *Flota Maritime*, it would seem that execution against the vessel located in the United States, devoted to commercial purposes, and directly connected with the contract sued upon, should have been allowed even if no waiver had been found. Such a result is greatly to be preferred from the standpoint of international law to the more artificial solution of *Rask*. The orderly process of judicial decision and execution gives less ground for complaint than self-help.\(^\text{129}\)

Indeed, the commercial-noncommercial distinction, which has proved to be such an elusive measure of the propriety of asserting jurisdiction over a foreign sovereign, need not stand as an immovable barrier to execution against non-commercial property so long as other means are employed to protect the legitimate interests of the foreign sovereign. If the sovereign is given notice in advance and the opportunity of posting bond in lieu of the seizure of specific property, there is no reason why even property held in connection with activities *jure imperii* might not also be made subject to execution.\(^\text{130}\) Of course, if the litigation concerns the title to any specific property devoted to a nonpublic use, there is no need for advance notice and execution should follow determination of the dispute.

**Judicial Doctrine and the Role of the Executive**

Any appraisal of American practice in the law of sovereign immunity is misleading to the extent that it ignores the intervention of the executive in the application of these doctrines. For this intervention often leads to the distortion of the results which would otherwise follow if the courts alone were to apply the doctrines of immunity from jurisdiction and execution and of waiver. Most states allow the executive to veto execution against property of a foreign sovereign where disruption of international relations might be occasioned by such execution. In fact, Italian\(^\text{131}\) and Greek\(^\text{132}\) courts cannot

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\(^{129}\) The possibilities for abuse under *Mexico v. Rask* and *National City Bank v. Republic of China* are manifest. For under the doctrine of self-help they encourage the situation where,

if a foreign sovereign brings suit in the United States, the defendant can purchase at par or discount any claim against that sovereign, even one of the highest public character . . . and use it as a defense to offset the sovereign’s claim.

\(^{130}\) No unfair hardship could be said to be visited upon the foreign country in light of the fact that the suggested measures follow judgment. In the unlikely event, moreover, that the foreign country is insolvent, there is no doubt that the State Department would intervene to protect its assets. And even if bond were not posted, seizure of specific assets would be necessary only in the nature of a conservatory attachment to ensure against the foreign country’s removing all its property from the United States. This is the substantial equivalent to the French *saisie-conservatoire*.


\(^{132}\) See note 122 *supra*. 
order execution without the prior approval of the executive. In the United States, the courts have recognized the prerogative of the executive to insist not only upon immunity from jurisdiction where the restrictive theory does not permit it, but also on immunity from execution even where waived. The recent case of Rich v. Naviera Vacuba, S.A. is an illustration of foreign policy considerations which may prompt the State Department to instruct a court to ignore the doctrine of waiver. The Bahia de Nipe, a Cuban vessel destined for a Russian port, was sailed instead to Virginia by the barratrous act of her master and ten of her crew. Immediately, Mayan Lines, possessed of a $500,000 Louisiana consent judgment, in which Cuba specifically waived its immunity from execution against any of its property in any court, libelled the vessel. Two days before the Bahia de Nipe had been brought into Virginia waters, Cuba had released an Eastern Airlines plane which had been hijacked. Simultaneously, the United States had released a Cuban naval vessel that had been taken to Florida by anti-Castro Cubans. Cuba had also sent a diplomatic note to the United States stating that it would discourage hijacking and promptly release all hijacked United States planes in the future if the United States were to act in like manner. In this context, the State Department “requested” the immediate release of the Bahia de Nipe. The Fourth Circuit then held, in a per curiam opinion, that the State Department’s suggestion was controlling, and ordered the vessel released.

Transient but pressing needs of foreign policy, however, need not work to the detriment of private parties. Nor should the temporary unavailability of any property on which to execute permanently deprive a private party of his remedy. Three protective measures are possible. In any suit against a foreign sovereign, a private plaintiff may be deprived of his cause of action if the intervention of the executive prevents final adjudication of the claim and thus allows either of two statutes of limitation to run: that which controls the initial bringing of the suit, and that which controls execution following judgment. The United States Supreme Court has recognized, in the context of domestic sovereign immunity, that the existence of a claim or lien on property does not always depend upon the ability to enforce it.

A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control.


134. 295 F.2d 24 (4th Cir. 1961).


138. The Siren, 74 U.S. (7 Wall.) 152, 158 (1868).
Not only should the claim or judgment continue to exist, however, but the relevant statute of limitations should be tolled from the date of executive intervention prohibiting the initial assertion of jurisdiction or the execution of judgment.

Secondly, if, after jurisdiction has been established, the court is ousted of the basis for quasi in rem or in rem jurisdiction by the State Department’s ordering the release of the res upon which jurisdiction is based or of in personam jurisdiction by the State Department’s ordering the cessation of proceedings, the court ought to suspend the proceedings without forfeiting its jurisdiction.\(^{139}\) A series of cases during the First World War supports this suggestion.\(^ {140}\) More recently in *Dade Drydock Corp. v. The M/T Mar Caribe*,\(^ {141}\) a federal court reached a similar result in a converse situation. A ship had been libelled and attached by Dade. A credit institution of the government of Cuba had intervened as claimant of the vessel, alleging that it was entitled to assert sovereign immunity on Cuba’s behalf. The hearing before the court began two weeks after diplomatic relations with Cuba had been suspended.\(^ {143}\) The court, perhaps mistakenly, found Cuba ineligible to bring suit, “or to assert any rights of possession to the vessel in question.”\(^ {145}\)

However, the action does not abate nor is it subject to dismissal. It simply means that the action is suspended until the Government of the Republic of Cuba is again recognized [sic] by the United States of America.\(^ {144}\)

Insofar as actual custody of the res is necessary to retain in rem or quasi in rem jurisdiction, Title 28 of the United States Code should be amended to allow the State Department’s request for release of the property to be honored without permanently ousting the court of its jurisdiction.\(^ {146}\)

Thirdly, in those cases where judgment has been rendered in favor of the private party and future remedy is rendered highly improbable by the action

\(^{139}\) Under these circumstances, merely tolling the Statute of Limitations is not satisfactory, if it does not help to reestablish jurisdiction at a later date.


\(^{142}\) Diplomatic relations with Cuba were severed on Jan. 3, 1961.

\(^{143}\) 199 F. Supp. at 874.

\(^{144}\) Ibid.

\(^{145}\) A similar suggestion is made in Comment, 63 YALE L.J. 1148, 1167 (1954). However, a mere continuance, without the release of property attached to obtain in rem or quasi in rem jurisdiction, would not be satisfactory from the point of view of the State Department and the foreign state claiming immunity. If immunity must be granted for a period of time to protect the foreign sovereign or to ease international tension, it must be complete immunity for that period. The foreign state must not be required to part with the use of its property or even to post bond. The very nature of the protection given the sovereign in such a case suggests the rarity of circumstances calling for State Department intervention of this order.
of the State Department, the United States government should pay the plaintiff his just claim and receive in return the right of subrogation, enforceable through diplomatic channels or — if feasible — by subsequent judicial execution. The argument in favor of such a result has been concisely formulated by the French Conseil d'Etat in Couitéas v. l'Etat. The French government had refused to authorize the use of military force to execute a judgment in favor of a Tunisian landowner giving him the right to eject all occupants from his property. The refusal was motivated by a fear of political disorders that might have followed the ejectment. Couitéas' claim for indemnity from the French government was upheld:

The ordinary man possessed of a judgment clothed in due form with the executory formula has the right to rely on the support of the public force to assure the execution of the title which has thus been delivered to him . . . [T]he total and limitless deprivation of enjoyment resulting to the complainant from the measures taken in his regard have imposed on him, in the general interest, an injury for which he is entitled to demand pecuniary reparation.

CONCLUSION

The presumption of even the restrictive theory of sovereign immunity is that with the exception of a defined class of activities a foreign state is immune

146. This would be the case, for example, if the only property susceptible of execution — i.e., nondiplomatic property not withdrawn from the country — after the State Department has ordered the release of any attached property from the court is of insufficient value to satisfy the judgment, and the likelihood of other property's coming within the jurisdiction of United States courts is negligible.

147. It has been suggested that the United States government indemnify a private plaintiff only in tort cases, since the injured party normally does not voluntarily incur the risk of injury. But in contract cases, it is said, the possibility of the foreign state's breach is but one of the factors in the bargain. Comment, 63 YALE L.J. 1148, 1164-69 (1954). There is a fundamental problem in this approach. In the case where the foreign state waives its immunity from suit and execution in a contract with the private party, the possibility of breach cannot be taken into account in the bargain for the waiver and the waiver should be enforced by the courts — assuming no State Department intervention — if they are not to regress to the English position. See text at notes 45-49 supra. Moreover, plaintiffs should be treated equally in both tort and contract actions, if the restrictive theory's prescription that commercial activities are within the competence of domestic courts is to have any meaning. One cannot bargain against the possibility of the exigencies of international relations or the future position of the foreign state calling for State Department intervention.

The 1954 Comment also suggests that the United States be added as a defendant where the State Department insists on immunity before the adjudication of the dispute between a private party and a foreign State. 63 YALE L.J. at 1167-68. But it is hard to envisage the United States as a substituted party; it has no knowledge of the true facts of the dispute, and an attempt to acquire the information necessary to litigate the claim from the foreign State might well annul the desired results of granting immunity from jurisdiction in the first place.

149. Id. at 70 (author's translation).
from suit in domestic courts. The confidence necessary to reverse this presumption and eventually to abolish sovereign immunity may not develop until international tribunals become the accepted forum for the resolution of international legal disputes. In the interim period, however, in which domestic courts are the only tribunals practically available, effective adjudication may be realized by a broad application of the doctrine of waiver of immunity, and by allowing execution to follow judgment in all cases. To this end, rules of national courts should be made flexible enough to accommodate both the needs of international relations and the requirements of international interdependence, justice and legality.