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Recent Decisions

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ADMIRALTY—DAMAGES—AWARD ALLOWED FOR EMOTIONAL DISTRESS OF SURVIVING SPOUSES AND CHILDREN, OR PARENTS, UNDER GENERAL MARITIME LAW

Petitioner, a shipowner, filed a petition for exoneration from or limitation of liability against individual claimants, injured seamen and surviving families of deceased seamen, in a case arising out of a ship collision on the Mississippi River.[1] Claimants alleged that operational negligence caused the seamen's deaths[2] and that damages for the emotional distress of the surviving families should be awarded pursuant to either the Jones Act[3] or general maritime law.[4] Petitioner contended that neither the Jones Act nor general maritime law permitted recovery beyond pecuniary damages. The District Court for the Eastern District of Louisiana, *held*, judgment for the claimants.[5] Damages for the emotional distress of the surviving spouses and children, or parents, of the deceased seamen may be awarded under general maritime law. *In re Sincere Navigation Corp.*, 329 F. Supp. 652 (E.D. La. 1971).

Prior to *Moragne v. States Marine Lines, Inc.*,[6] a true admiralty cause of action for wrongful death existed only under the Death on the High Seas Act (DOHSA).[7] In *Moragne*, the Supreme Court elimi-

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1. The court determined that the collision between petitioner's ship and the Coast Guard buoy tender resulted from the mutual fault of both vessels.

2. The instant court found that a viable cause of action lay in seaworthiness. Operational negligence may constitute a cause of action in negligence or seaworthiness, depending upon the circumstances in which the act is drawn into question. Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 418 (1953); Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

3. 46 U.S.C. § 688 (1970). The Act adopts by reference the rights and remedies afforded under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970), which gives the personal representative of the spouse, children, or parents a cause of action in negligence against the decedent seaman's employer. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 374-75 (1932).

4. The breach of a maritime duty which results in death gives rise to a cause of action for wrongful death. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

5. Damages totaled $800,000, of which $300,000 was attributable to the holding.

6. 398 U.S. 375 (1970), *overruling* The Harrisburg, 119 U.S. 199 (1886).

7. 46 U.S.C. §§ 761, 762 (1970). DOHSA applies only to actions arising beyond the three-mile limit. Seamen are covered in territorial waters as well as on

nated the basic anomaly of federal maritime tort law that death caused by an unseaworthy vessel beyond the three-mile limit imposed liability under DOHSA,[8] but not within the territorial waters of a state whose wrongful death statute excluded unseaworthiness claims.[9] In *Moragne*, the Court not only disapproved the three-mile limit as an inappropriate guide for the choice of maritime law,[10] but also gave seamen a comprehensive maritime cause of action for death attributable to an unseaworthy vessel.[11] The elements and damages of the cause of action are seemingly circumscribed and co-extensive with

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the high seas by the Jones Act as employees in a court of law under FELA, not as seamen in a court of admiralty under maritime principles. *See* 398 U.S. at 407.

In addition, the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1970), and the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 (1970) provide death and injury actions for non-seamen.

8. The Court noted that the DOHSA was not intended to be an exclusive remedy for unseaworthiness claims and intimated that general maritime and DOHSA recovery for wrongful death based on seaworthiness could either be joined or elected in an admiralty proceeding.

9. *See, e.g.,* Lindgren v. United States, 281 U.S. 38 (1930); Moragne v. States Marine Lines, Inc., 409 F.2d 32 (5th Cir. 1969) (Jones Act supercedes all state actions for death as result of negligence).

10. Beyond the three-mile limit the Jones Act and DOHSA give concurrent causes of action for death caused by negligence. Negligence under the Jones Act covers most types of unseaworthiness with the exception of unseaworthiness for which the shipowner-employer is in no way at fault, while DOHSA includes a separate cause of action for unseaworthiness. G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-37 (1957). Within the three-mile limit the Jones Act, which is grounded basically in negligence, is the exclusive federal cause of action for wrongful death. General maritime law now gives a cause of action in seaworthiness within and without the three-mile limit. 398 U.S. at 401.

11. Seaworthiness is a relative concept which contemplates a ship and crew reasonably prepared for the forthcoming voyage. M. NORRIS, MARITIME PERSONAL INJURIES §§ 29-34 (2d ed. 1966). *See also* Mahnich v. Southern S.S. Co., 321 U.S. 96, 103-04 (1944) (the duty is absolute and is not predicated on negligence and not satisfied by due diligence; it includes operating negligence); The Osceola, 189 U.S. 158 (1903) (seaworthiness includes the duty to furnish a seaworthy ship).

"The only case which is today clearly outside the scope of the unseaworthiness doctrine is the almost theoretical construct of an injury whose only cause is an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy." G. GILMORE & C. BLACK, *supra* note 10, at 320. Because it amounts to liability without fault, seaworthiness constitutes the main cause of action for personal injury and death. *See generally* Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960); Benbow, *Seaworthiness and Seamen,* 9 MIAMI L.Q. 418 (1955).

those of DOHSA.[12] Damages under DOHSA are limited to compensation for "pecuniary loss"[13] sustained by a spouse, parent, child, or dependent relatives.[14] Damages for loss of support, loss of decedent's wages and services, funeral expenses, and decedent's pain and suffering before death are proper elements of pecuniary damage.[15] They may also include punitive damages.[16] Pecuniary damages do not, however, include damages for loss of consortium[17] or society and companionship.[18] In *Michigan Central v. Vreeland*, the Supreme Court held that "pecuniary" loss does not include damages for grief or wounded feelings.[19] The Court reasoned that loss must be capable of measurement by some standard that is susceptible to monetary

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12. The Attorney General, amicus curiae in *Moragne*, suggested that DOHSA should form the standard guideline for lower courts filling in the framework of the new cause of action. Justice Harlan noted the suggestion and intimated that traditional maritime principles and Congressional expressions of maritime policy should furnish adequate precedent for the courts in light of their present experience in the area. 398 U.S. at 407-08.

13. 46 U.S.C. § 762 (1970). "The recovery . . . shall be a fair and just compensation for the pecuniary loss sustained by the person for whose benefit the suit is brought. . . ."

14. 46 U.S.C. § 761 (1970). The suit may be maintained ". . . for the exclusive benefit fo the decedent's wife, husband, parent, child, or dependent relative . . . ." The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947) (the father of the decedent seaman could recover under the Jones Act and the sister could recover as a dependent relative under the DOHSA); *cf.* Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954). While the Jones Act beneficiaries are listed in order of priority classes, the DOHSA beneficiaries are not. *See* Bailey v. Baltimore Mail S.S. Co., 43 F. Supp. 243 (S.D.N.Y. 1941).

15. *See, e.g., In re* Marina Mercante Nicaraguense, 248 F. Supp. 15 (S.D.N.Y. 1965), *modified* 364 F.2d 118 (2d Cir. 1966). The amount recovered included interest from the time of death. Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1962), *cert. denied*, 368 U.S. 989, 370 U.S. 937 (1963).

In Michigan Central R.R. v. Vreeland, 227 U.S. 59 (1913), FELA and, therefore, the Jones Act were held to limit recovery to "pecuniary loss or damage . . . which can be measured by some standard." *Id.* at 71. Pecuniary loss seemingly encompasses the same kind of loss for purposes of both the Jones Act and DOHSA. *See, e.g.*, United States Steel Corp. v. Lamp, 436 F.2d 1256 (6th Cir. 1970); The Four Sisters, 75 F. Supp. 399 (D. Mass. 1947).

16. Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335 (W.D. Mich. 1970), *noted in* 24 VAND. L. REV. 631 (1971).

17. Igneri v. Cie. de Transports Oceaniques, 323 F.2d 257, 266 (2d Cir. 1963), *cert. denied*, 376 U.S. 949 (1964).

18. Michigan Central R.R. v. Vreeland, 227 U.S. 59, 70 (1913); Middleton v. Luckenback S.S. Co., 70 F.2d 326, 330 (2d Cir. 1934).

19. Michigan Central R.R. v. Vreeland, 227 U.S. 59, 70 (1913).

evaluation and that can be supplied by the service of another for compensation.[20] In *United States Steel Corp. v. Lamp*,[21] the Court of Appeals for the Sixth Circuit concluded that general maritime law awards pecuniary damages which reflect the *Michigan Central* standard. Only elements properly included in the Jones Act or DOHSA awards were to be included in general maritime awards for wrongful death.[22]

The court in the instant case noted the absence of awards for emotional distress in wrongful death claims. Observing that many state courts permit non-pecuniary damages in ordinary wrongful death actions[23] and that the Jones Act and DOHSA cases award damages for the suffering of the deceased before death,[24] the court found no more difficulty in awarding damages for the emotional distress of widows and children or parents than in estimating the award for the suffering of the deceased.[25] The court, which reasoned that *Moragne*'s main purpose was to up-date admiralty law,[26] dismissed any conflict between its holding and prior law and held that an award of damages for emotional distress was proper.

Two principal reasons explain the past failure of courts to award damages for the emotional distress and grief of the surviving family of the decedent. First, the courts tend to view the entire pecuniary damage concept as a device for controlling excessive awards by overzealous juries.[27] Secondly, the courts recognize that factors necessary to evaluate such claims are highly subjective and involve a

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20. *Id. But cf.* St. Louis, I.M. & S. Ry. Co. v. Craft, 237 U.S. 648 (1915) (pain and suffering prior to death is a proper element of pecuniary damages). *See also* Kozar v. Chesapeake & Ohio Ry., 320 F. Supp. 335 (W.D. Mich. 1970) (punitive damages granted).

21. 436 F.2d 1256 (6th Cir. 1970).

22. 436 F.2d at 1275-79. *See generally* 2 M. NORRIS, THE LAW OF SEAMEN §§ 650-704 (3d ed. 1970); M. NORRIS, MARITIME PERSONAL INJURIES §§ 33-39 (2d ed. 1966).

23. W. PROSSER, LAW OF TORTS §127 (4th ed. 1970); Note, *Death of the Head of the Family*, 19 S.C.L. REV. 220 (1967). *See also* Plant v. Simmons Co., 321 F. Supp. 735 (D. Md. 1970) (interpreting the prospectivity of MD. ANN. CODE art. 67, § 4 (1957), which permits recovery for mental anguish, emotional pain and suffering and loss of companionship).

24. *See* cases cited notes 15 and 20 *supra.*

25. The court noted that Louisiana has permitted recovery for emotional distress suffered by the surviving family for many years. *See* 329 F. Supp. at 655 n.6.

26. *See* 398 U.S. at 385-90.

27. Duffey, *The Maldistribution of Damages in Wrongful Death*, 19 OHIO ST. L.J. 264, 272 (1958).

large element of speculation. Neither of these reasons, however, is persuasive when contrasted with the rationale of the instant decision and past judicial practice. The size of verdicts returned by juries and upheld by courts indicates *sub rosa* acceptance of the grief element in the award of damages.[28] Furthermore, the extant fear of the jury's zeal is a consideration absent in an admiralty court which generally sits without a jury.[29] The absence of a standard for recovery does not prevent the courts from including the emotional distress of the decedent as an element of the pecuniary award.[30] Additionally, the civil code, from which admiralty traces many of its principles,[31] permits recovery for emotional distress suffered by decedent's spouse, children, parents, or family.[32] Finally, *Moragne* intended to impose uniform liability for a breach of a maritime duty resulting in death and to up-date admiralty principles, especially admiralty's special solicitude for the welfare of seamen.[33] The instant decision should be viewed as an accurate interpretation of both the scope and intent of *Moragne*. The court properly focuses on the dominant purposes of *Moragne*, but it fails to recognize fully the scope of its holding. The nature of pecuniary damages is grounded in dependency, whereas the nature of emotional damages is founded on the legal relationship of the aggrieved parties.[34] Furthermore, the instant court is aware that its decision conflicts with the Jones Act and DOHSA decisions, but it

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28. *Id.*

29. *Cf.* 28 U.S.C. § 1873 (1970).

30. *See* cases cited note 20 *supra.*

31. *See* G. GILMORE & C. BLACK, *supra* note 10, at §§ 1-1 to 1-4.

32. *See* 6 M. PLANIOL & G. RIPERT, TRAITE PRACTIQUE DE DROIT CIVIL FRANÇAIS §§ 546 & 549 (2d ed. 1952). All damages are recoverable whether or not susceptible to exact evaluation. They are recoverable to the decedent's spouse, children, parents and *alliés* (family by marriage). Mistresses and fiances are not included. *Id.* at §§ 549-52.

33. 398 U.S. at 386-87. "Maritime law had always . . . been a thing apart from the common law. It was . . . administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *See, e.g.,* S.E. MORISON, THE EUROPEAN DISCOVERY OF AMERICA; THE NORTHERN VOYAGES A.D. 500-1600 (1971) for an insight into the nature of the pre-seventeenth century maritime existence that compelled admiralty to adopt that "special solicitude."

34. *See, e.g.,* Civil v. Waterman S.S. Corp., 217 F.2d 94 (2d Cir. 1954). The court strained to grant damages to an abandoned widow over Judge Hand's vigorous dissent. This case therefore may be considered together with St. Louis,

does not account adequately for the conflict with the statutes' basic premise that relatives can recover only if their dependency on the decedent is established in fact. Logically, there is no reason to prove dependency in order to recover emotional damages. The conflict in policies is not of the instant court's making, but is inherent in *Moragne.*[35] Nevertheless, the instant decision is a significant step in bringing admiralty to the forefront of tort law. It enhances the desirability of a general maritime recovery over the DOHSA and Jones Act remedies. The decision is also an important illustration of the growing judicial acceptance of recovery for non-pecuniary injuries. Future courts considering the awardability of beneficiaries' emotional distress under the Jones Act, DOHSA, and FELA will undoubtedly be influenced by the instant court's holding. Such influence will be even more likely if the courts recognize that an award for emotional distress is not a sympathetic gratuity but, rather, an approximate attempt to indemnify the surviving beneficiaries' total loss.

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I.M. & S. Ry. Co. v. Craft, 237 U.S. 648 (1915), in giving damages for the decedent's pain and suffering as lineal predecessors of the instant decision. The French Civil Code is not grounded on dependency, as is the Jones Act and DOHSA, but on the legal relationship. *See* G. GILMORE & C. BLACK, *supra* note 10, at § § 1-1 to 1-4.

35. *See* 398 U.S. at 408. Final resolution of any questions regarding the substance of the cause of action awaits future determination even though "Congress has expressed *its* preference of beneficiaries" (emphasis added). The Court held that a "violation of maritime duties" gives rise to the cause of action. This may be interpreted to include not only seaworthiness but also negligence which would make the DOHSA and Jones Act useful reference points and nothing more.

ANTITRUST—EXTRATERRITORIAL JURISDICTION—EFFORTS TO SECURE ACTION BY A FOREIGN STATE CONDUCIVE TO MONOPOLIZATION NOT PRIVILEGED; ACT OF STATE DOCTRINE BARS ANTITRUST CLAIM ARISING FROM ACTS OF A FOREIGN SOVEREIGN ALLEGEDLY INDUCED BY DEFENDANT

Plaintiff, an importer of petroleum into the United States, brought a private antitrust action for damages and injunctive relief against defendants, an American oil company and its officers.[1] The facts alleged were that plaintiff had obtained in 1969 a concession from the ruler of Umm al Quayayn, one of the Trucial States, granting plaintiff the exclusive right to explore for, extract and sell oil underlying the territorial and offshore waters of Umm al Quayayn.[2] In March, 1970, defendants, upon learning of the richness of plaintiff's concession area, "induced and procured" the ruler of the Trucial State, Sharjah, and later the government of Iran, to assert territorial ownership over the waters in which plaintiff was drilling.[3] The British Government, through its political representative in the Trucial States, forced the plaintiff to desist from operations until the claims of Sharjah and the Iranian Government could be resolved. Plaintiff contended that this activity constituted a conspiracy in restraint of trade within the meaning of the Sherman Act,[4] naming the states of Sharjah, Great Britain and Iran as co-conspirators with defendants. Defendants urged two arguments: first, that the court lacked jurisdiction because efforts to secure foreign executive or legislative action favorable to a monopoly were not within the contemplation of the antitrust laws; and second, that the act of state doctrine precluded

1. The suit originally included another petroleum company as co-defendant. The claim against it was dismissed for lack of personal jurisdiction under the Clayton Act, 15 U.S.C. § 15 (1970).

2. The mainland areas of Sharjah and Umm al Quayayn are situated contiguously at the southeastern end of the Persian Gulf. Plaintiff alleged that at the time of the concession Sharjah asserted a territorial waters domain of three miles, including a belt extending three miles seaward from the low water mark of Abu Musa.

3. The defendants, according to the complaint, had originally negotiated a concession from Sharjah similar to that of plaintiff's with Umm al Quayayn. Defendants thereupon "induced" Sharjah to assert territorial sovereignty to plaintiff's concession area. The British Government ordered Sharjah to desist. However, when defendants induced the Iranian Oil Company to assert Iranian sovereignty over the disputed area, the British Government restrained plaintiff from continuing operations until the conflicting claims could be resolved.

4. "Every contract . . . in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970).

an adjudication on the merits.[5] The District Court for the Central District of California, *held*, procurement of foreign governmental action tending to create a monopoly was not protected from antitrust jurisdiction, but the act of state doctrine barred a claim for damages for antitrust violations arising from a foreign sovereign's acts allegedly induced by defendants. *Occidental Petroleum Corp. v. Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Calif. 1971).

In *Underhill v. Hernandez*,[6] the Supreme Court first announced the principle that the courts of the United States will not sit in judgment on the acts of a foreign sovereign acting within its own territory. This policy, known as the act of state doctrine, has its "constitutional underpinnings" in the separation of powers doctrine.[7] As such, the doctrine prevents domestic courts from exercising jurisdiction whenever that exercise would infringe upon the executive's constitutional power to regulate foreign affairs.[8] Because of the restriction on the power of courts to adjudicate such issues, the act of state doctrine has proved one of the most formidable barriers to antitrust claims in which the activities of the defendant are carried on outside the United States.[9] Thus, in *American Banana Co. v. United Fruit Co.*,[10] the plaintiff alleged that the Costa Rican Government had seized plaintiff's railroad at defendant's instigation, contributing to defendant's monopoly in the banana trade.[11] The Supreme Court

5. The defendants asserted three other arguments: first, that the court lacked jurisdiction under § 1 of the Sherman Act because there was not an effect both direct and substantial on American commerce; second, that the case should be dismissed for failure to join Sharjah, Great Britain and Iran as indispensable parties under rule 19; and third, that the claim was non-justiciable because a boundary dispute was involved. The court held that it had jurisdiction of the claim in that the effect on American commerce was not "both insubstantial and indirect;" that Sharjah, Great Britain and Iran were not indispensable parties within the meaning of rule 19; and that the "boundary dispute" did not render the claim non-justiciable because plaintiff's action was in tort, and was not a suit to quiet title.

6. 168 U.S. 250 (1897).

7. Although the act of state doctrine is not constitutionally required, it is based on the separation of powers and it recognizes the executive's prerogative in the field of foreign relations. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

8. *Id.* at 432, 433.

9. *See generally* Haight, *Antitrust Laws and the Territorial Principle*, 11 VAND. L. REV. 27 (1957).

10. 213 U.S. 347 (1909).

11. A critical aspect of the facts was that no effect on American commerce was really established. The railroad was intended for the export of bananas, and so

held unanimously that the acts complained of were really those of the Costa Rican Government, and therefore, that the complaint set forth no cause of action since the claim was barred by the act of state doctrine.[12] By way of dictum, however, the Court also noted that because the defendant's acts were not illegal under Costa Rican law, they were not illegal at all; consequently, the acts were entirely exempt from American antitrust jurisdiction.[13]

Those cases that have attempted to limit the broad immunity granted antitrust defendants in *American Banana* have relied on the holding of *United States v. Sisal Sales Corp.*[14] *Sisal* involved a civil action under the Sherman Act in which it was alleged by the federal government that the defendants had procured Mexican legislation favorable to their monopoly on sisal importation into the United States.[15] The Supreme Court held that the mere fact that the defendants' control of production was aided by the discriminatory legislation of a foreign country did not prevent an application of the antitrust laws and an adjudication of the claim.[16] In addition, the fact that the defendants had done more than was required of them by the foreign legislation in question rendered the act of state doctrine inapplicable.[17]

The cases that have followed *Sisal* and distinguished *American Banana* have emphasized the discrepancy between "compulsory" and "permissive" legislation.[18] If it is the act of the foreign sovereign that

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the seizure was alleged to be merely a part of defendant's monopolization of banana exportation from Latin America. 213 U.S. at 355.

12. 213 U.S. at 359.

13. 213 U.S. at 357. This portion of the opinion has been distinguished in subsequent international antitrust cases as being limited to the facts of *American Banana. See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

14. 274 U.S. 268 (1927).

15. The legislation was in the form of discriminatory tax legislation enacted by the government of Mexico. By means of this legislation, Comisión Exportadora de Yucatan, a Mexican corporation, Sisal Sales Corp., an American corporation, and three American banks had sought to monopolize the world market in sisal. 274 U.S. at 274.

16. The court said in distinguishing *American Banana:* "The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about the forbidden results within the United States." 274 U.S. at 276.

17. 274 U.S. at 275.

18. *See, e.g.,* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962); Steele v. Bulova Watch Co., 344 U.S. 280 (1952); United States

has created the monopoly by "compulsory" legislation, then the holding of *American Banana* applies and the suit is barred. If, on the other hand, the act in question is really one of private parties who are acting independently and under cover of a "permissive" foreign law, then the holding of *Sisal* is applicable and immunity will not obtain.[19]

The decisions subsequent to *American Banana* and *Sisal*, however, have left unresolved the issue of whether the act itself of procuring foreign legislation favorable to a monopoly is outside the scope of the antitrust statutes.[20] The conclusion that such conduct is exempt is supported by two Supreme Court decisions[21] which hold that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take action regarding a law that might create a restraint or monopoly. A basic consideration behind these decisions appears to be the theory that the Sherman Act was not intended to create a barrier between law making institutions and the wishes of the electorate that they represent. If the Sherman Act were to prohibit such conduct, it would be regulating political, not economic, activity—"a purpose which would have no basis whatever in the legislative history of the Act."[22] An equally important factor contributing to the result reached in the two cases is that a contrary interpretation of the Sherman Act would raise grave constitutional questions regarding the right to petition government.[23]

There has been much speculation concerning the extent to which this doctrine, known as the *Noerr-Pennington* exception, extends to a defendant's attempt to influence foreign governments.[24] Some cases have held that immunity will not be granted except where the constitutional right to petition government is threatened.[25] On the

v. The Watchmakers of Switzerland Information Center, Inc., 168 F. Supp. 904 (S.D.N.Y. 1958).

19. *See generally* Fugate, *Antitrust Jurisdiction and Foreign Sovereignty*, 49 VA. L. REV. 925 (1963).

20. Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 131 (1967).

21. United Mine Workers v. Pennington, 381 U.S. 657 (1965), Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

22. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137 (1961).

23. 365 U.S. at 138.

24. P. AREEDA, ANTITRUST ANALYSIS ¶ 187 & n.206 (1967); Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967).

25. *See, e.g.*, Woods Exploration & Producing Co. v. Aluminum Co. of America 438 F.2d 1286 (5th Cir. 1971).

other hand, the decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*[26] is implied authority for the proposition that efforts to secure foreign governmental acts with respect to a monopoly are privileged. In the *Continental Ore* case, the defendant controlled a subsidiary corporation which had been appointed by the Canadian Government as wartime agent for the purchase of plaintiff's product. The complaint alleged that a conspiracy between the defendant and its subsidiary had caused plaintiff to be excluded from the Canadian market.[27] The defendant asserted immunity to antitrust jurisdiction on the ground that its activity consisted merely of an attempt to influence the Canadian Government by virtue of the controls it exercized over the government's purchasing agent. In denying immunity, the Court found that no solicitation of the Canadian Government was involved and held that the *Noerr-Pennington* exception did not apply to these facts.[28] Although the Court never reached the issue of whether *Noerr* would have applied if the defendant's position regarding its activities had been upheld, it has nevertheless been argued that the opinion reached the sub silentio conclusion that under appropriate findings of fact the exception would have been applicable.[29]

The instant court held that the *Noerr-Pennington* exception did not deprive it of jurisdiction under the Sherman Act. The exception, stated the court, should be construed strictly and should apply only to "avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition."[30] Additionally, the court noted that the *Noerr-Pennington* exception was based upon the theory that in a representative democracy, regulations should not be imposed that would restrict the access of constituents to the governmental institutions which represent them. Under such an interpretation, the exception would have little, if any, applicability to acts of foreign

26. 370 U.S. 690 (1962).

27. 370 U.S. at 695.

28. 370 U.S. at 702-08. In discussing the *Noerr* decision, the Court also said: "To subject [the defendants] to liability under the Sherman Act for eliminating a competitor from the Canadian market by exercise of the discretionary power conferred upon Electro Met of Canada by the Canadian Government would effectuate the purposes of the Sherman Act and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in *Noerr.*" *Id.* at 707-08. That the Court limited the *Noerr* decision to protecting constitutional freedoms supports the argument that *Continental Ore* did not consider the legal issue of whether the exception applied to foreign acts of state.

29. Graziano, *Foreign Governmental Compulsion as a Defense in United States Antitrust Law*, 7 VA. J. INT'L L. 100, 132 (1967).

30. 331 F. Supp. at 108.

governments. The instant court rejected defendants' contention that *Continental Ore* represented an implied extension of *Noerr-Pennington*, reasoning that an equally plausible interpretation of the *Continental Ore* decision was that a determination of the issue of immunity was unnecessary because of the facts involved. Since the interests to be protected by the *Noerr-Pennington* exception were dissimilar to the interests urged in the instant case, the court concluded on this issue that the exception did not apply.

Furthermore, the court held that the act of state doctrine precluded it from reaching plaintiff's claim on the merits. Citing *American Banana Co. v. United Fruit Co.*, the court ruled that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendants. In determining the applicability of *United States v. Sisal Sales Corp.* to the facts of the instant case, the court found that the acts complained of were clearly those of Great Britain, Sharjah and Iran, rather than those of the defendants. Additionally, the court found that the contention that the defendants were acting independently and under cover of foreign law was totally inconsistent with plaintiff's allegations that the states involved were co-conspirators with the defendants and that Sharjah was in violation of international law. The court pointed out that the act of state doctrine created a bar to any examination regarding the conduct of the states involved and, therefore, precluded a ruling on whether any of the states had violated international law. The court concluded that the holding of *American Banana* governed the outcome of the case and that plaintiff's complaint did not state a claim upon which relief could be granted.

The court's decision that the act of state doctrine precluded an adjudication on the merits of this suit should not be surprising in light of the facts and holding of *American Banana*. It would be difficult to imagine a more appropriate application of the act of state doctrine than in the instant case, where a foreign sovereign had asserted jurisdiction over the very territory from which the antitrust injury arose. More controversial, however, is the court's decision that the domestic right to solicit governmental action which might create a monopoly does not embrace efforts to secure action by a foreign state. Nonetheless, it is clear that in situations where the act of state doctrine applies, the issue of whether the *Noerr-Pennington* exception will obtain is moot. That doctrine deals solely with the matter of the court's jurisdiction, which is necessarily determined by a finding of whether the defendant's conduct is within the scope of the statute.[31]

31. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

The act of state doctrine, however, rests on entirely different grounds; it assumes that the power to adjudicate exists but dictates that this power ought not be exercised.[32] Thus, even if the court has jurisdiction, as in the instant case, the action will be barred under the holding of *American Banana* if the act solicited proves to be "compulsory." The result under this set of circumstances would be the same irrespective of whether an extension of the *Noerr-Pennington* exception were to be found. On the other hand, it is doubtful that an extension of the doctrine would be determinative of the defendant's immunity to antitrust liability even if the foreign act involved were "permissive" rather than "compulsory." In this situation, the holding of *Sisal* would govern the outcome of the case. Accordingly, whether or not the defendant's activity in procuring the foreign law in question were held to be privileged, he would remain subject to liability if he continued to monopolize under a "permissive" order or statute. Under the rule announced in *Sisal*, the defendant's liability is not premised on his obtaining discriminatory foreign legislation, but rather is founded on his going beyond the requirements of that legislation to monopolize voluntarily. However, since the holding of *Noerr* appears to be limited to situations that involve a law that might produce a restraint or monopoly,[33] the applicability of the doctrine would arise only in cases where the antitrust injury flows from the actions of the foreign state, and not from the defendant's conduct. In short, the *Noerr* exception would be relevant only under circumstances in which the decision reached in *American Banana* controls. Thus, as the instant case suggests, the issue of whether the exception carved out in *Noerr* extends to seeking or encouraging foreign governmental acts becomes largely, if not entirely, moot if there is a finding that the act of state doctrine applies.

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32. Although it has been asserted that the "Sabbatino Amendment," 22 U.S.C. § 2370(e)(2) (1970), sapped the act of state doctrine of its strength, courts have strictly construed the legislation and have not applied it to facts that do not precisely fit its statutory definition. *See, e.g.*, First National City Bank v. Banco Nacional de Cuba, 442 F.2d 530 (1971). The amendment provided that no United States court should "decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party . . . based upon . . . a confiscation or other taking . . . by an act . . . in violation of international law . . . ." The amendment itself was distinguished in the instant case.

33. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961).

CONSTITUTIONAL LAW—CITIZENSHIP—FIVE YEAR STATUTORY RESIDENCE REQUIREMENT AS A CONDITION SUBSEQUENT TO RETENTION OF CITIZENSHIP BY PERSONS BORN ABROAD NOT VIOLATIVE OF FIFTH AMENDMENT DUE PROCESS

Plaintiff, a United States citizen,[1] born in Italy of a father who was an Italian citizen and a mother who was a United States citizen, brought this action against the Secretary of State to enjoin enforcement of § 301 (b) of the Immigration and Nationality Act of 1952,[2] which would terminate his citizenship. Plaintiff contended that the statute's requirement of five year's residency in the United States for retention of United States citizenship violated his constitutional rights under the due process clauses of the fifth and fourteenth amendments since it removed his citizenship without a voluntary renouncement. The Government, contending it had the power to impose reasonable conditions for retaining citizenship on those persons who received their citizenship by statute, argued that § 301 (b) was a reasonable exercise of that power. The three judge district court found for the plaintiff and held the section unconstitutional.[3] On appeal to the United States Supreme Court, *held*, reversed. Congress may impose residence in this country as a reasonable condition subsequent to the grant of conditional citizenship upon persons who are not born or naturalized in the United States. *Rogers v. Bellei*, 401 U.S. 815 (1971).

1. Since his mother was an American citizen, appellee was afforded American citizenship at birth under the terms of 8 U.S.C. § 1401 (a) (7) (1970), which was made retroactive to include persons born at the time Bellei was born. This section provides citizenship for "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years."

2. 8 U.S.C. § 1401 (b) (1970). This section provides, "Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and preceeds the age of twenty-eight years."

3. Bellei v. Rusk, 296 F. Supp. 1247 (D.D.C. 1969).

The common law rule of *jus soli*, originally followed in the United States,[4] predicated citizenship[5] upon the place of birth. The extension of citizenship to foreign-born children whose American fathers had formerly lived in the United States was later accomplished by the adoption of the rule of *jus sanguinis*,[6] or right of blood. This alternative rule granted citizenship in the country of one's ancestors by descent or heritage. Subsequent legislative actions have merely assumed that Congress may impose reasonable standards upon such grants of derivative citizenship,[7] acquired through descent rather than place of birth. Additionally, the power of Congress to pass more rigid requirements[8] for the acquisition by other foreign born individuals of citizenship through naturalization has been upheld regularly by the Supreme Court.[9] Furthermore, Congress has passed legislation to revoke citizenship in certain cases.[10] These statutes have provided for the expatriation of citizens who became naturalized citizens of a

4. *See* 3 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 8 (1942); 3 J. MOORE, A DIGEST OF INTERNATIONAL LAW 276-82 (1906).

5. Although the terms "citizenship," "nationality" "citizen" and "national" are often used interchangeably, the terms "national" and "nationality" are broader and include individuals who are not included in the other terms. "National" includes both "citizens" and whose who, while not citizens enjoying full political and civil rights, owe allegiance to that particular country and are entitled to its protection. W. BISHOP, INTERNATIONAL LAW 394 (1962); 3 G. HACKWORTH, *supra* note 4, at 1.

6. Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604 (subsequently repealed). This rule is currently embodied in Act of June 27, 1952, ch. 447, § 301, 66 Stat. 235, *as amended,* 8 U.S.C. § 1401 (1970).

7. Children whose mothers were American citizens similarly were granted citizenship in 1934 under the terms of the Act of May 24, 1934, § 1, 48 Stat. 797. Although the provision granted citizenship at birth, a condition for continuing that citizenship was imposed—they had to return to the United States by the age of eighteen and execute a declaration of allegiance at twenty-one. This condition was later altered to the present standard which requires a five year term of continuous residence between the ages of fourteen and twenty-eight. 8 U.S.C. § 1401 (a) (7) (1970). The requirement of continuous presence is lightened somewhat by 8 U.S.C. § 1401 (b) (1970), which provides that absences of less than twelve months in the aggregate "shall not be considered to break the continuity of physical presence" required in subsection (a) (7).

8. *See* 8 U.S.C. §§ 1421-59 (1970).

9. Montana v. Kennedy, 366 U.S. 308 (1961); Weedin v. Chin Bow, 274 U.S. 657 (1927); United States v. Wong Kim Ark, 169 U.S. 649 (1898) develops basis for the common law rules in considerable detail).

10. Act of July 27, 1868, ch. 249, 15 Stat. 223. This statute failed to give express grounds for exercising the "natural and inherent right of all people," but declared that any administrative attempt to prohibit expatriation is invalid.

foreign state, of women who married a citizen of another country, and of those naturalized Americans who returned to their native countries for specified time periods. As recently as 1940, an entire series of "expatriating acts" was established,[11] and with only a few revisions, the series was reenacted as part of the Immigration and Nationality Act of 1952.[12] In recent cases, however, the Court has imposed constitutional limitations on the power of Congress to divest citizenship under these statutes. In *Schneider v. Rusk*,[13] the Court declared unconstitutional § 352 (a) (1) of the Immigration and Nationality Act of 1952, which provided that a naturalized U.S. citizen would lose his citizenship if he maintained his residence in the foreign state of his birth or nationality. The Court held that this section violated the naturalized citizen's fifth amendment due process rights because such foreign residency would have no similar effect on a native-born citizen. Previously, expatriation based upon desertion during wartime[14] or upon flight from the country to avoid military service had been declared unconstitutional.[15] In *Afroyim v. Rusk*,[16] the Supreme Court similarly rejected as unconstitutional the provisions of § 401 (e) of the Nationality Act of 1940, which provided that voting in a foreign political election would be an "expatriating act" resulting in the loss of United States citizenship. In reaching its decision in *Afroyim*, the Court attempted to establish the definitive rule that the fourteenth amendment precludes a loss of citizenship unless the citizen voluntarily relinquishes it.

In the instant case, the Court ruled, first, that since the plaintiff was not "born or naturalized in the United States," he was not within that class of citizens to whom the fourteenth amendment's protection attached. Rather, the Court found that plaintiff's status as a citizen was dependent upon statutory provisions and that the failure to satisfy these terminated his right to retain American citizenship.[17] The Court then turned to an examination of the legislation involved and found that since Congress had an appropriate interest in the problems of dual nationality and had arrived at a solution that was not unreasonable, the statute was constitutional. The Court reasoned that

11. Act of Oct. 14, 1940, ch. 876, 54 Stat. 1137, *as amended,* 8 U.S.C. §§ 1481 (a) (1) to (10) (1970).

12. Act of June 27, 1952, ch. 477, 66 Stat. 163, *as amended,* 8 U.S.C. §§ 1101-1503 (1970).

13. Schneider v. Rusk, 377 U.S. 163 (1964).

14. Trop v. Dulles, 356 U.S. 86 (1958).

15. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

16. Afroyim v. Rusk, 387 U.S. 253 (1967).

17. *See* cases cited note 9 *supra.*

Congress had established rigorous requirements for the naturalization of foreign born persons in plaintiff's class and that to hold the statute unconstitutional would result in frustration of congressional intent. Having concluded that plaintiff's citizenship status was not protected by the fourteenth amendment and that the Congress had not violated due process by imposing a five year residency requirement, the Court held the statute constitutional and denied relief to plaintiff. Justice Black, dissenting,[18] argued that "naturalization" was a generic term that would include those who, like the plaintiff, were granted citizenship through statutory provisions. Consequently, plaintiff's status as a citizen would be protected by the fourteenth amendment from congressional efforts to remove it. Justice Black pointed out that the question of the intent of the citizen, established as decisive in *Afroyim*, was not considered in § 301(b), and therefore "that section 301(b) is inevitably inconsistent with the constitutional principles declared in *Afroyim*."[19]

The instant decision is grounded in the distinction between the expiration of a conditional grant of citizenship and the expatriation of a citizen. The majority deemed this distinction to be crucial, since fourteenth amendment rights, as articulated in *Afroyim*, were felt to apply only to the expatriation of citizens. This distinction appears to be a retreat from the earlier absolute position on the inviolability of citizenship set forth in *Afroyim* and seems to reflect a changing attitude toward the balance between the rights of the individual and those of the state. This new distinction will create problems in at least two areas. First, considerable doubt remains regarding the constitutionally permissible scope and duration of conditions subsequent that may be imposed on individuals in plaintiff's class. Decisions indicating that there are few, if any, limits on congressional authority in this area[20] were all decided before *Afroyim*. The effect of *Afroyim* on these decisions remains unclear. Moreover, congressional authority to formulate rules for

18. Justice Black was joined by Justices Douglas and Marshall. Justice Brennan, joined by Justice Douglas, also dissented in an opinion in which he commented, "In light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons 'born or naturalized in the United States' includes those naturalized through an Act of Congress, wherever they may be at the time." 401 U.S. at 845.

19. 401 U.S. at 845.

20. United States *ex rel.* Harrington v. Schlotfeldt, 136 F.2d 935 (7th Cir. 1943), *cert. denied,* 327 U.S. 731 (1946) (naturalization revoked ten years after granted for conduct demonstrating lack of allegiance to the United States).

naturalization—the process which those in Bellei's class must now use to become citizens—is expressly granted in the Constitution.[21] Taken together, these two factors would seem to indicate that the creation of another definitive rule, as *Afroyim* was thought to be, is unlikely. Rather, the probable result will be challenges to selected provisions of the naturalization laws and a continuing review of this area of the law. The second major concern is the administrative feasibility of the new standards, which have yet to be formulated. Conclusively, whatever rules are adopted will be more difficult to apply than the absolute position that, according to Justice Black, was established in *Afroyim*. Furthermore, it is unclear whether the complex and interrelated problems of expatriation, dual nationality, statelessness and the conflicting requirements of various countries are capable of rational solution through the unilateral efforts of any nation, even when based on arguably sound constitutional standards. The Court was careful to note that the plaintiff would not be left stateless as a result of its opinion,[22] and this may be a basis for distinction in future cases. Authorities in this area have urged the adoption of a "dominant nationality" test as a possible solution to the problem of dual nationality.[23] They also have stressed the need for multi-national action to eliminate the problems of conflicting requirements for citizenship and statelessness.[24] The transnational significance of this

21. U.S. CONST. art. I, § 8.

22. 401 U.S. at 836.

23. Dual nationality, such as Bellei possessed prior to his twenty-third birthday, is a complex problem which, simply because of its dual nature, cannot be solved by the actions of any one government. Unilateral efforts to clear up the area in the past have resulted only in further confusion. *See* note 24 *infra*. Political considerations are also involved. This was recently demonstrated by the protests of various Arab leaders following the *Afroyim* decision that it reflected a desire on the part of the United States to encourage Americans to serve in the Israeli Army. N.Y. Times, Nov. 12, 1969, at 14, col. 1; *id.*, Oct. 19, 1969, at 18, col. 3.

24. Areas which are particularly troublesome seem to be marriage, naturalization in one country without consent of the citizen's former country, and claims concerning inheritance or property taxes on holdings of relatives in foreign countries. *See* Russell, *Dual Nationality in Practice–Some Bizarre Results*, 4 INT'L LAWYER 756 (1970). Mr. Russell concludes, "[D]ual nationality will be with us as long as some states look chiefly to the place of birth (jus soli), and others to descent (jus sanguinis). Also, we shall have it as long as some states do, and some do not, require their permission for their nationals to become naturalized elsewhere; and as long as some states do, and some do not, permit an automatic change of nationality by marraige." *Id.* at 763. One of the primary causes of the War of 1812 was the impressment of American sailors who had been

case, then, is its demonstration of the degree to which such essential rights as citizenship have become subject to attenuated legal subtleties due to the inability of the countries involved to formulate a rational and uniform standard. In view of the uncertainty presently surrounding these laws within the United States this would seem to be the appropriate time for the creation of such uniform standards.

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British subjects but whose naturalization was not recognized as effective by the Crown. A. BURT, THE UNITED STATES, GREAT BRITAIN, AND BRITISH NORTH AMERICA FROM THE REVOLUTION TO THE ESTABLISHMENT OF PEACE AFTER THE WAR OF 1812, at 305-16 (1940). Clearly, then, multi-national efforts are the only solution. Fortunately, there has been some effort in this direction. *See, e.g.,* Int'l L. Comm'n. Nationality Including Statelessness, U.N. Doc. A/CN.4/66 (1953); Convention on the Reduction of Statelessness. U.N. Doc. A/Conf.9/15 (1961). *See also* VISHNIAK, JEWS AND THE POST-WAR WORLD (1945); Griffin, *The Right to a Single Nationality,* 40 TEMP. L.Q. 57 (1966).

PRIVATE INTERNATIONAL LAW—SOVEREIGN IMMUNITY—EXECUTIVE SUGGESTION BINDING ON COURTS DESPITE CONTRACTUAL WAIVER OF IMMUNITY

Plaintiff, Isbrandtsen Tankers, sued the President of India in the United States District Court for the Southern District of New York for losses arising from allegedly unreasonable delays in unloading vessels.[1] In the charter party, India had agreed to settle all disputes in the New York district court.[2] After India had filed an answer to the complaint, the U.S. Department of State sent a formal suggestion of immunity to the district court. Plaintiff asserted that the court retained jurisdiction over the controversy in spite of the State Department's suggestion, reasoning that defendant had waived its immunity both in the charter party and by a general appearance in court. The district court found that the formal written suggestion of immunity by the State Department precluded any further inquiry and dismissed the case. On appeal to the United States Court of Appeals for the Second Circuit, *held*, affirmed. Courts are bound by a State Department suggestion of sovereign immunity, notwithstanding the commercial nature of the transaction, a contractual waiver of immunity, and the foreign sovereign's general appearance in court. *Isbrandtsen Tankers Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), *cert. denied*, 40 U.S.L.W. 3264 (U.S. Nov. 19, 1971).

The United States doctrine of sovereign immunity was first enunciated by Chief Justice Marshall in *The Schooner Exchange v. McFaddon*.[3] Reasoning that subjection to the jurisdiction of another state was incompatible with the doctrine of state sovereignty, the Court concluded that the dignity, equality and absolute independence of foreign states rendered them immune from the jurisdiction of the host state. Justice Marshall viewed territorial jurisdiction as an attribute of sovereignty; thus, when a friendly government entered the territory of another, an implied waiver of jurisdiction was said to be given by the host. If a suit were brought against the visiting sovereign, the State Department was to verify the waiver of jurisdiction by making a suggestion of immunity to the court in which suit was

1. Isbrandtsen tankers were being used to deliver emergency grain supplies to India to relieve a national famine caused by the drought in 1965 and 1966.

2. Paragraph 34 of the Charter Party provides: "Any and all differences and disputes arising under this Charter Party are to be determined by the U.S. Courts for the Southern District of New York, but this does not preclude a party from pursuing any *in rem* proceedings in another jurisdiction or from submission by mutual agreement of any differences or disputes to arbitration." Isbrandtsen Tankers Inc. v. President of India, 446 F.2d 1198, 1199 (2d Cir. 1971).

3. 11 U.S. (7 Cranch) 116 (1812).

brought.[4] The scope of *The Schooner Exchange* remained limited to military and diplomatic activities until the end of World War I. Then, in complicated litigation involving the Italian ship Pesaro, the Court adopted a theory of absolute sovereign immunity by extending immunity to trading vessels that were in the possession and service of a foreign sovereign, notwithstanding the fact that these vessels were engaged in commerce.[5] In *The Pesaro*[6] the State Department, in response to judicial inquiry, contended that when a foreign government enters into commercial activity it should not receive privileges given to public vessels of war because the United States does not demand privileges for its own commercial vessels.[7] Marking the only occasion when a court has not followed the suggestion of the State Department regarding sovereign immunity,[8] the Court in *Pesaro* reasoned that since a foreign sovereign was immune when maintaining her naval

4. *Id.* at 146. During this era most of a sovereign's extra-territorial activities were military or diplomatic. These activities, the Court noted, were manifestly different from a sovereign's trading in commerce. It implied, but did not hold, that the latter was not immune. *Id.* at 143.

5. In the original action, a libel in admiralty, the District Court for the Southern District of New York, in an unreported opinion, released the vessel Pesaro from arrest. The court took this action upon the "suggestion" of the Italian Ambassador, made directly to the court, that the vessel was immune from United States jurisdiction because it was owned by the Italian Government. The Supreme Court, hearing the case on direct appeal, reversed. Noting that a certificate of the Secretary of State acknowledging the Ambassador to be the accredited representative of Italy fell short of sanctioning immunity, the Court held that "the suggestion should come through official [executive] channels of the United States . . . ." 255 U.S. 216, 219 (1921). On remand, the district court, following advice from the State Department, overruled objections to United States jurisdiction and held that commercial vessels owned by foreign governments were not immune from arrest in admiralty. The Pesaro, 277 F. 473, 482-83 (S.D.N.Y. 1921) (Mack, J.). Due to procedural irregularities, this order was subsequently vacated by consent of the parties. *See* The Pesaro, 13 F.2d 468 (S.D.N.Y. 1926). The jurisdictional issue was raised for the final time in 1926 before Judge Augustus Hand who declined to follow Judge Mack's earlier opinion. Holding that commercial vessels owned by foreign governments were entitled to immunity, he dismissed the libel. The Pesaro, 13 F.2d 468 (S.D.N.Y. 1926). The Supreme Court heard the case on direct appeal and affirmed. Berizzi Bros. Co. v. Pesaro, 271 U.S. 526 (1926).

6. 277 F. 473 (S.D.N.Y. 1921).

7. *Id.* at 479-80, n.3.

8. *See* Rich v. Naviera Vacuba, S.A., 197 F. Supp. 710, 725 (E.D. Va. 1961). "[A]n examination of the opinions of the United States Supreme Court will reveal only one decision [*Pesaro*] in which the recommendation of the State Department was discarded."

force for the protection of her citizens, the sovereign was also immune while conducting trade for the commercial benefit of her people. The immunity of government trading vessels was confirmed in *Ex parte Peru.*[9] In that case, the State Department sent the Court a suggestion which recognized and allowed Peru's claim of immunity. The Court held that it was bound by the suggestion and dismissed the case.[10] Subsequently, in *Republic of Mexico v. Hoffman,*[11] the sovereign immunity doctrine was expanded by the Court's holding that it was bound to follow executive policy even in the absence of a suggestion of immunity, intimating that when the executive was silent the Court should not grant immunity.[12] In 1952, in order to guide the courts, the State Department released the so-called Tate Letter announcing a new policy of restrictive immunity. The Department indicated that it would henceforth deny immunity to private acts of a sovereign, but would continue to grant it to public acts.[13] The Tate Letter added confusion to the issue of the conclusiveness of the Department's suggestions, however, by stating that although such suggestions were not controlling, the courts should follow them.[14] Even greater difficulty was encountered in trying to distinguish between public and private acts of a state. Various tests were proposed, the most generally accepted being that which was established in *Victory Transport Inc. v. Comisaria General de Abastecimientes y Transportes,* limiting public acts to specified classes of activity.[15] Nevertheless, scholars have generally agreed that the public-private distinction is inadequate because of the variance in governmental involvement in economic

9. 318 U.S. 578 (1943).

10. The Court reasoned that any decision on the question of immunity would inevitably affect diplomatic relations and thereby lead the Court into a realm reserved exclusively to the executive branch by the constitutional distribution of powers. Furthermore the Court found itself bound to follow the suggestion in order to avoid embarrassing the executive branch in the management of foreign affairs. *Id.* at 582.

11. 324 U.S. 30 (1945), *aff'g,* 143 F.2d 854 (9th Cir. 1944), *aff'g sub nom.* The Baja California, 45 F. Supp. 519 (S.D. Cal. 1942).

12. 324 U.S. at 36-38. Immunity was denied because Mexico, although holding title to the vessel, did not have actual possession of it.

13. 26 DEP'T STATE BULL. 969 (1952). The Department's rationale was that the grant of absolute immunity to foreign governments in American courts was inconsistent with the submission of the United States to the jurisdiction of other countries. *Id.* at 984-85.

14. *Id.* at 985.

15. 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965). These classes are: (1) internal administrative acts, such as expulsion of an alien; (2) legislative acts, such as nationalization; (3) acts concerning the armed forces; (4) acts concerning diplomatic activity; (5) public loans. 336 F.2d at 360.

activities.[16] Compounding the difficulty is the fact that the Department may suggest immunity even when immunity has been waived[17] or when the activity is commercial in character. For example, in *Rich v. Naviera Vacuba, S.A.*,[18] a Cuban-owned ship was brought into United States jurisdiction by a defecting master and crew the day after Cuba had returned a hijacked commercial airliner to the United States.[19] When the Cuban-owned ship entered the territorial waters of the United States, the primary concern of the executive department was to return the ship as soon as possible in order to encourage the Cuban Government to return any other aircraft that might be hijacked and to prevent political flare-ups in both countries.[20] American creditors, however, managed to bring libels against the ship and its cargo. The State Department made a suggestion of immunity which was resisted in court by the creditors on the ground that it would be contrary to the policy enunciated by the State Department in the Tate Letter.[21] The court in *Rich*, despite the holding of absolute immunity in *Pesaro* and the Supreme Court's approval of the Tate Letter doctrine in *Republic of China v. National City Bank*,[22] held itself bound by the State Department's suggestion and, following *Peru* and *Hoffman*, dismissed the case.

16. *See, e.g.*, Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 225-26 (1951); Fitzmaurice, *State Immunity From Proceedings in Foreign Courts*, 14 BRIT. Y.B. INT'L L. 101, 123-24 (1933).

17. The Uxmal, 40 F. Supp. 258 (D. Mass. 1941) (immunity waived by a general appearance in court). A suggestion of immunity was made by the State Department. 3 U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 453-59 (1943).

18. 197 F. Supp. 710 (E.D. Va. 1961), *aff'd*, 295 F.2d 24 (4th Cir. 1961).

19. To obtain the release of the aircraft and to calm fears in both Cuba and the United States, the President had promised to return a Cuban patrol boat. The Cubans were fearful that the aircraft hijacking was an American ploy to justify a second attempt at the recently aborted Bay of Pigs invasion. N.Y. Times, July 30, 1961, at 1, col. 6. The American populace, on the other hand, initially was misled by the press into believing that the hijacking was carried out by a Castro agent in retaliation for the Bay of Pigs invasion. *See* U.S. State Dep't Press Release of Aug. 12, 1961, 45 DEP'T STATE BULL. 407 (1961).

20. N.Y. Times, Aug. 13, 1961, at 1, col. 6. Cuba was to return the plane and the United States was to grant sovereign immunity to the Cuban boat. Cuba said in its note of Aug. 4, 1961, that if the United States returned the boat, Cuba would reciprocate regarding American vessels and planes in a similar position in the future.

21. 197 F. Supp. at 724.

22. 348 U.S. 356 (1954), *rev'g*, 208 F.2d 627 (2d Cir. 1953), *aff'g*, 108 F. Supp. 766 (S.D.N.Y. 1952) (Court denied immunity from counter-claim when China sought remedy in United States courts).

The court in the instant case found that a decision to deny immunity could have serious international repercussions with which the judiciary was incapable of dealing. The court reasoned that the impact of these consequences required an extra-legal decision by the executive department before the court could consider the legal issues in the case. Therefore, when the executive submitted a suggestion of immunity, the court was bound to dismiss the case. Were it not to follow the suggestion, the court implied that it would be intruding into the sphere of foreign relations, an area reserved exclusively to the executive branch by the Constitution. The court reasoned further that India's waiver of immunity would neither reduce the possible international repurcussions of a judicial assertion of jurisdiction nor lessen the embarrassment to the executive department. Expressing sympathy for the plaintiff, the court nonetheless concluded that the politically motivated executive suggestion precluded its consideration of the legal aspects of the case, including the issue of waiver of immunity.

The conflict between the executive and judicial departments that is exemplified by the instant decision has plagued United States jurisprudence since the 1921 *Pesaro* case. Arguably, when the executive department commits the United States to an international position that precludes an individual's claim against a foreign government in the United States, the individual's right to due process is violated,[23] and the executive unconstitutionally abridges the judicial function.[24] On the other hand, if in the instant case the United States were to allow Isbrandtsen to assert its claim for damages against India, it would be inconsistent with the United States decision to give massive relief aid to India.[25] When such a conflict between the national interest and an individual's interest arises, the individual should be entitled to have his interests balanced against those of the

23. *See* M. Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

24. The State Department's power to decide that some claims against foreign governments will be entertained by the courts, and others will not, constitutes discretionary control of an individual's access to the courts which violates the principle of separation of powers. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Without this all the reservations of the particular rights or privileges would amount to nothing." THE FEDERALIST No. 78, at 100 (M. Dunne ed. 1901) (A. Hamilton).

25. It is inconsistent and clearly embarrassing for the executive to have said, on the one hand, that "America will do more than her part" in providing emergency food supplies, and, on the other hand, to allow Isbrandtsen to sue India for delaying its ships during the emergency. Speaking on India's emergency food-grain deficit resulting from the 1965 drought, the President in a joint

United States in a judicial proceeding. If the determination is made by the State Department, however, the individual's right is not protected because the Department does not weigh the legal merit of the claimant's position,[26] but rather asseses only the political consequences of denying immunity.[27] Text writers have justified the executive's power to make such determinations of immunity by arguing that the United States must speak "with only one voice" and that the determination must be made solely by the executive in the interest of furthering foreign relations.[28] Alternatively, several jurists have argued that the decision on the question of immunity should be made by the judiciary, rather than the State Department, because it is better equipped to develop principles of international law.[29] The proponents of this view contend that the Supreme Court should

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communique said, "The problem should be viewed not in isolation but in the context of an incipient world-wide food deficit, a challenge to humanity as a whole that merits the sustained and serious attention of all nations." 54 DEP'T STATE BULL. 604 (1966). Arthur J. Goldberg, U.S. Representative to the United Nations, said: "[W]e are fully prepared to participate in such an effort. India's problem is the world's problem. We believe that all men of good will have a stake in seeing that people do not starve. As President Johnson said last week: 'You can be sure that America will do more than her part.' " 54 DEP'T STATE BULL. 385 (1966).

26. RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 58, comment b at 201 (Tent. Draft No. 2, 1958). The Department usually conducts an *ex parte* hearing to decide whether to grant immunity.

27. P. JESSUP, THE USE OF INTERNATIONAL LAW 77, 78-83 (1959).

28. M. Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?* 48 CORNELL L.Q. 461, 462 (1963). Professor Cardozo contends that in practice the question of immunity depends upon the demands of international comity, and the judicial process is unsuited for determining the urgency of this demand. *Id.* at 471-72. *See also* Bilder, *The Office of Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 673-74 (1962).

Cardozo concedes that disposition of a citizen's claim by a State Department suggestion apparently violates the individual's right to due process since he is denied the opportunity to present his case. But Cardozo would remedy the present situation by providing for a hearing at the time the Department decides on the request for immunity. M. Cardozo, *supra* note 23.

29. *E.g.*, JESSUP, *supra* note 27, at 78-79. Judge Jessup contends that the determination should be made judicially on the basis of international legal principles and not on the varying needs of diplomacy or national policy. Once the court has recognized that the problem requires the application of international law, it could use the same sources of law used by the Court of International Justice. Jessup resisted suggestions that the State Department conduct hearings in determining immunity because the Department then would be exercising the

repudiate the *Ex parte Peru* doctrine[30] of the conclusiveness of the executive suggestion and, instead, seek non-obligatory executive advice on foreign policy. The instant case provided the Court with an appropriate vehicle to do so, but the Court wisely denied certiorari. It would appear that a reversal of *Isbrandtsen* would merely substitute one unworkable alternative for another; for a solution that places the decision totally in the hands of either branch of government is unsatisfactory. An organizational scheme is required which will provide for the cooperation of governmental branches, each making the decisions appropriate to its own function.[31] To obtain this result requires the enactment of positive law. Legislative provision for substitution of the United States as defendant in limited situations appears necessary to ensure fairness to private parties and to maintain a separation of powers of the judiciary and executive without diminishing the power of either. This could be achieved by providing that courts determine the question of immunity on the basis of international law, seeking the advice of the State Department concerning the interest of the United States in foreign relations. Under this proposal, once an individual has obtained jurisdiction under any of the present means, the executive would be given the option to intervene and substitute the United States as defendant, rendering itself liable to pay any judgment.[32] Consequently, a grant of

judicial function, and because the courts could do the job better and simultaneously contribute to international principles of law. *Id.* at 82-83; *accord*, Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 99 (1953); Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U.L. REV. 901, 906 (1969); Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101, 1123 (1960); Dickinson, *The Law of Nations as National Law: "Political Questions"*, 104 U. PA. L. REV. 451, 476-79 (1956).

30. Note 10 *supra* and accompanying text.

31. Professor Lowenfeld proposes to limit the jurisdiction of United States courts and to eliminate the requirement of attachment and personal process prior to taking jurisdiction. Such a proposal would tend to remove the executive from the decision on immunity. Lowenfeld, *supra* note 29. This solution is not desirable because it diminishes the power of the courts in dealing with claims against a foreign country. Without the ability to attach a vessel, for example, the court may be unable to execute its judgment.

32. Substitution might be inappropriate in cases involving a foreign government's expropriation of property abroad owned by an American citizen. A shipping contract between an individual and a foreign government is distinguishable from a foreign government's expropriation of private property. Because of the element of trade it is conceivable that substitution would apply in the former case but not in the latter. In addition, restrictions would have to be placed on the substitution practice to prevent fraud and misuse of the device.

immunity by the State Department would not deprive the plaintiff of his right to due process for he would still have the opportunity to litigate his claim. Regardless of whether the Department grants immunity, the court would decide the case, perhaps even granting immunity. The executive would be given a greater freedom in the conduct of international affairs since it would be able to intervene in the service of process, receive process itself, and completely insulate a foreign government from suit.[33] It would become a function of the executive to prevent the courts from exercising jurisdiction in a manner that would disrupt foreign relations. The provisions for the payment of judgments by the United States Government varies significantly from present practice and would undoubtedly be the most difficult suggestion to implement. It can be justified, however, on the ground that when immunity is granted by the Department, it is for the benefit of the nation. When the United States is substituted, it pays a judgment only after the plaintiff has obtained jurisdiction over the foreign government and then only after testing the merits of the plaintiff's claim in court. The United States may either hold the judgment for collection at a later time or consider it an expense of maintaining a viable foreign policy.[34] In addition, the proposed scheme would avoid a conflict in the roles of the two branches and would enable the courts to develop a law of sovereign immunity under a more orderly process. Under the present state of the law, a businessman cannot predict whether he will be able to enforce his contract with a foreign country, thereby necessarily increasing the risks (and costs) of doing business overseas and discouraging foreign trade. This negative effect is contrary to the United States policy of increasing foreign trade in order to improve its balance of payments.[35] Under the substitution proposal, foreign trade would be encouraged because individuals would be able to rely on an established body of law and the executive would not be able

33. The executive's need for this ability was well demonstrated in the *Rich* case. With full scale war hopefully a thing of the past, political and economic maneuvering become vital to the national interest and the proposed power of the executive would be more essential than the analogous national emergency powers granted in 50 U.S.C. § 404 (1970).

34. The Government cannot make available unlimited funds to pay these judgments, consequently the executive is limited somewhat in its choice to grant immunity. But this deficiency is minor compared to the inequity of peremptorily dismissing a plaintiff's claim for the benefit of United States foreign relations.

35. 60 DEP'T STATE BULL. 96 (1969). A goal of the 1970 budget was to "assure a favorable long-range impact on our balance of payments by financing the growth of United States exports and by building new markets for our exports through our aid."

summarily to conclude an individual's claim. In the absence of legislative action on this problem, however, it appears that possibly unconstitutional effects upon American claimants will continue, and they will be bound to bear the loss.

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