Catholic University Law Review

Volume 15 | Issue 2 Article 6

1966

Sovereign Immunity – The Restrictive Theory and Surrounding Jurisdictional Issues

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Comment/Sovereign Immunity—The Restrictive Theory and Surrounding Jurisdictional Issues

"The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power."[1]

I. Restrictive Theory

Inherent in the concept of sovereignty is the notion that every nation has exclusive and absolute jurisdiction over all matters within its borders. This is equally true for all nations regardless of size or political motivations. Conceptually, therefore, the complete sovereignty of a nation may not be abridged without its assent, express or implied.[2]

There is no reason in logic why a foreign sovereign should not be subject to the jurisdiction of another sovereign within the latter's borders, except as Chief Justice Marshall states:

> This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, *would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.*[3]

Custom, usage, and expediency,[4] however, require on occasion that a sovereign relinquish within its borders a portion of its sovereign power. That the person of a foreign sovereign is by custom "immune" from arrest within the borders of another is not open to doubt. The sovereign's representative, his ambassador, is likewise immune from process,[5] as are his ships of war.[6]

Whether or not it is politically expedient to exempt a foreign sovereign from the jurisdiction of the courts seems best determined then by the political branch of the government, namely the executive. It seems most appropriate that that "department of the government charged with the conduct of our foreign relations"[7] decide whether immunity should be granted a foreign sovereign.

[1] The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812).
[2] *Ibid.*
[3] *Supra* note 1, at 137 (Emphasis added).
[4] Chief Justice Marshall phrases it "common interest impelling them to mutual intercourse." *Ibid.*
[5] Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D. C. Cir. 1965).
[6] *Supra* note 1.
[7] Republic of Mexico v. Hoffman, 324 U. S. 30, 35 (1945).

In *Republic of Mexico v. Hoffman,* the court declared:

> It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.[8]

Traditionally the concept of sovereign immunity has been absolute. It has been deemed always politically expedient (by the courts as well as the executive) to exempt a foreign sovereign from the jurisdiction of a domestic court.[9] Of course, this tradition stems from the premise that sovereigns, be they kings, presidents or generals, only perform, from without their borders, those functions peculiar to a sovereign. These functions usually include the universally acknowledged responsibilities of state regarding diplomatic activity. Professor Friedman, however, in noting the trend away from the absolute theory of immunity states that these changes "stem from a shift in the practice of modern states regarding the traditional distribution of functions between governments and private citizens."[10] In other words, a sovereign buying commodities from a private person and then reselling them to its nationals for profit may not be consistent with the traditional concept of the function of a sovereign. Therefore, since "international law moves today on so many levels, it would be surprising indeed if the traditional principles of inter-state relations developed in previous centuries were adequate to cope with the vastly more divergent subject matters of international law of the present day."[11]

It is the purpose of this comment to discuss the current theory of sovereign immunity of the United States enunciated in the Tate Letter[12] and its application in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes,*[13] and *Petrol Shipping Corp. v. The Kingdom of Greece, Ministry of Commerce, Purchase Directorate.*[14] This discussion will center around the facts of *Petrol,* which are analogous to *Victory,* and the jurisdictional issues that emerge.

[8] *Ibid.*

[9] See *e.g.*, The Schooner Exchange, *supra* note 1; Berizzi Bros. Co. v. S. S. Pessaro, 271 U.S. 562 (1926); Puente v. Spanish National State, 116 F.2d 43 (2d Cir. 1940), *cert. denied,* 314 U.S. 627 (1941); Adatto v. United States of Venezuela, 181 F.2d 501 (2d Cir. 1950) and also Kahan v. Pakistan Federation, [1951] 2 K.B. 1003.

[10] Friedman, *Some Impacts of Social Organization on International Law,* 50 AM. J. INT'L. L. 475, 478 (1956).

[11] *Id.* at 477.

[12] 26 DEPT. STATE BULL. 984 (1952). In the Tate Letter, the State Department stated that it would recognize the plea of sovereign immunity only in controversies involving the public acts, *jure imperii,* of the sovereign but would not recognize such pleas of immunity when the controversy involved a commercial or private act, *jure gestionis,* of the sovereign. The Tate Letter has been commonly recognized as an endorsement of the restrictive theory of sovereign immunity.

[13] 336 F. 2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934 (1965).

[14] 37 F.R.D. 437 (S.D.N.Y. 1965).

The Kingdom of Greece, through its Ministry of Commerce, Purchase Directorate, chartered the vessel, Atlantis, from the Petrol Shipping Corporation of Delaware to transport grain to Piraeus, Greece. The grain was purchased by the charterer from the United States under the credit provisions of the Agriculture Trade Development and Assistance Act of 1954, as amended.[15] The charter provided that disputes between the parties should be arbitrated by three arbitrators in New York, one to be appointed by each party, and the third to be chosen by the two appointees. The arbitration clause also provided that, for the purposes of enforcing any award, "this agreement may be made a rule of the Court."

Petrol Shipping Corporation claimed that the Atlantis was damaged at the discharge berth in Piraeus through the failure of the Kingdom of Greece to provide the safe berth required by the charter party and demanded that the charterer appoint an arbitrator to settle the dispute. When the Kingdom of Greece declined, the shipowner appointed its arbitrator and, in the District Court for the Southern District of New York, moved for an order pursuant to § 4 of the Federal Arbitration Act,[16] directing the charterer to appoint an arbitrator and proceed with arbitration. Service of process upon the Kingdom of Greece was purportedly effected by one Lillian F. Clark, who swore that she had deposited "a true copy [of the notice of motion] thereof securely enclosed in a post-paid wrapper in a Post Office box ... at No. 26 Broadway, New York 4, N. Y. ..."[17] The notice of motion was mailed to the Ministry of Commerce, State Purchase Directorate, c/o Greek Government Foreign Trade Administration in Washington, D. C., the alleged attorneys for the Kingdom of Greece, in Washington, and also to the Kingdom of Greece, Ministry of Commerce, Purchase Directorate at 30 Rockefeller Plaza in New York. Upon the Greek ambassador's suggestion that the district court lacked in personam jurisdiction over the sovereign, Judge Dawson dismissed the petition to compel arbitration.[18]

The Court of Appeals for the Second Circuit affirmed the judgment of the district court[19] on the authority of *Puente v. Spanish National State*.[20] Judge Clark, the author of the *Puente* decision dissented, however. He was of the position that the Tate Letter of 1952, announcing the State Department's

[15] 68 Stat. 454, 7 U.S.C. §§ 1691-1724 (1958), as amended, 7 U.S.C. §§ 1691-1736 (Supp. V. 1964).

[16] 9 U.S.C. § 4 (1958).

[17] Brief for Appellant, Appendix, Second Appeal, pp. 19-21, Petrol Shipping Corp. v. The Kingdom of Greece, Ministry of Commerce, Purchase Directorate, *decision pending*, Docket No. 29935, 2d Cir. 1966.

[18] This decision is not reported. See Brief for Appellant, Appendix, *supra* note 17, at pp. 28-29 for the text of the decision.

[19] 326 F.2d 117 (2d Cir. 1964). This appeal was decided by a panel consisting of Judges Swan, Clark and Marshall.

[20] 116 F.2d 43 (2d Cir. 1940), *cert. denied*, 314 U.S. 627 (1941).

adoption of the restrictive theory of sovereign immunity, left the 1940 *Puente* decision, decided on the basis of the absolute theory of sovereign immunity, without force. Accordingly, Judge Clark would have reversed and remanded the case in order to ascertain the view of the State Department regarding the proper characterization of the sovereign act (public or private) in this case.[21]

Upon rehearing en banc, the court altered the decision of the panel, vacated the judgment of the district court, and remanded the case for further development of the facts.[22] At this time the charterer requested the State Department to recognize its assertion of sovereign immunity. The State Department refused to recognize such sovereign status and characterized the acts of Greece as private.[23]

Thereafter, while this case was pending in the district court on remand, the Second Circuit decided *Victory* which held an agency of Spain subject to arbitration under the Federal Arbitration Act. In light of the *Victory* case and the position of the State Department in this controversy, the district court granted the shipowner's motion to compel arbitration.[24]

The case has been appealed again by the charterer and at this writing is pending final determination by the Second Circuit after having been briefed and argued.

The district court's decision in *Petrol* rested precisely on the holding and rationale of *Victory,* and the Second Circuit will most likely follow its prior *Victory* opinion and affirm. The soundness of *Victory* generally has not been questioned by the commentators[25] but has been enthusiastically welcomed. Perhaps the result should be welcomed, but the rationale of the opinion is subject to doubt.[26]

The primary contention of the Comisaria General in *Victory* was that, as an arm of the sovereign government of Spain, it was immune from suit under well established principles of international law, without the consent it de-

[21] *Supra* note 19, at 118-119.

[22] 332 F.2d 370 (2d Cir. 1964).

[23] The letter from the State Department expressing its views in this manner is set out in Brief for Appellee, Second Appeal, pp. 6a-7a, Petrol Shipping Corp. v. The Kingdom of Greece, *decision pending*, Docket No. 29935, 2d Cir. 1966.

[24] *Supra* note 14.

[25] See *e.g.*, Comments, *Judicial Adoption of Restrictive Immunity for Foreign Sovereigns*, 51 VA. L. REV. 316 (1965), and *Sovereign Immunity Restricted To Noncommercial Activity*, 63 MICH. L. REV. 708 (1965); Note, 53 GEO. L. J. 837 (1965).

[26] In Memorandum for The United States As Amicus Curia on petition for a writ of certiorari, p. 5 n. 4, Comisaria General De Abastecimientos y Transportes v. Victory Transport Inc., 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), the Solicitor General tactfully understates:

> Although we agree with the courts below that the petitioner [Comisaria General] was not entitled to prevail in this action, we do not at this stage express an opinion on the Second Circuit's particular formulation of a restrictive theory of sovereign immunity or even upon the distinction between governmental acts and commercial or private acts.

clined to accord. The court acknowledged the great deal of precedent supporting the Comisaria General's position, citing the landmark case of *The Exchange*. The court however did not concern itself with the only decision by the Supreme Court on the restrictive theory of sovereign immunity, *Berizzi Bros. Co. v. S. S. Pesaro*,[27] where the Court held that:

> a ship owned and possessed by a foreign government, and operated by it in the carriage of merchandise for hire, is immune from arrest under process based on a libel *in rem* by a private suitor in a federal district court exercising admiralty jurisdiction.[28]

The court noted the apparent trend in foreign countries to restrict sovereign immunity[29] when the sovereign's acts are more "private" than "public". "Because of the dramatic changes in the nature and functioning of sovereigns ... the wisdom of retaining the doctrine [of absolute theory of immunity] has been cogently questioned."[30] The *Victory* court was also heavily influenced by the Tate Letter saying: "Through the 'Tate Letter' the State Department has made it clear that its policy is to decline immunity to friendly sovereigns in suits arising from private or commercial activity."[31] In differentiating between acts private, *jure gestionis* and acts public, *jure imperii*, the court observed that the Tate Letter offered no guidelines. It specifically rejected as "unsatisfactory" the "nature of the transaction" and "purpose of the transaction"[32] tests for determining whether the acts are private or public.

The court then formulated a very narrow test when it declared "we are disposed to deny a claim of sovereign immunity that has not been 'recognized and allowed' by the State Department unless it is plain that the activity in question falls within one of the categories of *strictly political or public*

[27] *Supra* note 9.

[28] *Supra* note 9, 271 U.S. at 570. The Court's omission of *Berizzi* is not altogether unjustifiable for in *Republic of Mexico v. Hoffman*, *supra* note 7, at 39, Justice Frankfurter, joined by Justice Black, in a concurring opinion, stated that "If this be an implied recission from the decision in *Berizzi Bros. v. The Pesaro*, I heartily welcome it." However, in *Hoffman*, *supra* note 7, at 35 n. 1, the majority stated "we have no occasion to consider the questions presented in the *Berizzi* case." The status of *Berizzi* does seem tenuous though it has never been overruled.

[29] Representatives of twenty nations, not including the United States and the Soviet Union, met in Brussels in 1926 (the year *Berizzi* was decided) and signed a convention limiting sovereign immunity in the area of maritime commerce to ships and cargoes employed exclusively for public and noncommercial purposes. An English translation by the State Department of the provisions of the treaty may be found in ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS, 303-308 (1933).

[30] *Supra* note 13, 336 F.2d at 357.

[31] *Supra* note 13, 336 F.2d at 359.

[32] The sovereign act is public when the "nature of the transaction" is such that it is an activity that could not be performed by individuals. It has also been suggested that the sovereign act be characterized as public when the object of the performance is public in character. "But this [latter] test is even more unsatisfactory, for conceptually the modern sovereign always acts for a public purpose." *Ibid.*

acts about which sovereigns have been traditionally quite sensitive."[33] These five sensitive areas are "internal administrative acts," "legislative acts," "acts concerning the armed forces," "acts concerning diplomatic activity," and "public loans."[34] It was the court's opinion that if this government wished to expand or contract these areas it was for the State Department to do so, not the courts. On the basis of this test, the Comisaria General's acts were characterized as private and thus sovereign immunity was denied.

The court buttressed its conclusion by stating that this charter party for the transportation of wheat had all the earmarks of a typical commercial transaction because Spain used *private channels* to procure the wheat.

But it may be asked, what are *public channels*? If the sovereign needs food for its people in time of national emergency, must it build its own ship? Is it not required to perform the duty in the most economical manner which, except in rare cases, is through "private channels?" Must it subject itself, as a sovereign, to the jurisdiction of the courts of the United States because the activity does not fit into one of the five categories? At first one might say that it need merely go to the State Department and, in such circumstances, immunity will be granted. Perhaps so, but as the court noted in *Victory*, what happens when the sovereign fails to request immunity? The recent en banc decision in *Petrol* seems to indicate what the Second Circuit will require of the sovereign. It reversed and vacated the district court decision and remanded for further development of the facts—meaning that the sovereign should request immunity from the State Department. If the sovereign must procure prior State Department approval for asserting immunity in the courts, this should be made explicit either by Congress or the Supreme Court. The indirect procedure devised in *Petrol* is not an orderly and expeditious treatment of sovereigns. If this is not to be the policy of the courts, then the five category test should be broadened perhaps by adding a better defined "public purpose" test. For example, immunity would be granted when the transaction in question either comes within the scope of the five categories or, *when the purpose of the transaction is not substantially for the mere economic profit of the nation.*

The unprecedented adoption of the restrictive theory of sovereign immunity by the Second Circuit in *Victory* as contrasted with the specific rejection of that theory by the Supreme Court in *Berizzi* creates an uncertainty that should be clarified by the Court.

Another subsidiary issue emerging from *Petrol* and *Victory* against the background of *Berizzi* is whether a distinction is to be drawn between actions in rem and in personam when applying the theories of sovereign immunity.

[33] *Supra* note 13, 336 F.2d at 360 (Emphasis added).
[34] *Ibid.*

Many courts[35] have held that the status of a sovereign defendant is an initial bar to the court's acquiring in personam jurisdiction; that the court does not concern itself with the nature of the transaction because it has no jurisdiction. It is said that only in an action in rem where jurisdiction[36] is based on the seizure of the res may the court then examine the nature of the transaction to determine whether or not to *impose liability* on the sovereign or allow him the *defense* of sovereign immunity. It is the position of the Attorney General that this distinction is unsound.[37] Again, this issue merits Supreme Court review.

II. Consent to Jurisdiction

Notwithstanding the restrictive theory of sovereign immunity, the argument is advanced that, in any event, the Kingdom of Greece, in *Petrol*, consented to jurisdiction in New York by virtue of the Arbitration Clause in the charter agreement. This was the holding in *Victory*, affecting Spain, where the court stated:

> We hold that the district court had *in personam* jurisdiction to enter the order compelling arbitration. By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity.[38]

Such an arbitration clause had previously been held to confer jurisdiction upon United States courts over foreign *corporations* who had entered into contracts with United States nationals.[39] It took little effort for the court in *Victory*, which concerned the Spanish Ministry of Commerce, to draw the analogy, when it stated:

> Unless the arbitration clause in this charter differs significantly from the arbitration clauses specifically enforced in the Farr and Orion cases, it is clear that the court has *in personam* jurisdiction, for we see no reason to treat a commercial branch of a foreign sovereign differently from a foreign corporation.[40]

In effect, therefore, the sovereign is held to have consented to the jurisdic-

[35] See cases cited *supra* note 9.

[36] *But see Berizzi, supra* note 9, at 576, where the Court held "that the general words of section 24, clause 3, of the Judicial Code investing the district courts with jurisdiction of 'all civil causes of admiralty and maritime jurisdiction' must be construed . . . as not intended to include a libel *in rem* against a public ship . . . of a friendly foreign government."

[37] *Supra* note 26, at p. 11.

[38] *Supra* note 13, 336 F.2d at 363.

[39] See Farr & Co. v. Cia. Intercontinental De Navagacion, 243 F.2d 342 (2d Cir. 1957), and Orion Shipping and Trading Co. v. Eastern States Petro. Corp. of Panama, 284 F.2d 419 (2d Cir. 1960).

[40] *Supra* note 13, 336 F.2d at 363.

tion of United States courts prior to any opportunity to assert its immunity regardless of any State Department ruling after the fact. On its face, the holding in *Victory* can only mean that the State Department's ruling granting immunity would be meaningless if a sovereign had previously agreed to arbitrate.

The corporations in the *Farr* and *Orion* cases, although foreign, were not branches of government and thus not in any circumstances entitled to sovereign immunity. The analogy drawn between those private enterprises and any sovereign entity is somewhat novel, as well as reminiscent of the fictions heretofore "evolved" by our courts to reach particular defendants. These hardly ever provide an adequate answer, rather they simply change the nature of the question! If it is admitted that a foreign sovereign is generally immune from suit in our courts, would it not be a better solution to the problem of immunity to base that determination solely upon the State Department's decision, rather than upon talk of prior "implied waiver"? In this fashion the executive branch of our government would retain the ultimate control over international relations which the courts keep repeating it should have.[41]

The situation in the *Victory* and *Petrol* cases is not to be confused with that in *National City Bank v. Republic of China*.[42] There, the sovereign was held not to be immune from defendant's counterclaim by virtue of the fact that the sovereign had initiated the suit in the United States courts thereby taking advantage of the judicial system. This, the Court stated, amounted to a consent to jurisdiction for whatever rights the defendant wished to assert, by way of a defense or a counterclaim. This result seems highly desirable from the point of view that the court's jurisdiction over the sovereign was wholly perfected when it sought redress therein, and that this judicial jurisdiction is not "severable", so to speak, at the whim of any plaintiff. Consent in the *Republic of China* case is by no means intellectually repugnant; on the contrary, there is a clear and unequivocal act submitting to jurisdiction.

On the other hand, consent in the instant case is extracted from the arbitration clause, and is fictional to the same extent that the "absent motorist" statutes exemplified.[43] It is to be doubted whether it is wise for our courts to engage in the same fictionalization when dealing with sovereign states as with domestic litigants. In holding that a sovereign entity, by agreeing to submit charter party disputes to arbitration in New York, has agreed to submit to the in personam jurisdiction of a federal court in New York, the court

[41] *Supra* note 7.
[42] 348 U.S. 356 (1955).
[43] Hess v. Pawloski, 274 U.S. 352 (1927). The interests are, of course, dissimilar, but the judicial process is the same.

in *Victory* rendered a decision of major significance in international law; one without precedent in the United States, and contrary to decisions of the English courts.

The pertinent English decisions hold that a foreign sovereign cannot be said to have consented to a court's in personam jurisdiction solely by reason of a prior arbitration agreement made with a private party. To be effective, a sovereign's consent to such jurisdiction must be *coram judice,* addressed to the court at or after the institution of the suit in question. This doctrine is rooted in the decision of *Mighell v. Sultan of Jahore,*[44] where the plaintiff brought her action against the Sultan for breach of promise of marriage. The Sultan had been travelling incognito using the alias "Albert Baker", of which deception the plaintiff was unaware at the time the promise was made. In determining whether the sovereign had elected to submit to the court's jurisdiction Lord Esher held that the election must be made

> when the court is about or is being asked to exercise jurisdiction over him, and not any previous time . . . . It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not the Court has no jurisdiction.[45]

In the same case, Lopes, L. J., added:

> In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court . . . . That he intends to waive his rights by taking an assumed name cannot be inferred.[46]

Finally, Kay, L. J., stated, "I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction."[47]

The foregoing doctrine of the *Sultan of Jahore* case is applied, in the context of an arbitration agreement, by the House of Lords in *Duff Development Co. v. Government of Kelantan.*[48] In the latter case, the sovereign had granted to the company certain rights of mining, timber cutting and road building to be exercised within Kelantan. The agreement contained an arbitration clause. Disputes arose and were submitted to an arbitrator pursuant to the contract. The arbitrator made an award in favor of the company and directed the Government of Kelantan to pay. In an English court,

[44] [1894] 1 Q.B. 149.
[45] *Id.* at 159-160. This case is decided under the "absolute theory" of sovereign immunity.
[46] *Id.* at 161.
[47] *Id.* at 163-164.
[48] [1924] A.C. 797.

the sovereign moved to set aside the award on the ground of error in law appearing on its face. The motion was denied. Thereafter, upon the company's application, a court order was entered to enforce the award, which order was then set aside on the ground that the courts of England had no jurisdiction over the sovereign state of Kelantan. The main thrust of the company's argument was that Kelantan had waived its immunity, first, by assenting to the arbitration clause, and secondly, by moving to set aside the award. Viscount Cave was of the opinion that an agreement to submit to jurisdiction was not equivalent to actual submission. He went on to state:

> If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court.[49]

With respect to the question whether, by applying to set aside the award, the sovereign impliedly submitted to jurisdiction[50] for its enforcement, the court answered in the negative. The application for leave to enforce the award is held to be a new and distinct proceeding from the sovereign's motion to set it aside. In the same decision, Viscount Finlay said:

> There is nothing in an agreement for settlement by arbitration to import a waiver of the right of a sovereign power to refuse the jurisdiction of the English Courts in an action upon the award.[51]

Lord Sumner stated that before jurisdiction could attach it was "necessary to find something voluntarily done by the foreign sovereign in or towards the Court and to find in what is done something that really evinces an intention to submit. This seems to me to be beyond the limits of *presumption* or *fiction*..."[52]

The *Kelantan* case probably goes further in applying immunity than our courts would do today in light of the *Republic of China* case, *supra*. Nevertheless, the principle is still set out clearly in the English decision that agreeing to submit to arbitration is not equivalent to actual submission to jurisdiction.

More recently, the English courts, in *Kahan v. Federation of Pakistan*,[53] have again re-affirmed their position upon the matter of consent. Here the plaintiff had contracted with Pakistan to sell it armored tanks and upon non-payment sued Pakistan for breach. Their contract contained the following clause

[49] *Id.* at 810.
[50] *Cf.* National City Bank v. Republic of China, 348 U.S. 356 (1955).
[51] *Supra* note 48 at 817.
[52] *Supra* note 48 at 829 (Emphasis added).
[53] *Supra* note 9.

> The interpretation and effect of this agreement shall be construed and governed by English law and for the purposes of proceedings this agreement shall be deemed to have been made in England and to have been performed there. The Government agrees to submit for the purposes of this agreement to the jurisdiction of the English courts. Any legal proceedings and any notices under this agreement requiring to be served on the vendor or on the Government respectively shall be deemed properly served, if served on the vendor at the address given at the heading of this agreement or on the High Commissioner for Pakistan in the United Kingdom at . . . London . . . .[54]

The action was dismissed with respect to Pakistan on the ground of sovereign immunity.[55] In its appeal plaintiff argued that unless it were allowed to proceed against Pakistan the aforementioned clause of their contract would be defeated. Plaintiff also submitted, "that if such an agreement does not constitute a submission to the jurisdiction, no agreement ever can, and no submission to the jurisdiction could be of any value, if it can be resiled from at any time."[56] The court dismissed plaintiff's appeal, resting its decision upon the *Duff* case. In so doing, Jenkins, L. J. stated:

> There is no doubt that [the contract] does contain an express and unambiguous agreement on the part of the Government . . . of Pakistan to submit, for the purposes of the agreement, to the jurisdiction of the English courts. . . . But . . . I think it is established beyond question by authorities binding on this court that 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—a submission, as it has been termed, in the face of the court—will suffice.[57]

The foregoing English precedents have not been without effect upon the United States. Indeed, in *Compania Mercantil Argentina v. United States Shipping Board*,[58] the United States government agency, when confronted with the assertion of in personam jurisdiction by an English court in an action to compel arbitration under a charter party clause providing for arbitration of disputes in England, urged that the arbitration clause was not a consent to the court's jurisdiction. The court agreed rejecting the contention that the Shipping Board had waived its immunity by agreeing to arbitrate. The dispute concerned freight charges only; therefore the proceeding was in personam. In his short opinion Banks, L. J. held:

> It requires a great deal more than a submission to arbitration to amount to a waiver of immunity of the sovereign when he is sued in a court of law in perso-

[54] *Id.* at 1003-1004.
[55] There were other named defendants in the complaint.
[56] *Supra* note 9, at 1007.
[57] *Id.* at 1012.
[58] [1924] All E.R. 186

> nam: and I think . . . the question of waiver arises when the question of immunity is raised and can be challenged.[59]

There is no precedent in American case law for implying a foreign sovereign's consent to the assertion of in personam jurisdiction from an arbitration clause. Therefore, the foregoing English cases are highly relevant when seen in the light of international principles of sovereign immunity. Neither the government of Greece nor its representatives took any action in this case toward the court itself which indicated an intention to submit to its jurisdiction. On the contrary, the sovereign specifically informed the district court that it declined to consent to be sued. For the courts to rest jurisdiction upon consent in this situation is not only a departure from our own historical position, but, equally significant, it is a basis yet unrecognized by England, with whose jurisdictional standards we traditionally have had much in common.

III. Service of Process

Another area of difficulty in the cases involving foreign sovereigns is service of process. The function of service is twofold: (1) service of the summons is an act symbolic of the court's assertion of power over the person of the defendant in the case of in personam jurisdiction; (2) service of the summons gives the defendant notice of the commencement of a suit.

The agreement of the parties in this case to submit disputes to arbitration carried with it the requirement of the Federal Arbitration Act that service of process be made under the Federal Rules of Civil Procedure.[60] Service of process is covered by Rule 4. Nowhere in Rule 4 is service upon a foreign sovereign specifically provided for or even mentioned. Of course, service of process is not significant should the sovereign consent to be sued. The parties could either stipulate that proper service was made, or the sovereign could waive the requirement. However, service of process is very significant in cases in which the sovereign is unwilling to be sued, making it necessary for the plaintiff to serve the sovereign in accordance with Federal Rules not specifically providing for such service.

Both functions of service, *i.e.*, assertion of power over the person and notice, must be satisfied to give the court jurisdiction in personam. In order to overcome part of this problem with respect to service, the court in *Victory* held that service there was reduced to its "notice giving" function, because the sovereign was held to have consented to jurisdiction by virtue of the arbitration clause. The court then reasoned, in so many words, that it perceived of no reason why an agency of a foreign sovereign should be treated

[59] *Id.* at 188.
[60] 9 U.S.C. § 4.

any differently than a foreign business corporation for purposes of service of process. This reasoning, of course, obviates any need to "assert power over the person of the defendant." In *Petrol* the court relied upon the *Victory* holding that mere notice was required to bring a foreign state within the court's in personam jurisdiction in an action under the Federal Arbitration Act. However, the procedure followed in both cases to effect service varied in significant respects. In *Victory* an attempt was made to effect service within the purview of Rules 4 (d) (7) and 4 (e) by obtaining an ex parte order of the court directing that the petition and notice be served by sending copies through registered mail to the governmental agency in Madrid, Spain. In *Petrol* however, Rule 4 was not complied with in any apparent respect. Indeed, no court order was obtained, and no registered mail was used. Rather, copies of the petition and notice were mailed "in a Post Office box . . . at No. 26 Broadway"[61] to the Greek Embassy and Consulate, and to a law firm not authorized to accept service.

Although the method employed to effect service of process in *Petrol* differed from that used in *Victory,* it seems reasonable to conclude that, if the court was correct in holding that Greece had consented to jurisdiction, then in fact "notice" is the only remaining mandate of the Federal Rules. Assuming this to be the case, there seems to be no reason apart from considerations of sovereign immunity why an agency of a foreign government should not be treated as a foreign corporation for purposes of service. Nevertheless, it might be considered desirable that, at the very least, service be made pursuant to a court order under Rule 4 (e). Whatever method is employed, however, service of process is very much a part of this controversy, as is sovereign immunity and the consent theory propounded in *Victory.* Moreover, a restrictive theory of immunity does not resolve the issue of service of process because immunity has no bearing on the problem of how a court acquires jurisdiction in personam over a foreign sovereign. Granted that the sovereign is found amenable to suit by virtue of its prior consent, service then is properly directed to notice only. Otherwise, the problem is clear. This point is presented in *Oster v. Dominion of Canada*[62] where United States property owners sued for damages to their lands resulting from raising the level of Lake Ontario through the construction of a dam. The defendant did not appear, but amici curiae argued in support of the suggestion of no jurisdiction because of improper service of process. Service had been effected by delivery of the summons and complaint to the Consul General of Canada in New York City. Dismissing the action, the court stated:

> These are in personam actions and the presence of the defendant is an essential

[61] *Supra* note 17.
[62] 144 F. Supp. 746 (N.D.N.Y. 1956), *aff'd, per curiam,* 238 F.2d 400 (2d Cir. 1956).

element of the jurisdiction of this Court. . . . No authority exists for the service of process in a manner other than that set forth in the Federal Rules of Civil Procedure . . . . Concededly there is no precedent which recognizes as valid the type of service of process made here. The argument that these actions came to the attention of the Canadian authorities and thereby performed their notice-giving function as referred to in Hickman v. Taylor, 329 U.S. 495 . . . is unavailing since the above decision refers to the function of pleadings rather than to the function of process. . . . It is beyond argument that jurisdiction of the person in this type of action is a necessary requisite to the overall jurisdiction of the Court to adjudicate the claim submitted. Such jurisdiction must be acquired either by service of process or by the defendant's appearance . . . . [S]ervice of process here [upon a consul] is ineffective to obtain jurisdiction over the person of the defendant.[63]

The Supreme Court will have an opportunity to hear these issues if the Second Circuit in *Petrol* follows *Victory*, as it apparently will. The Kingdom of Greece will undoubtedly petition for certiorari, and hopefully the Court will clarify these substantial issues.

G. A. D.
J. J. M.

[63] *Id.* at 748-749.