

IMMUNITY OF FOREIGN GOVERNMENTAL
INSTRUMENTALITIES

Prior to 1952 courts in the United States granted or denied immunity to foreign governmental instrumentalities largely on the recommendations of the United States Department of State.¹ Since this department did not have to make public its reasons, its recommendations were open to the charge of being prompted by shifting political considerations rather than settled legal rules.² In 1952 the State Department expressly adopted the position that grants of immunity ought to be determined in American courts as they are in many foreign

¹ This practice has proceeded from the view that the immunity question is largely political and within the peculiar competency of the State Department. See *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34 (1945), affirming trial court adherence to State Department request for "recognition and allowance" of immunity on grounds that "[such disputes are properly settled] through diplomatic channels rather than by the compulsion of judicial proceedings." Accord: *Ex parte Peru*, 318 U.S. 578, 588 (1943); *Compania Espanola v. Navemar*, 303 U.S. 68, 74, 75 (1938); *United States v. Lee*, 106 U.S. 196, 209 (1882).

² This "abdication" by the courts has provoked controversy. For argument that such controversies are not properly justiciable, see *Dickinson, A Decade of Admiralty in the Supreme Court of the United States*, 36 *Calif. L. Rev.* 169, 215 (1948). Contra: *Jessup, Has the Supreme Court Abdicated One of its Functions?* 40 *Am. J. Int'l L.* 168 (1946); *Judicial Deference to the State Dept. on Int'l Legal Issues*, 97 *U. of Pa. L. Rev.* 79 (1948). One commentator suggests that the "recognition and allowance" procedure violates due process. *Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 *Harv. L. Rev.* 608, 613 (1954). See also *The Jurisdictional Immunity of Foreign Sovereigns*, 63 *Yale L. J.* 1148 (1954).

But "abdication" may not be complete. Prior to 1945 federal courts did not invariably conform to State Department opinion. *Berizzi Bros. v. S. S. Pesaro*, 271 U.S. 562 (1926); 2 *Hackworth, Digest of International Law* 444, 445 (1941). Furthermore, while one commentator saw in the *Hoffman* case, *supra*, decided in 1945, a hint that deviation from State Department request would never be repeated, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, 58 *Yale L. J.* 176, 178 n. 15 (1948), that prediction has not materialized. See *Republic of China v. Nat'l City Bank*, 208 F.2d 627, 630 (C.A. 2d, 1953) (Frank, J.), noted in 47 *Am. J. Int'l L.* 321 (1953). The policy of "abdication" has been treated with similar scepticism by state courts. See *Frazier v. Hanover Bank*, 204 *Misc.* 922, 923-24, 119 *N.Y.S.2d* 319, 321 (S. Ct., 1953), where jurisdiction was assumed over the Peruvian state trading agency in the presence of State Department recognition and allowance, the court announcing that State Department "advice . . . means no more than that Peru is recognized by the State Department as a foreign sovereign."

Furthermore, courts seem to approve of State Department policy favoring foreign governmental instrumentalities on a view that extending immunity insures similar treatment of American instrumentalities abroad. Consequently, inquiry into immunity rules operative in the jurisdiction of the foreign instrumentality seeking immunity is not unusual. The *Pesaro*, 277 *Fed.* 473, 475 (S.D. N.Y., 1921). See also *Compania Naviera Vascongado v. S. S. Cristina*, [1938] *A.C.* 485, 502-3 (Lord Wright): "Immunity may be taken to flow from reciprocity, each sovereign state . . . accepting subtraction from its . . . sovereignty in return for similar concession on the side of others. . . ."

This principle of "leverage by reciprocity" seems to have motivated the provision in the *Claimants Act* to the effect that the right to recover from the United States is confined to "citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts." 15 *Stat.* 243 (1868), as amended, 28 *U.S.C.A.* § 2502 (1948). See similar provisions in the *Suits in Admiralty Act*, 1925, at c. 428, § 5, 43 *Stat.* 1113 (1925), 46 *U.S.C.A.* § 141. Italian courts have urged a similar rule. See *Florida c. Sovexportfilm*, [1952] 75 *For. Ital.* I, 796, 806.

countries, according to whether the instrumentality involved is "governmental" or "proprietary."³ Since such a determination is viewed abroad as properly a function of the judiciary, and since the "governmental-proprietary" distinction is one which has long been applied by the courts in other areas, this announcement appears to contemplate abolition of present State Department control of immunity grants. In such an event courts face the problem of applying this distinction in particular cases.

There are two relevant bodies of precedent to which courts might turn in applying the new rule; the law of municipal corporations and cases from those foreign jurisdictions which have adopted the restricted immunity rule in the international area. Courts familiar with the governmental-proprietary test in the area of municipal corporation immunity seem likely to resort to that precedent in deciding international cases.⁴ A prominent authority has, in fact,

³ See letter of Jack B. Tate (State Department Acting Legal Advisor) in 26 Dept. of State Bull. 984 (1952), declaring that the policy of the United States is not to grant immunity to instrumentalities of foreign governments engaged in commerce in the United States. Allusion was made to the widely adopted rule of international law to the same effect. For a comparative study of immunity see Lauterpacht, 28 *British Y. B. Int'l L.* 250 (1951); *Privileges of Sovereignty and L'Etat Commerçant*, 50 *Am J. Int'l L.* 478 (1956); Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 *Harv. L. Rev.* 614 (1950).

The governmental-proprietary test has often been defined as requiring denial of jurisdiction where the activity in question "is one in which only the government may engage (military or diplomatic)"; jurisdiction is to be imposed where the operation is one "open to private persons." The *Jurisdiction Immunity of Foreign Sovereigns*, 63 *Yale L. J.* 1148, 1161 (1954). Advocates of this test argue that immunity should be restricted to preserving the foreign state's political integrity but is inappropriate where the foreign government chooses to assume the character of a private business. See Fensterwald, *Sovereign Immunity and Soviet State Trading*, supra, at 620 et seq. (1950). The opposing, "absolute" immunity doctrine denies the propriety of imposing jurisdiction regardless of the governmental activity involved and regards all acts of the sovereign as qualitatively identical in that they further national interest; it urges that forcing foreign governments to litigate in municipal courts imperils international amity or aggravates an already inimical climate. *Id.*, at 616, 617. American adherence to this latter rule has historically been modified to impose jurisdiction on commercial instrumentalities of foreign governments which have separated themselves from their governments by incorporation. See *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 *F.2d* 199, 202 (S.D.N.Y., 1929); *Coale v. Société Co-operative Suisse des Charbons*, 21 *F.2d* 180, 181 (S.D.N.Y., 1921); *Hannes v. Kingdom of Roumania Monopolies Institute*, 260 *App. Div.* 189, 20 *N.Y.S. 2d* 825 (1st Dept., 1940); *Molina v. Comisión Regoladora del Mercado de Henequén*, 91 *N.J.L.* 382, 103 *Atl.* 397 (1918).

The immunity of governmental bodies from private suit (in both the foreign sovereign and domestic municipality cases) may be viewed as presently evolving from the practice of generally granting absolute immunity, to that of denying private redress only in isolated circumstances. The first stage in this evolution appears to be adoption of the ministerial-proprietary distinction as a palliative against the harsh effects of an absolute immunity rule. International law seems to be in this stage. Destruction of this to allow wholesale private redress constitutes the next evolutionary level. This appears to be the trend in the American law of municipal corporations. See Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 22 *Va. L. Rev.* 910 (1936); Gardner, *An Inquiry into the Principles of Municipal Responsibility in General Assumpsit and Tort*, 8 *Vand. L. Rev.* 753 (1955). For a decision expressly abolishing the rule, see *Hargrove v. Cocoa Beach*, 96 *So. 2d* 130 (Fla., 1957).

⁴ The parallel has been noted without discussion in Fensterwald, *Sovereign Immunity for Commercial Instrumentalities of Foreign Governments*, 58 *Yale L. J.* 176, 181 (1948).

urged such an approach.⁵ The analogy, however, presents certain problems.

Inasmuch as foreign instrumentalities probably do not engage in public service enterprises where personal injury is a recurring and widespread incident, restriction of municipality immunity proceeding from fear of exposing increasing numbers of citizens to unredressable personal injury seems inapplicable in the foreign instrumentality situation.⁶ Also, while abolition of municipality immunity may dissipate business reluctance to deal with the municipal corporation, a similar rule applied to foreign instrumentalities may deter desired trade or investment by foreign governments.⁷ And finally, it is questionable whether the argument made against municipal corporation immunity, i.e., that it promotes unfair competition against private local business, applies in the international field.⁸ Tariffs have historically been employed to protect American business; further protection through limitations of immunity runs the risk of further embarrassing the execution of United States foreign policy.

⁵ Bishop, *New American Policy Limiting Sovereign Immunity*, 47 *Am. J. Int'l L.* 93, 106 (1953).

⁶ Collisions involving ships of foreign state trading agencies have remained a recurrent source of tort injury. *Republic of China v. National City Bank of N.Y.*, 208 F.2d 627 (C.A. 2d, 1953). But a host of exceptions has operated to impair the absolute immunity rule in this area. E.g. (a) The instrumentality must have been in possession of the ship: *The Davis*, 10 Wall. (U.S.) 15 (1870); *Long v. The Tampico*, 16 Fed. 491 (S.D.N.Y., 1893); *The Fidelity*, 8 Fed. Cas. 1189, 1191 (No. 4758) (C.C.S.D.N.Y., 1879); (b) The formalities for invoking immunity must be rigidly met. *The Gul Djemal*, 264 U.S. 90 (1924); *The Sao Vicente*, 260 U.S. 151 (1922); *Ex parte Muir*, 254 U.S. 522 (1921).

The few non-maritime personal injury actions brought against foreign instrumentalities have been quasi in rem; see *Mason v. Intercolonial Ry. of Canada*, 197 Mass. 349, 83 N.E. 876 (1908). Foreign government-owned carriers, especially airlines, have traditionally incorporated and have regularly been denied immunity under the recognized "incorporation" exception.

⁷ It may be that absolute immunity has been employed by commercial nations in hopes of inducing reciprocity; such a policy implemented by those states risks little (loss of jurisdiction in cases involving non-commercial states) and may achieve much (immunity for widespread economic activities of such governments). Thus absolute immunity received its principal expression in the courts of the great commercial powers: Germany, England, France (see Lauterpacht, *Jurisdictional Immunities of Foreign States*, 28 *Brit. Y. B. Int'l L.* 220, 251 et seq. [1951]), and Japan (Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 22 *Brit. Y. B. Int'l L.* 101, 109 [1933]), while the restrictive approach was promulgated in Italy. But as more nations increased their exports, lessened economic advantage and increased domestic complaints caused wider adoption of the restrictive rule.

An American parallel may be discerned in legislation of the commercial states exempting foreign banking and trust companies from the "doing business" provisions of the legislating state, provided similar treatment is accorded the banking and trust companies of the legislating state in the forum of the foreign corporation seeking the protection of the statutory privilege. See, e.g., *Ill. Stat. Ann.* (Smith-Hurd, 1954) c.32, § 304.1-304.4.

⁸ Allen, *The Position of Foreign States before National Courts Chiefly in Continental Europe* 301-2 (1933); *Molina v. Comisión Reguladora del Mercado de Henequén*, 91 N.J.L. 382, 103 Atl. 999 (1918). The "unfair competition argument" seems tenuous, even as applied to domestic instrumentalities. Although domestic competition does not enjoy the immunity privilege, it is not burdened by concomitant business community reluctance to trade in the presence of an immunity privilege. If it is suggested that reluctance is minimal because of habitual self-restraint in exercise of the privilege, then competitive advantage seems similarly minimal.

On the other hand, however, a number of reasons suggest the desirability of restricting grants of immunity in the international field. While excessive invocation of the immunity privilege by municipal officials is mitigated by the practical consideration of ultimate electoral responsibility, such a consideration does not influence the foreign instrumentality.⁹ It may, in fact, be compelled by domestic political climate to preserve "national dignity" by demanding immunity. Also, concern in the municipality situation to the effect that unlimited responsibility to suit might result in bankruptcy and immobilization of government¹⁰ seems irrelevant in regard to foreign instrumentalities. While attachable assets of a domestic municipal corporation are all likely to be within the jurisdiction of the court, only a minute part of the assets of a foreign government is susceptible to attachment, and the practical difficulties of proceeding in foreign courts limit the value of simply obtaining a judgment.¹¹ Since it would seem that the differences stated above should be considered in labeling a foreign instrumentality governmental or proprietary, caution should be used in applying municipality precedent to the international field.

More relevant, perhaps, is foreign precedent exemplified by the Italian treatment of the problem. While Italy was the originator¹² of the government-proprietary distinction,¹³ modern expansion of the scope of accepted governmental activity forced Italian courts to adopt a different approach.¹⁴ Instead of

⁹ Consult Bishop, *International Law (Casebook Series)* pp. 451-55 (1953 ed.). Cf. contemporary assertion of immunity by Soviet government in *Lorina v. The Russia*, (Civil No. 18767, E.D.N.Y., 1948) litigated during a period of acute strain in Soviet-American relations.

¹⁰ See Lloyd, *Le Roi est Mort; Vive le Roi!*, 24 N.Y.U.L.Q. Rev. 38 (1949); Borchard, *Government Responsibility in Tort*, 36 Yale L. J. 1 (1926).

¹¹ Even assuming the possibility of judgment, courts of almost all countries are hesitant to permit execution. See *Dexter & Carpenter v. Kunglig Järnvagsstyrelsen*, 43 F.2d 705 (C.A. 2d, 1930) (surveying international practices regarding execution of foreign-state property); cf. Nadelman, *Non-Recognition of American Money Judgments Abroad*, 42 Iowa L. Rev. 236 (1957). Even in Italy, where foreign immunity has been most severely curtailed, execution is not readily obtained. See *Hampspahn John c. Bey of Tunis* (Court of Lucca, 1887), noted in 16 J. de Droit Privé 335 (1889). See also Bussano, [1951] *Giurisprudenza Italiana* I, 695.

¹² But compare passages in Grotius, indicating his familiarity with the principle as applied to the king and his immunity from "common law." "In this class of acts [buying, selling, leasing, hiring] . . . the common laws of the kingdom have . . . force, . . . even the laws of the town . . . are of force . . . [against the king]." Grotius, *De Jure Belli et Pacis*, c. 148.5, p. 116 (Whewell ed., 1853).

¹³ See Anzilotti, *L'Esenzione degli Stati Esteri dalla Giurisdizione*, [1910] *Rivista Diritto Internazionale* 477; Quadri, *La Giurisdizione sugli Stati Stranieri* (Milano, 1940).

¹⁴ Under Article 10 of the Italian Constitution, foreign sovereign immunity is a proper subject for determination under international, as opposed to domestic, law. But differing national views of the proper scope of government activity made application of the provision difficult. See *Floridi c. Sovexportfilm*, [1952] 75 For. Ital. I 796, where the court declared that Article 10 was inapplicable because no ascertainable international rule existed. Although the Italian court proceeded to apply the Italian view, i.e., that motion picture production is not deemed an essential "governmental" function, it noted that imposition of jurisdiction in the action by an Italian, non-policy-making employee would not undermine the independence of the Soviet state. See also *Pintor, Ferrovie Federali Svizzere c. Comune di Tronzano*, [1924]

asking whether the activity was normally the province of private capital, the relevant test became: Does imposition of jurisdiction in the particular case interfere with effective administration of the instrumentality?

Application of this rule has been as follows:

Sales contracts.—Jurisdiction should be assumed over suits against foreign trading instrumentalities based on sales contracts, since the defendant cannot, in such cases, urge that imposition of jurisdiction interferes with policy formation.¹⁵ The contract itself is the result of considered policy and enforcing it executes rather than disturbs the decision-making function.¹⁶ Where, however, state policy not to be bound by its contracts against its wishes is expressed in the contract or by treaty, jurisdiction should not be sustained. Argument that assumption of jurisdiction impairs the sovereign's policy against being sued seems invalid when such policy appears only at the time of trial and not at the time of the execution of the contract; under such a view jurisdiction could never be maintained against the wishes of the sovereign expressed in a claim of immunity at trial.

Torts.—The problem here is comporting untrammelled administration of government with the policy against denying redress for injury to individuals. Since tort judgments may be heavy and unforeseeable, withdrawal of immunity might produce budgetary difficulties. But Italian tort cases are tried before judges and judgments are likely to be less substantial than jury awards, which may be influenced by a feeling that governments, like insurance companies, can always pay. Consequently, because of the lessened danger to effective administration, jurisdiction in tort cases is assumed.¹⁷ The approach which New York

54 For. Ital. 1145, 1149, "But the proper classification of activities of foreign states is a matter of international disagreement."

For the American opinion that the "governmental" or "proprietary" character of foreign instrumentalities is determined by the economic system of the particular foreign government, see *Oliver v. United States of Mexico and National Railways of Mexico*, 264 U.S. 440, 442, 443 (1924). Accord: *The Maipo*, 259 Fed. 367 (S.D.N.Y., 1919). But cf. *The Roseric*, 254 Fed. 154 (D.N.J., 1918).

¹⁵ See *Onori c. L'Accademia d'Ungheria*, [1956], 79 For. Ital. I, 841 and annotation by Sereni.

¹⁶ Under this view, jurisdiction will be assumed even in cases involving military procurement contracts. *Canale c. Ministro di Guerra Francese*, [1936] 63 For. Ital. 795 (denying immunity in damage action for breach of French army procurement contract). But cf. note by Sperduti, [1953] 73 For. Ital. 795, 799 (pointing out that military contracts are included in the traditional definition of "governmental" functions).

¹⁷ See *Tani c. Rappresentivo Commerciale U.R.S.S.*, 71 For. Ital. 855 (1948). *Resati c. Rappresentivo Commerciale U.R.S.S.*, [1936] 63 For. Ital. 284; *Ferrovie Federali Svizzere c. Comune di Tronzano*, [1924] 54 For. Ital. 1146.

But within the "irreducible minimum" of internationally acknowledged governmental activity Italian courts will not assume jurisdiction. *Lagos c. Carmonia*, [1954] 37 Riv. Dir. Int. 111 (granting immunity to third secretary of Chilean Embassy for injuries caused by the latter to an Italian citizen in an automobile accident). But cf. *Balloni c. Ambasciatore del Cile*, [1936] 63 For. Ital. 284 (sustaining jurisdiction in a negligence action by an Italian citizen against the Chilean ambassador for personal injuries resulting from plaintiff's being hit by the ambassador's car driven by a diplomatic secretary).

has been said to follow in domestic cases is similar; immunity is granted where the injury involved is likely to be a recurrent incident of municipal operation, which may be impaired by recurrent tort judgments.¹⁸

*Suits on employment contracts.*¹⁹—These contracts present a double aspect: beyond representing crystallized state policy, they may also define the rights and obligations of persons involved in the determination of instrumentality policy.²⁰ Thus, where decision-making personnel are plaintiffs, jurisdiction will not be entertained because unfettered policy-making requires freedom to dismiss such personnel without fear of damage suits and their attendant notoriety, and without fear of overly generous awards by local courts to local plaintiffs.²¹

While the Italian approach is useful in that it attempts to deal realistically with the danger of interference with the policy-making of foreign governments, it may still permit the imposition of jurisdiction at what may be diplomatically inopportune moments. Considering the size of American investment in attempting to create and maintain foreign good will, it seems unwise to jeopardize that investment by permitting indiscriminate private interference in an area of executive concern.

One proposed solution urges that wherever suits against foreign instrumen-

¹⁸ Lloyd, *Le Roi est Mort; Vive Le Roi!*, 24 N.Y.U.L.Q. Rev. 38 (1949), suggests that refusal to allow suit against the municipality in *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945), where the city's failure to keep water hydrants in good repair resulted in plaintiff's fire loss, followed from the court's unwillingness to subject the city to the heavy claims which might proceed from this kind of negligence. The court expressed concern that municipal liability in such cases might result in bankruptcy and consequent frustration of all governmental objectives. But in *McCrink v. City of Albany*, 296 N.Y. 98, 71 N.E.2d 419 (1947), where failure of the police commissioner to remove a known drunkard and psychopath from the police force resulted in the unprovoked shooting of plaintiff's decedent by the policeman, the court denied immunity, the commentator's hypothesis being that the isolated character of such willful acts insured against the danger of continuing the heavy claims. Lloyd, *op. cit. supra*.

¹⁹ That peculiar jurisdictional problems are raised in employment contract actions has been recognized by Italian jurists. Consult Sereni, *Competenza Giurisdizionale dell'Autorità Giudiziaria Italiana nelle Controverse Relative ai Rapporti di Impiego*, Dir. Comp. vol. 1, Fasc. III (Roma, 1936).

²⁰ Sereni, noting *Onori c. L'Accademia d'Ungheria*, [1956] 79 For. Ital. 842, 845 (action by Italian domestic servant against cultural exchange agency of the Hungarian government), suggests that the criteria for ascertaining such personnel are, *inter alia*: (a) the duration of the contract; (b) the possibility of advancement with progressive pay increases; (c) the professional character of the job.

It should be noted that the "professional-non-professional" test does not require redefinition at each national border according to economic system, and consequently avoids the confusions of the ministerial-proprietary test.

²¹ Compare imposition of jurisdiction against claim of immunity by Russian Trade Delegation in *Corte d'Appello*, [1932] 2 Riv. Dir. Int. Privato 64, where plaintiff was Italian, and *Russian Trade Delegation v. Kazman*, [1933] 25 Riv. Dir. Int. 240. But it should be seen that granting immunity against Italian plaintiffs might, as a practical matter, remove all possibility of recovery. Further, Italian courts may not consider it unjust to force a citizen of the nation operating the instrumentality to litigate in his native courts. Denial of jurisdiction in such cases might also stem from a reluctance to interfere with foreign civil service machinery.

talities threaten interference with State Department policy, the United States should be impleaded at its request. Any judgment obtained against the foreign instrumentality would then be satisfied against the United States, the latter recouping through diplomatic channels.²² In fact, recovery from the United States also appears to be the just solution wherever immunity is granted; it would seem unfair to make individual plaintiffs suffer in order to further United States foreign policy.²³

²² *The Jurisdictional Immunity of Foreign Sovereigns*, 65 *Yale L.J.* 1148 (1954). This would require not simply the creation of a cause of action in favor of the foreign instrumentality against the United States but also amendment of Rule 14(a) of the Federal Rules of Civil Procedure presently providing for impleader only at the instance of the plaintiff or defendant.

²³ *Sovereign Responsibility and The Doctrine of Sacrifice (Aufopferungsanspruch)*, 24 *U. of Chi. L. Rev.* 513 (1957). This argument might, however, be limited to personal injury claimants, on the grounds that persons contracting with foreign instrumentalities assume the risk of immunity and can pass on the cost of such risk by adjusting the contract price. See *Jurisdictional Immunity of Foreign Sovereigns*, 63 *Yale L. J.* 1148 (1954).

HOT CARGO CLAUSES

A labor union, unable to secure its demands by striking and picketing a primary employer,¹ may seek to intensify its pressure by organizing boycotts on the part of employees of customers, suppliers, and carriers doing business with the primary employer. Although this boycott technique was in general prohibited by Section 8(b)(4)(A) of the Taft-Hartley Act,² perplexing problems result when the basis of the boycott is a hot cargo clause, i.e., an agreement by the secondary employer not to do business with employers stigmatized as "unfair" by the union.³

Section 8(b)(4)(A) makes it an unfair labor practice for a union to "induce or encourage" employees to engage in a "strike or concerted refusal in the course of their employment," the purpose of which is to force or require the employer to cease doing business with another employer. It was early decided by the National Labor Relations Board and by the courts that this section does not invalidate hot cargo clauses.⁴ And, although the Board later manifested increased hostility

¹ In a secondary boycott situation the employer involved in a dispute with the union is referred to as the primary employer. The employer whom the union attempts to induce not to handle the primary employer's goods is called the secondary or neutral employer.

² *Labor-Management Relations Act, 1947*, at § 8(b)(4)(A), 61 Stat. 141 (1947), 29 U.S.C.A. § 158(b)(4)(A) (1956).

³ The typical clause states that it will not be a violation of the contract or cause for discharge for the employees to refuse to handle non-union or "unfair goods." E.g., *McAllister Transfer, Inc.*, 110 N.L.R.B. 1769 (1954); *Pittsburgh Plate Glass Co.*, 105 N.L.R.B. 740 (1953). It is the union which designates what goods are "unfair" and consequently which employer is to be boycotted.

⁴ *International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 294 v. Rabouin*, 87 N.L.R.B. 972 (1949), *aff'd* *Rabouin v. N.L.R.B.*, 195 F.2d 906 (C.A. 2d, 1952); *Pittsburgh Plate Glass Co.*, 105 N.L.R.B. 740 (1953); *McAllister Transfer*,