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International Law - Sovereign Immunity - Seizure of Property Under Restrictive Immunity Doctrine

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INTERNATIONAL LAW — SOVEREIGN IMMUNITY — SEIZURE OF PROPERTY UNDER RESTRICTIVE IMMUNITY DOCTRINE—While in Korea unloading a cargo of rice purchased by the Korean Government, libellant's steamship was damaged by respondent's lighter which was assisting in the unloading operation. Libellant instituted suit against the Republic of Korea in a federal district court in New York claiming the court had jurisdiction over the respondent by virtue of a writ of foreign attachment on Republic of Korea funds deposited in two New York banks. Respondent, in a special appearance, moved to dismiss the libel on the alternative grounds that property of a foreign sovereign is immune from seizure and that the purchase of rice for distribution to its population is a governmental function entitling it to immunity from suit even under the current United States policy of restrictive immunity. The State Department, through the attorney general's office, had informed the court that under international law a foreign power's property is immune from seizure and that the department's recognition of this principle was not affected by its pronouncement in 1952 that it would favor the restrictive theory of sovereign immunity. On motion to vacate the attachment, *held,* granted. Since a foreign sovereign's immunity from suit is a political rather than a judicial question, the courts will give effect to the decisions of the State Department.[1] *New York and Cuba M.S.S. Co. v. Republic of Korea,* (D.C. N.Y. 1955) 132 F. Supp. 684.

Under the traditional theory of absolute sovereign immunity a foreign state could not, without its consent, be made a defendant in the courts of

[1] If a claim of immunity is "recognized and allowed" by the State Department, it is the duty of the court to release the property. Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 58 S.Ct. 432 (1938).

another sovereign.[2] As a corollary to this doctrine, a foreign state's property was also immunized from seizure,[3] if such immunity was properly requested.[4] In 1952 the State Department,[5] following a trend initiated by several European nations,[6] adopted the rule of restrictive sovereign immunity which permits suits to be brought against a foreign state without its consent when the cause of action arises out of a private or commercial act *(jure gestionis)* as opposed to a public or sovereign act *(jure imperii)*.[7] With the advent of this restrictive immunity to suit, the question arose whether the absolute immunity of foreign property from attachment should be continued.[8] Some writers have contended that, in those countries where suit is permitted under the restrictive immunity theory, a seizure of property which conforms to the restrictive theory should also be allowed.[9] It is submitted that this is the better view. Although many reasons are advanced for extending immunity to foreign states, such immunity is granted primarily as a matter of comity in order to maintain friendly relations with foreign nations.[10] If permitting suits against sovereigns in the *jure gestionis* area does not impair our foreign relations, the same reasoning should apply to allow a correlative seizure of sovereign property.[11]

2 See 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 393 (1941).

3 The Christina, [1938] A.C. (H.L.) 485. Dexter & Carpenter, Inc., v. Kunglig Jarnvagsstyrelsen, (2d Cir. 1930) 43 F. (2d) 705, the leading case in the United States, denied seizure even after a valid judgment had been obtained. See also National City Bank of New York v. Republic of China, 348 U.S. 356, 75 S.Ct. 423 (1955), for a more liberal view permitting set-off against a sovereign's bank deposits.

4 Foreign attachments are sustained where immunity is not properly requested since the immunity is granted only as a matter of comity. Maru Nav. Co. v. Societa Commerciale Italiana Di Navigation, (D.C. Md. 1921) 271 F. 97; Holzer v. Deutsche Reichsbahn Gesellschaft, 160 Misc. 597, 289 N.Y.S. 943 (1936). The proper manner to assert immunity is set forth in Ex parte Muir, 254 U.S. 522, 41 S.Ct. 185 (1921).

5 Letter by the Acting Legal Adviser of the Department of State to the Acting Attorney General, sometimes called the Tate Letter, 26 DEPT. OF STATE BULL. 984 (1952).

6 See Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 BRIT. Y. B. INT. L. 220 (1951); ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS CHIEFLY IN CONTINENTAL EUROPE (1933); Harvard Research in International Law, Draft Convention on Competence of Courts in Regard to Foreign States, art. 11 and comment, 26 AM. J. INT. L. (Supp. 1932) 597. Just recently Germany joined the trend in a decision of the Landgericht in Kiel on March 19, 1953, discussed in 48 AM. J. INT. L. 302 (1954).

7 For a discussion of the theory and problems under the restrictive immunity policy, see Bishop, "New United States Policy Limiting Sovereign Immunity," 47 AM. J. INT. L. 93 (1953); Brandon, "The Case Against the Restrictive Theory of Sovereign Immunity," 21 INS. COUNSEL J. 11 (1954).

8 Since immunity from property seizure probably arose out of the absolute sovereign immunity concept, it can be argued that once the sovereign is no longer immune, neither is his property. However, it has been pointed out that property seizure is a more serious threat to foreign relations since not until the seizure is the foreign power physically affected. See 29 MICH. L. REV. 894 (1931).

9 Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 BRIT. Y. B. INT. L. 220 (1951).

10 The Schooner Exchange v. McFadden, 7 Cranch (11 U.S.) 116 (1812); Ex parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793 (1943).

11 For recent treaties which waive immunity from execution as well as immunity from suit, see Bishop, "New United States Policy Limiting Sovereign Immunity," 47 AM. J. INT. L. 93 (1953).

This seems to be the theory of the European countries which have accepted the restrictive immunity doctrine.[12] Indeed, if some type of property seizure is not allowed, it may be argued that the restrictive theory of immunity to suit is illusory since in many instances jurisdiction can be acquired only by the attachment of property on the filing of suit.[13] Properties which should be subject to seizure include all property which is used or held in connection with acts *jure gestionis*,[14] including immovables,[15] even though they are not the subject of the action.[16] Of course, diplomatic and consular property should remain exempt.[17] The State Department, as before, would determine whether the property was immune.[18] This property classification may involve a complex fact determination, especially if commercial funds are intermingled with "governmental" assets.[19] For this reason, some type of quasi-judicial hearing may be in order before the State Department hands down its suggestion.[20] If the State Department does not "recognize and allow" a claim of immunity, the law is not entirely clear as to whether a court is compelled to find no immunity[21] or can decide the immunity issue independently.[22] If the latter course is followed, the court and State Department may end up sharing the characterization duties in any individual case; for the department may leave the issue of immunity to suit to the court, yet retain the power to declare the seized property immune.

In the principal case, the court suggests in a footnote that though attachment of property to vest jurisdiction is not allowed, execution to

12 *Belgium:* Socobelge v. Etat Hellenique, digested in 47 AM. J. INT. L. 508 (1953); *Egypt:* Egyptian Delta Rice Mills Co. v. Comisaria General, ANN. DIG. 1943-5, Case No. 27; *France:* State v. Vestig, Sirey 1947.1.137, ANN. DIG. 1946, Case No. 32; *Greece:* Athens Court of Appeals Dec. No. 1690/1949, reported in 3 REV. HELLENIQUE DE DROIT INT. 331 (1950); *Switzerland:* case reported in ANN. DIG. 1941-2, Case No. 60. For Italian and Dutch practice, see 28 BRIT. Y. B. INT. L. at 242, 263 (1951).

13 Cf. Pennoyer v. Neff, 95 U.S. 714 (1877).

14 See Harvard Research in International Law, note 6 supra, art. 23(b).

15 Id., art. 23(a), permitting execution on immovables with no limitation as to the subject of the action on which the judgment is based.

16 It has been advocated that execution on immovables be restricted to claims relating to the land itself. See Lowenfeld, "Some Legal Aspects of the Immunity of State Property," 34 GROTIUS SOC. TRANS. 111 (1949).

17 Harvard Research in International Law, note 6 supra, art. 23(b). For a case involving the Hungarian Legation in Czechoslovakia, see ANN. DIG. 1927-8, Case No. 111.

18 See note 7 supra and adjacent text.

19 See Castel, "Immunity of a Foreign State from Execution: French Practice," 46 AM. J. INT. L. 520 (1952), where the commentator criticizes the result in State v. Vestig, note 12 supra. In that case, Norwegian general governmental funds in France were attached in order to reach defendant's private funds which had been transferred to the government's account. If attachment is to be denied because the commercial property is not segregated from governmental assets, foreign powers have a simple avoidance device in the confusion of their fungible assets.

20 See Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 HARV. L. REV. 606 (1954).

21 Mexico v. Hoffman, 324 U.S. 30, 65 S.Ct. 530 (1945), commented on in 63 YALE L. J. 1149 (1954).

22 Lamont v. Traveler's Ins. Co., 281 N.Y. 362, 24 N.E. (2d) 81 (1939); Ex parte Republic of Peru, note 10 supra.

enforce collection of a judgment might be permitted.[23] If "governmental property" is involved it seems clear that no seizure should be allowed even on execution.[24] In the case of commercial property, however, it may be argued that such a distinction should be drawn since at the time of attachment to vest jurisdiction neither the substantive issues nor the question of immunity to suit has been settled, while in the case of execution after judgment all these questions have already been resolved. The validity of this distinction is questionable. The fact that the immunity from suit issue is resolved may have absolutely no bearing on the determination of the property's immunity, since the property seized need not have any connection with the acts upon which the suit is based. Thus, a separate determination as to the property's immunity would usually be necessary in execution as well as in attachment to vest jurisdiction. In addition, though permitting attachment may present a greater nuisance to foreign powers, this factor is of little significance if the foreign governments are permitted to release their assets on posting of bond.[25] Since, therefore, there is no sound reason for making a distinction between the two types of seizure, if the State Department is to be consistent with the results in the principal case, it will, in all probability, hold that foreign property is also immune from seizure on execution. However, as suggested above, a sounder policy would be to permit a foreign sovereign's commercial property to be subject to both attachment to vest jurisdiction and execution.[26]

Norman A. Zilber, S. Ed.

[23] Principal case at 687, n.7.

[24] See notes 14 and 19 supra and adjacent text.

[25] See Harvard Research in International Law, note 6 supra, art. 24; 63 YALE L. J. 1149 (1954).

[26] It is submitted that execution on commercial property should also be permitted on a judgment obtained when the sovereign has consented to be sued in a non-commercial action.