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International Law -- Sovereign Immunity

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The judicial goal of determining as much as possible in one litigation[18] may have been sought after too anxiously in the instant case. One wonders, if the owner had brought a separate action after the driver had accepted a settlement, would the motorist have been barred from asserting a counterclaim against the owner because of his failure to assert one against the driver in the first action?

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INTERNATIONAL LAW — SOVEREIGN IMMUNITY

The plaintiff-appellant, a Florida corporation, brought an action in assumpsit against the Republic of Cuba and procured writs of attachment against chattels of the defendant as well as garnishment of debts owing the defendant by garnishable co-defendants. The Consul General of the Republic of Cuba and his attorneys filed a motion to dismiss on the ground that a foreign state is immune from being made a defendant in an action of this kind. The plaintiff filed a motion to strike the motion to dismiss. The lower court sustained the defendant's motion to dismiss and overruled the plaintiff's motion to strike. On appeal, *held*, reversed: the defendant's act in hiring the plaintiff to promote tourism was non-governmental in nature and could not be invoked as a ground for sovereign immunity. *Harris & Co. Advertising v. Republic of Cuba*, 127 So.2d 687 (Fla. App. 1961).

The doctrine of sovereign immunity has been developed by judicial decision, based on policy considerations.[1] According to the doctrine, a sovereign may not, without its consent, be made a defendant in the

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18. 3 MOORE, FEDERAL PRACTICE § 13.12 (2d ed. 1948, Supp. 1960).

1. In this casenote, the words sovereign, state, and government are used as synonyms meaning an entity in which independent and supreme authority is vested.

The doctrine was said by Chief Justice Marshall to rest on this proposition:

> One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812). For a complete history of the development of the doctrine of sovereign immunity see Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925). For an exhaustive discussion of this doctrine and its application in American and foreign courts see SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959); SHEPARD, SOVEREIGNTY AND STATE-OWNED COMMERCIAL ENTITIES (1951).

courts of another state.[2] This practice is founded upon the policy that the national interest will be better served if the wrongs to suitors involving relations with a foreign power are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings.[3]

There are, however, certain exceptions to the application of the absolute theory of immunity.[4] When a vessel is the subject of controversy, a foreign government will succeed in its claim of immunity only by a showing that the ship, at the time the suit was filed, was in its actual possession and control.[5] In addition, foreign state-controlled corporations engaged in commercial activities are usually said to be amenable to local jurisdiction.[6] Moreover, sovereign immunity is susceptible to waiver.[7]

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2. The Schooner Exchange v. McFaddon, *supra* note 1; Wulfsohn v. Russian Republic, 234 N.Y. 372, 138 N.E. 24 (1923). Proponents of this absolute theory of sovereign immunity argue that all acts of the state are done in the public interest, and are therefore governmental in nature. Writers in favor of this theory include Gabba, Foelix, Leoning, Nys and Jordan. See Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 AM. J. INT'L L. 566, 570 (1928); FENWICK, INTERNATIONAL LAW 308 (3d ed. 1948).

3. Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945); Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938); *Ex parte* Peru, 318 U.S. 578 (1943). In Weilamann v. Chase Manhattan Bank, Judge Eager stated that when questions of immunity of foreign sovereign powers and their property are presented to the court they "must be dealt with in view of furtherance of comity between nations and must be resolved in accordance with policies formulated by the United States Department of State for the working out of international relations." 192 N.Y.S.2d 469, 471 (Sup. Ct. 1959).

4. See cases collected in 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 176 (1941).

5. The Roseric, 254 Fed. 154 (D.N.J. 1918); The Carlo Poma, 159 Fed. 369 (2d Cir. 1919); *Ex parte* Muir, 254 U.S. 522 (1921); The Pesaro, 255 U.S. 216 (1921); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). In The Beaton Park, 65 F. Supp. 211 (W.D. Wash. 1946), the claim of immunity was rejected on the grounds, *inter alia*, that the Canadian Government neither possessed nor operated the ship Beaton Park, but merely owned it. See however, Judge Mack's opinion in The Pesaro, 277 Fed. 473 (S.D.N.Y. 1921), in which immunity was denied to a merchant vessel owned and operated by the Italian Government. The English cases hold that title alone warrants immunity, The Parlement Belge, [1880] 5 P.D. 197; The Porto Alexandre, [1920] P. 30; Compania Naviera Vascongada v. Cristina S.S., [1938] A.C. 485. For comment on this area, see Sanborn, *The Immunity of Merchant Vessels When Owned by Foreign Governments*, 1 ST. JOHN'S L. REV. 1 (1926).

6. Amtorg Trading Corp. v. Commissioner, 65 F.2d 583 (2d Cir. 1933); Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A. 1934); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941); Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S.2d 201 (1940), *motion for leave to appeal denied*, 260 App. Div. 838, 25 N.Y.S.2d 1002 (1941); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825, *motion for leave to appeal denied*, 260 App. Div. 1006, 24 N.Y.S.2d 994 (1940). *Contra*, Stone Eng'r Co. v. Petroleos Mexicanos of Mexico D.F., 352 Pa. 12, 42 A.2d 57 (1945) (Mexican corporation formed by Mexican Government to develop oil lands); *In re* Investigation of World Arrangements with Relation to the Prod., Transp., Ref., & Distrib. of Petroleum, 13 F.R.D. 280 (D.D.C. 1952). See generally, Brandon, *Sovereign Immunity of Government Owned Corporations and Ships*, 39 CORNELL L.Q. 425 (1954).

7. Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 204 N.Y.S.2d 971, 978 (Sup. Ct. 1960); *In re* Patterson-MacDonald Shipbuilding Co., 293 Fed. 192 (9th Cir. 1923); The Uxmal, note 6 *supra* (waiver by general appearance); Fields v. Predionica I Tkanica A.D., 263 App. Div. 155, 31 N.Y.S.2d 739 (1941) (conduct of the sovereign was inconsistent with a general appearance). A special appearance by the representative of a foreign sovereign for the purpose of challenging jurisdiction is not a general appearance amounting to a waiver. Ervin v. Quintanilla, 99 F.2d 935

In all cases, a foreign state claiming immunity from jurisdiction has the burden of proving the grounds for this immunity.[8]

The authorized representative of a foreign state is the only competent person to appear and raise the jurisdictional issue.[9] Representations by a Consul General or by an attorney appearing as amicus curiae are ineffectual.[10] The request for immunity from suit may be made through the executive branch of the government by way of the State Department or by submitting the request directly to the judiciary.[11]

If application to the State Department results in recognition of the claim and the allowance of the immunity,[12] both the federal and state courts have held it their duty to follow the executive branch of the

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(5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939). See Cohn, *Waiver of Immunity*, 35 BRIT. YB. INT'L L. 260 (1958). For a list of bilateral treaties in which the United States has waived a part of its immunity see Setser, *The Immunities of the State and Government Economic Activities*, 24 LAW & CONTEMP. PROB. 291 n. 92 (1959).

8. Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68, 75 (1938); Fields v. Predionica I Tkanica A.D., note 7 *supra*; Bradford v. Chase Nat'l Bank, 24 F. Supp. 28 (S.D.N.Y. 1938); 48 C.J.S. *International Law* § 18 (1947).

9. A general agent specifically authorized is competent to appear and raise the jurisdictional issue. The Maipo, 252 Fed. 627 (S.D.N.Y. 1918). A minister is entrusted by virtue of his office with authority to represent. Lyders v. Lund, 32 F.2d 308 (N.D. Cal. 1929). In The Roseric, 24 Fed. 154 (D.N.J. 1918), the court said that the source from which the representation might be received was a matter of judicial discretion. In Telkes v. Hungarian Nat'l Museum, 265 App. Div. 192, 38 N.Y.S.2d 419 (1942), the court stated that neither lack of diplomatic recognition nor the existence of a state of war between the sovereign and the United States has any affect on the foreign sovereign's immunity from suit without his consent. *But see* Judge Knox's opinion in The Gul Djemal, 296 Fed. 567, 569 (S.D.N.Y. 1922), *aff'd*, 264 U.S. 90 (1924), he stated:

> I am of the opinion that at the time of the seizure of the Gul Djemal she enjoyed no immunity from such restraint, inasmuch as diplomatic relations between the United States and Turkey were then severed, and that therefore the comity and courtesy due from this country to Turkey did not, in the absence of appropriate suggestion from the State Department of this Government, require the extension of such immunity.

10. The Anne, 16 U.S. (3 Wheat.) 435, 445 (1818). Mr. Justice Story, speaking for the Court, stated: "A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes [and] . . . he is not considered as a minister or diplomatic agent of his sovereign. . . ." *Ex parte* Muir, 254 U.S. 522 (1921) held that a claim of sovereign immunity could not be properly put before the court by private counsel appearing as amicus curiae. It seems that in earlier cases, counsel for diplomatic representatives were permitted to file amicus curiae suggestions. See The Roseric, 254 Fed. 154 (D. N.J. 1918).

11. Republic of Mexico v. Hoffman, 324 U.S. 30, 34, 35 (1945); *Ex parte* Peru, 318 U.S. 578, 588 (1943); Compania Espanola De Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938); *Ex parte* Muir, 254 U.S. 522 (1921).

12. The procedure for filing a claim through the executive department is this: The foreign sovereign submits representations to the State Department. If the State Department determines that the claim should be recognized and the immunity allowed, it informs the Attorney General and he brings it to the court's attention through the United States Attorney for the appropriate district. See *Procedural Aspects of a Claim of Sovereign Immunity by a Foreign State*, 20 U. PITT. L. REV. 126 (1958). It appears that only the representations of the sovereign are considered by the Department of State. The plaintiff has no chance to be heard. For a general discussion of and possible solution to this problem, see Cardozo, *Sovereign Immunity: The Plaintiff Deserves a Day in Court*, 67 HARV. L. REV. 608 (1954).

government, and have declined to adjudicate the matter.[13] Absent court intervention by the United States government, the foreign sovereign may appear specially in a pending suit and assert immunity.[14] Should this occur, "the court will inquire whether the ground for immunity is one which it is the established policy of the [State] department to recognize."[15] Mr. Chief Justice Stone well stated the reason for following this procedure:

> It is the guiding principle in determining whether a court should exercise or surrender jurisdiction . . . that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs.[16]

In 1952, the Department of State, in the now famous Tate letter,[17] announced that henceforth it would follow the restrictive theory of sovereign immunity when considering requests by foreign governments for immunity from jurisdiction in United States courts.[18] According to this theory, a foreign sovereign's immunity from local jurisdiction is recognized with regard to sovereign or public acts (*jure imperii*) of the

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13. The Court in *Ex parte* Peru, 318 U.S. 578, 589 (1943), stated:
> The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification . . . must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations. Upon the submission of this certification to the district court, *it became the court's duty*, in conformity with established principles . . . to proceed no further in the cause. (Emphasis added.)

Judge Lupiano, speaking for a New York Supreme Court, was of the same opinion. He stated: "If the claim is recognized and allowed by the executive branch of the government, *it then becomes the duty of the courts* to accept the claim of immunity . . . ." (Emphasis added.), Stephen v. Zivnostenska Banka Nat'l Corp., 199 N.Y.S. 2d 797, 802 (Sup. Ct. 1960). A court may take jurisdiction to determine questions not covered by a State Department "suggestion." Matter of United States of Mexico v. Schmuck, 294 N.Y. 265, 62 N.E.2d 64 (1945). *Contra*, The Pesaro, 255 U.S. 216 (1921), in which the Court refused to follow the State Department's suggestion and allowed defendant's claim of immunity. Stephen v. Zivnovstenska Banka Nat'l Corp., 213 N.Y.S. 2d 306 (Sup. Ct. 1961). For criticism of this approach, see Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946); Note, *Judicial Deference to the State Department on International Legal Issues*, 97 U. PA. L. REV. 79 (1948).

14. Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); *Ex parte* Peru, 318 U.S. 578 (1943); Compania Espanola de Navegacion Maritima, S.A. v. The Navemar, 303 U.S. 68 (1938); *In re* Investigation of World Arangements with Relation to the Prod., Transp., Ref., & Distrib. of Petroleum, 13 F.R.D. 280 (D.D.C. 1952); Fields v. Predionica I Tkanica A.D., 263 App. Div. 155, 31 N.Y. S.2d 739 (1941); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825, *motion for leave to appeal denied*, 260 App. Div. 1006, 24 N.Y.S.2d 994 (1940).

15. Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945).

16. *Id.* at 35; Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469, 471 (Sup. Ct. 1959).

17. 26 DEP'T STATE BULL. 984 (1952) (letter dated May 19, 1952, from the acting Legal Adviser of the Department of State to the Attorney General). Dicta in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), and Keifer & Keifer v. RFC, 306 U.S. 381 (1939), indicates that governmental immunity from suit was in disfavor prior to the Tate letter.

18. 26 DEP'T STATE BULL. 984 (1952). The letter is discussed editorially in Bishop, *New United States Policy, Limiting Immunity*, 47 AM. J. INT'L L. 93 (1953).

state, but not with respect to private acts (*jure gestionis*).[19] The primary reason for the adoption of this distinction was that "the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts."[20]

This new position applied only to the immunity of a foreign state from jurisdiction with respect to private acts and did not immunize a foreign state's property from execution.[21] A recent letter from the Legal Advisor of the Department of State to the Attorney General stated:

> The Department has always recognized the distinction between 'immunity from suit' and 'immunity from execution.' The Department has maintained the view that, under international law, *property of a foreign sovereign is immune from execution to satisfy even a judgment obtained in an action against a foreign sovereign when there is no immunity from suit.*[22]

The most recent expression of the United States Supreme Court in regard to sovereign immunity may be found in *National City Bank v. Republic of China*.[23] The Republic of China had brought suit to recover a bank deposit and the bank had filed a counterclaim based on defaulted treasury notes of the Republic. The plaintiff claimed sovereign immunity as a defense to the counterclaim. The Court held that the Republic

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19. 26 DEP'T STATE BULL. 984, 985 (1952); see Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp., 204 N.Y.S.2d 971 (Sup. Ct. 1960); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825, *motion for leave to appeal denied*, 260 App. Div. 1006, 24 N.Y.S.2d 994 (1940). Italy was the first country to adopt the restrictive theory of sovereign immunity. An extensive survey concerning the theories of immunity used in foreign countries may be found in Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. YB. INT'L L. 220, 250-92 (1951). There is no international law making a foreign state exempt from local jurisdiction. Lauterpacht, *supra*, at 226-232. Recent application of the policy adopted by the Tate letter is discussed in Drachsler, *Some Observations on the Current Status of the Tate Letter*, 54 AM. J. INT'L L. 790 (1960).

20. 26 DEP'T STATE BULL. 984 (1952). However, when the United States is a defendant in foreign courts, the Justice Department invariably files a claim asserting the United States' immunity from suit. See *The United States as a Litigant in Foreign Courts*, address by George Leonard, American Society of International Law, April 25, 1958, in 1958 PROCEEDINGS, AMERICAN SOC'Y OF INT'L LAW 95.

21. In New York & Cuba M.S.S. Co. v. Republic of Korea, 132 F. Supp. 684, 685 (S.D.N.Y. 1955), a suggestion filed by the United States attorney for the Southern District of New York made it clear that the State Department "recognizes that under international law property of a foreign sovereign is immune from attachment and seizure and that the principle is not affected by [the Tate Letter] . . . in which the Department of State indicated its intention to be governed by the restrictive theory of sovereign immunity. . . ."; Weilamann v. Chase Manhattan Bank, 192 N.Y.S.2d 469, 472 (Sup. Ct. 1959) (property of U.S.S.R. is immune from execution or any other action analogous to execution). See generally 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW 479, 480 (1941); Lauterpacht, *supra* note 19, at 241-42; Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 624 (1950).

22. Myers, *Contemporary Practice of the United States Relating to International Law*, 54 AM. J. INT'L L. 632, 643 (1960) (Emphasis added.)

23. 348 U.S. 356 (1955).

had waived its immunity by bringing suit, and that the counterclaim would be permitted even though it did not arise out of the same transaction as the original claim.[24] The majority of the Court approved, in principle, the restrictive theory of sovereign immunity,[25] but preferred to rely on the old immunity doctrine in which no distinction was made between commercial and governmental activities. [26]

In the *Harris* case, the court held, in accordance with the great weight of authority, that neither a Consul General nor a private counsel had authority to claim sovereign immunity on behalf of the Republic of Cuba.[27] Since Cuba was not properly represented in the lower court to assert a claim for immunity, it is difficult to see how the appellate court reached the question as to the applicability of the restrictive theory unless it wished to give the lower court the needed directives in a delicate matter.

The court, however, did determine that the Republic of Cuba, even if properly represented, would not be entitled to immunity in this case. Judge Barns, speaking for the court, stated that the Department of State had "made clear its position that it will not intervene in favor of sovereign immunity in cases where non-governmental functions are involved."[28] Therefore, especially since this policy had been "approved" in the *National City Bank* case,[29] "any claim of sovereign immunity in our courts [would be] dependent on showing by evidence that the case involves matters *jure imperii* and not *jure gestionis*."[30] The hiring of the plaintiff to promote tourism was not a governmental function. It was an activity purely commercial in nature and could not be invoked as a ground for sovereign immunity.[31]

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24. National City Bank v. Republic of China, 348 U.S. 356, 362 (1955); prior to this decision an individual sued by a foreign government was not permitted to raise a counterclaim against such government unless the counterclaim arose out of the same transaction which gave rise to the initial claim. See French Republic v. Inland Nav. Co., 263 Fed. 410 (E.D. Mo. 1920); *The Tate Letter and the National City Bank Case: Implications*, address by Donald Claudy, American Society of International Law, April 25, 1958, in 1958 PROCEEDINGS, AMERICAN SOC'Y OF INT'L LAW 80.

25. National City Bank v. Republic of China, 348 U.S. 356, 361 (1955).

26. "The considerations found controlling in [The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)] . . . are not here present, and no consent to immunity can properly be implied." National City Bank v. Republic of China, 348 U.S. 356, 365 (1955), 69 HARV. L. REV. 152.

27. Cases cited note 10 *supra.*

28. Harris & Co. Advertising v. Republic of Cuba, 127 So.2d 687, 692 (Fla. App. 1961).

29. National City Bank v. Republic of China, 348 U.S. 356, 361 (1955).

30. Harris & Co. Advertising v. Republic of Cuba, 127 So.2d 687, 692 (Fla. App. 1961).

31. Instituto Nacional de la Industria Turistica was the government agency that hired the plaintiff. It was created by revolutionary law in 1959, Ley No. 636, Nov. 20, 1959, 22 GACETA OFICIAL 26502 (1959). Article one of this law specifies that the Instituto is autonomous in character and has a legal personality of its own. A state controlled corporation is not immune from suit, Amtorg Trading Corp. v. Commissioner, 65 F.2d 583 (2d Cir. 1953); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1921); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941);

The defendant made no special allegation that its property could not be attached to establish quasi-in-rem jurisdiction. Furthermore, there was no allegation that the various bank deposits of the Republic of Cuba were immune from execution had the plaintiff been successful in obtaining a judgment. The court stated that these bank accounts could not be immune from the powers of the courts "until it is shown by the preponderance of the evidence that they are directly related to activities *jure imperii*."[32] Absent this showing, the court apparently would deny the foreign sovereign immunity from suit and deny his property *immunity from execution*.[33] Since there was no allegation or proof that the bank accounts were directly related to activities *jure imperii*, and since the hiring of the plaintiff to promote tourism was a non-governmental function, the lower court's ruling sustaining the motion to dismiss was reversed.[34]

The general tendency of United States courts is to endorse the *jure imperii-jure gestionis* theory of immunity from suit already adopted by many European courts and by the State Department. The language of the instant case indicates that the Florida courts, in addition to complying with the trend, may well go even further by making the restrictive theory applicable to *immunity from execution* as well as immunity from suit.[35] This would seem to be a logical and equitable result.

Ulen & Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S.2d 201 (1940), *motion for leave to appeal denied*, 260 App. Div. 838, 25 N.Y.S.2d 1002 (1941); see Article 26 of the Harvard Research, 26 AM. J. INT'L L. 451, 716 (Supp. 1932):

> A State need not accord the privileges and immunities provided for in this Convention to such juristic persons as corporations or associations for profit separately organized by or under the authority of another State, regardless of the nature and extent of governmental interest therein or control thereof.

32. Harris & Co. Advertising v. Republic of Cuba, 127 So.2d 687, 693 (Fla. App. 1961).

33. Harris & Co. Advertising v. Republic of Cuba, *supra*, note 32, at 692. The court seems somewhat inconsistent inasmuch as it relied on State Department policy to gain jurisdiction over the Republic of Cuba, yet ignored this same policy to deny Cuba's property immunity from execution. In Loomis v. Rodgers, 254 F.2d 941 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 928 (1959), the plaintiff had attached funds of the Italian Government. The court held that since the funds were the *property* of a foreign sovereign, the attachment proceedings must be dismissed for want of jurisdiction. *The court stated that no formal suggestion of immunity was needed when there was no question as to the ownership of the property proceeded against.*

34. Harris & Co. Advertising v. Republic of Cuba, 127 So.2d 687, 695 (Fla. App. 1961).

35. Harris & Co. Advertising v. Republic of Cuba, 127 So.2d 687, 692 (Fla. App. 1961). In Republic Arabe Unie c. Dame X, Bundesgericht, Feb. 10, 1960, 86 Entscheidungen des Schweizerischen Bundesgerichtes 23 (Swit.), 55 AM. J. INT'L L. 167 (1961), the Supreme Court of Switzerland denied a foreign sovereign immunity from suit and his property immunity from execution where the underlying transaction had all the characteristics of an agreement between private parties. Although there are no American cases which allow execution against a foreign sovereign's property to satisfy a judgment, some writers contend that the power of execution is a consequence of the power of jurisdiction; see 2 SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS 836-37 (4th ed. 1958); RIEZLER, INTERNATIONALES ZIVILPROZESSRECHT 401-02 (Berlin 1949).

The rule that courts will avoid embarrassing the executive department of the government by not assuming an antagonistic position will go a long way toward establishing the restrictive theory of immunity in the United States.[36] The lack of criteria on which to base the distinction between acts *jure imperii* and *jure gestionis* has been the only apparent problem the courts have encountered in the application of this new theory to claims for immunity.[37] The problem could be solved if, whenever a claim for sovereign immunity is submitted directly to the judiciary, they would ask the State Department for a ruling. This procedure would result in a uniform application of the restrictive theory. Moreover, immunity problems would then be determined by the branch of the government responsible for the conduct of foreign affairs.

JAMES J. HOGAN

36. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945).

37. Mr. Justice Van Devanter well stated the difficulty in Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562, 574 (1926): "We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force." For discussion of the problem see Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 INS. COUNSEL J. 11 (1954); Fensterwald, *Sovereign Immunity and Soviet State Trading*, 63 HARV. L. REV. 614, 617 (1950); Lauterpacht, *supra* note 19, at 225; Setser, *supra* note 7, at 309; Bishop, *supra* note 18, at 203; Harvard Research in International Law, *Draft Convention on Competence of the Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 455 (Supp. 1932).