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Waiver of State Immunity

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license must be granted upon the payment of a single fee, good throughout the entire territorial jurisdiction of the country which issues the license.

The consular provisions of the treaty follow the lines laid down in the treaty with Germany of December 11, 1871, with certain modifications and extensions. A new clause is added with regard to the right of consular officers to take charge of property left by an intestate decedent, and the right of the consul to be appointed administrator. The language employed here is very guarded, probably in view of the many disputes arising over the interpretation of Article IX of the treaty of 1853 with the Argentine Republic, and culminating in the decision of the Supreme Court in *Rocca v. Thompson*, 223 U. S. 317. The present treaty limits the right of the consul to be appointed as administrator, by subjecting his appointment to the discretion of the court and to the provisions of local laws.

The actual operation of the new treaty will alone determine whether the *voeu* expressed in the preamble is to be realized and its provisions prove "responsive to the spiritual, cultural, economic, and commercial aspirations of the peoples" of both countries.

ARTHUR K. KUHN.

WAIVER OF STATE IMMUNITY

English and American courts have come to regard it as "an axiom of international law" that foreign states should be immune from suit in the national tribunals unless they expressly or impliedly waive their immunity and submit to the jurisdiction.¹ The exercise of jurisdiction in the absence of waiver, it has been said, would be "a violation of the respect due to every sovereign."² Sound policy has been thought to require that foreign states should be free from "the harassment of litigation" in forums and under conditions not of their own choosing.³ Yet it has not been doubted that states may waive immunity and submit to the local jurisdiction if they wish. In practice they frequently find it advantageous to do so. Some difficult questions arise when it becomes necessary to define the requisites of a waiver or to determine its precise effect in a particular case.

There is a waiver of immunity in a limited sense, in the first place, whenever a foreign state begins suit in a national court. States, as well as individuals, may resort to the courts to assert or protect their rights.⁴ If they do

¹ See *Duke of Brunswick v. King of Hanover* (1844), 6 Beav. 1, 40 (1848), 2 H. L. C. 1; *Wadsworth v. Queen of Spain* (1851), 17 Q. B. 171; *Gladstone v. Ottoman Bank* (1863), 1 H. & M. 505; *Hassard v. United States of Mexico* (1899), 61 N. Y. Supp. 939. See also *The Schooner Exchange v. M'Faddon* (1812), 7 Cr. 116; *The Parlement Belge* (1880), L. R. 5 P. D. 197.

² *Strousberg v. Republic of Costa Rica* (1880), 44 L. T. R. 199, 201.

³ *The Gloria* (1923), 236 Fed. 188, 194.

⁴ *Colombian Government v. Rothschild* (1826), 1 Sim. 94; *Hullet & Co. v. King of Spain* (1828), 1 Dow & Clark 169; *Republic of Mexico v. Arrangois* (1855), 11 How. Pr. 1; *King of Prussia v. Kuepper's Adm'r.* (1856), 22 Mo. 550; *United States of America v. Wagner* (1867), 36 L. J. Ch. N. S. 624.

resort to the courts, however, they should be regarded as having submitted, much as individuals are required to submit, to such orders, defenses, or cross-claims as may be essential to the complete adjudication of the controversy. The result may be inconsistent with the usual immunities, but the state should be regarded as having impliedly waived immunity in seeking the court's assistance.

Thus it is only reasonable, when a foreign state appears in court as a party plaintiff, that it should be required to give security for costs.⁵ It should be required also to make all material and relevant discoveries.⁶ While it should not be subjected to what is in substance an independent and separate suit disguised as a cross-action,⁷ it may nevertheless be required to answer the usual defenses of the nature of set-off or counterclaim, at least to the extent of the demand made or the property sought to be recovered.⁸ On the ground that a state in beginning suit does not waive its immunity in relation to others than the named defendant, it has been held that the defendant may not resort to interpleader or similar proceeding in order to bring in another party whose own claims to the subject-matter in controversy may leave nothing for the plaintiff.⁹ "If this be not so," said the court, "the immunity can be frittered away either by interpleader or attachment in any case where a foreign sovereign undertakes to collect a debt owed it."¹⁰ Whether this proposition be approved or not, it seems clear that counterclaims against foreign states should be allowed only in those cases in which similar cross-demands would be allowed against individual plaintiffs.¹¹ The latter limitation is of considerable importance because there is a temptation, whenever a foreign state begins suit, to bring in every conceivable kind of demand against it in the form of a counterclaim.

What should be done, however, in case the counterclaim exceeds in amount the plaintiff state's original demand? Has the state, by beginning suit, so completely waived its immunity that an affirmative judgment may be rendered against it? In a comparatively recent case, in which the suit was commenced by a foreign state and the defendant counterclaimed, the United

⁵ *Emperor of Brazil v. Robinson* (1837), 6 A. & E. 801; *Republic of Costa Rica v. Erlanger* (1876), 3 Ch. D. 62; *Vavasseur v. Krupp* (1878), 9 Ch. D. 351; *Republic of Honduras v. Soto* (1889), 112 N. Y. 310.

⁶ *King of Spain v. Hullet* (1833), 1 C. & F. 333; *Rothschild v. Queen of Portugal* (1839), 3 Y. & C. 594; *Republic of Peru v. Weguelin* (1875), L. R. 20 Eq. 140; *Republic of Costa Rica v. Erlanger* (1875), 1 Ch. D. 171. In *Rothschild v. Queen of Portugal*, 3 Y. & C. 594, 596, Alderson, B., said: "Her Most Faithful Majesty being a suitor voluntarily in a Court of English law, becomes subject, as to all matters connected with that suit, to the jurisdiction of this Court of Equity."

⁷ *Strousberg v. Republic of Costa Rica* (1880), 44 L. T. R. 199.

⁸ *The Newbattle* (1885), 10 P. D. 33. See *The Siren* (1868), 7 Wall. 152.

⁹ *Kingdom of Roumania v. Guaranty Trust Co. of New York* (1918), 250 Fed. 341.

¹⁰ 250 Fed. 341, 345.

¹¹ *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487 [1898] 1 Ch. 190.

States District Court for the Eastern District of Missouri sustained a motion to strike out as much of the answer as attempted to set up a counterclaim for affirmative relief.¹² But in a more recent and more carefully considered case, in which the same question was presented to the United States District Court for the Southern District of New York, a motion to restrict the counterclaim to such matters as might be pleaded by way of set-off was denied.¹³ It was held that while New York precedents might preclude the rendering of an affirmative judgment on the counterclaim, the court could at least proceed to a complete determination of the issues raised. In delivering the opinion, Judge Mack pointed out that while set-off and counterclaim were introduced originally as a part of the procedural law, they have actually developed from a mere procedural convenience into "a requirement of substantive justice." Courts will be reluctant in consequence to give judgment for a foreign state where in similar circumstances the judgment would go against a private litigant on a counterclaim. "Once the state has chosen its forum," said Judge Mack, "there seems little reason in law or policy why it should not be subject to the substantive requirements of law and justice."¹⁴

There is a waiver of immunity, in the second place, whenever a foreign state submits to be sued as a party defendant in a national court. Obviously a special appearance for the particular purpose of contesting the jurisdiction should not be regarded as a waiver.¹⁵ But a general appearance might be so regarded.^{15a} At least it should have some evidential significance as indicating an intention to waive immunity.

There have been divers results in the cases in which a general appearance by the diplomatic representative of a foreign state has been relied upon as a waiver. Perhaps the cases involving diplomatic representatives present a problem which is somewhat unique. In any event, where the diplomat of a foreign state was sued with other joint contractors as a necessary party defendant, appeared generally and permitted the suit to go to an advanced stage without claiming immunity, and there was no prospect of any interference with either his person or property, it was held that the plea of immunity came too late.¹⁶ It was said that immunity had been "abandoned by the voluntary act of the party," that he had "courted the jurisdiction."¹⁷ But in a later case in which a diplomatic representative entered a general appearance, asked for time to file evidence, and filed evidence on the merits, per-

¹² *French Republic v. Inland Navigation Co.* (1920), 263 Fed. 410. See also *In re Patterson-MacDonald Shipbuilding Co.* (1923), 293 Fed. 192.

¹³ *Kingdom of Norway v. Federal Sugar Refining Co.* (1923), 286 Fed. 188. See 22 *Michigan Law Review* 455. See also *Luckenbach S. S. Co. v. The Thekla* (1924), 45 *Sup. Ct.* 112.

¹⁴ 286 Fed. 188, 194. Compare *Von Hellfeld v. Russian Government* (1910), this *JOURNAL*, Vol. V, p. 490.

¹⁵ *Vavasseur v. Krupp* (1878), 9 *Ch. D.* 351.

^{15a} See *The Sao Vicente* (1922), 281 Fed. 111, 114.

¹⁶ *Taylor v. Best* (1854), 14 *C. B.* 487.

¹⁷ 14 *C. B.* 487, 525, 523.

mitting the suit to go on for more than a year without claiming immunity, it was held that immunity had not been waived.¹⁸ The court seems to have thought that the diplomat in this case was ignorant of his privilege, that knowledge of the law could not be imputed to him, and that in any case he could not waive immunity without his government's consent. If the diplomat's government consents, it has been held, the diplomat may waive his immunity and submit to a judgment which will be perfectly valid and which may be enforced as soon as the diplomatic appointment is terminated.¹⁹

May there be waiver by acts or conduct antedating appearance in court? The well-known English case of *Mighell v. Sultan of Johore* gives a negative answer. The Sultan lived incognito in England as an ordinary subject until sued for a breach of promise of marriage. Then he asserted his sovereign character and pleaded immunity. It was urged upon the Court of Appeal that by coming into the country incognito and making contracts as a private individual the Sultan had submitted to the jurisdiction. But the court rejected the contention. There could be no waiver, no submission to the jurisdiction, it was said, until the court was actually called upon to exercise jurisdiction over the defendant.²⁰ "Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual," declared Lord Esher, "yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction."²¹

The same rigid adherence to arbitrary principle which found such striking expression in the *Johore* case has had an interesting and significant application in Great Britain in the recent case of *Duff Development Co. v. Government of Kelantan*, decided by the House of Lords. Kelantan had granted a concession to the company by a deed containing an arbitration clause which incorporated the Arbitration Act of 1889. This Act made agreements to arbitrate enforceable and provided that awards should be given effect the same as judgments. There was a dispute with respect to the meaning of the deed, an arbitration was had pursuant to the agreement, and the arbitrator awarded in favor of the company. Kelantan first attempted to have the award set aside, but the Chancery Division, the Court of Appeal, and the House of Lords all decided against its contention. Then, when the company finally began proceedings to have the award enforced, Kelantan claimed immunity. The House of Lords held, Lord Carson dissenting, that Kelantan was entitled to immunity and that there had been nothing which amounted to a waiver.²² A majority of the House took the position that the arbitration was in no sense a judicial proceeding, that jurisdiction was not actually asserted over Kelantan until the company finally sought to have the award enforced, and that until jurisdiction was asserted there could be no opportunity

¹⁸ *In re Republic of Bolivia, Exploration Syndicate, Ltd.*, [1914] 1 Ch. 139.

¹⁹ *In re Suarez*, [1918] 1 Ch. 176.

²⁰ [1894] 1 Q. B. 149.

²¹ [1894] 1 Q. B. 149, 159.

²² [1924] A. C. 797.

for waiver. A final refusal to submit to the jurisdiction at this late stage might be a breach of agreement, but it was a breach with respect to which no national court could assume jurisdiction in the absence of consent.

The decision in *Duff Development Co. v. Government of Kelantan* seems peculiarly unfortunate at this day when sovereign immunities are regarded with less favor and are certainly less important than they may once have been.²³ It is in accord, however, with what seems to have been a tendency in the English cases to restrict waiver closely. While there are no American cases precisely in point, it is believed that American courts may be expected to approach the problem somewhat more liberally, with less concern for an arbitrary and somewhat archaic principle and more attention to the requirements of substantive justice.²⁴ If compulsory arbitration under modern statutes is not a judicial proceeding, it is at least closely analogous thereto. And certainly the ends of justice are ill subserved when a foreign state may arbitrate, proceed through all the courts of the land to have the award set aside, and finally defeat an order to enforce the award by claiming sovereign immunity.

EDWIN D. DICKINSON.

THE OPIUM CONFERENCES

On March 2, 1923, the President approved the Porter resolution which urged him to negotiate with various poppy and coca producing states for limiting their production of those substances to "strictly medicinal and scientific purposes." This led to discussion of this problem by representatives of the United States in the League's Advisory Committee on Opium and to the British suggestion on June 1, 1923, that two conferences be held. As a result of resolutions by the Assembly (Sept. 27, 1923) and Council (Dec. 13, 1923) of the League, official invitations for such conferences were issued by the League.¹

The first, which consisted of representatives of eight states² with possessions in which the smoking of opium is either considered legitimate or extensively practiced, met from November 3, 1924, to February 11, 1925, and

²³ See Hayes, "Private Claims Against Foreign Sovereigns," 38 *Harvard Law Review*, 599.

²⁴ In addition to the cases discussed above, see *Porto Rico v. Rosaly* (1913), 227 U. S. 270; *Porto Rico v. Ramos* (1914), 232 U. S. 627; *Richardson v. Fajardo Sugar Co.* (1916), 241 U. S. 44.

¹ For discussion of earlier international negotiations, see Wright, "The Opium Question," this *JOURNAL*, Vol. 18, p. 281. Accounts of the two recent conferences and the essential documents have been published by Buell, *World Peace Foundation Pamphlets*, Vol. 8, Nos. 2 and 3, and *Foreign Policy Association*, Pamphlet No. 33, 1925. See also *League of Nations*, *Monthly Summary*, Vol. 5, p. 54. On March 15, 1924 the League Council authorized a special preparatory committee to draft proposals for the conference. This committee failed to agree, and a proposal drafted by the League Advisory Committee on Opium was used as the basis of conference discussions. (*Minutes*, 6th session, p. 111.) The United States independently offered suggestions. (Buell, *op. cit.*, p. 144.)

² Great Britain, France, Netherlands, Portugal, Japan, India, Siam, China.