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INTERNATIONAL LAW - SOVEREIGN IMMUNITY - IMMUNITY FROM SUIT OF FUNDS BELONGING TO A POLITICAL SUBDIVISION OF A STATE

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INTERNATIONAL LAW — SOVEREIGN IMMUNITY — IMMUNITY FROM SUIT OF FUNDS BELONGING TO A POLITICAL SUBDIVISION OF A STATE — Plaintiff, the holder of bonds of defendant, the state of Sao Paulo, one of the federated states of the United States of Brazil, attached funds belonging to the defendant and deposited them in a New York bank to meet payments on the bonds. During the depression there had been a general default by Brazil and its states on their external debts because of the unfavorable trade conditions and consequent lack of dollar exchange. The Aranha plan was devised in 1934 to combat these conditions through control of foreign exchange. Each state was required to deposit with the Bank of Brazil full service on its debts and whenever sufficient dollar exchange became available, the government of Brazil ordered payments to be made. Complete control over any disposition of the funds was in the government of Brazil, but ownership remained in the several states. The Brazilian Ambassador through the United States Department of State raised a claim of sovereign immunity on behalf of both Brazil and Sao Paulo. The district court granted immunity from suit to Brazil and dissolved the attachment. Plaintiff appealed. *Held,* by Justices Chase and Clark, affirmed, because of the sovereign immunity of Sao Paulo; the interests of Brazil in the funds were found insufficient to support immunity. Justice Learned Hand, concurring, affirmed, because the claim of Brazil has been "recognized and allowed" by the State Department. *Sullivan v. Sao Paulo,* (C. C. A. 2d, 1941) 122 F. (2d) 355.[1]

American courts generally hold that the property of a foreign sovereign, as well as the sovereign itself, is immune from attachments or suits in the courts of this country.[2] Although there is a res before the court and hence jurisdiction in

[1] See (D. C. N. Y. 1941) 36 F. Supp. 503 for the lower court's decision, noted in 50 YALE L. J. 1088 (1941); 3 GA. B. J. 71 (May, 1941); 26 CORN. L. Q. 727 (1941).

[2] Berizzi Bros. v. S. S. Pesaro, 271 U. S. 562, 46 S. Ct. 611 (1926); Ex parte Muir, 254 U. S. 522, 41 S. Ct. 185 (1921); The Schooner Exchange v. McFaddon, 7 Cranch (11 U. S.) 116 (1812); Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrel-

the conventional sense, as a matter of comity such jurisdiction will not be exercised whenever the plea of sovereign immunity is satisfactorily raised.[3] The principal case suggests two problems involved in this rule: (1) when is a political entity a sovereign for purposes of immunity? and (2) of what character must the interest of the sovereign in the object taxed be to entitle it to assert the immunity? (1) Juristic concepts of national personality are of little help in determining when the courts, in a given case, should as a matter of policy recognize the sovereign immunity of any particular political entity.[4] Various criteria for determining the existence of "sovereignty" have been suggested, such as the existence of diplomatic relations; an absence of control by other states; and classification as a juristic person (*personne morale*).[5] Yet none of these seems adequate either to explain the judicial decisions or to serve as a rational guide for future decision. Recently, however, the principles behind the whole doctrine of immunity have been subjected to severe criticism.[6] Control or ownership by modern governments over the vastly increased facilities for commercial intercourse has compelled some limitation upon immunity.[7] Huge commercial or financial enterprises cannot be regulated fairly unless subjected to the normal incidents of local law. Also sovereign immunity necessitates the settlement of differences on the invidious basis of constant diplomatic negotiations, a hopelessly cumbersome method. In the principal case the court recognizes the sovereign immunity of Sao Paulo by draw-

sen, (C. C. A. 2d, 1930) 43 F. (2d) 705; Amtorg Trading Corp. v. United States, (Cust. & Pat. App. 1934) 71 F. (2d) 524; Oliver Trading Co. v. Mexico, (C. C. A. 2d, 1924) 5 F. (2d) 659. Accord, England: The Cristina, [1938] 1 All Eng. 719. *Contra,* Lamont v. Travelers Ins. Co., 281 N. Y. 362, 24 N. E. (2d) 81 (1939), and many continental courts. See cases collected in Brinton, "Suits Against Foreign States," 25 AM. J. INT. L. 50 (1931); Draft Convention on Competence of Courts in Regard to Foreign States, 26 AM. J. INT. L. SUPP. 455-738 (1932), prepared by the Research in International Law of Harvard Law School.

[3] Where the sovereign itself is a necessary party defendant, informal representations from the ambassador or from an amicus curiae are sufficient to raise the issue. Ex parte Muir, 254 U. S. 522, 41 S. Ct. 185 (1921); Puente v. Spanish National State, (C. C. A. 2d, 1940) 116 F. (2d) 43. If there is a res before the court, the ambassador must appear or a "suggestion" of immunity must be presented to the court through the State Department. The Navemar, 303 U. S. 68, 58 S. Ct. 432 (1938).

[4] For an exhaustive classification of states as international persons see 1 OPPENHEIM, INTERNATIONAL LAW, 5th ed., §§ 63-111 (1937); WHEATON, INTERNATIONAL LAW, 6th ed., 38 (1929).

[5] See supra, note 4, and draft convention, 26 AM. J. INT. L. SUPP. 475 at 479 (1932). See also Kawananakoa v. Polyblank, 205 U. S. 349, 27 S. Ct. 526 (1907); Smith v. Weguelin, L. R. 8 Eq. 198 (1869); Duff Development Co. v. Kelantan Government, [1924] A. C. 797; In re Patterson-MacDonald Shipbuilding Co., (C. C. A. 9th, 1923) 293 F. 192; Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N. Y. 372, 138 N. E. 24 (1923); and cases collected in 26 AM. J. INT. L. SUPP. 475 (1932).

[6] See 50 YALE L. J. 1088 (1941); 2 MODERN L. REV. 57 (1938); and opinions of Lords Maugham and Wright in The Cristina, [1938] 1 All Eng. 719.

[7] A distinction between private commercial and public functions of the sovereign, *jure gestionis* and *jure imperii,* may be employed with only the latter entitled to immunity. Such distinction is widely followed on the continent and is beginning to influence the American cases. See collected cases in 25 AM. J. INT. L. 83 (1931). Cf.

ing an analogy to the states of our own union.[8] Although sovereignty is severely limited by a federal constitution, the court declares the essential criterion to be satisfied, namely, the ability to change or affect the laws of property.[9] As is pointed out in the concurring opinion of Justice Learned Hand, such barren legal logic could be used to extend the doctrine immeasurably,[10] and such an extension would be unsupported by any reasonable considerations of policy. Should the court deny immunity and should such denial perchance endanger friendly relations with a foreign power or seriously embarrass the State Department, there is a completely adequate remedy for the foreign power in an application for "recognition and allowance" of its claim by the State Department.[11] When a suggestion to that effect is communicated to the courts, it is accepted as converting the problem from a judicial into a political one and jurisdiction is consequently abandoned.[12] (2) Brazil's interest in the funds in question being short of full ownership, the majority of the court refused to extend immunity to the funds at its instance.[13] At any event this limitation seems advisable if the courts are to

Bradford v. Director General of Railroads of Mexico, (Tex. Civ. App. 1925) 278 S. W. 251; Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1940); Ulen & Co. v. Bank Gospodarstwa Krajowego (National Economic Bank), 261 App. Div. 1, 24 N. Y. S. (2d) 201 (1940). The mixture of governmental and corporate powers held by modern instrumentalities make such distinctions very difficult.

[8] A foreign state cannot sue a state of the union, Monaco v. Mississippi, 292 U. S. 313, 54 S. Ct. 745 (1934). Domestic or foreign citizens are barred by the Eleventh Amendment, Hagood v. Southern, 117 U. S. 52, 6 S. Ct. 608 (1885); Louisiana v. Jumel, 107 U. S. 711, 2 S. Ct. 128 (1882); In re Ayers, 123 U. S. 443, 8 S. Ct. 164 (1887). Hawaii was granted immunity in Kawananakoa v. Polyblank, 205 U. S. 349, 27 S. Ct. 526 (1907).

Contra: Immunity was refused to a state of Brazil in a suit on French loans. Etat de Céara v. Dorr [1928] 2 GAZ. PAL. 614. See also continental cases collected in 26 AM. J. INT. L. SUPP. 475 at 484 (1932).

[9] The doctrine of sovereign immunity "is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights." Kawananakoa v. Polyblank, 205 U. S. 349 at 353, 27 S. Ct. 526 (1907).

[10] "It does not seem to me desirable, or indeed practicable, in every case to examine the municipal law of a foreign state in order to see how far the functions of one of its political divisions justify giving it immunity; nor indeed do I know any measure by which to judge that issue." Principal case, 122 F. (2d) 355 at 361 (1941). Cf. 26 CORN. L. Q. 727 (1941).

[11] "Certainly, if the answer depends upon how far the suit will affect foreign relations, only our foreign office ought to decide it. If that office does not think that the foreign state's protest deserves transmission to its own court, I would not go at all into the question of the 'sovereignty' of the political division of the foreign state." L. Hand, J., in concurring opinion in the principal case, 122 F. (2d) 355 at 361.

[12] Ex parte Muir, 254 U. S. 522, 41 S. Ct. 185 (1921); Puente v. Spanish National State, (C. C. A. 2d, 1940) 116 F. (2d) 43; Lamont v. Travelers Ins. Co., 281 N. Y. 362, 24 N. E. (2d) 81 (1939); Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N. Y. S. (2d) 825 (1940).

[13] District court contra, principal case, 36 F. Supp. 503 at 507. "The interest of the United States of Brazil is more than a passing interest of the fiscal funds of a State,

grant immunity even where there is an actual res before them, as seems to be the rule in most American and English jurisdictions. Proof of ownership, or at least possession, should be demanded of the foreign state, if immunity is to be granted as a judicial doctrine.[14] The majority, however, have misapprehended the nature of the suggestion of the State Department.[15] It not only vouched for the truth of the facts submitted by Brazil,[16] but also "recognized and allowed" the claim of immunity.[17] The State Department in its solution of the problem must necessarily consider many other factors besides actual ownership of the funds, and in this case recognition and allowance was probably motivated by sympathy toward the plans of Brazil, and intended to further our "good neighbor" policy.

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it bears directly upon the entire financial structure of the United States of Brazil and its control over external credits." Immunity was consequently granted as a judicial doctrine and not because of the suggestion of the State Department.

[14] Where the court seizes property from the actual possession of a foreign state immunity is granted without the intervention of the State Department on the theory that this is so grave an indignity as ipso facto to embarrass friendly relations. Ex parte Muir, 254 U. S. 522, 41 S. Ct. 185 (1921); Berizzi Bros. v. S. S. Pesaro, 271 U. S. 562, 46 S. Ct. 611 (1926); The Navemar, 303 U. S. 68, 58 S. Ct. 432 (1938); The Carlo Poma, (C. C. A. 2d, 1919) 259 F. 369. Cf. The Cristina, [1938] 1 All Eng. 719.

[15] The letter from the State Department conveying its suggestion said: "I may state, however, that, aside from the question of the political status of the two defendant states, it is the view of the Department that the interest of the Government of Brazil in the funds . . . is of such character as to entitle them to immunity from attachment by private litigants." Principal case, 122 F. (2d) 355 at 357.

[16] The effect of a suggestion as a determination of the facts by the State Department relieves the sovereign of the burdens of the private litigant where its title is disputed. This limited effect is accepted by all American courts even though the same court may reject it as conclusive of the question of immunity. See Déak, "The Plea of Sovereign Immunity and the New York Court of Appeals," 40 COL. L. REV. 453 (1940).

[17] The confusion in the cases is due to the refusal of the State Department to assume any responsibility for the immunity granted even when a "suggestion" is submitted to the court, and to its refusal to use the apt words "recognized and allowed," recommended by the Supreme Court in The Navemar, 303 U. S. 68, 58 S. Ct. 432 (1938), whenever the Department feels the problem is political. The uniformly ambiguous diplomatic language of the "suggestion" is practically unintelligible. See 40 COL. L. REV. 453 (1940); 50 YALE L. J. 1088 (1941); Lamont v. Travelers Ins. Co. 281 N. Y. 362, 24 N. E. (2d) 81 (1939); and the district court decision in the principal case, (D. C. N. Y. 1941) 36 F. Supp. 503.

The State Department disclaims any interference with judicial decision on principles of international law; yet the judicial principle of international law is to grant immunity whenever the State Department suggestion seems strong enough to imply "recognition and allowance" of the claim. The result is a vicious circle of shifted responsibility.