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# Sovereign Immunity in Perspective

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## I. LEGAL AND HISTORICAL PREDICATES

The doctrine of the immunity of foreign governments from the adjudicatory and enforcement jurisdiction of national courts is rooted in two bases of international law, the notion of sovereignty and the notion of the equality of sovereigns. There is no need to rehearse the historical growth of these foundations of the modern international community. Suffice it to say that E.D. Dickinson's celebrated study, *The Equality of States in International Law*, furnishes a detailed account of the evolution of these notions.[1]

Although historically the recognition of the jurisdictional im-

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** The style used in the footnotes reflects the preferred usage of Professor Riesenfeld. Ordinarily, the *Journal* adheres to the form set forth in A Uniform System of Citation (13th Ed., 1981).

1. III E.D. DICKINSON, THE EQUALITY OF STATES IN INTERNATIONAL LAW (1920).

munities of foreign states may have been intertwined with the recognition of the immunity of foreign sovereigns as rulers and of the immunity of foreign ambassadors as their representatives, its juridical foundation rests on the principals of sovereignty, independence, equality and dignity of states and, additionally, on the ideas of reciprocity, comity among nations and avoidance of unilateral action in international affairs.[2] Couched in the telling maxim, "Par in Parem imperium non habet,"[3] the principle of sovereign immunity is recognized in the jurisprudence of most nations.

There seems to be common agreement among scholars[4] that the earliest judicial pronouncement of the doctrine of sovereign immunity by the highest court of a nation was made in 1812 in the case of The Schooner Exchange v. McFaddon.[5] It is, however, less well known that similar holdings emanated from French courts only a few years later[6] and that the highest court of France (the Cour de Cassation) confirmed the principle of the immunity of foreign nations from local jurisdiction in a leading precedent handed down in 1849.[7] The importance of that decision, in light of the facts involved, requires further discussion.

A firm of French merchants, later placed in liquidation, sold military boots to the Spanish government through a Spanish merchant acting as middleman. To make payments for the merchandise the head paymaster of the Spanish military drew a bill of exchange on the chief financial officer of the Spanish province

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2. Jurisdictional Immunities of States and Their Property, Preliminary Report by Sompong Sucharitkul, Special Rapporteur [1979] II Y.B. INT'L L. COMM'N 227, 240, U.N. Doc. A/CN. 4/323/1979.

3. Quoted by Mr. William Riphagen, I.L.C. 1622nd Meeting, [1980] I Y.B. INT'L LAW COMM'N 194, 197, U.N. Doc. A/CN. 4/331/1980. Sometimes the maxim is stated as "Par inter parem non habet judicium."

4. *See, e.g.*, GAMAL M. BADR, STATE IMMUNITY, AN ANALYTICAL AND PROGNOSTIC VIEW 9 (1984).

5. 11 U.S. (7 Cranch) 116 (1812).

6. These older cases are listed and summarized in the comments of the notewriters accompanying the report of judgment of Cour de Cassation in the case of Gouvernement Espagnol c. Lambège et Pujol, Dalloz, Jurispr. Générale, 1849, I; Sirey, Lois et Arrêts, 1849, I, 81. These cases are Balguerie c. Gouvernement Espagnol, Cour de Paris, 1825; Blanchet c. République d'Haiti, Trib. civ. du Havre, 1827; Ternaux-Gandolphe c. Rep. d'Haiti, Trib. civ. de la Seine, 1828; Solon c. Gouvernement Egyptien, Trib. civ. de la Seine, 1847.

7. Gouvernement Espagnol c. Lambége et Pujol (Casaux, liquid.) Dalloz, Jurispr. Gén. 1849 I p. 1; Sirey, Lois et Arrêts, 1849, I p. 81.

of Oviedo, naming a military agent as payee. The payee endorsed the bill of exchange to the Spanish middleman who, in turn, endorsed the instrument to the French merchants, the endorsement to whom was followed by further endorsements. When, upon maturity of the bill, the ultimate endorsee presented it to the drawer for payment the latter failed to honor the instrument for the reason that the Spanish government had issued orders prohibiting payment. After proper payment the unpaid bill of exchange was returned to the liquidator of the French firm. The liquidator obtained a writ of garnishment which was served upon a French judgment debtor of the Spanish government. The garnishment order was communicated to the Spanish Minister of Finance together with a summons to appear before the Tribunal Civil de Bayonne. The Spanish government suffered a default judgment in the garnishment action which was upheld on appeal by the Court of Appeals of Pau. Thereupon the Spanish Minister of Finance sought a writ of error from the Cour de Cassation, claiming immunity from French jurisdiction in an elaborate brief reported together with the judgment. The Cour de Cassation sustained that plea and vacated the judgment below. In its characteristically terse and structured opinion the Court set forth its principal reason as follows:[8]

> Taking notice of art. 14 of the Civil Code — considering that the reciprocal independence of states is one of the most universally recognized principles of international law — that it follows from that principle that a government cannot be subject to the jurisdiction of a foreign state with respect to the obligations which it contracts — that actually the right of jurisdiction which appertains to each government with respect to the adjudication of controversies arising from acts emanating from it is inherent in its sovereign authority and could not be attributed by another government to itself without exposing itself to an alteration of their respective relations — considering further that if art. 14 of the Civil Code authorizes suits in French courts against a foreigner who has contracted an obligation vis-á-vis a French national, this article does not violate the principle cited set forth before — that it deals only with private agreements contracted between nationals belonging to different nations and not agreements by which a foreign state has bound itself with respect to a French citizen, an interpretation which is deductible very naturally from the terms of this article and, in par-

8. Dalloz, Jurispr. Gén. 1849 I p. 21; Sirey, Lois et Arrêts, 1849, I p. 93. The translation is by the author.

ticular, from its place in the Civil Code which deals exclusively with private persons and in a chapter whose provisions are designed exclusively to regulate the private rights of them. . .

The Court vacates, etc.[9]

France adhered to the doctrine of absolute immunity until its qualification by decisions of the Cour de Cassation, commencing in 1929 with the case of *Union des Républiques Socialistes Soviétiques c. Association France-Export.*[10] In that case[11] the Soviet Trade Mission in France had entered into an agreement with a French export corporation providing for the exposition of French articles in Moscow under the auspices of a Soviet association called Gostorg that would lease the premises to France-Export. The French company paid the rent in advance but ultimately the U.S.S.R. cancelled the import permit. Thereupon France-Export garnished funds owed to Gostorg and the U.S.S.R. Trade Mission. The U.S.S.R. challenged the garnishment as a violation of the principle of sovereignty recognized in article 7 of the law of 20.4 1810.[12] The Cour de Cassation rejected this contention and upheld the garnishment for the reason that the Trade Mission of the U.S.S.R. "manifests a broad commercial activity in all areas" and "that these manifestations can only appear to be commercial acts to which the principle of state sovereignty remains completely foreign."[13]

From that time, French courts have consistently assumed jurisdiction over actions against foreign states or instrumentalities of such states based on commercial activities conducted in France.[14] Moreover, French courts have denied immunity from enforce-

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9. The judgment was rendered by the Chambre Civil, composed of President M. Portalis, First President of the Cour de Cassation, Justice Bérenger as rapporteur and other members of the chambre, after hearing the conclusions of the Advocate General, Mr. Nicias-Gaillard.

10. Cour de Cassation, Judgment of Feb. 19, 1929, 1929 Dalloz. Receuil Périodique et Critique (D.P.) I 73.

11. For the statement of the facts, see the decision of the court below, Cour de Paris, Judgment of Nov. 19, 1926, Soc. Le Gostorg et Union des Républiques Socialistes Soviétiques, 54 Journal du Droit International 406 (1928).

12. The statute is reprinted in 17 Duvergier, Collection Complète des Lois 66-69 (1836). It provided that the administration of justice by the imperial courts is a sovereign function which cannot be vitiated except for an express violation of the law.

13. 1929 D.P. I. at 75.

14. *See, e.g.*, Sté des Etablissements Poclain c. Morflot, Trib. com. Paris, 1977, discussed in 1978 Annuaire Français de Droit International 1070.

ment jurisdiction, including pre-judgment sequestration of property in France such as bank accounts, owned by foreign states or their instrumentalities and used for commercial purposes or originating in commercial transactions.[15]

Two recent and important judgments of the Cour de Cassation have brought further clarification and refinement to the immunity from pre-judgment or post-judgment seizure of assets of a foreign state or its instrumentalities. The first of these two decisions was rendered in the case of *Société anon. EURODIF et autre c. République islamic d'Iran et autres.*[16] The second is the case of *Société Nationale Algérienne de Transport et de Commercialisation des Hydorcarbures (Sonatrach) c. Migeon.*[17]

Because of the significance of these decisions, French legal periodicals published not only the texts of the traditionally concise judgments themselves, but also the detailed analysis of the problems posed by the cases in the light of the prior jurisprudence of the Court, presented to the chamber by the Juge Rapporteur in charge of the cases as well as the elaborate opinions of the representative of the government, Advocate General Gulphe.

In the *Eurodif* case the litigation was prompted by an alleged breach on the part of Iran of an agreement concluded between the Iranian Organization of Atomic Energy (O.E.A.I.), a government department of Iran, on the one hand, and the French Commission for Atomic Energy (C.E.A.) and two corporations under French law, EURODIF and SOFIDIF, on the other hand. The agreement provided for Iran's participation in the production and distribution of enriched uranium and, at the same time, for loans by Iran to C.E.A. and EURODIF for the purpose of facilitating

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15. *See, e.g.*, Caisse d'assurance vieillesse des non-salarieés c. Caisse nationale des barraux Français, Cour de Cassation, 1977, Bull. Cour de Cass. 1977 I 369; 1978 Annuaire Français de Droit International 1070, upholding the garnishment by a French creditor of a bank account maintained at a Paris bank by the Algerian Social Security Fund for the Self-Employed.

16. Cour de Cassation, 1re Ch. Civ., 14.3.1984, Dalloz-Sirey, Jur. 629, including the report of M. le conseiller Fabre, La Semaine Juridique, Jur. 20205 (1984) with the opinion of M. l'Avocat Général Gulphe. The judgment of the Court of Appeal of Paris, 21.4.1982 is published in 110 Journal de Droit International 145 (1983); 1983 Annuaire Français de Droit International 838. An English translation of the Judgment of the Cour de Cassation is printed in 23 I.L.M. 1062 (1984).

17. Cour de Cassation, 1re Ch. Civ., 1.10.1985, La Semaine Juridique, Jur. 20566 (1986) with the opinion of the Attorney General Gulphe.

the production.

Following the overthrow of the Shah, the new Iranian government decided to discontinue its participation in the program and to withhold payment of the last installment of the loan to EURODIF. Pursuant to an agreement included in the contracts between the parties, EURODIF and its affiliate commenced arbitration proceedings and sought an order of pre-judgment garnishment from the president of the Commerce Tribunal in Paris, as permitted under the arbitration rules of the International Chamber of Commerce governing the dispute. The garnishment was levied upon Iran's right to the repayment of capital and interest on its loan to C.E.A. The Court of Appeals in Paris set the garnishment aside on the grounds that Iran was entitled to immunity from execution against the fund involved as public property, regardless of whether the loan had a commercial purpose or originated in a commercial transaction, and that the agreement to arbitrate did not constitute a waiver of the immunity from execution in the absence of an express agreement to that effect. Plaintiffs sought a writ of error from Cour de Cassation, assigning both grounds given by the appellate court as error. The Court vacated the judgment below on the first ground assigned and deemed it unnecessary to pass on the second ground. In remanding the case to another court of appeal (as prescribed by French law) the Court held

> that under the rules of private international law, governing the immunities of foreign states, the immunity from execution enjoyed by a foreign state is a matter of principle; that, however, it may be disregarded under exceptional circumstances and that this is the case in particular when the property is devoted to the economic or commercial activity governed by private law which gives rise to the action; that therefore the court below had misapplied the law by failing to determine whether the exceptions were applicable in view of the fact that the right to repayment originated in the funds devoted to the execution of the Franco-Iranian program for the production and distribution of nuclear energy whose disruption prompted plaintiff's claims.[18]

While the Cour de Cassation studiously applied a formula drawn from that of the Foreign Sovereign Immunities Act (FSIA) of the United States, it was careful not to close the door to

18. *Id.* (translation by the author).

broader exceptions to the immunity from execution. The United States FSIA differentiates between the immunity from execution of property belonging to the state itself and property belonging to a separate instrumentality of the state. The *Sonatrach* case mentioned before[19] furnished the opportunity to the Cour de Cassation to develop an analogous distinction.

In that case Mr. Migeon, who was a former employee of Sonatrach, an Algerian governmental instrumentality engaged in the transport and marketing of hydrocarbons, obtained a judgment against that entity for the breach of his employment contract. He obtained a garnishment order which he levied on a debt owing by Gaz de France to Sonatrach from a sale of liquified gas. The court of appeal sustained the garnishment and Sonatrach challenged it as violative of the principle of foreign sovereign immunity before the Cour de Cassation. That court rejected plaintiff's contention for the reason that

> in distinction to the property of a foreign state which in principle is immune from seizure but for exceptions applicable when such property is allocated to a commercial or economic activity under private law that gives rise to the claim of the garnishor, the property of public entities distinct from the foreign state, whether or not endowed with legal personality, may be seized by any of the creditors of such entity if such property forms part of assets which the foreign state has devoted to a principal activity governed by private law, and that in the case at hand, because Sonatrach had as its principal object the transport and marketing of gas, an activity subject by its nature to the rules of private law, its claim against Gaz de France which stemmed from the supply of gas was garnishable by Mr. Migeon, unless Sonatrach had shown that these were not the facts.[20]

Of course, the question of immunity of the property of a foreign state from seizure need not be faced, if such measure is sought as a provisional remedy in an action involving the alleged responsibility of a foreign state for an act taken in the exercise of a governmental function within its terrority. In a case of that type the principle of immunity from adjudication or the act of state doctrine will bar a judgment on the merits and therefore a pre-judgment attachment. A situation of this type came before the Cour

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19. *See supra*, text accompanying note 17.

20. Cour de Cassation, 1re Ch. Civ., 1.10.1985, La Semaine Juridique, Jur. 20566 (translation by the author of the operative portion of the Judgment).

de Cassation in the case of *General National Maritime Transport Company (G.N.M.T.C.) c. Soc. Marseille Fret*[21] in which Marseille Fret secured the attachment of the vessel Ghat, belonging to the Libyan State and chartered by a Libyan corporation. The attachment plaintiff claimed that Libya had wrongfully attached its own vessel, Rove, on request by a company acting for the account of Libya. The Cour de Cassation set aside a judgment of the court of appeal of Aix-en-Province upholding the attachment on the ground "that the conditions necessary for the application of the immunity from jurisdiction operating for the benefit of a foreign state or an entity acting on its order or its account were met in the instant case" and "that the sovereignty and independence of states prohibited French courts from recognizing the responsibility of a foreign state for an act taken in the exercise of public power in its own terrority."[22]

In Germany likewise the doctrine of sovereign immunity in its absolute form was recognized by Prussian or other German courts at least as early as in 1819.[23] The Supreme Court of the German Empire adhered to that practice throughout its existence. The leading precedent was rendered in 1905,[24] after a strong dictum to that effect in an earlier case.[25] In the 1905 decision the court held that, apart from litigation relating to local real property or jurisdiction over counterclaims, a foreign state was exempt from the local jurisdiction even over claims governed by private law because of principles of reciprocal independence and equality.

While many of the earlier cases arose out of pre-judgment attachments, one subsequent celebrated litigation compelled a more detailed differentiation between adjudicatory and enforcement jurisdiction. This decision arose out of a controversy between von Hellfeld and the Fisk of the Russian Empire.[26] During the Russo-

21. Cour de Cassation, Judgment of 4.2.1986, digested in Dalloz-Sirey, I.R. 233 (1986) (available in Lexis).

22. *Id.* (principles set forth by the court).

23. See cases from the years 1819, 1832, and 1834, discussed by Droop, Ueber die Zuständigkeit der inländischen Gerichte für die Rechtsstreitigkeiten zwischen Inländern und fremden Staaten, insbesondere für Anordnung von Arresten gegen fremde Staaten, 26 Gruchot's Beiträge 289 (1882).

24. B. w. Belgischer Staats-u. Eisenbahnfiskus, 62 RGZ 165 (Supreme Court of the German Empire, 1905).

25. Russische Naptha-Produktionsgesellschaft w. O., 22 RGZ 19, 29 (Supreme Court of the German Empire, 1889).

26. Von Hellfeld gegen den Fiskus des russischen Reiches, Preussischer Ger-

Japanese War of 1904 von Hellfeld, a German citizen, and the Russian War Ministry negotiated a contract for the supply to Russia of a steamer carrying war materials. The steamer was never delivered and the Russian treasury brought suit against von Hellfeld in the German court for the German colony Kiautschou. Von Hellfeld filed a counterclaim. The litigation traversed several stages of German courts in China and ended, over the protests of Russia, in a judgment for von Hellfeld on his counterclaim. The court of Kiautschou certified the executability of its judgment. Von Hellfeld thereupon obtained a writ of garnishment from the district court of Berlin and levied on a bank account of Russia with the Berlin banking firm Mendelssohn & Co. Russia objected against the garnishment and claimed lack of jurisdiction. As a result, upon motion of the German Minister for Foreign Affairs, the issue was referred to the Prussian Court for Jurisdictional Controversies. The parties produced a battery of academic experts on international law and as a result the court rendered a detailed judgment holding that existence of adjudicatory jurisdiction over the counterclaim did not entail enforcement jurisdiction and that in the absence of an express waiver by Russia of immunity from enforcement jurisdiction, international law mandates the exemption from enforcement remedies.

The doctrine of absolute jurisdictional immunity governed in German courts until World War II. Beginning with 1951, German lower and intermediate courts switched to the restrictive doctrine, and in 1963, finally, the Federal Constitutional Court[27] held that as a matter of international law a foreign state was not exempted from jurisdiction of domestic courts over actions based on non-governmental activities and that the distinction between governmental and non-governmental activities had to be determined on the basis of the nature of such activity. Subsequently the Court extended its holding to enforcement measures against property of a foreign state not used for governmental purposes.[28]

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ichtshof zur Entscheidung der Kompetenz-konflikte, 25.6.1910, *reprinted in* 20 T. NIEMEYER, ZEITSCHRIFT FÜR INTERNATIONALES RECHT 416 (1910).

27. Order of 30.4.1963, W. Ger., Ensheidungen des Bundesverfassungs gerichts [BVerfG] 27 (answer to certified question by Superior Court of Cologne in a breach of contract action against the Iranian Empire).

28. In re Matter of Republic of the Philippines, 46 BVerfG 342 (1977), *reported in* 78 AM. J. INT'L L. 305 (1979), *as corrected in id.* at 703 (answer to a certified question by the County Court in Bonn in a breach of contract action against the Republic of the Philippines).

In Italy the doctrine of absolute immunity had a shorter reign. Like the French and German courts, the Italian tribunals recognized the immunity of foreign states from domestic jurisdiction during the first part of the 19th century. But, unlike the situation in France and Germany where the lower courts long before the highest courts assumed jurisdiction in actions based on contractual obligations of foreign states,[29] even the highest courts in Italy, the Corte di Cassazione of the various regions, and subsequently the Corte di Cassazione for the whole nation, adopted the restrictive theory more than a decade before the end of the century. The first highest court to do so was the Corte di Cassazione of Naples which, in a judgment of March 16, 1886,[30] held that the Italian courts could exercise jurisdiction over an action by the mental hospital of Aversa against the Greek consul and Greece on the basis of a contract concluded in the name of Greece for the care of a Greek patient. This approach was likewise taken by the Corte di Cassazione of Florence in the same year[31] and the Corte de Cassazione of Rome in 1893,[32] the latter judgment involving an action against Austria on a contract between plaintiff's intestate and Austria for construction work in Venezia, at a time when Austria was still sovereign of that province. The decision was the subject of a critical annotation by Professor (later International Court of Justice judge) Anzilotti[33] who took the position that at that time the Italian theory of a distinction between acts *iure im-*

29. In France between 1871 and 1929 lower courts entertained actions against foreign states based on private contracts only sporadically. *See* Annotation to the case Union des Républiques Socialistes Soviétiques c. Chaliapine, Cass. 15.12.1936, 1937 Sirey I-104. *Contra*, Esnault-Pelterie c. A.V. Roe, Cy Ltd., Trib. civ. Seine, 1925, 52 JOURNAL DU DROIT INTERNATIONAL 702. In Germany, however, the lower courts since World War II adopted the restrictive theory consistently prior to its endorsement in 1963 by the Federal Constitutional Court; see the references by the court itself in Anon., v. Empire of Iran, W. Ger., 16 [BVerfG] 27, 35.

30. Tybaldos Console di Grecia c. Manicomio di Aversa, Corte di Cass. di Napoli, 16.3.1886, 1886 Giur. Italiana, I 228.

31. Governo di Tunisia (Guttiéres) c. Elmilik, Coret di Cass. di Firenze, 25.7.1886, 1886 Giur. Italania, I 486 (contract for the rendition of services as foreign language expert).

32. Governo Austriaco c. M. Fisola, Corte di Cass. di Roma (Sez. Unite) 12.10.1893, 1893 Giur. Italiana, I 1213.

33. Anzilotti, Competenza di tribunali italiani in confronto di stati esteri, 12.10.1893, 1894 Giur. Italiana, I, 145 *reprinted in* 4 OPERE DI DIONISIO ANZILOTTI 7 (1963).

*peri* (in the exercise of sovereign authority) and acts *iure gestionis* (in the exercise of managerial functions) was not generally recognized in international law and that a foreign state was subject to the domestic jurisdiction of another court only if it had recognized such jurisdiction either impliedly or expressly.

After the establishment, in 1923, of a single Italian court of cassation in civil matters, the new court continued adherence to the restrictive doctrine of immunity in two famous precedents, *Unione Republiche Soviettiste c. Tesini e Malrezzi*[34] and *Governo Rumeno c. Trutta*.[35] In the latter judgment the court reviewed the doctrine of sovereign immunity as applied in Italy and concluded that current international law, as illustrated by the practice or legislation of other nations, does not prohibit the adjudication by domestic courts of private law disputes between a national and a foreign nation and that the same principles are applicable to the authorization of a provisional sequestration by the president of the tribunal having jurisdiction over the merits, provided that the property of the foreign state that is attached is not exempt for reasons other than merely the ownership by a foreign state, considerations which govern also the execution of judgments.[36]

In its reasons the court relied on a newly enacted Italian decree of 30.8.1925 which required previous authorization by the Minis-

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34. Corte di Cassazione, 12.6.1925, 1925 Giur. Italiana 1925, I 1024, holding that the recognition of the U.S.S.R. by Italy did not prevent the exercise of jurisdiction by Italian courts over claims arising from commercial activities of the foreign state within Italy but that defendants were not entitled to the appointment of a sequestrator.

35. Corte di Cassazione, 13.3.1926, 1926 Giur. Italiana, I 774, involving an action by an Italian merchant against the government of Rumania for the payment of the price of tanned shoe-soles delivered to the Rumanian Government for the purpose of supply to its army. The payment was to be made by means of Rumanian treasury bills denominated in lira and deposited with an Italian bank in Rome. The contract subjected plaintiff to the jurisdiction of Rumanian courts. The plaintiff obtained provisional sequestration of the Rumanian funds at the bank which, upon default by the Rumanian Government, was upheld by the Tribunal and the Court of Appeals of Rome. The Government of Rumania petitioned for review by the Court of Cassation.

36. The court held further that the Italian courts had jurisdiction over the case despite the contractual acceptance by plaintiff of the jurisdiction of Rumanian courts and that an order of provisional sequestration was not warranted merely because a breach of contract without the presence of a danger to the enforceability of the judgment.

ter of Justice for sequestration of or execution against goods, real property, ships, instruments and credits of another state, provided that the other state accords reciprocity in that respect[37] which Rumania refused to do. The decree was converted into a statute in 1926 with the modification that the reciprocity must be established by ministerial decree.[38] The statute resulted practically in an immunity from execution of assets belonging to a foreign state.[39] For that reason the Italian government recently has proposed a statute which would provide compensation for a judgment creditor whose application for authorization of enforcement measures has been refused.[40]

Despite these limitations on the enforceability of the judgments the Italian Corte di Cassazione has consistently adhered to the restrictive doctrine of the immunity of foreign states,[41] thus contributing to the ultimate victory of that view.

## II. CODIFICATION: INTERNATIONAL AND NATIONAL

The divergence of the domestic laws of the various nations and the uncertainties within the domestic systems prompted increasing efforts at codification both on the international and national level. The impetus for that movement stemmed not only from the fact that beginning with the Russian revolution a number of na-

37. The decree, but not the statute, is reproduced in the Jessup-Deák report on the *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. 451, 691 (Supp. 1932).

38. The text of the statute is published in Gazetta Ufficiale della Repubblica Italiana 1731 (July 28, 1926) and in RIVISTA DI DIRITTO INTERNATIONALE [RIV. DIR. JUT] 407 (1926).

39. *See* Condorelli & Sbolci, *Measures of Execution Against the Property of Foreign States: The Law and Practice in Italy*, 1979 NETHERLANDS Y.B. INT'L L. 197, 230; M. Iovane, Recenti sviluppi della prassi in Materia di immunità deli Stati stranieri da misure cautelari ed esecutive, 119 RIVISTA DI DIRITTO, INTERNAZIONALE PRIVATO PROCESSUALE 288 (1983) (with an extensive comparative survey); G. Gaja, L'esecuzione su beni di Stati esteri: l'Italia paga per tutti, 68 [RIV. DIR. INT.] 345 (1985).

40. The text is reproduced in 68 [RIV. DIR. INT.] 491 (1985).

41. A leading precedent in which the Corte di Cassazione denied jurisdiction of the Italian courts because the claim was based on a governmental act of a foreign state is the case of *Regno di Grecia v. Gamet*. In that controversy, which reached the high court twice, plaintiff Gamet, a French national, sought restitution of shares in a Greek company which had been confiscated by Greece as Italian-owned enemy property. Corte di Cassazione, 8.6.1957, 7 Giustizia Civile I 1191, and 8.5.1959, 9 Giustizia Civile I 763.

tions had transformed their entire foreign trade into state monopolies but also that other nations even prior to that time conducted transportation by rail, by water and by air increasingly through state enterprises.

As a result the Brussels Convention of 1926[42] placed state-owned vessels engaged in commercial activities both as to liability and as to the domestic jurisdiction of other nations on the same footing. It was as the distinguished Thai jurist, Dr. Sucharitkul noted in his Hague lectures "the first example of international agreement which attempted to bring the laws and practice of State immunities up to date."[43]

Many international organizations of non-governmental character made efforts to propose codifications of the subject,[44] among them the carefully documented and detailed draft of Courts in regard to Foreign States, prepared by Philip Jessup and Francis Deák as reporters.[45]

The proposed Draft Convention in Part III clearly sided with the restrictive doctrine, providing in Art. II

> A State may be made a respondent in a proceeding in a court of another State, when in the territory of such other State it engaged in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.

The proposed Draft Convention provided for enforcement of judgments against another state against immovable property not used for diplomatic or consular purposes (Art. 23) and against other property used in connection with an enterprise such as described in Art. 11 and permitted denial of immunity to state owned or state controlled entities endowed with separate juristic

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42. Convention for the Unification of Certain Rules concerning the Immunities of Government Vessels, Apr. 10, 1926, 176 L.N.T.S. 194 and Additional Protocol, May 24, 1934, ("Brussels Convention"). The convention has been ratified by 27 nations and went into force in 1936. *Id.* at 214.

43. Sucharitkul, *Immunities of Foreign States Before National Authorities*, 1976 Hague Academy of International Law, 149 Rec. des Cours 87 198 (1976).

44. See the list in *id.* beginning at 193. Add the proposed ILA Montreal Draft Convention on State Immunity, Report of the Sixtieth Conference ¶82 (1983).

45. 26 AM. J. INT'L L. 451 (Supp. 1932).

personality and operated for profit (Art. 26).

When in 1952 the United States embraced the doctrine of restrictive immunity the Draft Convention furnished some guidelines for the new practice.

Prior to 1952 the United States Executive played an important role in the determination by the courts of their jurisdiction over proceedings against foreign states, especially in regard to vessels.[46] The shift to the restrictive theory multiplied the calls for State Department intervention in actions against foreign states and their instrumentalities and, as a result, the State Department, desiring to shed its burden and dispel constitutional doubts, proposed a comprehensive codification of the field. It went into force as the Foreign Sovereign Immunities Act of 1976.[47] Similar statutes were enacted in other common law or non-Code nations, such as the United Kingdom,[48] Canada,[49] and South Africa.[50] It is perhaps an ironic twist in legal history that the common law countries resorted to codification, while the civil law countries did not.

An attempt to achieve a general European codification was made by the Council of Europe. So far, however, the European Convention on State Immunity of 1972[51] has not found the necessary five acceptances.

The most ambitious effort to provide an international codification of the subject is the work of the International Law Commission toward the preparation of a Draft Treaty on Jurisdictional Immunities of States and Their Property, an undertaking that commenced in 1978 as a result of a General Assembly resolution to that effect in 1977. The present status of the work is described in the Report of the International Law Commission on the work of its 37th session.[52]

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46. *See* Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law*, 25 MINN. L. REV. 1 (1940).

47. 90 Stat. 2891.

48. State Immunity Act 1978, ch. 33.

49. State Immunity Act, 29-30-31 Eliz. II, ch. 95 (1982).

50. Foreign States Immunities Act, No. 87 of 1981.

51. European Convention on State Immunity and Additional Protocol, 66 AM. J. INT'L L. 923 (1972).

52. 40 U.N. GAOR Supp. (No. 10) U.N. Doc. A/40/10 (1985).

## III. International Law and Codificatory Statutes and Conventions

The European Convention as well as the state immunity legislation of Australia, Canada, South Africa, the United Kingdom, and the United States show a substantial degree of uniformity in the basic contours of jurisdiction over foreign states and their instrumentalities. In all of these instruments it is recognized that, in addition to cases of an express or an implied waiver resulting from its resort to the courts of the forum state, a foreign state is subject to the jurisdiction of another state with respect to actions or proceedings relating to:

1. commercial transactions or activities[53]

2. ownership, possession and use of real property[54]

3. interests of the state in movable or immovable property arising by way of succession, gift or escheat[55]

4. death or personal injury, or damage to or loss of tangible property caused by an act or omission in the forum state[56]

5. enforcement of maritime liens based on commercial activities[57]

The European Convention and the statutes of South Africa and the United Kingdom, but not of Canada, have special provisions relating to employment contracts,[58] patents and trademarks,[59]

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53. European Convention, art. 4; Canada, S.I.A. arts. 5 and 2(2); South Africa, F.S.I.A., § 4; U.K., S.I.A. art. 3; U.S., F.S.I.A., 28 U.S.C. §§ 1605(a)(2), 1603(d)-(e).

54. European Convention, art. 9; South Africa, F.S.I.A., § 7(a)-(b); U.K., S.I.A. art. 6(1)(a)-(b); U.S., 28 U.S.C. § 1605(a)(4). Canada has no special provision.

55. European Convention, art. 10; Canada S.I.A. art. 8; South Africa, F.S.I.A., § 7(c); U.K., S.I.A. art. 6(2); U.S., 28 U.S.C. § 1605(a)(4).

56. European Convention, art. 11; Canada, S.I.A. art. 6; South Africa, F.S.I.A., § 6; U.K., S.I.A. art. 5; U.S., 28 U.S.C. § 1605(a)(5).

57. Canada, S.I.A. art. 7; South Africa, F.S.I.A. § 11; U.K., S.I.A. art. 10(1)-(5); U.S., 28 U.S.C. § 1605(b). The European Convention has no provisions because of the Brussels Convention of 1926 on that subject.

58. European Convention, art. 5; South Africa, F.S.I.A. § 5; U.K., S.I.A. art. 4.

59. European Convention, art. 8; South Africa, F.S.I.A. § 8; U.K., S.I.A., art. 7.

and membership in associations and other bodies[60] that have no counterpart in United States legislation.

Most of all, the Acts of Canada, South Africa and the United Kingdom have broader provisions than the United States statute relating to enforcement remedies, extending them to all judgments in actions in which no immunity exists and to all property of a foreign state used for a commercial activity.[61] The European Convention, by contrast, grants complete immunity against enforcement measures.[62] It must be noted, however, that the European Convention does not deal with immunities of government instrumentalities.

There is no question that the United States Act does not restrict immunity from enforcement remedies to the extent permissible under international law.[63] While such moderation may be based on considerations of policy, the question arises whether inclusive codifications hamper the development of rules which permit redress in domestic courts for serious international wrongs. While the United States statute, alone among all others, provides, within narrowly defined boundaries, exceptions from immunity from suit in cases of expropriation in violation of international law, it does not expressly restrict immunity in cases where redress is sought for personal injury suffered outside the forum state by actions constituting recognized violations of human rights, such as torture with the complicity of a foreign state. It would seem that in such cases customary international law bars entitlement to immunity and that state laws should not thwart the administration of international justice in such cases, at least so long as the offending state does not offer a more convenient forum. To consider codifications comprehensive and exclusive is unsound and

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60. European Convention, art. 6; South Africa, F.S.I.A., § 9; U.K., S.I.A. art. 8.

61. Canada, S.I.A. art. 11(1)(b);U.K., S.I.A. art. 13(4); South Africa, F.S.I.A. § 14(3).

62. European Convention, art. 23. *But see id.* art. 24.

63. See the comments to that effect by the Federal Constitutional Court of the Federal Republic of Germany, In dem Verfahren über die Verfassungsbeschwerde der National Iranian Oil Co., 64 BVerfG. 1, 37 (1983), with comprehensive survey of contemporary practice. *Accord,* ILA, Montreal, Draft Convention on State Immunity, arts. VII, VIII, in Report of the Sixtieth Conference (Montreal 1982), p. 5 at p. 10.

not to be implied, unless there is a clear legislative mandate to that effect.[64]

64. *Contra* regrettably, Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 372 (7th Cir., 1985); *but see* Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.C. Cir. 1985).