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John W. Douglas
Assistant Attorney General
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Sovereign Immunity

cc: Files
Mr. Schlei
Mr. Reis
Mr. Marcuse
Mrs. Copeland
Solicitor General

MAY 1 1963

Transmitted herewith is a copy of a memorandum to the Deputy Attorney General dated April 12, 1963, from Richard D. Kearney, Acting Legal Adviser, Department of State, together with enclosures. On April 30, the Deputy Attorney General transmitted the memorandum and enclosures to this Office for comment.

I would suppose that the proposed amendment of the so-called "Tait letter" may have considerable impact upon the operations of the Civil Division both in the United States and abroad. Although we are examining the matter independently, we would therefore appreciate receiving the views of the Civil Division with respect to both enclosures to Mr. Kearney's memorandum. Mr. Kearney has advised me that State has deferred transmitting its report on S. 576 but may not be able to continue to do so for any considerable length of time. Accordingly, this matter should be treated with some expedition.

Attachments

DEPARTMENT OF STATE
Washington

COPY

April 12, 1963

MEMORANDUM FOR: Mr. Nicholas de B. Katzenbach
Deputy Attorney General
Department of Justice

SUBJECT: Nonrecognition of Sovereign Immunity of Certain Foreign Government Property from Execution and a Balance of Payments Problem.

In accordance with our telephone conversation, I am enclosing (1) a copy of a proposed letter to the Attorney General regarding sovereign immunity, and (2) a copy of a proposed reply to Senator Eastland containing the Department's comments on S. 576.

Ray Yingling was informed this morning by Fred Smith that Treasury is sending a letter to Abe Chayes from its General Counsel about the possible effect of a letter to the Attorney General on sovereign immunity at this time.

/s/ Richard D. Kearney
Richard D. Kearney
Acting Legal Adviser

Enclosures:

1. Copy of proposed letter to Attorney General regarding sovereign immunity.
2. Copy of proposed letter to Senator Eastland regarding S. 576.

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Dear Mr. Attorney General:

The Department's letter of May 19, 1952, from its Acting Legal Adviser to the Acting Attorney General, stated that thereafter it would be the policy of the Department of State to recognize sovereign immunity from suit of foreign governments made party defendant in courts in the United States without their consent only with regard to sovereign or public acts (jure imperii) but not with respect to private acts (jure gestionis). This decision, which rested on a number of reasons set forth in the letter, was made only after a study of the practice of foreign states, as reflected in the decisions of their courts, revealed that little support existed for continued full acceptance of the absolute theory of sovereign immunity. However, the change of policy stated in the letter related only to immunity from suit, and the Department of State, upon request, has continued to recognize sovereign immunity from execution of foreign government property without regard to the nature of such property or its use. This practice seemed to be in conformity with general international practice and not inconsistent with the law of the United States.

The experience of the last decade has satisfied the Department of State that its change of policy with respect to sovereign immunity from suit was correct. For some time, however, the Department has not been satisfied with the anomalous situation resulting from the fact that, although under the new policy a valid judgment against a foreign government may be obtained by a private suitor in a jure gestionis case, no satisfaction of the judgment is possible unless the sovereign defendant voluntarily submits to execution. No assurance exists that it will do so. Experience shows the contrary. Thus while it may be of some benefit to a person doing business with a foreign government to have his rights determined in the courts, the ends of justice are frustrated if, when such rights have been determined, no satisfaction is available. In such cases the order of the court, which would ordinarily be enforceable against the will of a party, is nullified through recognition by the executive of sovereign immunity from execution. Furthermore, the knowledge that immunity from execution is available reduces or removes the incentive for the foreign government to defend on the merits.

With

The Honorable
Robert F. Kennedy,
Attorney General.

With a view to remedying this situation, the Department has again examined the practice of other countries in the field of sovereign immunity as reflected in the decisions of their courts. The results of this examination indicate that not only has there been further abandonment of the absolute theory of sovereign immunity from suit amongst the dwindling number of states which still adhered to that theory, but there is a parallel trend away from immunity from execution on property of a foreign sovereign used in connection with acts of a private nature (jure gestionis). The courts of Austria, Belgium, Czechoslovakia, Egypt, France, Italy and Switzerland have all held that property of a foreign government, at least property held in its private capacity, is not immune from execution.

Important international agreements also make foreign government property used in commercial activities subject to the same measures of enforcement as privately owned property.

The International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, signed at Brussels on April 10, 1926, provides that state-owned merchant vessels and their cargoes are subject to the same enforcement measures as privately-owned vessels and cargoes. Argentina, Belgium, Brazil, Chile, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, Turkey, and the United Arab Republic are parties to this Convention. (Bulgaria ratified the Convention in 1937 but denounced it in 1959). Although the United States is not a party to the Convention, it has been its policy for many years not to claim sovereign immunity for government-owned or operated merchant vessels.

The United States is also a party to treaties of Friendship, Commerce and Navigation or similar treaties with Italy, Ireland, Greece, Israel, Denmark, Japan, Germany, Iran, Nicaragua, Netherlands and Korea, providing that no enterprise of either party which engages in commercial or other business activities within the territory of the other party shall enjoy any immunity from suit or execution of judgment to which privately-owned enterprises are subject.

Article 21 of the Convention on the Territorial Sea and the Contiguous Zone adopted on April 29, 1958 at the First United Nations Conference on the Law of the Sea at Geneva provides that government ships operated for commercial purposes are subject to the same enforcement measures including levy of execution as are privately-owned ships.

Although this Convention is not yet in force because the requisite number of ratifications or adherences (22) have not yet been received, it is likely to become effective in the near future. The United States is among the eighteen countries which have already ratified the Convention. Here it may be noted that Soviet bloc countries which have so far ratified the Convention have reserved on the provisions in question, still claiming sovereign immunity for government-owned or operated merchant vessels.

It is evident that, although courts of foreign states may often grant immunity from execution on government property, there is no such uniformity or generality of practice with respect to government property used in acts of a private nature as to constitute a rule of customary international law exempting such property from execution. As has been observed aptly by one authority, "It is significant that states affected by measures of execution have not as a rule protested against it as being unlawful." On the other hand, there is no doubt that property having a public function such as a warship, a military plane, an embassy building, etc., is immune from execution under international law.

The change of policy set forth in the 1952 letter was made because it was felt that the absolute theory of sovereign immunity from suit was inconsistent with widespread state trading, and that justice was more likely to be served, in the long run, by a practice which did not accord a privileged position to governments and which enabled persons doing business with them to have their rights determined in the courts. For similar reasons, it is now considered right to restrict the immunity from execution which foreign government property in the United States has heretofore enjoyed under the Department's practice. Hereafter, requests from foreign governments for recognition of sovereign immunity from execution on their property within United States jurisdiction will not be allowed unless the property is being used exclusively in connection with activities of a sovereign or public nature (jure imperii).

In conformity with past practice, the Department will continue to keep you informed of requests from foreign governments for recognition of sovereign immunity in connection with cases pending in the courts and of the action taken thereon.

Sincerely yours,

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Dear Mr. Chairman:

Your letter of February 1, 1963, previously acknowledged, transmitted for the Department's consideration and report thereon S. 576, A bill to amend title 28, United States Code, to provide means of redress for the unlawful seizure of American property by foreign governments.

Section 1 of the bill would amend Sections 1332 and 1655 of title 28 to provide for suits against a sovereign State without its consent where the matter in controversy involved or arose out of an act of a foreign State in violation of general principles of international law or of a treaty with the United States. It is the Department's view that enactment of such legislation would involve this Government in endless serious difficulties with foreign Governments. The absolute theory of sovereign immunity, that is, that a foreign Government cannot be sued without its consent in any circumstances has for some time met with growing disfavor in the practice of States and although some States still hold to that theory it has generally been succeeded by the restrictive theory of sovereign immunity, that is, that a foreign State is immune from suit only with regard to sovereign or public acts (jure imperii) but not with respect to private acts (jure gestionis). The proposed legislation makes no such distinction.

The Honorable

James O. Eastland, Chairman,

Committee on the Judiciary,

United States Senate.

The Department of State's letter of May 19, 1952, from its Acting Legal Adviser to the Acting Attorney General (copy enclosed) indicated that thereafter it would be the policy of the Department of State to recognize sovereign immunity from suit of foreign Governments made party defendant in the courts of the United States without their consent only with regard to sovereign or public acts (jure imperii) but not with respect to private acts (jure gestionis). This policy has been followed by the Department since that time when considering requests of foreign Governments for recognition of sovereign immunity from suit. In the Department's view, this policy goes as far in subjecting foreign Governments to suit in the courts of the United States as is warranted under international law.

Section 2 of the bill provides for the amendment of Section 1655 of title 28 to make the property of a foreign Government in the United States subject to execution "if it is used in or acquired from commercial activities by such foreign state, or has been acquired by it as a result of acts against an American citizen or corporation in violation of general principles of international law or of a treaty to which the United States and the foreign sovereign are signatories." The Department sees no objection from the standpoint of international law to subjecting foreign Government property used or acquired from commercial activities to enforcement procedures. However, to subject

foreign Government property to enforcement procedures solely because it is deemed to have been acquired as a result of acts in violation of general principles of international law or of a treaty with the United States would in the Department's judgment be subject to the same objections and have the same results as indicated above with respect to the abolition of sovereign immunity from suit in such circumstances.

For the reasons indicated, the Department does not favor the enactment of legislation such as that contemplated in S. 576. Furthermore, it is believed that such action as is warranted under international law to deny to foreign Governments and their property immunity from the jurisdiction of our courts can be accomplished through administrative action and therefore that while legislation within proper limits would not be objectionable, it is unnecessary.

Sincerely yours,

Frederick G. Dutton
Assistant Secretary

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