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CASE NOTE

SOVEREIGN IMMUNITY—Anaconda Co. v. Corporación del Cobre, 55 F.R.D. 16 (S.D.N.Y. 1972), *cert. denied*, 93 S. Ct. 2735 (1973).

In the latter part of 1969, the Chilean Exploration Company (CHILEX) and the Andean Copper Mining Company (ANDES) transferred all of their assets and liabilities to two separate Chilean corporations. Together with the Anaconda Company, each sold 51 percent of the stock in their various Chilean mining interests to one defendant, Corporación del Cobre (CODELCO), which made payment by promissory notes guaranteed by another defendant, Corporación de Fomento de la Producción (CORFO). In July of 1971, the Allende government, by constitutional amendment,[1] nationalized the Chilean mining industry. Involved in the nationalization were the CODELCO and CORFO interests, as well as the remaining 49 percent interest of each of the three plaintiffs. CODELCO, now a state agency, is responsible for operating and managing the mines.[2]

Although Chilean nationalizations have been the subject of much comment and litigation, the three plaintiff mining companies involved in this case did not challenge the legality of the action. Instead, they brought suit in the U.S. District Court to recover on the promissory notes and attached two million dollars the defendants had on deposit in U.S. banks.

The defendants moved to vacate the order of attachment giving three arguments in support of their motion. First, they contended that sovereign immunity prevented suit against them without their consent, since the corporations were "organic parts of the Chilean state that . . . were created to, and do, carry out governmental func-

1. Chile: Constitutional Amendment Concerning Natural Resources and Their Nationalization (July 15, 1971), Law 17,450, conveniently found in 10 INT'L LEGAL MATERIALS 1067 (1971) [hereinafter cited as the Nationalization Amendment].

2. For a closer examination of incidents leading to and occurring throughout this nationalization period in Chile, see generally *Expropriation Symposium: Proceedings of the 1972 Regional Conference of the American Society of International Law at the University of Denver College of Law*, 2 DENVER J. INT'L L. & POLICY 125 (1972); Landau, *Economic and Political Nationalism and Private Foreign Investment*, 2 DENVER J. INT'L L. & POLICY 169 (1972); Schlesser, *Recent Developments in Latin-American Foreign Investment Laws*, 6 INT'L LAWYER 64 (1972); Thome, *Expropriation in Chile under the Frei Agrarian Reform*, 19 AM. J. COMP. L. 489 (1971); Wesley, *Expropriation Challenge in Latin America: Prospects for Accord on Standards and Procedures*, 46 TOL. L. REV. 232 (1971); Santa Maria, *Perspectives on Spanish American Legal Norms Governing Mining Concessions, "Chileanization," and the Concensus of Viña del Mar*, 11 VA. J. INT'L L. 177 (1971); Doman, *New Developments in the Field of Nationalization*, 3 N.Y.U. J. INT'L L. & POLITICS (1970).

tions (*jure imperii*)."[3] Second, since the plaintiffs had already submitted their claim to a special Chilean tribunal,[4] attachment should not have been granted while the matter was *sub judice* there.[5] Finally, they urged vacation as an exercise of judicial discretion.

Judge Metzner, trying the case, initially held that the case could be decided on procedural grounds alone, without addressing the contentions of the defendants, since, under New York law,[6] an attachment may be vacated only after the defendant has made an appearance and these defendants had not done so. The judge did not stop there, however, and his holdings with respect to the contentions of the defendants form the most interesting aspect of the opinion.

The basic question confronting the court was whether the attached property was that of a foreign government and, therefore, subject to sovereign immunity,[7] or a foreign government engaged in commercial activities,[8] or a foreign corporation subject to the laws of

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3. 55 F.R.D. 16, 17 (S.D.N.Y. 1972).

4. Nationalization Amendment, *supra* note 1, at 1069. The Amendment provides for the establishment of a "Tribunal for hearing appeals on the amount of compensation determined by the Comptroller General utilizing a specific formula provided in the amendment, to be paid to corporations whose interest was expropriated. The Amendment also states that there is "no appeal available against its (the Tribunal's) decision."

5. The case referred to has since been resolved by the Tribunal. Copper Tribunal Decision, Diario Oficial (Aug. 1972), conveniently found at *Special Copper Tribunal Decision on the Question of Excess Profits of Nationalized Copper Companies*, 11 INT'L LEGAL MATERIALS 1013 (1972) [hereinafter cited as Copper Tribunal Decision].

6. New York CPLR § 6223 Vacating or Modifying Attachments:

> . . . If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

New York law is applied here in accordance with Rule 64, Federal Rules of Civil Procedure providing that attachment for the purpose of jurisdiction and execution "are available under the circumstances and in the manner provided by the law of the state in which the district court is held."

7. New York and Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955). Plaintiff sought to recover damages sustained by its vessel by attaching funds of the Republic of Korea on deposit in various New York banks. Inasmuch as the Department of State filed a statement, recognizing that "under international law property of a foreign government is immune from attachment and seizure," the Court complied with the request and granted the motion to vacate the attachment.

8. Harris and Co. Advertising Inc. v. Republic of Cuba, 127 So.2d 687 (Fla. Dist. Ct. App. 1961). Here, attachment of government funds deposited in various local banks was upheld:

> It would not be compatible with the principle of judicial powers of a sovereign nation if funds deposited as private funds . . . used in business type activities here, would be clothed in a vail radiating foreign sovereignty.

See also Pacific Molasses Co. v. Conrite de Ventas de Mulîn de la República Domini-

the United States.[9] This distinction between activity which is governmentally oriented and that which is commercially oriented forms the essence of a sovereign immunity defense.[10]

There are two ways to raise the question of sovereign immunity once the merits of the controversy have been placed in issue. Either the State Department may assert such immunity, or the claim may be made by an accredited diplomatic representative of the foreign state.[11] An assertion by the State Department is usually determinative of the issue,[12] as courts will generally not exercise their jurisdiction so as to embarrass the executive branch.[13] This procedure is not an "abrogation" of judicial power.[14] However, in the instant case there was no intervention by the State Department. The issue was raised only by the affidavit of the Chilean Ambassador. The court was thus left to its own discretion in determining the merits of the claim.[15]

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cana, 219 N.Y.S.2d 1018, 30 Misc. 2d 560 (Sup. Ct. N.Y. County 1961); National City Bank v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). *See generally* S. SUCHARITHUL, STATE IMMUNITIES AND TRADE ACTIVITIES IN INTERNATIONAL LAW, 347-50 (1959); T. QUITLARA, THE AMERICAN LAW OF SOVEREIGN IMMUNITY 254-309 (1970).

9. The distinction between public acts (*acta jure imperii*) and private acts (*acta jure gestionii*) is the foundation for the holding in the present case and will be discussed in greater depth, *infra*.

10. The issue is often solved by treaty provisions which preclude the assertion of sovereign immunity in the commercial disputes. Some examples are:

> Treaty of Friendship, Commerce, and Navigation between the United States and the Federal Republic of Germany (signed Oct. 29, 1954), art. 18, para. 27 U.S.T. 1839, 1859, T.I.A.S. No. 3593, 273 U.N.T.S. 3,26; Treaty of Friendship, Commerce, and Navigation between the United States and Italy (signed Feb. 2, 1948) art. 24, para. 6, 63 Stat. 2255, T.I.A.S. No. 1965; Treaty of Friendship, Commerce, and Navigation between the United States and Iceland (signed Jan. 21, 1950) art. XV, para. 3, 1 U.S.T. 785, 796, 797, T.I.A.S. No. 2155, 206 U.N.T.S. 296, 288.

11. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 71(1)(b) [hereinafter cited as RESTATEMENT].

12. Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); Compañia Española de Navegarian Martina, S.A.V. The Navemar, 303 U.S. 64 (1938).

13. *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943). *See also* United States v. Lee, 106 U.S. 196, 209 (1882).

> In such cases the judicial department of this government follows the action of the political branch, and will not embarass the latter by assuming an antagonistic jurisdiction.

14. New York and Cuba Mail S.S., *supra* note 7, at 685,

> . . . This course entails no abrogation of judicial power, it is a self-imposed restraint to avoid embarrassment of the executive in the conduct of foreign affairs.

15. Victory Transport, Inc. v. Comisara General de Abastecimiéntos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964) [hereinafter cited as Victory Transport]; Republic of Mexico v. Hoffman, *supra* note 12, at 34; *Ex parte* Republic of Peru, *supra* note 13, at 587; *Ex parte* Muir, 254 U.S. 522, 533 (1920).

In reaching his decision, Judge Metzner relied upon the distinction between *jure imperii* and *jure gestionis*.[16] This distinction is the basis of the restrictive theory of sovereign immunity,[17] and the policy followed by the State Department since 1952.[18] In its determination, the court attempted to find the characteristics of a corporation which would qualify, or disqualify, it for immunity. It looked to the Restatement (Second) of Foreign Relations Law which states that the immunity of a foreign state "extends to . . . a corporation created under its laws and exercising functions comparable to those of an agency of the state."[19] Adopting the Restatement comment, the court agreed that the term "agency" means "a body having the nature of a govern-

16. Victory Transport, *supra* note 15, at 360. *See also* National City Bank v. Republic of China, *supra* note 8; Hannes v. Kingdom of Roumania Monopolies Instit., 260 App. Div. 189, 20 N.Y.S. 2d 825 (1st Dept. 1940), Et Ve Blik Kuruna v.B.N.S. Int'l Sales Corp., 240 N.Y.S.2d 971 (Sup. Ct. 1960).

17. In contrast to the restrictive theory generally used today, is the classical theory espoused by Chief Justice Marshall in The Schooner Exchange, *supra* note 10. The usual point of reference for the change from the classical to the restrictive is the eloquent dissent of Justice Mach in The Pesaro, 277 F.472 (S.D.N.Y. 1921), where he differentiates between commercial and war vessels of governments. Recently, legal scholars have moved toward a third theory which would virtually remove sovereign immunity as a defense. Schmitthoff, *The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading*, 2 DENVER J. INT'L L. & POLICY 199 (1972).

18. Letter of Acting Legal Adviser, Jack B. Tate to Department of Justice, May 19, 1952, 26 DEP'T STATE BULL. 984 (1952):

> . . . 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. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

For comment on the "Tate letter" *see* Dubrovir, *A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity*, 54 VA. L. REV. 1 (1968); Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93 (1953); Comment, *Restrictive Sovereign Immunity, the State Department and the Court*, 62 N.W.U. L.J. 397 (1967).

19. RESTATEMENT, *supra* note 10, at § 66. Additionally, the RESTATEMENT provides immunity to the following areas of a foreign state:

> (a) the state itself;
> (b) its head of state and any person designated by him as a member of his official party;
> (c) its government or any governmental agency;
> (d) its head of government and any person designated by him as a member of his official party;
> (e) its foreign minister and any person designated by him as a member of his official party;
> (f) any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state . . .

ment department or ministry,"[20] and that "great weight must be given to the fact that the foreign state considers the corporation to be performing the functions of a governmental agency."[21]

On the other hand, the court noted, if a corporation is permitted to be sued in its own country, in the same manner as a private corporation, immunity becomes highly questionable.[22] Additionally, when a foreign government engages in commercial activities outside the traditional areas of government functions, the corporation, or separate governmental entity, should be reachable.[23]

Relying upon the opposing affidavits, Judge Metzner found several points against the claim of sovereign immunity. First, if the corporations were indeed immune, then it would not have been necessary for the government of Chile to join them as a party in the proceedings in the Chilean courts.[24] Secondly, the terms for delivery of the notes were in accordance with the laws of the State of New York and the parties to the notes considered the New York office of CODELCO as the domicile of the corporation. This led to the conclusion that the defendants were not entitled to sovereign immunity.

The defendants urged application of the *Victory Transport* case, where legislative acts, such as nationalization, were found to be public acts, and sovereign immunity was granted even in the absence of State Department suggestion.[25] However, Judge Metzner pointed out

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20. *Id.* Comment. Reiterated in the Comment is the previous discussion stating that:

> In determining whether the agency is in fact a part of the government, the views of the government creating the agency are given great weight, but are not necessarily conclusive.

See also Hannes v. Kingdom of Roumania Monopolier Instil., *supra* note 16; United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199 (S.D.N.Y. 1929) [hereinafter cited as United States v. Deutsches].

21. *Id.* Reporter's Notes. Judge Metzner points out that this argument is favorable to the defendants' point of view.

22. *Id.* Reporter's Notes. Judge Metzner points out that this argument is favorable to the plaintiffs' point of view.

23. United States v. Deutsches, *supra* note 21; Coale v. Société Co-operative Suisse dis Charbona Basle, 21 F.2d 180 (S.D.N.Y. 1921). *See also The Harvard Research in International Law Art. 23*, 29 AM. J. INT'L L. Supp. 451, 700 (1935):

> A State may permit orders or judgments of its courts to be enforced against the property of another State not used for diplomatic or consular purposes: (a) When the property is immovable property; or (b) When the property is used in connection with the conduct of an enterprise . . .

24. Copper Tribunal Decision, *supra* note 4.

25. Victory Transport, *supra* note 15, at 360. It is stated that public acts are generally limited to the following areas:

> (1) internal administrative acts, such as expulsion of an alien;
> (2) legislative acts, such as nationalization;
> (3) acts concerning the armed forces;

that the nationalization occurred in July of 1971,[26] whereas the sale, for which the notes were issued, occurred in 1969. This prior obligation of CODELCO, therefore, was not affected by the nationalization.

The second argument urged by the defendants was that since the plaintiffs had submitted their claims to a special Chilean court, the matter was *sub judice* and the attachment should have been vacated. This was handled rather summarily. The Special Copper Tribunal[27] was established to hear appeals from those affected by nationalization on the amount of compensation decided upon by the Comptroller General.[28] In making the decision, the Comptroller General arrived at a negative sum.[29] This negative sum provides a unique area of set-off for any claims against the Chilean government by those, such as the plaintiffs, who have claims arising outside the nationalization scheme. After joining CODELCO as a party in the appeal before the Special Copper Tribunal, the government further asserted that any obligation on the notes should be paid out of that compensation. The court found it incomprehensible that the defendants could assert that this matter was being seriously contended in Chile.

The defendants final argument urged the exercise of judicial discretion to vacate the order. The defendants raised three grounds which they thought rendered the exercise of judicial discretion appropriate. First, since the claim was for one hundred million dollars and the attachment was on a mere two million dollars, which would not afford the plaintiffs much relief, the attachment should have been removed. Secondly, the attachment would have damaged trade between Chile and the United States and, therefore, have adversely affected the U.S. balance of payments. Finally, the attachment would have had a deleterious effect on the economy of Chile. Judge Metzner found the arguments ludicrous, difficult to believe, and properly within the sphere of the State Department. The court then

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(4) acts concerning diplomatic activity;

(5) public loans.

26. Nationalization Amendment, *supra* note 1.

27. Nationalization Amendment, *supra* note 1, at 1069 (*see* note 3.). For further information on the structure of the Tribunal *see Regulations of the Special Copper Tribunal*, 11 INT'L LEGAL MATERIALS 147 (1971).

28. *Id.*, *see also* note 3. As pointed out by Judge Metzner compensation was determined by the Comptroller using the formula of the value of the mines less "excess profits," rights to mineral deposits, and the value of property in poor condition. According to the Amendment, the "President of the Republic" is "empowered to order the Comptroller General . . . to deduct all or part of the excess profits earned by the nationalized companies" as determined by the President. Nationalization Amendment, *supra* note 1, at 1069.

29. *Decree Concerning Excess Profits of Copper Companies* (Sept. 28, 1971), 11 INT'L LEGAL MATERIALS 1235 (1971).

denied the motion and vacated the temporary stay granted to the defendants.

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