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THE LIMITED IMMUNITY AND ITS RELATION WITH JUDICTIONAL IMMUNITY AND EXECUTIVE IMMUNITY

Although the mid- 20h Century was declared as the time period of acceptance of limited immunity of state in international community, but the basic core of the doctrine was founded in the late nineteenth century. As far as the jurisdictional immunity is concerned, the prevalence of limited immunity doctrine has completely marginalize the principles of absolute immunity and this change has shown itself. However, the limited immunity theory is not principally applied to executive immunity. the reason is both political and economical..

Keywords: Jurisdictional Immunity, Executive Immunity,Limited Immunity.

Interdiction; states' entry in trade causes the development of the classic theory of immunity known as governing the state's absolute immunity which had a basis in the common law and was supported by socialist and third world countries. Nowadays, the absolute immunity has lost its admissibility especially in countries with free economy and has been replaced by the theory of limited immunity. As far as the jurisdictional immunity is concerned, the prevalence of limited immunity doctrine has completely marginalize the principles of absolute immunity and this change has shown itself, since the beginning of the present century, in all the regulations of doctrine and jurisprudence. Whether the principles of the limited immunity theory are applied to the executive immunity or not?

The scope of state's jurisdictional immunity

By virtue of this theory distinction should be made between the acts of sovereignty and office action. In cases where a state, like businesspeople, engages in doing normal business and deals with commercial affairs (i.e. the act of the state is not in strict sense an act of sovereignty), the said state implicitly waives the principle of immunity in proceedings due by judicial authorities and, like private entities, is prosecutable in courts of justice[1]. Although, on the basis of limited immunity theory, making distinction between acts of sovereignty and office actions seems to be clear, but in practice there is no uniform criterion for their differentiation and there are many disagreement in this regard. In some countries, such as Zimbabwe and Malaysia, the nature of the action has been used as the sole criterion for making distinction between acts of sovereignty and office actions in transaction entered into by the state. In the courts of some other countries like France, in addition to the nature of the action, attention is given to the aim and intention of the state. Due to these differences, the International Law Commission (ILC) of the United Nations, in the draft of proposed Article 2 stipulated in its 1999 Report to the General Assembly of the United Nations, finally relinquished the issue of distinction criterion and only settled for mentioning the words "contracts and business transactions" as the scope of state's jurisdictional immunity. Thus, the outlook of instances of detecting the state's jurisdictional immunity from prosecution, like the present situation, shall still remain within the discretion and authority of the national courts[2]. This is with *due regard to the fact that the International Law Commission, in its previous* reports on the issue of state's jurisdictional immunity, had proposed the combination of the two criteria of nature and aim of the action[3] and, as already mentioned, while departing from its former outlook, had only settled for mentioning the words "contracts and business transactions" as the scope of state's jurisdictional immunity. I think, for the purpose of integrating the different views from different countries as well as the positive effects and the benefits of the quality of integration, it would be better if the Commission presented in the draft the same idea of combining the two criteria of the nature and the aim of the action.

The scope of state's jurisdictional immunity

As far as the jurisdictional immunity is concerned, the prevalence of limited immunity doctrine has completely marginalize the principles of absolute immunity and this change has shown itself, since the beginning of the present century, in all the regulations of doctrine and jurisprudence. However, the question is whether the principles of the limited immunity theory are applied to the executive immunity or not? The answer mostly given to this question is that the limited immunity theory is not principally applied to executive immunity. Now, what is the reason? Obviously the reason is both political and economical. From economic perspective, application of the principles of limited theory to executive theory can cause the foreign states

to refrain from investing in the countries where their property is prone to executive actions as a result of the said application. This situation has caused disharmony among different judicial and executive departments of the state. On one hand, the executive authorities of the state are more involved in political and economical issues, and, on the other hand, the judicial system must do its activities solely on the basis of law. This has caused a conflict within the system of a country like Switzerland. In this country, the courts apply the limited immunity to the executive immunity. However, the political authorities would rather apply absolute immunity[4]. An idea proposed by a prominent Iranian Lawyer, Morteza Nassiri, provides that when an arbitral award has been issued in terms of a pure business transaction against a foreign state, the said award can be enforced, in most countries, against the property possessed by trade companies affiliated with that losing state. However, when the arbitral award does not pertain to ordinary business disputes and for instance relates to disputes arising from investments put up in developing countries by the states for their national interests – and these states have actually made the subject matter of investment a part of their property. In this case, the issued award is not even enforceable to the property possessed by industrial companies affiliated with foreign state[5]. For example, the Iranian Government engages in concluding oil contracts with foreign investment on the basis of national interest; the disputes arising from the performance of these contracts-the original of which are signed after going through different ceremonies such as ratification, adoption and being signed by the King as clear examples of application of sovereignty, cannot be mixed, for instance, with the disputes arising from the performance of the contracts related to bank guarantee and/or other bank operations entered into by National Bank of Iran and a foreign establishment; contracts that are among the office actions and daily operations of that organization. Briefly, in any case that the state as the sovereignty holder of the country has signed a contract, even if the contract apparently resembles a private agreement, the awards issued on the strength of that contract cannot be enforced on the territory of a third country and contrary to the state's consent. But, when a state- affiliated business organization signs a contract as its routine operation, the said contract shall be considered within the scope of office actions and the affiliation of that organization to the particular state cannot establish immunity for that organization. In confirming this opinion, the author has encountered the Judgment of the Hague Court of First Instance, dated April 15, 1965, in which, the said Court has refused to enforce the arbitral award issued against the National Iranian Oil Company "NIOC" and has considered "NIOC" an agent of Iranian Government; therefore, has ruled that the said award, issued in terms of the disputes of that Contract, is not enforceable to the property of "NIOC" in Holland[6]. (Its English translation is printed in the leaflet dated, May, 1966. articles of international law, Publication of the US International Law Institute.)

Of special note is a part of the provisions of this judgment, especially on the sovereign immunity from executive actions, as follows:"…it is a recognized principle that a sovereign state cannot be held subject to another court, unless at the will of the same sovereign state. "Therefore, if the suit of the Iranian Government is filed, the court shall have to refrain from cognizance on the strength of Article 13 (a) of the general provisions of law. When a lawsuit is instituted against a foreign company, the court must investigate whether the said company has entered into the transaction as a private legal entity or as an organization of a foreign state, enabling it to enjoy immunity. Upon studying the legal organization of the "NIOC" and the legal nature of the oil contracts, and with due consideration to the fact that these contracts shall be enforceable after being approved by the parliament and signed by the King, the court shall comment that the "NIOC" is an institute as a corporate entirely managed by the government of Iran. Whereas the "Safyr" contract came into force after being signed by the King and pursuant to being approved by the parliament, the Court ruled that at the time of concluding the contract, "NIOC" acted as the agent of Iranian Government, hence it is subject to ACTA JURE IMPERII and this Company like the State of Iran is not, without its consent, under the jurisdiction of the Dutch Court; and neither the fact that in the oil contract with Safyr, recourse to arbitration is provided, nor the fact that "NIOC" has entered this Court shall be considered as a waiver of immunity. "This opinion has been accepted in some judicial decisions of other countries as the Supreme Court of Pennsylvania of the US held a Mexican oil company - which, after the oil nationalization, had become in charge of running the State's oil industry-, a state- affiliated public organization and considered the funds of that Company in the US as undetainable[7]. Now, therefore, although it cannot be exactly determined in which countries are the arbitral awards issued against the public companies enforceable and in which countries unenforceable, but, what is almost acceptable is that when a court, on the basis of its internal standards, regards, one way or another, a state- affiliated organization as a direct agent of the state, it shall refrain from enforcing the arbitral award against that

organization; to the extent that the state organization engages in business in its strict sense. It is to be mentioned that nowadays the states' participation in international trade is generally carried out through state-affiliated organizations, institutions and elements; and as they are parts of the state, naturally they are subject to each and every set of rules and regulations applicable to the states. These state- affiliated entities are categorized into two. They are either independent in their economic activities decision makings and responsibilities, or they need the official approval or permit of the state authorities for conclusion of commercial contracts. Obviously in the latter case, if the contract is confirmed and approved by the authorities of the state, the state itself shall be in fact considered as the party to the contract. Therefore, a doctrine called the "Doctrine of Integration" came into existence[8]. This theory is strengthened that granting immunity according to the standards of state- related public international law is a part of the state's sovereignty and the principles of states' equality and independence do not allow the state to be subject to the jurisdiction of a foreign court; but when a state engages in trade, as states' interference in these affairs do not have a classic and ancient background, it is assumed that the state has waived its immunity in terms of trade arbitration. In the present circumstances, the following results may be inferred from the doctrine and judicial practice of different states: the old rule of absolute immunity of a foreign state's property and assets from any writ of attachment or issuance of writ of execution is now abandoned. According to the new approach, the executive immunity of a foreign state only includes the property and assets exclusively relating to the implementation of the duties arising from principle of sovereignty. The recent inference is opposed to the idea that a state can assume the property and assets of another state in its respective state as having the nature of sovereign activity according to the description of the state possessing them. Imposing the legal approach of a foreign state, concerning the duties of limited power of sovereignty, on the state where the property is located is incompatible with the principle of sovereignty of the host state. Thereby, the question whether some of the property of the foreign state is in connection with its exercise of public powers or not should be described according to the law of the host country. i.e., according to the laws of the country in whose court the party in interest has filed a lawsuit for making security decisions or enforcement of awards[9]. Anyhow, the religious political considerations have drastically affected the law issue, so much so that finding a clear and rather accurate formula for the enforcement of arbitral awards against state- affiliated organizations in ordinary courts have become very difficult.

Conclusion:

The efforts made by some publicists for the development of the idea of the dependence between waiver of jurisdictional immunity and waiver of executive immunity have been fruitless because of political aspect of the executive immunity. Therefore, there is no dependence between non- acceptance of jurisdictional immunity and non- acceptance of executive immunity and the latter is not the subordinating result of the former. According to the jurisprudence of some countries, the foreign state that has waived its immunity or is devoid of immunity for other reasons, can still invoke the executive immunity unless agreed otherwise. After studying these two principles and awareness of the exceptions related to them, it was revealed that their relation is not a relation of subordination and it cannot be said that when there is no jurisdictional immunity, there is no executive immunity either. Studies show that there are differences among the courts in accepting this consequential relation between these two concepts. It is to be mentioned that the advocates of this relationship regard non- accepting it as the uselessness of the proceedings. Because, otherwise the issued judgment shall lose its best property i.e., enforceability; and will turn into a mere legal theory. Moreover, this confusion may be considered as arising from the fact that the relation between the two types of immunity are, in the final analysis, a series of crucial extralegal considerations and indicate that states are more sensitive to executive actions against their property rather than being merely under the jurisdiction of foreign courts and issuance of judgments against them.

[1] - Jonaidi, Laaya, Enforcement of Foreign Trade Arbitral Awards: Tehran Shahre Danesh Publications, p. 307
[2] - Ibid., P. 309
[3] - International Law Commission Report to the General Assembly. Supplement No. 10 (A/5h/10), 1999, p. 372.
[4] - Ebrahim Gol, Alireza, Enforcement of Foreign Arbitral Awards against state in the light of ……., Masters' thesis, 1384, p. 57
[5] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran, 1346, P. 101
[6] - Ref. the Hague Award – Second Branch – April 15, 1965, Cabolent v. N.I.O.C. Cas
[7] - Nassiri, Morteza, Enforcement of Foreign Arbitral Awards, Tehran 1346, p. 105
[8] - Ebrahim Gol, Alireza, Enforcement of Foreign Arbitral Awards against state in the light of ……., Masters' thesis, 1384, p. 53
[9] - Speculations on Washington Treaty 1965, Blaka zhi. Vitani translated by Dr. Nasser Ali Mansoorian, p. 65

Մոստաֆա Յուսֆվանդ
ԵՊՀ իրավագիտության ֆակուլտետի եվրոպական
և միջազգային իրավունքի ամբիոնի հայցորդ

ԱՄՓՈՓՈՒՄ

Սահմանափակ անձեռնմխելիությունը և դրա կապը պետության դատական անձեռնմխելիության և գործադիր անձեռնմխելիության հետ

Թեև 20-րդ դարի կեսը միջազգային հասարակության կողմից հռչակվեց որպես պետության սահմանափակ անձեռնմխելիության ընդունման ժամանակահատված, սակայն այդ հայեցակարգի հիմնական կորիզը ձևավորվել է 19-րդ դարի վերջին: Ինչ վերաբերում է պետության դատական անձեռնմխելիությանը, սահմանափակ անձեռնմխելիության հայեցակարգի տարածումն ամբողջովին նսեմացրեց բացարձակ անձեռնմխելիության սկզբունքները, և այս փոփոխությունն զգալի դարձավ: Սակայն, սահմանափակ անձեռնմխելիության տեսությունը սկզբունքորեն կիրառելի չէ գործադիր անձեռնմխելիության համար այն պատճառով, որ երկուսն էլ քաղաքական և տնտեսական բնույթի են:

Հիմնաբառեր- *Պետության դատական անձեռնմխելիություն, գործադիր անձեռնմխելիություն, սահմանափակ անձեռնմխելիություն:*

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РЕЗЮМЕ

Ограниченный иммунитет и его связь с юрисдикционным иммунитетом государства и с исполнительным иммунитетом

Хотя и половина 20-го века международным сообществом была провозглашена как период принятия ограниченного иммунитета государства, однако основное ядро концепции было сформировано в конце 19-ого века. Что касается распространения юрисдикционного иммунитета государства, концепции ограниченного иммунитета, то оно полностью подорвало принципы абсолютного иммунитета, и это изменение стало существенным. Однако, теория ограниченного иммунитета принципиально не применима для исполнительного иммунитета по причине того, что они оба политического и экономического характера.

Ключевые слова*: юрисдикционный иммунитет государства, исполнительный иммунитет, ограниченный иммунитет.*