IMMUNITIES FROM ATTACHMENT AND EXECUTION IN RESPECT OF PROPERTY OF FOREIGN STATES — THAILAND

The subject of state immunity in Thailand merits close attention for a determination of the extent to which a state may claim immunity for its property against the decrees of Thai courts touches upon two basic questions of law and practice. First, to what extent can a foreign state sue and be sued before a Thai court? Second, to what extent can a foreign state claim that with respect to its property it is immune from the jurisdictional grasp or enforcement powers of the Thai courts? Before addressing these two questions, the preliminary consideration of the position of Thailand before its own courts will be addressed.

(1) *The Position of the Thai Government before its own Courts*

Under the Civil and Commercial Code of Thailand, only prescribed categories of legal or juristic persons are accorded legal personality, which carries with it the capacity to sue and be sued in the Thai courts.[1] The State or Government, as such, is not clothed with such legal personality, and subsequently cannot institute or defend legal actions in the courts of Thailand.[2]

Under the Thai legal system the capacity to sue and be sued is attributed only to two types of persons: all natural persons and the recognized categories of juristic persons.[3] Lacking juristic personality, no entity or authority can bring a cause of action in a Thai court, nor can such a body be there pursued in litigation by any person, natural or juridical. The Government of Thailand is therefore not amenable to the jurisdiction of its own courts, not by dint of any constitutional theory of sovereign immunity but for sheer lack of legal personality. A party seeking relief against the government would have to establish the identity of a defendant vested with a legal personality, such as a legally constituted department of government, ministry or body-politic. Thus, independent of the Civil and Commercial Code, legislation has been enacted which recognizes the legal personality of various types of entities: State organs, instrumentalities of government, international and regional organizations, as well as

[1] S. 68 stipulates that juristic persons can only come into existence by virtue of the provisions of the Civil and Commercial Code of Thailand, or of other Acts, such as the Act for the Administration of the Kingdom B.E. 2495, the Act for the Administration of the Provinces B.E. 2498, and the Act for the Administration of the Municipalities B.E. 2496.

[2] S. 72 of the Civil and Commercial Code recognizes the following categories of juristic persons: (1) bodies politic, (2) monasteries and temples, (3) registered partnerships, (4) limited companies, (5) associations, and (6) authorized foundations. The State and the Government as such are not included under the provisions of this Code or any other Act.

[3] See ss. 68 and 72 of the Civil and Commercial Code and note 1 above.

their subsidiary organs or regional centres. Recognition of juristic personality through the legislative process has been achieved on a case-by-case, organization-by-organization basis.

A leading case for the proposition that the Government of Thailand cannot be sued in a Thai Court is *Phya Preeda Narubate* v. *H.M. Government*.[4] The Supreme Dika Court of Thailand rejected the claim against the Government not for lack of jurisdiction but for the absence of legal personality on the part of the Government under the internal civil law. The Court said: "Although the word 'Government' may refer to the central organ of the State or a group of persons, it is not a juristic person under the Civil and Commercial Code or any other law, and is not therefore a proper party before the Court."

This does not mean that the aggrieved parties will be remediless. If no action lies against the Government as such, actions could well lie against any of its competent ministries or responsible departments. Thus, in *Chamnongburanapat* v. *Ministry of Defence*,[5] the Court allowed recovery of land expropriated for the defence of the Country. The Supreme Dika Court gave judgment in favour of landowners in seven subsequent cases which were brought at the same time against (1) The Ministry of Defence, and (2) The Minister of Defence, then Field Marshal Phibul Songgram.[6] In all these cases, the Court ordered restoration of expropriated land. These decisions illustrate the possibility of civil actions against the Government technically instituted against a Government department or even an appropriate Minister in his official capacity. The Thai Courts do not apparently recognize any governmental immunity from jurisdiction as Thai authorities are answerable before the Judiciary.

While the Government as such has been denied access to its own courts as party-litigant, on an international level, it has never doubted its own legal capacity to act, negotiate, conclude international agreements, and sue and be sued in international forums.[7] Moreover, in matters of foreign affairs, and matters affecting the conduct of foreign relations, such as interpretation of treaty provisions, the court will in practice look to the Executive, or the Ministry of Foreign Affairs, for information, evidence or to establish the existence of some facts or status.

THE POSITION OF FOREIGN STATES BEFORE THAI AUTHORITIES

(1) *The Capacity of Foreign States to Litigate in Thailand*

As far as natural persons are concerned, Thai courts have encountered little difficulty in recognizing the capacity of an alien to sue and be sued. This has not always been clear as some foreigners, at one time or another, were entitled to better treatment than nationals

[4] Supreme Court Decisions, No. 724/2490.
[5] Supreme Court Decisions, No. 1525/2495, December 17, 1952, Supreme Court Report, (1952), 2495, Vol. IV, pp. 1147-1152.
[6] Supreme Court Decisions, Nos. 984-990/2496, September 10, 1953, Supreme Court Report, (1953) 2496, Vol. III, pp. 1098-1104.
[7] See, for instance, the Conciliation Commission of 1947 and the Temple of Preah Vihear case before the International Court of Justice (1960-1961).

of the Kingdom. Such privileged positions have been abolished since 1926, together with the consular courts or mixed courts. Now all foreigners are clearly amenable to Thai jurisdiction and subject to Thai laws.

The capacity of foreigners to initiate law-suits before Thai courts has received additional recognition in the provisions of various Treaties concluded by Thailand and her European and Asian partners. These Treaties reconfirm on the basis of reciprocity the capacity of the nationals of signatory parties to sue and be sued in the courts of the other parties. Foreign corporations are likewise assimilated to aliens. Proper proof of incorporation or of existence as a juristic person under the legal system of the country of incorporation will, however have to be furnished to warrant the reciprocal treatment assured by the treaty provisions.

With respect to foreign States, foreign sovereigns or foreign governments, the Thai courts would appear reluctant to assume jurisdiction or to recognize the legal capacity of such litigants. It should be observed, in this connection, that there is evidently a two-tier approach to the problem.

There has been no reported case in which a foreign government or State is a party in litigation before a Thai court, and it is likely that a State as such would lack the legal personality to be a party. However, it is equally likely that in such circumstances the Court will not be shy of upholding the legal capacity of a representative of a foreign government, such as a consul or ambassador, to sue and be sued on behalf of the foreign Government. In those instances, the Foreign Ministry will have to confirm the legal status of the foreign representative concerned.

(2) *The Immunities of Foreign States*

The immunities of foreign States before Thai authorities should be examined in the light of judicial and governmental practice.

The absence of reported judicial decisions directly on point does not necessarily imply the absence of any problems or disputes in this area. In Thailand, official reporting of judicial decisions is only undertaken in respect of important decisions of the Supreme Dika Court. Litigation not reaching the Dika Court will depending on its notoriety, newsworthiness or sensational nature, at most receive some publicity in local newspapers or sporadic comments in the few academic law reviews or publications of the Bar Association.

Several cases involving immunities in a somewhat different context have escaped public notice for want of public reporting, especially claims of immunities by international organizations which have been settled out of court.[8] Governmental practice provides an additional

[8] See, for instance, the case involving a motor car accident, *Mr. Vichai Ittikamchorn* (1961), where immunity was established and waived by the Secretary-General of the United Nations; *Mr. Sunant Virakierti* (1968) house theft, suspension of employment pending investigation; and a number of car accident cases involving *Mr. Serevirantri* (1970) and *Mr. Kasem Yongyingsakdi* (1972).

interesting area of enquiry which may throw light upon the views attributable to the executive branch.

(a) *Judicial practice*

In the absence of any specific provisions in local statutes or customary rules, Thai courts are free to apply general principles of law[9] recognized by civilized nations. Conceivably, Thai courts will also directly apply principles of public international law, once the contents of the relevant rules are firmly established and clearly identified.

As far as immunities from jurisdiction are concerned, the Courts are bound to honor legislative enactments concerning the immunities of the United Nations Organizations and of its Specialized Agencies, as well as other relevant headquarters agreements. The Vienna Convention on Diplomatic Relations (1961) is about to be ratified by Thailand, while legislation to the same effect may be expected shortly to receive parliamentary approbation. Diplomatic immunities are as such recognized both by way of customary rules and practice, and in the imminent future through legislative process.

State immunities, though more fundamental as a concept, appear to have received no express judicial endorsement in Thailand. Nonetheless this should not be taken as a negative sign that the court will decline to apply the international law of State immunities. Once the question is properly placed before the court, an expert opinion on the applicable international law will be sought. This procedure assures the participation of the executive branch for the Government will be invited to give its views on whether a foreign State or Government is entitled to jurisdictional immunities. Under the democratic system of government in Thailand, separation of powers is a practical concept of division of labour between the judiciary and the executive. While the views of the executive are not necessarily determinative of immunities or decisive on any related issue, the courts have invariably followed the advice and counsel of the Foreign Ministry in the area of foreign relations.

It follows that the court of Thailand will recognize the jurisdictional immunities of foreign States to the same extent as it is recognized by the Government of Thailand to be internationally binding.

(b) *Governmental Practice*

The executive branch of the Government, which has been more consistently exposed to the application of rules of international law in the conduct of foreign relations, is clearly more aware of international practice. In all likelihood, the executive through the offices of the attorney-general and more specifically the Treaty and Legal Department of the Ministry of Foreign Affairs, is better acquainted with international legal developments in the field of State immunities. The political arm of the Government is accordingly prepared to advise the judicial branch not only on the principles of the sovereign or

[9] S. 4 of the Civil and Commercial Code authorises the court to apply general principles of law in the absence of an express legal provision or local custom or closest applicable legal analogy pertinent to the question under consideration.

jurisdictional immunities of foreign States, but also on the nature, scope and extent of their application in a particular case.

The court may seek the views of the Government *d'office* or at the request of an interested party. Furthermore, a foreign State implicated in any proceeding could enter a plea of immunities, or request the intervention of the political branch of the Government, namely the Foreign Ministry or the Attorney-General, or of any other authority *amicus curiae.* Such intervention may also come upon request from the trial court or the Ministry of Justice.

The doctrine of State immunities may therefore be said to have been firmly established in the practice of Thailand. It is evidenced by the past and present conduct of the executive, both in regard to the immunities of foreign States before national authorities, and the immunities it is entitled to claim from the jurisdiction of foreign courts.[10] The precise extent of State immunities and the scope of the principle's application to government activities attributable to the State forms the subject of current studies being undertaken by the International Law Commission.[11] Therefore, the *renvoi* or reference by the Thai authorities to the findings of the Commission on this point for further consideration and adoption would appear both logical and appropriate.

(3) *Immunities of State Property from Attachment and Execution*

By no stretch of imagination could property itself be entitled to jurisdictional immunities or any other right or privilege. It is the foreign State which can claim immunities for its property from attachment and execution by the territorial authorities.

The views of the Thai Government on the immunities from attachment and execution to be accorded to the property of a foreign State are reflected in some of the more recent legislative enactments and in the consistent conduct of the executive branch of the Government in the matter of State immunities.

Although there are no judicial pronouncements on whether, and to what degree, immunities from attachment and execution are extended to the property of foreign States by Thai courts, the attitude of the Judiciary is one of conformity with the general practice of States and general principles of law, or with customary international law as reinforced by international conventions on specific subjects. The views of the three branches of the Government appear to be sufficiently uniform to warrant the conclusion that the principle of immunity from execution has been officially recognized in Thailand and adequately reflected in national legislation and State practice.

[10] See *Arthur Kirsch* v. *The Kingdom of Thailand* (1976), where the lease of the office of the Commercial Counsellor of the Royal Thai Embassy in Bonn was considered to be covered by Thailand's jurisdictional immunity (Note No. 0602/15331 dated 12 April 1976). The dispute was finally settled through diplomatic channels.

[11] See Report of the International Law Commission on the work of its thirtieth session, G.A. Official Records of the 33rd Session, Supplement No. 10 (A/33/10), pp. 379-388.

(a) *Immunities of Warships and Government Ships Operated for Non-commercial Purposes*

Thailand participated in the first U.N. Conference on the Law of the Sea under the presidency of His Royal Highness Prince Wan Waithayakon, Krommun Naradhip Bongsprabandh of Thailand. Convention I on the Territorial Sea and the Contiguous Zone, and Convention II on the High Seas have some direct bearing on the immunities of public vessels.

The Thai Government appears to have been inclined to adhere to the principles contained in these two Conventions. Government ships operated for commercial purposes are treated in the same manner as merchant vessels, while government ships operated for non-commercial purposes may be compared with warships. In terms almost identical with the provisions of the Brussels Convention, 1926, upholding the immunities of vessels employed exclusively on governmental and non-commercial service,[12] Article 22 of the Geneva Convention (No. I) preserves the immunities of government ships operated for non-commercial purposes. Paragraph 2 provides: "Nothing in these articles affects the immunities which such ships enjoy under these articles or other rules of international law."[13]

Paragraphs 2 [14] and 3 [15] of Article 20 give the coastal State jurisdiction to levy execution against or arrest foreign ships (including government ships operated for commercial purposes by application of Article 21)[16] in certain cases where the ships are exercising the right of innocent passage and in all cases where those ships are lying in territorial waters.

The Convention on the High Seas (No. II) contains provisions concerning the status of ships on the high seas. Paragraph 1 of Article 8 provides that "Warships on the High Seas have complete immunity from the jurisdiction of any State other than the flag State."[17] Article 9 assimilates the position of "ships owned or operated by a State and used only on government non-commercial service" to that of warships in as much as these ships, like warships, "shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."

[12] See Art. III, para. I, of the Brussels Convention 1926, *cf.* Hudson, *International Legislation,* Vol. III, No 154, pp. 1837-1845, at p. 1840.

[13] UN. Doc. A/CONF. 13/L 52; *U.N. Treaty Series,* Vol. 516, p. 205.

[14] Art. 20, para. (2): "The Coastal State may not levy execution against or arrest the ship for the purpose of any civil proceedings, save only in respect of obligations or liabilities assumed or incurred by the ships itself in the course of or for the purpose of its voyage through the waters of the Coastal State."

[15] Art. 20, para. (3) : "The provisions of the previous paragraph are without prejudice to the right of the Coastal State in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in the territorial sea, or passing through the territorial sea after leaving internal waters."

[16] Art. 21: "The rules contained in Sub-sections A and B shall also apply to government ships operated for commercial purposes."

[17] U.N. Doc. A/CONF. 13/L. 53 and Corr. 1; *U.N. Treaty Series,* Vol. 450. p. 11.

(b) *Immunities of State Property Used in Connexion with Diplomatic and other Official Missions*

Thailand has considered the provisions of the Vienna Convention on Diplomatic Relations (1961)[18] to be declaratory of existing rules of customary international law. In any event, steps have been taken by the Thai Government to ratify the Convention.

In the practice of the Thai Government, diplomatic missions accredited to Thailand have been accorded the customary privileges and immunities, including inviolability of the premises, archives and official documents of the missions. Immunities from search, arrest and attachment are essentially included in the notion of inviolability. Immunity from execution is another aspect of State immunity with respect to its property. The same inviolability is also extended to the residence of accredited ambassadors and of other members of diplomatic missions.

To a somewhat lesser degree, similar treatment is accorded to consular premises and archives in conformity with the Vienna Convention on Consular Relations (1963),[19] and to the premises and archives of Special Missions and other official missions consistent with the provisions of the Convention on Special Missions (1969)[20] and with those of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (1975).[21]

Although the Thai Government is not, as at present advised, contemplating adoption or ratification of any of the Conventions other than the Vienna Convention on Diplomatic Relations (1961), the official attitude of the Government as evidenced by its consistent conduct appears fairly clear; the immunities will be granted to property of foreign States with respect to their accredited missions in Thailand, when used in connexion with the representational activities of those States.

(c) *The Immunities Sought by the Thai Government in Respect of State Property Abroad*

As the Thai Government appears inclined to follow the general practice of States with respect to the granting of jurisdictional immunities and immunities from attachment and execution of State property, it is not unnatural that the Thai Government would feel free to assert like claims of jurisdictional immunities and the immunities from attachment and execution in respect of its own property used in government and non-commercial service. This property includes warships, State-owned or State-operated vessels employed exclusively in government and non-commercial service, as well as

[18] *U.N. Treaty Series,* Vol. 500, p. 95.
[19] *U.N. Treaty Series,* Vol. 596, p. 261.
[20] Annex to General Assembly Resolution 2530 (XXIV) of 8 December 1969.
[21] Official Records of the U.N Conference on the Representation of States in Their Relations with International Organizations, Vol. II, U.N. Publications. Sales No. E25, V. 12, p. 207.

property used in connexion with one of its official missions abroad, whether diplomatic, consular or a special mission of representational character.

While the precise extent to which jurisdictional immunities will be accorded and claimed by the Thai authorities will not be finally settled until there is progressive development and codification of rules of international law on the subject, it can be stated with a reasonable measure of certainty that the authorities of Thailand are now following, however provisionally, a restrictive doctrine of State immunities. States are not immune in respect of all their activities. Only those acts which reflect an exercise of sovereign authority or *"puissance publique"* as opposed to simple acts of administration or *"actes de gestion"* will be entitled to such immunity.

In a recent series of agreements, the Thai Government appears to have accepted this restrictive theory even to the extent of including a waiver clause in some guarantee agreements, in which the Thai Government acts as guarantor for loans made by three French commercial banks to a national airline, a State enterprise of Thailand.[22]

Like many other governments, the Thai Government awaits with keen interest the final outcome of the findings of the International Law Commission, and will add its voice and views to assist the Commission in its worthy project. On the other hand, it will not seek to prejudice or complicate international legal developments by adopting over-all national legislation on the topic at this critical juncture.

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[22] See, for instance, an agreement between Banque Francaise du Commerce Exterieur and the Kingdom of Thailand signed on 23 March 1978 in Paris by the authorized representative of the Minister of Finance of Thailand. Article III, para. 3.04 provides:—

> "For purpose of jurisdiction and of execution or enforcement of any judgment or award, the Guarantor certifies that he waives and renounces hereby any right to assert before an arbitration tribunal or court of law or any other authority any defence or exception based on his sovereign immunity."

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