

The Department of State acknowledges receipt of note No. 03799, dated April 14, 1989, from the Embassy of Italy, requesting certain information concerning the means of execution against property of foreign states in the United States. In particular, the Embassy draws attention to the procedure established in Italy by decree no. 1621 of August 30, 1925, and asks if there is an analogous procedure in the United States law regarding foreign sovereign immunity.

The Department refers the Embassy to the United States Foreign Sovereign Immunities Act of 1976 (the "FSIA"), which governs all suits against foreign states and their agencies and instrumentalities in the United States and which is consistent with the United States view of international law on foreign sovereign immunity. As section 1602 of the FSIA makes clear, claims of foreign states to immunity, including the immunity of a foreign state from jurisdiction and the immunity of foreign state's property from attachment and execution, are decided by the courts of the United States and the fifty states in conformity with the FSIA.

Under the FSIA, the immunity of a foreign state from jurisdiction is treated differently from the immunity of a foreign state's property from attachment or execution.

In general, the immunity of a foreign state from jurisdiction is not as broad as the immunity of a foreign state's property from attachment and execution, in part because it is expected that states will honor valid judgments entered against them and because of potential difficulties that arise with seizure of foreign state property.

In particular, sections 1609, 1610 and 1611 of the FSIA pertain to attachment and execution of property of a foreign state and its agencies and instrumentalities. The principles laid down in these sections provide substantial protection to the property of a foreign state in the United States.

Section 1609 states the rule that a foreign state's property shall be immune from arrest and execution except as provided in section 1610 of the FSIA, or where an international agreement to which the United States is a party provides otherwise. Section 1610 provides for certain limited exceptions to immunity from attachment or execution. Section 1611 describes the types of property that are completely immune from execution.

Section 1610(a) of the FSIA permits courts in the United States to order execution against the property in the United States of a foreign state under certain

limited circumstances. The only foreign state property available for execution is property used for a commercial activity in the United States. Moreover, absent a waiver, this commercial property can only be attached for the five types of judgments listed in the statute at subsections 1610(a)(2) through (a)(6). Importantly, in a claim based upon the commercial activity exception to immunity from jurisdiction, only property of the foreign state that is used for the activity on which the claim is based is subject to execution to satisfy that particular judgment.

The Department of State notes that the FSIA provides additional grounds for the attachment and execution of property of separate agencies or instrumentalities of foreign states engaged in commercial activity in the United States under section 1610(b) of the FSIA. Section 1610(b) provides that any property in the United States of such an agency or instrumentality shall not be immune from attachment or execution if the agency or instrumentality has waived immunity, or the judgment relates to a claim for which the agency or instrumentality is not immune under certain provisions of the FSIA.

The Department also notes that the FSIA defines agencies and instrumentalities of a foreign state as

separate legal persons which are organs or political subdivisions of a foreign state, or which are majority owned by the foreign state. The Department wishes to assure the Government of Italy that well-established law of the United States respects the separate juridical identities of a foreign state and its agencies and instrumentalities. Thus, United States law does not generally permit execution against the property of a foreign state to satisfy a judgment against an agency or instrumentality of that foreign state, or vice-versa.

Even under those very limited circumstances where execution may proceed against foreign state property in the United States, section 1610(c) of the FSIA requires that a court must order such execution. In addition, in the United States, execution against property upon a judgment is taken by a court only after a separate proceeding is brought specifically to consider the matter of execution. The FSIA is consistent with this two step scheme by providing for distinct standards applicable to the question of immunity of foreign state property from attachment and execution in sections 1609, 1610 and 1611.

Moreover, a U.S. court can only order execution after a reasonable time has elapsed following the entry of a judgment. Such procedural protections were specifically included in the law in order to provide a foreign state

sufficient time to carry out its own procedures to honor a judgment entered against it. The United States would request that Italy also accord such procedural protections to the United States on the basis of reciprocity and international law.

Finally, section 1610(d) of the FSIA forbids attachment of property of a foreign state prior to the entry of judgment unless the foreign state has explicitly waived its immunity from such pre-judgment attachment.

The Department wishes especially to draw the attention of the Embassy to section 1611 of the FSIA, which provides absolute immunity from execution for certain property, unless the foreign state has made an explicit waiver. First, funds of foreign states that belong to a foreign central bank or monetary authority held for the bank or authority's own account are not subject to attachment or execution. Such funds are those used or held in connection with central banking activities.

Section 1611 also protects property that is or is intended to be used in connection with a military activity, and is of a military character or is under the control of a military authority or defense agency. This military property is not subject to attachment or execution. The United States Congress, in passing this statute, clearly indicated its intent to protect military

property that is essential to military operations, such as fuel and office equipment, although not in itself of a military character. This protection was enacted, in part, to ensure that foreign states would not permit execution against military property of the United States under a reciprocal application of the PSIA.

The PSIA is consistent with U.S. obligations under international law to accord appropriate protections, such as immunity from attachment and execution, to diplomatic and consular property, including diplomatic and consular bank accounts used to maintain and carry out the functions of diplomatic and consular missions.

Accordingly, as described above, the United States provides absolute protection from attachment and execution to certain foreign state property. Such protection is analogous to the protection provided in the Italian decree n. 1621. (The Department notes its understanding that this decree was converted into law n. 1263 on July 15, 1926.) In the view of the United States Government, for reciprocity to exist under the Italian law no. 1263 and decree no. 1621, the Government of Italy should determine whether the United States would provide effective immunity from execution for property of the state of Italy in a reciprocal case of comparable nature

in the United States. As described earlier in this note, U.S. law provides substantial protection to the property of a foreign state in the United States. Thus, the fundamental issue is whether immunity from execution is actually granted in practice. Accordingly, the United States expects that the Government of Italy will provide protection to equivalent United States property in Italy on the basis of reciprocity, as stated in the Italian law.

Department of State,

Washington, October 16, 1989.

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