Sovereign immunity—Foreign State-owned corporation—Determination regarding sovereign immunity by State Department — Conclusiveness—Extraterritorial effect of expropriatory decrees—Whether agency of foreign State succeeds to rights located in the United States—Whether entitled to claim sovereign immunity—Immunity from execution—The law of the United States

GONZALEZ *v.* INDUSTRIAL BANK

United States, New York, Supreme Court, Special Term, New York County

(McGivern, *Justice*)

26 *December* 1961

SUMMARY: *The facts:*—A Cuban refugee brought an action in New York against the Industrial Bank (of Cuba) to recover on a draft drawn by that bank on a New York bank. The Banco Nacional de Cuba intervened claiming to be the successor to the Industrial Bank, and the Ambassador of Czechoslovakia[1] applied for leave to appear to enter a plea of sovereign immunity on behalf of Cuba and the Banco Nacional. The United States Department of State declined to file a suggestion of immunity.

Held:—The Ambassador's application was rejected. The fact that the Department of State had not filed a suggestion of immunity was entitled to be accorded significant weight. Moreover, the Cuban law by which Industrial Bank was dissolved and the Banco Nacional de Cuba was made its successor was expropriatory and would not be given effect insofar as property and rights located in the United States were concerned. The question of sovereign immunity thus became irrelevant, since neither Cuba, nor its agency, the Banco Nacional, succeeded to Industrial Bank's rights in respect of the disputed fund.

The following is the text of the judgment of the Court:

[457] This is an application in the name of the Ambassador of the Czechoslovak Socialist Republic to the United States on behalf of the present regime in Cuba. The purpose is to permit the Ambassador to appear specially solely to assert a Plea of Sovereign Immunity on behalf of Cuba and the Banco Nacional de Cuba, an agent and instrumentality of that country's present regime.

The subject matter is a certain fund of $155,000 under attachment in this action, held by the Sheriff of the City of New York pending the determination of this action. The trial herein began on November 13, 1961

[1] Representing Cuban interests in the United States.

and was concluded on November 15, 1961. This application is made after the conclusion thereof. The court has decided after trial that plaintiff is entitled to the relief requested in the complaint. Its opinion with respect thereto is being filed simultaneously herewith (33 Misc.2d 285, 227 N.Y.S.2d 459).

This application would nullify such decision since it seeks under the Plea of Sovereign Immunity to vacate the warrant of attachment, releasing the attached fund to the Banco Nacional de Cuba and enjoining any execution against said fund, on the ground that it is the property of the Cuban Government.

Appearing specially, defendant Industrial, still a private banking corporation, moved to vacate the warrant of attachment and the levy thereunder, and to set aside the summons and complaint. That motion was denied (22 Misc.2d 874, 195 N.Y.S.2d 346), and unanimously affirmed on appeal (10 A.D.2d 624, 196 N.Y.S.2d 926) and subsequently unanimously affirmed by the Court of Appeals (9 N.Y.2d 623, 210 N.Y.S.2d 227, 172 N.E.2d 80).

Meanwhile, defendant Industrial had permitted the entry of a default judgment on December 11, 1959 for $137,444.90. In February, 1961, it moved to set it aside and for leave to answer and defend upon the merits. Simultaneously Banco Nacional de Cuba moved for leave to intervene as a party defendant or to be substituted in the place of Industrial as a party defendant, and to open the default judgment, and to permit it to plead upon the merits. These motions were denied at Special [458]
Term but reversed on appeal (13 A.D.2d 770, 215 N.Y.S.2d 632) and Banco Nacional appeared in the action.

It appears that on October 13, 1960, defendant Industrial was dissolved, pursuant to Law 891 of the present Cuban regime, article IV. Under article III of said law, Banco Nacional was declared the legal successor, surrogate in the place of and stead of defendant Industrial, with respect to its property rights and shares of stock, and all of the assets and liabilities of Industrial were transferred to Banco Nacional.

The State Department of the United States has not filed any suggestion that sovereign immunity be considered in this action. Its failure or refusal to suggest such immunity is accorded significant weight (National City Bank of New York v. Republic of China, 348 U.S. 356, 360, 75 S.Ct. 423, 99 L.Ed. 389).[2]

The court has decided that Law Decree 891 is confiscatory in nature, ineffectual to deprive plaintiff of her property, and is in violation of the public policies of the State of New York:

[2 22 *I.L.R.* 210.]

"We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy; we open or close our courts to foreign corporations according to our public policy, and in determining our public policy in these matters common sense and justice must be consideration of weight." (Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 163–164, 147 N.E. 703, 707.)[3]

"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets, and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equality." (Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369, 378, 189 N.E. 456, 460, 91 A.L.R. 1426.)[4]

The present Cuban regime might terminate the liability of defendant Industrial in Cuban courts under Cuban law.

"Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum." (James & Co. v. Second Russian Ins. Co., 239 N.Y. 248, 257, 146 N.E. 369, 371, 37 A.L.R. 720.)[5]

"Neither comity nor public policy requires us to enforce a mandate of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts." (James & Co. v. Second Russian Ins. Co., supra, at p. 257, 146 N.E. at p. 371, 37 A.L.R. 720.)

[459] No recognition will be given to such expropriation decrees as apply to assets located in New York (Bollack v. Societe Generale Pour [6] Favoriser le Developpement du Commerce et de L'Industrie en France, 263 App.Div. 601, 33 N.Y.S.2d 986; Plesch v. Banque Nationale De La Republique D'Haiti, 273 App.Div. 224, 77 N.Y.S.2d 43.[7]

The United States Government does not have an overriding public policy requiring recognition of the lawless act of the Cuban regime which is clearly repugnant to our public policy. The decree is offensive and will not be given effect.

Accordingly, the motion is denied in its entirety.

[3 3 *Ann. Dig.* 54.]
[4 7 *Ann. Dig.* 65.]
[5 3 *Ann. Dig.* 57.]
[6 10 *Ann. Dig.* 147.]
[7 15 *Ann. Dig.* 13.]

[In his judgment on the merits, delivered on the same day, McGivern J., after stating the facts and considering certain questions of United States law, said:]

As for the ex post facto dissolution of Industrial by Law Decree [462] 891 of the present Cuban regime, the court rejects such a ukase as confiscatory in nature, contrary to our public policy and ineffectual to deprive plaintiff of her property (Vladikavkazsky Ry. Co. v. New York Trust Co., 263 N.Y. 369, 189 N.E. 456, 91 A.L.R. 1426).[8]

No recognition will be given to such expropriation decrees as relative to assets located in New York (Bollack v. Societe Generale Pour Favoriser le Developpement du Commerce et de L'Industrie en France,[9] 263 App.Div. 601, 33 N.Y.S.2d 986; Plesch v. Banque Nationale De La Republique D'Haiti, 273 App.Div. 224, 77 N.Y.S.2d 43).[10]

The other defenses raised have not been proven sufficiently to defeat the plaintiff's action.

Accordingly, the court concludes that plaintiff is entitled to judgment for the sum of $132,000 with interest. The foregoing constitutes the court's decision in accordance with section 440 of the Civil Practice Act. All motions on which decision was reserved are hereby denied.

[Report: 227 N.Y.S. 2d 456 (1961).]

NOTE.—On 6 February 1962 the United States Department of State rejected a second request that it file a suggestion of immunity from execution. The Department's note to the Czechoslovak Ambassador stated in part:

> As the Ambassador's note indicates, a final judgment in this case was handed down by the Supreme Court of New York County on December 27 1961. It is clear that the property which is the subject of the judgment had been attached by the plaintiff a year prior to the dissolution of the defendant Industrial Bank of Cuba by Cuban Decree Law No. 891 and was in the custody of the sheriff of New York County at the time the decree purported to transfer title thereto. In its judgment, the Court held that the *ex post facto* dissolution of the Industrial Bank of Cuba by the Decree was "ineffectual to deprive plaintiff of her property," and that no recognition would be given to such expropriation decree relative to assets located in New York. In these circumstances, the Department considers that no proper basis exists for recognition of the assets in question as the property of the Cuban Government immune from disposition by the Court. The Department has reached this conclusion after careful consideration of written and oral presentations by counsel for both sides. (*Digest of United States Practice in International Law,* 1977, p. 1043).

[8 7 *Ann. Dig.* 65.]
[9 10 *Ann. Dig.* 147.]
[10 15 *Ann. Dig.* 13.]

Sovereign immunity — Foreign State-owned corporations — New York corporation owned by British nationalized industry—Jurisdiction of the United States Labor Relations Board — Whether appropriate for Board to exercise jurisdiction over State-owned corporation—The law of the United States

BRITISH RAIL INTERNATIONAL, INC., EMPLOYER, *and* OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, PETITIONER

United States, National Labor Relations Board. 31 *March* 1967

(*Panel composed of:* Brown, Jenkins and Zagoria, *Members*)

SUMMARY: *The facts:*—The Petitioner, a United States trade union, applied to represent the office staff employed at the New York office of the employer, a New York corporation wholly owned by the British Railways Board, an agency of the United Kingdom Ministry of Transport.

Held:—The petition was dismissed. In view of the close connection between the employer and the United Kingdom Government, it would be inappropriate for the Board to assert jurisdiction.

The following is the text of the decision of the Board:

[721] Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before Hearing Officer Joan Messing of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. The Employer and the Petitioner filed briefs with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the National Labor Relations Board finds:

The Petitioner seeks to represent all regular and regular part-time office, clerical, and sales employees at the Employer's New York office. The Employer urges that the petition should be dismissed on the grounds, *inter alia,* that the Board does not have, or in the alternative should not assert, jurisdiction, over a wholly owned subsidiary of a foreign government, that the requested unit is inappropriate, and that there is an existing collective-bargaining agreement which bars the petition.

The Employer, herein called BRI, a New York corporation, with its principal place of business in New York, New York, operates

throughout the United States and Canada, where it is engaged in selling tickets for the British railways and vouchers for rooms and meals in British hotels in connection with rail travel in Britain, to travel agents, tour groups, and individuals. Its total annual sales are in excess of $500,000, and the value of tickets sold directly across State lines exceeds $50,000. It has branch offices in Los Angeles, California, and Toronto and Vancouver, Canada.

All stock of the Employer is owned by the British Railways Board, herein called BRB, an agency of the Ministry of Transport of the United Kingdom. The Employer's board of directors of six members are appointed by the BRB, comprising three nonresident directors who reside in London, and three directors who reside in the United [722] States. It appears that the three directors who reside in the United States have no managerial responsibility and all policy matters are referred to the directors in London for decision. Although the day-to-day operations of the Employer are administered by officials in the United States, overall policy directives regarding labor relations and personnel policies emanate from London.

The day-to-day administration of the New York office is under the general traffic manager and the deputy traffic manager. Each branch office is administered by an area sales manager who is guided by personnel and administrative directives emanating from the New York office. American and Canadian nationals are hired by officials of the respective branch offices, but British citizens on treaty trader visas employed in the various branch offices are hired abroad by the BRB, or are British Railway employees who have been temporarily transferred to one of the Employer's North American offices. It also appears that the BRB regularly assigns its employees to the Employer's operations as needed.

In the New York office unit sought by the Petitioner, it appears that there are approximately 39 employees. Of these 39, approximately 12 employees are British nationals working in the United States on treaty trader visas for a period of 1 year, and subject to extension for a similar period. Seven such employees are British nationals on treaty trader visas for an initial period of 3 years, and five other British nationals are assigned for a maximum of 6 months. The latter assignments are also renewable for additional or consecutive 3-year or 6-month periods, but the decision is subject to the discretion of the BRB. The Los Angeles office has approximately five employees; the Toronto office has approximately nine employees; and the Vancouver office has approximately four employees.

The Transport Salaried Staffs' Association, herein called TSSA, or intervenor, a British labor organization, has for approximately 45 years represented employees engaged in occupations listed above in the British Railway industry in Great Britain. A representative of the

TSSA testified that, in the past, general wage increases had been negotiated in England between the TSSA and the BRB for all North American employees of the Employer regardless of citizenship. It also appears that members of the TSSA assigned to this country continued to make pension fund contributions and payments to British National Insurance. However, the record does not indicate what deductions, if any, are made from the salaries of American citizens employed by the Employer.

It appears that pursuant to a document entitled "Machinery of Negotiations," introduced in evidence, certain basic National Agreements are negotiated in England between the BRB and TSSA covering "Rates of pay and Conditions of service of Railroad Male clerical staff" and "Rates of pay and conditions of service of Women and girl clerks," containing provisions for salaries, wages, hours and other conditions for employment, including provisions for deductions for a pension fund and national insurance from the salaries of Employer BRI employees. The record indicates that these agreements are then incorporated in the Machinery of Negotiated Agreements. Although copies of the National Agreements were not placed in the record and there is no evidence that the Employer was a direct party to the agreements, it does appear that the basic National Agreements were modified for all BRI employees in North America by an exchange of correspondence made part of the record beginning April 10, 1963, and ending April 30, 1964, establishing general wage increases. TSSA, according to the Employer, is currently negotiating on another general wage increase regarding BRI employees in London. None of the above-described negotiations occurred in New York.

The Employer's principal contention in urging dismissal of the petition is that the Board does not have jurisdiction, or, in the alternative, should not assert jurisdiction, over a wholly owned subsidiary of a foreign government. In essence, the Employer contends that Employer "BRI is merely the North American ticket agent of BRB, the same as other BRB ticket agents in Britain, and elsewhere," and that therefore the BRB, agency of the British Government, is in fact the employer of the employees herein sought.

In all the relevant circumstances, particularly in view of the Employer's close relationship with the BRB, an agency of the British Government, and without reaching the question whether the Board in fact has jurisdiction over the Employer's operations with respect to the employees herein involved, we deem it inappropriate to assert jurisdiction in the instant proceeding. We shall, accordingly, dismiss the petition.[1]

[1] See *United Fruit Co.*, 159 NLRB 135. Cf. *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963) [34 *I.L.R.* 51.]

In view of our disposition herein, we find it unnecessary to consider the unit, contract bar, and other grounds on which the Employer urged that the petition be dismissed.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

[Report: 163 N.L.R.B. 721 (1967).]

NOTE.—See also the decision in the *AGIP, USA Case,* below, p. 18, and the decision of the full Board in the *State Bank of India Case,* below, p. 81.

Sovereign immunity — Foreign States — Restrictive theory of sovereign immunity—Commercial transactions—Contract for the delivery of fishing vessel to be used for training purposes—Whether commercial—Whether Court bound by decision of Department of State — Pre-judgment attachment of property — The law of the United States

OCEAN TRANSPORT CO. *v.* GOVERNMENT OF THE REPUBLIC OF THE IVORY COAST

United States, District Court, E. D. Louisiana, New Orleans Division

(Cassibry, *District Judge*)

23 *May* 1967

SUMMARY: *The facts:*—Under a contract negotiated through the United States Agency for International Development (A.I.D.), the plaintiff company agreed to provide a crew to sail a fishing vessel recently purchased by the Ivory Coast to Abidjan in the Ivory Coast. The vessel was intended for use in training Ivory Coast nationals as fishermen and had been acquired by the Ivory Coast Government through A.I.D. The vessel became unseaworthy with the result that the plaintiff's crew had to put in to a port in the United States. The Ivory Coast Government then refused to make payment to the plaintiff who commenced *in personam* proceedings against the Ivory Coast and an *in rem* action against the vessel, alleging breach of contract. The United States Department of State rejected a request from the Republic of the Ivory Coast for a suggestion of sovereign immunity.[1] The Republic nevertheless moved that the action be dismissed on grounds of sovereign immunity.

Held:—The motion to dismiss was denied. Although the State Department's determination that this was a private, commercial transaction might not be binding on the Court, it was highly persuasive. Moreover, according to the test set out in *Victory Transport, Inc.* v. *Comisaria General,*[2] the agreement between the plaintiff and the Ivory Coast Government clearly came into the category of commercial transactions.

The following is the text of the judgment of the Court:

[703] This cause came on for hearing on April 19, 1967 on motion of defendant to dismiss.

Ocean Transport Company, Inc., a Louisiana corporation, has sued the Government of the Republic of the Ivory Coast,

[1] The letter from the State Department is set out at p. 10, note 1, below.
[2] 35 *I.L.R.* 110.

a sovereign nation, and the Fishing Vessel, President Kennedy, for breach of contract, civil and maritime. The President Kennedy is a tuna and sardine fishing boat, constructed in the United States, the ownership of which was acquired by the Republic of the Ivory Coast from the United States of America through the Agency for International Development (A.I.D.) pursuant to the Foreign Assistance Act of 1961. The Republic of the Ivory Coast intends to use the President Kennedy to train and educate its Nationals to become fishermen.

In August 1966, plaintiff entered into negotiations with representatives of defendant, acting through A.I.D., which culminated in a contract effective December 10, 1966. Under the terms of the contract, defendant was to deliver the vessel to plaintiff in a seaworthy condition fully found and ready for sea and, upon delivery of the vessel, plaintiff would be obligated to place a crew on board and deliver the vessel to Abidjan, Ivory Coast. The contract further provided that upon delivery of the vessel to the defendant at Abidjan, defendant would have paid the plaintiff the total sum of $23,000.00, plus $215.00 for each day, or portion thereof, that the voyage might be delayed by reason of the vessel having to put into a port for major repairs or alterations. To make certain that funds would be available to discharge defendant's obligations to pay plaintiff the agreed upon contract price for delivery of the vessel to Abidjan, defendant, on or about November 29, 1966, deposited the sum of $23,000.00 in the Hibernia National Bank in New Orleans in the form of a letter of authorization to disburse portions of said funds to plaintiff prior to, and at various stages of the contemplated voyage. At the time suit was filed, sums totalling $10,000.00 had been disbursed to the plaintiff. The vessel was finally delivered to the plaintiff who placed a crew aboard and the ship duly sailed for Abidjan. On January 15, 1967, enroute to the Republic of the Ivory Coast, the Master of the vessel discovered that the ship was unstable and unseaworthy. As a result, he felt constrained to put in to Key West, Florida for the safety of the crew and the vessel. The vessel has remained in Key West since that date. Defendant refused to authorize any further disbursement of funds and, as a consequence, plaintiff has filed this suit alleging breach of contract. To obtain jurisdiction and assure payment of at least a portion of his alleged losses, plaintiff has filed this suit *in personam* against the Republic of the Ivory Coast and *in rem* against the vessel and has obtained a writ of attachment on the balance of the contract funds now in the Hibernia National Bank of New Orleans. [704]

Defendant has moved to dismiss the action in its entirety on the grounds that the Republic of the Ivory Coast as a sovereign nation, is immune to suit. The State Department of the United States has declined the Republic of the Ivory Coast's request for immunity, saying that it does so because the contract at issue is of a "private" nature. (*jure gestionis*) [1]

1. The State Department responded to a letter written to them by plaintiff as follows:
"The Department refers to your letter of March 2, 1967, in reply to its letter of February 20, 1967, concerning the case of Ocean Transport Company, Inc. v. The Government of the Republic of the Ivory Coast and the Fishing Vessel President Kennedy, Docket No. 67-99-E, United States District Court, Eastern District of Louisiana.
The Department is informing the Embassy of the Republic of the Ivory Coast that it must decline its request for recognition of sovereign immunity from suit in the above case because in the Department's view the contract out of which the present action against the Government of the Republic of the Ivory Coast arises and in which the defendant government contracted for the services of a private company for the transportation of the fishing vessel President Kennedy and its delivery in Abidjan is of a private nature (jure gestionis) and, therefore, not entitled to immunity under the restrictive theory of sovereign immunity which the Department follows."