PRACTICAL APPLICATION OF THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 FOR THE PRACTICING ATTORNEY

Resumen

La ley de Estados Unidos de 1.976 sobre inmunidades de la soberania estatal (FSIA), facilita a las partes medios para iniciar acciones legales contra un estado extrajero o sus entidades ante las cortes de los Estados Unidos y determina cuándo dicho estado extranjero tiene derecho a inmunidad basada en su soberania. Hasta ahora no se ha dado ningún fallo por las cortes federales en el distrito de Arizona interpretando la ley. El propósito de este articulo es identificar áreas problemáticas en la aplicación de ella. La FSIA se basa en la doctrina de inmunidad de la soberania y en los actos de estado. Tal como se codifica en la FSIA, la inmunidad a la soberania es garantizada si la activadad es determinada con base en hechos de naturaleza (gubernamental) pública y se rechaza cuando la actividad es de caracter comercial. La definición de lo que constituye un actividad pública como opuesta a la meramente comercial no es clara. Determinar si una entidad es un "estado extranjero," una subdivisión política de un estado extranjero o una "agencia o instrumento de un estado extranjero" es labor de la corte, lo cual hace apoyada en un variado número de definiciones emergentes de fallos jurisprudenciales sobre lo que es una entidad. El estado extranjero no es inmune en aquellos casos en los cuales ha renunciado expresa o implicitamente a ella. Existen dudas sobre si la cláusula de renuncia a la inmunidad se aplica a estados extranjeros sin suficientes contactos con los Estados Unidos. Tampoco es claro hasta qué punto la FSIA puede aplicarse retroactivamente.

Abstract

The United States Foreign Sovereign Immunities Act of 1976 (FSIA) provides a means for parties to maintain a lawsuit against a foreign state or agencies or instrumentalities in the courts of the United States and delineates when a foreign state is entitled to sovereign immunity. The purpose of this article is to identify problem areas in the application of the FSIA. The FSIA is based on the doctrines of sovereign immunity and act of state. As codified in the FSIA, sovereign immunity is granted if the activity is factually determined to be of a public (governmental) nature and refused where the activity is of a commercial nature. The definition of a public as

opposed to a commercial activity is still not clear. Whether an entity is a "foreign state" or an "agency or instrumentality of a foreign state," including political subdivisions of a foreign state, is determined by the court, subject to varied case law definitions of an entity. The foreign state is not immune in cases in which it has explicitly or implicitly waived its immunity. There is some question whether the waiver provision applies to foreign states not having sufficient contacts with the United States. It is unclear to what extent the FSIA may be retroactively applied.

The purpose of the Foreign Sovereign Immunities Act of 1976 (FSIA)[1] is to provide a means for parties to maintain a lawsuit against a foreign state or its entities in the courts of the United States. The FSIA also delineates when a foreign state is entitled to sovereign immunity.

There is no decision on record by the federal courts in the district of Arizona interpreting the FSIA. The only Arizona decision falling within an area covered by the FSIA is *Citizens Utilities Company v. Cia de Servicios Publicos de Nogales.*[2] In this case, a United States corporation brought an action against the Mexican government, a governmental agency and a governmentally-owned public service utility for an alleged breach of contract involving the supply of electricity across international boundaries. The decision for the defendant by Judge James Walsh was based upon the act of state doctrine, which, as discussed in this article, is intimately related to the doctrine of foreign sovereign immunities.

The FSIA makes five major changes in the law:[3]

(1) it creates a federal long-arm statute for suits against foreign governments and their agencies or instrumentalities;[4]

(2) it eliminates in rem and quasi in rem jurisdiction against foreign sovereigns;[5]

(3) it vests exclusive authority in the judiciary to determine whether a particular activity of a foreign sovereign is commercial;[6]

(4) it permits execution of a judgment against certain commercial property of a foreign government;[7] and

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1. 28U.S.C. § § 1602-1611 (1976).
2. Citizens Utilities Company v. Cia de Servicios Publicos de Nogales, No. CIV 75-268 TUC-JAW (D. Ariz. 1976) (memorandum in support of motion to dismiss).
3. Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice,* 33 Sw. L. J. 1009, 1011 (1979).
4. 28 U.S.C. § 1608 (1976).
5. *Id.* § § 1609-1611.
6. *Id.* § 1602.
7. *Id.* § 1610.

(5) it establishes venue provisions for suits against foreign governments and their instrumentalities.[8]

In order to understand the FSIA, it is necessary to take a look at the two doctrines underlying it; sovereign immunity and act of state must each be considered and compared to understand how they interrelate and how they differ.

Initially, in dealing with the act of state doctrine, courts have pointed out that it

> would not be only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states.[9]

The United States Supreme Court has refrained from laying down or reaffirming an inflexible and all-encompassing rule about what kind of activity constitutes an act of state.[10] The Court's case-by-case approach leaves much unanswered about the doctrine.

While an investor may be precluded by an act of state doctrine only from litigating certain issues such as the authority of the court or administration officer to adjudicate in a claim, litigation of all parts of his claim may be precluded by an applicable doctrine of sovereign immunity. Defined as "...doctrine of international law under which domestic courts, given the proper circumstances, will relinquish jurisdiction over a foreign state,"[11] the sovereign immunity doctrine is a modern formulation of the ancient proverb "par in parem imperium non habet" ("an equal has no dominion over an equal").[12]

As announced in the State Department's "Tate Letter,"[13] the United States follows a "restrictive theory" of sovereign immunity which continues to shield a state's public acts with sovereign immunity but does not similarly shield private acts of the state. However, "the 'Tate Letter' offer[ed] no guide-lines or criteria for differentiating between a sovereign's private and public acts."[14]

Per the FSIA, sovereign immunity accords a defendant exemption from suit by virtue of its status if the activity concerned is found to be one that is of a public (governmental) nature and refuses exemption

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8. *Id.* § 1391(f).
9. Underhill v. Hernandez, 65 F. 577, 579 (2d Cir. 1895).
10. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
11. Jet Line Services, Inc. v. M/V Marsa Hariga, 462 F. Supp. 1165, 1168 (D. Md. 1978).
12. THE LAW OF NATIONS 442 (H. Briggs 2d ed. 1952).
13. 26 Dept. of State Bull. 984 (1952).
14. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 359 (2d Cir. 1964).

where the activity is of a commercial nature. This determination is a mixed question of fact and law. Nearly six years after the FSIA was enacted, the definition of what is a public (governmental) versus commercial activity is still not clear. Some clarification is provided by the legislative history to the FSIA.

> Paragraph (c) of section 1603 defines the term "commercial activity" as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A "regular course of commercial conduct" includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a "particular transaction or act."
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> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function....
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> [P]ublic or governmental...would be the employment of diplomatic, civil service, or military personnel, but not the employment of American citizens or third country nationals by the foreign state in the United States.
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> The courts would have a great deal of latitude in determining what is a "commercial activity" for purposes of this bill.[15]

Since the definition as set forth lacks preciseness, an attorney could skillfully argue the commercial nature of the activity in question.

Commercial activities engaged in by a foreign sovereign can result in a permitted law suit in three situations. The first of these exceptions

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15. H.R. REP. No. 94-1487, 94th Congr., 2d Sess. 1, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604, 6614-15 [hereinafter cited as HOUSE REPORT].

to sovereign immunity is where "the commercial activity is carried on in the United States by the foreign state."[16] The second situation occurs when an "act [is] performed in the United States in connection with a commercial activity of the foreign state elsewhere."[17] The third exception arises when "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere... causes a *direct effect* in the United States."[18] Despite all the legislative history and statutory and case law, the concept of "direct effect" remains elusive. In *National America Corporation v. Federal Republic of Nigeria,*[19] the court held that a breach of a letter of credit having a New York beneficiary, advised by and payable through New York banks met the direct effect test of the third exception in section 1605 (a)(z). However, in *Carey v. National Oil Corp.,*[20] the court refused to assert jurisdiction as the defendant had made a conscious effort to minimize contacts with the United States and had made no attempt to avail itself of any of the privileges or protections afforded by the United States.

With respect to non-commercial torts, close attention should be given to the characterization of the interference by a foreign sovereign. This can be extremely important. For example, the FSIA provides sovereign immunity for tortious acts or omissions by an employee of a foreign state while acting within the scope of his employment[21] but excepts tortious interference with contractual rights.[22]

The FSIA applies to "foreign states" or an "agency or instrumentality of a foreign state,"[23] including political subdivisions of a foreign state.[24] In *Edlow International Co. v. Nuklearna Electrarna Krsko,*[25]

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16. *Id.* at 6617; *see* 28 U.S.C. § 1605(a)(2)(1976).

17. *Id.*

18. HOUSE REPORT, *supra* note 15, at 6618 (emphasis added); *see* 28 U.S.C. § 1605(a)(2)(1976).

19. *National American Corp. v. Federal Republic of Nigeria,* 448 F. Supp. 622 (D.C.N.Y. 1978), affirmed 597 F.2d 314 (2d Cir. 1979).

20. *Carey v. National Oil Corp.,* 453 F. Supp. 1097 (S.D.N.Y. 1978), affirmed 592 F.2d 673 (2d Cir. 1979).

21. 28 U.S.C. § 1605(a)(5)(1976).

22. *Id.* § 1605(a)(5)(B).

23. An "agency or instumentality of a foreign state" means any entity: (1) which is a separate legal person, corporate or otherwise and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and (3) which is neither a citizen of a state of the United States as defined in section 1332(c) and (d) of Title 28, not created under the laws of any third country. A corporation wholly-owned by the government is a "foreign state." See also *Gevere & Co. Int'l. v. Kompania Di Awa, etc.,* 482 F. Supp. 660, (S.D.N.Y.) 1979).

24. *Id.* § 1603(a)-(b).

25. Edlow International Co. v. Nuklearna Elektrarna Krsko, 441 F. Supp. 827 (D.D.C. 1977).

the court held that the defendant, a Yugoslav workers' organization created to build and operate a nuclear power plant, was not an agency or instrumentality of a foreign state within the meaning of the FSIA. The court concentrated on the degree of government control over the entity and pointed out that the Yugoslavian Government did not subsidize the defendant (NEK), held no seats on NEK's board and took no direct hand in the daily management of NEK's operations. The court indicated concern that if a nation's system of ownership were alone determinative of whether an entity is an agency or instrumentality under the FSIA, then every entity of a socialist state could be so classified.

Section 1605(a)(1) of the FSIA provides that a foreign state shall not be immune in any case "in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver... except in accordance with the terms of the waiver."[26]

> With respect to explicit waivers, a foreign state may renounce its immunity by treaty... or [it] may waive its immunity in a contract with a private party....
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> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of soverign immunity.[27]

Is the language of the waiver provision of the FSIA too broad? There is language by a United States district court in *Verlinden B. V. v. Central Bank of Nigeria*[28] indicating that this is the case.

> By its peculiar mixture of substantive and procedural provisions, the Immunities Act confers personal jurisdiction over all foreign states not entitled to immunity (assuming that valid service has been effectuated). Proof of an implicit waiver absolutely defeats the assertion of sovereign immunity. If the language of the Act is applied literally, the result is that a foreign sovereign which has waived its immunity can be subjected to the personal

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26. 28 U.S.C. § 1605(a)(1)(1976).
27. HOUSE REPORT, *supra* note 15, at 6617; *see also* 28 U.S.C. § 1605(a)(1)(1976).
28. Verlinden B.V. v Central Bank of Nigeria, 488 F. Supp. 1284 (S.D. N.Y. 1980), *aff'd*, 647 F.2d 320 (1981).

> jurisdiction of United States courts regardless of the nature or quality of its contacts with this country.[29]

There is reason to believe that the United States Congress did not anticipate this problem at all. On the one hand, the legislative history indicates that Congress intended the courts to exercise personal jurisdiction only over foreign states having sufficient contacts with the United States.[30] On the other hand, the statute permits the assertion of jurisdiction either when there are sufficient contacts (i.e., when one of the commercial activity exceptions has been met) or when there has been a waiver.

While reviewing the facts of a specific case, the implicit waiver argument should be kept in mind, along with the knowledge that although the FSIA itself does not contain any provision for waiver of its venue provisions, the House Report makes it clear that this can be done.[31]

It is unclear to what extent the FSIA may be retroactively applied. Section 8 of the House Report provides that the FSIA shall take effect ninety days after its enactment date of October 21, 1976.[32] In *Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina),* the court refused to apply the FSIA retrospectively because "the very wording of section 1330(a) that the 'district courts shall have original jurisdiction is prospective."[33] Despite this 1977 ruling, the court in 1978 in *Yessenin-Volpin v. Novosti Press Agency* indicated that the statute could be applied retroactively.[34]

Nearly five years after the FSIA took effect, many of the questions propounded at the time of enactment still remain unresolved and new problems have arisen.

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29. *Id.* at 1301.

30. HOUSE REPORT, *supra* note 15, at 6612.

31. "As with other provisions in 28 U.S.C. 1391, venue in any court could be waived by a foreign state...." HOUSE REPORT, *supra* note 15, at 6631.

32. HOUSE REPORT, *supra* note 15, at 6632; *see* 28 U.S.C. § 1602 (1976).

33. Martropico Compania Naviera S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), 428 F. Supp. 1035, 1037 (S.D. N.Y. 1977); *see* Rasu Martima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 77 Civ. 263 (S.D. N.Y. 1977) (memo endorsement).

34. Yessenin-Volpin v. Novosti Press Agency, 443 F. Supp. 849, 851 n. 1 (S.D. N.Y. 1978). The court reasoned: "[A]pplying the Immunities Act to the instant case will give effect to the congressional intent and will not interfere with the antecedent rights of the parties.... Indeed, insofar as the Immunities Act alters the rights of parties, it does so by expanding the ability of plaintiffs to obtain satisfaction of judgments against foreign states."