



Small Group: Foreign Sovereign Immunity

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Current Issues

Issues under of the U.S. Foreign Sovereign Immunity Act

In the global village, foreign governments and governmental entities are more and more frequently involved in commercial undertakings. And that raises the question whether and under what circumstances they can be taken to court. In the United States, the question is governed by the Foreign Sovereign Immunities Act of 1976 (FSIA).

The FSIA is exclusive, the sole basis for suit against foreign states – as well as their agencies and instrumentalities -- in federal or state courts. This principle was established by the U.S. Supreme Court in the Amerada Hess case in 1989 and recently reaffirmed in Altmann v. Austria (2004).

The general rule is that the immunity of the foreign state is presumed, so in order to succeed a suit must fit within one of the enumerated exceptions. If it does not, then there is no subject matter jurisdiction and no personal jurisdiction, and the suit must be dismissed. In other words, the foreign state has immunity unless it's been removed by operation of the statute.

The FSIA applies to (1) states (including governments and their political subdivisions) and (2) their agencies and instrumentalities. Suits against the “government” are in fact suits against the “state.” Constituent units of the government, such as ministries and entities performing “core functions” of the government (like armed forces), can either be considered “the state” or one of its “political subdivisions.” Sometimes they are considered “agencies and instrumentalities.”

The term “agency and instrumentality” is roughly synonymous with foreign government owned corporation, that is, an entity with separate juridical personality, owned by a foreign government, and established under the law of the state that owns it. In Dole Food v. Patrickson (2003), the U.S. Supreme Court ruled that an entity qualifies only when the foreign state itself owns a majority of its shares directly.

Individual government officials acting in their official capacity are sometimes assimilated to the state, in the fashion of substituting the foreign state as the real defendant, but sometimes this issue gets confused with diplomatic and head of state immunity.

The FSIA defines seven exceptions to the rule of immunity. The four major ones, at least in terms of volume of litigation, have traditionally been (i) waivers, (ii) commercial activity, (iii) non-commercial torts in the U.S., and (iv) acts of state-sponsored terrorism. However, courts and practitioners may also encounter issues concerning arbitration agreements and awards, and expropriations in violation of international law. Not many cases are brought regarding rights to immovable property or maritime issues.

Waivers can be explicit (for example written provisions in the underlying contract) or implicit (i.e., by conduct which evidences a clear intent to submit to the jurisdiction of the courts in respect of the claim or allegation at issue). Both waiver types are treated conservatively by U.S. courts.

Not surprisingly, the most frequently invoked exception concerns “commercial activity.” Sometime it is difficult to determine what constitutes a “commercial activity.” The clear FSIA rule is that it’s the nature, not the purpose or intent of the act, which matters. In some ways, this is the heart of the statute – codification of the so-called “restrictive theory” of immunity. When a foreign sovereign acts in the market place like a private party, it should be treated as a

private party would – at least in respect of its amenability to the judicial settlement of disputes arising out of the conduct in question.

There must also be a sufficient jurisdictional nexus with the U.S. Specifically, the FSIA contemplates three situations which provide the required jurisdictional connection. The first provides for jurisdiction when the claim is based on commercial activity carried out within the U.S., i.e., the relevant commercial acts take place in the U.S. The second, when an act is performed in the U.S. in connection with a commercial activity elsewhere, i.e., the relevant activity takes place in the US in connection with commercial activity outside the U.S. The third, when an act is performed outside the U.S. in connection with a commercial activity outside the U.S. that causes a “direct effect” in the U.S.

Regarding expropriation, suits are permitted against foreign states in which rights in property taken in violation of international law are in issue, where the property (or property exchanged for it) is found in the U.S. in connection with a commercial activity carried on here by the foreign state. The FSIA also permits suits against agencies and instrumentalities where the expropriated property was owned or operated by the agency or instrumentality and it is engaged in commercial activity in the U.S.

The FSIA also authorizes suits for non-commercial torts occurring in the United States. The typical case involves a claim for money damages against a foreign state for personal injury or death or damage to/loss of property resulting from a “slip and fall” or other non-discretionary tort. The provision is conservatively interpreted. Both the wrongful act and the injury must occur in the U.S.; the lingering after-effects of an injury which occurred abroad are not enough.

No immunity applies with respect to cases involving arbitration in the U.S., or if there is a waiver of immunity apart from the arbitration agreement, or if the underlying suit could have been brought in US courts apart from the agreement,

or if the agreement or award is or may be governed by an international agreement for the recognition and enforcement of arbitral awards, especially applicable to cases involving arbitration agreements and awards subject to the New York Convention.

The most controversial FSIA provision permits a limited range of suits based on injuries resulting from “state sponsored terrorism.” This exception is in fact narrow and applies only to suits against officially designated state-sponsors of terrorism, only when the victims are U.S. citizens, and certain other restrictive criteria have been met.

The FSIA establishes a default rule that “the property in the United States of a foreign state shall be immune from attachment arrest and execution. . . .” There can be no prejudgment attachment for jurisdictional purposes, and in any event only with an explicit waiver. Execution and attachment of state assets is generally limited to property in the U.S. which is used for a commercial purpose in the United States. The rules for assets belonging to agencies and instrumentalities differ.

There are some categorical exclusions from the rules regarding enforcement, for example, property of “a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution. . . .” and “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.” A special rule applies to judgments based on the “terrorist-state” exception.

There is considerable litigation about what constitutes property used for a commercial activity in the United States.