SUING AND REPRESENTING FOREIGN SOVEREIGNS:

SOVEREIGN IMMUNITY FOR FUN AND PROFIT

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November 17, 2007

Introduction

- Historically, common law jurisdictions found foreign sovereigns to be immune from the authority of their courts. The immunity was absolute: it did not matter what the nature or purpose of the foreign prince's activity may have been.

- This was said to follow from "the perfect equality and absolute independence of sovereigns," with "one being in no respect amenable to the other." *The Schooner "Exchange" v. McFaddon*, 7 Cranch. 116 (1812) (Marshall, C.J.).

- And it did not exclude extreme results: *Mighell v. The Sultan of Jahore*, [1894] 1 Q.B. 149 (C.A.).

Yet the absolute view of immunity ultimately gave way to a more complex structure, in which it is not the **person** of the sovereign that determines the outcome, but the **nature** of the **conduct** giving rise to the lawsuit.

The shift was driven by the feeling that, if a government acts like a trader, it should be treated like a trader when it comes to enforcing the government's obligations. There is something unfair and asymmetrical about any other outcome. But when the government acts in its capacity as a sovereign, then is still entitled to protection.

In the United States, this shift happened in stages, involving all three branches of government: judicial decisions beginning in the late 19th century, the 1952 State Department "Tate letter," and finally the Foreign Sovereign Immunities Act of 1976.

- This talk is about the Foreign Sovereign Immunities Act, which is the exclusive vehicle for bringing a foreign government, its organs, agencies, or instrumentalities, before United States courts. The FSIA determines when there is **subject matter jurisdiction** over a case against a foreign sovereign.

- The talk does not address these closely related areas:

    - The act of state doctrine (under which courts will, in their discretion, refrain from determining the legality of foreign states' acts in their own territory: not statutory in the United States, although there are statutory restrictions on its use);

    - Diplomatic immunity (under which, pursuant to treaties and extensive usages, certain accredited representatives of foreign governments are entitled to immunity from judicial process); and

    - The sovereign immunity of the United States itself from the jurisdiction of its own courts.

The basic rule of the FSIA:

Foreign **states**, and their **subdivisions**, **organs**, **agencies**, and **instrumentalities**, are immune from suit in courts of the United States and the States **except** as provided in the Act.

There are seven principal statutory categories of exceptions to the general rule of immunity:

- When immunity has been waived, expressly or by implication;
- In the case of:
  - commercial activities in the United States;
  - acts committed in the U.S. in connection with commercial activities elsewhere; or
  - acts committed outside the U.S. in connection with commercial activities that caused direct effects in the United States.

When property has been taken in violation of international law, and that property or something for which it was exchanged:

- is present in the United States in connection with a commercial activity conducted here; or
- is owned or operated by an agency or instrumentality of the foreign state, which is engaged in commercial activity in the United States.

- When rights to certain property in the United States (including real estate) are in issue;
- In suits for money damages, alleging non-discretionary torts committed in the United States;
- In actions to compel arbitration, or to enforce an arbitral award, governed by U.S. law; and
- In actions for money damages arising from acts of terrorism when the foreign state was involved in those acts or provided "material support" to the perpetrators.

There are also statutory exceptions for certain suits in admiralty.

Definitions

- A "**foreign state**" includes political subdivisions, as well as agencies and instrumentalities.
- An "**organ**" of a foreign state is part of the state, which carries out one or more sovereign functions.
- An "**agency or instrumentality**" of a foreign state is an organ of the state, which also has separate legal personality according to the state's laws.
- The **direct-ownership rule** says that, to be an organ of the state, an entity must be **majority-owned by the state**. Second-tier ownership disqualifies an entity from immunity.

Procedures for filing suit

Service may be made on a **foreign state**:

- By agreement of the parties;
- Pursuant to any applicable international treaty regime (such as The Hague Convention);
- By mail to the foreign ministry; or, if all else fails,
- Through the Department of State.

In the last two cases, service must include translations of the summons and complaint.

Service may be made on an **agency or instrumentality** through a local agent, or with the assistance of the U.S. court (directly or via letters rogatory).

Defendants have **60 days to answer** the complaint. They have the right to **remove State court cases** to Federal court.

Default procedures

- If the foreign state **defaults**, the plaintiff must still put on its case, establishing its "claim or right to relief by evidence **satisfactory to the court**."

- In practice, this means that the court will conduct an *ex parte* trial. Decisions are not uniform on whether the standard of proof is "preponderance of the evidence" or "clear and convincing evidence"?

Attachment and execution

- The immunity of the property of a foreign state used for commercial purposes in the U.S. is regulated by the FSIA. Generally speaking, property used in connection with the commercial activities giving rise to the suit will **not** be immune.

- Diplomatic, military, and central bank property **is** generally immune from execution.

The exceptions to immunity

Waivers

- May be **express** (by contract or treaty) or **implied**.
- A state that files suit has impliedly waived immunity from any compulsory **counterclaim**.
- **Implied** waivers are also found when: the foreign state agreed to arbitration under U.S. law, the state agreed that a contract would be governed by U.S. law, or when it defends a lawsuit against it without asserting immunity.
- Implied waivers require that the state contemplate and agree to be sued **in the United States**.

Commercial activities

- The **nature**, not the **purpose**, of the activity governs. Ask: is this something that only states do, or that private actors do as well?
- Think of buying boots for the army: anyone can buy boots, but only states have armies. Is the transaction "equipping the military," or "procuring footwear"?
- The circuits split on what constitutes a "direct effect in the United States." A financial loss in the United States, without more, is probably **not** a "direct effect" [except maybe in the 5th and 6th Circuits].

Expropriation

- Taking must be "in violation of international law," which is to say without adequate, effective, and prompt compensation.
- It is not necessary for a plaintiff to prove the violation of international law at the motion to dismiss stage.
- This is the exception giving rise to high-profile litigation over artworks and other valuable objects stolen during the Holocaust.

Real property

- This exception does not apply to disputes over leases of diplomatic or consular property.

Non-discretionary torts in the U.S.

- Essentially a *respondeat superior* statute, allowing suit against foreign states for tortious acts of their agents on U.S. soil.
- Torts involving the exercise of discretion, such as defamation, fraud, or tortious interference, are expressly **excluded**.

Compelling and enforcing arbitration

- A state that signed an arbitration agreement can be judicially compelled to submit to arbitration, and an arbitral award against that state can be judicially enforced.

- **But**, the agreement must expressly contemplate arbitration in the United States.

State-sponsored terrorism

- States alleged to have provided material support to terrorist attacks on Americans may not shield themselves from suits through sovereign immunity.

- The statute has been invoked successfully against Iran and Cuba. The plaintiffs in the landmark case of *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), were represented by GT.

- Recently, courts have held that this provision of the FSIA does not create a cause of action.

Conclusion

Overall, the progression from absolute to situation-specific sovereign immunity has been:

-- smooth

-- positive

-- well-grounded in principles of fairness and reciprocity.

But, it has not been without problems, and the Supreme Court has on numerous occasions been called upon to decide hard cases.

There will be more to come.

Thanks for listening to me. If there is time, I will be happy to take questions.