

INTERNATIONAL LITIGATION

FROM THE U.S. PERSPECTIVE

Foreign Sovereign Immunity

1812 - Absolute Theory of FSI – The Schooner Exchange
And U.S. State Department Role “Advisory” only

1945 - Restrictive Theory of FSI - Mexico v. Hoffman
State Department Role becomes Greater

1952 - Tate Letter Changes State Dept’s Role to “Conclusive”
But Diplomatic Pressures & Lack of Fact-Finding was Problem

1976 - Congress Enacts Foreign Sovereign Immunity Act.
Returns FSI Determinations to Courts.

CZECH FOREIGN SOVEREIGN IMMUNITY

Section 47 Exemption from the jurisdiction of Czechoslovak courts(1) Foreign States and persons who under international treaties or other rules of international law or special Czechoslovak legal regulations enjoy immunity in the Czechoslovak Socialist Republic shall not be subject to the jurisdiction of Czechoslovak courts.(2) The provision of paragraph 1 shall also apply to the delivery of documents, summoning of the aforesaid persons as witnesses, execution of decisions or other procedural acts.(3) However, Czechoslovak courts shall have jurisdiction, if:(a) the object of the proceedings is real property of the States and persons mentioned in paragraph 1, which is located in the Czechoslovak Socialist Republic, or their rights relating to such real property belonging to other persons, as well as rights arising from the lease of such real property, unless the object of the proceedings is the payment of rent,(b) the object of the proceedings is an inheritance in which the persons mentioned in paragraph 1 act outside their official duties,(c) the object of the proceedings concerns the pursuance of a profession or commercial activity which the persons mentioned in paragraph 1 carry out outside their official duties,(d) the foreign State or the persons mentioned in paragraph 1 voluntarily submit to their jurisdiction.(4) Delivery in the cases listed in paragraph 3 shall be done through the Ministry of Foreign Affairs. If delivery cannot thus be realized, the court shall appoint a guardian for accepting documents or, if necessary, for protecting the absentee's rights.

Act No. 97/1963 - 4

December 1963

Foreign Sovereign Immunity Act

1st Section: Grants Subject Matter & Personal Jurisdiction

2nd Section: Gives Cts Sole Power re Immunity Decisions

3rd Section: Defines "Foreign State" & "Commercial Activity"

4th Section: Rule of FSI Subject to FSIA's Exceptions

5th Section: Sets Forth Nine (9) Exceptions to FSI

ENTITIES ENTITLED TO IMMUNITY

FOREIGN STATES - Entity That Has Defined Territory, Permanent Population, Under Control of Its Own Government, Has Capacity to Engage in Formal Relations

POLITICAL SUBDIVISIONS - All Governmental Units Beneath the Central Government, e.g. Czech 13 Regions, Cities, States, Counties, etc.

AGENCIES & INSTRUMENTALITIES – 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 . . . nor created under the laws of any third country

FSIA EXCEPTIONS TO IMMUNITY

1. ** CONSENT **
2. ** COMMERCIAL ACTIVITY **
3. EXPROPRIATION OF PROPERTY IN U.S.
4. INHERITANCE OR GIFT
5. INJURY OCCURRING IN U.S.
6. ENFORCEMENT OF ARB. AGREEMENT
7. SOME ACTS OF TORTURE, TERRORISM
8. MARITIME LIENS
9. FORECLOSURE OF SHIP MORTGAGE

COMMERCIAL ACTIVITY EXCEPTION

DETERMINED BY "PURPOSE" OR "NATURE" OF ACTIVITY?

CONTRAST:

MOL, INC v. P.R. of BANGLADESH (9TH Cir 1984)
Export of Rhesus Monkeys

WITH

HONDURAS AIRCRAFT REGISTRY (US Corp) v. HONDURAS
(11th Cir. 1997) Inspection & Registry of Aircraft

NECESSARY CONNECTION BETWEEN U.S. & COMMERCIAL ACTIVITY

1. FOREIGN GOVERNMENT CARRIES ON COMMERCIAL ACTIVITY IN U.S.

Like Continuous and Systematic

2. COMMERCIAL ACTIVITY MOSTLY TOOK PLACE OUTSIDE U.S. INVOLVED ACT THAT TOOK PLACE IN U.S.

Similar to Minimum Contacts

3. COMMERCIAL ACTIVITY THAT TOOK PLACE ENTIRELY OUTSIDE U.S. HAD DIRECT EFFECT IN U.S.

Broader than Minimum Contacts or Target Tests

ACT OF STATE DOCTRINE

COURTS OF ONE COUNTRY WILL NOT SIT IN JUDGMENT OF THE ACTS OF THE GOVERNMENT OF ANOTHER COUNTRY, DONE WITHIN THE OTHER'S OWN TERRITORY. Restatement of Foreign Relations §443

RATIONALE FOR DOCTRINE?

CHOICE OF LAW and
SEPARATION OF POWERS

ACT OF STATE v. FSIA

FSIA = RULE OF SUBJECT MATTER & PERSONAL JURISDICTION
ASD = CHOICE OF LAW RULE

FSIA = CODIFIED BY LAW
ASD = FEDERAL COMMON LAW

FSIA = PRINCIPLE OF CUSTOMARY INTERNATIONAL LAW
ASD = NOT RECOGNIZED IN MANY COUNTRIES

FSIA = APPLIES TO GOVT'S, SUBD'S, AGENCIES, INSTRUMENT'S.
CAN BE RAISED BY PLs FOR JURISD, OR Ds FOR DEFENSE
ASD = ALMOST ALWAYS RAISED BY Ds WHO ACT IN
GOVERNMENTAL/POLICY-MAKING CAPACITY.

QUALIFICATIONS TO ASD

TYPE OF ACTS? GOVERNMENTAL/POLICY, NOT OPERATIONAL/MINISTERIAL

INDIVIDUAL PERSON? UNDER PROPER CIRCUMSTANCES, CAN CLAIM ASD

LOCATION OF ACT? ACT MUST TAKE PLACE WITHIN SOVEREIGN'S TERRITORY

ONLY APPLIES IN CASE WHERE COURT MUST RULE ON VALIDITY OF FOREIGN ACT IN ORDER TO DECIDE CASE
Kirkpatrick v. Environ Tectonics (U.S. 1990)

EXCEPTIONS TO ASD

1. TREATY EXCEPTION –
PARTIES HAVE CHOSEN APPLICABLE LAW
2. BERSTEIN EXCEPTION –
STATE DEPARTMENT OPINION CONTROLLING
3. COMMERCIAL “EXCEPTION” –
DIVISION AMONG COURTS
4. ARBITRATION EXCEPTION –
NOT APPLICABLE TO ARBITRATION AGREEMENTS
5. 2ND HICKENLOOPER AMENDMENT –
EXPROPRIATION IN VIOLATION OF CIL