Foreign Sovereign Immunity Act of 1976

Notes and Questions

1. Subject Matter or Personal Jurisdiction? (a) Section 1330(a) of the FSIA looks like a provision conferring subject matter jurisdiction on the federal district courts, without regard to the question of personal jurisdiction. Section 1330(b) then provides that personal jurisdiction shall exist as to every claim over which there is subject matter jurisdiction, once service as prescribed in the Act has been carried out. But § 1606(a)(l) provides for waiver of immunity, which is not ordinarily available to cure absence of subject matter jurisdiction; on the other hand, § 1330(c) provides that an appearance does not confer personal jurisdiction unless the claim passes muster under §§ 1605-07. Those sections in turn, and particularly § 1605(a)(2) and (a)(5), look like a long-arm statute, which one normally thinks of in connection with personal jurisdiction.

(b) Apart from creating confusion for lawyers, students, and judges, does all this matter? Can you think of situations in which the outcome of a case could turn on whether immunity is viewed as a matter of subject matter or personal jurisdiction?

(c) Why do you suppose the draftee addressed the question of jurisdiction at all? The British State Immunity Act,[1] for instance, makes provisions for when a state is immune and when it is not immune, but does not confer jurisdiction on English courts that they otherwiae would not have, and expressly provides (in s. 12(7)) that the method of service on foreign states provided in the Act does not affect any rules of court whereby leave is required for the service of process outside the jurisdiction, thus in effect requiring the plaintiff to satisfy the requirements of Order 11 with respect to service on a foreign state.[2]Documents Supplemental p. 7. Could that approach have worked for the United States?

2. Foreign States and the United States as Defendants. Note several similarities between the provision for suits against foreign states under the FSIA and provisions in other statutes and rules for suits against the United States.

(a) Section 1330(a), which confers jurisdiction on courts for suits against foreign states, makes clear that such suits shall be without a jury;[3] the foreign state's liability for actions in tort, § 1605(a)(5), does not apply to discretionary acts, defamation, and an enumerated list of intentional torts;[4] and under § 1608(d) the defendant state has sixty days instead of the usual twenty to anawer the initial pleading, as does the United States when it is a defendant.[5] Further, as noted earlier, pre-judgment attachment is forbidden in suits againet foreign states, § 1609, as it is against the United

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[1] Documents Supplement p. 210.

[2] Accord. Dicey and Morris on the Conflict of Laws vol. I. p. 238 (11th ed. 1987).
For the requirements under Order 11, see Chapter III p. 178, questions 5 supra, and

[3] Compare 28 U.S.C. § 2402.

[4] Compare Federal Tort Claims Act, 28 U.S.C. § 1346(b), § 2680(a) and (h).

[5] Compare Fed.R.Civ.P. Rule 12(a).

States;[6] and no default judgment may be entered against a foreign state "unless the claimant establishes his claim by evidence satisfactory to the court," § 1608(e), again as is true for claims against the United States.[7]

(b) As under the Federal Tort Claims Act with respect to suits against the United States,[8] the FSIA provides in § 1606 that the foreign state, if not immune, "shall be liable in the same manner and to the same extent as a private individual in like circumstances." But punitive damages are not permitted, even as they are not permitted in suits against the United States.[9]instrumentality, such as a state-owned airline or manufacturer.

(c) Thus the FSIA creates jurisdiction and excludes immunity in stated circumstances, but it does not create liability. The assumption is that most claims against foreign states would be regarded in the United States as “State-created,” as contrasted to federal claims. It seems, however, that claims arising under federal laws, such as under the antitrust or securities laws, could be brought under the FSIA, and if a contract provided that it was governed by the law of a foreign state, that state’s law could also be applied.

[6] 28 U.S.C. § 2408.

[7] Fed.R.Civ.P. Rule 55(e).

[8] 28 U.S.C. § 1346 (b).

[9] Compare 28 U.S.C. § 2674. The provision in § 1606 for tort liability in a state, such as Massachusetts, that seems to link tort damages to degree of culpability is also copied from § 2674. Note that the prohibition on punitive damages does not apply to a foreign state

3. *Counterclaims*. (a) If a foreign state or instrumentality is the original plaintiff in a court in the Unitod States, the FSIA provides for jurisdiction (i.e., exclusion from immunity) over related counterclaims without limit on recovery, even if the counterclaim, standing alone, would have been subject to the defense of immunity. § 1607(b). If a given transaction results in obligations on the part of both sides , it would plainly be unfair to permit only one party's claim to be adjudicated.[10]526-36 (4th ed. 1983) and sources there cited.

(b) The more difficult problem is raised by unrelated counterclaims. On the one hand, it seems unfair for a state to secure a judgment from another party but to deprive that party of the opportunity to have its own claim heard. On the other hand, while jurisdiction over a related counterclaim can be regarded based on consent to have a given controversy adjudicated, the same cannot be said about a counterclaim unrelated to the claim that the state sought to submit to the jurisdiction of the court. This issue came before the *U.S. Supreme Court in National City Bank v. Republic of China*, 348 U.S. 356, 75 S.Ct. 423, 99 L.Ed. 389 (1955).[11]precedent in the act of state context in *First National City Bank*, Chapter VI, p. 488 supra. In 1948, the Shanghai-Nanking Railway Administration, an official agency of the Republic of China, deposited $200,000 with City Bank in New York. When the Republic (by now in Taiwan) sought to withdraw the funds, City Bank refused payment, and the Republic brought suit. City Bank interposed two counterclaims for $1.6 million on defaulted Treasury Notes issued by China and held by the bank. The district court dismissed the counterclaim on the grounds of sovereign immunity, and denied leave to City Bank to amend its counterclaim to reduce it to a set-off. The Court of Appeals affirmed, but the Supreme Court, by a 5-3 vote, reversed:

We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice ....

[10] The definitions of related and unrelated counterclaims track those in Rule 13(a) and (b) of the Federal Rules of Civil Procedure, and decisions interpreting § 1607 of the FSIA. For a discussion of the experience with Rule 13, see, e.g., C. Wright, The Law of Federal Courts

[11] Recall that Justice Douglas saw the *Republic of China* case as the appropriate

Respondent urges that fiscal management falls within the category of immune operations of a foreign government as defined by the [Tate Letter]. This is not to be denied, but it is beside the point.... No doubt the present counterclaims cannot fairly be described as related to the Railway Agency's deposit of funds except insofar as the transactions between the Republic of China and [City Bank] may be regarded as aspects of a continuous business relationship. The point is that the ultimate thrust of the consideration of fair dealing which allows a setoff or counterclaim based on the same subject matter reaches the present situation. The considerations found controlling in *The Schooner Exchange* are not here present....[12]

Thus the compromise was to permit the defendant, here City Bank, to recover up to the amount awarded to the state on its claim, but not to permit an affirmative recovery on the counterclaim.

[12] 348 U.S. at 361-62, 364-65, 75 S.Ct. at 427-28, 428-30 (Frankfurter, J.) Justice Reed, for the minority, wrote:

> I find no justification for the Court's restricting [the Republic's] immunity in the absence of legislative or executive action.... Why should City Bank be able to assert its notes against the Republic of China, even defensively, when other noteholders not obligated to the sovereign are prevented from collecting their notes?

348 U.S. at 369, 371, 75 S.Ct. at 431, 432.

(c) The compromise outcome of the *Republic of China* case was adopted in the Foreign Sovereign Immunities Act as § 1607(c). Though read literally § 1607(c) appears to limit an unrelated counterclaim to the amount *sought* in the principal claim by the foreign state, the legislative history, referring specifically to the *Republic of China* case and to § 70 of the Restatement (Second) of Foreign Relations Law makes it clear that the exclusion from immunity applies to setoff only, and does not authorize affirmative recovery.[13] *Cuba*, 462 U.S. 611, 620 n. 7.103 S.Ct. 2591, 2596 n. 7, 77 L.Ed.2d 46 (1983).

(d) Counterclaims can also flow the other way. If a foreign state or state instrumentality is sued and files an answer and a counterclaim without raising the defense of immunity, the state may be found to have waived the defense of immunity. See, e.g.., *Aboujdid v. Singapore Airline, Ltd*., 67 N.Y.2d 450, 503 N.Y.S.2d 555, 494 N.E.9id 1055 (1986). A counterclaim by a foreign state will generally be regarded aa a waiver of immunity unless the state challenges the court's jurisdiction and the counterclaim is expreasly made conditional on a finding of jurisdiction.

4. Commercial Activity. Clearly, the most important provision of the FSIA (apart from the provisions for initiating an action) is § 1605(a)(2) dealing with commercial activity—the translation of *jus gestionis* in the Tate Letter, in *Victory Transport*, and in much of the literature.

(a) Note first the wholly circular definition of "commercial activity," the critical term used in all three bases of jurisdiction (exclusion from immunity) in § 1605(a). Section 1603(d) invites the reader (or court) to start with “activity,” proceed via “conduct” or “transaction” to “character,” which is to be determined by “nature” rather than “purpose.”[14] At the end on e arrives back at the term “commercial,” the term that was to be defined in the first place.[15] ways in its passage through Congress, the definition was not improved.

(b) The Restatement proposes the following definiton:

[13] See House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*. H.R.Rept. No. 94-1487 p. 23, 94th Cong. 2d Sess (1976); Restatement (Third) of Foreign Relations Law § 456(2)(a)(ii); *First National City Bank v. Banco Para el Comercio Exterior de*

[14] Recall the discussion of this point in question 2, p. 585 supra.

[15] The present author made this point in 1974 in commenting on a draft of what became the FSIA. Lowenfeld, “Litigating a Sovereign Immunity Claim–The *Haiti* Case,” 49 N.Y.U.L.Rev. 377, 435, note 244 (1974). Though the bill was changed in a number of

> An activity is deemed commercial, evenif carried out by a state or state instrumentality, it it is concerned with production, sale, or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities of the kind that are carried on by natural or juridical persons. The fact that the goods, property, money, or services may be used for a public or governmental purpose does not alter the commercial character or the activity.[16]

Does this definition by illustration seem persuasive? Would you, for instance, still want to distinguish between a government guarantee of purchases of commodities on the one hand, and a long-term loan on the other? Putting the question another way, as counsel to a lender in the second situation, would you advise insisting on an exprress waiver of immunity? What if the borrower-say the Central Bank of Patria— declines to give such a waiver, and advises that under the constitution or laws of Patria, it is not authorized, when acting as fiscal agent of the state, to consent to be sued outside of Patria? Can the lender nevertheless rely on the FSIA?

(c) Satisfying the test of "commercial activity" goes only part of the way toward meeting the criteria of § 1605(a)(2). The other criteria look to connection between the activity on which the claim is based and the forum—here the United States as a whole.[17]connection, or which does not require any connection. See Restatement, § 453 Reporters' Note 1. One might think that the three clauses of subsection (a)(2), separated by semicolons, provide for [i] general jurisdiction; [ii] specific or activity-based jurisdiction; and [iii] effects jurisdiction. Would you agree with this interpretation? Or do all three clauses require a link between the claim and the United States? As to clause [iii], think back to the discussion of judicial jurisdiction over non-governmental parties in chapter III, particularly *Helicopteros* and *Asahi*, and the cases in the Notes and Questions following those two decisions. Should those cases govern construction of § 1605(a)(2) as well? Must they?

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[16] Restatement (Third) of Foreign Relations Law § 453, comment *b.*

[17] Since § 1605(a)(2) is an American, self-imposed limitation probably not required by international law, it is possible that an activity of a state may be entitled to immunity in the United States but not in a third state with which the activity had closer