Suing Foreign Governments and Their Corporations

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Preface

When Congress enacted the Foreign Sovereign Immunities Act of 1976, it intended to encourage suits in U.S. courts against foreign governments and foreign-government-owned corporations. Its intent was amply fulfilled. Within days of the Immunities Act's coming into effect, attorneys filed new suits under it and attempted to have it applied retroactively to pending suits. Before January 19, 1977, such suits were infrequent. Since then, federal trial and appellate courts have applied the Immunities Act to hundreds of cases, three of the cases reaching the Supreme Court, and there have been more than a dozen reported cases in state courts.

This book is the first comprehensive and detailed examination of the resulting jurisprudence of the Immunities Act. Courts have explored most, but not all, of the peculiar facets of suits under the Act against foreign states or their corporations. Written from a vantage point of almost ten years after the Immunities Act came into effect, this books covers those facets as well as some that have not yet figured prominently in the litigated cases.

Congress enacted many highly detailed, but often puzzling, new rules for suits under the Immunities Act. Puzzlement can grow from a number of features common to litigation against foreign states or foreign-government-owned corporations—not least of which is the unfamiliar vocabulary that attaches to these suits both because it was used in drafting the Foreign Sovereign Immunities Act, and because often it is the vocabulary of international law. In addition, an attorney will also encounter doctrines of U.S. foreign relations law with which she might not be familiar, and which all too often defy easy mastery or agile use. And an attorney will often deal with counterparts trained in radically different legal traditions or subtly different versions of the common law.

Litigation against foreign states and their corporations, and the problems attendant on such litigation, will undoubtedly become more common here as the United States becomes ever more integrated into a world economy that increasingly features governments and their corporations as major actors in marketplaces, as holders or takers of property, and as the parties responsible for both ordinary and ex-

traordinary torts. And, as governments more frequently behave in ways that formerly were thought of as the sphere of private action, they will find themselves treated much the same as courts treat private defendants. If the government is foreign and the court American, the governing law will be found, directly or indirectly, through application of the Foreign Sovereign Immunities Act of 1976. The special rules drawn from that Act go far beyond the narrow question of foreign sovereign immunity.

This book will not solve all problems a litigating attorney or presiding judge will encounter in litigation against a foreign state or foreign-government-owned corporation. The most salient problems, however, are analyzed and explained here. Why to, as well as how to, are dealt with carefully and (I hope) creatively.

Congress included puzzling special rules, enacted in sometimes excruciating detail, in the Immunities Act, covering what entities qualify as foreign states and foreign-government-owned corporations; judicial competence, jurisdiction, immunity, service, and venue that apply in suits against such entities; and greatly restricted opportunities to execute a judgment against such an entity. Explanation and analysis of and guidance through these special rules is in chapters 1–6 and 11 of this book. Congress also included a number of special rules that were almost cursory in their terseness. Other supposed rules were only mentioned in the section-by-section analysis to the Act. As one might expect, both cursory and suggested rules have proven especially troublesome. The ban on jury trials, the burden of proof on various issues, the right to discovery and other rules of evidence, and the remedies available under the Act all fall into these troubling categories. These topics are discussed in chapters 9 and 10. Finally, Congress said almost nothing about certain topics that nonetheless are central to successful litigation under the Immunities Act. Among them are the enforcement of agreements to arbitrate or arbitral awards, the exceptionally confused Act of State doctrine, choice-of-law questions, and the possibilities of enforcement of a judgment against a foreign state or foreign-government-owned corporation abroad. These issues are covered in chapters 7, 8, 10, and 12.

This book includes reference to all reported cases that involved the Immunities Act, and numerous unreported ones. Altogether there have been over 2,000 cases brought under the Act in the barely 10 years since it was enacted. Reported decisions alone amount to over 400 officially published opinions. Other opinions are available from topical reporters or the computerized research services, including a number of opinions that were withdrawn after being initially released to these informal publishers or in at least one significant instance after being published in a West advance sheet. Several patterns are revealed by examining this now massive volume of litigation.

Suits under the Immunities Act have naturally clustered in New York, Washington, Chicago, Los Angeles, and San Francisco. Attorneys all over the United States, however, have found themselves

participating in such suits even when they had no suspicion when the litigation began that the Immunities Act would be involved. Virtually any suit against a foreign-owned airline is potentially an Immunities Act suit since most such airlines are foreign-government-owned corporations. One of the most controversial suits under the Immunities Act—the Huguang Railway Bonds case (*Jackson v. the People's Republic of China*)—was brought in Alabama, as was one of the Mexican bank cases that will be mentioned below. Most of the admiralty claims under the Act have been in Texas and Louisiana. In sum, the Immunities Act can come into play anywhere someone has a claim against a foreign state or foreign-government-owned corporation—even if the claimant does not realize before the Act is invoked that that is the kind of defendant she faces.

Attorneys have brought suits under the Immunities Act in a series of waves. The first wave, brought in 1975–1979, consisted of dozens of suits growing out of the Nigerian cement fiasco and produced one of the Supreme Court cases under the Act. The last cases from this wave are still working their way through the courts. As with the Nigerian cement cases, a cluster of suits begun before enactment of the Immunities Act in response to the Cuban nationalizations (some having been in court for as much as 15 years before the Act came into effect) also were swept up by the Act. The third Supreme Court decision under the Act dealt with a Cuban nationalization case. Some of these cases also are still in court.

In 1979, in the aftermath of the Iranian revolution and the hostage taking at the U.S. embassy, more than 1,000 suits were filed against Iran. Several of these were eventually brought by former hostages, but the bulk were brought by disappointed business people as Iran defaulted on contracts or confiscated property. This wave was abruptly ended when President Carter agreed to transfer all such suits to a joint arbitral tribunal in the Hague in exchange for the release of the hostages, although it took a Supreme Court case (the first to reach the Court) to resolve the legality of the Algiers Declarations (as the agreement is called).

The final defendant-specific wave began in 1982 when the Mexican government nationalized all banks and changed the terms of certificates of deposit in those banks. These cases, like many in the prior waves, focused more directly on the Act of State doctrine than on the Immunities Act itself. A few of these cases are still bouncing around in the courts.

Beginning as early as 1978, and slowly building in the shadow of the more dramatic waves, have been a number of smaller waves that continue to wash through the courts. These waves have been defined more by the nature of the claim than by the defendant. The largest such wave could be termed general commercial claims against literally dozens of countries. These have ranged from simple breach of contract claims or commercial tort claims to attempts to litigate claims based on changes in tax laws or export licenses. Despite the

lack of success attorneys have had with the more provocative of such claims, the waves, after starting slowly, have continued to build and show no sign of abating.

One of the more interesting of the lesser waves might be termed the human rights wave. Attorneys have brought the numerous human rights claims primarily against the Soviet Union, but also against Chile and the Republic of China based on political murders in the United States by those countries, and against other countries for less dramatic violations of human rights. By and large, courts have found these suits troubling and have sought excuses not to hear the claims.

Yet another lesser wave, an eddy in the general commercial wave really, is the diplomatic premises cases. These encompass landlord's eviction suits and local efforts to collect property taxes. Further lesser waves could be described: as the descriptions given already suggest, virtually any claim that involves a foreign state (including a foreign-government-owned corporation) could end up as a suit under the Foreign Sovereign Immunities Act—often enough, as a surprise to the claimant's attorney.

Courts decided the cases in a series of generations representing the characteristic issues that arose as the different waves of cases washed through the judicial system. The first generation (roughly 1977–1983) focused on whether a U.S. court was competent to hear, and had jurisdiction over, the suit. A significant variation in this generation focused on claimant's attempts to obtain a jury trial. The second generation (roughly from 1982 to 1985) focused on procedural aspects of the trial. At the same time, many Immunities Act proceedings dealt with the impact of the Act of State doctrine. Only recently have courts reached judgments on the merits. Thus we are now in the opening stages of the generation of cases that focus on the substantive law to be applied to suits under the Foreign Sovereign Immunities Act. Thus far only one case has produced reported decisions on the execution of judgments against a foreign state (there a foreign-government-owned corporation).

These generations of issues are amply represented in this book, as are the various waves of cases, organized in the typical sequence that the various issues are likely to be encountered in litigation under the Immunities Act. The Act itself (as codified) is set out as Appendix A to this book. Citations to decided cases and other authorities are provided in copious footnotes. The reader will note that in some respects I used nonstandard citation form in the footnotes, hoping to improve clarity and economize on length. Full and technically correct citations are provided for every case in the table of cases.

For cases, all departures from standard form involve the names used as captions. First, I shortened case names to the shortest form that appears unambiguous. Words that added nothing to identifying a party were regularly omitted. This was particularly true for the names of foreign states where the variant forms used to caption cases added no information and created at least a slight risk of confusion.

Thus, the "Republic of Mexico," the "United Mexican States," and the "United States of Mexico" are all rendered simply as "Mexico." On the other hand, when a fuller designation was necessary to indicate a precise foreign state, I gave the full designation (e.g., the "People's Rep. of China" and the "Republic of China").

A similar approach to the names of corporations and of persons seemed appropriate. When an acronym was regularly used in the opinion, that acronym is used in place of the full, proper name (e.g., "C.N.A.N." for "Cie. Nationale Algerienne de Navigation"). I omitted superfluous words in corporate names ("Chicago Bridge & Iron Co." becomes "Chicago Bridge Co.") and shortened hyphenated family names by using only one (usually the first) of the several family names ("Yessenin-Volpin" becomes "Yessenin"). At the same time I attempted to use the native language form of the family name, as near as I know; thus, "de Letelier" instead of either "De Letelier" or "Letelier"; and "tel-Oren" instead of "Tel-Oren."

The major departure from standard form for statutes and regulations is the omission of dates when reference is to the current or most recent version of a provision or rule. When dates are included, it is to clearly indicate that a noncurrent version is being cited—usually to contrast with the current version.

Finally, several sources—certain foreign statutes, treaties, books, articles, and the Restatement (Revised) of the Foreign Relations Law of the United States—are cited frequently in many different chapters. I deemed it wasteful to provide repeated full citations or numerous specific cross-references to other footnotes when the reader could more readily find the full citation in one place for the entire book; reference to these sources then is always by an abbreviated form. A complete list of these abbreviated forms and the full citations to the indicated source is found in a list entitled Abbreviated Citation Forms immediately preceding the text. This list necessarily also provides a list of the most important secondary sources for information on foreign state immunity.

I take this opportunity to thank Mary Miner, Mildred Cary, and Louise R. Goines, all of BNA Books, whose patience and encouragement helped me to complete this undertaking. I also want to thank the many people who contributed to the undertaking at Villanova University School of Law as research assistants or secretaries. In particular Joan DeLong and Betty Dilworth typed many early drafts of large parts of this book, including a series of 14 now outdated articles which formed the early working outline of this book.

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Villanova, Pennsylvania
November 1987

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List of Abbreviated Citation Forms

Full citations for works that are cited frequently in more than one chapter are not given in the footnotes to the text. Instead, only an abbreviated citation form is used without reference to any other footnote. To facilitate the use of abbreviated citations, the full citation is given here following the alphabetical listing of the abbreviated form used in the text.

BADR	G. BADR, STATE IMMUNITY: AN ANALYTIC AND PROGNOSTIC VIEW (1984).
BSIA	Brit. State Immunity Act, ch. 33 (1978), *reprinted in* 17 INT'L LEGAL MAT'LS 1123 (1979).
CSIA	Can. State Immunity Act, ch. 95, 1980–81–82 Can. Stat., *reprinted in* 21 INT'L LEGAL MAT'LS 798 (1982).
EHRENZWEIG I	A. EHRENZWEIG, TREATISE ON THE CONFLICT OF LAWS (1962).
EHRENZWEIG II	A. EHRENZWEIG & E. JAYME, PRIVATE INTERNATIONAL LAW (3 vols., 1967–1977).
European Convention	European Convention on State Immunity and Additional Protocol (1972), *reprinted in* 11 INT'L LEGAL MAT'LS 470 (1972).
FTCA	The Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671–2680.
Hill	Hill, *A Policy Analysis of the American Law of Foreign State Immunity*, 50 FORDHAM L. REV. 155 (1981).
H.R. REP. 94–1487	H.R. REP. NO. 94–1487, Sept. 9, 1976, *reprinted in* [1976] U.S. CODE CONG. & ADM. NEWS 6604 (cited with pagination only to the reprinted version).

INTERNATIONAL CONTRACTS	INTERNATIONAL CONTRACTS (H. Smit, N. Galston, & S. Levitsky eds. 1981).
ILA Draft Convention	Int'l L. Ass'n, *Draft Convention on State Immunity* (1982), *reprinted in* 22 INT'L LEGAL MAT'LS 287 (1983).
Kane	Kane, *Suing Foreign Governments: a Procedural Compass*, 34 STAN. L. REV. 385 (1982).
LEFLAR	R. LEFLAR, AMERICAN CONFLICTS LAW (3rd ed. 1977).
MOORE	J. MOORE ET AL., MOORE'S FEDERAL PRACTICE (9 vols. 1986).
RESTATEMENT (REVISED)	RESTATEMENT (REVISED) OF FOR. REL. L. OF THE UNITED STATES (all citations are to Tent. Draft No. 6, 1985, unless otherwise indicated).
SCOLES & HAY	E. SCOLES & P. HAY, CONFLICT OF LAWS (1982).
Tate Letter	Tate, *Letter from the Acting Legal Advisor to the Acting Attorney-General*, May 29, 1952, *reprinted in* 26 DEP'T STATE BULL. 984 (1952).
Triggs	Triggs, *An International Convention on Sovereign Immunity? Some Problems in Application of the Restrictive Rule*, 9 MONASH U.L. REV. 74 (1982).
WEINTRAUB	R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986).
WRIGHT	C. WRIGHT, A. MILLER, E. COOPER, M. KANE & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE (many vols., various dates).

Detailed Table of Contents

1

Introduction

Background

§1.1 The Origins of Absolute Immunity

The history of the immunity of foreign states from suit or execution has been told often and well, especially after the enactment of the Foreign Sovereign Immunities Act (the Immunities Act)[1] in 1976, which set off a torrent of writing on the origins of the immunity of foreign states. Gamal Badr has written a definitive history of foreign state immunity around the world;[2] Chief Justice Burger's opinion in *Verlinden B.V. v. Central Bank of Nigeria*[3] provided a standard, summary version of the history for the United States. An exhaustive study of the historical evolution of foreign state immunity therefore is unnecessary here. The following brief summary should help one to understand the Immunities Act.

Although one might find antecedents in decisions of English or U.S. courts before 1800, or in the writings of well-known authorities on international law of that time, Badr [4] concluded that U.S. courts were the first to announce a theory of immunity for foreign states and their agents—foreign sovereign immunity in its modern sense,

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[1]Pub. L. No. 94–583, 90 STAT. 2892, codified at 28 U.S.C. §§1330, 1332(a), 1391(f), 1441(d), 1602–1611.

[2]BADR at 9–70. Other worthwhile histories include E. ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS (1933); C. LEWIS, STATE AND DIPLOMATIC IMMUNITY 19–41 (2d ed. 1985); 2 D. O'CONNELL, INTERNATIONAL LAW 841–886 (2d ed. 1970); S. SUCHARITKUL, STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959). See also Hill at 158–173; Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220 (1951); Comment, *The American Doctrine of Sovereign Immunity: an Historical Analysis*, 13 VILL. L. REV. 583 (1968).

[3]461 U.S 480, 486–489 (1983). See also *Victory Transport, Inc. v. Comisaria General*, 336 F.2d 354, 357–362 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

[4]BADR at 9–10.