

## 1983–84 Judicial Developments: A Survey

In 1983 and 1984 there were a number of significant cases decided by U.S. courts which may be of interest to lawyers with an international practice. The range of subjects addressed by these cases include, *inter alia*, sovereign immunity, act-of-state, extra-territorial jurisdiction, trade regulation, international arbitration and human rights. In an attempt to provide easy reference for the readership of *The International Lawyer*, we have attempted to briefly describe and annotate some of the cases determined as most significant by members of the Section Council and Section Committee chairpersons who responded to a questionnaire circulated to them. Because of space constraints, the scope of this note is limited to three general areas of law, all of which are related to jurisdictional concerns: Foreign Sovereign Immunities Act (FSIA), the act-of-state doctrine, and other important jurisdictional cases. A follow-up survey covering case development in such areas as trade regulation, international arbitration and human rights will be presented in issue No. 4. The editor welcomes reader suggestions about case coverage and assistance in identifying significant judicial developments occurring both here and abroad.

### FSIA

One court has characterized the FSIA<sup>1</sup> as “complex and largely unconstrued . . . introducing sweeping changes in some areas of prior law.”<sup>2</sup> With

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\*The following members of the Southwestern International Law Society (all students at Southwestern University School of Law) undertook this project: Edward Fox, Chair; Joe Laurine, Kenneth McKay, Kathryn Brett, Patrick Smith, Elissa Miller and Kassie McMenammin. The project included case identification, polling the Section’s leadership and individual case analyses. Regrettably, space did not permit publication of the individual student casenotes here. Readers wanting copies may request them from the Editor. (Please include five dollars to cover costs for copying and postage.)

<sup>1</sup>28 U.S.C. §§ 1602–11 (1982); for a discussion of the FSIA accompanying the passage of the Act, see House Judiciary Committee, *Jurisdiction of United States Courts in Suits Against Foreign States*, H.R. REP. No. 1487, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Admin. News, 6604.

<sup>2</sup>Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 306 (2d Cir. 1981), cert. denied, 454 U.S. 1148, 102 S. Ct. 1032, 71 L.Ed.2d 306 (1982).

respect to suits against foreign states, the Act determines whether sovereign immunity of the foreign state exists, accords subject matter jurisdiction over certain claims, and determines the appropriateness of personal jurisdiction over the defendant. In any question arising under the FSIA, however, all three aspects are generally involved.<sup>3</sup>

The authors of the FSIA purposely drafted the Act with vague provisions, leaving the courts to “fine-tune” to give form and substance to legislative intent.<sup>4</sup> Since 1978, when the first cases concerning the FSIA were seen, the courts have been fulfilling the authors’ expectations. The past year and a half has been no exception.

Six recent cases are reported here. One of the most important of these was *Verlinden B.V. v. Central Bank of Nigeria*.<sup>5</sup> Chief Justice Burger, writing for the Court, held that under the FSIA, the legislature had intended that foreign plaintiffs could sue foreign sovereigns in U.S. courts, and as so interpreted, the FSIA is constitutional. Some have suggested, perhaps exaggerating the result, that the decision could make federal courts a sort of international court of justice.<sup>6</sup>

The other cases noted in this category are decisions interpreting specific provisions of the Act. *S & S Machinery Co. v. Masin Exportimport*<sup>7</sup> further defined the scope of “agent or instrumentality” of a foreign state under section 1603(b) of the Act. The same case also prescribed the parameters of when there is an explicit waiver of immunity from prejudgment attachment under section 1610(d)(1). *Ministry of Supply Cairo v. Universe Tankships Inc.*,<sup>8</sup> considered the relationship of cross-claims to the FSIA, specifically as they apply to sections 1607 and 1605. The court found that the language of the FSIA’s commercial activities exception was broad enough to include cross-claims against foreign state plaintiffs.

Two cases having much broader impact than their narrow holdings might suggest are *Mckeel v. Islamic Republic of Iran*,<sup>9</sup> and *Persinger v. Islamic Republic of Iran*.<sup>10</sup> Both cases define the limits of “United States territory” under section 1605(a)(5) as not extending to United States embassies abroad. Consequently, foreign nations are immune from suit in United

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<sup>3</sup>See Hearings on H.R. 11315 Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess. 28 (1976) (testimony of Monroe Leigh, Legal Advisor, Department of State).

<sup>4</sup>*Id.* at 53.

<sup>5</sup>103 S. Ct. 1962 (1983).

<sup>6</sup>Since there still must be subject matter jurisdiction under the Act for a court to hear a case, this fear may be exaggerated. See also Comment, *Federal Question Jurisdiction Over Actions Brought by Aliens Against Foreign States*, 15 CORNELL INT’L L.J. 463, 481–86 (1982) (commenting on Appellate Court’s decision).

<sup>7</sup>706 F.2d 411 (2d Cir. 1983).

<sup>8</sup>708 F.2d 80 (2d Cir. 1983).

<sup>9</sup>722 F.2d 582 (9th Cir. 1983).

<sup>10</sup>729 F.2d 835 (D.C. Cir. 1984).

States courts for torts committed against United States citizens in U.S. embassies by agents of that foreign sovereign.<sup>11</sup> In *Persinger* the court also noted that Congress intended the non-commercial tort exception (Section 1605(a)(5)) to be narrower than the commercial tort exception (Section 1605(a)(2)), which allows a sovereign immunity for commercial activity outside the territory of the U.S. having a direct effect inside the U.S. This prevented the court from having jurisdiction over tort claims by parents who claimed mental and emotional distress injuries from their sons' confinement in Iran.

The last FSIA case reported here, *Alberti v. Empresa Nicaraguense De La Carne*,<sup>12</sup> arose out of the Nicaraguan revolution and that country's subsequent expropriations. It addressed, *inter alia*, the commercial activities exception to the FSIA and established who bears the burden of going forward with the evidence to establish immunity.

#### ACT OF STATE

Although the House Report on the FSIA suggests it was intended to take the place of the act of state doctrine,<sup>13</sup> it clearly has not done so. The doctrine is still alive and appears to be causing the judiciary numerous headaches.

As originally conceived and thereafter classically stated by Chief Justice Fuller in the case of *Underhill v. Hernandez*,<sup>14</sup> the act of state doctrine was intended to be an absolute theory of sovereign immunity. With the famous act of state case, *Banco Nacional de Cuba v. Sabbatino*,<sup>15</sup> however, the doctrine of absolute sovereign immunity has eroded.<sup>16</sup> Exceptions have been made,<sup>17</sup> but the contours of the act of state doctrine remain uncertain. The recent cases concerning act of state still leave substantial confusion in this area.

Two recently decided New York District Court cases<sup>18</sup> illustrate this

<sup>11</sup>*Id.*

<sup>12</sup>705 F.2d 250 (7th Cir. 1983).

<sup>13</sup>See [1976] U.S. CODE CONG. & ADMIN. NEWS, *supra*, note 1 at 6604-06. The act of state doctrine, generally, but with certain exceptions, precludes U.S. courts from adjudicating matters concerning a foreign nation's public acts.

<sup>14</sup>168 U.S. 250 (1897). The Court stated:

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. *Id.* at 252.

<sup>15</sup>376 U.S. 398 (1964).

<sup>16</sup>The Court stated that the doctrine may not be applied when there is "a treaty or other unambiguous agreement regarding controlling legal principles, . . ." *Id.* at 428.

<sup>17</sup>See *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S. Ct. 1854, 45 L.Ed.2d 301 (1976) (wherein the commercial activities exception was created).

<sup>18</sup>*Allied Bank International v. Banco Credito Agricola*, 566 F. Supp. 1440 (S.D.N.Y. 1983) and *Libra Bank Limited v. Banco Nacional de Costa Rica*, 570 F. Supp. 870 (S.D.N.Y. 1983).

situation. Both cases arose from the same set of circumstances. In 1978, the Costa Rican government, because of a serious economic crisis, forbade all public banks from paying any debts in foreign currency to foreign creditors. The two lawsuits resulted from subsequent defaults involving New York creditor banks among others. The act of state doctrine was used as a defense by the defendants who in each case were agents of the Costa Rican government. In one case, the doctrine, which requires the situs of the act to be in the foreign state, was held inapplicable because the situs of the debt was considered to be in New York. In the other case, however, the doctrine was applied. In this latter case, the appellate court<sup>19</sup> affirmed the lower court's decision that the defendant would be accorded immunity, but on different grounds. The Court's decision was based upon principles of comity and it expressly declined to apply the act of state doctrine. Perhaps the contrary District Court decisions were so problematic for the appellate court that it simply did not want to deal with the issue.<sup>20</sup>

Notwithstanding this confusion, courts increasingly appear to find reasons not to apply the doctrine. In *Associated Container Transportation (Australia) Ltd. v. United States*,<sup>21</sup> the Second Circuit held that the use of act of state to bar the Justice Department from seeking information, pursuant to civil investigative demands concerning transactions between members of shipping conferences and foreign sovereign, was premature and thus inapplicable. The court stated that as of the time the action was brought, there had been no foreign sovereign activity to justify use of the doctrine. Significantly, the information stemming from the demands may, nevertheless, result in an adjudication of the validity of a foreign nation's acts. Similarly, in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*,<sup>22</sup> the Sixth Circuit held inapplicable the act of state doctrine. The decision was based on the "treaty" exception to the doctrine. In other words, the Court of Appeals would not permit the defense of act of state for an Ethiopian expropriation of a United States Corporation's assets because there was a treaty in place between the United States and Ethiopia providing for certain guidelines governing expropriations.

One recent case bucking this trend of judicial aversion to the doctrine is *Clayco Petroleum Corporation v. Occidental Petroleum Corporation*.<sup>23</sup> According to the Court, the facts of this case justified use of the act of state because it involved a sovereign decision, allocating the benefits of its oil developments. Decisions regarding a nation's natural resources are the type

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<sup>19</sup>*Allied Bank International v. Banco Credito Agricola De Cartago*, 733 F.2d 23 (2d Cir. 1984).

<sup>20</sup>*Id.*

<sup>21</sup>705 F.2d 53 (2d Cir. 1983).

<sup>22</sup>729 F.2d 422 (6th Cir. 1984).

<sup>23</sup>712 F.2d 404 (9th Cir. 1983).

of sovereign activity generally shielded by the act of state doctrine.<sup>24</sup> The alleged antitrust violations in that suit were, therefore, shielded from adjudication.

#### OTHER JURISDICTIONAL CASES

Jurisdictional problems are not, however, entirely governed by the act of state and the FSIA. Where a foreign entity, other than the sovereign is involved, a host of other problems arise, and other rules apply to determine the justiciability of a particular case. These problems range from the determination of the juridical status of a foreign entity to issues of comity and a federal court's criminal jurisdiction.

The determination of the juridical status of a foreign entity was at issue in *First National City Bank v. Banco Para El Comercio De Cuba*.<sup>25</sup> If an entity is juridically separate and distinct from the sovereign, it cannot be liable for the acts of its sovereign. The determination of whether there is a separate juridical entity is particularly difficult where entities of socialist countries are involved. The United States Supreme Court addressed this issue in *First National City Bank*, involving Cuban expropriations of a United States corporation's assets in the early 1960s. Justice O'Connor, speaking for the Court, held that the determination of a foreign entity's status, i.e., whether it should be considered the "alter-ego" of its sovereign, is determined by general principles of equity, governing federal common law and international law. In the instant case, an American bank was granted the right to set off the value of its seized Cuban assets when a Cuban bank with full juridical capacity filed suit seeking to collect on a letter of credit issued by the American bank. Hence, when it is determined that a juridical entity is also the "alter-ego" of a sovereign and that sovereign has acted wrongfully causing a breach by a third party to the alter-ego, then the latter, upon bringing suit, may be subject to an offset for damages it sustained.

In addition to the status of juridical entities, the application of comity principles was addressed this year. In *Laker Airways Ltd. v. Sabena*,<sup>26</sup> the Circuit Court had to decide what to do when British courts enjoined a plaintiff from continuing a lawsuit in United States federal courts. In its opinion, the District of Columbia Circuit Court of Appeals established the criteria for determining federal court jurisdiction where a foreign sovereign has concurrent jurisdiction and exercises it to interfere with litigation in a United States court. This case, which preserved the federal court's adjudicatory power and perhaps added clarity to U.S. courts' application of comity, will surely have ramifications beyond its specific facts.

<sup>24</sup>See, e.g., *id.* at 407; *IAM v. OPEC*, 649 F.2d 1354 (1981), *cert. denied*, 454 U.S. 1163 (1982).

<sup>25</sup>103 S. Ct. 2591 (1983).

<sup>26</sup>731 F.2d 909 (D.C. Cir. 1984).

The scope of a federal grand jury's authority over foreign corporations was decided in *Marc Rich & Co. A.G. v. United States*.<sup>27</sup> Importantly, the court determined the requisite facts needed to order compliance by a foreign corporation to a grand jury subpoena: the government need only show a *reasonable probability* that it will ultimately succeed in establishing jurisdiction over the foreign corporation.

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<sup>27</sup>707 F.2d 663 (2d Cir. 1983), *cert. denied*, 103 S.Ct. 3555 (1983).