Cultural Property Litigation and the Foreign Sovereign Immunities Act of 1976: the Expropriation Exception to Immunity

MARK B. FELDMAN[1]

The following three articles were presented at the panel discussion entitled: "Shield or Sword: Why has the Foreign Sovereign Immunities Act Become One of the Most Frequently Litigated Statutes in Cultural Property Disputes?" at the ABA Section of International Law. Meeting held in Washington D.C. on April 7, 2011[2]

As the title of the panel suggests, the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "the Act")[3] has become a contentious issue in several cases involving efforts to recover cultural property, particularly objects taken from victims of the Holocaust. In fact, cultural property cases such as Republic of Austria v Altmann – holding that suits may be brought under the FSIA based on claims arising decades before its enactment – have helped define the basic reach of the statute.[4] The reason for this lies in the structure of the Act which not only delimits the immunities of foreign states in U.S. courts, but which also establishes a long-arm statute that brings foreign states before U.S. courts in cases in which they are not entitled to immunity.[5]

To enable this scheme, the State and Justice Department attorneys who drafted the Act required, among the criteria for disallowing immuniy, connections to the United States that they believed warranted litigation in U.S. courts. When the drafters decided – for reasons totally unrelated to cultural property interests – to allow a narrow class of claims against foreign states based on confiscation of property, that expropriation exception to immunity became an important vehicle for obtaining jurisdiction over foreign states in cultural property cases.

The United States was the first nation to codify the law of foreign sovereign immunity by statute. The Foreign Sovereign Immunities Act of 1976 had three broad objectives: (1) to transfer responsibility for immunity determinations from the Department of State to the judiciary; (2) to define and codify the "restrictive" theory of immunity, which allows immunity for purely governmental acts but not for commercial acts by the foreign state or its agencies; and (3) to provide a comprehensive, nation-wide regime for litigation against foreign states and governmental agencies, including such matters as jurisdiction, immunity, service of process, pre-judgment attachment and execution of judgment.[6]

This legislation was initiated by the Executive Branch seeking to minimize foreign policy problems resulting from State Department determination of foreign requests for immunity and responding to private sector criticism that the existing system was lacking in due process and subject to undue diplomatic pressures. Both the statutory text and the legislative history were drafted mainly by State Department and Justice Department attorneys. The section-by-section analysis submitted by the Executive was adopted in large part in the relevant committee reports.

The Nixon Administration first submitted legislation on foreign sovereign immunity to Congress on January 16, 1973. That proposal drew complaints from the private sector, and Congressional staff told State and Justice that Congress would not take up the measure unless the Executive could present a revised proposal that was acceptable to all parties concerned. As the State Department's acting Deputy Legal Adviser in 1974, I was asked to coordinate that effort. Over the next two years, State and Justice attorneys held broad consultations with the private sector and some foreign governments. A revised bill was submitted to Congress on October 31, 1975, and President Ford signed the FSIA into law on October 21, 1976.

Section 1605 (a)(3) – Language and History.

The expropriation exception to immunity, Section 1605 (a) (3) of the Act, was included in the 1975 bill sent to Congress in essentially the same words[7] and with the same section-by-section analysis as the 1973 proposal.

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— (3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Protection of American foreign investment was a major U.S. policy concern in the 1960s and 1970s. Confiscatory takings of American investments were widespread in that period – in Cuba, Peru, Chile, Jamaica and in Africa. Remedies in foreign courts were illusory, few countries

1 Adjunct Professor, Georgetown University Law Center; Of Counsel, Garvey Schubert Barer, Washington D.C. As Deputy Legal Adviser, U.S. Department of State (1974-1981), Mark B. Feldman played a significant role in drafting the 1976 Act. Ten years later, as Chairman of the SIL Committee on Foreign Sovereign Immunity, he managed the ABA effort to improve the statute which led to the 1988 amendments facilitating enforcement of arbitral awards against foreign states in U.S. courts.

2 Panel: "Shield or Sword: Why has the Foreign Sovereign Immunities Act Become One of the Most Frequently Litigated Statutes in Cultural Property Disputes?"

3 P.L. 94-583, 90 Stat. 2891, Title 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), and 1602-1611.

4 541 U.S. 677 (2004)

5 See 28 U.S.C. 1330 (a).

6 See Feldman, The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View, 35 ICLQ 302 (1986); Feldman, Foreign Sovereign Immunity in the United States Courts 1976-1986, 19 Van. JTL 19 (1986); See also Feldman, Amending the Foreign Sovereign Immunities Act: The ABA Position, 20 Int'l Lawyer 1289 (1986).

7 The phrase "political subdivision" was deleted from the second prong of this text in the revised version.

Continued on page 10

[N]o state that has codified foreign state immunity since 1976 has followed the U.S. example in disallowing immunity in cases of confiscatory takings.

of concern had then accepted international dispute settlement, numerous law suits had been brought in U.S. courts implicating the controversial federal act-of-state doctrine, and there were strong pressures on the Executive to suspend foreign assistance to Peru and other countries under the Hickenlooper Amendment.[8]

Thus, there was a strong U.S. policy interest in providing a domestic judicial remedy for takings of foreign investment in violation of international law. The problem was that expropriation is generally regarded as a "sovereign" rather than "commercial" act for purposes of the restrictive theory of immunity, and it was unclear whether a broad exception for suits based on confiscatory foreign takings would be consistent with emerging international norms of foreign state immunity. To the best of my knowledge, no state that has codified foreign state immunity since 1976 has followed the U.S. example in disallowing immunity in cases of confiscatory takings. The 2004 UN Convention on the Jurisdictional Immunities of States and Their Property includes no such provision.[9]

The drafters at State and Justice found a solution by limiting the expropriation exception to two narrow situations involving commercial activities and territorial connections with the United States that they believed would meet any objections based on international law principles relating to jurisdiction and immunity. As stated in the report of the House Committee on the Judiciary:

"The first category involves cases where the property in question or any property exchanged for such property is present in the United States, and where such presence is in connection with a commercial activity carried on in the United States by the foreign state, or political subdivision, agency or instrumentality of the foreign state. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign state and (ii) that agency or instrumentality is engaged in a commercial activity in the United States. Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality."[10]

Out of deference to international expectations, the first category is extraordinarily narrow. A foreign state that chooses to bring expropriated property into the United States for commercial purposes invites litigation of its title to that property including judicial review of the foreign taking under applicable principles of international law. In drafting this part of the immunity exception, Executive Branch attorneys were mindful that Congress adopted the Second Hickenlooper Amendment[11] in 1964 to require adjudication of expropriation claims notwithstanding the federal act of state doctrine established by the Supreme Court in the Sabbatino case,[12] and that judicial decisions as of the mid-70s had limited application of the Amendment to cases where title to property was at issue and the property was present in the U. S.[13]

Given the tenets of the restrictive theory, however, and foreign policy concerns, the Executive drafters added a further requirement before disallowing a foreign state's immunity – the property must be present in the United States in connection with a commercial activity carried on by the foreign state in the United States. At the same time, the Executive's section-by-section analysis, adopted in the House Judiciary Committee Report, makes clear that the expropriation exception "deals solely with issues of immunity" and "in no way affects existing law on the extent to which, if at all, the 'act of state' doctrine may be applicable."[14] This is significant because the act of state doctrine applies in private litigation not involving foreign state parties.

Different considerations apply, however, where the foreign actor is an "agency or instrumentality" of a foreign state. As defined in the FSIA, such an entity "is a separate legal person, corporate or otherwise."[15] It is not clear that such entities are entitled to

8 76 stat. 260-61 (1962), Title 22 U.S.C. 2370(e)(1).
9 Not yet in force. See UN Doc A/55/508
10 H.Rep. 94-1487, 94th Cong., 2nd Sess., September 9, 1976, p. 19.
11 Title 22 U.S.C. 2370(e)(2).
12 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
13 See, e.g., Banco Nacional de Cuba v. Farr, 383 F. 2d 166 (2 Cir. 1967).
14 H.Rep. 94-1487, supra.
15 28 USC 1603(b).

Continued on page 11

any immunity from adjudication in foreign courts under international law, and most states that have codified foreign state immunity by legislation have sharply limited the immunity accorded such entities.[16] The FSIA defines a foreign state broadly to include such entities for some purposes, but treats them differently for other purposes, including service of process and execution of judgment.[17]

In drafting the expropriation exception, State and Justice recognized that foreign states confiscating American investments in natural resources (including petroleum and mining properties) would likely transfer the resources to separate legal entities that might want to do business in the United States. As an element of U.S. expropriation policy, the second prong of Section 1605(a)(3) was crafted to allow actions against a foreign state (including its agencies and instrumentalities) when a government agency or instrumentality that owns or operates property taken in violation of international law is engaged in a commercial activity in the United States. Under that prong, no nexus is required between the expropriated property (presumably held abroad) and the commercial activity in the United States.

Nancy Farinella

Recent litigation – legislative intent.

With this background, I would like to present a drafter's perspective on three issues of statutory interpretation arising under section 1605(a) (3) that were addressed in two recent cases, Cassirer v. Spain and Thyssen-Bornemisza Collection Foundation ("Cassirer")[18]and Agudas Chasidei Chabad of U.S. v Russian Federation ("Chabad")[19]:

(1) whether suits may be brought against a foreign state under the expropriation exception to recover property originally expropriated by a different state;

(2) what conduct is sufficient to meet the statutory requirement that a foreign agency or instrumentality be "engaged in a commercial activity in the United States;" and

(3) whether claimants must exhaust judicial remedies in a foreign state before bringing an action in a U.S. court under the expropriation exception.

Suits Against a Foreign State Claiming Property Confiscated by a Different State

In Cassirer, plaintiff sought to recover a Pissaro painting confiscated by Germany during WWII and subsequently purchased by Spain after being traded on international art markets for decades. Among other points, Spain argued that Section 1605(a) (3) did not apply because Spain was not the foreign state that took the property. The Ninth Circuit rejected that interpretation holding that "the plain language of the statute does not require that the foreign state against whom the claim is made be the entity which took the property in violation of international law."[20] While I cannot say that the drafters considered this issue, I agree with the Court's conclusion concerning the language of the expropriation exception.

Moreover, I can say with some confidence that had the drafters pondered the question at the time, they would have elected to provide a forum for a claimant seeking to recover confiscated property that was being traded in international markets. The Cuban expropriations were still fresh at that time, and American investments were threatened in many countries. As I read the Second Hickenlooper Amendment, contrary to the dissent's interpretation, Congress intended to set aside the act of state doctrine in litigation against private parties, or any other litigation, where the claim was made that the taking state's action was contrary to international law. Moreover, Congress addressed the Cuba question again in 1996 when it enacted the Helms-Burton Act authorizing lawsuits against persons trafficking in property expropriated in Cuba.[21]

I do not understand the dissent's assumption that a foreign state can legitimately acquire formerly private property that was confiscated by another state in violation of international law and wonder about its conclusion that Congress could not have intended to allow suits against

16 See UK State Immunity Act of1978.
17 See 28 USC 1608 (a) and (b); 28 USC 1610 (a) and (b).
18 ... F. 3d ..., (9 Cir. August 12, 2010)
19 528 Fed 3rd 934 (DC Cir 2008)
20 The Court ruled en banc with all but two judges concurring.
21 22 USC 6082(a)(6).

Continued on page 12

Under the Act, the terms "commercial activity" and "commercial activity carried on in the United States" are defined terms constructed to implement the commercial exception provided in Section 1605(a) (2).

foreign states based on old claims. The assumption is contrary to the traditional common law rule that a thief cannot pass good title to stolen property even to a bona fide purchaser,[22] and the conclusion was expressly rejected by the Supreme Court in Altmann. Finally, plaintiff's equities are particularly compelling in the Holocaust context. Its claims are consonant with U.S. Government policy supporting restitution of property confiscated by the Nazis which dates back to the famous State Department letter in the Bernstein[23] case and is embodied in the Washington[24] and Terezin Declarations.[25]

Engaged in Commercial Activity

The more difficult question of construing the "commercial activity" provisions of section 1605(a)(3) arose in both Cassirer and Chabad. As courts have frequently noted, the language of the FSIA is sometimes less than clear, and the drafters left some difficult questions for judicial resolution. Both these cases involved the second prong of section 1605 (a) (3). The first prong is rarely litigated as few foreign states bring expropriated property into the United States. A plaintiff cannot take advantage of the second prong unless an agency or instrumentality of the foreign state is "engaged in a commercial activity in the United States." The courts have struggled with this language and have been generous to plaintiffs with holocaust equities.

Under the Act, the terms "commercial activity"[26] and "commercial activity carried on in the United States" [27] are defined terms constructed to implement the commercial exception provided in section 1605(a)(2). The phrase "carried on in the United States" is used in the first prong of the expropriation exception, but not in the second prong. The operative language used there is different and undefined: "engaged in a commercial activity in the United States." This discrepancy was noted when the text was being finalized in 1975. For better or for worse, we decided not to conform the second prong to the words of the commercial exception, because the policies underpinning the two provisions are very different, and we did not think the results should necessarily be the same.[28] And we deliberately left the phrase "engaged in a commercial activity in the United States" open to judicial interpretation, because we doubted our ability to anticipate the myriad factual circumstances that could raise serious policy issues. It was not clear then – and it is not clear now – whether the difference in wording would lead to a different result in any particular case.

Cassirer correctly states that this language does not "explicitly require any particular level of activity or conduct commensurate to that normally contemplated for general jurisdiction." However, as Russia pointed out in the Chabad case, one of the dictionary definitions[29] of "engaged in" is to "begin and carry on an enterprise." That would imply substantial activity in the United States. At the time, we were thinking mainly of business activities such as petroleum exports to the United States and retail gasoline distribution, but we laid down no guidelines for the courts.

Not having a definition, the courts have generally found commercial activities in the United States sufficient to sustain jurisdiction without seeking to define "engaged in." In the Chabad case, a prominent ultra-Orthodox Jewish movement sued the Russian Federation and other entities under the second prong of 1605(a)(3) to recover two large collections of important religious books, manuscripts and documents seized by the Soviet Union and the Russian Federation: (1) an Archive held by the Russian State Military Archive ("RSMA") and (2) a Library held by the Russian State Library ("RSL").[30] The com-

22 See Bakaler v. Vava, 2008 WL 4067335
23 Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375 (2 Cir. 1954)
24 Washington Conference Principles on Nazi Confiscated Art, December 3, 1998.
25 Terezin Declaration on Holocaust Era Assets and Related Issues, June 30, 2009.
26 1603(d)
27 1603(e)

28 Section 1603(e) defining "commercial activity carried on in the United States" to include such activity "having substantial contact with the United States" was added in the 1975 bill to clarify the reach of the commercial activity exception. It deals more with the nexus to the United States than with the extent of the activity and, arguably, could include activity abroad having substantial contact with the U.S. This definition does not apply as such to section 1605 (a)(3).
29 Webster's Third International
30 Russia conceded that each of these institutions qualifies as an agency or instrumentality for purposes of the expropriation exemption and apparently did not contest that the

Continued on page 13

mercial contacts with the United States were not that strong, but the D.C. Circuit deemed them sufficient to satisfy the second prong: RSMA had contracted with two U.S. entities for publication of archival documents, and RSL had licensed a U.S. firm to distribute microcopies of RSL materials. In Cassirer, the commercial contacts were somewhat more extensive.

Russia argued that the phrase "engaged in" equates with the words "carried on in" used in the first prong of Section 1605(a)(3) and should be read to require substantial contacts with the United States as stipulated in the definition of "carried on in" set out in Section 1603(e). That point has some force, but I have to agree with the Court that Congress deliberately used different language in the two prongs opening the way to different results. On the other hand, I would not agree with the Court's conclusion that Congress necessarily approved less than "substantial contacts with the United States" under the second prong. Given the complexities of the statute, this confusing is understandable. In my view, however, this is not what the drafters intended.

Section 1603(d) contains a broad definition of "commercial activity," but does not attempt to quantify the level of activity or to define the contacts with the United States required to establish subject matter jurisdiction over the foreign state defendant. The contact requirements are provided in section 1605(a)(2) -- read together with section 1603(e) -- and in section 1605(a)(3). In my view, the statute does not stipulate a quantum requirement for "commercial activity," but it does require contacts with the United States. The operative phrase in the second prong is not "commercial activity" alone, but the whole phrase -- "is engaged in a commercial activity in the United States." The words "engaged in" are not defined, but certainly suppose activity having more than minimum contacts with the United States.

Exhaustion of Local Judicial Remedies

As one of the drafters of the FSIA, to me the most disturbing issue in these cases is the suggestion that exhaustion of foreign judicial remedies might be a precondition for access to the U.S. courts under the expropriation exception. The courts rejected the argument in both Cassirer and Chabad in the circumstances before them, but did not put the question firmly to rest. On this point, I can state categorically that the FSIA in general and the expropriation exception in particular were intended by Congress and the Executive to provide a domestic judicial remedy for claimants. To require claimants to resort to foreign courts would subvert the basic purpose of the statute. This is especially true in expropriation cases where the foreign state would then be claimant's adversary in the proceedings and judge of its own actions.

In my years as a State Department attorney, I learned that few foreign states have a truly independent judiciary in cases where the foreign state has a strong interest. Our courts may have a national bias in certain cases, but they do not take guidance from the government, public or private. That is often not true in other countries including, sometimes, countries with advanced legal systems. Moreover, in Latin America in the 1960s and 70s, expropriation of foreign interests was frequently associated with military coups, violent revolution, or restructuring of society on Marxist lines where the possibility of local judicial redress was ludicrous. In other situations, where the State Department naively encouraged recourse to local judicial remedies, the cases turned out badly. That is why the United States promoted impartial international arbitration to resolve investment disputes, stopped referring victims of expropriation to local remedies, and wrote the expropriation exception into the FSIA.

The idea that exhaustion of local judicial remedies may be required in these cases stems from an unfortunate comment by Justice Breyer, concurring in Altmann that a plaintiff "may have to show an absence of remedies in the foreign country sufficient to compensate for any taking..."[31] This suggestion was included in a long list of potential obstacles to expropriation claims put forward to allay concerns that retroactive application of the FSIA would open the floodgates to a wide range of historic claims that would trouble U.S. relations with friendly foreign governments. The exhaustion of remedies question was not before the Supreme Court in Altmann, and this casual comment should not be taken as guidance by lower courts. It should also be noted that U.S. government suggestions that the exhaustion doctrine might be applied to limit human rights litigation in U.S. courts under the Alien Tort Statute,[32] do not apply to the FSIA or to expropriation issues more broadly.

This is not the forum to discuss in detail the international law doctrine of exhaustion of local remedies. It should be noted, however, that the doctrine arose in the 19th and early 20th century at a time when most international claims were presented diplomatically on grounds of denial of justice. Even in that context, it was recognized that exhaustion is not required and would be futile, absent effective judicial remedies. In the expropriation context, there is an inherent conflict of interest between the dispossessed claimant and the foreign state defendant that seized or holds the claimant's property. I am not saying that the Spanish courts could not have decided the Cassirer case fairly. I do not know. But I am saying that the Executive drafters of the FSIA and Congress would never have dreamed of allowing any such defense in an action brought under Section 1605(a)(3). ◆

Mark B. Feldman is Adjunct Professor, Georgetown University Law Center; Of Counsel, Garvey Schubert Barer, Washington D.C. As Deputy Legal Adviser, U.S. Department of State (1974-1981), Mr. Feldman played a significant role in drafting the 1976 Act. Ten years later, as Chairman of the SIL Committee on Foreign Sovereign Immunity, he managed the ABA effort to improve the statute, which led to the 1988 amendments facilitating enforcement of arbitral awards against foreign states in U.S. courts.

depositary institutions owned or operated the collections under their control.

31 Altmann at 714.

32 28 USC 1350; See Sosa v. Alvarez-Machain, 542 U.S. 692(2004)