Sovereign Immunity: A Venerable Concept in Transition?

By James E. Berger and Charlene Sun

Sovereign immunity, the principle derived from the ancient truism that the "king can do no wrong" and holding that nations are immune from the jurisdiction of other nations' courts, is recognized by virtually every nation in the world. Despite the principle's universality, however, its application differs across states. Some states extend sovereign immunity as a matter of comity, while others have codified the doctrine in their jurisdictional statutes. Some states, such as China, afford foreign states absolute immunity, while the majority of nations, including the United States, have adopted a more restrictive approach that immunizes foreign states from suit in connection with sovereign acts but leaves them subject to suit in connection with commercial acts.

Sovereign Immunity in the United States Before 1952

Virtually from its founding, the United States has recognized that foreign states enjoy immunity from suit. The doctrine was first recognized in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), where Chief Justice Marshall recognized that wrongs perpetrated by foreign sovereigns were more appropriately addressed by diplomatic, rather than judicial means. The Court's ruling recognized sovereign immunity as a common-law doctrine with its roots in international comity; it accordingly placed primary responsibility for immunity determinations with the executive branch, consistent with its role as the government branch with primary responsibility for the conduct of foreign affairs.

Until 1952, the United States generally afforded foreign states absolute immunity from suit, unless, as noted above, the executive branch objected to the grant of immunity. In 1952, however, the Department of State issued a letter (the "Tate Letter") in which it abandoned absolute immunity in favor of the "restrictive theory" of sovereign immunity. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dept. of State, to Acting U.S. Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984–85 (1952). Under the restrictive theory, foreign states were accorded immunity for their governmental acts, but not for their private or commercial acts. Following the issuance of the Tate Letter, the State Department continued to make immunity determinations on a case-by-case basis, which courts generally accepted without independent scrutiny. Where the State Department failed to make a recommendation, courts made the immunity determination using the principles typically relied upon by the State Department. *See* Br. of the United States, *Samantar v. Yousef*, 130 S. Ct. 2278 (2010).

The Foreign Sovereign Immunities Act

In 1976, Congress adopted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq*. The FSIA codified the restrictive immunity doctrine that courts had followed as a matter of policy since 1952. The FSIA confers foreign states (and their instrumentalities and political subdivisions) with immunity from both suit and attachment, subject to specified exceptions. The most notable exceptions are where immunity has been waived, where the claim arises out of commercial activity or tortious conduct, and/or where the action arises out of an agreement to arbitrate. 28 U.S.C. § 1605.

Sovereign immunity operates as a bar to subject matter jurisdiction; accordingly, the court is obligated to rule on an immunity claim before proceeding to the merits of a case. If the court finds that an exception to immunity applies, the foreign state may generally be held liable in the same manner as a private party. 28 U.S.C. § 1606. If the foreign state does not pay a resulting judgment, it has an independent immunity from execution, which, like the corresponding jurisdictional immunity, is subject to exceptions designed to permit the execution of commercial assets while preventing the seizure of sovereign assets. *See* 28 U.S.C. §§ 1609–1611. Beyond its conferral of immunity modeled on the "restrictive theory," the FSIA provides a broad array of procedural protections, including the right to a federal forum, additional time to respond to a complaint, specialized methods of service, a prohibition on jury trials, and immunity from punitive damages. *See generally* 28 U.S.C. §§ 1330(a), 1608, 1441, 1606.

Samantar v. Yousuf

On June 1, 2010, the Supreme Court issued a major ruling concerning the FSIA's scope. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), involved claims by former citizens of Somalia against Mohamed Ali Samantar, who served in a series of high-ranking positions in the Somali government (including prime minister) between 1980 and 1990. The plaintiffs alleged that Samantar was responsible for extrajudicial killings and the torture of the plaintiffs and their families.

Samantar promptly asserted immunity under the FSIA and moved to dismiss the case. Consistent with pre-FSIA practice, the district court stayed

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the proceedings to solicit the views of the State Department on Samantar's immunity claim; the State Department, however, never responded. In 2007, the district court lifted the stay and dismissed the case, holding that the FSIA governed Samantar's claim of immunity and dismissing the case on the ground that the plaintiffs never sought to establish any exception to immunity. The district court's conclusion that Samantar was an "agent" of Somalia within the meaning of the FSIA (and thus a "foreign state" entitled to its protections) reflected the majority view among federal courts that had addressed the question.

The Court's rejection of the Section 1603(a) argument was conclusively bolstered by its observation that other provisions of the FSIA specifically mention officials.

The Fourth Circuit reversed. 552 F.3d 371 (4th Cir. 2009). While acknowledging that the district court's ruling reflected the majority view, the court of appeals held that the FSIA's text did not support the view that individual state officers fell within the FSIA's definition of "foreign states" and that the FSIA therefore did not confer immunity over individuals such as Samantar. The court remanded the case to the district court to determine whether Samantar was entitled to immunity at common law.

The Supreme Court granted certiorari and, in a majority opinion delivered by Justice Stevens, affirmed. All nine justices joined the judgment. Justice Scalia wrote a concurrence, joined by Justices Alito and Thomas, noting his view that the plain text of Section 1603 made recourse to legislative history unnecessary. The Court began its analysis with a review of the history and evolution of sovereign immunity in the United States, emphasizing the doctrine's common-law roots. The Court noted that, prior to the enactment of the FSIA, the common law "extend[ed] virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'" *Samantar*, 130 S. Ct. at 2284 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). Under this theory of "absolute immunity," the Court explained, a two-step procedure emerged for resolving immunity claims. Typically, the immunity claim was asserted to the State Department through a request for a "suggestion of immunity" by a diplomatic representative of the sovereign; if the State Department accepted the request, it would assert immunity, depriving the court of jurisdiction. If the State Department refused or did not act, the court would make its own immunity determination.

As noted above, this paradigm shifted with the issuance of the Tate Letter and its embrace of the "restrictive theory" of sovereign immunity. This change, the Court observed, threw "immunity determinations into some disarray," because "political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Samantar*, 130 S. Ct. at 2285 (citing *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004)).

The Court noted that the FSIA represented a congressional response to the imprecision that had characterized immunity determinations after 1952, and that "[a]fter the enactment of the FSIA, the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Samantar*, 130 S. Ct. at 2285. The Court then turned to the specific question before it: whether a government official, acting in his official capacity, is entitled to the FSIA's statutory protections. The Court's analysis focused on the most fundamental provision of the act, Section 1603's definition of "foreign state":

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means 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 as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

The Court rejected Samantar's claim that individual state actors were covered by the reference to "agencies and instrumentalities," holding that such a broad construction could not be supported by the definition's text. Specifically, the Court found that "agency or instrumentality" was defined as any "entity," a term that the Court understood to refer to an organization, rather than an individual. Further, the Court found that the qualification that an agency or instrumentality be a "separate legal person" dictated against finding that individuals were included in the

definition, because that term typically refers to the legal fiction allowing an entity to hold personhood separate from the natural persons who comprise it. Finally, the Court found that it would be "awkward to refer to a person as an 'organ' of the foreign state," and that a natural person could not be "created under the laws of a third country."

The Court also rejected Samantar's argument that because the definition of a "foreign state" in Section 1603(a) merely "included" political subdivisions and agencies, the concept was nonexclusive and could be read to also include individuals. The Court disagreed, noting that the "included" concepts, while nonexclusive, were all "entities" rather than natural persons. The Court's rejection of the Section 1603(a) argument was conclusively bolstered by its observation that other provisions of the FSIA specifically mention officials and that Congress's failure to mention officials in Section 1603's definition of a foreign state was legally significant.

Finally, the Court rejected Samantar's claim that because the FSIA was intended to codify the common law of sovereign immunity, all of the common-law immunity doctrines were necessarily eliminated and merged into the FSIA. Noting that "we do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity . . . it does not follow from this premise that Congress intended to codify that immunity in the FSIA" and that "[i]t hardly furthers Congress' purpose of 'clarifying the rules that judges should apply in resolving sovereign immunity claims' to lump individual officials in with foreign states without so much as a word about spelling out how and when individual officials are covered."

Finding that individual officials were not covered by the FSIA, the Court held that those officials' immunity is governed by the common-law doctrines developed prior to the FSIA's adoption. The Court discounted the possibility that its ruling would encourage plaintiffs to artfully plead around the FSIA by naming state officials instead of the state itself, emphasizing that the common-law doctrines remained independently cognizable, that a plaintiff attempting to avoid the FSIA by naming officials alone would be confronted with potential joinder issues (which could arise if a state was an indispensable party to the action), and that a party seeking to avoid the FSIA would likely confront significant jurisdictional hurdles, including being required to establish a constitutionally sufficient basis of personal jurisdiction over the individual defendant that the plaintiff would generally not be required to do if the defendant were the state itself. *See Samantar*, 130 S. Ct. at ___ & n. 20; *see also, e.g., Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Rep.*, 582 F.3d 393 (2d Cir. 2009) (holding that foreign states are not entitled to the protections of the due process clause).

The immediate significance of the Court's ruling in *Samantar* is clear—foreign states and their agencies and instrumentalities are subject to the FSIA's well-understood statutory scheme, while state officials' immunity is governed by common law. Notwithstanding the Court's rejection of the notion that its ruling will lead to artful pleading, plaintiffs considering bringing claims predicated on the actions of foreign governments will almost surely engage in a comparison of the FSIA and the common-law rules (which the solicitor general noted in her amicus brief were "not necessarily co-extensive") when deciding against whom to file suit. Second, the Court's ruling will force courts to pay increased attention to the common-law immunity doctrines and lead to their continued jurisprudential development, as those doctrines will play a far more prominent role than they have at any time since the FSIA was adopted in 1976.

There is relatively little case law defining or construing the specific contours of common-law immunity, although there is general consensus that they are set forth in the Second Restatement of Foreign Relations Law of the United States. *See Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (applying Section 66(f) to determine whether an Israeli official was immune from suit as a result of acts taken in his official capacity).

Because the common-law doctrines continue to rely heavily upon the views of the executive branch, claims of sovereign immunity may, at least in the short run, be characterized by the imprecision that led to the adoption of the FSIA in the first place.

Decisions after *Samantar*

Only a handful of courts have had occasion to apply *Samantar*. When *Samantar* was decided, cases involving assertions of sovereign immunity by individual officials were pending before the Courts of Appeals for the Second, Third, and Fourth Circuits. Two of these courts, without the benefit of the individual defendants' arguments regarding alternative theories of immunity, vacated and remanded lower court dispositions for reconsideration under the common law. *See Carpenter v. Rep. of Chile*, 610 F.3d 776, 780 (2d Cir. 2010) (vacating and remanding dismissal of a complaint against the individual defendants in light of *Samantar* and directing the

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district court "to determine, in the first instance, whether [the plaintiff's] claims . . . are barred by sovereign immunity under the common law"); *Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co.*, No. 09-1297, 2010 WL 3279173 at *6–7 (3d Cir. Aug. 20, 2010) (the defendants' argument that they enjoyed immunity under the FSIA had been foreclosed by *Samantar*, vacating a district court order and remanding for further proceedings on "alternative paths to immunity outlined in *Samantar*" and to permit the executive branch to offer its views on immunity). Other cases have been decided on alternative grounds. *See, e.g., RSM Production Corp. v. Fridman*, 387 Fed. Appx. 72 (2d Cir. 2010) (recognizing that the immunity claim was governed by common law but finding remand for further proceedings on immunity unnecessary because the plaintiff failed to adequately state a claim); *Ochoa Lizarbe v. Rivera Rondon*, No. 09-1376, 2010 WL 3735865 (4th Cir. Sept. 22, 2010) (the Fourth Circuit refused to exercise jurisdiction over the individual defendant's common-law immunity claim on appeal, finding that he had not presented that claim to the district court).

While it is too early to tell if and how *Samantar* will change the way lower courts address immunity claims asserted by state officials, these and other recent decisions suggest that one potential consequence of the decision may be to breathe new and independent life into defenses—such as lack of personal jurisdiction and forum non conveniens—that tended to be subordinated in FSIA cases to the immunity determination, as there may be a temptation for lower courts to dispose of cases based on the well-developed doctrines underlying these defenses rather than grapple with common-law rules that have remained largely unused and undeveloped for over three decades. As *Samantar* notes, an individual foreign official who claims immunity outside the FSIA framework is entitled to due-process protections that are generally not available to states themselves, a reality that provides individual defendants a substantial defense that is unavailable to states. At least one lower court has taken this route by bypassing the common-law immunity determination and dismissing a case on personal jurisdiction grounds. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 467 (S.D.N.Y. 2010) (declining to rule on common-law immunity claims, as the case could be dismissed for lack of personal jurisdiction).

Recent Developments Outside the United States

U.N. Convention on Jurisdictional Immunities

The U.N. Convention on Jurisdictional Immunities of States and Their Property was opened for signature in 2004. It seeks to codify, as a matter of international law, the restrictive approach to sovereign immunity and follows the same general structure as the FSIA by immunizing states for sovereign acts and withholding immunity for commercial acts. However, the U.N. Convention diverges from U.S. law as recently clarified by *Samantar* by explicitly including "representatives of the State" within its definition of "State." *See* U.N. Convention, art. 2(1)(b)(iv).

The U.N. Convention will come into force if it is ratified by 30 nations; to date, only 11 states have ratified, and the United States is not among them. Switzerland, Japan, Kazakhstan, and Saudi Arabia ratified the treaty in 2010, however, suggesting that the treaty may be gaining more widespread support. For a background and history of the U.N. Convention, see http://untreaty.un.org/ilc/summaries/4_1.htm.

FG Hemisphere v. Congo

A recent decision of the Hong Kong Court of Appeal (the intermediate appellate court in Hong Kong) provides a unique insight into the competing immunity doctrines and their evolution under both national and international law. On February 10, 2010, the court of appeal issued its decision in *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, [2010] 2 H.K.C. 487. *FG Hemisphere* required the Hong Kong courts to determine the status of foreign sovereign immunity in Hong Kong and, by extension, in China. The case arose out of Congo's failure to pay two arbitration awards, leading the award creditor to seek to enforce the awards in Hong Kong, as well as execute on Congolese assets in that jurisdiction.

Congo responded to the proceedings by claiming sovereign immunity and by claiming that Hong Kong was legally bound to apply the absolute sovereign immunity that the People's Republic of China recognizes and applies in all cases. Congo's immunity claim, which was joined by the Hong Kong Secretary for Justice (and, through submission of letters to the court, by the Chinese government itself), was based on a view that because foreign sovereign immunity implicates foreign affairs, Hong Kong was bound, under the Basic Law that has governed Hong Kong's relationship with China since its 1997 transformation from a British overseas territory to a special administrative region of China, to apply the doctrine of immunity currently in force in China. The plaintiff responded by arguing that because the restrictive doctrine of sovereign immunity was embedded in the common law of Hong Kong on July 1, 1997 (the date that Hong Kong came under Chinese sovereignty), it should therefore apply, because Hong Kong's common law remained in force following the handover.

The court of appeal engaged in a lengthy and comprehensive analysis of the evolution of the sovereign-immunity doctrine in Hong Kong, as well as an analysis of whether China, which has signed (but not ratified) the U.N. Convention, continues to follow the absolute approach to sovereign immunity. The court concluded that while China does continue to follow the absolute immunity doctrine, its failure to impose that doctrine on Hong Kong through legislation (something

the court found China had authority under the Basic Law to do) justified a finding that the restrictive immunity doctrine, which was embedded in Hong Kong's common law at the time of the handover, continues to apply in Hong Kong. The court thus ruled that Congo was not immune from the proceedings to enforce the arbitral award.

The decision has been appealed to the Court of Final Appeal, the court of last resort in Hong Kong, and until the Court of Final Appeal rules, the law of sovereign immunity in Hong Kong must be regarded as unsettled. The Court of Final Appeal's ruling will attract a great deal of attention, given Hong Kong's status as a global financial center and key venue for disputes involving states and their instrumentalities.

Kuwait Airways Corp. v. Republic of Iraq

On October 21, 2010, the Canadian Supreme Court announced its decision in *Kuwait Airways v. Republic of Iraq*, 2010 SCC 40 (Can.). The case involved an attempt by Kuwait Airways Corp. (KAC) to enforce a London judgment. The judgment at issue arose out of an action for damages against Iraq Airways Co. (IAC) for the latter's seizure of several KAC airplanes during the Iraqi invasion of Kuwait. The specific judgment was for costs awarded as a result of the English court's finding that IAC had committed perjury and engaged in other improper tactics intended to deceive the courts. The English court found that IAC's legal defense was controlled and funded by Iraq and that Iraq's management of IAC's legal defense in those proceedings did not constitute sovereign acts, but instead commercial activities exempt from immunity under Section 3 of the State Immunity Act 1978 (UK). Iraq moved to dismiss KAC's application in the Quebec Superior Court for recognition of the English court's order on the basis that Iraq's control of IAC's legal defense constituted sovereign activity under Section 3 and Canadian law. The Superior Court of Quebec agreed and dismissed KAC's application, and the court of appeal affirmed.

The Supreme Court of Canada reversed, finding that the lower courts had mischaracterized the nature of the commercial act in question. After determining that the SIA applied to the application before it and that the English court's legal conclusions regarding immunity did not constitute res judicata in the Canadian courts, the Supreme Court turned to the question of whether the SIA's commercial activities exception applied to Iraq's actions. The Court first noted that the SIA embodied a restrictive view of sovereign immunity and represented a "clear rejection of the view that the immunity of foreign states is absolute." *Kuwait Airways*, 2010 SCC 40, ¶ 24. The Court acknowledged that the commercial activities exception of the SIA was based on the same exceptions found in both U.S. and English law and compared the exceptions under each nation's law. The Court found that both U.S. and English law focused exclusively on the nature of the act in determining whether to confer immunity. However, the Court distinguished the Canadian approach to the commercial activities analysis, relying on Canadian Supreme Court precedent holding that the SIA requires a court to consider the entire context, which includes not only the nature of the act in question, but also the purpose. *See Kuwait Airways*, 2010 SCC 40, ¶ 31 (citing *Re Canada Labour Code*, pp. 73–74). Applying that analysis to the case at hand, the Court found that the specific acts at issue were not the acts performed by Iraq during the underlying proceedings (the legal defense of IAC), but rather those acts which were the subject of the underlying proceedings, namely Iraq's seizure and ultimate use of KAC's aircraft. The Court held that while the original appropriation of the aircraft might have been characterized as a sovereign act, the subsequent retention and use of that aircraft by IAC were undeniably commercial acts for which the SIA conferred no immunity. Accordingly, the Court set aside the judgments of the two lower courts.

The decision in *Kuwait Airways* illustrates a more flexible approach toward sovereign immunity determinations than is typical of U.S. immunity determinations. While the decision itself recognizes the heavy influence that U.S. and English law have had on the Canadian concept of sovereign immunity, it also reflects Canada's deliberate divergence from the traditional restrictive standard embodied by U.S. and English law.