# International Litigation From a U.S. Perspective

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# OUTLINE

I. Basic Influences on The U.S. Perspective

# The U.S. Federal System

- Two constitutional layers of government
  - Federal (national)
  - State
- Both are, in theory, sovereign entities
- Each has authority to make laws and decide disputes
- There are 50 different states, each with powers of a sovereign
- U.S. constitution is somewhat analogous to a treaty among the states
  - Example: requires states to give "full faith and credit to" (i.e., respect and enforce) judgments (judicial decisions) of other states.
  - But: treaties, unlike constitution, can be ignored or disavowed
- System presents <u>many of the same tensions and problems in domestic disputes as in international disputes.</u>

# The U.S. Federal System: Multiple Sources of Law

- Federal constitution
- Treaties
- Federal statutes
- Federal judicial decisions
- State constitutions
- State judicial decisions

# The U.S. Federal System: Hierarchy of Law

- Federal constitution and treaties are at the top of the hierarchy.
- In general, federal law takes precedence over state law.
  - Concept of "preemption" – under some circumstances, federal government may take away the states' ability to make the law in certain areas
- But, the powers of the federal government are limited to certain defined (but broad) areas.
- As a result, decisions concerning international litigation are often affected by U.S. constitutional law.

# The U.S. Common-Law System

- Many rules of law (procedural and substantive) are made by the courts.
- The law is announced in the process of deciding disputes ("case-by-case basis"), rather than codified into a comprehensive civil code.
- Implications for decision-making:
  - Gradual formulation of rules over time.
  - Legal problems considered in different contexts and in light og changing circumstances.
  - Flexible, evolving doctrines. BUT:
  - Rules of law are not comprehensively stated or even decided.
  - Decision-making is decentralized – no single vision.
  - Sometimes, inconsistency and confusion.
- Therefore, decisions that are not based on constitutional issues, or on existing law, are <u>often based on considerations of policy</u>.

# Common Policy Considerations for International Issues

- Comity
- Reciprocity
- Efficiency
- Fairness
- Predictability
- Protecting expectations
- Uniformity (of rule or of outcome)
- Public policy (protection / paternalism / development)
- Avoiding / promoting bias
- Practicality
- Finality

# OUTLINE

II. Conflict of Laws (Choice of Law)

# Conflict of Laws

- Issue: which law applies to a given dispute?
- Assumption: generally the law of the host jurisdiction.
- In the U.S., there are 3 common types of conflicts problems:
  a) State vs. federal law – constitutional question
  b) Law of state #1 vs. law of state #2
  c) Domestic law vs. foreign law (analysis similar to (b)).
- No clear rule that applies in all cases.
- "Which law applies" is generally a question of state law, not federal law.
- Conflict-of-law rules have evolved over time.

# Evolution of Conflict Rules

- Oldest theory: court applies its own laws.
- Territorial theory: apply the law of the state where the harm occurred.
  - Example: *Alabama Great Southern Railroad v. Carroll,* 97 Ala. 126, 11 So. 803 (Ala. 1892).
  - Railroad employee is injured by negligence (carelessness) of another employee. Plaintiff and defendant are both Alabama residents, the negligence occurred in Alabama, Alabama has a modern law that allows the plaintiff to win, and plaintiff has filed his lawsuit in Alabama.
  - The accident occurred in Mississippi, which has an old-fashioned (i.e., not modern) law that does not permit the plaintiff to win.
  - Outcome: the Alabama court applies the law of Mississippi, where the harm occurred, and the plaintiff loses.

# The "First Restatement" Approach

The American Law Institute

- Authors "Restatements" of the law, which state "the best" version of the law in specific areas.
- Not actual sources of law, but persuasive to many courts.
- Provisions often adopted by courts as the law.

# The "First Restatement" Approach

- A series of "look-up" rules that state which jurisdiction's law applies to a particular issue.
- Example: performance of contract governed by law of place where contract was made.
- High predictability, but results often seemed unfair.
- Result: "escape devices" (legal fictions, recharacterization, substance vs. procedure).

# The "Second Restatement" Approach

Restatement (Second) of Conflict of Laws (1971).

- Often called "most significant relationship" test.
- Presumption as to which law will normally apply, but court must always apply the law of the state with the "most significant relationship" to the issue.
- Example: in personal injury case, apply law of state where injury occurred to determine liability -- unless another state has a more significant relationship to the case.

# The "Second Restatement" Approach

- To determine "most significant relationship", court must balance different factors, including:
  - The needs of the interstate and international systems,
  - The relevant policies of the forum,
  - The relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  - The protection of justified expectations,
  - The basic policies underlying the particular field of law,
  - Certainty, predictability, and uniformity of result, and
  - Ease in the determination and application of the law to be applied. (Restatement (Second) of Conflict of Laws, § 6).
- A very subjective approach – low predictability, perhaps higher fairness. Inefficient for courts to engage in this analysis.
- In general, the same analysis applies to international disputes as to domestic disputes.

# Additional Approaches to Conflict of Laws

- "Interest analysis" approach (New York): apply the law of the "jurisdiction which has the strongest interest in the resolution of the particular issue presented." *E.g., Babcock v. Johnson,* 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).
  - Further refined through "Neumeier rules" that distinguish between conduct-regulating and loss-allocating laws.
- "Comparative impairment" approach: apply the law of the state whose "interest would be more impaired if its policy were subordinated to the policy of the other state." *E.g., Bernhard v. Harrah's Club,* 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976).
- Applying the "better law" (based on the work of Prof. R. Leflar). *E.g., Milkovich v. Saari,* 295 Minn. 155, 203 N.W.2d 408 (1973.
- Many other approaches.

# Current Status: Conflict of Laws

- Different states follow different rules.
  - Some states, such as Florida, follow one set of rules for contracts and another set of rules for torts (non-contract wrongs).
- There are constitutional limits in this area.
  - To apply its law to a case, a state must have a significant contact, or significant aggregation of contacts, creating a state interest, such that its choice of law is neither arbitrary nor unfair. *Allstate Insurance Co. v. Hague,* 449 U.S. 302 (1981).
- Lack of uniformity in this area creates opportunity for "forum shopping."

# OUTLINE

## III. Jurisdiction to Prescribe

# Jurisdiction to Prescribe

- Two different ways of stating the issue.
  - When does the U.S. have the jurisdiction (i.e., authority or rightful power) to apply its laws to persons or conduct outside its borders? ("Legislative jurisdiction").
  - When should a U.S. statute be construed (interpreted) as applying to persons or conduct outside of the U.S.?
- U.S. been very strongly criticized for making laws that try to control what happens in other countries.
  - Antitrust law and criminal law are two examples.
- The first question has apparently now been answered, and the answer to the second is still evolving.

# Legislative Jurisdiction: Historical Approach

- It was initially believed that the U.S. lacked the authority to regulate actions in other countries.
- *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (U.S. 1909):
  - "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."
  - "For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."
- Limited exceptions:
  - Regions subject to no sovereign or to no "civilized" law
  - International outlaws, e.g., pirates
  - Cases "immediately affecting national interests" (e.g., "criminal correspondence with foreign governments").

# Legislative Jurisdiction: "Modern" Approach

- The U.S. courts do not presently recognize territorial limits on the authority of Congress to legislate.
- *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991):
  - "Congress has the authority to enforce its laws beyond the territorial boundaries of the United States."
  - "Whether Congress has in fact exercised that authority in this case is a matter of statutory construction."
- *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993):
  - Rejected *American Banana* rule: "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the U.S. antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct." (citing Restatement (Third), Foreign Relations Law of the United States).
  - Dissent acknowledged Congress' "undoubted legislative jurisdiction"; "though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded … customary international-law limits on jurisdiction to prescribe."

# Legislative Jurisdiction
# The Restatement Approach

- A nation that has a "basis" for jurisdiction to prescribe law should nevertheless refrain from doing so "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."

In deciding whether legislative jurisdiction is "unreasonable", should consider factors such as: (a) how much of the activity takes place domestically, (b) the connections between the regulating state and the primary regulated person, (c) the nature of the activity to be regulated, (d) the extent to which the activity is regulated by other states, (e) the interests of other states in regulating the activity, and (f) the likelihood of conflict with regulation by another state.

--Restatement (Third), Foreign Relations Law of the United States, § 403.

# Jurisdiction to Prescribe: Extraterritorial Application of U.S. Law

- Unless a contrary intent appears, U.S. legislation is presumed to apply only within the territorial jurisdiction of the U.S.
  - This presumption protects against conflicts with the interests of other nations which could damage international relationships.
  - Court must "look to see whether 'language in the [statute] gives any indication of a congressional purpose to extend its coverage beyond places over which the U.S. has sovereignty'"
  - The court will "assume that Congress legislates [with knowledge of] the presumption against extraterritoriality."
  - Therefore, unless Congress clearly shows its intention to regulate extraterritorially, the courts assume that a law is intended to apply only domestically.
  - Standard "boilerplate" language is insufficient to show this intention.
  - (But antitrust law is treated somewhat differently for historical reasons).

--*EEOC v. Arabian American Oil Co.,* 499 U.S. 244 (1991).

# Jurisdiction to Prescribe: Extraterritorial Application of U.S. Law

- In *Hartford Fire Insurance Co. v. California,* 509 U.S. 764 (1993), the Supreme Court was asked to find that the doctrine of international comity prevented jurisdiction over antitrust claims for conduct of reinsurers.
- Conduct of the reinsurers was not prohibited in England where it took place.
- The court did not decide whether the doctrine of "international comity" would ever be a ground for declining to find that a statute covered foreign conduct.
- The court found that, where there is not a "true conflict between domestic and foreign law", there was no reason to consider the doctrine of international comity.
- Under this reasoning, the U.S. could regulate any conduct (even if not related to the U.S.) in any country, so long as the country's own law did not specifically say the conduct was legal. (Contrary to the Restatement approach).

# Jurisdiction to Prescribe: Extraterritorial Application of U.S. Law

- In *F. Hoffman-La Roche Ltd. V. Empagran, S.A.,* 124 S. Ct. 2359 (2004), the Supreme Court was asked to determine whether the antitrust laws allowed a plaintiff to recover for injuries suffered abroad as a result of a foreign conspiracy where the conspiracy had effects within the United States.
  - "This Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law –law that (we must assume) Congress ordinarily seeks to follow."
  - "Our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."
  - Court found it unreasonable to apply antitrust law to foreign conduct where plaintiffs' only injury was suffered outside the United States.

# Current Status: Jurisdiction to Prescribe

- Courts find no constitutional limitations on the ability of Congress to regulate foreign activity.
- However, courts are sensitive to international implications of broad assertions of jurisdiction.
- Courts generally construe statutes as regulating only domestic activity unless a clear intention to regulate internationally has been stated.
- Even where a statute applies to foreign conduct, the courts will consider various means of limiting its application, but the courts do not appear to claim the authority to contradict the clearly stated intentions of Congress in this fashion.

# OUTLINE

## IV. Foreign Sovereign Immunity

# Foreign Sovereign Immunity

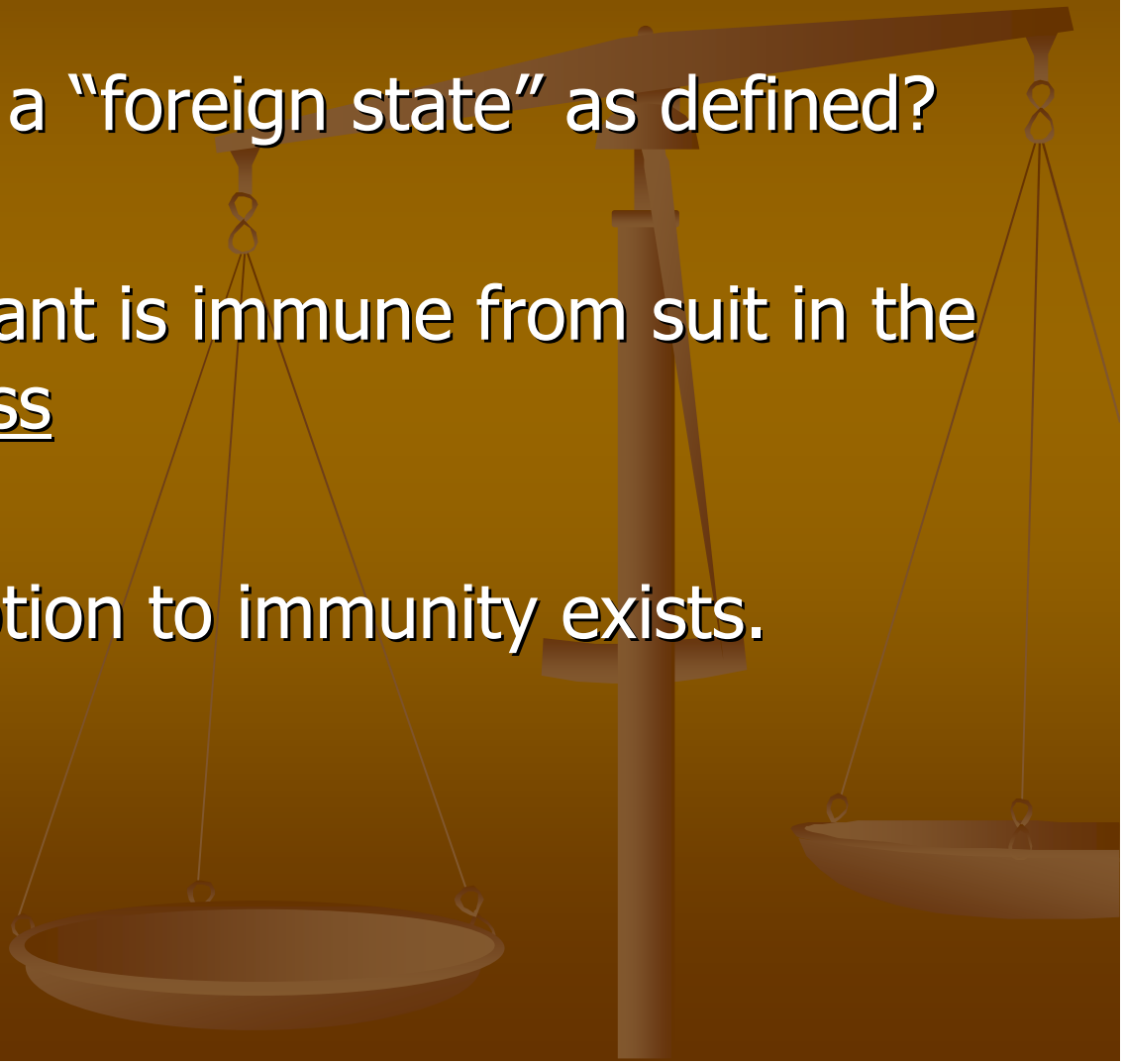
- Issue: when can a foreign government or agency be sued in U.S. courts?
- Historic understanding: sovereigns were completely immune from (not subject to) being sued in court. "Absolute theory" of sovereign immunity.
  - Theory that "the king can do no wrong."
  - Concern with impact on foreign relations.
- As sovereigns became more significant commercial actors, this changed.
- 1952 – the "Tate Letter" – U.S. State Department announced that it would follow the "restrictive theory" of sovereign immunity.
  - A foreign state is immune in connection with its public or sovereign acts.
  - But not in connection with its private or commercial acts.

# The Foreign Sovereign Immunities Act ("FSIA") - 1976

- Enacted in 1976. States national rules for assertion of jurisdiction in cases involving foreign sovereigns (including agencies).
  - General principle of immunity from suit in any U.S, court, with stated exceptions.
  - Gives foreign sovereigns certain procedural rights when sued (specified manner for being served with process, longer time to respond, protections against default, right to be heard in federal court).
  - No punitive damages; no jury trial.
  - Protections against seizure of assets to satisfy judgment.

# FSIA: Analysis of Immunity

1) Is the defendant a "foreign state" as defined?
   - 28 U.S.C. § 1603
2) If so, the defendant is immune from suit in the U.S. courts, unless
   - 28 U.S.C. § 1604
3) a specified exception to immunity exists.
   - 28 U.S.C. § § 1605-07



# FSIA: What Is a "Foreign State"?

- Includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined below.
- 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 States of the United States … nor created under the laws of any third country.
- Therefore, "foreign state" includes some government-owned entities.

# FSIA: Government-Owned Entities as "Foreign States"

- Must be directly, not indirectly, owned by the foreign government. "Second-tier subsidiaries" do not qualify.
  - *Dole Food Co. v. Patrickson,* 2003 WL 1906158 (U.S. 2003)
- Some courts have allowed "pooling of interests" of different states – adding the percentages of ownership – to determine whether the majority-ownership requirement is met.
  - *In re Air Crash Disaster near Roselawn, Indiana,* 96 F.3d 932 (7th Cir. 1996)
  - Under FSIA test, entity cannot be "created under the laws of any third country."

# FSIA: Exceptions to Immunity

- Express or implied waiver (even if waiver withdrawn)
- Commercial activity, where the claim is based upon:
  1. a commercial activity carried on in the U.S. by the foreign state;
  2. an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or
  3. an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
- Rights in property taken in violation of international law are in issue and that property (or proceeds):
  1. is present in the U.S. in connection with a commercial activity carried on in the U.S. by a foreign state;
  2. is owned or operated by an agency or instrumentality of the foreign state that is engaged in a commercial activity in the U.S.

# FSIA: Exceptions to Immunity

- Rights in real estate within the U.S. or property in the U.S. acquired by succession or gift are at issue.
- Commercial activity, where the claim is based upon:
  1. a commercial activity carried on in the U.S. by the foreign state;
  2. an act performed in the U.S. in connection with a commercial activity of the foreign state elsewhere; or
  3. an act outside the territory of the U.S. in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
- Personal injury, death, or property loss or damage within the U.S. caused by wrongful act or omission of the foreign state or official, EXCEPT FOR:
  1. performance, non-performance, or wrongful performance of discretionary functions;
  2. claims for malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights

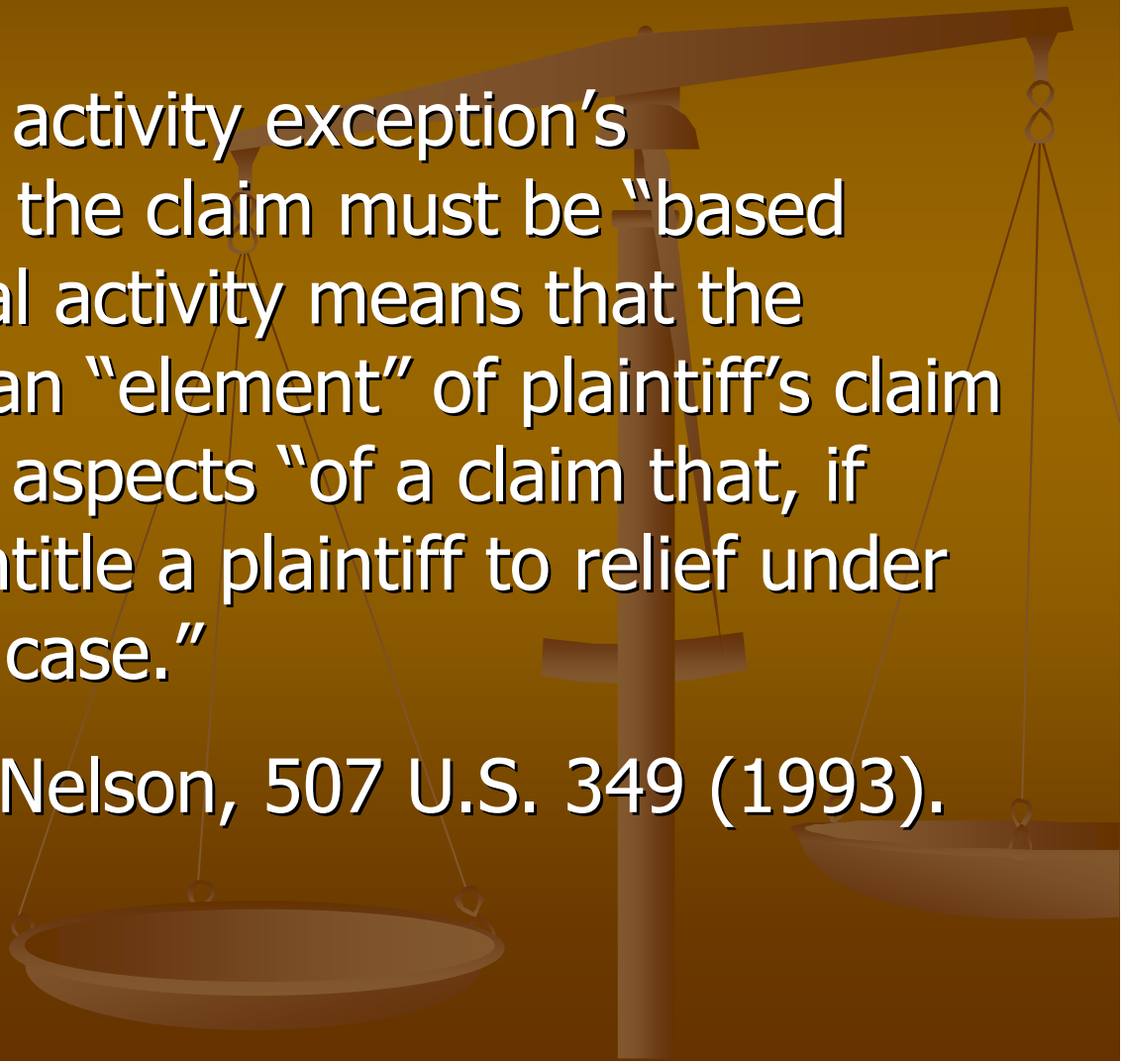
# FSIA: Exceptions to Immunity

- Arbitration (compelling arbitration and confirming awards), so long as there is an appropriate U.S. connection to the dispute.
- Claims for torture, extrajudicial killing, aircraft sabotage, hostage taking, BUT ONLY IF
  1. the foreign state has been officially designed by the U.S. as a state sponsor of terrorism;
  2. the claimant or victim was a U.S. national at the time of the act; and
  3. if the act occurred in the foreign state, the claimant has given the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration.
- Counterclaim to actions initiated by the foreign state.

# FSIA: The Commercial Activity Exception

- "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).
- Difficult to determine what is a "commercial activity."
  - Argentina's issuance and rescheduling of bonds as part of a plan to stabilize its currency was a commercial activity.
  - Its purpose in selling the bonds was irrelevant. Selling bonds is the type of activity that private interests can engage in.
  - *Republic of Argentina v. Weltover, Inc.,* 504 U.S. 607 (1992).

# FSIA: The Commercial Activity Exception



- FSIA commercial activity exception's requirement that the claim must be "based upon" commercial activity means that the activity must be an "element" of plaintiff's claim – *i.e.*, one of the aspects "of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case."
- Saudia Arabia v. Nelson, 507 U.S. 349 (1993).

# Current Status: Foreign Sovereign Immunity

- The subject is exclusively regulated by the FSIA.
- In general, the courts are hostile to claims against foreign sovereigns.
- Exceptions: claims based on true business activity, arbitration claims, and claims in which the foreign state has clearly agreed to be subject to jurisdiction in the U.S.

# OUTLINE

## IV. The Act of State Doctrine

# The Act of State Doctrine

- Related to, but different from foreign sovereign immunity.
- Foreign sovereign immunity focuses on which parties can be brought into court in the U.S.
- Act of state doctrine focuses on which issues can be considered by the U.S. courts.
- Issue: when will the U.S. courts consider, as part of deciding a lawsuit before them, the validity or invalidity of a foreign government's action?

# The Act of State Doctrine: Historical Development

- Historically, the courts refused to consider the validity of the actions of foreign sovereigns within their own territory. *Underhill v. Hernandez,* 168 U.S. 250 (assault and detention within Venezuelan of American citizen):

  "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. Redress of grievances by means of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

- The courts continued to apply this doctrine following the Cuban revolution, when the Cuban revolutionary government expropriated property in which American companies had interests. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398 (1964).

- In response to the courts' failure to protect American interests against the expropriation, Congress passed the "Hickenlooper Amendment", which excludes from the act of state doctrine (i.e., allows to be heard) claims for expropriation of property in violation of international law.

# The Act of State Doctrine: Exceptions

- Expropriation of property in violation of international law (unless the President determines that the doctrine should apply). (Hickenlooper Amendment). (Property must be before the court).
- Possibly a commercial activity exception. *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682 (1976) (plurality opinion only).
- Treaty exception. *Kalamazoo Spice Extraction Co. v. Government of Socialist Ethiopia,* 729 F.2d 422 (6th Cir. 1984). (Treaty of amity and commerce provided that nationals' "property shall not be taken except for a public purpose, nor shall it be taken without prompt payment of just and effective compensation.")
- Arbitration exception (enforcing arbitration agreements, enforcing arbitration awards, and execution of judgments based upon arbitration awards). Federal Arbitration Act, 9 U.S.C. §15.

# Current Status: The Act of State Doctrine

- U.S. courts will generally refrain from examining the validity of acts of a governmental character done by a foreign state within its own territory and applicable there.
- Exceptions to this rule exist.
- The doctrine does not mean that courts cannot reach conclusions that foreign officials acted illegally (e.g., took bribes); it only means that courts cannot question the validity of foreign governmental action. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp. International*, 493 U.S. 400 (1990).

# CONCLUSION

- The U.S. domestic perspective (government structure, constitutional limitations, and common-law background) strongly affects the U.S. approach to international litigation.
- Where the courts have freedom to act, they generally decide based on policy considerations.
- International litigation in the U.S. presents tremendous opportunities for creative thinkers.

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