



The Foreign Sovereign Immunities Act
2008 Year in Review

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THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2008 YEAR IN REVIEW

by Crowell & Moring LLP¹

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The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. (“FSIA”), provides the exclusive basis for suing a foreign sovereign in United States courts. While the FSIA generally grants immunity to foreign sovereigns, it also lays out a number of exceptions under which U.S. courts can exercise jurisdiction. Plaintiffs have thus used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of contexts, ranging from purely commercial disputes to wrongful death claims on behalf of victims of state-sponsored terrorism. The purpose of this Review is to provide an overview of the primary areas of litigation under the FSIA through an analysis of judicial decisions under the statute issued in 2008.

INTRODUCTION: THE FSIA IN 2008

Litigation involving foreign sovereigns in the United States is on the rise. In the past ten years, the number of reported decisions discussing the FSIA has increased by nearly 70 percent. This dramatic increase is attributable to a variety of circumstances that continued to play out in FSIA jurisprudence in 2008.

The continued globalization of business and the increased use of international arbitration as a dispute resolution mechanism (with enforcement left to domestic courts) have resulted in an increase in purely commercial litigation involving foreign states. Thus, much litigation in 2008 centered around the “commercial activity” exception under the FSIA, including the pivotal questions of whether acts are “governmental” or “commercial” when undertaken by sovereign entities or their agencies and instrumentalities, and how close a nexus such acts must have to the United States to fall within the statute. While the courts continue to grapple with these issues, the decisions in 2008 have provided some additional guidance in this constantly evolving area of the FSIA.

Another significant trend in 2008 was the continued growth in cases arising out of the 1996 “Terrorism Exception” to the FSIA, which authorized U.S. victims to sue foreign governments (and their agents) designated by the U.S. as “state sponsors of terrorism” for “personal injury or death” caused or sponsored by the defendants.² Terrorism-related litigation is likely to increase further, given the passage in 2008 of the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”),³ which, for the first time, established a federal private right of action against terrorist states, and authorized punitive damages, in addition to damages for property loss.

Overall, FSIA cases in 2008 continued to address the core issues facing foreign sovereigns in U.S. litigation, including:

² More than 35% of all reported FSIA decisions in 2008 involved terrorism-related claims – an increase of more than 15% from 2002 and nearly 25% from 1998.

³ Pub. L. No. 110-181, 122 Stat. 3 (2008).

We are available to assist in addressing any questions you may have regarding the Foreign Sovereign Immunities Act or any of the issues raised in this 2008 Year in Review. Please contact any members of our FSIA litigation team:

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