

## SECOND CIRCUIT LIMITS RETROACTIVE APPLICATION OF FOREIGN SOVEREIGN IMMUNITIES ACT

The United States Court of Appeals for the Second Circuit recently reversed a decision by Judge David G. Trager in the Eastern District of New York dismissing claims by Holocaust survivors against the French national railroad company. *Abrams v. Société Nationale des Chemins de Fer Français*, No. 01-9442, 2003 U.S. App. LEXIS 11713, at \*37 (2d Cir. June 13, 2003). In *Abrams*, the central issue before the court was the retroactive applicability of the Foreign Sovereign Immunities Act of 1976,

28 U.S.C. §§ 1602 et seq. (2004) (FSIA) to the operation of Société Nationale des Chemins de Fer Français (SNCF) between 1942 and 1944 during World War II. The Second Circuit held that the FSIA does not govern claims based on conduct occurring prior to its enactment, but that pre-FSIA principles and practices would be determinative, remanding the case to the district court.

### DISTRICT COURT CONCLUDED THAT FOREIGN SOVEREIGN IMMUNITIES ACT APPLIES RETROACTIVELY

In *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001), the plaintiffs alleged that SNCF had violated international law during the World War II Nazi occupation of France by transporting Jews to concentration camps. SNCF moved to dismiss for lack of subject matter jurisdiction, asserting that it was an agency of the French state, and therefore entitled to sovereign immunity for its alleged actions under the FSIA, or, alternatively, under sovereign immunity law existing prior to the 1976 enactment of the FSIA. At the outset, the district court concluded that SNCF qualified as a foreign sovereign since it is wholly-owned by the French government. *Id.* at 429.

The court further concluded that Congress had enacted the FSIA to codify preexisting sovereign immunity law. Before 1952, foreign states could assert absolute immunity from actions brought against them in the United States. Precedent was unclear whether that absolute immunity extended to such state's agencies and instrumentalities. In 1952, the United States Department of State (State Department) adopted the "restrictive" theory of foreign sovereign immunity under which

immunity was restricted to the state's public acts and, therefore, did not apply to its purely commercial acts. *Id.* at 426-27. Moreover, the State Department was responsible for recommending on a case-by-case basis whether sovereign immunity should be granted, making the decisions susceptible to political and diplomatic pressure. To obviate such case-by-case determinations, and to clarify the sovereign immunity standards, Congress passed the FSIA to codify "restrictive" immunity. *See id.* at 426-27. Citing to § 1602 of the Act, the court concluded that the Act applied to claims brought after its enactment, even if the conduct occurred before 1976. The district court noted that: "Congress directed that 'claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.'" *Id.* at 436-37 (emphasis added).

In addition, the district court followed the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), where the Court held that jurisdictional statutes apply to claims brought after their enactment. *See id.* at 433-38. The Court

stated that the relevant issue with respect to the application of a jurisdictional statute is “whether or not jurisdiction lay when the suit was filed.” *Id.* at 435 (quoting *Lindb v. Murphy*, 521 U.S. 320, 274 (1997)). By this reasoning, the district court found

that the grant of sovereign immunity under the FSIA applied retroactively to SNCF, despite plaintiffs’ contention that such application prevents claims that could have been brought in the United States absent the FSIA.

## SECOND CIRCUIT REJECTS RETROACTIVITY OF THE FSIA AND REMANDS CASE TO DISTRICT COURT

The Second Circuit rejected the retroactive application of the FSIA despite the fact that it codified preexisting law granting foreign sovereigns immunity from suits in the United States based on their public and noncommercial activities. The court also concluded that there was not enough information to determine whether the plaintiffs could in fact have brought their claims under immunity laws in effect during World War II. The court agreed that, prior to 1952, the United States conferred absolute immunity on foreign states from suit in the United States. However, the Second Circuit’s interpretations of the Supreme Court’s decisions in *Landgraf* and *Lindb* led to a different conclusion with respect to the retroactive application of the FSIA. The Second Circuit deduced a two-step analysis from these two cases to determine whether a statute could be retroactively applied. The first question under the analysis is whether Congress explicitly indicated that the statute should apply to events that occurred before its enactment. *Abrams*, 2003 U.S. App. LEXIS 11713, at \*31. The Second Circuit found that the language of the statute, particularly the word “henceforth,” is ambiguous since it can refer to either the timing of the claim or the timing of the underlying events. The court also found the phrase “district courts *shall* have original jurisdiction” ambiguous, despite plaintiffs’ assertion that it meant that Congress intended for the FSIA to apply only to events occurring after its enactment. *Id.* at \*34 (emphasis added).

Since this examination of the statutory language did not resolve the issue of retroactivity, the court then turned to the

second part of its analysis, invoking the *Landgraf* reasoning regarding the retroactive effect of a statute. According to *Landgraf*, retroactive application is impermissible if it would preclude claims that otherwise could have been brought in the United States and thus affect more than the forum. *Id.* at \*36-37. Disallowing the plaintiffs’ claims in federal court by applying the FSIA would prevent their actions altogether since they would not be able to file suit in state court either. *Id.* at \*39. Consequently, the court found that the FSIA should not apply retroactively to the claims against SNCF.

Absent sovereign immunity under the FSIA, the court concluded that an open issue remained as to whether the plaintiffs could have expected to litigate claims against SNCF in the United States prior to the enactment of the statute. The court remanded the case to the district court to resolve two issues regarding State Department policy: (1) whether it would have recognized claims of immunity by a corporation owned by a foreign state during World War II, and (2) whether it would have recognized the rights of that state, including sovereign immunity, when the United States was at war with that state and the claims against it related to war crimes. *Id.* at \*42. As such, this decision may be favorable to foreign states friendly to and recognized by the United States, as opposed to those with which it was at war. According to the court, resolution of these issues would clarify whether the plaintiffs could have expected to bring claims against an agency or instrumentality of the foreign sovereign in the United States at the time of the underlying conduct.

## DECISION BY SECOND CIRCUIT FAVORS SUBJECTIVE APPROACH

Essentially, the court of appeals has charged the district court with the task of ascertaining what subjective policy determination the State Department would have made six decades ago with respect to a sovereign's instrumentalities or agencies such as SNCF. Future defendants attempting to invoke the defense of sovereign immunity on behalf of an enemy state or its agencies or instrumentalities, where the conduct underlying the claims predated the FSIA, will have the very heavy burden of demonstrating that the State Department

would have supported their hypothetical requests for immunity made at the time of the conduct. Litigation involving agencies and instrumentalities of such foreign states are less likely to be dismissed for lack of subject matter jurisdiction. Furthermore, this decision to remand the case for this subjective determination has the potential to expose such agencies or instrumentalities to litigation in United States courts, even though they might have previously been immune from such actions.

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