Florida Journal of International Law

Volume 23 | Issue 1 Article 5

April 2011

Foreign Sovereign Immunity: Is the FSIA Ineffective, or is it Politics as Usual?, Samantar v. Yousuf, 130 S. Ct. 2278 (2010)

Michael Gutman

CASE COMMENT

FOREIGN SOVEREIGN IMMUNITY: IS THE FSIA INEFFECTIVE, OR IS IT POLITICS AS USUAL?, Samantar v. Yousuf, 130 S. Ct. 2278 (2010)

Michael Gutman[*]

I. FACTS

Petitioner, Mohamed Ali Samantar (Samantar), was a high-ranking government official in Somalia in the early 1980s,[1] and served as its Prime Minister from 1987 to 1990.[2] In 2004, Respondents, native Somalians and members of the Isaaq clan,[3] filed suit in the U.S. District Court for the Eastern District of Virginia pursuant to the Torture Victim Protection Act of 1991 and the Alien Tort Statute.[4] Respondents sought damages for the alleged torture and extrajudicial killings committed against them and their family members by the Somali military while Samantar was in command of that force.[5] Samantar filed a motion to dismiss, arguing that he was entitled to immunity under the Foreign Sovereign Immunity Act of 1976 (FSIA).[6] The District Court, finding it lacked subject matter jurisdiction,[7] granted Samantar's motion to

---

* The author is a rising third year law student at the University of Florida, Levin College of Law. The author would like to thank his friends, family, and girlfriend who have provided him invaluable guidance and inspiration throughout the writing process.

1. *See* Samantar v. Yousuf, 130 S. Ct. 2278, 2282 (2010) (noting that Petitioner was initially the first Vice President and Minister of Defense of Somalia from 1980-1986).

2. *Id.*

3. *Id.* The Isaaq Clan was comprised of wealthy, educated Somalian citizens, who were systematically persecuted by the military force governing Somalia in the 1980s. *Id.*

4. *See id.* at 2282-83. For further discussion, see also Jordan J. Paust, *This History, Nature, and Reach of the Alien Tort Claims Act*, 16 FLA. J. INT'L L. 249 (2004).

5. *See id.* at 2282. Respondents also claimed Petitioner knew, or should have known, about the alleged abuse while he abetted the military forces in committing the abuse. *Id.*

6. *See id.* at 2283, 2283 n.2. The FSIA reads in relevant part,

> [s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604 (2010).

7. *Samantar*, 130 S. Ct. at 2283. "The Act, if it applies, is the 'sole basis for obtaining jurisdiction over a foreign state in federal court.'" (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989)). *Id.* at 2286.

dismiss.[8] The Court of Appeals for the Fourth Circuit reversed and remanded the case,[9] and the U.S. Supreme Court granted certiorari.[10] The Court affirmed, and held that the FSIA did not govern the determination of immunity for an individual official acting on behalf of a foreign state.[11]

II. HISTORY

Initially, the doctrine of foreign sovereign immunity was governed by general common law principles.[12] At common law, in order to obtain immunity, foreign governmental representatives had to petition the State Department for a "suggestion of immunity."[13] Once a suggestion was granted, the courts would relinquish their jurisdiction.[14] Without a "suggestion of immunity," a foreign official could not be certain that he or she was free from prosecution in the United States.[15]

Before 1952, the State Department had a policy of granting virtually all petitions that were filed by friendly sovereign countries.[16] In 1952, the State Department moved to a "restrictive" theory of sovereign immunity.[17] Under, the "restrictive" theory, foreign sovereigns were granted immunity for public acts, while immunity for commercial activities was withheld.[18] Despite adherence to the restrictive theory, inconsistent application of foreign sovereign immunity remained.[19]

Throughout the 1970s, Congress became increasingly concerned that

---

8. *Id.* at 2283.

9. *Id.* at 2283-84. While noting the majority view among the circuit courts, that the FSIA did govern the immunity of an individual in his official capacity, the Court of Appeals held that "based on the language and structure of the statute, the FSIA does not apply to individual foreign government agents like [petitioner]." *Id.* at 2284 (quoting Yousuf v. Samantar, 552 F.3d 371, 381 (4th Cir. 2009).

10. *Id.* at 2284.

11. *See id.* at 2282.

12. *See, e.g., id.* at 2284.

13. *See id.*

14. *See id.* The same process was usually followed when an individual acting on behalf of a foreign state asserted a claim of immunity. *See id.* at 2284-85.

15. *See id.* at 2284; *see also* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990) ("In fact, however, the courts treated such 'suggestions' as binding determinations, and would invoke or deny immunity based upon the decision of the State Department").

16. *See Samantar*, 130 S. Ct. at 2285.

17. *Id.*

18. *Id.* ("[u]nder this theory, 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.'") (quoting Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983)).

19. *Id.* (explaining that "political consideration sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'")(quoting Republic of Austria v. Altmann, 541 U.S. 677, 690 (2004)).

the State Department was granting or withholding "suggestions of immunity" for political reasons, and not according to the common law.[20] In 1976, Congress reacted by passing the FSIA: "[t]he principal change envisioned by the statute was to remove the role of the State Department in determining immunity."[21] Unfortunately, since its inception, the judiciary has struggled to interpret the scope of the FSIA in relation to the plain language of the statute.[22]

An early case interpreting the scope of the FSIA was *Chuidian v. Philippine National Bank*.[23] In *Chuidian*, Vincente B. Chuidian sued the Philippine National Bank and Raul Daza, an official of the Philippine government, when Daza instructed the bank not to honor a letter of credit issued to Chuidian.[24] The court struggled with the issue of whether Daza, as an official acting on behalf of a foreign state, was entitled to foreign sovereign immunity under the FSIA.[25] While Daza argued he was entitled to immunity,[26] Chuidian claimed Daza was not individually covered by the Act.[27] The government[28] contended that Daza was not covered under the FSIA because he was an individual and not an association or corporation, but was nevertheless immune under

---

20. *Chuidian*, 912 F.2d at 1100. A report from the House of Representatives outlined Congress's concern:

> From a legal standpoint, if the Department applies the restrictive principle in a given case, it is in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts . . . . From a foreign relations standpoint . . . [a] private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.

Id. (quoting H.R. REP. NO. 94-1487, at 8-9 (1976) *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607).

21. *Id.*

22. *Compare In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71 (2d Cir. 2008) (holding that the FSIA governs immunity for officials acting in their official capacity), *and* Velasco v. Gov't of Indon., 370 F.3d 392, 398-99 (4th Cir. 2004) (*same*), *and* Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002) (*same*), *and* Byrd v. COFINO, 182 F.3d 380 (5th Cir. 1999) (*same*), *and* El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (*same*), *with* Enahoro v. Abubakar, 408 F.3d 877, 882 (7th Cir. 2005) (holding that individual immunity is not governed by the FSIA).

23. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990)

24. *Id.* at 1097.

25. *See id.* at 1099.

26. *Id.* Daza claimed that he fit the definition of an "agency or instrumentality of a foreign state" which was afforded immunity under the FSIA. *Id.*

27. *See id.*

28. The government appeared by way of a "Statement of Interest of the United States." *See id.*

"general principles of sovereign immunity."[29] The U.S. Court of Appeals for the Ninth Circuit held Daza's immunity was governed by the FSIA.[30] The court reasoned that due to the Act's ambiguity, limiting the application of the FSIA to individuals would be inconsistent with the goals of Congress, and a grave "unannounced departure from prior common law."[31] As such, individuals acting in their official capacity did constitute an "agency or instrumentality of a foreign state" under section 1603(b).[32] The reasoning of the *Chuidian* court became the majority view interpreting the FSIA.[33]

Upsetting the apparent consensus among the U.S. district courts and courts of appeals, the Seventh Circuit handed down a much different interpretation of the FSIA in *Enahoro v. Abubakar*.[34] In *Enahoro*, plaintiffs filed a tort action against General Abdulsalami Abubakar, a former head of state of Nigeria.[35] The plaintiffs alleged, among many other counts, that Abubakar was behind the extrajudicial killings and torture endured by them or their family members.[36] Akin to *Chuidian*, the *Enahoro* court was faced with the issue of whether the FSIA applied to individuals linked to the actions of foreign governments.[37] However, in opposition to *Chuidian*, the *Enahoro* court held the FSIA did not govern the determination of immunity for Abubakar.[38] The court, undertaking a textual analysis of the FSIA, concluded the Act was not meant to apply to individuals.[39] According to the *Enahoro* court, "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable

29. *Id.* The "general principles of sovereign immunity" referred to by the court are those found in the Restatement (Second) of Foreign Relations Law § 66(b). *See id.*

30. *Id.* at 1103.

31. *See id.* at 1101. In its reasoning, the Court mentioned three problems it had with limiting the scope of the FSIA. First, a narrow reading of the Act would encourage artful pleading, because attorneys would take advantage of the Act's ambiguity and choose the more beneficial law. Second, a bifurcated system for foreign sovereign immunity would be counter to Congress's goal of removing the State Department from the determination of immunity. Finally, there was no known authority that recognized common law principles of foreign sovereign immunity in light of the FSIA. *See id.* at 1102–03.

32. *Id.* at 1103.

33. *See generally In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 83 (2d Cir. 2008) (holding the FSIA governs immunity for officials acting in their official capacity); Velasco v. Gov't of Indon., 370 F.3d 392, 398-99 (4th Cir. 2004) (*same*); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002) (*same*); Byrd v. COFINO, 182 F.3d 380, 388-89 (5th Cir. 1999) (*same*); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (*same*).

34. Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).

35. *See id.* at 879. Abubakar "was Nigeria's head of state for the last year of the junta's reign." *Id.*

36. *Id.*

37. *See id.* at 881.

38. *Id.* at 882.

39. *See id.* at 881–82.

terms."[40]

III. INSTANT CASE

In the instant case, the Supreme Court definitively resolved the split among the U.S. circuit courts of appeals by holding that the FSIA did not govern Samantar's claim of immunity.[41] The Court focused its analysis on the plain language[42] and legislative history of the statute.[43] In so doing, the Court concluded that an individual acting in an official capacity could not constitute a "foreign state" within the meaning of the statute.[44] Consequently, an individual could not claim immunity pursuant to the FSIA.[45]

The Court specifically focused on the meaning of the phrase "agency or instrumentality of a foreign state" defined in section 1603(b).[46] The FSIA defines that phrase as an "entity" which possesses the characteristics of one of the three subdivisions laid out in section 1603(b)(1)-(3).[47] The Court noted that "'entity' typically refers to an organization [or corporation], rather than an individual."[48] Also, the Court mentioned that there are other provisions of the FSIA in which

40. *Id.* at 882.
41. Samantar v. Yousuf, 130 S. Ct. 2278, 2292 (2010).
42. The FSIA reads in relevant part:

> (a) A "foreign state" . . . 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.
>
> . . . .

28 U.S.C. § 1603 (2010).
43. *See Samantar*, 130 S. Ct. at 2285–92.
44. *Id.* at 2289.
45. *See id.*
46. *See id.* at 2286–87.
47. *Id.* at 2286. *See also* FSIA, *supra* note 42.
48. *Id.* at 2286.

Congress expressly mentions "officials" when linking their acts to those of a foreign state.[49] Yet, Congress chose not to include "officials" in the definition of "foreign state" provided by section 1603(a).[50] According to the Court, such exclusion meant that Congress did not intend the FSIA to extend immunity to individuals acting on behalf of a foreign state.[51]

To supplement its textual analysis, the Court reviewed some of the legislative history of the FSIA.[52] Among other things, the Court looked at reports from the House of Representatives that demonstrated an intent to leave diplomatic immunity outside the scope of the FSIA.[53] The Court viewed as significant the fact that the State Department believed its role in determining individual immunity was unaffected by the FSIA.[54] In light of this information, the Court concluded that individual immunity was not something Congress sought to address with the FSIA; rather, "[t]he FSIA was adopted to address 'a modern world where foreign state enterprises are every day participants in commercial activities.'"[55]

The Court examined Samantar's claim that the FSIA should be interpreted in connection with prevailing international law,[56] as well as his argument that foreign relations and protection of American officials in other countries would be undermined if the Court did not adopt his reading of the statute.[57] The Court also noted the concern of the Courts of Appeals that limiting the scope of the FSIA would encourage artful pleading, and as a result make application of the FSIA optional.[58] In addressing these issues, the Court stressed the narrowness of its holding.[59] It explained, "[w]hether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him, are matters to be addressed . . . on remand."[60] As such, the Court clearly contemplated that an individual may still be entitled to foreign sovereign immunity, but that

49. *Id.* at 2288 (citing, inter alia, 28 U.S.C.A. § 1605A(c) (Supp. 2009) (allowing suit against a "foreign state" as well as "any official, employee, or agent" of a foreign country)).

50. *See id.* at 2287.

51. *See id.* at 2289, 2289 n.12.

52. *See, e.g., id.* at 2287 n.9, 2289 n.12, 2291, 2291 n.19.

53. *Id.* at 2289 n.12 (referencing H.R. REP. NO. 94-1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610-11.

54. *Id.* at 2291 n.19.

55. *Id.* at 2291 (quoting H.R. REP. NO. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

56. *Id.* at 2290 n.14.

57. *Id.*

58. *Id.* at 2292.

59. *Id.* at 2292-93.

60. *Id.*

the determination would be governed by common law principles.[61]

IV. ANALYSIS

The Supreme Court could have deferred to the reasoning of the *Chuidian* court, and the majority of the U.S. Courts of Appeals, and concluded individual immunity was coextensive with foreign state immunity.[62] It could have rejected the *Enahoro* decision as an aberration.[63] Instead, the Court chose to rely on the plain language and legislative history of the FSIA to narrow the scope of the Act.[64]

The result of the Court's interpretation of the FSIA has been a bifurcated approach to determining foreign sovereign immunity.[65] Under this approach, individual immunity is decided in line with common law principles, while "foreign state" immunity is governed by reference to the FSIA.[66] As such, foreign countries seeking immunity on behalf of their officials are compelled to petition the State Department for a "suggestion of immunity."[67] Without such a suggestion, the district court is left to decide if immunity exists.[68]

Interestingly, the resulting bifurcated approach runs counter to the goal of Congress of removing the role of the State Department from the immunity process.[69] The instant case exposed, albeit implicitly, the flaws in the FSIA legislation. The opinion revealed that after reading the plain language of the statute, the Court interpreted the scope of the FSIA in a way that was contradictory to one of Congress's goals.

In light of the canons of statutory interpretation, it must be noted that the Court's textual analysis of the FSIA is accurate and highly relevant.[70] However, by overemphasizing the plain language of the

61. *Id.* at 2293.

62. Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990); *see also In re* Terrorist Attacks on Sept. 11, 2001, 538 F.3d 71, 75 (2d Cir. 2008); Velasco v. Gov't of Indon., 370 F.3d 392, 398-99 (4th Cir. 2004); Keller v. Cent. Bank of Nig., 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. COFINO, 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996).

63. Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).

64. *Samantar*, 130 S. Ct. at 2289.

65. *Cf. id.* at 2285 (explaining after the passage of the FSIA, it is the Act and not the common law which governs the determination of "foreign state" immunity), *with id.* at 2292-93 (concluding Samantar may still be able to gain immunity under the common law).

66. *See id.* at 2292–93.

67. *See id.* at 2284–85.

68. *See id.* at 2284.

69. *See id.* at 2285.

70. *See, e.g.*, Markovski v. Gonzales, 486 F.3d 108, 110 (4th Cir. 2007) ("Under the most basic canon of statutory construction, we begin interpreting a statute by examining the literal and plain language of the statute").

statute, the Court overlooked a significant factor in the creation of the FSIA. Congress sought to codify the restrictive theory of immunity and remove the State Department from the immunity process, so that there would no longer be inconsistent awards of sovereign immunity.[71]

However, after the Court's holding, there remains the possibility that awards of immunity will continue to be politically motivated and inconsistent.[72] Take for instance, a state-sponsored terrorist attack carried out by an official of a foreign state. Under the Court's interpretation of the FSIA, the state would automatically be immune from prosecution, unless one of the exceptions of the FSIA applies.[73] However, the individual who carried out the attack would need to petition the State Department for a "suggestion of immunity."[74] Because there are political factors that may sway the State Department, the official could end up being denied immunity, while the state that sponsored the attack would be shielded from prosecution. Considering the official was merely an agent of the foreign state, it seems unjust that immunity could be awarded to one and not the other.

Finally, the Court correctly dismissed Samantar's claim arguing a narrow reading of the FSIA would undermine foreign relations.[75] The Court also correctly dismissed Samantar's prediction that a narrow interpretation would have a negative effect on awards of individual immunity to American officials abroad.[76] This is because individuals acting in their official capacity will still be able to gain sovereign immunity.[77] The only difference is that individuals will have to seek immunity through the pre-FSIA process,[78] while the determination of "foreign state" immunity will be made strictly by the U.S. courts.[79] In the case of individual immunity, the same political implications will exist now that existed before 1976. Moreover, the inconsistent awards of immunity occuring pre-FSIA will continue to occur following this case. Therefore, it was appropriate for the Court to bypass an analysis of the effect its decision would have on international law and foreign relations.[80]

---

71. *See Samantar*, 130 S. Ct. at 2285.

72. *See id.* (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.'") (quoting Republic of Austria v. Altmann 541 U.S. 677, 690 (2004)).

73. *See Samantar*, 130 S. Ct. at 2285–86.

74. *See id.* at 2292–93.

75. *Id.* at 2289–90.

76. *Id.* at 2290 n.14.

77. *Id.* at 2292–93.

78. *Id.*

79. *Id.* at 2285.

80. *Id.* at 2290 n.14.

V. CONCLUSION

In essence, while the Court's textual analysis is admirable, the Court falls short in failing to take into account some of the goals Congress sought to achieve in enacting the FSIA.[81] Nevertheless, by interpreting the FSIA through the plain language of the statute, the Court did expose the mechanical and practical flaws of the legislation.[82] The Court did not set out to criticize Congress. Still, this case may result in Congress becoming aware of errors it committed while crafting the FSIA. The complete ramifications of this case on international law are not yet known. That being said, it would not be surprising if, in response to this case, Congress amended the FSIA to more accurately reflect its goals.

+ 81. "The principal change envisioned by the statute was to remove the role of the State Department in determining immunity." Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (1990).

82. *See Samantar*, 130 S. Ct. at 2285–92.