

III. FOREIGN SOVEREIGN IMMUNITIES ACT AND SUBJECT MATTER JURISDICTION

Abrams v. Societe Nationale des Chemis de Fer Francais

In *Abrams v. Societe Nationale des Chemis de Fer Francais*, 332 F.3d 173 (2002), plaintiff brought suit this individually and on behalf of other Holocaust victims and such heirs against the French International Railroad, Societe Nationale des Chemis de Fer Francais [hereinafter SNCF] for actions arising out of the operation of trains which transferred thousands of French civilians to Nazi concentration camps.³³ The allegation stated that SNCF violated customary international law by committing crimes against humanity and acts of war crimes.³⁴

While the Nazi's occupied France, the SNCF remained under civilian control and maintained its independence by cooperating with German authorities and satisfying their transportation requests.³⁵ In March of 1942, at the insistence of the German authorities, SNCF began transporting Jews and other "undesirables" from France to the concentration camps.³⁶

Defendant argued that the district court lacked subject matter claiming that SNCF was an "agency or instrumentality of a foreign state" as defined in the Foreign Sovereign Immunities Act of 1976 [hereinafter FSIA].³⁷ Plaintiffs argued that the FSIA should not be applied to their claims claiming that it would be "impermissibly retroactive" and issues immunity and subject matter jurisdiction should be resolved using those laws in effect in the 1940's.³⁸ Furthermore, plaintiff argued that the "SNCF was not entitled to sovereign immunity because it was organized as a corporate entity and distinct from the French government."³⁹ Additionally, plaintiff argued federal subject matter jurisdiction under the federal question statute and the Alien Tort Claims Statute.⁴⁰ In granting defendant's motion for summary judgment, the district court reasoned that plaintiffs' claims did not fall under one of the FSIA's enumerated exceptions and therefore they

33. *Abrams v. Societe Nationale des Chemis de Fer Francais*, 332 F.3d 173, 174 (2002).

34. *Id.*

35. *Id.* at 175.

36. *Id.*

37. *Id.* at 174.

38. *Abrams*, 332 F.3d at 175.

39. *Id.*

40. *Id.* at 179.

lacked jurisdiction to hear the matter.⁴¹

Prior the enactment of FSIA, issues of sovereign immunity in American courts was decided by the executive branch and they operated under the theory that a foreign sovereign cannot be sued in American courts without first obtaining consent from the sovereign.⁴² Under such a theory, “a foreign state is immune from claims arising out of the state’s governmental activities, but not immune from claims arising out of its commercial activities.”⁴³ However, under the FSIA of 1976, foreign states are immune from the jurisdiction of the federal district courts unless the FSIA provides otherwise.⁴⁴ The FSIA applies to claims brought against an instrumentality of foreign state, as defined as “first, it must be a ‘separate legal person, corporate or otherwise;’ second, it must be ‘an organ of a foreign state or political subdivision thereof;’ . . . third, it must be ‘neither a citizen of a State of the United States. . . nor created under the laws of any third country.’”⁴⁵ Here, the court found that SNCF was an instrumentality of France as of this point in time, but the evidence does not indicate whether it was such during the 1940’s.⁴⁶ However, this issue was resolved in a later case, *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003), holding that such a matter must be determined at the time the complaint is filed.⁴⁷

This court relied on the two-step test stated in *Landgraf*, to determine whether the FSIA should apply retroactively to events occurring prior to its enactment.⁴⁸ First, a court inquires, “whether Congress has expressly prescribed the statute’s proper reach.”⁴⁹ If the answer to such question is yes, then the examination ceases.⁵⁰ If the answer to such question is no, “the court must determine whether applying the statute to pre-enactment events “would have retroactive effect.”⁵¹ If the court determines that there is such an effect, the court must reject the application of the statute.⁵² Here, the court analyzed this situation using the *Landgraf* test and determined that the FSIA shall not

41. *Abrams*, 332 F.3d at 174–75.

42. *Id.* at 176–77.

43. *Id.* at 177.

44. *Id.* at 178.

45. *Id.* at 179–80.

46. *Abrams*, 332 F.3d at 180.

47. *Id.*; *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003).

48. *Abrams*, 332 F.3d at 180; *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

49. *Id.*

50. *Id.*

51. *Abrams*, 332 F.3d at 180–81; *Landgraf*, 511 U.S. 244.

52. *Abrams*, 332 F.3d at 181; *Landgraf*, 511 U.S. 244.

apply.⁵³

Therefore, this court reverses the decision to dismiss the plaintiff's complaint and remands the case for further proceedings consistent with the opinion of this court.⁵⁴

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IV. THE ALIEN TORT CLAIMS ACT AND SUBJECT MATTER JURISDICTION

Presbyterian Church of Sudan v. Talisman Energy

A. Introduction

In *Presbyterian Church of Sudan v. Talisman Energy*, the District Court for the Southern District of New York held that there was subject matter jurisdiction under the Alien Tort Claims Act [hereinafter ATCA], and that the Court could assert personal jurisdiction over a foreign corporation under New York law.⁵⁵ The Court treated Talisman Energy [hereinafter Talisman], a Canadian corporation, as a state actor for ATCA purposes and further found that Talisman's acts constituted *jus cogens* violations.⁵⁶

This Court's ruling reaffirmed Second Circuit and international treaty precedent, which holds that corporations may be held liable for *jus cogens* violations under the ATCA.⁵⁷ However, the District Court's ruling expanded the Court's subject matter jurisdiction under the ATCA. First, the Court reaffirmed that a corporation engaging in genocide need not act under color of state law in order to be subject to *jus cogens* violations under the ATCA.⁵⁸ Secondly, the Court determined that even if a corporation were not acting directly under color of state law, demonstration of a "substantial degree of cooperation" between a corporation and a state is sufficient to treat the corporation as a state actor under the ATCA.⁵⁹

53. *Abrams*, 332 F.3d at 186.

54. *Id.* at 188.

55. *Presbyterian Church of Sudan v. Talisman Energy*, 244 F. Supp. 2d 289, 319,331 (S.D.N.Y. 2003) [hereinafter *Presbyterian Church*].

56. *Id.* at 328-29; *See id.* at 306.

57. *See id.* at 308-14, 316-17.

58. *Presbyterian Church*, 244 F. Supp. 2d at 328.

59. *Id.* at 328-29.