

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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McKESSON CORPORATION, <i>et al.</i> ,)
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Plaintiff,)
)
v.)
	Civil Action No. 82-220 (RJL))
)
ISLAMIC REPUBLIC OF IRAN, <i>et al.</i> ,)
)
)
Defendants.)
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STATEMENT OF INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517 and this Court’s Orders of February 25, 2009 and August 17, 2009.^{1/}

In its most recent opinion in this long-running case, the Court of Appeals for the D.C. Circuit held that the Treaty of Amity between the United States and Iran does not provide a private right of action against Iran in U.S. courts. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 491 (D.C. Cir. 2008) (“We give great weight to the fact that the United States shares this view” (quotation omitted)). The court remanded the case for a decision on three issues: (1) whether Iranian law provides plaintiff with a cause of action; (2) whether, in light of, *inter alia*, *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), plaintiff has a customary international law cause of action; and 3) whether the act of state doctrine applies to bar adjudication of plaintiff’s claims. *Id.* at 491. This Court has invited the United States to provide its views as to

^{1/} 28 U.S.C. § 517 provides that: “The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

the latter two issues.

The United States hereby provides its views, explained in more detail below: (1) no federal common law cause of action incorporating principles of customary international law is available in a case, such as this one, where jurisdiction is premised on the commercial activities exception within the Foreign Sovereign Immunities Act; and (2) the United States does not have enough information to evaluate the applicability of the act of state doctrine, and respectfully suggests that the Court may need to defer consideration of this issue until after it has determined which, if any, Iranian law causes of action are available to plaintiff in this action, what the elements of those causes of action are, and what acts or omissions of Iran are implicated by those causes of action.

I. Customary International Law

As the court of appeals' most recent opinion in this case suggests, the leading case on the availability of customary international law as a basis for a cause of action in federal court is *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). In *Sosa*, a Mexican national who had been abducted in Mexico and taken to the United States to stand trial for murder sued a Mexican national who had participated in the abduction, alleging violations of customary international law. The plaintiff claimed jurisdiction pursuant to the Alien Tort Statute ("ATS"), which provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

The plaintiff in *Sosa* contended that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of

international law.” *Sosa*, 542 U.S. at 713. The Court dismissed this reading of the ATS as “implausible.” *Id.*; *see also id.* at 729 (“All Members of the Court agree that § 1350 is only jurisdictional.”). The defendant in *Sosa* contended that the ATS “was stillborn” because it could have effect only if Congress enacted international law causes of action, which Congress had not done. *Id.* at 714. The Court rejected this position as well, holding instead that ATS jurisdiction permits federal courts to exercise “residual common law discretion” to “creat[e] a private cause of action” in certain circumstances. *Id.* at 738. Given the unique interpretive challenges posed by the 200-year-old statute, the Court emphasized that the courts’ authority to fashion new causes of action was limited to “a narrow class of international norms.” *Id.* at 729; *see id.* at 725 (“[T]here are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind.”).

In dissent, Justice Scalia suggested that the Court’s reasoning made the ATS superfluous: “If the law of nations can be transformed into federal law on the basis of (1) a provision that merely grants jurisdiction, combined with (2) some residual judicial power (from whence nobody knows) to create federal causes of action in cases implicating foreign relations, then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS.” *Id.* at 745 n.*. The Court rejected Justice Scalia’s view, suggesting that, while the ATS authorizes courts to fashion “a narrow set of [federal] common law actions derived from the law of nations,” *id.* at 721, not all sources of jurisdiction would provide a basis for courts to develop claims based on customary international law:

Our position does not, as Justice Scalia suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350). Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.

Id. at 731 n.19.

The Court's response to Justice Scalia's dissent demonstrates that the Court, in holding that a limited set of federal common law causes action premised on norms of customary international law may be brought in cases where jurisdiction is founded on the ATS, did not hold that similar authority is conferred by every jurisdiction statute. Rather, the relevant inquiry is whether or not the language, purpose, structure and history of a statute providing the court's jurisdiction in a given case establishes that the statute was, like the ATS, "enacted on [an] understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations." 542 U.S. at 731 n.19.^{2/}

The suit here is not premised on the ATS.^{3/} Rather, plaintiff claims jurisdiction pursuant to 28 U.S.C. § 1330, which was enacted as part of the FSIA and confers federal subject matter jurisdiction in cases where foreign sovereign immunity has been lifted elsewhere in the FSIA.

^{2/} *Sosa* makes clear that customary international law does not, in its own right, provide private rights of action. The question, rather, is whether a court should fashion a cause of action as a matter of federal common law based on a particular international law norm incorporated into the federal common law.

^{3/} Indeed, the Supreme Court has held that the ATS does not supply jurisdiction for suits against foreign sovereigns. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

The FSIA sets forth a general rule of foreign sovereign immunity, 28 U.S.C. § 1604, and then establishes a number of exceptions for categories of cases in which “[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States,” 28 U.S.C.

§ 1605(a). When a case falls within a category where immunity is lifted, “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 1606.

The category in which this case falls is the so-called commercial activities exception, which provides jurisdiction over a foreign state, *inter alia*, where the action is based upon “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C.

§ 1605(a)(2). The question presented is thus whether the commercial activities exception in the FSIA was “enacted on [an] understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.” *Sosa*, 542 U.S. at 731 n.19. The answer, made clear from the text, structure, purpose and legislative history of the FSIA, is that the commercial activities exception does not serve as a basis for courts to formulate new federal common law causes of action to sue for commercial activities based on claimed violations of customary international law.

The legal landscape against which the commercial activities exception was enacted strongly suggests that Congress would not have intended that courts, in the exercise of jurisdiction pursuant to that provision, fashion common law causes of action derived from the law of nations. Nearly forty years before the FSIA’s enactment, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), had not only held that “[t]here is no federal general common law,” but had

also reversed *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), which had applied general common law to a commercial claim based on a bill of lading. *See* 304 U.S. at 75 (“general law” includes commercial law). It would have been anomalous had Congress drafted a commercial activities provision that implicitly revived *Swift* by licensing federal courts to create federal common law causes of action based on customary international law for ordinary commercial acts.⁴ Moreover, the express purpose of the commercial activities exception was not to confer on the federal courts broad federal common lawmaking powers, but rather, to codify practice under the State Department’s 1952 Tate Letter, which directed that foreign states could be held civilly liable in the courts of the United States for commercial activities that could equally have been conducted by private parties. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Att’y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-715 (1976).

Against this background, it is not surprising that the text of the commercial activities exception speaks only about the nexus required between the commercial activity and the act that gives rise to the plaintiff’s claim, and contains no affirmative indication that it was intended to authorize a court to fashion a new cause of action incorporating international law principles as a matter of federal common law. Indeed, in the very same month that it decided *Sosa*, the Supreme Court held: “The FSIA simply limits the jurisdiction of federal and state courts to

⁴ Compare 28 U.S.C. § 1605(b) (providing jurisdiction over certain admiralty suits for the application of admiralty law, which incorporates general maritime law (*see East River Steamship Corp. v. Transamerica Delaval, Inc.* 476 U.S. 858, 864-65 (1986) (“Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modification of those rules, and newly created rules.”); *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (describing general maritime law as “the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men”)).

entertain claims against foreign sovereigns. *The Act does not create or modify any causes of action.*” *Republic of Austria v. Altmann*, 541 U.S. 677, 695 n.15 (2004) (emphasis supplied).

The D.C. Circuit has observed that § 1606 of the FSIA, which makes foreign states liable to the same extent as similarly situated private parties, “instructs federal judges to find the relevant law, not to make it.” *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003); *accord id.* at 338 (holding that courts “have no freewheeling commission to construct common law as we see fit” because the FSIA “instructs us to find the law, not to make it”).⁵ And, as stated, there is nothing in the text of the commercial activities exception that could suggest that it was enacted with the expectation or understanding that cases encompassed by it would be decided under federal common law.

The FSIA’s legislative history makes it clear that the commercial activities exception was meant to provide jurisdiction for ordinary commercial claims concerning conduct of states in a non-sovereign capacity – conduct that generally would be governed by municipal commercial law rather than international law. *See* H.R. Rep. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (“[T]he immunity of a foreign state is ‘restricted’ to suits involving a foreign state’s public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*).”).⁶

⁵ *See also Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 2006 WL 2384915, at *12 (D.D.C. May 11, 2006) (holding that plaintiffs could not maintain a customary international claim in a case brought pursuant to the terrorism exception within the FSIA).

⁶ *See also Rong v. Liaoning Province Government*, 452 F.3d 883 (D.C. Cir. 2006) (commercial activities exception did not apply to suit alleging conversion, expropriation, violation of international law, and unjust enrichment); *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) (commercial activities exception rejected as jurisdictional foundation in suit alleging violation of international law, conversion, constructive trust, accounting, and

Unlike the ATS, the FSIA's commercial activities exception does not reflect an understanding that courts would exercise jurisdiction by fashioning new federal common law causes of action to redress commercial wrongs derived from international law. *See Sosa*, 542 U.S. at 731 n.19. To the contrary, Congress expected suits brought under the commercial activities exception to proceed under municipal causes of action, particularly contract law, that are normally available to challenge private commercial conduct. Accordingly, this court should hold that customary international law causes of action are not available in suits premised on the commercial activities exception of the FSIA.

II. The Act of State Doctrine

The act-of-state doctrine applies when an American court would be required "to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). Declaring an official act invalid means that the court renders the foreign act of state "ineffective as 'a rule of decision for the courts of this country.'" *Id.* (quoting *Ricaud v. American Metal Co.*, 246 U.S.

restitution in claim to recover property).

To the extent that the FSIA focused on acts of expropriation that would implicate international, and not merely municipal, law, Congress addressed such acts not in the commercial activities exception, but rather, in the "takings" exception, which lifts foreign sovereign immunity in certain cases where "rights in property [were] taken in violation of international law." See 28 U.S.C. § 1605(a)(3). In a suit brought against a sovereign pursuant to the takings exception, the property at issue must be located in the United States, which is not the case here. Presumably for this reason, Plaintiff has not plead the applicability of the takings exception. Thus, the question whether the takings exception provides jurisdiction to entertain international law-based causes of action, or whether the claimed violation of international law in that context merely triggers a court's jurisdiction to decide the property rights issue pursuant to applicable municipal law, is not presented in this case.

304, 310 (1918)). Thus, the act-of-state doctrine is implicated when “the outcome of the case turns upon the effect of official action by a foreign sovereign.” *Id.* at 406; *see also Underhill v. Hernandez*, 168 U.S. 250 (1897) (act of state doctrine barred a suit for damages for allegedly unlawful detention by a revolutionary force which subsequently became the government of Venezuela).

This doctrine, which has “constitutional underpinnings,” *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), “expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.” *Id.* Nevertheless, the doctrine applies only “when a court *must decide* – that is, when the outcome of case turns upon – the effect of official action by a foreign sovereign.” *Kirkpatrick*, 493 U.S. at 406 (emphasis in original). “The act of state doctrine does not establish an exception [to courts’ duty to decide cases] for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.” *Id.* at 409.

Moreover, even when the elements of the doctrine – *i.e.*, the case cannot be decided without the court passing on the validity of an official act of a foreign sovereign – are met, the Supreme Court has counseled that a court may still refrain from applying the doctrine if “the policies underlying the act of state doctrine” would not be served by its application. *Id.* These purposes include “international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations.” *Id.* at 408.

The question of whether a ruling in this matter would require application of the act of state doctrine cannot be answered by the United States at the present time. This question may turn on the particular claims and defenses of any viable causes of action that the court finds applicable here, as well as factual determinations as to the role, if any, that capital controls played in Pak Dairy's decisions. If the court finds that plaintiff's claims are premised on the non-payment of dividends by the board of directors of Pak Dairy, rather than formal acts of the government of Iran, it may conclude that there have been no acts of state that would require further consideration of the doctrine. *See Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682 (1976).⁷

The United States thus respectfully suggests that the Court may wish to defer consideration of the applicability of the act of state doctrine until after the Court has determined which municipal law causes of action, if any, are viable here and what acts or omissions of Iran are relevant to those causes of action.

CONCLUSION

For the reasons stated above, the Court should find that a plaintiff may not maintain a federal common law cause of action based on customary international law in a suit where jurisdiction is premised on the commercial activities exception within the FSIA. In addition, the United States respectfully suggests that the Court may wish to defer consideration of the applicability of the act of state doctrine at this time.

⁷ The imposition of capital controls could qualify as a sovereign act that would implicate the act of state doctrine. *See Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (holding that exchange rate controls are sovereign in nature even if done for the purpose of monetary gain).

September 28, 2009

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