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*Impact of Foreign Sovereign Immunity on EPA's New,
But Not Necessarily Improved, Gasoline Rule*

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Abstract by Janet C. Goldberg

In 1996, the World Trade Organization (WTO) found that the United States violated the General Agreement on Tariffs and Trade (GATT) because the Environmental Protection Agency's (EPA) regulations for imported foreign gasoline were stricter than regulations for domestically refined gasoline. GATT required that the United States accord treatment to products from GATT signatory nations that was no less favorable than that accorded to like products of domestic origin. EPA's regulations did not provide equally favorable treatment; the regulations required foreign refiners to meet a "statutory baseline" (the average quality of gasoline in the United States in 1990), but domestic refiners were only required to meet a less rigorous "individual baseline" (the amount of air pollution that a refiner cannot exceed, which reflects the quality and quantity of gasoline produced at each refinery). In response to the WTO ruling, the EPA issued a new Gasoline Rule (Rule) in August 1997. The new Rule permits foreign refiners to apply for an individual baseline. Under the new EPA rule, a foreign government-owned refiner explicitly waives, by implication, its right to claim sovereign immunity when it submits an application for or operates under an individual baseline. Thus, the new Rule offers a hybrid "implicit-explicit" waiver in which foreign government-owned refiners explicitly waive their immunity by implicit means. Under the new Rule, refiners are not required to provide a signature to waive their rights. Rather, the refiners waive sovereign immunity when they apply for or operate under an individual baseline.

Foreign government-owned refiners' explicit waiver of sovereign immunity, as provided in the new Rule, is unnecessary because importation of gasoline fits into the "waiver by implication" and "commercial activities" exceptions to the Foreign Sovereign Immunities Act of 1976 (FSIA). Under the FSIA, waiver by implication occurs when foreign sovereigns: agree to arbitration in the United States; agree that a contract, to which they are a party, will be governed by United States' laws; or file a responsive pleading without invoking the sovereign immunity defense. In addition, the FSIA prohibits the granting of sovereign immunity when adjudication involves "public acts" of the state—commercial or private acts are not immune.

Although the implicitly explicit waiver in the new Rule is unnecessary, due to the availability of exceptions to the FSIA, the EPA continues to require the implicitly explicit waiver because the agency is uncertain as to how the courts will interpret the commercial activities exception in the context of administrative regulations—courts have not yet decided the extent to which sovereign immunity applies to administrative regulations. However, the continued presence of the implicitly explicit waiver in EPA's regulations assures that the EPA will have to appear before the WTO again, to defend the new Rule.