

*Federal Judicial Center
International Litigation Guide*

The Foreign Sovereign Immunities Act:
A Guide for Judges

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A Guide for Judges

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I. Introduction

This guide provides an overview of the Foreign Sovereign Immunities Act of 1976 (FSIA).¹ It is intended as a practical introduction for those who have little knowledge of or experience with the statute as interpreted and applied in U.S. courts. The focus is on the basic legal issues faced by U.S. courts in cases arising under the statute.

Following this brief Introduction, the guide discusses the statute's purpose and scope of application. It reviews the jurisdictional, procedural, and evidentiary questions most likely to arise at the outset of litigation, and it discusses the entities entitled to immunity (in particular the distinctions between a "foreign state," its "political subdivisions," and its "agencies and instrumentalities"). It then provides an introductory description of the specific exceptions to immunity as well as the statutory regime applicable to execution of judgments and attachment of assets. The Addendum in Part VII discusses the terrorism exception, which was recently revised by Congress.

The FSIA governs all litigation in both state and federal courts against foreign states and governments, including their "agencies and instrumentalities." It provides the exclusive basis for obtaining jurisdiction over these entities in U.S. courts (including special rules for service of process) and contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."²

The FSIA recognizes immunity for "public acts, that is to say, acts of a governmental nature typically performed by a foreign

1. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1391(f), 1441(d), and 1602-11 (2000)).

2. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The reference to "civil actions" does not suggest, however, that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts; nothing in the text or legislative history supports such a conclusion.

state, but not for acts of a private nature even though undertaken by a foreign state.”³

A. The First Basic Rule

Under the FSIA, foreign states and governments, including their political subdivisions, agencies, and instrumentalities, are immune from suit *unless* one of the statute’s specific exceptions applies. Thus, jurisdiction exists only when one of the exceptions to foreign sovereign immunity applies. If the claim does not fall within one of the enumerated exceptions, the defendant is entitled to immunity and the courts lack *both* subject-matter and personal jurisdiction.

All FSIA cases therefore require courts to address three related questions at the outset:

1. Is the defendant a “foreign state or government” within the meaning of the statute?
2. Has valid service been made as provided by the statute?
3. Does a statutory exception to immunity apply?

If the answer to the first question is yes, the statute applies. Even when the answer to the second question is yes, the case nonetheless must be dismissed if no exception applies—“even in situations where the wrongfulness of the foreign sovereign’s conduct is clear and indisputable.”⁴

Where an exception does apply, so that the defendant lacks immunity and jurisdiction exists, the statute continues to govern the proceedings against qualified defendants. Reflecting the particular sensitivities of litigation against foreign governmental entities, the FSIA provides these entities with certain protections and benefits, such as extended time for answering complaints, a right of removal from state to federal court, entitlement to a non-jury trial,

3. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1026 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011).

4. *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 225 (D.D.C. 2012).

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limitations on award of punitive damages, and constraints against attachment of and execution against government property.

B. The Second Basic Rule

The statute also provides foreign states and their agencies and instrumentalities with immunity from execution of judgments and attachments. The rules governing this issue are in some respects more restrictive than the jurisdictional rules, so that a state or agency or instrumentality may validly be subject to a court's jurisdiction but nonetheless be insulated from execution of a resulting judgment.

The most common FSIA cases involve claims against foreign governmental entities for breach of commercial contracts for the purchase and sale of goods or services. U.S. courts are also likely to encounter suits involving the expropriation of property in a foreign country, torts committed in the United States (such as automobile accidents and slip-and-fall injuries), enforcement of foreign arbitral awards, and death or injury resulting from acts of state-sponsored terrorism abroad.

II. Purpose, Scope, and Rules of Application

Historically, like most nations, the United States accorded foreign states and governments “absolute” immunity from suit in domestic court based on principles of customary international law.⁵ Moreover, determinations of immunity were traditionally made by the executive branch and communicated to the judiciary by way of “suggestions of immunity.”⁶

In 1952, the Department of State adopted the “restrictive” theory of sovereign immunity in the so-called “Tate Letter,”⁷ reflecting its view that customary international law had evolved to permit adjudication of disputes arising from a state’s commercial activities (*acta jure gestionis*) while preserving immunity for sovereign or “public” acts (*acta jure imperii*). Twenty-four years later, the FSIA codified and expanded upon that “restrictive” approach toward immunity. It also shifted the decision making from the Department of State to the courts.⁸

5. See, e.g., *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), in which Chief Justice Marshall, noting the “perfect equality and absolute independence of sovereigns,” observed that a “foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation . . .” *Id.* at 137.

6. The term “suggestion of immunity” denotes the formal communication by which the executive branch traditionally communicates its decision to recognize a defendant’s immunity (for example, as a head of state or a foreign diplomat or other governmental official) without either intervening as a party or taking sides on an issue otherwise to be decided by the court. In contrast, when the views of the government are offered at the trial level in any case to which it is not a party, they are typically submitted in a “statement of interest.” The specific label, however, is not necessarily determinative. See generally 28 U.S.C. § 517 (2006).

7. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952) [“Tate Letter”], reprinted in 26 Dep’t St. Bull. 984–85 (1952) and *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711–15 (1976).

8. A useful recent summary of the background and purpose of the statute is set forth in *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010).

A. Purpose

The FSIA created a clear statutory basis for the judiciary's adjudication of claims by foreign sovereigns that they are immune from suit in U.S. courts. As stated in 28 U.S.C. § 1602,

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. 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.

B. Scope

Application of the statute depends in the first instance on whether the defendant is a *foreign state or government*. For FSIA purposes, no distinction is drawn between the "state" and its "government." Thus, the statute applies whether the named defendant is, for example, China, the People's Republic of China, the Government of China, or one of its integral governmental components (such as the National People's Congress, the People's Liberation Army, or the Ministry of State Security).

However, § 1603(a) raises an additional distinction by defining the term "foreign state" to include (1) a *political subdivision* of a foreign state or (2) an *agency or instrumentality* of a foreign state. As discussed in more detail below, the meaning of these terms can be elusive and somewhat confusing.

In most circumstances, political subdivisions are readily equated with the state (or government). To continue the example above, a suit against one or more of China's twenty-three provinces, five autonomous regions, or four municipalities would be treated the same as a suit against the state or government. However, if the defendant is an "agency or instrumentality" (such as the National

II. Purpose, Scope, and Rules of Application

Bauxite Trading Company of China), the statute’s rules for “agencies and instrumentalities” would apply. This important distinction between the sovereign itself and its separate agencies and instrumentalities is reflected throughout the FSIA and has concrete legal consequences, including those with respect to service of process, venue, punitive damages, attachment, and execution.

The U.S. Supreme Court recently held that the FSIA does not apply to suits against individual foreign officials in their personal capacity.⁹ This issue is also addressed in Part IV.C *infra*.

C. Basic Rules of Application

The basic rule, stated in 28 U.S.C. § 1604, is the following:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state is immune from suit in any civil action in any court of the United States unless, and to the extent that, one of the exceptions set forth in §§ 1605–1607 applies.¹⁰

In other words, there is a statutory presumption in favor of immunity for entities that meet the definition of “foreign state.” The specific exceptions in 28 U.S.C. §§ 1605–1607 are discussed in Part V *infra*. It is useful to keep in mind several other essential principles and distinctions.

9. *Samantar v. Yousuf*, 560 U.S. 305 (2010).

10. *See also* *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Because immunity under the FSIA is expressly made “[s]ubject to existing international agreements to which the United States [was] a party at the time of” the statute’s enactment, immunity may in rare cases also be based in international agreements to which the United States was a party in 1976, to the extent they conflict with the statute’s immunity provisions. *See, e.g.*, *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004) (discussing NATO Status of Forces Agreement); *767 Third Ave. Assocs. v. Permanent Mission of Republic of Zaire*, 988 F.2d 295 (2d Cir. 1993) (discussing UN Charter, UN Headquarters Agreement, Convention on Privileges and Immunities of the United Nations, and Vienna Convention on Diplomatic Relations). Later-in-time treaties, such as bilateral investment treaties, are clearly excluded. *See, e.g.*, *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 114–15 (D.D.C. 2012).

1. Exclusivity

In *Argentine Republic v. Amerada Hess Shipping Corp.*, the U.S. Supreme Court held that “the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court”¹¹ In so doing, the Court rejected the argument that preexisting jurisdictional provisions (including the Alien Tort Statute, 28 U.S.C. § 1350, and general admiralty and maritime jurisdictional statutes) authorized alternative and independent bases for suit against foreign states for violations of international law. Thus, if the defendant qualifies as a “foreign state,” the suit must be adjudicated under the FSIA.

2. Retroactivity

The statute applies regardless of whether the conduct that is the subject of the suit occurred before or after the FSIA was enacted.¹²

3. Treaty exception

The FSIA is subject to preexisting international agreements in force when the statute was enacted, to the extent there is an express conflict between its terms and the agreement in question.¹³

4. Other types of immunity

Foreign sovereign immunity differs from, but is sometimes confused with, head of state immunity as well as diplomatic and consular immunity. In U.S. law, head of state immunity arises from rules of customary international law and applies to individual heads of state and government and certain other individuals (such

11. 488 U.S. 428, 439 (1989).

12. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Writing for the majority, Justice Stevens said that “Congress’ purposes in enacting such a comprehensive jurisdictional scheme would be frustrated if, in postenactment cases concerning preenactment conduct, courts were to continue to follow the same ambiguous and politically charged ‘standards’ that the FSIA replaced.” *Id.* at 699.

13. *Moore v. United Kingdom*, 384 F.3d 1079 (9th Cir. 2004); *de Csepel v. Republic of Hungary*, 714 F.3d 591 (D.C. Cir. 2013).

II. Purpose, Scope, and Rules of Application

as foreign ministers).¹⁴ Former heads of foreign states are entitled to a more limited form of immunity.¹⁵ By contrast, diplomatic and consular immunities are based on treaty law and apply to individual representatives of foreign governments (e.g., ambassadors, embassy officials, consuls) who have been duly accredited to the Department of State.¹⁶

The immunities of most international organizations in the United States are governed by separate instruments.¹⁷ International organizations themselves will not meet the definition of a “foreign state,” and the immunities they enjoy in U.S. law typically flow either from a relevant treaty obligation (such as the Convention on

14. See, e.g., *Wei Ye v. Jiang Zemin*, 383 F.3d 620 (7th Cir. 2004); *Manoharan v. Rajapaksa*, 845 F. Supp. 2d 260 (D.D.C. 2012) (“State Department’s Suggestion of Immunity is conclusive and not subject to judicial review”); *Smith v. Ghana Commercial Bank*, Civ. No. 10-4655 (DWF) (JJK), 2012 WL 2930462, at *5–11 (D. Minn. June 18, 2012) (head of state and foreign official immunity in absence of suggestion of immunity). Cf. *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244 (W.D. Okla. 2011). Along with heads of states and governments, members of their immediate family and accompanying “entourage” may also be covered. Hazel Fox & Philip-pa Webb, *The Law of State Immunity* (3d ed. 2013), at 540–41.

15. See, e.g., *Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247 (D.D.C. 2011).

16. See, e.g., *Gomes v. ANGOP Angola Press Agency*, No. 11-CV-0580 (DLI) (JO), 2012 WL 3637453, at *8–10 (E.D.N.Y. Aug. 22, 2012) (diplomatic immunity); *Politis v. Gavriil*, Civ. Action No. H-08-2988, 2008 WL 4966914, at *5–6 (S.D. Tex. Nov. 19, 2008) (consular immunity). Immunity depends in the first instance on certification by the executive branch that the individual is so entitled as an accredited diplomat or consular officer.

17. Including (but not limited to) the International Organizations Immunities Act, 22 U.S.C. § 288(a)–(l). See, e.g., *Mendaro v. World Bank*, 717 F.2d 610 (D.C. Cir. 1983); *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980). Questions concerning the status of the United Nations require reference, inter alia, to the United Nations Participation Act, 22 U.S.C. § 287 (2011), the 1947 UN Headquarters Agreement, 22 U.S.C. § 287 note (2011), and the Convention on Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force with respect to the United States Apr. 29, 1970).

Privileges and Immunities of the United Nations) or from the International Organizations Immunities Act, not from the FSIA.¹⁸

Foreign-owned works of art on loan to U.S. museums are generally covered by a separate statute, the Immunity from Seizure Act (22 U.S.C. § 2495), but occasionally have been the subject of actions under the “expropriation” exception to the FSIA.¹⁹

5. Act of state

Foreign sovereign immunity is sometimes confused by litigants with the “act of state” doctrine. Under that judicially fashioned doctrine, U.S. courts do not “sit in judgment on the validity of the acts” of another government performed under its law and within its own territory.²⁰ However, the U.S. Supreme Court has held that “act of state” issues “only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine.”²¹

18. See *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 922 n.9 (11th Cir. 2003) (FSIA held inapplicable to OPEC because it is not a foreign state or political subdivision in its own right and, while its members are sovereign nation states, it is neither a governmental unit nor a subdivision). Cf. *European Cmty. v. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189 (E.D.N.Y. 2011) (the European Community is neither a “foreign state,” a “political subdivision of a foreign state,” nor an “agency or instrumentality of a foreign state”). For the U.S. government’s view that the EC is an agency or instrumentality and thus covered by the FSIA, see its brief *amicus curiae*, 2011 WL 4734329 (2d Cir. Oct. 5, 2011). The Convention on Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force with respect to the United States Apr. 29, 1970). The International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669 (codified as amended at 22 U.S.C. §§ 288–288I).

19. See, e.g., *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934 (D.C. Cir. 2008); *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

20. *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 309–10 (1918). This doctrine is of course subject to various exceptions.

21. *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 406 (1990). Thus, in *In re Refined Petroleum Prods. Antitrust Litig.*, 649 F. Supp. 2d

6. Political question

Foreign sovereign immunity must also be distinguished from the “political question” doctrine, which can operate to preclude judicial review of claims that call into question the decisions of the legislative and executive branches in matters of foreign policy or national security constitutionally committed to their discretion.²² At the same time, actions against foreign sovereigns in U.S. courts can “raise sensitive issues concerning the foreign relations of the United States,”²³ and because the U.S. government has a significant interest in the proper application of the FSIA, its views can be and have been sought in appropriate cases.²⁴

572 (S.D. Tex. 2009), the court dismissed antitrust claims challenging crude oil production decisions of individual OPEC Member States and the Russian Federation because to adjudicate such claims would have required it to determine the legality of public acts taken by the sovereign members of OPEC within their sovereign territories. *See also* Provincial Gov’t of Marinduque v. Placer Dome, Inc., 582 F.3d 1083 (9th Cir. 2009).

22. *Baker v. Carr*, 369 U.S. 186 (1962); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005); *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000).

23. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).

24. *See, e.g., Figueiredo Ferraz e Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384, 388 (2d Cir. 2011); *Millen Indus., Inc. v. Coordination Council*, 855 F.2d 879, 881–82 (D.C. Cir. 1988).

III. Jurisdictional, Procedural, and Evidentiary Issues

A. Subject-Matter Jurisdiction

Under 28 U.S.C. § 1330(a), federal district courts have

original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.²⁵

Accordingly, in order to ascertain whether it has subject-matter jurisdiction, a court must first determine whether the defendant meets the definition of “foreign state” in § 1603(a) and then whether the claim falls within one of the stated exceptions to immunity under § 1605(a) or § 1605A. If the defendant qualifies and no exception applies, it is immune and the court lacks both personal and subject-matter jurisdiction (even if proper service has been made). In contrast, if the claim falls within an exception to immunity (and if proper service has been made), the court has personal and subject-matter jurisdiction.

This unusual formula—conditioning subject-matter jurisdiction on the absence of immunity—creates some unique consequences, the most important of which is that it imposes an obligation on the court to determine the question of immunity as a first order of business in *all* cases. “[E]ven if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under this Act.”²⁶ At the same time, because immunity can be waived (see discussion of § 1605(a)(1) in Part V.A *infra*), a foreign state defendant in effect has the ability to provide the court with “subject-matter jurisdiction” it might otherwise lack in the given case.

25. 28 U.S.C. § 1330(a) (2010).

26. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 n.20 (1983).

B. Personal Jurisdiction

Under the statute, subject-matter jurisdiction together with valid service equals personal jurisdiction. As stated in § 1330(b), “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.”²⁷

Section 1608 prescribes the exclusive means of service on both foreign states and their agencies and instrumentalities.²⁸ These provisions are mandatory, but alternatives are specified in descending order of preference. Under § 1608(d), both states and their agencies and instrumentalities have sixty days from date of service to answer or respond to a complaint. In practice, however, effecting (and establishing proof of) service can be time-consuming and fraught with delays.

1. Foreign states and political subdivisions

Service on a *foreign state* or its *political subdivisions* must follow the requirements of § 1608(a). That section offers four alternative methods, in a descending hierarchy:

1. pursuant to a special arrangement between the plaintiff and the defendant state (for example, a contractual provision);
or
2. under an international convention, such as the Hague Service Convention; or
3. if not possible under the first two, then the clerk of court may send the summons, complaint, and notice of suit by any form of mail requiring a signed receipt to the relevant foreign ministry; or

27. 28 U.S.C. § 1330(b) (2010).

28. Implementing regulations can be found at 22 C.F.R. § 93 (2011). *See also* Fed. R. Civ. P. 4(j).

4. if service cannot be made under (3) above within thirty days, then at the plaintiff's request from the clerk to the Department of State for transmission via diplomatic channels.²⁹

The third and fourth alternatives require the summons, complaint, and notice of suit to be translated into the foreign state's official language.³⁰

2. Agencies and instrumentalities

By contrast, service on *agencies and instrumentalities* is governed by § 1608(b) and may be made

1. under any special arrangement between the parties; or
2. by personal delivery to an officer or authorized agent in the United States; or
3. if it cannot be made under (1) or (2) above, then by delivery of a copy of the summons and complaint as directed by letter rogatory, or by any form of mail requiring signed receipt, or "as directed by order of the court consistent with the law of the place where service is to be made."³¹

29. See *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39 (D.D.C. 2008) (diplomatic channels). Where service on a foreign state is made by mail under § 1608(a)(3), it must actually be sent to the head of the ministry of foreign affairs of the foreign state concerned. Attempted personal service on an embassy of a foreign state, foreign ambassador, or UN mission does not comply with the statutory requirements. *Ellenbogen v. Canadian Embassy*, No. Civ.A.05-01553JDB, 2005 WL 3211428, at *2-3 (D.D.C. Nov. 9, 2005); *Lewis & Kennedy, Inc. v. Permanent Mission of the Republic of Botswana*, No. 05 Civ. 2591(HB), 2005 WL 1621342, at *4-5 (S.D.N.Y. July 12, 2005); *Liu v. Naomi*, 208 F.3d 203 (2d Cir. 2000) (unpublished opinion) (personal service upon the consul general of a foreign state is not effective as service of process upon that foreign state). Service by U.S. diplomatic channels is governed by 22 C.F.R. § 93 (2011). Additional information on service under the FSIA is available on the Department of State's website, http://travel.state.gov/law/judicial/judicial_693.html.

30. 28 U.S.C. § 1608(a)(3) and (4).

31. *Id.* § 1608(b).

It should be noted that a number of foreign states do not permit service by mail (including under the Hague Service Convention).³²

The “state vs. agency or instrumentality” distinction has another consequence regarding service. Some courts have held that the requirements of § 1608(a) must be strictly complied with, while substantial compliance will suffice under § 1608(b).³³

3. *Minimum contacts*

In *Republic of Argentina v. Weltover*, the U.S. Supreme Court assumed (without deciding) that foreign states could be “persons” for purposes of due process protections.³⁴ Since then, several circuits have held that foreign states are *not* persons within the meaning of the Fifth Amendment and are thus not entitled to due process protections with respect to the requirement for “minimum contacts” with the jurisdiction.³⁵ As the D.C. Circuit put it, as long as subject-matter jurisdiction exists under the FSIA and service was proper, there is no “need to examine whether [a foreign state defendant] has the minimum contacts that would otherwise be a prerequisite for personal jurisdiction under the Due Process Clause of the Fifth Amendment.”³⁶

Whether the same conclusion applies to “political subdivisions” and “agencies and instrumentalities” remains an open and debated

32. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=17. On service abroad generally, see U.S. Department of State, Judicial Assistance—Service of Process Abroad, http://travel.state.gov/law/judicial/judicial_2513.html.

33. See, e.g., *Magness v. Russian Fed’n*, 247 F.3d 609 (5th Cir. 2001); *Agudas Chasidel Chabad of U.S. v. Russian Fed’n*, 798 F. Supp. 2d 260 (D.D.C. 2011); *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 2008); *O’Bryan v. Holy See*, 490 F. Supp. 2d 826 (W.D. Ky. 2005).

34. 504 U.S. 607, 619 (1992).

35. See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 95 (D.C. Cir. 2002).

36. *I.T. Consultants, Inc. v. Islamic Republic of Pakistan*, 351 F.3d 1184, 1191 (D.C. Cir. 2003).

issue. In the D.C. Circuit, the question turns on whether the state in question exercised sufficient or “plenary” control over the entity in question to make it an “agent of the [s]tate.”³⁷

For example, in *TMR Energy Ltd.*, the court found that the State of Ukraine had “plenary control” over the State Property Fund (SPF) of Ukraine because the regulations creating the SPF stated that “[t]he [SPF] is a body of the State which implements national policies in the area of privatization” and “[i]n the course of its activities, the [SPF] shall be subordinated and accountable to the Supreme Rada The activities of the [SPF] shall be governed by the Constitution and legislative acts of Ukraine, the Cabinet of Ministers of Ukraine and these Regulations.”³⁸ The court noted that “the SPF’s chairman [was] ‘appointed and discharged by the President of Ukraine subject to the consent of the Supreme Rada,’ and the members of its board must be ‘approved by the Presidium of the Supreme Rada.’ ” The court also found it significant that the SPF’s budget was funded by the State of Ukraine. Considering these “structural features,” the court held:

[I]t is apparent that the SPF is an agent of the State, barely distinguishable for an executive department of the government, and should not be treated as an independent juridical entity. Therefore, the SPF—like its principal, the State of Ukraine—is not a “person” for purposes of the due process clause and cannot invoke the minimum contacts test to avoid the personal jurisdiction of the district court.³⁹

In *Valore*, the U.S. District Court for the District of Columbia applied the logic of *TMR Energy Ltd.* to political subdivisions. Noting that the Iranian Ministry of Information and Security (MOIS) “operates as the foreign and domestic intelligence agency of Iran, is funded by Iran and operates under the guidance of Iranian Supreme Leader Ayatollah Ali Khamenei,” the court held that Iran exerts “plenary control” over MOIS and, therefore, MOIS is not a

37. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301–02 (D.C. Cir. 2005); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 71 n.13 (D.D.C. 2010).

38. *TMR Energy Ltd.*, 411 F.3d at 302.

39. *Id.*

“person” for the purpose of the Due Process Clause of the Fifth Amendment.⁴⁰

C. Venue

Venue is governed by 28 U.S.C. § 1391(f), which provides that civil actions against a “foreign state” may be brought

- (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
- (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;
- (3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or
- (4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.⁴¹

D. Applicable Law

An action against a foreign sovereign arises under federal law for purposes of Article III jurisdiction.⁴² Jurisdiction and procedure are governed by the FSIA. However, for most purposes, the statute itself does not provide the substantive law, but provides, in 28 U.S.C. § 1606, that where no immunity exists, foreign states “shall be liable in the same manner and to the same extent as a private individual under like circumstances.” Thus, state substantive law is controlling on most issues of liability in FSIA cases.⁴³ The exceptions

40. *Valore*, 700 F. Supp. 2d at 71.

41. 28 U.S.C. § 1391(f) (2010).

42. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

43. *See* *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620, 622 n.11 (1983) [hereinafter *Bancec*] (“The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state. . . . [W]here

are in the area of expropriations (under § 1605(a)(3), a court must determine whether the “taking” occurred in violation of international law) and state-sponsored terrorism (under new § 1605A, the statute provides a federal cause of action).⁴⁴

However, there appears to be a circuit split on the question of which choice-of-law rule should be used by federal courts in deciding which substantive state law to apply in a suit under the FSIA. The Ninth Circuit applies the federal rule,⁴⁵ while the Second, Fifth, and Sixth Circuits have applied the choice-of-law rule of the state in which the federal court sits.⁴⁶

state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances.”).

44. See the discussions of §§ 1605(a)(3) and 1605A in Parts V.C and V.F, *infra*, and in the Addendum in Part VII *infra*. In reference to international law generally, see *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1294–95 (11th Cir. 1999): “We may look to international law as a guide to the meaning of the FSIA’s provisions. We find the FSIA particularly amenable to interpretation in light of the law of nations for two reasons. First, Congress intended international law to inform the courts in their reading of the statute’s provisions. . . . Second, the FSIA’s purposes included ‘promot[ing] harmonious international relations. . . .’” The United Nations has adopted a convention incorporating the “restrictive” view of sovereign immunity, but the treaty is not yet in force (and the United States has not yet signed, much less ratified, it). See United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf.

45. See *Liu v. Republic of China*, 892 F.2d 1419, 1425–26 (9th Cir. 1989); *Chuidian v. Philippine Nat’l Bank*, 976 F.2d 561, 564 (9th Cir. 1992), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

46. See *Barkanic v. Gen. Admin. of Civil Aviation of the People’s Republic of China*, 923 F.2d 957, 960 (2d Cir. 1991); *O’Bryan v. Holy See*, 556 F.3d 361, 381 (6th Cir. 2009); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009).

E. Procedural and Evidentiary Issues

Because the issue is jurisdictional, a federal court must always inquire at the outset whether the defendant is entitled to immunity.⁴⁷ In most cases, the issue will arise on motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), although sometimes it may be dealt with under Federal Rule of Civil Procedure 12(b)(6) as a failure to state a claim upon which relief can be granted. It may also be presented on motion for summary judgment under Federal Rule of Civil Procedure 56, on the basis that no genuine dispute exists as to any material fact and the movant is entitled to judgment as a matter of law.

A defendant moving for dismissal for lack of subject-matter jurisdiction must present a prima facie case that it is a foreign state as that term is defined by the statute. Once the defendant establishes that prima facie case, the burden shifts to the plaintiff to show claim that one of the exceptions articulated in the FSIA applies. Nevertheless, the defendant retains the ultimate burden of persuasion to demonstrate, by a preponderance of the evidence, that an exception does not apply.⁴⁸

47. *Verlinden*, 461 U.S. at 493–94 (“At the threshold of every action in a District Court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act.”).

48. See, e.g., *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 80 (2d Cir. 2008), *abrogated on other grounds by* *Samantar v. Yousuf*, 560 U.S. 305 (2010) (on motion to dismiss for lack of subject-matter jurisdiction, defendant must present a prima facie case that it is a foreign sovereign; plaintiff then bears the burden of showing that an exception applies; but the “ultimate burden of persuasion remains with the alleged foreign sovereign.”); see also *O’Bryan*, 556 F.3d at 361; *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000); *RSM Prod. Corp. v. Fridman*, 643 F. Supp. 2d 382, 393 (S.D.N.Y. 2009). For more recent discussion, see *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 107–08 (D.D.C. 2012); *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests*, 898 F. Supp. 2d 301, 309–10 (D. Mass. 2012), *aff’d*, 727 F.3d 10 (1st Cir. 2013).

1. Jurisdictional discovery

The complaint itself should contain sufficient factual allegations for this purpose.⁴⁹ The court must review those allegations as well as any undisputed facts presented by the parties. While the FSIA aims to protect foreign sovereigns and their agencies and instrumentalities from not only liability but also discovery and other burdens of litigation, limited jurisdictional discovery may be allowed.⁵⁰

The most widely stated standard specifies that discovery must be ordered “circumspectly and only to verify allegations of specific facts crucial to the immunity determination.”⁵¹ Absent specific

49. *Cf.* *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009). *See also* *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 127 (D.D.C. 2011), *aff’d in part*, 714 F.3d 591 (D.C. Cir. 2013) (“To the extent that jurisdiction depends on factual propositions independent of the merits, the plaintiff must, on a challenge by the defendant, present adequate supporting evidence.”).

50. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 795 (7th Cir. 2011) (“[I]t is widely recognized that the FSIA’s immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery.”); *Reiss v. Société Centrale du Groupe des Assurance Nationales*, 235 F.3d 738, 748 (2d Cir. 2000) (“We think it essential for the district court to afford the parties the opportunity to present evidentiary material at a hearing on the question of FSIA jurisdiction. The district court should afford broad latitude to both sides in this regard and resolve disputed factual matters by issuing findings of fact.”).

51. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534, 537 n.17 (5th Cir. 1992) (“A necessary prerequisite to an order for limited discovery is a district court’s clear understanding of the plaintiff’s claims against a sovereign entity . . . [and] discovery may be used to confirm specific facts that have been pleaded as a basis for enforcing the commercial activities exception, but it cannot supplant the pleader’s duty to state those facts at the outset of the case.”). *See also* *Aero Union Corp. v. Aircraft Deconstructors Int’l LLC*, No. 1:11-cv-00484-JAW, 2012 WL 3679627, at *8 (D. Maine Aug. 24, 2012); *Doe v. Bin Laden*, 580 F. Supp. 2d 93, 96 (D.D.C. 2008); *Intelsat Global Sales & Mktg., Ltd. v. Cmty. of Yugoslav Posts*, 534 F. Supp. 2d 32, 34 (D.D.C. 2008); *Gabay v. Mostazafan Found. of Iran*, 151 F.R.D. 250, 257 (S.D.N.Y. 1993).

facts providing a “reasonable basis for assuming jurisdiction,” jurisdictional discovery may be refused.⁵²

Courts generally recognize two competing interests here: on the one hand, allowing plaintiffs sufficient discovery to establish that their causes of action fall within the statutory exceptions to immunity and, on the other hand, protecting the defendants’ legitimate claim to immunity, including from discovery. Thus,

jurisdictional discovery should be permitted only if it is possible that the plaintiff could demonstrate the requisite jurisdictional facts sufficient to constitute a basis for jurisdiction and it should not be allowed when discovery would be futile [and] . . . only if the plaintiff presents non-conclusory allegations that, if supplemented with additional information, will materially affect the court’s analysis with regard to the applicability of the FSIA.⁵³

Whether the FSIA applies to discovery requests directed at non-parties that may be entitled to immunity is a question of apparent first impression. One recent decision authorized issuance of letters rogatory to a foreign court requesting production of documentary and testimonial evidence from a foreign governmental instrumentality despite the latter’s claims of immunity.⁵⁴

Note that § 1605(g) provides special rules regarding discovery requests against the U.S. government in an action filed under the state-sponsored terrorism exception in § 1605A. These rules are discussed in the terrorism addendum in Part VII *infra*. In brief, § 1605(g) requires the court, upon request of the Attorney General, to stay

any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as

52. See, e.g., *Orkin v. Swiss Confederation*, 444 F. App’x 469, 471 (2d Cir. 2011).

53. *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268, 274 (D.D.C. 2008) (internal quotations and citations omitted). See also *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000).

54. *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769 (S.D.N.Y. 2012).

III. Jurisdictional, Procedural, and Evidentiary Issues

the Attorney General advises the court that such request, demand, or order will no longer so interfere.⁵⁵

In addition to various time limits and other limitations, § 1605(g)(4) states that “a stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.”⁵⁶

2. *Interpleader*

In *Republic of Philippines v. Pimentel*, the U.S. Supreme Court considered the operation of Federal Rule of Civil Procedure 19 in the context of foreign sovereign immunity.⁵⁷ Because “[g]iving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine,” the Court held that where sovereign immunity has been asserted by parties whose participation is required by Rule 19(a), the entire action must be dismissed unless the sovereign’s substantive defenses are frivolous or its interests would not be prejudiced if the litigation proceeded without its participation.⁵⁸

3. *Removal*

Few FSIA cases are filed in state courts. Notably, 28 U.S.C. § 1441(d) gives foreign states (and their agencies and instrumentalities) the right to remove to federal court any action filed against them in a state court. Removal is to the district court “for the district and division embracing the place where such action is pending.”⁵⁹ If the petitioner does not qualify as a “foreign state,” the federal court may order the case remanded. Such orders are subject to substantially limited appellate review under 28 U.S.C. § 1447(d).⁶⁰

55. 28 U.S.C. § 1605(g) (2010).

56. *Id.*

57. 553 U.S. 851 (2008).

58. *Id.* at 866.

59. 28 U.S.C. § 1441(d) (2010).

60. *Cf. Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 237 (2007).

4. Non-jury trial

Foreign states (and their agencies and instrumentalities) have the right to a non-jury trial if they so elect. Under § 1441(d), “[u]pon removal the action shall be tried by the court without jury.”⁶¹

5. Damages

Under 28 U.S.C. § 1606, foreign states themselves are not liable for punitive damages, but this limitation does not apply to agencies and instrumentalities.⁶²

6. Default

Title 28 U.S.C. § 1608(e) provides that a court may not enter judgment by default against a foreign state “unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”⁶³ Thus, even if a foreign state does not enter an appearance, the court must determine that an exception to immunity applies and that an adequate legal and factual basis exists for the plaintiff’s claims.⁶⁴ A copy of the proposed default judgment must first be

61. A waiver of immunity is not a waiver of immunity from trial by jury. *See* *Aboeid v. Saudi Arabian Airlines, Inc.*, No. CV-10-2518 (SJ) (VVP), 2011 WL 2222140, at *3 (E.D.N.Y. June 1, 2011).

62. A different rule applies in actions for personal injury or death brought under the state-sponsored terrorism exception, 28 U.S.C. § 1605A (2008), where punitive damages as well as economic damages, solatium, and compensation for pain and suffering may be awarded.

63. 28 U.S.C. § 1608(e) (2010).

64. *See* *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 18–19 (D.D.C. 2011). *Cf.* *Hill v. Republic of Iraq*, 328 F.3d 680, 684–85 (D.C. Cir. 2003) (“[T]o recover damages a FSIA plaintiff must prove that the projected consequences are ‘reasonably certain’ (i.e., more likely than not) to occur, and must prove the amount of damages by a ‘reasonable estimate’ under this circuit’s application of [*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)]. This is consistent with § 1606 and not inconsistent with § 1608(e), which is silent on damages, and assures that a FSIA plaintiff’s recovery of damages has some proportionality to the harm proved. It is fair to hold FSIA default-judgment winners to the same preponderance standard of damages as other default-judgment winners with regard to future damages, as at the damages stage the FSIA plaintiff is

sent to the foreign state or political subdivision in accordance with § 1608(a).⁶⁵

7. Appeal

While denial of a motion to dismiss for lack of personal or subject-matter jurisdiction is generally not subject to interlocutory review, a majority of the circuits have expressly held that denial of a claim of immunity is immediately appealable under the collateral order doctrine in order to prevent parties from having to litigate claims over which the court lacks jurisdiction.⁶⁶ An order granting a motion to dismiss on the basis of immunity is a final order from which an appeal may be taken under 28 U.S.C. § 1291.

no longer handicapped by the defendant's absence and proof of future damages is likely in the plaintiff's control.").

65. Under § 1608(e), service must be made on all parties, and an opportunity to respond given, before entry of default; service on the state alone is insufficient when agency or instrumentality is also named. *Murphy v. Islamic Republic of Iran*, 778 F. Supp. 2d 70 (D.D.C. 2011).

66. *See, e.g., Abelesz v. OTP Bank*, 692 F.3d 661 (7th Cir. 2012); *Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010); *Abi Jaoudi & Ajar Trading Co. v. Cigna Worldwide Ins. Co.*, 391 F. App'x 173 (3d Cir. 2010); *Hansen v. PT Bank Negara Indonesia (Persero)*, TBK, 601 F.3d 1059 (10th Cir. 2010); *La Reunion Aérienne v. Socialist People's Libyan Arab Jamahirya*, 533 F.3d 837 (D.C. Cir. 2008); *Filler v. Hanvit Bank*, 378 F.3d 213 (2d Cir. 2004). Under the collateral order doctrine, appellate review is restricted to legal issues, but the jurisdictional issue is considered *de novo* because, as stated by the Sixth Circuit in *Gould, Inc. v. Pechniney Uguine Kulhmann*, 853 F.2d 445, 451 (6th Cir. 1988), deferring the question would "frustrate the significance and benefit of entitlement to immunity from suit." *See also* Brief for the United States as Amicus Curiae Supporting Defendant-Appellants, in *Licea v. Curacao*, Nos. 11-15909, 11-15910, 11-15944, 2012 WL 3264655, at *8-14 (11th Cir. June 21, 2012).

IV. Entities and Persons Entitled to Immunity

In virtually every litigation under the FSIA, the first issue is whether the entity claiming protection of the statute qualifies as a “foreign state.” In this regard, the statute makes several important definitional distinctions.

Under 28 U.S.C. § 1603(a), the term “foreign state” includes (1) a *political subdivision* of a foreign state and (2) an *agency or instrumentality* of a foreign state. This fundamental distinction is reflected throughout the FSIA and has concrete legal consequences, since the statute provides for differing treatment of the two categories in various ways, including with respect to service of process, venue, punitive damages, execution, and attachment.

In practice, however, the distinction to be made is almost always between a foreign state proper (including its integral governmental components and political subdivisions) and its separate agencies and instrumentalities.

A. Foreign States, Components, and Political Subdivisions

Despite the practical importance of the basic distinction, neither “foreign state” nor “political subdivision” is actually defined by the statute.

1. Foreign state or government

Clearly the FSIA applies to a suit against the sovereign entity itself, whatever it is called (the Commonwealth of W, the Republic of X, the Kingdom of Y, the State of Z, or any other independent country, nation, union, principality, confederation, etc.), as well as to its government (which may be a named defendant even if not a separate juridical entity).⁶⁷

67. Not every entity aspiring to “statehood” qualifies (for example, the “Principality of Seborga”). One possibly useful reference is the CIA’s World Factbook, <https://www.cia.gov/library/publications/the-world-factbook>. The Office of the Legal Adviser at the U.S. Department of State is another. Generally speaking, the term “state,” as used in international law, denotes “an entity that

Formal diplomatic or political recognition of the foreign state or government by the United States is not a statutory prerequisite. However, in some circumstances, the fact that the U.S. Government has given formal recognition to a named defendant as a “foreign state” has been found relevant.⁶⁸ Full membership in the United Nations can also be a reliable indicator that an entity is a foreign state. However, if an entity has only “observer status” or lesser rights of participation, that would not necessarily be conclusive proof of lack of “statehood.” Some cases require difficult factual determinations.⁶⁹

2. Internal government components

The term “foreign state” encompasses not only the national government but also internal governmental or administrative units, such as provinces, prefectures and parishes, cantons and counties, governorates, states, autonomous republics or regions, capital districts, territories, dependencies, and possessions. As a matter of international law, such units are a part of the “state” just as Nevada or the District of Columbia is rightly considered part of the United States of America. Such entities may or may not have a separate legal personality or status under their own domestic law, but for purposes of the FSIA they are best considered as integral parts of their parent state as a whole. In *Rong v. Liaoning Provincial Government*, for example, the defendant (“a sovereign political subdivision of China”) was properly treated as the foreign state for FSIA purposes.⁷⁰

has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” Restatement (Third) of Foreign Relations Law of the United States § 201 (1987).

68. See, e.g., *O’Bryan v. Holy See*, 556 F.3d 361, 372–73 (6th Cir. 2009).

69. See, e.g., *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 292 (1st Cir. 2005) (“[T]he defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time.”).

70. 362 F. Supp. 2d 83 (D.D.C. 2005).

3. Government departments and ministries

Main components of a national (or central) government (such as ministries of defense, foreign affairs, finance, commerce, or interior, as well as the armed forces) are also properly considered part of the state itself.⁷¹ The same is true of central banks.⁷² Foreign embassies, consulates, and the permanent missions of member states to the United Nations, the OAS, or other international organizations in the United States will normally be included within the definition of “foreign state” because they are integral parts of their governments and lack separate legal identities and the capacity to sue or be sued in their own right.⁷³

71. *Cf.* Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Elahi, 556 U.S. 366, 370 (2009) (describing the ministry “for present purposes [as] an inseparable part of the Iranian State”); Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 214 (4th Cir. 2011) (“[A] foreign state and its armed forces are not legally separate for jurisdictional purposes”); Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003) (foreign ministry); Transaero, Inc. v. La Fuerza Aerea Boliviana, 39 F.3d 148, 153 (D.C. Cir. 1994) (armed forces); Gomes v. ANGOP, Angola Press Agency, No. 11-CV-0580 (DLI) (JO), 2012 WL 3637453, at *11 (E.D.N.Y. Aug. 22, 2012) (ministries); Jerez v. Republic of Cuba, 777 F. Supp. 2d 6, 20 (D.D.C. 2011) (armed forces, ministry of interior). However, the decisions are not uniform. *See, e.g.*, Magness v. Russian Fed’n, 247 F.3d 609, 613 n.7 (5th Cir. 2001) (Russian Ministry of Culture is a “political subdivision” for purposes of service requirements of § 1608). *See generally* Compagnie Noga D’Importation et D’Exportation, S.A. v. Russian Fed’n, 361 F.3d 676, 687–90 (2d Cir. 2004).

72. *See, e.g.*, Howland v. Hertz Corp., 431 F. Supp. 2d 1238, 1242 (M.D. Fla. 2006).

73. USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia, 681 F.3d 103, 107 (2d Cir. 2012) (“A foreign state’s permanent mission to the United Nations is indisputably the ‘embodiment’ of that state.”); *cf.* Gray v. Permanent Mission of the People’s Republic of the Congo, 443 F. Supp. 816, 820 (S.D.N.Y.), *aff’d*, 580 F.2d 1044 (2d Cir. 1978).

B. Agencies or Instrumentalities

Title 28 U.S.C. § 1603(b) does provide a definition of the term “agency or instrumentality of a foreign state”—if not an entirely unambiguous one. The term includes any entity that

1. is a *separate legal person*, corporate or otherwise; and
2. *either* is an organ of a foreign state or political subdivision thereof, *or* a majority of its ownership interest is owned by a foreign state or political subdivision thereof; and
3. is *neither* a citizen of a state of the United States *nor* created under the laws of a third country.⁷⁴

To qualify under this provision, all entities must meet the first and third criteria, as well as one of the two branches of the second criterion (“organ or political subdivision” or “majority of state ownership”).⁷⁵

1. Separate legal entity

The FSIA’s legislative history clearly reflects that the term “agency or instrumentality” was intended to be interpreted broadly:

[The] criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name. . . . As a general matter, entities which meet the definition of an “agency or instrumentality of a foreign state” could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.⁷⁶

74. 28 U.S.C. § 1603(b) (2010).

75. See *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 639 (9th Cir. 2003).

76. H.R. Rep. No. 94-1487, at 15–16 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

IV. Entities and Persons Entitled to Immunity

In this regard, the statute reflects a fundamental policy of respecting the distinction between the state itself and its separate creations or appendages. This policy was elucidated in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*,⁷⁷ where the U.S. Supreme Court noted Congress's intent that "duly created instrumentalities of a foreign state are to be accorded a presumption of independent status." It also said:

Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee. As a result, the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration would surely be frustrated.⁷⁸

As stated by the district court in *Seijas v. Republic of Argentina*,

The principal-agent exception of *Bancec* has generally been characterized as referring to the question of whether the instrumentality is an "alter ego" of the sovereign. The alter ego relationship may exist if (1) the instrumentality was established to shield the sovereign from liability, (2) the sovereign ignored corporate formalities in running the instrumentality and the sovereign exercised excessive control over the instrumentality, or (3) the sovereign has directed the instrumentality to act on its behalf, and the instrumentality has done so. An alter ego finding is not, however, justified merely because the sovereign wholly owns the instrumentality or exercises its power as a controlling shareholder.⁷⁹

77. Hereinafter *Bancec*, 462 U.S. 611 (1983). The opinion contains a description of a "typical governmental instrumentality." *Id.* at 626–27.

78. *Id.* at 626. As stated in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 440 (D.C. Cir. 1990),

It is not enough to show that various governmental entities or officials represent a majority of the shareholders or constitute a majority of the board of directors of the applicable agency or instrumentality; in other words, mere involvement by the state in the affairs of an agency or instrumentality does not answer the question whether the agency or instrumentality is controlled by the state for purposes of FSIA.

79. *Seijas v. Republic of Argentina*, No. 10 Civ. 4300 (TPG), 2011 WL 1137942, at *11 (S.D.N.Y. March 28, 2011), *aff'd*, 502 F. App'x 19 (2d Cir. 2012).

The Court’s reasoning in *Bancec* was guided by its understanding of the underlying goal of including agencies or instrumentalities in the FSIA. In so doing, Congress intended primarily to focus on “public commercial enterprises”—such as state trading corporations created for the purpose of doing business on behalf of the state. The different treatment of agencies and instrumentalities (as opposed to the state itself) serves two purposes in this regard: (1) it acknowledges the importance of separate corporate form (and the need to treat such entities as separate from the government itself), and (2) it permits the judicial resolution of disputes arising from commercial transactions and events for which no immunity is provided.

In *Bancec*, the specific question was whether the separate instrumentality could be held liable (as an “alter ego”) for the actions of the foreign state. *Bancec* had been created as an official, autonomous credit institution for foreign trade, wholly owned by the Cuban government. When it sued in U.S. court to collect on a letter of credit issued in its favor by First National City Bank, the bank counterclaimed and asserted a right to set off the value of its assets in Cuba which had been nationalized by the government. Under the circumstances, the Court held, the presumption of separate status could be overcome.

[W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be liable for the actions of the other. . . . In addition, our cases have long recognized “the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.” . . . Giving effect to *Bancec*’s separate juridical status . . . would permit the real beneficiary of such an action, the Government of the Republic of Cuba, to obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for the seizure of Citibank’s assets—a seizure previously held by the Court of Appeals to have violated international law.⁸⁰

80. *Bancec*, 462 U.S. at 629, 632.

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Courts occasionally confront the reverse situation, that is, whether the acts of the separate entity can be attributed to the state itself. The Ninth Circuit recently addressed that issue, noting that the presumption of the foreign state's separate juridical status can only be overcome when the complaint alleges "day-to-day, routine involvement" by that state in the separate entity's affairs, or when the presumption would work a fraud or an injustice.⁸¹

2. *Second criterion*

As indicated above, to qualify as an agency or instrumentality, the separate legal entity in question must also be either an organ of a foreign state or political subdivision thereof, or an entity a majority of whose ownership interest is owned by a foreign state or political subdivision thereof.

a. *State-owned corporations*

To take the easier (and more common) situation first, a foreign corporation incorporated in, and at least 50% owned by, a foreign state (or a political subdivision of that state) will typically qualify as an "agency or instrumentality" under the second criterion of § 1603(b). State-owned commercial banks are one example.⁸² Of course, as explained below, to the extent that the corporation's activities fall within the "commercial activity" exception, it will not enjoy immunity.

b. *Tiering*

In certain fields, the question of separate entities arises in the context of more complex organizational structures involving a series of holding companies and subsidiaries. Under *Dole Food Co. v. Patrickson*, an entity qualifies under the majority ownership clause of § 1603(b)(2) only if the foreign state (or political subdivision) itself directly owns a majority of the entity's shares ("one tier only").⁸³

81. See *Sachs v. Republic of Austria*, 695 F.3d 1021 (9th Cir. 2012).

82. See, e.g., *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank, Ltd.*, No. 11 Civ. 0955(PGG), 2011 WL 6187077 (S.D.N.Y. Nov. 28, 2011).

83. 538 U.S. 468, 477 (2003).

The reasoning is that a corporation and its shareholders are distinct entities, and therefore “[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary.”⁸⁴

Thus, an entity wholly owned by a corporate parent, which in turn wholly owned by the sovereign, is not entitled to benefit from that sovereign’s immunity. (*Dole* also held that the entity’s status must be determined as of the time the complaint is filed, not when the alleged tort or other actionable conduct occurred.⁸⁵)

In some situations, the separate entity in question may be majority-owned by more than one foreign state. Such “pooled entities” may meet the definition of “agency or instrumentality” under § 1603(b)(2).⁸⁶

c. Organs or political subdivisions

In practice, the more difficult issue has been in applying the first branch of the second criterion of the definition of “agency or instrumentality”—that is, in determining whether a particular defendant is properly considered an *organ* of a foreign state or a distinct *political subdivision* thereof when it is a separate entity but not one in which the government has a majority ownership interest.

The distinction arose from a recognition that not all “public commercial enterprises” created by foreign governments take independent corporate form as understood in U.S. law. The point was that a non-corporate structure—one as to which the notion of “ownership interest” was inapposite—could still fall within the meaning of “agency or instrumentality” if it met the separate entity and nationality criteria.

Organ. Again, unfortunately, the term “organ of a foreign state” is not defined by the statute. Clearly, an entity that is a “separate legal person” may be an “organ” and therefore an agency or in-

84. *Id.* at 475.

85. *Id.* at 479–80.

86. See *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400 (E.D. Va. 1988).

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strumentality entitled to immunity even if it is neither a corporation nor directly “owned” by a state. To be an “organ” for these purposes, the entity must have a clear measure of independence and autonomy from the foreign government.

To determine whether an entity satisfies this definitional test, courts typically examine

- the circumstances surrounding the entity’s creation;
- its organizational structure;
- the purpose of its activities;
- the level of government supervision and financial support;
- whether the foreign state requires the hiring of public employees and pays their salaries; and
- the entity’s status, obligations, and privileges under state law.⁸⁷

In *Alperin v. Vatican Bank*, the Ninth Circuit held that the Vatican Bank constitutes an organ of the Vatican because of its status, structure, and role under Vatican law.⁸⁸ The Vatican Bank was created by the Pope for the purpose of supporting religious and charitable work, and its highest administrative level is composed of high-ranking government officials appointed by the Vatican. Furthermore, it has exclusive control over several obligations assigned

87. See, e.g., *Alperin v. Vatican Bank*, 360 F. App’x 847, 849 (9th Cir. 2009) (Vatican Bank qualifies as an “organ” and therefore “agency or instrumentality”); *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004). In *Murphy v. Korea Asset Management Corp.*, 421 F. Supp. 2d 627, 640 (S.D.N.Y. 2005), *aff’d*, 190 F. App’x 43 (2d Cir. 2006), the trial court observed that “the term ‘organ’ should be interpreted broadly to reflect Congress’ intent that it be ‘difficult for private litigants to bring foreign governments into Court, thereby affronting them.’” See also *California v. NRG Energy, Inc.*, 391 F.3d 1011 (9th Cir. 2004); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003); *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635 (9th Cir. 2003). Cf. *Compagnie Noga D’Importation et D’Exportation, S.A. v. Russian Fed’n*, 361 F.3d 676 (2d Cir. 2004) (distinguishing “organ” from “political organ”).

88. 360 F. App’x 847 (9th Cir. 2009).

to it by Vatican law and is immune from suit in Italy as a foreign sovereign.⁸⁹

In *Filler v. Hanvit Bank*, the Second Circuit affirmed the district court's holding that the Korean Deposit Insurance Corporation is an organ of a foreign state, noting that it performs functions traditionally performed by the government (such as protecting depositors and promoting financial stability) and government officials appoint its upper-level managers and oversee its operations.⁹⁰

Political subdivision. Section 1603(b)(3) covers components of the foreign government's structure that are more properly considered "political subdivisions" than "organs." Like organs, such entities must still have a separate legal identity or "personality" and the capacity to engage in commercial transactions, but they must function as part of the government structure itself. The difference between the two is admittedly unclear. Moreover, use of the term "political subdivision" here, as part of the definition of "agency and instrumentality," as well as part of the definition of "foreign state" itself in § 1603(a), has understandably led to a certain amount of confusion.⁹¹

Core functions. More generally, the predominant mechanism for making the broad distinction between "foreign state" and "agency or instrumentality" has been the so-called "core functions" test. The test was initially developed with regard to the service pro-

89. *Id.* at 849.

90. 378 F.3d 213, 217 (2d Cir. 2004).

91. The court in *California Department of Water Resources v. Powerex Corp.*, 533 F.3d 1087, 1098 (9th Cir. 2008), reexamined the distinction between "organ" and "political subdivision" for purposes of § 1603(b). Citing *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff'd on other grounds*, 538 U.S. 468 (2003), the court said an entity is an organ of a foreign state (or political subdivision thereof) if it "engages in a public activity on behalf of the foreign government." In the court's view, the fact that Powerex was a "second tier" subsidiary of the provisional government was not dispositive of the question whether it qualified as an "organ." The court stated that "[t]here is no reason to think Congress cared about the manner in which foreign states interact with their organs—i.e., whether the foreign state supervises the organ directly or through an incorporated agent." 533 F.3d at 1101.

visions of § 1608, not the distinctions in § 1603.⁹² However, the test has subsequently been applied in additional contexts. In the D.C. Circuit, for example, an entity that is an “integral part” of a foreign state’s political structure is treated as the state itself, but an entity which is commercial in its structure and “core function” is treated as an “agency or instrumentality.”⁹³ In *Garb v. Republic of Poland*, the Second Circuit referred to the core functions test in determining, for purposes of the “takings” exception, that Poland’s Ministry of the Treasury is “an integral part of Poland’s political structure” and not an agency or instrumentality.⁹⁴

Agents. Although not expressly addressed in the statute itself, agents of foreign governments may also be covered. For example, in *Phaneuf v. Republic of Indonesia*, the Ninth Circuit held that, in order to invoke the commercial activity exception, a government’s agent must have acted with actual authority.⁹⁵ The Fourth Circuit concurred in *Velasco v. Government of Indonesia*, stating that “[w]hether a third party reasonably perceives that the sovereign has empowered its agent to engage in a transaction . . . is irrelevant if the sovereign’s constitution or laws proscribe or do not authorize the agent’s conduct and the third party fails to make a proper in-

92. In *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 39 F.3d 148, 151 (D.C. Cir. 1994), for example, the D.C. Circuit had to decide whether the Bolivian Air Force was a “foreign state” or an “agency or instrumentality” for purposes of § 1608. Rather than relying on the factors listed in the legislative history cited above (e.g., could the entity sue and be sued in its own name, contract in its own name, or hold property in its own name, under its own law), it considered “whether the core functions of the foreign entity are predominantly governmental or commercial.” *Id.* at 151–52. See also *Magness v. Russian Fed’n*, 247 F.3d 609, 613 n.7 (5th Cir. 2001) (“[w]hether an entity is a ‘separate legal person’ depends upon the nature of its ‘core functions—governmental vs. commercial’—and whether the entity is treated as a separate legal entity under the laws of the foreign state.”).

93. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300 (D.C. Cir. 2005) (citing *Transaero*).

94. 440 F.3d 579, 594 (2d Cir. 2006).

95. 106 F.3d 302, 308 (9th Cir. 1997).

quiry.”⁹⁶ In *Batters v. Vance International, Inc.*, a private security company hired by a foreign government was found to be entitled to immunity as an agent.⁹⁷

3. *Non-U.S. nationality*

Determining that the entity in question is neither a citizen of a state of the United States nor created under the laws of a third country ordinarily presents no difficulties. Generally speaking, for purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.⁹⁸

C. *Individual Foreign Officials and Agents*

For some years, courts debated whether the FSIA should apply to claims against individual foreign government officials for actions taken in their official capacities on behalf of foreign states. A majority of circuits answered in the affirmative, following the so-called *Chuidian* doctrine, which treated individual officials as “agencies or instrumentalities” for FSIA purposes; other circuits held the opposite.⁹⁹

96. 370 F.3d 392, 410 (4th Cir. 2004).

97. 225 F.3d 462, 466 (4th Cir. 2000).

98. *Rowell v. Franconia Minerals Corp.*, 706 F. Supp. 2d 891, 895 (N.D. Ill. 2010) (citing Restatement (Third) of Foreign Relations Law of the United States § 213 (1986)).

99. In *Chuidian v. Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), the appellate court held that FSIA immunity extends to individual officials of foreign states acting in their official capacity, since these officials are properly considered “agenc[ies] or instrumentalit[ies]” of the state and accordingly are protected by the FSIA. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008); *Belhas v. Ya’alon*, 515 F.3d 1279 (D.C. Cir. 2008); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002); *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007). The Seventh Circuit explicitly rejected *Chuidian*, noting that “[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 terms” (*Enahoro v. Abubakar*, 408 F.3d 877, 881–82 (7th Cir. 2005)), and the Fourth Circuit concluded on the basis of the FSIA’s “language and struc-

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In 2010, the U.S. Supreme Court resolved the issue in favor of the minority view, rejecting the *Chuidian* doctrine and holding in *Samantar v. Yousuf* that an individual foreign official sued for conduct undertaken in his or her personal capacity is not a “foreign state” entitled to immunity from suit within the meaning of the FSIA.¹⁰⁰ The Court found nothing in the text or legislative history of the statute to suggest that the term “foreign state” should be read to include an official acting on its behalf, nor any reason to presume that when Congress codified state immunity, it also intended to codify the immunity of individual foreign government officials.

The Court took care, however, to note that a suit against such an official may nonetheless be precluded by principles of foreign sovereign immunity under the common law, following the practice that governed the immunity of individual foreign government officials prior to 1976. In this case, it remanded the suit for a determination whether Samantar might be entitled to immunity under the common law or have other valid defenses.¹⁰¹ It also noted that in some cases an action against an official in his or her official capaci-

ture” that it does not apply to “individual foreign government agents” (*Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009)).

100. 560 U.S. 305, 130 S. Ct. 2278 (2010).

101. *Id.* “[N]ot every suit can successfully be pleaded against an individual official alone. Even when a plaintiff names only a foreign official, it may be the case that the foreign state itself, its political subdivision, or an agency or instrumentality is a required party, because that party has ‘an interest relating to the subject of the action’ and ‘disposing of the action in the person’s absence may . . . as a practical matter impair or impede the person’s ability to protect the interest Or it may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest.” 560 U.S. at 324–25, 130 S. Ct. at 2292. On remand, the Fourth Circuit determined that the district court had properly deferred to the State Department’s position that Samantar was not entitled to head of state immunity and furthermore that he was not entitled to immunity for *jus cogens* violations. *Yousuf v. Samantar*, 699 F.3d 763 (2012).

ty should be treated as a suit against the entity as the “real party” in interest.¹⁰²

102. *Samantar v. Yousuf*, 560 U.S. 305 (2010). For such a case, see *Odhiambo v. Republic of Kenya*, 930 F. Supp. 2d 17, 34 (D.D.C. 2013) (“Odhiambo’s suit against the individual defendants will be governed by the FSIA because the suit is in all respects a suit against the Kenyan government.”).

V. Exceptions to Immunity

The FSIA creates nine distinct and independent exceptions to immunity from jurisdiction. Six of these are found in 28 U.S.C. § 1605(a), as amended: (1) waiver, (2) commercial acts, (3) expropriations, (4) rights in certain kinds of property in the United States, (5) non-commercial torts, and (6) enforcement of arbitral agreements and awards. The seventh involves cases arising from certain acts of state-sponsored terrorism (formerly § 1605(a)(7), this exception is now codified separately at § 1605A.) The eighth category involves maritime liens and preferred mortgages and is dealt with in §§ 1605(b), (c), and (d). Counterclaims under 28 U.S.C. § 1607 constitute the ninth category.

The most commonly invoked exceptions are waiver, commercial activity, expropriations, non-commercial torts, arbitration, and state-sponsored terrorism. Each of these exceptions is addressed briefly in this part, and citations are provided to facilitate further research as needed.¹⁰³

It is worth emphasizing that “[a]t the threshold of every action in a District Court against a foreign state . . . the court must satisfy itself that one of the exceptions applies.”¹⁰⁴

A. *Waiver*

Section 1605(a)(1) provides an exception to immunity when the foreign state has waived its immunity “either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the

103. While the “immovable property” exception in § 1605(a)(4) is infrequently invoked, it was recently interpreted by the U.S. Supreme Court to include an action to establish the validity of a tax lien. *See Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007).

104. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 483 (1983).

terms of the waiver.”¹⁰⁵ Like other exceptions, this provision operates to limit the statutory grant of federal question jurisdiction.¹⁰⁶

1. *Explicit waivers*

Explicit waivers are typically found in contractual provisions, although they could arise from independent statements (for example, by a duly authorized governmental official). They are normally construed narrowly by U.S. courts in favor of the sovereign.¹⁰⁷ In some situations, treaty provisions may also qualify, although the U.S. Supreme Court cautioned in *Argentine Republic v. Amerada Hess Shipping Corp.* that federal courts should not lightly imply a waiver based upon ambiguous treaty language.¹⁰⁸

2. *Implied waivers*

As a rule, courts are even more reluctant to find implied waivers, requiring strong evidence of the foreign state’s intent.¹⁰⁹ As noted in *In re Republic of the Philippines*,¹¹⁰ implied waivers have traditionally been found only when (1) a foreign state has agreed to ar-

105. 28 U.S.C. § 1605(a)(1) (2010).

106. See *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934, 942 n.4 (D.C. Cir. 2008) (citing Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559 (2002)).

107. See *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (“A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so.”); *Capital Ventures Int’l v. Republic of Argentina*, 552 F.3d 289, 293–94 (2d Cir. 2009) (accepting as a waiver a contractual provision that “[t]o the extent that the Republic has or hereafter may acquire any immunity (sovereign or otherwise) from jurisdiction of any court or from any legal process . . . , the Republic hereby irrevocably waives such immunity in respect of its obligations under the Bonds to the extent it is permitted to do so under applicable law”).

108. 488 U.S. 428, 442 (1989). See also *Carpenter v. Republic of Chile*, 610 F.3d 776, 779 (2d Cir. 2010) (waiver by treaty must be “clear and unambiguous” and treaty adherence did not qualify).

109. Cf. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd.*, No. 11 Civ. 0955 (PGG), 2011 WL 6187077, at *14 (S.D.N.Y. Nov. 28, 2011).

110. 309 F.3d 1143, 1151 (9th Cir. 2002).

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bitration in another country,¹¹¹ (2) a foreign state has agreed that a contract is governed by the law of another foreign country,¹¹² or (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.¹¹³

Allegations of implicit waiver by foreign government conduct in violation of the norms of international law (including acts alleged to be contrary to *jus cogens*, such as torture or genocide) have not been successful.¹¹⁴

111. See *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 236 F. Supp. 2d 1140, 1151 (S.D. Cal. 2002); *but see S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000). Waivers resulting in agreements to arbitrate are addressed in § 1605(a)(6), discussed below in Part V.E.

112. See *World Wide Demil, L.L.C. v. Nammo, A.S.*, 51 F. App'x 403, 405 (4th Cir. 2002); *Phoenix Consulting, Inc. v. Republic of Angola*, 35 F. Supp. 2d 14, 19 (D.D.C. 1999).

113. See *Haven v. Polska*, 215 F.3d 727, 731–32 (7th Cir. 2000); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1291–92 (11th Cir. 1999); *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests*, 898 F. Supp. 2d 301, 310–11 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013). By comparison, a clause providing that “[t]he Courts in India and USA [sic] only shall have jurisdiction in respect of [sic] all matters of dispute about the [bonds]” has been held insufficient to waive immunity. *Poddar v. State Bank of India*, 235 F.R.D. 592, 597 (S.D.N.Y. 2006).

114. See *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009) (“there is no general *jus cogens* exception to FSIA immunity”); *Belhas v. Ya’alon*, 515 F.3d 1279, 1286–89 (D.C. Cir. 2008) (to same effect); *Joo v. Japan*, 332 F.3d 679, 686 (D.C. Cir. 2004) (“[A] sovereign cannot realistically be said to manifest its intent to subject itself to suit inside the United States when it violates a *jus cogens* norm outside the United States.”), *vacated on other grounds by Joo v. Japan*, 542 U.S. 901 (2004)); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 105 (D.D.C. 2005) (“*Jus cogens* violations, without more, do not constitute an implied waiver of FSIA immunity.”). *Cf. Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (“if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.”).

B. Commercial Activity

The “commercial activity” exception in § 1605(a)(2) lies at the heart of the restrictive theory of immunity, and not surprisingly it is the most litigated exception. Availability of the exception rests on the answers to several related questions:

1. Does the activity of the state or government in question qualify as a “commercial activity”?
2. Is the plaintiff’s specific claim “based upon” that activity (or upon an act in connection with that activity)?
3. Does the activity in question have a sufficient jurisdictional nexus to the United States?

1. Definition of commercial activity

Section 1603(d) defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act.”¹¹⁵ It is important to note that the provision also provides that “[t]he commercial character of the activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*.” (emphasis added).

This “nature not purpose” criterion is fundamental to the exception. In *Republic of Argentina v. Weltover*, the U.S. Supreme Court stated:

[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its “nature” rather than its “purpose,” 28 U.S.C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in “trade and traffic or commerce.”¹¹⁶

115. 28 U.S.C. § 1603(d) (2010).

116. 504 U.S. 607, 614 (1992).

Thus, a state remains immune with respect to its sovereign or public acts (*jure imperii*) but not with respect to its acts that are private or commercial in character (*jure gestionis*).

[A] state engages in commercial activity under the restrictive theory where it exercises “only those powers that can also be exercised by private citizens,” as distinct from those “powers peculiar to sovereigns.” Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts “in the manner of a private player within” the market.¹¹⁷

The phrase “commercial activity” thus refers to “the character of the foreign state’s exercise of power rather than its effects.”¹¹⁸

Applying these criteria in given factual situations has generated a substantial body of case law. A few of the main issues are summarized here.

a. *Contracts*

A contract between a foreign state and a private party for the purchase and sale of goods and services is presumptively commercial.¹¹⁹ Even “a contract to buy army boots or even bullets is a ‘commercial’ activity, because private companies can similarly use sales contracts to acquire goods.”¹²⁰ A motor vehicle lease is a

117. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993). The assumption of liability for bonds issued by a predecessor government was held to be a commercial act in *Mortimer Off-Shore Services, Ltd. v. Federal Republic of Germany*, 615 F.3d 97 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1502 (2011) (relying on *Weltover*).

118. *Rong v. Liaoning Provincial Gov’t*, 452 F.3d 883, 888 (D.C. Cir. 2006). “[T]here is no indication that Congress intended the presence of a profit motive on the part of the sovereign to be a *threshold requirement* for applying the commercial activity exception. In this regard the Legislative History merely states that ‘[c]ertainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed.’ H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6615.” *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987).

119. *See Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987); *cf. Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781 (S.D.N.Y. 2008) (government agreement to purchase yarn).

120. *Weltover*, 504 U.S. at 614–15. *See also UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia*, 581 F.3d 210 (5th Cir. 2009), *cert. denied*, 559 U.S. 971 (2010)

“commercial” activity, even where usage is limited to official business of a foreign government mission to the United Nations.¹²¹ Contracts for legal services have been held to fall within this exception.¹²²

Distinctions are fact-based and sometimes difficult. In *Globe Nuclear Services and Supply GNSS, Ltd. v. AO Techsnabexport*, a Russian company wholly owned by the Russian Federation was held not to be entitled to immunity in respect of its contract to supply an American company with uranium hexafluoride extracted from dismantled nuclear warheads, because the transaction was the type of commerce engaged in by private parties.¹²³ The court rejected the defendant’s argument that it was not merely dealing in uranium but was regulating its supply in a manner that no private party could do.¹²⁴ In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, a contract for the provision of training and support services to the Royal Saudi Air Force for its fleet of F-5 fighter aircraft (including, for example, flight operations services; training in survival skills; and ejection over sea, desert, or mountain terrain) was deemed non-commercial, while a related contract for repair ser-

(repair services for F-5 aircraft parts and components); *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212 (11th Cir. 2005) (purchase and storage of arms); *Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 385 F.3d 1206 (9th Cir. 2004) (sale and servicing of Air Combat Maneuvering Range); *Virtual Def. & Dev. Int’l Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999) (contract for sale of MIG-29 aircraft).

121. *Ford Motor Co. v. Russian Fed’n*, No. 09 Civ. 1646 (JGK), 2010 WL 2010867, at *4 (S.D.N.Y. May 10, 2010).

122. *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 901 F. Supp. 2d 136, 140–41 (D.D.C. 2012).

123. 376 F.3d 282 (4th Cir. 2004). *See also* *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010) (offer of reward for information leading to capture of fugitive was commercial activity but was not “based upon” commercial activities within the United States); *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests*, 898 F. Supp. 2d 301, 313–17 (D. Mass. 2012), *aff’d*, 727 F.3d 10 (1st Cir. 2013) (government contract with private entity to recover misappropriated assets falls within commercial activity exception).

124. *Globe Nuclear Servs.*, 376 F.3d at 289.

vices, parts, and components for those aircraft was found to fall within the commercial activities exception.¹²⁵

In contrast, a private firm's acts in providing basic health insurance to foreign government workers and monitoring compliance with the governmental mandate under the national social security program was held to be non-commercial.¹²⁶

b. Illegal acts

While a commercial activity (at least for FSIA purposes) is presumptively one in which a private person can engage lawfully, in some situations even illegal or unenforceable contracts may be considered commercial. Money laundering, for example, has been held not to fall within the commercial activity exception.¹²⁷ As recently stated by one court, "abuses of official power for corrupt ends . . . could not be undertaken by private parties in a marketplace" and therefore cannot fall within the commercial activity exception.¹²⁸ However, criminal acts in the course of business or trade, such as bribery, forgery, or fraud, can constitute commercial activity if they are conduct in which private parties can engage.¹²⁹

125. 581 F.3d 210 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1689 (2010). *See also* *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2379 (2012), and *cert. denied*, 132 S. Ct. 2380 (2012) (sunken Spanish naval vessel entitled to immunity despite carrying private cargo for a charge); *Abdullah v. Embassy of Iraq at Washington, DC*, Civ. Action No. 12-2590, 2013 WL 4787225 (E.D. Pa. Sept. 9, 2013) (alleged breach of government-funded scholarship and employment agreement falls within commercial activity exception).

126. *Anglo-Iberia Underwriting Mgmt. Co. v. P.T. Jamosostek (Persero)*, 600 F.3d 171 (2d Cir. 2010).

127. *See In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 793 (S.D.N.Y. 2005); *Letelier v. Republic of Chile*, 748 F.2d 790, 797-98 (2d Cir. 1984) (alleged participation in an assassination is not a lawful activity and therefore not a commercial activity for FSIA purposes).

128. *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 111 (D.D.C. 2012).

129. *See, e.g., Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 816 (6th Cir. 2002).

c. Employment contracts

Employment relationships with foreign governments, embassies, missions, or other offices may or may not be considered “commercial,” depending on whether the duties in question involve official or “civil service” functions.¹³⁰

d. Charitable donation

While a charitable intent behind a purchase is irrelevant under the “nature, not purpose” rule, a donation to charity may not be a “commercial activity.”¹³¹

e. Trade promotion

A government’s efforts to foster trade, commerce, and investment with a particular region within its territory is a “quintessential” government function and therefore not commercial activity.¹³²

f. Regulatory or “police powers”

Regulation of the market, licensing the export of natural resources, seizure of goods for law enforcement purposes, or similar exercises of state authority (including eminent domain) are typically found to be non-commercial, since they are not the kinds of actions by

130. See, e.g., *Lasheen v. Embassy of the Arab Republic of Egypt*, 485 F. App’x 203 (9th Cir. 2012); *Hijazi v. Permanent Mission of Saudi Arabia to United Nations*, 689 F. Supp. 2d 669 (S.D.N.Y. 2010); *Kato v. Ishihara*, 360 F.3d 106 (2d Cir. 2004); *Butters v. Vance Int’l, Inc.*, 225 F.3d 462 (4th Cir. 2000); *El-Hadad v. United Arab Emirates*, 216 F.3d 29 (D.C. Cir. 2000); *Crum v. Kingdom of Saudi Arabia*, No. Civ.A.05-275, 2005 WL 3752271, at *3–4 (E.D. Va. July 13, 2005). Cf. *Sabbithi v. Al Saleh*, 605 F. Supp. 2d 122, 127–28 (D.D.C. 2009) (employment of domestic workers by diplomats not “commercial” because incidental to daily life of diplomat).

131. See *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (donation to charity not “part of the trade and commerce engaged in by a merchant in the marketplace”).

132. *Best Med. Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230, 237–38 (E.D. Va. 2012).

which private parties engage in trade, traffic, or commerce.¹³³ Failure to investigate allegations of fraudulent commercial activity has been held to fall outside this exception.¹³⁴

Governmental expropriations and nationalizations of private property by foreign governments are presumptively considered non-commercial.¹³⁵ In *Elbasir v. Kingdom of Saudi Arabia*, the court concluded that a government's provision of health care to its citizens and residents is not a "commercial" activity, but left open the possibility that promises of financial assistance might be, depending on the specific circumstances.¹³⁶

g. Human rights violations and terrorism

Efforts to use the commercial activity exception in § 1605(a)(2) to reach human rights violations and terrorist activities have not been successful.¹³⁷

2. "Based upon"

The complaint must be "based upon" a commercial activity.¹³⁸ In *Saudi Arabia v. Nelson*, the Supreme Court said that an action is "based upon" the particular conduct that the plaintiff needs to prove in order to satisfy the elements of a claim that would entitle

133. See *First Merchants Collection Corp. v. Republic of Argentina*, 190 F. Supp. 2d 1336, 1338 (S.D. Fla. 2002); *MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984).

134. *Community Fin. Group, Inc. v. Republic of Kenya*, 663 F.3d 977 (8th Cir. 2011).

135. Cf. *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) ("Expropriation is a decidedly sovereign—rather than commercial—activity."); *Yang Rong v. Liaoning Prov. Gov't*, 452 F.3d 883, 889–91 (D.C. Cir. 2006).

136. 468 F. Supp. 2d 155, 161–62 (D.D.C. 2007).

137. See, e.g., *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994) (hostage taking for profit did not fall within commercial activity exception).

138. See 28 U.S.C. § 1605(a)(2) (exception to immunity for actions "based upon a commercial activity").

it to relief under its theory of the case (“something more than a mere connection with, or relation to, commercial activity”).¹³⁹

Courts have taken varying approaches to this question, depending on the factual circumstances presented to them. For example, some courts have only required a causal (“but for”) relationship,¹⁴⁰ while others have said there needs to be a “significant nexus” . . . between the commercial activity in [the foreign state] upon which the exception is based and a plaintiff’s cause of action.”¹⁴¹ In *Kirkham v. Société Air France*, the court of appeals held that a negligence suit for a personal injury sustained at Orly Airport in France was cognizable under § 1605(a)(2) because it was “based upon” the plaintiff’s purchase of a plane ticket in the United States; “the ticket sale is necessary to the ‘duty of care’ element of her negligence claim” and thus is sufficient to trigger the commercial activity exception.¹⁴²

3. Jurisdictional nexus

Under § 1605(a)(2), a foreign state is not immune if the action brought against that state is based upon:

- (1) A commercial activity carried on in the United States by the foreign state; or
- (2) An act performed in the United States in connection with a commercial activity of the foreign state elsewhere (i.e., outside the United States); or

139. 507 U.S. 349, 358 (1993).

140. See *Transatlantic Shiffahrtstkontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 390 (2d Cir. 2000).

141. *Reiss v. Société Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 747 (2d Cir. 2000) (quoting *NYSA-ILA Pension Trust Fund v. Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993)). See also *Human Rights in China v. Bank of China*, No. 02 Civ. 4361 (NRB), 2003 WL 22170648, at *4 (S.D.N.Y. Sept. 18, 2003).

142. 429 F.3d 288, 295 (D.C. Cir. 2005).

V. Exceptions to Immunity

(3) An act outside the United States that was taken in connection with a commercial activity of the foreign state outside of the U.S. and that caused a direct effect in the United States.¹⁴³

These three alternatives reflect, in descending order, different degrees of jurisdictional connection to the United States. The first requires the most substantial contacts and would presumptively be satisfied by import–export transactions involving sales to or purchases from parties in the United States, the negotiation or execution of a loan agreement in the United States, or the receipt of financing from a private or public lending institution located in the United States. Here, the particular conduct giving rise to the claim must be part of the commercial activity having substantial contact with the United States.¹⁴⁴

The second alternative might be satisfied by an act in the United States that violated federal securities laws or involved the unlawful discharge of an employee in the United States working on a commercial activity carried on in a third country.

The Ninth Circuit recently distinguished the standards applicable to the three clauses of § 1605(a)(2) as follows: the first entails a “nexus” requirement; the second, a “material connection” requirement; and the third, a “legally significant acts” requirement.¹⁴⁵

The third alternative has occasioned the most judicial analysis and commentary. In *Republic of Argentina v. Weltover*, the U.S. Supreme Court explained that a “direct effect” in the United States must follow “as an immediate consequence” of the defendant’s ac-

143. 28 U.S.C. § 1605(a)(2) (2010).

144. See *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Ltd.*, No. 11 Civ. 0955 (PGG), 2011 WL 6187077, at *14 (S.D.N.Y., Nov. 28, 2011). For a recent decision based on lack of substantial contacts, see *Triple A Int’l, Inc. v. Democratic Republic of the Congo*, 852 F. Supp. 2d 839 (E.D. Mich. 2012).

145. *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1127 (9th Cir. 2012), *reh’g denied*, 704 F.3d 814 (9th Cir. 2013), *cert. denied sub nom. Pentonville Developers, Inc. v. Republic of Iraq*, 134 S. Ct. 64 (2013), 2013 WL 1723794 (Oct. 7, 2013).

tivity.¹⁴⁶ However, some courts have declined to read “direct effect” quite so literally and, like the Ninth Circuit, instead require a “legally significant act” occurring in the United States before a “direct effect” can be found.¹⁴⁷

Other courts have interpreted the “direct effect” test to require a contractual clause mandating the fulfillment of commercial obligations in the United States.¹⁴⁸ For example, a default by a foreign state, agency, or instrumentality on a contractual obligation to pay in the United States has been held to have a direct effect in the United States.¹⁴⁹ Alleged financial losses suffered in the United States as the result of a failed investment opportunity abroad, a foreign government’s default on bonds, or breach of a contract to be

146. 504 U.S. 607, 618 (1992). In *Weltover*, the issuance of sovereign bonds and the rescheduling of their repayment by the foreign government were held to be commercial activities with a direct effect in the United States because payments were due in dollars in New York. The Court rejected “any unexpressed requirement” of foreseeability or substantiality.

147. See *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 77 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1475 (2011) (discussing the “legally significant” test); *cf.* *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 227–28 (D.D.C. 2012) (infringement of intellectual property owned by U.S. company does not necessarily cause direct effect in United States). In *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 895 (5th Cir. 1998), the court explicitly rejected the “legally significant act” test on the ground that it makes the third clause of the commercial activity exception under § 1605(a)(2) redundant with the second clause.

148. *Atl. Tele-Network Inc. v. Inter-Am. Dev. Bank*, 251 F. Supp. 2d 126, 134 (D.D.C. 2003). *Cf.* *Samco Global Arms, Inc. v. Arita*, 395 F.3d 1212 (11th Cir. 2005); *Samco Global Arms, Inc. v. Republic of Honduras*, No. 10-20196-CIV, 2012 WL 1372197, at *8 (S.D. Fla. Mar. 29, 2012).

149. See, e.g., *Skanga Energy & Marine Ltd. v. Avervenca S.A.*, 875 F. Supp. 2d 264 (S.D.N.Y. June 21, 2012). In contrast, the “direct effect” requirement has been held unsatisfied where no contractual requirement existed for payment to be made in the United States and no provision existed permitting the holder to designate a place of performance, *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131 (2d Cir. 2012).

performed abroad have been held insufficiently direct to satisfy § 1605(a)(2).¹⁵⁰

In 2010, the D.C. Circuit held that the alleged breach of a contract to provide cruise ship services in Canada had a direct effect in the United States because

- the plaintiff experienced financial losses caused by the termination of the contract;
- the contract had been negotiated in the United States;
- one of the cruise ships under the contract would have traveled through United States waters;
- the contract's termination resulted in up to \$40 million of lost cruise-related business in the United States; and
- contracts related to the terminated contract called for performance in the United States.¹⁵¹

The Sixth Circuit has also taken a more liberal approach, holding that because notes issued by a foreign government allowed the holder to demand payment anywhere, the government's failure to pay a demand in Ohio created a "direct effect" in the United States.¹⁵²

150. See *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't*, 533 F.3d 1183 (10th Cir. 2008); *Can-Am Int'l, LLC v. Republic of Trinidad and Tobago*, 169 F. App'x 396 (5th Cir. 2006); see also *Pons v. People's Republic of China*, 666 F. Supp. 2d 406 (S.D.N.Y. 2009); *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, No. 06-00570 (ESH), 2006 WL 3060017, at *6–7 (D.D.C. Oct. 26, 2006). In the Second Circuit, "direct effect" is interpreted liberally, see *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 138–40 (2d Cir. 2012); *Securities Investor Prot. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 513 (S.D.N.Y. 2012). Cf. *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994, cert. denied, 513 U.S. 1121 (1995) (lingering effect of personal injury suffered overseas does not produce a direct effect in the United States when the injured person returns home).

151. *Cruise Connections Charter 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661 (D.C. Cir. 2010).

152. *DRFP L.L.C. v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010); but see *Westfield v. Fed. Republic of Germany*, 633 F.3d 409 (6th Cir. 2011).

In *Agrocomplect, AD v. Republic of Iraq*,¹⁵³ the district court considered a claim by a Bulgarian corporation under a contract with an Iraqi government entity to perform work on a land reclamation project. The plaintiff's machinery, production base, and camp facilities were allegedly destroyed by the U.S. military as a consequence of the Iraqi invasion and occupation of Kuwait. The court rejected arguments that the "direct effect" requirement was satisfied where (1) payment under the contract was to be made at least in part by and through banking institutions in the United States, (2) goods and services under the contract were to be supplied in part by commercial entities in the United States, and (3) the construction projects became "foreseeable targets of opportunity and necessity for the United States military." As to payments, the court said, the direct effect test is properly interpreted to require an agreement that payment be made "through and into" a U.S. bank or to allow the party receiving payment the discretion to require payment in that fashion. In addition, use of American subcontractors and American supplies does not constitute a "direct effect" and neither does the destruction of American property abroad.

In contrast, in *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, the complaint alleged that the government of Iran had illegally divested a U.S. company's minority interest in an Iranian entity, causing the interruption of a contractually required flow of capital, management personnel, engineering data, machinery, equipment, materials, and packaging between Iran and the United States.¹⁵⁴ The D.C. Circuit found that the foreseeable interruption substantially and directly affected the United States and was sufficient to satisfy the commercial activities exception.¹⁵⁵

153. 524 F. Supp. 2d 16 (D.D.C. 2007), *aff'd*, 304 F. App'x 872 (D.C. Cir. 2008).

154. 905 F.2d 438 (D.C. Cir. 1990).

155. *Id.* at 451. *But see* *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, No. 12-7103, 2013 WL 5853916, at *5-10 (D.C. Cir. Nov. 1, 2013) (foreign sovereign's intellectual property infringement occurring abroad insufficient to cause direct effect in United States).

C. Expropriations

Section 1605(a)(3) grants jurisdiction against foreign states in any case “in which rights in property taken in violation of international law are in issue.” In addition to these three elements (“rights in property” that have been “taken” and “in violation of international law”), § 1605(a)(3) imposes a “commercial nexus” requirement (sometimes referred to as the “fourth prong”):

- either the seized property in question (or property exchanged for such property) must be present in the United States in connection with a commercial activity carried on by the foreign state in the United States, or
- if that property (or property exchanged for it) is owned or operated by an agency or instrumentality of the foreign state, that agency or instrumentality must be engaged in commercial activity in the United States.¹⁵⁶

1. Rights in property

Most courts have concluded that the alleged “taking” in question must relate to *physical or tangible* property, not the right to receive payment. Bank accounts have been held to be a form of intangible property and thus not within the scope of the expropriation exception.¹⁵⁷ However, in *Nemariam v. Federal Democratic Republic of Ethiopia*,¹⁵⁸ the D.C. Circuit noted that neither the text of § 1605(a)(3) nor its legislative history expressly states that the ex-

156. 28 U.S.C. § 1605(a)(3) (2010).

157. See generally *Lord Day & Lord v. Socialist Republic of Vietnam*, 134 F. Supp. 2d 549, 560–61 (S.D.N.Y. 2001); *Peterson v. Royal Kingdom of Saudi Arabia*, 332 F. Supp. 2d 189, 197 (D.D.C. 2004), *aff'd*, 416 F.3d 83 (D.C. Cir. 2005). Cf. *Idas Resources N.V. v. Empresa Nacional de Diamantes De Angola E.P.*, No. 06-00570 (ESH), 2006 WL 3060017, at *6–7 (D.D.C. Oct. 26, 2006) (license is a contractual right, thus not tangible property). A claim under § 1605(a)(3) based on the alleged confiscation of shares held in trust was rejected in *Yang Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83, 100–101 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), because the property at issue was not “physical property” or taken in violation of international law.

158. 491 F.3d 470 (D.C. Cir. 2007).

propriation exception applies only to tangible property. “[T]here seems to us to be no reason to distinguish between tangible and intangible property when the operative phrase is ‘rights in property.’ We therefore conclude that the expropriation exception applies to the appellants’ bank accounts.”¹⁵⁹

2. Taken in violation of international law

The term “taken” is not defined in the FSIA, but the provision was intended to refer to the nationalization or expropriation of property by a foreign sovereign without payment of prompt, adequate, and effective compensation as required by international law.¹⁶⁰ Judicial administration and sale of a financially struggling company does not constitute a “taking.”¹⁶¹ The reference to takings “in violation of international law” is therefore properly read as a reference to the international law of expropriation and state responsibility, not to other bodies of international law, such as human rights law.¹⁶² Thus, this exception does not reach takings by a foreign government of its own nationals’ property.¹⁶³

159. *Id.* at 480. See also *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012).

160. See *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000) (“[T]he legislative history makes clear that the phrase ‘taken in violation of international law’ refers to ‘the nationalization or expropriation of property without payment of the prompt, adequate and effective compensation required by international law,’ including ‘takings which are arbitrary or discriminatory in nature’” (quoting H.R. Rep. No. 94-1487, at 19 (1976), as reprinted in 1976 U.S.C.C.A.N. 6004, 6618).

161. *Best Med. Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230, 239 (E.D. Va. 2012). Nor does “expropriation to satisfy a debt declared valid by a foreign court.” *Id.*

162. In *Kalamazoo Spice Extraction Co. v. Provincial Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984), the court allowed an expropriation claim to go forward based on alleged violations of a bilateral treaty of friendship, commerce, and navigation. However, in *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 491 (D.C. Cir. 2008), the court held that a plaintiff cannot base a § 1605(a)(3) expropriation claim on a treaty unless the text of the treaty specifically provides for court enforcement or otherwise indicates that the treaty parties intended treaty rights to be enforceable in their domestic

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As recently stated by the U.S. District Court for the District of Columbia, a taking violates international law if “(1) it was not for a public purpose, (2) it was discriminatory, or (3) no just compensation was provided for the property taken.”¹⁶⁴

In contrast to the terrorism provision, § 1605(a)(3) does not textually require a plaintiff to exhaust foreign remedies before bringing a suit against a foreign state or its agency or instrumentality, even though such a requirement is generally said to exist in international law.¹⁶⁵ Several U.S. courts have suggested, however,

courts. The court in *McKesson Corp. v. Islamic Republic of Iran*, Civ. Action No. 82-0220 (RJL), 2009 WL 4250767, at *3–4 (D.D.C. Nov. 23, 2009), found that the FSIA’s commercial activities exception permits a plaintiff to base an expropriation claim on customary international law. The U.S. government argued that, to the contrary, the commercial activities exception does not authorize U.S. courts to create a new federal common law cause of action by looking to customary international law. *See* Brief of the United States as Amicus Curiae, *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174, 2011 WL 3209069, at *6–15 (D.C. Cir. July 27, 2011).

163. *Beg v. Islamic Republic of Pakistan*, 353 F.3d 1323 (11th Cir. 2003); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 711 (9th Cir. 1992); *de Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). Claims arising from a sovereign’s alleged failure to privatize state-owned assets do not give rise to a claim under this section, but the selling and reselling of vouchers and options in connection with the privatization program have been found to fall within the commercial activities exception. *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 751 (S.D.N.Y. 2004).

164. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 128 (D.D.C. 2011), *aff’d in part*, 714 F.3d 591 (D.C. Cir. 2013).

165. *See* Restatement (Third), Foreign Relations Law of the United States, § 713 (1987) cmt. f:

Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged. There is no need to exhaust local remedies when the claim is for injury for which the respondent state firmly denies responsibility, for example a claim for injury due to the shooting down of a foreign commercial aircraft where the respondent state contends that the act was justified under international law.

that exhaustion might be appropriate as a prudential matter.¹⁶⁶ In *Abelesz v. Magyar Nemzeti Bank*, the Seventh Circuit recently required plaintiffs either to exhaust remedies available to them in the foreign jurisdiction or to provide a “legally compelling explanation” for their failure to do so.¹⁶⁷

The term “taking” refers to acts of a sovereign government, not those of private individuals or entities.¹⁶⁸ In a case of first impression, the Ninth Circuit concluded that nothing in the plain language of § 1605(a)(3) requires that the foreign state against which the claim is made be the same foreign state that took property in violation of international law.¹⁶⁹ Thus, a suit could proceed against the Kingdom of Spain for the recovery of a Camille Pissarro painting on display at a museum in Madrid, even though the painting was taken from the plaintiff’s grandmother in violation of international law in 1939 by an agent of the government of Nazi Germany.

3. Commercial nexus

The so-called “fourth prong” requires a connection between the taking and commercial activity in the United States. As is often the case under the FSIA, standards established for the foreign state dif-

See also id., Reporters’ Note 3: “In general, the availability of a domestic remedy does not relieve the state of responsibility for the injury under international law, although in principle the domestic remedy must be exhausted before international remedies can be pursued.”

166. *See, e.g.*, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1062–63 (9th Cir. 2009), *aff’d in part on reh’g en banc*, 616 F.3d 1019, 1034–37 (2010), *cert. denied*, 131 S. Ct. 3057 (2011); *Agudas Chasidei Chabad of U.S. v. Russian Fed’n*, 528 F.3d 934 (D.C. Cir. 2008). The U.S. government disagrees that exhaustion is required by § 1605(a)(3). *See* Brief of the United States as Amicus Curiae, *Kingdom of Spain v. Estate of Cassirer*, No. 10-786, 2011 WL 2135028, at *16–17 (U.S. Sup. Ct. on petition for writ of certiorari, May 27, 2011).

167. 692 F.3d 661 (7th Cir. 2012).

168. *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247, 251 (2d Cir. 2000).

169. *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1057 (9th Cir. 2009), *aff’d in part on reh’g en banc*, 616 F.3d 1019, 1031 (2010), *cert. denied*, 131 S. Ct. 3057 (2011).

V. Exceptions to Immunity

fer from those established for its agencies and instrumentalities. If the suit is against the foreign state itself, the seized property in question (or property exchanged for such property) must be present in the United States in connection with a commercial activity carried on by that foreign state in the United States. If the property in question (or property exchanged for it) is owned or operated by an agency or instrumentality of the foreign state, then all that is required is for that agency or instrumentality to be engaged in commercial activity in the United States.

In *Agudas Chasidei Chabad of United States v. Russian Federation*, the D.C. Circuit considered the application of § 1605(a)(3) to two entities that were admittedly agencies or instrumentalities of the Russian government. The court noted that Congress had intentionally used different wordings in the two parts of this “prong,” with the result that the second part (which concerns the commercial activities of a foreign state’s agencies and instrumentalities) is clearly less demanding than the first (which applies to activities “carried on *by the foreign state*”). It therefore rejected the defendants’ argument that the “substantiality” requirement of § 1603(e) should apply to the agencies and instrumentalities in question.¹⁷⁰

D. Non-Commercial Torts in the United States

Under § 1605(a)(5), a foreign state is not immune for acts (not otherwise covered by the commercial activity exception) in which money damages are sought for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his or her office or employment. Prototypical cases include injuries resulting from an automobile accident involving an embassy vehicle and a “slip and fall” in a foreign consulate.

170. 528 F.3d 934, 947 (D.C. Cir. 2008).

Liability under this section is determined by reference to otherwise applicable tort law.¹⁷¹ The statute does not provide a federal standard for assessing liability. Thus, in an action under § 1605(a)(5) alleging that a foreign mission to the United Nations failed to maintain the structural integrity of a common wall during construction, in violation of the New York City building code, state law applied.¹⁷²

1. Discretionary functions excluded

The non-commercial tort exception does not apply to two important categories of claims, namely those

- “based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion is abused”; and
- “arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”¹⁷³

171. Cf. *Doe v. Holy See*, 434 F. Supp. 2d 925, 948 (D. Or. 2006, *aff'd in part, rev'd in part*, 557 F.3d 1066 (9th Cir. 2009), *cert. denied sub nom.* *Holy See v. Doe*, 130 S. Ct. 3497 (mem.) (2010); *Skeen v. Federative Republic of Brazil*, 566 F. Supp. 1414, 1417 (D.D.C. 1983).

172. *USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia*, 681 F.3d 103 (2d Cir. 2012).

173. 28 U.S.C. § 1605(a)(5)(A–B) (2010). See *Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 8 (1st Cir. 2002) (“[T]respas claims are ‘based upon the exercise or performance . . . [of] a discretionary function’”); *Cabiri v. Gov’t of the Republic of Ghana*, 165 F.3d 193 (2d Cir. 1999); *Ortega Trujillo v. Banco Central del Ecuador*, 17 F. Supp. 2d 1340, 1345 (S.D. Fla. 1998); *In re Terrorist Attacks on Sept. 11, 2001*, 349 F. Supp. 2d 765, 794 (S.D.N.Y. 2005) (“The FSIA’s discretionary function exception replicates the discretionary function exception in the Federal Tort Claims Act.”). In *Doe v. Holy See*, a complaint alleging injury inflicted by a sexually abusive priest was held not to fall within the commercial activities exception, but it was sufficient to sustain jurisdiction against the Holy See under the tort exception on a theory of *respondeat superior*; the alleged failure to warn parishioners about a known danger did not qualify as the exercise of a discretionary function. 434 F. Supp. 2d 925 (D. Or. 2006), *aff'd*

2. *Not extraterritorial*

The exception covers only torts occurring within the territorial jurisdiction of the United States. The exception does not apply when a tort occurring outside the United States is merely said to have had an effect in the United States.¹⁷⁴ Most courts have concluded that “both the injury and the tortious act or omission must occur in the United States.”¹⁷⁵ Claims based on personal injury and death occurring at a U.S. embassy overseas have been held not to fall within § 1605(a)(5).¹⁷⁶

3. *No punitive damages*

Under 28 U.S.C. § 1606, punitive damages are not recoverable against a foreign state but are recoverable against an agency or instrumentality. As noted in Part V.F. *infra*, special rules apply to damages in actions under § 1605A against state sponsors of terrorism.

E. *Arbitration*

Under § 1605(a)(6), a foreign state, agency, or instrumentality is not immune from the jurisdiction of U.S. courts in any proceeding to enforce an arbitration agreement made by a foreign state (with

in part, rev'd in part, 557 F.3d 1066 (9th Cir. 2009), *cert. denied sub nom.* Holy See v. Doe, 130 S. Ct. 3497 (mem.) (2010).

174. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (exception does not apply when injury occurs outside the United States); *Jerez v. Republic of Cuba*, ___ F. Supp. 2d ___, No. 09-466 (RWR), 2013 WL 4578999, at *2–3 (D.D.C. Aug. 29, 2013) (unlike the commercial activity exception, the non-commercial tort exception covers only torts occurring within the territorial jurisdiction of the United States).

175. *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 108 (D.D.C. 2005). *See also* *O'Bryan v. Holy See*, 556 F.3d 361, 382 (6th Cir. 2009) (the entire tort must occur in the United States); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985) (tortious act or omission, as well as injury, must occur in the United States).

176. *Abur v. Republic of Sudan*, 437 F. Supp. 2d 166, 174–75 (D.D.C. 2006).

or for the benefit of a private party) or to confirm an arbitration award pursuant to such an agreement if

(A) the arbitration takes place, or is intended to take place, in the United States,

(B) the agreement or award is (or may be) governed by a treaty or international agreement in force for the United States which calls for the recognition and enforcement of arbitral awards, or

(C) the underlying claim could have been brought in a U.S. court but for the agreement to arbitrate or if the foreign state has waived its immunity.¹⁷⁷

Courts have utilized § 1605(a)(6), which was added in 1988, to exercise jurisdiction over foreign states in proceedings to enforce arbitration agreements and to recognize and enforce arbitral awards under the U.N. Convention on the Recognition and Enforcement of Arbitral Awards (“New York Convention”)¹⁷⁸ as well as the Inter-American Convention on International Commercial Arbitration (“Panama Convention”).¹⁷⁹ In contrast, courts have applied a waiver theory to the enforcement of awards against foreign states under the International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID” or “Washington Convention”).¹⁸⁰

177. 28 U.S.C. § 1605(a)(6) (2010).

178. U.N. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention], implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–207 (2010); *see* S & Davis Int’l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1301–02 (11th Cir. 2000); *Creighton Ltd. v. Qatar*, 181 F.3d 118, 123–24 (D.C. Cir. 1999).

179. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975), implemented at 9 U.S.C. § 301 (2010).

180. *See, e.g., Blue Ridge Invs., LLC, v. Republic of Argentina*, 902 F. Supp. 2d 367 (S.D.N.Y. 2012) (applying both § 1605(a)(1) and § 1605(a)(6)), *aff’d*, 735 F.3d 72 (2d Cir. 2013); International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID” or “Washington Convention”), Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1291, T.I.A.S. No. 6090. Under 22 U.S.C. § 1650a, ICSID awards are entitled to “the same full

Suits to enforce arbitral awards against foreign sovereigns may be subject to dismissal on *forum non conveniens* grounds.¹⁸¹

F. State-Sponsored Terrorism

Since 1996, when Congress amended the FSIA to remove the immunity of foreign states for certain acts of state-sponsored terrorism, more and more cases have been brought under this provision. As enacted, § 1605(a)(7) provided that immunity did not apply in cases in which money damages were sought for personal injury or death caused by acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources if those acts were taken at a time when the state in question had been formally designated as a sponsor of terrorism. That provision was repealed in 2008 and replaced by an even broader exception, now codified at 28 U.S.C. § 1605A.¹⁸² The new statute is summarized here; a more detailed discussion is provided in Part VII, the Addendum.

1. The new rule

Under the 2008 amendment, a designated state sponsor of terrorism has no immunity in a case

in which money damages are sought for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is

faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”

181. See *Figueiredo Ferraz e Engenharia de Projecto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011).

182. See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083(a) and (b) (2008), 122 Stat. 338, 341 (codified at 28 U.S.C. § 1605A). For a comprehensive review of the new statute and pending litigation, see *In re Islamic Republic of Iran Terrorism Litigation*, 659 F. Supp. 2d 31 (D.D.C. Sept. 30, 2009).

engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.¹⁸³

2. Limitations

As the quoted provision indicates, the exception applies only to actions for money damages arising from specifically enumerated categories of acts which were engaged in by foreign officials, employees, or agents “acting within the scope of [their] office, employment, or agency.” In addition, the exception applies only if

1. the foreign state had been formally designated as a state sponsor of terrorism at the time of (or as a result of) the act in question;
2. the claimant or victim was a U.S. national, a member of the armed forces, or an employee or contractor of the United States government acting within the scope of employment; and
3. for acts occurring in the foreign state concerned, the state was given a “reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”¹⁸⁴

3. Designated state sponsors

For these purposes, a foreign state must have been formally designated by the Secretary of State as a government that has “repeatedly provided support for acts of international terrorism” pursuant to § 6(j) of the Export Administration Act of 1979, § 620A of the Foreign Assistance Act of 1961, § 40 of the Arms Export Control Act, or any other relevant provision of law. The list of designated state sponsors of terrorism is published officially. As of December 2013, four countries were on the list: Cuba, Iran, Sudan, and Syria.¹⁸⁵

183. 28 U.S.C. § 1605A(a)(1) (2010).

184. *Id.* § 1605A(a)(2). This section includes additional requirements.

185. See U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/j/ct/list/c14151.htm>. South Yemen was removed from the list in 1990, Iraq in 2004, Libya in 2006, and North Korea in 2008.

G. Counterclaims

Title 28 U.S.C. § 1607 provides that a foreign state shall not be accorded immunity with respect to any counterclaim

- (a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or
- (b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or
- (c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.¹⁸⁶

With respect to counterclaims arising out of the transaction or occurrence that is the subject matter of the affirmative claim, the relevant test is the same as that for compulsory counterclaims under Federal Rule of Civil Procedure 13(a).¹⁸⁷

¹⁸⁶ 28 U.S.C. § 1607 (2010).

¹⁸⁷ *Reino de Espana v. Am. Bureau of Shipping, Inc.*, 328 F. Supp. 2d 489 (S.D.N.Y. 2004).

VI. Attachment and Execution

In addition to immunity from jurisdiction, the FSIA provides for immunity from pre-judgment attachment and post-judgment execution. The general rule under 28 U.S.C. § 1609 is that the property in the United States of a foreign state or its agencies and instrumentalities is “immune from attachment arrest and execution except as provided in §§ 1610 and 1611,” and subject to existing international agreements to which the United States was a party at the time the FSIA was enacted. Therefore, courts must always satisfy themselves that they have jurisdiction before considering requests for attachment, arrest, execution, or post-judgment discovery, even when the foreign state, agency, or instrumentality fails to appear.

Immunity under these provisions has been held to be “an affirmative defense that only the foreign state has standing to invoke.”¹⁸⁸ The Ninth Circuit recently held that when a court is asked to attach the property of a foreign state, it must raise and decide the issue of immunity from execution on its own initiative even if the defendant does not appear. The court of appeals recognized a statutory presumption in favor of immunity from attachment and execution where it is “apparent from the pleadings or uncontested” that the defendant is a foreign state: “Once the court has determined that the defendant is a foreign state, the burden of production shifts to the plaintiff to offer evidence that an exception applies.”¹⁸⁹

It is important to note that the FSIA provides narrower exceptions to immunity with respect to attachment and execution than it

188. *Rubin v. Islamic Republic of Iran*, 408 F. Supp. 2d 549, 555 (N.D. Ill. 2005). *But see Walker Int’l Holdings Ltd. v. Republic of the Congo*, 395 F.3d 229, 233 (5th Cir. 2004) (holding that a garnishee may also raise a sovereign immunity claim under the FSIA).

189. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010) (citing *Phaneuf v. Republic of Indonesia*, 106 F.3d 302 (9th Cir. 1997)); *accord*, *Walters v. Indus. & Commercial Bank of China, Ltd.*, 651 F.3d 280, 290 (2d Cir. 2011).

does with respect to jurisdiction.¹⁹⁰ In addition, it contains more protective rules for foreign states than for their agencies and instrumentalities.

A. Post-judgment Attachment and Execution

Section 1610 sets forth limited exceptions to immunity for attachments in aid of execution and for execution of judgments obtained under the statute against foreign states (§ 1610(a)) and their agencies and instrumentalities (§ 1610(b)), respectively. In *all* cases, the property against which execution is sought must be “in the United States.”¹⁹¹ Moreover, under § 1610(c), no attachment or execution against either foreign states or their agencies or instrumentalities is permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under § 1608(e).¹⁹²

B. Pre-judgment Attachment

Under § 1610(d), pre-judgment attachment of a foreign state’s property used for a commercial activity in the United States is available *only* if the foreign state in question has explicitly waived its immunity from such attachment and the purpose of the attachment is to secure satisfaction of an eventual judgment, not to ob-

190. The execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself. *Walters*, 651 F.3d at 289.

191. Assets located outside the United States fall outside the FSIA’s exceptions to immunity. *Walters v. People’s Republic of China*, 672 F. Supp. 2d 573, 574–75 (S.D.N.Y. 2009).

192. Section 1608(e) states: “No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.”

tain jurisdiction.¹⁹³ This provision has been held to prohibit writs of garnishment.¹⁹⁴

C. *States vs. Agencies and Instrumentalities*

In respect of enforcing judgments (as with jurisdictional issues), courts have generally taken care to respect the distinction (codified in § 1610(a) and (b)) between the foreign state or government and its agencies and instrumentalities. A separate juridical entity cannot be held liable for a judgment against a foreign state.¹⁹⁵

For example, in *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, the Eleventh Circuit Court of Appeals vacated the district court's decision issuing writs of garnishment over amounts owed to a Cuban telecommunications company that was majority-owned by companies owned and controlled by the Cuban government. Although the telecommunications company was found to be an instrumentality of the government of Cuba, it was held to be a separate entity and therefore not liable for execution of a judgment rendered against the government of Cuba.¹⁹⁶ Relying on *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (“*Bancec*”), the court held that in cases of attachment or execution, there is a presumption of separate juridical status for governmental

193. See *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); *Venus Lines Agency v. CVG Industria Venezolana de Aluminio, C.A.*, 210 F.3d 1309, 1311–12 (11th Cir. 2000); *Libancell S.A.L. v. Republic of Lebanon*, No. 06-Civ. 2765 (HB), 2006 WL 1321328, at *3–5 (S.D.N.Y. May 16, 2006) (central bank funds used for commercial activities). In *International Insurance Co. v. Caja Nacional de Ahorro Y Seguro*, 293 F.3d 392, 399–400 (7th Cir. 2002), involving a petition to confirm an arbitral award, the defendant (an instrumentality of the Argentine government) was required to post pre-judgment security because the provisions of the New York Convention (a pre-FSIA agreement) took precedence under § 1609.

194. *FG Hemisphere Assocs. LLC v. République du Congo*, 455 F.3d 575 (5th Cir. 2006).

195. *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1075 (9th Cir. 2002).

196. 183 F.3d 1277, 1284–85 (11th Cir. 1999).

instrumentalities.¹⁹⁷ That presumption can only be overcome either by piercing the corporate veil under state law or by applying the broader equitable principle that “the doctrine of corporate entity will not be regarded where to do so would work fraud or injustice or defeat overriding public policies.”¹⁹⁸

D. Procedure

In actions under the FSIA, courts will generally apply the relevant procedures under applicable state law.¹⁹⁹ However, § 1610(c) provides that “[n]o attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required” under § 1608(e). Thus, post-judgment attachment can only occur by court order after the foreign state in question has received notice and an adequate time to respond.²⁰⁰

The purpose of this requirement is to give a government time to react to the judgment. It has been accepted as mandatory. According to the relevant House Report, the procedures mandated by § 1610(c) exist to afford sufficient protection to foreign states in respect of efforts to attach or execute against their property in the United States (just as the United States would expect in reciprocal circumstances):

In some jurisdictions in the United States, attachment and execution to satisfy a judgment may be had simply by applying to a clerk or a local sheriff. This would not afford sufficient protection to a foreign state. This subsection contemplates that the courts will exercise their discre-

197. *Id.*; see *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983).

198. *Alejandro*, 183 F.3d at 1284–85.

199. See Fed. R. Civ. P. 69(a).

200. For a recent discussion of these requirements, see *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 798 F. Supp. 2d 260 (D.D.C. 2011). See also *First City, Texas Houston, N.A. v. Rafidain Bank*, 197 F.R.D. 250, 256 (S.D.N.Y. 2000).

VI. Attachment and Execution

tion in permitting execution. Prior to ordering attachment and execution, the court must determine that a reasonable period of time has elapsed following the entry of judgment In determining whether the period has been reasonable, the courts should take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment; or any steps being taken to satisfy the judgment; or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment.²⁰¹

Consistent with this approach, courts have exercised their discretion to prevent undue hardships to foreign states in a variety of circumstances. For instance, the Second Circuit noted with approval the district court's stay of a lawsuit brought by a lone creditor against the Peruvian government when it was attempting to negotiate an exchange offer with its creditors.²⁰²

E. Post-judgment Discovery

A court may order limited discovery of a foreign sovereign defendant for purposes of identifying assets against which a judgment might be executed. The same considerations that apply at the initial jurisdictional stage also apply here as a function of the presumptive immunity of those assets, even where the sovereign may have waived its jurisdictional immunities.²⁰³

201. H.R. Rep. No. 94-1487 (1976), at 30, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6629.

202. *Pravin Banker Assocs. Ltd. v. Banco Popular del Peru*, 109 F.3d 850, 854–56 (2d Cir. 1997) (district court granted two stays before granting summary judgment). *See also* *Elliott Assoc. L.P. v. Banco de la Nacion*, 948 F. Supp. 1203, 1213–14 (S.D.N.Y. 1996) (prejudgment attachment denied); *Morgan Guar. Trust Co. v. Republic of Palau*, 702 F. Supp. 60 (S.D.N.Y. 1988) (amount of supersedeas bond reduced); *Meridien Int'l Bank Ltd. v. Gov't of Republic of Liberia*, No. 92 Civ. 7039 (AGS), 1996 WL 22338, at *6 (S.D.N.Y. Jan. 22, 1996).

203. *See generally* *Thai Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, No. 10 Civ. 5256 (KMU), 2011 WL 4111504, at *4–5 (S.D.N.Y. Sept. 13, 2011); *Walters v. People's Republic of China*, 672 F. Supp. 2d 573 (S.D.N.Y. 2009); *Rubin v. Islamic Republic of Iran*, 349 F. Supp. 2d 1108 (N.D. Ill. 2004).

There is some debate about the permissible scope of post-judgment discovery in aid of execution. In *Rubin v. Islamic Republic of Iran*,²⁰⁴ the plaintiffs obtained a default judgment against Iran for injuries sustained in a suicide bombing in Israel carried out by a terrorist organization with the assistance of Iranian material support and training. They registered that judgment in the Northern District of Illinois for the purpose of attaching two collections of Persian antiquities owned by Iran but on long-term academic loan to the University of Chicago's Oriental Institute, as well as a third collection of Persian artifacts owned by Chicago's Field Museum of Natural History. The court of appeals held that general-assets discovery of all Iranian assets in the United States was inconsistent with the presumption of sovereign immunity under § 1609:

To overcome the presumption of immunity, the plaintiff must identify the particular foreign-state property he seeks to attach and then establish that it falls within a statutory exception. The district court's general-asset discovery order turns this presumptive immunity on its head. Instead of confining the proceedings to the specific property the plaintiffs had identified as potentially subject to an exception under the FSIA, the court gave the plaintiffs a "blank check" entitlement to discovery regarding *all* Iranian assets in the United States. This inverts the statutory scheme.²⁰⁵

In contrast, in *EM Ltd. v. Republic of Argentina*,²⁰⁶ the Second Circuit upheld subpoenas duces tecum that sought information from two non-party banks about Argentina's assets located outside the United States. "[B]ecause the Discovery Order involves discovery, not attachment of sovereign property, and because it is directed at third-party banks, not at Argentina itself, Argentina's sovereign immunity is not infringed."²⁰⁷ Noting that it is not unusual for a judgment creditor to seek disclosure related to assets outside the United States, including from third parties, and that Argentina had expressly waived its immunity concerning the bond agree-

204. 637 F.3d 783 (7th Cir. 2011).

205. *Id.* at 796.

206. 695 F.3d 201 (2d Cir. 2012).

207. *Id.* at 203.

ments that were the basis of the plaintiffs' claims, the court of appeals said:

Because sovereign immunity protects a sovereign from the expense, intrusiveness, and hassle of litigation, a court must be "circumspect" in allowing discovery before the plaintiff has established that the court has jurisdiction over a foreign sovereign defendant under the FSIA. . . . But [such concerns are not present when the plaintiff] seeks discovery from a defendant over which the district court indisputably had jurisdiction.²⁰⁸

Whether sanctions can be imposed for failure to comply with a discovery order has been contested. Recently, in *FG Hemisphere Associates, LL.C. v. Democratic Republic of Congo*, the D.C. Circuit held that contempt sanctions could in fact be imposed on a foreign sovereign for failure to respond to court-ordered discovery in an action to enforce an arbitral award, but the court distinguished the imposition of those sanctions from the attempt to enforce them (which it said could be "problematic").²⁰⁹

F. Property of a Foreign State

Under § 1610(a), in order to be subject to attachment or execution, the *property* of a foreign state must be (a) located in the United States and (b) "used for a commercial activity." (In contrast, under the separate test of § 1610(b)(2), it is sufficient if the *agency or instrumentality* itself is "engaged in commercial activity in the United

208. *Id.* at 210.

209. 637 F.3d 373, 375 (D.C. Cir. 2011). In an amicus brief in that case, the U.S. government argued that the FSIA "does not permit the enforcement of monetary contempt sanctions against a state." See 2010 WL 4569107 (Oct. 7, 2010). In *Af-Cap, Inc. v. Republic of Congo*, 462 F.3d 417 (5th Cir. 2006), the court had concluded that a contempt order requiring a foreign sovereign to pay money into the court's registry was inconsistent with the FSIA. In *Autotech Technologies v. Integral Research & Dev.*, 499 F.3d 737 (7th Cir. 2007), the court found no inherent limitation on the contempt power in the statute itself. See also *First City, Texas-Houston, N.A. v. Rafidain Bank*, 281 F.3d 48 (2d Cir. 2002).

States.”) Moreover, the property must be in the United States when the court authorizes execution.²¹⁰

G. Location of the Property

The FSIA does not apply to the property and assets of a sovereign defendant located *outside* the United States.²¹¹ The Ninth Circuit has held that the situs of an intangible right to payment, under applicable state law, was the location of the debtor, so that a debt obligation of a French corporation to the government of Iran did not constitute “property in the United States” for purposes of § 1610(a)(7).²¹²

H. Used for a Commercial Purpose

In a commercial activity case, the property of the foreign state must be “used for the commercial activity upon which the claim is based.”²¹³ Accordingly, the statutory definition of “commercial activity” under § 1603(d) (discussed above) is applicable.²¹⁴ This requirement excludes such property as embassies and consulates, and military vessels and aircraft.²¹⁵

210. See *FG Hemisphere Assocs., LLC v. République du Congo*, 455 F.3d 575, 588–89 (5th Cir. 2006).

211. *Walters v. People’s Republic of China*, 672 F. Supp. 2d 573 (S.D.N.Y. 2009).

212. *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117 (9th Cir. 2010).

213. 28 U.S.C. § 1610(a)(2) (2010).

214. See also *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992).

215. However, the question can still pose difficult factual determinations. See, e.g., *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 482–83 (2d Cir. 2007) (government repayment of debt to IMF is not a “commercial activity”); *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1091 (9th Cir. 2007) (“[P]roperty is ‘used for a commercial activity in the United States’ when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity.”). In *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 260–61 (5th Cir. 2002), royalty payments owed by oil companies in Texas to a foreign state were found not to be “used for a commercial activity in the United States” because the revenue from a transaction is not “used

VI. Attachment and Execution

The Second Circuit has held that the property in question must be “used for a commercial activity” *at the time* the writ of attachment or execution is issued.²¹⁶ The question arose in the context of attempts by holders of defaulted bonds issued by the Republic of Argentina to execute their judgments against certain investment accounts administered in the United States by private corporations for the benefit of Argentine pensioners. The Argentine government had nationalized its private pension system and thus claimed the funds in the investment accounts. The district court determined that the assets were used for a commercial activity and ordered their attachment. The appellate court disagreed, noting that when the attachment was ordered, the only activity that the republic had engaged in was the adoption of a law taking legal control of the funds. Argentinian authorities had not had the opportunity to use the funds for any commercial activity whatsoever. Under § 1610(a), the Second Circuit said, “a sovereign’s mere transfer to a governmental entity of legal control over an asset does not qualify the property as being ‘used for a commercial activity.’”²¹⁷

However, the Second Circuit has also held, in the context of a sale of scientific equipment by one private party to another, that a foreign government’s remittance of the purchase price to the seller

for” that transaction. *See also* Walker Int’l Holdings Ltd. v. Republic of the Congo, 395 F.3d 229, 235–36 (5th Cir. 2004) (certain contractual payments held to not constitute “commercial activities”); *but see* Af-Cap, Inc. v. Republic of Congo, 383 F.3d 361, *clarified on reh’g*, 383 F.3d 503 (5th Cir. 2004) (intangible obligations to pay certain tax and royalty payments to a foreign government constituted a commercial activity, and the situs of the requirement payments was the situs of the prospective garnishees); NML Capital, Ltd. v. Spaceport Sys. Int’l, L.P., 788 F. Supp. 2d 111 (C.D. Cal. 2011) (scientific applications satellite not “used for commercial purposes”).

216. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1691 (2010). *See also* *EM Ltd.*, 473 F.3d at 484 (“The plain language of the statute suggests that the standard is actual, not hypothetical, use.”).

217. *Aurelius Capital Partners, LP*, 584 F.3d at 131. “[W]e must respect the Act’s strict limitations on attaching and executing upon assets of a foreign state.” *Id.* at 132.

does constitute market activity even if the government purchased the equipment in order to implement a national program of scientific research and development, had no “profit motive,” and obtained no tangible benefit from the transaction.²¹⁸ Since the funds were used for a commercial activity in the United States, they were accordingly subject to attachment under § 1610(a).

Several courts have interpreted this requirement to apply to the entirety of the funds at issue, so that, for example, the use of a portion of a bank account for commercial purposes does not deprive the entire account of its immunity.²¹⁹

I. Other Requirements

In addition, for foreign state property to be amenable to execution, the moving party must also satisfy one of the subsidiary requirements in § 1610(a)(1)–(7), which correspond roughly to the exceptions from jurisdictional immunity set forth in § 1605. Thus, § 1610(a)(1) addresses waivers. As in the case of jurisdiction, express waivers with respect to attachment and execution are sometimes found in the relevant underlying contracts but must be clearly made on behalf of the foreign state in question.²²⁰ Under § 1610(a)(6), property of a foreign state in the United States which is “used for a commercial activity in the United States” may be attached upon a judgment “based on an order confirming an arbitral award rendered against the foreign state.”²²¹

218. *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 273 (2012).

219. *Walker Int’l Holdings Ltd. v. Republic of the Congo*, 395 F.3d 229, 233–34 (5th Cir. 2004); *Liberian E. Timber Corp. v. Gov’t of the Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987).

220. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 82–83 (2d Cir. 2002); *Af-Cap*, 383 F.3d at 36–67.

221. *See TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 303 (D.C. Cir. 2005) (“SPF has not shown that Article V of the New York Convention provides any ground for non-enforcement of the arbitration award. Accordingly, we hold the district court correctly entered judgment against the SPF.”).

J. State Sponsors of Terrorism

As discussed at greater length in the Addendum in Part VII *infra*, execution of judgments against designated state sponsors of terrorism based on § 1605A (which has replaced § 1605(a)(7)) is governed by the provisions of § 1610(f). Execution of such judgments against certain “blocked assets” is permitted by § 201 of the Terrorism Risk Insurance Act of 2002 (TRIA).²²² In *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. Elahi*, the U.S. Supreme Court held that a judgment creditor of Iran could not execute against a separate entity because (a) the latter judgment did not constitute a “blocked asset” for TRIA purposes at the time of the lower court decision and (b) in any event, the judgment creditor had waived his right to attachment by electing to take partial payment under the Victims of Trafficking and Violence Protection Act of 2000 judgment in favor of Iran.²²³

K. Agency or Instrumentality

Under § 1610(b), which applies to execution against property of an agency or instrumentality located in the United States, the agency or instrumentality itself must be “engaged in commercial activity in the United States.”²²⁴ Moreover, § 1610(b) provides that the property of a foreign agency or instrumentality engaged in commercial activity in the United States is subject to execution, or attachment in aid of execution, if that agency or instrumentality has specifically waived its immunity or if the judgment relates to a claim for which the agency or instrumentality is not immune, “regardless of whether the property is or was involved in the act upon which the claim is based.”²²⁵

222. Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified at 28 U.S.C. § 1610 note) (2002); *see* *Hegna v. Islamic Republic of Iran*, 380 F.3d 1000, 1002–03 (7th Cir. 2004); *Weininger v. Castro*, 462 F. Supp. 2d 457, 479 (S.D.N.Y. 2006).

223. 556 U.S. 366, 369 (2009).

224. *See* *Ministry of Def. & Support for the Armed Forces of the Republic of Iran v. Elahi*, 546 U.S. 450, 452 (2006).

225. 28 U.S.C. § 1610(b) (2010).

Judgments against agencies and instrumentalities may, of course, also be enforced in any way that a judgment could be enforced against the concerned foreign state itself.

L. Exceptions

Under 28 U.S.C. § 1611, certain categories of property are immune from attachment and execution. These categories include property of international organizations that have been designated under the International Organizations Immunities Act²²⁶ (for example, funds being disbursed by the World Bank to a foreign state), property of a foreign central bank held for its own account, and property of a military character or used for a military activity.²²⁷

Funds held in the name of a central bank or monetary authority are presumed to be immune from attachment. In *NML Capital, Ltd. v. Banco Central de la Republica Argentina*,²²⁸ the Second Circuit considered the language of § 1611(b)(1) providing that property “of a foreign central bank or monetary authority held for its own account” is immune from attachment or execution. Plaintiffs in that action had sought ex parte orders of pre-judgment attachment and post-judgment restraint over certain funds of Banco Central held at the Federal Reserve Bank of New York. They argued that because Banco Central was not in fact independent of the government (but rather its alter ego), the funds did not fall within the scope of that provision. The court of appeals disagreed, finding that

226. 22 U.S.C. § 288a–288f (1945).

227. See, e.g., *Olympic Chartering S.A. v. Ministry of Industry & Trade of Jordan*, 134 F. Supp. 2d 528 (S.D.N.Y. 2000) (central bank); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463 (2d Cir. 2007) (central bank funds deposited in United States). In *All American Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional de Nicaragua*, 818 F. Supp. 1552 (S.D. Fla. 1993), foreign military aircraft were held immune from execution under § 1611(b)(2) even though they were in the United States for alterations.

228. 652 F.3d 172 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (Mem.). This presumption is rebuttable, for example where it can be demonstrated that the funds are not in fact used for central bank functions. *Id.*

VI. Attachment and Execution

the plain language, history and structure of § 1611(b)(1) immunizes property of a foreign central bank or monetary authority held for its own account without regard to whether the bank or authority is independent from its parent state pursuant to *Bancec*. . . . [F]oreign central banks are not treated as generic “agencies or instrumentalities” of a foreign state under the FSIA: they are given “special protections” befitting the particular sovereign interest in preventing the attachment and execution of central bank property.²²⁹

Efforts to enforce judgments against property that is otherwise inviolable or immune (such as embassies, consulates, or their bank accounts falling under the Vienna Conventions on Diplomatic or Consular Relations) have been rejected.²³⁰

229. *Id.* at 187–88.

230. *Cf.* *Hegna v. Islamic Republic of Iran*, 376 F.3d 485 (5th Cir. 2004).

VII. The FSIA and State-Sponsored Terrorism: Addendum

The Foreign Sovereign Immunities Act removes the immunity of certain foreign states with respect to specific acts of state-sponsored terrorism. This particular exception is almost unique to the United States, since to date only one other country has adopted a comparable limitation to the general rule of sovereign immunity.²³¹ It is also invoked frequently. The exception was first enacted in 1996, and steadily growing numbers of plaintiffs have sought to take advantage of its provisions. Most complaints have been filed (and thus most decisions have been rendered) in the District of Columbia, but other courts are increasingly likely to encounter issues under this provision, particularly with regard to efforts to enforce judgments against the property and assets of state sponsors of terrorism.

The terrorism exception was originally adopted as 28 U.S.C. § 1605(a)(7).²³² In response to various problems encountered by plaintiffs in the course of their litigation under this earlier provision, Congress replaced it in 2008 with an expanded exception, codified at 28 U.S.C. § 1605A.²³³ Cases have proliferated against Iran and Cuba, but over time against Libya, Iraq, North Korea, Su-

231. In March 2012, Canada amended its State Immunity Act to permit victims of terrorism who are Canadian citizens and permanent residents of Canada, as well as others if the action has a “real and substantial” connection to Canada, to seek redress against designated state sponsors by way of a civil action for terrorist acts committed anywhere in the world on or after January 1, 1985. See <http://laws-lois.justice.gc.ca/PDF/S-18.pdf>. To date, no suits have been brought under this new law.

232. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)).

233. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338, 338–44 (NDAA) (codified at 28 U.S.C. § 1605A).

dan, and Syria as well. A substantial body of interpretive decisional law has already emerged under the new statute.²³⁴

This Addendum provides an overview of the background and purpose of the FSIA’s “terrorism exception” (section A), describes the current statutory provision (section B), and then discusses in somewhat greater detail the main elements of a claim under the provision (section C). Section D summarizes the particular issues related to enforcement of judgments against state sponsors of terrorism under § 1605A.

This Addendum builds upon and occasionally refers to, but endeavors not to repeat, the analysis offered in the rest of this guide.

Litigation under the state-sponsored terrorism exception to the FSIA must be distinguished from suits against individuals and non-state entities under the separate Anti-Terrorism Act (ATA), enacted in 1992. That statute provides that

[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.²³⁵

234. The D.C. District Court completed a lengthy, comprehensive review of the FSIA terrorism exception in *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009) [hereinafter *In re Terrorism Litig.*]. For additional reading on the terrorism exception, see Danica Curavic, Note, *Compensating Victims of Terrorism or Frustrating Cultural Diplomacy? The Unintended Consequences of the Foreign Sovereign Immunities Act’s Terrorism Provisions*, 43 Cornell Int’l L.J. 381 (2010) (discussing the unintended consequences of the FSIA terrorism exception); Michael T. Kotlarczyk, Note, *The Provision of Material Support and Resources and Lawsuits Against State Sponsors of Terrorism*, 96 Geo. L.J. 2029 (2008); and Jennifer K. Elsea, *Suits Against Terrorist States by Victims of Terrorism*, CRS Report RL 31258 (Aug. 8, 2008).

235. 18 U.S.C. § 2333(a). See, e.g., *Estate of Parsons v. Palestinian Auth.*, 651 F.3d 118 (D.C. Cir. 2011); *Kaplan v. Al Jazeera*, No. 10 Civ. 5298, 2011 WL 2314783, at *3–4 (S.D.N.Y. June 7, 2011); *Sokolow v. Palestine Liberation Org.*, No. 04 CV 00397 (GBD), 2011 WL 1345086 (S.D.N.Y. Mar. 30, 2011). The ATA contains a definition of “international terrorism,” and a related provision provides civil liability for those engaged in “material support” of terrorist organizations. See 18 U.S.C.A. §§ 2331 and 2339B (2009).

On occasion, a particular terrorist incident may give rise to claims under both statutes.²³⁶

A. Background and Purpose

Although victims' groups had long advocated for a "terrorist" exception to foreign sovereign immunity, no such provision was included in the FSIA when it was originally enacted in 1976.²³⁷ Only after several significant terrorist incidents in the 1980s and 1990s (for example, the kidnapping of Joseph Ciccipio in Beirut and the destruction of Pan Am Flight 103 over Lockerbie, Scotland) did Congress amend the statute to permit suits against state sponsors of terrorism.²³⁸

State sponsors of terrorism

consider terrorism a legitimate instrument of achieving their foreign policy goals. They have become better at hiding their material support for their surrogates, which includes the provision of safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like. . . . [A]llowing suits in the federal courts against countries responsible for terrorist acts where Americans and/or their loved ones suffer injury or death at the hands of the terrorist states is warranted. Section 804 will give American citizens an important economic and financial weapon against these outlaw states.²³⁹

236. See, e.g., the litigation concerning a Palestinian suicide bombing at a restaurant in Tel Aviv. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24 (D.D.C. 2012) (claims against Iran and Syria); *Wultz v. Islamic Republic of Iran*, 762 F. Supp. 2d 18 (D.D.C. 2011) (claims against the Bank of China); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1 (D.D.C. 2010) (same).

237. The executive branch resisted because it feared that a terrorism exception would "cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002); see also H.R. Rep. No. 103-702, at 12 (1994).

238. See Presidential Statement Upon Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. of Pres. Doc. 719 (Apr. 29, 1996).

239. H.R. Rep. No. 104-383, at 62 (1995).

As originally enacted, § 1605(a)(7) removed the immunity of foreign states with respect to cases seeking money damages for personal injury or death caused by certain enumerated acts taken by those states or their officials. The exception was limited to those few states that had been formally designated by the Secretary of State as sponsors of terrorism under § 6(j) of the Export Administration Act of 1979²⁴⁰ or § 620A of the Foreign Assistance Act of 1961²⁴¹ at the time the acts in question had occurred or as a result of such acts. In 1996, this list included Cuba, Iran, Libya, North Korea, Sudan, Syria, and Iraq.²⁴²

In addition, the original exception only permitted suits arising from acts of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources, and only if such acts or provision of material support had been engaged in by an official, employee, or agent of the foreign state while acting within the scope of his or her office, employment, or agency.

The impact of § 1605(a)(7) as initially enacted was further circumscribed when courts interpreted it as “merely a jurisdiction-conferring provision” that did not create an independent private right of action. In *Flatow v. Islamic Republic of Iran*, for example, the district court ruled that the statutory exception to sovereign foreign immunity did not itself create a federal cause of action.²⁴³ Instead, the statute operated merely as a “pass-through,” allowing plaintiffs to bring suit in federal court for claims based in state law. Given the difficulties encountered by plaintiffs in seeking to recov-

240. Section 6(j) of the Export Administration Act of 1979 is codified at 50 U.S.C. app. § 2405(j).

241. Section 620A of the Foreign Assistance Act of 1961 is codified at 22 U.S.C. § 2371.

242. Iraq was removed in 2004, Libya in 2006, and North Korea in 2008. As of December 2013, the designees are Cuba, Iran, Sudan, and Syria. See the Department of State website at <http://www.state.gov/j/ct/list/c14151.htm>.

243. 999 F. Supp. 1 (D.D.C. 1998). Alisa Flatow, a Brandeis University student, had been killed by a terrorist attack while traveling on a bus in the Gaza Strip when a suicide bomber drove a van full of explosives into the bus. The failure of the litigation provoked sufficient political pressure to prompt legislative action.

er for injuries occurring abroad under state tort statutes or general common law, this interpretation sharply limited the reach of the exception. Differences in state law also produced disparate results for victims of the same terrorist act, depending on their domicile at the time of the attack.

In response, Congress passed the so-called Flatow Amendment.²⁴⁴ This amendment sought to clarify the liability under the terrorism exception of any official, employee, or agent of a designated state sponsor of terrorism for personal injury or death caused to a U.S. national by acts of that official, employee, or agent while acting within the scope of his or her office, employment, or agency. It also provided that money damages in FSIA suits could include economic damages, solatium, pain and suffering, and punitive damages.

However, the Flatow Amendment failed to resolve the most significant obstacles facing plaintiffs under the statute. While some courts held that it provided a cause of action against a foreign state itself,²⁴⁵ others found that it provided a cause of action only against the individual officials, employees, or agents of a foreign state. In *Cicippio-Puleo v. Islamic Republic of Iran*, for example, the D.C. Circuit held that neither § 1605(a)(7) nor the Flatow Amendment, nor the two taken in tandem, created a private right of action against foreign state sponsors of terrorism.²⁴⁶ In *Acree v. Republic of Iraq*, the same court held that plaintiffs could not state a cause of action under the “generic common law” or merely allude “to the

244. See Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Div. A, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2006)).

245. See, e.g., *Acree v. Republic of Iraq*, 271 F. Supp. 2d 179, 214 (D.D.C. 2003); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003); *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 290 F. Supp. 2d 54 (D.D.C. 2003).

246. 353 F.3d 1024 (D.C. Cir. 2004). In so doing, it removed the basis for punitive damage awards.

traditional torts . . . in their generic form” but must identify a “particular cause of action arising out of a specific source of law.”²⁴⁷

In consequence, § 1605(a)(7) was repealed and replaced in 2008 by a further revision, now codified at 28 U.S.C. § 1605A. Although in many respects the new provision’s operative language is virtually identical to that of its predecessor, the new provision clearly established a private right of action, recodified the provisions for the award of punitive damages, authorized compensation for special masters to assist the courts in resolving cases, and incorporated new mechanisms for the enforcement of judgments.²⁴⁸

B. The Current Exception

By its terms, § 1605A(c) provides a private right of action under federal law for money damages against designated foreign state sponsors of terrorism (including their political subdivisions and agencies or instrumentalities). The action may be for personal injury or death resulting from certain listed acts caused by the designated state sponsor or its officials, employees, or agents. Claimed damages may include economic damages, solatium, pain and suffering, and punitive damages. A designated foreign state may be held to be vicariously liable for the acts of its officials, employees, or agents acting within the scope of their office, employment, or agency.²⁴⁹

247. 370 F.3d 41, 59–60 (D.C. Cir. 2004). For general background on the Flatow Amendment, see Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 Seattle U. L. Rev. 1029 (2005). For an example of “state-by-state” analysis of claims under § 1605(a)(7), see *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229 (D.D.C. 2006) (“*Heiser I*”).

248. *In re Terrorism Litig.*, 659 F. Supp. 2d 31, 39 (D.D.C. 2009).

249. In explicitly establishing a private right of action and in specifying the damages that may be claimed, the amended provisions were intended to resolve the issues created by *Cicippio-Puleo*, 353 F.3d at 1024 (holding that neither § 1605(a)(7) nor the Flatow Amendment, nor the two taken in tandem, created a private right of action against a foreign government), and *Acree*, 370 F.3d at 41 (holding that plaintiffs could not state a right of action under the “generic common law” or merely allude “to the traditional torts . . . in their generic form” but

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Specifically, the claim must be for personal injury or death “caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”²⁵⁰

Additional requirements must also be satisfied. The exception applies only if

- (i) the foreign state had been designated as a state sponsor of terrorism at the time of (or as a result of) the act in question,
- (ii) the claimant or victim was a U.S. national, member of the U.S. armed forces or an employee or contractor of the U.S. Government acting within the scope of employment, and
- (iii) when the acts in question occurred within the territory of the foreign state, that state has been given a “reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration.”²⁵¹

1. *Exclusivity*

The generally accepted rule has been that, if the conduct in question constitutes “terrorism” within the scope of this exception, then none of the FSIA’s other exceptions may be applied. For example, the Second Circuit held in 2010 that although the acts listed in the terrorism exception are by definition “torts,” plaintiffs could not bring their claim under the FSIA’s non-commercial torts exception if it properly fell under the terrorism exception, since to do so would “evade and frustrate that key limitation” on the terrorism exception.²⁵² Similarly, the Fifth, Seventh, and Ninth Circuits have

must identify a “particular cause of action arising out of a specific source of law”). *See, e.g.*, the discussion in *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561 (7th Cir. 2012).

250. 28 U.S.C. § 1605A(a)(1) (2010).

251. *Id.* § 1605A(a)(2).

252. *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 88–89 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

also rejected attempts by a plaintiff to “shoehorn” a claim properly brought under one exception into another.²⁵³

More recently, however, the Second Circuit has taken a different approach, holding that “the terrorism exception, rather than limiting the jurisdiction conferred by the noncommercial tort exception, provides an additional basis for jurisdiction.”²⁵⁴ In so deciding, the court focused on the fact that Congress had expressly limited the exception to “any case not otherwise covered by [the FSIA],” meaning that it was intended “to cover some injuries that the noncommercial tort exception does not reach.”²⁵⁵ The court acknowledged that its holding conflicted with the 2010 decision but said that the panel in that earlier case had been presented “with sparse and one-sided argument on this point in the context of a very large and complex case that focused on other aspects of the FSIA.”²⁵⁶

Whether the availability of a federal cause of action excludes the possibility of recovery under *state* law remains unclear, however. In *Gates v. Syrian Arab Republic*, the U.S. District Court for the District of Columbia held that “state law no longer controls the nature of the liability and damages that may be sought . . .; Congress has provided the ‘specific source of law’ for recovery.”²⁵⁷ Yet in *Valore v. Islamic Republic of Iran*, the same court found that “[a]lthough the FSIA terrorism exception now includes an independent federal cause of action . . . plaintiffs may still pursue claims based on law of states of the United States . . . under the FSIA ter-

253. *See de Sanchez v. Banco Cent. De Nicaragua*, 770 F.2d 1385, 1398–99 (5th Cir. 1985); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 254 (7th Cir. 1983); *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990).

254. *Doe v. Bin Laden*, 663 F.3d 64, 70 (2d Cir. 2011).

255. *Id.* at 70.

256. *Id.* at n.10.

257. 580 F. Supp. 2d 53, 66 (D.D.C. 2008). *Cf. Rux v. Republic of Sudan*, 672 F. Supp. 2d 726 (E.D. Va. 2009), *aff’d*, 410 F. App’x 581 (4th Cir. 2011) (holding, in a case arising from the bombing of the U.S.S. Cole in October 2000, that the federal Death on the High Seas Act provided plaintiffs’ exclusive cause of action and precluded reliance on state law as well as § 1605A).

rorism exception's jurisdiction-conferring provisions, § 1605A(a)-(b)."²⁵⁸ In another case, *Wyatt v. Syrian Arab Republic*, the parties were required to submit additional briefing on whether the plaintiff's state tort claims were appropriate with respect to the new federal cause of action language in § 1605A.²⁵⁹

2. Statute of limitations

Under § 1605A, there is a ten-year limitations period; the action must be brought or maintained no later than ten years after the date on which the cause of action arose *or* after April 24, 1996, whichever is later.²⁶⁰ This latter provision represented a significant change from the previous version of the exception, under which a number of cases were dismissed because they had been filed after the ten-year period following the acts in question.²⁶¹

3. Default

In the majority of state-sponsored terrorism cases brought under § 1605A, neither the foreign state nor the individuals named as defendants appear or answer. However, because jurisdiction under the FSIA depends on a determination that the defendants in such cases are not entitled to immunity, the court must nonetheless determine whether the case falls within the terms of the exception and that the defendant is not entitled to immunity. Service of pro-

258. 700 F. Supp. 2d 52, 81 n.15 (D.D.C. 2010).

259. 736 F. Supp. 2d 106, 114 (D.D.C. 2010).

260. Section 1605A(b) provides that an action

may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of (1) ten years after April 24, 1996; or (2) ten years after the date on which the cause of action arose.

261. *See, e.g., Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 21–23 (D.D.C. 2006), *rev'd in part sub nom. Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *rev'd sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

cess must still be attempted in accordance with the methods specified in § 1608.

Moreover, § 1608(e) provides that a default judgment can be entered against a foreign state only after the plaintiff “establishes his claim or right to relief by evidence that is satisfactory to the court.” In making that determination, the court may not simply accept the plaintiff’s unsupported allegations, but must conduct further inquiry before entering judgment.²⁶² It may accept as true uncontroverted evidence offered by the plaintiff and may take judicial notice of court records in related proceedings.²⁶³ Several recent decisions have addressed when and to what extent a court may take judicial notice of prior findings of fact in related proceedings before the same court.²⁶⁴

4. Discovery

Since default is the norm, discovery requests directed to the defendants do not typically pose problems in terrorism cases. Regarding discovery requests directed to the U.S. government, the special rules set forth in § 1605(g) remain applicable. That provision requires the court, upon request of the U.S. Attorney General, to stay

any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

262. *Beer v. Islamic Republic of Iran*, No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010); *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204 (D.D.C. 2012).

263. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24 (D.D.C. 2012); *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1 (D.D.C. 2011); *Baker v. Socialist People’s Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48 (D.D.C. 2011).

264. *See Wultz*, 864 F. Supp. 2d at 29; *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109 (D.D.C. 2012); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C. 2012); *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68 (D.D.C. 2010); *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163 (D.D.C. 2010).

In addition to various time limits and other limitations, § 1605(g)(4) provides that “a stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.”

C. Main Elements of a Claim Under § 1605A

The following sections consider the main requirements of a claim brought under § 1605A.

1. Nationality of claimant or victim

Under § 1605A(c), a claim may be pursued by four categories of individuals:

1. a national of the United States;
2. a member of the U.S. armed forces;
3. an employee of the U.S. government or of an individual performing a contract awarded by the U.S. government, acting within the scope of the employee’s employment; or
4. a legal representative of such a person.²⁶⁵

Plaintiffs may include family members as well as those who were directly harmed by the acts in question. One district court has distinguished between victims (defined as “those who suffered injury or died as a result of the attack”) and claimants (defined as “those whose claims arise out of those injuries or deaths but who

265. The term “national” is of course broader than the term “citizen.” See 28 U.S.C. § 1605A(a)(2)(A)(ii), which refers to the definition provided in the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22): “The term ‘national of the United States’ means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” See the discussion in *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48 (D.D.C. 2013). *But see* *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 26 (D.D.C. 2008) (Congress did not intend that “a cause of action under § 1605A remain available to those persons who voluntarily and deliberately renounce American citizenship”).

might not be victims themselves”).²⁶⁶ Under this approach, victims may include those who were killed or physically or emotionally injured, as well as members of a victim’s immediate family who suffered from intentional infliction of emotional distress.

Regardless of whether the plaintiff is a victim or a claimant, the standing requirements must be satisfied. Most commonly, that means that either the claimant or the victim of the terrorist attack must have been a U.S. citizen at the time of the attack. In *Acosta v. Islamic Republic of Iran*, for example, the claims arose from the 1990 assassination of Israeli Rabbi Meir Kahane in New York City. Because Rabbi Kahane was not a U.S. citizen, claims on his behalf fell outside the statute, but claims for severe mental anguish of his wife and family, who were citizens, were allowed to proceed.²⁶⁷

Several courts have rejected claims by individuals who were not “immediate family members” at the time of the attack in question.²⁶⁸ As one court stated,

The very nature of a claim for solatium or intentional infliction of emotional distress necessitates a relationship between the victim and the claimant at the time of the attack. Intentional infliction of emotional distress requires an element of shock. If the definition of emotional distress were expanded to include claimants who were not immediate family members at the time of the attack, the potential number of claimants would be unidentifiable, changing with every new marriage or new child.²⁶⁹

Non-citizens and non-nationals can satisfy this requirement only if, at the relevant time, they were either members of the U.S. armed forces or “otherwise an employee of the Government of the United States, or of an individual performing a contract awarded

266. *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 65 (D.D.C. 2010).

267. *Acosta*, 574 F. Supp. 2d at 15.

268. See, e.g., *Murphy*, 740 F. Supp. 2d at 51; *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25, 45 (D.D.C. 2007); *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 334–35 (D.C. Cir. 2003).

269. *Baker v. Socialist People’s Libyan Arab Jamahirya*, 775 F. Supp. 2d 48, 75 (D.D.C. 2011).

by the United States Government, acting within the scope of the employee's employment."²⁷⁰

In *Estate of Doe v. Islamic Republic of Iran*, the court held that the foreign (non-U.S.-citizen) family members of foreign national employees of the U.S. embassy in Beirut who were killed or injured in terrorist attacks lacked a federal cause of action under § 1605A.²⁷¹ Similarly, in *Owens v. Republic of Sudan*, the court found that foreign national family members of the victims of the bombings of the U.S. embassies in Dar es Salaam and Nairobi could not proceed under § 1605A, although they "may continue to pursue claims under applicable state and/or foreign law."²⁷²

2. Designated state sponsor of terrorism

At the time of (or as a result of) the act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources in question, the Secretary of State must have formally designated the foreign state as a government that has "repeatedly provided support for acts of international terrorism" pursuant to § 6(j) of the Export Administration Act of 1979, § 620A of the Foreign Assistance Act of 1961, § 40 of the Arms Export Control Act, or any other relevant provision of law.²⁷³

The list of designated state sponsors of terrorism is published on April 30 of each year. If the foreign state is not on the list at the time of the act or as a result of the act, the terrorism exception does

270. 28 U.S.C. § 1605A(a)(2)(ii)(III) (2008).

271. 808 F. Supp. 2d 1 (D.D.C. 2011).

272. 826 F. Supp. 2d 128, 153 (D.D.C. 2011).

273. 28 U.S.C. § 1605A(h)(6) (2008). *See also* 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (2008) (if the action is a "related" or "prior" action, the foreign state must have been designated as a state sponsor of terrorism when the original action or the related action was filed).

not apply.²⁷⁴ As of December 2013, four countries were on the list: Cuba, Iran, Sudan, and Syria.²⁷⁵

The removal of a state from the list of designated state sponsors does not automatically impact pending litigation. However, following the overthrow of Saddam Hussein, Congress passed legislation that permitted the President to make the terrorism exception to immunity under former § 1605(a)(7) inapplicable to Iraq, depriving the courts of jurisdiction over then-pending actions. In *Republic of Iraq v. Beaty*,²⁷⁶ the Supreme Court upheld the President's exercise of this authority: "When the President exercised his authority to make inapplicable to Iraq all provisions of law that apply to countries that have supported terrorism, the exception to foreign sovereign immunity for state sponsors of terrorism became inoperative as against Iraq."²⁷⁷

3. Scope of authority

The private right of action provided by § 1605A recognizes that both the foreign state itself and any official, employee, or agent of that state can be held liable for personal injury or death resulting from any of the enumerated acts specified by the statute.²⁷⁸ The

274. 28 U.S.C. § 1605A(a)(2)(A)(i)(I) (2008); *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 75 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

275. See U.S. Department of State, State Sponsors of Terrorism, <http://www.state.gov/j/ct/list/c14151.htm>.

276. 556 U.S. 848 (2009), upholding Pres. Determin. No. 2003-23, 68 Fed. Reg. 26459 (May 7, 2003), under sections 1503 and 1504 of the Emergency War-time Supplemental Act of 2003, Pub. L. No. 108-11, 117 Stat 559.

277. 556 U.S. at 866. In so doing, the Court overruled several lower courts. See, e.g., *Kilburn v. Republic of Iran*, 441 F. Supp. 2d 74, 78 (D.D.C. 2006) ("[T]he acts in question occurred while the defendant was designated as a state sponsor of terrorism, and the Presidential Determination [removing Libya from the list] does not divest the court of jurisdiction over the case."); *Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46, 51-52 (D.D.C. 2008); *Hartford Fire Ins. Co. v. The Socialist People's Libyan Arab Jamahiriya*, Civ. No. 98-3096 (TFH), 2007 WL 1876392, at *2 (D.D.C. June 28, 2007).

278. 28 U.S.C. § 1605A(c) (2008). This distinguishes the terrorism exception from the other exceptions in the FSIA, since the Supreme Court recently held, in

acts must have been committed by the official, employee, or agent “while acting within the scope of his or her office, employment or agency.” The statute expressly makes the foreign state “vicariously liable for the acts of its officials, employees, or agents.”²⁷⁹

Whether the specific acts in question fall within “the scope of a defendant’s office, employment, or agency” appears to be addressed as a factual question. In *Rux v. Republic of Sudan*, for example, the Fourth Circuit found that plaintiffs had “easily” satisfied this requirement by alleging that Sudanese President Bashir had authorized Al-Qaeda operatives to enter Sudan and had given Al-Qaeda special authority to avoid paying taxes and duties.²⁸⁰ Bashir, the court said, was clearly “an official, employee, or agent” of Sudan by virtue of his elected position, and his alleged actions fell “within the scope of his . . . office, employment, or agency” because each involved the exercise of the governmental authority vested in the office of president by Sudan’s constitution.²⁸¹ The court also acknowledged other actions that involved governmental officials acting within the scope of their offices, including using diplomatic pouches, allowing the “establishment and operation of terrorist training camps, and establishing financial joint ventures between Sudan and Al-Qaeda.”²⁸²

In *Taylor v. Islamic Republic of Iran*, which arose from the bombing of the U.S. Marine barracks in Beirut, the court determined that Iran had been “directly tied to the actions undertaken by the members of Hezbollah” and played a “crucial and necessary role in planning and ordering” the attack.²⁸³

Samantar v. Yousuf, 560 U.S. 305, 324–325 (2010), that the statute does not apply to individuals. In its decision, the Court referred to § 1605A(c) as an example of Congress’s ability to distinguish between “foreign states” and their officers, employees, and agents.

279. 28 U.S.C. § 1605A(c) (2010).

280. 461 F.3d 461, 472 (4th Cir. 2006).

281. *Id.* at 471.

282. *Id.* at 472 n.5.

283. 811 F. Supp. 2d 1, 9–10 (D.D.C. 2011).

4. Listed acts

Under § 1605A(a)(1), the plaintiff must sufficiently allege that one of the following specified acts has been committed: “an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.”

a. Torture

For purposes of § 1605A, “torture” has the meaning given to that term in section 3 of the Torture Victim Protection Act of 1991:

Torture means any act, directed against an individual in the offender’s custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.²⁸⁴

One of the most important elements of this definition is its severity requirement. Courts must examine the “degree of pain and suffering that the alleged torturer intended to, and actually did, inflict upon the victim.”²⁸⁵ The purpose is to ensure that the conduct proscribed by the 1984 United Nations Convention Against Torture²⁸⁶ and the Torture Victim Protection Act is “sufficiently extreme and outrageous to warrant the universal condemnation that the term ‘torture’ both connotes and invokes.”²⁸⁷ This examination will typically require a factual inquiry. As the court in *Price v. Socialist People’s Libyan Arab Jamahiriya* pointed out, torture does

284. 28 U.S.C. § 1605A(h)(7) (2008). The Torture Victim Protection Act of 1991, § 3(b)(1), Pub. L. No. 102-256, 106 Stat. 73, is codified at 28 U.S.C. § 1350 Note (1992).

285. *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 93 (D.C. Cir. 2002).

286. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, ___ U.S.T. ___, 1465 U.N.T.S. 85.

287. *Id.* at 92.

not automatically result whenever an individual in custody is the subject of physical assault.²⁸⁸ However, deprivation of adequate food, light, toilet facilities, and medical care over a prolonged period of captivity has been found to meet the statutory requirement.²⁸⁹

b. Extrajudicial killing

The term “extrajudicial killing” also has the meaning given in the Torture Victim Protection Act, namely, “a deliberate killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁹⁰ An assassination qualifies.²⁹¹

In *Campuzano v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia held that suicide bombings resulting in injury to the plaintiffs constituted extrajudicial killings within the scope of the state-sponsored terrorism exception.²⁹² However, in *Wyatt v. Syrian Arab Republic*, an extrajudicial killing claim did not succeed when two soldiers, unknown and unrelated to the plaintiffs, were killed when attempting to rescue the plaintiff-hostages.²⁹³ The *Wyatt* court distinguished *Campuzano* by

288. *Id.* at 93 (“Not all police brutality, not every instance of excessive force used against prisoners, is torture under the FSIA.”).

289. See, e.g., *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 32 (D.D.C. 2001), *aff’d sub nom.* *Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27 (D.D.C. 2001) (The court found that the “deprivation of adequate food, light, toilet facilities, and medical care for over six years amounts to torture. . .”).

290. 28 U.S.C. § 1605A(h)(7) (2008); Torture Victim Protection Act of 1991, § 3(a), 28 U.S.C. § 1350 Note (1992). See *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011); *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1 (D.D.C. 2011); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 74 (D.D.C. 2010); *Kilburn v. Islamic Republic of Iran*, 699 F. Supp. 2d 136, 152–53 (D.D.C. 2010).

291. *Elahi v. Islamic Republic of Iran*, 124 F. Supp. 2d 97, 107 (D.D.C. 2000).

292. 281 F. Supp. 2d 258, 269–70 (D.D.C. 2003).

293. 362 F. Supp. 2d 103, 111–12 (D.D.C. 2005).

pointing out that the death of the soldiers in *Wyatt* caused no physical injury to the plaintiffs, whereas the *Campuzano* suicide bombs physically injured the plaintiffs.²⁹⁴

c. Aircraft sabotage

The statute defines “aircraft sabotage” by reference to Article 1 of the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, commonly referred to as the Montreal Convention.²⁹⁵ Under that article, a person commits an offense if he or she unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.²⁹⁶

A person also commits an offense if he or she (a) attempts to commit any of the offenses mentioned above or (b) is an accomplice of a person who commits or attempts such an offense.

Aircraft sabotage claims were sustained in *Pugh v. Socialist People’s Libyan Arab Jamahiriya*²⁹⁷ and *Rein v. Socialist People’s Libyan*

294. *Id.* at 112.

295. 28 U.S.C. § 1605A(h)(1). Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 U.N.T.S. 178, 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force on Jan. 26, 1973). (Montreal Convention). The offenses are criminalized in the United States by 18 U.S.C. § 32(a)(3) & (6) (2006).

296. Montreal Convention, at 1.

297. 290 F. Supp. 2d 54 (D.D.C. 2003).

Arab Jamahiriya.²⁹⁸ In *Pugh*, claims were brought on behalf of seven American citizens killed on September 19, 1989, when UTA Flight 772, en route from Brazzaville to Paris, exploded in mid-air over southeastern Niger, killing all aboard. *Rein* involved claims by the survivors and representatives of persons killed aboard Pan Am Flight 103 above Lockerbie, Scotland.

d. Hostage taking

The statute adopts the definition of “hostage taking” used in Article 1 of the International Convention Against the Taking of Hostages, according to which hostage taking occurs when a person “seizes or detains and threatens to kill, to injure or to continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage. . . .”²⁹⁹

An essential element of this claim is that the “intended purpose of the detention be to accomplish the sort of third-party compulsion described in the convention.”³⁰⁰ For instance, in *Price v. Socialist People’s Libyan Arab Jamahiriya*, this compulsion element was not satisfied when the detention of the plaintiffs was undertaken to “express[] support for illegal behavior” rather than to compel a third party to act.³⁰¹

Additionally, because the definition of “hostage taking” focuses on the state of mind of the individual detaining the hostages, it is not necessary for the hostage-taker to communicate his or her in-

298. 162 F.3d 748 (2d Cir. 1998), *aff’d in part*, 162 F.3d 748 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

299. 28 U.S.C. § 1605A(h)(2); International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/34/45, at 245 (June 3, 1983), 1316 U.N.T.S. 205, T.I.A.S. No. 1108, 18 ILM 1456 (entered into force for the United States Jan. 6, 1985).

300. *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230, 235 (D.C. Cir. 2003).

301. 294 F.3d 82, 94 (D.C. Cir. 2002).

tended purpose to a third party in order for the element to be fulfilled.³⁰²

e. Material support or resources

This statutory element incorporates the broad meaning given to the term “material support or resources” in the Anti-Terrorism Act, which lists various types of support, including “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . ., and transportation, except medicine or religious materials.”³⁰³ A plaintiff may satisfy this requirement by identifying conduct by the defendant that falls within the “meaning of any one of these listed forms of material support.”³⁰⁴

Evidence that a foreign state has provided financial, technical, logistical, and other material support and resources to terrorist groups for the purpose of carrying out any of the above-enumerated acts is sufficient.³⁰⁵ It is important to note that it is not necessary for the material support to have directly contributed to the specific act under which the claims arose. However, at least one

302. *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 470 F.3d 356, 360 (D.C. Cir. 2006).

303. 18 U.S.C. §§ 2339A(b)(1), 1605A(h)(3). *See Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1 (D.D.C. 2011); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011); *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1 (D.D.C. 2011); *Owens v. Republic of Sudan*, 412 F. Supp. 2d 99 (D.D.C. 2006).

304. *Rux v. Republic of Sudan*, 461 F.3d 461, 470 (4th Cir. 2006). If the type of material support alleged in the complaint is not included in 18 U.S.C § 2339A, the definition should be construed in accordance with its ordinary or natural meaning in a manner that “effectuates congressional intent.” *Id.* at 476.

305. *See, e.g., Beer v. Islamic Republic of Iran*, No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010).

of the listed acts above must occur as a result of the material support in order for the terrorism exception to apply.³⁰⁶

5. Causation

Causation is a jurisdictional requirement of the FSIA's state-sponsored terrorism provisions. Like its predecessor, § 1605A(a)(1) requires that the injury or death have been "caused by" one of the listed acts (and that such act was "engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency"). Both the D.C. and Fourth Circuits have rejected a "but for" interpretation of the "caused by" language found in both § 1605(a)(7) and § 1605A in favor of "proximate cause."³⁰⁷

In *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, the D.C. Circuit distinguished the issue of jurisdictional causation under the state-sponsored terrorism exception from the proof necessary to prevail on a substantive cause of action.³⁰⁸ With regard to the first issue, which may arise on a motion to dismiss, the court of appeals said that proximate cause exists so long as there is "some reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered."³⁰⁹

In *Rux v. Republic of Sudan*, which involved claims against Sudan by the relatives of seventeen U.S. sailors killed in the terrorist bombing of the U.S.S. Cole, the Fourth Circuit found the allega-

306. *Wyatt v. Syrian Arab Republic*, 362 F. Supp. 2d 103, 111 (D.D.C. 2005).

307. *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1127–28 (D.C. Cir. 2004) (court considered extensively the question of using "but for" versus "proximate cause" for the causation standard); *accord*, *Rux v. Republic of Sudan*, 461 F.3d 461, 472 (4th Cir. 2006). *See also* *Wyatt v. Syrian Arab Republic*, 736 F. Supp. 2d 106 (D.D.C. 2010) (proximate cause); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 75 (D.D.C. 2010) ("[t]here is no but-for causation requirement under the FSIA; proximate causation is sufficient.").

308. 376 F.3d 1123, 1127–29 (D.C. Cir. 2004).

309. *Id.* at 1128–29 (citing Prosser & Keeton on the Law of Torts 263 (5th ed. 1984)).

tions sufficient to satisfy jurisdictional causation.³¹⁰ The plaintiffs alleged that Sudan had provided “material support or resources” to the al-Qaeda operatives who planned the attack; Sudan challenged the sufficiency of the specific allegations. The court of appeals said that the statute only required the plaintiffs to allege facts “sufficient to establish a reasonable connection between a country’s provision of material support to a terrorist organization and the damage arising out of a terrorist attack.”³¹¹ It noted that at the jurisdictional stage, the “proximate cause” standard “serves simultaneously to weed out the most insubstantial cases without posing too high a hurdle to surmount at a threshold stage of the litigation.”³¹²

In comparison, in *Davis v. Islamic Republic of Iran*, in ruling on a special master’s recommendations regarding damages following entry of a default judgment, the U.S. District Court for the District of Columbia stated that the FSIA requires plaintiffs to prove that the consequences of the defendants’ conduct were “reasonably certain,” that is, “more likely than not” to occur.³¹³ More generally, causation and liability will be determined by reference to established principles of law, as reflected for example in the *Restatement (Second) of Torts*³¹⁴ and as adopted in state jurisdictions. In this regard, a series of decisions from the U.S. District Court for the District of Columbia reminds plaintiffs that the statute requires them to prove “a theory of liability” articulating a justification for the recovery of damages, “generally expressed ‘through the lens of civil tort liability.’”³¹⁵

310. 461 F.3d 461 (4th Cir. 2006).

311. *Id.* at 473. This decision applied § 1605(a)(7).

312. *Id.*

313. *Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7 (D.D.C. 2012); *see also* *Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78 (D.D.C. 2012).

314. *Restatement (Second) of Torts* (1965).

315. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 54 (D.D.C. 2012) (quoting *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163, 175–76 (D.D.C. 2010)); *see also* *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24 (D.D.C. 2012); *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109 (D.D.C. 2012); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C. 2012).

Additional discussion of theories of recovery for wrongful death, survival, and intentional infliction of emotional distress can be found in *Beer v. Islamic Republic of Iran*.³¹⁶

6. Personal injury or death

Section 1605A(a)(1) does not specifically state the elements required for establishing “personal injury or death.” In interpreting the provisions, courts have looked to “general principles of tort law,” including the *Restatement (Second) of Torts*, as a “proxy for state common law.”³¹⁷ Courts accordingly describe the harm to plaintiffs as constituting such torts as assault, battery, and intentional infliction of emotional distress.

As the *Valore* court stated, “The FSIA does not restrict the personal injury or death element to injury or death suffered directly by the claimant; instead, such injury or death must merely be the bases of a claim for which money damages are sought.”³¹⁸ The court therefore found claims were permissible not only for the deaths of the 241 servicemen killed in the attack on the Marine barracks in Beirut and the physical injuries suffered by those who survived the

316. No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010). For a recent discussion of causation under the civil remedy provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333(a), see *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 507–08 (E.D.N.Y. 2012).

317. *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C. Cir. 2003). See also *Baker v. Socialist People’s Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48 (D.D.C. 2011); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51 (D.D.C. 2010); *Heiser v. Islamic Republic of Iran*, 659 F. Supp. 2d 20, 24 (D.D.C. 2009) (hereinafter “*Heiser II*”). The *Heiser II* court noted that the application of general principles of tort law is “an approach that in effect looks no different from one that explicitly applies federal common law” but “. . . because these actions arise solely from statutory rights, they are not in theory matters of federal common law.” *Heiser II*, 659 F. Supp. 2d at 24. Cf. *Bettis*, 315 F.3d at 333 (D.C. Cir. 2003) (“[B]ecause the FSIA instructs that ‘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, it in effect instructs federal judges to find the relevant law, not to make it.’”).

318. *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 66 (D.D.C. 2010).

attack, but also for “emotional and financial injury to survivors, decedents, decedent’s estates, and decedent’s family members.”³¹⁹

7. Opportunity to arbitrate

When the act or acts in question took place in the foreign state’s territory, the government in question must be given an opportunity to arbitrate the claim before its immunity can be removed under section 1605A.³²⁰ In effect, the arbitration provision operates as a type of “exhaustion of remedies” requirement, giving the foreign state an arbitration alternative to litigation in U.S. courts. To date, no state sponsor of terrorism has agreed to such arbitration.

Nonetheless, the statutory requirement must be satisfied. One court found it sufficient that the plaintiff had mailed to the foreign state an offer to arbitrate subject to certain conditions. The conditions included demands that arbitration would be “conducted ‘by a third-party organization with extensive experience in arbitrating international disputes’ and that the arbitration would ‘not require [the plaintiff’s] absence from the United States.’”³²¹ Notably, the plaintiff did not need to make the offer to arbitrate prior to the filing of the complaint.³²²

319. *Id.* Under § 1605A(c), the estates of covered individuals are permissible plaintiffs. “[S]ection 1605A(a)(1) does not require that the injury to a plaintiff result from the actual ‘extrajudicial killing,’ but rather from an ‘act of extrajudicial killing.’ A deadly terrorist act, taken as a whole, clearly constitutes an ‘act’ of extrajudicial killing,” *Calderon-Cardona v. Democratic People’s Republic of Korea*, 723 F. Supp. 2d 441, 459 (D.P.R. 2010). In *La Reunion Aerienne v. Socialist People’s Libyan Arab Jamahiriya*, 477 F. Supp. 2d 131, 138 (D.D.C. 2007), the court barred recovery for insurers of a French airliner destroyed by a terrorist act, holding that the exception only applied to suits for personal injury or death, not for insurance payments.

320. 28 U.S.C. § 1605A(a)(2)(A)(iii) (2010). See *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 44 (D.D.C. 2000) (act occurred inside Iraq and the plaintiffs properly offered to arbitrate); *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51 (D.D.C. 2010) (bombing occurred outside the territory of the defendant state, therefore the arbitration requirements do not apply).

321. *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 326 F.3d 230, 232 (D.C. Cir. 2003).

322. *Id.* at 233.

If the terrorist act in question occurred outside the defendant state, the arbitration requirement does not apply.³²³

8. Damages

The terrorism exception applies only to suits seeking money damages. Although FSIA § 1606 generally prohibits the award or recovery of punitive or noncompensatory damages against foreign states (but not their agencies or instrumentalities), § 1605A(c)(4) explicitly provides that money damages against foreign states as well as their officials, employees, and agents may include “economic damages, solatium, pain and suffering, and punitive damages.” The U.S. District Court for the District of Columbia has adopted a standardized approach for calculating various categories of damages in state-sponsored terrorism cases.³²⁴

Punitive damages are awarded both to punish defendants and to deter future terrorist acts. In calculating those damages, courts have looked to four factors initially articulated in *Flatow v. Islamic Republic of Iran*:

1. the nature of the defendant’s act;
2. the circumstances of its planning;
3. the defendant’s economic status with regard to its ability to pay; and
4. the basis on which a court might determine the amount of an award reasonably sufficient to deter like conduct in the future.³²⁵

323. See *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 (9th Cir. 2010); *Murphy*, 740 F. Supp. 2d at 51.

324. See *Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78 (D.D.C. 2012); *Taylor v. Islamic Republic of Iran*, 881 F. Supp. 2d 19 (D.D.C. 2012).

325. 999 F. Supp. 1 (D.D.C. 1998). See, e.g., *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 50 (D.D.C. 2012) (citing *Flatow*, 999 F. Supp. at 32–34 (D.D.C. 1998)):

Synthesizing these factors, courts in similar cases have generated two numbers that, together, determine the punitive damages award: (1) the multiplicand and (2) the multiplier (the factor by which the multiplicand should be multiplied to yield the desired deterrent effect). Depending on

In recent cases, courts have applied a “multiplier” to the amount of compensatory damages, to arrive at a figure deemed appropriate to deter future terrorist conduct.³²⁶

In *Beer v. Islamic Republic of Iran*, Chief Judge Lamberth of the U.S. District Court for the District of Columbia evaluated and sustained the “Flatow Method” in light of recent U.S. Supreme Court decisions.³²⁷ His decision in large part rested on determinations that foreign states do not enjoy the same “due process” protections as individuals do under the U.S. Constitution.³²⁸

Since the same terrorist incident may give rise to multiple claims under § 1605A, it is possible that a given defendant might be subject to multiple punitive damage awards for the same conduct. This possibility was recently addressed in *Murphy v. Islamic Republic of Iran*, where the court expressed concern about “over-punishing the same conduct through repeated [punitive damage] awards with little additional deterrent effect” but concluded that “when punitive damages are personal to plaintiffs in a given case, they are not necessarily excessive when awarded in a subsequent

the evidence available, the multiplicand is either the magnitude of defendant’s annual expenditures on terrorist activities . . . or the amount of compensatory damages already awarded . . . (using compensatory damages as the multiplicand and 3.44 as the multiplier, based on a ratio set forth in earlier cases). Here, plaintiffs have not presented evidence relating to Sudan’s actual expenditures on terrorist activities. The Court will thus use the compensatory damages value as the multiplicand.

326. See, e.g., *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37 (D.D.C. 2012) (applying a 3.44 multiplier); *In re Terrorist Attacks on Sept. 11, 2011*, Nos. 03 Civ. 9848 (GBD) (FM), 03 MDL 1570 (GBD) (FM), 2012 WL 3090979, at *6 (S.D.N.Y. July 30, 2012) (same); *Taylor*, 881 F. Supp. 2d at 19 (same).

327. 789 F. Supp. 2d 14, 18 (D.D.C. 2011) (“In awarding damages following passage of the NDAA, courts have generally identified the *Flatow* Method as the procedure that best serves the retribution and deterrence interests that Congress sought to promote in enacting the 2008 Amendments.”).

328. *Id.* at 20–22.

case, even arising out of the same fact, if the subsequent case involves different plaintiffs.”³²⁹

9. Application of § 1605A to prior suits

New cases filed after the effective date of the new statute (January 28, 2008) must be considered on that basis alone. However, § 1605A was intended to have at least some retroactive effect. The specific provisions are complicated.³³⁰

If a party had filed a claim, but did not obtain relief under the previous statute (§ 1605(a)(7)), the party could claim the benefits of new § 1605A by filing a motion to convert its pending case to a new action under § 1605A.³³¹ These have been called “prior actions.” The deadline for filing them was 60 days after the effective date of the statute, that is, March 28, 2008.

Alternatively, plaintiffs whose actions had been timely commenced under the prior statute and were pending or had gone to judgment when the new provision went into effect were permitted to refile under § 1605A under certain circumstances. These suits have been termed “related actions.”³³² Plaintiffs relying on the

329. 740 F. Supp. 2d 51, 81–82 (D.D.C. 2010).

330. For a comprehensive review, see *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009). See also *Simon v. Republic of Iraq*, 529 F.3d 1187, 1191 (D.C. Cir. 2008), *rev'd on other grounds sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (“[T]he new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it.”).

331. Section 1083(c)(2) of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083, 122 Stat. 3, defined a “prior action” as one in which the action was brought under § 1605(a)(7) before January 28, 2008; relied upon § 1605(a)(7) as creating a cause of action; was adversely affected on the grounds that the provision failed to create a cause of action against the state; and as of January 28, 2008, the action was before the courts in “any form.”

332. § 1083(c)(3). A related action is any “action arising out of the same act or incident” that was timely commenced under § 1605(a)(7). See generally *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1 (D.D.C. 2011); *Rimkus v. Islamic Republic of Iran*, 750 F. Supp. 2d 163 (D.D.C. 2010); *Murphy*, 740 F. Supp. 2d at 51. In *Wyatt v. Syrian Arab Republic*, 736 F. Supp. 2d 106 (D.D.C. 2010), the defendant contended that the action did not qualify as a “related ac-

“related action” provision must have sought the benefits of the new statute not later than sixty days after the date of the entry of judgment in the original action or January 28, 2008, whichever was later.³³³

*Taylor v. Islamic Republic of Iran*³³⁴ is a recent example of a related action. The immediate family members of eight U.S. servicemen killed in the 1983 bombing of the Marine barracks in Beirut had sued Iran, alleging that it had not only created and supported the terrorist organization Hezbollah but also directed it to conduct the attack. As the *Taylor* court noted, the incident spawned a “lengthy history of litigation,” leading to several prior judgments under the previous version of the state-sponsored terrorism exception.³³⁵ Because the new action was filed within sixty days after entry of judgment in one of the prior cases, it qualified as a “related action” and § 1605A could be applied retroactively to the plaintiffs’ claim for relief.

The extent to which a court may take judicial notice of prior findings of fact in related proceedings before the same court has been addressed in several decisions. In *Oveissi v. Islamic Republic of*

tion” under § 1083(c)(3) because it was identical to the original action under § 1605(a)(7). The court found that there is no statutory requirement that “a related action be distinct from the prior action in any way.”

333. § 1083(c)(3).

334. 811 F. Supp. 2d 1 (D.D.C. 2011). For a comprehensive review of the issues, see *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31 (D.D.C. 2009) (no *res judicata* effect for prior actions). See also *Simon v. Republic of Iraq*, 529 F.3d 1187, 1191 (D.C. Cir. 2008), *rev’d sub nom.* *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (“[T]he new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it.”); *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (May 29, 2012) (holding that the state-sponsored terrorism amendments to the FSIA did not abrogate the Algiers Accords). See also *Kumar v. Republic of Sudan*, Civil Action No. 2:10CV171, 2011 WL 4369122, at *6–10 (E.D. Va. Sept. 19, 2011).

335. *Taylor*, 811 F. Supp. 2d at 5. See *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52 (D.D.C. 2010).

Iran, for example, Chief Judge Lamberth said that “a FSIA court may ‘take judicial notice of related proceedings and records in cases before the same court.’”³³⁶

10. *Challenges to the legality of the exception*

Defendants have repeatedly argued that the terrorism exception is unconstitutional, and courts have repeatedly rejected the claims. In *Wyatt v. Syrian Arab Republic*, for example, the court denied the defendant’s claim that the exception “‘exposes’ the final judgments of Article III courts to potential rescission by the president and Congress, thereby violating the separation of powers between the judicial and political branches.”³³⁷

Defendants have also argued that the terrorism exception violates international law. The D.C. Circuit has rejected the contention that the exception violates the United Nations Charter by abrogating foreign sovereign immunity for those states designated as sponsors of terrorism and thereby denies such states “equality with others in violation of Article 2.1 of the United Nations Charter.”³³⁸

In *Gates v. Syrian Arab Republic*, the court rejected the defendant government’s claim that the executive branch’s designation of a state as a sponsor of terrorism, which constitutes a critical element of the abrogation of sovereign immunity under the statute,

336. 879 F. Supp. 2d 44, 49 (D.D.C. 2012) (quoting *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 59 (D.D.C. 2010)). See also *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 29 (D.D.C. 2012); *Fain v. Islamic Republic of Iran*, 885 F. Supp. 2d 78 (D.D.C. 2012); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C. 2012); *Anderson v. Islamic Republic of Iran*, 753 F. Supp. 2d 68 (D.D.C. 2010); *Rimkus*, 750 F. Supp. 2d at 163.

337. 736 F. Supp. 2d 106, 113 (D.D.C. 2010). See also *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4190277, at *3 (D.D.C. Oct. 20, 2010); *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79 (D.D.C. 2009); *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008) (addressing claim that terrorism exception was an unconstitutional delegation of power).

338. *Wyatt v. Syrian Arab Republic*, 266 F. App’x 1 (D.C. Cir. 2008). See also *Wultz*, 2010 WL 4190277 at *1–2; *Gates*, 646 F. Supp. 2d at 88.

inherently constitutes a non-justiciable “political question” under *Baker v. Carr*.³³⁹

D. Execution of Judgments in § 1605A Cases

Many of the judgments rendered under the terrorism exception have been substantial, sometimes exceeding \$100 million.³⁴⁰ Most have been default judgments. And most have remained unsatisfied. Despite the FSIA’s specific provisions concerning the enforcement of terrorism judgments against state sponsors, successful plaintiffs have had great difficulty with actual execution.³⁴¹ Problems result partly from the restrictive provisions of the law itself, but more generally from the fact that designated state sponsors of terrorism have taken steps to minimize or eliminate any property or assets in the United States that might be subject to execution.

In response, the FSIA has been amended several times with regard to judgments against state sponsors of terrorism, and several separate but related statutes have also been enacted. This section

339. 646 F. Supp. 2d at 87–88; *Baker v. Carr*, 369 U.S. 186 (1962). See also *Simon v. Republic of Iraq*, 529 F.3d 1187, 1197 (D.C. Cir. 2008), *rev’d sub nom. Republic of Iraq v. Beaty*, 556 U.S. 848 (2009). The *Gates* court also rejected Syria’s arguments that the designation violates the doctrine of sovereign equality under the UN Charter and contravenes the constitutional principle of separation of powers. 646 F. Supp. 2d at 88.

340. E.g., *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15, 31–32 (D.D.C. 2008) (\$300 million in punitive damages); *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 26 (D.D.C. 2011) (\$300 million in punitive damages); *Wultz*, 864 F. Supp. 2d 24, 42 (\$300 million in punitive damages); *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 233 (D.D.C. 2012) (\$300 million in punitive damages).

341. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 37 (D.D.C. 2009), where the court concluded that “civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy. . . . The cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President’s foreign policy initiatives.” (To support this assertion, the court noted that at the time of the decision, there were currently \$45 million of Iranian assets in the United States and over \$10 billion in outstanding court judgments.)

provides a description of these developments and the specific issues relating to the enforcement of judgments rendered in cases brought under § 1605A. These issues are discussed within the context of the FSIA's broader provisions concerning attachment and execution of judgments against foreign states and their agencies and instrumentalities, and in light of successive statutory amendments. With a changing legislative framework (which has in turn stimulated various judicial interpretations), this area of law remains complicated and continues to evolve.

1. Generally

Under the FSIA, the property of a foreign state (including its agencies and instrumentalities) in the United States is presumptively immune, and the lack (or waiver) of immunity of the state from jurisdiction under the FSIA does not guarantee that a resulting judgment will be enforceable against the foreign state's assets. This is true because the statute provides broader immunity from execution than from jurisdiction. Under § 1609, even if a valid judgment has been entered, the property of a foreign state (or its agencies and instrumentalities) remains immune and can only be subject to attachment and execution as specifically provided in §§ 1610 and 1611.

Accordingly, the burden remains on the judgment creditor to demonstrate that specific property is subject to attachment or execution. Limited discovery may be allowed to aid in the execution of judgments against foreign state property, but only with regard to *specific* property believed to be subject to attachment.³⁴²

2. Protected properties

Section 1610 sets out the rules regarding attachment and execution, and they are discussed in detail in this section. However, additional

342. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011) (general asset discovery order incompatible with FSIA; plaintiffs must identify specific property subject to attachment and plausibly allege an exception to § 1609).

limitations apply. Specifically, § 1611 exempts certain categories of property from those rules. These categories include

1. the property of international organizations that have been designated under the International Organizations Immunities Act;³⁴³
2. the property of a foreign central bank held for its own account (as well as funds held in the name of a central bank or monetary authority);³⁴⁴
3. property of a military character or used for a military activity;³⁴⁵ and
4. in actions brought under § 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, a facility or installation used by an accredited diplomatic mission for official purposes.³⁴⁶

In addition, certain types of property are protected by operation of other rules; for example, foreign embassies, consulates, and other missions, along with their bank accounts, are generally immune and inviolable under the Vienna Conventions on Diplomatic Relations and Consular Relations.³⁴⁷

343. 28 U.S.C. § 1611(a) (1996) (not subject to “attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States”). The International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669, is codified at 22 U.S.C. § 288–288*l*. The list of organizations designated under the IOIA can be found at 22 U.S.C. § 288 note.

344. 28 U.S.C. 1611(b)(1). *But see* *Weininger v. Castro*, 462 F. Supp. 2d 457, 498–99 (S.D.N.Y. 2006) (Terrorism Risk Insurance Act overrides immunity granted in § 1611 so that property of foreign central bank of terrorist party was not immune from attachment and execution to satisfy judgment obtained against terrorist party pursuant to FSIA).

345. 28 U.S.C. § 1611(b)(2).

346. 28 U.S.C. § 1611(c).

347. Under Article 22 of the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972), the premises of the mission are inviolable and

3. *Section 1610*

When the FSIA was amended in 1996 to include the state-sponsored terrorism exception to jurisdiction in § 1605(a)(7), a parallel provision was included regarding enforcement of judgments rendered under that section. Thus, § 1610(a)(7) was added to permit execution of judgments related to claims for which *foreign states* were no longer immune under the new provision, but it allowed execution only against property of that state used for commercial purposes in the United States “regardless of whether the property in question was involved with the act on which the claim was based.”³⁴⁸ Under the amended § 1610(b)(2), property in the United States of an *agency or instrumentality* of a foreign state engaged in commercial activity in the United States was no longer entitled to immunity from execution, or attachment in aid of execution, upon a U.S. judgment relating to a claim for which that agency or instrumentality was not immune by virtue of §§ 1605(a)(7). This was true regardless of whether the property was “involved in the act” upon which the claim was based at any time.

In addition, the 1996 amendments included a provision permitting execution against frozen or diplomatic assets of state sponsors of terrorism. Section 1610(f)(1) provided that, notwithstanding any other provision of law, “any property with respect to which financial transactions are prohibited or regulated” under various statutory authorities, including the Trading With the Enemy Act (TWEA) and the International Emergency Economic Powers Act (IEEPA), was made subject to execution to satisfy any judgment relating to a claim for which a foreign state or its agency or instru-

are (together with their furnishings and other property) immune from search, requisition, attachment, or execution. More limited protections are provided for consular premises and property under the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the United States Dec. 24, 1969).

348. Pub. L. No. 104-132, § 221(b), 110 Stat. 1214 (April 24, 1996). The commercial property exception under § 1610(a)(7) only applies where the foreign sovereign itself engages in the relevant commercial activity. See *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 234 (D. Mass. 2006).

mentality was not immune under § 1605(a)(7).³⁴⁹ However, recognizing that such execution could cause significant foreign policy issues, the amendments also explicitly authorized the President, in the interests of national security, to waive that provision, which he did right after it was enacted.³⁵⁰ Section 1610(f)(1) has never become operative.

4. TRIA

Despite these 1996 amendments, most plaintiffs with judgments against state sponsors remained unable to obtain satisfaction because, then as now, (a) the states in question typically do not engage in commercial activity in the United States and (b) any assets they might have in the United States are typically seized or frozen as a result of government sanctions.

To overcome this hurdle, Congress subsequently enacted the Terrorism Risk Insurance Act of 2002 (TRIA), which created a temporary federal program of “shared public and private compen-

349. Specifically, 28 U.S.C. § 1610(f)(1)(A) (2010) stated:

Notwithstanding any other provision of law . . . any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under § 1605(a)(7) (as in effect before the enactment of section 1605A) or 1605A.

The introductory “notwithstanding any other provision of law” phrase has been determined to override any immunity provided in the FSIA but not other sanctions regimes (such as the Cuban Assets Control Regulations) or state law. *See, e.g., Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389 (S.D.N.Y. 2011). *But see Weininger v. Castro*, 462 F. Supp. 2d 457 (S.D.N.Y. 2006) (TRIA overrides Cuban sanctions).

350. 28 U.S.C. § 1610(f)(3); Pres. Determ. No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). *See also* Pres. Determ. No. 2001-03, 63 Fed. Reg. 66,483 (Oct. 28, 2000).

sation for insured losses resulting from acts of terrorism” and (in § 201) specifically allowed for attachment and execution of terrorism judgments for compensatory damages against the “blocked assets of the terrorist party” (including those of its agencies and instrumentalities) which might otherwise have been immune.³⁵¹

The simplicity of this formulation is misleading. Each of these elements is further defined in the statute, the relevant provisions have subsequently been amended, and their application has been the subject of continuing judicial interpretation, making this (to say the least) a challenging area to summarize.

TRIA defined the term “terrorist party” to mean “a terrorist, a terrorist organization . . . or a foreign state designated as a state sponsor of terrorism.”³⁵² Moreover, the enforcement of judgments provision only applied in cases based on (a) an “act of terrorism” or (b) an act for which the terrorist party lacks immunity under

351. Pub. L. No. 107-297, §§ 101(b) and 201(a), 116 Stat. 2322, 2337 (2002 (codified at 28 U.S.C. § 1610 note)). Specifically, § 201(a) stated:

Notwithstanding any other provision of law, . . . in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of the terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

See *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6 (D.D.C. 2011). TRIA’s constitutionality was upheld in *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010), *cert. denied sub nom.* *Bank Melli Iran New York Rep. Office v. Weinstein*, 133 S. Ct. 21 (2012).

352. Pub. L. No. 107-297, § 201(d)(4). “Terrorist organization” has the meaning specified in § 212(a)(3)(B)(vi) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(vi). The “designation” must be one under § 6(j) of the Export Administration Act of 1979 (codified at 50 U.S.C. app. 2405(j)), or § 620A of the Foreign Assistance Act of 1961 (codified at 22 U.S.C. § 2371). In *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 396 (S.D.N.Y. 2011), the court interpreted the term “terrorist party” to require that a state sponsor have been so designated “both at the time of the underlying judgment and at the time of the enforcement proceeding.” Because the 1998 designation of North Korea had been rescinded in October 2008, even before the entry of judgment, TRIA did not apply in that case.

§ 1605(a)(7).³⁵³ These are separate requirements. The term “act of terrorism” was defined somewhat confusingly to mean either (a) any act certified by the Secretary of the Treasury, in conjunction with the Secretary of State and the Attorney General, as provided in § 102 of the statute³⁵⁴ or (b) to the extent not covered by the preceding clause, any terrorist activity falling within the definition of terrorist activities, excluding certain classes of aliens under the Immigration and Nationality Act (INA).³⁵⁵ Violence failing to meet the criteria in one or the other accordingly does not qualify as an “act of terrorism” for TRIA purposes.³⁵⁶

Finally, TRIA defined the term “blocked assets” to include, in pertinent part, “any asset seized or frozen by the United States” under the authority of relevant sections of the Trading With the Enemy Act (TWEA) or the International Emergency Economic Powers Act (IEEPA).³⁵⁷ At the same time, it explicitly excluded property subject to a license issued by the U.S. government under IEEPA or the United Nations Participation Act.³⁵⁸

For several reasons, these TRIA provisions were less than effective. Generally, determining whether particular assets are blocked requires reference to Office of Foreign Assets Control (OFAC) reg-

353. Pub. L. No. 107-297, § 201(a).

354. See TRIA § 102(1), codified as a note to 15 U.S.C. § 6701.

355. Specifically, those under INA § 212(a)(3)(B)(iii) (codified at 8 U.S.C. § 1182(a)(3)(B)(iii)).

356. *Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 29 (D.D.C. 2011). However, TRIA’s requirements may otherwise be satisfied if they are acts for which the relevant state has been found liable under the FSIA’s terrorism exception. For an example, see *Weininger v. Castro*, 462 F. Supp. 2d 457 (S.D.N.Y. 2006).

357. § 201(d)(2)(A), 116 Stat. at 2339. The specific provisions are § 5(b) of the Trading With the Enemy Act, 50 app. U.S.C.A. § 5(b), and § 202 or 203 of the International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701 and 1702.

358. § 201(d)(2)(B)(i). The UN Participation Act of 1945, 59 Stat. 619, is codified at 22 U.S.C. § 287–287e-3. See *Hausler v. JP Morgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 534 (S.D.N.Y. 2010) (citing *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 556 U.S. 366 (2009) (an arbitral award is not a blocked asset under TRIA)).

ulations.³⁵⁹ When they are blocked, transactions in those assets are prohibited, and the assets may thus not be available to judgment creditors of state sponsors regardless of any sovereign immunity shield. When transactions have been licensed, the assets are “unblocked” to the extent of the license and thus by definition outside of TRIA § 201.³⁶⁰ One purpose of TRIA, of course, was to override OFAC’s regulations and permit attachment and execution even when no OFAC license had been issued. In any event, few assets of state sponsors that could be blocked remain in the United States. Moreover, TRIA excluded property used exclusively for diplomatic or consular purposes and thus entitled to immunity and inviolability under the Vienna Conventions.³⁶¹ As a result, the practical impact of TRIA was limited.

5. *Post-TRIA legislation*

When the FSIA was further amended in 2008 to replace § 1605(a)(7) with § 1605A, the additional modifications were made with respect to judgments.³⁶² The most important changes were made by adoption of § 1610(g), in which Congress further expanded the category of property subject to attachment for cases involving state sponsors.

359. Sanctions under TWEA and IEEPA are administered by the Office of Foreign Assets Control (OFAC) in the U.S. Department of the Treasury. A general description of OFAC, its authorities, and its functions can be found at <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>.

360. *Estate of Heiser v. Islamic Republic of Iran*, 807 F. Supp. 2d 9 n.6 (D.D.C. 2011) (“*Heiser III*”). In *Weinstein v. Islamic Republic of Iran*, 299 F. Supp. 2d 63, 75 (S.D.N.Y. 2004), the court rejected the argument that the term “blocked assets” includes all assets “regulated” or “licensed” under IEEPA by OFAC.

361. § 201(d)(2)(B)(ii). These terms were further defined in § 201(d)(3). Execution is not permitted against diplomatic and consular property being used for those purposes, *Bennett v. Islamic Republic of Iran*, 618 F.3d 19 (D.C. Cir. 2010).

362. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A).

The first major change was to eliminate (for judgment purposes) the distinction between the state itself and its agencies or instrumentalities. Thus, § 1610(g)(1) provides that both the property of a foreign state against which a judgment is entered under § 1605A *and* the property of an agency or instrumentality of such a state (including “property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity”) are subject to attachment and execution.³⁶³ In addition, the statute states that this amenability to execution is to be determined regardless of

- (A) the level of economic control over the property by the government of the foreign state;
- (B) whether the profits of the property go to that government;
- (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
- (D) whether that government is the sole beneficiary in interest of the property; or
- (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.³⁶⁴

The property must still be used in commercial activity, but the distinction between states and their agencies and instrumentalities is attenuated. Judgment creditors proceeding under § 1610(g)(1) must nonetheless establish that the entity in question meets the requirements of “agency or instrumentality.”³⁶⁵ At least one court, however, has declined to give this provision a broad reading.³⁶⁶

363. This provision was an apparent effort to limit the effect of the decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), in which the U.S. Supreme Court held, *inter alia*, that duly created instrumentalities of a foreign state are presumed to have independent status.

364. § 1610(g)(1).

365. *See, e.g., Heiser III*, 807 F. Supp. 2d at 9.

366. *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 867 F. Supp. 2d 389, 406 (S.D.N.Y. 2011) (refusing to interpret the phrase “interest held directly or indirectly in a separate juridical entity” to mean any property in the United States in which the judgment debtor has “any interest whatsoever”).

The 2008 amendment's second change addressed the issue of blocked assets. Under § 1610(g)(2), the fact that the U.S. government has regulated the property in some way, such as through enforcement under the Trading with the Enemy Act or the International Emergency Economic Powers Act, does not shield it from execution.

Finally, in an evident effort to provide a measure of protection to uninvolved third parties with interests in the property in question, § 1610(g)(3) reserved the authority of a court to “prevent appropriately the impairment of an interest held by a person who is not liable” in the underlying action under § 1605A that gives rise to the judgment in question.³⁶⁷

6. *Blocked assets*

In practice, the complicated interplay between TRIA and amended § 1610 has given rise to a number of sharply litigated issues. One set of issues involves the particular assets to which the provisions apply.

For example, the U.S. District Court for the Southern District of New York addressed the attachment of funds frozen under the Cuban Assets Control Regulations in *Weininger v. Castro*,³⁶⁸ reading TRIA to permit enforcement of a judgment against a foreign state by execution against the blocked assets of that state's agency or instrumentality. The court stated, “[W]here a judgment against a terrorist party exists, not only its blocked assets, but the assets of its agencies and instrumentalities can be used to satisfy the judgment.”³⁶⁹

In *Weininger*, the plaintiffs sought to enforce a judgment against the Republic of Cuba by seizing funds held in accounts at

367. As stated by Chief Judge Lamberth in *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 443 (D.D.C. 2012) (“*Heiser IV*”), section 1610(g)(3) “provides courts with the important power to protect interests held by third-parties where Iran has some ownership of a property.”

368. 462 F. Supp. 2d 457 (S.D.N.Y. 2006).

369. *Id.* at 485, 487. The decision also found that TRIA superseded the immunity granted a central bank by § 1611. *Id.* at 498–99.

JPMorgan Chase Bank; these funds were alleged to be owed to various agencies and instrumentalities of the Cuban government, but the accounts had been frozen under the Cuban Assets Control Regulations. The court concluded that the plain language of TRIA § 201(a) permits execution against funds held by or owed to those agencies and instrumentalities.³⁷⁰ The court found that the rationale in the Supreme Court’s decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*³⁷¹ (recognizing the independence of separate government instrumentalities) did not apply in the TRIA context.

The assets must be identified with specificity and proven to be those of the state sponsor and/or its agencies or instrumentalities. Thus, in *Bennett v. Islamic Republic of Iran*,³⁷² the U.S. District Court for the Northern District of California found that TRIA’s requirements had not been satisfied because the plaintiffs had failed to demonstrate that the assets in question were owned by Iran or its agencies or instrumentalities. In that case, plaintiffs attempted to enforce default judgments rendered by the U.S. District Court for the District of Columbia against “tangible and/or intangible assets” held in two banks which, they alleged, were blocked by the U.S. government and which were owned by, or had a nexus with, the Islamic Republic of Iran and its agents and instrumentalities. Because the plaintiffs had provided only “vague, indeterminate information,” the court said, it was unable to determine whether there were in fact any “blocked assets” of Iran within TRIA’s scope.

Moreover, while TRIA does not require the separate agency or instrumentality to be a named party to the litigation resulting in the judgment, the assets of that separate agency or instrumentality

370. *Id.* at 487 (“[T]his Court finds that TRIA allows for execution of the blocked assets of “juridically separate” entities to satisfy a judgment against a designated terrorist party, as defined by TRIA, when such entities are agencies or instrumentalities of that terrorist party”).

371. 462 U.S. 611 (1983).

372. *Bennett v. Islamic Republic of Iran*, No. CV 11-80065 MISC CRB (NJV), 2011 WL 3157089, at *6 (N.D. Cal. July 26, 2011); *see also* *Bennett v. Islamic Republic of Iran*, 927 F. Supp. 2d 833 (N.D. Cal. 2013).

must also have been “blocked.” In *Weinstein v. Islamic Republic of Iran*, the Second Circuit held that the requirements of § 201(a) had been satisfied because the assets of an Iranian bank held by a New York bank had been blocked by Executive Order.³⁷³ Even though the Iranian bank had not been a named party to the original litigation or the resulting judgment, it had conceded its status as an agency or instrumentality of the Government of Iran and thus met the explicit language of TRIA.³⁷⁴

At least one court has read TRIA narrowly to exclude from its reach assets blocked under other authority than TWEA and IEEPA.³⁷⁵

7. *Extent of property interest*

One sharply contested set of questions concerns the extent of the terrorist party’s interest in the blocked assets required for attachment and the appropriate choice of law in making this determination.

In *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, the court rejected the plaintiffs’ argument that TRIA should be interpreted to reach any asset in which the terrorist party “has a property inter-

373. 609 F.3d 43, 50 (2d Cir. 2010), *cert. denied sub nom.* Bank Melli Iran New York Rep. Office v. Weinstein, 133 S. Ct. 21 (2012) (concluding that TRIA allows “post-judgment execution and attachment . . . against property held in the hands of an instrumentality of the judgment-debtor, even if the instrumentality is not itself named in the judgment.” In a brief filed by the U.S. government amicus curiae opposing certiorari in this case (*see* 2012 WL 1883085 (May 24, 2012)), the government supported the court of appeals’ conclusion that under TRIA § 201(a), the agency or instrumentality need not be the “terrorist party” against which the judgment was entered.

374. The Second Circuit also rejected a constitutional (separation of powers) challenge to TRIA as well as the argument that it conflicted with the 1955 bilateral Treaty of Amity between Iran and the United States. *Id.* at 52–54.

375. In *Stansell v. Revolutionary Armed Forces of Columbia*, 704 F.3d 910, 915 (11th Cir. 2013), the court of appeals stated that for purposes of TRIA, “blocked assets” must be read to cover only those assets frozen under specified sections of the Trading Act and the Economic Powers Act, and thus not to extend to assets frozen under different authority.

est.”³⁷⁶ The plaintiffs included victims of a terrorist attack in Israel and their families seeking to satisfy a judgment against the Democratic Republic of Korea and its main intelligence agency by seizing accounts at various banks containing funds (wire transfers) that had been blocked pursuant to the North Korea Sanctions Regulations.³⁷⁷ The court said that in order to be subject to execution under TRIA § 201, “the blocked assets of that terrorist party” must be both “blocked assets” *and* assets “of that terrorist party.”³⁷⁸ However, TRIA itself does not define “property” or “property interest”; nor does it preempt state law. The court looked to relevant New York law, under which the word “of” signifies “ownership.”³⁷⁹ The plaintiffs could not prove that North Korea owned the proceeds of the electronic funds transfers (EFTs) that had been blocked pursuant to OFAC sanctions, and as a result TRIA was inapplicable.

In its analysis of this issue, the *Calderon-Cardona* court rejected an earlier Southern District of New York decision, *Hausler v. JPMorgan Chase Bank, N.A.*, which held that § 201 preempts state law and, when read in conjunction with the Cuban Assets Control Regulations,³⁸⁰ extends to assets in which a terrorist party has an interest, even if they are not owned by that party.³⁸¹ Following *Calderon-Cardona*, the *Hausler* court again addressed the issue, in a related proceeding, and responded by reiterating its conclusion that TRIA does preempt state property law and permits execution against assets from blocked EFT accounts from banks that were

376. 867 F. Supp. 2d 389 (S.D.N.Y. 2011).

377. 31 C.F.R. ch. V, pt. 510 (2011).

378. *Calderon-Cardona*, 867 F. Supp. 2d at 394.

379. *Calderon-Cardona* also held that § 1610(g) itself creates no property rights but “merely attaches consequences, federally defined, to rights created under state law.” *Id.* at 406 (citing *Exp.-Imp. Bank of U.S. v. Asia Pulp & Paper Co.*, 609 F.3d 111, 117 (2d Cir. 2010)).

380. 31 C.F.R. § 515.101–901 (2013).

381. *Calderon-Cardona*, 867 F. Supp. 2d at 404–05, distinguishing *Hausler v. JPMorgan Chase Bank, N.A.*, 740 F. Supp. 2d 525, 529–41 (S.D.N.Y. 2010). The *Hausler* court had explicitly rejected the views of the executive branch on the issue. *Id.* at 537–38.

admittedly agencies and instrumentalities of the Cuban government.³⁸² On the first issue, the *Hausler* court stated:

In essence, the TRIA, supplemented by the [Cuban Assets Control Regulations] and the OFAC procedures, represents Congress's policy determination that under some circumstances, such as those prevailing here, in a choice between a claim to assets asserted by a victim of an act of a terrorist state and embodied in a judgment interest obtained under federal law, and a claim of an interest in the same assets arising from a commercial transaction and asserted under state law, the federal interest is superior and must be given priority in any court dispute over release of the assets.³⁸³

As of December 2013, the appeal from *Calderon-Cardona* and the second *Hausler* decision remained pending before the Second Circuit.³⁸⁴

However, the reasoning in *Calderon-Cardona* was followed by the court in *Rubin v. Islamic Republic of Iran*,³⁸⁵ in which the plaintiffs obtained a default judgment against Iran and sought to execute it against antiquities that were in the possession of the Museum of Fine Arts and Harvard University but were allegedly the property of Iran. Noting that TRIA does not specify the mechanism for execution and attachment, the district court looked to Massachusetts law to discern the meaning of property "of the defendant." Under Massachusetts law, this phrase means "belonging to the defendant."³⁸⁶

On appeal, the First Circuit affirmed the district court's decision but on a narrower ground.³⁸⁷ The court of appeals agreed with

382. *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012 ("*Hausler II*"), *appeal docketed*, Nos. 12-1264 (Mar. 20, 2012) & 12-1272 (Apr. 5, 2012) (2d Cir.).

383. *Id.* at 563. *Hausler II* was followed in *Levin v. Bank of New York Mellon*, No. 09 Civ. 5900 (RPP), 2013 WL 5312502 (S.D.N.Y. Sept. 23, 2013).

384. Both cases were argued on Feb. 11, 2013. The brief of the United States amicus curiae in the *Calderon-Cardona* appeal is available at 2012 WL 4509846 (Sept. 21, 2012).

385. 810 F. Supp. 2d 402 (D. Mass. 2011), *aff'd*, 709 F.3d 49 (1st Cir. 2013).

386. *Id.* at 403–06.

387. *Rubin v. Islamic Republic of Iran*, 709 F.3d 49 (1st Cir. 2013).

the U.S. government's position (submitted in a brief amicus curiae) that TRIA's terms permit attachment only of "the blocked assets of [the] terrorist party"³⁸⁸ and TRIA "does not give judgment creditors a property interest in blocked assets greater than that of the terrorist party itself."³⁸⁹ Therefore, the government argued, TRIA does not permit plaintiffs "to attach the artifacts possessed by the Museum if those assets are not owned by Iran."³⁹⁰ The court declined to reach the question of ownership (or whether that should be decided under state or federal law), however, because it found that Iran had never asserted a claim to (or directed the transfer of) the antiquities in question; as a result, ownership of those antiquities was not "contested" within the meaning of OFAC regulations, and they were not "blocked" for TRIA purposes.³⁹¹

The U.S. District Court for the District of Columbia has also addressed these issues in *Estate of Heiser v. Islamic Republic of Iran*.³⁹² Chief Judge Lamberth agreed with *Calderon-Cardona* on the question of the necessary ownership interest, concluding that "Congress intended to permit terrorist victims to execute on only the assets 'of—or, in other words, 'belonging to'—the terrorist state committing the act."³⁹³ On the issue of applicable law, he agreed with *Hausler*, holding that TRIA § 201 and FSIA § 1610(g) "implicate exclusively federal interests and, therefore, preempt District of Columbia law."³⁹⁴ The U.S. Court of Appeals for the Dis-

388. *Rubin v. Islamic Republic of Iran*, No. 11-2144, 2012 WL 2192627 (Appellate Brief at 11) (1st Cir. June 7, 2012).

389. *Id.* at *12.

390. *Id.* at *14.

391. *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 52 (1st Cir. 2013).

392. 885 F. Supp. 2d 429 (D.D.C. 2012) ("*Heiser IV*")

393. *Id.* at 438. *See also* *Peterson v. Islamic Republic of Iran*, 938 F. Supp. 2d 93 (D.D.C. 2013), *appeal docketed*, No. 13-7086 (D.C. Cir. May 28, 2013).

394. *Heiser IV*, 885 F. Supp. 2d at 444. Noting that the D.C. Circuit has cautioned against labeling actions under FSIA as "federal common law" cases, the court proceeded to analyze sources to "find and apply what are generally considered to be the well-established standards of state common law, a method of evaluation which mirrors—but is distinct from—the 'federal common law' ap-

trict of Columbia Circuit affirmed this decision on the first point (noting that nothing in the relevant legislative histories suggests congressional intent to enable attachment of property not owned by the foreign states in question) but said that because §§ 201 and 1610(g) are controlling as a matter of federal law, “it is not correct to treat this as an issue of preemption.”³⁹⁵

8. *Blocked Iranian assets*

The current state of the law has continued to frustrate judgment creditors, especially those who have been the victims of Iranian-sponsored terrorist acts. In 2009, Chief Judge Lamberth of the U.S. District Court for the District of Columbia described their situation in some detail, noting that despite the various legislative amendments, “the vast majority of victims have not collected so much as a dime on their court judgments against Iran.”³⁹⁶ He noted cases such as *Peterson v. Islamic Republic of Iran*,³⁹⁷ in which Iran was determined to have furnished money, weapons, training, and guidance to Hezbollah in direct support of a terrorist plot that culminated in a large-scale suicide bombing attack on the U.S. Marine barracks in Beirut, Lebanon, on October 23, 1983, killing more than 200 American servicemen and injuring many others. The plaintiffs received one of the largest FSIA judgments (over \$2.6 billion) but have been unable to recover, since most of Iran’s property or interests in property in the United States have been frozen or otherwise regulated, are otherwise unreachable under the FSIA, or are held by financial institutions that are themselves entitled to immunity as agencies or instrumentalities of other foreign nations.

proach.” *Id.* at 445 (citing *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 23 n.7. (D.D.C. 2011)).

395. *Heiser v. Islamic Republic of Iran*, 735 F.3d 934, 940 (D.C. Cir. 2013).

396. *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 127 (D.D.C. 2009).

397. 264 F. Supp. 2d 46 (D.D.C. 2003); *Peterson v. Islamic Republic of Iran*, 515 F. Supp. 2d 25 (D.D.C. 2007); *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268 (D.D.C. 2008).

Chief Judge Lamberth called for meaningful legislative reform with respect to civil actions against Iran.

A limited change was made in August 2012, addressed specifically to the situation in *Peterson*. Section 502 of the Iran Threat Reduction and Syria Human Rights Act of 2012³⁹⁸ makes available for execution certain Iranian blocked financial assets held in the United States for a foreign securities intermediary doing business in the United States. These assets are deemed “equal in value to a financial asset of Iran . . . that such foreign securities intermediary or a related intermediary holds abroad.” Before assets can be turned over under this provision, a court is required to make a determination that Iran holds “equitable title to, or the beneficial interest in, the assets” and that “no other person possesses a constitutionally protected interest” in them.³⁹⁹ However, the effect of this provision is expressly limited to assets at issue in *Peterson*.⁴⁰⁰

Moreover, the term “blocked asset” is defined in the statute to mean any asset seized or frozen by the United States under § 5(b) of TWEA or § 202 or § 203 of IEEPA and to exclude property (1) subject to a license specifically required by any other provision of law or (2) subject to the Vienna Convention on Diplomatic Relations or the Vienna Convention on Consular Relations or “that enjoys equivalent privileges and immunities under the laws of the United States, and is being used exclusively for diplomatic or consular purposes.”⁴⁰¹ Even this expanded access to Iranian assets for the plaintiffs in *Peterson* is extremely limited, and it reflects the overall heavy burden that remains on judgment creditors under the FSIA to establish that specific property is subject to attachment or execution.

398. Pub. L. No. 112-158, § 502, 126 Stat. 1214 (2012) (codified at 22 U.S.C.A. § 8772).

399. *Id.* § 502(a)(2)(A).

400. *Id.* § 502(b).

401. *Id.* § 502(d)(1)(B)(ii).

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Cases

- 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000), 11
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- Abdullah v. Embassy of Iraq at Washington, DC, Civ. Action No. 12-2590, 2013 WL 4787225 (E.D. Pa. Sept. 9, 2013), 47
- Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012), 42, 56
- Abelesz v. OTP Bank, 692 F.3d 661 (7th Cir. 2012), 25
- Abi Jaoudi & Ajar Trading Co. v. Cigna Worldwide Ins. Co., 391 F. App'x 173 (3d Cir. 2010), 25
- Aboeid v. Saudi Arabian Airlines, Inc., No. CV-10-2518 (5v)(VVP), 2011 WL 2222140, at *3 (E.D.N.Y. June 1, 2011), 24
- Abur v. Republic of Sudan, 437 F. Supp. 2d 166 (D.D.C. 2006), 61
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- Acree v. Republic of Iraq, 271 F. Supp. 2d 179 (D.D.C. 2003), 85
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- Aero Union Corp. v. Aircraft Deconstructors Int'l LLC, No. 1:11-cv-00484-JAW, 2012 WL 3679627, at *8 (D. Maine Aug. 24, 2012), 21
- Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417 (5th Cir. 2006), 73
- Af-Cap, Inc. v. Republic of Congo, 383 F.3d 361, *clarified on reh'g*, 383 F.3d 503 (5th Cir. 2004), 75, 76
- Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007), 74
- Agrocomplect, AD v. Republic of Iraq, 524 F. Supp. 2d 16 (D.D.C. 2007), *aff'd*, 304 F. App'x 872 (D.C. Cir. 2008), 54
- Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 528 F.3d 934 (D.C. Cir. 2008), 10, 42, 58
- Agudas Chasidei Chabad of U.S. v. Russian Fed'n, 798 F. Supp. 2d 260 (D.D.C. 2011), 16, 70
- Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250 (7th Cir. 1983), 88

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- All Am. Trading Corp. v. Cuartel General Fuerza Aerea Guardia Nacional de Nicaragua, 818 F. Supp. 1552 (S.D. Fla. 1993), 78
- Alperin v. Vatican Bank, 360 F. App'x 847 (9th Cir. 2009), 35, 36
- Anderson v. Islamic Republic of Iran, 753 F. Supp. 2d 68 (D.D.C. 2010), 90, 109
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- Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989), 8, 42, 61
- Arriba Ltd. v. Petroleos Mexicanos, 962 F.2d 528 (5th Cir. 1992), 21
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- Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957 (2d Cir. 1991), 19
- Beer v. Islamic Republic of Iran, 789 F. Supp. 2d 14 (D.D.C. 2011), 106, 110
- Beer v. Islamic Republic of Iran, No. 08-cv-1807 (RCL), 2010 WL 5105174, at *11–12 (D.D.C. Dec. 9, 2010), 90, 100, 103
- Beg v. Islamic Republic of Pakistan, 353 F.3d 1323 (11th Cir. 2003), 57
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- Bell Helicopter Textron Inc. v. Islamic Republic of Iran, 892 F. Supp. 2d 219 (D.D.C. 2012), 2, 52
- Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, No. 12-7103, 2013 WL 5853916, at *5–10 (D.C. Cir. Nov. 1, 2013), 54
- Bennett v. Islamic Republic of Iran, 618 F.3d 19 (D.C. Cir. 2010), 117
- Bennett v. Islamic Republic of Iran, 927 F. Supp. 2d 833 (N.D. Cal. 2013), 120
- Bennett v. Islamic Republic of Iran, No. CV 11-80065 MISC CRB (NJV), 2011 WL 3157089, at *6 (N.D. Cal. July 26, 2011), 120
- Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39 (D.D.C. 2008), 15
- Best Med. Belgium, Inc. v. Kingdom of Belgium, 913 F. Supp. 2d 230 (E.D. Va. 2012), 48, 56
- Bettis v. Islamic Republic of Iran, 315 F.3d 325 (D.C. Cir. 2003), 92, 97, 103
- Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183 (10th Cir. 2008), 53
- Blue Ridge Invs., LLC v. Republic of Argentina, 902 F. Supp. 2d 367 (S.D.N.Y. 2012), *aff'd*, 735 F.3d 72 (2d Cir. 2013), 62
- Broadbent v. Org. of Am. States, 628 F.2d 27 (D.C. Cir. 1980), 9
- Butters v. Vance Int'l, Inc., 225 F.3d 462 (4th Cir. 2000), 48
- Cabiri v. Gov't of the Republic of Ghana, 165 F.3d 193 (2d Cir. 1999), 60
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- California Dep't of Water Resources v. Powerex Corp., 533 F.3d 1087 (9th Cir. 2008), 36
- California v. NRG Energy, Inc., 391 F.3d 1011 (9th Cir. 2004), 35
- Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258 (D.D.C. 2003), 97
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- Capital Ventures Int'l v. Republic of Argentina, 552 F.3d 289 (2d Cir. 2009), 42

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- Carpenter v. Republic of Chile, 610 F.3d 776 (2d Cir. 2010), 42
- Cassirer v. Kingdom of Spain, 580 F.3d 1048 (9th Cir. 2009), 58
- Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 3057 (2011), 2, 25
- Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990), 38, 88
- Chuidian v. Philippine Nat'l Bank, 976 F.2d 561 (9th Cir. 1992), 19
- Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994), 49
- Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004), 85, 86
- Community Fin. Group, Inc. v. Republic of Kenya, 663 F.3d 977 (8th Cir. 2011), 49
- Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n, 361 F.3d 676 (2d Cir. 2004), 29, 35
- Conn. Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002), 74
- Creighton Ltd. v. Qatar, 181 F.3d 118 (D.C. Cir. 1999), 62
- Cruise Connections Charter 1, LP v. Attorney Gen. of Canada, 600 F.3d 661 (D.C. Cir. 2010), 53
- Crum v. Kingdom of Saudi Arabia, No. Civ.A.05-275, 2005 WL 3752271, at *3-4 (E.D. Va. July 13, 2005), 48
- Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38 (D.D.C. 2000), 104
- Daventree Ltd. v. Republic of Azerbaijan, 349 F. Supp. 2d 736 (S.D.N.Y. 2004), 57
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- Taylor v. Islamic Republic of Iran, 811 F. Supp. 2d 1 (D.D.C. 2011), 95, 100, 108
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- Thai Lao Lignite (Thailand) Co. v. Gov’t of the Lao People’s Democratic Republic, No. 10 Civ. 5256 (KMU), 2011 WL 4111504, at *4–5 (S.D.N.Y. Sept. 13, 2011), 71
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- UNC Lear Servs., Inc. v. Kingdom of Saudi Arabia, 581 F.3d 210 (5th Cir. 2009), *cert. denied*, 559 U.S. 971 (2010), 45
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- Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests, 898 F. Supp. 2d 301 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013), 20, 43, 46
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- Walters v. People's Republic of China, 672 F. Supp. 2d 573 (S.D.N.Y. 2009), 68, 71, 74
- Wei Ye v. Jiang Zemin, 383 F.3d 620 (7th Cir. 2004), 9
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- Wyatt v. Syrian Arab Republic, 362 F. Supp. 2d 103 (D.D.C. 2005), 97, 101
- Wyatt v. Syrian Arab Republic, 736 F. Supp. 2d 106 (D.D.C. 2010), 89, 101, 107, 109
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- Yousuf v. Samantar, 699 F.3d 763 (2012), 39
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Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi, 215 F.3d 247 (2d Cir. 2000), 20, 56, 58

International Sources

1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the United States Dec. 24, 1969), 113

1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (entered into force for the United States Dec. 13, 1972), 112

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 974 U.N.T.S. 178, 24 U.S.T. 564, T.I.A.S. No. 7570 (entered into force on Jan. 26, 1973), 98

Convention on Privileges and Immunities of the United Nations, *opened for signature* Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900 (entered into force with respect to the United States Apr. 29, 1970), 9, 10

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention), Nov. 15, 1965, http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=17, 14, 16

Inter-American Convention on International Commercial Arbitration (Panama Convention), Jan. 30, 1975, O.A.S.T.S. No. 42, 14 I.L.M. 336 (1975), implemented at 9 U.S.C. § 301 (2010), 62

International Convention Against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 45, U.N. Doc. A/34/45, at 245 (June 3, 1983), 1316 U.N.T.S. 205, T.I.A.S. No. 1108, 18 ILM 1456 (entered into force for the United States Jan. 6, 1985), 99

International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID or Washington Convention), Mar. 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1291, T.I.A.S. No. 6090, 62

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, ___ U.S.T. ___, 1465 U.N.T.S. 85, 96

United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38

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(Dec. 2, 2004), http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf, 19

U.N. Convention on the Recognition and Enforcement of Arbitral Awards (New York Convention), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, implemented by Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–207 (2010), 62

Acts

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 12241 (1996) (codified at 28 U.S.C. § 1605(a)(7)), 81, 113

Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, Div. A, § 589, 110 Stat. 3009-172 (1996) (codified at 28 U.S.C. § 1605 note (2006)), 85

Export Administration Act of 1979 § 6(j), Pub. L. No. 96-72, Sept. 29, 1979, 93 Stat. 503 (codified at 50 U.S.C. app. § 2405(j)), 84, 115

Federal Arbitration Act, ch. 2, 9 U.S.C. §§ 201–207 (2010), 62

Foreign Assistance Act of 1961 § 620A, Pub. L. No. 87-195, as amended (codified at 22 U.S.C. § 2371), 64, 84, 93, 114, 115

Immigration and Nationality Act § 212(a)(3)(B)(iii) (codified at 8 U.S.C. § 1182(a)(3)(B)(iii)), 91, 115

Immunity from Seizure Act (22 U.S.C. § 2495), 10

International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, Dec. 28, 1977, 91 Stat. 1626, as amended (codified at 50 U.S.C. §§ 1701–1706), 113, 116, 117, 121, 126

International Organizations Immunities Act (IOIA), Dec. 29, 1945, ch. 652, Title I, 59 Stat. 669 (codified as amended at 22 U.S.C. §§ 288–288l), 10, 112

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214 (Aug. 10, 2012) (codified at 22 U.S.C.A. § 8772), 126

National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, Div. A, § 1083 (2008), 122 Stat. 338 (codified at 28 U.S.C. § 1605A), 63, 81, 117

Terrorism Risk Insurance Act (TRIA), Pub. L. No. 107-297, 116 Stat. 2322 (2002) (codified at 28 U.S.C. § 1610 note), 77, 114–15

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