

THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2012 YEAR IN REVIEW

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ABSTRACT

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. (FSIA), provides the exclusive basis for suing a foreign sovereign in U.S. courts. While the FSIA generally grants immunity to foreign sovereigns, it also lays out a number of exceptions under which U.S. courts may exercise jurisdiction. Plaintiffs have thus used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of contexts, ranging from purely commercial disputes to wrongful death claims on behalf of victims of state-sponsored terrorism. The purpose of this Review is to provide an overview of the primary areas of litigation under the FSIA through an analysis of judicial decisions invoking the statute in 2012.

INTRODUCTION: THE FSIA IN 2012

LITIGATION involving foreign sovereigns in the United States is on the rise. In recent years, the number of reported decisions discussing the FSIA has increased considerably. This increase is attributable to a variety of circumstances that continued to play out in FSIA jurisprudence in 2012.

Ever increasing globalization of business and the increased use of international arbitration as a dispute resolution mechanism (with enforcement left to domestic courts) have resulted in an increase in purely commercial litigation involving foreign states. Consequently, substantial litigation in 2012 centered around the “commercial activity” exception under the FSIA, including the pivotal questions of whether acts are “governmental” or “commercial” when undertaken by sovereign entities or their agencies and instrumentalities, and how close a nexus such acts must have to the United States to fall within the statute’s exemptions. While the courts continue to grapple with these issues, decisions in 2012 provided welcome guidance in this constantly evolving area of the FSIA.

Overall, FSIA cases in 2012 continued to address the core issues facing foreign sovereigns in U.S. litigation, including:

- Who is a “foreign state” subject to jurisdiction in U.S. courts?
- What acts are sufficient to entitle plaintiffs to move forward with U.S. litigation against foreign sovereign entities?
- When may plaintiffs pursue foreign sovereign assets located in the United States to satisfy U.S. court judgments?

This review will focus on the answers to those questions provided by U.S. courts in 2012. This review also includes a short introduction to the FSIA as well as some practical guidance based on the most recent FSIA decisions.

I. BRIEF HISTORY OF THE FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. As early as 1812,¹ U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice rooted in a sense of “grace and comity” between the United States and other nations.² Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.³

In 1952, U.S. courts’ jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called “Tate Letter” announcing the Department’s adoption of a new “restrictive theory” of foreign sovereign immunity⁴ to guide courts in invoking jurisdiction over foreign sovereigns. The “Tate Letter” directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or “public,” acts.⁵ But acts taken in a commercial, or “private,” capacity no longer would be protected from U.S. court review.⁶ Yet, even with this new guidance, courts continued to seek the Executive Branch’s views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistency and susceptibility to “diplomatic pressures rather than to the rule of law.”⁷

In 1976, Congress sought to address this problem by enacting the FSIA, essentially codifying the “restrictive theory” of immunity, and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch.⁸ Today, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in U.S. courts.⁹

The FSIA provides that “foreign states”—including their “political subdivisions” and “agencies or instrumentalities”¹⁰—shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immu-

1. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

2. *See generally* *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (explaining the history of the FSIA).

3. *See id.*

4. *Id.* at 486–87.

5. *Id.* at 487.

6. *Id.*

7. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 82 (2d Cir. 2008) (quoting *Chuidian v. Phil. Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990)).

8. 28 U.S.C. § 1602 (2006).

9. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 428 (1989).

10. 28 U.S.C. § 1603.

nity set forth in the statute applies.¹¹ The FSIA includes several provisions that define the scope of a foreign state's immunity, and establishes detailed procedural requirements for bringing claims against a sovereign defendant.¹²

The exceptions to immunity are set forth in sections 1605 and 1605A of the FSIA.¹³ These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities.¹⁴ In most instances, where a claim falls under one of the FSIA exceptions, the act provides that the foreign state shall be subject to jurisdiction in the same manner and to the same extent as a private individual.¹⁵ The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment, in aid of execution of a judgment against a foreign state or its agencies or instrumentalities, of property located in the United States.¹⁶ Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, *e.g.*, special rules for service of process, default judgments, and appeals.¹⁷

II. THE DEFINITION OF A FOREIGN STATE: POLITICAL SUBDIVISIONS, AGENCIES, AND INSTRUMENTALITIES

A. WHAT IS A "FOREIGN STATE?"

A threshold issue in any case brought under the FSIA is whether the defendant person or entity constitutes a "foreign state," and therefore is generally entitled to immunity from litigation and judgment execution.¹⁸ For purposes of the FSIA, "foreign states" include not only the states themselves (*i.e.*, the states writ-large or their political subdivisions), but also their agencies and instrumentalities.¹⁹ As discussed further below in Section II. B., agencies and instrumentalities may be subject to different statutory rules than a state itself or its political subdivisions.

Determining whether an entity is a "foreign state"—and therefore entitled to the protections of the FSIA—is a fact-specific inquiry, requiring careful attention to the entity's nature and functions. The following sec-

11. *See id.* § 1604.

12. *See id.* § 1605.

13. *Id.* §§ 1605–1605A.

14. *Id.*

15. *See id.* § 1606. *But see id.* § 1605A (providing federal statutory cause of action for terrorism-related acts).

16. *See id.* §§ 1609–1611. For example, property belonging to a foreign central bank or monetary authority and held for its own account is immune from suit absent a waiver. *Id.* § 1611(b)(1). Likewise, military property held by a military authority and used or intended to be used in connection with a military activity is immune from attachment. *Id.* § 1611(b)(2).

17. *See, e.g.*, 28 U.S.C. §§ 1605(g), 1608.

18. *See id.* § 1604.

19. *Id.* § 1603(a).

tions illustrate how U.S. courts determined the status of a variety of entities under the FSIA in 2012.

1. Political Subdivision

Governmental Ministries and Bureaus—Foreign State.] Several District of Columbia district courts considered in 2012 whether Iran’s Ministry of Information and Security (MOIS) was a “political subdivision . . . or an agency or instrumentality of a foreign state.”²⁰ The courts considered specifically whether MOIS was “an integral part of a foreign state’s political structure.”²¹ In *Oveissi v. Islamic Republic of Iran*, for example, the court concluded that MOIS was a “foreign state” for purposes of the FSIA, because it was a division of the Iranian state and “acted as a conduit for the state’s provision of funds to terrorist organizations.”²²

Applying a similar analysis, the Bankruptcy Court in the Southern District of New York found that the Taiwanese Bureau of Labor Insurance had made a prima facie case that it was an agency or instrumentality of Taiwan by offering evidence that the Bureau was (1) a political branch of the Republic of China, (2) created for a national purpose, and (3) established under Taiwanese law to “handle labor insurance affairs” under the authority of the Chinese Executive Branch.²³

2. Agency or Instrumentality

To qualify as an “agency or instrumentality” of a foreign state, an entity must be (1) a “separate legal person,” that is (2) “neither a citizen of a State of the United States . . . nor created under the laws of any third country” and (3) either “an organ of a foreign state or political subdivision thereof” or an entity, “a majority of whose shares or other ownership interest is owned by [the] foreign state or a political subdivision thereof.”²⁴

The FSIA does not provide a specific test for determining whether an entity is an “organ of a foreign state or political subdivision thereof”—the third prong of the definition of “agency or instrumentality.”²⁵ In practice, the courts have continued to consider a variety of factors in determining

20. *Id.*

21. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44 (D.D.C. 2012).

22. *See id.* at 51; *see also* *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 119 (D.D.C. 2012) (concluding same); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 32 (D.D.C. 2012) (same).

23. *See* *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 510–11 (Bankr. S.D.N.Y. 2012).

24. 28 U.S.C. § 1603(b) (emphasis added). The phrase “not created under the laws of any third country” reflects the requirement that the entity must have been created under the laws of the country of which it purports to be an agency or instrumentality. *See* *Aluminum Distributions, Inc. v. Gulf Aluminum Rolling Mill Co.*, No. 87 C 6477, 1989 WL 64174, at *2 (N.D. Ill. June 8, 1989) (stating “GARMCO is created under the laws of Bahrain, one of the owner nations. Hence, it is not created under the laws of a third nation, and it is a foreign state under § 1603.”).

25. 28 U.S.C. § 1603(b)(2).

whether an entity is an “organ.”²⁶ For example, in *Hausler v. JP Morgan Chase, N.A.*,²⁷ the district court applied a series of factors established by the Second Circuit in order to determine whether certain Cuban banks were “organs” of Cuba:

Although there is no specific test for “organ” status under the FSIA, various factors are relevant: (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.²⁸

The court noted that the Second Circuit’s test does not favor any particular factor, or require that each weigh in the analysis.²⁹ In *Hausler*, the undisputed evidence that the banks were state-owned entities created under Cuban laws granting specific powers by the Cuban Government and were operated by executives selected by Cuban politicians was sufficient to show that the banks were “organs” of Cuba.³⁰

Applying the same factors, another New York district court in *In re 650 Fifth Ave. & Related Properties* found that an Iranian foundation (the Foundation) and corporation (the Corporation) were organs of Iran where they were created and operated for a national purpose, the Iranian government actively supervised and was involved in “all aspects of the Foundation,” and the Ayatollah determined the composition of the boards of both entities.³¹

State-Owned Press Agency—Agency or Instrumentality. In *Gomes v. ANGOP, Angola Press Agency*, the New York District Court considered

26. See, e.g., *Hausler v. JPMorgan Chase Bank, N.A.*, 845 F. Supp. 2d 553 (S.D.N.Y. 2012).

27. *Hausler* actually involved a case brought under the Terrorism Risk Insurance Act, but the New York district court considered whether certain Cuban banks would be considered organs of Cuba under the FSIA. *Id.*

28. *Id.* at 572 (citing *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)).

29. *Id.* (citing *European Cmty. v. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189, 202 (E.D.N.Y. 2011)).

30. *Id.* at 573–74.

31. *In re 650 Fifth Ave.*, 881 F. Supp. 2d 533, 549–50, 552 (S.D.N.Y. 2012). The court also found that the Foundation and Corporation met the first requirement under the FSIA agency or instrumentality test of having separate corporate forms—because each was a New York-incorporated not-for-profit and partnership, respectively. *Id.* Interestingly, the court also found the third factor met—that they were not citizens of a U.S. state—despite their incorporation in New York, because “formalistic adherence to corporate form [would] work inequity” where the corporate form was obtained by fraudulent representations designed to “obscure ownership by Iran.” *Id.* at 552–53. Other factors the court found significant included: a government-created entity controlled the Foundation’s assets; the government at various points directed changes to the composition of the Foundation’s board; the Foundation used funds from an Iranian instrumentality to purchase a New York property, then contributed that property as capital to form the Corporation; the purpose of the Corporation was to receive tax-free rent on the property; and the Foundation consulted with the Iranian government about the formation of the Corporation. See *id.* at 538–43.

the Angola Press Agency's (ANGOP) defense that it was Angola's "agency or instrumentality" and therefore was entitled to immunity.³² Applying traditional corporate veil-piercing standards, the Court explained: "[i]t is well settled that 'duly created instrumentalities of a foreign state are to be accorded a presumption of independent status,' which Plaintiff could overcome only by showing that: "(1) ANGOP 'is so extensively controlled by [Angola] that a relationship of principal and agent is created' or (2) recognition of ANGOP's separate juridical status 'would work fraud or injustice.'"³³ The court found that the plaintiff failed to make either showing.³⁴ Although the plaintiff argued that ministry officials "clearly approved" the tortious conduct at issue in the suit (publication of his photographs), the court noted that "[j]oint participation in a tort is not the classic abuse of corporate form that warrants piercing the independent status of [a] foreign corporate entity."³⁵

Corporation Owned by State-Owned Enterprise—Not Agency or Instrumentality. In *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd*, the Louisiana District Court considered whether an entity that was majority-owned by a wholly state-owned entity could meet the definition of an "agency or instrumentality."³⁶ In an action to confirm an arbitral award under the New York Convention, Defendant Mawei argued that there was no basis for the Court to exercise personal jurisdiction over it under the FSIA.³⁷ The court found that Mawei was not an "agency or instrumentality of a foreign state" as defined in the statute—and therefore was not entitled to immunity under the FSIA³⁸—because "a majority of [its] shares or other ownership interest [was] owned" not by a foreign state or political subdivision, but by a Chinese state-owned enterprise.³⁹ The Court noted that "only *direct ownership* of a majority of shares by the foreign state satisfies the statutory requirement."⁴⁰

32. *Gomes v. ANGOP*, Angl. Press Agency, No. 11-CV-0580, 2012 WL 3637453, at *12 (E.D.N.Y. Aug. 22, 2012).

33. *Id.* at *13.

34. *Id.*

35. *Id.* at *13 (internal quotations omitted).

36. *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 858 F. Supp. 2d 658 (E.D. La. 2012), *aff'd on other grounds*, 703 F.3d 742 (5th Cir. 2012).

37. *Id.* at 670.

38. Because Mawei was not entitled to immunity under the FSIA, the court proceeded to consider whether Louisiana's long-arm statute authorized personal jurisdiction over Mawei. *Id.* at 672.

39. *Id.* at 671; *see also* 28 U.S.C. § 1603(b)(2).

40. *Fujian Mawei Shipbuilding*, 858 F. Supp. 2d at 671 (emphasis added); *see also* *Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 48 n.1 (2d Cir. 2012) ("[A] subsidiary of a sovereign's instrumentality is not itself an instrumentality." (emphasis in original)). By contrast, in *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 811 (D.C. Cir. 2012), the D.C. Circuit found decisive in considering whether the National Port Authority of Liberia was an agency or instrumentality of the state that the Port Authority was wholly owned by the Liberian government. *See also* *Grynberg v. BP P.L.C.*, 855 F. Supp. 2d 625, 641 (S.D. Tex. 2012) (Norwegian oil company was an instrumentality of Norway where it was 67 percent owned by the Norwegian state itself).

The “Core Functions Test”: “Governmental” Versus “Commercial” Activities. As noted above, an “agency or instrumentality” of a foreign sovereign may be subject to different statutory rules than the “foreign state” itself or its political subdivisions. In particular, rules relating to service of process, venue, the availability of punitive damages, and attachment of assets can differ depending on whether the defendant is deemed an agency of the state or the state itself.⁴¹ To make this distinction, courts apply the so-called “core functions test.”⁴² Under this test, if the entity’s predominant activities (“core functions”) are “governmental” in nature, courts will treat the entity as if it were the state itself and apply rules and standards that are more protective of the sovereign.⁴³ But if the entity’s “core functions” are predominantly “commercial” in character, courts will apply the less protective rules and standards reserved for agencies and instrumentalities of the state.⁴⁴

In *S.K. Innovation, Inc. v. Finpol*,⁴⁵ the District of Columbia district court discussed how Kazakhstan’s Agency on Economic Crimes & Corruption and its Committee on Penal Enforcement Facilities “fit soundly within [the] definition” of entities whose “core functions” are governmental.⁴⁶ As national law-enforcement agencies, these bodies provided “important and ‘indispensable’ governmental functions,” including overseeing detention and imprisonment facilities and regulating businesses.⁴⁷ The Court did not find dispositive the fact that these entities were not constitutional bodies, or part of Kazakhstan’s central government, because “[a]ny government of reasonable complexity must act through men organized into offices and departments,” and “[h]aving a separate name and some power to conduct its own affairs does not suffice[] to make a foreign department an ‘agency’ rather than a part of the state itself.”⁴⁸

The Southern District of New York also applied the core functions test in *NML Capital, Ltd. v. Republic of Argentina*.⁴⁹ In that case, the plaintiff, who held beneficial interests in defaulted bonds issued by Argentina, sued an Argentine energy company (ENARSA), arguing that it operated

41. See, e.g., 28 U.S.C. §§ 1608(a)–(b) (service of process); 28 U.S.C. §1391(f)(3) (permitting venue in suits against an agency or instrumentality of a foreign state “in any judicial district in which the agency or instrumentality is licensed to do business or is doing business”); 28 U.S.C. §1610(a)–(b) (attachment of assets).

42. See e.g., *Garb v. Republic of Pol.*, 440 F.3d 579 (2d Cir. 2006).

43. *Id.*

44. See *id.* at 591 (citing *Magness v. Russian Fed’n*, 247 F.3d 609, 613 n.7 (5th Cir. 2001)).

45. Although *S.K. Innovation* involved a claim brought under the Alien Tort Claims Act, the court still considered the threshold issue whether the defendant was entitled to immunity under the FSIA. *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 107 (D.D.C. 2012).

46. *Id.* at 108. The Court also noted other agencies whose core functions the courts have found to be governmental, including national armed forces, the Iranian Ministry of Information and Security, and the Sudanese Ministry of the Interior. *Id.*

47. *Id.*

48. *Id.* at 108–09 (citing *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994)).

49. *NML Capital, Ltd. v. Republic of Arg.*, 892 F. Supp. 2d 530, 533 (S.D.N.Y. 2012).

as a political organ of Argentina and therefore should be liable for the government's debts.⁵⁰ After noting that ENARSA was owned primarily by the Republic and was responsible for several seemingly governmental functions (including providing subsidized energy to the public), the court determined that ENARSA's core function was the marketing of low-cost natural gas—which it deemed predominantly commercial.⁵¹

III. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY

A. WAIVER

Section 1605(a)(1) of the FSIA provides that a foreign sovereign is not immune from suit in any case “in which 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 terms of the waiver.”⁵²

Explicit waiver occurs where a “foreign state” accepts U.S. court jurisdiction—through a statement, contractual forum selection clause, or some similar means—with regard to the subject matter being litigated.⁵³ Implicit waiver can come in various forms, including, *inter alia*, when: “(1) a foreign state agrees to arbitration in another country; (2) the foreign state agrees that a contract is governed by the laws of a particular country; [or] (3) the state files a responsive pleading without raising the immunity defense.”⁵⁴

Explicit Waiver by Contract. In *Themis Capital, LLC v. Democratic Republic of Congo*, Themis Capital, LLC and Des Moines Investments, Ltd. sued the Democratic Republic of Congo and its central bank to enforce a credit agreement which contained a forum selection clause.⁵⁵ The defendants asserted sovereign immunity.⁵⁶ But the New York District Court denied immunity because the defendants in the agreement had “irrevocably submit[ted] to the non-exclusive jurisdiction of” state and federal courts sitting in New York City.⁵⁷

Implicit Waiver as Signatory to ICSID Convention. In *Blue Ridge Investments, LLC v. Republic of Argentina*, Blue Ridge filed a petition in the Southern District of New York to confirm an arbitral award against

50. *Id.* at 530.

51. *Id.* at 531–33. ENARSA also has regulatory functions (it is empowered to “intervene in the market” in response to monopolies and oligopolies), it “manage[s] the tender process for major public works and energy projects” pursuant to governmental decrees, and it carries out “agreements with other sovereigns . . . developed by Argentina or the Ministry of Planning.” *Id.* at 532–33.

52. 28 U.S.C. § 1605(a)(1) (2006).

53. *See, e.g.*, *Themis Capital, LLC v. Dem. Rep. Congo*, 881 F. Supp. 2d 508 (S.D.N.Y. 2012).

54. *Af-Cap, Inc. v. Congo*, 462 F.3d 417, 426 (5th Cir. 2006) (quoting *Rodriguez v. Transave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993)).

55. *See Themis*, 881 F. Supp. 2d at 512, 516–17.

56. *Id.* at 515.

57. *Id.* at 516 (quoting the credit agreement) (emphasis omitted).

Argentina.⁵⁸ Argentina moved to dismiss for lack of subject-matter jurisdiction,⁵⁹ but Blue Ridge argued Argentina had waived its sovereign immunity by signing the Convention on the International Centre for the Settlement of Investment Disputes (the ICSID Convention).⁶⁰ The court explained that in a case involving enforcement of an arbitral award against a foreign sovereign, “waiver is commonly found . . . so long as [1] the award is rendered pursuant to a convention to which the foreign state is a signatory, and [2] the convention provides for recognition and enforcement of the award in contracting states.”⁶¹

The court explained that the award here satisfied both prongs. First, the arbitral award was issued under the ICSID Convention⁶²—to which both Argentina and the United States were signatories.⁶³ Second, article 54 of the Convention required signatories to “recognize an award rendered pursuant to th[e] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”⁶⁴ The court concluded that, as a signatory to the Convention and participant in the ICSID arbitration, “Argentina must have contemplated enforcement actions in other signatory States, including the United States.”⁶⁵ Argentina thus waived its sovereign immunity with respect to enforcement of the arbitral award.⁶⁶ On appeal, the Second Circuit affirmed the district court’s holding that Argentina had waived sovereign immunity.⁶⁷

No Waiver by Constitutional Incorporation of International Law. *Abelesz v. Magyar Nemzeti Bank* involved two suits in the Northern District of Illinois brought by several Holocaust survivors against several Hungarian entities, including the national bank and national railway.⁶⁸ The plaintiffs alleged that these two defendants committed a variety of torts while “play[ing] critical roles in the expropriation of Jewish property that was essential to finance the genocide of the Holocaust in Hungary.”⁶⁹ The bank and railway each moved to dismiss on sovereign-imm-

58. See *Blue Ridge Invs., LLC v. Republic of Arg.*, 902 F. Supp. 2d 367, 370 (S.D.N.Y. 2012), *aff’d in part*, 735 F.3d 72 (2d Cir. 2013).

59. See *id.* at 371.

60. See *id.* at 373.

61. *Id.*

62. See *id.* at 370–71.

63. See *id.* at 374 & n.5.

64. See *Blue Ridge*, 902 F. Supp. 2d at 374 (internal quotation marks omitted) (alteration in original); see also 22 U.S.C. § 1650a(a) (2004) (implementing article 54 of the Convention).

65. *Blue Ridge*, 902 F. Supp. 2d at 374 (citation omitted) (internal quotation marks omitted).

66. See *id.* at 375.

67. *Blue Ridge Invs., LLC v. Republic of Arg.*, 735 F.3d 72, 85–86 (2d Cir. 2013). The court reached the same conclusion under the arbitration exception, which is discussed more fully in Section III. E.

68. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 665 (7th Cir. 2012).

69. *Id.* at 666.

munity grounds;⁷⁰ the district court denied both motions.⁷¹ On appeal, the Seventh Circuit considered plaintiffs' argument that the bank was not entitled to immunity by virtue of a waiver by the Hungarian State.⁷² Specifically, plaintiffs argued that "Hungary implicitly waived its sovereign immunity by stating in its constitution that the Republic of Hungary accepts the universally recognized rules and regulations of international law, and harmonizes the internal laws and statutes of the country with the obligations assumed under international law."⁷³ Holding that waiver under section 1605(a)(1) should be "construed narrowly,"⁷⁴ and must be supported by "strong evidence that this is what the foreign state intended,"⁷⁵ the Seventh Circuit rejected plaintiffs' argument because the constitution expressed no "intent by the Republic of Hungary to be subject to suit in U.S. courts."⁷⁶

No Waiver By Ambassador's Letter Assuming Responsibility for Wrongdoing. In *Gomes v. ANGOP, Angola Press Agency*, the plaintiff brought a defamation action against, among others, the Angola Press Agency (ANGOP) for allegedly publishing on the ANGOP website a photograph of plaintiff that mistakenly identified his image as that of a known international criminal.⁷⁷ Plaintiff argued that defendants waived their immunity when the Angolan Ambassador to the United States advised plaintiff that: "If the website in question is that of ANGOP the government of the Republic of Angola will assume its responsibilities."⁷⁸ The court disagreed, explaining that "[a]n implied waiver is only found in circumstances in which the waiver was unmistakable and unambiguous."⁷⁹ An implicit waiver must, at the very least, "relat[e] to the conduct of litigation,"⁸⁰ but the Ambassador's statement was made more than six months before the suit was filed and it "contain[ed] no express or indirect reference to a waiver of sovereign immunity."⁸¹

No Waiver by Granting Power of Attorney. In *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in Interna-*

70. See *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689, 697 (N.D. Ill. 2011); *Victims of the Hungarian Holocaust v. Hungarian State Rys.*, 798 F. Supp. 2d 934, 938 (N.D. Ill. 2011).

71. *Abelesz*, 692 F.3d at 666; see also *Magyar Nemzeti Bank*, 807 F. Supp. 2d at 697–98 (relying on expropriation exception but considering both expropriation and waiver exceptions); *Hungarian State Rys.*, 798 F. Supp. 2d at 938 (relying on expropriation exception).

72. *Abelesz*, 692 F.3d at 670.

73. See *id.* at 670 (internal quotation marks omitted).

74. *Id.*

75. *Id.* (internal quotation marks omitted).

76. *Id.* at 671; cf. *id.* ("[T]he language of the Hungarian Constitution demonstrates Hungary's recognition and acceptance of international law norms and obligations, but it is not a waiver of its sovereign immunity.")

77. See *Gomes v. ANGOP, Angola Press Agency*, No. 11-CV-0580, 2012 WL 3637453, at *1 (E.D.N.Y. Aug. 22, 2012), *aff'd*, No. 12-3826-CV (2d Cir. Nov. 19, 2013).

78. *Id.* at *14 (internal quotations omitted).

79. *Id.* (internal quotation marks omitted).

80. *Id.* (internal quotation marks omitted) (emphasis omitted).

81. *Id.* (internal quotation marks omitted).

tional & Foreign Courts, plaintiffs sued Ukraine, the Ukrainian Prosecutor General's Office, and the Bureau for Representing Ukrainian Interests in International and Foreign Courts under a variety of contract and tort theories stemming from the defendants' failure to pay for work done by the plaintiffs.⁸² Among other exceptions, the plaintiffs argued that the defendants explicitly waived immunity by granting one plaintiff power of attorney to attach real property in the United States in order to recover assets expatriated from Ukraine.⁸³ The court rejected this explicit waiver argument, finding that the power of attorney contained no language relating to waiver.⁸⁴ The court also rejected a separate argument that the agency relationship created by the power of attorney implicitly waived immunity.⁸⁵ Explaining that neither an agency relationship nor a fiduciary relationship implies waiver, the court concluded that the waiver exception did not apply.⁸⁶

No Waiver by Agreeing to Arbitrate Related Dispute. *Moreira v. Ministerio de Economia y Produccion de la Republica Argentina* involved a long-running dispute between lawyer Jorge Moreira and a former client, a reinsurance company owned by the Argentine government.⁸⁷ In 2002, Moreira brought a New York arbitration against the reinsurance company and Argentina's economic ministry to recover legal fees and expenses, and received a favorable award in 2005.⁸⁸ During that arbitration, the reinsurance company filed a criminal complaint against Moreira in Argentina, "claiming that [his] fees were exorbitant, that he engaged in fraudulent billing practices, and that he had conspired with [the reinsurance company's] employees to obtain approval of these bills."⁸⁹ The prosecution failed, and Moreira sued the defendants in a New York district court for malicious prosecution as well as for resulting business losses and emotional distress.⁹⁰

The defendants asserted sovereign immunity under the FSIA and moved to dismiss for lack of subject-matter jurisdiction.⁹¹ Moreira responded that defendants, by "rais[ing] the issue of fraudulent overbilling in the New York arbitration, have waived immunity with respect to any action involving claims of overbilling [as] such claims were the basis for the Argentine prosecution[]."⁹² Finding that waiver must be "construed

82. *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 898 F. Supp. 2d 301, 304, 308 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013).

83. *Id.* at 311.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Moreira v. Ministerio de Economia y Produccion de la Republica Arg.*, No. 10-CV-266, 2012 WL 6178220, at *1 (S.D.N.Y. Dec. 7, 2012).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at *3.

narrowly,” the court rejected Moreira’s argument,⁹³ concluding that consenting to arbitrate a fee dispute “is hardly an unmistakable or unambiguous waiver of . . . immunity from a separate tort suit seeking damages on account of . . . a criminal prosecution related to the billing in the Argentine courts.”⁹⁴

B. COMMERCIAL ACTIVITY—§ 1605(a)(2)

The “commercial activity” exception remains one of the most frequently litigated aspects of the FSIA as governments continue to be active participants in the global marketplace.⁹⁵ This exception to foreign sovereign immunity is codified in Section 1605(a)(2) of the FSIA, which provides that a “foreign state shall not be immune from the jurisdiction of” U.S. courts in a case where the action is based:

[(1)] upon a commercial activity carried on in the United States by the foreign state; or [(2)] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [(3)] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . .⁹⁶

In other words, foreign states lose their immunity from suit in the United States where their actions are commercial *and* have a nexus to the United States (i.e., are carried out, or cause a direct effect, in the United States).⁹⁷

1. What Acts Are Considered “Commercial?”

Determining at what point a foreign state’s acts cross the line from governmental to commercial is crucial to the “commercial activity” analysis. The FSIA requires that U.S. courts define a foreign sovereign’s acts by their nature, not their purpose.⁹⁸ For example, a foreign sovereign’s decision to enter into a construction contract with a private contractor is by its nature “commercial,” even if the contract is for the uniquely governmental purpose of building a military base.⁹⁹ Although such distinctions are fact-intensive inquiries, they often focus on the core principle

93. *Moreira*, 2012 WL 6178220, at *3–4.

94. *Id.* at *4.

95. See, e.g., *Lasheen v. Embassy of the Arab Republic of Egypt*, 485 F. App’x 203 (9th Cir. 2012); *Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230 (E.D. Va. 2012); *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99 (D.D.C. 2012); *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F.Supp.2d 769 (S.D.N.Y. 2012); *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501 (Bankr. S.D.N.Y. 2012).

96. 28 U.S.C. § 1605(a)(2) (2006).

97. For a discussion of loss of immunity from attachment or enforcement of judgments in the United States based on commercial activity, see discussion *infra* section IV.B.

98. See 28 U.S.C. § 1603(d).

99. *Tonoga, Ltd. v. Ministry of Pub. Works & Hous. of Saudi Arabia*, 135 F. Supp. 2d 350, 356 (N.D.N.Y. 2001).

that commercial acts are those that any private entity could undertake.¹⁰⁰ Governmental acts are those made possible only through power peculiar to a sovereign.¹⁰¹ Several federal court decisions from 2012 illustrating this and other relevant points are described below.

Promoting Foreign Investment Opportunities and Incentives—Governmental. In *Best Medical Belgium, Inc. v. Kingdom of Belgium*, a Virginia corporation and its Belgian subsidiary sued Belgium and its trade offices for fraud, breach of contract, and other claims stemming from alleged representations by Belgian trade officials regarding certain financial incentives and other assistance available for foreign investors “to help establish business investments” in a particular region of Belgium.¹⁰² Looking to the nature of the acts at issue, the Virginia district court concluded that Belgium’s promotion of a geographic area and incentives to invest in Belgian companies did not constitute “commercial activity [equally] available to private parties.”¹⁰³ Rather, the promotion of domestic commerce was a “basic—even quintessential—government function” and was far broader than anything to be expected of a private entity.¹⁰⁴ In addition, the incentives promoted were those that only a sovereign could provide, such as tax exemptions.¹⁰⁵ Belgium therefore retained its immunity from suit.¹⁰⁶

Conducting Criminal Investigations in Conjunction with Business Competitors—Governmental. In *S.K. Innovation, Inc. v. Finpol*, Kazakhstani businessmen and U.S. corporations alleged that Kazakhstan’s Agency on Economic Crimes and Corruption (Finpol) and its Committee on Penal Enforcement Facilities colluded with the plaintiffs’ business competitors to conduct unwarranted criminal investigations into the plaintiffs’ activities.¹⁰⁷ The court concluded that such actions were alleged “abuses of official power” that private parties could not similarly undertake in the marketplace.¹⁰⁸ That such abuses were allegedly done for the benefit of private parties was irrelevant, because that fact went only to the “motive” of the government’s acts and did not take away from the inherently governmental nature of the acts.¹⁰⁹

Investing in “Feeder Funds” of U.S. Securities Company—Commercial. In *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC*, the trustee charged with the liquidation of Bernard L. Madoff Investment Securities LLC and its infamous Ponzi scheme sued Taiwan’s Bureau of Labor Insurance (BLI) for the recovery

100. *Saudi Arabia v. Nelson*, 507 U.S. 349, 359–60 (1993).

101. *Id.*

102. *Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230, 233–34 (E.D. Va. 2012).

103. *Id.* at 237.

104. *Id.* at 237–38 (citation omitted).

105. *Id.* at 238.

106. *Id.* at 239.

107. *S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 103–05 (D.D.C. 2012).

108. *Id.* at 111.

109. *Id.* at 112.

of asset transfers that the BLI allegedly received in connection with its investment in a Madoff “feeder fund.”¹¹⁰ The New York District Court concluded that the BLI was engaged in commercial activity when it chose to invest with a Madoff-affiliated investment firm.¹¹¹ Importantly, any private individual could have made the same investment decisions, and the BLI used no peculiarly sovereign powers in pursuing its investments.¹¹²

Operating a Nuclear Reactor for the Sale of Medical Isotopes—Commercial. In *Lantheus Medical Imaging, Inc. v. Zurich American Ins. Co.*, the plaintiff, Lantheus, relied on a Canadian nuclear reactor for the provision of raw material necessary for its radiopharmaceutical products.¹¹³ After the reactor shut down for an extended period of time, Lantheus sued its insurer, Zurich, in the Southern District of New York for failing to indemnify it for financial losses stemming from Lantheus’ resulting inability to manufacture and sell its radiopharmaceuticals.¹¹⁴ As part of its lawsuit, Lantheus sought the issuance of letters rogatory to obtain evidence from Atomic Energy of Canada Limited (AECL), a Canadian Crown corporation that operated the nuclear reactor.¹¹⁵ AECL in turn argued that the FSIA prohibited a U.S. court from issuing the letters.¹¹⁶

The court concluded that AECL’s operation of the nuclear reactor was commercial, not governmental.¹¹⁷ It distinguished AECL from other sovereign entities that exploited their countries’ natural resources by explaining how AECL’s operation was fundamentally self-interested.¹¹⁸ Among other things, AECL was not governing others’ use of nuclear resources, but rather was “market[ing] itself as a leader in research and development of nuclear energy, and as a commercial enterprise that supplies a large portion of the worldwide need for medical isotopes.”¹¹⁹ The court also noted that AECL received attention from the Canadian legislature after the reactor shutdown not because of some preferential status as a sovereign entity, but because of the commercial importance of its global sales.¹²⁰ And notably, AECL’s contractual obligations, not the national interests of Canada, determined which countries would receive a supply of medical isotopes.¹²¹ Thus, the operation of the reactor was

110. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 506–09 (Bankr. S.D.N.Y. 2012).

111. *Id.* at 511–12.

112. *Id.* at 512. *See generally* *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts*, 898 F. Supp. 2d 301 (D. Mass. 2012) (holding that the Ukrainian government’s act of hiring a private entity to recover lost property was commercial, even when the lost property was sovereign assets).

113. *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F.Supp.2d 769, 772 (S.D.N.Y. 2012).

114. *Id.* at 771–72, 786.

115. *Id.* at 773.

116. *Id.* at 772–74, 784.

117. *Id.* at 789.

118. *Id.*

119. *Id.* at 788.

120. *Id.* at 789.

121. *Id.*

found to be commercial activity under the FSIA.¹²²

Contracting for the Management of Health Benefit Plans—Commercial. In *Lasheen v. Embassy of the Arab Republic of Egypt*, the estate of an Egyptian scholar who had been studying in the United States sued various Egyptian defendants, alleging violations of the Employee Retirement Income Security Act (ERISA) and breach of contract stemming from the denial of health benefits relating to the plaintiff's liver transplant.¹²³ The Ninth Circuit affirmed the district court's decision¹²⁴ that the Egyptian defendants had engaged in fundamentally commercial activity when they contracted with a private company to manage the health benefits plan in which the plaintiff participated.¹²⁵ The defendants did so without using any power peculiar to a sovereign.¹²⁶

2. What Acts Create a Nexus with the United States?

Once a court has found that a foreign sovereign's act is "commercial" under the FSIA, it must then determine whether the act has a sufficient nexus with the United States to fall within the commercial activity exception.¹²⁷ Courts can find this nexus in three possible circumstances: (1) the foreign sovereign "carried on" the commercial act in the United States; (2) the act took place in the United States in connection with commercial activity abroad; or (3) the foreign sovereign acted outside of the United States in connection with its commercial activity but still caused a "direct effect" in the United States.¹²⁸

a. Acts in the United States by Foreign States

The first clause of the commercial activity exception permits jurisdiction over commercial acts "carried on in the United States" by foreign states.¹²⁹ The federal courts addressed this issue frequently in 2012, most often concluding that the alleged acts did not sufficiently establish a nexus with the United States to satisfy the exception.¹³⁰

Execution of Contracts in United States—Insufficient. In *Terenkian v. Republic of Iraq*, two Cyprus oil brokerage companies sued Iraq for its unilateral termination of contracts for the purchase and sale of Iraqi oil.¹³¹ Reversing the lower court's decision, the Ninth Circuit found that Iraq's commercial activities were not "carried on in the United States"

122. *Id.*

123. *Lasheen v. Embassy of the Arab Republic of Egypt*, 485 F. App'x 203, 204 (9th Cir. 2012).

124. *See Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1171 (9th Cir. 2010).

125. *Lasheen*, 485 F. App'x at 205.

126. *Id.*

127. *See, e.g., S.K. Innovation, Inc. v. Finpol*, 854 F. Supp. 2d 99, 109–10 (D.D.C. 2012).

128. 28 U.S.C. § 1605(a)(2) (2006).

129. *Id.*

130. *See, e.g., Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1137 (9th Cir. 2012).

131. *Id.* at 1125.

and thus did not establish the necessary nexus for jurisdiction to exist.¹³² Although the plaintiffs alleged that the contracts at issue were executed at the Cyprus Mission in New York City, the Court held that this alone was insufficient to satisfy the first clause, and to hold otherwise would be too “formalistic.”¹³³ Here, the plaintiffs alleged no prior activity related to the contracts occurring within the United States, nor did the contracts specify that any performance was to occur in the United States.¹³⁴ Without more, the mere signing of the contracts in the United States was not enough.¹³⁵

Partial Ownership of Rail Group Contracting with U.S. Company—Insufficient. In *Sachs v. Republic of Austria*, the plaintiff sued Austria and its national railway based on injuries she suffered while attempting to board a moving train in Austria.¹³⁶ Sachs argued that the Austrian defendants “carried on” commercial activity in the United States through their relationship with the Massachusetts-based company Rail Pass Experts, from which she purchased her “Eurail” ticket.¹³⁷ The Ninth Circuit concluded that this relationship was too attenuated.¹³⁸ The Austrian defendants did not have a direct relationship with the U.S. company.¹³⁹ Rather, the Austrian national railway, along with thirty other European national railways, jointly owned Eurail,¹⁴⁰ which, as a distinct legal entity, marketed and sold its Eurail passes, including through Rail Pass Experts.¹⁴¹ Sachs was unable to show that the Austrian defendants undertook “day-to-day, routine involvement” in the Eurail Group, let alone in Rail Pass Experts, and thus could not show any commercial activity that the defendants “carried on in the United States.”¹⁴²

Performing Logistical Aspects of Contract in United States—Insufficient. In *Triple A Intern., Inc. v. Democratic Republic of Congo*, a Michigan corporation brought suit against the Democratic Republic of the Congo (DRC) to collect on a debt allegedly owed to the corporation by the DRC’s predecessor, Zaire.¹⁴³ In response to the DRC’s motion to dismiss, Triple A argued that the commercial activity exception applied based on the DRC’s “substantial contact” with the United States.¹⁴⁴ The court disagreed, noting that the FSIA’s legislative history suggests “substantial contact” may establish a sufficient nexus with the United States, but finding that the DRC’s relevant contacts with the United States fell

132. *Id.* at 1137.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Sachs v. Republic of Austria*, 695 F.3d 1021, 1022 (9th Cir. 2012).

137. *Id.* at 1024.

138. *Id.* at 1026.

139. *Id.*

140. *Id.* at 1022.

141. *Id.* at 1022–23.

142. *Id.* at 1025, 1033.

143. *Triple A Int’l, Inc. v. Dem. Rep. Congo*, 852 F. Supp. 2d 839, 840 (E.D. Mich. 2012).

144. *Id.* at 845.

short of being “substantial.”¹⁴⁵ Specifically, the court found that the parties did not conduct any contract negotiations in the United States and the contract required all payments to be made to a Zaire bank account in Zaire currency.¹⁴⁶ The court also found no evidence that the parties deliberately sought substantial contract performance related to the United States.¹⁴⁷ Rather, the court found that Triple A’s performance of certain tasks related to the contract from its Michigan office was “occasioned simply by U.S. citizenship or U.S. residence of the plaintiff” and therefore was insufficient for purposes of the commercial activity exception.¹⁴⁸

b. Acts in the United States in Connection with Commercial Activity Abroad

The second clause of the commercial activity exception under section 1605(a)(2) provides for jurisdiction where the challenged acts take place in the United States but relate to a sovereign’s commercial activity abroad.¹⁴⁹ It is important to remember that this exception applies only if the acts in the United States are “in connection with” the commercial activity of the foreign state.¹⁵⁰ And again, those acts must also form the basis of the suit itself.

In 2012, the federal courts found few opportunities to directly address this second clause of the commercial activity exception. One court that did address the issue focused on the initial question of whether an act actually occurs “in the United States”—an often overlooked but essential inquiry.¹⁵¹ The Second Circuit, in *Rogers v. Petroleo Brasileiro, S.A.*, addressed claims brought by holders of Brazilian bonds for breach of contract in connection with refusal by Petrobrás—a Brazilian state-owned company—to convert plaintiffs’ bonds into shares.¹⁵² Importantly, the plaintiffs became aware of Petrobrás’ denial after receiving an e-mail from a U.S.-based investor relations employee.¹⁵³ The Second Circuit concluded that the U.S.-originated e-mail was not the actual act upon which the plaintiffs rested their breach of contract claim.¹⁵⁴ The alleged breach in fact occurred in Brazil when Brazil denied conversion of the arguably expired bonds.¹⁵⁵ The U.S. e-mail was merely notice of this denial, not the denial itself.¹⁵⁶ With no other “act performed in the United States” supporting plaintiffs’ claims, plaintiffs could not establish a suffi-

145. *Id.* at 848.

146. *Id.* at 846.

147. *Id.*

148. *Id.* at 845.

149. 28 U.S.C. § 1605(a)(2) (2006).

150. *Id.*

151. *Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 132 (2d Cir. 2012).

152. *Id.* at 133–35.

153. *Id.* at 134.

154. *Id.* at 138.

155. *Id.* at 137–38.

156. *Id.*

cient nexus to overcome Brazil's immunity.¹⁵⁷

c. Acts outside the United States that Cause a "Direct Effect" in the United States

The third clause of the commercial activity exception under section 1605(a)(2) grants U.S. courts jurisdiction over acts that occur *outside* the United States, but which cause a "direct effect" in the United States.¹⁵⁸ This third category is a repeated subject of litigation because of the uncertainty behind what constitutes a "direct" versus an "indirect" effect.¹⁵⁹ Courts will often consider whether the act at issue necessarily caused an effect in the United States.¹⁶⁰ As the examples below illustrate, courts are more likely to find a "direct effect" in contract disputes where the contract references some kind of performance specifically related to the United States.

Non-Deposit of Payments and Non-Sales in United States—No Direct Effect. Again in *Terenkian*, the Cyprus brokerages argued that Iraq's termination of its contracts had a direct effect in the United States because it prevented the sale of oil to potential U.S. customers and the deposit of oil payments into a New York bank.¹⁶¹ The Ninth Circuit rejected this argument, finding that the non-payment and non-sales were merely indirect effects.¹⁶² For instance, no evidence existed that, but for the contracts' cancellation, the payments would have been made to New York banks or that the oil would have been sold to U.S. customers.¹⁶³ Iraq had no contractual obligation to deliver oil to the United States, and the brokerages had no contractual obligations to U.S. buyers.¹⁶⁴ Moreover, these tangential consequences did not give rise to the plaintiffs' claims and thus were "too remote and attenuated to qualify as a direct effect" in the United States for FSIA purposes.¹⁶⁵

Investing in "Feeder Funds" of U.S. Securities Company—Direct Effect. In *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities LLC*—previously discussed as an example of commercial activity—the Southern District of New York also held that the investment of Taiwan's Bureau of Labor Insurance (BLI) in "feeder funds" affiliated with Madoff's investment company had a "direct effect"

157. *Id.* at 138.

158. 28 U.S.C. § 1605(a)(2) (2006).

159. *See, e.g., Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1138 (9th Cir. 2012).

160. *See, e.g., id.* at 1139.

161. *Id.* at 1138.

162. *Id.* at 1138–39.

163. *See id.*; *see also Rogers v. Petroleo Brasileiro, S.A.*, 673 F.3d 131, 138–40 (2d Cir. 2012) (holding that the refusal to honor allegedly expired Brazilian bonds owned by U.S. citizens did not have a direct effect in the United States, where nothing in the bonds required payment in the United States, nor contemplated the reasonably likelihood that payment could occur in the United States).

164. *Terenkian*, 694 F.3d at 1138–39.

165. *Id.* at 1139 (internal citations and quotations omitted).

in the United States.¹⁶⁶ Specifically, Taiwan's transfer of funds into the United States, and then eventual transfer—with Taiwan's profits—from the United States back abroad constituted a direct effect sufficient to trigger the commercial activity exception.¹⁶⁷ The court found that the U.S. connection to the transfer process was not merely incidental, but was part of the investment's "ultimate objective."¹⁶⁸

Selling Medical Isotopes to the United States—Direct Effect. In *Lantheus Medical Imaging*, after determining that the operation of a nuclear reactor and subsequent sale of medical isotopes by Atomic Energy of Canada Limited (AECL) was a commercial activity as discussed above, the court held that AECL's conduct had a "direct effect" in the United States.¹⁶⁹ It did not matter that a third party refined AECL's medical isotopes before their sale to Lantheus in the United States, because that third party played no role in the detrimental, direct effects that AECL's operation and shutdown of its reactor had on Lantheus' finances.¹⁷⁰ In other words, Lantheus' financial losses did not "depend crucially" on the conduct of the third-party refiner—only on that of AECL.¹⁷¹

Selling Counterfeit Products Overseas—No Direct Effect. Last year, we discussed the district court's decision in *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*,¹⁷² in which the court entered a default judgment against Iran because Iran's actions had a "direct effect" in the United States. In 2012, the court considered Iran's motion to vacate the 2011 default judgment, and specifically whether Iran's alleged manufacture of low quality helicopters that copied the trade dress of the plaintiff's higher quality helicopters had a direct effect in the United States.¹⁷³ This time, the court concluded that there was not a direct effect.¹⁷⁴ The court noted that the testimony before it established only the "potential" for confusion between the two manufacturers' helicopters.¹⁷⁵ The manufacturers also tended to sell to different markets: the market for plaintiff's products had more discerning buyers and certification standards (such as those in the United States), while Iran's market had more cost-conscious buyers willing to accept products that did not meet those certifications.¹⁷⁶ And even if a U.S. buyer contemplated purchasing Iranian-made helicop-

166. *Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 480 B.R. 501, 513 (Bankr. S.D.N.Y. 2012).

167. *Id.* at 513–14.

168. *Id.* at 513.

169. *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F.Supp.2d 769, 790–91 (S.D.N.Y. 2012).

170. *Id.* at 790.

171. *Id.*

172. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 764 F. Supp. 2d 122, 126 (D.D.C. 2011), *vacated*, 892 F. Supp. 2d 219 (D.D.C. 2012).

173. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 892 F. Supp. 2d 219, 221–22 (D.D.C. 2012), *aff'd*, 734 F.3d 1175 (D.C. Cir. 2013).

174. *Id.* at 234.

175. *Id.* at 232.

176. *Id.*

ter *parts* over those made by the plaintiff, such an effect would be “necessarily dependent on a series of intervening acts by others”—i.e., not a *direct* effect.¹⁷⁷

C. TAKINGS—§ 1605(a)(3)

Section 1605(a)(3) of the FSIA provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.¹⁷⁸

In 2012, the courts addressed only a limited number of cases under section 1605(a)(3)’s takings exception to the FSIA.¹⁷⁹ Those cases, however, raised a number of substantive issues.

Takings can be of intangible property. In *Abelesz v. Magyar Nemzeti Bank*, Holocaust survivors and the descendants of Holocaust victims brought suit against Hungarian banks and the Hungarian national railway, alleging that the defendants had expropriated plaintiffs’ property some sixty-five years before.¹⁸⁰ In their defense, the Hungarian banks argued that the FSIA takings exception did not apply to takings of intangible property, such as bank assets.¹⁸¹ The Seventh Circuit disagreed, concluding that the statutory language behind the takings exception in no way supported the distinction between tangible and intangible property and thus allowed the taking of intangible property to trigger an exception to immunity.¹⁸²

Exhaustion of domestic remedies is generally necessary to assert a taking in violation of international law. Also in *Abelesz*, the defendants argued that the plaintiffs could not rely upon the takings exception because they had not yet exhausted Hungary’s domestic remedies.¹⁸³ This time the Seventh Circuit agreed.¹⁸⁴ Although noting that the FSIA’s language did not explicitly require plaintiffs to exhaust domestic remedies, the court found that customary international law required that each state should have the opportunity to redress its alleged wrongs through its own

177. *Id.* at 233.

178. 28 U.S.C. § 1605(a)(3) (2006).

179. *See, e.g., Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661 (7th Cir. 2012); *Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230 (E.D. Va. 2012).

180. *Abelesz*, 692 F.3d at 665.

181. *Id.* at 671–72.

182. *Id.* at 673.

183. *Id.* at 678.

184. *See id.* at 684.

means, and that a U.S. court should afford that opportunity before interceding.¹⁸⁵ That the plaintiffs were seeking damages amounting to 40 percent of Hungary's gross domestic product was all the more reason for the United States to delay its consideration of the matter.¹⁸⁶

The Seventh Circuit acknowledged that legally compelling reasons could exist for plaintiffs' failure to exhaust, but the plaintiffs were unable to meet this burden on the facts of the case. Specifically, the court found insufficient plaintiffs' stated concerns about pursuing their claims in a country suffering from resurgent anti-Semitism and an economic depression, and that remedies available in Hungary were not congruent with those available in the United States.¹⁸⁷

Sale of assets pursuant to judgment by a foreign court is not a taking of property. In *Best Medical Belgium, Inc. v. Kingdom of Belgium*, discussed above, the U.S. corporation and its Belgian subsidiary asserted claims against Belgium and certain Belgian judicial figures for their role in the sale of the subsidiary's assets pursuant to a Belgian court proceeding similar to that of bankruptcy in the United States.¹⁸⁸ The district court determined that the asset sale occurred only after the Belgian courts determined that the subsidiary owed significant debt, which the plaintiffs did not dispute.¹⁸⁹ Thus, the judicial administration and sale of the struggling company's assets was not a "taking" of property sufficient to confer jurisdiction.¹⁹⁰

"Domestic takings" do not violate international law, or do they? The *Best Medical Belgium* defendants also argued that the takings exception did not apply because, under the FSIA, a "domestic taking"—i.e., the "[e]xpropriation by a foreign government of the property of its nationals"—is not a recognized violation of international law, and therefore does not support jurisdiction.¹⁹¹ The district court agreed, finding that, even if Belgium's actions could be deemed a "taking," because its own citizens were involved, the exception did not apply.¹⁹² The Seventh Circuit in *Abelesz* also considered this argument but reached the opposite conclusion, finding that the alleged expropriation was incident to acts of genocide.¹⁹³ Because the takings in that case constituted conduct universally condemned under international law, the court found that the defendants could not rely on the "domestic takings" principle to escape jurisdiction.¹⁹⁴

185. *Id.* at 680–82.

186. *Id.* at 682.

187. *Id.* at 684–85.

188. *Best Med. Belg., Inc. v. Kingdom of Belg.*, 913 F. Supp. 2d 230, 234–35 (E.D. Va. 2012).

189. *Id.* at 239–40.

190. *Id.* at 239.

191. *Id.*

192. *Id.* at 239–40.

193. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675–77 (7th Cir. 2012).

194. *Id.* at 677.

D. NON-COMMERCIAL TORTS—§ 1605(a)(5)

The “non-commercial tort” or “tortious activity” exception subjects a sovereign defendant to jurisdiction in the United States for claims based on actions:

[I]n which money damages are sought against a foreign state 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 office or employment¹⁹⁵

When determining whether an alleged action constitutes a tort, courts generally apply the substantive law of the state in which the act took place.¹⁹⁶

The Act provides two circumstances where a state actor may retain its immunity even though the exception might otherwise apply. First, the exception does not apply where the claim is based on the exercise or performance (or failure to perform) of a “discretionary function.”¹⁹⁷ Second, the exception does not apply to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights.¹⁹⁸

In 2012, the Second Circuit analyzed when the exercise of a “discretionary function” is sufficient to avoid application of the tortious activity exception.¹⁹⁹ In addition, certain cases discussed elsewhere in this review were dismissed under the non-commercial tort exception because the tort did not occur in or entirely in the United States.²⁰⁰

In *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia*, the Second Circuit held that the Permanent Mission of the Republic of Namibia (Mission), an instrumentality of the Republic, was not immune from a tort suit arising out of its alleged failure to comply with the New York City Building Code.²⁰¹ The case arose out of the collapse of a shared wall between the plaintiff’s property and the Mission.²⁰² Applying New York law, the Second Circuit first determined that the failure to “shore up” the shared wall between the Mission’s property and the adjoining townhouse was a violation of the non-delegable obligation under the New York Building Code that the persons “causing” construction “[m]aintain the structural integrity of [common walls].”²⁰³ Next, the

195. 28 U.S.C. § 1605(a)(5) (2006).

196. *See, e.g.*, *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namib.*, 681 F.3d 103, 113 (2d Cir. 2012).

197. 28 U.S.C. § 1605(a)(5)(A).

198. *Id.* § 1605(a)(5)(B).

199. *Permanent Mission of Republic of Namib.*, 681 F.3d at 111–12.

200. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 684 (7th Cir. 2012); *Gomes v. ANGOP, Angl. Press Agency*, No. 11-CV-0580, 2012 WL 3637453, at *55–56 (E.D.N.Y. Aug. 22, 2012).

201. *Permanent Mission of Republic of Namib.*, 681 F.3d at 113.

202. *Id.* at 105.

203. *Id.* at 109 (quoting N.Y.C. § BC 3309.8).

Court considered whether the violation took place in the context of the Mission's "exercise [of] a discretionary function"—namely, the Mission's decision to locate its chancery in the building.²⁰⁴ Noting that the discretionary function exception is available only if (1) the acts alleged to be negligent involve an "element of judgment or choice and are not compelled by statute or regulation;" and (2) the "judgment or choice in question must be grounded in considerations of public policy or susceptible to policy analysis," the court found that the Mission's actions did not qualify as a discretionary function for two reasons.²⁰⁵ First, the Mission's obligation to maintain the integrity of the common wall was "specifically compelled by regulation and was nondelegable."²⁰⁶ And second, there was no policy consideration implicated in the Mission's failure to protect the wall.²⁰⁷ Relying on Supreme Court precedent, the Court determined that a "discretionary" act "must [itself] involve the exercise of policy judgment," and that the failure of the Mission to ensure the structural integrity of the common wall during construction is "simply not a judgment . . . of the kind that the discretionary function exception was designed to shield."²⁰⁸

E. ARBITRATION—§ 1605(a)(6)

U.S. courts have jurisdiction under the FSIA to enforce an agreement by a foreign state to arbitrate, or to confirm an arbitration award against a foreign state, in three circumstances: (1) where the arbitration took place or is intended to take place in the United States; or (2) where the agreement or award is governed by a treaty or other international agreement calling for the recognition and enforcement of arbitral awards; or (3) where, but for the agreement to arbitrate, the underlying claim could have been brought in a U.S. court under the FSIA.²⁰⁹ Cases are most frequently brought under the second option, but plaintiffs' failure to satisfy other jurisdictional requirements (statutory or constitutional) can prove fatal to their claims.

In 2012, courts continued to hold that arbitral awards made pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") and the International Convention on the Settlement of Investment Disputes (the "ICSID Convention") were precisely the types of awards section 1605(a)(6) was intended to cover.²¹⁰

204. *Id.* at 112–13.

205. *Id.* at 113.

206. *Id.* at 112.

207. *Permanent Mission of Republic of Namib.*, 681 F.3d at 113.

208. *Id.* (internal citations omitted).

209. 28 U.S.C. § 1605(a)(6) (2006).

210. *See, e.g.,* *Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. Dominican State*, No. 12-CV-1335, 2012 WL 6632812, at *10–11 (D.D.C. Dec. 20, 2012); *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 751 (E.D. Va. 2012).

Also in 2012, the Fifth Circuit addressed in two cases whether, under traditional veil-piercing/agency principles, the arbitration exception can confer jurisdiction over a foreign sovereign that was not a party to an arbitration agreement but allegedly controlled (or was the alter ego of) a signatory party.²¹¹

In *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd. of People's Republic of China*²¹² and *In re Arbitration Act of 1996*,²¹³ the plaintiffs attempted to enforce arbitration awards against the People's Republic of China (PRC) despite the fact that they were not party to any arbitration agreement or named in any award. In *First Inv. Corp.*, the plaintiffs argued that the PRC should be bound by an arbitration agreement because Fujian Mawei—a private company 100% owned by the PRC and a party to the arbitration agreement—was the PRC's alter ego.²¹⁴ The Fifth Circuit rejected this argument, upholding the lower court's determination that mere ownership was insufficient to establish the “necessary degree of control” and accordingly dismissed the case against the PRC.²¹⁵ Similarly, in *In re Arbitration Act of 1996*, the plaintiffs argued that the PRC exerted “so much control over [the defendant] Xiamen, that they are not legally separate entities[.]”²¹⁶ Again, the Fifth Circuit rejected this argument and dismissed PRC from the case, finding that plaintiffs had not demonstrated the high level of control necessary for the court to “find an agency relationship and enforce an arbitration award against a principal.”²¹⁷

In a slightly different twist, in *Blue Ridge Investments LLC v. Republic of Argentina*, Argentina sought dismissal of a claim by Blue Ridge to enforce an ICSID award against it that Blue Ridge had purchased from a third party, on the grounds that Blue Ridge was not an original party to the underlying arbitration agreement, but an “assignee,” and therefore lacked standing to enforce the award.²¹⁸ Rejecting Argentina's argument, the New York District Court held that Argentina waived its immunity under the arbitration exception by (1) joining the ICSID Convention; and (2) entering into an agreement with the assigning party to submit its dispute to arbitration.²¹⁹ On appeal, the Second Circuit affirmed the district court's finding that Argentina had waived its sovereign immunity pursuant to both the waiver exception and the exception for the enforce-

211. See *In re Arbitration Act of 1996*, No. 09-7041, 2012 WL 669240 (E.D. La. Feb. 29, 2012), *aff'd*, *Covington Marine Corp. v. Xiamen Shipbuilding Indus.*, 504 F. App'x 298 (5th Cir. 2012); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012).

212. *Fujian Mawei Shipbuilding*, 703 F.3d 742.

213. *In re Arbitration Act of 1996*, 2012 WL 669240.

214. *Fujian Mawei Shipbuilding*, 703 F.3d at 756.

215. *Id.* at 755–56.

216. *In re Arbitration Act of 1996*, 2012 WL 669240, at *8.

217. *Id.*

218. *Blue Ridge Invs., LLC v. Republic of Arg.*, 902 F. Supp. 2d 367, 375 n.7 (S.D.N.Y. 2012), *aff'd in part*, 735 F.3d 72 (2d Cir. 2013).

219. *Id.* at 375.

ment of arbitral awards.²²⁰

F. TERRORISM—§ 1605A AND § 1605(a)(7)

In 2012, courts continued to address the amendments to the “terrorism exception” to the FSIA, which were enacted in 2008 as part of the National Defense Authorization Act for Fiscal Year 2008 (NDAA).²²¹ The amendments replaced section 1605(a)(7) of the FSIA with the new “terrorism exception,” codified at 28 U.S.C. § 1605A.²²² Under both section 1605(a)(7) and section 1605A, foreign states designated by the U.S. Department of State as sponsors of terrorism (and their agencies and instrumentalities) are stripped of sovereign immunity for certain terrorist acts for as long as the state is designated a “state sponsor of terrorism.”²²³ The states lose immunity if they were a “state sponsor of terrorism” either at the time of the terrorist act or are so designated at a later time as a result of the act that is the subject of the suit.²²⁴ For foreign sovereigns’ conduct to fall within this exception (in addition to being designated a “state sponsor of terrorism”), they must have participated in an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking” or provided “material support or resources for such an act.”²²⁵ Plaintiffs must also prove causation and damages.²²⁶ Among the most significant recent changes to the “terrorism exception,” the statute now expressly: (1) provides plaintiffs with a federal statutory cause of action against state sponsors of terrorism, and (2) allows plaintiffs to seek punitive damages directly against the foreign state.²²⁷

1. Implementation of § 1605A

Mechanics. Courts generally agree that the NDAA’s expansive provisions are applicable to cases “related” to those filed under section 1605(a)(7) only if they were “before the courts in any form on its date of enactment,”²²⁸ and most have rejected the argument that where final judgments stand unsatisfied, the underlying claims remain “before the

220. *Blue Ridge Invs., LLC v. Republic of Arg.*, 735 F.3d 72, 85–86 (2d Cir. 2013).

221. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, 122 Stat. 3.

222. 28 U.S.C. § 1605A (2008).

223. *Id.* Currently, the list of “state sponsors of terrorism” consists of Cuba, Iran, Sudan, and Syria. *State Sponsors of Terrorism*, U.S. DEP’T ST., <http://www.state.gov/j/ct/list/c14151.htm> (last visited Nov. 12, 2014). Countries that were once on the list but have since been removed include Iraq, Afghanistan, North Korea, South Yemen, and Libya. Molly McCluskey, *The United States’ ‘Outdated’ Terror List*, AL JAZEERA (Jan. 26, 2014), <http://www.aljazeera.com/indepth/features/2014/01/united-states-outdated-terror-list-20141267333982434.html>.

224. § 1605A(a)(2)(A)(i).

225. § 1605A(a)(1).

226. § 1605A(c).

227. *Id.*

228. *See, e.g., Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116, 116–18, 123 (D.D.C. 2012) (citing National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110–181, § 1083(c)(2)(A)(iv), 122 Stat. 3, 342); *see also Bodoff v. Islamic Republic of Iran*, 567 F. Supp. 2d 141, 142 (D.D.C. 2008).

courts” for the purposes of the NDAA.²²⁹ But some courts have held that the NDAA provides plaintiffs an additional “avenue of relief under section 1605A based on the same prior act or incident.”²³⁰

State Law Causes of Action. With regard to U.S. citizen plaintiffs who seek to bring claims simultaneously under section 1605A and state law, courts have dismissed the state law claims, finding that allowing such causes of action to proceed would “nullify Congress’ expressed purpose” to avoid inconsistent judgments due to the variations in state laws and would “largely undermine the sea-change effected by the enactment” of the NDAA.²³¹ As discussed below, this line of reasoning has not been extended to claims by foreign nationals.

Evidentiary Burden. In properly filed related actions, courts in 2012 continued to rely upon evidence presented in earlier cases—without requiring the parties to reproduce such evidence—to reach their own, independent findings of fact as to liability.²³² In *Fain v. Islamic Republic of Iran*, the district court found Iran responsible for the 1983 attacks on the Marine barracks in Lebanon, but relied on evidence presented in prior actions involving the same incident instead of requiring plaintiffs to re-establish Iran’s liability.²³³ Likewise, in *Bodoff v. Islamic Republic of Iran*—filed after plaintiffs received a judgment in a section 1605(a)(7) case—the court took judicial notice of its previous findings to establish that the District of Columbia’s intentional infliction of emotional distress standard was satisfied.²³⁴

In cases involving acts of torture, such as *Han Kim v. Democratic People’s Republic of Korea*, courts in 2012 continue to require plaintiffs to provide “useful details about the torture” suffered and “its severity” that strictly satisfies the “[Torture Victim’s Protection Act’s] rigorous definition of torture.”²³⁵

229. See *Hegna*, 908 F. Supp. 2d at 122–23 (citing *Holland v. Islamic Republic of Iran*, 545 F. Supp. 2d 120, 121–22 (D.D.C. 2008) (“Plaintiffs’ suggestion—that this case is currently pending because of the open-ended possibility of filing an attachment or executing the judgment in the future—is inconsistent with the statutory language that requires the case to be before the Court as of January 28, 2008.”)); *Bodoff*, 567 F. Supp. 2d at 142; accord *Blais v. Islamic Republic of Iran*, 567 F. Supp. 2d 143, 144 (D.D.C. 2008); *Haim v. Islamic Republic of Iran*, 567 F. Supp. 2d 146, 147 (D.D.C. 2008)).

230. See *In re Islamic Republic of Iran Terrorism Litig.*, 659 F. Supp. 2d 31, 63–65 (D.D.C. 2009); see also *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93, 100 (D.D.C. 2012).

231. See *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 215 (D.D.C. 2012) (quoting *Beer v. Islamic Republic of Iran*, No. 08-CV-1807, 2010 WL 5105174, at *9 (D.D.C. Dec. 9, 2010)).

232. See, e.g., *Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 115–16 (D.D.C. 2012); *Bodoff*, 907 F. Supp. 2d at 96–97.

233. See *Fain*, 856 F. Supp. 2d at 114–16 (citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52 (D.D.C. 2010)) (relying on evidence presented in *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003)).

234. *Bodoff*, 907 F. Supp. 2d at 98.

235. *Han Kim v. Democratic People’s Republic of Korea*, No. CIV. A. 09-648 RWR, 2012 WL 3696385, at *2 (D.D.C. Aug. 17, 2012).

Causation. In *Wyatt v. Syrian Arab Republic*, the court followed precedent in holding that to establish jurisdiction under § 1605A, plaintiffs:

Need not establish that the material support or resources provided by Syria for terrorist acts contributed directly to the hostage-taking . . . Rather, the plaintiffs must allege facts sufficient to establish a reasonable connection between a country's provision of material support to a terrorist organization and the damages arising out of a terrorist attack.²³⁶

2. *Claims by Foreign Nationals*

One of the most significant features of § 1605A is its expansion of the “terrorism exception” to provide a cause of action to certain victims and family members who are foreign nationals. This new federal cause of action is available to: (1) U.S. nationals, (2) members of the U.S. armed forces, (3) U.S. government employees, even if not U.S. nationals, and (4) legal representatives of the individuals in the first three categories.²³⁷ In 2012, courts continued to permit the claims of those victims' foreign national family members to proceed, finding that, although § 1605A's plain language limits the federal cause of action to its four stated categories, it continues to operate as a pass-through (or waiver of sovereign immunity) for foreign national family members to state claims under applicable state or foreign law.²³⁸

3. *Choice of Law Issues*

One of Congress' motivations for creating this federal cause of action was to eliminate the disparate outcomes that had resulted from the application of varying substantive law to plaintiffs in the same case based on their domiciles at the time of the incident.²³⁹ Nonetheless, in certain circumstances, courts still must navigate through difficult choice of law principles in applying the terrorism exception.

1. *Claims of Foreign National Family Members Under § 1605A.*

Because § 1605A's federal cause of action is available only to categories of individuals explicitly identified therein, courts must determine which state or foreign law applies to the claims of foreign national family members of victims of terrorism.²⁴⁰ In furtherance of the NDAA's purpose of promoting uniformity, courts conducting this choice-of-law analy-

236. *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 228 (D.D.C. 2012) (internal alterations and quotations omitted).

237. 28 U.S.C. § 1605A(c).

238. *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561, 570–71 (7th Cir. 2012) (holding that “Congress has established a private right of action principally for American *claimants*, while waiving sovereign immunity in a broader set of cases also involving American *victims*.”).

239. *See, e.g., Leibovitch*, 697 F.3d at 568; *Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116, 121 (D.D.C. 2012).

240. *Leibovitch*, 697 F.3d at 567–68.

sis have typically applied the law of the forum—typically the District of Columbia—to all such claims where the attacks directly targeted U.S. facilities and U.S. nationals working abroad.²⁴¹ But where an attack does not directly target U.S. interests, the claims of foreign national family members must be adjudicated under the law of the jurisdiction where the injury took place.²⁴²

2. 1605(a)(7) Claims.

Despite the passage of § 1605A in 2008, courts in 2012 still found it necessary to address choice of law issues in §1605(a)(7) cases, which continue to yield “inconsistent results.”²⁴³ In *Estate of Botvin v. Islamic Republic of Iran*,²⁴⁴ the district court had previously held that Israeli law applied to the claims of a U.S. national who was murdered in 1997 by a suicide bomber at a pedestrian mall in Jerusalem, as well as to the claims of the victim’s foreign national family members.²⁴⁵ The court reasoned that the victim was domiciled in Israel and that there was no evidence the attack, which was intended to disrupt Israeli-Palestinian peace negotiations, was targeted at U.S. citizens or interests.²⁴⁶ In 2012, upon the plaintiffs’ fifth motion for default judgment, the court found that plaintiffs had established liability under Israeli law and that the estate of the U.S. national victim was entitled to compensatory damages under Israeli law.²⁴⁷ But the court then found that there was insufficient evidence that the victim’s family members were entitled to compensatory damages because “Israeli law lacks a legal mechanism by which plaintiffs could obtain compensation for their emotional or non-economic injuries.”²⁴⁸

241. See *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 153–56 (D.D.C. 2011) (Sudanese- and Iranian-sponsored attacks on U.S. embassies in Kenya and Tanzania in 1998); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 20–23 (D.D.C. 2011) (Iranian-sponsored attacks on U.S. embassy in Lebanon in 1983 and 1984).

242. *Leibovitch*, 697 F.3d at 569 (vacating and remanding lower court judgment for reconsideration of claims under Israeli law in case brought by foreign national family members arising out of terrorist attack on a highway in Israel, during which a U.S. citizen child was injured).

243. *Estate of Botvin v. Islamic Republic of Iran*, 873 F. Supp. 2d 232, 246 (D.D.C. 2012) (“Today’s decision is another sad example of the inconsistent results arising from this defunct regime: the family members of Yael Botvin receive no solatium compensation while family members of victims in the earlier *Compuzano* decision received millions of dollars in solatium compensation.”) (citing *Compuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 276 (D.D.C. 2003)).

244. *Estate of Botvin*, 873 F. Supp. 2d 232, 235 (D.D.C. 2012).

245. *Estate of Botvin v. Islamic Republic of Iran*, 772 F. Supp. 2d 218, 225–26 (D.D.C. 2011).

246. *Id.*

247. *Estate of Botvin*, 873 F. Supp. 2d at 235, 243–44 (D.D.C. 2012) (holding that Israeli Civil Wrongs Ordinance § 78 is similar to a wrongful death action in the United States and awarding \$1,704,457 in compensatory economic damages).

248. *Id.* at 245.

4. Damages

1. Economic Damages.

Reasonably foreseeable damages have been awarded under the terrorism exception for economic loss, such as loss of earning capacity and property.²⁴⁹ In 2012, courts continued to rely on expert testimony²⁵⁰ to award economic damages for the loss of earning capacity for injured victims and for the loss of accretions to the estate that would have been expected had there not been a wrongful death.²⁵¹ But in *Wyatt v. Syrian Arab Republic*, the court refused to award: (1) damages for a lost business opportunity because the allegations were “too speculative to credit;” (2) medical costs because plaintiffs failed to provide evidence of specific costs that were incurred; and (3) travel expenses because plaintiffs failed to offer any evidence to support this claim.²⁵² Similarly, in *Oveissi v. Islamic Republic of Iran*, the court refused to “engage in the speculative venture plaintiff seeks” to award damages to the grandson of an assassinated former Iranian general for loss of inheritance.²⁵³ The reason for the property loss was the 1979 Iranian Revolution and the general’s subsequent flight from Iran, not the general’s assassination in Paris in 1984.²⁵⁴ The inheritance loss was not a “reasonably foreseeable” result of the assassination because the general had lost possession or control over the property at issue due to his exile from Iran, and there was no guarantee that the grandson would have inherited any property had the general lived.²⁵⁵

2. Victims’ Pain and Suffering.

Survivors of terrorist attacks have been deemed entitled to “baseline” awards of \$5 million in compensatory damages for substantial injuries.²⁵⁶ Courts have departed upward to award higher damages in cases of more severe, permanent physical and psychological injuries,²⁵⁷ and downward

249. See 28 U.S.C. § 1605A(d).

250. Section 1605A specifically provides for the use of Special Masters to determine damages in terrorism-related activities. See 28 U.S.C. § 1605A(e)(1).

251. See, e.g., *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93, 97–98 (D.D.C. 2012); *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 GBD FM, 2012 WL 4711407, at *3 (S.D.N.Y. Oct. 3, 2012); *Fain III v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 82 (D.D.C. 2012); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 39 (D.D.C. 2012); *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 214 (D.D.C. 2012).

252. *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 230 (D.D.C. 2012).

253. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 58 (D.D.C. 2012) (denying damages sought under 28 U.S.C. § 1605A(d)).

254. *Id.* at 57–58.

255. *Id.* at 58.

256. See *Fain III v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 81 (D.D.C. 2012); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 38 (D.D.C. 2012); *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 231–32 (D.D.C. 2012) (awarding \$5 million in pain and suffering to hostage victims of terrorists).

257. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 38 (D.D.C. 2012) (awarding \$8 million where victim had “conscious suffering for nearly one month” from physical injuries of “exceptional severity”).

to as low as \$1.5 million where the injuries are minor or purely emotional.²⁵⁸ In hostage cases, some courts have calculated damages on a per diem basis; but in *Wyatt v. Syrian Arab Republic*, where the per diem amount was “inadequate to compensate plaintiffs for their injuries,” the court awarded the baseline \$5 million to each victim.²⁵⁹

3. Solatium.

In assessing loss of solatium awards for victims’ family members, courts have analyzed the following factors: (1) whether the victim died in the attack; (2) “the nature of the relationship between the claimant and the victim;” and (3) “the severity and duration of the pain suffered by the family member.”²⁶⁰ Courts have generally ordered baseline awards of \$8 million to spouses of deceased victims, \$5 million to the decedent’s parents, \$3 million to children, and \$2.5 million to siblings.²⁶¹ Those amounts are generally reduced by half for family members of the victims who were injured, not killed.²⁶² Where a plaintiff is related to multiple victims, courts “establish the family member’s baseline at the higher of the figures and then consider whether to grant an upward departure from that higher baseline.”²⁶³ Absent special circumstances, “it is inappropriate for the solatium awards of family members to exceed the pain and suffering awards of the surviving servicemen.”²⁶⁴ In such cases, courts have reduced family members’ awards in rough proportion to the baseline framework.²⁶⁵

Plaintiffs must have been immediate family members of the victims at

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258. *Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 12–13 (D.D.C. 2012) (awarding \$2 million for minor physical but severe emotional injuries); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 49 (D.D.C. 2012) (awarding \$1.5 million where victims sustained no physical harm).
259. *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 231–32 (D.D.C. 2012).
260. *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 25–26 (D.D.C. 2011). That solatium award was upheld in *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012).
261. *E.g.*, *Fain III v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 82 (D.D.C. 2012) (citing *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 299 (D.D.C. 2006)); *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 42 (D.D.C. 2012).
262. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 42 (D.D.C. 2012). *But see* *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216 (D.D.C. 2012) (awarding \$4 million each to victims’ spouses and \$2.5 million each to victims’ children where one victim was still alive and another had died of causes unrelated to the attack). The higher award in *Wyatt* appears to be based on a misapplication of the framework set out in *Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 299, 271–359 (D.D.C. 2006).
263. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 40 (D.D.C. 2012).
264. *Estate of Brown*, 872 F. Supp. 2d at 42 (D.D.C. 2012).
265. *Estate of Brown*, 872 F. Supp. 2d at 42–44 (D.D.C. 2012) (modifying proposed awards in proportion with servicemen’s awards and *Heiser* framework, but with consideration of special circumstances warranting higher awards); *O’Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 47–48 (D.D.C. 2012) (awarding in “rough proportionality” \$850,000 and \$500,000 respectively to parents and siblings of injured servicemen who received \$1.5 million in pain and suffering); *see generally* *Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 157–58 (D.D.C. 2011).

the time of the attack to receive awards for loss of solatium.²⁶⁶ Indeed, in *Davis v. Islamic Republic of Iran*, the court considered several claims of victims' children born after the attack and held that "a plaintiff bringing an action under § 1605A must have been alive at the time of the attack in order to collect solatium damages."²⁶⁷ But courts have applied the \$5 million baseline for relatives other than children who were in *de facto* parent-child relationships with the victim.²⁶⁸

Decisions to depart upward from these baselines are rooted in common sense and may be warranted when plaintiffs present support such as: (1) evidence establishing "an especially close relationship between the plaintiff and decedent," (2) "medical proof of severe pain, grief or suffering on behalf of the claimant," or (3) evidence that "circumstances surrounding the terrorist attack [rendered] the suffering particularly more acute or agonizing."²⁶⁹ In *In re Terrorist Attacks on September 11, 2001*, given the "extraordinarily tragic circumstances surrounding the September 11th attacks" and "their indelible impact on the lives of the victims' families," the court granted a collective upward departure, awarding \$12.5 million, \$8.5 million, \$8.5 million, and \$4.25 million for spouses, parents, children, and siblings of deceased victims, respectively.²⁷⁰ Other upward departures were awarded where a plaintiff was himself the victim of the attack and also witnessed the slow death of his son,²⁷¹ and where another plaintiff suffered a nervous breakdown after her brother's death.²⁷²

On the other end of the spectrum, courts will also award downward departures from the baseline where circumstances warrant. For example, an award was lowered in a case involving an estranged mother who had not seen her son in 16 years.²⁷³ And, in certain circumstances, the court may even deny an award of solatium, as it did for an estranged brother who had only "speculative information" about the attack and was unable to recall whether he felt any emotional distress afterwards.²⁷⁴

266. See, e.g., *Estate of Brown*, 872 F. Supp. 2d at 44, 55 (D.D.C. 2012) (dismissing solatium claims of victim's child born two months after the attack and of victim's half-siblings who "did not have a close relationship with him—a prerequisite to a solatium award"); *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 GBD FM, 2012 WL 4711407, at *2, n.2 (S.D.N.Y. Oct. 3, 2012) (dismissing solatium claim of victim's niece who "does not serve functionally as an immediate family member" of the victim).

267. *Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 14–15 (D.D.C. 2012).

268. See, e.g., *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 27 (D.D.C. 2011) (finding parent-child relationship between plaintiff and victim-grandfather). The solatium award was upheld in *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 55 (D.D.C. 2012).

269. *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 42–43 (D.D.C. 2012).

270. *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 GBD FM, 2012 WL 4711407, at *2 (S.D.N.Y. Oct. 3, 2012).

271. *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 40 (D.D.C. 2012).

272. *Estate of Brown*, 872 F. Supp. 2d at 43–44 (D.D.C. 2012).

273. *Estate of Brown*, 872 F. Supp. 2d at 44 (D.D.C. 2012).

274. *O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 48 (D.D.C. 2012).

4. Punitive Damages.

Unlike § 1605(a)(7), § 1605A explicitly allows for punitive damages awards against foreign sovereigns.²⁷⁵ Some plaintiffs have brought actions for punitive damages after they have already obtained judgments for compensatory damages under § 1605(a)(7)—with varying success.²⁷⁶ Courts have recognized that the statutory language of § 1605A “can reasonably be read to authorize only suits related to pending cases or, more broadly, to authorize any suit related to an earlier action brought under § 1605(a)(7), or the Flatow Amendment, regardless of whether that first suit was pending when the second suit was brought.”²⁷⁷ In *Hegna v. Islamic Revolutionary Guard Corps*, the court dismissed a second action brought under § 1605A, reasoning that, if the statute authorized “a second suit for damages based on the same nucleus of facts at the core of the final judgment in an earlier suit,” such an authorization “would raise a serious [constitutional] question as to whether it violated the Article III prohibition on the legislative revision of final judicial judgments.”²⁷⁸ But in *Bodoff v. Islamic Republic of Iran*, the court had awarded compensatory and punitive damages to plaintiffs in 2006, but still heard an action for punitive damages, which was brought within 60 days of passage of the § 1605A.²⁷⁹ The court confirmed its prior damages awards under § 1605A and held the Republic of Iran (the defendant in the prior suit) and the Iranian Ministry of Information and Security (the new defendant in the second suit) jointly and severally liable.²⁸⁰

In determining the amount of punitive damages, courts consider four factors: “(1) the character of the defendants’ act, (2) the nature and extent of harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of the defendants.”²⁸¹ In applying these factors, many courts have awarded approximately three times the compensatory damages in punitive damages; although the cases arising out of the bombing of U.S. barracks in Beirut use a 3.44 ratio as the standard.²⁸² Other courts have awarded \$300 mil-

275. See 28 U.S.C. § 1605A(e)(1).

276. See, e.g., *Hegna v. Islamic Revolutionary Guard Corps*, 908 F. Supp. 2d 116 (D.D.C. 2012); *Bodoff v. Islamic Republic of Iran*, 907 F. Supp. 2d 93 (D.D.C. 2012).

277. *Hegna*, 908 F. Supp. 2d 116, 135 (D.D.C. 2012) (holding that the “related action” provision is limited to cases that have not yet been fully decided before an Article III tribunal).

278. *Hegna*, 908 F. Supp. 2d at 118, 135 (D.D.C. 2012).

279. *Bodoff*, 907 F. Supp. 2d at 96, 107 (D.D.C. 2012).

280. See *id.* at 105.

281. *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 56 (D.D.C. 2012); *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 232 (D.D.C. 2012).

282. *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 GBD FM, 2012 WL 4711407, at 3 (S.D.N.Y. 2012) (noting a 3.44 ratio of compensatory damages to punitive damages is “the standard ratio applicable to a number of cases arising out of terrorist attacks”); *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 50–51 (D.D.C. 2012) (awarding “three times the compensatory damages in punitive damages” while noting that the ratio “has ranged between three and, in exceptional cases, five”); *Fain III v. Islamic Republic of Iran*, 885 F. Supp. 2d 78, 83 (D.D.C.

lion in punitive damages after weighing heavily the amount of a state's estimated annual funds that are used to support terrorism and the depravity of the state's acts.²⁸³

In both *Wultz v. Islamic Republic of Iran* and *Oveissi v. Islamic Republic of Iran*, courts awarded \$300 million in punitive damages, but then considered whether such awards comport with recent Supreme Court guidance on punitive damages.²⁸⁴ In both cases, the courts agreed with the holding in *Beer v. Islamic Republic of Iran*:²⁸⁵ "foreign sovereigns cannot use the constitutional constraints of the Fifth Amendment due process clause to shield themselves from large punitive damages awards, and so the longstanding method for the calculation of punitive damages in FSIA terrorism cases remains viable."²⁸⁶

IV. ENFORCEMENT OF AWARDS AGAINST FOREIGN SOVEREIGNS

Even if a plaintiff overcomes a foreign state's immunity and obtains a judgment against the foreign sovereign, the plaintiff may find it difficult to enforce the judgment. The FSIA protects a foreign state's property in the United States by granting broad immunity from attachment and execution to satisfy a debt owed as a result of a judgment against the state.²⁸⁷ This immunity from attachment and execution is separate from the immunity from jurisdiction.²⁸⁸ Therefore, "if a sovereign waives immunity from jurisdiction and a judgment is rendered, the plaintiff can generally execute the judgment only on property with respect to which the sovereign has explicitly waived immunity."²⁸⁹

The immunity from attachment and execution prevents not only orders of attachment against the foreign state's property, but also protects the state from certain pre-judgment security requirements.²⁹⁰ It also protects from preliminary injunctions that "would serve the same purpose as an

2012) (noting "\$3.44 ratio . . . has been established as the standard ratio applicable to cases arising out of the Beirut bombing"); *see also* *Estate of Brown v. Islamic Republic of Iran*, 872 F. Supp. 2d 37, 45 (D.D.C. 2012); *Davis v. Islamic Republic of Iran*, 882 F. Supp. 2d 7, 17 (D.D.C. 2012); *O'Brien v. Islamic Republic of Iran*, 853 F. Supp. 2d 44, 48 (D.D.C. 2012); *Anderson v. Islamic Republic of Iran*, 839 F. Supp. 2d 263, 267 (D.D.C. 2012).

283. *Wyatt*, 908 F. Supp. 2d at 233 (D.D.C. 2012); *Oveissi*, 879 F. Supp. 2d at 56 (D.D.C. 2012); *Wultz v. Islamic Republic of Iran*, 864 F. Supp. 2d 24, 41-42 (D.D.C. 2012).

284. *Oveissi*, 879 F. Supp. 2d at 55-58 (D.D.C. 2012); *Wultz*, 864 F. Supp. 2d 24, 42 (D.D.C. 2012); *see also* *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

285. *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14 (D.D.C. 2011).

286. *Oveissi*, 879 F. Supp. 2d at 55 (D.D.C. 2012); *Wultz*, 864 F. Supp. 2d at 42 (D.D.C. 2012).

287. 28 U.S.C. § 1609; *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 257 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 273 (2012).

288. *Themis Capital, LLC v. Democratic Republic of Congo*, 881 F. Supp. 2d 508, 516 (S.D.N.Y. 2012); *Compare* 28 U.S.C. § 1604 (immunity from jurisdiction), *with* 28 U.S.C. § 1609 (immunity from attachment and execution).

289. *Themis Capital*, 881 F. Supp. 2d at 516.

290. *Pine Top Receivables of Ill., LLC v. Banco de Seguros del Estado*, No. 12 C 6357, 2012 WL 6216759, at *4 (N.D. Ill. Dec. 13, 2012).

attachment” by effectively freezing funds immune under the FSIA.²⁹¹ But the FSIA does not protect foreign states from injunctions that do not involve “the court’s ever exercising dominion over sovereign property,” such as injunctions that require a sovereign only to comply with existing contractual obligations without affecting any payment obligations.²⁹²

The FSIA also creates exceptions to the immunity from attachment and execution.²⁹³ Certain property of a foreign state may be executed upon or attached if: (1) a court authorizes such attachment or execution; (2) the foreign state’s property was used for a commercial activity in the United States; (3) a reasonable amount of time has passed since a court entered the judgment to be enforced against the foreign state; (4) the foreign state was properly given notice of the judgment (if necessary, as in the case of a default judgment); and (5) the foreign state’s property otherwise satisfies the additional requirements of one of the exceptions to immunity in Section 1610.²⁹⁴ The additional requirements in Section 1610 include situations where, for example: (1) the foreign state waived its immunity from attachment; (2) the foreign state’s property was used in the commercial activity that formed the basis of the plaintiff’s claim; or (3) the judgment against the foreign state is based on a court order confirming an arbitration award against the state.²⁹⁵

Some exceptions to the immunity from attachment and execution, as well as circumstances where these exceptions do not apply, are discussed below.

A. WAIVER OF IMMUNITY FROM ATTACHMENT

One key exception to Section 1609’s immunity from attachment and execution is a foreign state’s waiver of that immunity.²⁹⁶ The waiver may be explicit or implicit.²⁹⁷ Under Section 1610(b)²⁹⁸ (which deals with an

291. *Janvey v. Libyan Inv. Auth.*, 478 F. App’x 233, 236 (5th Cir. 2012).

292. *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246, 262 (2d Cir. 2012) (noting the Injunctions at issue directed Argentina “to comply with its contractual obligations not to alter the rank of its payment obligations” and “affect Argentina’s property only incidentally to the effect that the order prohibits Argentina from transferring money to some bondholders and not others.”).

293. See 28 U.S.C. § 1610. *But see* 28 U.S.C. § 1611 (providing exceptions to exceptions from immunity in 28 U.S.C. § 1610).

294. See 28 U.S.C. § 1610(a)–(c); *see also* 28 U.S.C. § 1608(e) (2012) (describing service of default judgment on foreign state).

295. See 28 U.S.C. § 1610(a)(1)–(7) (2012).

296. See 28 U.S.C. § 1610(a)(1).

297. *Id.*

298. 28 U.S.C. § 1610(b)(1) (“(b) . . . any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver . . .”).

agency's or instrumentality's waiver of immunity), the waiver of immunity from attachment can affect not only property used by the foreign state for commercial activity in the United States, but also "any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States."²⁹⁹

A foreign state's waiver of immunity from attachment and execution can only be withdrawn through "an affirmative act in accordance with the terms of the original waiver."³⁰⁰ If the terms of the waiver do not "contemplat[e] the future revocation of a waiver as to attachment of property," then the foreign state's waiver of immunity from attachment is "irrevocable."³⁰¹ In *Themis Capital, LLC v. Democratic Republic of Congo*, the court found that the Republic of Zaire and the Central Bank of Zaire, who were predecessors in interest to defendants the Democratic Republic of the Congo and the Central Bank of the Democratic Republic of the Congo, had "unambiguously waived immunity of defendants' property from execution" in the terms of the credit agreement, under which plaintiffs were suing.³⁰² The credit agreement stated:

To the extent that the [Republic of Zaire] or the Bank of Zaire may be entitled . . . to claim for itself or its Assets or the Assets of any Governmental Agency immunity from suit, from the jurisdiction of any court . . . , from attachment prior to judgment, from execution on a judgment or from the giving of any other relief or issue of any process, or to the extent that in any such jurisdiction there may be attributed such an immunity (whether or not claimed), the [Republic of Zaire] and the Bank of Zaire each irrevocably agrees not to claim and irrevocably waives any and all such immunity to the fullest extent now or hereafter permitted under the laws of the jurisdiction in which any such suit, action or proceeding may be commenced³⁰³

That waiver of immunity from attachment did "not provide a procedure for revocation of that waiver."³⁰⁴ Therefore, the court found that, "in accordance with the FSIA, the DRC's waiver of immunity from attachment is . . . irrevocable" and therefore there would be no immunity from attachment.³⁰⁵

B. THE COMMERCIAL ACTIVITY EXCEPTION TO IMMUNITY FROM ATTACHMENT

Section 1610 of the FSIA creates an exception to immunity from attachment and execution for a foreign state's property when that property is used for commercial activity in the United States and that property was

299. 28 U.S.C. § 1610(a)(1), (b)(1).

300. *Themis Capital*, 881 F. Supp. 2d at 517; see 28 U.S.C. § 1601(a)(1), (b)(1).

301. *Themis Capital*, 881 F. Supp. 2d at 517.

302. *Id.* at 513, 517.

303. *Id.* at 517–18 (quoting terms of credit agreement and adding emphasis).

304. *Id.* at 518.

305. *Id.*

“used for the commercial activity upon which the claim is based.”³⁰⁶ Thus, “when a foreign government acts . . . in the manner of a private player . . . the foreign sovereign’s actions are ‘commercial’ within the meaning of the FSIA.”³⁰⁷

1. Defining “Commercial Activity”

To determine whether property falls within the commercial activity exception to immunity, the court looks at the *nature*—not purpose—of the foreign state’s course of conduct.³⁰⁸ For instance, a foreign state’s purchasing goods in the market is one common example of commercial activity “because private companies can similarly use sales contracts to acquire goods.”³⁰⁹ The purpose of those purchases is irrelevant.³¹⁰ The Second Circuit recently rejected Argentina’s argument that funds held in a New York bank account by ANPCT—a sub-unit of Argentina’s Ministry of Science, Technology, and Productive Innovation—were immune from attachment because ANPCT purchased scientific equipment as part of “national program of scientific research and development.”³¹¹ Argentina asserted that the “essential nature” of ANPCT’s payments to equipment sellers was “sovereign” because the equipment was not shipped to ANPCT or Argentina, but to beneficiaries of research grants.³¹² The court found that this argument went to the “governmental purpose” of the payments, but this purpose was not “relevant to the commercial activity analysis” because “the relevant inquiry concerns the power that is exercised, rather than the motive for its exercise.”³¹³ Because “a private party engaged in trade and traffic or commerce can purchase scientific equipment,” ANPCT’s purchases “in the manner of a private actor” satisfied the commercial use requirement of the FSIA.³¹⁴ Therefore, the court held that Argentina “may not claim sovereign immunity as to the funds in the ANPCT Account.”³¹⁵

It is important to remember that the courts have “a great deal of latitude in determining what is a commercial activity for purposes of the FSIA,” and may draw fine distinctions between commercial uses and non-commercial uses of property.³¹⁶ For example, a foreign state’s licens-

306. 28 U.S.C. § 1610(a)(2) (2012). For a discussion of loss of immunity from suit in the United States based on commercial activity, see *supra* section III.B.

307. *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 CIV. 2715 TPG, 2012 WL 983564, at *4 (S.D.N.Y. Mar. 22, 2012) (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)) (internal quotations omitted).

308. *NML Capital, Ltd. v. Republic of Argentina*, 680 F.3d 254, 257–59 (2d Cir. 2012) *cert. denied*, 133 S. Ct. 273 (2012).

309. *Id.* at 258.

310. *Id.*

311. *Id.* at 258–59.

312. *Id.* at 258.

313. *Id.* at 259.

314. *Id.* at 260 (internal quotations and alterations omitted).

315. *Id.*

316. *Id.* at 257 (citing *Kato v. Ishihara*, 360 F.3d 106, 110 (2d Cir. 2004) (internal quotations omitted)).

ing of patents in the United States in the same manner as any non-sovereign patent holder has been found to be a “commercial activity.”³¹⁷ But the mere filing of patent applications in the U.S. is “at most the generation of a property interest, not [a] commercial use,” and so the filing of patent applications may not subject the patents rights to attachment.³¹⁸

Aurelius Capital Partners, LP v. Republic of Argentina illustrates the distinction between the commercial nature of patent licensing and the non-commercial nature of patent application filing.³¹⁹ In *Aurelius*, Instituto Nacional de Tecnología Agropecuaria (INTA), an Argentine governmental research institution, developed an herbicide-resistant rice gene and rice variety, and entered into licensing agreements with a Dutch corporation called BASF B.V.³²⁰ Under the licensing agreements, BASF B.V. was allowed to sell INTA’s rice gene and rice variety in most parts of the world in exchange for royalty payments to INTA.³²¹ BASF B.V.’s parent company, BASF SE, engaged in commercial activity in the United States, but none of its U.S. products used technology licensed by INTA.³²² But two patent applications relating to the rice plants were filed by BASF in the United States in INTA’s name, though BASF did not plan to commercialize INTA’s technologies in the United States.³²³

The plaintiffs in *Aurelius* had obtained orders of attachment relating to the U.S. patents or patent applications, as well as the royalties from the INTA-BASF licensing agreements.³²⁴ The court found that the mere filing of patent applications and the grant of patent rights, without any evidence that Argentina “is actively using its patent interests for commercial activity in the United States,” did not subject the patent interests to attachment under the FSIA.³²⁵ As for the royalties from the licensing agreements, a U.S. affiliate of BASF B.V. had paid INTA advance royalties on behalf of BASF B.V. for activities in Costa Rica and Brazil. But the court characterized the U.S. affiliate’s role as that of a “paying agent” and found there was no indication that the rice gene technology or the contractual right to receive royalties related to that technology was ever “put to commercial use in the United States.”³²⁶ The court therefore vacated the orders attaching the patents and the royalties because the property had not been used for commercial activity in the United States as required by the FSIA.³²⁷

317. *Aurelius Capital Partners, LP v. Republic of Argentina*, No. 07 CIV. 2715 TPG, 2012 WL 983564, at *4 (S.D.N.Y. Mar. 22, 2012) (citing *Intel Corp. v. Commonwealth Scientific & Indus. Research Org.*, 455 F.3d 1364, 1370 (Fed. Cir. 2006)).

318. *Id.* at *5.

319. *See generally id.*

320. *Id.* at *3.

321. *Id.*

322. *Id.*

323. *Id.* at *3–4.

324. *Id.* at *1.

325. *Id.* at *5.

326. *Id.*

327. *Id.*

C. EXCEPTIONS TO THE COMMERCIAL ACTIVITY EXCEPTION

1. *The Military Activity Exception*

Even if a foreign state's property falls within the commercial activity exception to immunity from attachment, Section 1611 of the FSIA restores immunity to certain property that "is, or is intended to be, used in connection with a military activity."³²⁸ If that property is "of a military character" or is "under the control of a military authority or defense agency," then the intended military activity for that property makes the property immune from attachment.³²⁹

2. *The Central Bank Exception*

Section 1611 of the FSIA also immunizes property used for commercial activity if that property is "of a foreign central bank . . . held for its own account."³³⁰ The Second Circuit has adopted a "modified central bank functions test" to determine when central bank property is held for the bank's own account.³³¹ Under this test, funds are presumed immune from attachment under Section 1611 if they are held in an account with the central bank's name.³³² A plaintiff seeking attachment can "rebut that presumption by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood."³³³

This test was recently applied in *EM Ltd. v. Republic of Argentina*.³³⁴ Plaintiffs sought to enforce orders of attachment against funds held by the Central Bank of Argentina (and Citibank) at the Federal Reserve Bank of New York.³³⁵ Argentina had defaulted on certain bonds, but continued to make payments on certain bonds through CRYL, an Argentine clearing system managed by the Central Bank.³³⁶ The court vacated the attachment orders that attempted to reach these payments made by CRYL, holding that "the Republic had no further interest in the funds designated to pay the [relevant] bonds once it transferred those funds to CRYL" and therefore "the funds are not property of the Republic and therefore cannot be attached under § 1610."³³⁷

The court also rejected the argument that the Central Bank's payment of Argentina's commercial debt in the United States overcame the presumption that Central Bank funds are immune from attachment under

328. 28 U.S.C. § 1611(b) (1996); *Aero Union Corp. v. Aircraft Deconstructors Int'l LLC*, No. 1:11-CV-00484-JAW, 2012 WL 3679627 (D. Me. Aug. 24, 2012).

329. 28 U.S.C. § 1611(b) (1996).

330. 28 U.S.C. § 1611(b)(1) (1996).

331. *NML Capital, Ltd. v. Banco Cent. de la Republica Argentina*, 652 F.3d 172, 194 (2d Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

332. *Id.*

333. *Id.*

334. *EM Ltd. v. Republic of Argentina*, 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012).

335. *Id.* at 417.

336. *Id.* at 419.

337. *Id.* at 424.

Section 1611 of the FSIA.³³⁸ The Second Circuit had previously found that loans from the Central Bank to the Republic of Argentina did not transfer title of the Central Bank's assets held in the Federal Reserve Bank of New York account.³³⁹ Thus, "there was no property of the Republic being used for a commercial activity in the United States" and the Central Bank's funds in the United States remained immune from attachment.³⁴⁰

D. ENFORCEMENT IN TERRORISM CASES

For victims of state-sponsored terrorism, the enforcement of judgments against foreign states presents special problems. Foreign states involved in terrorism often have very limited assets in the United States, and any remaining assets may have been seized by the United States, which would require plaintiffs to litigate against the U.S. government to enforce the judgment against the foreign state.³⁴¹ To overcome this "perverse" situation, Congress enacted the Terrorism Risk Insurance Act ("TRIA") to "subject the assets of terrorist states to attachment and execution in satisfaction of judgments."³⁴² Because the TRIA still exempted certain properties from attachment, Congress subsequently added paragraph (g) to § 1610 of the FSIA, which now provides that judgments against a terrorist state can be enforced against the property of that foreign state or its agencies or instrumentalities, regardless of the "level of economic control over the property by the government of the foreign state."³⁴³

A topic of some dispute among the courts is how to determine whether an asset is property "of" a terrorist state. Both the TRIA and the FSIA allow attachment of assets "of" a terrorist state, which has been interpreted to mean that the foreign state must have at least an "ownership interest" in the property to be attached.³⁴⁴ In *Estate of Heiser v. Islamic Republic of Iran*, the court applied these principals to the question of whether survivors of a terrorist bombing attributed to Iran could garnish funds held in blocked accounts in U.S. banks. The proceeds of Iranian-related transactions had been blocked pursuant to federal regulations and were held in Electronic Funds Transfer (EFT) accounts in U.S. banks that served as intermediary banks in those transactions.³⁴⁵ For some EFTs, Iran or an Iranian instrumentality functioned as the originator or the originator's bank for the transfer.³⁴⁶ The U.S. banks "concede[d] that

338. *Id.*

339. *Id.* (citing *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 475–76 (2d Cir. 2007)).

340. *Id.* at 424.

341. *See* *Estate of Heiser v. Islamic Republic of Iran*, 885 F. Supp. 2d 429, 435 (D.D.C. 2012) *aff'd*, *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013).

342. *Id.* at 436.; *see generally* Terrorism Risk Insurance Act, Pub.L. No. 107–297, 116 Stat. 2322 (2002). TRIA is codified as a note to FSIA Section 1610.

343. 28 U.S.C. § 1610(g) (2012).

344. *Estate of Heiser*, 885 F. Supp. 2d at 438, 442; *see also* TRIA § 201(a) (2002); FSIA § 1610(g)(1) (2012).

345. *Estate of Heiser*, 885 F. Supp. 2d at 430.

346. *Id.* at 450 n.6.

Iran has a sufficient ownership interest in these accounts to permit attachment.”³⁴⁷ But for other EFTs that were blocked; the only beneficiary’s bank that was supposed to receive the funds was Iranian.³⁴⁸ The court applied generally adopted principals for EFT property rights under the Uniform Commercial Code to find that “a creditor of *the originator or the beneficiary* cannot levy on the property of either while the property is in the possession of an intermediary bank . . . because ‘midstream EFTs held by an intermediary bank ‘are not the property of either the originator or the beneficiary.’”³⁴⁹ Thus, Iran had at most a contingent future interest in the funds—an interest sufficient to trigger blocking of the transfer but insufficient to grant Iran legal title to the funds. The blocked-midstream EFTs were therefore not subject to attachment under the FSIA.³⁵⁰

V. PRACTICAL ISSUES IN FSIA LITIGATION

In 2012, FSIA decisions illustrated various procedural issues that arise in cases brought against foreign sovereigns, including, *inter alia*: the act of state doctrine, due process, service of process, jurisdictional issues, venue, *forum non conveniens*, default judgments, and interlocutory appeals. This section contains a brief review of several notable decisions.

A. ACT OF STATE DOCTRINE

The act of state doctrine precludes U.S. courts “from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.”³⁵¹ It applies when “the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.”³⁵² Courts, however, are not required to give deference to purely commercial acts.³⁵³ The foreign entity seeking to invoke the act of state as an “affirmative defense” has the burden of establishing its applicability.³⁵⁴

In *Konowaloff v. Metropolitan Museum of Art*, the Second Circuit held that the district court properly granted a motion to dismiss on the basis of

347. *Id.*

348. *Id.* at 447.

349. *Id.*

350. *Id.* at 448 (“Applying both the Restatement and U.C.C. Article 4A, plaintiffs cannot show that Iran has any ownership interest in the Contested Accounts.”).

351. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1073 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1582, 185 L. Ed. 2d 577 (2013) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964)).

352. *McKennon*, 672 F.3d at 1073 (quoting *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)).

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

354. *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 146 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2837 (2013); *Victims of Hungarian Holocaust v. Hungarian State Rys.*, 798 F. Supp. 2d 934, 939 (N.D. Ill. 2011) *rev’d on other grounds*.

the act of state doctrine where the complaint itself shows that the action is barred by that doctrine.³⁵⁵ An heir to a Russian national's art collection sued a museum, seeking return of a painting, as well as compensatory damages for wrongful acquisition, possession, and display of the painting.³⁵⁶ The heir alleged that a political party seized power from the Russian government in 1917 and established the Soviet government that decreed that the art collection was state property, which then transferred the art to a state-run museum.³⁵⁷ When the painting was ultimately sold, the proceeds were deposited into an account controlled by the Soviet government.³⁵⁸ The complaint also alleged that the Soviet state received official U.S. recognition in 1933.³⁵⁹ Based on these allegations, the district court ruled that the decree designating the art collection as state property was an act of state that barred the heir's suit.³⁶⁰ Although formal recognition of the Soviet government by the United States occurred years after the decree, the effect of this recognition was to validate all acts of the Soviet government from the "commencement of its existence," including the sovereign expropriation of the art collection.³⁶¹

McKesson Corporation v. Islamic Republic of Iran illustrates circumstances where the court found the act of state doctrine did not shield Iran from liability in an action initiated by a U.S. corporation.³⁶² The corporation alleged that the Iranian government expropriated the corporation's equity interest in a dairy and illegally withheld dividends.³⁶³ *McKesson's* outcome turned on whether the Iranian government's agents took over the dairy's board of directors, froze out the U.S. corporation, and stopped paying it dividends—a course of conduct which could be characterized as "public or official acts of a sovereign government."³⁶⁴ In assessing the course of conduct, the court noted, "Iran did not pass a law, issue an edict or decree, or engage in formal governmental action explicitly taking property for the benefit of the Iranian public."³⁶⁵ Rather, the U.S. corporation's claims arose from what resembled a basic "corporate dispute between majority and minority shareholders."³⁶⁶ The court therefore held that the relevant acts were not the "type of public act[s] of a foreign sovereign power" to which the act of state doctrine would apply.³⁶⁷

355. *Konowaloff*, 702 F.3d at 146.

356. *Id.* at 143.

357. *Id.* at 146–47.

358. *Id.* at 147.

359. *Id.* at 146.

360. *Id.*

361. *Id.* at 143.

362. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066 (D.C. Cir. 2012) *cert. denied*, 133 S. Ct. 1582, 185 L. Ed. 2d 577 (2013).

363. *Id.* at 1070.

364. *Id.* at 1074.

365. *Id.*

366. *Id.*

367. *Id.*

B. SERVICE OF PROCESS

Service of process pursuant to the FSIA must comport with 28 U.S.C. §§ 1608(a) and (b), which detail the acceptable methods of service on foreign states, political subdivisions, agencies, or instrumentalities.³⁶⁸ To effect proper service on foreign states (or political subdivisions), the summons and complaint must be transmitted using one of the methods enumerated in Section 1608(a), in the following preferential order: (1) “in accordance with any special arrangement for service between the plaintiff and the foreign state”; (2) “in accordance with an applicable international convention on service of judicial documents”; (3) “by any form of mail, requiring a signed receipt, . . . [from] the clerk of the court to the head of the ministry of foreign affairs”; or (4) by “diplomatic channels” through the State Department in Washington, D.C.³⁶⁹ If a plaintiff is using the third or fourth forms of service, the statute requires that the documents be sent along with translations into the official language of the foreign state.³⁷⁰

Ordinarily, strict compliance with this rule is essential to succeed in an action governed by the FSIA.³⁷¹ But in some cases, such as *Angellino v. Royal Family Al-Saud*, *pro se* litigants are afforded “more latitude than litigants represented by counsel to correct defects in service of process.”³⁷² Angellino, an artist, filed a *pro se* breach of contract suit against the Saudi royal family and sixteen members of the royal family for failure to pay for 29 sculptures that the family allegedly had commissioned.³⁷³ At the time of service in 2010, the defendants were considered an “agency or instrumentality of a foreign state” under Section 1608 of the FSIA.³⁷⁴ Angellino ordinarily communicated with the defendants through the Royal Embassy of Saudi Arabia located in Washington, D.C.³⁷⁵ He argued that he had served defendants by a “special arrangement” under Section 1608(a), which was the parties’ usual means of transaction and communication.³⁷⁶ Nevertheless, the district court dismissed Angellino’s complaint without prejudice for failure to prosecute based on his failure to demonstrate that he had served a political subdivision of the Kingdom of Saudi Arabia pursuant to a “special arrangement for service” under FSIA § 1608(a).³⁷⁷ Specifically, the district court cited “his failure to attempt one of the alternative methods of service prescribed in § 1608(a),” and “his failure to serve the members of the Royal

368. 28 U.S.C. § 1608(a), (b).

369. 28 U.S.C. § 1608(a)(1)–(4). Sequential service of process requirements also exist for service on agencies and instrumentalities under 28 U.S.C. § 1608(b).

370. 28 U.S.C. § 1608(a)(3), (4).

371. See 28 U.S.C. § 1608.

372. *Angellino v. Royal Family Al-Saud*, 688 F.3d 771, 778 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 851, 184 L. Ed. 2d 656 (2013).

373. *Id.* at 773.

374. *Id.*

375. *Id.*

376. See *id.* at 774.

377. See *id.* at 775.

Family pursuant to the Federal Rules of Civil Procedure (FRCP) 4(f).³⁷⁸

The D.C. Circuit reversed the district court's ruling for abuse of discretion, although the D.C. Circuit agreed "that Angellino was required to serve process on the Kingdom of Saudi Arabia under § 1608(a) and on the sixteen defendant Royal Family members under FRCP 4(f)."³⁷⁹ The court stated that a dismissal for failure to prosecute due to a delay in service is appropriate only when there is no "reasonable probability" that service can be obtained or there is a "lengthy period of inactivity."³⁸⁰ Here, the plaintiff's inability to effect service did not result from his inactivity, as he repeatedly attempted to serve process.³⁸¹ Further, as a pro se litigant, he was not given the required fair notice from the district court of service requirements under Section 1608 or the consequences of not obtaining service.³⁸² The court noted that "there exists a 'reasonable probability' that Angellino can effect service given the success of other parties in serving process on the Kingdom of Saudi Arabia under § 1608(a)(3) and (4) [of the FSIA]."³⁸³

With respect to service on agencies or instrumentalities, a plaintiff need not follow the requirements of Section 1608(b) as closely as with a foreign state or political subdivision; only "substantial compliance" with the service rules is required.³⁸⁴ Thus, some courts have allowed a case to proceed based on "'technically faulty service' [under § 1608(b)] as long as the defendants receive adequate notice of the suit and are not prejudiced."³⁸⁵

C. DUE PROCESS AND PERSONAL JURISDICTION

The majority of courts that have addressed the issue have held that, for purposes of the FSIA, foreign states are not "persons" protected by the due process clause of the Fifth Amendment.³⁸⁶ Accordingly, foreign

378. *Id.*

379. *Id.* at 776, 788.

380. *See id.* at 776-77.

381. *Id.* at 777.

382. *Id.* at 778.

383. *Id.* at 776.

384. *See* *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 798 F. Supp. 2d 260, 269 (D.D.C. 2011).

385. *Id.* (quoting *Doe v. State of Isr.* 400 F. Supp. 2d 86, 102 (D.D.C. 2005)).

386. *GSS Grp. Ltd v. Nat'l Port Auth.*, 680 F.3d 805, 809 (D.C. Cir. 2012); *Cont'l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 752 n.12 (E.D. Va. 2012) ("Every circuit court to address the issue has held 'that foreign states are not 'persons' protected by the Fifth Amendment'"). *See also, e.g.*, *Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 72 (D.C.C. 2011) (quotation omitted); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002); *Baker v. Socialist People's Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48, 77 (D.D.C. 2011); *O'Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1168 (C.D. Cal. 2006); *Rux v. Republic of Sudan*, No. CIV.A. 2:04CV428, 2005 WL 2086202, at *18 (E.D. Va. Aug. 26, 2005); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001).

states typically may not invoke lack of due process as a defense in FSIA litigation. The consequence for a foreign state is that it is “not subject to the minimum contacts analysis prior to the exercise of personal jurisdiction.”³⁸⁷ Thus, after subject matter jurisdiction under the FSIA has been established and defendants are properly served pursuant to the requirements of 28 U.S.C. § 1608, the court will assert personal jurisdiction over the defendants.³⁸⁸

But the inapplicability of due process protection to foreign states in FSIA actions does not necessarily extend to foreign agencies or instrumentalities.³⁸⁹ In 2012, the D.C. Circuit considered whether a public foreign entity—e.g., a corporation owned and operated by a foreign government—could rely on a due process argument to avoid personal jurisdiction. In *GSS Group Ltd. v. National Port Authority*,³⁹⁰ the district court determined that a Liberian public corporation, which specifically held itself out as independent from its sovereign, was entitled to due process protections, while the Liberian government was not.³⁹¹ The D.C. Court of Appeals affirmed, finding that because no one had contested that the corporation was an independent juridical entity, it was a “person” entitled to due process protection, and consequently, had a right to assert a minimum contacts defense.³⁹² Thus, a public foreign entity, separately and independently from its sovereign, may be entitled to the same due process protections as a *private* foreign entity with respect to personal jurisdiction in U.S. courts. This norm may be overcome under a variety of circumstances, such as where a foreign-government-owned “corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created,” or where honoring the distinction between instrumentality and sovereign “would work fraud or injustice.”³⁹³

387. *Cont'l Cas. Co.*, 893 F. Supp. 2d at 752 n.12.

388. 28 U.S.C. § 1330(b) (1976); see also *Concesionaria Dominicana de Autopistas y Carreteras, S.A. v. Dominican State*, No. 12-CV-1335 RLW, 2012 WL 6632812 (D.D.C. Dec. 20, 2012) (finding personal jurisdiction over foreign sovereign and stating that personal jurisdiction under FSIA exists when court concludes that it has subject matter jurisdiction pursuant to one of the statute’s exceptions and that the plaintiff has complied with the service of process requirements set forth in 28 U.S.C. § 1608); *Blue Ridge Invs., LLC v. Republic of Arg.*, 902 F. Supp. 2d 367, 376 (S.D.N.Y. 2012), *aff’d sub nom.*, *Blue Ridge Invs., L.L.C. v. Republic of Arg.*, 735 F.3d 72 (2d Cir. 2013) (same).

389. See *Smith v. Ghana Commercial Bank, Ltd.*, No. CIV. 10-4655 DWF/JJK, 2012 WL 2930462, at *6 (D. Minn. June 18, 2012), *report and recommendation adopted*, No. CIV. 10-4655 DWF/JJK, 2012 WL 2923543 (D. Minn. July 18, 2012), *aff’d* (Dec. 7, 2012) (dismissing complaint against Ghana Commercial Bank because plaintiff did not allege sufficient minimum contacts with forum state such that court could establish general or specific jurisdiction over Ghana Commercial Bank).

390. *GSS Grp. Ltd v. Nat’l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012).

391. *Id.* at 809–10.

392. *Id.* at 817.

393. *Id.* at 814 (quoting *First Nat’l City Bank v. Bano Para el Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983)).

First Investment Corporation v. Fujian Mawei Shipbuilding illustrates how a personal jurisdiction analysis under the FSIA may affect parties involved in international arbitration.³⁹⁴ In *First Investment*, the Fifth Circuit affirmed a district court's decision to deny confirmation of a foreign arbitral award against a Chinese state-owned entity and a private corporation whose majority shareholder was the state-owned entity (together, the "Fujian entities") for lack of personal jurisdiction.³⁹⁵ The court rejected the plaintiff's argument that a lack of personal jurisdiction is not a ground for non-recognition of an arbitral award and that constitutional due process concerns therefore are not implicated in a confirmation proceeding under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").³⁹⁶ Specifically, the court held that "dismissal of a petition under the New York Convention for lack of personal jurisdiction is appropriate as a matter of constitutional due process."³⁹⁷ The court also rejected the plaintiff's argument that it was erroneous to dismiss a foreign sovereign's alter egos for lack of personal jurisdiction because foreign sovereigns are not entitled to due process protections as a predicate for a federal court's assertion of personal jurisdiction.³⁹⁸ Because the plaintiff did not present sufficient evidence that the Fujian entities were the alter egos of the Chinese government, the defendants' motion to dismiss for lack of personal jurisdiction was properly granted.³⁹⁹

D. JURISDICTIONAL DISCOVERY

A request for jurisdictional discovery is common in FSIA cases, where further fact-finding may be necessary to establish that the foreign entity falls within one of the exceptions to sovereign immunity. Jurisdictional discovery is usually permitted only when the plaintiff is able to carry its initial burden of establishing a *prima facie* case that jurisdiction exists.⁴⁰⁰

Because "the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery," courts are often disinclined to require foreign sovereigns to participate in discovery.⁴⁰¹ If a ruling denying jurisdictional discovery is appealed, the decision "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial

394. *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 756 (5th Cir. 2012), *as revised* (Jan. 17, 2013).

395. *Id.* at 745, 756.

396. *Id.* at 748.

397. *Id.*

398. *Id.* at 752.

399. *Id.* at 754–55.

400. *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 609 (S.D.N.Y. 2012).

401. *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 779 (S.D.N.Y. 2012) (quoting *Thai Lao Lignite (Thai.) Co., v. Gov't of the Lao People's Democratic Republic*, No. 10 Civ. 5256 KMW, 2011 WL 4111504, at *3 (S.D.N.Y. Sept. 13, 2011)).

prejudice to the complaining litigant.”⁴⁰² In *Seijas v. Republic of Argentina*, the Second Circuit affirmed the district court’s denial of jurisdictional discovery to ascertain whether Banco de la Nación Argentina (“BNA”) was an alter ego of Argentina, and therefore liable for its debt.⁴⁰³ BNA, a commercial bank wholly owned by Argentina, qualified for sovereign immunity as Argentina’s “agency or instrumentality.”⁴⁰⁴ Plaintiffs made two arguments that exceptions to BNA’s immunity applied—both relying on an “alter ego theory”: (1) Argentina’s “waiver of immunity with respect to litigation arising from its default on its sovereign debt is imputed to BNA as an alter ego of the Republic;” and (2) Argentina’s “commercial activity is imputed to BNA as an alter ego of the Republic.”⁴⁰⁵ The Second Circuit found that plaintiffs’ “allegations [were] insufficient to establish the extensive control necessary to sustain an alter ego claim or even to establish a reasonable basis for assuming jurisdiction;” and so the denial of jurisdictional discovery was proper.⁴⁰⁶

In *Aero Union Corp. v. Aircraft Deconstructors International LLC*, the issue was whether limited discovery was appropriate to determine whether a military-grade aircraft owned by Brazil was immune to pre-judgment attachment.⁴⁰⁷ The plaintiff argued that limited jurisdictional discovery was “necessary to explore possible waivers of sovereign immunity” by the Brazilian Air Command and “the facts underlying the asserted immunity.”⁴⁰⁸ The critical question was whether the aircraft was used for a commercial purpose and could therefore be attached under Section 1610, or whether the aircraft was immune from attachment under Section 1611 because it was being used, or would be used, for a military purpose.⁴⁰⁹ The court acknowledged the “tension between permitting discovery to substantiate exceptions to [the FSIA] and protecting a sovereign’s . . . legitimate claim to immunity from discovery.”⁴¹⁰ Nevertheless, limited discovery “only to verify allegations of specific facts crucial to [the] immunity determination” was permissible because it would not unduly burden the foreign sovereign.⁴¹¹

In *EM Ltd. v. Republic of Argentina*, to facilitate a judgment creditor’s execution of its judgments against Argentina, the Second Circuit ordered

402. *Doe v. Holy See*, No. CV 02-430-MO, 2011 WL 1541275, at *2 (D. Or. Apr. 21, 2011) (quoting *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008)).

403. *Seijas v. Republic of Argentina*, 502 F. App’x 19, 20–21 (2d Cir. 2012).

404. *Id.* at 20.

405. *Seijas v. Republic of Argentina*, No. 10 CIV. 4300 TPG, 2011 WL 1137942, at *10 (S.D.N.Y. Mar. 28, 2011) *aff’d*, 502 Fed. App’x. 19 (2d Cir. 2012).

406. *Seijas*, 2012 WL 5259030 at *21–22. Plaintiffs claimed that Argentina could appoint and remove BNA’s directors, BNA made loans in Argentina’s political interest, and that BNA’s financial records were opaque. Taken together, these allegations did not satisfy the plaintiffs’ burden of showing an “abuse of corporate form” sufficient to overcome presumption of separate legal personality. *Id.*

407. *Aero Union Corp. v. Aircraft Deconstructors Int’l LLC*, No. 1:11-CV-00484-JAW, 2012 WL 3679627, at *1 (D. Me. Aug. 24, 2012).

408. *Id.* at *5.

409. *Id.* at *7.

410. *Id.* at *8.

411. *Id.*

asset discovery from third parties in connection with property owned by Argentina outside the United States.⁴¹² The court reasoned that asset discovery did not implicate Argentina's sovereign immunity because it: (1) only mandated the production of information and not the attachment of sovereign asset itself;⁴¹³ and (2) was directed at third-party banks with no claim to any immunity, not at Argentina itself.⁴¹⁴ The court acknowledged that the district court could not attach Argentinean assets located abroad, but a "district court's power to order discovery to enforce its judgment does not derive from its ultimate ability to attach the property in question but from its power to conduct supplementary proceedings, involving persons indisputably within its jurisdiction, to enforce valid judgments."⁴¹⁵

E. DEFAULT JUDGMENTS

Where a foreign sovereign does not answer or otherwise defend itself against a complaint, a court may grant a default judgment in favor of the plaintiff.⁴¹⁶ Before a court will enter a default judgment, though, the court must be satisfied that the plaintiffs have established their right to relief through evidence.⁴¹⁷ The court may accept all uncontroverted evidence as true, which may take the form of sworn affidavits or prior transcripts. A court may also take judicial notice of findings and conclusions in related proceedings.⁴¹⁸

F. VENUE AND FORUM *NON CONVENIENS*

Under 28 U.S.C. § 1391(f), claims against a foreign state, or political subdivision thereof, may be brought in the U.S. District Court for the District of Columbia, or "any judicial district" where (1) "a substantial part of the events . . . or a substantial part of property . . . is situated;" (2) "the vessel or cargo of a foreign state is situated;" or (3) "the agency or instrumentality is licensed to do business."⁴¹⁹ Venue disputes in FSIA litigation typically concern the location where "a substantial part of the events" occurred.⁴²⁰

412. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 202–03 (2d Cir. 2012).

413. *Id.* at 208.

414. *Id.* at 210.

415. *Id.* at 208.

416. *See, e.g.,* *Sikhs for Justice v. Nath*, 893 F. Supp. 2d 598, 612 (S.D.N.Y. 2012); *Reed v. Islamic Republic of Iran*, 845 F. Supp. 2d 204, 208 (D.D.C. 2012) (finding Iran liable for terrorist acts after entry of default judgment where Iran failed to respond to Complaint).

417. *Wyatt v. Syrian Arab Republic*, 908 F. Supp. 2d 216, 219 (D.D.C. 2012) (quoting 28 U.S.C. § 1608(e)).

418. *See Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109, 115 (D.D.C. 2012) (granting plaintiffs' motion for default judgment against Iran after taking on judicial notice of findings in related proceedings).

419. 28 U.S.C. § 1391(f) (2011).

420. *See, e.g.,* *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int'l & Foreign Courts*, 898 F. Supp. 2d 301, 317–18 (D. Mass. 2012), *aff'd*, 727 F.3d 10 (1st Cir. 2013) (finding that venue was proper in District of Mas-

But it is not guaranteed that the proper venue for an FSIA action always will lie in the United States. Under the doctrine of *forum non conveniens*, a defendant seriously inconvenienced by a particular venue may urge the court to decline to hear the case in the plaintiff's chosen forum.⁴²¹ "Considering whether to dismiss a case pursuant to the doctrine of *forum non conveniens* involves a two-step analysis."⁴²² "The first step in the *forum non conveniens* analysis is establishing an adequate alternative forum;" the second requires determining whether a balancing of various private and public interest factors strongly favors dismissal.⁴²³ The determination is highly discretionary, and courts may deny foreign sovereigns' motions to dismiss based on *forum non conveniens*.⁴²⁴

For example, in *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, where a Nigerian corporation sought a refund of \$11.12 million from a Venezuelan state-owned energy corporation for non-delivery of petroleum products, the defendant Venezuelan company argued for dismissal because both Nigeria and Venezuela provided an adequate alternate forum.⁴²⁵ The court performed the two-step analysis to determine whether the suit should be dismissed under *forum non conveniens*. The court found it "unnecessary . . . to decide whether Venezuela and Nigeria are adequate alternative fora; even assuming that they are, the balancing of private and public interest factors tip decisively in favor of [the plaintiff's] forum choice," which was entitled to "considerable deference."⁴²⁶

In evaluating the private interests at stake, the court noted that the bulk of the evidence and witnesses were located in the United States and Venezuela, not in Nigeria.⁴²⁷ The private interests "bearing on the parties' convenience [were] evenly balanced between New York and Venezuela, and tip[ped] decidedly against litigation in Nigeria."⁴²⁸ Because the defendants allegedly "availed themselves of the protection of the New York banking system to perpetrate a fraud," and New York "has a great interest in the integrity of its banking system," the court found that "[s]ubstantial public interest factors favor retention of this case in New York."⁴²⁹ The court ultimately denied the defendant's motion to dismiss

sachusetts in a contractor's suit against agencies or instrumentalities of the Republic of Ukraine, where contractor's performance in Massachusetts was a significant component of the contract claims and constituted an event giving rise to the claims).

421. See BLACK'S LAW DICTIONARY, *Forum Non Conveniens* (9th ed. 2009).

422. See *DRFP, LLC v. Republica Bolivariana De Venezuela*, No. 2:04-CV-00793, 2012 WL 5252306, at *2 (S.D. Ohio Oct. 23, 2012) (internal citations omitted).

423. See *id.* (listing factors)

424. See *id.* at *3, *10 (deferring to U.S. plaintiff's choice of U.S. forum where only some factors weighed in favor of Venezuela as a forum).

425. *Skanga Energy & Marine Ltd. v. Arevenca S.A.*, 875 F. Supp. 2d 264, 266, 273-74 (S.D.N.Y. 2012), *aff'd sub nom.*, *Skanga Energy & Marine Ltd. v. Petroleos de Venezuela S.A.*, 522 F. App'x 88 (2d Cir. 2013).

426. *Id.* at 273-74.

427. *Id.* at 274.

428. *Id.* 274-75.

429. *Id.* at 275.

and deferred to the plaintiff's choice of New York as the forum.⁴³⁰

G. INTERLOCUTORY APPEAL

In 2012, two circuits addressed issues relating to interlocutory appeals in FSIA cases.⁴³¹ The Ninth Circuit addressed whether it could hear an appeal from a denial of a motion to dismiss where the district court had transferred the matter to a district court in another circuit.⁴³² The Second Circuit addressed whether a judgment creditor's motion to compel non-party banks to comply with subpoenas *duces tecum*, seeking information about sovereigns assets located abroad, was immediately appealable under collateral order doctrine.⁴³³

In *Terenkian v. Republic of Iraq*, "two Cyprus oil brokerage companies sued the Republic of Iraq for unilaterally terminating two contracts for the purchase and sale of Iraqi oil."⁴³⁴ Iraq moved to dismiss for lack of subject matter jurisdiction, among other grounds.⁴³⁵ The Central District of California denied Iraq's motion and, after concluding that venue was improper, transferred the case to the District of Columbia.⁴³⁶ Iraq appealed to the Ninth Circuit, although the notice of appeal was not filed until after the case was docketed in the District of Columbia.⁴³⁷ The plaintiff argued that after the transferee court docketed the case files, the transferor court and its appellate court lose jurisdiction over the case.⁴³⁸ Rejecting this argument, the Ninth Circuit concluded, "[a] district court's transfer of a case to an out-of-circuit district court does not strip an appellate court of jurisdiction over an interlocutory but 'immediately appealable, and timely appealed, decision' of a district court within its circuit."⁴³⁹

In *EM Ltd. v. Republic of Argentina*, the Second Circuit ruled that a discovery order directing two non-party banks to provide information concerning property owned by defendant Argentina was immediately appealable under the collateral order doctrine.⁴⁴⁰ Even though a discovery order normally is not a final decision, and therefore usually not appealable, the appellate court found that the discovery order was the district court's final determination that extraterritorial asset discovery did not infringe on Argentina's sovereign immunity.⁴⁴¹ The issue of the scope of discovery was also separate from the merits of the case.⁴⁴² Finally, if that

430. *Id.*

431. See *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1129–30 (9th Cir. 2012), cert. denied, 134 S. Ct. 64 (2013); *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 205–06 (2d Cir. 2012).

432. *Terenkian*, 694 F.3d at 1129–30.

433. *EM Ltd.*, 695 F.3d at 202–03, 205–06.

434. *Terenkian*, 694 F.3d at 1125.

435. *Id.* at 1128.

436. *Id.* at 1129.

437. *Id.*

438. *Id.*

439. *Id.* at 1129–30.

440. *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 205–06 (2d Cir. 2012).

441. *Id.* at 206.

442. *Id.*

discovery order were not appealable, then Argentina would be “unable to obtain effective review in a United States court of the Discovery Order through a later appeal of a final judgment.”⁴⁴³ Argentina also did not have the option of obtaining review through “disobedience and contempt” because the discovery order was directed at third parties, not Argentina.⁴⁴⁴ Thus, the court had jurisdiction over Argentina’s appeal of the discovery order.

443. *Id.*

444. *Id.*