THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2013 YEAR IN REVIEW

*Crowell & Moring LLP**

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* This Review was authored by Crowell & Moring attorneys Laurel Pyke Malson, Aryeh S. Portnoy, Birgit Kurtz, Theresa Buckley, Kate M. Growley, Namrata Kotwani, and Ethan Simonowitz.

THE Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. ("FSIA"), provides the exclusive basis for suing a foreign sovereign in United States 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 2013.

I. INTRODUCTION: THE FSIA IN 2013

Over the years, the number of reported decisions discussing the FSIA has steadily increased. The continuing globalization of business and increased involvement of sovereigns and their instrumentalities in international commerce have resulted in an increase in litigation involving foreign states. Thus, not surprisingly, FSIA litigation in 2013 often focused on the statute's "commercial activity" exception, but also dealt with various other, often novel and creative, arguments raised by the parties. In these cases, courts addressed the core issues sovereign and private litigants face under the FSIA, including:

- Who is a "foreign state" subject to jurisdiction in U.S. courts?
- Which acts are "commercial" and which are "governmental"?
- How close must the nexus be between an act and the United States?
- What acts violate international law under the "takings" exception?
- 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 2013. This Review also includes a short introduction to the FSIA as well as some practical guidance based on recent FSIA decisions.

II. A BRIEF HISTORY OF THE FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. As early as 1812 in *Schooner Exchange v. McFaddon*,[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 its adoption of a new "restrictive theory" of foreign sovereign immunity.[4] The "Tate Letter" directed that state sovereigns continue to be granted 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 immunity set forth in the statute applies.[11] The FSIA includes several provisions that define the scope of the exceptions to a foreign state's immunity, and establishes detailed procedural requirements for bringing claims against a foreign sovereign defendant.[12]

The primary exceptions to immunity are set forth in Section 1605 and

1. 11 U.S. (7 Cranch) 116 (1812).
2. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).
3. *See id.* (explaining history of the FSIA).
4. *Id.* at 486–87.
5. *Id.* at 487.
6. *Id.*
7. *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 (2012).
9. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 439 (1989).
10. 28 U.S.C. § 1603 (2012).
11. *See id.* § 1604.
12. *See id.* §§ 1605, 1608, 1610-1611.

Section 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 of foreign sovereign property located in the United States, in aid of execution on a judgment against a foreign state or its agencies or instrumentalities.[16] Finally, the FSIA sets forth various unique procedural rules for pursuing claims against foreign states, including, *e.g.*, special rules for service of process, default judgments, and appeals.[17]

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

A. What Is a "Foreign State"?

A threshold issue in any case brought under the FSIA is whether the defendant constitutes a "foreign state." Under the FSIA, "foreign state" is defined to include not only the state itself (i.e., the state writ-large or its political subdivisions), but also its agencies and instrumentalities.[18]

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 foreign state or a political subdivision thereof."[19] In 2013, some U.S. courts had occasion to expound on specific aspects of this definition. For example, the Eastern District of New York in *Chowdhury v. Saudi Arabian Airlines*, the district court noted that a foreign entity

13. *Id.* §§ 1605, 1605A.
14. *Id.*
15. *Id.* § 1606; *but see* 28 U.S.C. § 1605A (providing federal statutory cause of action for terrorism-related acts).
16. *See id.* §§ 1610-1611. 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 military activity is immune from attachment. *Id.* § 1611(b)(2).
17. *See, e.g.*, 28 U.S.C. §§ 1605(g), 1608.
18. 28 U.S.C. § 1603(a).
19. *Id.* § 1603(b). 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 Distribs., Inc. v. Gulf Aluminum Rolling Mill Co., No. 87 C 6477, 1989 WL 64174, *2 (N.D. Ill. June 8, 1989) ("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.").

would not be considered a citizen of a United States state simply by virtue of its authorization to perform business in that state.[20]

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."[21] In practice, courts continue to use a set of factors to make this determination. For example, in *Capital Trans International, LLC v. International Petroleum Investment Co.*,[22] the district court considered a claim against three entities, one of which was a "public joint stock company with its principal place of business in Abu Dhabi."[23] The court applied a series of factors adopted by the Second, Fifth, and Ninth Circuits to determine whether the publicly traded company was an "organ" of Abu Dhabi:

(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.[24]

None of these factors is, by itself, dispositive; nor must all be satisfied.[25] In *Capital Trans Int'l, LLC*, because none of these factors suggested that the public joint stock company at issue was an "organ" of the Abu Dhabi state, the court dismissed the case as to that defendant.[26]

B. The "Core Functions Test": "Governmental" Versus "Commercial" Activities

Although the FSIA recognizes the immunity of an "agency or instrumentality" of a foreign sovereign, such entities are subject to different statutory rules than the sovereign 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.[27] To make

20. No. 13-CV-2537 (RJD), 2013 WL 2395986, at *1-2 (E.D.N.Y. May 31, 2013) (finding that Saudi Arabian Airlines was not a citizen of New York by virtue of its authorization to perform business in New York).
21. 28 U.S.C. § 1605(a).
22. No. 8:10-CV-529-T-30TGW, 2013 WL 557236, at *5 (M.D. Fla. Feb. 14, 2013) (internal citations omitted).
23. *Id.* The other two entities included a company "wholly-owned by and organized as an instrumentality of the Abu Dhabi government" and a "private limited liability company organized under the laws of Abu Dhabi" and in whose formation "[t]he government of Abu Dhabi had no role[.]" *Id.*
24. *Id.* at *6 (citing Filler v. Hanvit Bank, 378 F.3d 213, 217 (2d Cir. 2004)).
25. *Id.*
26. *Id.* at *8–10.
27. *See, e.g.*, 28 U.S.C. §§ 1608(a)–(b) (service of process); 28 U.S.C. §§ 1391(f)(3)-(4) (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).

this distinction, courts apply the so-called "core functions test." Under this test, if the entity's predominant activities, or its "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.[28] On the other hand, 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.[29] For example, in *Buonocore v. Great Socialist People's Libyan Arab Jamahiriya*, the district court determined that it should treat the Syrian Air Force Intelligence agency as a foreign state because its core functions were "governmental" and not "commercial."[30] Similarly, the district court in *Richardson v. Attorney General of the British Virgins Islands* concluded that "[c]ertainly, the Attorney General's role as the principal legal advisor to the BVI Government is a governmental, as opposed to a commercial[,] function."[31]

IV. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY

Once a court concludes that an entity is a foreign state or an agency or instrumentality of a foreign state entitled to sovereign immunity under the FSIA, it must then decide if one of the exceptions set forth in the FSIA applies. This section examines how the courts addressed those exceptions in 2013.

A. WAIVER—§ 1605(A)(1)

The FSIA provides in Section 1605(a)(1):

> 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 the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver that the foreign state may purport to effect except in accordance with the terms of the waiver . . . .[32]

In 2013, the courts addressed a broad range of issues under the waiver exception, including: (1) waiver by treaty, (2) waiver by contract, (3) waiver by agreeing to governing law, and (4) waiver by failing to raise the defense in a responsive pleading.

1. Waiver by Treaty

The Second Circuit, in *Blue Ridge Investments, L.L.C. v. Republic of*

28. Roeder v. Islamic Republic of Iran, 333 F.3d 228, 234 (D.C. Cir. 2003).
29. *Id.*
30. No. CIV.A. 06-727 JMF, 2013 WL 351546, at *21 (D.D.C. Jan. 29, 2013) *amended sub nom.* Estate of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya, No. CIV.A. 06-727 JMF, 2013 WL 653921 (D.D.C. Feb. 12, 2013)
31. CV 2008-144, 2013 WL 4494975, at *2 (D.V.I. Aug. 20, 2013).
32. 28 U.S.C. § 1605(a)(1).

Argentina,[33] held that by signing the ICSID Convention[34]—an international treaty protecting foreign direct investment—Argentina had agreed to an implied waiver of its sovereign immunity.[35] The court explained:

> Although this exception "must be construed narrowly," we agree with the District Court that . . . Argentina waived its sovereign immunity by becoming a party to the ICSID Convention.
>
> . . .
>
> As the District Court noted, "[p]ursuant to Article 54 of the Convention, [e]ach Contracting State shall 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." In light of the enforcement mechanism provided by the ICSID Convention, we agree with the District Court that Argentina "must have contemplated enforcement actions in other [Contracting] [S]tates," including the United States.[36]

2. Waiver by Contract

In *Firebird Global Master Fund II Ltd. v. Republic of Nauru*,[37] the district court rejected the plaintiff's argument that Nauru had explicitly waived its sovereign immunity from process in U.S. courts when it signed a repayment guarantee for certain bonds.[38] In that guarantee, Nauru expressly waived sovereign immunity as to the courts of Japan and Nauru.[39] The plaintiff argued that that waiver was "not limited to actions brought in Japan or Nauru, but goes to *any legal action relating to the Guarantee*."[40] The court disagreed, stating:

> Generally, with regard to express waivers under this provision, "[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so. [E]xplicit waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged beyond what the language requires."
>
> . . . .
>
> The limited nature of the waivers of sovereign immunity in this case and the obligation to narrowly construe explicit waivers in favor of the sovereign doom the plaintiff's argument under 28 U.S.C. § 1605(a)(1).[41]

33. 735 F.3d 72 (2d Cir. 2013).
34. United Nations Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159.
35. *Blue Ridge*, 735 F.3d at 83–84.
36. *Id.* at 84 (internal citations omitted). Since the Second Circuit's decision, Argentina has announced its intention to withdraw from ICSID. *Argentina in the Process of Quitting from World Bank Investment Disputes Centre*, MERCOPRESS, S. ATL. NEWS AGENCY (Jan 31, 2013), *available at* http://en.mercopress.com/2013/01/31/argentina-in-the-process-of-quitting-from-world-bank-investment-disputes-centre.
37. 915 F. Supp. 2d 124 (D.D.C. 2013).
38. *Id.* at 126–28.
39. *Id.* at 126.
40. *Id.* at 127 (emphasis in original).
41. *Id.* at 126–28 (internal citations omitted).

Because the waiver language in the guarantee was limited to the courts of Japan and Nauru, the court found that Nauru had not waived its immunity for actions brought in U.S. courts.[42]

In *Commissions Import Export S.A. v. Republic of Congo*,[43] a dispute arose over the repayment of debts owed under contracts between the plaintiff and Congo.[44] In a series of commitment letters, Congo "irrevocably and on a final basis waive[d] the right to invoke any immunity from legal proceedings."[45] The court held that "[t]his language expressly waives defendants' sovereign immunity pursuant to section 1605(a)(1)."[46] Based on this clear language and the fact that the defendants "concede[d] that they waived their sovereign immunity," the court found that it had subject matter jurisdiction over the suit.[47]

3. Waiver by Agreeing to Governing Law

In *Ewald v. Royal Norwegian Embassy*,[48] the plaintiff sued her employer, the Norwegian Embassy in Minneapolis, alleging employment discrimination.[49] U.S. and Minnesota law governs the plaintiff's employment agreement.[50] Following a discovery dispute in which the plaintiff demanded certain information and documents regarding the Norwegian Foreign Service ("NFS"),[51] the district court upheld the magistrate judge's denial of the plaintiff's motion to compel.[52] The court found that, despite the Embassy's agreement that the employment relationship would be governed by domestic law, the discovery sought "exceed[ed] the scope of the Embassy's waiver of inviolability under international law."[53]

The court stated that "[o]ne exception to jurisdictional immunity occurs when a foreign state waives its immunity, either explicitly or by implication. Implied waiver occurs when 'a foreign state has agreed that a contract is governed by the law of a particular country.'"[54] But, pointing to the "treaty exception" in Section 1604, the court explained:

> [A] foreign state's waiver of immunity to the jurisdiction of the U.S. courts under the FSIA is not synonymous with a waiver of the protections provided by the treaties that pre-date the FSIA and to which the United States is a party . . . . [O]ne such treaty is the Vienna

42. *Id.* at 128.
43. 916 F. Supp. 2d 48 (D.D.C. 2013), *rev'd and remanded on other grounds*, 757 F.3d 321 (D.C. Cir. 2014).
44. *Id.* at 49.
45. *Id.* at 51.
46. *Id.*
47. *Id.*
48. No. 11-CV-2116 (SRN/SER), 2013 U.S. Dist. LEXIS 164828 (D. Minn. Nov. 20, 2013).
49. *Id.* at *1–3.
50. *Id.* at *15.
51. *Id.* at *8–9.
52. *Id.* at *18.
53. *Id.* at *10.
54. *Ewald*, 2013 U.S. Dist. LEXIS 164828, at *11.

> Convention on Diplomatic Relations, which was opened for signature in 1961 and was enforceable with respect to the United States in 1972.[55]

The court held that the Embassy's agreement that the "employment relationship shall be governed by the laws of the country in which the Employee is employed," did not waive the Embassy's right to object to discovery based on Article 24 of the Vienna Convention on Diplomatic Relations and Article 33 of the Vienna Convention on Consular Relations.[56]

4. Waiver by Failure to Raise Immunity

In *Exim Brickell LLC v. PDVSA Services Inc.*,[57] the Eleventh Circuit found that a sovereign defendant had waived immunity because it had failed to raise the argument in the court below.[58] In this contract dispute, the plaintiff (Exim) had imported large quantities of powdered milk from China and delivered shipments to defendant Bariven S.A., a Venezuelan state-owned purchasing company.[59] After a melamine contamination scare for Chinese milk products and the subsequent discovery of such contamination in the goods imported by the plaintiff, the parties disputed responsibility for inspection and storage costs under the installment contract and filed cross-claims.[60]

Neither party contested the district court's jurisdiction to hear the case.[61] In a unique twist, when the district court awarded partial damages to Bariven, Exim—the party who brought the case in the first instance—appealed the decision to the Eleventh Circuit, raising itself the question whether Bariven's immunity foreclosed jurisdiction over Exim's own claim. Exim noted that the Eleventh Circuit, in a related case (*Absolute Trading Corp. v. Bariven*), had entertained a question as to the district court's jurisdiction over Bariven, as a sovereign "agency,"[62] though it ultimately held that Bariven's contract with a seller of powdered milk from China fell under the commercial activity exception to immunity under the FSIA.[63] The Eleventh Circuit in *Exim* noted that the commercial activity exception likewise would have applied there.[64] But it did not need to reach the issue because "Bariven, the only party possibly in a position to assert sovereign immunity, did not do so," and thereby waived immunity.[65]

55. *Id.*
56. *Id.* at *11–15.
57. 516 F. App'x 742 (11th Cir. 2013).
58. *Id.* at 748–49.
59. *Id.* at 745.
60. *Id.*
61. *Id.* at 748.
62. Brief of Appellant-Cross Appellee at 1, *Exim Brickell, LLC v. Bariven, S.A.*, 516 F. App'x 742 (11th Cir. 2013).
63. Absolute Trading Corp. v. Bariven, S.A., 503 F. App'x 694, 697 (11th Cir. 2013).
64. *Id.*
65. *Exim Brickell, LLC*, 516 F. App'x at 749.

In *Richardson v. Attorney General of the British Virgin Islands*,[66] the court reached the opposite conclusion where the defendant's failure to raise immunity was based on its failure to appear at all. In that case, the plaintiffs sued for physical injuries they allegedly sustained while on a boat owned by the British Virgin Islands ("BVI") and operated by a BVI customs agent.[67] After the defendants failed to appear, the plaintiffs moved for a default judgment. The court analyzed whether, *inter alia*, the waiver exception in Section 1605(a)(1) applied.[68] The court stated that a sovereign's claim of immunity is waived "only when the sovereign/state fails to assert immunity in a responsive pleading" and not simply because a sovereign entity fails to appear before a court.[69] The court stated:

> "Thus, a waiver of sovereign immunity cannot be implied from a foreign state's failure to appear. Such a waiver would be inconsistent with Section 1608(e) of the FSIA, which requires the court to satisfy itself that jurisdiction exists prior to entering a default judgment. 'Even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act.' "[70]

Because BVI had not done anything to "explicitly or impliedly waive[ ] its immunity," the court held that the waiver exception did not apply.[71]

5. Alleged Assistance with Asylum Request–Not Waiver

In *Odhiambo v. Republic of Kenya*,[72] the plaintiff sued Kenya and related sovereign defendants, alleging that the defendants (i) improperly failed to pay him a reward for reporting certain tax misconduct by his former employer and (ii) improperly disclosed the plaintiff's identity as an informant, forcing him to seek asylum in the United States.[73] Plaintiff asserted "that defendants implicitly waived their immunity by helping him seek asylum in the United States," stating "[s]ince the 'processing' of Plaintiff for admission into the United States was an adjudicatory process under the U.S. Refugee Act of 1980, Defendants implicitly agreed for their obligation to protect Plaintiff to be governed by U.S. law."[74]

The court rejected this argument on two grounds.[75] First, the plaintiff acknowledged in his own pleadings that the defendants had not "processed" his asylum application under any "adjudicatory process" under U.S. law.[76] Second, the alleged acts "were not related to any 'con-

66. 2013 WL 4494975 at *1–2.
67. *Id.* at *1.
68. *Id.* at *3.
69. *Id.* at *4.
70. *Id.* (internal citation omitted).
71. *Id.*
72. 930 F. Supp. 2d 17 (D.D.C. 2013), *aff'd*, 764 F.3d 31 (D.C. Cir. 2014), *petition for cert. filed*, No. 14-1206 (U.S. Mar. 30, 2015).
73. *Id.* at 19–20.
74. *Id.* at 24.
75. *Id.* at 24–25.
76. *Id.* at 24.

duct of litigation,' let alone this one."[77] The court reasoned that "Congress primarily expected courts to hold a foreign state to an implied waiver of sovereign immunity by the state's actions in relation to the conduct of litigation."[78] Because "[t]his matter is not about [plaintiff's] asylum in the United States; his relocation occurred more than five years before [the plaintiff] filed this suit, and [the plaintiff] has not pointed to any action taken by defendants 'in relation to the conduct of litigation' [which would] indicate their amenability to suit in the United States," the court concluded that the defendants had not implicitly waived their immunity.[79]

B. Commercial Activity—§ 1605(a)(2)

As foreign sovereigns continue to participate actively in the global marketplace, the "commercial activity" exception remains one of the most frequently litigated provisions of the FSIA.[80] This exception to immunity, codified in 28 U.S.C. § 1605(a)(2), 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 . . . .[81]

In other words, foreign states lose their immunity from suit in the United States when 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).[82]

1. What Acts Are Considered "Commercial"?

Determining at what point a foreign state's acts cross the line from governmental to commercial is fundamental to the "commercial activity" analysis, because the courts define a sovereign's acts by their nature, not

77. *Id.* (citing Abur v. Republic of Sudan, 437 F. Supp. 2d 166, 178 (D.D.C. 2006)).
78. *Id.* (quoting Smith *ex rel* Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1996)).
79. *Id.* at 24–25.
80. *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). *See also* Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. Pa. L. Rev. 411, 456 (2015) ("[t]he commercial activity exception is the FSIA's most frequently litigated exception to immunity.").
81. 28 U.S.C. § 1605(a)(2).
82. For a discussion of immunity from attachment or enforcement of judgments based on commercial activity, *see* Part IV.B, *infra*.

their purpose.[83] Although these are fact-intensive inquiries, they often focus on the core principle that commercial acts are acts that any private entity could undertake, whereas governmental acts are those made possible through power peculiar to a sovereign.[84] Federal court decisions in 2013 addressing this issue are described below.

Contracting for Asset Recovery Services—Commercial. In *Universal Trading & Investment Co. v. Bureau for Representing Ukrainian Interests in International & Foreign Courts*, a contractor ("UTICo") brought suit against the Ukrainian government for breach of contract.[85] UTICo had agreed to perform certain asset recovery services for the Ukrainian government, which included locating and freezing criminal assets abroad.[86] In determining whether subject matter jurisdiction existed under the FSIA, the court determined that UTICo's contract with Ukraine was "indistinguishable from ordinary asset recovery services."[87] The court noted that, "[e]ven if the final goal or *purpose* of the information and assistance was uniquely governmental . . . , [t]he *nature* of UTICo's contracted-for services" was commercial, as any private party can enter into a similar contract.[88] Moreover, the contract did not call for UTICo to perform any governmental functions, but rather to facilitate Ukraine's ability to perform its governmental functions itself—prosecution of the criminals whose assets UTICo was seeking.[89]

Bailment Agreements to Return Plunders of War—Commercial. In *de Csepel v. Republic of Hungary*, descendants of a Jewish family sued Hungary for the country's failure to return a family art collection seized during World War II.[90] The plaintiffs argued that, following the War, the Hungarian government entered into bailment agreements with the family by offering to retain their artwork for safekeeping, but to return the collection at the family's request.[91] When such a request was not complied with, the plaintiffs filed suit, arguing that U.S. courts had jurisdiction under the FSIA's commercial activity exception.[92]

The D.C. Circuit held that "Hungary's alleged breach of bailment agreements easily satisfies [the "commercial activity"] standard."[93] First, the repudiation of a contract was "precisely the type of activity in which a private player within the market engages."[94] And second, the contract established Hungary's commercial relations with respect to artwork,

83. *See* 28 U.S.C. § 1603(d).
84. *See e.g.*, Republic of Arg.v. Weltover, Inc., 504 U.S. 607, 614 (1992).
85. 727 F.3d 10, 12 (1st Cir. 2013).
86. *Id.* at 12–13.
87. *Id.* at 20.
88. *Id.* at 19–20.
89. *Id.* at 20.
90. 714 F.3d 591, 594 (D.C. Cir. 2013).
91. *Id.* at 596.
92. *Id.* at 598.
93. *Id.* at 599.
94. *Id.* (internal quotations omitted) (quoting Saudi Arabia v. Nelson, 507 U.S. 349, 360 (1993)).

about which there was nothing "sovereign."[95] That Hungary initially acquired the Jewish family's artwork by confiscating it during the Holocaust was irrelevant to the commercial analysis because this arguably sovereign act did not form the basis of the plaintiffs' claims.[96] Rather, that basis was Hungary's commercial act of creating and then repudiating its post-War bailment agreements.[97]

Contracting for Intelligence Services—Not Commercial. In *Eringer v. Principality of Monaco*, plaintiff sued Monaco for failure to pay him for services rendered.[98] Monaco claimed sovereign immunity, and the Ninth Circuit agreed. Monaco had employed Eringer as its Director of Intelligence Services.[99] The duties that Eringer performed under his contract with Monaco included "liasing with other intelligence agencies, investigating potential government appointments, investigating suspicions of corruption . . . and protecting [the Royal family] from improper foreign influence."[100] The Ninth Circuit agreed with the lower court that Eringer's employment was thus "not the type of employment private parties can undertake."[101] Because the contract underlying plaintiff's complaint was not commercial, Monaco was entitled to immunity.

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

Once a court has determined that a foreign sovereign's act is "commercial" under the FSIA, it must then decide whether that act has a sufficient nexus with the United States to satisfy the commercial activity exception.[102] That nexus can exist in one of three circumstances: (1) the foreign sovereign "carried on" the commercial act in the United States; (2) the challenged act took place in the United States in connection with commercial activity abroad; or (3) the foreign sovereign acted outside the United States in connection with its commercial activity, but caused a "direct effect" in the United States.[103]

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.[104] Federal courts addressed this issue multiple times in 2013, often concluding that the alleged acts established a sufficient nexus with the United States to satisfy the exception.

95. *Id.* (quoting Malewicz v. City of Amsterdam, 362 F. Supp. 2d 298, 314 (D.D.C. 2005)).
96. *Id.* at 600.
97. *Id.*
98. 533 F. App'x 703, 704 (9th Cir. 2013).
99. *Id.* at 705.
100. *Id.*
101. *Id.*
102. *See e.g.*, Universal Trading, 727 F.3d at 25–26.
103. 28 U.S.C. § 1605(a)(2).
104. *Id.*

Partial Ownership of the Group Contracting with U.S. Company—Sufficient. In *Sachs v. Republic of Austria*, plaintiff (Sachs) sued an Austrian-owned national railway after suffering injuries while attempting to board a moving train in Austria.[105] Sachs argued that her claim was "based upon a commercial activity carried on in the United States" because she purchased the railway ticket through a Massachusetts-based travel agent.[106] In an *en banc* reversal of its prior decision, the Ninth Circuit agreed with Sachs.[107] Although the national railway was not directly related to the local travel agent, the travel agent was authorized as the railway's subagent to sell tickets in the United States that the railway would honor in Austria.[108] As the Court held: "Where a ticket for travel on a foreign common carrier is bought and paid for in the United States, . . . [FSIA's] substantial contact requirement is satisfied."[109]

Contracting with U.S. Law Firm for Legal Services—Sufficient. In *Lanny J. Davis & Associates LLC v. Republic of Equatorial Guinea*, the plaintiff sued for failure to pay for legal services rendered, namely advice and assistance in instituting a "comprehensive program of political, legal, and economic reform."[110] The Washington D.C.-based law firm argued that, because it had substantially performed its contract from within the United States, Equitorial Guinea was not immune from suit under the FSIA.[111] The court concluded that this first prong of the FSIA's commercial activity exception was "easily met."[112] In performance of its contract, the law firm's lead attorney met with the defendants' ambassador and government officials, U.S. government officials, U.S. business leaders, and NGOs all in Washington, D.C.[113] Indeed, plaintiff performed the "majority" of its work from the United States.[114]

Execution of Unilateral Contract in United States—Sufficient. In *Universal Trading & Investment Co.*, discussed *supra*, the First Circuit found that the sovereign's activity not only was commercial, but was also "carried on the United States."[115] The court noted that UTICo and Ukraine had negotiated the entirety of their asset recovery contract within the United States, that UTICo was organized under the laws of the United States and maintained its principal place of business in Massachusetts, and finally that "more than 90%" of UTICo's work under the contract was performed in Massachusetts.[116] Moreover, and key to the court's decision, was that the parties' agreement stemmed from an offer made by

105. 737 F.3d 584, 587 (9th Cir. 2013), *cert. granted sub. nom.* OBB Personenverkehr AG v. Sachs, 135 S. Ct. 1172 (2015).
106. *Id.* at 590.
107. *Id.* at 603.
108. *Id.* at 593.
109. *Id.* at 599.
110. 962 F. Supp. 2d 152, 156 (D.D.C. 2013).
111. *Id.* at 158.
112. *Id.* at 159.
113. *Id.*
114. *Id.*
115. *Universal Trading*, 727 F.3d at 25–26.
116. *Id.*

Ukraine to UTICo in the United States.[117] It was this offer that established a nexus or link between the two parties and thus allowed the foreign sovereign to "engage[ ] in commerce and officially enter[ ] the marketplace in the United States."[118]

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.[119] The U.S.-based acts must also be "in connection with" the commercial activity of the foreign state.[120] As is the case with all of the commercial activity exceptions, those acts must also form the basis of the suit itself.

The federal courts found few opportunities in 2013 to address substantively the second clause of the commercial activity exception. One court that did address the issue focused primarily on the question of whether the alleged U.S. acts were actually relevant to the suit at hand.[121] As explained *supra*, in *Odhiambo v. Republic of Kenya*, the plaintiff sued the African country for violating its "Information Reward Scheme" in which plaintiff had participated.[122] Specifically, the plaintiff had assisted the Kenyan government by relaying information related to potential tax evasion occurring at a Kenyan bank at which he had worked.[123] In return, Kenya was to provide plaintiff with a monetary award, while keeping his cooperation strictly confidential.[124] According to the plaintiff, Kenya did neither, prompting him to flee to the United States.[125]

In holding that the complaint did not satisfy the commercial activity exception, the district court focused on the relationship between the plaintiff's cause of action and the alleged acts that occurred in the United States in connection with Kenya's commercial activity abroad.[126] The court concluded that "[n]one of the U.S.-based acts that [plaintiff] lists to support his . . . argument form the basis of this action."[127] For example, although the defendants had helped the plaintiff obtain asylum in the United States, this was irrelevant to his breach of contract claim; as were the Kenyan bank's diversion of funds to the United States and the plaintiff's attempts to negotiate his award from the United States.[128] As

117. *Id.* at 25.
118. *Id.* at 24–25.
119. 28 U.S.C. § 1605(a)(2).
120. *Id.*
121. *Odhiambo*, 930 F. Supp. 2d at 17.
122. *Id.* at 20.
123. *Id.* at 20–21.
124. *Id.* at 20.
125. *Id.* at 21.
126. *Id.* at 29–30.
127. *Odhiambo*, 930 F. Supp. 2d at 30.
128. *Id.*

"none of these acts constitute[d] facts without which the plaintiff w[ould] lose his case," the second clause of the commercial activity exception did not apply.[129]

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

The third clause of the commercial activity exception permits jurisdiction over acts that occur outside the United States, but which cause a "direct effect" in the United States.[130] This third category was a frequent subject of litigation in 2013, as courts grappled with what constituted a "direct" and an "indirect" effect.[131]

Financial Loss of U.S. Plaintiff—No Direct Effect. In *Chey v. Orbitz Worldwide, Inc.*, the plaintiff sued Air China for failing to notify him at the time of his ticket purchase that his destination country of Brazil requires U.S. visitors to have visas.[132] In response, Air China argued that the court lacked subject matter jurisdiction because, as a corporate entity whose majority of shares were owned by the Chinese government, it was immune under the FSIA.[133] The district court agreed, holding that none of the FSIA's exceptions applied.[134] The flight at issue was from Spain to Brazil and the plaintiff purchased the ticket in Paris.[135] Indeed, the only connection to the United States was the location of the plaintiff's "legally [in]significant" loss.[136] This, the court held, was insufficient. "A mere financial loss suffered by a plaintiff in the United States as a result of the action abroad of a foreign state does not constitute a 'direct effect' and cannot by itself create subject matter jurisdiction under Section 1605(a)(2)."[137]

Overseas Copying of U.S. Product—No Direct Effect. The case of *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran* continues to present new insights into the FSIA.[138] In that case, a U.S. helicopter manufacturer brought suit against Iran for the country's alleged manufacturing and marketing of a similar but substandard version of one of Bell's helicopter models.[139] In 2011, the court entered a default judgment against Iran, finding a waiver of sovereign immunity because its actions had a "direct effect" in the United States.[140] In 2012, the court considered

129. *Id.* (internal quotations omitted).
130. 28 U.S.C. § 1605(a)(2).
131. *See* Chey v. Orbitz Worldwide, Inc., 983 F. Supp. 2d 1219, 1219-1234 (D. Haw. 2013).
132. *Id.* at 1224.
133. *Id.* at 1224, 1228.
134. *Id.* at 1128.
135. *Id.* at 1229.
136. *Id.*
137. *Chey*, 983 F. Supp. 2d at 1229 (quoting Gregorian v. Izvestia, 871 F.2d 1515, 1527 (9th Cir. 1989)).
138. Bell Helicopter Textron, Inc. v. Islamic Republic of Iran (*Bell Helicopter I*), 764 F. Supp. 2d 122 (D.D.C. 2011).
139. *Id.* at 122.
140. *Id.* at 126.

Iran's motion to vacate the 2011 default judgment and again considered whether the country's manufacturing of low quality but visibly similar helicopters had caused a "direct effect" in the United States.[141] After considering testimony regarding the "potential confusion" between the two types of helicopters and the respective markets in which the two helicopters were sold, the court concluded that the Iranian manufacturing and marketing had not caused a direct effect in the United States.[142] Bell appealed.

The D.C. Circuit affirmed, finding that the evidence that Bell presented was "too remote and attenuated to satisfy the 'direct effect' requirement."[143] Bell had not presented any evidence that its current or potential customers were likely to encounter the Iranian helicopters, nor that any consumers had considered purchasing the Iranian model over its own.[144] Bell also failed to show that the presence of the similar-looking, but technically inferior, Iranian helicopters in the broader market had damaged its reputation.[145] Finally, the court rejected Bell's argument that Iran's actions had caused a direct effect in the United States because, under U.S. intellectual property law, the effect of an infringement occurs where the possessor of the intellectual property resides.[146] The court leaned on a Second Circuit opinion that stated that "[t]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the [direct effect] exception."[147]

Loss of Third Party Revenue in United States—Direct Effect. In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, the Venezuelan government breached its contracts with a U.S.-based oil drilling company and its Venezuelan subsidiary by refusing to pay for services rendered.[148] When the plaintiff (H&P) subsequently refused to renegotiate renewal of the breached contracts, Venezuela nationalized its property, including drilling rigs, real property, vehicles, and equipment.[149] H&P sued Venezuela for takings under international law and breach of contract, arguing that the breach of the underlying contracts caused a "direct effect" in the United States.[150] The court agreed.

Under the contracts, H&P was to procure specific equipment from spe-

141. Bell Helicopter Textron, Inc. v. Islamic Republic of Iran (*Bell Helicopter II*), 892 F. Supp. 2d 219, 225–34 (D.D.C. 2012).
142. *Id.* at 232–33.
143. Bell Helicopter Textron, Inc. v. Islamic Republic of Iran, 734 F.3d 1175, 1186 (D.C. Cir. 2013) (quoting *Weltover*, 504 U.S at 618).
144. *Id.* at 1185.
145. *Id.*
146. *Id.* at 1186.
147. *Id.* at 1184 (quoting Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 34 (2d Cir. 1993)).
148. 971 F. Supp. 2d 49 (D.D.C. 2013), *aff'd in part*, *rev'd in part*, 784 F.3d 804 (D.C. Cir. 2015).
149. *Id.* at 55.
150. *Id.* at 56.

cific manufacturers in the United States.[151] The breach of those contracts resulted in the loss of those manufacturers' revenues from the required purchases.[152] The court clarified that the "direct effects" under the FSIA need not necessarily harm the plaintiff.[153] Any direct effect in the United States was sufficient.[154]

Failure to Pay U.S. Law Firm for Legal Services—Direct Effect. In *Lanny J. Davis & Associates*, discussed *supra*, the court asserted jurisdiction over a U.S. law firm's suit against Equatorial Guinea for failure to pay for legal services rendered.[155] After finding that plaintiff's performance of the majority of its contract in the United States constituted a commercial activity that was "carried on in the United States,"[156] the court further noted that "subject matter jurisdiction would [also] exist because this action arises from commercial activity . . . causing a 'direct effect' here."[157] Namely, even if all relevant acts had occurred outside the United States, the African country had failed to make contractually required deposits in a U.S. bank.[158] This lack of payment was a sufficient "direct effect," regardless of how "important, critical, or integral" the parties considered the place of payment.[159]

Failure to Return Plunders of War to U.S. Owners—Direct Effect. As discussed *supra*, *de Csepel v. Republic of Hungary* involved a Jewish family's suit against Hungary for violation of its bailment contract with the family to maintain the family's artwork in national museums and to return the artwork upon the family's request.[160] The plaintiffs argued that the commercial activity exception applied because Hungary's failure to return the artwork had a "direct effect" in the United States.[161] Specifically, the bailment contract required specific performance of the artwork's return, and Hungary was aware that the family now resided in the United States.[162] Drawing all reasonable inferences in favor of the plaintiffs, the D.C. Circuit found these facts sufficient to establish a "direct

151. *Id.* at 66.
152. *Id.* at 68.
153. *Id.*
154. In 2015, the D.C. Circuit reversed the district court's direct effects holding because there had been no breach of H&P's third-party contracts with U.S. manufacturers, as H&P had already performed its obligations under those contracts. 784 F.3d at 817. As there were no breaches of those contracts, there were no losses resulting from Venezuela's breach of its contract with H&P, and therefore no direct effect in the United States. *Id.* The D.C. Circuit also rejected the argument that H&P's inability to renew the third-party contracts was a direct effect of Venezuela's breach, since H&P did not allege that it would have renewed the third-party contracts if Venezuela had not breached its agreement with H&P, but rather that it would have renewed the third-party contracts if Venezuela chose to renew its contract with H&P. *Id.*
155. *Davis & Assoc. LLC*, 962 F. Supp. 2d at 159–60.
156. *Id. See supra* Part III.B.2.a.
157. *Davis & Assoc. LLC*, 962 F. Supp. 2d at 160.
158. *Id.*
159. *Id.* at 153.
160. *de Csepel*, 714 F.3d at 596.
161. *Id.* at 598.
162. *Id.* at 601.

effect" in the United States—the failure to return property to U.S. residents—and allowed the suit to proceed under the commercial activity exception.[163]

Failure to Pay U.S. Asylum Seeker Award for Assisting Foreign Government—No Direct Effect. In *Odhiambo v. Republic of Kenya*, Kenya argued that U.S. courts did not have jurisdiction over plaintiff's claim for breach of the country's "Information Reward Scheme," and the court agreed.[164] The court rejected the plaintiff's argument that his relocation to the United States constituted a "direct effect" under the FSIA, finding that the relocation was not an "immediate consequence" of Kenya's breach of contract.[165] Indeed, before the plaintiff fled Kenya, the Kenyan government actually had protected him from threats and faulty warrants drawn up by corrupt officials.[166] Moreover, in trying to protect himself from corrupt officials, the plaintiff himself had revealed his identity to a local newspaper, which led to a second string of threats that forced him ultimately to flee the country.[167] Accordingly, there was no direct connection between Kenya's failure to ensure the plaintiff's safety and his eventual decision to flee to the United States.[168]

C. TAKINGS—§ 1605(A)(3)

The FSIA provides the following in Section 1605(a)(3)

> 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

163. *Id.* The court also addressed the "treaty exception" of 28 U.S.C. § 1604, which provides that, "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]" in 1976, foreign sovereigns are generally immune from suit in the United States. *Id.* Addressing the general rule that the treaty exception applies '"only if there is an express conflict between the treaty and the FSIA exception,'" Hungary argued that such an "express conflict" was created by two treaties to which the United States. is a signatory, namely the 1947 Peace Treaty between Hungary and the Allies ("Peace Treaty") and the 1973 U.S.-Hungarian Claims Settlement Agreement ("1973 Agreement"). *Id.* (quoting Wyatt v. Syrian Arab Republic, 266 F. App'x 1, 2 (D.C. Cir. 2008). Hungary argued that these treaties "establish[ed] an exclusive treaty-based mechanism for resolving all claims seeking restitution of property discriminatorily expropriated during World War II from individuals subject to Hungarian jurisdiction" and "bar[red] litigation against it for claims based on expropriation of property during World War II." *Id.* at 602. The court disagreed, pointing out that the treaties govern only takings during World War II, and therefore did not impact Hungary's amenability to suit under the FSIA with respect to the alleged post-war breach of the bailment agreement. *Id.* at 603.

164. *Odhiambo*, 930 F. Supp. 2d at 27-32. *See also* Odhiambo v. Republic of Kenya, 947 F. Supp. 2d 30 (D.D.C. 2013) (finding that amended complaint still failed FSIA exception requirements).

165. *Odhiambo*, 930 F. Supp. 2d at 31–32.

166. *Id.*

167. *Id.* at 32.

168. *Id.*

> 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.

In 2013, federal courts addressed several cases in which plaintiffs alleged that the sovereign defendant should be subject to jurisdiction based on the FSIA's "takings" (or "expropriation") exception. It is settled that a sovereign's taking of the property of its own citizens, no matter how egregious, does not constitute a "violation of international law" under Section 1605(a)(3).[169] Thus, in each of the cases described below, the focus was the citizenship of the plaintiffs and/or their predecessors for purposes of analyzing whether the takings at issue violated international law.

1. "Re-Taking" by Refusal to Compensate?

In *Santivanez v. Estado Plurinacional de Bolivia*,[170] the plaintiffs (U.S. citizens) were the heirs of Francisco Loza, a Bolivian national.[171] They alleged that Bolivia had expropriated certain plots of land from Loza in order to build an airport, and that, in 1993, after Loza's death, Bolivia acknowledged that the family was entitled to full and just compensation for the land, but that neither Loza nor his heirs had received such compensation.[172] While the original expropriation was made by Bolivia of one of its own citizens, plaintiffs argued that Bolivia's subsequent refusal to compensate *plaintiffs* was a "re-taking" of property from U.S. citizens.[173] The court disagreed:

> This case is different. According to Lozas' complaint, the Bolivian government–when it expropriated Francisco Loza's land–acknowledged that he (a Bolivian) was entitled to full and just compensation, consistent with Bolivian law. The Bolivian government later issued official resolutions confirming its original position . . . the Bolivian government has at no time taken official action to return ownership of the pertinent property to the Loza family or even officially to declare the Loza family unentitled to just compensation. Although the Lozas have been unsuccessful at enforcing government resolutions for compensation, they *have not shown that the Bolivian government's continued failure to pay just compensation for the taking of land from Francisco constituted a second taking*: a taking from citizens not of Bolivia and, thus, arguably in violation of international law.[174]

169. *See, e.g.*, Dreyfus v. Von Finck, 534 F.2d 24, 31 (2d Cir. 1976).

170. 512 F. App'x 887 (11th Cir.), *cert. denied*, 134 S. Ct. 158 (U.S. Oct. 7, 2013) (No. 12-1434).

171. *Id.* at 888.

172. *Id.*

173. *Id.* at 889.

174. *Id.* (emphasis added).

2. Nationality of Corporations

In *Helmerich & Payne International Drilling Co.*,[175] discussed *supra*, a U.S.-based oil drilling company and its Venezuelan subsidiary alleged that Venezuela had expropriated drilling rigs in Venezuela without just compensation.[176] The parties jointly submitted to the court a list of four "initial issues" to be decided by the court, including whether, for purposes of determining if a "taking in violation of international law" had occurred, the Venezuelan subsidiary ("H&P-V") was a national of Venezuela under international law.[177] The district court conducted a lengthy analysis of national and international sources in order to determine H&P-V's corporate nationality[178] and concluded that "the general practice in international law has been to consider a corporation a national of the country of its incorporation."[179]

In reaching this conclusion, the court looked to several sources, including § 213 of the Restatement (Third) of Foreign Relations Law, which states that, "[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."[180] The court rejected the Second Circuit's 1962 decision in *Banco Nacional de Cuba v. Sabbatino*,[181] to "disregard[ ] the nationality of the corporation where it was different from the nationality of most of the corporation's shareholders," finding that "*Sabbatino's* proposition that a corporation's state of incorporation can be ignored has never been followed by any court in the United States."[182] The court held that "[t]he weight of authority therefore leads to the conclusion that H&P-V is considered a national of Venezuela under international law."[183]

D. Non-Commercial Torts—§ 1605(a)(5)

The "noncommercial tort" or "tortious activity" exception of the FSIA subjects a sovereign entity to jurisdiction in the United States for claims based on actions

> in 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 employment.[184]

175. *Helmerich & Payne Int'l Drilling Co.*, 971 F. Supp. 2d at 49.
176. *Id.* at 54–56.
177. *Id.* at 56.
178. *Id.* at 57–61.
179. *Id.* at 58.
180. *Id.* at 59–61 (quoting Restatement (Third) of Foreign Relations Law § 213 (1987)).
181. 307 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).
182. *Helmerich & Payne Int'l Drilling Co.*, 971 F. Supp. 2d at 61.
183. *Id.*
184. 28 U.S.C. § 1605(a)(5).

The FSIA limits the noncommercial tort exception in two significant ways. First, it excludes claims based on the "exercise or performance or the failure to exercise or perform" any "discretionary function."[185] Second, the Act excludes claims stemming from alleged "malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."[186] Thus, the exception applies to "relatively few situations."[187]

In the latest of a series of decisions relating to the terrorist attacks of 9/11, the Second Circuit in *In re Terrorist Attacks on September 11, 2001* held that the allegations against two particular defendants were insufficient to establish subject matter jurisdiction under the Act.[188] Plaintiffs alleged that the defendants, including both the Saudi Joint Relief Committee and the Saudi Red Crescent Society, waived immunity as instrumentalities of Saudi Arabia by providing financial support to al Qaeda and thus participating in and supporting tortious activity.[189] Defendants raised several arguments in response, including that the plaintiffs' claim failed because they did not allege that the entire tort occurred in the United States.[190]

The Second Circuit agreed with the defendants' argument based on the "entire tort" rule.[191] This rule, first articulated by the Supreme Court in 1989,[192] requires that "[f]or th[e] exception to apply . . . the 'entire tort' must be committed in the United States."[193] Plaintiffs alleged that defendants' support contributed to the harms committed in the United States via the terrorist attacks of September 11, 2001.[194] They further argued that the attacks were the foreseeable outcome of such contribution and support.[195] The Second Circuit emphasized, however, that the plaintiffs failed to allege that the defendant agencies—or any of their employees or agents—directly participated in the terrorist attacks.[196] The court held that such allegations failed to comply with the entire tort rule inasmuch as "*all of the tortious conduct* allegedly committed" by defendants, including "providing funding and other aid to entities that purportedly supported al Qaeda," actually "took place completely outside the

185. *Id.* § 1605(a)(5)(A); Mohammadi v. Islamic Republic of Iran, 947 F. Supp. 2d 48, 81 n.4 (D.D.C. 2013), *aff'd*, 782 F.2d 9 (D.C. Cir. Apr. 3, 2015) (This exclusion applies "regardless of whether the discretion is abused.").
186. 28 U.S.C. § 1605(a)(5)(B).
187. *In re Terrorist Attacks*, 714 F.3d at 116 n.8 (noting that the legislative history of the FSIA suggests that Congress's purpose in implementing the noncommercial tort exception was to allow officials and employees of sovereigns to be held liable for traffic accidents in the United States).
188. *Id.* at 109.
189. *Id.* at 111–12.
190. *Id.* at 112.
191. *Id.* at 117 n.11.
192. *Argentine Republic*, 488 U.S. at 441.
193. *In re Terrorist Attacks*, 714 F.3d at 115.
194. *Id.* at 116.
195. *Id.* at 117.
196. *Id.*

United States."[197] As a result, the court lacked subject matter jurisdiction over the case.

Jerez v. Republic of Cuba involved an effort to enforce a default judgment rendered in state court against the Republic of Cuba and various members of its officers and agencies, for damages stemming from the "physical and mental torture" plaintiff alleged he suffered while incarcerated in Cuba in the 1970s.[198] To overcome the entire tort rule, plaintiff highlighted the "continuing nature of his injuries."[199] The district court stressed the need for both the tortious act *and* the resultant injury to have occurred in the United States, in order for the noncommercial torts exception to apply.[200] It held that even if the injuries had occurred in the United States, "the tortious acts which gave rise to these injuries undoubtedly occurred outside of the United States."[201] In response to plaintiff's allegation that Cuban representatives in the United States failed to inform him of his condition (thus constituting a tortious omission), the court held that he had failed to submit evidence as to "the knowledge or duty of unnamed individuals."[202]

E. Arbitration—§ 1605(a)(6)

The FSIA provides in Section 1605(a)(6):

> 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 the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if
>
> (A) the arbitration takes place or is intended to take place in the United States,
>
> (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,
>
> (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this Section or section 1607, or
>
> (D) paragraph (1) of this subsection is otherwise applicable.[203]

197. *Id.* (emphasis in original).

198. 964 F. Supp. 2d 52, 54 (D.D.C. 2013), *aff'd,* 775 F.3d 419 (D.C. Cir. 2014).

199. *Id.* at 56.

200. *Id.* at 55–56.

201. *Id.* at 56.

202. *Id.* at 57.

203. 28 U.S.C. § 1605(a)(6).

In 2013, U.S. courts addressed this exception in three cases and found it to apply each time.[204]

In *Blue Ridge Investments LLC v. Republic of Argentina*,[205] discussed *supra*, the Second Circuit held that the district court had "correctly concluded that Argentina waived its sovereign immunity pursuant to the arbitral award exception."[206] The court explained:

> To our knowledge, every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIA has concluded that they do. We agree. Indeed, inasmuch as (1) the Award was issued pursuant to the ICSID Convention, which is a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, 28 U.S.C. § 1605(a)(6)(B), and (2) the United States and Argentina are both parties to the ICSID Convention, . . . Argentina's agreement to submit its dispute to arbitration under the ICSID Convention constituted a waiver of immunity from suit pursuant to 28 U.S.C. § 16505(a)(6)(B).[207]

The appeals court thus affirmed the district court's holding that Argentina had waived its immunity under the FSIA when it agreed to submit the dispute to arbitration.[208]

In *Chevron Corp. v. Republic of Ecuador*, the plaintiffs commenced arbitration against Ecuador pursuant to the U.S.-Ecuador Bilateral Investment Treaty (BIT).[209] Following the arbitration, the panel issued an award against Ecuador and the plaintiffs asked the district court to confirm that award pursuant to the New York Convention.[210] Ecuador contested subject matter jurisdiction pursuant to the FSIA while the plaintiffs argued that the FSIA's arbitration exception applied.[211] The district court agreed with the plaintiffs, holding that (1) "the Award's own language indicates it was rendered pursuant to the BIT, an agreement that provides for arbitration"; (2) "the Award is clearly governed by the New York Convention"; and (3) "the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception.'"[212]

204. *See Blue Ridge*, 735 F.3d at 75–76; Belize Social Dev. Ltd. v. Gov't. of Belize, 5 F. Supp. 3d 25, 29–30 (D.D.C. 2013) (mem.), *aff'd* 794 F.3d 99 (D.C. Cir. 2015); Chevron Corp. v. Republic of Ecuador, 949 F. Supp. 2d 57, 60 (D.D.C. 2013) (mem.), *aff'd* 795 F.3d 200 (D.C. Cir. 2015).

205. *Blue Ridge*, 735 F.3d at 83-84. *See* Part II.A.1 *supra*.

206. *Blue Ridge*, 735 F.3d at 85.

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

208. *Id.* at 86.

209. *Chevron Corp.*, 949 F. Supp. 2d at 60.

210. *Id.* at 60 (citing 9 U.S.C. § 207 (2015)); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 220 U.N.T.S. 3, *available at* treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en).

211. *Chevron Corp.*, 949 F. Supp. 2d at 61–62.

212. *Id.* at 62–63.

The court then analyzed what it called a "novel" argument raised by Ecuador in contesting the application of the "arbitration" exception. Ecuador argued "that it never consented to arbitrating the underlying dispute" and that the district court had to "satisfy itself of the arbitrability of the underlying dispute before finding subject-matter jurisdiction over [the] enforcement proceeding."[213] The court rejected Ecuador's argument, reasoning that it "appear[ed] to be an attempt by Ecuador to get two bites at the apple of the merits of its dispute with [the plaintiffs], by seeking to have this Court separately determine the arbitrability of the underlying dispute under both the FSIA and the New York Convention."[214] The court stated that the argument "runs counter to the clear teaching of [the D.C.] Circuit on the purpose and role of the FSIA":

> The FSIA is a jurisdictional statute that "'speak[s] to the power of the court rather than to the rights and obligations of the parties.' Likewise, '§ 1605(a)(6) does not affect the contractual right of the parties to arbitration but only the tribunal that may hear a dispute concerning enforcement of an arbitral award.' Inquiring into the merits of the enforcement dispute–that is, the arbitrability of the underlying claims–would involve an inquiry into the 'contractual rights of the parties to arbitration' and would thus be beyond the reach of the FSIA's cabined jurisdictional inquiry.[215]

The court noted that its rejection of Ecuador's suggested merits review was consistent with cases decided by several other federal courts.[216]

In *Belize Social Development Ltd. v. Government of Belize*, the plaintiff asked the court to confirm and enforce an arbitration award the London Court of International Arbitration ("LCIA") had entered against Belize to resolve a dispute relating to a series of telecommunications contracts.[217] Belize argued that it was immune from suit under the FSIA and that none of the FSIA's exceptions applied. The court disagreed:

> The LCIA's award in this case is clearly governed by the New York Convention because both England (where the arbitration took place) and the United States are parties to the Convention. Belize's status under the convention is irrelevant. Moreover, it is well settled that an action to confirm an arbitration award under the New York Convention falls squarely within the ambit of the § 1605(a)(6)(B) immunity exception.[218]

Belize further argued that the "arbitration" exception should not apply because the underlying arbitration agreements were void under Belize law.[219] The court again disagreed:

213. *Id.* at 63.
214. *Id.*
215. *Id.* (internal citations omitted).
216. *Id.* at 63–64.
217. 5 F. Supp. 3d 25, 25–26 (D.D.C. 2013).
218. *Id.* at 33 (internal citations omitted).
219. *Id.* at 33–34.

> [rejecting the] proposition that the Court must conduct [ ] an independent, de novo determination of the arbitrability of a dispute to satisfy the FSIA's arbitration exception. Indeed, the FSIA jurisdiction inquiry is a 'cabined' one that focuses on the authority of the court, not the contractual rights and obligations of the parties. And regardless of whether I consider contract validity now, the question will be addressed anyway—as it always is, though under a deferential standard—when I turn to the Article V(I)(a) exception to the New York Convention.[220]

Thus, the court found that it had subject matter jurisdiction over the dispute.[221]

F. State-Sponsored Terrorism—§ 1605A

Courts continued to grapple with the nuances of the "terrorism exception" to sovereign immunity under the FSIA in 2013. This exception, codified at 28 U.S.C. § 1605A, was enacted with the passage of the National Defense Authorization Act for Fiscal Year 2008 ("NDAA").[222] The NDAA amended the FSIA's original "terrorism exception," previously codified at Section 1605(a)(7). That provision, enacted in 1996, did not provide plaintiffs with a federal cause of action; rather, it simply granted the court jurisdiction to decide certain claims. Nor did it permit the award of punitive damages against state sponsors of terrorism, as does the 2008 enactment. The 2008 provision, now codified at Section 1605A, provides for a more uniform approach to compensating victims of state-sponsored terrorism, as well as providing a greater deterrent to state-sponsored terrorism.

This exception applies only to foreign sovereigns that have been designated by the U.S. Department of State as "state sponsor[s] of terrorism," as well as the agencies and instrumentalities of those states.[223] Sovereigns so designated lose their immunity from suit under Section 1605A if they were designated as a state sponsor of terrorism either at the time of the terrorist act, or subsequently, as a direct result of the act that is the subject of the litigation.[224]

Not every foreign sovereign recognized by the U.S. Department of State as a state sponsor of terrorism will be subject to suit for any claim arising under the terrorism exception, however. A state sponsor of ter-

220. *Id.* at 34 (quoting *Chevron Corp.*, 949 F. Supp. 2d at 63).
221. *Id.* at 33.
222. Pub. L. No. 110-181, 122 Stat. 3 (2008).
223. *See* 28 U.S.C. § 1605A(a)(2)(A)(i)(I). In 2013, the State Department identified only four state sponsors of terrorism: Cuba, Iran, Sudan, and Syria. *See* U.S. Dep't of State, State Sponsors of Terrorism, http://www.state.gov/j/ct/list/c14151.htm (last visited Apr. 11, 2015) (identifying the U.S. State Department's current list of state sponsors of terrorism).
224. 28 U.S.C. § 1605A(a)(2)(A)(i)(I). *See also* Jerez v. Republic of Cuba, 964 F. Supp. 2d 52, 53 (D.D.C. 2013) (finding no subject matter jurisdiction pursuant to § 1605A where the sovereign in question was not recognized as a state sponsor of terrorism at the time of the event in dispute and "was not designated [as such] as a result of [its] treatment of [the] plaintiff").

rorism (and its officials and agents) must additionally be alleged to have participated in an act in furtherance of a terrorist objective.[225] Such acts include an "act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act."[226] The FSIA further limits claims to those brought by plaintiffs who are U.S. nationals, members of the U.S. armed forces, employees or agents of the United States, or legal representatives of these individuals.[227] A plaintiff meeting any one of these categories must then demonstrate causation and damages in order to potentially hold a foreign sovereign liable under the FSIA.[228]

1. Implementing the Exception

Timelines. In 2013, courts continued to address the effect of Section 1605A on claims previously filed pursuant to Section 1605(a)(7).[229] The NDAA guaranteed retroactive application of Section 1605A for particular prior actions. Actions filed under Section 1605(a)(7) that were ongoing at the time of the NDAA's enactment could be treated, on plaintiff's motion, "as if the action had originally been filed" pursuant to Section 1605A.[230] Moreover, for any action validly invoking Section 1605(a)(7) and for sixty days post-judgment, parties could bring "any other action arising out of the same act or incident" under Section 1605A.[231]

In *Van Beneden v. Al-Sanusi*, a victim of a 1985 terrorist attack at Vienna's Schwechat Airport had filed a claim under Section 1605A against Syria, Libya, and certain individuals and organizations.[232] The 1985 attack coincided with a simultaneous attack on Rome's main airport.[233] The district court dismissed the claim as untimely.[234] On appeal to the D.C. Circuit, plaintiff argued that his Section 1605A claim was timely because the suit was *related to* a timely filed Section 1605(a)(7) action arising out of the Rome attack.[235] The D.C. Circuit reversed.

The court noted the similarities between the two airport attacks, including the orchestration of the attacks by the same group, coordinated training efforts in the same Syrian-sponsored training camp, the use of the same types of weapons during the attack, and the same strategy for

225. 28 U.S.C.§ 1605A(c).
226. *Id.* § 1605A(a)(1).
227. *Id.* § 1605A(c).
228. *Id.*
229. Van Beneden v. Al-Sanusi, 709 F.3d 1165, 1166 (D.C. Cir. 2013) ("[E]ven as the NDAA rang the knell for § 1605(a)(7) suits, it promised a slow burial.").
230. NDAA § 1083(c)(2).
231. *Id.* § 1083(c)(3).
232. *Van Beneden*, 709 F.3d at 1165–66.
233. *Id.* at 1166.
234. *Id.*
235. *Id.* at 1166–67. The related action was Estate of Buonocore v. Great Socialist People's Libyan Arab Jamahiriya, Civ. No. 1:06-cv-00727 (D.D.C.) (filed Apr. 21, 2006), a section 1605(a)(7) suit "against many of the same defendants for their alleged support of the Rome attack." *Id.* at 1167.

accessing the airport terminals.[236] Ultimately, the court found that "[i]nterpreting the proximal connection between two acts of terrorism . . . requires a number of conceptual judgments" necessitating examinations beyond "the ordinary meanings of 'act' and 'incident'" and held that the Vienna and Rome attacks "constitute[d] the same 'incident.'"[237]

Evidentiary Burden. In *Spencer v. Islamic Republic of Iran*, victims and their surviving family members sought a default judgment pursuant to Section 1605A against Iran based on evidence submitted in a prior case arising out of the 1983 bombing of the U.S. Marine Barracks in Lebanon.[238] In support of their claim, plaintiffs "urge[d] the court to take judicial notice of the evidence presented".[239] The court held that taking judicial notice of such evidence would provide an insufficient basis upon which to grant judgment in the plaintiffs' favor because the plaintiffs did not demonstrate that they were present at the time of the attack and that they had suffered "'personal injury or death *caused by*' this blast."[240] The plaintiffs further failed to demonstrate that they satisfied the "status" requirements of the terrorism exception enumerated in Section 1605A(c).[241] The court distinguished its previous decision in *Fain v. Islamic Republic of Iran*[242] by noting that "plaintiffs [in *Spencer*] have attempted to rely *entirely* upon the [prior] *Peterson* case."[243] The court found such reliance "inadequate."[244] The *Spencer* decision highlights the need to provide courts with evidence particular to the plaintiffs in a given case—evidence in addition to that from other, related actions.[245]

Plaintiffs seeking to invoke the terrorism exception due to torture and extrajudicial killing (as opposed to "a targeted bombing" or a "deliberate execution") face a unique evidentiary burden.[246] In *Kim v. Democratic People's Republic of Korea*, plaintiffs were relatives of a South Korean national (Reverend Kim)[247] who they alleged was abducted by agents of North Korea, severely tortured, and ultimately murdered, while serving

236. *Id.* at 1167.
237. *Id.* at 1168. The court emphasized that the attacks invited "a single group of people committing two simultaneous attacks planned as part of a coordinated assault on an identifiable group of individuals at similar locations using weapons from the same shipment." *Id.* at 1167.
238. 922 F. Supp. 2d 108, 109 (D.D.C. 2013).
239. *Id.*; *see* Peterson v. Islamic Republic of Iran, 264 F. Supp. 2d 46 (D.D.C. 2003).
240. *Spencer*, 922 F. Supp. 2d at 109–10 (citing § 1605A(c)) (emphasis in original).
241. *Id.* at 110. These requirements allow plaintiffs to proceed upon a showing that the plaintiff is a U.S. national, a member of the U.S. armed forces, an employee or agent of the United States, or a legal representative of any of these individuals.
242. 856 F. Supp. 2d 109 (D.D.C. 2012) (holding defendants liable based on judicial notice of the evidence submitted in *Peterson* and affidavit testimony of a plaintiff establishing his physical presence at the site of and injuries stemming from the bombing).
243. *Spencer*, 922 F. Supp. 2d at 110 (emphasis in original).
244. *Id.*
245. *Id.*
246. Kim v. Democratic People's Republic of Korea, 950 F. Supp. 2d 29, 32 (D.D.C. 2013) (noting the high evidentiary standard "that the statutory definition of torture imposes").
247. *Id.* at 41.

as a missionary in China.[248] The plaintiffs sought a default judgment against North Korea—a designated state sponsor of terrorism within six months prior to the filing of the action.[249] The *Kim* court noted the high evidentiary bar for pleading torture under the FSIA, emphasizing that "[t]he FSIA adopts the definition of torture contained in section 3 of the Torture Victims Protection Act."[250] Although the plaintiffs submitted a wide range of evidence relating to Reverend Kim's abduction, from congressional resolutions to a South Korean court decision,[251] the court found that such evidence failed to "establish the severity of the treatment of Reverend Kim in particular, or that his treatment amounts to torture under the rigorous definition of that term adopted in the FSIA."[252] Accordingly, the court refused to exercise jurisdiction.[253] But the court offered some hope for plaintiffs without access to direct evidence of torture by certifying the action for interlocutory appeal.[254] And, in 2014, the D.C. Circuit found that the plaintiffs *did* present sufficient evidence to establish that North Korea had tortured and killed plaintiffs' decedent because of his political activities, as demonstrated by the decedent's well-documented abduction and expert testimony on the conditions at the camp where he was held.[255]

Claims by Foreign Nationals. Section 1605A does not provide a cause of action solely for U.S. citizens.[256] In fact, it expands the terrorism exception to U.S. nationals, members of the armed forces, U.S. Government employees (even if not U.S. nationals), and legal representatives of individuals in the first three categories.[257] Courts in 2013 continued to recognize the ability of victims' non-citizen family members to avail themselves of the jurisdictional benefits of Section 1605A.[258]

248. *Id.* at 30, 32.

249. *Id.* at 30, 41. North Korea was designated a state sponsor of terrorism in 1988 and remained so designated until October 11, 2008. The action was filed on April 9, 2009. *Id.* at 41. Section 1605A(2)(A)(i)(l) provides that a court will hear a claim against a foreign state pursuant to § 1605A if the state in question was designated a state sponsor of terrorism "at the time the [alleged acts] occurred, . . . and . . . either remains so designated when the claim is filed under [the Section] or was so designated within the 6-month period before the claim is filed[.]" (quoting 28 U.S.C. § 1605A(a)(2)(A)(i)(I)).

250. *Kim*, 950 F. Supp. 2d at 31 (citing 28 U.S.C. § 1604A(h)(7)).

251. *Id.* at 35. Plaintiffs submitted evidence ranging from "congressional resolutions relating to Reverend Kim's abduction, and press materials, book excerpts and reports from human rights organizations and the U.S. State Department about North Korea" as well as "the decision of a South Korean court that tried and convicted a [North Korean] intelligence agent for crimes including the abduction of Reverend Kim." *Id.*

252. *Id.* at 41-42. The court emphasized that the FSIA incorporates the definition of torture contained in the Torture Victims Protection Act ("TVPA"). *Id.* at 32.

253. *Id.* at 42.

254. *Id.* at 43.

255. Kim v. Democratic People's Republic of Korea, 774 F.3d 1044 (D.C. Cir. 2014).

256. 28 U.S.C § 1605A(c).

257. *Id.*

258. *See Estate of Buonocore*, 2013 WL 351546 at *20–21. *See also* Estate of Doe v. Islamic Republic of Iran, 943 F. Supp. 2d 180, 191 (D.D.C. 2013).

The limitation of the federal cause of action to individuals falling within the four categories set forth above has led some plaintiffs to advance novel theories regarding the scope of the term "national." In *Mohammadi v. Islamic Republic of Iran*, four former Iranian nationals alleged they were "imprisoned, tortured, and/or killed in a Tehran prison."[259] The plaintiffs brought claims pursuant to Section 1605A against Iran.[260] At the time of the alleged torture, however, the plaintiffs did not have, and had not applied for, U.S. citizenship.[261] Nonetheless, they argued that they should be considered U.S. "nationals" because, at the time of the acts in question, they owed a "permanent allegiance to the United States."[262] The plaintiffs also directed the court's attention to previous cases in which the D.C. Circuit had recognized allegiance to the United States as a significant factor for determining jurisdiction under the FSIA.[263] The court distinguished the earlier case law because plaintiffs had "not applied for or otherwise pursued U.S. citizenship at the time that the defendants perpetrated the acts of torture and extrajudicial killing" alleged in the claim and noted that subsequent D.C. Circuit decisions have "clarified" that "manifestations of 'permanent allegiance' do not, by themselves, render a person a U.S. national."[264]

2. Choice of Law Issues

In 2013, courts continued to confront difficult choice-of-law questions in applying the terrorism exception. Indeed, the presence of non-citizen plaintiffs, foreign law, and competing interests in combating terror have led courts to confront difficult questions regarding the applicable rule of law. In *Estate of Buonocore*, for example, the court considered claims by family members of a U.S. national who was killed in an attack in Italy.[265] Applying the choice-of-law rules of the District of Columbia, the court concluded that Italian law should govern the analysis.[266] The court noted that the victim's sons were not U.S. nationals at the time of the attack and reasoned that although the United States "arguably has an interest in applying its domestic law to its aggrieved domiciliaries, that interest is diminished when those domiciliaries are not U.S. nationals."[267] The court

259. 947 F. Supp. 2d at 54.
260. *Id.*
261. *Id.* at 65.
262. *Id.* at 64.
263. *See* Asemani v. Islamic Republic of Iran, 266 F. Supp. 2d 24, 27 (D.D.C. 2003) (noting that the plaintiff had "demonstrated . . . permanent allegiance to the United States sufficient to constitute him a 'national' within the meaning of FSIA" where the plaintiff already had applied for U.S. citizenship); *Peterson*, 515 F. Supp. 2d at 25 (recognizing a decedent's allegiance to the United States pursuant to § 1605(a)(7) where the decedent was a member of the armed forces from 1980 until his death in 1983 while serving abroad).
264. *Mohammadi*, 947 F. Supp. 2d at 65 (quoting Lin v. United States, 561 F.3d 502, 508 (D.C. Cir. 2009)).
265. *Estate of Buonocore*, 942 F. Supp. 2d at 14.
266. *Id.* at 14–16.
267. *Id.* at 16.

further emphasized the lack of evidence that the attack in question was specifically targeted against the United States and its citizens, as well as Italy's interest in the matter.[268]

3. Damages

In 2013, courts addressed the various types of damages available under the FSIA terrorism exception, including economic damages, solatium, pain and suffering, and punitive damages.[269]

Economic Damages. Courts have awarded damages for reasonably foreseeable economic loss under the terrorism exception.[270] These losses reflect the decedent's expected earning capacity and any lost property.[271] As in previous years, courts in 2013 continued to rely on the testimony of experts and the authority of Special Masters to determine damages.[272]

In *Estate of Doe v. Islamic Republic of Iran*, for instance, the court reviewed the figures contained in an expert report that presented "each deceased victim's expected stream of income."[273] *Estate of Doe* involved a suit against Iran brought by the victims and family members of victims of bomb attacks on the U.S. embassy and barracks in Beirut, Lebanon, in 1983 and 1984.[274] This embassy attack "was the first large-scale attack against a United States embassy anywhere in the world, and it marked the onset of decades of terrorism against the United States."[275] The court approved the award of economic damages recommended by the magistrate judge, including the analyses and damages calculations contained in the plaintiffs' underlying expert report.[276] That report declined to factor in payments received by the affected families from the U.S. government, on the ground that the actual death benefits received were not "reliably known."[277] The court agreed that such payments should not be included in the damages calculation because (1) due to faded memories and the absence of documentary evidence, the information on such benefits was "extremely sporadic" and "no systematic inquiry about these benefits" had been performed; (2) factoring such payments into a damages award that accounted for contemporary values would be "quite complex" and "substantively thorny"; and (3) "it is not at all clear that benefits paid by

268. *Id.* The court noted that Italy "has a strong governmental interest in . . . deterring attacks within its sovereign borders. . . ." *Id.* at 15.
269. 28 U.S.C. § 1605A(c)(4).
270. *See Estate of Doe*, 943 F. Supp. 2d at 180.
271. *See id.*
272. Section 1605A specifically provides for the use of Special Masters to determine damages in cases falling within the terrorism exception. *See* 28 U.S.C. § 1605A(e)(1).
273. 943 F. Supp. 2d at 185 .
274. *Id.* at 182–83.
275. *Id.* at 183 (citing Dammarell v. Islamic Republic of Iran, No. 01-2224, 2005 WL 756090, at *1 (D.D.C. Mar. 29, 2005)).
276. *See* Estate of Doe v. Islamic Republic of Iran, 808 F. Supp. 2d 1, 8–9 (D.D.C. 2011), and Report and Recommendation, Apr. 30, 2013, ECF No. 105.
277. *Estate of Doe*, 943 F. Supp. 2d at 185.

the U.S. government can be used to reduce Iran's responsibility."[278]

Pain and Suffering. Damage awards for pain and suffering incurred as a result of a qualifying act under Section 1605A vary according to the degree and duration of the injury. Courts have noted that victims enduring extreme pain and suffering "for a period of several hours or less" have been almost "uniformly" awarded $1 million.[279] Other courts have referred to $5 million as a "baseline" award for pain and suffering due to a terrorist attack.[280] Courts have departed upward from this baseline to $7 million and down to $1.5 to $3 million, depending on the injury.[281] In *Estate of Doe*, the court made downward departures, for example, for victims incurring "fairly light physical injuries," defined as "injuries that required no medical attention."[282] In *Buonocore*, the court determined that victims who "died instantly" would not be awarded damages for pain and suffering.[283]

Solatium. While a number of courts in 2013 noted the availability of solatium damages under Section 1605A, few courts engaged in an analysis of such damages. Solatium damages compensate plaintiffs "for 'the mental anguish, bereavement and grief that those with a close personal relationship to a decedent experience as a result of the decedent's death, as well as the harm caused by the loss of the decedent, society and comfort.'"[284] Courts will generally look to previous case law to properly estimate such awards.[285] In *Goldberg-Botvin*, discussed *supra*, the court noted a "general rule of this Court" that parents of a victim receive $5 million and siblings receive $2 million each.[286]

Punitive Damages. Unlike its predecessor, Section 1605(a)(7), Section 1605A allows plaintiffs to seek punitive damages against state sponsors of terrorism.[287] Punitive awards serve a deterrence function, and, in this category of damages, courts scrutinize less the award as to each individual plaintiff and instead focus on a total award that will serve to deter and punish the defendant state sponsor of terrorism.[288] In *Estate of Doe*, the Magistrate Judge recommended that $600 million be awarded in punitive damages in a case involving the bombing of the U.S. barracks and embassy in Beirut.[289] The court reduced that number to $300 million, taking into account the amount sought by the plaintiffs as well as previous puni-

278. *Id.* at 186.
279. *Estate of Buonocore*, 2013 WL 351546 at *28 (citing Baker v. Socialist People's Libyan Arab Jamahirya, 775 F. Supp. 2d 48, 81 (D.D.C. 2011)).
280. *Estate of Doe*, 943 F. Supp. 2d at 186.
281. *Id.*
282. *Id.* at 188.
283. 2013 WL 351546, at *28.
284. *Id.* at *29 (citing Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8, 22 (D.D.C. 2009)).
285. *Id.*
286. Goldberg-Botvin v. Islamic Republic of Iran, 938 F. Supp. 2d 1, 11 (D.D.C. 2013).
287. 28 U.S.C. § 1605A(e)(1).
288. *See, e.g.*, *Goldberg-Botvin*, 938 F. Supp. 2d at 11 (citing Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 55-56 (D.D.C. 2012)).
289. 943 F. Supp. 2d at 189.

tive awards against the same defendant (Iran) for the same bombings.[290]

Indeed, several courts in 2013 looked to the awards granted in other, similar cases in order to assess punitive damages. The *Estate of Buonocore* court, for example, noted that a "punitive damage finding must . . . comport with the requirements of due process, and should be commensurate with awards in other FSIA cases."[291] The court then compared a particular punitive damages amount with that awarded in prior cases dealing with other, more deadly attacks.[292] In *Goldberg-Botvin*, the court used a ratio of compensatory to punitive damages in an earlier action stemming from the same event to calculate punitive damages.[293] The court multiplied the combined compensatory damages by the ratio to calculate a punitive damage award "to be divided evenly among all four plaintiffs."[294]

V. ENFORCEMENT OF AWARDS AGAINST FOREIGN SOVEREIGN

Even if a plaintiff can demonstrate that one of the exceptions to immunity applies, convince a court to exercise jurisdiction, and even obtain a judgment against a sovereign defendant, enforcing that judgment presents additional challenges with which the courts continued to grapple in 2013.

Section 1609 provides that the property of a foreign sovereign in the United States "shall be immune from attachment arrest and execution."[295] In 2013, courts continued to interpret such enforcement immunity broadly, upholding immunity with respect to remedies that are "the functional equivalent of attachment, arrest, and execution."[296] Such remedies include, e.g., restraining notices, turnover proceedings, injunctions against sovereign property, or requirements to post prejudgment security that "would create precisely the same result that would obtain if the foreign sovereign's assets were formally attached."[297] On the other hand, courts have refused to extend immunity to requests for, e.g., post-judgment discovery about the location of the country's assets in the United States,[298] or for injunctions to require a foreign state to comply with its

290. *Id.* at 190.
291. 2013 WL 351546 at *31.
292. *Id.* ("While this shooting incident was very tragic and serious, and lives were destroyed by it, it would not be appropriate for this Court to award plaintiffs $8 million more than the families and victims of the Beirut bombing in *Valore* received.").
293. 938 F. Supp. 2d at 11–12.
294. *Id.* at 12.
295. 28 U.S.C. § 1609; *see also* Rubin v. Islamic Republic of Iran, 709 F.3d 49, 52 (1st Cir. 2013).
296. Thai Lao Lignite (Thai.) Co. v. Gov't of Lao People's Democratic Republic, No. 10 CIV. 5256 (KMW) (DCF), 2013 WL 1703873, at *3 (S.D.N.Y. Apr. 19, 2013).
297. *Id.* (citing Stephens v. Nat'l Distillers & Chem. Corp., 69 F.3d 1226, 1229 (2d Cir. 1995) (internal quotation marks omitted)).
298. Thai Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic, 924 F. Supp. 2d 508 (S.D.N.Y. 2013).

existing contractual obligations.[299]

In analyzing whether immunity from attachment or execution applies in a given case, the Second Circuit has employed a test that "looks to the practical effect of the proposed remedy, not simply whether it is specifically listed in the FSIA."[300] In *Thai Lao Lignite (Thailand) Co., Ltd. v. Government of Lao People's Democratic Republic*,[301] the plaintiffs, seeking to enforce an arbitration award against the government of Laos, moved *ex parte* for restraining notices and turnover fees from four international airlines.[302] In rejecting the plaintiffs' request, the court reasoned that these remedies were the functional equivalent of attachment because they "involve[d] court-ordered seizure and control."[303] The court found that allowing the plaintiffs to proceed simply by labeling their request as a "turnover proceeding rather than as attachment of that property" would "eviscerate the protections of the FSIA."[304]

This is not to say that plaintiffs cannot enforce against sovereign assets to satisfy a judgment. As with jurisdiction, there are several exceptions to immunity from attachment and execution in the FSIA, including specifically for property "used for a commercial activity in the United States" where additional statutory requirements are met.[305] The FSIA also provides for attachment of sovereign property where a "person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under § 1605A . . . ."[306] But before any court can authorize attachment or execution of assets, the party seeking relief must "provide specific evidence that [the] FSIA abrogates immunity and permits attachment and execution upon each property in question."[307]

299. NML Capital, Ltd. v. Republic of Arg., 727 F.3d 230, 240–41 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (2014) (No. 13-990) (FSIA did not prohibit injunction requiring Argentina to pay holders of defaulted FAA bonds if it makes payments to other bond holders because the injunction "d[id] not attach, arrest, or execute upon any property." Rather, Argentina was free to pay the "FAA debts with whatever resources it likes.") (internal citation omitted).

300. *Thai Lao Lignite (Thai.) Co.*, 2013 WL 1703873, at *4 (citing NML Capital, Ltd. v. Republic of Arg., 699 F.3d 246, 262 (2d Cir. 2012).

301. *Thai Lao Lignite (Thai.) Co.*, 924 F. Supp. 2d at 508.

302. *Thai Lao Lignite (Thai.) Co.*, 2013 WL 1703873, at *1.

303. *Id.* at *4.

304. *Id.* (internal citation and quotation marks omitted).

305. 28 U.S.C. §1610(a). Section 1610 also provides for exceptions to attachment immunity for property of agencies or instrumentalities of a foreign state "engaged in commercial activity in the United States." *Id.* §1610(b). However, even where the threshold "commercial activity" standards are met, certain special types of property will retain immunity from attachment and execution, including, *e.g.*, property "of a foreign central bank or monetary authority held for its own account" (unless waived), and certain property that "is, or is intended to be, used in connection with a military activity." *Id.* §1611(b)(1)–(2).

306. 28 U.S.C. §1610(a) note.

307. Harrison v. Republic of Sudan, No. 13-mc-80116 JSW, 2013 WL 3815660, at *5 (N.D. Cal., July 22, 2013).

A. Commercial Activity Exception

Section 1610(a) provides that a foreign state's property "shall not be immune from attachment in aid of execution, or from execution" if the property was used for commercial activity in the United States and the property in question "was used for the commercial activity upon which the claim is based."[308]

In determining whether this exception to attachment immunity applies, courts in 2013 continued to look at whether the actions the foreign state performed with respect to the property were those in which "a private party engages in trade and traffic or commerce."[309] Put another way, "if the activity is one in which a private person could engage, [the foreign sovereign] is not entitled to immunity."[310]

In *Thai Lao Lignite (Thailand) Co.*, the plaintiffs sought restraining notices and a turnover of "overflight" fees owed to Laos from four airlines in connection with their efforts to enforce a $56 million arbitration award against the Laos government.[311] The fees were authorized by a Laos statute that permits a "charge on any operator of an aircraft that has conducted a flight over" its sovereign territory.[312] The court denied plaintiffs' request because the fees did not reflect commercial activity by Laos, but, instead, were equivalent to "other taxes sovereign states assess against transportation companies . . . which are immune from attachment as sovereign activity."[313] Indeed, the court noted that several foreign courts had recently held that overflight fees "may not be attached to satisfy judgments because they represent a sovereign function."[314] Moreover, even if collection of the fees could be deemed a commercial function, the court explained, the exception still would not apply because the fees were not used for a commercial activity *in the United States* as required by Section 1610(a).[315]

B. Notice Requirements under Section 1610(c)

"Before permitting enforcement of an FSIA judgment, a court must ensure that all foreign entities involved receive notice of the exposure of

308. 28 U.S.C. §1610(a). Section 1610(a) also provides for additional circumstances in which property in the United States used for commercial activity in the United States will not be immune from attachment or execution, *e.g.*, if the foreign state has waived its immunity from attachment or execution, or if the execution relates to a judgment establishing rights in property taken (or exchanged for property taken) in violation of international law. *Id.* §1610(a)(1)–(7).

309. *Thai Lao Lignite (Thai.) Co.,* 2013 WL 1703873, at *6 (citing NML Capital Ltd. v. Republic of Arg., 680 F.3d 254, 258 (2d Cir. 2012)).

310. *Id.* (citing LNC Invs., Inc. v. Republic of Nicar., No. 96 Civ. 6360 JFK., 2000 WL 745550, at *5 (S.D.N.Y. June 8, 2000)).

311. *Id.* at *1.

312. *Id.* (internal citation and quotation marks omitted).

313. *Id.* at *6.

314. *Id.* at *7.

315. *Id.*

their property and other interests to attachment and execution."[316] Thus, 28 U.S.C. § 1610(c) provides that "[n]o attachment or execution [under Section 1610(a) or (b)] shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under Section 1608(e)."[317]

In *Byrd v. Corporacion Forestal y Industrial de Olancho, S.A.*, the district court clarified the requirements for providing notice to a foreign sovereign under Section 1610(c).[318] The plaintiffs sought to enforce a 2003 judgment in the Southern District of Mississippi against defendant Corfino, a public corporation created by the Honduran Forest Ministry, for various breach of contract and tort claims relating to plaintiffs' removal as managers of a project to exploit lumber resources in Honduras.[319] Corfino then stopped defending the lawsuit, and the court entered a judgment after a hearing on the merits.[320] In 2011, the plaintiffs registered the Mississippi judgment in the Southern District of New York.[321] In January 2013, they applied for an order declaring that they had satisfied the FSIA's § 1610(c) notice provisions, and specifically "that a reasonable period of time had elapsed after entry of the judgment against Corfino in 2003 and that notice under Section 1608(e) was not required because the judgment was not a default."[322] In addition, they sought a judicial finding that the Republic of Honduras was the successor in interest to Corfino. The district court issued the order, and Honduras filed a motion to vacate.[323]

Reconsidering its prior ruling, the district court clarified that "[e]ven where a foreign state or its instrumentality initially appears in an action, judgment creditors must provide notice of a subsequent default judgment in accordance with Section 1608(e)."[324] This was necessary because, when "a foreign state or agency is not participating or has withdrawn from the litigation, the entry of a default judgment will not, in and of itself, give sufficient warning that the defendant's interests and assets are exposed."[325] The plaintiffs argued that, because the court entered judgment following an evidentiary hearing, the "evidentiary findings trans-

316. Byrd v. Corporacion Forestal y Indus. de Olancho, S.A., 974 F. Supp. 2d 264, 273 (S.D.N.Y. 2013), *aff'd sub nom.* Byrd v. Republic of Honduras, 2015 WL 3448835 (2d Cir. June 1, 2015) (citing Agudas Chasidei Chabad v. Russ. Fed'n, 798 F. Supp. 2d 260, 267 (D.D.C. 2011)).

317. Section 1608(e) provides that "[n]o judgment by default shall be entered by a court of the United States . . . against a foreign state . . . or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

318. *Byrd*, 974 F. Supp. 2d at 272–273.

319. *Id.* at 266.

320. *Id.*

321. *Id*. at 265.

322. *Id.* at 267.

323. *Id.*

324. *Id.* at 273.

325. *Id.* (citing *Agudas Chasidei Chabad*, 798 F. Supp. 2d at 267).

formed [the] default judgment into a final judgment immune from FSIA notice requirements . . . ."[326] The court disagreed, explaining that Section 1610(c) "requires a court to find an evidentiary basis for the claims before issuing a default judgment against a foreign state or its instrumentality."[327] Accordingly, even though the defendant was not present, the judgment remained a default judgment and the plaintiffs were required to serve the judgment on Corfino and provide notice to Honduras in accordance with Section 1608(e).[328] Because the plaintiffs had failed to comply with the notice provisions, the court granted Honduras's motion to vacate.

C. Terrorism Judgments—Attachment and Execution

The FSIA contains separate rules for attachment and execution in cases involving victims of state-sponsored terrorism.

1. Section 1610(g)

Section 1610(g) authorizes "attachment in aid of an execution of a judgment entered under Section 1605A."[329] It provides that "property of a foreign state against which a judgment is entered under Section 1605A, and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution . . . ."[330] The expansive reach of Section 1610(g) is particularly useful because it permits judgment creditors to attach "any U.S. property in which [the designated terrorist state] has any interest."[331] Under this provision, "the only requirement for attachment or execution of property is evidence that the property in question is held by a foreign entity that is in fact an agency or instrumentality of the foreign state against which the Court has entered judgment."[332] Section 1610(g) does not impose a "commercial use test."[333] Rather, it permits "attachment regardless of where the profits go or whether the government controls the property."[334]

In 2013, several plaintiffs sought to enforce judgments under § 1610(g) with varying degrees of success. For example, in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, the court permitted certain claimants who held judgments against Iran under Section 1605A to attach an arbitration award against an American company in favor of Iran's defense minis-

326. *Id.*
327. *Id.*
328. *Id.*
329. Estate of Heiser v. Bank of Tokyo Mitsubishi UFJ, N.Y. Branch, 919 F. Supp. 2d 411, 417 (S.D.N.Y. 2013).
330. 28 U.S.C. 1610(g)(1); *Estate of Heiser*, 919 F. Supp. 2d at 417.
331. *Estate of Heiser*, 919 F. Supp. 2d at 417 (citing Estate of Heiser v. Islamic Republic of Iran, 807 F. Supp. 2d 9, 18 (D.D.C. 2011)).
332. *Id.* (citing *Estate of Heiser*, 807 F. Supp. 2d at 19).
333. *See* 28 U.S.C. § 1610(g).
334. 984 F. Supp. 2d 1070, 1094 (S.D. Cal. 2013).

try.[335] Section 1605A applied even though the activity at issue, the purchase of military equipment was "a classic government function."[336] The court noted that, prior to the enactment of Section 1605A, "[a] significant roadblock exist[ed] because few Iranian assets remain in the United States . . . impair[ing] the ability of terrorism victims to obtain justice."[337] In recognition of this problem, Congress "sensibly expanded the universe of assets that could be attached to any property interest in which the foreign state enjoys a beneficial ownership."[338] But claimants whose suits were brought under the prior "terrorism exception" statute were not eligible to invoke Section 1610(g), which "by its express terms, applies only to 'judgments under 1605A'" and not its predecessor statute.[339]

2. Terrorism Risk Insurance Act

A related statutory scheme permits victims of state-sponsored terrorism to execute on judgments against foreign sovereigns that sponsor terrorism. The Terrorism Risk Insurance Act of 2002 ("TRIA"), codified in part as 28 U.S.C. §1610 note, allows plaintiffs to "execute [a judgment] against blocked assets of a terrorist party" as well as the assets of an "agency or instrumentality of that terrorist party."[340] The TRIA defines a terrorist party as "a terrorist, a terrorist organization . . . , or a foreign state designated as a state sponsor of terrorism under Section 6(j) of the Export Administration Act of 1979."[341]

One issue that arose in 2013 regarding attachment of terrorism judgments is the interplay between the TRIA and the general immunity afforded central banks under §1611. In *Levin v. Bank of New York Mellon*,[342] the plaintiffs sought to attach certain funds a foreign central bank had directed JPMorgan to transfer from the central bank's own account to an Iranian engineering firm.[343] The central bank opposed the attachment, arguing that central bank immunity (§1611) preempted the TRIA.[344] The court disagreed, finding that the TRIA's broad authorization of attachment of blocked assets of terrorist parties, "notwithstanding any other provision of law," preempts any statutory immunity from attachment under the FSIA.[345] The court specifically found that, to the

335. *Id.* at 1096.
336. *Id.* at 1094.
337. *Id.* at 1095.
338. *Id.* at 1096 (citing H. Rep. No. 110-447 (Dec. 6, 2007) (internal quotation marks omitted)).
339. *Id.*
340. Peterson v. Islamic Republic of Iran, No. 10 Civ. 4518 (KBF), 2013 WL 1155576, at *7 (S.D.N.Y. Mar. 13, 2013), *aff'd*, 758 F.3d 185 (2d Cir. 2014), *petition for cert. docketed*, 83 U.S.L.W. 3587 (U.S. Dec. 31, 2014) (No. 14-770); *see generally* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002).
341. *Peterson*, 2013 WL 1155576, at *8 (citation omitted).
342. Levin v. Bank of N. Y. Mellon, No. 09 CV 5900 (RPP), 2013 WL 5312502, at *15 (S.D.N.Y Sept. 23, 2013).
343. *Id.* at *14.
344. *Id.* at *15.
345. *Id.*

extent the TRIA and §1611 were in conflict, "any conflict should be resolved in favor of the TRIA because it was enacted after" the FSIA.[346] The court cautioned that "providing an exception to attachment and execution for foreign central banks would frustrate the remedial purpose of the TRIA," which is to "deal comprehensively with the problem of enforcement of judgments issued to victims of terrorism."[347] Allowing absolute immunity for central banks thus "would leave judgment creditors with valid judgments against state sponsors of terror without recourse if assets happened to be held in the account of a foreign central bank."[348] Accordingly, the court held that central bank immunity did not preempt TRIA, and the assets were not immune from attachment.[349]

Another issue courts considered in 2013 is the scope of "blocked assets" that terrorism victims may attach to secure a judgment against a terrorist state. For instance, courts analyzed whether electronic fund transfers ("EFTs") could be considered "blocked assets" of the sovereign to whom the assets were being transferred. In *Estate of Heiser*, the court found that EFTs belonging to several agencies that were "mere instrumentalities" of Iran were blocked assets that could be attached to pay a judgment against Iran for its involvement in the 1996 bombing of the Khobar Towers.[350] Likewise, in *Gates v. Syrian Arab Republic*, the court also held that EFTs located at JP Morgan Chase bank in New York were blocked assets of the Banque Centrale de Syrie, an agency or instrumentality of Syria.[351] Beyond EFTs, in 2013, one district court found that bonds belonging to Bank Markazi, the central bank of Iran, were blocked assets under the TRIA.[352] But the First Circuit concluded that antiquities from Iran were not "blocked assets" eligible for attachment and execution under the TRIA.[353]

A related issue is the meaning of the terms "asset of" and "property of" a terrorist party. In *Bennett v. Islamic Republic of Iran*, the court found that blocked assets in the possession of Visa owed to Bank Melli, an Iranian instrumentality, could be considered the instrumentality's own property or assets for purposes of the TRIA.[354] The court held that it did not matter that the bank did not actually "own" the assets yet. Under the FSIA, enforcement of judgments is governed by the "law of the state in which the Court sits."[355] In California, where the case was brought, "all property of a judgment debtor, regardless of the type of interest, is sub-

346. *Id.* (explaining that the TRIA's "notwithstanding clause—enacted in 2002, well after FSIA § 1611(b) was adopted in 1976—thus preempts central bank immunity to the extent it would apply").
347. *Id.* at *16 (citation omitted).
348. *Levin*, 2013 WL 5312502, at *16.
349. *Id.*
350. 919 F. Supp. 2d at 421.
351. No. 11 C 8715, 2013 WL 6009491, at *4 (N.D. Ill. Nov. 13, 2013).
352. *Peterson*, 2013 WL 1155576, at *23.
353. *Rubin*, 709 F.3d at 55–58.
354. 927 F. Supp. 2d 833, 843 (N.D. Cal. 2013).
355. *Id*.

ject to enforcement of a money judgment."[356] Because Bank Melli had a "100% beneficial interest" in the assets, which were "already 'due and owing' to Bank Melli from Visa," they could be considered "'assets of' or 'property of'" the bank.[357]

VI. PRACTICAL ISSUES IN FSIA LITIGATION

In 2013, judicial decisions regarding the FSIA explored various procedural issues that arise in cases brought against foreign sovereigns, such as the act of state doctrine, due process, service of process, jurisdictional issues, venue, *forum non conveniens*, default judgments and interlocutory appeals. A brief review of certain notable decisions follows.

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."[358] 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."[359] Courts are not, however, required to give deference to purely commercial acts.[360] The foreign entity seeking to invoke the act of state doctrine as an "affirmative defense" has the burden of establishing its applicability.[361] Further, "the act of state doctrine goes to the merits, and is not a jurisdictional defense."[362] The court must resolve jurisdictional disputes prior to any ruling on the merits, including whether and how the act of state doctrine applies.[363]

In *United States v. One Gulfstream G-V Jet Aircraft*, the United States brought a forfeiture action against a $38.5 million dollar jet purchased by Teodoro Nguema Obiang Mangue ("Nguema"), Equatorial Guinea's Minister of Forestry and Agriculture and the son of Equatorial Guinea's

356. *Id.*
357. *Id.* at 843–44 (internal citation omitted).
358. Kaplan v. Cent. Bank of Islamic Republic of Iran, 961 F. Supp. 2d 185, 196 (D.D.C. 2013); McKesson Corp. v. Islamic Republic of Iran, 672 F.3d 1066, 1073 (D.C. Cir. 2023), *cert. denied*, 133 S. Ct. 1582 (2013) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964)).
359. *Kaplan*, 961 F. Supp. 2d at 196 (quoting W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., 493 U.S. 400, 405 (1990)).
360. *See* Republic of Iraq v. ABB AG, 920 F. Supp. 2d 517, 540 (S.D.N.Y. 2013), *aff'd*, 768 F.3d 145 (2d Cir. 2014), *petition for cert. docketed*, 83 U.S.L.W. 3729 (U.S. Mar. 5, 2015) (No.14-1074); *Best Med. Belg.*, 913 F. Supp. at 237 (E.D. Va. 2013).
361. *Helmerich & Payne Int'l Drilling Co.*, 971 F. Supp. 2d at 62; Konowaloff v. Metro. Museum of Art, 702 F.3d 140, 146 (2d Cir. 2013), *cert. denied*, 133 S. Ct. 2837 (U.S. Jun. 17, 2013); Victims of Hungarian Holocaust v. Hungarian State Rys., 798 F. Supp. 2d 934, 939 (N.D.Ill. 2011), *rev'd on other grounds sub nom.* Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015).
362. *Helmerich & Payne Int'l Drilling Co.*, 971 F. Supp. 2d at 62-63 (D.D.C. 2013) (citing Republic of Austria v. Altmann, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits.")).
363. *Id.* at 63.

president.[364] The United States alleged that Nguema purchased the jet with funds derived from extortion, misappropriation, theft, and embezzlement.[365] Nguema argued that the act of state doctrine barred the suit and that the court should decline to "complicate foreign affairs by validating or invalidating the actions of foreign sovereigns."[366] The United States countered that the complaint did not "impugn any official acts," and maintained that all "relevant acts were perpetrated for Nguema's personal benefit."[367] The court found that the claim was not barred by the act of state doctrine because the applicability of this doctrine is "weakened when the Executive Branch of the United States is the party that brings suit."[368] The main policy rationale underlying the doctrine is the Judicial Branch's reluctance to interfere in the Executive Branch's foreign affairs power. When the Executive itself brings suit, courts can act without fear of hindering or embarrassing the Executive in the conduct of foreign relations.[369]

In *Republic of Iraq v. ABB AG*,[370] Iraq sued more than ninety multinational corporations under the Racketeer Influenced and Corrupt Organization Act ("RICO") and the Foreign Corrupt Practices Act ("FCPA"), alleging that the defendant corporations conspired with deposed President Saddam Hussein and other Iraqi officials to corrupt the United Nations' Oil-for-Food Programme, a large-scale humanitarian relief program managed by the United Nations from 1996 to 2003.[371] The defendant corporations contended that the act of state doctrine barred the court from considering Iraq's claims.[372] The court stated that the purpose of invoking the act of state doctrine is to "restrain[ ] the judiciary from interfering with the Executive Branch's conduct of foreign affairs."[373] This policy was not implicated where the foreign government itself had brought the claim in a U.S. court, "calling into question" the acts of the prior regime.[374]

Nevertheless, the court clarified that Iraq could not avoid legal responsibility for the conduct of that prior regime simply because the act of state doctrine did not apply. The prior regime's acts remained government conduct (not merely private, self-serving conduct) performed under color of authority.[375] As the court observed, sovereign states are accountable

364. United States v. One Gulfstream G-V Jet Aircraft, 941 F. Supp. 2d 1 (D.D.C. 2013).
365. *Id.* at 5.
366. *Id.* at 11(internal citation and quotation marks omitted).
367. *Id.*
368. *Id.*
369. *Id.* Although the court concluded that the United States' action was not barred by the act of state doctrine, it nevertheless dismissed the case since the complaint did not link the jet to any specific illicit acts.
370. 920 F. Supp. 2d at 517.
371. *Id.* at 524, 529.
372. *Id.* at 533.
373. *Id.*
374. *ABB AG*, 920 F. Supp. 2d at 534.
375. *Id.* at 537.

for the wrongful conduct of their governments and the "state's responsibility for the acts of its government does not coincide with the application of the act of state doctrine or the FSIA."[376] Indeed, the court dismissed the case, in part because it found that Iraq's claims were barred by the defense of *in pari delicto* because the alleged wrongdoing by the prior regime was attributable to the state of Iraq.[377]

B. Service of Process

Service of process pursuant to the FSIA must comport with 28 U.S.C. §§ 1608(a) and (b), which set forth the acceptable methods of service on foreign states or their political subdivisions, and their agencies or instrumentalities. Each provision provides a hierarchy of methods to effect service, such that a plaintiff only may resort to subsequent methods of service if it is unable to effect service under the prior methods.[378]

While strict compliance with Section 1608(a) is required in an action against a foreign state or political subdivision,[379] only substantial compliance with the service rules is required under Section 1608(b) in actions against an agency or instrumentality of the state.[380] Thus, for example, some courts have allowed cases to proceed against an agency or instrumentality based on "'technically faulty service' [under Section 1608(b)] as long as the defendants receive adequate notice of the suit and are not prejudiced."[381]

Where a plaintiff serves a complaint on a foreign state defendant under the FSIA, the foreign state defaults, and then plaintiff files an amended complaint, service of the new complaint is necessary only if the changes are substantial.[382] In *Shoham v. Islamic Republic of Iran*, however, the court directed plaintiff to serve a new complaint on six foreign defendants again after her case was severed from a previously filed action brought by victims of similar terrorist attacks and their families against Iran, Syria, and other defendants under the FSIA's state-sponsored terrorism exception.[383] The court noted that the new complaint was nearly identical to the joint complaint, although it bore a different caption and excluded facts and prayers for relief applicable to other plaintiffs.[384] The previously filed joint complaint had been successfully served on six defendants.[385] Nevertheless, the court concluded that service of the prior

376. *Id.* at 536, 540.
377. *Id.* at 543.
378. *Byrd*, 974 F. Supp. 2d at 273 (internal citations omitted); *see also Kaplan*, 961 F. Supp. 2d at 185.
379. *See* Jimenez v. United Mexican States, 978 F. Supp. 2d 720, 724 (S.D. Tex. 2013).
380. *See Agudas Chasidei Chabad*, 798 F. Supp. 2d at 269 (citing Doe I v. State of Isr., 400 F. Supp. 2d 86, 102 (D.D.C. 2005)).
381. *Id.* (citation omitted).
382. Shoham v. Islamic Republic of Iran, 922 F. Supp. 2d 44, 47 (D.D.C. 2013) (citations omitted).
383. *Id.* at 44.
384. *Id.* at 46.
385. *Id.*

complaint on six foreign state defendants could not be deemed to constitute service on those defendants for purposes of plaintiff's subsequent "new and unrelated" lawsuit, even if the claims were largely identical to those made in the joint complaint.[386]

The plaintiff also moved for authorization of substitute service on three defendants outside of their home country of Iran, after demonstrating that service on these Iranian agencies or instrumentalities could not be effected via special arrangement between the parties, or by serving an agent in the United States.[387] The plaintiff sought to serve these agencies or instrumentalities through international registered mail, in countries that were signatories to the Hague Service Convention.[388] The court found that such service would be permissible as long as it was consistent with Section 1608(b)(3)(C), which allows for service "if [it is] reasonably calculated to give actual notice . . . as directed by order of the court consistent with the law of the place where service is to be made."[389] The court thus permitted service on three defendants via the Clerk of the Court using registered mail in seven countries that were signatories to the Hague Service Convention and did not object to service via international mail.[390] The court would not permit service to a defendant's address in Australia—even though Australia was a signatory to the Hague Service Convention—absent a showing that the relevant jurisdiction in Australia permitted service by mail.[391]

In *Zhang v. Baidu.com Inc.*,[392] the plaintiff alleged that the People's Republic of China and a Chinese Internet search engine service provider conspired to prevent his pro-democracy political speech. He sought to serve China under Section 1608(a)(3), "in accordance with an applicable international convention."[393] China declined to effect service under the Hague Convention, on the grounds that doing so would "infringe its sovereignty or security" under Article 13 of the Convention. The plaintiff argued that China's invocation of Article 13 was "illegal and erroneous," and that China's refusal to comply with the Hague Service Convention did not defeat effective service because the defendants had actual notice of the lawsuit.[394] Plaintiffs also asserted that a default judgment could be entered pursuant to Article 15 of the Hague Service Convention.[395]

The court rejected these arguments. First, the court found that it lacked jurisdiction to address the propriety of China's refusal to effect service under the Hague Service Convention.[396] Second, the court found

386. *Id.* at 47.
387. *Id.* at 49–50.
388. *Shoham*, 922 F. Supp. at 50.
389. *Id.* at 49.
390. *Id.* at 50.
391. *Id.*
392. 932 F. Supp. 2d 561 (S.D.N.Y. 2013).
393. *Id.* at 564 (internal citation and quotation marks omitted).
394. *Id.* at 565.
395. *Id.*
396. *Id.*

that actual notice was an insufficient replacement for service of process under the Hague Service Convention.[397] In so holding, the court noted that the Convention does permit a state to refuse to comply with a request for service if the state determines that "compliance would infringe its sovereignty or security."[398]

C. Due Process and Personal Jurisdiction

Historically, 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.[399] Accordingly, foreign states typically may not assert a 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."[400] Thus, once 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 exercise personal jurisdiction over the defendants.[401]

But the inapplicability of due process protection to foreign states under the FSIA does not necessarily extend to foreign agencies or instrumentalities.[402] A public foreign entity—e.g., a corporation owned and operated by a foreign government—may be entitled to the same due process protections as a *private* foreign entity that is subject to personal jurisdiction in U.S. courts, provided that it is run separately and independently from the sovereign.[403] But due process protections may not apply even to such entities where, e.g., the 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."[404] In *Capital Trans International v. International Petroleum Investment Co.*, discussed *supra* at Part II.A., the court concluded that defendant International Petroleum Investment Company ("IPIC") was not a "person" for purposes of the due process clause and therefore could not invoke the minimum contacts test to avoid personal jurisdiction. The court found that IPIC was clearly an agent of Abu Dhabi and could not be treated as an "independent juridical entity."[405] IPIC's board of directors was appointed by Emiri Decree, and it was a "government-owned

397. *Id.* at 566.
398. *Id.* at 565.
399. *Capital Trans Int'l.*, 2013 WL 557236, at *5; GSS Grp. Ltd. v. Nat'l Port Auth., 680 F.3d 805, 809 (D.C. Cir. 2012); Cont'l Cas. Co. v. Arg. 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 . . . .'") (citation omitted).
400. *Cont'l Cas. Co.*, 893 F. Supp. 2d at 752 n.12 (citation omitted).
401. 28 U.S.C. § 1330(b); Blue Ridge Invs., LLC v. Republic of Arg., 902 F. Supp. 2d 367, 376 (S.D.N.Y. 2013), *aff'd*, 735 F.3d 72 (2d Cir. 2013).
402. *See Capital Trans Int'l*, 2013 WL 557236, at *5.
403. *GSS Grp. Ltd.*, 680 F.3d at 816.
404. *Id.* at 814 (internal citations omitted).
405. *See Capital Trans Int'l*, 2013 WL 557236, at *13.

and controlled entity," completely funded by the Abu Dhabi government.[406]

D. Jurisdictional Discovery

Plaintiffs seeking relief from foreign sovereign defendants often seek jurisdictional discovery where further fact-finding may be necessary to establish that the foreign entity falls within one of the exceptions to sovereign immunity. Because "the FSIA's immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery[,]" courts often are disinclined to require foreign sovereigns to participate in discovery.[407] Accordingly, jurisdictional discovery typically is permitted only when the plaintiff is able to carry its initial burden of establishing a *prima facie* case that one or more exceptions to immunity applies.[408]

In *Funnekotter v. Agricultural Development Bank of Zimbabwe*,[409] the plaintiffs were judgment creditors of the Republic of Zimbabwe, which expropriated plaintiffs' property in contravention of a bilateral investment treaty between the Netherlands and Zimbabwe.[410] The plaintiffs' judgment resulted from the court's confirmation of an arbitration award in their favor from the International Centre for Settlement of Investment Disputes ("ICSID").[411] After receiving this judgment, the plaintiffs moved to amend the judgment to include as judgment debtors certain additional defendants (e.g., Defendants Agricultural Development Bank of Zimbabwe, Minerals Marketing Corporation of Zimbabwe, etc.), claiming that these defendants were "alter egos" of Zimbabwe.[412] The plaintiffs then sought to attach the defendants' assets in the United States, arguing that the assets constituted property of Zimbabwe used for commercial purposes against which Plaintiffs could execute their judgment.[413]

Certain of the defendants moved to dismiss for lack of subject matter jurisdiction and to halt ongoing discovery between the parties.[414] They argued that plaintiffs were not entitled to any discovery at all until they established subject matter jurisdiction.[415] The court rejected this argument and found that the complaint alleged a sufficient factual basis to warrant jurisdictional discovery.[416] The court stated that, when jurisdictional facts are disputed, the Court has "considerable latitude in devising

406. *Id.*
407. *Lantheus Med. Imaging*, 841 F. Supp. 2d at 779 (internal citation and quotation marks omitted).
408. Sikhs for Justice v. Nath, 893 F. Supp. 2d 598, 609 (S.D.N.Y. 2012).
409. No. 13 Civ. 1917 (CM), 2013 WL 6091616 (S.D.N.Y. Nov. 15, 2013).
410. *Id.* at *1.
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.* at *4.
415. *Id.*
416. *Id.*

the procedures it will follow to ferret out the facts pertinent to jurisdiction."[417] Further, the court noted that, when evidence on the jurisdictional issues overlaps with evidence on the merits, the court had the "discretion even to 'proceed to trial and make its jurisdictional ruling at the close of the evidence.' "[418]

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.[419] Before a court will enter a default judgment, the plaintiff must establish that there is sufficient evidence to support its right to relief.[420] The court may accept all uncontroverted evidence as true, which may take the form of sworn affidavits or transcripts.[421] The evidence proffered, however, is subject to the Federal Rules of Evidence.[422] A court may also take judicial notice of findings and conclusions in related proceedings.[423]

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." Venue disputes in FSIA litigation typically concern the location where "a substantial part of the events" occurred.[424]

417. *Id.* at *2 (internal citation and quotation marks omitted).
418. *Id.* (citation omitted).
419. *See, e.g.*, *Sikhs for Justice*, 893 F. Supp. 2d at 612; 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).
420. *Firebird Global Master Fund II*, 915 F. Supp. 2d at 126; *Spencer*, 922 F. Supp. 2d at 109; *Byrd*, 974 F. Supp. 2d at 273 (quoting 28 U.S.C. § 1608(e)).
421. *Firebird Global Master Fund II*, 915 F. Supp. 2d at 126 (citing Oveissi v. Islamic Republic of Iran, 879 F. Supp. 2d 44, 49 (D.D.C. 2012)).
422. *Kim*, 950 F. Supp. 2d at 35.
423. *Goldberg-Botvin*, 938 F. Supp. 2d at 1 (finding that evidence presented in plaintiffs' previous case, and in another case arising from same bombing, established that Iran was culpable for both the extrajudicial killing of plaintiffs' family member and the provision of material support to the terrorist organization involved in the bombing). *See also Fain*, 856 F. Supp. 2d at 115–16 (granting plaintiffs' motion for default judgment against Iran after taking judicial notice of findings in related proceedings).
424. *See*, *e.g.*, Universal Trading & Inv. Co., Inc. 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. 2012) (finding that venue was proper in District of Massachusetts 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).

But even where a proper basis may exist to bring an action under the FSIA in a U.S. court, a defendant seriously inconvenienced by a particular venue may urge the court under the doctrine of *forum non conveniens* to decline to hear the case in the plaintiff's chosen forum. Considering whether to dismiss a case pursuant to the doctrine of *forum non conveniens* involves a two-step analysis.[425] The first step in the *forum non conveniens* analysis is determining the existence of an adequate alternative forum; the second requires determining whether a balancing of various private and public interest factors strongly favors dismissal.[426] It ultimately rests within the court's discretion whether to dismiss based on *forum non conveniens*.

In *Belize Social Development Limited v. Government of Belize*, discussed *supra*, petitioner Belize Social Development Limited ("BSDL") brought an action against the Government of Belize, seeking the confirmation and enforcement of an arbitral award pursuant to the Federal Arbitration Act.[427] The Government of Belize argued for dismissal based, *inter alia*, on the relative inconvenience of litigating the matter in the United States. Because the court found that BSDL had no adequate alternative forum for a lawsuit seeking to confirm and enforce its arbitral award, it denied the motion and allowed the case to proceed.[428]

In *Wye Oak Technology v. Republic of Iraq*, the district court performed a detailed analysis of the public and private factors favoring dismissal on the basis of *forum non conveniens* and upheld the "substantial presumption" favoring the plaintiff's choice of forum.[429] The case was a breach of contract action brought by an American defense contractor, Wye Oak Technology, against the Republic of Iraq.[430] Iraq moved to dismiss, contending that the Iraqi courts provided the proper forum.[431] The court first found that many private factors were either neutral or weighed against dismissal.[432] Witnesses and documents were located both in Iraq and the United States, resulting in unavoidable delay and costs no matter where the litigation occurred.[433] The costs and burdens of translating documents similarly would apply to both parties. But the FSIA would allow attachment of assets located in the United States that weighed against dismissal.[434]

The court then analyzed the public factors weighing for and against

425. *See* Boeing Co. v. KB Yuzhnoye, No. CV 13-730 (ABC)(AJWX), 2013 WL 4446816, at *5 (C.D. Cal. Aug. 8, 2013) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981)).
426. *See id.*
427. *Belize Soc. Dev. Ltd.*, 5 F. Supp. 3d at 28.
428. *Id.* at 34.
429. Wye Oak Tech., Inc. v. Republic of Iraq, 941 F. Supp. 2d 53 (D.D.C. 2013).
430. *Id.* at 55.
431. *Id.*
432. *Id.*
433. *Id.* at 59–60.
434. *Id.*

dismissal.[435] The court concluded that Iraq's interest in resolving the national controversy at home evenly matched the United States' foreign policy interest in the proper performance of defense contracts.[436] Second, the court noted that it was fully competent to apply Iraqi law to "numerous and complex issues."[437] Finally, the court found that only very limited foreign discovery would be needed to recover documents abroad.[438] Considering the public and private interests together, the court sustained Wye Oak's choice of forum.[439]

G. Interlocutory Appeal

An issue that often arises in FSIA cases is whether a party may seek interlocutory appeal of a court's ruling that immunity does or does not exist under the FSIA, or that the United States presents an appropriate forum for adjudicating the dispute. In 2013, courts addressed whether an interlocutory appeal was warranted in the following contexts: a holding that the plaintiff did not adequately allege FSIA's torture exception; an order denying defendant's motion to dismiss under *forum non conveniens*; and a finding of a waiver of sovereign immunity where a plaintiff sought to confirm an arbitral award against the defendant sovereign.

In *Kim v. Democratic People's Republic of Korea*, the district court agreed to certify for interlocutory appeal its decision regarding whether the facts in the complaint adequately alleged a basis for invoking the FSIA's exception for cases involving torture.[440] The brother and son of an abducted South Korean national sued officials, employees, and agents of North Korea under the terrorism exception of the FSIA, seeking damages due to the abduction.[441] When North Korea failed to answer the complaint, the plaintiffs moved for a default judgment.[442] The court found that the plaintiffs' complaint had not provided sufficient evidence to invoke the FSIA's torture exception and that the court thus lacked subject matter jurisdiction over the case.[443]

The court also held, however, that its decision should be immediately appealable under. 28 U.S.C. §1292(b), which provides for certification for interlocutory appeal when the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."[444] Under the statute, a controlling question of law: (1) is one that would require reversal if it was decided

435. *Wye Oak*, 941 F. Supp. 2d at 60.
436. *Id.*
437. *Id.* at 61.
438. *Id.*
439. *Id.*
440. *Kim*, 950 F. Supp. 2d at 29.
441. *Id.* at 30.
442. *Id.*
443. *Id.* at 43.
444. 28 U.S.C. § 1292(b).

incorrectly, or (2) is one that includes dispositive issues that could terminate the action, and thus materially affect the course of litigation and result in savings to the court and the parties.[445] According to the court, the determination of subject matter jurisdiction was a controlling question of law.[446] Further, the court also noted that whether the plaintiffs had produced "the requisite quantum of evidence" presented "a substantial ground for difference of opinion."[447] Third, the court noted that an immediate appeal would "materially advance the ultimate termination of the litigation."[448]

In contrast, in *DRFP, LLC v. Republica Bolivariana de Venezuela*, the court refused to certify for interlocutory appeal its denial of the defendant's *forum non conveniens* motion.[449] In *DRFP*, a holder of promissory notes sued Venezuela and the Venezuelan Ministry of Finance for breach of contract and default on two notes that the holder had purchased from a Panamanian corporation.[450] The court denied Venezuela's *forum non conveniens* motion and Venezuela moved for certification of the decision for interlocutory appeal.[451] The court found that Venezuela did not raise controlling questions of law—but was simply contesting the court's *application* of established law in its fact-intensive *forum non conveniens* analysis.[452] While federal courts may attach different weight to various factors while performing a *forum non conveniens* analysis, resulting in different outcomes, this is not enough to establish a split in authority.[453] Finally, the court found that intermediate appeal would not advance the ultimate termination of the litigation, particularly because Venezuela would find it an "uphill battle" to demonstrate that the court abused its discretion by not dismissing the case. Thus, the court found that the unsuccessful interlocutory appeal would *delay* the litigation.[454]

Finally, in *Blue Ridge Investments, LLC v. Republic of Argentina*, where a purchaser and assignee of an arbitral award sought to confirm the award against Argentina, the Second Circuit held that the district court's interlocutory order refusing to dismiss the case was sufficiently final for appellate review under the collateral order doctrine, to the extent it applied to Argentina's waiver of sovereign immunity.[455] The court explained that a denial of foreign sovereign immunity satisfies the conditions necessary to invoke the collateral order doctrine, which "provides for appellate jurisdiction over a small class of 'collateral' rulings that do not terminate the litigation in the court below but are nonetheless suffi-

445. Kim, 750 F. Supp. 2d at 43.
446. *Id.*
447. *Id.* at 898–99.
448. *Id.* at 918.
449. *Id.* at 919.
450. *Id.*
451. *Id.*
452. *DRFP, LLC*, 945 F. Supp. 2d at 919.
453. *Id.*
454. *Id.*
455. *Blue Ridge*, 735 F.3d at 72.

ciently 'final' and distinct from the merits to be appealable without waiting for a final judgment to be entered."[456] The court rejected petitioner's argument that the collateral order doctrine should not be invoked where the underlying proceeding involved only a confirmation of the award, and did not subject the sovereign to a trial or other burdensome litigation.[457] Petitioner contended that the sovereign could easily and effectively appeal the sovereignty issue after the entry of a final order.[458] The Second Circuit noted the "general rule that the denial of foreign sovereign immunity is immediately appealable."[459] Although the court found it had jurisdiction over the question of whether Argentina had waived its sovereign immunity under the collateral order doctrine, it declined to exercise pendent appellate jurisdiction over the question of whether the assignee could state a claim to confirm the award against Argentina.[460] This issue stood independently from the question of whether Argentina had waived its sovereign immunity, and did not warrant a discretionary exercise of pendent appellate jurisdiction, which a court may exercise over related rulings that would be otherwise unappealable but are "inextricably intertwined" with an issue over which the court properly has appellate jurisdiction.[461]

456. *Id.*at 79–80 (citation omitted).
457. *Id.* at 80.
458. *Id.*
459. *Id.* at 81.
460. *Id.*
461. *Id.* at 83 (internal citations omitted).