



The Foreign Sovereign Immunities Act
2010 Year in Review

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The Foreign Sovereign Immunities Act: 2010 Year in Review

by Crowell & Moring LLP*

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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 under the statute issued in 2010.

Introduction: The FSIA in 2010

Litigation involving the Foreign Sovereign Immunities Act (FSIA) continues to be an active and dynamic area of the law. In 2010, the number of published opinions issued in United States federal courts remained consistently high, with more than 130 published decisions over the course of the year, including one opinion by the U.S. Supreme Court.

As in years past, FSIA decisions in 2010 addressed claims ranging from commercial disputes with sovereign entities and instrumentalities to high-profile, politically-charged cases, involving, for example, claims against diplomatic officials for rape and other abuse, claims by relatives of Holocaust survivors against sovereign states and state-owned museums seeking restitution for art stolen by the Nazi Regime and later acquired by the defendants, and claims by victims of state-sponsored terrorist attacks, to name just a few.

Like Crowell & Moring’s past annual reviews, this review addresses some of the core issues affecting foreign sovereigns that are parties to litigation in courts in the United States, including:

- Who or what is considered a “foreign state” subject to the FSIA?
- Under what circumstances will a foreign state lose its otherwise generally recognized sovereign immunity?
- What are the rules governing attaching a foreign sovereign’s assets located within the United States?

The Review also includes a short introduction to the FSIA as well as some practical guidance based on the most recent FSIA decisions. If you have any questions about the FSIA, please feel free to contact the members of Crowell & Moring’s International Litigation Team:

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I. 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 U.S. and other nations. 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.²

In 1952, U.S. courts’ jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called “Tate Letter,” announcing the Department’s adoption of a new “restrictive theory” of foreign sovereign immunity.³ The “Tate Letter” directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or “public,” acts. However, acts taken in a commercial, or “private,” capacity no longer would be protected from U.S. court review. 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.”⁴

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.⁵ Today, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in U.S. courts.⁶

The FSIA provides that “foreign states” – including their “political subdivisions” and “agencies or instrumentalities”⁷ – shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in Sections 1605 or 1605A of the statute applies.⁸ These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities. In most instances, where a claim falls under one of the FSIA exceptions, the Act provides that the foreign state shall be

¹ 11 U.S. (7 Cranch) 116 (1812).

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

³ *Id.* at 486-87.

⁴ *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 82 (2d Cir. 2008) (quoting *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990)).

⁵ 28 U.S.C. § 1602 (2009).

⁶ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

⁷ 28 U.S.C. § 1603.

⁸ See *id.* § 1604.

subject to jurisdiction in the same manner and to the same extent as a private individual.⁹ The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment, in aid of execution of a judgment against a foreign state or its agencies or instrumentalities, of property located in the United States.¹⁰ Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, *e.g.*, special rules for service of process, default judgments, and appeals.¹¹

II. The Definition of a Foreign State: Political Subdivisions, Organs, Agencies, and Instrumentalities

The threshold issue in any FSIA case is whether the defendant person or entity qualifies as a “foreign state” and therefore is potentially entitled to immunity. For purposes of the FSIA, “foreign states” include not only the states themselves, but also agencies and instrumentalities thereof.¹² To qualify as an “agency or instrumentality” of a foreign state, an entity must be a “separate legal person,” that is “neither a citizen of a State of the United States . . . nor created under the laws of any third country” *and* either “an organ of a foreign state or political subdivision” or an entity, “a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof.”¹³

A. What Is a “Foreign State”?

Determining whether an entity is a “foreign state,” and therefore entitled to the protections of the FSIA, is a fact-specific inquiry, requiring careful attention to the specific nature and functions of the defendant. The following decisions illustrate how courts in 2010 addressed the “foreign state” status of certain entities under the FSIA.

Foreign Consulate – Foreign State. In December 2010, the U.S. District Court for the Northern District of Texas revisited its decision in *Box v. Dallas Mexican Consulate General*.¹⁴ The court previously had determined that the Mexican Consulate General located in Dallas, Texas, was a separate legal entity – an organ of Mexico – that was neither a citizen of a state of the United States nor created under the laws of a third country.¹⁵ The court found that the entity

⁹ *See id.* § 1606.

¹⁰ *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 a military activity is immune from attachment. *Id.* § 1611(b)(2).

¹¹ *See, e.g.*, 28 U.S.C. §§ 1605(g), 1608.

¹² 28 U.S.C. § 1603(a).

¹³ *Id.* § 1603(b).

¹⁴ No. 3:08-CV-1010-O, 2010 WL 5437246 (N.D. Tex. Dec. 23, 2010).

¹⁵ No. 3:08-CV-1010-O, 2009 WL 3163551, at *1 (N.D. Tex. Sept. 30, 2009).

qualified as both a “foreign state” and “an agency or instrumentality of a foreign state,” and therefore was entitled to the immunity protections of the FSIA.¹⁶

In its second review, the court was forced to delve further into the specific status of the Consulate under the FSIA because for purposes of service of process – the issue before the court – the FSIA treats differently a foreign state and one of its agents or instrumentalities. After reviewing the decisions of other district courts on this issue, the court vacated that portion of its prior opinion holding that the Consulate was an “agency or instrumentality of a foreign state” and held that the Consulate was a “foreign state” under the FSIA.¹⁷

Former Officials – Not Foreign States. As discussed in Crowell & Moring’s 2009 Review, the Fourth Circuit Court of Appeals decided in *Yousuf v. Samantar*¹⁸ that the FSIA does not apply to individual foreign government agents, including former government agents, who are sued in their official capacities. Before this decision, most federal circuits had interpreted the FSIA to treat foreign officials as “agencies or instrumentalities” of the foreign state. Samantar appealed the Fourth Circuit’s ruling, and the U.S. Supreme Court granted certiorari. On June 1, 2010, the Supreme Court rendered its decision.

*Samantar v. Yousuf*¹⁹ involved a claim by former citizens of Somalia under the Alien Tort Statute and the Torture Victims Protection Act against Samantar, the former First Vice President and Minister of Defense of Somalia and now a resident of Virginia.²⁰ Plaintiffs claimed that Samantar, through his command and control of Somali military forces, was responsible for extrajudicial killings and torture of the plaintiffs and members of their families.²¹ Samantar claimed he was entitled to sovereign immunity under the FSIA, and the district court agreed. On appeal, the Fourth Circuit reversed, holding that Congress did not intend to shield individual foreign government agents from suit under the FSIA.²² The Supreme Court affirmed the Fourth Circuit’s decision on the narrow ground that a government official, acting in his official capacity, is not entitled to immunity under the FSIA. The Court found that the FSIA does not apply to suits against such officials.²³

Samantar had argued first that the terms “foreign state” and “agency or instrumentality” in the FSIA could be read to include a foreign official.²⁴ The Court agreed that Samantar’s interpretation was literally possible, but, after analyzing the statute, the Court found that

¹⁶ *Id.*

¹⁷ *Box*, 2010 WL 5437246, at *6.

¹⁸ 552 F.3d 371 (4th. Cir. 2009).

¹⁹ 130 S. Ct. 2278 (2010).

²⁰ *Id.* at 2282.

²¹ *Id.*

²² *Id.* at 2283-84.

²³ *Id.* at 2286.

²⁴ *Id.*

Samantar's reading was not consistent with Congress's intent.²⁵ Specifically, the Court found that "agency or instrumentality" (as defined in § 1603(b)) means any "entity," and an entity typically does not refer to natural persons.²⁶ The Court also found that the phrase "separate legal person, corporate or otherwise" in § 1603(b)(1) did not apply to individuals as the phrase "typically refers to the legal fiction that allows an entity to hold personhood separate from the natural persons who are its shareholders and officers."²⁷ Finally, the Court stated that it would be awkward to "refer to a person as an 'organ' of a foreign state" and that a natural person cannot be "created under the laws of any third country."²⁸ Thus, the Court found that the terms Congress chose in drafting the FSIA do not evidence an intent to include individual officials within the meaning of "agency or instrumentality."²⁹

The Court also rejected Samantar's second argument that the definition of a "foreign state" in § 1603(a) supports his claim because it set out a non-exhaustive list that "includes" political subdivisions and agencies or instrumentalities, but (because it is non-exclusive) also *could* include officials. The Court found that Congress's use of the term "includes" could signal simply that the ensuing list was meant to be illustrative rather than exhaustive.³⁰ Moreover, the list includes only "entities," suggesting further that the term "foreign state" does not encompass officials.³¹

The Court found further support for its conclusion that the term "foreign state" in § 1603(a) did not include an official acting on behalf of the foreign state in the fact that Congress had expressly mentioned officials in the statute when it intended that officials be treated in the same way as the state.³²

Finally, the Court rejected Samantar's argument that the FSIA was intended to codify the common law of foreign sovereign immunity, including the common law regarding individual immunity, which immunizes foreign officials for acts taken on behalf of a foreign state.³³ Samantar urged that a suit against an official must *always* be equivalent to a suit against the state.³⁴ The Court disagreed with this interpretation and stated:

[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity. But it does not

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 2287.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 2288.

³³ *Id.* at 2289.

³⁴ *Id.* at 2290.

follow from this premise that Congress intended to codify immunity in the FSIA. It hardly furthers Congress' purpose of 'clarifying the rules that judges should apply in resolving sovereign immunity claims,' to lump individual officials in with foreign states without so much as a word spelling out how and when individual officials are covered.³⁵

After Samantar. The U.S. Court of Appeals for the Fourth Circuit applied *Samantar* in *Lizarbe v. Rondon*, holding that the defendant was not immune from suit under the FSIA.³⁶ The defendant was alleged to have committed war crimes and human rights violations as a commander of Peruvian military forces in the 1980's.³⁷ The defendant argued that he was entitled to immunity under the FSIA.³⁸ The Fourth Circuit disagreed with the defendant and held that *Samantar* clearly foreclosed the defendant's argument that he was entitled to immunity.³⁹

Proposed Legislation? As discussed in Crowell & Moring's 2009 Review, certain lawmakers have sought to resolve the debate regarding individual immunity under the FSIA through legislative action. In December 2009, Senator Arlen Specter, along with cosponsors Senators Charles Schumer and Lindsey Graham, introduced the Justice Against Sponsors of Terrorism Act bill.⁴⁰ The bill, among other things, sought to amend § 1604, the FSIA's general immunity provision, to require a claim against an official or employee of a state or organ thereof, acting within the scope of office or employment, to be asserted against the state itself.⁴¹ The bill was not reported from the committee by the end of 2010 and the bill has not been reintroduced.

B. "Governmental" Versus "Commercial" Agencies and Instrumentalities: the "Core Functions Test"

As discussed above, in certain cases (including matters involving service of process), an "agency or instrumentality" of a foreign sovereign is subject to different statutory rules than the "foreign state" itself. In addition to service of process, different standards may apply to issues of venue, the availability of punitive damages, and attachment of assets.⁴² Thus, a court must often decide whether the defendant is the "foreign state" itself, or an "agency or instrumentality" of the foreign state. To make this determination, courts apply the so-called "core functions test." Under this test, if the entity's predominant activities, or "core functions," are "governmental" in nature, courts will treat the entity as if it were the state itself, applying rules and standards that are more

³⁵ *Id.* at 2290-91.

³⁶ No. 09-1376, 2010 WL 3735865, at *2 (4th Cir. Sept. 22, 2010).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ S. 2930, 111th Cong. (2009).

⁴¹ S. 2930 § 4.

⁴² *See, e.g.*, 28 U.S.C. §§ 1608(a) & (b) (service of process); *id.* § 1391(f)(3) (permitting venue in suits against an agency or instrumentality of a foreign state "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business"); *id.* §§ 1610(a) & (b) (attachment of assets).

protective of the sovereign. However, 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.

In 2010, in *Lee v. Taipei Economic and Cultural Representative Office*, the U.S. District Court for the Southern District of Texas applied the “core functions” test to determine that a plaintiff could not maintain a punitive damages claim against the Taipei Economic and Cultural Representative Office (TECRO).⁴³ Applying the “core functions” test, the court held that TECRO functioned as the state itself, rather than as an agency or instrumentality.⁴⁴ Specifically, TECRO operated as a *de facto* Taiwanese embassy, offering full consular services, serving as the official trade representative office established by the Ministry of Economic Affairs of Taiwan, and facilitating other cultural and educational exchanges.⁴⁵ Thus, because TECRO performed all of the functions of a foreign embassy, which entailed exclusively sovereign duties, the court held that TECRO should be treated as Taiwan itself, rather than a separate agency or instrumentality of Taiwan.⁴⁶ Accordingly, the plaintiff was not able to recover punitive damages against TECRO.⁴⁷

III. Exceptions to the General Grant of Immunity

A. Waiver – § 1605(a)(1)

Section 1605(a)(1) provides that a foreign sovereign does not enjoy immunity from suit in any case:

in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.⁴⁸

In 2010, courts focused on implicit waivers of sovereign immunity, considering whether such waivers existed in the context of (1) choice of law and jurisdictional consent provisions and (2) assertion of counterclaims by the sovereign entities.

Choice of U.S. Law and Consent to U.S. Forum. In *Farhang v. Indian Inst. of Tech.*, the U.S. District Court for the Northern District of California considered whether provisions in a nondisclosure agreement (NDA) which stated that (1) the agreement shall be governed by “the laws of the United States and . . . the state of California” and (2) the parties consent to personal

⁴³ No. 4:09-cv-0024, 2010 WL 2710661, at *1-2 (S.D. Tex. Jul. 6, 2010).

⁴⁴ *Id.* at *3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ 28 U.S.C. § 1605(a)(1).

jurisdiction in California state and federal courts were sufficient to constitute a waiver of immunity under the FSIA.⁴⁹

The court observed first that the waiver exception is narrowly construed and applies only where “(1) [the] foreign state has agreed to arbitration in another country; (2) [the] foreign state has agreed that a contract is governed by the law of a particular country; [or] (3) [the] foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.”⁵⁰ The court noted that “[s]ince the FSIA became law, courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.”⁵¹ The court held that the NDA’s choice of law clause constituted an implied waiver of immunity under the second example set forth above. The court also found that the jurisdictional consent clause constituted an implied waiver “because it illustrates that the parties contemplated adjudication of a dispute by the United States courts.”⁵²

In *Lasheen v. The Loomis Co.*, the U.S. District Court for the Eastern District of New York similarly found that a provision in a group health benefits plan which explicitly stated that covered persons may have the right to file suit in state or federal court to pursue a claim for benefits was sufficient to waive sovereign immunity, even though the document itself (1) did not constitute a contract and (2) did not explicitly state against whom such suits may be brought.⁵³ Moreover, the court found that even though the plan did not explicitly state against whom such suits may be brought, the plan suggested that claims would be brought against plan fiduciaries, and defendants had agreed that they were fiduciaries.⁵⁴

In *State Farm Mut. Auto. Ins. Co. v. Ins. Corp. of British Columbia*, the U.S. District Court for the District of Oregon held that the language of British Columbia’s Act governing the state insurance program – and, therefore, the defendant (ICBC) – implicitly waived immunity because it “clearly contemplate[d] that ICBC [would] be appearing and defending claims in . . . the United States” brought against its insureds.⁵⁵ However, the court held that ICBC’s immunity was not waived in the case before it because the action had been brought by a third party against ICBC itself, so ICBC was *not* “defending claims . . . against its insured.”⁵⁶ Accordingly, because the waiver “could only apply to ICBC [when defending its] insureds,” the exception did not apply.

⁴⁹ *Farhang v. Indian Inst. of Tech.*, C-08-02658 RMW, 2010 WL 519815, at *3 (N.D. Cal. Jan. 26, 2010).

⁵⁰ *Id.* at *2 (citing *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987)).

⁵¹ *Id.* (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).

⁵² *Id.* at *3 (citing *Joseph*, 830 F.2d at 1023).

⁵³ *Lasheen v. The Loomis Co.*, CIV. S-01-227, 2010 WL 3448601, at *3 (E.D. Cal. Sept. 1, 2010).

⁵⁴ *Id.*

⁵⁵ *State Farm Mut. Auto. Ins. Co. v. Ins. Corp. of British Columbia*, CV-09-762-ST, 2010 WL 331786, at *11 (D. Or. Jan. 25, 2010).

⁵⁶ *Id.* at *12.

Counterclaims. In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, the U.S. District Court for the Western District of Texas considered whether the defendant’s assertion of counterclaims in the litigation constituted an implied waiver of sovereign immunity.⁵⁷ Although the court acknowledged that some courts have recognized an implicit waiver where a foreign state initiates suit in a U.S. court,⁵⁸ it concluded that defendant’s counterclaims did not constitute an implicit waiver of sovereign immunity under § 1605(a)(1).⁵⁹ The court reasoned that “it appears that no U.S. court has ever found that the mere assertion of counterclaims is an implicit waiver of sovereign immunity.”⁶⁰ The court also noted a split among the circuits as to whether a sovereign’s affirmative use of U.S. courts necessarily should be deemed an implied waiver of immunity.⁶¹

B. Commercial Activity – § 1605(a)(2)

With the increased globalization of business and involvement of governments in commercial affairs, the “commercial activity” exception of the FSIA continues to be a frequently invoked basis for U.S. courts to exercise jurisdiction over foreign sovereigns. This exception to foreign sovereign immunity provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case:

in which 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 States⁶²

In 2010, courts addressed the commercial activity exception across a wide array of subject matters – from general contract liability to employment cases to insurance matters, and even to successor liability cases involving countries that no longer exist. In each of these cases, the courts continued to provide guidance to sovereign entities and legal practitioners regarding the scope of the exception and how it may be applied in the future.

⁵⁷ *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, 720 F. Supp. 2d 800, 803 (W.D. Tex. 2010).

⁵⁸ *Id.* (citing *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1206 (9th Cir. 2003) (“[A] foreign country’s use of United States courts can be sufficient to trigger a § 1605(a)(1) implied waiver under *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992).”).

⁵⁹ *Id.*

⁶⁰ *Id.* (citing *Cabiri v. Gov't of Republic of Ghana*, 165 F.3d 193, 202 (2d Cir. 1999) (“The implicit theory of *Siderman* is new and dubious, and seems to be that a foreign state forfeits immunity with respect to matters related to a scheme of persecution if it advances that scheme by bringing suit in the United States.”)).

⁶¹ *Id.*

⁶² 28 U.S.C. § 1605(a)(2).

1. Which Acts Are Considered Commercial?

In distinguishing between commercial and sovereign acts, the FSIA expressly requires that acts be defined by their nature, not their purpose.⁶³ For example, the act of leasing a motor vehicle may be “commercial” in nature, and therefore fall within the exception, even if the vehicle is leased by a foreign mission to the United Nations, for the seemingly “sovereign” purpose of official mission business.⁶⁴ This is because the *nature* of the act – leasing a car – is commercial, even though in this particular instance, the act is being performed to promote a political or “governmental” purpose.

In distinguishing between commercial and sovereign acts, courts in 2010 continued to look to the standard established by the Supreme Court in *Saudi Arabia v. Nelson* – *i.e.*, that the commercial activity exception should apply “when a state exercises only those powers that can also be exercised by private citizens as distinct from those powers peculiar to sovereigns.”⁶⁵ A review of some of the key areas in which the courts addressed the exception in 2010 are set forth below:

a. General Contracting/Business Activity

While courts generally have held that the act of contracting for the purchase, sale, or lease of goods or services is presumptively commercial activity for purposes of the FSIA,⁶⁶ case law in 2010 continued to define the reaches of this notion.

Leasing Mission Vehicles for “Official Use” Only – Commercial: The court in *Ford Motor Co. v. Russian Federation*⁶⁷ asserted jurisdiction over Russia’s Mission to the United Nations in a suit involving the Mission’s fleet of leased vehicles. The Russian Mission had entered into an agreement with Ford as part of Ford’s “Diplomatic Lease Program” pursuant to which the Mission had agreed to indemnify the carmaker against any losses caused by the leased vehicles. When a passenger sued Ford for injuries she had sustained while riding in one of the vehicles, Ford settled with the injured passenger and then sought indemnification from the Russian Federation. The Russian Mission argued that its leasing of the vehicles was sovereign activity because the lease program was aimed solely at sovereigns and diplomats, and the Mission’s use of the vehicles was limited to “official business” by a “designated employee or principal of the Embassy or Mission and while conducting business of the Embassy or Mission.”⁶⁸

⁶³ See 28 U.S.C. § 1603(d).

⁶⁴ See *Ford Motor Co. v. Russian Federation*, No. 09 Civ. 1646(JGK), 2010 WL 2010867 (S.D.N.Y. May 18, 2010).

⁶⁵ See *id.*, at *3 (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993)); see also *Swarna v. Al-Awadi*, 622 F.3d 123, 147 (2d Cir. 2010).

⁶⁶ See, e.g., *In re Potash Antitrust Litigation*, 686 F. Supp. 2d 816, 823 (N.D. Ill. 2010).

⁶⁷ *Ford Motor Co.*, 2010 WL 2010867.

⁶⁸ *Id.* at *2.

Looking to the nature of the activity (leasing vehicles) rather than its purpose (providing transportation for a diplomatic mission), the court held that the lease agreement constituted commercial activity for purposes of the FSIA. Reasoning that the lease of vehicles for official use does not require the exercise of any sovereign powers and that the terms of the lease did not suggest that the lease was uniquely designed for a sovereign customer, the court concluded: “Nothing distinguishes the lease agreement between Ford and the Russian Mission from a private executive lease program except that the Russian Mission happens to be a sovereign.”⁶⁹ Indeed, the court noted, the terms of the lease were identical to those Ford offered to private customers.⁷⁰

Export of Potash – Non-Commercial: *In re Potash Antitrust Litigation* provides a helpful example of the distinction between closely related commercial and sovereign activity.⁷¹ This case involved a series of class actions brought by purchasers of potash products⁷² in the United States alleging, in part, that Belaruskali, a company owned and established by the Government of Belarus to explore, develop, and trade potash, had engaged in price-fixing in violation of the Sherman Antitrust Act and various state laws. The plaintiffs alleged specifically that Belaruskali had artificially increased global potash prices by cutting exports by 50% in January 2006. The court noted that while Belaruskali’s *sales* of potash arguably constituted commercial activity, the plaintiffs’ allegations were not based on those sales, but rather on Belaruskali’s political decision to reduce its potash *exportation*, a uniquely sovereign function.⁷³ Thus, the court concluded it lacked jurisdiction over Belaruskali and dismissed it from the case.

Proposed Joint Venture – Commercial: In *Farhang v. Indian Inst. of Tech.*,⁷⁴ the court considered whether a sovereign entity could be deemed to have engaged in “commercial” activity when it entered into an agreement to form a joint venture but never completed the deal. The sovereign entity – the Indian Institute of Technology (IIT) – argued that it had not engaged in commercial activity with its proposed business partner (a U.S. technology company) because it “expressly extricated itself from the proposed joint venture.” IIT argued further that the plaintiff “continued to engage in discussions with IIT knowing full-well that [it] was incapable of forming a joint venture with anyone.”⁷⁵ The court concluded that even “[e]ngaging in preparatory discussions to set the groundwork for the formation of a joint venture” may be commercial activity as it is activity “which private persons ordinarily perform and is not ‘peculiarly within the realm of governments.’”⁷⁶ The court noted that even if the defendant had never intended to form a joint venture and was merely misleading the plaintiff to gain access to

⁶⁹ *Id.*

⁷⁰ *Id.* at *4.

⁷¹ *In re Potash Antitrust Litigation*, 686 F. Supp. 2d 816 (N.D. Ill. 2010).

⁷² Potash is a compound containing potassium and is used chiefly in fertilizers.

⁷³ *In re Potash*, 686 F. Supp. 2d at 822.

⁷⁴ *Farhang v. Indian Inst. of Tech.*, No. C-08-02658, 2010 WL 519815 (N.D. Cal. Jan. 26, 2010).

⁷⁵ *Id.* at *7.

⁷⁶ *Id.*

his technology, the *discussions* still could be commercial in nature “since making fraudulent representations to gain access to confidential information is also an activity which private persons ordinarily perform and is not ‘peculiarly within the realm of governments.’”⁷⁷

b. Employment Actions

In a series of cases this year, courts grappled with the question of when a foreign sovereign’s employment-related actions constitute commercial activity – with differing results.

Employment of Civil Service Mission Employee – Non-Commercial: In *Hijazi v. Permanent Mission of Saudi Arabia to the United Nations*,⁷⁸ an employee sued the Saudi Mission for sexual harassment, discrimination based on gender and national origin, and unlawful retaliation. The parties raised an interesting jurisdictional debate on the proper focus of the inquiry, with the plaintiff arguing that the immunity question turned on the nature of *her duties* as an employee, and the Mission arguing that the question turned on nature of the *employer’s actions* in question. Unfortunately, the court found no need to address the broader question, holding that under either analysis, the Mission had engaged in sovereign activity.

In reaching its conclusion, the court noted that the plaintiff’s responsibilities included attending and taking notes at diplomatic meetings, conducting research, writing memoranda, and, “on one occasion, speaking on behalf of the Mission.”⁷⁹ The court found that these duties were thus “in service of the Mission’s governmental function.”⁸⁰ With respect to the defendant’s activities, the court concluded that those, as well, were clearly governmental rather than commercial in nature.⁸¹ Thus, the court held that the plaintiff’s employment was sovereign in nature, and that the court lacked jurisdiction over the Mission.

Employment of Non-Civil Service Mission Employee – Commercial: In *Lian Ming Lee v. Taipei Economic and Cultural Representative Office*,⁸² an employee of Taiwan’s Economic and Cultural Representative Office (TECRO), sued for age discrimination in the Southern District of Texas. The court applied a two-stage analysis articulated by the D.C. Circuit in *El Hadad v. United Arab Emirates*,⁸³ asking first whether the employee was a “civil servant,” and, if not, asking further whether the civil servant’s job responsibilities were commercial or sovereign.⁸⁴ The court determined that the plaintiff was not a civil servant, but rather a staff

⁷⁷ *Id.*

⁷⁸ *Hijazi v. Permanent Mission of Saudi Arabia to the United Nations*, No. 10-0904-cv, 2010 WL 5174946 (2d Cir. Dec. 22, 2010).

⁷⁹ *Id.* at *1.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Lian Ming Lee v. Taipei Economic & Cult’l Rep. Office*, No. 4:09-cv-0024, 2010 WL 786612 (S.D. Tex. Mar. 5, 2010).

⁸³ *El Hadad v. United Arab Emirates*, 469 F.3d 658 (D.C. Cir. 2007).

⁸⁴ *Lian Ming Lee*, 2010 WL 786612, at *5.

laborer, after looking to such factors such as how TECRO classified the plaintiff's job, whether the plaintiff had to take competitive exams to apply for the job, and whether TECRO had to receive approval from Taiwan's Ministry of Foreign Affairs in order to hire the plaintiff.⁸⁵ In the second stage of the inquiry, the court concluded that the plaintiff's job activities were primarily commercial, rather than sovereign, in nature. Thus, the court held that TECRO had engaged in a commercial activity through its employment relationship with the plaintiff, and was not immune from suit arising from that relationship.

In *Shih v. Taipei Economic and Cultural Representative Office*,⁸⁶ three other employees sued TECRO for age discrimination, this time in the Northern District of Illinois. Here, the court did not inquire into whether the employees were "civil servants." Rather the court focused on the actions of TECRO, finding them to be sufficiently similar to acts that might be performed by a commercial employer. The court observed that "[m]aking decisions about what tasks employees perform, how much they are paid, or how they are treated in the workplace does not implicate concerns 'peculiar to sovereigns.' These are decisions that parties in the private sector make every day."⁸⁷ The court also noted that none of the three employees in their day-to-day work were privy to confidential documents or engaged in policy-making decisions.⁸⁸

c. Provision of Health Insurance

Contracting for Administration of Embassy Health Insurance Program – Commercial:
In *Embassy of the Arab Republic v. Lasheen*,⁸⁹ the Ninth Circuit held that the Egyptian Government engaged in commercial activity when it contracted with an American company to administer the Embassy's health benefits plan and agreed to indemnify the American company. The Egyptian Embassy had a practice of extending health insurance coverage to visiting Egyptian scholars in the United States. When one such scholar was denied coverage under the program and died, his estate sued the American health insurer for ERISA violations. The health insurer, in turn, sought indemnification from the Egyptian Government. The court held that, "[b]y contracting with a company to manage a health benefits plan and agreeing to indemnify that company, the Egyptian Defendants did not act with the powers peculiar to a sovereign, but instead acted as private players in the market."⁹⁰

In its decision, the court did not answer the question whether the purchasing of health insurance was "incidental" to the sovereign act of sponsoring the educational program, because under the FSIA, it is the *nature* of the act, in this case, contracting for health insurance, rather than its *purpose*, which determines its commercial character.⁹¹ Still, it is worth noting that the

⁸⁵ *Id.*

⁸⁶ *Shih v. Taipei Economic and Cultural Representative Office*, 693 F. Supp. 2d 805 (N.D. Ill. 2010).

⁸⁷ *Id.* at 811.

⁸⁸ *Id.* at 807-08.

⁸⁹ *Embassy of the Arab Republic v. Lasheen*, 603 F.3d 1169, 1171 (9th Cir. 2010).

⁹⁰ *Id.*

⁹¹ *Id.*

lower court had suggested that, if forced to confront the issue, it would have held that “the provision of health benefits in the United States under an ERISA insurance framework constitutes commercial activity.”⁹²

Supervision of National Health Insurance Program Employees – Non-Commercial: In *Anglo-Iberia Underwriting Management Company v. P.T. Jamsostek (Persero)*,⁹³ the defendant was an Indonesian state-owned insurer sued for negligent supervision of its employees who allegedly perpetrated a fraud scheme in connection with the company’s provision of health insurance in Indonesia. When faced with the question of whether the court had jurisdiction over the Indonesian company, the court concluded that (1) the company was a default health insurer under Indonesia’s national social security program, (2) the company’s provision of health insurance was part of the administration of Indonesia’s national health insurance program, and (3) actions in connection with the company’s administration of health insurance were sovereign in nature.⁹⁴ The court held that the company’s hiring, supervision, and employment of its agents was thus “directly concerned with employment in the provision of a governmental program” and is therefore, by *nature*, non-commercial.⁹⁵

2. Which Acts Create a Sufficient Nexus with the United States?

Once an act has been deemed “commercial” under the FSIA, it also must be shown to have a sufficient nexus with the United States to fall within the commercial activity exception. A nexus can be established in one of three ways: (1) the foreign sovereign conducts a commercial act in the U.S.; (2) the sovereign conducts an act in the U.S. in connection with commercial activity abroad; or (3) the sovereign acts *outside* of the U.S. in connection with the sovereign’s commercial activity but causes a “direct effect” in the United States.⁹⁶

Acts in the U.S. by Foreign States. The first clause of the exception permits jurisdiction over commercial acts carried out in the United States by foreign states. Because “a sovereign [state] cannot act except through individuals,”⁹⁷ whether the exception applies on this basis often turns on agency principles – *i.e.*, whether the sovereign can be bound by the acts of its agents in the U.S. In general, courts have responded that apparent authority is insufficient to bind sovereigns but that actual authority may do so.⁹⁸

⁹² *Lasheen v. Loomis Co.*, No. Civ. S-01-227 LKK/PAN, 2010 WL 3448601, at *2 n.3 (E.D. Cal. Sept. 1, 2010).

⁹³ *Anglo-Iberia Underwriting Management Company v. P.T. Jamsostek (Persero)*, 600 F.3d 171 (2d Cir. 2010).

⁹⁴ *Id.* at 177-78.

⁹⁵ The court further stated, in *dicta*, that even if the act of administering the national health insurance program were commercial and not sovereign, the alleged fraud scheme perpetrated by company employees was not sufficiently “in connection” with the agency’s business of providing health insurance to warrant jurisdiction under the FSIA. For a discussion of the “in connection with” requirement, see discussion *infra*.

⁹⁶ 28 U.S.C. § 1605(a)(2).

⁹⁷ See *Swarna v. Al Awadi*, 607 F. Supp. 2d 509, 518 (S.D.N.Y. 2009) (quoting *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008) (internal quotations omitted)), *aff’d in part*, 622 F.3d 123 (2d Cir. 2010).

⁹⁸ See *Republic of Benin v. Mezei*, No. 06 Civ. 870(JGK), 2010 WL 3564270, at *6 (S.D.N.Y. Sept. 9, 2010).

Acts in the U.S. in Connection with Commercial Activity Abroad. The second clause provides for jurisdiction where the foreign sovereign performs acts in the United States in connection with commercial activity abroad. As with the first clause, for the exception to apply, the acts in the United States must be not only “in connection with” the commercial activity of the foreign state, but also must be sufficient to form the basis of the suit itself.

Acts Outside the U.S. that Cause a “Direct Effect” in the U.S. The third clause grants U.S. courts jurisdiction over acts that occur *outside* the United States, but which cause a “direct effect” *in* the United States. Because Congress provided no guidance as to what constitutes a “direct effect” in the United States, this clause tends to generate substantial litigation regarding which acts and effects are sufficient, and how “direct” the effects must be to demonstrate a sufficient jurisdictional nexus.

Two principles provide a starting point for analysis under the “direct effects” prong: (1) mere financial loss to an American individual or corporation without more is insufficient to establish the nexus;⁹⁹ however, (2) the nexus may be established when the funds at issue were to be paid within the U.S.¹⁰⁰ In 2010, courts continued to define the reaches of these principles.

Breach of Contract in Connection with Proposed Joint Venture. In *Farhang v. Indian Inst. of Tech.*,¹⁰¹ referenced above, the plaintiff successfully argued that jurisdiction over the state-owned research institute was appropriate. Finding that the defendant had failed to live up to its promise to participate in the joint venture, the court held that this act was “in connection” with a commercial activity and had a “direct effect” inside the United States. The court found that “[a] ‘direct effect’ under the FSIA is present when money that was to be paid to a location in the United States is not forthcoming as a consequence of the extraterritorial act.” Since the U.S. plaintiff was to be paid 72% of the profits under the contemplated joint venture agreement, the sovereign entity’s alleged breach of various ancillary agreements that led to the scuttling of the joint venture produced such a “direct effect” in the United States.¹⁰²

Loss to U.S. Shareholder Resulting from Conduct Abroad. In *Gosain v. State Bank of India*,¹⁰³ the plaintiff, an American individual who was the majority shareholder in an Indian company, sued the State Bank of India for fraud arising from the company’s liquidation auction. The plaintiff argued that his losses as a shareholder suffered in the United States were a direct effect of the Bank’s tortious commercial activity in India. The court disagreed, reaffirming that mere financial loss felt in the United States is insufficient to satisfy the “direct effect” prong of the commercial activity exception. The court also focused on evidence in the record that demonstrated that any proceeds of the sale of plaintiff’s shares were to be deposited *first* in an Indian bank account and only then remitted to the plaintiff’s U.S. bank account upon compliance

⁹⁹ *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 78 (2d. Cir. 2010).

¹⁰⁰ *Farhang v. Indian Inst. of Tech.*, No. C-08-02658 RMW, 2010 WL 519815, at *8 (N.D. Cal. Jan. 26, 2010).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Gosain v. State Bank of India*, 689 F. Supp. 2d 571 (S.D.N.Y. 2010).

with Indian regulations. Thus, the immediate (or direct) consequence of the alleged fraud was financial loss suffered by the plaintiff in India, and any corresponding loss in the United States would be an indirect effect of the Bank's actions.¹⁰⁴

Failure of Foreign Insurer to Reimburse for Claim Paid. In *State Farm Mut. Auto. Ins. Co. v. Ins. Corp. of British Columbia*,¹⁰⁵ State Farm insured the victim of a car accident, while the state-owned defendant (ICBC) insured the negligent driver. After State Farm paid out for personal injury coverage to the victim, it sought reimbursement from ICBC. When the defendant failed to pay, State Farm sued. The court found that ICBC's *issuance of the insurance policy* to its client was an act occurring outside of the United States taken in connection with a commercial activity; however, it concluded that State Farm's financial injury – *i.e.*, loss of monies paid to *its* insured without reimbursement from ICBC – was not a direct effect of ICBC's commercial relationship with the driver. Absent any contract between State Farm and ICBC, it could not invoke the FSIA to sue ICBC for reimbursement.

Collection on Bond in U.S. In *DRFP LLC v. Republica Bolivariana de Venezuela*,¹⁰⁶ an Ohio company holding two promissory notes allegedly issued by the Government of Venezuela sued to collect on the notes after unsuccessfully demanding payment from the defendant in Ohio. Venezuela argued that, as the terms of the notes did not explicitly state that the notes could be collected in the United States, Venezuela's refusal to pay was not an action causing a direct effect in the United States. The court rejected that argument, concluding that the notes did not need to identify the U.S. explicitly as a place of collection because the notes stated that the bearer could sue for collection in the jurisdiction of his or her choice. Thus, the court concluded that the plaintiff could rightly demand that payment be made in the United States, and the defendants' refusal to honor that demand was therefore an act that caused a direct effect in the United States.

Refusal to Pay Reward for Information Leading to Arrest. In *Guevara v. Republic of Peru*,¹⁰⁷ the Eleventh Circuit considered a reward offered by the Government of Peru for information leading to the arrest of a high-profile fugitive. The plaintiff informant argued that he had provided the information while in the United States, and that therefore when the Government of Peru declined to pay him the reward, it breached its "contract" with him. Although the court held that Peru's offer of a reward constituted commercial activity, it found that Peru's actions did not bear a sufficient nexus with the United States.

The court analyzed Peru's actions under all three prongs of the commercial nexus test. First, since the announcement of the reward (the "offer"), the decision not to pay the reward (the "breach"), and the payment of the reward (the "performance") all either took place or would

¹⁰⁴ *Id.* at 581.

¹⁰⁵ *State Farm Mut. Auto. Ins. Co. v. Ins. Corp. of British Columbia*, CV-09-762-ST, 2010 WL 331786 (D. Or. Jan. 25, 2010).

¹⁰⁶ *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010).

¹⁰⁷ *Guevara v. Republic of Peru*, 608 F.3d 1297 (11th Cir. 2010).

have taken place in Peru,¹⁰⁸ the court found that the Government of Peru engaged in no commercial acts within the United States under the first prong.¹⁰⁹ Under the second prong, it found that the only act arguably taken by Peru in the U.S. “in connection with” commercial activity elsewhere was a phone call made by Peru’s Minister of the Interior to an FBI agent, in which the official reiterated the terms of the reward offer to the FBI agent so that he could relay them to the informant. The court declined to find a nexus based on such *de minimis* activity in the United States.¹¹⁰ Finally, under the third prong, the court found that a single phone call from a foreign official – even though it may have induced “acceptance” by the informant in the United States – was insufficient to cause a “direct effect” in the United States.¹¹¹ It therefore concluded that there was no basis for jurisdiction under the FSIA.

3. Successor Liability

Finally, the Second Circuit in 2010 considered the immunity of a “successor” sovereign entity under the FSIA. In *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*,¹¹² the plaintiff sued Germany to recover the outstanding principal and interest on bonds issued by banks within the former state of Prussia. The court concluded that the conduct forming the basis of the action was the assumption of liability for the bonds by the former West Germany. Because West Germany had taken affirmative acts to assume liability for the Prussian bonds, the Second Circuit found this sufficient to satisfy the requirement of a commercial “act” for purposes of subjecting Germany (the successor entity) to the jurisdiction of the court. In an interesting twist, the court reached the opposite conclusion with respect to bonds issued from a part of Prussia that had become *East* Germany because *that* former state had not affirmatively assumed liability for the bonds. The court rejected an “automatic assumption” theory for these bonds, finding that “[t]he state performs no action when it automatically assumes liability.”¹¹³

C. Takings – § 1605(a)(3)

Because the “takings exception” is one of the lesser-used exceptions in the Act, few cases elaborate on the conditions that must be met for the exception to apply. The year 2010 produced only a handful of cases in this area of the law, only one of which dealt with the exception in any detail, and even that case broke little new ground.

The takings exception of the FSIA gives a court jurisdiction over a foreign sovereign in any case:

¹⁰⁸ Under the terms of the offer, payment would be administered by a Peruvian governmental entity, and the payment would be “made in Peru from funds the Peruvian government had placed in escrow in a Peruvian bank.” *Id.* at 1308.

¹⁰⁹ *Id.* at 1307.

¹¹⁰ *Id.* at 1308.

¹¹¹ *Id.* at 1308-09.

¹¹² *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 106-12 (2d Cir. 2010).

¹¹³ *Id.*

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.¹¹⁴

In other words, a plaintiff seeking to establish jurisdiction under this exception must show that (1) the property taken in violation of international law is present in the United States in connection with a commercial activity undertaken by the defendant sovereign state; or (2) where the property is *not* physically present in the United States, the property must be owned by a foreign state's agency or instrumentality, *and* the owner must be engaged in commercial activity within the United States.

Sufficiency of the Complaint. In 2010, two cases, one from the Eastern District of New York¹¹⁵ and the other from the U.S. Court of Appeals for the Second Circuit,¹¹⁶ focused on the sufficiency of pleadings by plaintiffs attempting to gain jurisdiction through the use of the takings exception. In each case, the court dismissed the complaint for failure to allege essential facts necessary for the exception to apply. In *Zapolski v. Federal Republic of Germany*, the plaintiff failed to allege that the property was present in the United States, and made no allegation about the ownership of the property.¹¹⁷ Similarly, in *Freund v. Société Nationale Des Chemins De Fer Français*, the Second Circuit affirmed the lower court's holding that the plaintiffs had failed to allege facts sufficient to satisfy either of the takings clause's tests for an exception to immunity to apply.¹¹⁸ Moreover, plaintiffs demonstrated affirmatively through their pleadings that the exception did *not* apply, by alleging that the property was both outside the United States and not currently owned by the specific instrumentality that was party to the appeal. Neither case broke any new doctrinal ground, but each serves as a reminder that a well-pleaded complaint is key for establishing subject matter jurisdiction under the FSIA.¹¹⁹ Courts may

¹¹⁴ 28 U.S.C. § 1605(a)(3).

¹¹⁵ *Zapolski v. Federal Republic of Germany*, No. 09-cv-1503(BMC), 2010 WL 1816327 (E.D.N.Y. May 4, 2010) (dismissing complaint *sua sponte* for lack of subject matter jurisdiction).

¹¹⁶ *Freund v. Société Nationale Des Chemins De Fer Français*, No. 09-cv-0318, 2010 WL 3516220 (2d Cir. Sept. 7, 2010). Note that the plaintiffs in *Freund* challenged the dismissal of the case as to only one of the defendants, the French National Railway.

¹¹⁷ *Zapolski*, 2010 WL 1816327, at *2.

¹¹⁸ *Freund*, 2010 WL 3516220, at *1.

¹¹⁹ Indeed, if a plaintiff develops each element adequately in the pleadings, it may be positioned to move for a default judgment if the defendant state fails to participate in the proceeding. This occurred in *Agudas Chasidei Chabad of United States v. Russian Federation*, where the district court reaffirmed its 2008 holding as to the applicability of the takings exception and held that the plaintiffs carried their burden of establishing a *prima facie* case for the entry of a default judgment. 729 F. Supp. 2d 141 (D.D.C. 2010). The court relied in large part on the plaintiffs' uncontested allegations and also the court's previous holding that the FSIA's takings exception provided jurisdiction over the complaint, a holding subsequently affirmed by the D.C. Circuit.

sua sponte dismiss a complaint that fails to adequately allege necessary jurisdictional facts. And beyond that, a defendant need only present a *prima facie* case that it is a foreign sovereign (or the agency or instrumentality of one) to be entitled to immunity, after which it becomes the burden of the plaintiff to establish facts sufficient to show that an exception applies.¹²⁰

The Identity of the Taker and the Level of Commercial Activity Required. Only the Ninth Circuit had occasion this past year to consider some of the more complex issues that arise in FSIA takings exception cases. In *Cassirer v. Kingdom of Spain*,¹²¹ the Court of Appeals for the Ninth Circuit reheard *en banc* a challenge to the district court’s denial of the defendants’ – the Kingdom of Spain and its instrumentality, the Thyssen-Bornemisza Collection Foundation – motions to dismiss. The property at issue in *Cassirer* was a valuable painting that had allegedly been taken from its Jewish owner in violation of international law by German agents in 1939. Through a subsequent series of commercial transactions, the painting ultimately became the property of the Kingdom of Spain, and it was displayed in Spain’s Thyssen-Bornemisza Museum in Madrid, where it was eventually discovered by the heir of the original owner.

In its decision following the rehearing, the Ninth Circuit largely repeated its 2009 analysis, holding that the foreign state being sued need not be the actor who originally performed the taking¹²² and that the commercial activity undertaken by the defendant need not be undertaken for profit – only that “the actions are ‘the type of actions by which a private party engages in trade and traffic or commerce.’”¹²³ The *en banc* court elaborated on this holding, rejecting the Foundation’s arguments that the commercial activities upon which jurisdiction is based need to rise above a *de minimis* level and, moreover, have some nexus to the property at issue. The court drew a sharp distinction between the test for the “commercial activity” needed for the takings exception to apply in § 1605(a)(3) and that more commonly used to support jurisdiction under § 1605(a)(2) – the “commercial activity exception” of the FSIA.¹²⁴ Finding no evidence of congressional intent to require either a certain level of commercial activity or that it be related specifically to the property taken, the court affirmed the district court’s ruling that the defendants were not immune from suit.

No Exhaustion Requirement. The *en banc* court in *Cassirer* did make one significant departure from its 2009 decision when it held that there is no exhaustion requirement in the

¹²⁰ As a further note of caution, the court in *Freund* found it did not even need to conduct a burden-shifting analysis (as the district court had done) to determine whether the exception applied, because the complaint’s plain language alleged that the property was *not* in the possession of the defendant, making the takings exception inapplicable on the face of the complaint. *Freund*, 2010 WL 3516220, at *1.

¹²¹ 616 F.3d 1019 (9th Cir. 2010).

¹²² In the *en banc* decision, Judge Gould, joined by Judge Kozinski, lodged a strong dissent to this primary holding of the court. In their dissenting view, the judges found that statutory interpretation along with principles of international law and comity all militated against stripping Spain and the Foundation of their sovereign immunity. *Id.* at 1038 (Gould, J. dissenting).

¹²³ *Id.* at 1032 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

¹²⁴ *Cassirer*, 616 F.3d at 1033 (“The difference between the two exceptions shows that Congress knew how to draw upon traditional notions of personal jurisdiction when it wanted to, and did.”).

FSIA. The defendants in *Cassirer* argued to the district court that because the plaintiff had failed to seek any remedies overseas before bringing suit in the United States, the court was without jurisdiction to hear the case. In 2009, the Ninth Circuit panel held that, while the FSIA did not *mandate* exhaustion of remedies in other fora, the district court erred by not considering prudential exhaustion principles, and it remanded the case for such consideration.¹²⁵

On rehearing, the *en banc* court affirmed the district court's holding – exhaustion of remedies is not a requirement for jurisdiction under the FSIA – and retreated from its earlier pronouncement on prudential exhaustion. The court held that while prudential exhaustion principles may be appropriate for claims brought under the Alien Tort Statute, the FSIA is different in that it is a *jurisdictional* statute. “Unlike statutory exhaustion, which, if clearly imposed by Congress, is mandatory and may also be jurisdictional . . . prudential exhaustion is not a prerequisite to the exercise of jurisdiction, but rather is one among related doctrines . . . that govern the timing of federal-court decisionmaking.”¹²⁶ Because the district court considered only the matter of its jurisdiction, the Ninth Circuit held it could go no further to consider whether a judicially-imposed exhaustion requirement might apply. For the time being, the takings exception, lacking any explicit exhaustion doctrine language, remains free of any such requirement.

D. Non-Commercial Torts – § 1605(a)(5)

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

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[.]¹²⁷

When determining whether an alleged action constitutes a tort, courts generally apply the substantive law of the state in which the act took place.¹²⁸

The Act provides for two circumstances where a state actor may retain its immunity in a situation where the exception might otherwise apply. First, the exception will not apply in cases where the plaintiff's claim is based on the exercise or performance of (or failure to perform) a

¹²⁵ *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1062-63 (9th Cir. 2009), *reh'g en banc granted*, 590 F.3d 981 (9th Cir. 2009).

¹²⁶ *Cassirer*, 616 F.3d at 1037 (internal quotation marks omitted) (quoting *Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 828 (9th Cir. 2008)).

¹²⁷ 28 U.S.C. § 1605(a)(5).

¹²⁸ *Swarna v. Al-Awadi*, 622 F.3d 123, 144 (2d Cir. 2010) (citing *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 142 & n.11 (2d Cir. 2001)).

“discretionary function.”¹²⁹ In this vein, courts often rely on case law developed under the Federal Tort Claims Act’s (FTCA) discretionary function doctrine, in part because the legislative history indicates Congress’s intent for the courts to do so.¹³⁰ Second, the exception does not apply to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights.¹³¹

In 2010, there were no significant new developments interpreting this section of the FSIA. Instead, courts continued to apply the exception, with predictable results, to a variety of fact patterns. In *Swarna v. Al-Awadi*,¹³² the Second Circuit affirmed the district court’s decision denying the plaintiff a default judgment against the State of Kuwait on the basis of sovereign immunity. The plaintiff in the case was a servant employed in the United States by a Kuwaiti diplomat who allegedly abused, raped, and held her against her will during the four years she was “employed” by the diplomat. She first argued that the FSIA created jurisdiction over the State of Kuwait through the actions of its employee (the diplomat), but the Second Circuit rejected this argument. Because rape and torture of household employees were clearly outside the scope of the diplomat’s employment and “not related to the furtherance of Kuwait’s purposes in the United States,”¹³³ the diplomat’s abusive actions for his own “personal motives” would not be imputed to Kuwait.

The plaintiff also alleged that various Kuwaiti Permanent Mission employees were complicit in the diplomat’s abuse – by translating personal correspondence of hers to give to the diplomat, providing an escort for the plaintiff on trips outside the house to ensure she could not run away, and holding her passport securely at the Mission outside of her control. The plaintiff also claimed that the Mission’s failure to monitor the actions of its diplomats constituted an independent tort of the state that should suffice to justify application of the exception. The Second Circuit again disagreed. Looking to the “discretionary function” jurisprudence under the FTCA, the court found that any failure to monitor diplomatic employees by a state would be a “systemic failure that occurred at the planning level of government”¹³⁴ and, thus, would be protected activity. Further, relying on New York tort law, the Second Circuit found that the plaintiff did not plead adequately the actions of the other Mission employees to support a finding of intentionally tortious behavior.

In contrast, one district court in the same circuit held that a foreign state’s failure to properly construct one of its embassy’s walls in accordance with New York’s building and safety

¹²⁹ 28 U.S.C. § 1605(a)(5)(A).

¹³⁰ See, e.g., *Doe v. Holy See*, 557 F.3d 1066, 1083 (9th Cir. 2009); *O’Bryan v. Holy See*, 556 F.3d 361, 383-84 (6th Cir. 2009).

¹³¹ 28 U.S.C. § 1605(a)(5)(B).

¹³² 622 F.3d 123 (2d Cir. 2010).

¹³³ *Id.* at 145.

¹³⁴ *Swarna*, 622 F.3d at 146.

code was *not* a protected discretionary function.¹³⁵ Therefore, the court found that the resulting injuries to the plaintiff caused by the wall’s collapse were likely the type of injuries that Congress intended to cover with this exception.¹³⁶ Taken together, these two cases demonstrate that courts are willing to use this exception for the protection of injured plaintiffs when foreign states act as any other domestic tortfeasor, but are reluctant to interfere with policy-related (or discretionary) actions of a state.

E. Arbitration – § 1605(a)(6)

U.S. courts have jurisdiction under the FSIA to enforce an agreement by a foreign state to arbitrate, or to confirm an award against it, in two cases: (1) where the arbitration took place or is intended to take place in the United States; or (2) where the agreement or award is governed by a treaty or other international agreement calling for the recognition and enforcement of arbitral awards.¹³⁷

One such treaty is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention¹³⁸ – a multilateral agreement that gave rise to claims in 2010 against Albania¹³⁹ and Nigeria¹⁴⁰ under the FSIA’s arbitration exception. However, one court in 2010 distinguished claims brought against a non-signatory to the Convention. In *Aurum Asset Managers, LLC v. Banco do Estado do Rio Grande do Sul*,¹⁴¹ the U.S. District Court for the Eastern District of Pennsylvania rejected an attempt to invoke the New York Convention “against a party that was under no obligation to participate in the arbitration [at issue].”¹⁴² The court found that the theories advanced by the plaintiff for binding non-signatories to arbitration agreements were inapplicable to the defendant, and therefore, the defendant could not be bound by an arbitration agreement it did not sign.¹⁴³

¹³⁵ *USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namibia*, No. 10-cv-4262(LTS), 2010 WL 4739945, at *3 (S.D.N.Y. Nov. 17, 2010) (foreign state “wrongly conflate[d] the decision to establish a permanent mission, which is discretionary, with ordinary determinations and obligations relating to building construction and maintenance, which do not implicate the political, social and public policy choices contemplated by the discretionary function exception”).

¹³⁶ *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-40 (1989) (“Congress’ primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state’s immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law.”) (citing H.R. Rep. at 14, 20-21; S. Rep. at 14, 20-21).

¹³⁷ 28 U.S.C. § 1605(a)(6).

¹³⁸ The New York Convention is codified domestically at 9 U.S.C. §§ 201 *et seq.*

¹³⁹ *See G.E. Transport S.P.A. v. Republic of Albania*, 693 F. Supp. 2d 132, 136 (D.D.C. 2010).

¹⁴⁰ *See Continental Transfert Technique Ltd. v. Federal Government of Nigeria*, 697 F. Supp. 2d 46, 56 (D.D.C. 2010).

¹⁴¹ *Aurum Asset Managers, LLC v. Banco do Estado do Rio Grande do Sul*, No. 08-102, 2010 WL 4027382 (E.D. Pa. Oct. 13, 2010).

¹⁴² *Id.* at *6.

¹⁴³ *Id.* at *5-6.

F. Terrorism – § 1605A, § 1605(a)(7), and Other Claims

In 2010, courts continued to address the amendments to the “terrorism exception,” enacted in 2008 as part of the National Defense Authorization Act for Fiscal Year 2008 (NDAA).¹⁴⁴ The amendments replaced § 1605(a)(7) of the FSIA with the new “terrorism exception,” codified at § 1605A. Under both provisions, foreign states designated by the U.S. Department of State as “state sponsors” of terrorism (and their agencies and instrumentalities) are stripped of sovereign immunity for certain terrorist acts as long as the state is designated as a “state sponsor of terrorism” either at the time of the terrorist act or at some later time as a result of the act which is the subject of the suit.¹⁴⁵ For a sovereign state’s conduct to fall within this exception, it must have participated in an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking” or provided “material support or resources for such an act.”¹⁴⁶ Plaintiffs also must allege causation and damages.¹⁴⁷ Among the most significant recent changes to the “terrorism exception,” the statute now (a) expressly provides plaintiffs with a federal statutory cause of action against state sponsors of terrorism,¹⁴⁸ and (b) allows plaintiffs to seek punitive damages against foreign sovereigns who are state sponsors of terrorism.¹⁴⁹

1. “Related Actions” Under § 1605A

A plaintiff may bring claims under § 1605A that are “related” to a prior action asserted under § 1605(a)(7) where the claims arise out of the same acts or incidents. *See* 28 U.S.C. § 1605A note. In 2010, courts continued to clarify the requirements for pleading § 1605A claims that are brought as “related actions.” In *Wyatt v. Syrian Arab Republic*,¹⁵⁰ Syria argued that the new complaint filed by plaintiffs asserting claims under § 1605A should be dismissed because the claims were identical and arose out of the acts that were the subject of pending claims in a related action brought by the same plaintiffs under § 1605(a)(7). The court denied the motion to dismiss plaintiff’s new complaint, finding that “[t]here is no statutory requirement that a related action be distinct from the prior [1605(a)(7)] action in any way.” The court, however, did suggest that the claims would need to be consolidated.¹⁵¹ In *Anderson v. Islamic Republic of Iran*, the court noted that it is sufficient, and in fact preferable, to amend a complaint originally brought

¹⁴⁴ Pub. L. No. 110-181, 122 Stat. 3.

¹⁴⁵ The list currently includes Cuba, Iran, Sudan, and Syria. Countries that were once on the list but have since been removed include Iraq, Afghanistan, North Korea, South Yemen, and Libya.

¹⁴⁶ 28 U.S.C. § 1605A(a)(1).

¹⁴⁷ *Id.* § 1605A(c).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ 736 F. Supp. 2d 106 (D.D.C. 2010).

¹⁵¹ *Id.* at 115.

under § 1605(a)(7) to state causes of action under § 1605A, rather than to file a separate related action.¹⁵²

Courts also addressed whether and to what extent the court may take judicial notice of findings of fact and conclusions of law issued in a prior related litigation. In *Rimkus v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia held that while, in general, a court may take judicial notice of findings of fact and conclusions of law, it was not appropriate simply to adopt those findings as the court's own. Rather, the court may rely on the evidence presented in earlier litigation – without the formality of having that evidence reproduced – to reach its own, independent findings of fact in the cases before it.¹⁵³

2. Damages

Compensatory Damages. Courts have assessed compensatory damages in § 1605A actions in the same manner as they did under § 1605(a)(7). For example, the U.S. District Court for the District of Columbia in *Kilburn v. Islamic Republic of Iran* found Iran liable for the 16-month hostage taking and subsequent murder by Hezbollah of university librarian Peter Kilburn in 1986.¹⁵⁴ In assessing compensatory damages, the court held that considering the small amount of information available concerning Kilburn's time as a hostage or his earning capacity, it was appropriate to apply predetermined damages figures routinely applied by courts in FSIA terrorism cases.¹⁵⁵ Thus, the court did not award any economic damages, but did award Kilburn's estate \$6,030,000 in pain and suffering damages: \$10,000 per day of captivity and \$1 million for the portion of his life facing certain death alone.¹⁵⁶ In addition, the court awarded the estate of Kilburn's brother \$5 million in damages for loss of solatium, the upper limit awarded in prior cases to siblings.¹⁵⁷

Generally speaking, other decisions in 2010 frequently adhered to the baseline awards adopted by courts in prior decisions, awarding \$5 million for plaintiffs suffering physical injuries and “lasting and severe psychological pain”; awarding \$8 million, \$5 million, and \$2.5 million for spouses, parents, and siblings of deceased victims respectively; and cutting this latter set of figures in half for family members of surviving victims who were physically injured in an

¹⁵² *Anderson v. Islamic Republic of Iran*, No. 08-cv-535 (RCL), 2010 WL 4871189, at *9 n.7 (D.D.C. Dec. 1, 2010).

¹⁵³ *Rimkus v. Islamic Republic of Iran*, No. 08-cv-1615 (RCL), 2010 WL 4628317, at *6 (D.D.C. Nov. 16, 2010); see also *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 81-82 (D.D.C. 2010).

¹⁵⁴ 699 F. Supp. 2d 136, 139 (D.D.C. 2010).

¹⁵⁵ *Id.* at 156.

¹⁵⁶ *Id.* at 156-57.

¹⁵⁷ *Id.* at 158.

attack.¹⁵⁸ However, some courts have departed both upward and downward from these baseline awards in cases depending on individual circumstances.¹⁵⁹

Use of Special Masters. Section 1605A specifically provides for the use of Special Masters to determine damages in terrorism-related actions.¹⁶⁰ Several courts have used Special Masters, including in the multiple cases arising out of the bombings in the 1980's of the U.S. Marine Barracks in Beirut, Lebanon.¹⁶¹ The courts in these cases generally have followed the recommendations of the appointed Special Masters.¹⁶²

Punitive Damages. As noted above, plaintiffs may pursue claims for punitive damages under § 1605A.¹⁶³ Yet, a question arises whether a plaintiff who was awarded compensatory damages against a foreign state under 28 U.S.C. § 1605(a)(7) (prior to the enactment of § 1605A) may file a new suit for punitive damages under § 1605A. The results have been mixed. In *Rimkus*, the court permitted claims for punitive damages under § 1605A to proceed after a judgment for compensatory damages had been awarded, finding that the plaintiff had pled facts necessary to establish a cause of action under § 1605A.¹⁶⁴ However, the court in *Anderson* reached a different conclusion, holding that it was improper to plead punitive damages as a separate cause of action.¹⁶⁵ Nonetheless, the court still allowed the plaintiffs to seek punitive damages under the claims set forth in other counts.

In determining the amount of a punitive damages award, courts typically “have imposed punitive damage [awards] of three times of a state sponsor’s annual budget for the export of terrorism.”¹⁶⁶ In *Calderon-Cardona v. Democratic People’s Republic of Korea*, the U.S. District Court for the District of Puerto Rico found North Korea liable for sponsoring a machine-gun attack at Israel’s Lod Airport in 1972 by the Japanese Red Army and the Popular Front for the

¹⁵⁸ See *Valore*, 700 F. Supp. 2d at 84-85; *Murphy*, 740 F. Supp. 2d at 79-81; cf. *Calderon-Cardona v. Democratic People’s Republic of Korea*, 723 F. Supp. 2d 444, 461 (D.P.R. 2010) (“Surviving victims of terrorist attacks are generally awarded between \$7 and \$15 million for their own pain and suffering.”).

¹⁵⁹ See *Valore*, 700 F. Supp. 2d at 85-87 (departing upward for “particularly horrendous physical injuries” and “particularly devastating” emotional suffering, and downward for victim with “lack of severe physical injuries” and family members with attenuated relationships); *Murphy*, 740 F. Supp. 2d at 79 (departing upward from \$5 million to \$7 million in light of “severity, number, and life-long deleterious effect” of injuries for victim who was “100% disabled”); *Calderon-Cardona*, 723 F. Supp. 2d at 482 (awarding \$15 million to estate of victim who witnessed the murder of several friends and whose marriage and relationship with his children suffered), 484 (awarding \$10 million to this victim’s wife, who herself became “permanently depressed and disabled”).

¹⁶⁰ See 28 U.S.C. § 1605A(e)(1).

¹⁶¹ See *Anderson*, 2010 WL 4871189, at *15-16 (ordering plaintiffs to submit a motion for the appointment of a special master).

¹⁶² See *Valore*, 700 F. Supp. 2d at 83; *Murphy*, 740 F. Supp. 2d at 76.

¹⁶³ See 28 U.S.C. § 1605A(c).

¹⁶⁴ *Rimkus*, 2010 WL 4628317, at *10.

¹⁶⁵ *Anderson*, 2010 WL 4871189, at *15.

¹⁶⁶ *Id.* at *1.

Liberation of Palestine.¹⁶⁷ The court assessed “the typical punitive damages award of \$300 million” awarded in prior cases (against Iran), where North Korea’s budget for the export of terrorism was not known.¹⁶⁸

Yet, in *Valore v. Islamic Republic of Iran*, the court applied an additional five-times multiplier, based on an expert’s suggestion that Iran recently had begun to participate more actively in litigation.¹⁶⁹ “In the hopes that Iran is paying more attention to the cases that have been brought against it,” the court sought to send “the strongest possible message” and “hold Iran to account.”¹⁷⁰

Finally, in *Murphy*, the court held that punitive damages may be awarded against a state sponsor of terrorism even though a punitive judgment award already had been issued against that state in favor of a different plaintiff victim for the same act or incident.¹⁷¹ The court reasoned that punitive damages are personal to plaintiffs in a given case, and thus may be awarded in a subsequent case involving different plaintiffs.¹⁷² The court assessed punitive damages according to the same ratio of “punitive-to-compensatory” damages as in *Valore*.¹⁷³

3. Libyan Claims Resolution Act

In 2008, the U.S. accepted a \$1.5 billion payment from Libya in resolution of all claims brought by victims of Libya-sponsored terrorism, and reinstated Libya’s sovereign immunity. The Libyan Claims Resolution Act (LCRA) thus divested courts of jurisdiction over these claims and authorized the State Department to designate procedures for providing fair compensation to the victim-plaintiffs.¹⁷⁴ In 2010, in *Certain Underwriters at Lloyds London v. Great Socialist People’s Libyan Arab Jamahiriya*, the court rejected plaintiffs’ pleas that it “retain jurisdiction over the case until it is clear that an alternate forum can provide relief for their claims.”¹⁷⁵ The plaintiffs in that case were providers of liability insurance for the hull of a plane that had been destroyed during the 1985 terrorist hijacking of an Egypt Air flight.¹⁷⁶ They included both United States and foreign entities,¹⁷⁷ the latter of which were ineligible to bring claims before the Foreign Claims Settlement Commission to which the State Department had referred claims

¹⁶⁷ *Id.* at *43.

¹⁶⁸ 723 F. Supp. 2d at 485.

¹⁶⁹ 700 F. Supp. 2d at 89.

¹⁷⁰ *Id.* (awarding \$1 billion in punitive damages, to “be apportioned among the plaintiffs in proportion to their relative compensatory-damages awards”).

¹⁷¹ 740 F. Supp. 2d at 81-82.

¹⁷² *Id.* at 81 (citing *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007)).

¹⁷³ *Id.* at 82.

¹⁷⁴ Pub. L. No. 110-301, 122 Stat. 2999 (2008).

¹⁷⁵ 677 F. Supp. 2d 270, 275 (D.D.C. 2010).

¹⁷⁶ *Id.* at 272.

¹⁷⁷ *Id.*

subject to the LCRA. The court held that it was stripped of jurisdiction over all claims against Libya without regard to the availability of an alternative forum.

4. Constitutional Challenges to § 1605A

Courts have continued to uphold the validity of the FSIA in the face of challenges by certain defendants subject to the terrorism exception. In 2010, Syria's continued attempts to challenge the constitutional validity of the FSIA were met with swift rejection, including one court's admonition that certain of the arguments were "utterly without merit" and "now flirt[ed] with frivolity."¹⁷⁸ Specifically, Syria argued unsuccessfully that the FSIA (1) violates Article 2 of the United Nations Charter, (2) violates Syria's due process rights under the Fifth Amendment, and (3) raises non-justiciable political questions.¹⁷⁹ The U.S. District Court for the District of Columbia, in two separate cases, found that the D.C. Circuit previously had rejected these arguments in holdings with respect to § 1605(a)(7), which now applied with equal force to § 1605A.¹⁸⁰

The courts also rejected Syria's argument that the FSIA violates the separation of powers doctrine because final judgments rendered under § 1605A are subject to rescission by Congress or the President.¹⁸¹ In *Wyatt v. Syrian Arab Republic*, the court found that the argument was misplaced, and more properly directed at the executive and legislative acts that would be impacting final judgments, rather than the law giving rise to those judgments.¹⁸² The court thus diverged from the reasoning that the court in *Gates v. Syrian Arab Republic* had used in rejecting the same attack against § 1605(a)(7).¹⁸³ The court in *Gates* had relied upon the D.C. Circuit's holding that the FSIA did not violate the separation of powers doctrine because "it was not an unconstitutional delegation of power for Congress to require the Secretary of State to designate foreign sovereigns as state sponsors of terrorism prior to permitting Article III courts to exercise their jurisdiction"¹⁸⁴ The *Wyatt* court found that holding to be inapposite because of the distinction between the non-delegation doctrine and separation of powers arguments with regard to the finality of judgments.¹⁸⁵

5. Choice of Law Issues

In reviewing state law claims asserted under § 1605(a)(7), courts must determine what law to apply. Typically, options are the *lex loci* (law of the situs of the injury), the law of the domicile of the plaintiff, or the law the forum. In *Estate of Botvin v. Islamic Republic of Iran*, a

¹⁷⁸ *Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2010 WL 4190277, at *2 (D.D.C. Oct. 20, 2010).

¹⁷⁹ *Id.* at *1-3; *Wyatt v. Syrian Arab Republic*, 736 F. Supp. 2d. 106, 113 & n.8 (D.D.C. 2010).

¹⁸⁰ *Wultz*, 2010 WL 4190277, at *1-3; *Wyatt*, 736 F. Supp. 2d at 113 & n.8.

¹⁸¹ *Wultz*, 2010 WL 4190277, at *2; *Wyatt*, 736 F. Supp. 2d at 113 & n.10.

¹⁸² 736 F. Supp. 2d at 113 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)).

¹⁸³ *Id.* at 113 & n.10 (citing *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 88 (D.D.C. 2009)).

¹⁸⁴ *Id.* at 113 & n.10 (citing *Owens v. Republic of Sudan*, 531 F.3d 884, 887-89 (D.C. Cir. 2008)).

¹⁸⁵ *Id.*

case in which plaintiffs elected to pursue their state law claims under § 1605(a)(7), the court held that, under D.C.’s choice of law rules, foreign law – and specifically Israeli law, rather than California law (the current domicile of the victim) – applied to the plaintiffs’ claims of wrongful death, survival, and intentional infliction of emotional distress.¹⁸⁶ The court reasoned that Israeli law applied because the decedent victim was domiciled in Israel at the time of the terrorist attack, the attack – a 1997 suicide bombing at a pedestrian mall – took place in Israel, and the attack was targeted at Israel, not the United States.¹⁸⁷ The court accordingly denied without prejudice the plaintiffs’ renewed motion for default judgment, granting them leave to file a brief demonstrating their entitlement to judgment under Israeli law.¹⁸⁸

IV. Enforcement of Awards Against Foreign Sovereigns

Overcoming a foreign state’s immunity against suit does not necessarily ensure a plaintiff’s ability to collect on a judgment against a foreign sovereign. Rather, the FSIA also grants immunity from attachment and execution.¹⁸⁹ Thus, unless the property to be attached *itself* falls within an exception under § 1610 – and a reasonable time has passed since entry of the judgment – it cannot be used in satisfaction of the judgment.¹⁹⁰ In 2010, courts addressed two of these enforcement exceptions: the commercial activity exception and the terrorism exception. In addition, the Ninth Circuit handed down an important procedural decision confirming a district court’s ability to raise immunity from attachment and execution *sua sponte*.

A. The Commercial Activity Exception to Immunity from Attachment

To qualify for immunity from attachment under the commercial activity exception, “the property that is subject to attachment and execution must be ‘property in the United States of the foreign state’ and must have been ‘used for a commercial activity’ at the time the writ of attachment or execution was issued.”¹⁹¹

The first of these requirements (that the property be located in the United States) was the subject of a significant decision in 2010 issued by the U.S. District Court for the Southern District of New York. At first blush, resolution of the issue would seem to be straightforward – the property is either located in the United States or it is not – however, in the case of intangible assets (as was the case in *Aurelius Capital Partners, LP v. Republic of Argentina*), the issue becomes more complicated. In that case, the court issued a pair of decisions dealing with

¹⁸⁶ 684 F. Supp. 2d 34.

¹⁸⁷ *Id.* at 41.

¹⁸⁸ *Id.* at 42.

¹⁸⁹ 28 U.S.C. § 1609.

¹⁹⁰ 28 U.S.C. § 1610.

¹⁹¹ *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009) (quoting 28 U.S.C. § 1610).

custodial securities accounts¹⁹² and trust bonds.¹⁹³ In both instances, the court concluded that the assets were *not* located in the United States and therefore not subject to attachment under the FSIA.

With respect to the securities accounts, the court noted that, while deposited at a Citibank branch in Argentina, and serviced by Citibank's central facility in New York, the securities on deposit were "reflected in an entirely non-physical form."¹⁹⁴ Acknowledging that the location of intangible property "is deemed to be the location of the garnishee,"¹⁹⁵ the court observed that because Citibank has a presence in many countries, including both Argentina and the United States, the general rule was unhelpful in that case.¹⁹⁶ The plaintiffs attempted to persuade the court to rule that the relevant "location" was the United States because the accounts were *custodial* accounts, "involving a range of services completely unknown to a regular bank account," all of which were performed in the United States.¹⁹⁷ The court acknowledged this distinction but ultimately was not persuaded. Rather, the court focused on the fact that all of the transactions between Argentina and Citibank – "setting up the accounts (whether electronically or by paper), giving instructions to Citibank regarding the accounts, receiving advice regarding the accounts, [and] directing the sale and purchase of securities" – had taken place at a branch in Argentina.¹⁹⁸ Accordingly, the court concluded that the intangible assets in the accounts were located in Argentina and therefore immune from attachment.

The court came to a similar conclusion regarding the trust bonds. As with the custodial accounts, the plaintiffs argued that the trust bonds were intangible assets whose location should be determined by a "common sense appraisal of the requirements of justice and convenience...."¹⁹⁹ The court agreed that the trust bonds were intangible assets, but it again concluded that those intangible assets were located in Argentina, not the United States. Despite the fact that Argentina had issued the trust bonds in New York pursuant to an agreement governed by New York law, the court observed that the bonds ultimately had been transferred to an account in Argentina. Even though this transfer had not occurred in any physical sense, this did "not take away from the fact that they were deposited, in an ordinary *commercial* sense, at

¹⁹² *Aurelius Capital Partners, LP v. Republic of Argentina*, Nos. 07 Civ. 2715 (TPG), 07 Civ. 11327 (TPG), 07 Civ. 2693 (TPG), 09 Civ. 8757 (TPG), 09 Civ. 10620 (TPG), 2010 WL 768874 (S.D.N.Y. Mar. 5, 2010).

¹⁹³ *Aurelius Capital Partners, LP v. Republic of Argentina*, Nos. 07 Civ. 2715 (TPG), 07 Civ. 11327 (TPG), 07 Civ. 2693 (TPG), 2010 WL 2925072 (S.D.N.Y. July 23, 2010).

¹⁹⁴ *Aurelius Capital Partners, LP*, 2010 WL 768874, at *1.

¹⁹⁵ *Id.* at *2.

¹⁹⁶ *Id.* at *3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at *4.

¹⁹⁹ *Aurelius Capital Partners, LP*, 2010 WL 2925072, at *3 (internal quotation marks omitted).

Caja de Valores in Argentina.”²⁰⁰ Located in Argentina, the bonds were immune from attachment.

B. Enforcement in Terrorism Cases

1. General Difficulties in Enforcing Terrorism Judgments

One of the principal challenges for plaintiffs in terrorism cases continues to be the ability to execute on their judgments against state perpetrators of terrorist acts. One of the goals of the 2003 National Defense Authorization Act was “to ease the difficulty of collecting FSIA judgments by entitling plaintiffs to impose liens on property belonging to state sponsors of terrorism.”²⁰¹ The enactment of 28 U.S.C. § 1610(g), in particular, allowed for the attachment of property “in aid of execution” of FSIA judgments, including property owned by a foreign state or agency or instrumentality of such a state.²⁰²

However, even with these additional tools, and although plaintiffs have sought out creative approaches to satisfy judgments against state sponsors of terrorism, they have experienced little success, especially against Iran. One of these failed efforts can be seen in *Ben-Rafael v. Islamic Republic of Iran*, where the court found that the Islamic Revolutionary Guard Corps was not an agency or instrumentality of Iran and thus its property was not subject to the attachment provisions.²⁰³

In another case, *Peterson v. Islamic Republic of Iran*, the Ninth Circuit affirmed the denial of the plaintiffs’ motion to assign Iran’s right to payment from a French corporation.²⁰⁴ Because the FSIA only allows assignment of a right to payment in the United States, and under California law the location of a right to payment is the location of the debtor, the French corporation’s payments owed to Iran were immune from execution.²⁰⁵

2. Terrorism Risk Insurance Act

The Terrorism Risk Insurance Act (TRIA), enacted in 2002, allows victims of terrorism to satisfy their judgments from certain assets of terrorists, terrorist organizations, and state sponsors of terrorism which have been blocked by the Office of Foreign Asset Control (OFAC)

²⁰⁰ *Id.* at *4 (emphasis added).

²⁰¹ *Ben-Rafael v. Islamic Republic of Iran*, 718 F. Supp. 2d 25, 29 (D.D.C. 2010) (citing 28 U.S.C. § 1605A(c)).

²⁰² *Id.* (citing 28 U.S.C. § 1610(g)(1)).

²⁰³ *Id.* at 31-32.

²⁰⁴ 627 F.3d 1117 (9th Cir. 2010).

²⁰⁵ *Id.* at 1130-32.

of the U.S. Department of State.²⁰⁶ In 2010, there were two important cases dealing with this exception: *Weinstein v. Islamic Republic of Iran*²⁰⁷ and *Bennett v. Islamic Republic of Iran*.²⁰⁸

In *Weinstein*, the widow and children of a U.S. citizen who died from a suicide bombing sued and secured a default judgment against Iran for approximately \$183 million. After registering the judgment in the U.S. District Court for the Eastern District of New York, the plaintiffs sought to attach New York real estate held by Bank Melli Iran (“Bank Melli”) on the theory that it was an instrumentality of the state. While the matter was pending before the district court, Bank Melli was designated as a “proliferat[or] of weapons of mass destruction” by OFAC and its assets were frozen.²⁰⁹ The district court then denied Bank Melli’s motion to dismiss the attachment proceedings, and Bank Melli appealed.

The appeal was not well taken. Bank Melli asserted a number of theories: that the TRIA does not provide jurisdiction for a court to permit attachment against a party that was not itself the subject of the underlying judgment; that the TRIA applies only to judgments rendered after its enactment; and that the proceedings in the case violated separation-of-powers principles. The Second Circuit rejected all of these arguments.

The court clarified that blocked assets of a terrorist state are subject to attachment even if the agency or instrumentality holding the blocked assets was not itself subject to the judgment. As the court put it, the TRIA “clearly differentiates between the party that is the subject of the underlying judgment itself, which can be any terrorist party (here, Iran), and parties whose blocked assets are subject to execution or attachment, which can include not only the terrorist party but also ‘any agency or instrumentality of that terrorist party.’”²¹⁰ Further, the court held that the TRIA applies retroactively – to judgments obtained before its enactment – and that this retroactive application was consistent with separation of powers. Congress did not revise or reopen the earlier judgment through its enactment of the TRIA. Instead, “the effect of the TRIA...was simply to render a judgment [already in place] more readily enforceable against a related third party.”²¹¹

In contrast to *Weinstein*, the issue in *Bennett* was much more discrete: When is property “being used exclusively for diplomatic or consular purposes”?²¹² If used for these purposes, property that would otherwise be attachable under the TRIA is nevertheless immune. The properties at issue in *Bennett* were Iran’s former embassy, the ambassador’s residence, another diplomatic residence, and two associated parking lots. The United States took control of the properties in 1980 and had since rented them out periodically to private parties to generate

²⁰⁶ Pub. L. No. 107-297, § 201, 116 Stat. 2337 (2002).

²⁰⁷ *Weinstein v. Islamic Republic of Iran*, 609 F.3d 43 (2d Cir. 2010).

²⁰⁸ *Bennett v. Islamic Republic of Iran*, 618 F.3d 19 (D.C. Cir. 2010).

²⁰⁹ *Weinstein*, 609 F.3d at 46 (internal quotation marks omitted) (alteration in original).

²¹⁰ *Id.* at 49 (quoting TRIA § 201(a)).

²¹¹ *Id.* at 51.

²¹² *Bennett*, 618 F. 3d at 21 (quoting TRIA § 201(d)(2)(B)(ii) (internal quotation marks omitted)).

income to pay for the upkeep required by the Vienna Convention (which requires the United States to “respect and protect” the properties of a diplomatic mission if relations are severed).²¹³

Against this backdrop, the plaintiffs argued that the properties were not used exclusively for diplomatic or consular purposes – and were therefore subject to attachment – because they had been rented to private parties. The court disagreed. Rather than considering the character of the use itself, the court looked to the *purpose* of the use. Because the properties were rented to satisfy the upkeep provision of the Vienna Convention, it mattered not that the private parties used the properties in a non-diplomatic way. “[B]y its plain language,” TRIA “is concerned only with the *purpose* for which the property is used, and not the way the property is used in service of that end.”²¹⁴ Applying this rule, the court held that the properties were immune from attachment.

C. Immunity from Attachment and Execution May Be Raised *Sua Sponte*

Another key development in 2010 was the Ninth Circuit’s holding that the issue of immunity from attachment and execution may be raised by the court *sua sponte*. In *Peterson*,²¹⁵ discussed above, when the plaintiffs, after obtaining a default judgment, asked the district court to assign to them Iran’s right to payments due from a French company, the district court raised the issue of immunity from attachment and execution *sua sponte* and denied the motion.

Agreeing with the Fifth Circuit²¹⁶ (and disagreeing with the U.S. District Court for the Northern District of Illinois²¹⁷), the Ninth Circuit affirmed the decision and held that a district court may – and should – raise the issue on its own initiative. The court summarized its reasoning as follows:

Allowing courts to independently raise and decide the question of immunity from execution is not only consistent with historical practice, but also with the purposes underlying the FSIA. A burden-shifting approach, unlike one that places the burden on the foreign state to plead and prove that its property is immune, is appropriately respectful of the “perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse.”²¹⁸

²¹³ *Id.* (quoting Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95) (internal quotation marks omitted).

²¹⁴ *Id.* at 23.

²¹⁵ *Peterson*, 627 F.3d 1117.

²¹⁶ *Id.* at 1124 (citing *FG Hemisphere Assocs., LLC v. Republique du Congo*, 455 F.3d 575, 590-91 (5th Cir. 2006)).

²¹⁷ *Id.* (citing *Rubin v. Islamic Republic of Iran*, 436 F. Supp. 2d 938, 941 (N.D. Ill. 2006)).

²¹⁸ *Id.* at 1126 (quoting *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (alteration in original)).

V. Practical Issues in FSIA Litigation

FSIA judicial decisions from 2010 also provide useful guidance with respect to several practical procedural issues that arise in cases brought against foreign sovereigns, including, among others, service of process, personal jurisdiction, default judgments, and *forum non conveniens*. A brief review of certain notable decisions follows.

A. Service of Process

Pursuant to Federal Rule of Civil Procedure 4(j), service under the FSIA must comply with 28 U.S.C. §§ 1608(a) and (b). These provisions set forth various acceptable methods of service, depending on whether the party being served is (a) a foreign state or political subdivision or (b) an agency or instrumentality.

Service of process on foreign sovereigns under the FSIA is governed by § 1608(a), which requires using the designated methods of service set forth in the statute, *in order – i.e.*, using the next method only if all preceding methods are not available – as follows: (1) in accordance with a special arrangement between the plaintiff and the foreign state; (2) in accordance with an applicable international convention on service; (3) by mail, return receipt required, from the clerk of the court to the foreign state’s ministry of foreign affairs; or (4) by diplomatic channels through the State Department in Washington, D.C.²¹⁹ Sequential requirements also exist for service on agencies and instrumentalities under § 1608(b). While some courts applied the service rules strictly in 2010, a number of courts were lenient and allowed the offending party the opportunity to re-serve.²²⁰

One of the first decisions of 2010 highlights the various pitfalls parties may encounter when attempting to effect service under the FSIA, particularly with respect to nations that are remote or otherwise difficult to access. In *Fly Brazil Group, Inc. v. Government of Gabon, Africa*, the U.S. District Court for the Southern District of Florida granted defendants’ motion to quash the certificate of service, and ordered the plaintiff to comply with service under the FSIA, including (1) translating the complaint and exhibits attached thereto into French, the official language of Gabon; (2) attaching a copy of the FSIA and other relevant statutes to the served documents; and (3) sending the service package to Gabon’s head of ministry for foreign affairs.²²¹

Plaintiff, seeking a writ of attachment for an aircraft owned by the Government of Gabon and located in the Commonwealth of Virginia, initially made unsuccessful service attempts on Gabon, by failing to use the Clerk of Court to effect service, serving the President’s Office rather

²¹⁹ See, e.g., *Wye Oak Tech., Inc. v. Republic of Iraq*, No. 1:09cv793 (AJT/JFA), 2010 WL 2613323 (E.D. Va. June 29, 2010).

²²⁰ See, e.g., *First Investment Corp. v. Fujian Mawei Shipbuilding, Ltd.*, No. 09-3663, 2010 WL 3168371 (E.D. La. Aug. 9, 2010); *Fly Brazil Group, Inc. v. Government of Gabon, Africa*, 709 F. Supp. 2d 1274 (S.D. Fla. 2010); *USAA Cas. Ins. Co. v. Permanent Mission of Republic of Namibia*, No. 10 Civ. 4262(LTS), 2010 WL 4739945 (S.D.N.Y. Nov. 17, 2010).

²²¹ 709 F. Supp. 2d 1274 (S.D. Fla. 2010).

than the Ministry of Foreign Affairs, and failing to include a Notice of Suit and a Verified Amended Complaint.²²² Plaintiff conceded improper service, and the court provided 90 days in which to effect proper service.²²³ Plaintiff made a corrected service package and served via Federal Express,²²⁴ which misrouted the package; although the package was eventually delivered, it was never located because of a change in Gabon's government.²²⁵ Although a number of the missteps in plaintiff's process-serving procedures were not attributable to plaintiff, the district court nevertheless adopted a strict interpretation of the requirements of § 1608, and ultimately granted Gabon's motion to quash.²²⁶

Although *Fly Brazil* may be read as a cautionary tale to parties wishing to effect service on foreign governments under the FSIA, not all courts interpret the FSIA service requirements so strictly. For example, plaintiffs in *Peterson v. Islamic Republic of Iran* similarly "self-dispatched" default judgment documents to the Iranian Foreign Affairs Minister instead of having the court clerk dispatch them, as required under the statute.²²⁷ However, the Ninth Circuit explained that "[t]his mistake is not fatal. The Ninth Circuit has adopted a substantial compliance test for the FSIA's notice requirements; a plaintiff's failure to properly serve a foreign state defendant will not result in dismissal if the plaintiff substantially complied with the FSIA's notice requirements and the defendant had actual notice."²²⁸ Accordingly, the Ninth Circuit reversed the district court's finding that plaintiffs had not complied with the service requirements under the FSIA.²²⁹

B. Due Process and Personal Jurisdiction

The FSIA confers personal jurisdiction as well as subject matter jurisdiction for certain claims against foreign sovereigns. As a general rule, the FSIA confers personal jurisdiction over foreign sovereigns where subject matter jurisdiction has been established and service of process

²²² *Id.* at 1277.

²²³ *Id.*

²²⁴ Plaintiff presented the service package to the Clerk of Court to dispatch, but was told that it could not send the package to Gabon, and that plaintiff's agent would have to take it to Federal Express. *Id.* at 1282-1283. The district court stated: "While the Court can appreciate the dilemma in which [plaintiff's agent] believed himself to be[], this method of dispatch does not comport with the strict compliance demanded by Section 1608(a)." *Id.* at 1283.

²²⁵ *Id.* at 1278.

²²⁶ *Id.* at 1280 n.3 ("In effecting service on a foreign state under the FSIA, a party must comply strictly with the requirements of 28 U.S.C. 1608(a)" (citations omitted)). *But see Wye Oak*, 2010 WL 2613323, at *5-6 (finding service effective despite alleged failure to follow service order, in part because plaintiff "could reasonably think that service directly to the head of the Ministry of Foreign Affairs in Iraq was impossible in this case due to unique, war-time security issues and the rebuilding and restructuring of the Iraqi government").

²²⁷ *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1129 (9th Cir. 2010).

²²⁸ *Id.*; *see also Rux v. Republic of Sudan*, No. 2:04-cv-428, 2005 WL 2086202 (E.D. Va. Aug. 26, 2005), *aff'd on other grounds*, 461 F.3d 461 (4th Cir. 2006) (finding that service to the Sudanese embassy in the United States was sufficient, even though it was not delivered to the Ministry of Foreign Affairs in Sudan).

²²⁹ *Id.*

has been accomplished pursuant to 28 U.S.C. § 1608.²³⁰ Some courts also consider the traditional constitutional due process requirements – *i.e.*, that there be “sufficient minimum contacts between the foreign state and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.”²³¹ As one court stated, “[w]hether this minimum-contacts requirement applies to defendants sued under the FSIA depends on whether such defendants are persons under the Due Process Clause.”²³² However, the majority of jurisdictions which have considered this question hold that foreign states are *not* persons protected by the Fifth Amendment and thus do not enjoy constitutional due process rights that may be invoked as a defense in FSIA proceedings.²³³ This held true in 2010.²³⁴

C. Jurisdictional Discovery

In general, U.S. courts attempt to protect foreign sovereigns from the “burdens of litigation,” including the requirement of responding to discovery requests. However, where a dispute arises as to a sovereign’s entitlement to immunity, thereby creating a factual question as to jurisdiction, the court “must give the plaintiff ample opportunity to secure and present evidence relevant to the existence of jurisdiction.”²³⁵ Broad jurisdictional discovery is typically limited by the courts, and in 2010, the Tenth Circuit held that it would not immediately review an appeal of an order for jurisdictional discovery unless the district court “did not adequately limit permissible discovery to the question of...immunity.”²³⁶ Further, sovereign parties are subject to the same production requirements as non-sovereign defendants in general civil discovery, and failure to produce the requested discovery may result in motions to compel.²³⁷

Although jurisdictional discovery is available against sovereign defendants, it remains within the court’s broad discretion to grant such discovery, and it is not obtained as a matter of

²³⁰ See, e.g., *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 69-70 (D.D.C. 2010).

²³¹ *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) (citing *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945)).

²³² *Valore*, 700 F. Supp. 2d, at 70; *Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 68 (D.D.C. 2010).

²³³ See, e.g., *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1168 (C.D. Cal. 2006); *Rux v. Republic of Sudan*, No. Civ. A. 2:04CV428, 2005 WL 2086202, at *18 (E.D. Va. Aug. 26, 2005); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) (“[I]n common usage, the term ‘person’ does not include the sovereign.” (Citation omitted.)); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001).

²³⁴ *Valore*, 700 F. Supp. 2d at 70-71.

²³⁵ See, e.g., *Hansen v. PT Bank Negara Indonesia (Persero) TBK*, 601 F.3d 1059, 1063-64 (10th Cir. 2010) (citation omitted).

²³⁶ *Id.* at 1064 (applying the “*Maxey*” rule to FSIA cases, see *Maxey v. Fulton*, 890 F.2d 279, 282-83 (10th Cir. 1989) (“[Q]ualified immunity does not shield government officials from all discovery but only from discovery which is either avoidable or overly broad.”)).

²³⁷ See, e.g., *Solgas Energy Ltd. v. Federal Government of Nigeria*, No. H-09-368, 2010 WL 2854278, at *5-7 (S.D. Tex. July 19, 2010).

right. Accordingly, plaintiffs seeking such discovery may need to make a showing as to the necessity of jurisdictional discovery, and that it is not simply a means to conduct a fishing expedition to harass or otherwise build a case against the defendant. In *In re Terrorist Attacks on September 11, 2001*, the U.S. District Court for the Southern District of New York considered plaintiffs' request for additional limited jurisdictional discovery in order to defeat a motion to dismiss.²³⁸ There, the court determined that the initial legal theory underlying plaintiffs' assertion of subject matter jurisdiction was faulty, and accordingly, discovery in support of plaintiffs' theory of jurisdiction lacked evidentiary value.²³⁹ The court emphasized, however, that "[t]he failure to make out a *prima facie* showing of jurisdiction is not a bar to jurisdictional discovery."²⁴⁰ Still, citing the court's "wide latitude to determine the scope of discovery," as well as the fact that the parties had been engaged in limited jurisdictional discovery for five years, the court concluded that additional jurisdictional discovery was not warranted.²⁴¹

D. Default Judgments

If a foreign sovereign is properly served with a complaint but refuses to answer, move, or otherwise respond, the court may use its discretion to grant a default judgment in favor of the plaintiff.²⁴² Such judgments are not uncommon in foreign sovereign litigation, as foreign states often choose to ignore claims asserted against them in U.S. courts, for political, economic, practical, or other reasons.²⁴³

Under the FSIA, however, "[n]o judgment by default shall be entered . . . against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."²⁴⁴ The claim may be established only through the presentation of a legally sufficient *prima facie* case, *i.e.*, "a legally sufficient evidentiary basis for a reasonable jury to find for the plaintiff."²⁴⁵ However, the reviewing court may "accept as true the plaintiff's uncontroverted

²³⁸ 718 F. Supp. 2d 456, 487 (S.D.N.Y. 2010).

²³⁹ *Id.* at 488.

²⁴⁰ *Id.* (citing *Ehrenfeld v. Mahfouz*, 489 F.3d 542, 550 n.6 (2d Cir. 2007)).

²⁴¹ *Id.*

²⁴² See, e.g., *Kilburn v. Islamic Republic of Iran*, 699 F. Supp. 2d 136, 150 (D.D.C. 2010) (awarding \$5 million in loss of solatium damages on default to brother of terrorist hostage).

²⁴³ See, e.g., *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79 (D.D.C. 2009); *Butler v. Sukhoi Co.*, 579 F.3d 1307 (11th Cir. 2009); *Belkin v. Islamic Republic of Iraq*, 667 F. Supp. 2d 8 (D.D.C. 2009); *Box v. Dallas Mexican Consulate*, No. 3:08-CV-1010-0, 2009 WL 3163551 (N.D. Tex. Sept. 30, 2009); *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124 (D.D.C. 2009). One court also upheld a default judgment against the Palestinian Authority, which had belatedly asserted sovereign immunity. *Estates of Ungar v. Palestinian Auth.*, 613 F. Supp. 2d 219 (D.R.I. 2009). Where a sovereign makes a limited appearance, however, courts likely will decline to enter a default judgment. See *Smith v. Ghana Commercial Bank, Ltd.*, No. 08-5324, 2009 WL 3327206, at *10 (D. Minn. Oct. 13, 2009) (refusing to enter default judgment where defendants had made limited appearance indicating intention to defend against claims).

²⁴⁴ 28 U.S.C. § 1608(e).

²⁴⁵ *Kilburn*, 699 F. Supp. 2d at 150.

evidence,” which may be established by affidavit.²⁴⁶ Nevertheless, courts have noted that default judgments are a “sanction of last resort” and that “there is a strong policy favoring the adjudication of a case on its merits,”²⁴⁷ particularly where the defendant is a foreign sovereign. As one court noted, “intolerant adherence to default judgments against foreign states could adversely affect” U.S. foreign relations.²⁴⁸

In *Valore v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia considered whether a court should take judicial notice of findings of fact and conclusions of law in related proceedings in order to determine whether to grant a default judgment.²⁴⁹ In FSIA cases, such notice “is inappropriate absent some particular indicia of indisputability.”²⁵⁰ Further, “because default judgments under the FSIA require additional findings than in the case of ordinary default judgments, the court should endeavor to make such additional findings in each case.”²⁵¹ Plaintiffs in *Valore* sought damages following the entry of default judgment in litigation arising from the October 1983 suicide bombing of the United States Marine barracks in Beirut, Lebanon, which resulted in the deaths of 241 American military personnel.²⁵² The court adopted the findings and recommendations made by the special masters regarding the factual bases for the complaint, and awarded compensatory and punitive damages to the family members and victims of the bombing.²⁵³

E. Venue

Pursuant to 28 U.S.C. § 1391(f), claims under the FSIA may be brought in “the United States District Court for the District of Columbia if that action is brought against a foreign state or political subdivision thereof; or any judicial district in which (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.” Parties litigating venue issues in FSIA cases typically dispute the location of the occurrence of the “substantial” acts or omissions. To determine whether a “substantial part of the events or

²⁴⁶ *Id.* (citations omitted).

²⁴⁷ *Acree v. Republic of Iraq*, 658 F. Supp. 2d 124, 127 (D.D.C. 2009) (citations omitted); *see also Richardson v. Attorney General of British Virgin Islands*, No. 3:08-cv-144, 2010 WL 2949438, at *3 (D.V.I. July 23, 2010) (denying entry of default where plaintiff failed to establish “that the alleged tortious act occurred in the United States or that there has been a waiver of foreign immunity”).

²⁴⁸ *Id.* (internal citations omitted).

²⁴⁹ *Valore*, 700 F. Supp. 2d at 59-60; *see also, e.g., Anderson*, 2010 WL 4871189.

²⁵⁰ *Id.*

²⁵¹ *Id.* (citations and internal quotations omitted).

²⁵² *Id.*

²⁵³ As discussed above, punitive damages now are available under the FSIA against foreign sovereigns for terrorist acts pursuant to the National Defense Authorization Act for Fiscal Year 2008 (NDAA). 28 U.S.C. § 1605A; *see also Rimkus*, 2010 WL 4628317; *Murphy*, 740 F. Supp. 2d 51; *Beer v. Islamic Republic of Iran*, No. 08-cv-1807, 2010 WL 5105174 (D.D.C. Dec. 9, 2010).

omissions giving rise to the claim” occurred in a particular judicial district, the court “must consider the entire circumstances and events” pertaining to the event.²⁵⁴

In *Wye Oak Technology, Inc. v. Republic of Iraq*, plaintiff argued that although the execution of a contract for broker services, and the performance required under that contract, occurred in Iraq, the proper venue for the claim was the Eastern District of Virginia.²⁵⁵ In support of its venue argument, plaintiff cited meetings with the Pentagon officials to discuss the construction project in Iraq and the presence of bank accounts and a general counsel in the Eastern District.²⁵⁶ However, the district court determined that plaintiff’s argument was insufficient to establish the “substantial” contacts necessary for venue, and transferred the action to the U.S. District Court for the District of Columbia.

Parties also may waive their right to raise the issue of improper venue. In *Wultz v. Islamic Republic of Iran*, the U.S. District Court for the District of Columbia determined that defendant Bank of China (accused of executing wire transfers for the Palestinian Islamic Jihad from 2003-2006) had waived its right to oppose venue, when it did not raise the issue until its reply brief in support of its motion to dismiss.²⁵⁷ However, because plaintiffs responded to the venue argument in a surreply, the court nonetheless considered the argument, and determined that venue in the District of Columbia was appropriate under the FSIA.²⁵⁸

F. Forum Non Conveniens

The doctrine of *forum non conveniens* provides that a U.S. court may decline to hear a claim if (1) allowing the claim would impose a serious inconvenience on the defendant and (2) there exists an adequate alternative forum for the claim to be heard. In order to make that determination, courts deciding *forum non conveniens* issues “must decide (1) whether an alternative forum for the dispute is available and, if so, (2) whether a balancing of private and public interest factors strongly favors dismissal.”²⁵⁹

In *DRFP LLC v. Republica Bolivariana de Venezuela*, the Sixth Circuit reversed an order by the U.S. District Court for the Southern District of Ohio denying Venezuela’s motion to dismiss on *forum non conveniens* grounds.²⁶⁰ The lower court had found Venezuela to be an inadequate alternative forum, because the Venezuelan Supreme Court had issued an “interpretive opinion” effectively barring one of plaintiff’s key claims.²⁶¹ However, the appellate court found

²⁵⁴ *Wye Oak*, 2010 WL 2613323, at *10 (citation omitted).

²⁵⁵ *Id.* at *10.

²⁵⁶ *Id.*

²⁵⁷ 755 F. Supp. 2d 1, 36 (D.D.C. 2010), *abrogated on other grounds by Wultz v. Islamic Republic of Iran*, No. 08-cv-1460 (RCL), 2011 WL 263676, at *1 (D.D.C. Jan. 28, 2011).

²⁵⁸ *Id.* at 36-38.

²⁵⁹ *Agudas Chasidei Chabad of United States v. Russian Federation*, 528 F.3d 934, 950 (D.C. Cir. 2008).

²⁶⁰ *DRFP LLC v. Republica Bolivariana de Venezuela*, 622 F.3d 513 (6th Cir. 2010).

²⁶¹ *Id.* at 518-19.

that the district court relied too heavily on the Venezuelan Supreme Court’s opinion, and that plaintiff would still have the ability to litigate and defend its claims should a Venezuelan court be chosen as the acceptable alternative forum.²⁶² Because the district court made its ruling on the first stage of the *forum non conveniens* analysis, *i.e.*, alternative venue, it did not consider the remaining factors in connection with the public and private interest balancing test.²⁶³ Accordingly, the Sixth Circuit remanded the action back to the district court for further analysis of the *forum non conveniens* issue.

In *Continental Transfer Technique Ltd. v. Federal Government of Nigeria*, the U.S. District Court for the District of Columbia declined to dismiss on *forum non conveniens* grounds an action seeking enforcement of an arbitral award against Nigeria.²⁶⁴ The court determined that Nigeria had failed to establish the existence of an adequate alternative forum, and even if it had done so, on balance, the private and public interest factors did not strongly favor dismissal.²⁶⁵ Factors relating to private interests included relative ease of access to sources of proof, compulsory process, enforcement of judgments, expense of litigation, and other practical issues.²⁶⁶ Public interest factors included local interest in having local controversies decided in local courts, and pursuant to the New York Convention, U.S. courts being “open to foreign litigants seeking to enforce arbitral awards.”²⁶⁷ The court concluded that Nigeria’s failure to identify public or private interests favoring dismissal, combined with plaintiff’s interest in attaching Nigeria’s property located in the United States, weighed in favor of declining to dismiss the action.²⁶⁸

G. Removal

Generally, pursuant to 28 U.S.C. § 1446(b), a defendant may remove to federal court an action filed against it in state courts, within 30 days. Moreover, “removal statutes are construed narrowly, and . . . uncertainties are resolved in favor of remand.”²⁶⁹ However, with respect to

²⁶² *Id.* at 519.

²⁶³ *Id.* at 520.

²⁶⁴ 697 F. Supp. 2d 46.

²⁶⁵ *Id.* at 57-59.

²⁶⁶ *Id.* at 57.

²⁶⁷ *Id.* at 58.

²⁶⁸ *Id.* Other 2010 cases in which courts refused to dismiss the case on *forum non conveniens* grounds include: *Rogers v. Petróleo Brasileiro, S.A.*, 741 F. Supp. 2d 492 (S.D.N.Y. 2010); and *Continental Transfer Technique Ltd. v. Federal Gov’t of Nigeria*, 697 F. Supp. 2d 46 (D.D.C. 2010).

²⁶⁹ *Martinez v. Republic of Cuba*, 708 F. Supp. 2d 1298, 1301 (S.D. Fla. 2010) (“[I]n enacting the FSIA, Congress did not intend that all cases against a foreign state be in federal court; it merely gave foreign states the right to decide.”) (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

foreign sovereigns, the FSIA permits the deadline to be extended for cause.²⁷⁰ Indeed, it is squarely in the court’s discretion to allow removal past the 30-day time period.²⁷¹

In making this determination, courts have found the following factors helpful: (1) danger of prejudice to the nonmoving party; (2) length of delay and the potential impact on the court; (3) the reason for the delay; (4) whether the movant acted in good faith; (5) the purpose of the removal statute; (6) the prejudice to both parties; and (7) the extent of proceedings in state court.²⁷² In considering these factors, the U.S. District Court for Oregon expressed disbelief that the sovereign defendant missed the statutory deadline for removal as a result of misplacing the file, stating that “[i]t is beyond belief that a department devoted to litigation for a large insurance company would take nearly two months” to locate it.²⁷³ Nevertheless, despite the fact that the defendant’s excuse for delay was “exceedingly weak,” the court found that the remaining factors supported defendant and denied the motion for remand.²⁷⁴

²⁷⁰ 28 U.S.C. § 1441(d); *see also* *Martinez*, 708 F. Supp. 2d at 1302 (“Congress intended that § 1441(d) be the exclusive basis for removal in actions against foreign states.”) (citing *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003)).

²⁷¹ *State Farm Mutual Auto Ins. Co. v. Ins. Corp. of British Columbia*, No. CV 09-762-ST, 2010 WL 331786, at *4 (D. Or. Jan. 25, 2010) (citing *Big Sky Network Canada v. Sichuan Provincial Gov’t*, 533 F.3d 1183, 1186 (10th Cir. 2008)).

²⁷² *Id.* at *5 (citing *Big Sky* and others).

²⁷³ *Id.*

²⁷⁴ *Id.* at *5-7.

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