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THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2014 YEAR IN REVIEW

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ABSTRACT

The Foreign Sovereign Immunities Act (“FSIA”) provides the exclusive basis for suing a foreign sovereign in United States courts.¹ 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.² Thus, plaintiffs have used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of contexts, ranging from purely commercial disputes to wrongful death claims on behalf of victims of state-sponsored terrorism. The purpose of this Review is to provide an overview of the primary areas of litigation under the FSIA through an analysis of judicial decisions invoking the statute in 2014.

I. INTRODUCTION: THE FSIA IN 2014

OVER the years, the jurisprudence surrounding the FSIA has grown increasingly sophisticated, as parties raise more nuanced and creative arguments. Although the FSIA is a relatively short statute, the issues the statute raises are complex, and undeniably important in light of the continuing globalization of business and increasing involvement of sovereigns and their instrumentalities in international commerce. Not surprisingly, FSIA litigation in 2014 continued to focus on the statute’s “commercial activity” exception,³ but also dealt with various other issues. As the cases show, the core issues sovereign and private litigants face under the FSIA include:

- Who is a “foreign state” subject to jurisdiction in U.S. courts?
- When has a foreign state waived its immunity?
- Which acts by a state are “commercial,” and which are “governmental”?
- How close must the nexus be between an act and the U.S.?
- When may plaintiffs pursue foreign sovereign assets located in the U.S. to satisfy U.S. court judgments or qualifying arbitration awards?

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1. 28 U.S.C. §§ 1602 et seq.
2. *Id.*
3. 28 U.S.C. § 1605(a).

This Review will focus on the answers to those questions provided by U.S. courts in 2014. This Review also includes a short introduction to the FSIA as well as some practical guidance based on recent FSIA decisions.

II. A BRIEF HISTORY OF THE FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. From as early as 1812, in *Schooner Exchange v. McFaddon*,⁴ 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.⁵ Instead, judges deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, and only exercised jurisdiction where the U.S. State Department expressly referred claims for their consideration.⁶

In 1952, U.S. courts’ jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called Tate Letter announcing its adoption of a new “restrictive theory” of foreign sovereign immunity.⁷ The Tate Letter directed that foreign states continue to be granted immunity from suits involving their sovereign, or “public,” acts.⁸ But acts taken in a commercial, or “private,” capacity no longer would be protected from U.S. court review.⁹ Yet, even with this new guidance, courts continued to seek the Executive Branch’s view on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistent outcomes and was susceptible to “diplomatic pressures rather than to the rule of law.”¹⁰

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.¹¹ Today, the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in U.S. courts.¹²

The FSIA provides that “foreign states,” including their “political subdivisions” and “agencies or instrumentalities,”¹³ shall be immune from the jurisdiction of U.S. courts, unless the state has waived its immunity or one of the exceptions to immunity set forth in the statute applies.¹⁴ The FSIA includes several provisions that define the scope of these excep-

4. *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

5. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

6. *See id.* (explaining the history of the FSIA).

7. *Id.* at 486-87.

8. *Id.* at 487.

9. *Id.*

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

11. 28 U.S.C. § 1602.

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

13. 28 U.S.C. § 1603.

14. *See id.* § 1604.

tions, and establishes detailed procedural requirements for bringing claims against a foreign sovereign defendant.¹⁵

The primary exceptions to immunity are set forth in sections 1605 and 1605A of the FSIA.¹⁶ These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities, or claims for which the sovereign has explicitly or implicitly waived its immunity.¹⁷ In instances where a claim falls under one of the FSIA exceptions, the Act provides that the foreign state shall be subject to jurisdiction “in the same manner and to the same extent as a private individual.”¹⁸ The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment of foreign sovereign property located in the United States, in aid of execution on a judgment against a foreign state or its agencies or instrumentalities.¹⁹ Finally, the FSIA sets forth various unique procedural rules for pursuing claims against foreign states including: special rules for service of process, default judgments, and appeals.²⁰ In 2014, courts considered almost all of these elements of the FSIA.

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

A threshold issue in any case brought under the FSIA is whether the defendant constitutes a “foreign state” under the statute. If the defendant meets the definition of a foreign state, it will be immune from jurisdiction unless an exception applies.²¹ If the defendant meets the definition of a foreign state and an exception applies, proper service of process under the FSIA may grant both subject matter and personal jurisdiction over the defendant, even where personal jurisdiction might not otherwise exist.²² A “foreign state” is defined to include not only the state itself (*i.e.*, the state writ-large or its political subdivisions), but also its agencies and instrumentalities.²³

15. *See id.* §§ 1605, 1608, 1610-1611.

16. *Id.* §§ 1605, 1605A.

17. *Id.*

18. *See id.* § 1606; *but see* 28 U.S.C. § 1605A (providing federal statutory cause of action for terrorism-related acts).

19. *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. §1611(b)(1). Likewise, military property held by a military authority and used or intended to be used in connection with military activity is immune from attachment. § 1611(b)(2)).

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

21. *See id.* § 1604.

22. *See* 28 U.S.C. § 1330(b) (“Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction . . . [and] where service has been made.”); *see also* GSS Group Ltd. v. Nat’l Port Auth., 680 F.3d 805, 811 (D.C. Cir. 2012) (“In other words . . . subject matter jurisdiction plus service of process equals personal jurisdiction.”).

23. 28 U.S.C. § 1603(a).

A. AGENCIES OR INSTRUMENTALITIES: DEFINING “ORGAN
OF A FOREIGN STATE”

The definition of “agency or instrumentality” is found in section 1603(b). To qualify as an “agency or instrumentality” of a foreign state, an entity must be (1) a “separate legal person,” that is (2) *either* “an organ of a foreign state or political subdivision thereof” *or* an entity “a majority of whose shares or other ownership interest is owned by [the] foreign state or a political subdivision thereof,” and (3) “neither a citizen of a State of the United States . . . nor created under the laws of any third country.”²⁴ The majority of cases interpreting this portion of the statute focus on whether, under the second prong, an entity qualifies as an “organ of a foreign state,” which the statute does not define.²⁵ Some courts have found five factors to be relevant, with no single factor being dispositive:

- (1) whether the foreign state created the entity for a national purpose;
- (2) whether the foreign state actively supervises the entity;
- (3) whether the foreign state requires the hiring of public employees and pays their salaries;
- (4) whether the entity holds exclusive rights to some right in the [foreign] country; and
- (5) how the entity is treated under foreign state law.²⁶

Other courts have considered similar factors to evaluate “whether the entity engages in a public activity on behalf of the foreign government”²⁷ including: “the circumstances surrounding the entity’s creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.”²⁸

In many cases, it is either obvious that an entity is an agency or instrumentality of a foreign state, or the parties do not dispute it. For example, reported decisions in 2014 treated the following entities as agencies or instrumentalities of a foreign state without discussion: a Kazakh sover-

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

25. See *id.*

26. *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004) (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000)). These factors are sometimes described as the “*Filler* factors.” See *In re Aluminum Warehousing Antitrust Litigation*, No. 13-md-2481 (KBF), 2014 WL 4211353 (S.D.N.Y. Aug. 25, 2014) (slip op.).

27. *NXP Semiconductors USA Inc. v. Brevets*, C 14-1225 SI, 2014 WL 4621017, *5 (N.D. Cal. Sept. 15, 2014).

28. See *id.* (quoting *Patrickson v. Dole Food Co.*, 251 F.3d 795, 807 (9th Cir. 2001), *aff’d on other grounds*, 538 U.S. 468 (2003)).

eign wealth fund,²⁹ a Mexican Consulate,³⁰ the Nicaraguan social security agency,³¹ the Hungarian national railway,³² the Iraqi Ministry of Trade,³³ a Saudi Arabian University,³⁴ the Venezuelan state oil company,³⁵ the Czech Republic's Ministry of Health,³⁶ a Venezuelan Consulate,³⁷ the London police,³⁸ and a Filipino adoption agency.³⁹

In some cases, however, courts considered the question more in depth, analyzing whether certain defendants qualified as sovereign entities for FSIA purposes.

1. *Sovereign State's U.S. Counsel—Not an Organ of the State*

In *Mare Shipping v. Squire Sanders (US) LLP*, the Second Circuit affirmed that a sovereign state's U.S. counsel was not a sovereign entity under the FSIA.⁴⁰ The claims stemmed from protracted litigation in both the U.S. and Spain over a 2002 oil spill off the coast of Spain.⁴¹ In the U.S. proceedings, U.S. counsel for Spain prepared various witness declarations.⁴² After the U.S. action had been dismissed, the plaintiffs brought an action seeking discovery for use in the Spanish litigation, alleging that the witness declarations were false and seeking information from Spain's U.S. counsel about the preparation of those declarations.⁴³ The court held that the plain text of the FSIA "excludes a foreign sovereign's U.S. counsel"⁴⁴ from the definition of an agency or instrumentality. Therefore, Spain's U.S. counsel was not immune from discovery.⁴⁵

29. *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F. Supp. 3d 650 (S.D.N.Y. 2014), *aff'd in part*, 813 F.3d 98 (2d Cir. 2016).

30. *Blake Box v. Dallas Mexican Consulate General*, Civil Action No. 3:08-cv-1010 -O (N.D. Tex. 2014).

31. *Araya Solorzano v. Gov't of Republic of Nicaragua*, 562 Fed. Appx. 901 (11th Cir. 2014).

32. *Simon v. Republic of Hungary*, 37 F. Supp. 3d 381 (D.D.C. 2014).

33. *Reynolds Shipping USA LLC v. Ministry of Trade of Republic of Iraq*, No. H-13-mc-0068, 2014 WL 2800758 (S.D. Tex. June 18, 2014).

34. *Ketty v. Saudi Ministry of Education*, 53 F. Supp. 3d 40 (D.D.C. 2014). The court also treated the Saudi Ministry of Education and the Saudi Ministry of Higher Education as state political subdivisions, which plaintiffs also did not contest.

35. *Skanga Energy & Marine Ltd. v. Arevanca, S.A.*, No. 11-cv-4296 (DLC), 2014 WL 3928704 (S.D.N.Y. Aug. 12, 2014).

36. *Diag Human S.E. v. Czech Republic Ministry of Health*, 64 F. Supp. 3d 22 (D.D.C. 2014).

37. *Fraser v. Rodriguez-Espinoza*, No. 14 CV 1046, 2014 WL 4783095 (N.D. Ill. Sept. 24, 2014).

38. *Ezeiruaku v. Bull*, 2014 WL 5587404, Civil Action No. 14-2567 (JBS/KMW) (D. NJ Nov. 3, 2014).

39. *McEachern v. Inter-Country Adoption Bd. of the Republic of the Phil.*, 62 F. Supp. 3d 187 (D. Mass. Nov. 26, 2014).

40. *Mare Shipping v. Squire Sanders (US) LLP*, 574 Fed. Appx. 6 (2d Cir. 2014).

41. *Id.* at 7

42. *Id.*

43. *Id.*

44. *Id.* at 9.

45. *Id.* (notwithstanding the holding, the court declined to compel discovery, but ordered the defendant not to destroy any records, in case discovery was appropriate later).

2. *French Patent Promotion Corporation—Not an Organ of the State*

In *NXP Semiconductors USA, Inc. v. France Brevets S.A.S.*, the court held that a corporation created by the French government to promote and monetize patents was not an agency or instrumentality of France.⁴⁶ The court found that, although the corporation was funded by the French government, and supervised by a Board of Directors appointed by the government, it was established as a standard limited liability company, with no special status and no regulatory authority.⁴⁷ Accordingly, the court held that it is “more similar to a private company acting to maximize profits, as opposed to an arm of the state conducting sovereign functions.”⁴⁸

3. *English For-Profit Investment Exchange—Organ of the State*

The court in *In re Aluminum Warehousing Antitrust Litigation* held that the London Metal Exchange is an ‘organ’ of the United Kingdom, even though it is a for-profit company, privately owned by a Hong Kong securities and futures exchange.⁴⁹ The London Metal Exchange provides a platform for trading industrial metal contracts, and is a “recognized investment exchange” under U.K. law, meaning it has statutory obligations regarding maintaining the prices of metals.⁵⁰ The court held that, “while not formed by the U.K. Government, the Exchange was charged by statute with performing the decidedly public function of market regulation,”⁵¹ and noted that an agency of the U.K. government actively supervises the Exchange, and that U.K. law treats the Exchange as a state organ by partially immunizing certain regulatory functions from suit.⁵² These factors outweighed the countervailing factors that Exchange employees were not public employees and their salaries were not paid by the state, and that the Exchange did not have the exclusive right to act as a “recognized investment exchange.”⁵³

4. *European Community—Organ of the State(s)*

In *European Community v. RJR Nabisco, Inc.*, the Second Circuit held that the European Community qualified as an organ of a foreign state

46. *NXP Semiconductors USA, Inc. v. France Brevets, S.A.S.*, No. C 14-1225 SI, 2014 WL 4621017 (N.D. Cal. Sept. 15, 2014).

47. *Id.* at *7.

48. *Id.* The court also concluded that the corporation was not an agency or instrumentality by virtue of the ownership of its shares. The French government owned only 50% of the shares; the other 50% was owned by an instrumentality of the French government, but the court nevertheless concluded that instrumentality was not a political subdivision of France. *Id.* at *7-8.

49. *In re Aluminum Warehousing Antitrust Litigation*, No. 13-md-2481 (KBF), 2014 WL 4211353 (S.D.N.Y. Aug. 25, 2014) (slip op.).

50. *Id.* at *2.

51. *Id.* at *11.

52. *Id.* at *11-12 (discussing the first, second, and fifth *Filler* factors).

53. *Id.* (discussing the third and fourth *Filler* factors).

under the FSIA.⁵⁴ The European Community, as plaintiff, argued that it was a state organ not to establish immunity (because the European Community had waived immunity by initiating the proceedings), but so that the federal court would have diversity jurisdiction under 28 U.S.C. § 1332.⁵⁵ The court rejected the defendants' arguments that an organ of a foreign state must be subordinate to a larger entity, and could not be an international organization created by multiple states.⁵⁶ The court held that the European Community was an organ of the various member states because those member states (1) created the European Community for a national purpose, "to establish governmental control on a collective basis over various national functions;"⁵⁷ (2) actively supervise the European Community by appointing representatives to the Council of Ministers and appointing commissioners to the European Commission;⁵⁸ (3) pay the salaries of European Community officials, who are considered public employees;⁵⁹ (4) give the European Community the exclusive right to authorize issuance of banknotes and conclude certain multilateral agreements;⁶⁰ and (5) consider the European Community to be a governmental entity, even if no European law clearly addresses the question.⁶¹

5. *New York and UK Corporate Entities and Foundation—Organs of the State*

In *In re 650 Fifth Avenue*, the district court held that the four defendants were all agencies or instrumentalities of the state of Iran, even though three were incorporated or otherwise established under New York law and one was incorporated under the laws of the United Kingdom.⁶² The defendants had been created at the direction of Iranian authorities in order to own and manage certain property on behalf of the Iranian government.⁶³ Judgment creditors of Iran, seeking to enforce terrorism-related judgments obtained under the FSIA, sought turnover of a

54. *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014).

55. *Id.* at 143.

56. *Id.* at 144, 147.

57. *Id.* at 145.

58. *Id.*

59. *Id.*

60. *Id.* at 146.

61. *Id.* at 146-47. *See also* *Guardian Industries Corp. v. Commissioner of Internal Revenue*, 143 T.C. 1 (2014) (holding that European Commission is an instrumentality of European Community member states, for the purposes of interpreting provisions of the tax codes, but applying the same test courts use in FSIA determinations).

62. *In re 650 Fifth Ave. & Related Properties*, No. 08 Civ. 10934 (KBF), 2014 WL 1516328 (S.D.N.Y. Apr. 18, 2014), *rev'd sub nom.* *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016). Specifically, the defendants were a New York corporation; its parent, a corporation domiciled in the United Kingdom; a foundation established as a New York non-profit corporation; and a partnership established under the laws of New York.

63. *Id.* at *2-4, 9.

number of properties and bank accounts held by the defendants.⁶⁴ In analyzing whether the judgment creditors were entitled to turnover, the court held that the defendants were organs of Iran because Iran had created them for a national purpose and actively supervised them.⁶⁵ The court was mindful that the entities were created under New York law, which would seem to violate the third prong of section 1603(b), but held that it could disregard the entities' corporate forms, as doing otherwise would allow Iran escape liability by transferring its assets into U.S. juridical entities.⁶⁶ In 2016, the Second Circuit reversed, holding that the defendants did not "equate" to the state, because they "lack[ed] the traditional attributes of statehood," and could not "be deemed 'agencies or instrumentalities' of the state under the FSIA," because their unchallenged status as citizens of New York could not be disregarded.⁶⁷

B. THE STATE AND ITS POLITICAL SUBDIVISIONS: THE "CORE FUNCTIONS" TEST

Although the FSIA recognizes the immunity of an "agency or instrumentality" of a foreign sovereign, such agencies and instrumentalities are not always treated in the same manner as the state itself for immunity purposes. In particular, rules relating to service of process, venue, the availability of punitive damages, and attachment of assets can differ depending on whether the defendant is deemed an agency of the state or the state itself.⁶⁸

To determine which FSIA rules apply, courts have applied the so-called "core functions" test.⁶⁹ Under this test, if the entity's predominant activities or its core functions are governmental in nature, courts will treat the entity as if it were the state itself and apply rules and standards that are more protective of the sovereign.⁷⁰ On the other hand, if the entity's core functions are predominantly commercial in character, courts will apply the less protective rules and standards reserved for agencies and instru-

64. *Id.* at *7. The judgment creditors' actions were consolidated with an action brought by the U.S. government for civil forfeiture of the assets, in which the U.S. government alleged that it was entitled to forfeiture because of the defendants' violations of money laundering and economic sanctions laws. See *In re 650 Fifth Ave. & Related Properties*, 830 F.3d 66, 85 (2d Cir. 2016). In 2015, the U.S. Government and the judgment creditors reached a settlement regarding how any funds obtained through the action were to be distributed. See *In re 650 Fifth Ave.*, No. 08-cv-10934 (KBF), 2015 WL 996387, *1 (S.D.N.Y. Mar. 6, 2015).

65. *In re 650 Fifth Ave.*, 2014 WL 1516328 at *13.

66. *Id.*

67. *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 123-30 (2d Cir. 2016).

68. 28 U.S.C. §§ 1608(a)-(b) (service of process); 28 U.S.C. §§ 1391(f)(3)-(4) (permitting venue in suits against an agency or instrumentality of a foreign state "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business"); 28 U.S.C. §§ 1610(a)-(b) (attachment of assets).

69. See *Ministry of Def. & Support for Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc. ("Cubic")*, 495 F.3d 1024, 1034-35 (9th Cir. 2007).

70. See *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003).

mentalities of the state.⁷¹ For example, the court in *Worley v. Islamic Republic of Iran*, like previous courts, held that intelligence gathering and intelligence operations were “governmental,” not commercial.⁷² Therefore, the Iranian Ministry of Information and Security would be treated as the state for purposes of the FSIA.⁷³

In contrast, the court in *NXP Semiconductors* applied the core functions test to determine that an entity was not a political subdivision of the state, but merely an agency or instrumentality.⁷⁴ The plaintiff had argued that the defendant French corporation was majority-owned by France or a French political subdivision, and therefore fell under section 1603(b) even if it was not itself an agency or instrumentality.⁷⁵ The state owned fifty percent of the corporation, but the other fifty percent was owned by a French investment agency; the plaintiff had argued that the investment agency was actually a subdivision of the French state, making the defendant wholly owned by the government of France.⁷⁶ The court disagreed, noting that although the investment agency was created by statute and controlled by the French Parliament, and it conducted banking, savings, pension, and development services in the public interest, it was also guaranteed autonomy under French law, was primarily responsible for its own finances, and was therefore a “‘distinct economic enterprise’” not subject to close political control.⁷⁷ Accordingly, the court found that it was “not an integral part of France’s political structure, but rather that its structure and function [were] predominantly commercial, and that it operates with a significant degree of independence.”⁷⁸

C. ATTRIBUTING LIABILITY AND ATTACHING ASSETS: THE PRESUMPTION OF SEPARATENESS

The distinction between the state and its agencies or instrumentalities is also relevant in determining whether the liabilities of a state can be attributed to an agency or instrumentality, or vice versa—both for questions regarding jurisdiction and for questions regarding enforcement through the attachment of assets. As a general rule, agencies or instrumentalities are entitled to a presumption of separateness.⁷⁹ This presumption can be overcome if (1) the state has control or authority over

71. *Id.*

72. *Worley v. Islamic Republic of Iran*, 75 F. Supp. 3d 311 (D.D.C. 2014).

73. *Id.*

74. *NXP Semiconductors USA, Inc. v. France Brevets, S.A.S.*, No. C 14-1225 SI, 2014 WL 4621017, at *8-9 (N.D. Cal. Sept. 15, 2014).

75. *Id.* at *7.

76. *Id.*

77. *Id.* at *9 (quoting *Cubic*, 495 F.3d at 1034-35).

78. *Id.*

79. *See, e.g.*, *GSS Grp. Ltd.*, 31 F. Supp. 3d 50 (D.D.C. 2014). *See also* *Funnekotter v. Agricultural Development Bank of Zimbabwe*, No. 13-CV-1917 (CM) (RLE), 2014 WL 4630020 (S.D.N.Y. Sept. 11, 2014) (mag. op.) (holding that because judgment creditor plaintiffs had not yet proved that the defendants were alter egos of the state, they were entitled to jurisdictional discovery from the defendants about the state’s assets, but not about the defendants’ own assets).

the agency, such that either the two are not meaningfully distinct or the state would be liable under ordinary agency principles; or (2) fraud or injustice would result from maintaining the distinction.⁸⁰ Several courts in 2014 addressed this presumption of separateness.

1. Social Investment Fund—Separate from the State

In *DRC, Inc. v. Republic of Honduras*, the plaintiff had obtained an arbitral award for breach of contract against the Honduran Social Investment Fund, and tried to enforce that award against Honduras.⁸¹ The plaintiff relied on the arbitration exception for jurisdiction over Honduras, but that exception would apply only if the Honduran agency and the state were not viewed as separate.⁸² The court found that the agency's enabling statute provided that it had an independent legal status, which entitled it to a presumption of separateness in U.S. courts.⁸³ The court further held that the state did not completely dominate the agency such that this presumption could be overcome: notwithstanding evidence that the agency sometimes acted on behalf of the state, that the state could override the agency's decisions, that ministers of the state served on the body that functioned as the agency's board of directors, and that the state had some financial control over the agency, the agency still had "significant autonomy in the conduct of its daily operations."⁸⁴ The court also held that no principal-agent relationship could be created unless the sovereign actually exercised control over the agency.⁸⁵ Thus, regardless of what control the foreign sovereign could have exercised under the law, because it had not exercised that control, the presumption of separateness could not be overcome.⁸⁶ Nor did the court find fraud or injustice sufficient to overcome the presumption of separateness. The plaintiff argued that it would be unfair not to hold the state responsible because the plaintiff had reasonably believed that the agency "possessed the authority of the [state],"⁸⁷ but the court held that the plaintiffs had failed to explain how this belief was essential in inducing them to enter into the contract.⁸⁸ Having concluded that the agency and the state were separate, the court dismissed the plaintiff's enforcement action for lack of subject matter

80. See *DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201 (D.D.C. 2014) (citing *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 301 (D.C. Cir. 2005)); see also *Wye Oak Technology, Inc. v. Republic of Iraq*, 72 F. Supp. 3d 356 (D.D.C. 2014) (holding that because Iraqi Ministry of Defense was a separate legal person under Iraqi law, it was entitled to presumption of separateness and therefore Iraq could only be liable for breaches of agreement signed by Ministry if plaintiff produced evidence to overcome the presumption).

81. See *DRC, Inc. v. Republic of Honduras*, 71 F. Supp. 3d 201 (D.C. 2014).

82. *Id.* at 208.

83. *Id.* at 208-09.

84. *Id.* at 215.

85. *Id.*

86. *Id.* at 217.

87. *Id.* at 218.

88. *Id.*

jurisdiction.⁸⁹

2. *National Port Authority—Separate from the State*

GSS Group Ltd. v. Republic of Liberia also involved the enforcement of an arbitration award.⁹⁰ The plaintiff was seeking to confirm an award against the National Port Authority of Liberia, and also added Liberia as an additional party against whom it sought confirmation.⁹¹ The Port Authority argued that there was no personal jurisdiction under the “minimum contacts” analysis.⁹² Minimum contacts are not required for jurisdiction over a state, but some courts have required minimum contacts for jurisdiction over agencies and instrumentalities.⁹³ Additionally, there was subject matter jurisdiction over Liberia under the arbitration exception only if the actions of the Port Authority could be attributed to the state.⁹⁴ Thus, the jurisdictional question for both defendants was whether the Port Authority should be treated as the state.⁹⁵ Because the court ultimately held that the presumption of separateness had not been overcome, the plaintiff was not able to confirm its arbitration award against either the Port Authority or Liberia.⁹⁶ The plaintiff “assert[ed] that the [Port Authority]’s board of directors ‘is wholly dominated and controlled by the President of Liberia,’” but the court held that fact to be “far from dispositive.”⁹⁷ The court held that the alignment between the Port Authority’s economic interests and those of the state, and the fact that the Port Authority’s assets would return to the state if the agency was dissolved, “reflected only a normal relationship between a sovereign and an instrumentality of the state.”⁹⁸ The court also held that a contract executed years after the transaction at issue was irrelevant to the relationship between the Port Authority and the state that existed when the plaintiff entered into its contract, and that the state’s co-signing of the contract and request to be kept apprised did not demonstrate any excessive control.⁹⁹ Finally, the court held that one instance of control, where the state directed the Port Authority to cancel its contract with the plaintiff, was not enough to give rise to an agency relationship.¹⁰⁰ Nor was there any fraud or injustice in allowing the state to escape liability where it had ordered the cancellation of the plaintiff’s contract, because the state was

89. *Id.* at 219.

90. GSS Group Ltd. v. Republic of Liberia, 31 F. Supp. 3d 50 (D.D.C. 2014).

91. *Id.* at 54. The plaintiff’s first attempt to confirm the arbitral award against just the National Port Authority had been dismissed for lack of personal jurisdiction over the Port Authority.

92. *Id.* at 58.

93. *See id.* at 56.

94. *Id.* at 61-62.

95. *Id.*

96. *Id.* at 68.

97. *Id.* at 63, 66.

98. *Id.* at 66 (quoting *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 851 (D.C. Cir. 2000)).

99. *Id.*

100. *Id.* at 66-68.

not using the Port Authority's corporate status to gain benefits while shielding itself from risks or to unjustly enrich itself.¹⁰¹ Concluding that the state and the Port Authority were separate entities, the court dismissed the plaintiffs' enforcement action against both parties.¹⁰²

3. *New York and United Kingdom Entities Created As Agents for Iran—Not Separate from the State*

In *In re 650 Fifth Avenue*, although the court did not explicitly consider the presumption of separateness, it nonetheless held that the defendant corporate entities were not distinct from the state.¹⁰³ In answering the question of whether the assets of the defendants could be considered assets of the state, the court held that defendants should be treated as Iran "under an 'alter ego' theory," because of Iran's extensive control over the defendants, concluding that defendants had "no true separate decision-making authority or real existence except that which was allowed and directed by the Iranian government."¹⁰⁴

4. *Government-owned Arms Company—Separate from the State*

In *Williams v. Romarm*, the court held that it lacked personal jurisdiction over the defendant, a firearms manufacturer owned by the Romanian government.¹⁰⁵ As in *GSS*, the question was whether the presumption of separateness had been overcome such that there was jurisdiction without regard to a minimum contacts analysis.¹⁰⁶ The defendant had "'consistently' represented itself as a separate entity from the Romanian state," and the plaintiffs had not timely provided any basis for overcoming that separateness.¹⁰⁷

IV. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY

Once a court concludes that an entity is a foreign state or an agency or instrumentality of a foreign state entitled to sovereign immunity under the FSIA, the court must then decide if one of the exceptions set forth in the FSIA applies. This Section examines how courts addressed the FSIA exceptions in 2014.

A. WAIVER—SECTION 1605(A)(1)

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

101. *Id.* at 68.

102. *Id.*

103. *In re 650 Fifth Ave.*, No. 08 Civ. 10934, 2014 WL 1516328 (S.D.N.Y. Apr. 18, 2014), *rev'd sub nom.* *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016).

104. *Id.* at *13.

105. *Williams v. Romarm, SA*, 756 F.3d 777, 787 (D.C. Cir. 2014).

106. *Id.* at 785.

107. *Id.* at 782-783. The D.C. Circuit Court declined to consider a belated, new argument that the defendant had conceded that it was not separate.

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.¹⁰⁸

In 2014, the courts addressed a broad range of issues under the waiver exception, including: (1) waiver by treaty, (2) waiver by agreeing to governing law, (3) waiver by participating in other U.S. litigation, and (4) waiver by failing to raise the defense in a responsive pleading.

1. Waiver by Treaty

In *Odhiambo v. Republic of Kenya*, the plaintiff, an employee of a Kenyan bank, brought an action against Kenya and its various agencies and officials, alleging breach of contract arising from the Kenya Revenue Authority's offer to pay a reward in exchange for information about unpaid taxes due to the Kenyan government.¹⁰⁹ The plaintiff had turned over records implicating numerous accountholders in potential tax evasion.¹¹⁰ When the bank discovered the plaintiff's actions, the plaintiff began "receiving disquieting phone calls telling him to leave Kenya," and became the victim of police harassment.¹¹¹ The plaintiff applied for asylum in the United States, and Kenyan officials supported his application, which was granted.¹¹² The plaintiff then filed suit arguing that Kenya owed him additional reward money.¹¹³ The district court held that the FSIA barred the plaintiff's suit.¹¹⁴ On appeal, the plaintiff argued that "Kenya waived its sovereign immunity . . . [by] acced[ing] to the 1951 Convention Relating to the Status of Refugees."¹¹⁵ The court of appeals held that, even if this new argument could have been raised on appeal, "it would have little merit,"¹¹⁶ as the "ambiguous and generic language of the Refugee Convention falls far short of the exacting showing required for waivers."¹¹⁷ Courts will not generally find a waiver in a treaty that "contains no mention of a waiver of immunity."¹¹⁸

2. Waiver by Agreeing to Governing Law

An agreement that a contract or disputes thereunder shall be governed by U.S. law may be deemed a waiver of sovereign immunity. In *Ashraf-Hassan v. Embassy of France*, for example, the district court held that a

108. 28 U.S.C. § 1605(a)(1) (2008).

109. *Odhiambo v. Republic of Kenya*, 764 F.3d 31, 33 (D.C. Cir. 2014).

110. *Id.* at 34.

111. *Id.*

112. *Id.*

113. *Id.* at 34-35.

114. *Id.*

115. *Id.* at 35.

116. *Id.*

117. *Id.*

118. *Id.*

contract clause stipulating that the agreement was “to be governed by ‘local legislation’” (in this case, the law of New York) constituted a waiver of sovereign immunity.¹¹⁹

Whether such a waiver is found to exist may depend on the specificity of the contract language and whether the parties clearly demonstrated their intent was that U.S. law should apply to the contract. In *Barapind v. Government of the Republic of India*, the defendants entered into an agreement with the U.S. Department of State (“DOS”), stating that the plaintiff would not be tortured upon his return to India.¹²⁰ The plaintiff argued that the defendants had “implicitly waived [their] sovereign immunity” by entering into the agreement with the DOS.¹²¹ Although there had been no explicit agreement that the contract would be governed by U.S. law, the court observed that the central inquiry for implied waivers in the Ninth Circuit “is whether a sovereign contemplated the involvement of United States courts in the affair in issue”—in other words, how India and the DOS “envisioned the Agreement would be enforced.”¹²² The plaintiff argued that the agreement at issue was “centered on United States domestic law and implicitly specified United States courts for enforcement.” The district court rejected the plaintiff’s argument, holding that the agreement was based on Indian law and “implicitly suggests that Indian courts are the appropriate venue for relief.”¹²³ The district court also held that the plaintiff was a third party beneficiary to the agreement at issue, and noted that “courts rarely find that a nation has waived its sovereign immunity, particularly with respect to suits brought by third parties, without strong evidence that this is what the foreign state intended.”¹²⁴ The court concluded that there was no indication that the defendants had contemplated the involvement of U.S. courts, and therefore granted the defendants’ motion to dismiss for lack of subject matter jurisdiction.¹²⁵

Similarly, in *A Star Group, Inc. v. Manitoba Hydro*, the district court held that one of the defendants, a Canadian public utilities board (“PUB”), had not waived immunity because it was not a party to the agreements with the governing law and forum selection clauses.¹²⁶ The plaintiff and a third party signed agreements that included “a New York governing law clause and forum selection clause.”¹²⁷ Pursuant to those

119. *Ashraf-Hassan v. Embassy of Fr.*, 40 F. Supp. 3d 94, 100 (D.D.C. 2014).

120. *Barapind v. Gov’t of the Republic of India*, 50 F. Supp. 3d 1388, 1390 (E.D. Cal. 2014), *aff’d*, ___ F.3d. ___, 2016 WL 7384023 *1 (9th Cir. Dec. 21, 2016).

121. *Id.* at 1392-93

122. *Id.* at 1393.

123. *Id.*

124. *Id.* at 1395.

125. *Id.* at 1397. In 2016, the Ninth Circuit affirmed the dismissal of the complaint, holding that the defendants “did not waive their sovereign immunity through their diplomatic communications with the United States.” *Barapind v. Gov’t of the Republic of India*, ___ F.3d. ___, 2016 WL 7384023 *1 (9th Cir. Dec. 21, 2016).

126. *A Star Group, Inc. v. Manitoba Hydro*, No. 13 Civ. 4501 (PAC) 2014 WL 2933155 (S.D.N.Y. June 30, 2014).

127. *Id.* at *1.

agreements, the plaintiff provided the third party with certain confidential information.¹²⁸ That information was later submitted to PUB: first by the plaintiff, who later withdrew the submission “due to confidentiality concerns,” and then by the third party.¹²⁹ As part of PUB’s regulatory proceedings, the information was ultimately released to the public.¹³⁰ The plaintiff argued that because PUB had “agree[d] not to violate the terms” of the two original agreements, the forum selection clause constituted a waiver of sovereign immunity.¹³¹ But the court found that the forum selection clause did not bind the utilities board, and so could not be a waiver of immunity.¹³² The plaintiff also argued that PUB waived its immunity by suggesting that the plaintiff retain New York counsel, but the court held that this had “no bearing on whether PUB, itself, submitted to New York jurisdiction.”¹³³

3. Waiver by Participating in Other U.S. Litigation

In *Gotham Asset Locations Inc. v. Israel*, the district court rejected the plaintiff’s argument that the defendant “consented to jurisdiction” by “implicitly waiv[ing] its sovereign immunity.”¹³⁴ The plaintiff had helped Israel recover certain real property in the United States, including by assisting Israel in intervening in estate proceedings related to Israel’s title in the property.¹³⁵ The plaintiff then filed suit against Israel, seeking compensation for the work it had done.¹³⁶ In response to Israel’s motion to dismiss, the plaintiff argued that Israel had “consented to jurisdiction” by intervening in the estate proceedings.¹³⁷ The district court noted that “[a]dmittedly, there is some authority for the proposition that a foreign state can waive its immunity by affirmatively prosecuting litigation in the United States,” but also that such a theory requires a “direct connection between the sovereign’s activities in [the United States courts] and the plaintiff’s claims for relief.”¹³⁸ Specifically, the district court found that “the connection between [the defendant’s] participation in United States-based litigation and [p]laintiff’s claims in this action [were] far too remote to support . . . waiver.”¹³⁹ The court held that the defendant was immune under the FSIA and granted the defendant’s motion to dismiss.¹⁴⁰

128. *Id.* at *1-2.

129. *Id.* at *2.

130. *Id.* at *2-3.

131. *Id.* at *4.

132. *Id.*

133. *Id.*

134. *Gotham Asset Locators Inc. v. Isr.*, 27 F. Supp. 3d 409, 414 (S.D.N.Y. 2014).

135. *Id.* at 410.

136. *Id.*

137. *Id.* at 414.

138. *Id.*

139. *Id.*

140. *Id.* at 415.

4. Waiver by Failure to Raise Immunity

In *Ashraf-Hassan v. Embassy of France*, the district court found that the defendant, a foreign embassy, had implicitly waived sovereign immunity by filing a motion to dismiss in which the foreign embassy agreed not to contest the court's personal jurisdiction, and through the sovereign's subsequent participation in the litigation.¹⁴¹ The court first found that the defendant waived sovereign immunity by entering into an employment contract with the plaintiff that "was expressly subject to U.S. law to the exclusion of" other sources of law.¹⁴² Additionally, the court held that the defendant had implicitly waived sovereign immunity in its motion to dismiss, which "specifically addressed the issue of sovereign immunity and agreed not to challenge the Court's personal jurisdiction unless the case should happen to 'intrude upon [the defendant's] governmental activities' requiring the defendant to "protect the confidential nature of such activities."¹⁴³

In contrast, in *Diag Human S.E. v. Czech Republic-Ministry of Health*, the district court explained that "under the law of [the D.C.] Circuit" the filing of "a motion to dismiss that does not address sovereign immunity . . . does not waive sovereign immunity."¹⁴⁴ The court pointed out that the D.C. Circuit "has held that implied waiver requires 'a conscious decision [by the sovereign] to take part in the litigation.'"¹⁴⁵ The court further held that "a motion to dismiss that omits mention of immunity will not provide sufficient proof of such a conscious decision."¹⁴⁶ The court cited *Ashraf-Hassan* (discussed above) as an illustration of "the type of activity a foreign sovereign must undertake to implicitly waive sovereign immunity."¹⁴⁷

Similarly, in *Fraser v. Rodriguez-Espinoza*, the district court concluded that a motion to dismiss and a motion for summary judgment, both of which asked the court to dismiss on the grounds of statute of limitations, "d[id] not reflect a conscious decision [by the defendant] to take part in the litigation."¹⁴⁸ The court therefore concluded that the defendant did not waive immunity; and thus, the claims were dismissed for lack of subject matter jurisdiction.¹⁴⁹

141. *Ashraf-Hassan v. Embassy of Fr.*, 40 F. Supp. 3d 94, 102 (D.D.C. 2014).

142. *Id.* at 101.

143. *Id.* at 101. Although the defendant attempted to withdraw the waiver, the court held that because the waiver could be withdrawn only "in accordance with the terms of the waiver," and because the defendant had "offered absolutely no explanation of how the 'confidential character' of its 'governmental activities' [had] been implicated," the defendant was not able to withdraw its waiver.

144. *Diag Human S.E. v. Czech Republic-Ministry of Health*, 64 F. Supp. 3d 22, 31 (D.D.C. 2014), *rev'd on other grounds* sub nom *Human v. Czech Republic—Ministry of Health*, 824 F.3d 131, 136 (D.C. Cir. 2016).

145. *Id.*

146. *Id.* (citing *Ashraf-Hassan v. Embassy of Fr.*, 40 F. Supp. 3d 94 (D.D.C. 2014)).

147. *Id.* at 31-32.

148. *Fraser v. Rodriguez-Espinoza*, No. 14 C 1046, 2014 WL 4783095, at *3 (N.D. Ill. Sept. 24, 2014).

149. *Id.* at *3.

B. COMMERCIAL ACTIVITY—SECTION 1605(A)(2)

As foreign sovereigns continue to participate in the global market, the commercial activity exception remains “one of the most frequently litigated” provisions of the FSIA.¹⁵⁰ This exception to immunity, codified at section 1605(a)(2), provides that:

[a] foreign state shall not be immune from the jurisdiction of U.S. courts in any case where the action is based [(1)] upon a commercial activity carried on in the United States by the foreign state; or [(2)] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [(3)] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.¹⁵¹

In other words, foreign states lose immunity from suit in the U.S. when their actions are commercial and have a nexus to the U.S. (*i.e.*, are carried out or have a direct effect in the U.S.). Therefore, plaintiffs may bring claims against the state “based on” such acts, which some courts have interpreted as “requir[ing] a ‘degree of closeness between the acts giving rise to the cause of action and those needed to establish jurisdiction that is considerably greater than common law causation requirements.’”¹⁵²

1. What Acts Are Considered Commercial?

Determining the point in which a foreign state’s act cross the line from *governmental* to *commercial* is fundamental to the commercial activity analysis, as courts define a sovereign’s acts by their nature, not their purpose.¹⁵³ Although these are fact-intensive inquiries, they often focus on the core principle that commercial acts are acts that any private entity could undertake, whereas governmental acts are only possible through sovereign power. Multiple federal court decisions in 2014 addressing commercial and governmental activity are described below.

a. Contracting for Non-Civil Servant Employment at An Embassy—Commercial

In *Ashraf-Hassan v. Embassy of France*, the District Court for the District of Columbia stated that employment will be considered commercial “if an employee is contracted to work as a non-civil servant and has duties of a clerical nature.”¹⁵⁴ The plaintiff’s “duties included supervising the Embassy’s internship-placement program and coordinating the Em-

150. See Crowell and Moring LLP, *The Foreign Sovereign Immunities Act: 2012 Year in Review*, 20 Law & Bus. Rev. Am. 565, 577 (2014).

151. 28 U.S.C. § 1605(a)(2).

152. *Chettri v. Nepal Bangladesh Bank, Ltd.*, 10 Civ. 8470(PGG), 2014 WL 4354668 (S.D.N.Y. Sept. 2, 2014).

153. See 28 U.S.C. § 1603(d).

154. *Ashraf-Hassan v. Embassy of Fr.*, 40 F. Supp. 3d 94, 102 (D.D.C. 2014) (citing *El-Hadad v. United Arab Emirates*, 216 F.3d 29, 34 (D.C. Cir. 2000)).

bassy's partnership with the French-American Cultural Exchange,"¹⁵⁵ and the plaintiff "was hired in a purely administrative position, was not a civil servant, and was not involved with governmental decisions."¹⁵⁶ Accordingly, the plaintiff's claims for employment discrimination were based on a commercial activity and the Embassy was not entitled to immunity.¹⁵⁷

b. Employment to Promote Commerce—Not Commercial

In *Kim v. Korea Trade Promotion-Investment Agency*, the plaintiff brought claims for employment discrimination against a Korean agency established to promote the sale of Korean goods and services in the United States.¹⁵⁸ Even though the plaintiff alleged that the agency was involved in the marketing and selling of goods and services, and that he was employed as a sales agent, the court found that the agency was not engaged in commerce, but rather in the promotion of commerce.¹⁵⁹ Finding the promotion of commerce to be a governmental endeavor, the court held that the commercial activity exception did not apply.¹⁶⁰

c. Confiscating Money—Not Commercial

Unsurprisingly, in *Ezeiruaku v. Bull*, the court held that the London police had not engaged in commercial activity when they confiscated the plaintiff's money during a seizure.¹⁶¹ The plaintiff argued that the police's actions constituted commercial activity because the police were able to profit by accruing interest on the funds seized from the plaintiff.¹⁶² The court disagreed, holding that the seizure of the plaintiff's money was an exercise of police power and therefore a "quintessentially sovereign act."¹⁶³

d. Utilities Regulator Paying for Reports During an Investigation—Not Commercial

In *A Star Group, Inc. v. Manitoba Hydro*, the district court rejected the plaintiff's argument that PUB had engaged in commercial activity when it obtained confidential information from the plaintiff.¹⁶⁴ In a suit over the public release of confidential information, the plaintiff argued that it had a commercial agreement with PUB to supply "commercial services infor-

155. *Id.* at 97.

156. *Id.* at 103 (quoting Defendant's Motion to Dismiss).

157. *Id.*

158. *Kim v. Korea Trade Promotion-Investment Agency*, 51 F. Supp. 3d 279, 281 (S.D.N.Y. 2014).

159. *Id.* at 286-88.

160. *Id.*

161. *Ezeiruaku v. Bull*, 2014 WL 5587404, at *5 (D.N.J. Nov. 3, 2014).

162. *Id.*

163. *Id.*

164. *A Star Group, Inc. v. Manitoba Hydro*, No. 13 Civ. 4501(PAC) 2014 WL 2933155 at *5 (S.D.N.Y., June 30, 2014).

mation related to the PUB's review of [one of the defendants]."¹⁶⁵ The district court disagreed, noting that PUB had "explicitly declined to retain" the plaintiff, and instead requested only the information, while also "agree[ing] to pay the costs associated with that request. This is not commercial activity; rather, it is routine practice for a regulatory body during the course of an investigation."¹⁶⁶ Additionally, because PUB's use of the plaintiff's confidential information was "in furtherance of" PUB's regulatory investigation, the court found its release was not commercial activity.¹⁶⁷

e. Regulating the Aluminum Market by Manipulating Prices—Not Commercial

In *In re Aluminum Warehousing*, the plaintiffs alleged that the London Metal Exchange had engaged in a conspiracy to restrain the output of aluminum, and thereby increase the price.¹⁶⁸ As part of the Exchange's activities, it oversees the trade of metals through warehouses all over the world.¹⁶⁹ The plaintiffs alleged that the Exchange's rules for the warehouse operations led to inflated prices for aluminum.¹⁷⁰ The court held that because it is the nature, and not the purpose, of an activity that matters, it was irrelevant whether the Exchange had engaged in the conduct in bad faith.¹⁷¹ The court found that the Exchange's warehousing activities "serve a vital and necessary role in enabling the [Exchange] to regulate the aluminum market," and therefore are regulatory, not commercial, in nature.¹⁷² Although the plaintiffs argued that the activities were quintessentially commercial because they were contractual in nature, the court held that the contractual arrangements at issue served a regulatory purpose.¹⁷³ Accordingly, the court held that it had no jurisdiction over the claims.¹⁷⁴

f. Leasing Property and Maintaining Bank Accounts—Commercial

In *In re 650 Fifth Avenue*, the court held that leasing property, which resulted in substantial revenue, constituted commercial behavior.¹⁷⁵ Although the defendants argued that certain rent-free or reduced rent leases to mosques, non-profit schools, and Islamic education centers

165. *Id.*

166. *Id.*

167. *Id.*

168. *In re Aluminum Warehousing Antitrust Litigation*, No. 13-md-2481 (KBF), 2014 WL 4211353 at *1, 14-15 (S.D.N.Y. Aug. 25, 2014) (slip op.).

169. *Id.* at *4.

170. *Id.* at *1.

171. *Id.* at *14.

172. *Id.*

173. *Id.* at *15 (observing that the contracts at issue "were not negotiated at arms-length, but rather were offered on a mandatory, 'take it or leave it' basis.>").

174. *Id.*

175. *In re 650 Fifth Ave. & Related Properties*, No. 08 Civ. 10934 (KBF), 2014 WL 1516328 at *17-19 (S.D.N.Y. Apr. 18, 2014).

should be viewed as charitable donations instead of commercial activity, the court held that they were not true donations, as the tenants compensated the owners by assuming certain liabilities, including insurance, taxes, and utility fees.¹⁷⁶ Regardless of any charitable purpose, because the defendants leased real property in exchange for financial benefit, the nature of the leases was commercial.¹⁷⁷ Finally, the plaintiffs also sought to attach various bank accounts belonging to one of the defendants, which the defendant admitted was used to support its general operations.¹⁷⁸ The court found that the defendant used the bank account just as a private party would, and therefore used the account for a commercial purpose.¹⁷⁹

g. Foreign Adoption—Commercial

Although in *McEachern v. Inter-Country Adoption Bd. of the Republic of the Philippines* the court acknowledged that although adoption “is not primarily a commercial activity,” it still held that “the process of adoption, which entails numerous contracts and often an exchange of money, undoubtedly affects commerce.”¹⁸⁰ Accordingly, the court concluded that the plaintiff’s suit to enjoin the removal of a child from a pre-adoptive home fell under the commercial activity exception.¹⁸¹

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

Once a court has determined that a foreign sovereign has engaged in commercial activity under the FSIA, it must then decide whether that activity has sufficient nexus with the U.S. to satisfy the commercial activity exception. That nexus can exist in one of three circumstances: (1) the foreign sovereign carried on commercial activity in the U.S.; (2) the challenged act took place in the U.S. in connection with the foreign sovereign’s commercial activity abroad; or (3) the foreign sovereign acted outside the U.S. in connection with its commercial activity elsewhere, and this activity caused a direct effect in the U.S.¹⁸²

a. Acts in the United States by Foreign States

The first clause of the commercial activity exception permits jurisdiction of commercial acts “carried on in the United States” by foreign states.¹⁸³ Not all commercial acts, however, will be sufficient to grant jurisdiction.

176. *Id.* at *17.

177. *Id.* at *18.

178. *Id.* at *20.

179. *Id.*

180. *McEachern v. Inter-Country Adoption Bd. of the Republic of the Phil.*, 62 F. Supp. 3d 187, 191-192 (D. Mass. 2014).

181. *Id.* at 188-92.

182. 28 U.S.C. § 1605(a)(2).

183. *Id.*

i. *Sending Agents and Materials to the U.S. to Market Securities—Sufficient*

In dicta in *Atlantica Holding*, the court held that the defendant’s conduct met this first prong of the commercial activity test where the defendant had induced investment by the plaintiffs (and other U.S. investors) by sending agents to the United States to meet with investors and sending information about the securities to the United States.¹⁸⁴

ii. *Mere Business Meetings in the U.S.—Insufficient*

The plaintiff in *Odhiambo v. Republic of Kenya* argued that Kenya’s failure to pay him reward money that had been offered to anyone providing information about tax evaders was a commercial activity.¹⁸⁵ The plaintiff further alleged that the activity partially took place in the United States because he conducted meetings with Kenyan officials in the United States.¹⁸⁶ The court rejected this argument, holding that “mere business meetings” did not create sufficient contact.¹⁸⁷ Similarly, the court in *Schoeps v. Bayern* held that there was no commercial activity in the United States where a meeting in the U.S. did not result in a contract, or even a legally binding offer, to sell a painting, but only an agreement to talk further.¹⁸⁸

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

The second clause of the commercial activity exception under Section 1605(a)(2) provides for jurisdiction where the challenged acts—including potentially non-commercial acts—take place in the U.S. but are “in connection with” the sovereign’s commercial activity abroad.¹⁸⁹ As is the case generally with the commercial activity exception, those acts must also form the basis of the suit.

The federal courts found few opportunities in 2014 to address substantively the second clause of the commercial activity exception. The courts that did address this clause found that the acts in the U.S. were not legally sufficient to confer jurisdiction over the plaintiffs’ claims.

The plaintiffs in *Chettri v. Nepal Bangladesh Bank, Ltd.* relied on the second clause for their claims against defendants for freezing a bank account in Nepal.¹⁹⁰ According to the plaintiffs, the freeze was “part and parcel” of a commercial transaction with a U.S. company, and because the defendants had contracted with that U.S. company, they “must have

184. *Atlantica Holdings, Inc. v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 2 F. Supp. 3d 550, 558-59 (S.D.N.Y. 2014), *aff’d in part*, 813 F.3d 98 (2d Cir. 2016), 2016 WL 403445.

185. *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014).

186. *Id.* at 36.

187. *Id.*

188. *Schoeps v. Bayern*, 27 F. Supp. 3d 540, 544-45 (S.D.N.Y. 2014)

189. 28 U.S.C. § 1605(a)(2).

190. *Chettri v. Nepal Bangladesh Bank, Ltd.*, No. 10 CIV. 8470 (PGG), 2014 WL 4354668 at *13 (S.D.N.Y. Sept. 2, 2014).

foreseen” jurisdiction in the U.S. courts.¹⁹¹ The court disagreed, holding that the complaint was not based on the commercial contracts, but on the sovereign act of freezing the bank account.¹⁹² Because all the actions related to the freezing took place in Nepal, the second clause did not apply.¹⁹³

In both *Schoeps* and *Odhiambo*, the courts also considered the second clause, but held that the analysis was essentially the same as under the first clause. Accordingly, the *Schoeps* court held that the preliminary meeting to discuss the possible sale of a painting was “of no legal consequence” and therefore could not constitute commercial activity with a substantial connection to the United States.¹⁹⁴ The court in *Odhiambo* likewise rejected the plaintiff’s argument under the second prong for the same reason it rejected the arguments under the first—even if the alleged meetings in the U.S. were “in connection” with a commercial activity, the plaintiffs’ claims were not based on those meetings.¹⁹⁵

c. Acts Outside the United States that Cause a “Direct Effect” in the United States

The third clause of the commercial activity exception permits jurisdiction over acts that occur outside the U.S., but which cause a “direct effect” in the U.S.¹⁹⁶ This third category was discussed in several cases in 2014, as courts grappled with the distinction between a “direct” and an “indirect” effect.

i. *Failure to Pay—Sometimes Direct*

In 2014, courts continued to struggle with whether payment obligations have a “direct effect” in the United States. The court in *Odhiambo* concluded that, in the D.C. Circuit, there was a “very clear line” in the analysis:

For purposes of clause three of the FSIA commercial activity exception, breaching a contract that establishes or necessarily contemplates the United States as a place of performance causes a direct effect in the United States, while breaching a contract that does not establish or necessarily contemplate the United States as a place of performance does not cause a direct effect in the United States.¹⁹⁷

191. *Id.*

192. *Id.*

193. *Id.*

194. *Schoeps*, 27 F. Supp. 3d at 545.

195. *Odhiambo*, 764 F.3d at 37-38.

196. 28 U.S.C. § 1605(a)(2); *see Tarsavage v. CITIC Trust Co.*, 3 F. Supp. 3d 137, 145 (S.D.N.Y. 2014) (stating in a footnote that the test for direct effect overlapped with the Second Circuit’s long-arm jurisdiction test, which asks, in cases “[w]here the conduct that forms the basis for the controversy occurs entirely out-of-forum, and the only relevant jurisdictional contacts are the in-forum effects harmful to the plaintiff,” whether “the defendant expressly aimed its conduct at the forum.”) (internal quotations omitted).

197. *Odhiambo*, 764 F.3d at 40.

Accordingly, the court found that failure to pay money allegedly owed pursuant to a general offer to pay a reward did not have a direct effect in the United States, where the offer was made in Kenya and did not specify any place of payment.¹⁹⁸ The facts that Kenya helped the plaintiff immigrate to the United States and that some payments were made in the United States were not sufficient to show a “direct effect.”¹⁹⁹ The dissent, however, rejected the “clear line” drawn by the majority, concluding that the direct effects test was met under a “holistic analysis.”²⁰⁰

Most courts have agreed with the *Odhiambo* majority, finding that a mere promise to pay, without some promise to pay in the United States, is not sufficient to show a direct effect in the United States.²⁰¹ In *Araya-Solarzano*, the court concluded that there was no “direct effect” where the only connection to the United States was that the plaintiffs lived in the United States, were citizens, and included in their acceptance of a contract that payment would be made in U.S. dollars.²⁰² Similarly, in *GMI, LLC v. Asociacion del Futbol Argentino*, the court held there was no direct effect where the plaintiff never designated the U.S. as the place of payment, but only “intended” to do so, and it was not clear that such a designation, had it been made, would have bound the relevant parties.²⁰³ And the court in *Ketty* concluded that, where the plaintiff did not allege there was any arrangement to pay in the United States, there was no direct effect.²⁰⁴

ii. *Marketing Securities to United States Investors—Direct*

In *Atlantica Holding*, the court held that the defendant created a “direct effect” where it had created a subsidiary to market securities in the U.S., sent information to qualified buyers in the U.S., sent agents to meet with investors in the U.S., and made false statements that resulted in losses to U.S. investors.²⁰⁵ According to the court, the defendant “plainly contemplated investment by United States persons and indeed successfully subscribed twenty-fivepercent of the [securities] offering with individuals within the United States.”²⁰⁶

198. *Id.* at 41.

199. *Id.* at 40-42.

200. *Id.* at 50 (Pillard, J., dissenting).

201. *See, e.g., Voest-Alpine Trading v. Bank of China*, 142 F.3d 887 (5th Cir. 1998) (“[W]e hold that a financial loss incurred in the United States by an American plaintiff, if it is an immediate consequence of the defendant’s activity, constitutes a direct effect.”).

202. *Araya Solorzano v. Gov’t of Republic of Nicaragua*, 562 Fed. Appx. at 905.

203. *GMI, LLC v. Asociacion del Futbol Argentino*, No. 13-21494-CIV, 2014 WL 2818663 (S.D. Fla. June 23, 2014).

204. *Ketty*, 53 F. Supp. 3d at 51-52.

205. *Atlantica Holding*, 2 F. Supp. 3d at 557-58.

206. *Id.* at 558.

iii. *Effect on the Art Market—Not Direct*

In *Schoeps*, the plaintiffs argued that allowing the defendant to get away with the purchase of a stolen art work, where the purchase was structured to avoid U.S. tax consequences, would have a “disastrous” effect on the art market in the United States and would further an alleged criminal conspiracy to evade taxes.²⁰⁷ The court rejected these arguments as “balderdash,” holding that the claimed effects were not “direct” effects for purposes of the FSIA.²⁰⁸

iv. *Freezing a Bank Account Outside the United States—Not Direct*

In *Chettri*, the court held that freezing a bank account in Nepal, and thus allegedly interfering with the plaintiffs’ supply contracts with the Nepalese government, did not cause a direct effect in the United States.²⁰⁹ Mere financial injury in the United States from the freeze was not sufficient; the actual direct effect was to prevent payments to third-party subcontractors in Nepal to satisfy the supply contracts.²¹⁰

3. “Based Upon”

It is not enough for a plaintiff to allege a qualifying commercial activity that has some connection with the claim alleged; a plaintiff must show that its claims arise from or are “based upon” the commercial activity described.²¹¹ If the alleged commercial conduct is not part of the conduct that would entitle the plaintiff to relief, then the commercial activity exception will not apply.

For example, the claims in *Smith Rocke Ltd. v. Republica Bolivariana de Venezuela* arose from the Venezuelan state’s alleged conversion of two financial institutions in Venezuela and their assets, which occurred when a Venezuelan agency placed them in receivership then ordered their liquidation.²¹² Those institutions possessed some rights in notes issued by the U.S. financial institution Lehman Brothers (“the Lehman notes”), which also was in receivership.²¹³ The Venezuelan regulators participated in the U.S. bankruptcy proceedings for Lehman Brothers, to assert the rights of the Venezuelan banks, and the plaintiff alleged that this participation constituted commercial activity that gave the court jurisdiction over the plaintiff’s conversion claims.²¹⁴ The court disagreed. Even if the Venezuelan state’s post-conversion actions on behalf of the banks could be considered commercial activity, the court found that the plaintiff’s claims

207. *Schoeps*, 27 F. Supp. 3d at 546.

208. *Id.*

209. *Chettri*, 2014 WL 4354668 at *15.

210. *Id.* at *15-16.

211. See 28 U.S.C. § 1605(a)(2).

212. *Smith Rocke Ltd. v. Republica Bolivariana de Venezuela*, No. 12-Cv-7316(LGS), 2014 WL 288705 (S.D.N.Y. Jan. 27, 2014).

213. *Id.* at *2.

214. *Id.* at *4.

were not based on those actions because those actions would not entitle the plaintiff to any relief.²¹⁵ Instead, the plaintiff's claims were based on the alleged conversion by the state—claims which had to be analyzed under the expropriation exception.²¹⁶

Similarly, in *Chettri*, the court rejected the plaintiffs' argument that the commercial activity exception applied because the government froze assets that were part of a commercial transaction. The court held that the plaintiffs' claims were not based on the commercial contracts, but on the act of freezing the bank account.²¹⁷

The court in *Odhiambo* also examined this question, holding that the plaintiff's claims were not based on the U.S. meetings that the plaintiff had argued constituted the relevant commercial activity.²¹⁸ According to the court, "clause one requires a plaintiff's claim to be 'based upon' the aspect of the foreign state's commercial activity that establishes a substantial contact with the United States."²¹⁹ The plaintiff did not meet this test, as the meetings, which were "the only aspect of Kenya's commercial activity that allegedly established substantial contact with the United States," were "not necessary to make out any element of [plaintiff's] breach-of-contract claim."²²⁰

The court in *Schoeps*, in addition to holding that there was no legally sufficient commercial activity, also held that the plaintiffs' claims were not "based on" the alleged commercial activity.²²¹ The plaintiffs had sued the current owner of a painting, alleging commercial acts related to the buying of the painting in the 1960s.²²² The true wrongful conduct, however, had occurred in the 1930s, when a Jewish banker in Germany was forced to transfer the painting because of Nazi persecution.²²³ According to the court, the suit was not based on the defendant's acquisition of the painting, but on the decades-earlier forced transfer to the previous owner, with no involvement by the defendant.²²⁴

In *Ketty*, the court held that it had no jurisdiction over the plaintiff's claims for breach of contract and *quantum meruit* related to his employment contract to teach in Saudi Arabia holding that "[a]lthough Plaintiff was interviewed in the United States and signed his contract in the United States, the elements of Plaintiff's . . . claims that would entitle him to relief are his performance and Defendant's nonpayment, both of which

215. *Id.* at *5.

216. *Id.* at *5.

217. Chettri, 2014 WL at *13 ("[T]he 'gravamen' of the Complaint is not [the] supply contracts with the government of Nepal, but rather the [] freez[ing] of the \$1 million.")

218. *Odhiambo*, 764 F.3d at 37.

219. *Id.*

220. *Id.*

221. *Schoeps*, 27 F. Supp. 3d at 544.

222. *Id.* at 542.

223. *Id.*

224. *Id.*

occurred in Saudi Arabia.”²²⁵ The court did, however, find that it had jurisdiction over the plaintiff’s fraudulent inducement claim, because that claim was based on alleged “fraudulent representations to Plaintiff at the time Plaintiff signed the Contract in the United States,” and the signing of the contract was “in connection with” the commercial activity of teaching in Saudi Arabia.²²⁶

C. TAKINGS—SECTION 1605(A)(3)

The FSIA provides in section 1605(a)(3):

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on 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.²²⁷

In 2014, federal courts decided several cases in which plaintiffs alleged that the sovereign defendant should be subject to jurisdiction based on the FSIA’s “takings” (or “expropriation”) exception. It is settled that a sovereign’s taking of the property of its *own* citizens, no matter how egregious, does not constitute a “violation of international law” sufficient to confer jurisdiction under section 1605(a)(3).²²⁸ Thus, in two of the three cases described below, the focus was the citizenship of the plaintiffs and/or their predecessors for purposes of analyzing whether the takings at issue violated international law.

In *LaLoup v. United States*, the parents of a U.S. Marine who died while stationed in Greece brought an action against the United States, the U.S. Department of Defense, Greece, and a Greek hospital, asserting claims for mishandling of their son’s body after he committed suicide, and for negligence and intentional infliction of emotional distress arising from the removal of their son’s heart during his autopsy in Greece, and the defendants’ failure to disclose this information to the plaintiffs.²²⁹ The Greek defendants asserted sovereign immunity and the plaintiffs argued that the expropriation exception to the FSIA governed the case.²³⁰

The court found that the plaintiffs had a “quasi-property” right in their son’s body arising out of, and limited to, their burial duties.²³¹ The court explained that because the plaintiffs were unable to bury the body with

225. *Ketty*, 53 F. Supp. 3d at 51.

226. *Id.* at 52.

227. 28 U.S.C. § 1605(a)(3).

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

229. *LaLoup v. United States*, 29 F. Supp. 3d 530, 533-35 (E.D. Pa. 2014).

230. *Id.* at 545.

231. *Id.* at 548.

the heart in it, they were deprived of that right.²³² However, the district court explained that the plaintiffs did not have an interest in the body that could be compensated by money; as such, the court concluded that the provision requiring “just compensation” did not contemplate the type of “taking” at issue in this case.²³³ The court also found that the taking of the heart was not for a public purpose.²³⁴ Accordingly, the court concluded that the activities the plaintiffs alleged did not fall within the meaning of section 1605(a)(3), and so the court granted the defendants’ motion to dismiss for lack of subject matter jurisdiction as to the Greek defendants.²³⁵

In *Smith Rocke Ltd.*, the plaintiff also argued that the court had jurisdiction over its claims for conversion under the expropriation exception.²³⁶ Among the assets of the expropriated financial institutions were the “Lehman Notes,” and the court found that the right to payment under those notes was a right to property, and thus satisfied the first element of 1605(a)(3).²³⁷ For the second element of section 1605(a)(3), the district court concluded that the property at issue was “nationalized” by the defendant and thus was “taken” for FSIA purposes.²³⁸ For the third element, however, the district court concluded that the taking was not in violation of international law because the defendant was only “taking” from its own citizens.²³⁹ Ultimately the court concluded that without a violation of international law, the expropriation exception could not apply, and granted the defendant’s motion to dismiss for lack of subject matter jurisdiction.²⁴⁰

In *Chettri*, where the plaintiffs brought claims for the freezing of a bank account in Nepal, the court determined that the second prong of the takings exception did not apply for several reasons.²⁴¹ First, that prong requires that the taken property be “owned or operated by an agency or instrumentality” of the sovereign (unless the property is actually in the United States);²⁴² because the plaintiffs alleged that the property had been taken by the government itself, rather than an agency or instrumentality, this requirement was not met.²⁴³ Second, the court concluded that the plaintiffs had not exhausted remedies in Nepal, which was required before the plaintiffs could bring a takings claim.²⁴⁴ Third, the court concluded that the plaintiffs had not demonstrated that the freezing of a bank account, pursuant to a money laundering investigation, constituted

232. *Id.*

233. *Id.* at 549.

234. *Id.* at 550.

235. *Id.*

236. *Smith Rocke Ltd.*, 2014 WL 288705, at *1 (S.D.N.Y. Jan. 27, 2014).

237. *Id.* at *5-6.

238. *Id.* at *7.

239. *Id.* at *7-10.

240. *Id.* at *10-11.

241. *Chettri*, 2014 WL 4354668 at *12-19.

242. 28 U.S.C. § 1605(a)(3).

243. *Chettri*, 2014 WL 4354668 at *17.

244. *Id.*

a taking.²⁴⁵ Finally, by transferring money into the Nepalese bank account, the plaintiffs had voluntarily agreed to submit to the laws of Nepal, including those governing money laundering.²⁴⁶ Although the plaintiffs complained that Nepal had deliberately prolonged the time during which the bank account was frozen, the length of the freeze was not sufficient to transform it into a taking, especially where Nepal had been engaged in an active investigation.²⁴⁷

D. NON-COMMERCIAL TORTS—SECTION 1605(A)(5)

The “noncommercial tort” or “tortious activity” exception of the FSIA subjects a sovereign entity to jurisdiction in the U.S. 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.”²⁴⁸

The FSIA limits the noncommercial tort exception in two significant ways. First, it excludes claims based on the “exercise or performance or the failure to exercise or perform” any “discretionary function.”²⁴⁹ Second, the Act excludes claims stemming from alleged “malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”²⁵⁰ Thus, the exception applies to “relatively few situations.”²⁵¹

Some courts in 2014 declined to apply section 1605(a)(5) when the alleged tortious conduct occurred outside of the United States. For example, in *Fernandez v. Spain*, the plaintiff, a Spanish national, alleged that Spain had “consciously and wantonly” violated his rights throughout the prosecution of a criminal case against him that was related to embezzlement of public funds.²⁵² The district court concluded that it was “undeniable” that the legal proceedings at the heart of the case took place outside of the United States (in Spain), and therefore the FSIA exception for noncommercial torts did not apply.²⁵³ The district court dismissed the

245. *Id.* at *18.

246. *Id.*

247. *Id.*

248. 28 U.S.C. § 1605(a)(5).

249. *Id.* § 1605(a)(5)(A). This exclusion applies “regardless of whether the discretion is abused.” *Mohammadi v. Islamic Republic of Iran*, 947 F. Supp. 2d 48, 81 n.4 (D.D.C. 2013), *aff’d*, 782 F.3d 9, 2015 WL 1499342 (D.C. Cir. Apr. 3, 2015).

250. 28 U.S.C. § 1605(a)(5)(B).

251. *See, e.g., In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 109, 116 n.8 (2d Cir. 2013) (noting that the legislative history of the FSIA suggests that Congress’s principal purpose in implementing the noncommercial tort exception “‘was to enable officials and employees of foreign sovereigns to be held liable for the traffic accidents which they cause in this country, whether or not in the scope of their official business’”).

252. *Fernandez v. Spain*, 2014 WL 1807069, at *1 (D.P.R. May 6, 2014).

253. *Id.* at *2.

case *sua sponte* for lack of subject matter jurisdiction.²⁵⁴

Similarly, in *Ezeiruaku v. Bull*, the plaintiff alleged that the London police seized \$80,000 in “undisclosed” U.S. currency at London’s Heathrow International Airport, and contended that the court had subject matter jurisdiction over the police on the basis of a number of exceptions to the FSIA, including the tortious activity exception.²⁵⁵ The court rejected the plaintiff’s argument as to the tortious activity exception, explaining that the exception is limited to torts occurring within the territorial jurisdiction of the United States.²⁵⁶ Because the plaintiff’s allegations established that the events in question occurred outside of the United States (“clearly . . . within the territorial jurisdiction of the United Kingdom”), this exception did not apply.²⁵⁷

In *Richardson v. Attorney General of British Virgin Islands*, there was a dispute as to whether the tortious activity occurred in U.S. territorial waters or in the territorial waters of the foreign sovereign.²⁵⁸ The plaintiffs were passengers on a power boat that was stopped by a customs officer for the government of the British Virgin Islands (“BVI”), who ordered the plaintiffs to come aboard his boat.²⁵⁹ The plaintiffs alleged that they sustained injuries because the officer did not safely operate his boat, and thereafter filed a negligence action against the Attorney General of BVI and against the officer himself.²⁶⁰ The defendants argued that they were immune under the FSIA, and submitted documents that appeared to be judgments from the BVI wherein the plaintiffs pled guilty to illegal entry into the BVI.²⁶¹ The district court concluded, however, that it was unclear that the documents were, in fact, judgments, and also questioned whether the judgments should be recognized, given that the plaintiffs alleged they had been forced to sign the documents while one of them was suffering from severe injuries from the boating accident.²⁶² As there was other evidence on the record showing that the incident had occurred in the territorial waters of the U.S. Virgin Islands, the district court concluded that the defendants failed to demonstrate “by a preponderance of the evidence that the tortious activity exemption [did] not apply,” and therefore the court could exercise subject matter jurisdiction.²⁶³

E. ARBITRATION—SECTION 1605(A)(6)

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

254. *Id.*

255. *Ezeiruaku v. Bull*, 2014 WL 5587404 at *1 (D.N.J. Nov. 3, 2014).

256. *Id.* at *7.

257. *Id.*

258. *Richardson v. Attorney Gen. of British V.I.*, 2014 WL 3708115, at *1 (D.V.I. July 25, 2014).

259. *Id.*

260. *Id.*

261. *Id.* at *5.

262. *Id.* at *5-7.

263. *Id.* at *8.

[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

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

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

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this Section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.²⁶⁴

In 2014, several U.S. courts examined the arbitration exception. In *Diag Human S.E. v. Czech Republic—Ministry of Health*, the plaintiff sought to enforce an arbitration award related to the defendant's alleged interference with a business relationship between the plaintiff and a third party.²⁶⁵ To enforce the award, the plaintiff attempted to rely on the New York Convention as the source of jurisdiction over the foreign sovereign defendant.²⁶⁶ First, the district court found that subsection 1605(a)(6)(A) did not apply because the arbitration took place in the Czech Republic.²⁶⁷ Second, the court concluded that subsection 1605(a)(6)(C) did not apply because the underlying claim could not have been brought in a United States court using any of the exceptions listed in sections 1605 or 1607 (and the plaintiff failed to assert that any other sections applied).²⁶⁸ Third, the court found that 1605(a)(6)(D) did not apply because the facts did not support a finding of implicit or explicit waiver.²⁶⁹ Finally, although the plaintiff did not specifically invoke subsection 1605(a)(6)(B), the court noted that it did not apply because the case did not fall within the scope of the New York Convention.²⁷⁰ As such, the court dismissed the case *sua sponte* for lack of subject matter jurisdiction.²⁷¹ In 2016, the D.C. Circuit reversed, holding that the plaintiff "satisfied its burden of showing that its arbitration award 'may be governed' by the New York Convention because" the plaintiff had a commercial relationship with the

264. 28 U.S.C. § 1605(a)(6).

265. *Diag Human S.E. v. Czech Republic—Ministry of Health*, 64 F. Supp. 3d 22 (D.D.C. 2014)

266. *Id.* at 28.

267. *Id.* at 32.

268. *Id.*

269. *Id.* at 32-33.

270. *Id.* at 33.

271. *Id.*

Czech Republic.²⁷²

In *DRC, Inc.*, the district court conducted an in-depth analysis of the arbitration exception as it relates to government instrumentalities.²⁷³ The plaintiff had obtained an arbitration award against the Honduran Social Investment Fund (“HSIF”), and sought to enforce that award against the state.²⁷⁴ The state asserted that it was immune, and the plaintiff attempted to rely on the arbitration exception to the FSIA.²⁷⁵ The district court explained that “[t]here is no dispute that, had this confirmation action been brought against HSIF, the award debtor, the Court would have subject matter jurisdiction.”²⁷⁶ But because the action was against the Republic itself, the district court had to analyze the case under the line of cases addressing government instrumentalities.²⁷⁷ The court held that HSIF was entitled to a presumption of separateness from the state, and that no basis existed for disregarding that separateness.²⁷⁸ Accordingly, the arbitration exception did not apply as to the defendant Republic, and the court therefore granted the defendant’s motion to dismiss the plaintiff’s petition to confirm the award.²⁷⁹

In *GSS Group Ltd. v. Republic of Liberia*, the district court similarly examined whether a sovereign non-signatory to an arbitration agreement can be held responsible for payment of an arbitration award on the theory that an agent of the sovereign was a signatory to the agreement.²⁸⁰ The plaintiff in that case sought confirmation of a \$44 million arbitral award issued against National Port Authority of Liberia (“NPA”) arising out of the plaintiff’s claim that NPA breached a contract.²⁸¹ The plaintiff named not just NPA, but also the Republic of Liberia, on the theory that NPA had acted as Liberia’s agent.²⁸² The district court analyzed whether NPA should be afforded a presumption of independence. The court agreed with the defendants that none of the purported links alleged by the plaintiff established that Liberia dominated the NPA or that the NPA acted as the government’s agent.²⁸³ The court therefore concluded that Liberia was entitled to sovereign immunity and that the court lacked jurisdiction over that defendant.²⁸⁴

272. *Human v. Czech Republic-Ministry of Health*, 824 F.3d 131, 136 (D.C. Cir. 2016).

273. *DRC, Inc.*, 2014 WL 5390182, at *1.

274. *Id.*

275. *Id.* at *3-4.

276. *Id.* at *4.

277. See *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (“*Bancec*”) (establishing that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such”); see also *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F. 3d 843, 849 (D.C. Cir. 2000) (holding that government instrumentalities enjoy a “presumption of separateness” from the sovereign).

278. 2014 WL 5390182, at *8-12 (D.D.C. Oct. 23, 2014).

279. *Id.* at *12.

280. *GSS Group Ltd. v. Republic of Liberia*, 31 F. Supp. 3d 50, 54 (D.D.C. 2014)

281. *Id.*

282. *Id.*

283. *Id.* at 64.

284. *Id.* at 68.

F. STATE-SPONSORED TERRORISM—SECTION 1605A

In 2014, courts continued to grapple with the nuances of the “terrorism exception” to sovereign immunity under the FSIA. This exception was enacted in 1996, as Section 1605(a)(7), to allow victims of terrorism to sue foreign sovereigns that have been designated by the U.S. Department of State as “state sponsor[s] of terrorism,” as well as the agencies and instrumentalities of those states.²⁸⁵ Sovereigns so designated lose their immunity from suit if they were designated as a state sponsor of terrorism either at the time of the terrorist act, or subsequently, as a direct result of the act that is the subject of the litigation.²⁸⁶

Section 1605(a)(7) did not provide plaintiffs with a federal cause of action; rather, it simply granted the courts jurisdiction to decide certain claims.²⁸⁷ Nor did it permit the award of punitive damages against state sponsors of terrorism.²⁸⁸ In 2008, Congress amended the exception, enacting a new section 1605A, to provide for a more uniform approach to compensating victims of state-sponsored terrorism, as well as to provide a greater deterrent to state-sponsored terrorism.²⁸⁹ Actions filed under section 1605(a)(7) that were ongoing at the time of the amendment could be treated “as if the action had originally been filed” pursuant to section 1605A.²⁹⁰ Additionally, for sixty days post-judgment in any action that had validly invoked section 1605(a)(7), plaintiffs could bring any other action arising out of the same event under section 1605A.²⁹¹

To invoke the exception, a plaintiff also must allege that the sovereign defendant participated in an act in furtherance of a terrorist objective. Such acts include an “act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act.”²⁹² The FSIA further limits claims to those brought by plaintiffs who are U.S. nationals, members of the U.S. armed forces, employees or agents of the United States, or legal representatives of these individuals.²⁹³ A plaintiff meeting any one of these categories must then demonstrate causation and damages in order to potentially hold a foreign

285. See 28 U.S.C. § 1605A(a)(2)(A)(i)(I); see also Country Reports on Terrorism 2014, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/rls/crt/2014/239410.htm> (last visited Mar. 3, 2016). In 2015, the State Department removed Cuba from the list, leaving only Iran, Sudan, and Syria.

286. 28 U.S.C. § 1605A(a)(2)(A)(i)(I); see also *Jerez v. Republic of Cuba*, 775 F.3d 419 (D.C. Cir. 2014) (finding that plaintiff’s claim did not fall within FSIA terrorism exception where Cuba was not designated as a state sponsor of terrorism at the time of his alleged torture, nor designated as such as a result of his alleged torture).

287. See 28 U.S.C. § 1605(a)(7).

288. *Id.*

289. National Defense Authorization Act for Fiscal Year 2008 (“NDAA”), Pub. L. No. 110-181, 122 Stat. 3 (2008).

290. NDAA § 1083(c)(2); see, e.g., *In re 650 Fifth Ave. & Related Properties*, No. 08 Civ. 10934(KBF), 2014 WL 1998233, *5 (May 14, 2014, S.D.N.Y.).

291. NDAA § 1083(c)(3).

292. *Id.* § 1605A(a)(1).

293. *Id.* § 1605A(c).

sovereign liable under the FSIA.²⁹⁴

1. Implementing the Exception

a. Evidentiary Burden

The FSIA grants jurisdiction to courts only where a plaintiff pleads (and ultimately produces) satisfactory evidence that a foreign state's conduct falls within one of the enumerated exceptions to sovereign immunity.²⁹⁵ Plaintiffs may produce evidence in the form of not only live witnesses, but also affidavits or declarations,²⁹⁶ and a court may accept uncontroverted evidence as true.²⁹⁷

In 2014, as in previous years, courts took judicial notice of evidence presented in previous cases without requiring the evidence to be resubmitted.²⁹⁸ But the extent to which this satisfied a plaintiff's evidentiary burden varied by court. For example, in *Opati v. Republic of Sudan*, the court observed that, while it may take judicial notice of, and give effect to, its own records from another related proceeding, it may not follow the findings of prior proceedings without making its own independent findings of fact, based on that evidence.²⁹⁹

"Plaintiffs seeking to invoke the terrorism exception based on torture (as opposed to "a targeted bombing or a deliberate execution") face the unique evidentiary burden of meeting the statutory definition of torture."³⁰⁰ As explained in our 2013 review, in *Han Kim v. Democratic People's Republic of Korea*, the plaintiffs were relatives of a reverend who was allegedly abducted by agents of North Korea, tortured, and ultimately killed.³⁰¹ The plaintiffs sought a default judgment against North Korea.³⁰² The lower court had found that the plaintiffs could not meet the high evidentiary bar for torture under the FSIA, *i.e.*, the definition of torture in Section 3 of the Torture Victims Protection Act ("TVPA"), because they had not produced "first-hand evidence" of what had happened to the Reverend.³⁰³ In 2014, the D.C. Circuit disagreed and reversed the lower court's judgment.³⁰⁴ The court emphasized that the secrecy with which a state like North Korea operates undoubtedly makes it difficult for plaintiffs to bring direct evidence of torture.³⁰⁵ But the crucial evidence was records from a South Korean court that had convicted a North

294. *Id.*

295. *See, e.g., Jerez*, 775 F.3d 419, 423-24.

296. *Leibovitch v. Syrian Arab Republic*, 25 F. Supp. 3d 1071, 1080 (N. D. Ill. 2014).

297. *Id.*; *see also Worley* 75 F. Supp. 3d at 319.

298. *See, e.g., Leibovitch*, 25 F. Supp. 3d at 1075-76, 1080.

299. *Opati v. Republic of Sudan*, 60 F. Supp. 3d 68 (D.D.C. 2014).

300. *See Crowell and Moring LLP, The Foreign Sovereign Immunities Act: 2013 Year in Review*, 21 Law & Bus. Rev. Am. 241, 286 (2015).

301. *Han Kim v. Democratic People's Republic of Korea*, 774 F.3d 1044, 1045 (D.C. Cir. 2014).

302. *Id.*

303. *Id.*

304. *Id.* at 1045.

305. *Id.* at 1049.

Korean intelligence agent for, among other crimes, abducting Reverend Kim.³⁰⁶ That evidence, combined with expert testimony establishing North Korea's practice of torturing and killing prisoners like the Reverend and also its use of terror and intimidation to suppress witness testimony, was enough for the court to "reach the logical conclusion" that the plaintiffs' evidence satisfied the TVPA's definition of torture.³⁰⁷ It thus directed the lower court to enter a default judgment against North Korea and noted that North Korea could seek to vacate that judgment should it disagree with the court's decision.³⁰⁸

b. Causation

In order to avail themselves of the terrorism exception under section 1605A, plaintiffs also must "prove a theory of liability" which justifies holding the defendants culpable for the injuries that the plaintiffs have allegedly suffered.³⁰⁹ Plaintiffs need not, however, plead "but-for" causation; they may rely instead on a reasonable causal link.³¹⁰ Courts considering a FSIA claim under the terrorism exception "must articulate the justification for such recovery, generally through the lens of civil tort liability."³¹¹

A foreign state need not be directly involved in an act of terrorism to be held liable under the FSIA.³¹² Section 1605A also provides for liability if a state sponsor of terrorism provides material support or resources for a terrorist attack.³¹³ In *Kaplan v. Central Bank of Islamic Republic of Iran*, the court found that both North Korea and Iran were liable to the plaintiffs for their role in providing "material support" to Hezbollah in connection with Hezbollah rocket attacks.³¹⁴ Specifically, the court found that North Korea had provided Hezbollah with advanced weapons, expert advice and construction assistance in hiding the weapons in underground bunkers, and training on how to use the weapons and bunkers.³¹⁵ Meanwhile, the court found that Iran had financed North Korea's assistance, and also helped transport weapons into Hezbollah's hands.³¹⁶

306. *Id.* at 1051.

307. *Id.*

308. *Id.*

309. *Worley*, 75 F. Supp. 3d at 334-35 (citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 73 (D.D.C.2010)); *see also* 28 U.S.C. 1605A(a)(1) (requiring causation).

310. *See Worley*, 75 F. Supp. 3d at 325.

311. *Valore*, 700 F. Supp. 2d at 66.

312. *See* 28 U.S.C. 1605A.

313. *See Kaplan v. Central Bank of Islamic Republic of Iran*, 55 F. Supp. 3d 189, 198 (D.D.C. 2014) (citing § 1605A(a)(2)(A)(i)(I)).

314. *Id.* at 200.

315. *Id.*

316. *Id.*

c. Waiver

In 2014, courts continued to address the effect of section 1605A—or lack thereof—on claims previously filed pursuant to section 1605(a)(7). In *In re 650 Fifth Avenue*, the plaintiffs had obtained a default judgment against Iran and its Ministry of Information & Security for both compensatory and punitive damages.³¹⁷ They then submitted applications to the U.S. Treasury Department for payment pursuant to the Victims of Trafficking and Violence Protection Act (“TVPA”).³¹⁸ Each application stated that the plaintiffs “hereby relinquish . . . all rights and claims to punitive damages awarded in connection with the claim or claims . . . brought under 28 U.S.C. 1605(a)(7) and any related interest, costs, and attorneys fees.”³¹⁹ The plaintiffs received some, but not all, of their judgment through the TVPA funds.³²⁰ Several years later in 2010, the plaintiffs converted their action to one under section 1605A and pursued an action against various building owners affiliated with Iran to satisfy the remainder of the default judgment, including its punitive damages.³²¹ The court rejected the plaintiffs’ attempt to recover the punitive damages. Although the plaintiffs had converted their action to one under section 1605A, that conversion did not create new rights to punitive damages that the plaintiffs had previously relinquished when receiving payment under the TVPA.³²² The court held that the plaintiffs had waived their right to punitive damages in exchange for the partial payment.³²³

2. Choice of Law Issues

In 2014, courts continued to confront difficult choice-of-law questions in applying the terrorism exception. Indeed, the presence of non-citizen plaintiffs, foreign law, and competing interests in combating terror have led courts to confront difficult questions regarding the applicable rule of law. In *Leibovitch*, the court considered claims by the estate of a victim killed in Israel during a shooting committed by the Palestinian Islamic Jihad.³²⁴ The court construed the estate’s claim as one for intentional infliction of emotional distress (“IIED”) but noted that the plaintiffs had failed to offer a legal basis for such a claim under either Israeli or American law.³²⁵ The court thus undertook an independent analysis of Israeli law and concluded that it was unclear whether that nation’s law recognized the estate’s IIED claim.³²⁶ The court concluded that both parties, by failing to prove Israeli law, could be said to have acquiesced to the law

317. *In re 650 Fifth Ave.*, 2014 WL 1998233, at *1.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.* at *2.

322. *Id.* at *5.

323. *Id.*

324. *Leibovitch*, 25 F. Supp. 3d at 1076.

325. *Id.* at 1084.

326. *Id.*

of the forum, and further noted that interpreting the plaintiffs' IIED claim under Illinois law was a better alternative to denying the plaintiffs' claim because "the United States has a unique interest in having a domestic law apply in cases involving terrorist attacks on United States citizens."³²⁷

3. Damages

Generally, a plaintiff must prove that the consequences of the foreign state's conduct were reasonably certain, *i.e.*, more likely than not to occur.³²⁸ A plaintiff must also prove the amount of the damages by a reasonable estimate.³²⁹ To determine whether a plaintiff is entitled to damages under the FSIA, the courts apply general principles of tort law.³³⁰ When calculating damages, the courts also seek to ensure that individuals with similar injuries receive similar awards.³³¹ In 2014, the courts addressed various types of damages available under the terrorism exception, including "economic damages, solatium, pain and suffering, and punitive damages."³³²

a. Economic Damages

Courts have awarded damages under the terrorism exception for reasonably foreseeable economic loss. "Under the FSIA, injured victims and the estates of deceased victims may recover economic damages, which typically include lost wages, benefits and retirement pay, and other out-of-pocket expenses."³³³ As in previous years, courts in 2014 continued to rely on the testimony of experts and the authority of special masters to determine damages.³³⁴

b. Pain and Suffering

Under the FSIA terrorism exceptions, courts determine the amount to award for pain and suffering based on a variety of factors, including the severity of the pain immediately following the injury, the length of hospitalization, and the extent of the victim's impairment.³³⁵ Those killed in-

327. *Id.* at 1084-85 (quoting *Greenbaum v. Islamic Republic of Iran*, 451 F. Supp. 2d 90, 102 (D.D.C. 2006)).

328. *See, e.g., Onsongo v. Republic of Sudan*, 60 F. Supp. 3d 144, 148 (D.D.C. 2014) (citing *Valore* at 83).

329. *See, e.g., id.*

330. *See, e.g., id.* (citing *Owens v. Republic of Sudan*, 826 F.Supp.2d 128, 157, n.3 (D.D.C. 2011)).

331. *See, e.g., id.* at 150 (quoting *Peterson v. Islamic Republic of Iran*, 515 F.Supp.2d 25, 54 (D.D.C. 2007)).

332. 28 U.S.C. § 1605A(c)(4).

333. *See, e.g., Owens v. Republic of Sudan*, 71 F. Supp. 3d 252, 258 (D.D.C. 2014).

334. Section 1605A specifically provides for the use of Special Masters to determine damages in cases falling within the terrorism exception. *See* 28 U.S.C. § 1605A(e)(1).

335. *See, e.g., Onsongo*, 60 F. Supp. 3d at 149-50 (quoting *O'Brien v. Islamic Republic of Iran*, 853 F.Supp.2d 44, 46 (D.D.C.2012)).

stantly are generally not compensated for pain and suffering.³³⁶ Courts historically have adhered to a basic framework for calculating damages, with specific benchmarks for specific injuries, but with departures for extraordinary circumstances.

For example, in *Opati v. Republic of Sudan*, the court agreed to an upward departure for a victim of the U.S. embassy bombings in Tanzania and Kenya, where she was pulled from the rubble with injuries so severe that rescuers thought she was dead, ultimately resulting in her loss of vision in one eye and diminished movement in one hand.³³⁷ It also did so with another victim who contracted HIV while rushing to help with the recovery.³³⁸

Solatium damages compensate plaintiffs for “the mental anguish, bereavement and grief that those with a close personal relationship to a decedent experience . . . as well as the harm caused by the loss of the decedent’s society and comfort.”³³⁹ Accordingly, these damages are only available to immediate family members, such as parents, siblings, spouses, and children.³⁴⁰ As with awards for pain and suffering, courts in 2014 similarly have tended to follow a consistent framework for damages, with specific amounts for spouses, parents, children, and siblings, but with departures from that framework based on the circumstances.³⁴¹

For instance, courts have differentiated between family members of victims who were injured, rather than killed.³⁴² Solatium awards to family members of surviving victims also typically do not exceed the amount awarded to the survivors for their pain and suffering.³⁴³ However, courts have deviated from these baselines where, for example, a plaintiff has established a particularly close relationship with the victim, or where evidence suggests that the victim’s pain and suffering was particularly acute or agonizing.³⁴⁴ For example, the court in *Spencer v. Islamic Republic of Iran* implemented an upward departure for the parents of a serviceman injured in the Beirut Marine barracks bombings, where they were initially informed that their son had died in the attack.³⁴⁵ In contrast, the court approved a downward departure for parents of an injured serviceman,

336. See, e.g., *Amduso v. Republic of Sudan*, 61 F. Supp. 3d 42, 49 (D.D.C. 2014); *Owens*, 71 F. Supp. 3d at 259 (citing *Peterson*, 515 F. Supp. 2d at 53).

337. *Opati v. Republic of Sudan*, 60 F. Supp. 3d at 78; see also *Wamai v. Republic of Sudan*, 60 F. Supp. 3d 84, 93-94 (D.D.C. 2014) (approving upward departure where victims suffered more egregious wounds than suffered by others, such as lost eyes, extreme burns, skull fractures, brain damage, ruptured lungs, or months of recovery).

338. *Id.*

339. *Spencer v. Islamic Republic of Iran*, 71 F. Supp. 3d 23, 27 (D.D.C. 2014) (quoting *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 25 (D.D.C.2011)).

340. See, e.g., *Onsongo*, 60 F. Supp. 3d at 150-51 (citing *Valore* at 79)); *Amduso*, 61 F. Supp. 3d at 49-50 (citing *Valore* at 79).

341. See, e.g., *Onsongo*, 60 F. Supp. 3d at 151; *Amduso*, 61 F. Supp. 3d at 50.

342. See, e.g., *Onsongo*, 60 F. Supp. 3d at 151; *Amduso*, 61 F. Supp. 3d at 50.

343. See, e.g., *Amduso*, 61 F. Supp. 3d at 51.

344. See, e.g., *Spencer*, 71 F. Supp. 3d at 28 (quoting *Oveissi*, 768 F. Supp. 2d at 26-27).

345. *Spencer* at 29.

where they had separated from their son when he was five years old.³⁴⁶ The court completely denied solatium damages to the serviceman's father, who had lost all ties with his son shortly after his birth.³⁴⁷

Unlike its predecessor section 1605(a)(7), section 1605A allows plaintiffs to seek punitive damages against state sponsors of terrorism.³⁴⁸ Punitive damage awards serve a deterrence function, and in this category of damages, courts scrutinize less the award as to each individual plaintiff and instead focus on a total award that will serve to deter and punish the defendant state sponsor of terrorism.³⁴⁹

Despite the horrific nature of the events in section 1605A cases, courts are usually thoughtful in awarding punitive damages and consider four primary factors: (1) the character of foreign state's act; (2) the nature and extent of the actual or intended harm to the plaintiffs; (3) the need for deterrence; and (4) the wealth of the foreign state.³⁵⁰ For example, in *Onsongo v. Republic of Sudan*, the court affirmed a special master's recommendation of punitive damages amounting to almost \$100 million, or the equivalent of the compensatory damages awarded.³⁵¹ The court did so after considering the above four factors, finding the award appropriate because the nature of the attack was "horrific," the number of murdered and injured victims was extensive, the need for deterrence was "tremendous," and—although evidence regarding Sudan and Iran's wealth was scant—they were foreign states with presumably "substantial" assets.³⁵²

G. THE "TREATY EXCEPTION"—SECTION 1604

Section 1604 of the FSIA provides that both the FSIA's grant of immunity and the exceptions to that immunity listed in section 1605 are "subject to existing international agreements to which the United States [was] a party at the time" the FSIA was enacted.³⁵³ The treaty exception can be invoked either to expand or to limit a foreign sovereign's immunity, but some courts have held that interpretation of the treaty exception to limit immunity is disfavored.³⁵⁴ Thus, a suit against a sovereign pursuant to one of the FSIA's exceptions to immunity can proceed only if it does not conflict with a pre-existing treaty to which the U.S. was a party.³⁵⁵

In 2014, the treaty exception was examined in some detail in *Simon v.*

346. *Id.* at 30; see also *Wamai*, 60 F. Supp. 3d at 95, n.8 (reducing solatium award where children of deceased victim had been separated from father for extended period of time).

347. *Id.* at 30-31.

348. 28 U.S.C. § 1605A(e)(1).

349. See, e.g., *Onsongo*, 60 F. Supp. 3d at 152 (citing Valore, 700 F. Supp. 2d at 87); *Amduso*, 61 F. Supp. 3d at 51-52 (citing Valore, 700 F. Supp. 2d at 87).

350. See, e.g., *Onsongo*, 60 F. Supp. 3d at 152 (citing Valore at 87); *Amduso*, 61 F. Supp. 3d at 52 (quoting Oveissi, 879 F. Supp. 2d at 56 (D.D.C.2012)).

351. *Onsongo*, 60 F. Supp. 3d at 152-55.

352. *Id.* at 152-53.

353. 28 U.S.C. § 1604.

354. See *Simon v. Republic of Hungary*, 37 F. Supp 3d 381, 409 (D.D.C. 2014), *rev'd in part*, 812 F.3d 127 (D.C. Cir. 2016).

355. See *id.*

Republic of Hungary.³⁵⁶ After outlining the contours of the treaty exception, the court agreed with the defendants that the treaty at issue provided “a process to administer the class of claims now raised by the plaintiffs,” which were claims stemming from the discriminatory expropriation of rights and property from Hungarian Jews during World War II and the “exclusive mechanism and forum for the resolution of” such claims.³⁵⁷ Thus, the court held that the treaty “expressly conflict[ed]” with the FSIA and therefore precluded the district court’s exercise of subject matter jurisdiction.³⁵⁸ On appeal, the D.C. Circuit reversed the district court.³⁵⁹ The D.C. Circuit held that the treaty was not the sole means of recovery for the plaintiffs’ claims, and therefore there was no conflict between the FSIA.³⁶⁰ Accordingly, the treaty exception did not apply, and defendant’s immunity had to be analyzed by the normal FSIA rules.³⁶¹

V. ENFORCEMENT OF AWARDS AGAINST FOREIGN SOVEREIGN

Even if a plaintiff can demonstrate that one of the exceptions to immunity applies, convince a court to exercise jurisdiction, and obtain a judgment against a sovereign defendant, enforcing that judgment presents additional challenges with which the courts continued to grapple in 2014.

A. IMMUNITY FROM REMEDIES EQUIVALENT TO ATTACHMENT

Section 1609 provides that the property of a foreign sovereign in the U.S. “shall be immune from attachment arrest and execution.”³⁶² This immunity includes remedies that are “the functional equivalent of attachment, arrest, and execution,”³⁶³ such as restraining notices, turnover proceedings, injunctions against sovereign property, or requirements to post prejudgment security that “would create precisely the same result that would obtain if the foreign sovereign’s assets were formally attached.”³⁶⁴

In *Thai-Lao Lignite*, the court considered whether a sovereign could be required to post security as a condition for vacating an award against it.³⁶⁵ The court had previously entered judgment against Laos enforcing an arbitral award, but the arbitral award had since been vacated by the

356. *Id.* at 415, 419-420.

357. *Id.* at 424.

358. *Id.*

359. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.D.C. 2016).

360. *Id.* at 136-140.

361. *Id.*

362. 28 U.S.C. § 1609; *see also* *Rubin v. Islamic Republic of Iran*, 709 F.3d 49, 52 (1st Cir. 2013).

363. 28 U.S.C. § 1609.

364. *Id.* (citing *Stephens v. Nat’l Distillers & Chem. Corp.*, 69 F.3d 1226, 1229 (2d Cir. 1995) (internal quotation marks omitted)), *see also* *Pine Top Receivables of Illinois, LLC v. Banco de Seguros del Estado*, 771 F.3d 980 (7th Cir. 2014).

365. *Thai Lao Lignite (Thai.) Co. v. Gov’t of Lao People’s Democratic Republic*, 997 F. Supp. 2d 214 (S.D.N.Y. 2014)

Malaysian courts.³⁶⁶ Laos thus asked the court to vacate its previous judgment, and the court agreed.³⁶⁷ The plaintiffs had asked the court to order Laos to post security, either as a condition for seeking vacatur, or in the event the court granted vacatur.³⁶⁸ The court rejected this request, holding that because the plaintiffs had not yet identified any assets in the United States that were used for a commercial purpose, as required for the exception to attachment immunity in section 1610(a) to apply, ordering Laos to post security would be the equivalent to an impermissible attachment under section 1609.³⁶⁹

Similarly, in *Pine Top Receivables of Illinois v. Banco de Seguros del Estado*, reinsurer Pine Top moved to strike the responsive pleading of the defendant, an entity wholly owned by Uruguay, for failure to post pre-answer security as required by state law governing out-of-state insurers.³⁷⁰ The defendant opposed the motion on the ground that the FSIA bars any requirement of prejudgment security, and Pine Top acknowledged that the defendant's status as an entity wholly owned by Uruguay brings it within the purview of the FSIA.³⁷¹ The federal district court initially denied reinsurer Pine Top's motion to strike, and Pine Top immediately appealed.³⁷² Addressing this matter of first impression in the Seventh Circuit, the court of appeals affirmed, holding that the FSIA bars any requirement of prejudgment security because such a requirement would qualify as an "attachment" under the statute.³⁷³

On the other hand, courts have refused to extend immunity to requests for, e.g., injunctions to require a foreign state to comply with its existing contractual obligations,³⁷⁴ or post-judgment discovery about the location of the country's assets in the United States.³⁷⁵ For example, in *Republic of Argentina v. NML Capital*, the Supreme Court upheld post-judgment discovery orders on nonparty banks for information about a sovereign's assets outside the U.S.³⁷⁶ So long as the post-judgment discovery order complies with the applicable federal or state law, the Court held there is

366. *Id.* at 215-16.

367. *Id.* at 216.

368. *Id.* at 228.

369. *Id.* at 228-29.

370. *Pine Top Receivables of Illinois LLC v. Banco de Seguros del Estado*, 771 F.3d 980 (7th Cir. 2014).

371. *Id.* at 981.

372. *Id.*

373. *Id.*

374. *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230, 240-41 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 2819 (U.S. Jun. 16, 2014) (No. 13-990) (FSIA did not prohibit injunction requiring Argentina to pay holders of defaulted FAA bonds if it makes payments to other bond holders because the injunction "d[id] not attach, arrest, or execute upon any property." Rather, Argentina was free to pay the "FAA debts with whatever resources it likes.") (internal citation and quotation marks omitted).

375. *Republic of Arg. v. NML Capital*, 573 U.S. —, 134 S. Ct. 2250 (2014); *see Aurelius Capital Master, Ltd. v. Republic of Arg.*, 589 Fed. Appx. 16 (2d Cir. 2014); *see also Thai Lao Lignite (Thai.) Co. v. Gov't of the Lao People's Democratic Republic*, 924 F. Supp. 2d 508 (S.D.N.Y. 2013).

376. *Republic of Arg. v. NML Capital*, 134 S. Ct. at 2256-58.

no FSIA immunity “limiting discovery in aid of execution of a foreign-sovereign judgment debtor’s assets,”—even if some of those assets might later prove to be immune from attachment.³⁷⁷

B. COMMERCIAL ACTIVITY EXCEPTION

Section 1610(a) provides that a foreign state’s property “shall not be immune from attachment in aid of execution, or from execution” if the property was used for commercial activity in the United States and the property in question “was used for the commercial activity upon which the claim is based.”³⁷⁸

In determining whether this exception to attachment immunity applies, courts look at whether the actions the foreign state performed with respect to the property were those in which “a private party engages in trade and traffic or commerce.”³⁷⁹ Put another way, “if the activity is one in which a private person could engage, [the foreign sovereign] is not entitled to immunity.”³⁸⁰

In *Export-Import Bank of the Republic of China v. Grenada*, the Second Circuit agreed with the Fifth and Ninth Circuits that the analysis under 1610(a) must focus not on how the state made or obtained the money, but on how it uses it.³⁸¹ The plaintiffs in that case were seeking to enforce a judgment against Grenada by attaching “funds that commercial third parties (primarily airlines and cruise lines having some United States-based operations) owe to several Grenadian statutory corporations.”³⁸² The court held that the source of these funds was irrelevant; the relevant question was “the *use* to which Grenada puts—or clearly intends to put, by virtue of some formal designation or other specific means—the funds at issue.”³⁸³ As most funds were used for “‘carrying out public functions in Grenada,’ and ‘[] for the maintenance of facilities and services in Grenada,’” not the United States, those funds “fail[ed] both the ‘commercial use’ and the ‘in the United States’ prongs” of section 1610(a).³⁸⁴ As to certain other funds, which were forwarded to a

377. *Id.* at 2256.

378. 28 U.S.C. §1610(a). Section 1610(a) also provides for additional circumstances in which property in the U.S. used for commercial activity in the U.S. will not be immune from attachment or execution, *e.g.*, if the foreign state has waived its immunity from attachment or execution, or if the execution relates to a judgment establishing rights in property taken (or exchanged for property taken) in violation of international law.

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

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

381. *Exp-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 89 (2d Cir. 2014) (citing *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002), *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080 (9th Cir. 2007)).

382. *Id.* at 78.

383. *Id.* at 90-91.

384. *Id.* at 91.

trustee that serviced certain bonds issued by Grenada, the court concluded it needed more information about the bonds before it could determine whether the funds were used for commercial activity, and so remanded the issue for further fact-finding.³⁸⁵

In *Rubin v. Islamic Republic of Iran*, the plaintiffs attempted to attach certain Iranian artifacts in the possession of museums in the U.S. to satisfy a judgment against Iran.³⁸⁶ The court rejected the plaintiffs' efforts, holding that the state itself had to engage in the commercial activity.³⁸⁷ Although section 1610 does not explicitly require that the commercial activity be carried out by the state, the court held that the context of the FSIA "demonstrates that it is the sovereign's commercial activities that subject the property to attachment."³⁸⁸ Additionally, the court held that the museums were not agents of Iran whose activity could be attributed to the state; a bailment agreement with the state did not transform the museums into agents, because Iran had no control over their activities and because the museums were acting for their own benefit, not for the benefit of Iran.³⁸⁹

C. NOTICE REQUIREMENTS UNDER SECTION 1610(C)

"Before permitting enforcement of an FSIA judgment, a court must ensure that all foreign entities involved receive notice of the exposure of their property and other interests to attachment and execution."³⁹⁰ Thus, section 1610(c) provides that "[n]o attachment or execution [under Section 1610(a) or (b)] shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) [for a default judgment]."³⁹¹

In 2014, the main issue courts faced regarding section 1610(c) was the relationship between that section and section 1610(g), which governs attachment in aid of execution of terrorism judgments; those cases are discussed in the following section.

D. TERRORISM JUDGMENTS – ATTACHMENT AND EXECUTION

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

1. *Section 1610(g)*

Section 1610(g) authorizes "attachment in aid of an execution of a

385. *Id.*

386. *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003 (N.D. Ill. 2014).

387. *Id.* at 1009.

388. *Id.*

389. *Id.* at 1011.

390. *Cortez Byrd v. Corporacion Forestal y Indus. de Olancho, S.A.*, 974 F. Supp. 2d 264, 273 (S.D.N.Y. 2013) (citing *Agudas Chasidei Chabad v. Russian Fed'n*, 798 F. Supp. 2d 260, 267 (D.D.C. 2011)).

391. *Id.* at 266-67.

judgment entered under section 1605A.”³⁹² It provides that “property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state . . . is subject to attachment in aid of execution.”³⁹³ Section 1610(g) not only allows attachment of property of a foreign state, but also property of an agency or instrumentality “that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity.”³⁹⁴

Despite its potentially broad application, courts in 2014 found little opportunity to address attachments under section 1610(g). Courts that did address 1610(g) attachment focused on the interplay between section 1610(g) and other sections of the FSIA. For example, in *Gates v. Syrian Arab Republic*, the court found that, by its text, section 1610(c) applied only to attachments based on the commercial activity exception under subsections 1610(a) and (b), and not to attachments to satisfy terrorism judgments under section 1610(g).³⁹⁵ In *Gates*, two competing groups of plaintiffs both sought to attach Syrian assets in satisfaction of a terrorism judgment.³⁹⁶ One group of plaintiffs obtained an order from the District Court for the District of Columbia that, pursuant to section 1610(c), a reasonable amount of time had passed since the terrorism judgment.³⁹⁷ The plaintiffs then registered the terrorism judgment in the Northern District of Illinois, accompanied by the section 1610(c) judgment, and began seeking to attach various assets.³⁹⁸ The second group of plaintiffs then intervened, arguing that the first plaintiffs’ failure to obtain a new section 1610(c) order from the Illinois court should prevent those plaintiffs from recovering the sought-after assets, leaving them available for the second plaintiffs to attach.³⁹⁹ The Illinois court held that no new section 1610(c) order was required.⁴⁰⁰ First, the Court reasoned that section 1610(c) did not apply to section 1610(g), and that, when Congress enacted section 1610(g), Congress had explicitly declined to subject attachment under the new section to the requirements of section 1610(c).⁴⁰¹ Second, the court reasoned that even if section 1610(c) did apply, only one section 1610(c) order was necessary to allow the plaintiffs to pursue assets in any jurisdiction.⁴⁰² Thus, the first plaintiffs were not prevented from pursuing their

392. *Calderon-Cardona v. JPMorgan Chase Bank, N.A.*, 770 F.3d 993, 1000 (2d Cir. 2014).

393. 28 U.S.C. 1610(g)(1).

394. *Calderon-Cardona*, 770 F.3d at 999 (quoting FSIA § 1610(g)(1)).

395. *Gates v. Syrian Arab Republic*, 755 F.3d 568 (N.D. Ill. 2014).

396. *Gates v. Syrian Arab Republic*, 755 F.3d 568 (N.D. Ill. 2014).

397. *Id.*

398. *Id.* at 570.

399. *Id.* at 574.

400. *Id.* at 575.

401. *Id.* at 575-76; *but see Owens v. Republic of Sudan*, 141 F. Supp. 3d 1 (D.D.C. 2015) (disagreeing with the *Gates* court, holding that “[a] close reading of § 1610 convinces this Court that, notwithstanding the plaintiff-friendly aims of [1610(g)] . . . , § 1610(c) still applies to plaintiffs . . . seeking to enforce a judgment under § 1605A”).

402. *Id.* at 577-78.

section 1610(g) attachment for failure to obtain a second determination that a reasonable period of time had elapsed under section 1610(c).⁴⁰³

2. Terrorism Risk Insurance Act

A related statutory scheme permits victims of state-sponsored terrorism to execute on judgments against foreign sovereigns that sponsor terrorism. The Terrorism Risk Insurance Act of 2002 (“TRIA”), codified in part as section 1610 note, allows plaintiffs to execute on a judgment against blocked assets of a terrorist party, as well as the assets of any agency or instrumentality of that terrorist party.⁴⁰⁴ TRIA defines a terrorist party as “a terrorist, a terrorist organization . . . or a foreign state designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979.”⁴⁰⁵

One issue that courts considered in 2014 is what constitutes “blocked assets” that terrorism victims may attach to secure a judgment against a terrorist entity. For example, in *Stansell v. Revolutionary Armed Forces of Colombia*, the court clarified that, while many “blocked assets” under TRIA are blocked pursuant to the authority of the Treasury Department’s Office of Foreign Assets Control (“OFAC”), not all assets blocked by OFAC qualify as “blocked assets” under TRIA.⁴⁰⁶

In *In re 650 Fifth Avenue*, the U.S. government had previously blocked defendant banks’ assets through its sanctions policy.⁴⁰⁷ But the banks argued that, because the government had not prohibited them from “exercising the power and privileges normally associated with ownership,” there had been no “transfer” of their possessory interest, meaning the sanctions could not create “blocked assets” under TRIA.⁴⁰⁸ The court disagreed, holding that because the properties were managed by a court-appointed monitor who controlled all expenditures, which were strictly limited, and managed all related funds, the defendant banks had indeed lost the ability to exercise the powers and privileges normally associated with ownership.⁴⁰⁹ The banks’ assets were thus “blocked” under TRIA.⁴¹⁰ In 2016, the Second Circuit vacated this holding, identifying genuine issues of material fact regarding whether the assets could be considered “blocked assets” under the TRIA and therefore remanding to the

403. *Id.*

404. Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (2002); see *In re 650 Fifth Ave. & Related Properties*, No. 08 Civ. 10934(KBF), 2014 WL 1284494, at *14 (quoting TRIA § 201(a)); see also *Rubin v. Islamic Republic of Iran*, 33 F. Supp. 3d 1003, 1010-11 (N.D. Ill. 2014) (finding that Iranian artifacts housed in U.S. museum for research purposes were not subject to attachment under TRIA because Iran and museum had created merely a bailment relationship and not one of agency).

405. *In re 650 Fifth Ave.*, 2014 WL 1516328, at *14 (quoting TRIA § 201(d)(4)).

406. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713, 723 (11th Cir. 2014).

407. *In re 650 Fifth Ave.*, 2014 WL 1516328, at *14.

408. *Id.* at *15.

409. *Id.*

410. *Id.*

district court for further proceedings.⁴¹¹

Some courts also analyzed whether electronic fund transfers (“EFTs”) could be considered blocked assets subject to TRIA. For example, in *Peterson v. Islamic Republic of Iran*, family members of servicemen killed in the 1983 Marine barracks bombing in Beirut attempted to satisfy a default judgment against Iran by serving several financial institutions with writs of attachment obtained under TRIA.⁴¹² When one of the defendant banks represented that it did not hold any Iranian property, the plaintiffs moved for sanctions, believing that the bank should have disclosed certain blocked EFTs, which the plaintiffs argued were subject to TRIA.⁴¹³ The EFTs had been destined for accounts in Iranian banks, but because the transfers had been blocked, the funds were still held in a special, frozen account in the United States.⁴¹⁴ The court denied the plaintiffs’ motion.⁴¹⁵ The court reasoned that legal title could not pass to the Iranian banks until those banks accepted the payments.⁴¹⁶ Because the payments had been blocked, the banks had never held legal title, and thus Iran, as owner of the Iranian banks, never had a property interest in the contested funds.⁴¹⁷

Similarly, in *Hausler v. JP Morgan Chase Bank NA*, the court looked to the law of the state in which the at-issue EFTs were blocked to determine whether Cuba had a property interest in them.⁴¹⁸ Under New York law, when an EFT is blocked by an intermediary bank, only the party who passed the EFT on to that bank has a property interest in it.⁴¹⁹ Because it was undisputed that Cuba had not initiated the blocked EFTs, the EFTs were not “blocked assets” under TRIA.⁴²⁰

Another unique issue to face 2014 courts was the extent to which the court adjudicating attachment proceedings should defer to the initial judgment rendered by a different court. In *Vera v. Republic of Cuba*, family members of those tortured and killed by the Cuban government had a judgment against Cuba awarded by a Florida state court under the FSIA.⁴²¹ But when the plaintiffs brought turnover proceedings under the TRIA in a New York district court, the affected bank argued that the judgment was void because the Florida state court did not have subject-

411. *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d at 117.

412. *Peterson v. Islamic Republic of Iran*, 561 Fed. Appx. 9, 9-10 (D.C. Cir. 2014), cert. denied, 2015 WL 132998 (U.S. 2015).

413. *Id.* at 10.

414. *Id.*

415. *Id.*

416. *Id.* at 10 (citing *Heiser v. Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013)). In both *Peterson* and *Heiser*, Iran was not the owner of the account for which the funds were destined, only the owner of the banks where those accounts were held.

417. *Id.*

418. *Hausler v. JP Morgan Chase Bank NA*, 770 F.3d 207, 212 (2d Cir. 2014).

419. *Id.* (quoting *Calderon-Cardona v. JPMorgan Case Bank, N.A.*, 770 F.3d 993, 1002 (2d Cir. 2014)).

420. *Id.*

421. *Vera v. Republic of Cuba*, 40 F. Supp. 3d 367 (S.D.N.Y. 2014).

matter jurisdiction over the plaintiffs' original claims.⁴²² The New York court rejected the bank's argument.⁴²³ The Florida court's judgment was entitled to deference under the Constitution's Full Faith & Credit Clause, where the state court had fully and fairly litigated the issues before it, including jurisdiction, and had not violated either party's due process rights in issuing its judgment.⁴²⁴

VI. PRACTICAL ISSUES IN FSIA LITIGATION

In 2014, judicial decisions regarding the FSIA explored various procedural issues that arise in cases brought against foreign sovereigns, such as service of process, due process and personal jurisdiction, jurisdictional discovery, and default judgments.⁴²⁵ A brief review of certain notable decisions follows.

A. SERVICE OF PROCESS

Service of process pursuant to the FSIA must comport with sections 1608(a) and (b), which set forth the acceptable methods of service on foreign states or their political subdivisions, and their agencies or instrumentalities.⁴²⁶ Each provision provides a hierarchy of methods to effect service, such that a plaintiff may resort to subsequent methods of service only if it is unable to effect service under the prior methods.⁴²⁷

While strict compliance with section 1608(a) is required in an action against a foreign state or political subdivision,⁴²⁸ only substantial compliance with the service rules is required under section 1608(b) in actions against an agency or instrumentality of the state.⁴²⁹ Thus, for example, some courts have allowed cases to proceed against an agency or instrumentality based on "technically faulty service" [under section 1608(b)] as long as the defendants receive adequate notice of the suit and are not prejudiced.⁴³⁰

In *Doe v. Holy See*, the plaintiff brought suit against a Catholic priest and the Holy See, among others, to recover damages suffered as a result of alleged sexual abuse.⁴³¹ The plaintiff attempted to serve the original complaint on the Holy See through both the clerk of court and the State

422. *Id.* at 369-70.

423. *Id.* at 370.

424. *Id.* at 376-77.

425. Other practical issues may also arise; some, relating to venue, forum non conveniens, the act of state doctrine, and interlocutory appeal, have been discussed in this Review in previous years. This edition of the Review focuses on only those issues which were addressed by the courts 2014.

426. 28 U.S.C. §§ 1608(a), (b).

427. *See* Cortez Byrd, 974 F. Supp. 2d at 273 (internal citations omitted); *see also* Kaplan, 961 F. Supp. 2d at 185.

428. *See* Jimenez v. United Mexican States, 978 F. Supp. 2d 720, 724 (S.D. Tex. 2013).

429. *See* Agudas Chasidei Chabad of U.S., 798 F. Supp. 2d at 269 (citing *Doe I v. State of Isr.* 400 F. Supp. 2d 86, 102 (D.D.C. 2005)).

430. *Id.* (citation omitted).

431. *Doe v. Holy See*, No. 13-128, 2014 WL 1329985 (E.D. La. Apr. 2, 2014).

Department, but subsequently filed an amended complaint without attempting service of that complaint upon the Holy See.⁴³² The Holy See moved to dismiss the claims against it for insufficient service of process, insufficient process, and lack of personal jurisdiction under section 1608(a).

Emphasizing that only strict adherence to the notice requirements of section 1608(a) renders service effective, the court found that the plaintiff had failed to properly effect notice upon the Holy See because he failed to serve the amended complaint, did not serve a translation thereof, and failed to provide a notice of suit that accurately described the lawsuit.⁴³³ While the plaintiff did not dispute this failure to serve the amended complaint, he contended that he “honestly believe[d] that service on Defendant [. . .] was completed in strict compliance” with the FSIA’s requirements.⁴³⁴ The court rejected this argument, finding that the plaintiff’s “honest belief” was “irrelevant” because it fell short of the explicit standard under section 1608(a).⁴³⁵ Accordingly, the court granted the Holy See’s motion to dismiss for insufficient service, without prejudice, granting the plaintiff’s request for a second attempt to properly effect service on the Holy See.⁴³⁶

In *McEachern v. Inter-Country Adoption Board of the Republic of the Philippines*, a pre-adoptive parent brought suit against the adoption agency, as an agency or instrumentality of the Philippines, seeking to enjoin the adoption agency from removing a minor child from the pre-adoptive parent’s home.⁴³⁷ The defendant removed the case to federal court beyond the deadline for removal, and the plaintiff moved to remand to the probate court.⁴³⁸ In contesting the remand, the defendant contended that the 30-day period for removal under 28 U.S.C. § 1446(b)(1) was never triggered because service of process had been improper.⁴³⁹ The defendant further contended that 28 U.S.C. § 1441(d) permits extensions of the period for removal “for cause shown” and that the insufficient service constituted good cause.⁴⁴⁰ The court rejected the defendant’s arguments and found that the plaintiff had substantially complied with the FSIA’s service requirements under section 1608(b) and had provided actual notice of the lawsuit to the defendants where, in response to technically deficient service, the defendant adoption agency or its representative had filed a request to enter an appearance *pro se*, requested telephonic access to a probate court hearing, filed an appearance in a related guardianship matter, and actively participated in the

432. *Id.* at *2, *3.

433. *Id.* at *6.

434. *Id.*

435. *Id.*

436. *Id.* at *7.

437. *McEachern v. Inter-Country Adoption Bd. of the Republic of the Phil.*, 62 F.Supp.3d 187 (D. Mass. 2014).

438. *Id.* at 191.

439. *Id.*; 28 U.S.C. § 1446(b)(1).

440. *Id.*; 28 U.S.C. § 1441(d).

matter.⁴⁴¹

B. DUE PROCESS AND PERSONAL JURISDICTION

Historically, courts that have addressed the issue have held that, for purposes of the FSIA, foreign states are not “persons” protected by the due process clause of the Fifth Amendment.⁴⁴² Accordingly, foreign states typically may not assert a lack of due process as a defense in FSIA litigation. The consequence for a foreign state is that it is “not subject to the minimum contacts analysis prior to the exercise of personal jurisdiction.”⁴⁴³ Thus, once subject matter jurisdiction under the FSIA has been established and defendants are properly served pursuant to the requirements of section 1608, the court will exercise personal jurisdiction over the defendants.⁴⁴⁴

But the inapplicability of due process protection to foreign states under the FSIA does not necessarily extend to foreign agencies or instrumentalities.⁴⁴⁵ A public foreign entity—e.g., a corporation owned and operated by a foreign government—may be entitled to the same due process protections as a private foreign entity that is subject to jurisdiction in U.S. courts, provided that it is run separately and independently from the sovereign.⁴⁴⁶ However, due process protections may not apply even to such entities where, e.g., the entity “is so extensively controlled by its owner that a relationship of principal and agent is created,” or where honoring the distinction between instrumentality and sovereign “would work fraud or injustice.”⁴⁴⁷

In *In re 650 Fifth Avenue*, the court concluded that the defendants were “alter egos” of Iran, with “no true separate decision-making authority or real existence” apart from the state, and therefore granted the plaintiff’s motions for summary judgment, authorizing the turnover of assets of a foreign sovereign entity.⁴⁴⁸ A contrary result might have obtained in *Williams v. Romarm SA*, where the defendant was a state-owned firearms manufacturer that the district court had found “‘consistently’ represented itself as a separate entity from the Romanian State.”⁴⁴⁹ The plaintiffs appealed from the district court’s dismissal of their wrongful death action

441. *McEachern*, 62 F.Supp.3d at 191.

442. *Capital Trans Int’l*, 2013 WL 557236, at *5; *GSS Grp. Ltd. v. Nat’l Port Auth.*, 680 F.3d 805, 809 (D.C. Cir. 2012); *Cont’l Cas. Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 752 n.12 (E.D. Va. 2012) (“Every circuit court to address the issue has held ‘that foreign states are not “persons” protected by the Fifth Amendment’”(citation omitted).

443. *Cont’l Cas. Co.*, 893 F. Supp. 2d at 752 n.12 (citation omitted).

444. 28 U.S.C. § 1330(b); see also *Blue Ridge Invs., LLC v. Republic of Arg.*, 902 F. Supp. 2d 367, 376 (S.D.N.Y. 2013), *aff’d*, 735 F.3d 72 (2d Cir. 2013).

445. See *Capital Trans Int’l, LLC*, 2013 WL 557236, at *5.

446. *GSS Grp. Ltd.*, 680 F.3d at 816.

447. *Id.* at 814 (internal citation and quotation marks omitted).

448. *In re 650 Fifth Ave.*, No. 08 Civ. 10934 (KBF), 2014 WL 1516328, *12 (S.D.N.Y. Apr. 18, 2014), *rev’d sub nom.* *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107 (2d Cir. 2016).

449. *Williams v. Romarm SA*, 756 F.3d 777, 782 (D.C. Cir. 2014).

for lack of personal jurisdiction over the defendant.⁴⁵⁰ But on appeal, the court refused to consider the issue of whether the government of Romania controlled the defendant firearms manufacturer, and thus whether the defendant was not a “person” entitled to due process protection. Because the appellants had never raised this issue in their brief, the court found that appellants had forfeited the argument, “however weighty [it] may be[.]”⁴⁵¹ Accordingly, the court affirmed the district court’s dismissal of the plaintiff’s case under the assumption that the defendant firearms manufacturer was a “person” apart from the state, and entitled to due process under the Fifth Amendment.⁴⁵²

C. JURISDICTIONAL DISCOVERY

Plaintiffs seeking relief from foreign sovereign defendants often seek jurisdictional discovery where further fact-finding may be necessary to establish that the foreign entity falls within one of the exceptions to sovereign immunity. Because “the FSIA’s immunity provisions aim to protect foreign sovereigns from the burdens of litigation, including the cost and aggravation of discovery[,]” courts often are disinclined to require foreign sovereigns to participate in discovery.⁴⁵³ Accordingly, jurisdictional discovery typically is permitted only when the plaintiff is able to carry its initial burden of establishing a *prima facie* case that one or more exceptions to immunity applies.⁴⁵⁴

In *Republic of Argentina v. NML Capital Ltd.*, the Supreme Court considered whether the FSIA limits the scope of discovery available to a judgment creditor in a post-judgment execution proceeding against a foreign sovereign.⁴⁵⁵ At previous stages of the case, Argentina had waived its sovereign immunity; was found to owe money under valid judgments; subsequently failed to pay, and apparently had no executable assets in the United States.⁴⁵⁶ Judgment creditor NML Capital sought discovery of Argentina’s property through subpoenas served upon two nonparty banks.⁴⁵⁷ The district court granted NML’s motions to compel compliance with these subpoenas, and the Second Circuit affirmed.⁴⁵⁸ On certiorari to the Supreme Court, Argentina argued that because the FSIA is silent on the matter, discovery of assets that do not fall within an exception to execution immunity under section 1609 is forbidden.⁴⁵⁹ Additionally, both Argentina and the U.S. Government (as *amicus curiae*) urged the court to consider the sovereignty and international comity implica-

450. *Id.* at 781.

451. *Id.* at 782.

452. *Id.* at 783.

453. *Lantheus Med. Imaging, Inc. v. Zurich Am. Ins. Co.*, 841 F. Supp. 2d 769, 779 (S.D.N.Y. 2012) (internal citation and quotation marks omitted).

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

455. *Republic of Arg. v. NML Capital, Ltd.*, 134 S.Ct. 2250 (2014).

456. *Id.* at 2258.

457. *Id.* at 2253-54.

458. *Id.* at 2254.

459. *Id.* at 2257.

tions of a decision to affirm the orders to compel compliance with NML's subpoenas.⁴⁶⁰

The Supreme Court concluded that, assuming the district court had discretion to order discovery from third-party banks about a judgment debtor's assets located outside the United States, the FSIA did not preclude discovery of Argentina's extraterritorial assets.⁴⁶¹ The court rejected Argentina's argument that execution immunity under section 1609 implies coextensive discovery-in-aid-of-execution immunity, because section 1609 by its terms immunizes only foreign-state property "in the United States."⁴⁶² The court observed that the reason for NML's subpoenas was that NML did not yet know what property Argentina had and where it was located, "let alone whether it is executable under the relevant jurisdiction's law."⁴⁶³ Moreover, the court found that the prospect that NML's general request for information about Argentina's worldwide assets may turn up information about property that Argentina regards as immune did not mean that NML could not pursue discovery of it.⁴⁶⁴ As to the foreign policy implications of its decision, the court noted that those concerns should be directed to the Executive Branch.⁴⁶⁵ Although the court acknowledged a secondary issue of whether foreign sovereign immunity under the FSIA includes protection from being drawn into discovery targeting third parties, it declined to address that question.⁴⁶⁶

In *Aurelius Capital Master Ltd. v. Republic of Argentina*, Argentina appealed from an order granting post-judgment discovery both from Argentina and from certain third-party banks.⁴⁶⁷ Argentina contended that the FSIA prohibits discovery of sovereign property that is potentially immune from attachment.⁴⁶⁸ On appeal, the court held that appellees' discovery demands did not run afoul of the FSIA, because insofar as the discovery demands reached diplomatic or consular property that is immune from attachment, Argentina should object if and when appellees actually seek to execute on such property.⁴⁶⁹

The court reasoned that the potential immunity of property from attachment does not preclude discovery relating to that property, because discovery may be necessary for the parties to properly litigate the existence of immunity.⁴⁷⁰ Further, the court found that it was "entirely speculative" whether documents Argentina might regard as privileged or inviolable would be responsive to appellees' discovery requests and, if so, whether appellees would persist in demanding such documents in the face

460. *Id.* at 2258.

461. *Id.* at 2257.

462. *Id.*

463. *Id.*

464. *Id.*

465. *Id.* at 2258.

466. *Id.*

467. *Aurelius Capital Master, Ltd. v. Republic of Arg.*, 589 Fed.Appx. 16 (2014).

468. *Id.* at *17.

469. *Id.*

470. *Id.* at *18.

of particularized claims of privilege by Argentina.⁴⁷¹ Even as it affirmed the district court's order, the court stressed the considerations of grace and comity owed in matters touching upon a foreign sovereign's diplomatic and military affairs, and "urg[ed] the district court to closely consider Argentina's sovereign interests in managing discovery, and to prioritize discovery of those documents that are unlikely to prove invasive of sovereign dignity," for example by "modify[ing] usual procedures to accommodate [the eventual need for the court to review diplomatic documents] in a way that is effective and respectful."⁴⁷²

In *De Csepel v. Republic of Hungary*, heirs of a Jewish Hungarian art collector brought suit against the Republic of Hungary and various state institutions, alleging that the defendants breached bailment agreements entered into after World War II when they refused to return pieces of the art collection upon the heirs' demand.⁴⁷³ The court initially found that it had subject matter jurisdiction under the expropriation exception to the FSIA. The D.C. Circuit then affirmed in part and reversed in part, holding that the district court had jurisdiction pursuant to the commercial activity exception and that the district court's dismissal, on other grounds, of several of the plaintiffs' claims was premature.⁴⁷⁴ On remand, the district court ordered discovery to proceed and, based upon documentary evidence produced, the defendants moved to dismiss for lack of subject matter jurisdiction under the FSIA.⁴⁷⁵ The court denied the defendants' motion to dismiss. The court noted that the documentary evidence already produced provided some support for the plaintiffs' jurisdictional assertions, and because "the Court believe[d] that further discovery 'could produce [facts] that would affect [its] jurisdictional analysis,'" the court held that it would be premature to rule on the merits of the defendants' motion until fact discovery had concluded.⁴⁷⁶

D. DEFAULT JUDGMENTS

When a foreign sovereign does not answer or otherwise defend itself against a complaint, a court may grant a default judgment in favor of the plaintiff.⁴⁷⁷ Before a court enters a default judgment on a claim under the FSIA, the plaintiff must establish that there is sufficient evidence to support its right to relief, as section 1608(e) requires that default can only

471. *Id.* at *17-18.

472. *Id.* at *18.

473. *De Csepel v. Republic of Hungary*, 75 F. Supp. 3d 380 (D.D.C. 2014).

474. *Id.* at 381-82.

475. *Id.* at 382.

476. *Id.* at 386-87 (quoting *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1147 (D.C.Cir.1994)). Following the completion of all fact discovery, the defendants once again moved for dismissal. In March 2016, the district court held that it had jurisdiction under the expropriation exception but that "plaintiffs [could not] show a factual basis for their claim of jurisdiction under the [FSIA]'s commercial activity exception." Civil Action No. 10-1261 (ESH), 2016 WL 1048758 (D.D.C. March 14, 2016).

477. *See, e.g.,* *Sikhs for Justice*, 893 F. Supp. 2d at 612.

be entered on “evidence satisfactory to the court.”⁴⁷⁸ The court may accept all uncontroverted evidence as true, which may be in the form of sworn affidavits or transcripts.⁴⁷⁹ The evidence proffered, however, is subject to the Federal Rules of Evidence.⁴⁸⁰ A court may also take judicial notice of findings and conclusions in related proceedings.⁴⁸¹

In *Han Kim*, the brother and son of an abducted South Korean national, sued officials, employees, and agents of North Korea under the terrorism exception to the FSIA, seeking damages resulting from the abduction.⁴⁸² The plaintiffs alleged that the abductee, a religious official, was sent to a state penal colony, tortured, and killed.⁴⁸³ North Korea failed to appear in the action, and the family members moved for an entry of default judgment. The court denied this request, finding that the plaintiffs’ complaint had not provided sufficient evidence to invoke the FSIA’s torture exception, thus depriving the court of subject matter jurisdiction over the case.⁴⁸⁴ The district court determined that the plaintiffs’ witnesses could not establish that the religious official’s treatment “amount[ed] to torture under the rigorous definition of that term adopted in the FSIA,” but instead engaged only in a discussion about the abuses generally perpetrated in North Korean labor camps. The plaintiffs appealed.⁴⁸⁵

On appeal, the court addressed the issue of how much and what kind of evidence the FSIA’s default provision requires, ultimately reversing and remanding with instructions to enter a default judgment against North Korea.⁴⁸⁶ The court considered uncontroverted evidence of the official’s activities and subsequent abduction by North Korean operatives, along with the testimony of experts on conditions within North Korean labor camps, and found that the admissible record evidence demonstrated that North Korea abducted the official, that it “invariably tortures and kills political prisoners,” and that “through terror and intimidation it prevents any information about those crimes from escaping to the outside world.”⁴⁸⁷ Given these state-imposed restrictions on the free flow of information from the country, especially in cases of forced disappearance,

478. *Firebird Global Master Fund II Ltd.*, 915 F. Supp. 2d at 126; *Spencer*, 922 F. Supp. 2d at 109; *Cortez Byrd*, 974 F. Supp. 2d at 273 (quoting 28 U.S.C. § 1608(e)).

479. *Firebird Global Master Fund II*, 915 F. Supp. 2d at 126 (citing *Oveissi v. Islamic Republic of Iran*, 879 F. Supp. 2d 44, 49 (D.D.C. 2012)).

480. *Kim v. Democratic People’s Republic of Korea*, 950 F. Supp. 2d 29, 35 (D.D.C. 2013).

481. *Goldberg-Botvin*, 938 F. Supp. 2d at 1 (finding that evidence presented in plaintiffs’ previous case, and in another case arising from same bombing, established that Iran was culpable for both the extrajudicial killing of plaintiffs’ family member and the provision of material support to the terrorist organization involved in the bombing).

482. *Han Kim v. Democratic People’s Republic of Korea*, 774 F.3d 1044 (D. C. Cir. 2014).

483. *Id.* at 1045.

484. *Id.*

485. *Id.* at 1046.

486. *Id.* at 1047, 1045.

487. *Id.* at 1045.

the court reasoned that “[r]equiring a plaintiff to produce direct, first-hand evidence of the victim’s torture and murder would [] thwart the purpose of the terrorism exception: holding state sponsors of terrorism accountable for torture and extrajudicial killing.”⁴⁸⁸ In view of Congress’s purpose in enacting the terrorism exception, and the court’s authority, if not “obligation,” to adjust evidentiary requirements to differing situations, the court found the plaintiffs’ evidence sufficient to establish subject matter jurisdiction and to satisfy section 1608(e)’s standard for default judgment against North Korea.⁴⁸⁹

In *Worley v. Islamic Republic of Iran*, the plaintiffs brought an action against Iran under the terrorism exception to the FSIA for injuries arising out of the bombing of the U.S. Marine barracks in Beirut, Lebanon nearly three decades earlier, in October 1983.⁴⁹⁰ When Iran failed to appear, the plaintiffs moved for default judgment on the issue of liability.⁴⁹¹ In evaluating plaintiffs’ motion, the district court was confronted with the novel question of whether section 1605A’s statute of limitations is a jurisdictional requirement, such that the court must raise and consider it *sua sponte* despite a defendant’s failure to raise it by failing to appear.⁴⁹²

Looking to the text of the provision, the court noted that it was plausible to conclude that jurisdiction under the FSIA requires a claim to be brought in compliance with all aspects of sections 1605 to 1607, including the limitations provision of section 1605A.⁴⁹³ However, the court ultimately held that interpreting the FSIA’s text to indicate a jurisdictional limitations period would not comport with the Supreme Court’s “bright line” rule that a statute “clearly state” that a particular provision is jurisdictional.⁴⁹⁴ The court went on to find that neither the structure of the FSIA nor prior judicial precedent establish that the limitations period is jurisdictional.⁴⁹⁵ Further, the court declined to exercise its discretionary authority to raise the limitations defense on Iran’s behalf because statutes of limitations are generally treated as affirmative defenses that may be waived—by failing to appear, Iran waived what might have been a meritorious defense.⁴⁹⁶

488. *Id.*

489. *Id.* at 1048, 1051.

490. *Worley*, 75 F. Supp. 3d at 318.

491. *Id.* at 319.

492. *Id.* at 328.

493. *Id.*

494. *Id.*

495. *Id.* at 330.

496. *Id.* at 331.

