

2013

The Foreign Sovereign Immunities Act: 2011 Year in Review

Follow this and additional works at: <https://scholar.smu.edu/lbra>

Recommended Citation

The Foreign Sovereign Immunities Act: 2011 Year in Review, 19 Law & Bus. Rev. Am. 139 (2013).

Available at: <https://scholar.smu.edu/lbra/vol19/iss2/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Law and Business Review of the Americas by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2011 YEAR IN REVIEW

*Crowell & Moring LLP**

TABLE OF CONTENTS

INTRODUCTION: THE FSIA IN 2011	140
I. A BRIEF HISTORY OF THE FSIA	140
II. THE DEFINITION OF A FOREIGN STATE: POLITICAL SUBDIVISIONS, ORGANS, AGENCIES AND INSTRUMENTALITIES	142
A. WHAT IS A "FOREIGN STATE?"	142
III. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY	146
A. WAIVER – SECTION 1605(A)(1)	146
B. COMMERCIAL ACTIVITY – SECTION 1605(A)(2)	149
C. TAKINGS – SECTION 1605(A)(3)	156
D. NON-COMMERCIAL TORTS – SECTION 1605(A)(5)	159
E. ARBITRATION – SECTION 1605(A)(6)	161
F. TERRORISM - SECTION 1605A AND SECTION 1605(A)(7)	163
IV. ENFORCEMENT OF AWARDS AGAINST FOREIGN SOVEREIGNS	169
V. PRACTICAL ISSUES IN FSIA LITIGATION	173
A. ACT OF STATE DOCTRINE	173
B. SERVICE OF PROCESS	174
C. DUE PROCESS AND PERSONAL JURISDICTION	176
D. JURISDICTIONAL DISCOVERY	177
E. DEFAULT JUDGMENTS	178
F. VENUE AND FORUM NON CONVENIENS	179
G. INTERLOCUTORY APPEAL	181

The Foreign Sovereign Immunities Act, 28 U.S.C. sections 1602 et seq. (FSIA), provide the exclusive basis for suing a foreign sovereign in U.S. courts. While the FSIA generally grants immunity to foreign sovereigns, it also lays out a number of exceptions under which U.S. courts may exercise jurisdiction. Plaintiffs have thus used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of

* This Review was authored by Crowell & Moring attorneys Aryeh S. Portnoy, Laurel Pyke Malson, John Murino, Lisa Savitt, Birgit Kurtz, Sam Nielson, Kerry Mustico, Jesse Kirchner, Moreen O'Brien, Jonathan Anastasia, Melanie Henry, and Arash Jahanian.

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 2011.

INTRODUCTION: THE FSIA IN 2011

LITIGATION involving foreign sovereigns in the United States is on the rise. Since the year 2000, the number of reported decisions discussing the FSIA has increased considerably. This increase is attributable to a variety of circumstances that continued to play out in FSIA jurisprudence in 2011.

Ever increasing globalization of business and the increased use of international arbitration as a dispute resolution mechanism (with enforcement left to domestic courts) have resulted in an increase in purely commercial litigation involving foreign states. Consequently, substantial litigation in 2011 centered around the “commercial activity” exception under the FSIA, including the pivotal questions of whether acts are “governmental” or “commercial” when undertaken by sovereign entities or their agencies and instrumentalities, and how close a nexus such acts must have to the United States to fall within the statute’s exemptions. While the courts continue to grapple with these issues, the decisions in 2011 provided welcome guidance in this constantly evolving area of the FSIA.

Overall, FSIA cases in 2011 continued to address the core issues facing foreign sovereigns in U.S. litigation, including:

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

This Review will focus on the answers to those questions provided by U.S. courts in 2011. The Review also includes a short introduction to the FSIA as well as some practical guidance based on the most recent FSIA decisions.

I. A BRIEF HISTORY OF THE FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. As early as 1812 in *The Schooner Exchange v. McFaddon*,¹ U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice rooted in a sense of grace and comity between the United States and other nations. Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the

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

U.S. State Department expressly referred claims for their consideration.²

In 1952, U.S. courts' jurisdiction over claims against foreign states and their agents expanded significantly when the U.S. State Department issued the so-called "Tate Letter" announcing the Department's adoption of a new "restrictive theory" of foreign sovereign immunity³ to guide courts in invoking jurisdiction over foreign sovereigns. The Tate Letter directed that state sovereigns continue to be entitled to immunity from suits involving their sovereign, or "public," acts. But, acts taken in a commercial, or "private," capacity no longer would be protected from U.S. court review. Yet, even with this new guidance, courts continued to seek the Executive Branch's views on a case-by-case basis to determine whether to assert jurisdiction over foreign sovereigns—a system that risked inconsistency and susceptibility to "diplomatic pressures rather than to the rule of law."⁴

In 1976, Congress sought to address this problem by enacting the FSIA, essentially codifying the "restrictive theory" of immunity, and empowering the courts to resolve questions of sovereign immunity without resort to the Executive Branch.⁵ Today, the FSIA provides the "sole basis" for obtaining jurisdiction over a foreign state in U.S. courts.⁶

The FSIA provides that "foreign states"—including their "political subdivision[s]" and "agenc[ies] or instrumentalit[ies]"⁷—shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in the statute applies.⁸ The FSIA includes several provisions that define the scope of a foreign state's immunity, and establishes detailed procedural requirements for bringing claims against a sovereign defendant.

The exceptions to immunity are set forth in sections 1605 and 1605A of the FSIA. These exceptions include, *inter alia*, certain claims based on commercial activities, expropriation of property, and tortious or terrorist acts by foreign sovereign entities.⁹ In most instances, where a claim falls under one of the FSIA exceptions, the Act provides that the foreign state shall be subject to jurisdiction "in the same manner and to the same extent as a private individual."¹⁰ The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment in aid of execution of a judgment against a foreign state or its

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

3. *Id.* at 486-87.

4. *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)).

5. See 28 U.S.C. § 1602 (2011).

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

7. 28 U.S.C. § 1603 (2011).

8. See *id.* § 1604.

9. See *id.* §§ 1605-1605A.

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

agencies or instrumentalities, of property located in the United States.¹¹ Finally, the FSIA sets forth various unique procedural rules for claims against foreign states, including, *e.g.*, special rules for service of process, default judgments, and appeals.¹²

II. 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 person or entity constitutes a "foreign state" for purposes of the FSIA, and therefore is generally entitled to immunity from litigation and judgment execution. For purposes of the FSIA, "foreign states" include not only the states themselves, but also agencies and instrumentalities thereof.¹³ To qualify as an "agency or instrumentality" of a foreign state, an entity must be a "separate legal person," that is "neither a citizen of a State of the United States . . . nor created under the laws of any third country" *and* either "an organ of a foreign state or political subdivision" or an entity, "a majority of whose shares or other ownership interest is owned by [the] foreign state or a political subdivision thereof."¹⁴

A. WHAT IS A "FOREIGN STATE?"

Whether an entity qualifies as a "foreign state" is a fundamental inquiry in any case brought under the FSIA because it determines whether the entity will be able to assert sovereign immunity to defeat a court's exercise of jurisdiction over it. If an entity is deemed to be a foreign state, it may be sued in a U.S. court *only* if the claims fall within one or more of the exceptions set forth in the statute.¹⁵

Determining whether an entity is a "foreign state" and therefore entitled to the protections of the FSIA is a fact-specific inquiry, involving careful attention to the specific nature and functions of each defendant. The following decisions illustrate how U.S. courts have addressed the status of a variety of entities under the FSIA in 2011.

11. *See id.* §§ 1610-11. 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 a military activity is immune from attachment. § 1611(b)(2).

12. *See, e.g., id.* §§ 1605(g), 1608.

13. *Id.* § 1603(a).

14. *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 Distrib., Inc. v. Gulf Aluminum Rolling Mill Co.*, 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.")

15. *Id.* § 1604.

1. *Economic Agency – Not Foreign State*

In the case *In re Fresh and Process Potatoes Antitrust Litigation*,¹⁶ the district court found that an entity called the United Potato Growers of Canada (UPGC) was not an agency or instrumentality of a foreign state entitled to immunity under the FSIA.¹⁷ UPGC's argument for immunity under the FSIA was that it was an organ of a foreign state engaging in a public activity on behalf of the foreign government.¹⁸ To determine whether UPGC was an "agency or instrumentality" of a foreign state, the court examined the following factors:

- (1) the circumstances surrounding the entity's creation;
- (2) the purpose of its activities;
- (3) its independence from the government;
- (4) the level of government financial support;
- (5) its employment policies; and
- (6) its obligations and privileges under state law.

The court considered the circumstances surrounding how UPGC's member agencies came to form the entity, finding that "[a] province did not instruct or direct the member agencies to establish UPGC or any other subsidiary that would assist it with its sovereign functions."¹⁹ The court further held that the purpose of UPGC's activities was to "disseminate information about the production and marketing of potatoes," which weighs against finding that it qualifies as an organ of a foreign state.²⁰ Moreover, the court found that the government neither controlled nor financially supported the entity.²¹ The court further concluded that "[t]he final two factors, UPGC's employment policies and UPGC's obligations and privileges under state law, do not tip the scale in either direction."²² The reason was that UPGC had one part-time employee who was not a public servant, and while "[e]mployment of civil servants is indicative of an organ of government . . . it is not dispositive. Moreover, it does not appear that any savings UPGC receives as a non-profit amounts to substantial financial support."²³ Thus, "[b]ased on an evaluation of all six factors," the court concluded that "the scale tips decidedly in favor of finding that UPGC is not an organ of a foreign state."²⁴

2. *European Community*

In May 2011, the district court looked to the FSIA's definition of a "foreign state" to assist in determining whether the European Commu-

16. *In re Fresh and Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141 (D. Idaho, 2011).

17. *Id.* at 1178.

18. *Id.* at 1177.

19. *Id.*

20. *Id.* at 1177-78.

21. *Id.* at 1178.

22. *Id.*

23. *Id.*

24. *Id.*

nity (EC) was a “foreign state” for purposes of federal diversity jurisdiction.²⁵ While the case was not brought under the FSIA, the court nevertheless engaged in a robust analysis using FSIA case law as a guide and found that the EC is neither a foreign state, nor a political subdivision of a foreign state, nor an agency or instrumentality of a foreign state.²⁶

As part of its FSIA analysis, the court first borrowed from the Supreme Court’s analysis in *Samantar v. Yousuf*,²⁷ which observed that a “foreign state” under the FSIA “generally ‘indicates a body politic that governs a particular territory.’”²⁸ The district court then found that the EC was an international organization rather than a foreign state, did not exercise control over its territories, and did not abrogate its member states’ powers of international sovereignty, including the ability to “receive ambassadors, sign treaties and wage war.”²⁹ Accordingly, the court concluded that the EC was not a “foreign state” under the FSIA.³⁰

The court also determined that the EC was neither a political subdivision or an agency or instrumentality of a foreign state, but rather a separate, legal person.³¹ The court considered similar factors to the court in *In re Fresh and Process Potatoes Antitrust Litigation*, specifically:

- (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.³²

The court observed that the treaty governing the EC provided for its separate legal personhood, and, while the EC was created for a “national” purpose, the Member States did not actively supervise the entity, “did not require the hiring of employees that could be deemed public employees of the Member States,” and rejected notions that the EC was an “organ” of their states under the EC Member States’ own laws.³³ The court found that “[t]hese factors all point[ed] to the inescapable conclusion that the European Community really is a supranational body, truly independent of the governments of the Member States,” and therefore

25. *European Cmty v. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189, 208 (E.D.N.Y. 2011) (applying the FSIA definition of a “foreign state” from 28 U.S.C. § 1603(a) to determine diversity jurisdiction under 28 U.S.C. § 1332(a)).

26. *Id.* at 208; see generally *id.*

27. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010).

28. *European Cmty.*, 814 F. Supp. 2d at 198 (quoting *Samantar*, 130 S. Ct. at 2286).

29. *Id.*

30. *Id.* at 199-200.

31. *Id.* at 200 (holding that “the European Community is a separate legal person for the purposes of the FSIA.”).

32. *Id.* at 202 (citing *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2009)).

33. *Id.* at 207-08.

did not fall within any of the FSIA's definitions of a foreign state.³⁴

B. "GOVERNMENTAL" VERSUS "COMMERCIAL" ACTIVITIES:
THE "CORE FUNCTIONS TEST"

As to certain issues, an "agency or instrumentality" of a foreign sovereign may be subject to different statutory rules than the "foreign state" itself or its political subdivisions. In particular, rules relating to service of process, venue, the availability of punitive damages, and attachment of assets can differ depending on whether the defendant is deemed an agency of the state or the state itself.³⁵ To make this determination, courts apply the so-called "core functions test."³⁶ Under this test, if the entity's predominant activities ("core functions") are "governmental" in nature, courts will treat the entity as if it were the state itself and apply rules and standards that are more protective of the sovereign.³⁷ But, if the entity's "core functions" are predominantly "commercial" in character, courts will apply the less protective rules and standards reserved for agencies and instrumentalities of the state.³⁸

In 2011, in *Wye Oak Technology, Inc. v. Republic of Iraq*,³⁹ the Fourth Circuit applied the "core functions" test to determine whether the Iraq Ministry of Defense (IMOD) was an agency or instrumentality of Iraq, and thus legally separate from the foreign state, or a political subdivision of the state itself.⁴⁰ The plaintiff contractor sued IMOD for breach of contract when IMOD failed to make required contractual payments under a contract to refurbish and dispose of Iraqi military equipment.⁴¹ As part of its contract, the plaintiff performed acts in the United States such as "accounting, computer programming, contacting agents of foreign nations, etc."⁴² And the contract related to IMOD's commercial activities abroad. Applying the "core functions" test, the court held that "the core functions of the IMOD—waging war and defending the state—are inherently governmental."⁴³ Accordingly, the court held that for FSIA purposes, "Iraq and IMOD are legally one and the same" and so IMOD enjoyed broader sovereignty protection.⁴⁴ Even so, because the acts challenged by the plaintiff were commercial in nature, they triggered the "commercial activity" exception under the FSIA and effectively waived

34. *Id.* at 208.

35. *See, e.g.*, 28 U.S.C. § 1608(a)-(b) (2011) (service of process); § 1391(f)(3) (permitting venue in suits against an agency or instrumentality of a foreign state "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business"); § 1610(a)-(b) (attachment of assets).

36. *See Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 215 (4th Cir. 2011).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 206.

42. *Id.* at 216.

43. *Id.* at 215.

44. *Id.*

IMOD's sovereign immunity in the case.⁴⁵

III. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY

Once a court determines that an entity constitutes a foreign state (or an agency or instrumentality) potentially entitled to immunity, it must next determine whether an exception to that immunity applies. Decisions from 2011 addressing those exceptions are discussed below.

A. WAIVER – SECTION 1605(A)(1)

The FSIA provides:

A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which 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 waiver⁴⁶

In 2011, the courts addressed a broad range of issues under the waiver exception, including: (1) whether a non-party to a treaty can use that treaty to demonstrate waiver by a party state, (2) whether choice of law and forum selection clauses survive nationalization of an entity and waive the immunity of the newly-nationalized entity, (3) whether responding to subpoenas implicitly waives immunity, (4) whether waiver of jurisdictional immunity also constitutes waiver of the right to a non-jury trial, and (5) whether waiver by a parent state operates to waive immunity of all subsidiary entities under an alter ego theory.

Waiver by Treaty. In *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp.*, the district court addressed two theories of waiver proffered by the plaintiffs—two Cayman Island limited partnerships that held \$200 million in notes from defendant Anglo Irish Bank Corp.⁴⁷ The Irish government, which nationalized the bank in 2009,⁴⁸ asserted sovereign immunity.⁴⁹ The plaintiffs countered that Ireland had impliedly waived its sovereign immunity by entering into the Friendship Treaty of 1950—an agreement between the United States and Ireland which provided that “[n]o enterprise of either Party which is publicly owned or controlled shall, if it engages in . . . business activities within the territories of the other Party, claim or enjoy . . . immunity therein from . . . suit.”⁵⁰ Despite the existence of this treaty, the court held that the plaintiffs, as non-parties to the bilateral agreement, could not avail

45. *Id.* (noting that the plaintiff's same allegations were “sufficient to bring a claim against Iraq [IMOD] within the FSIA's commercial activities exception.”).

46. 28 U.S.C. § 1605(a)(1) (2011).

47. *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp.*, No. 11 Civ. 0955, 2011 WL 6187077, at *1, 8-11 (S.D.N.Y. Nov. 28, 2011).

48. *Id.* at *1.

49. *Id.* at *6.

50. *Id.* at *9 (quoting Treaty of Friendship, Commerce and Navigation, U.S.-Ir., art. XV(3), Jan. 21, 1950, 1 U.S.T. 785).

themselves of the treaty as a basis for jurisdiction. As the court held “[w]hen the case involves an implied waiver . . . a court should be even more hesitant to extend the waiver in favor of third parties. [S]uch a waiver will not be implied absent strong evidence of the sovereign’s intent.”⁵¹

Waiver by Agreement of a Subsequently Nationalized Entity. The plaintiffs in *Fir Tree Capital* further argued that when the Irish government nationalized the bank, the choice of law and forum selection clauses contained in the notes prior to the nationalization had the effect of waiving sovereign immunity for the state-owned successor.⁵² Distinguishing several cases cited by the plaintiffs, the court held that the Irish government had not expressly assumed the choice of law and forum selection provisions.⁵³ Without a “case suggesting that a nationalized entity may be found to have waived sovereign immunity because of an agreement entered into by its private sector predecessor,” the court “concluded that the Irish government [had] not waived sovereign immunity.”⁵⁴

Waiver by Responding to Subpoenas. In *Eitzen Bulk A/S v. Bank of India*, the district court found implicit waiver by defendant Bank of India where the Bank responded twice to subpoenas and failed to timely assert its immunity.⁵⁵ The Bank responded to the subpoenas but never filed a responsive pleading.⁵⁶ After plaintiff Eitzen Bulk moved to compel full compliance with the subpoenas, the Bank asserted sovereign immunity, arguing that it could not be held to have waived immunity prior to filing a responsive pleading.⁵⁷ The court noted that the time to respond had lapsed,⁵⁸ but “[m]ore importantly,” the Bank had responded to Eitzen Bulk’s subpoenas “without objecting on the basis of sovereign immunity.”⁵⁹ The court held that the Bank’s conduct constituted an implicit waiver of sovereign immunity.⁶⁰

Waiver of Right to Non-Jury Trial. In *Aboeid v. Saudi Arabian Airlines, Inc.*, the district court held that a waiver of sovereign immunity under a Department of Transportation (DOT) Permit did not waive the FSIA provision granting sovereign defendants the right to a non-jury

51. *Id.* at *8 (quoting *Cargill Intern S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993)).

52. *Id.* at *10. The Notes included a Note Purchase Agreement stating that the bank would submit to the jurisdiction of “‘courts of the State of New York or the United States District Court for the Southern District of New York.’” (capitalization in original); *Id.* at *3.

53. *Id.* at *10-11.

54. *Id.* at *11.

55. *Eitzen Bulk A/S v. Bank of India*, 827 F. Supp. 2d 234, 241 (S.D.N.Y. 2011).

56. *Id.*

57. *Id.*

58. *Id.* (citing 28 U.S.C. § 1608(d) (2011)) (requiring “an answer or other responsive pleading to the complaint within sixty days”).

59. *Id.*

60. *Id.*

trial.⁶¹ The plaintiff demanded a jury trial in its complaint against Saudi Arabian Airlines (SAA).⁶² SAA moved to strike the jury demand.⁶³ In granting SAA's motion, the court clarified that a waiver of jurisdictional immunity should not be construed to reach other "rights and privileges afforded by the FSIA"⁶⁴ such as the non-jury provision of 28 U.S.C. section 1441(d).⁶⁵ The court further noted that "[t]he waiver language in the [DOT] Permit assert[ed] that operations by the defendant 'constitute a waiver of sovereign immunity, *for the purposes of 28 U.S.C. 1605(a).*'"⁶⁶ That provision provides that "a foreign state may no[t] assert immunity from the jurisdiction of United States courts if 'the foreign state has waived its immunity expressly or by implication.'"⁶⁷ Given this "explicit reference to the FSIA in the DOT's waiver," the court found that "it would be entirely anomalous to interpret the waiver to exclude the defendant from all of the other provisions of the FSIA" as well.⁶⁸

Waiver Under an Alter Ego Theory. In *NML Capital, Ltd. v. Republic of Argentina*, the district court addressed whether a complaint contained sufficient factual allegations to impute waiver by a parent state to a subsidiary under an alter ego theory.⁶⁹ Prior to bringing the action, plaintiff NML Capital, Ltd. (NML) won several judgments against defendant Republic of Argentina (Republic).⁷⁰ Because of expected challenges in enforcing judgments against the Republic, NML also sued defendant Energia Argentina S.A. (ENARSA) and sought to have it declared an alter ego of the Republic, subject to the government's own waiver of immunity.⁷¹ While acknowledging "that the Republic had a substantial degree of control over ENARSA," the court held that the complaint did not allege the right type of control to support an alter ego theory.⁷² Yet the court's opinion provided some hints as to what a plaintiff would need to allege to succeed on such a theory.⁷³ Specifically, the court observed that

61. *Aboeid v. Saudi Arabian Airlines, Inc.*, No. CV-10-2518, 2011 WL 2222140, at *3 (E.D.N.Y. June 1, 2011). SAA had waived sovereign immunity for merits purposes "by operating as a foreign air carrier in the United States pursuant to a permit issued by the Department of Transportation." *Id.* at *2.

62. *Id.* at *2; cf. FED. R. CIV. P. 38(b).

63. *Aboeid*, 2011 WL 2222140, at *2; cf. FED. R. CIV. P. 39(a)(2).

64. *Aboeid*, 2011 WL 2222140, at *3.

65. *See id.* at *3 n.1; *see also id.* at *3 ("The waiver upon which the plaintiffs rely here does not say anything about non-jury trials.").

66. *Id.* at *4 (quoting DOT Permit) (emphasis in original).

67. *Id.*

68. *Id.* Right to a non-jury trial under § 1441(d) is one of the FSIA's provisions. *See* History, 28 U.S.C.S. § 1441(d). In fact, § 1441(d) is § 6 of the FSIA. *See* Oct. 21, 1976, P.L. 94-583, § 6, 90 Stat. 2898. Other provisions of the FSIA are codified at Title 28, §§ 1330, 1332, 1391(f), and 1602-1611.

69. *NML Capital, Ltd. v. Republic of Argentina*, No. 09 Civ. 7013, 2011 WL 524433, at *1 (S.D.N.Y. Feb. 15, 2011).

70. *Id.*

71. *Id.*

72. *Id.* at *7.

73. *See id.* The court granted NML leave to amend its complaint. *Id.* at *8. NML filed an Amended Complaint on July 21, 2011, but "did not seek to strengthen its case of alter ego" and in fact seemed to abandon the theory altogether. *Id.* at *1

NML did not sufficiently allege “that the Republic managed the day-to-day business of ENARSA or disposed of the funds of ENARSA in any abnormal manner or in any way designed to treat such funds as funds of the Republic.”⁷⁴ Even “‘dictat[ing] the quantity, price of purchase, and price of sale for ENARSA’s natural gas transactions’” was not sufficient where the complaint did not allege more frequent intervention.⁷⁵ Practitioners addressing similar situations involving a possible veil-piercing analysis should thus consider both the scope and frequency of acts purportedly establishing control by the parent over the subsidiary for purposes of establishing jurisdiction under the FSIA.

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

Increased government involvement in commercial affairs, whether resulting from ongoing intervention following the 2008 financial crisis or from increased involvement by state-centered regimes like China’s, has led to the “commercial activity” exception of the FSIA being frequently invoked as a basis for U.S. courts to exercise jurisdiction over foreign sovereigns. This exception to foreign sovereign immunity provides that a foreign state shall not be immune from the jurisdiction of U.S. courts in any case:

in which the action is based: [(1)] upon a commercial activity carried on in the United States by the foreign state, or [(2)] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or [(3)] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States⁷⁶

In other words, foreign states lose their immunity from lawsuits in the United States where their actions at issue in the lawsuit are: (1) commercial, and (2) have a nexus to the United States (i.e., are carried out, or cause a direct effect, in the United States).

1. What Acts Are Considered “Commercial”?

In distinguishing between “commercial” and “governmental” acts, the FSIA expressly requires that acts be defined by their nature, not their purpose.⁷⁷ For example, the act of selling bonds to raise government funds to enter into a construction contract is “commercial” in nature, even if the contract is for a seemingly “governmental,” non-commercial,

(“Whereas the original complaint had expressly cited *Bancec* [a particular case discussing alter ego] as the legal basis for its claim, *Bancec* is not referred to in the amended complaint.”).

74. *NML Capital*, 2011 WL 524433, at *7.

75. *Id.* (quoting Compl. ¶ 36); see also *id.* at *7. (“[T]he claim that the Republic intervened in the daily transactions and affairs of ENARSA, if there is such a claim, is not developed in the complaint with any specific detail.”) (emphasis added).

76. 28 U.S.C. § 1605(a)(2) (2008).

77. See *id.* § 1603(d).

purpose such as building an embassy compound. Often, the cases are not so straightforward. But in 2011, cases dealing with this issue generally adhered to established distinctions between “commercial” and “governmental” acts.

Following an enduring principle, courts in 2011 followed the Supreme Court’s guidance in *Republic of Argentina v. Weltover, Inc.*, that a foreign sovereign’s actions are “commercial” when it acts as a private player in the market rather than as a regulator.⁷⁸ In this light, the courts followed prior distinctions and found several acts to be commercial in nature including: selling bonds in the United States,⁷⁹ negotiating and settling legal claims,⁸⁰ transferring money into the United States for a sovereign-owned corporation to purchase a United States-based entity,⁸¹ and contracting for the purchase of goods, services, and technology.⁸²

On the other hand, when the government acts as a regulator, e.g., makes “decisions regarding whether or how to investigate an allegedly fraudulent commercial transaction between private parties, regulate exports, enforce criminal laws, and seize property during criminal investigations,” the government acts as a sovereign and not as a commercial actor.⁸³

Some cases decided in 2011 help the sovereign and the practitioner alike know where to draw the line between “commercial” and “governmental” acts:

- **Sale of Bank Assets – Commercial:** In *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp. Ltd.*, the district court determined that a state-owned bank’s merger and sale of assets were commercial acts.⁸⁴ The plaintiffs, affiliates of a New York investment firm, owned \$200 million of notes issued in the United States by defendant Anglo Irish Bank.⁸⁵ The Republic of Ireland nationalized the bank in 2009 following the 2008 global financial crisis.⁸⁶ The plaintiffs alleged that after its nationalization, the bank began liqui-

78. See, e.g., *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 764 F. Supp.2d 122, 127 (D.D.C. 2011) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)).

79. *Bleier v. Bundesrepublik Deutschland, et al.*, No. 08 C 06254, 2011 WL 4626164, at *4 (N.D. Ill. Sept. 30, 2011) (“The alleged marketing and sale of bonds in the United States fits readily within the definition of ‘commercial activity.’”).

80. *Fagan v. Republic of Austria*, No. 08 Civ. 6715, 2011 WL 1197677, at *9 (S.D.N.Y. Mar. 25, 2011).

81. *Transcor Astra Group S.A. v. Petroleo Brasileiro S.A.-Petrobras*, 409 F. App’x 787, 289 (5th Cir. 2011).

82. *Servaas, Inc. v. Republic of Iraq*, No. 10-828-cv, 2011 WL 454501, at *1 (2d Cir. Feb. 16, 2011) (noting that “contracting for the purchase of goods, services and technology—is quintessentially commercial”).

83. *Cnty. Fin. Grp., Inc. v. Republic of Kenya*, 663 F. 3d 977, 981 (8th Cir. 2011) (dismissing case for lack of jurisdiction where plaintiffs alleged that Kenyan government failed adequately to prevent plaintiffs’ loss or to restore the lost funds).

84. *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp. Ltd.*, No. 11 Civ. 0955, 2011 WL 6187077, at *14 (S.D.N.Y. Nov. 28, 2011).

85. *Id.* at *1.

86. *Id.*

dating its assets, including a U.S.-based loan portfolio, at steep discounts and, pursuant to an order by the High Court of Ireland, had begun to formulate a plan for a merger with another bank.⁸⁷ Concerned about their investment, plaintiffs sought an order enjoining the bank from entering into the merger or selling its assets and requiring the bank to leave sufficient assets in the United States to satisfy its obligations to plaintiffs. The bank argued that the acts were not “commercial” because they had been ordered by the High Court.

The court rejected this argument. Because the nature of the acts—the sale of assets and merger with another bank—were “the *type* of actions by which a private party engages in ‘trade and traffic or commerce,’” the court considered the bank’s actions to be “commercial” in nature rather than “governmental.”⁸⁸ The court further observed that, “because a foreign instrumentality such as a nationalized or central bank presumably always acts at the volition of a foreign government,” if it held that acts compelled by the government were sovereign in nature, “the commercial activity exception would be rendered nugatory.”

- **Purchase of Licensing and Distribution Rights – Commercial:** In *CYBERSitter, LLC v. People’s Republic of China*, the district court asserted jurisdiction over the People’s Republic of China (PRC) in a suit alleging misappropriation of computer software code.⁸⁹ The PRC had purchased from plaintiffs a one-year distribution license for a program known as “Green Dam.” The PRC then allegedly made the program available worldwide on the Internet for free downloading, including on its own official site, and used propaganda to encourage Chinese speakers worldwide to download the program. The court concluded that because “entities other than a sovereign state can purchase licenses for software programs and, in turn, sublicense such programs to other actors[.]” it was irrelevant “[w]hether the PRC conducted this business for a governmental purpose.”⁹⁰
- **Negotiation, Investigation, and Settlement of a Legal Claim – Commercial:** In *Fagan v. Republic of Austria*, the district court held that a sovereign engages in commercial activity when it participates in the settlement of a legal claim.⁹¹ The court noted that such activity “is not ‘peculiarly within the realm of governments,’ but rather is an activity ‘which private parties ordinarily perform.’”⁹² So to the extent that a sovereign engages in settlement alongside private entities, it is

87. *Id.* at *3.

88. *Id.* at *13 (emphasis in original) (quoting *Anglo-Iberia Underwriting Mgmt. v. P.T. Jamsostek (Persero)*, 600 F.3d 171, 177 (2d Cir. 2010).

89. *CYBERSitter, LLC v. People’s Republic of China*, 805 F. Supp. 2d 958, 962 (C.D. Cal. 2011).

90. *Id.* at 976.

91. *Fagan v. Republic of Austria*, No. 08 Civ. 6715(LTS)(JCF), 2011 WL 1197677, at *10 (S.D.N.Y. Mar. 25, 2011).

92. *Id.* at *9.

engaging in a commercial activity.⁹³

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

Once a court considers an act to be “commercial” under the FSIA, it must then determine whether the act has a sufficient nexus with the United States to fall within the commercial activity exception. A nexus is established in one of three ways: (1) the foreign sovereign conducts the commercial act in the United States, (2) the act takes place in the United States in connection with commercial activity abroad, or (3) the sovereign acts outside of the United States in connection with the sovereign’s commercial activity but causes a “direct effect” in the United States.⁹⁴

Acts in the United States by Foreign States. The first clause of the exception permits jurisdiction over commercial acts carried out in the United States by foreign states. The courts did not address this exception in 2011. But, practitioners should be mindful that issues with this exception may occur when questions arise as to the authority of the individual whose acts are the subject of the claim to bind a sovereign.

Acts in the United States in Connection with Commercial Activity Abroad. The second exception provides for jurisdiction where the challenged acts are taken in the United States that relate to the sovereign’s commercial activity abroad. As with the first clause, for the exception to apply, the acts in the United States must be not only “in connection with” the commercial activity of the foreign state, but also must be sufficient to form the basis of the suit itself. The key difference is that, for this second clause to apply, the acts taken in the United States do not themselves have to be taken by the foreign state, but can be the plaintiff’s own acts.

For example, in *Wye Oak Technology, Inc. v. Republic of Iraq*, the plaintiff performed acts in the United States such as “accounting, computer programming, contacting agents of foreign nations, etc.” as part of its contract with Iraq’s Ministry of Defense.⁹⁵ The contract was related to the Ministry’s commercial activities abroad, and the plaintiff’s claim was for breach of contract with the Ministry. Consequently, these acts were sufficient to show that the claim was based on upon “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere.”⁹⁶ And the Fourth Circuit affirmed the district court’s decision to exercise jurisdiction over the claim.⁹⁷

Acts Outside the United States that Cause a “Direct Effect” in the United States. The third clause of the exception grants United States courts jurisdiction over acts that occur *outside* the United States, but which cause a “direct effect” in the United States. This third category is often the subject of litigation because of the lack of clarity over what

93. *Id.*

94. 28 U.S.C. § 1605(a)(2) (2008).

95. *Wye Oak Technology, Inc. v. Republic of Iraq*, 666 F.3d 205, 216 (4th Cir. 2011).

96. *Id.* at 215.

97. *Id.* at 217.

constitutes a “direct effect” (as opposed to an “indirect” effect) in the United States.

Still, there are some basic principles the courts have applied when determining whether a sovereign has taken action that causes a “direct effect” in the United States. For example, “[t]o be a ‘direct’ effect within the meaning of the [exception], the impact need not be either substantial or foreseeable; rather, ‘an effect is direct if it follows as an immediate consequence of the defendant’s activity.’”⁹⁸ But, “jurisdiction may not be predicated on purely trivial effects in the United States.”⁹⁹ As one court stated: “Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.”¹⁰⁰ The courts are not uniform on the type of act required to find a “direct effect,” with some courts requiring the act to be “legally significant” to have a direct effect in the United States, while others, including the Sixth Circuit, have expressly rejected such a requirement.¹⁰¹

In 2011, several cases considered the “direct effects” category to confer or deny jurisdiction based on the FSIA’s commercial activity exception. These cases followed the general rule that courts will not find “direct effects” where “[t]he only effects of [an] activity felt in the United States [a]re side effects of the plaintiffs’ U.S. citizenship and residence.”¹⁰² But, several decisions provide further guidance on what does qualify as a “direct effect.”

- **Selling Counterfeit Products Overseas – Direct Effect:** In *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, defendant Islamic Republic of Iran manufactured allegedly counterfeit military and civilian models of Bell Helicopter’s 206 Model Helicopter Series.¹⁰³ The models in question used Bell Helicopter’s well-recognized trade dress, but they were of a “lower quality and likely ha[d] poorer performance characteristics” than Bell’s models.¹⁰⁴ Iran then marketed these counterfeits to the global market through the government’s annual international air show held in Iran. The district court found that Iran’s acts “likely result[ed] in consumer confusion” and thereby “dilute[d] [Bell Helicopter’s] famous mark” because consumers who thought they were purchasing a Bell Helicopter were really purchasing a substandard product.¹⁰⁵ Accordingly, the court held that Iran’s

98. *Gosain v. State Bank of India*, 414 F. App’x 311, 313 (2d Cir. 2011).

99. *Republic of Argentina v. Weltover Inc.*, 504 U.S. 607, 618 (1992).

100. *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232, 1238 (10th Cir. 1994).

101. *Compare, e.g., Gosain*, at 313-14 with *Westfield v. Federal Republic of Germany*, 633 F.3d 409, 414 (6th Cir. 2011).

102. *Fagan v. Republic of Austria*, No. 08 Civ. 6715(LTS)(JCF), 2011 WL 1197677, at *10 (S.D.N.Y. Mar. 25, 2011).

103. *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 764 F. Supp. 2d 122 (D. D.C. 2011).

104. *Id.* at 128.

105. *Id.* at 126, 128.

manufacture and marketing of the knock-off helicopters had a direct effect in the United States by tarnishing Bell's reputation and good will.¹⁰⁶

- **Intent to Transfer Property to the United States – No Direct Effect:** In *Westfield v. Federal Republic of Germany*, the Sixth Circuit addressed the question whether an act by a foreign sovereign passes the “direct effect” test if the sovereign's acts prevent a third-party from transferring funds or goods to the United States.¹⁰⁷ In *Westfield*, heirs of an art dealer sued Germany based on the Nazis' seizure of the dealer's art collection and sale at auction in the 1930s. The Sixth Circuit found that Germany's acts were “commercial” but that the exception did not apply because the government's actions had no “direct effect” in the United States.¹⁰⁸ The court said it was “very sympathetic” to the plaintiffs' claims, but held that the art dealer's unfulfilled intent to send his collection to relatives in Nashville, Tennessee, caused only an “indirect” or “derivative” effect in the United States.¹⁰⁹ According to the court, “finding a direct effect based on plans to send property to the United States would largely eliminate the protections of sovereign immunity.”¹¹⁰ “Concluding otherwise would effectively read the ‘direct’ requirement out of the statute and greatly expand the jurisdiction of our courts in contrast to Congress's goals in enacting the Foreign Sovereign Immunities Act.”¹¹¹ The court analogized its ruling to prior decisions holding that a foreign country's failure to pay monies owed does not cause direct effects in the United States merely because the entity entitled to receive the funds planned to move the funds to the United States.¹¹²
- **Financial Loss Resulting from Conversion and Property Damage in a Foreign Country – No Direct Effect:** In *Hammerstein v. The Federal Republic of Germany* the district court reiterated the oft-cited principle that the mere suffering of an economic loss in the United States, without more, is not sufficient to confer jurisdiction over the sovereign entity that causes the loss.¹¹³ The court also highlighted the significance, in cases where loss is predicated on the payment of money, on whether the payments were *required* to be made from the United States or whether the location of payment was merely fortuitous. The plaintiff in the case had fled to the United States from Germany in the 1930s. Her family's property had been taken by the Nazis, used as a Gestapo headquarters and prison until the end of World War II, and then used as a hospital by East Germany until reunifica-

106. *Id.* at 127.

107. *Westerfield*, 633 F.3d at 412.

108. *Id.* at 414.

109. *Id.* at 417.

110. *Id.* at 416.

111. *Id.* at 417.

112. *Id.* at 416.

113. *Hammerstein v. The Federal Republic of Germany*, No. 09-CV-443 (ARR)(RLM), 2011 WL 9975796, at *4 (E.D.N.Y. August 1, 2011).

tion. In the 1990s, ownership of the property was restored to the plaintiff and she began paying property taxes to the government. But after a series of legal battles, the German Ministry of Finance notified plaintiff that she did not, in fact, own the property and therefore was not required to pay taxes on it. Because the Ministry of Finance would not refund the taxes, the plaintiff filed suit.¹¹⁴

The court found that the commercial activity exception to the FSIA did not apply. It reasoned that the government's alleged misuse of the property and receipt of taxes did not have a "direct effect" in the United States even though plaintiff had made the tax payments from the United States. The fact that the plaintiff paid taxes and fees to Germany from New York was not significant "because the origination of these payments was not contractually mandated . . . The payments were 'incidental and inconsequential' because Germany would have accepted the payments from any location."¹¹⁵ Thus, the financial loss the plaintiff suffered in the United States for events occurring entirely in a foreign state was merely fortuitous and therefore "insufficient to provide jurisdiction."¹¹⁶

- **Potential Financial Losses from Notes Issued in the United States to an Overseas Entity – No Direct Effect:** In *Fir Tree Capital Opportunity Master Fund, LP*, discussed *supra*, when the state-owned bank began liquidating assets, the plaintiffs sought to enjoin further sales.¹¹⁷ The district court acknowledged that when a foreign entity breaches an obligation to make a payment in the United States, such a breach may be a "legally significant act" with a "direct effect" in the United States.¹¹⁸ But in this case, although the bank's obligations to the plaintiffs were "payable" in the United States, the plaintiffs alleged only a *risk* of non-payment, and jurisdiction under the "direct effects" clause may not be based on acts that cause "only speculative, generalized, immeasurable, and ultimately unverifiable effects in the United States."¹¹⁹ Moreover, even if some concrete injury could be discerned, the court found that the "effects" of the bank's action would be felt in the Cayman Islands—where the plaintiffs were based—not in the United States.¹²⁰
- **Loss to U.S. Shareholder Resulting from Conduct Abroad – No Direct Effect:** Updating a case from our 2010 review, in *Gosain v. State Bank of India*, the plaintiff, a U.S. national who was the majority shareholder in an Indian company, sued the State Bank of India for fraud arising from the bank's liquidation auction.¹²¹ In the district

114. *Id.* at *2.

115. *Id.* at *5.

116. *Id.* at *6.

117. *Fir Tree Capital Opportunity Master Fund, LP v. Anglo Irish Bank Corp.*, No. 11 Civ. 0955(PPG), 2011 WL 6187077, at *1 (S.D.N.Y. Nov. 11, 2011).

118. *Id.* at * 19.

119. *Id.*

120. *Id.*

121. *Gosain v. State Bank of India*, 414 F. App'x 311, 312 (2d Cir. 2011).

court, the plaintiff had argued that his losses as a shareholder suffered in the United States were a direct effect of the Bank's commercial activity in India.¹²² The district court disagreed, reaffirming that mere financial loss felt in the United States is insufficient to satisfy the "direct effect" prong of the commercial activity exception. The district court focused on evidence demonstrating that any proceeds of the sale of plaintiff's shares were to be deposited first in an Indian bank account and only then remitted to the plaintiff's U.S. bank account upon compliance with Indian regulations. Thus, the immediate (or direct) consequence of the alleged fraud was financial loss suffered by the plaintiff in India, and any corresponding loss in the United States would be an indirect effect of the bank's actions.¹²³ On appeal, the Second Circuit affirmed, noting that "the mere fact that a foreign state's commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States."¹²⁴ "[A] financial loss to an individual in the United States is insufficient, standing alone, to satisfy the direct effect requirement of the [FSIA's commercial activities exception]."¹²⁵

C. TAKINGS – SECTION 1605(A)(3)

The FSIA provides that:

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.¹²⁶

In 2011, federal courts addressed several cases in which plaintiffs alleged that the sovereign defendant should be subject to jurisdiction based on the takings, or expropriation, exception to FSIA.

Plaintiff Must Allege a Taking. In *Community Finance Group, Inc. v. Republic of Kenya*, the plaintiffs attempted to purchase gold in Kenya.¹²⁷ As part of the transaction, the plaintiffs deposited \$350,000 into a holding company's account to cover taxes, customs, fees, and storage associated with the planned purchase of Kenyan gold. The Kenyan Central Bank

122. *Gosain v. State Bank of India*, 689 F. Supp. 2d 571, 579 (S.D.N.Y. 2010).

123. *Id.* at 581.

124. 414 F. App'x at 313 (quoting *Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 78 (2d Cir. 2010)).

125. *Id.*

126. 28 U.S.C. § 1605(a)(3) (2008).

127. *See Cmty. Fin. Grp., Inc. v. Republic of Kenya*, 663 F.3d 977 (8th Cir. 2011).

verified the \$350,000 transaction. Shortly thereafter, a Kenyan customs officer informed plaintiffs that a United Nations permit was necessary before the gold could be exported. Two individuals claiming to be with the Nairobi United Nations office then told plaintiffs that the gold plaintiffs were purchasing came from a consignment confiscated by Kenyan customs officials. The plaintiffs became suspicious and contacted Kenyan authorities. Kenyan police arrested the individual who the plaintiffs had been working with in Kenya to secure the gold, and then escorted plaintiffs' representatives to the customs office at Kenyatta International Airport. There, Kenyan police informed plaintiffs' representatives that the gold had been removed from the airport and was being stored at the Kenya Central Bank. None of plaintiffs' \$350,000 was ever returned, and plaintiffs never received any gold.

Following these events, the plaintiffs sued the Republic of Kenya, its governmental agencies, and its central bank, alleging that the defendants "improperly retained" plaintiffs' money and the gold plaintiffs intended to buy by failing to protect the funds or otherwise make restitution out of funds seized from the individual who had defrauded them.¹²⁸ The Eighth Circuit affirmed dismissal of plaintiffs' claim, finding that the plaintiffs "never paid for or acquired the gold that they allege[d] was taken from them" and that they never alleged that money they had deposited with the holding company for the gold was transferred to the defendants.¹²⁹ Thus, because the plaintiffs never owned or possessed the gold, it could not be taken by the defendants.¹³⁰ The court added that "[e]ven if such property had been taken by defendants, [plaintiffs] still failed to establish that the property is present in the United States or that the expropriating defendants engage in commercial activity in the United States" as required by section 1605(a)(3).¹³¹

Taking Must Be Performed by the Sovereign. In *Orkin v. Swiss Confederation*, the Second Circuit affirmed dismissal of the plaintiff's suit against defendants Swiss Confederation and its agencies.¹³² The plaintiff alleged that, to pay for his family's escape from Nazi Germany, his great-grandmother sold valuable artwork to an art collector at an artificially low price who subsequently bequeathed the painting to the Swiss government.¹³³ The district court found that the takings exception did not apply because the exception applies "only where the property at issue passed in the first instance from the plaintiff—or . . . plaintiff's predecessor—to a sovereign or to some person or entity acting on a sovereign's behalf."¹³⁴ The district court recognized that other courts have upheld suits against

128. *See id.* at 979-81.

129. *Id.* at 981.

130. *See id.*

131. *Id.*

132. *See Orkin v. Swiss Confederation*, 444 F.App'x 469 (2d Cir. 2011).

133. *Orkin v. Swiss Confederation*, 770 F. Supp. 2d 612, 613-14 (S.D.N.Y.), *aff'd*, 444 F. App'x 469 (2d. Cir. 2011).

134. *Id.* at 616.

sovereigns who were not responsible for the original expropriation but noted that even in those cases, the original taking was by a sovereign entity.¹³⁵ Because the “taking” in this case was by a private individual, the district court dismissed the case for lack of jurisdiction and the Second Circuit affirmed.¹³⁶

Contractual Right to Receive Payment Is Not “Property” Subject to the Takings Exception. In *Fagan v. Republic of Austria*,¹³⁷ the plaintiff—an attorney who represented Austrian victims in a mass tort action—sued defendants Republic of Austria and its agencies for attorneys’ fees arising from the underlying tort action.¹³⁸ The plaintiff argued that the Takings Exception applied because the Austrian government interfered with his right to receive attorney’s fees.¹³⁹ The district court refused to exercise jurisdiction. As the court held, for purposes of the Takings Exception, “the ‘property taken . . . means physical property [and] not the right to receive payment,’” as is the case in a claim for attorney’s fees.¹⁴⁰

Taking from De Facto Non-Citizens Violates International Law. In *de Csepe v. Republic of Hungary*, the plaintiffs—a Jewish Hungarian art collector and her descendants—alleged that defendant Republic of Hungary and its agencies cooperated with Nazi Germany to seize artwork that is now housed in a state-owned museum.¹⁴¹ The defendants argued that a government’s taking of its own citizens’ property does not violate international law.¹⁴² Evidence showed that a central plaintiff “considered herself to be a Hungarian citizen in 1944.”¹⁴³ But, the court found that under the “extraordinary facts” of this case, “the government of Hungary . . . had *de facto* stripped . . . all Hungarian Jews of their citizenship rights,” and for that reason could not avoid scrutiny under the FSIA.¹⁴⁴

The defendants also argued that the complaint did not allege a sufficient “commercial activity nexus” to the United States.¹⁴⁵ This requirement derives from the text of section 1605(a)(3): the “taken” property must be either: (1) “present in the United States in connection with a commercial activity carried on in the United States by the foreign state,” or (2) “owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activ-

135. *Orkin*, 444 F. App’x at 471; cf. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032 (9th Cir. 2010) (“[W]e conclude that § 1605(a)(3) does not require that the foreign state against whom suit is brought be the foreign state that took the property at issue in violation of international law.”).

136. *Orkin*, 444 F. App’x at 470-71.

137. *Fagan v. Republic of Austria*, No. 08 CIV. 6715, 2011 WL 1197677 (S.D.N.Y. Mar. 25, 2011).

138. *See id.* at *3.

139. *See id.* at *10.

140. *Id.* at *8 (quoting *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 749-50 (S.D.N.Y. 2004)).

141. *See De Csepe v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011).

142. *Id.* at 129.

143. *Id.* at 130.

144. *Id.*

145. *Id.* at 131.

ity in the United States.”¹⁴⁶ Under the second prong of this “nexus” requirement, the plaintiffs alleged that the state-run museum “engaged in a commercial activity in the United States” by exchanging art with American museums, selling reproductions of the taken art to Americans both online and at the museum gift shop, and encouraging American tourists to visit the museum.¹⁴⁷ The court found these allegations “more than sufficient to amount to ‘commercial activity’” for purposes of surviving a motion to dismiss.¹⁴⁸

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

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

[I]n which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment¹⁴⁹

The Act, however, specifically removes two areas of liability from the exception to immunity. First, the exception does not apply where the claim is based on the exercise or performance (or failure to perform) of a “discretionary function.”¹⁵⁰ Second, the exception does not apply to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights.¹⁵¹

In 2011, there were two developments relating to the non-commercial torts exception. First, the Second Circuit addressed the question of whether the terrorism exception contained in 28 U.S.C. section 1605A (discussed more fully *infra*) provides the exclusive basis for jurisdiction over terrorist acts by foreign states, thereby taking such cases out of the realm of the non-commercial tort exception. Second, Congress re-introduced a bill to amend the terrorism exception specifically to encompass terrorist activity on U.S. soil. Aside from these new developments, 2011 saw several cases in which courts dismissed suits under the non-commercial tort exception because the tort did not occur in or entirely in the United States.¹⁵²

Scope of Jurisdiction Over Terrorist Acts Under the Non-Commercial Tort Exception. In *Doe v. Bin Laden*, the Second Circuit held that the terrorism exception is not the exclusive basis for jurisdiction over terrorist acts by foreign states, and that the non-commercial tort exception pro-

146. 28 U.S.C. § 1605(a)(3) (2006).

147. *De Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 131 (D.D.C. 2011).

148. *Id.* at 132.

149. § 1605(a)(5).

150. § 1605(a)(5)(A).

151. § 1605(a)(5)(B).

152. *See, e.g., Jerez v. Republic of Cuba*, 777 F. Supp. 2d 6, 25 (D.D.C. 2011); *Cnty. Fin. Grp., Inc. v. Republic of Kenya*, 663 F.3d 977, 977 (8th Cir. 2011).

vides jurisdiction over injuries that the terrorism exception does not cover, e.g., where the foreign state has not been designated by the United States as a state sponsor of terrorism.¹⁵³ In 2008, in the case *In re Terrorist Attacks on September 11, 2001*, the Second Circuit had dismissed claims by victims of the September 11, 2001, attacks against the Saudi Arabian Government under the FSIA's tort exception on the ground that the terrorism exception provided the exclusive basis for any "claims based on terrorism."¹⁵⁴ The terrorism exception was not applicable because Saudi Arabia had not been designated a state sponsor of terrorism. In *Doe v. Bin Laden*, victims of the September 11 attacks brought claims against the Transitional Islamic State of Afghanistan, alleging a civil conspiracy with the Taliban and the Republic of Iraq to carry out the September 11, 2001 attacks.¹⁵⁵ Afghanistan, like Saudi Arabia, was not designated as a state sponsor of terrorism. The trial court, while not directly addressing whether the terrorism exception is the exclusive basis for terrorism-related claims, held that the suit against Afghanistan was properly cognizable under the non-commercial tort exception. Afghanistan appealed from the decision. The question before the Second Circuit was "whether the noncommercial tort exception [could] be a basis for a suit arising from the terrorist acts of September 11, 2001."¹⁵⁶

Afghanistan argued that the terrorism exception was designed to limit those cases that may be covered by the non-commercial tort exception. The Second Circuit discussed several reasons for rejecting that reading.

First, the court said that such a reading would have to rest on the premise that "there exists no set of cases covered by the terrorism exception that fall outside the noncommercial tort exception."¹⁵⁷ But, such a premise is demonstrably false because the noncommercial tort exception applies to injuries or damages occurring in the United States, and the paradigmatic wrong the terrorism exception was intended to cover are terrorist acts injuring or killing U.S. nationals abroad. Second, the court reasoned that Afghanistan's narrow reading of the non-commercial tort exception would amount to a partial repeal of the non-commercial tort exception. Prior to enactment of the terrorism exception, courts had allowed claims against foreign governments under the non-commercial tort exception for arguably terrorist acts occurring in the United States. Congress is presumed to have been aware of this interpretation of the non-commercial tort exception when it enacted the terrorism exception. Third, under Afghanistan's reading, "the enactment of the terrorism exception would represent a contraction rather than an expansion of jurisdiction over foreign states,"¹⁵⁸ and the legislative history of the terrorism exception suggests a contrary intent. Finally, the court held that the stat-

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

154. *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 90 (2d Cir. 2008).

155. *Bin Laden*, 663 F.3d at 65.

156. *Id.* at 66.

157. *Id.* at 67.

158. *Id.* at 69.

ute alleviates any concern regarding overlapping exceptions by expressly limiting the terrorism exception to cases “not otherwise covered by [the FSIA].”¹⁵⁹ Thus, “the terrorism exception, far from limiting the preexisting noncommercial tort exception, is there to cover some injuries that the noncommercial tort exception does not reach.”¹⁶⁰

Re-introduction of Proposed Amendment Encompassing Terrorism.

In 2011, ten days after the Second Circuit’s decision in *Doe v. Bin Laden*, Senator Schumer re-introduced the Justice Against Sponsors of Terrorism Act,¹⁶¹ legislation which, like its predecessor bill, would allow victims of terrorism to sue foreign states for damages resulting from attacks on U.S. soil. Unlike the terrorism exception, the defendant sovereign need not be on the U.S. Department of State’s state-sponsor-of-terrorism list. Rather, this proposed legislation would provide that any country that provides material support for a terrorist attack on U.S. soil would be stripped of immunity and subject to jurisdiction in U.S. courts.¹⁶² The current bill differs from its predecessor in that it would not apply retroactively to dismissed actions.¹⁶³ But, it would apply to all proceedings pending on the date of enactment or commenced thereafter.¹⁶⁴

Finally, the proposed amendment would remove the requirement from section 1605(a)(5) (the non-commercial tort exception), as currently interpreted by the courts, that the tortious act or omission occur in the United States. While the bill’s stated purpose is to provide the fullest possible basis on which civil litigants can seek relief against foreign organizations that engage in terrorist activities against the United States,¹⁶⁵ this statutory language could sweep in a broad array of activities that would otherwise be excluded from section 1605(a)(5). In 2011 alone, there were five decisions in which courts refused to find against foreign sovereigns for liability under the non-commercial torts exception because the tortious act did not occur in the United States.

E. ARBITRATION – SECTION 1605(A)(6)

Under the FSIA, U.S. courts have subject matter jurisdiction to enforce an agreement to arbitrate or to confirm an arbitration award if (1) the arbitration took place or is intended to take place in the United States, (2) “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,” or (3) but for the agree-

159. *Id.* at 70.

160. *Id.*

161. Justice Against Sponsors of Terrorism Act, S. 1894, 112th Cong. (2011). Little action has been taken on the bill since its introduction and, as of the date of this publication, it is still pending before the Senate Judiciary Committee. Bill Summary & Status: 112th Congress (2011 - 2012) S. 1894, Library of Congress, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.01894>: (last visited Mar. 19, 2013).

162. *Id.* at § 2(b).

163. *Id.* § 7(c).

164. *Id.* §§ 3(b), 4(b), 5(b), 6(b), 7(b).

165. *Id.* at § 2(b).

ment to arbitrate, the underlying claim could have been brought in a U.S. court under the FSIA.¹⁶⁶ Cases are frequently brought under the second option, but plaintiffs' failure to satisfy other jurisdictional requirements (statutory or constitutional) can prove fatal to their claims.

A related question that courts frequently address under the FSIA's arbitration exception is whether the party against whom enforcement of an arbitral award is sought is an agency or instrumentality of the foreign state.¹⁶⁷ In *GSS Group Ltd. v. National Port Authority*, the plaintiff petitioned the district court to confirm a foreign arbitration award against the National Port Authority, a public corporation registered under the laws of the Republic of Liberia.¹⁶⁸ The court found that the defendant, a Liberian government-owned corporation, was not an instrumentality of the Liberian government because it operated independently from the government.¹⁶⁹ Consequently, the court found that the defendant was similar to a private foreign entity that was entitled to due process rights (not afforded to foreign sovereigns) and could not be subject to suit in a U.S. court without sufficient minimum contacts, something the plaintiff had not alleged.¹⁷⁰ So while the court had subject matter jurisdiction over the dispute under the FSIA arbitration exception, it did not have personal jurisdiction over the defendant. The court thus dismissed the plaintiff's petition for confirmation of the arbitration award.

In another arbitration case, *Funnekotter v. Republic of Zimbabwe*, the arbitration judgment holders sought to modify confirmation of an arbitration award.¹⁷¹ The petitioners were Dutch nationals who had investments in commercial farms in Zimbabwe. Because of the Zimbabwe government's actions over a number of years, the petitioners lost their investments. In response, the petitioners commenced an arbitration proceeding against the government of Zimbabwe, and eventually received an award against Zimbabwe based on a bilateral investment treaty between Zimbabwe and the Netherlands. The petitioners sought to add as judgment debtors several entities affiliated with Zimbabwe's government so that they could attempt to collect the arbitration award from these entities.

The district court found that because Zimbabwe, the Netherlands, and the United States were signatories to the Convention on the Settlement of Investment Disputes, and the petitioners' arbitration award was obtained under that treaty, the court had subject matter jurisdiction under the FSIA's arbitration exception.¹⁷² But the court avoided the question

166. 28 U.S.C. § 1605(a)(6) (2006).

167. See *supra* Section II.A (discussing entities that qualify as a foreign state or agency or instrumentality of a foreign state).

168. See *GSS Grp. Ltd. v. Nat'l Port Auth.*, 774 F. Supp. 2d 134 (D.D.C. 2011).

169. *Id.* at 138-39.

170. *Id.* at 139-41.

171. *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168, 2011 WL 666227, at *1 (S.D.N.Y. Feb. 10, 2011).

172. *Id.* at *2.

of whether the defendants were “instrumentalities” under the FSIA because the plaintiffs had failed to identify specific property located in the United States used for a commercial activity and had failed to serve defendants properly under section 1608 of the FSIA, thereby failing to establish personal jurisdiction.¹⁷³ Consequently, the court denied the petitioners’ motion to add defendants to the arbitration award.¹⁷⁴

F. TERRORISM - SECTION 1605A AND SECTION 1605(A)(7)

In 2011, courts continued to address the amendments to the “terrorism exception” to the FSIA, which were enacted in 2008 as part of the National Defense Authorization Act for Fiscal Year 2008 (NDAA).¹⁷⁵ The amendments replaced section 1605(a)(7) of the FSIA with the new “terrorism exception,” codified at section 1605A. Under both section 1605(a)(7) and section 1605A, foreign states designated by the U.S. Department of State as state sponsors of terrorism (and their agencies and instrumentalities) are stripped of sovereign immunity for certain terrorist acts as long as the state is designated as a “state sponsor of terrorism” either at the time of the terrorist act or at some later time as a result of the act that is the subject of the suit.¹⁷⁶ For defendants’ conduct to fall within this exception, they must have participated in an “act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking” or provided “material support or resources for such an act.”¹⁷⁷ Plaintiffs must also prove causation and damages.¹⁷⁸ Among the most significant recent changes to the “terrorism exception,” the statute now expressly (a) provides plaintiffs with a federal statutory cause of action against state sponsors of terrorism,¹⁷⁹ and (b) allows plaintiffs to seek punitive damages.¹⁸⁰

1. Implementation of Section 1605A

Mechanics. Section 1605A does not apply automatically to claims pending before courts under section 1605(a)(7).¹⁸¹ Rather, claims pending under section 1605(a)(7) could be “converted” to section 1605A claims, or “given effect” of such claims, if they were re-filed within sixty

173. *Id.* at *3.

174. *Id.*

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

176. Currently, that list consists of Cuba, Iran, Sudan, and Syria. *State Sponsors of Terrorism*, U.S. DEP’T OF STATE, <http://www.state.gov/j/ct/list/c14151.htm> (last visited Mar. 19, 2013). Countries that were once on the list but have since been removed include Iraq, Afghanistan, North Korea, South Yemen, and Libya.

177. 28 U.S.C. § 1605(A(a)(1)) (2006).

178. § 1605A(c).

179. *Id.*

180. *Id.*

181. *Simon v. Republic of Iraq*, 529 F.3d 1187, 1192 (D.C. Cir. 2008) *rev’d sub nom. Republic of Iraq v. Beatty*, 556 U.S. 848 (2009) *vacated*, 330 F. App’x 3 (D.C. Cir. 2009); *Gates v. Syrian Arab Republic*, 646 F. Supp. 2d 79, 89-90 (D.D.C. 2009).

days of the enactment of section 1605A.¹⁸² Plaintiffs also could have filed “new” claims that were “related” to a prior action—i.e., arose from the same act or incident—that was timely brought under section 1605(a)(7), so long as the related action was filed within sixty days of the enactment of section 1605A or of the judgment in the prior action.¹⁸³

Evidentiary Burden. In properly filed related actions, courts in 2011 continued to rely upon evidence presented in earlier cases—without requiring the parties to reproduce such evidence—to reach their own, independent findings of fact.¹⁸⁴ In *Taylor v. Islamic Republic of Iran*, the district court found Iran responsible for the 1983 attacks on the Marine barracks in Lebanon, but relied on evidence presented in prior actions involving the same incident without requiring plaintiffs to re-establish Iran’s liability.¹⁸⁵

2. *Claims by Foreign Nationals*

One of the most significant aspects of section 1605A was its expansion of the “terrorism exception” to provide a cause of action to certain victims and family members who are foreign nationals. This new federal cause of action is available to: (1) U.S. nationals, (2) members of the armed forces, (3) U.S. government employees, and (4) legal representatives of the individuals in the first three categories.¹⁸⁶ In addressing claims of foreign national victims for the first time, courts also permitted the claims of those victims’ foreign national family members to proceed, finding that although section 1605A’s plain language limits the federal cause of action to its four stated categories, it operates as a pass-through for foreign national family members to claims under applicable state or foreign law.¹⁸⁷

3. *Choice of Law Issues*

One of Congress’s motivations in creating a federal cause of action was to eliminate the disparate outcomes that had resulted from the application of different state and foreign laws to plaintiffs in the same case based on their domiciles at the time of the incident.¹⁸⁸ Nonetheless, in certain

182. National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 1083(c)(2), 122 Stat 3 (2008).

183. *See id.*; *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1, 12 (D.D.C. 2011) (citing § 1083(c)(2)(C)(ii)).

184. *See Taylor*, 811 F. Supp. 2d at 7.

185. *See id.* at 14-16 (citing *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52 (D.D.C. 2010); *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46 (D.D.C. 2003)).

186. 28 U.S.C. § 1605A(c) (2006).

187. *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 152-53 (D.D.C. 2011); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 18-19 (D.D.C. 2011).

188. *Baker v. Socialist People’s Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48, 72 (D.D.C. 2011); *Certain Underwriters at Lloyd’s London v. Great Socialist People’s Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 69 (D.D.C. 2011).

circumstances, courts still must navigate through difficult choice of law principles in applying the terrorism exception.

Claims of Foreign National Family Members Under Section 1605A.

Because a federal cause of action pursuant to section 1605A is available only to the categories of individuals explicitly identified therein, courts must determine which state or foreign law applies to the claims of foreign national family members of victims of terrorism.¹⁸⁹ In light of the NDAA's purpose of promoting uniformity, the courts conducting this analysis typically have applied D.C. law, the law of the forum, to all such claims where the attacks were targeted at U.S. interests.¹⁹⁰

1605(a)(7) Claims. In 2011, despite the passage of section 1605A, courts still had to address choice of law issues in section 1605(a)(7) cases. In *Estate of Botvin v. Islamic Republic of Iran*, the district court reaffirmed its previous finding that Israeli law applied to the claims of a U.S. national who was murdered in 1997 by a suicide bomber at a pedestrian mall in Jerusalem.¹⁹¹ The court reasoned that the victim was domiciled in Israel and that there was no evidence the attack, which was intended to disrupt Israeli-Palestinian peace negotiations, was targeted at U.S. citizens or interests.¹⁹² The court then found that Israeli law did not permit the plaintiff to proceed with claims for assault, wrongful death, or mental injury.¹⁹³

Other Choice of Law Issues Under Section 1605A. Even section 1605A's federal cause of action may still involve choice of law analyses in addressing certain issues, such as whether estates can recover for emotional and mental anguish suffered while the decedent was still alive.¹⁹⁴ The court in *Taylor* applied the laws of four different states to find that four plaintiff-estates had standing to bring such claims.¹⁹⁵

3. *Rulings by Appellate Courts on the Bounds of Section 1605A*

Noncommercial Tort Exception. As discussed above, the Second Circuit in *Doe v. Bin Laden* held that Afghanistan, which is not a designated state sponsor of terrorism, could be sued under the noncommercial tort exception for its role in the September 11, 2001 attacks.¹⁹⁶ The court held section 1605A does not provide the exclusive basis for terrorism-related suits, but rather was intended to fill a gap where other exceptions do not.¹⁹⁷

189. See *Owens*, 826 F. Supp. 2d at 153-57; *Doe*, 808 F. Supp. 2d at 20-23.

190. *Owens*, 826 F. Supp. 2d at 153-56 (Sudanese and Iranian-sponsored attacks on U.S. embassies in Kenya and Tanzania in 1998); *Doe*, 808 F. Supp. 2d at 20-23 (Iranian-sponsored attacks on U.S. embassy in Lebanon in 1983 and 1984).

191. See *Estate of Botvin v. Islamic Republic of Iran*, 772 F. Supp. 2d 218 (D.D.C. 2011).

192. *Id.* at 225-26.

193. *Id.* at 229-32.

194. *Taylor v. Islamic Republic of Iran*, 911 F. Supp. 2d 1, 12.

195. *Id.* at 12-13.

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

197. *Id.* at 70.

Algiers Accords. The D.C. Circuit held that the NDAA does not go so far as to allow claims against Iran for its taking of hostages in 1979.¹⁹⁸ The court held that the NDAA did not abrogate the Algiers Accords—the 1981 agreement between the U.S. and Iran that secured the hostages' release and contained express prohibitions barring lawsuits arising out of the hostage taking.¹⁹⁹ The court reasoned that to abrogate an international agreement, the legislation must have been unambiguous, and the NDAA was not on this point, and that a fair reading of the provision was that it only allowed cases that were still pending at the time of the 2008 amendments, and the plaintiff's case had been dismissed.²⁰⁰

G. DAMAGES

2011 witnessed several significant damage awards levied against state sponsors of terrorism—in particular, against Iran, which “continues to be the world’s most active state sponsor of terrorism.”²⁰¹ Damage awards in FSIA cases continue generally to apply benchmark awards developed under section 1605(a)(7) for certain types of injuries and circumstances. A more recent challenge for courts has been the measure of punitive damages, which are explicitly allowed under section 1605A.

Economic Damages. Reasonably foreseeable economic damages have been awarded under the terrorism exception for, among other things, loss of earning capacity and property. In *Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya*, the district court awarded property damages to underwriters of the insurance policy on an EgyptAir aircraft destroyed in a 1985 attack sponsored by Syria.²⁰² In a companion case, the court relied on expert testimony to award economic damages based on the victims' loss of earning capacity.²⁰³ Similarly, in *Bland v. Islamic Republic of Iran*, the same court awarded economic damages for lost wages resulting from injuries suffered in the 1983 bombing of the U.S. Marine Barracks in Lebanon and for loss of accretions to the estate resulting from wrongful death of decedents in the attack.²⁰⁴ However, in *Oveissi v. Islamic Republic of Iran*, the court refused to award damages for loss of inheritance to the grandson of an assassinated former Iranian general, because the proximate cause of the loss of assets was the 1979 revolution and his grandfather's flight from Iran, not his murder in Paris in 1984.²⁰⁵

198. *See* *Roeder v. Islamic Republic of Iran*, 646 F.3d 56 (D.C. Cir. 2011).

199. *Id.*

200. *Id.* at 61-62.

201. *Leibovitch v. Syrian Arab Republic*, 08 C 1939, 2011 WL 444762, at *6 (N.D. Ill. Feb. 1, 2011) *rev'd sub nom.* *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561 (7th Cir. 2012).

202. *Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 74-75 (D.C.C. 2011).

203. *Baker v. Socialist People's Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48, 72 (D.D.C. 2011).

204. *Bland v. Islamic Republic of Iran*, 831 F. Supp. 2d 150, 156 (D.D.C. 2011).

205. *Oveissi v. Islamic Republic of Iran*, 768 F. Supp. 2d 16, 30-33 (D.D.C. 2011).

Victims' Pain and Suffering. Survivors of terrorist attacks have been deemed entitled to baseline awards of \$5 million in compensatory damages for substantial injuries.²⁰⁶ Courts have departed upward to award damages as high as \$15 million in cases of more severe, permanent injuries,²⁰⁷ and downward to as low as \$1.5 million where the injuries are minor or purely emotional.²⁰⁸ Courts have "rather uniformly" awarded \$1 million to estates of victims who endured extreme pain and suffering for a period of hours prior to their deaths.²⁰⁹

Solatium. In assessing loss of solatium awards for victims' family members, courts have analyzed the following factors: (1) whether the victim died in the attack, (2) the nature of the relationship between the claimant and the victim, and (3) the severity and duration of the pain suffered by the family member.²¹⁰ Courts have generally awarded baseline awards of \$8 million, \$5 million, and \$2.5 million for spouses, parents, and siblings of deceased servicemen respectively; and have cut these amounts in half for family members of surviving victims who were injured.²¹¹ Plaintiffs must have been immediate family members of the victims at the time of the attack to receive awards for loss of solatium.²¹² But, courts have applied the \$5 million baseline for *de facto* parent-child relationships.²¹³

Decisions to depart upward from these baselines "are largely derived from common sense, and generally fall into one of three categories: evidence establishing an especially close relationship between the plaintiff and decedent . . . medical proof of severe pain, grief or suffering on behalf of the claimant; and circumstances surrounding the terrorist attack which made the suffering particularly more acute or agonizing."²¹⁴ The *Oveissi* court departed upward to an award of \$7.5 million because of a particularly close parent-child relationship, the sudden and unexpected nature of the murder, the plaintiff's inability to grieve because he lived under the threat of a further attack, and the plaintiff's life-altering feeling of permanent loss.²¹⁵ Other upward departures included when a plaintiff endured the deaths of multiple family members and suffered other

206. See *Bland*, 831 F. Supp. 2d at 155; *Baker*, 775 F. Supp. 2d at 82; *Leibovitch v. Syrian Arab Republic*, 08 C 1939, 2011 WL 444762, at *9 (N.D. Ill. Feb. 1, 2011) *rev'd sub nom.* *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561 (7th Cir. 2012).

207. See *Leibovitch*, 2011 WL 444762, at *9; *Baker*, 775 F. Supp. 2d at 82; *Bland*, 831 F. Supp. 2d at 154-55.

208. See *Bland*, 831 F. Supp. 2d at 155-56.

209. *Baker*, 775 F. Supp. 2d at 81-82.

210. *Oveissi*, 768 F. Supp. 2d at 25-26.

211. *Baker v. Socialist People's Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48, (D.D.C. 2011); *Oveissi*, 768 F. Supp. 2d at 26, n.10; *Bland*, 831 F. Supp. 2d at 156; see also *Leibovitch*, 2011 WL 444762, at *10.

212. See *Baker*, 775 F. Supp. 2d at 75-76 (dismissing solatium claims of husband married to victim 11 years after attack and son born 12 years after attack); *Bland*, 831 F. Supp. 2d at 157.

213. See *Oveissi*, 768 F. Supp. 2d at 27 (finding child-parent relationship between plaintiff and victim-grandfather).

214. *Oveissi*, 768 F. Supp. 2d at 26-27; *Bland*, 831 F. Supp. 2d at 157 (quoting *Oveissi*, 768 F. Supp. 2d at 26-27).

215. *Oveissi*, 768 F. Supp. 2d at 27-30.

strained relationships,²¹⁶ and for claimants who were “hit particularly hard” by the murder of their sibling.²¹⁷ Downward departures included circumstances involving a former spouse,²¹⁸ and for family members of victims who did not suffer physical injuries.²¹⁹

Punitive Damages. Unlike section 1605(a)(7), section 1605A explicitly allows for punitive damages.²²⁰ To avail themselves of this provision some plaintiffs have brought related actions for punitive damages under section 1083(c)(3) after they already obtained judgments for compensatory damages under section 1605(a)(7).²²¹ Other plaintiffs in related actions have requested punitive damages as a separate count. Courts have dismissed these counts for failure to state a cause of action, but have read the requests for punitive damages into the proper counts.²²²

In determining the amount of punitive damage awards, courts evaluate: (1) the character of the defendants’ acts, (2) the nature and extent of the harm to the plaintiffs that the defendants caused or intended to cause, (3) the need for deterrence, and (4) the wealth of defendants.²²³ Applying these factors, some courts have applied a three-to-five time multiple of the state’s estimated annual funds used to support terrorism.²²⁴

In *Beer v. Islamic Republic of Iran*, the district court rejected the argument that this method did not comport with due process concerns regarding punitive damages, as expressed most recently by the Supreme Court in *Exxon Shipping Co. v. Baker*.²²⁵ The court reasoned that: (1) federal due process protections do not apply to foreign states,²²⁶ (2) *Exxon* was limited to the context of maritime law,²²⁷ (3) Congress was aware of the Supreme Court’s concerns when it chose language specifically indicating its intention to allow this method,²²⁸ and (4) FSIA cases involve unique policy considerations because “[t]errorism, along with atrocities such as genocide, occupies a unique place in the pantheon of human conduct as an activity devoid of value that observes no respect for life and no hint of compassion.”²²⁹

But in *Leibovitch v. Syrian Republic*,²³⁰ the district court deviated from

216. *Leibovitch*, 2011 WL 444762, at *10.

217. *Baker*, 775 F. Supp. 2d at 83-84.

218. *Id.* at 84.

219. *Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23, 49 (D.D.C. 2012).

220. See 28 U.S.C. § 1605A(e)(1) (2006).

221. See *Beer v. Islamic Republic of Iran*, 789 F. Supp. 2d 14, 15-16 (D.D.C. 2011); *Haim v. Islamic Republic of Iran*, 784 F. Supp. 2d 1, 4-5, 9-10 (D.D.C. 2011).

222. See *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1, 17 (D.D.C. 2011).

223. *Haim*, 784 F. Supp. 2d at 13; *Baker*, 775 F. Supp. 2d at 84-85.

224. See *Beer*, 789 F. Supp. 2d at 26; *Haim*, 784 F. Supp. 2d at 13-14.

225. *Beer*, 789 F. Supp. 2d at 14 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)).

226. *Id.* at 20-22.

227. *Id.* at 22-23.

228. *Id.* at 23-25.

229. *Id.* at 25.

230. *Leibovitch v. Syrian Arab Republic*, No. 08 C 1939, 2011 WL 444762 (N.D. Ill. Feb. 1, 2011), *rev’d sub nom.* *Leibovitch v. Islamic Republic of Iran*, 697 F.3d 561 (7th Cir. 2012).

the three-to-five times multiplier in part because of *Exxon*.²³¹ The court noted that a high punitive damage award in that case would not significantly add to the deterrent effect of the numerous other such awards already assessed against Iran.²³² The court thus doubled compensatory damages to arrive at its punitive damage award.²³³ Other courts similarly have balanced the Supreme Court's concerns against the need to deter state sponsors of terrorism by applying a ratio of 3.44 to compensatory damages.²³⁴

Still other courts have applied a "per-victim" standard based on awards in similar terrorism cases. The court in *Baker* limited punitive damages awards against Syria to \$450 million in light of other awards based on the same incident, where multiplying the annual terrorism expenditures by three would have resulted in an award of \$1.8 billion.²³⁵

IV. ENFORCEMENT OF AWARDS AGAINST FOREIGN SOVEREIGNS

Even if a plaintiff overcomes a foreign state's immunity and obtains a judgment, it may find it difficult to enforce the judgment. The FSIA protects a foreign state's property in the United States by granting broad immunity from attachment and judgment execution.²³⁶ For example, a foreign state's military property is always immune from attachment.²³⁷

But there are exceptions to the FSIA's protection of a foreign state's property.²³⁸ For example, the FSIA authorizes a judgment creditor to execute on the judgment, or attach in aid of such execution, property of a foreign sovereign if the following conditions are met: (1) the property is used for a commercial activity in the United States, (2) a reasonable amount of time has passed since a court entered the judgment against the foreign state, and (3) the property otherwise satisfies the requirements of one of the exceptions to immunity in section 1610.²³⁹ Moreover, *pre-judgment* attachments are permitted in certain limited circumstances, where the foreign state has expressly waived its attachment immunity prior to judgment, and the purpose of the attachment is *solely* to secure satisfaction of a judgment that may be entered later against the foreign state (and *not* to obtain jurisdiction over the sovereign).²⁴⁰ Additionally, the filing of a complaint pursuant to 28 U.S.C. section 1605A against a state sponsor of terrorism may operate to establish a lien of *lis pendens*

231. *Id.* at *10.

232. *Id.*

233. *Id.*

234. *See* Estate of Bland v. Islamic Republic of Iran, 831 F. Supp. 2d 150, 158 (D.D.C. 2011) (resulting in punitive damages award of \$955,652,324).

235. Baker v. Socialist People's Libyan Arab Jamahirya, 775 F. Supp. 2d 48, 85-86 (D.D.C. 2011).

236. 28 U.S.C. § 1609 (2006).

237. *Id.* § 1611(b)(2).

238. *See id.* § 1610.

239. *Id.* § 1610(a)-(c).

240. *Id.* § 1610(d).

upon certain real or tangible property subject to attachment.²⁴¹

A. THE COMMERCIAL ACTIVITY EXCEPTION TO IMMUNITY FROM ATTACHMENT

Section 1610 of the FSIA creates an exception to immunity from attachment and execution for a foreign state's property when that property is used for commercial activity in the United States and it "was used for the commercial activity upon which the claim is based."²⁴² At first glance, this commercial activity exception for attachment and execution appears similar to the FSIA's general "commercial activity" exception to immunity from suit.²⁴³ In practice, however, the exception for attachment and execution is narrower than the exception for jurisdiction.²⁴⁴ As a result, plaintiffs may find it difficult to establish that a foreign state's commercial activity in the United States makes its property exempt from immunity, even if that same commercial activity subjected the foreign state to jurisdiction in a U.S. court.²⁴⁵

According to the Ninth Circuit, for property to be "used for commercial activity" under FSIA section 1610, the foreign state's property must be "put into action . . . or employed for a commercial activity."²⁴⁶ Merely employing the property "*in connection* with a commercial activity or *in relation* to a commercial activity" is not enough.²⁴⁷ This subtle distinction was recently the subject of a case involving the property of a foreign state's space agency. In *NML Capital, Ltd. v. Spaceport Systems International*, the plaintiff hoped to enforce a judgment against Argentina by attaching a satellite developed by Argentina's national space agency, CONAE, in cooperation with NASA.²⁴⁸ The district court held that the plaintiff failed to show that the satellite fell within the commercial activity exception to immunity from attachment because the satellite was not being "used for a commercial activity" as required by section 1610(a) of the FSIA.²⁴⁹ The plaintiff had argued that conducting research in space qualified as a commercial activity, but since the satellite had not been launched yet, the court found that it was not actively employed for that commercial activity.²⁵⁰ The satellite's pre-launch tests and procedures also did not constitute commercial activity under the FSIA because they

241. *Id.* § 1605A(g).

242. *Id.* § 1610(a)(2); *Licea v. Curacao Drydock Co., Inc.*, 794 F. Supp. 2d 1299, 1304 (S.D. Fla. 2011).

243. Compare § 1610(a)(2) with 28 U.S.C. § 1605(a)(2) (2006).

244. See *Licea*, 794 F. Supp. 2d at 1303 (noting that Congress deliberately chose to make immunity from attachment and execution narrower than immunity from jurisdiction).

245. See *id.*

246. *NML Capital, Ltd. v. Spaceport Sys. Int'l, L.P.*, 788 F. Supp. 2d 1111, 1120 (C.D. Cal. 2011) (emphasis in original).

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

248. *Id.* at 1115.

249. *Id.* at 1120.

250. *Id.* at 1121.

had only “a passing connection to commerce.”²⁵¹ Finally, the court observed that even if the satellite were to be launched, it would not be subject to attachment because Argentina’s relationships with NASA and other space agencies were in no way commercial.²⁵² Argentina planned to use the satellite for “a mission of ‘international cooperation’ exclusively amongst governmental bodies,” and therefore the satellite did not fall under the exception to attachment immunity under the FSIA.²⁵³

B. ENFORCING AWARDS AGAINST A FOREIGN CENTRAL BANK

The FSIA expressly preserves the immunity accorded certain sovereign assets from attachment. In addition to, *e.g.*, military property, the FSIA, 28 U.S.C. 1611, makes clear that a foreign central bank’s property is generally immune from attachment and execution if it is held for the bank’s own account. This immunity applies even if the property otherwise would fall into an exception to immunity under section 1610.²⁵⁴ Pursuant to section 1611, only an explicit waiver by the central bank or its parent foreign government can subject the central bank’s property to attachment and execution.²⁵⁵

In *NML Capital, Ltd. v. Banco Central de la Republica Argentina*,²⁵⁶ the subject of the dispute was a bank account held by the Central Bank of Argentina at the Federal Reserve Bank of New York. The Central Bank used the account in New York to manage its “dollar-denominated reserve holdings.”²⁵⁷ In 2005, beneficial owners of debt instruments on which Argentina had defaulted in 2001 moved to attach the funds in the Central Bank’s Federal Reserve Bank account in New York to satisfy their judgments against Argentina.²⁵⁸ Under section 1611 of the FSIA, these funds would be immune from attachment if they were held for the Central Bank’s own account. The district court concluded that Argentina completely controlled the Central Bank and disregarded the formal separation between the Republic of Argentina and the Central Bank.²⁵⁹ Accordingly, the court held that the funds in the Central Bank’s New York account at the time the action was brought in 2005 were effectively the Republic of Argentina’s funds and no longer held for the Central Bank’s “own account,” and therefore section 1611’s general immunity from attachment of central bank property did not apply.²⁶⁰ The district court then looked at section 1610 and held that the Argentina had used the Central Bank’s account in New York for typical private banking activ-

251. *Id.* at 1122.

252. *Id.* at 1124.

253. *Id.*

254. 28 U.S.C. § 1611(b)(1) (2006).

255. *Id.*

256. *NML Capital, Ltd. v. Banco Cent. de la Republica Arg.*, 652 F.3d 172, 175 (2d Cir. 2011).

257. *Id.* at 177.

258. *Id.* at 178.

259. *Id.* at 182-83.

260. *Id.*

ity.²⁶¹ In other words, Argentina had engaged in commercial activity in the United States, and the district court allowed the plaintiffs to attach the Central Bank's funds in the New York account.²⁶² Argentina and the Central Bank appealed.²⁶³

On appeal, the Second Circuit rejected the district court's conclusion that Argentina's total control over the Central Bank exempted the bank's funds from immunity.²⁶⁴ The court emphasized that foreign central banks are not "generic agencies and instrumentalities of a foreign state" because they receive special protections under the FSIA.²⁶⁵ Section 1611 "immunizes foreign central bank property 'held for its own account' without regard to the central bank's independence from its parent state."²⁶⁶ The level of control Argentina exerted over the Central Bank therefore was irrelevant to the question of whether the Central Bank's property was immune from attachment under the FSIA.

The Second Circuit then adopted "a modified central bank functions test" to determine when central bank property is held for the bank's own account.²⁶⁷ Under this test, funds are presumed immune from attachment under section 1611 if they are held in an account with the central bank's name.²⁶⁸ A plaintiff seeking attachment "can rebut that presumption by demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood."²⁶⁹ By managing its reserves and transferring funds to conform with regulatory requirements, the Central Bank had engaged in central banking functions, and so the funds in the New York account were deemed held for the bank's own account.²⁷⁰ Finally, because there had been no "clear and unambiguous" waiver of immunity, the court held that the Central Bank's funds in the account were immune from attachment.²⁷¹

C. ENFORCEMENT IN TERRORISM CASES

A special exception to immunity from attachment applies when a judgment holder seeks to attach property "as compensation for personal injury or death resulting from an act of terrorism or the provision of material support or resources for an act of terrorism."²⁷² But the FSIA still respects "the independence and dignity of every foreign state"—even

261. *Id.*

262. *Id.*

263. *Id.* at 186.

264. *Id.* at 190.

265. *Id.* at 188 (internal quotations omitted).

266. *Id.* at 190.

267. *Id.* at 194.

268. *Id.*

269. *Id.*

270. *Id.* at 195.

271. *Id.* at 195-96.

272. *See Levin v. Bank of New York*, No. 09-CV-5900, 2011 WL 812032, at *6 (S.D.N.Y. Mar. 4, 2011) (citing 28 U.S.C. §§ 1605A(a)(1), 1610(a)-(b) (2006)).

states found to be sponsors of terrorism.²⁷³ As a result, even victims of terrorism must follow the proper procedures for enforcing a judgment against a foreign sovereign to ensure that the foreign state's rights are respected under the FSIA.

Murphy v. Islamic Republic of Iran illustrates the point. There, the plaintiffs held a default judgment against the Islamic Republic of Iran and the Iranian Ministry of Information and Security (MOIS) under the state-sponsored terrorism exception to the FSIA.²⁷⁴ The plaintiffs asked the court's permission to serve a copy of the judgment on Iran *only* and not on MOIS, since they planned to execute the judgment only against Iran.²⁷⁵ The court denied plaintiffs' request, noting that "entry of default judgment against a foreign state or its instrumentalities must be accompanied by service of that judgment" so that proper notice is provided to the defaulting entities.²⁷⁶ The court went on to say that the FSIA does not allow plaintiffs "to selectively choose those defendants upon which they would serve and then seek enforcement."²⁷⁷ The court noted that section 1610(c) of the FSIA does *not* state that a defendant's property is immune from execution and attachment until that particular defendant is served with the judgment against it; rather, the FSIA indicates that courts will not permit any attachment or execution against *any* defendant's property until *all* defendants are properly notified of the judgment against them.²⁷⁸ As a result, the court found that the plaintiffs' intent to serve Iran only (because they planned to seek enforcement against only Iranian property) would circumvent the purpose of the FSIA,²⁷⁹ and refused to authorize execution until all defendants had been "served with the final judgment and given an opportunity to respond."²⁸⁰

V. PRACTICAL ISSUES IN FSIA LITIGATION

In 2011, judicial decisions regarding the FSIA illustrated various procedural issues that arise in cases brought against foreign sovereigns in such areas as the Act of State doctrine, due process, service of process, jurisdictional issues, venue, forum non conveniens, default judgments and interlocutory appeals. A brief review of certain notable decisions follows.

A. ACT OF STATE DOCTRINE

"The act of state doctrine prevents U.S. courts from inquiring into the validity of the public acts of a recognized sovereign power committed

273. *Murphy v. Islamic Republic of Iran*, 778 F. Supp. 2d 70, 71 (D.D.C. 2011).

274. *Id.*; 28 U.S.C. § 1605A (2006).

275. *Murphy*, 778 F. Supp. 2d at 71.

276. *Id.*

277. *Id.* at 72.

278. *Id.*

279. *Id.*

280. *Id.*

within its own territory.”²⁸¹ Pursuant to the act of state doctrine, “an action may be barred if (1) there is an ‘official act of a foreign sovereign performed within its own territory,’ and (2) ‘the relief sought or the defense interposed [in the action would require] a court in the United States to declare invalid the [foreign sovereign’s] official act.’”²⁸² But courts are not required to give deference to “purely commercial” acts.²⁸³ The foreign entity seeking to invoke the act of state “defense” has the burden to establish its applicability.²⁸⁴ Foreign sovereigns must also consider the procedural posture of the action before attempting to invoke the act of state doctrine, as courts may decline to address the issue at the pleadings stage and wait until summary judgment.²⁸⁵

In *de Csepel v. Republic of Hungary*, the district court considered whether the taking of Jewish artifacts by Hungary implicated the act of state doctrine.²⁸⁶ The district court determined that the alleged theft was commercial in nature, and that the appropriate foreign entity was not the current sovereign nation of Hungary; rather, it was “Nazi Germany and their allies in the World War II-era Hungarian government.”²⁸⁷ In this situation, “courts have consistently held that the act of state doctrine does not apply to the Nazi taking of Jewish property during the Holocaust,” which is considered “manifestly illegal” and was supported by a government that is no longer in existence.²⁸⁸

B. SERVICE OF PROCESS

Service of process pursuant to the FSIA must comport with 28 U.S.C. sections 1608(a) and (b), which detail the acceptable methods of service on foreign states, political subdivisions, agencies, or instrumentalities. In order to affect proper service on foreign states (or political subdivisions), the summons and complaint must be transmitted pursuant to the following methods enumerated in section 1608(a), in the following preferential order:

- (1) “in accordance with any special arrangement for service between the plaintiff and the foreign state,” (2) “in accordance with an applicable international convention on service of judicial documents,” (3)

281. *Fir Tree Capital Opportunity Master Fund, LP*, 2011 WL 6187077, at *14 n.10 (S.D.N.Y. Nov. 28, 2011) (quoting *Sarei v. Rio Tinto*, 487 F.3d 1193, 1208 (9th Cir. 2007)).

282. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 405 (1964)).

283. *Id.* at *14 (holding the act of state doctrine inapplicable where foreign banks acts were “commercial rather than sovereign in nature”).

284. *Victims of Hungarian Holocaust v. Hungarian State Rys.*, 798 F. Supp. 2d 934, 939 (N.D. Ill. 2011).

285. *Id.* (“[T]he act of state doctrine is properly characterized as a defense and thus is not properly addressed at the pleadings stage since a plaintiff need not plead allegations in anticipation of avoiding defenses.”); *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689, 697-98 (N.D. Ill. 2011) (supporting the same premise).

286. *See de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113 (D.D.C. 2011).

287. *Id.* at 143.

288. *Id.* (citing *Chabad v. Russ. Fed’n*, 466 F.Supp.2d 6, 14 (D.D.C. 2006)).

“by any form of mail, requiring a signed receipt . . . [from] the clerk of the court to the head of the ministry of foreign affairs,” or (4) by diplomatic channels through the State Department in Washington, D.C.²⁸⁹

If a plaintiff is using the third or fourth forms of service, the statute requires that the documents be sent along with translations into the official language of the foreign state.²⁹⁰

Strict compliance with this rule is essential to succeed in an action under the FSIA. A cautionary tale is found in *Bleier v. Bundesrepublik Deutschland*, where plaintiffs were “granted leave” by a previously assigned judge to serve the summons and complaint on Germany and the Ministry of Finance by e-mailing the documents to the foreign entities’ counsel.²⁹¹ But in a motion to dismiss, Germany and the Ministry of Finance argued that the previous judge’s decision on service should be reconsidered. The district court made clear that plaintiffs *must* follow the service requirements under section 1608(a), and granted the defendants’ motion to dismiss for insufficient service of process, noting that service by email is not provided for under section 1608(a).²⁹²

In another case, the D.C. Circuit found service effective despite a factual dispute. In *Gates v. Syrian Arab Republic*, family members of victims of a terrorist attack attempted to serve the initial pleadings on Syria, but Syria claimed that the pleadings were never delivered by the mail carrier, DHL.²⁹³ Counsel for the plaintiffs produced a letter from DHL together with a copy of a delivery log reflecting that the package was tracked to the right address and signed for upon receipt.²⁹⁴ Syria claimed the tracking documentation was fraudulent, but the district court determined that Syria had been properly served. The appellate court found no clear error in the district court’s reliance upon the DHL letter, and service was deemed effective.²⁹⁵

With respect to service on agencies or instrumentalities, one need not follow the requirements of section 1608(b) as closely as with a foreign state or political subdivision;²⁹⁶ only “substantial compliance” with the service rules is required.²⁹⁷ Thus, some courts have allowed the case to proceed based on “‘technically faulty service’ [under section 1608(b)], as long as the defendants receive adequate notice of the suit and are not

289. See 28 U.S.C. § 1608(a)(1-4); see also 28 U.S.C. § 1608(b) (sequential service of process requirements also exist for service on agencies and instrumentalities of a foreign state).

290. *Id.* § 1608(a)(3-4).

291. *Bleier v. Bundesrepublik Deutschland*, No. 08-C-06254, 2011 WL 4626164, at *6 (N.D. Ill. Sept. 30, 2011).

292. *Id.*

293. *Gates v. Syrian Arab Republic*, 646 F.3d 1, 4 (D.C. Cir. 2011).

294. *Id.*

295. *Id.* at *4-5.

296. See *Chabad v. Russ. Fed’n*, 798 F. Supp. 2d 260, 269 (D.D.C. 2011) (citing *Doe I v. State of Israel* 400 F. Supp. 2d 86, 102 (D.D.C. 2005)).

297. *Id.* at 268.

prejudiced.”²⁹⁸

C. DUE PROCESS AND PERSONAL JURISDICTION

The majority of courts that have addressed the issue have held that, for purposes of the FSIA, “there is no issue of due process under the Fifth Amendment, as ‘foreign states are not “persons” protected by the Fifth Amendment.’”²⁹⁹ Accordingly, foreign states typically may not invoke lack of due process as a defense in FSIA litigation. The consequence for a foreign state is that “‘customary international law,’ which may call for a ‘minimum-contacts-like test’ is inapplicable in these circumstances.”³⁰⁰ Thus, after subject matter jurisdiction under the FSIA has been established and defendants are properly served pursuant to the requirements of 28 U.S.C. section 1608, the court will retain personal jurisdiction over the defendants.³⁰¹

But the inapplicability of due process protection to foreign states in FSIA actions does not necessarily extend to foreign agencies or instrumentalities. In 2011, at least one court considered whether a public foreign entity—e.g., a corporation owned and operated by a foreign government—could rely upon a due process argument to avoid personal jurisdiction. In *GSS Group Ltd. v. National Port Authority (NPA)*, the district court determined that a Liberian public corporation, which specifically held itself out as “independent from its sovereign,” was entitled to due process protections while the Liberian government was not.³⁰² In

298. *Id.* at 269.

299. *Certain Underwriters at Lloyd’s London v. Great Socialist People’s Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 71-72 (D.C.C. 2011); *see also* *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002); *see e.g.*, *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 399 (2d Cir. 2009); *Baker v. Socialist People’s Libyan Arab Jamahiriya*, 775 F. Supp. 2d 48, 77 (D.D.C. 2011); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007); *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1168 (C.D. Cal. 2006); *Rux v. Republic of Sudan*, No. Civ. A. 2:04CV428, 2005 WL 2086202, at *18 (E.D. Va. Aug. 26, 2005); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005); *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1207 (C.D. Cal. 2001).

300. *Lloyd’s London*, 811 F. Supp. 2d at 71-72; *see also* *Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov’t of the Lao People’s Democratic Republic*, 2011 WL 3516154, at *8 (S.D.N.Y. Aug. 3, 2011).

301. *See* 28 U.S.C. § 1330(b); *See, e.g.*, *Servaas Inc. v. Republic of Iraq*, No. 10-828-CV, 2011 WL 665334, at *1 (2d Cir. Feb. 16, 2011); *Owens v. Republic of Sudan*, 826 F. Supp. 2d 128, 148 (D.D.C. 2011); *Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1, 11 n. 4 (D.D.C. 2011); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 12 (D.D.C. 2011); *but cf.* *Bleier v. Bundesrepublik Deutschland*, No. 08 C 06254, 2011 WL 4626164, at *6 (N.D. Ill. Sept. 30, 2011) (finding no personal jurisdiction over Germany or the Ministry of Finance where they were not properly served under section 1608(a)); *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168, 2011 WL 666227, at *3 (S.D.N.Y. Feb. 10, 2011) (same holding applied to the Reserve Bank of Zimbabwe); *Seijas v. The Republic of Argentina*, No. 10 Civ. 4300, 2011 WL 1137942, at *10 (S.D.N.Y. Mar. 28, 2011) (holding that plaintiffs’ failure to establish foreign corporation as an alter ego of Argentina precluded the finding of subject matter, and thus, personal jurisdiction); *NML Capital, Ltd. v. The Republic of Argentina*, No. 09 Civ., 2011 WL 524433 (S.D.N.Y. Feb. 15, 2011).

302. *GSS Grp. Ltd. v. Nat’l Port Auth.*, 774 F. Supp. 2d 134, 139 (D.D.C. 2011).

other words, a public foreign entity run separate and independently from its sovereign is entitled to the same due process protections as a *private* foreign entity that is subject to personal jurisdiction in United States courts.³⁰³ Finding that it lacked personal jurisdiction over the foreign entity, the court observed:

Such a corporation, unlike a foreign sovereign, is not the “juridical equal[]” of the United States. It presumably has no diplomatic presence or political authority with which to engage the United States and defend its rights and interests when they may be affected by a judicial proceeding in a United States court.”³⁰⁴

The court further noted the lack of evidence that the Liberian corporation was “not so independent from the Liberian government as it claims to be,” in which case the decision may have been different.³⁰⁵

D. JURISDICTIONAL DISCOVERY

A request for jurisdictional discovery is common in FSIA cases, where a plaintiff may require further fact-finding to establish that the foreign entity falls within one of the exceptions to immunity. This follows the burden-shifting applicable at the initial stages of an FSIA action, where first “the plaintiff must overcome the presumption of immunity by producing some evidence that the foreign state’s conduct falls within a statutory exception,” and second, the defendant must “prove the plaintiff’s claims do not fall within an FSIA exception.”³⁰⁶ “Jurisdictional discovery is only available where the plaintiff is able to carry its initial burden of establishing a *prima facie* case that jurisdiction exists.”³⁰⁷

Because immunity for foreign sovereigns under the FSIA “was meant to spare foreign states not only from liability on the merits but also from the cost and inconvenience of trial,” courts are often disinclined to require foreign sovereigns to engage in discovery.³⁰⁸ Further, upon appeal of a ruling denying jurisdictional discovery, the decision “will not be reversed except upon the clearest showing that denial of discovery results in

303. *Id.* at 138 (citing *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102 (1987) (“applying the ‘minimum contacts’ test to determine whether a state court could, without violating the *Due Process Clause*, exercise personal jurisdiction over a Japanese corporation”)) (emphasis added)).

304. *Id.* at 140 (citation omitted).

305. *Id.* at 140-41.

306. *Licea v. Curacao Drydock Co., Inc.*, 794 F. Supp. 2d 1299, 1304-05 (S.D. Fla.) (finding that “a plaintiff relying on an alter ego theory that is able to allege the existence of an exception to immunity under the FSIA may be entitled to jurisdictional discovery”).

307. *Id.*

308. *Doe v. Holy See*, CV 02-430-MO, 2011 WL 1541275 (D. Or. Apr. 21, 2011) at *2 (quoting *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010)); see also *Orkin v. Swiss Confederation*, 444 F. App’x 469 (2d Cir. 2011) (affirming district court’s denial of jurisdictional discovery); *Fagan v. Republic of Austria*, No. 08-CIV-6715-LTS-JCF, 2011 WL 1197677, at *20 (Mar. 25, 2011) (denying request for jurisdictional discovery); *Sachs v. Republic of Austria*, No. C-08-1840, 2011 WL 816854, at *4 (N.D. Cal. Jan. 28, 2011).

actual and substantial prejudice to the complaining litigant.”³⁰⁹ But in 2011, some courts departed from the general reluctance to grant jurisdictional discovery that foreign sovereigns enjoy.³¹⁰

In *Furry v. Miccosukee Tribe of Indians of Florida*, the district court permitted the plaintiff to begin discovery to determine whether the factual allegations in the complaint would support an exception to sovereign immunity.³¹¹ The plaintiff alleged that the Miccosukee Tribe served his daughter alcohol at a tribal casino and allowed her to leave in an intoxicated state; the daughter died in a car accident later that evening.³¹² The court determined that the factual allegations in the Complaint were sufficient, “if substantiated through discovery” to establish whether an exception to the FSIA for this Tribe existed.³¹³

Similarly, in *Doe v. Holy See*, the district court permitted plaintiff to take limited jurisdictional discovery to determine the type of employment relationship the Holy See had over a Catholic priest accused of sexually molesting plaintiff.³¹⁴ But the court denied discovery on the commercial activity exception, as plaintiff could not make out a *prima facie* showing of its applicability.³¹⁵

E. DEFAULT JUDGMENTS

Where a foreign sovereign does not answer, or otherwise respond to a complaint, a court may grant a default judgment in favor of the plaintiff.³¹⁶ Before a court will enter a default judgment, “the claimant [must] establish [] his claim or rights to relief by evidence satisfactory to the court.”³¹⁷ The court may accept all uncontroverted evidence as true, “which may take the form of sworn affidavits or prior transcripts[,] . . . judicial notice of findings[,] and conclusions of related proceedings.”³¹⁸ Courts also continue to emphasize the importance of proper service as a foundational requirement prior to entering a default judgment.³¹⁹

309. *Holy See*, 2011 WL 1541275, at *2.

310. *See, e.g., Doe v. Bin Laden*, 663 F.3d 64 (2d Cir. 2011) (granting request for limited discovery to determine the existence of jurisdiction).

311. *Furry v. Miccosukee Tribe of Indians of Florida*, No. 10-24524-CIV-SEITZ, 2011 WL 1303281, at *3 (S.D. Fla. Mar. 31, 2011).

312. *Id.*

313. *Id.* (citing *Guevara v. Republic of Peru*, 468 F.3d 1289, 1295 (11th Cir. 2006)).

314. *Doe v. Holy See*, CV 02-430-MO, 2011 WL 1541275, at *4 (D. Or. Apr. 21, 2011).

315. *Id.* at *3.

316. *See, e.g., Taylor v. Islamic Republic of Iran*, 811 F. Supp. 2d 1, 17 (D.D.C. 2011) (finding Iran liable for terrorist acts after entry of default judgment where Iran failed to respond to Complaint); *Estate of Doe v. Islamic Republic of Iran*, 808 F. Supp. 2d 1, 19 (D.D.C. 2011).

317. *Bell Helicopter Textron Inc. v. Islamic Republic of Iran*, 764 F. Supp. 2d 122, 126 (D.D.C. 2011) (quoting 28 U.S.C. § 1608(e)).

318. *See, e.g., Certain Underwriters at Lloyd's London v. Great Socialist People's Libyan Arab Jamahiriya*, 811 F. Supp. 2d 53, 73 (D.D.C. 2011) (citations omitted).

319. *See, e.g., Bleier v. Bundesrepublik Deutschland*, No. 08 C 06254, 2011 WL 4626164, at *7 (N.D. Ill. Sept. 30, 2011) (denying default judgment where foreign sovereign was not properly served).

Several cases in 2011 addressed default judgments under the FSIA, sending cautionary signals to defendants who choose not to respond to plaintiffs' allegations.³²⁰ For example, in *Baker v. Socialist People's Libyan Arab Jamahirya*, the district court criticized the Syrian defendants for choosing default as a "litigation strategy," stating:

This is not the first time Syria has done this. Syria has defaulted in several recent and currently pending cases before this court. In fact, in reviewing the pending and recent proceedings against Syria on the court docket, the court is unable to identify a case where Syria has filed a timely response to a complaint despite receiving proper service of process.³²¹

The *Baker* court considered two issues in particular, beyond the pure question of whether a default had occurred: (1) "whether a Magistrate Judge has authority to enter final judgment in the absence of a party's explicit consent, where that party has defaulted despite proper service of process and has failed to appear to contest referral of the case to the magistrate judge prior to entry of final judgment," and (2) whether the dismissal of other defendant (Libya) in the lawsuit rendered the Syrian co-defendants themselves immune from suit under the FSIA.³²² As to the first question, the court determined that because the Syrian defendants "received proper service of process and willfully defaulted" more than once, "defaulting nullifies any right to argue the absence of the magistrate judge's jurisdiction for the first time on appeal."³²³ The court held that a settlement agreement between the United States and Libya that reinstated Libya's immunity from suit did "not deprive [the court] of jurisdiction over the claims by plaintiffs against the Syrian defendants."³²⁴ Specifically, Syria is not a party to the agreement between the United States and Libya, and the agreement was not "intended to apply to claims by United States nationals against states other than Libya."³²⁵

F. VENUE AND FORUM NON CONVENIENS

Under 28 U.S.C. section 1391(f), claims against a foreign state or political subdivision thereof may be brought in the United States District Court for Columbia, "or any judicial district" in which (1) "a substantial part of the events . . . or a substantial part of property . . . is situated," (2)

320. See, e.g., *Estate of Heiser, et al. v. Islamic Republic of Iran*, 807 F. Supp. 2d 9, 24 (D.D.C. 2011) ("[T]his action has been proceeding for more than a decade, and yet in all this time Iran has not appeared to account for its role in the horrific bombing of the Khobar Towers residential complex. This choice was made despite both exposure to more than \$500 million in damages and evidence that Iran is perfectly capable of appearing when it wishes. See, e.g., *Rubin v. Islamic Republic of Iran*, No. 03 Civ. 9370, 2008 WL 192321, at *1-*2 (N.D. Ill. Jan. 18, 2008).").

321. *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 96 (D.D.C. 2011).

322. *Id.*

323. *Id.* at 99.

324. *Id.*

325. *Id.* at 100.

“the vessel or cargo of a foreign state is situated,” or (3) “the agency or instrumentality is licensed to do business.” Venue disputes in FSIA litigation, as in other litigation, typically concern the location where “a substantial part of the events” occurred.

However, a U.S. court is not guaranteed in an FSIA action. Pursuant to the doctrine of forum non conveniens, where: (a) a claim would impose a serious inconvenience on the defendant, and (b) an adequate alternative forum for the claim exists, a U.S. court may decline to hear the case. In this situation, the court “must first determine whether an adequate alternative forum for the dispute is available, and if so, whether a balancing of the private and public interest factors strongly favors dismissal.”³²⁶ The determination is highly discretionary, and a number of courts in 2011 denied foreign sovereigns’ motions to dismiss based on forum non conveniens.³²⁷

For example, in *de Csepel*, where plaintiffs sought the return of artwork from the Republic of Hungary, the defendants argued that the case should be dismissed because Hungary provided an adequate alternate forum. Although the Court assumed that to be true, “the Court nevertheless conclude[d] that defendants . . . failed to show that the balance of private and public factors favor[ed] dismissal” on forum non conveniens grounds.³²⁸

Looking at the “private interest” factors, the court noted that language concerns did not shift the balance in favor of Hungary as many of the relevant witnesses lived outside of Hungary. The Court also noted that a judgment would be enforceable in the United States since the court would be able to attach property owned by Hungary in the United States.³²⁹ With respect to the “public interest” factors, the court found that Hungary failed to rebut the “strong presumption” that the court should honor plaintiffs’ choice of forum,³³⁰ where the U.S. court had an equal interest in resolving the controversy, and there was no burden on potential jurors, “as jury trials are not available in suits brought under the FSIA.”³³¹ The Court denied the motion to dismiss.³³²

326. *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 138 (D.D.C. 2011) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981)).

327. *Id.*; *Holocaust Victims of Bank Theft v. Magyar Nemzeti Bank*, 807 F. Supp. 2d 689 (N.D. Ill. 2011); *reh’g denied*, 807 F. Supp. 699 (N.D. Ill. 2011); *Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov’t of the Lao People’s Democratic Republic*, 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011); *Cybersitter, LLC v. The People’s Republic of China*, 805 F. Supp. 2d 958 (C.D. Cal. 2011); *Victims of the Hungarian Holocaust v. Hungarian State Rys.*, 798 F. Supp. 2d 934 (N.D. Ill. 2011); *Cruise Connections Charter Mgmt. 1, LP v. Att’y Gen. of Can.*, 764 F. Supp. 2d 155 (D.D.C. 2011).

328. *de Csepel*, 808 F. Supp. 2d at 138.

329. *Id.*

330. *Thai-Lao Lignite (Thai.) Co., Ltd. v. Gov’t of the Lao People’s Democratic Republic*, 2011 WL 3516154, at *9 (“The more it appears that a domestic or foreign plaintiff’s choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff’s forum choice.”) (citation omitted).

331. *de Csepel*, 808 F. Supp. 2d at 139 (citation omitted).

332. *Id.*

G. INTERLOCUTORY APPEAL

Denials of immunity under the FSIA are immediately appealable under the collateral-order doctrine. In 2011, two circuits addressed issues relating to such interlocutory appeals.³³³ The Fourth Circuit addressed whether it could hear an appeal from a denial of a motion to dismiss where the district court had transferred the matter to a district court in another circuit.³³⁴ The Seventh Circuit addressed “[w]hether a collateral order that is not timely appealed is revived for review when a timely appeal is taken from a later collateral order.”³³⁵

In *Wye Oak Technology, Inc. v. Republic of Iraq*, a contractor sued Iraq for breach of contract.³³⁶ Iraq moved to dismiss for, inter alia, lack of subject matter jurisdiction.³³⁷ The Virginia district court denied Iraq’s motion and, in “concluding that venue was improper,” transferred the case to the District of Columbia.³³⁸ Iraq appealed to the Fourth Circuit.³³⁹

The Fourth Circuit noted that the transferor court could have aided its review by either: (1) transferring before reaching the jurisdiction question, or (2) staying the transfer order pending consideration of the appeal.³⁴⁰ Nonetheless, the court determined that it did have jurisdiction over the appeal because the “immediately appealable” nature of the denial of immunity was “severed from the remainder of the case that traveled to the transferee court.”³⁴¹

In *Rubin v. Islamic Republic of Iran*, several judgment creditors sought to satisfy judgments against Iran by attaching Persian antiquities housed in Chicago museums.³⁴² Iran failed to appear.³⁴³ Though the FSIA, as a general matter, immunizes foreign sovereigns’ assets from attachment,³⁴⁴ the district court held that immunity from attachment must be pled specially as an affirmative defense.³⁴⁵ After the thirty-day window for filing an interlocutory appeal lapsed,³⁴⁶ the plaintiffs served Iran with discovery requests “regarding *all* Iranian-owned assets located anywhere in the

333. See *Wye Oak Tech., Inc. v. Republic of Iraq*, 666 F.3d 205, 209-11 (4th Cir. 2011); *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 789-93. The Supreme Court denied both Iraq’s and Iran’s petitions for writ of certiorari on June 25, 2012. *Republic of Iraq v. Wye Oak Tech., Inc.*, 133 S. Ct. 38 (2012); *Rubin v. Islamic Republic of Iran*, 133 S. Ct. 23 (2012).

334. *Wye Oak*, 666 F.3d at 209.

335. *Rubin*, 637 F.3d at n. 7.

336. *Wye Oak*, 666 F.3d at 207.

337. *Id.* at 208.

338. *Id.* at 209.

339. *Id.*

340. *Id.*

341. *Id.* at n. 6. The Fourth Circuit considered that declining jurisdiction “could result in the district court’s decision escaping de novo review entirely.”

342. *Rubin v. Islamic Republic of Iran*, 637 F.3d 783, 785 (7th Cir. 2011).

343. *Id.*

344. *Id.* (citing 28 U.S.C. § 1609).

345. *Id.*

346. *Id.*

United States.”³⁴⁷ The district court permitted the requests, and Iran appealed both the discovery order and the prior denial of attachment immunity.³⁴⁸

After first deciding that the discovery order was immediately appealable under the collateral order doctrine,³⁴⁹ the Seventh Circuit then faced the “trickier” question whether Iran could also appeal the denial of attachment immunity³⁵⁰—i.e., whether the timely interlocutory appeal of the discovery order revived the opportunity to appeal the immunity decision without waiting until final disposition of the case.³⁵¹ The court decided in favor of Iran:

The failure to timely appeal an immunity order under the collateral-order doctrine does not necessarily postpone review until the end of the case; it postpones review until another appealable order is entered. This will usually be the final judgment, but not always. And here, there is “another appealable order,” not the final judgment, that has provided the next opportunity for review.³⁵²

The court justified the decision as “sound appellate management” because the orders involved similar issues related to immunity under the FSIA.³⁵³

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

348. *Id.*

349. *See id.* at 790.

350. *Id.*

351. *Id.* at n.7.

352. *Id.* at 791 (quoting *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990)).

353. *Id.*