



**The Foreign Sovereign Immunities Act**  
2008 Year in Review

crowell  moring

**THE FOREIGN SOVEREIGN IMMUNITIES ACT: 2008 YEAR IN REVIEW**

**by Crowell & Moring LLP<sup>1</sup>**

**Table of Contents**

INTRODUCTION: THE FSIA IN 2008 ..... 1

I. A BRIEF HISTORY OF THE FSIA ..... 3

II. THE DEFINITION OF A FOREIGN STATE: POLITICAL SUBDIVISIONS,  
ORGANS, AGENCIES AND INSTRUMENTALITIES ..... 5

A. What is a “Foreign State?” ..... 5

    1. Entities that Qualified as a Foreign State, Agency or  
    Instrumentality ..... 6

    2. Entities That Failed to Qualify as Foreign States, Agencies or  
    Instrumentalities ..... 7

B. “Governmental” Versus “Commercial” Agencies and Instrumentalities:  
The “Core Functions Test” ..... 8

III. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY ..... 10

A. Waiver and Treaties – § 1605(a)(1) ..... 10

B. Commercial Activity – § 1605(a)(2) ..... 11

    1. What Acts are Considered Commercial? ..... 11

    2. What Acts Cause a “Direct Effect” in the United States? ..... 14

C. Takings – § 1605(a)(3) ..... 17

D. Non-Commercial Torts – § 1605(a)(5) ..... 18

E. Arbitration – § 1605(a)(6) ..... 20

F. Terrorism – § 1605(a)(7) ..... 20

IV. ENFORCEMENT OF AWARDS AGAINST FOREIGN STATES ..... 26

V. PRACTICAL ISSUES IN FSIA LITIGATION ..... 29

A. Service ..... 29

B. Due Process and Personal Jurisdiction ..... 30

C. Interlocutory Appeals ..... 31

---

<sup>1</sup> This Review was authored by Crowell & Moring attorneys Aryeh Portnoy, Katherine Nesbitt, Laurel Pyke Malson, Birgit Kurtz, Joshua Dermott, Beth Goldman and Marguerite Walter.

|    |  |    |
|----|--|----|
| D. | Jurisdictional Discovery .....                         | 31 |
| E. | Removal.....   | 32 |
| F. | Default Judgments.....                                 | 33 |
| G. | Related Jurisprudential and Jurisdictional Issues..... | 34 |

*The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 et seq. (“FSIA”), provides the exclusive basis for suing a foreign sovereign in United States courts. While the FSIA generally grants immunity to foreign sovereigns, it also lays out a number of exceptions under which U.S. courts can exercise jurisdiction. Plaintiffs have thus used this statute as a basis to sue foreign governments and their agencies and instrumentalities in a variety of contexts, ranging from purely commercial disputes to wrongful death claims on behalf of victims of state-sponsored terrorism. The purpose of this Review is to provide an overview of the primary areas of litigation under the FSIA through an analysis of judicial decisions under the statute issued in 2008.*

## **INTRODUCTION: THE FSIA IN 2008**

Litigation involving foreign sovereigns in the United States is on the rise. In the past ten years, the number of reported decisions discussing the FSIA has increased by nearly 70 percent. This dramatic increase is attributable to a variety of circumstances that continued to play out in FSIA jurisprudence in 2008.

The continued 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. Thus, much litigation in 2008 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. While the courts continue to grapple with these issues, the decisions in 2008 have provided some additional guidance in this constantly evolving area of the FSIA.

Another significant trend in 2008 was the continued growth in cases arising out of the 1996 “Terrorism Exception” to the FSIA, which authorized U.S. victims to sue foreign governments (and their agents) designated by the U.S. as “state sponsors of terrorism” for “personal injury or death” caused or sponsored by the defendants.<sup>2</sup> Terrorism-related litigation is likely to increase further, given the passage in 2008 of the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”),<sup>3</sup> which, for the first time, established a federal private right of action against terrorist states, and authorized punitive damages, in addition to damages for property loss.

Overall, FSIA cases in 2008 continued to address the core issues facing foreign sovereigns in U.S. litigation, including:

---

<sup>2</sup> More than 35% of all reported FSIA decisions in 2008 involved terrorism-related claims – an increase of more than 15% from 2002 and nearly 25% from 1998.

<sup>3</sup> Pub. L. No. 110-181, 122 Stat. 3 (2008).

- 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 U.S. to satisfy U.S. court judgments?

This Review will focus on the answers to those questions provided by U.S. courts in 2008. In addition, the Review includes a brief introduction to the statute, as well as some practical litigation guidance for foreign sovereigns derived from the most recent FSIA cases. If you have any questions about the Foreign Sovereign Immunities Act, please do not hesitate to contact Crowell & Moring’s International Dispute Resolution litigation team:

|   |   |   |  |
|---|---|---|--|
| <b>WASHINGTON, DC</b>   |   |   |  |
| Stuart H. Newberger<br>snewberger@crowell.com<br>(p) 202.624.2649                     | Laurel Pyke Malson<br>lmalson@crowell.com<br>(p) 202.624.2576               | Michael L. Martinez<br>mmartinez@crowell.com<br>(p) 202.624.2945                | Aryeh S. Portnoy<br>aportnoy@crowell.com<br>(p) 202.624.2806 |
| Katherine J. Nesbitt<br>knesbitt@crowell.com<br>(p) 202.624.2678                      | Lisa Savitt<br>lsavitt@crowell.com<br>(p) 202.624.2761                      | Daniel Vielleville<br>dvielleville@crowell.com<br>(p) 202.624.2768              | John L. Murino<br>jmurino@crowell.com<br>(p) 202.624.2663    |
| <b>NEW YORK</b>   |   |   |  |
| Birgit Kurtz<br>bkurtz@crowell.com<br>(p) 212.803.4016                                | Pieter H.F. Bekker<br>pbekker@crowell.com<br>(p) 212.895.4305               | William J. McSherry Jr.<br>wmcsherry@crowell.com<br>(p) 212.895.4207            |  |
| <b>CALIFORNIA</b><br>Kimberley Chen Nobles<br>knobles@crowell.com<br>(p) 949.263.8400 | <b>LONDON</b><br>Jane Wessel<br>jwessel@crowell.com<br>(p) +44.207.413.0071 | <b>BRUSSELS</b><br>Emmanuel Gybels<br>egybels@crowell.com<br>(p) +32.2.282.4082 |  |

## I. A BRIEF HISTORY OF THE FSIA

Foreign sovereigns have enjoyed immunity from suit in U.S. courts for nearly two centuries. As early as 1812 in *Schooner Exchange v. McFaddon*,<sup>4</sup> U.S. courts generally declined to assert jurisdiction over cases involving foreign government defendants, a practice rooted in a sense of “grace and comity” between the U.S. and other nations. Judges instead deferred to the views of the Executive Branch as to whether such cases should proceed in U.S. courts, exercising jurisdiction only where the U.S. State Department expressly referred claims for their consideration.<sup>5</sup>

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

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.<sup>8</sup> Today, the FSIA provides the “sole basis” for obtaining jurisdiction over a foreign state in U.S. courts.<sup>9</sup>

The FSIA provides that “foreign states” – including their “political subdivisions” and “agencies or instrumentalities”<sup>10</sup> – shall be immune from the jurisdiction of U.S. courts unless one of the exceptions to immunity set forth in the statute applies.<sup>11</sup> The FSIA includes several provisions that define the scope of a foreign state’s immunity, and establishes detailed procedural requirements for filing claims against a sovereign defendant.

---

<sup>4</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>5</sup> *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

<sup>6</sup> *Id.*

<sup>7</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 82 (2d Cir. 2008) (quoting *Chiudian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1100 (9th Cir. 1990)).

<sup>8</sup> 28 U.S.C. § 1602.

<sup>9</sup> *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989).

<sup>10</sup> 28 U.S.C. § 1603.

<sup>11</sup> 28 U.S.C. § 1604.

The exceptions to immunity are set forth in Sections 1605 and 1607 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. 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.<sup>12</sup> The FSIA also includes separate provisions establishing immunity (and exceptions to immunity) from the attachment of property located in the United States in aid of execution of a judgment against a foreign state or its agencies or instrumentalities.<sup>13</sup> 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.<sup>14</sup>

---

<sup>12</sup> 28 U.S.C. § 1606; *but see* 28 U.S.C. § 1605A.

<sup>13</sup> 28 U.S.C. § 1610-1611. For example, property belonging to a foreign central bank or monetary authority and held for its own account is immune from suit absent a waiver. Likewise, military property held by a military authority and used or intended to be used in connection with a military activity is immune from attachment. *Id.*

<sup>14</sup> *See, e.g.*, 28 U.S.C. § 1608.

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

---

As in previous years, much of FSIA litigation in 2008 dealt with the threshold issue of whether an entity qualifies as a “foreign state,” and therefore is entitled to immunity (or subject to the exceptions to immunity) under the FSIA.<sup>15</sup> For FSIA purposes, “foreign states” include not only the states themselves, but also political subdivisions, agencies and instrumentalities thereof.<sup>16</sup> 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 “a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof.”<sup>17</sup>

### **A. WHAT IS A “FOREIGN STATE?”**

Whether an entity qualifies as a foreign state is a fundamental inquiry in any FSIA case because it dictates whether the court will be able to assert jurisdiction over the claim. If an entity is deemed to be a foreign state – even as a political subdivision or an agency or instrumentality – it may be sued in a U.S. court only if the claim falls within one of the narrow exceptions set forth in the statute.

Courts have applied various factors and tests to resolve the question whether an entity falls within the FSIA’s definition of a foreign state. In some cases, courts look simply to the nature of the entity (or individual) being sued, or even how the entity has been treated by others, to determine whether it should be entitled to the protections of the FSIA. In other cases, courts apply specific tests to determine whether one or more elements of the definition of “foreign state” have been satisfied. For example, in considering whether an entity qualifies as an “organ” of the sovereign, courts have applied a five-factor analysis, considering:

(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.<sup>18</sup>

---

<sup>15</sup> In rare cases, a defendant will *resist* a finding of sovereign status, in order to avoid application of the FSIA. This scenario is most likely where the FSIA provides the only basis for jurisdiction over the defendant.

<sup>16</sup> 28 U.S.C. § 1603(a).

<sup>17</sup> 28 U.S.C. § 1603(b).

<sup>18</sup> *Ocean Line Holdings Ltd. v. China Nat’l Chartering Corp.*, 578 F. Supp. 2d 621, 624 (S.D.N.Y. 2008) (quoting *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004)) (citations omitted); *Intelsat Global Sales & Mktg., Ltd. v. Community of Yugoslav Posts Telegraphs & Telephones*, 534 F. Supp. 2d 32 (D.D.C. 2008) (citing *Peninsula Asset Mgmt. v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007)).



In all cases, the court’s analysis is based on the same underlying principle – consistent with the “restrictive theory” of sovereign immunity – that immunity from jurisdiction should be limited to entities and acts of a public or governmental nature, but should not extend to predominantly commercial entities or conduct. This inevitably requires the court to engage in a highly fact-intensive analysis, involving careful attention to the specific nature and functions of each defendant in order to make a preliminary determination regarding whether to allow the case to proceed.

The following is a brief review of 2008 decisions that helps to illustrate how U.S. courts have addressed the status of a variety of entities under the FSIA.

### **1. Entities that Qualified as a Foreign State, Agency or Instrumentality**

***Individual Officers Acting in Their Official Capacity.*** Courts have issued conflicting decisions regarding whether individual officers fall within the scope of the FSIA as “agents” of a foreign state. In 2008, the Second Circuit in *In re Terrorist Attacks on September 11, 2001* joined the majority of circuits in holding that individual officers qualify as “agents” for immunity purposes when they act in an official capacity within the scope of their employment.<sup>19</sup> The court noted that circuits are split on this issue, citing the Seventh Circuit’s continuing refusal to extend sovereign immunity to individual agents of foreign governments.<sup>20</sup> However, the court adopted the majority view, as set forth in the Ninth Circuit’s opinion in *Chuidan v. Philippine Nat’l Bank*,<sup>21</sup> that extending immunity to individuals acting in their official capacity conforms with common-law precedent, the FSIA’s legislative history, and the plain language of the statute. The court reasoned that because the term “agency” includes “any thing or person through which action is accomplished,” the statute should grant senior members of a foreign state’s government and secretariat sovereign immunity for their official acts.<sup>22</sup>

***Foreign Sovereigns Recognized by U.S.*** The Sixth Circuit in *O’Bryan v. Holy See*,<sup>23</sup> found the Holy See to be entitled to sovereign status under the FSIA, observing that the United States currently conducts diplomatic relations with the Holy See and recognizes it as a foreign sovereign. The court held, however, that the Holy See may yet be subject to suit, depending on the nature of its actions, including the extent to which it acted in a private capacity as an unincorporated association, or even as the head of an international religious organization.

---

<sup>19</sup> 538 F.3d 71 (2d Cir. 2008).

<sup>20</sup> *Id.* at 81 (citing *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)).

<sup>21</sup> 912 F.2d 1095 (9th Cir. 1990).

<sup>22</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 85. The court found additional support for this conclusion in the newly amended FSIA Terrorism Exception, discussed more fully *infra* at Section III.F., which expressly *removes* immunity for individuals acting in their official capacities in certain terrorism cases. The court reasoned, by implication, that where the Terrorism Exception does *not* apply – and in the absence of any other applicable exception – such individuals must be entitled to immunity from suit under the FSIA.

<sup>23</sup> 556 F.3d 361 (6th Cir. 2009).

***Corporations Jointly-Owned by Multiple Governments.*** In *United Arab Shipping Company v. Eagle Systems, Inc.*,<sup>24</sup> a U.S. District Court for the Southern District of Georgia held that a foreign corporation created by treaty that was wholly-owned by multiple foreign governments qualified as a “foreign state” under the FSIA, even though no single nation possessed a majority of the ownership interest.<sup>25</sup> The defendant, United Arab Shipping Company (UASC), was a corporation created pursuant to treaty and owned jointly by Bahrain, Iraq, Kuwait, Qatar, Saudi Arabia and the United Emirates. Although some courts have adhered closely to the statutory language requiring the entity to be owned by “a” foreign state,<sup>26</sup> – that is, a *single* foreign state – the court determined that these six foreign nations could “pool” their ownership interests such that the corporation still qualifies as a “foreign state” under the FSIA.

## **2. Entities That Failed to Qualify as Foreign States, Agencies or Instrumentalities**

***Quasi-Public University.*** In *Santilli v. Cardone*,<sup>27</sup> an Italian university claimed immunity from suit as a “foreign state” because of its close ties to the Italian government. The university’s president attested that (a) the university had been re-established in 1964 by the Italian Government; (b) it received approximately 75% of its funding from the Italian Government; (c) the Italian Government oversaw and controlled the university’s budget; and (d) the university was required to account to the Government for its spending. Despite these facts, the court refused to grant immunity to the university, finding no evidence that (1) the university’s purpose of teaching and conducting research served a national purpose; (2) the Italian Government actively supervised the university or required it to hire public employees; (3) the university held any exclusive rights; or (4) Italian law treated the university as dependent upon the Government.<sup>28</sup> Applying the five-factor analysis for determining whether an entity is an “organ” of a foreign state, *see supra* at Section II.A., the court found that the university was not an agency or instrumentality of the Italian government entitled to immunity from suit under the FSIA.

***Agencies of Governments Not Recognized by the United States.*** In *Sokolow v. Palestine Liberation Org.*,<sup>29</sup> a U.S. District Court for the Southern District of New York found that the Palestine Liberation Organization (PLO) and the Palestinian Interim Self-Government Authority

---

<sup>24</sup> No. CV408 067, 2008 WL 4087121 (S.D. Ga. Sept. 2, 2008).

<sup>25</sup> *Id.* at \*1 (citing *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 937-39 (7th Cir. 1996); *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1406 (E.D. Va. 1988); *Ahmed v. United Airlines, Inc.*, No. C97-4666, 1998 WL 289294, at \*2-3 (N.D. Cal. Apr. 21, 1998); *In re EAL Corp.*, No. 93 578, 1994 WL 828320, at \*4 (D. Del. Aug. 3, 1994)).

<sup>26</sup> *See, e.g., United Arab Shipping Co. v. Al-Hashim*, 574 N.Y.S.2d 743 (1st Dep’t 1991).

<sup>27</sup> No. 8:07-cv-308-T-23MSS, 2008 WL 2790242, at \*2 (M.D. Fla. July 18, 2008).

<sup>28</sup> *Id.*

<sup>29</sup> 583 F. Supp. 2d 451 (S.D.N.Y. 2008).

(PA) did not qualify as “foreign states” entitled to sovereign immunity.<sup>30</sup> The court found that Palestine’s statehood was not recognized by the U.S. or as a matter of international law. The court further rejected the argument that the PA was entitled to immunity as a political subdivision of Israel because the Israeli Government and the Israeli Supreme Court had rejected that proposition.

***National Sports-Related Entities.*** In *Scheidmann v. Qatar Football Association*, the federal court for the Southern District of New York refused to exercise jurisdiction over defendants Qatar Football Association (“QFA”) and Qatar National Olympic Committee (“QNOC”) because the plaintiff proffered insufficient evidence to show that the entities were “organs” of the Qatar Government.<sup>31</sup> Thus, despite evidence that: (a) members of the Qatari royal family held positions in the QFA; (b) some QFA and QNOC salaries were budgeted as “government expenditures;” (c) QFA and QNOC’s mailing addresses were found on a website listing government post office boxes; and (d) QFA had “exclusive rights” to market the Qatar Football League, the court rejected the plaintiff’s argument for jurisdiction based on the defendants’ alleged “organ” status because neither defendant “[had been] created exclusively to serve [a] national purpose . . . [or held] exclusive rights in the state of Qatar . . . .”<sup>32</sup> In fact, the court found that “both entities [were] treated as independent entities under the law of Qatar” and thus were neither “organs” nor an “alter-ego” of the government subject to the FSIA.<sup>33</sup> Without the FSIA as a basis for jurisdiction over the defendants, the court dismissed the claims.

## **B. “GOVERNMENTAL” VERSUS “COMMERCIAL” AGENCIES AND INSTRUMENTALITIES: THE “CORE FUNCTIONS TEST”**

Agency or instrumentalities deemed “foreign states” under the FSIA, however, still may be subject to varying rules, depending on the nature of the entity and its conduct. The FSIA and other procedural rules allow, *e.g.*, for more liberal treatment of agencies and instrumentalities than their sovereign counterparties with respect to such issues as service of process, proper venue, available damages (in particular, punitive damages, which rarely are available against foreign states but may be awarded against agencies or instrumentalities), and attachment of assets.<sup>34</sup>

To determine whether an entity, despite its agency or instrumentality status, should be treated as if it were part of the foreign state itself, rather than simply an agency or instrumentality, courts apply the so-called “core functions test.”<sup>35</sup> Thus, if the entity’s

---

<sup>30</sup> *Id.*

<sup>31</sup> No. 04 Civ. 3432, 2008 WL 144846 (S.D.N.Y. Jan. 15, 2008).

<sup>32</sup> *Id.* at \*3.

<sup>33</sup> *Id.* at \*4.

<sup>34</sup> *See e.g.*, 28 U.S.C. §§ 1608(a)-(b) (service of process); 28 U.S.C. §§ 1391(f)(3) (permitting venue in suits against an agency or instrumentality of a foreign state “in any judicial district in which the agency or instrumentality is licensed to do business or is doing business”); 28 U.S.C. §§ 1610(a)-(b) (attachment of assets).

<sup>35</sup> *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234 (D.C. Cir. 2003).

predominant activities, or “core functions,” are “governmental” in character, courts will treat the entity as if it were the state itself, applying rules more protective of the sovereign regarding, *e.g.*, service, venue, damages, and attachment.<sup>36</sup> However, if the entity’s “core functions” are predominantly commercial in character, courts will apply the less protective standards reserved for commercial agencies and instrumentalities of the state.<sup>37</sup>

Two cases in 2008 demonstrate the significance of this distinction. First, in *Rimkus v. Islamic Republic of Iran*, the United States District Court for the District of Columbia addressed the question of whether, for purposes of awarding punitive damages, the Iranian Revolutionary Guard Corps (IRGC) should be treated like the Iranian state itself or, instead, a mere agency or instrumentality thereof.<sup>38</sup> The court noted that punitive damages are not available against foreign states or “against divisions of a foreign state that are considered to be the state itself,” but are available against an agent or instrumentality of a foreign state acting in a commercial capacity.<sup>39</sup> Applying the “core functions test” to the IRGC’s activities, the court held that, despite the IRGC’s use of its status as a paramilitary organization for pecuniary gain through commercial enterprises, including engineering businesses, drug and alcohol smuggling, and business activities in the oil sector, the IRGC’s “core functions” were not commercial. Because the IRGC’s core functions were “governmental” in nature and not “commercial,” the court refused to award punitive damages.

In *Baumel v. Syrian Arab Republic*, the court also applied the “core functions test” to determine the proper treatment of governmental agents for purposes of service of process.<sup>40</sup> In that case, the District of Columbia federal district court held that Syria’s President, various former and current foreign ministers and a former high-ranking military officer should be treated like the state, because the officials’ core functions were of a “governmental” character. Accordingly, these agents were entitled to the more protective service rules applicable to foreign sovereigns rather than the less protective standards for agencies and instrumentalities thereof.

---

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 575 F. Supp. 2d 181 (D.D.C. 2008).

<sup>39</sup> 28 U.S.C. § 1606.

<sup>40</sup> 550 F. Supp. 2d 110 (D.D.C. 2008).

### III. EXCEPTIONS TO THE GENERAL GRANT OF IMMUNITY

Once a court determines that a defendant is a “foreign state” subject to the FSIA, it must next determine whether one of the exceptions to the general grant of immunity applies. These exceptions – found primarily in Section 1605 of the statute – are the most litigated provisions of the FSIA. In 2008, courts continued to focus heavily on the terrorism exception (which was further amended by an Act of Congress). However, several other exceptions drew attention from both appellate and district courts, providing further guidance as to the scope of foreign state immunity in disputes involving treaties, contractual waivers of immunity, arbitration agreements, commercial claims and torts occurring in the United States.

#### A. WAIVER AND TREATIES – § 1605(a)(1)

A foreign sovereign may waive its immunity from suit in the U.S. either explicitly or implicitly.<sup>41</sup> These waivers often take the form of an agreement in a contract to arbitrate or to adjudicate disputes in a United States venue or in accordance with U.S. laws.<sup>42</sup> In 2008, courts continued to uphold the long-settled principle that *any* waiver of immunity “is to be construed narrowly and in light of the requirement that the foreign state must have intended to waive its sovereign immunity.”<sup>43</sup>

***No Waivers for Third Parties.*** Consistent with the courts’ historically narrow interpretation of supposed waivers of immunity, the court in *Heroth v. Kingdom of Saudi Arabia*, held that a contractual waiver of immunity does not apply to benefit third parties that are not signatories to the contract containing the waiver.<sup>44</sup> In *Heroth*, the Saudi Government entered into an agreement with the U.S. Government that stipulated that all disputes under the agreement would be resolved under U.S. procurement law. The court held that, while the Saudi Government waived its immunity with respect to the parties to the agreement (the U.S. and Saudi Arabia), the waiver did not extend to a dispute between the Saudi Government and a separate U.S. contractor hired under the agreement, but who had not signed the underlying contract. In the absence of contractual privity between the foreign sovereign and the plaintiff, Saudi Arabia retained its immunity from suit.

***International Agreements as Waivers.*** Another common issue raised in 2008 was whether actions pursuant to international treaties and conventions serve as implicit waivers. In *Good v. Fuji Fire & Marine*,<sup>45</sup> an American woman sued multiple Japanese ministries, claiming that the Japanese Government waived the ministries’ immunity when it served process on them

---

<sup>41</sup> 28 U.S.C. § 1605(a)(1).

<sup>42</sup> See, e.g., *Lasheen v. Loomis Co.*, No. Civ. S-01-227, 2008 WL 295079, \*3 (E.D. Cal. Feb. 1, 2008).

<sup>43</sup> *Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59, 64 (D.D.C. 2008).

<sup>44</sup> *Id.*

<sup>45</sup> 271 Fed. Appx. 756 (10th Cir. 2008).

pursuant to the Hague Service Convention.<sup>46</sup> The Tenth Circuit held that Japan did not waive immunity for its ministries merely by acting in accordance with international law. In another case, *Auster v. Ghana Airways, Ltd.*,<sup>47</sup> the D.C. Circuit declined to decide whether a Ghana-owned airline had waived its sovereign immunity by signing the Warsaw Convention – an international agreement establishing a carrier’s liability for the death or wounding of a passenger in international transportation. However, the court implied that an international agreement, to constitute a waiver under § 1605(a)(1), must clearly and unambiguously waive immunity to suit in U.S. courts.<sup>48</sup>

## **B. COMMERCIAL ACTIVITY – § 1605(a)(2)**

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

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States . . . .<sup>49</sup>

In short, a foreign state is not immune from suit in the U.S. where its actions are (1) commercial; and (2) are carried out, or cause a direct effect, in the United States.

### **1. What Acts are Considered Commercial?**

In distinguishing between commercial and sovereign acts, the FSIA requires that acts be defined by their nature, not their purpose.<sup>50</sup> For example, the act of entering into a construction contract is commercial in nature, even if the contract is for a seemingly sovereign, non-commercial purpose – like building an embassy compound. However, most cases addressing this exception have not been so straightforward. In 2008, many courts grappled with the

---

<sup>46</sup> Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361; 658 U.N.T.S. 163, T.I.A.S. No. 6638.

<sup>47</sup> 514 F.3d 44 (D.C. Cir. 2008).

<sup>48</sup> See *id.* at 46 (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (finding no waiver under § 1605(a)(1) when an international agreement did not mention “a waiver of immunity to suit in United States courts”), and *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (“a foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so”)).

<sup>49</sup> 28 U.S.C. § 1605(a)(2).

<sup>50</sup> See 28 U.S.C. § 1603(d).

question of where to draw the line between “commercial” and “governmental” acts. The following cases illustrate some of the nuances identified by the courts in drawing this boundary.

***Military contracts with a private company: Commercial.*** In *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*,<sup>51</sup> the Saudi Arabian Government hired an American company to service and maintain its fleet of F-5 aircraft. The District Court for the Western District of Texas found that, while maintaining an air force typically is a sovereign act, the commercial activity exception applied here because Saudi Arabia had “ventured into the marketplace” to contract for maintenance services in the same manner as a private party would.

***Military contracts under a government program: Non-commercial.*** Like the court in *UNC Lear Services*, the D.C. district court in *Heroth v. Kingdom of Saudi Arabia*<sup>52</sup> considered whether entering into a contract to provide services to the Saudi military was “commercial” or “governmental” activity. In *Heroth*, however, the Saudi Government did *not* contract directly with a private company. Instead, it utilized the U.S. Government’s Foreign Military Sales (“FMS”) program, a mechanism by which the U.S. Government sells defense articles and services exclusively to foreign governments. As part of the contract, a private U.S. firm was hired to provide military base security for the Saudi Government. When employees of that U.S. contractor attempted to sue the Saudi Government, the court precluded them from using the commercial activity exception. It held that, since participation in the FMS was limited to governments, and was not the type of activity in which a private actor could participate, the contract was not commercial in nature. Furthermore, the court added, provision of security at a military facility is a “quintessentially sovereign activity.”<sup>53</sup>

***Charitable Contracts: Commercial.*** In *Hilaturas Miel, S.L. v. Republic of Iraq*,<sup>54</sup> Iraq contracted to purchase merchandise from the plaintiff as part of the Oil-for-Food Programme. When Iraq was unable to perform, the plaintiff sued. Iraq argued that, since the Oil-for-Food Programme was humanitarian in nature, it fell outside of the commercial activity exception. The court rejected this argument, finding that, regardless of the contract’s purpose, Iraq had entered into a commercial transaction, just like any other private party – which therefore constituted a “commercial” act.

***Charitable Donations: Non-commercial.*** By contrast, in *In re Terrorist Attacks on September 11, 2001*,<sup>55</sup> the Second Circuit held that donating money to charities that funneled

---

<sup>51</sup> No. SA 04-CA-1008, 2008 WL 2946059 (W.D. Tex. July 25, 2008).

<sup>52</sup> 565 F. Supp. 2d 59 (D.D.C. 2008).

<sup>53</sup> *Id.* at 68 n.9. The court’s reasoning raises the question: If the Saudi Government had contracted for security services in the marketplace, outside of the FMS program, would it then fall within the commercial activity exception, like the contract in *UNC Lear*, or would the “quintessentially sovereign” nature of providing military security override the commercial nature of the act? The D.C. District Court left this issue open for future determination.

<sup>54</sup> 573 F. Supp. 2d 781 (S.D.N.Y. 2008).

<sup>55</sup> 538 F.3d 71 (2d Cir. 2008).

support to Al Qaeda was not a commercial activity. The plaintiffs argued that the act of giving money to a charity was commercial in nature because it was something private parties could engage in—as opposed to an activity strictly reserved for sovereigns. The court rejected this analysis, focusing instead on whether the defendants’ acts were the “*type* of actions by which a private party engages in trade and traffic or commerce.”<sup>56</sup> The court found that while the act of donating money to charity is something a private party has the power to do, it is not “part of the trade and commerce engaged in by a merchant in the marketplace,” and is therefore not commercial in nature.<sup>57</sup>

***Contract to Service a Foreign Government’s Health Care Program: Commercial.*** The District Court for the Eastern District of California held in *Lasheen v. Loomis Co.*<sup>58</sup> that the defendant’s provision of “administrative services” for the Egyptian Government’s health care benefits plan was commercial in nature because “[p]rivate companies often make similar arrangements; undertaking such conduct does not require the exercise of the power of a sovereign nation.”<sup>59</sup>

***Government Employee’s Servicing of a Foreign Government’s Health Care Program: Non-commercial.*** In *Anglo-Iberia Underwriting Mgmt. Co. v. Loderhose*,<sup>60</sup> the plaintiff sued the administering agency for Indonesia’s social security health care program, claiming it had negligently supervised an employee who had perpetrated an elaborate scam, causing damages. The court held that it could not exercise jurisdiction over the defendant because, among other things, the employee’s work was not commercial in nature. The court stressed that the employee’s responsibilities did not involve commercial activities such as contracting with foreign doctors or providing overseas coverage; rather, his job was to process health claims and collect premiums for Indonesia’s national social security program. The court found that “such employment is by nature non-commercial.”<sup>61</sup> Nonetheless, the court cautioned that “mere employment in the conduct of commercial activities” is not sufficient to satisfy the exception because foreign sovereigns almost always act through their employees.<sup>62</sup> If mere employment were considered commercial activity, “the exception would be expanded to swallow the rule.”<sup>63</sup>

---

<sup>56</sup> *Id.* at 92 (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)) (emphasis added).

<sup>57</sup> *Id.*.

<sup>58</sup> No. Civ. S-01-227, 2008 WL 295079 (E.D. Cal. Feb. 1, 2008).

<sup>59</sup> *Id.* at \*4.

<sup>60</sup> No. 97-0084, 2008 WL 190364 (S.D.N.Y. Jan. 22, 2008).

<sup>61</sup> *Id.* at \*4.

<sup>62</sup> *Id.* at \*4 n.10.

<sup>63</sup> *Id.*



## 2. What Acts Cause a “Direct Effect” in the United States?

Once an act has been characterized as “commercial” under the FSIA, it still must have a sufficient jurisdictional “nexus” with the United States to fall within the commercial activity exception. This nexus can be shown in three ways:

***Acts in the U.S. by foreign states.*** The first clause of the exception permits jurisdiction over acts carried on in the U.S. by foreign states. This clause presents a fairly straightforward test for the geographic nexus, and in 2008, the only significant question that arose under this clause was whether a foreign state could be liable for the acts of its agents in the U.S. The courts responded that, subject to traditional agency principles, if the state implicitly or explicitly authorized the acts of its employees and agents, such acts may be deemed “carried on” by the state, and subject to review in U.S. courts.<sup>64</sup>

***Acts in the U.S. in connection with commercial activity abroad.*** The second clause of the commercial activity exception involves acts performed in the U.S. in connection with the a commercial activity of the foreign state elsewhere. Multiple cases in 2008 reaffirmed the well-established precedent that, for the exception to apply, the act in the U.S. must be not only “in connection with” the commercial activity of the foreign state, but also sufficient to form the basis of the suit itself. In other words, if the foreign state’s commercial acts in the U.S. are unrelated to the cause of action, such acts cannot confer jurisdiction under the exception.<sup>65</sup>

***Acts outside the U.S. that cause a “direct effect” in the U.S.*** The third clause of the commercial activities exception grants U.S. courts jurisdiction over acts that occur *outside* the U.S. in connection with a foreign state’s commercial activity, but which cause a “direct effect” in the United States. Because Congress provided no guidance as to what constitutes a “direct effect” in the United States, this clause tends to generate substantial litigation. This remained true in 2008. Most litigation centers on how strong the “direct effect” must be to bring an act within the exception. Here, too, courts have struggled to establish clearly-defined boundaries,<sup>66</sup> but the decisions in 2008 provide some useful guidance looking forward.

***Checks and Letters of Credit from U.S. Banks:*** Even where both parties to a commercial contract are foreign, they often choose to pay each other through U.S. banks. This

---

<sup>64</sup> See *Heroth v. Kingdom of Saudi Arabia*, 565 F. Supp. 2d 59 (D.D.C. 2008); *Anglo-Iberia Underwriting Mgmt. Co. v. Loderhose*, No. 97-0084, 2008 WL 190364 (S.D.N.Y. Jan. 22, 2008).

<sup>65</sup> See *Heroth*, 565 F. Supp. 2d at 66 (finding defendant’s actions of recruiting employees in U.S. insufficient to form basis of “failure to warn” cause of action); *Anglo-Iberia Underwriting Mgmt. Co.*, 2008 WL 190364 (finding defendant’s support of its employee in U.S. MBA program incidental to his employment, and therefore insufficient to support jurisdiction over a claim for negligent supervision); *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268 (D.D.C. 2008) (finding bank’s participation in bond offering on New York Stock Exchange insufficient to form jurisdictional nexus to U.S. because terrorist acts that were basis of plaintiff’s action occurred 24 years prior to stock offering at issue).

<sup>66</sup> See *Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov’t*, 533 F.3d 1183, 1190 (10th Cir. 2008) (“We do not doubt that drawing lines between what qualifies as a direct, rather than an indirect, effect, like efforts to distinguish between proximate and contributing causes, is a slippery business”) (citations omitted).

creates an attractive option for plaintiffs seeking U.S. jurisdiction over foreign sovereigns because such financial transactions arguably cause a “direct effect” in the United States, despite the fact that all other relevant acts took place abroad. However, the nexus between the financial transaction and the cause of action must be strong – not merely incidental – to fall under this clause.

In *Hilturas Miel, S.L. v. Republic of Iraq*,<sup>67</sup> the plaintiff sued Iraq under a contract that required the sovereign to make payments pursuant to a letter of credit issued by the New York branch of the Banque Nationale de Paris. The District Court for the Southern District of New York held that, since the contract *required* Hilturas to present certain documents and collect the amounts due to it *in the United States*, the commercial activity had a “direct effect” in the U.S. sufficient to confer jurisdiction over the case.

By contrast, a New York state court found the jurisdictional nexus to the U.S. insufficient where the Singapore branch of an international bank (which also had U.S. offices) advised on a letter of credit between two foreign parties.<sup>68</sup> The fact that the New York branch also was used “for some tangential purpose” did not create a sufficient “direct effect” in the United States for the New York court to exercise jurisdiction. The court emphasized that “the United States was not identified as the place of performance of any obligation under the letter of credit.”<sup>69</sup> Similarly, in *Agrocomplect, AD v. Republic of Iraq*,<sup>70</sup> the court declined to exercise jurisdiction over plaintiff’s claim against Iraq because the contract at issue did not *require* that Iraq make payments through United States banks. The fact that the parties entered into separate, related agreements to finance the defendant’s obligations using a U.S. bank did not change this result. These financing obligations were not the actions that the claim was “based upon,” and therefore failed to create a “direct effect” in the U.S. that would meet the jurisdictional nexus requirement of the commercial activity exception.

In *Guirlando v. T.C. Ziraat Bankasi, A.S.*,<sup>71</sup> the federal court in the Southern District of New York further required that the connection between the “effect” in the United States and the tortious act be “legally significant.”<sup>72</sup> In that case, a New York woman moved to Turkey and transferred \$250,000 of her life savings into an account at a Turkish state-run bank, at her husband’s urging. When her husband turned out to be a scam artist, she sued the Turkish national bank for failing to warn her that he could withdraw her money from the account. The court found that it lacked jurisdiction over her claim because her withdrawal of \$250,000 from a New York bank account was not sufficient to establish a “direct effect” in the U.S. Mere

---

<sup>67</sup> 573 F. Supp. 2d 781 (S.D.N.Y. 2008).

<sup>68</sup> *Lalasis Trading PTE, Ltd. v. Janata Bank*, 860 N.Y.S.2d 109 (1st Dep’t 2008).

<sup>69</sup> *Id.* at 110-11.

<sup>70</sup> 247 F.R.D. 213 (D.D.C. 2008).

<sup>71</sup> No. 07 Civ. 10266, 2008 WL 5272195 (S.D.N.Y. Dec. 15, 2008).

<sup>72</sup> *Id.* at \*4 n.4 (citing *Filetech S.A. v. Fr. Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998), for the proposition that the Second Circuit’s “legally significant acts” test requires that the “conduct having a direct effect in the United States be legally significant conduct in order for the commercial activity exception to apply”).

financial loss to an American individual or firm – no matter how devastating – is not sufficient alone to trigger an exception to foreign sovereign immunity. The court noted that all “legally significant acts” in connection with her claim – *i.e.*, where she opened her account, where the bank failed to warn her, and where her husband absconded with her money – occurred in Turkey. The court recognized the harshness of the result, but maintained that it stayed appropriately within the restrictive theory of sovereign immunity.

***Damage to a Parent Company – No Direct Effect:*** The Tenth Circuit also adopted a narrow view of “direct effect” jurisdiction by holding that a foreign company harmed abroad cannot gain jurisdiction over a foreign sovereign in the U.S. merely because the foreign company’s parent is American. In *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*,<sup>73</sup> a British Virgin Islands company with offices in Canada entered into a joint venture with the Chinese Government to provide cable broadband services. When China reneged on the venture, the BVI company brought suit in the U.S., basing jurisdiction on the fact that its parent company – a Nevada corporation – suffered financially, lost profits and was forced to reorganize as a result of China’s breach. This, it argued, caused a direct effect in the United States. The Tenth Circuit rejected this argument, finding that the joint venture did not require any action in the U.S., nor did the termination of the joint venture occur in the U.S. Thus, while financial injuries ultimately were felt in the U.S. by plaintiff’s parent company, they were “derivative of a financial injury Big Sky suffered in China, and thus are not sufficiently direct under our case law to invoke the commercial activity exception.”<sup>74</sup> In so holding, the court reinforced the general rule that mere financial loss to an American citizen or company is “insufficient to place the direct effect of [a defendant’s] actions in the United States.”<sup>75</sup>

***Magnitude of Injury is Irrelevant to Direct Effect Inquiry:*** Both *Guirlando* and *Big Sky* also reaffirmed the proposition that the severity of the injury to a U.S. party is irrelevant to the determination of whether the effect is sufficiently “direct” to overcome the defendant’s immunity. In *Big Sky*, the plaintiff argued that the court should find a “direct effect” because the defendant’s acts financially harmed the U.S. parent company so badly that it was forced to restructure. The court recognized the severity of the parent company’s injury, but added that § 1605(a)(2) does not consider the “substantiality” of an effect – only whether it was direct, and whether it was in the United States. In that case, the injury in question was felt in China, and thus did not *directly* affect anyone in the U.S., regardless of how severely it was felt. Similarly, in *Guirlando*, the court recognized the terrible plight of the defrauded bride, but held that “the fact that Plaintiff suffered a substantial, or even devastating, financial loss [by losing her life savings] does not permit the Court to exercise jurisdiction over a foreign state under the FSIA.”<sup>76</sup>

---

<sup>73</sup> 533 F.3d 1183 (10th Cir. 2008).

<sup>74</sup> *Id.* at 1191.

<sup>75</sup> *Id.* at 1190 (citing *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass’n*, 33 F.3d 1232 (10th Cir. 1994)).

<sup>76</sup> 2008 WL 5272195, at \*4 n.5.

### C. TAKINGS – § 1605(a)(3)

Though the “takings exception” is one of the lesser-used exceptions to the FSIA, two cases in 2008 devoted significant discussion to its finer points, and provide guidance for parties that may invoke it in the future. The takings exception permits jurisdiction over a foreign state 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.<sup>77</sup>

***Level of Commercial Activity Required.*** The takings exception also requires a commercial nexus to the United States. However, unlike the nexus required by the commercial activity exception, the takings exception “does not require that the commercial activity be connected to the actions resulting in the expropriation.”<sup>78</sup> Thus, under this exception, a U.S. court may assert jurisdiction over a foreign sovereign carrying on activities in the U.S. that are completely unrelated to the relevant cause of action. For example, in the 2008 decision *Agudas Chasidei Chabad of United States v. Russian Federation*, the plaintiffs were able to invoke the takings exception in a claim to recover a religious archive that was allegedly “taken” nearly a century ago, based on the defendant Russian agencies’ unrelated, present-day publishing contracts in the U.S.<sup>79</sup>

This seemingly low jurisdictional threshold has its boundaries, however, which were addressed by the New York federal district court in *Freund v. Republic of France*.<sup>80</sup> In *Freund*, a group of Holocaust survivors and their families sued France and a French government-run bank and railroad company for unlawfully confiscating their money and property during World War II. Because the property was not in the United States, plaintiffs asserted the second jurisdictional nexus clause of the takings exception – *i.e.*, that the property was “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.”<sup>81</sup> Plaintiffs argued that both the bank and the railroad were engaged in commercial activity in the U.S. through the actions of their subsidiaries, which included advertising on U.S. websites and construction projects in the U.S. The district court rejected this argument, finding that actions by distant subsidiaries are insufficient to capture foreign entities within the takings exception. The defendant agencies in *Freund* were removed

---

<sup>77</sup> 28 U.S.C. § 1605(a)(3).

<sup>78</sup> *Freund v. Republic of France*, 592 F. Supp. 2d 540, 554 (S.D.N.Y. 2008).

<sup>79</sup> 528 F.3d 924 (D.C. Cir. 2008).

<sup>80</sup> 592 F. Supp. 2d 540 (S.D.N.Y. 2008).

<sup>81</sup> 28 U.S.C. § 1605(a)(3).

from their subsidiaries (which were engaged in commercial activity in the U.S.) by multiple organizational layers. The court explained that to meet the jurisdictional nexus requirement under the FSIA takings exception there must be “at least, an affirmative decision by the agency or instrumentality to perform a commercial transaction or act” in the U.S.<sup>82</sup> Because the foreign agencies did not exercise control over these subsidiaries, they could not be held accountable for their acts in the United States. Thus, the plaintiffs could not use these subsidiaries’ acts to create a jurisdictional nexus with the U.S. sufficient to subject the foreign agencies to U.S. courts’ jurisdiction.

***Property “Owned and Operated” by a Foreign Entity.*** The absence of an adequate commercial nexus was not the only problem for plaintiffs in *Freund*. In fact, with respect to one of the defendants, plaintiffs were able to prove that it was engaged in commercial activity in the U.S. but were unable to prove the second required element – *i.e.*, that their allegedly expropriated property had been “exchanged for” property that the defendant now “owned or operated.” The court applied the FSIA’s burden-shifting analysis, and found that since the defendant had made a *prima facie* case for immunity by showing that it was an instrumentality of a foreign state, the burden was on the plaintiff to show why the takings exception should apply. Plaintiffs submitted voluminous reports to the court, but none of them were sufficient to show that the defendant’s current assets could be traced to the property that was once taken from plaintiffs. Thus, in the absence of any evidence that the subject property was in the defendants’ possession, plaintiffs’ claims could not stand.

#### **D. NON-COMMERCIAL TORTS – § 1605(a)(5)**

The “non-commercial tort” or “tortious activity” exception deprives a sovereign defendant of immunity in any case in “which money damages are sought against a foreign state for personal injury or death or damages or loss of property occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.”<sup>83</sup> However, the exception does not apply where the claim is based on the exercise or performance of (or failure to exercise or perform) a “discretionary function.”<sup>84</sup> The exception also does not apply to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contractual rights.<sup>85</sup>

Courts have noted that Congress’s primary purpose in enacting the tortious activity exception was “to eliminate a foreign state’s immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law.”<sup>86</sup>

---

<sup>82</sup> *Freund*, 592 F. Supp.2d at 556.

<sup>83</sup> 28 U.S.C. § 1605(a)(5).

<sup>84</sup> 28 U.S.C. § 1605(a)(5)(A).

<sup>85</sup> 28 U.S.C. § 1605(a)(5)(B).

<sup>86</sup> *O’Byryan v. Holy See*, 556 F.3d 361 (6th Cir. 2009) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989), and H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. (1976), reprinted in 1976 U.S.C.A.A.N. 6623, at 14).

Recent cases demonstrate, however, that plaintiffs are seeking to use the exception to cover claims far beyond the typical diplomatic traffic incident.

In *O'Bryan v. Holy See*, the Sixth Circuit addressed whether the tortious activity exception applied to claims against the Holy See by the alleged victims of sexual abuse by Roman Catholic priests.<sup>87</sup> The appellate court dismissed certain claims arising under a negligent supervision theory as a discretionary function and also dismissed those claims which were based on actions occurring outside the United States. The court also dismissed plaintiff's misrepresentation and deceit claims as those claims expressly fell outside the exception. Nonetheless, the court held that it had jurisdiction over plaintiff's tort claims stemming from the alleged tortious activities by certain bishops and high-level authorities in the United States. The court found that these authorities were agents or employees of the Holy See and, thus, their activities could be attributed to the sovereign state. Further, the court held that plaintiff's claims, including failure to report and failure to warn negligence claims, did not fall under the discretionary function exception because the Holy See's 1962 policy allegedly directed its employees to impose the "highest level of secrecy on the handling of clergy and sexual abuse matters."<sup>88</sup> Thus, the court denied the Holy See's motion to dismiss, allowing this high-profile case to go forward against the Holy See.

The events of September 11, 2001 also have required courts to address the novel question of whether any overlap exists between the terrorism exception and the non-commercial tort exception in cases arising from a terrorist attack on U.S. soil. In *In re Terrorist Attacks on September 11, 2001*, the Second Circuit 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."<sup>89</sup> In *Doe v. Bin Laden*, however, the United States District Court for the District of Columbia allowed plaintiffs to take jurisdictional discovery in connection with terrorism-related claims under the tortious activity exception.<sup>90</sup> In that case, 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. While the court did not directly address an argument that the terrorism exception was the exclusive basis for terrorism-related claims, the court held that the tort exception did not preclude plaintiff's civil conspiracy claims. The court allowed the plaintiff to take jurisdictional discovery to explore the connection between the Taliban and Afghanistan, as well as the question whether Afghanistan had participated in the conspiracy to engage in terrorist activities leading to the September 11<sup>th</sup> attacks.<sup>91</sup>

---

<sup>87</sup> 549 F.3d 431 (6th Cir. 2008), *amended and superseded on other grounds by* 556 F.3d 361 (6th Cir. 2009).

<sup>88</sup> *Id.* at 457.

<sup>89</sup> 538 F.3d at 90.

<sup>90</sup> 580 F. Supp. 2d 93 (D.D.C. 2008).

<sup>91</sup> *Id.* at 97-98.

## E. ARBITRATION – § 1605(a)(6)

United States courts have jurisdiction under the FSIA to enforce an agreement to arbitrate or to confirm an award made pursuant to such an agreement in two cases: (1) where the arbitration took place or is intended to take place in the United States; or (2) where the agreement or award is governed by a treaty or other international agreement calling for the recognition and enforcement of arbitral awards.<sup>92</sup>

In 2008, the D.C. Circuit recognized the limitations of this exception – including how a contractual agreement vesting jurisdiction in another country’s courts can trump the arbitration exception. The court in *Agrocomplect AD v. Republic of Iraq*<sup>93</sup> held that it did not have jurisdiction over a breach of contract claim against Iraq under the arbitration exception of the FSIA because the contract at issue, while providing for arbitration, also vested exclusive jurisdiction over disputes arising out of the contract in Iraqi courts. In addition, Iraq was not a signatory to any international agreement calling for the recognition and enforcement of arbitral awards. As such, Iraq was not subject to U.S. jurisdiction.

In *Suraleb, Inc. v. Production Ass’n “Minsk Tractor Works,” Republic of Belarus*, the District Court for the Northern District of Illinois upheld the plaintiff’s right to execute on an arbitral award by attaching property belonging to a company wholly owned by Belarus.<sup>94</sup> The court ultimately denied Suraleb’s request for a writ of execution, however, because Suraleb had not specifically identified the property within the court’s district that it sought to attach.<sup>95</sup>

## F. TERRORISM – § 1605(a)(7), 1605A, AND OTHER CLAIMS

Cases under the “Terrorism Exception” to the FSIA continued to dominate the FSIA landscape in 2008.<sup>96</sup> Enacted in 1996, the Antiterrorism and Effective Death Penalty Act –

---

<sup>92</sup> 28 U.S.C. § 1605(a)(6).

<sup>93</sup> 247 F.R.D. 213 (D.C. Cir. 2008).

<sup>94</sup> No. 06-C3496, 2008 WL 294839, at \*2 (N.D. Ill. Jan. 31, 2008).

<sup>95</sup> *Id.*

<sup>96</sup> More than 30 percent of the 2008 decisions mentioning the FSIA discuss terrorism or the “terrorism exception.” See (alphabetically) *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008) (Iran); *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008) (Iran); *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 85 (D.D.C. 2008) (Iran); *Doe v. Bin Laden*, 580 F. Supp. 2d 93 (D.D.C. 2008) (Osama Bin Laden); *Fisher v. Great Socialist People’s Libyan Arab Jamahiriya*, 541 F. Supp. 2d 46 (D.D.C. 2008) (Libya); *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53 (D.D.C. 2008) (Syria); *Higgins v. Islamic Republic of Iran*, 545 F. Supp. 2d 122 (D.D.C. 2008) (Iran); *Holland v. Islamic Republic of Iran*, 545 F. Supp. 2d 120 (D.D.C. 2008) (Iran); *In Re Terrorist Attacks of September 11, 2001*, 538 F.3d 71 (2d. Cir. 2008); *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200 (D.D.C. 2008) (Iran); *La Reunion Aeriennne v. Socialist People’s Libyan Arab Jamahiriya*, 533 F.3d 837 (D.C. Cir. 2008) (Libya); *Lawton v. Republic of Iraq*, 581 F. Supp. 2d 43 (D.D.C. 2008) (Iraq); *Massie v. Government of Democratic People’s Republic of Korea*, 592 F. Supp. 2d 57 (D.D.C. 2008) (North Korea); *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268 (D.D.C. 2008) (Iran); *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216 (D.D.C. 2008) (Libya); *Rimkus v. Islamic Republic of Iran*, 575 F. Supp. 2d 181 (D.D.C. 2008) (Iran); *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243 (S.D. Fla. 2008) (Cuba); *Steen v. Islamic Republic of Iran*, No. 00-3037, 2008 WL 1800778 (D.D.C. Apr. 21, 2008) (Iran); *Wachsman v. Islamic Republic of*

(continued...)

codified as Section 1605(a)(7) of the FSIA – was designed to “give American citizens an important economic weapon against . . . outlaw states that sponsor terrorism by providing ‘safe havens, funding, training, supplying weaponry, medical assistance, false travel documentation, and the like.’”<sup>97</sup> Such an exception had been sought by victims’ groups for a long time but had met resistance from the Executive Branch out of fear that it “might cause other nations to respond in kind, thus potentially subjecting the American government to suits in foreign countries for actions taken in the United States.”<sup>98</sup>

Ultimately, Congress settled on a compromise approach which permitted U.S. nationals to sue foreign states (and their agencies and instrumentalities) for terrorist acts in limited circumstances, the most notable being that the plaintiffs must be U.S. nationals, and the defendant must be designated by the United States Government as a “state sponsor of terrorism” either at the time of the terrorist act, or at some later time as a result of the act which is the subject of the suit.<sup>99</sup> Over the past decade, scores of cases have resulted in substantial damages awards against Libya, Iran, Syria, Cuba and Sudan for terrorist acts committed by these states or committed by others but sponsored by these states. In 2008, for the first time, a terrorist case also went to judgment against North Korea.<sup>100</sup>

***Resolution of Libyan Claims.*** Of particular note in 2008 was the determination by the Executive Branch to espouse<sup>101</sup> all pending terrorism-related claims against Libya as part of a comprehensive settlement with the African nation to settle outstanding litigation and pave the way for renewed economic ties with the U.S. The determination followed a January 2008 decision by a District of Columbia federal district court awarding the families and estates of seven American citizens \$6 billion in damages against the Libyan government and six Libyan

---

(continued)

*Iran*, 537 F. Supp. 2d 85 (D.D.C. 2008) (Iran); *Welch v. Islamic Republic of Iran*, 545 F. Supp. 2d 120 (D.D.C. 2008) (Iran); *Wyatt v. Syrian Arab Republic*, 266 Fed. Appx. 1, 2008 WL 441828 (D.C.Cir. Jan. 25, 2008) (Syria); *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008) (Sudan); *Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27 (D.D.C. 2008) (Iran); *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009) (Iraq); *Bodoff v. Islamic Republic of Iran*, 567 F. Supp. 2d 141 (D.D.C. 2008) (Iran); *Blais v. Islamic Republic of Iran*, 567 F. Supp. 2d 143 (D.D.C. 2008) (Iran); *Stethem v. Islamic Republic of Iran*, 568 F. Supp. 2d 1 (D.D.C. 2008) (Iran); *Prevatt v. Islamic Republic of Iran*, 567 F. Supp. 2d 144 (D.D.C. 2008) (Iran); *Haim v. Islamic Republic of Iran*, 567 F. Supp. 2d 146 (D.D.C. 2008) (Iran); *Simpson v. Socialist People’s Libyan Arab Jamahiriya*, 529 F. Supp. 2d 80 (D.D.C. 2008) (Libya).

<sup>97</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F.3d at 88 (quoting H.R.Rep. No. 104-383, at 62 (1995)).

<sup>98</sup> *Id.* (quoting *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 89 (D.C. Cir. 2002)).

<sup>99</sup> Currently, that list consists of Cuba, Iran, Syria and Sudan. Countries that were once on the list but have since been removed include Iraq, Afghanistan, North Korea, South Yemen and Libya.

<sup>100</sup> *Massie v. Government of the Democratic People’s Republic of Korea*, 592 F. Supp. 2d 57 (D.D.C. 2008).

<sup>101</sup> Espousal refers to an act by the President, consistent with his constitutional authority in the realm of foreign relations, to compromise or settle the claims of U.S. nationals against a foreign sovereign. The practice goes back over 200 years and has received congressional acquiescence throughout its history, leading the Supreme Court to conclude: “[t]hat the President’s control of foreign relations includes the settlement of claims is indisputable.” *See American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415 (2003).



officials for their involvement in the bombing of a French airliner in 1989.<sup>102</sup> The judgment was the first ever terrorism judgment in a contested litigation with a foreign state. Faced with the possibility of having its assets in the United States attached for purposes of satisfying this enormous judgment, Libya entered into negotiations with the United States to resolve all outstanding claims in exchange for a full release.<sup>103</sup> In October 2008, Libya deposited \$1.5 billion into an account for the payment of claims to victims of Libyan terrorist acts in exchange for its renewed immunity from suit for claims brought under the Terrorist Exception.

***Practical Challenges under § 1605(a)(7).*** In practice, litigants have faced hurdles in successfully adjudicating their terrorism-related claims against foreign states.<sup>104</sup> First, until recent legislative changes, the statute did not provide a cause of action against foreign states, but only waived immunity for terrorism-related claims. Many cases were delayed, or in some cases, limited in scope, as the plaintiffs were required to prove an entitlement to relief under applicable – but often inconsistent – state laws.<sup>105</sup> Plaintiffs also have experienced difficulties enforcing their judgments against foreign states – most often obtained by default – because of the strict standards for reaching foreign sovereign assets even with a finding of liability.

***The Lautenberg Amendments to the Terrorism Exception.*** To address certain of these challenges, on January 28, 2008, the President signed into law the National Defense Authorization Act for Fiscal Year 2008 (“NDAA”).<sup>106</sup> Section 1083 of the NDAA replaced Section 1605(a)(7) with a new “terrorism exception” – codified as Section 1605A – with certain significant plaintiff-friendly modifications. Among the most significant, the new statute (a) expressly provided plaintiffs with a federal cause of action against state sponsors of terrorism; and (b) allowed plaintiffs to seek punitive damages.<sup>107</sup> Congress also permitted plaintiffs with

---

<sup>102</sup> *Pugh v. Socialist People’s Libyan Arab Jamahiriya*, 530 F. Supp. 2d 216 (2008).

<sup>103</sup> Libya was removed from the list of state sponsors of terrorism in 2006, but this did not retroactively affect outstanding cases brought during the time of Libya’s designation.

<sup>104</sup> Perhaps recognizing these hurdles, or maybe simply as a result of the horrific nature of the claims themselves, courts also have shown patience (and, in some circumstances, leniency) in allowing plaintiffs to assert a proper claim under the Terrorism Exception. That trend continued in 2008 as courts identified deficiencies in plaintiffs’ claims but provided guidance to the plaintiffs on how to remedy them in lieu of dismissal. *See, e.g., Simpson v. Socialist People’s Libyan Jamahiriya*, 529 F. Supp. 2d 80 (D.D.C. 2008); *Wachsmann v. Islamic Republic of Iran*, 537 F. Supp. 2d 85 (D.D.C. 2008); *Ben-Rafael v. Islamic Republic of Iran*, 540 F. Supp. 2d 39, 58 (D.D.C. 2008) (allowing infant children to state claims for “emotional distress” and permitting wrongful death claim to proceed under D.C. law though a “literal reading” of the statute “may arguably bar recovery for injuries occurring outside the District”).

<sup>105</sup> *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53 (D.D.C. 2008); *see also Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27 (D.D.C. 2008) (finding certain family members unable to state claim under California law either because of attenuated family relationships or because of an inability to demonstrate actual emotional distress).

<sup>106</sup> Pub. L. No. 110-181, 122 Stat. 3.

<sup>107</sup> *See Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53 (D.D.C. 2008) (\$150,000,000 in punitive damages); *Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008) (\$300,000,000 in punitive damages – or “three times defendant Iran’s annual expenditure on terrorism”).

“pending cases” to invoke the new statute, provided they “re-filed” their suit based on Section 1605A within 60 days of its passage.<sup>108</sup>

One recurring question the courts faced in 2008 was how this new statute affected cases brought under the now-stricken prior terrorism exception to the FSIA, but in which the plaintiffs did *not* avail themselves of the limited opportunity to recast their claims under the NDAA. In several such cases, the sovereign defendants argued that the courts no longer retained jurisdiction over those cases because the alleged statutory basis for immunity no longer applied.<sup>109</sup> The D.C. Circuit resolved this question in *Simon v. Republic of Iraq*,<sup>110</sup> holding that the courts “retained jurisdiction over cases pending pursuant to former § 1605(a)(7) when the Congress enacted the NDAA.”<sup>111</sup> However, plaintiffs who failed to amend their complaints to state a claim under the NDAA have not been permitted to avail themselves of the benefits of the new statute.<sup>112</sup>

**Constitutional Challenge.** In 2008, the D.C. Circuit also addressed a constitutional challenge to the FSIA Terrorism Exception. In *Owens v. Republic of Sudan*,<sup>113</sup> Sudan argued that the exception constituted an unconstitutional delegation of power to the Executive Branch because it authorized the Secretary of State to determine the jurisdiction of the federal courts by designating state sponsors of terrorism subject to suit in the United States. The D.C. Circuit rejected Sudan’s argument, finding that Congress did not empower the Executive Branch to define the jurisdiction of the courts, but rather only determined that jurisdiction should rest, in part, on a “factual finding” by the Executive Branch, which it already was authorized to make pursuant to prior legislation.<sup>114</sup> The court found this especially appropriate given the unique constitutional powers reserved for the Executive Branch in foreign affairs. The court also

---

<sup>108</sup> See 28 U.S.C. § 1605A. In several 2008 cases, courts refused to allow plaintiffs who previously had obtained default judgments against state sponsors of terrorism, without appeal, to avail themselves of the post-judgment benefits of the new statute because their cases were not “pending” at the time of the NDAA’s passage. See *Bodoff v. Islamic Republic of Iran*, 567 F. Supp. 2d 141 (D.D.C. 2008); *Blais v. Islamic Republic of Iran*, 567 F. Supp. 2d 143 (D.D.C. 2008); *Prevatt v. Islamic Republic of Iran*, 567 F. Supp. 2d 144 (D.D.C. 2008); *Stethem v. Islamic Republic of Iran*, 568 F. Supp. 2d 1 (D.D.C. 2008); *Haim v. Islamic Republic of Iran*, 567 F. Supp. 2d 146 (D.D.C. 2008); *Peterson v. Islamic Republic of Iran*, No. C08-80030-MISC, 2008 WL 5046327 (N.D. Cal. Nov. 24, 2008); *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200 (D.D.C. 2008); *Beer v. Islamic Republic of Iran*, 574 F. Supp. 2d 1 (D.D.C. 2008); *Welch v. Islamic Republic of Iran*, 545 F. Supp. 2d 118 (D.D.C. 2008); *Higgins v. Islamic Republic of Iran*, 545 F. Supp. 2d 122 (D.D.C. 2008); *Holland v. Islamic Republic of Iran*, 545 F. Supp. 2d 120 (D.D.C. 2008); *Steen v. Islamic Republic of Iran*, No. 00-3037, 2008 WL 1800778 (D.D.C. Apr. 21, 2008).

<sup>109</sup> See, e.g., *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008).

<sup>110</sup> 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009).

<sup>111</sup> Courts uniformly have held that Section 1605(a)(7) continues to apply to actions brought prior to the effective date of the NDAA. See *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1251 (S.D. Fla. 2008); *Bakhtiar v. Islamic Republic of Iran*, 571 F. Supp. 2d 27 (D.D.C. 2008).

<sup>112</sup> See, e.g., *Bakhtiar*, 571 F. Supp. 2d at 38; *Simon v. Republic of Iraq*, 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009); *but see Acosta v. Islamic Republic of Iran*, 574 F. Supp. 2d 15 (D.D.C. 2008) (U.S. family members of assassinated Israeli citizen awarded \$300 million in punitive damages against Iran after amending their complaint to state a claim under § 1605A).

<sup>113</sup> *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008).

<sup>114</sup> *Id.* at 889.

pointed out that this deference to Executive fact-finding is not unique to the Terrorism Exception – the entire FSIA “depends upon the President’s decision to recognize an entity as a foreign nation because the FSIA only applies to recognized nations.”<sup>115</sup>

**Third-party claims.** Finally, the D.C. Circuit ruled in *La Réunion Aérienne v. Socialist People’s Libyan Arab Jamahiriya*<sup>116</sup> that the Terrorism Exception provides jurisdiction not only for direct claims by victims of terrorism against their aggressors, but also for third parties to whom the victims have assigned such claims, e.g., to recover insurance payments. Libya argued that once the claims are assigned, they no longer are for money damages “for personal injury or death” under the FSIA, but rather for money damages for payments made to the victims themselves under commercial insurance contracts. The D.C. Circuit disagreed, holding that the payments made to the victims were specifically for money damages “for the deaths of the victims” and, therefore, the third-party insurers simply stepped into the shoes of the victims for purposes of a claim under the Terrorism Exception. The court also emphasized the language in the statute which allows claims when *either* the victim *or* the “claimant” is a U.S. national. Since the victims were U.S. nationals, the claims were valid and sustainable.

**Other claims.** Several 2008 cases involved claims for alleged “extrajudicial killings” or other terrorist acts against defendants not subject to the Terrorism Exception because they were not designated “state sponsors of terrorism” by the United States Government. Plaintiffs in these cases tried a variety of mechanisms to avoid the limitations of the FSIA, with mixed results.

In *Belhas v. Ya’Alon*,<sup>117</sup> plaintiffs sought damages against a retired general of the Israeli Defense Forces resulting from injuries and death suffered during a battle between Israeli and Hezbollah forces in 1996. Plaintiffs asserted claims under the Torture Victims Protection Act<sup>118</sup> and the Alien Tort Claims Act, and also argued that the defendant should be liable for violations of *jus cogens* norms of international law. The court dismissed the claims, finding that none of the referenced causes of action abrogated the defendant’s immunity under the FSIA.<sup>119</sup>

Plaintiffs also sought to bring terrorism-related claims against foreign sovereigns under the federal Anti-Terrorism Act (“ATA”).<sup>120</sup> In one 2008 case,<sup>121</sup> the court refused to allow claims against Iraq to go forward under the Act, rejecting the plaintiffs’ argument that the Terrorism Exception should be applied retroactively to allow the previously enacted ATA to be

---

<sup>115</sup> *Id.* at 892.

<sup>116</sup> 533 F.3d 837 (D.C. Cir. 2008).

<sup>117</sup> 515 F.3d 1279 (D.C. Cir. 2008).

<sup>118</sup> 28 U.S.C. § 1350, note.

<sup>119</sup> The court specifically referenced the Terrorism Exception to demonstrate that Congress knows how to create exceptions to sovereign immunity in specific cases, including those involving terrorism, but chose not to do so in connection with the TVPA or ATCA. *Id.* at 1289.

<sup>120</sup> 18 U.S.C. §§ 2331 *et seq.* (2000).

<sup>121</sup> *Lawton v. Republic of Iraq*, 581 F. Supp. 2d 43 (D.D.C. 2008).

used against foreign states.<sup>122</sup> However, in *Sokolow v. Palestine Liberation Organization*,<sup>123</sup> the plaintiffs were permitted to proceed with ATA claims against the Palestine Liberation Organization and the Palestinian Interim Self-Government Authority because neither the PLO or the PA met the definition of “state” under United States or international law. Therefore, neither was entitled to immunity under the FSIA.

Finally, in a decision with potentially significant ramifications for future sovereign litigation, the Second Circuit refused to allow victims of the September 11, 2001 attacks to bring claims against the Saudi Arabian Government under the FSIA’s tort exception because the Terrorism Exception provided the exclusive basis for any “claims based on terrorism.”<sup>124</sup> The court reasoned that plaintiffs should not be permitted to “shoehorn a claim properly brought under one exception into another.”<sup>125</sup> One problem posed by the Second Circuit’s analysis is that claims against Saudi Arabia could *not* “properly be brought” under any other exception to the FSIA because Saudi Arabia is not on the list of “state sponsors of terrorism.” Moreover, the terrorism exception specifically addresses terrorism claims based on acts occurring *outside* the United States, while the tort exception covers domestic torts. It will be interesting to see whether future courts adopt the Second Circuit’s reasoning or recognize the different purposes and scopes of the FSIA’s various exceptions when deciding whether to allow claims against sovereign entities to proceed.

---

<sup>122</sup> Since Iraq was subject to jurisdiction under the Terrorism Exception, the court addressed only whether plaintiffs could state a substantive claim against the sovereign under the ATA.

<sup>123</sup> 583 F. Supp. 2d 451 (S.D.N.Y. 2008).

<sup>124</sup> 538 F.3d at 90.

<sup>125</sup> *Id.* at 89.

#### IV. ENFORCEMENT OF AWARDS AGAINST FOREIGN STATES

Property in the United States of a foreign state (including an agency or instrumentality of a foreign state) generally is immune from attachment under the FSIA,<sup>126</sup> unless the property fits into an exception under § 1610(a) or (b) and a reasonable time has passed from the time judgment is entered.<sup>127</sup> Thus, the FSIA permits post-judgment attachment of a foreign state's property located in the United States, if the property is used for a commercial activity in the United States and the property meets one of several exceptions to attachment immunity listed in §1610.<sup>128</sup> The standard for attaching the property of an *agency or instrumentality* is more relaxed. Property of an agency or instrumentality of a foreign state is subject to attachment where that agency or instrumentality is “engaged in commercial activity in the United States,” irrespective of whether the property itself was used for commercial activity within the U.S.<sup>129</sup> This exception to attachment immunity applies where the agency or instrumentality has waived its immunity from attachment (either explicitly or implicitly), or in cases where the judgment relates to certain claims where the agency or instrumentality's jurisdictional immunity is waived automatically, such as those arising under certain of the §1605 exceptions to immunity.<sup>130</sup>

A series of cases in 2008 helps to demonstrate the current state of the law on attachment and execution under the FSIA, addressing these and other related issues, including waiver of immunity from pre-judgment attachment, attachment of third-party property, attachment of property of an agency or instrumentality, and damages for wrongful attachment.

***Discovery in Aid of Attachment.*** In the latest chapter of a long-standing case against Iran, plaintiff Jenny Rubin sought discovery and attachment pursuant to the “blocked” assets provision of the Terrorism Risk Insurance Act (“TRIA”) of Persian antiquities allegedly owned by the Islamic Republic of Iran but held by the University of Chicago.<sup>131</sup> The Northern District of Illinois district court found that although the FSIA and TRIA are silent with respect to discovery requests, they do not preclude discovery in aid of attachment. Rather, the court held that the Federal Rules of Evidence define the scope of discoverable evidence (*i.e.*, information

---

<sup>126</sup> For examples of property that always is immune from attachment, *e.g.*, property of foreign central banks, *see* 28 U.S.C. §§ 1611(a) and (b).

<sup>127</sup> 28 U.S.C. § 1610(c).

<sup>128</sup> Examples of these exceptions include claims where the foreign state has waived its immunity, the property was used for the commercial activity upon which the claim is based, the execution relates to a judgment based on expropriation of property, the judgment is based on an order confirming an arbitral award, or the judgment relates to a claim under the terrorism exception. For a complete list, *see* 28 U.S.C. §§ 1610(a)(1) – (7).

<sup>129</sup> 28 U.S.C. § 1610(b).

<sup>130</sup> Reflecting Congress's intention to facilitate the enforcement of terrorism judgments, the FSIA also includes special provisions regarding enforcement of judgments in terrorism cases. *See* 28 U.S.C. § 1610 note (the Terrorism Risk Insurance Act).

<sup>131</sup> *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2008 WL 2501996 (N.D. Ill. May 23, 2008), *modified on reconsideration*, 2008 WL 2502039 (N.D. Ill. June 23, 2008); *Rubin v. Islamic Republic of Iran*, 541 F. Supp. 2d 416 (D. Mass. 2008); *Rubin v. Islamic Republic of Iran*, No. 03 CV 9370, 2008 WL 192321 (N.D. Ill. Jan. 18, 2008).

that is reasonably calculated to lead to admissible evidence), while the FSIA and TRIA simply define the subset of Iran’s assets subject to attachment or execution.<sup>132</sup>

***Waiver of Pre-Judgment Attachment Immunity.*** To the extent that pre-judgment security for claims against a sovereign is treated as a form of “attachment,” immunity from pre-judgment attachment may be waived only by “*unmistakable and plain language.*”<sup>133</sup> In *Shipping Corp. of India Ltd. v. Jaldhi*, the court found that neither susceptibility to counterclaims under § 1607 nor attachment of the defendant’s funds amounted to an “unmistakable” or “clear and unambiguous” waiver of the plaintiff’s immunity to pre-judgment attachment. Thus, the court denied the defendant’s motion for counter-security.<sup>134</sup>

***Attachment of Third-Party Property.*** Property held by third parties in which a sovereign holds an interest generally is subject to attachment in satisfaction of judgment. But in *Peterson v. Islamic Republic of Iran*, the court quashed the plaintiffs’ post-judgment writs of attachment on the assets of third-party garnishees on the basis of sovereign immunity.<sup>135</sup> The plaintiff had obtained judgment against the Government of Iran for the bombings of the U.S. Embassy in Lebanon and sought to satisfy the judgment by attaching the property of two Japanese national banks and one Korean national bank. The court held that the assets of the banks were protected by sovereign immunity even though plaintiff sought to levy upon only the assets of Iran held by the bank and not the assets of the national banks themselves. The court also found that sovereign immunity protected the banks from jurisdiction and, thus, was a complete bar to attachment of assets in their possession. Thus, the court also denied plaintiffs’ motion to appoint a receiver because it would allow the plaintiffs “to do *indirectly* what they cannot do *directly.*”<sup>136</sup>

***Attaching Assets of an Agency or Instrumentality.*** Where a foreign state has waived immunity or otherwise is properly subject to jurisdiction, a judgment creditor may attach and execute against the foreign state’s property under §§ 1610(a) and (d) of the FSIA. In addition, courts have relied on the seminal case of *First National City Bank v. Banco Para El Comercio Exterior de Cuba (“Bancec”)*<sup>137</sup> to determine whether to permit attachment of the property of an agency or instrumentality of the state to satisfy a judgment against the state itself. The “*Bancec*” analysis is similar to the traditional “veil-piercing” analysis under U.S. law in that it applies a strong presumption of independence and requires a finding that the agency or instrumentality is an alter-ego of the sovereign or that that the sovereign exercises day-to-day control over the entity.

---

<sup>132</sup> *Rubin*, 2008 WL 192321.

<sup>133</sup> No. 08 Civ. 4328, 2008 WL 2596229, at \*1 (S.D.N.Y. June 17, 2008) (emphasis added).

<sup>134</sup> *Id.* at \*2.

<sup>135</sup> 563 F. Supp. 2d 268 (D.D.C. 2008).

<sup>136</sup> *Id.* at 278 (emphasis added).

<sup>137</sup> 462 U.S. 611, 629 (1983).

Some courts similarly apply a “core functions” analysis to determine whether to treat an agency or instrumentality as if it were the state itself for purposes of attachment. In *Aurelius Capital Partners, LP v. Republic of Argentina*,<sup>138</sup> the plaintiffs argued that Argentina had waived immunity from attachment, thereby enabling them to pursue assets held by Administracion Nacional de Seguridad Social (ANSES) – an agency or instrumentality of the Republic. The court agreed. Because the Republic of Argentina dominated the finances of ANSES and used ANSES to obtain funds for non-pension uses by the Government, the court found that ANSES’ predominant or “core” function was governmental and not commercial.<sup>139</sup> Therefore, ANSES was treated like the Argentine state itself and its assets were subject to attachment and execution to the same degree as assets of the Republic of Argentina itself.

***Potential Risks in Attaching Foreign Sovereign Assets.*** Attachment of foreign sovereign assets under the FSIA is not without significant risk. In one case decided by the Southern District of New York, *ETI v. Republic of Bolivia*,<sup>140</sup> the court awarded the defendant, Empresa Nacional de Telecomunicaciones Entel S.A., nearly \$1.4 million in damages for wrongful attachment. Under New York’s Civil Practice Law & Rules 6212, “attaching plaintiffs [are] strictly liable for all damages occasioned by the wrongful attachment” where such wrongful attachment is the proximate cause of the damage. Attorneys’ fees and costs were included in the award.<sup>141</sup>

---

<sup>138</sup> No. 07 Civ. 2715, 2008 WL 5203732 (S.D.N.Y. Dec. 11, 2008).

<sup>139</sup> The court found unavailing defendants argument that ANSES’s assets were protected under the *Bancec* strong presumption of independent status. Instead, the court found on the basis of Second Circuit precedent (*i.e.*, *Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir 2006)), that the relaxed agency or instrumentality standard for attachment was intended to target “public commercial enterprises,” and that this was tested by using the “core function” analysis to determine whether the core functions of the entity are predominantly governmental or commercial.

<sup>140</sup> *E.T.I. Euro Telecom Int’l N.V. v. Republic of Bolivia*, No. 08 Civ. 4247(LTS)(FM), 2008 WL 5170168, (S.D.N.Y. Dec. 9, 2008).

<sup>141</sup> In the same suit, the court denied the Republic of Bolivia’s motion for award of costs and damages against ETI. Bolivia claimed it was entitled to damages under the New York statute because it was a successful defendant in the suit. But the plaintiff had failed to successfully attach Bolivia’s assets. Further, although Bolivia claimed 97.5% ownership of Entel – sufficient to cloak it in immunity as an agency or instrumentality of Bolivia – it claimed no ownership in Entel’s assets that were *actually* attached. Thus, the court rejected Bolivia’s expansive reading of the statute that *any* successful defendant in the action could claim wrongful attachment damages, and limited recovery under NY CPLR 6212(e) *solely* to actual owners of the property that actually was attached.

## V. PRACTICAL ISSUES IN FSIA LITIGATION

The majority of cases under the FSIA involve the exceptions to immunity discussed above. In addition, 2008 FSIA opinions provide some useful guidance regarding some of the practical issues that arise in cases brought against foreign sovereigns. A brief review of these issues and decisions follows.

### A. SERVICE OF PROCESS

Service under the FSIA is governed by 28 U.S.C. §§ 1608(a) and (b). Those provisions set forth various acceptable methods of service, depending on whether the party being served is (a) a foreign state or political subdivision; or (b) an agency or instrumentality. Though the statute sets forth seemingly straightforward instructions for serving foreign sovereigns, parties in 2008 continued to test new methods of service to reach their foreign adversaries – methods that were generally met with disapproval by the courts.

One clear trend in 2008 was the courts' strict adherence to the sequential requirements of service under the FSIA. For example, Section 1608(a) requires a plaintiff to serve a foreign state using the designated methods of service set forth in the statute, *in order* – *i.e.*, using the next method only if all preceding methods are not available – as follows: (1) in accordance with a special arrangement between the plaintiff and the foreign state; (2) in accordance with an applicable international convention on service; (3) by mail, return receipt required, from the clerk of the court to the foreign state's ministry of foreign affairs; or (4) by diplomatic channels through the State Department in Washington, D.C. Multiple courts in 2008 emphasized that, because Congress expressly created a sequential method of service, any deviance from this strict sequential order without proper basis is facially invalid.<sup>142</sup> Sequential requirements also exist for service on agencies and instrumentalities under Section 1608(b).

Parties seeking to effect service also must be mindful of the local law in the jurisdiction where process is to be served. For example, in *Rice Corp. v. Grain Board of Iraq*,<sup>143</sup> the plaintiff was unable to serve an instrumentality of Iraq under §§ 1608(b)(1) or (2), because no special arrangement or international agreement at the time provided for the proper service of papers on that particular defendant. Thus, the plaintiff was required to serve the defendant under § 1608(b)(3)(C), *i.e.*, “consistent with the law of the place where service is to be made.” The plaintiff – seeking to ease the burdens of serving hard-to-reach defendants – served the defendant by e-mail, arguing that “there is no evidence stating that service by . . . email is ‘prohibited’ by Iraqi law.”<sup>144</sup> The court rejected this argument and found that, in the absence of *affirmative*

---

<sup>142</sup> See, e.g. *Hilaturas Miel, S.L. v. Republic of Iraq*, 573 F. Supp. 2d 781, 796, (S.D.N.Y. 2008) (finding that the plaintiff failed to strictly comply with § 1608 because it attempted service by diplomatic means under § 1608(a)(4) when service by Federal Express was available and would have complied with § 1608(a)(3)); see also *Sachs v. Republic of Austria*, No. C 08 1840, 2008 WL 1815810 (N.D. Cal. Apr. 12, 2008) (finding that, before it would permit plaintiff to serve foreign agent or instrumentality under § 1608(b)(3), plaintiff would have to convince the court that service under § 1608(b)(1) and (2) was impossible).

<sup>143</sup> 582 F. Supp. 2d 1309 (E.D. Cal. 2008).

<sup>144</sup> *Id.* at 1312.



evidence showing that service by e-mail was acceptable under Iraqi law, such service was invalid.

Finally, in a case highlighting the continuing interplay of the Executive and Judicial Branches in FSIA matters – even in the post-Tate Letter statutory scheme – a District of Columbia federal district court held that plaintiff’s service on a Chinese cabinet official while he was on a diplomatic trip to Washington, D.C. was invalid.<sup>145</sup> The court did not base this decision on any statutory ground. Instead, the court wrote a letter to the State Department seeking the Executive Branch’s guidance on whether the court should exercise jurisdiction and hear the case. The State Department submitted a Suggestion of Immunity and Statement of Interest pursuant to 28 U.S.C. § 517, asking the court to find that, as a member of a special diplomatic mission, the Chinese official should be immune from service and therefore not subject to the court’s jurisdiction.<sup>146</sup> The court agreed, deferring to the Executive Branch and holding further that “a suggestion of immunity by the Executive Branch on behalf of a head of state or diplomatic agent is binding upon the federal courts and must be accepted as conclusive.”<sup>147</sup>

## **B. DUE PROCESS AND PERSONAL JURISDICTION**

The FSIA confers not only subject matter jurisdiction over certain claims against foreign sovereigns, but personal jurisdiction as well. As a general rule, the FSIA provides that personal jurisdiction over foreign sovereigns exists where subject matter jurisdiction has been established and service of process has been accomplished pursuant to 28 U.S.C. § 1608.<sup>148</sup> Some sovereign defendants have argued, however, that courts also must consider the traditional constitutional due process requirements – *i.e.*, that there must be “sufficient minimum contacts between the foreign state and the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.”<sup>149</sup> In other words, these sovereigns have argued that foreign states must be afforded the same constitutional protection as individuals under the due process clause of the United States Constitution.

In 2008, the D.C. Circuit reaffirmed its longstanding position that, under the FSIA, foreign states are not entitled to any such constitutional due process rights because “foreign states are not ‘persons’ protected by the Fifth Amendment.”<sup>150</sup> In doing so, the court quoted its

---

<sup>145</sup> *Weixum v. Xilai*, 568 F. Supp. 2d 35 (D.D.C. 2008).

<sup>146</sup> *Id.* at 36.

<sup>147</sup> *Id.* at 37 (citing *Ye v. Zemin*, 383 F.3d 620, 625-26 (7th Cir. 2004)); *see also First Am. Corp.*, 948 F. Supp. at 1119 (citing *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943)); *Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994); *Abdulaziz v. Metro. Dade County*, 741 F.2d 1328, 1331 (11th Cir. 1984); *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949).

<sup>148</sup> *Kirschenbaum v. Islamic Republic of Iran*, 572 F. Supp. 2d 200 (D.D.C. 2008).

<sup>149</sup> *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991) (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

<sup>150</sup> *Wyatt v. Syrian Arab Republic*, 266 Fed. Appx. 1, 2008 WL 441828 (D.C.Cir. Jan. 25, 2008) (quoting *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002)).

prior decision in *Price v. Socialist People's Libyan Arab Jamahiriya*, where it set forth several grounds for its conclusion that foreign states are not persons with due process rights, including, *inter alia*, that the Supreme Court had ruled that the U.S. states are not “persons” for purposes of the due process clause, and foreign states therefore were entitled to no greater deference.<sup>151</sup> Nationwide, most federal courts that have subsequently considered this question have followed the ruling in *Price*.<sup>152</sup>

Still, the D.C. Circuit’s view has not been universally accepted. In 2008, the Second Circuit continued to follow its own pre-*Price* precedent that personal jurisdiction under the FSIA must comport with the due process clause. Thus, in *In re Terrorist Attacks on September 11, 2001*, the court declined to reach the broader question of whether foreign states have due process rights, but nevertheless required that there be sufficient minimum contacts with the foreign sovereign to support jurisdiction under the FSIA.<sup>153</sup>

### C. INTERLOCUTORY APPEALS

Special rules apply to appeals in litigation involving foreign sovereigns. Federal appellate courts ordinarily do not entertain appeals from decisions that do not conclusively end the litigation (“interlocutory appeals”). This includes, *e.g.*, appeals of orders denying a motion to dismiss. Yet courts have held that when such an order subjects a foreign sovereign to jurisdiction, it is appealable under the “collateral order doctrine” because “sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits.”<sup>154</sup> In other words, the courts recognize that to prohibit a foreign sovereign from appealing the denial of its motion to dismiss would thwart the purpose of sovereign immunity, which is to protect sovereigns from the burdens of trial and pre-trial proceedings.

### D. JURISDICTIONAL DISCOVERY

Because sovereign immunity is designed to protect sovereign governments not only from judgments of foreign courts but also the “burdens of litigation,” U.S. courts generally are wary of subjecting foreign sovereigns to jurisdictional discovery absent a compelling showing by the plaintiff. This issue traditionally arises when a plaintiff seeks to prove that a foreign sovereign

---

<sup>151</sup> *Price*, 294 F.3d at 96.

<sup>152</sup> See *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); *O’Bryan v. Holy See*, 471 F. Supp. 2d 784, 794 (W.D. Ky. 2007).

<sup>153</sup> *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 85 n.11 (2d Cir. 2008) (citing *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1020 (2d Cir. 1991)).

<sup>154</sup> *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990); see also *Owens v. Republic of Sudan*, 531 F.3d 884 (D.C. Cir. 2008) (“United States Courts of Appeal do not ordinarily have jurisdiction over interlocutory appeals . . . such as the denial of a motion to dismiss. But when such a denial subjects a foreign sovereign to jurisdiction, the order is ‘subject to interlocutory appeal under the collateral order doctrine’”) (citations omitted).

falls within one of the exceptions of the FSIA, but requires additional evidence to make such a showing – evidence that may be obtained only through jurisdictional discovery.

In 2008, courts continued to recognize that “a tension exists between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign’s . . . legitimate claim to immunity from discovery.”<sup>155</sup> In *Peterson v. Islamic Republic of Iran*, the D.C. District Court, quoting an earlier D.C. Circuit opinion, stated:

jurisdictional discovery should not be ordered when to do so would frustrate the significance and benefit of entitlement to immunity from suit. . . . Rather, jurisdictional discovery should be permitted only if it is possible that the plaintiff could demonstrate the requisite jurisdictional facts sufficient to constitute a basis for jurisdiction and it should not be allowed when discovery would be futile.<sup>156</sup>

In short, unless a plaintiff alleges specific facts that could make jurisdiction proper under one of the FSIA exceptions, courts generally will not subject foreign sovereigns to jurisdictional discovery.<sup>157</sup>

However, the court in *Intelsat Global Sales and Marketing, Ltd. v. Community of Yugoslav Posts Telegraphs & Telephones*<sup>158</sup> adopted a more lenient, plaintiff-friendly approach. In that case, the defendant argued that it was not an “organ” of a foreign state as the plaintiff alleged, but the D.C. Circuit held that limited jurisdictional discovery should be permitted where the plaintiff had made non-conclusory allegations that jurisdiction was proper, and there was a likelihood that discovery might assist the court in making a decision regarding immunity.<sup>159</sup>

## E. REMOVAL

Under certain circumstances, pursuant to 28 U.S.C. § 1446(b), a defendant may remove a case filed against it from state to federal court,<sup>160</sup> as long as it does so within 30 days. But where the defendant is a foreign state under the FSIA, Congress has allowed for greater leniency, providing expressly that the removal period may be extended for cause.<sup>161</sup> The majority of

---

<sup>155</sup> *Peterson v. Islamic Republic of Iran*, 563 F. Supp. 2d 268, 274 (D.D.C. 2008) (citations omitted).

<sup>156</sup> *Id.* (quoting *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996)).

<sup>157</sup> See also *Intelsat Global Sales & Mktg., Ltd. v. Community of Yugoslav Posts Telephones & Telegraphs*, 534 F. Supp. 2d 32, 34 (D.D.C. 2008) (“At minimum, a plaintiff must allege some facts upon which jurisdiction could be found after discovery is completed”) (citations omitted).

<sup>158</sup> 534 F. Supp. 2d 32 (D.C. Cir. 2008).

<sup>159</sup> *Doe v. Bin Laden*, 580 F. Supp. 2d 93, 96 (D.D.C. 2008) (“[A] court should allow for limited jurisdictional discovery if a plaintiff shows a nonconclusory basis for asserting jurisdiction and a likelihood that additional supplemental facts will make jurisdiction proper”) (citations omitted).

<sup>160</sup> Although the vast majority of cases against foreign sovereigns are brought in the federal courts, in some instances litigants have chosen to pursue actions in the state courts as well. See, e.g., *Hyundai Corp. v. Republic of Iraq*, 794 N.Y.S.2d 327 (1st Dep’t 2005).

<sup>161</sup> See 28 U.S.C. § 1441(d).

litigation over this issue in 2008 centered around what constitutes sufficient “cause” to justify removal by a foreign state after the thirty-day time limit. Courts in 2008 identified specific factors that district courts should consider when answering this question.

In *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*,<sup>162</sup> the Tenth Circuit addressed this issue for the first time. The court held that mere sovereign status does not entitle the defendant to an extension. Rather, the foreign sovereign bears the burden of establishing an “affirmative” and “meaningful” justification for its delay. The court set forth four factors to consider when deciding a foreign sovereign’s request to extend the time period for removal: (1) the danger of prejudice to the nonmoving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the sovereign acted in good faith.<sup>163</sup>

The Eastern District for New York outlined a similar test for determining whether to permit a foreign sovereign’s removal after the thirty-day time limit: “[S]ome of the factors to consider [are] the purpose of the removal statute, the extent of prior activity in the state system, the prejudice to both parties, the effect on the substantive rights of the parties and any intervening equities . . . [a]nother factor is the failure of service of process to conform to the requirements of FSIA.”<sup>164</sup>

## F. DEFAULT JUDGMENTS

If a foreign sovereign is properly served with a complaint but refuses to answer, move or otherwise respond, the court may, in its discretion, grant a default judgment in favor of the plaintiff.<sup>165</sup> Such judgments are not uncommon in foreign sovereign litigation, as foreign states often choose to ignore claims asserted against them in U.S. courts, for political, economic, practical, or other reasons.

The standard for a default judgment under the FSIA affords substantial discretion to the trial courts. The statute merely establishes that “[n]o judgment by default shall be entered . . . against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.”<sup>166</sup> Moreover, in evaluating whether a plaintiff has established a claim or right to relief against a foreign state, “the court may accept as true the plaintiffs’ uncontroverted evidence, including proof by affidavit.”<sup>167</sup>

---

<sup>162</sup> 533 F.3d 1183 (10th Cir. 2008).

<sup>163</sup> *Id.* at 1186-87 (citations omitted).

<sup>164</sup> *James v. Government of St. Lucia*, No. 08-CV-0067, 2008 WL 4410959, \*2 (E.D.N.Y. Sept. 29, 2008).

<sup>165</sup> *See, e.g., Lasheen v. Loomis Co.*, No. 01-0227, 2008 WL 2880408, at \*3 (E.D. Cal. July 22, 2008).

<sup>166</sup> 28 U.S.C. § 1608(e).

<sup>167</sup> *Saludes v. Republica de Cuba*, 577 F. Supp. 2d 1243, 1246 (S.D. Fla. 2008).

While this standard may appear plaintiff-friendly, courts also continue to recognize the time-honored theory that “the interests of justice are best served by trials on the merits, not by default.”<sup>168</sup> Thus, even when courts do grant default judgments, it is often only after a thorough analysis of the plaintiff’s claims. For example, in *Lasheen v. Loomis Co.*,<sup>169</sup> the court considered the following factors: (1) the possibility of prejudice to the plaintiff if the judgment were not entered; (2) the merits of plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning the material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits.

Several courts in 2008 denied default judgment motions by plaintiffs who – despite the liberal standard – failed to convince the court sufficiently of their entitlement to judgment on the merits against absent foreign sovereigns.<sup>170</sup> And still other courts set aside previously entered default judgments upon the defendant’s request, demonstrating their preference for resolving the case on the merits. For example, in *Tohme v. Sebaaly*,<sup>171</sup> the Eastern District of Michigan district court granted a foreign sovereign’s request to set aside a default judgment, because (1) the sovereign’s delay in answering the complaint did not prejudice the plaintiff; (2) the sovereign eventually filed an answer, albeit untimely, raising several affirmative defenses; and (3) there was no evidence that the foreign sovereign had intended to thwart the judicial proceedings, or was reckless in disregarding the effect of its conduct on the proceedings.

Thus, while courts are willing and able to grant default judgments against foreign sovereigns that choose not to participate in U.S. litigation, courts have continued to demonstrate reluctance to render final judgment in the absence of the sovereign defendants.

## G. RELATED JURISPRUDENTIAL AND JURISDICTIONAL ISSUES

The FSIA is not the only basis on which a U.S. court may decline to exercise jurisdiction over a foreign sovereign defendant or to allow the case to proceed to the merits. The following are some examples of other jurisprudential and jurisdictional considerations addressed by courts in 2008 that may lead a court to decline to hear a claim against a foreign sovereign.

***Political Question Doctrine.*** Two notable FSIA cases in 2008 considered the application of the political question doctrine to bar claims against foreign sovereigns in U.S. courts. In each case, the court looked to statements by the Executive Branch to determine whether allowing the case to continue would seriously impede United States foreign policy interests.

---

<sup>168</sup> *Tohme v. Sebaaly*, No. 07-10989, 2008 WL 878770, at \*2 (E.D. Mich. Mar. 28, 2008) (citing *United Coin Meter v. Seaboard Coastline R.R.*, 705 F.2d 839, 846 (6th Cir. 1983)).

<sup>169</sup> No. 01-0227, 2008 WL 2880408, at \*3 (E.D. Cal. July 22, 2008).

<sup>170</sup> See, e.g., *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131 (D.D.C. 2008) (refusing to enter default judgment because plaintiffs’ pleadings did not sufficiently prove that the foreign sovereign fell within the commercial activity exception, or that it had interfered with the plaintiff’s contract); *Almon v. Caplan*, No. 2:07-10219, 2008 WL 3010619 (E.D. Mich. Aug. 4, 2008).

<sup>171</sup> No. 07-10989, 2008 WL 878770, at \*2 (E.D. Mich. Mar. 28, 2008).

In *Freund v. Republic of France*,<sup>172</sup> the Southern District of New York found that it did not have jurisdiction to hear a claim brought under the takings exception to the FSIA by Holocaust survivors against France, the Société Nationale des Chemins de Fer Français (SNCF), and the Caisse des Dépôts et Consignations (CDC). The court also found that, even if it had jurisdiction over the claim, abstention was appropriate under the political question doctrine and for reasons of international comity.

The court found abstention appropriate under the political question doctrine based on one of the tests enumerated by the Supreme Court in *Baker v. Carr*,<sup>173</sup> explaining that “[u]nder the fourth *Baker* test, a ‘lack of respect’ to the Executive Branch would result if the Court were to disregard the Executive’s declared preference” to resolve these claims ‘outside of litigation.’”<sup>174</sup> The United States had filed a Statement of Interest in the case recommending dismissal “on any valid legal ground.”<sup>175</sup> The United States had previously entered into an Executive Agreement with France which stated that it was in the interests of the two nations to establish a mechanism to resolve claims by Holocaust survivors and their heirs that was “non-adversarial and non-confrontational, and outside of litigation.”<sup>176</sup> The Agreement represented an effort by the U.S. and France to ensure prompt compensation for Holocaust victims through a commission France had established in 1999. In the Agreement, the parties agreed to dismiss pending expropriation claims against French banks. Because of the interests expressed by the United States and its unequivocal recommendation of dismissal, the court found abstention appropriate. The court further found that international comity required it to abstain from hearing the case because there were parallel proceedings before an adequate forum, the French commission on Holocaust compensation, with “‘substantially the same’” parties.<sup>177</sup>

In *Simon v. Republic of Iraq*, the D.C. Circuit found abstention inappropriate under the political question doctrine where defendants had not met the burden of demonstrating a clear conflict between United States foreign policy interests and claims brought by U.S. citizens against Kuwait and Iraq.<sup>178</sup> Iraq argued that the court should abstain from hearing the claims because allowing the case to proceed would be contrary to United States foreign policy. It cited a number of statements made by the U.S. President in support of its argument. The court rejected Iraq’s arguments, noting that the mere assertion that a claim *might* affect United States foreign relations was insufficient to warrant abstention under the political question doctrine.<sup>179</sup>

---

<sup>172</sup> 592 F. Supp. 2d 540 (S.D.N.Y. 2008).

<sup>173</sup> 369 U.S. 186 (1962).

<sup>174</sup> *Id.* at 572.

<sup>175</sup> *Id.* at 557, 573.

<sup>176</sup> *Id.* at 564.

<sup>177</sup> *Id.* at 575.

<sup>178</sup> 529 F.3d 1187 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 894 (2009).

<sup>179</sup> *Id.* at 1197.

***Forum Non Conveniens.*** Under the doctrine of *forum non conveniens*, a U.S. court may decline to hear a claim if accepting the claim would impose a serious inconvenience on the defendant and there exists an adequate alternative forum. In 2008, several courts addressed the question of what order to consider arguments based on sovereign immunity and other jurisprudential grounds for dismissal – a question that could impact significantly a foreign sovereign’s litigation burdens from an early stage.

In *MBI Group, Inc. v. Crédit Foncier du Cameroun*,<sup>180</sup> a District of Columbia federal district court held that a case may be dismissed on grounds of *forum non conveniens* without reaching the question of whether there is jurisdiction under the FSIA. This decision highlights potential tensions between a defendant’s sovereign immunity, on the one hand, and a plaintiff’s choice of forum, on the other. Relying on D.C. Circuit case law holding that jurisdictional discovery should not be authorized in FSIA cases where the defendant has raised other jurisdictional objections, the district court concluded that a court may dismiss a case based on *forum non conveniens* grounds *before* addressing the immunity issue, particularly where the case raises difficult issues that might require jurisdictional discovery.<sup>181</sup> Thus, the court spared the defendant from first having to submit to costly and time-consuming discovery to resolve the question of its sovereign status.

In contrast, both the District Court for the Western District of Texas and the D.C. Circuit Court of Appeals, analyzing their jurisdiction in the traditional order, started with a jurisdictional analysis under the FSIA and only then considered whether dismissal based on *forum non conveniens* was appropriate.<sup>182</sup> In both cases, the courts declined to dismiss based on *forum non conveniens*, holding that, while there were adequate alternative fora, the balance of private and public interest factors did not strongly favor dismissal.<sup>183</sup> The Texas court particularly emphasized the fact that dismissal for *forum non conveniens* should be the exception rather than the rule given the importance of respecting the plaintiff’s choice of forum.<sup>184</sup> Thus, in these cases, the plaintiff was able to force the defendant to submit to jurisdictional discovery to decide the sovereign immunity issue.

It remains an open question how courts will address requests by sovereign (or alleged sovereign) entities to dismiss their cases on other grounds without forcing them first to endure the burdens of providing their sovereign status, or even jurisdictional discovery, at the outset of the case.

---

<sup>180</sup> 558 F. Supp. 2d 21 (D.D.C. 2008).

<sup>181</sup> *Id.* at 27.

<sup>182</sup> See, e.g., *UNC Lear Services, Inc. v. Kingdom of Saudi Arabia*, No. SA 04 CA 1008-WRF, 2008 WL 2946059 (W.D. Tex. July 25, 2008); *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934 (D.C. Cir. 2008).

<sup>183</sup> See *id.*

<sup>184</sup> *UNC Lear*, 2008 WL 2946059, at \*20.

We are available to assist in addressing any questions you may have regarding the Foreign Sovereign Immunities Act or any of the issues raised in this 2008 Year in Review. Please contact any members of our FSIA litigation team:

#### **WASHINGTON, DC**

Stuart H. Newberger  
snewberger@crowell.com  
(p) 202.624.2649

Laurel Pyke Malson  
lmalson@crowell.com  
(p) 202.624.2576

Michael L. Martinez  
mmartinez@crowell.com  
(p) 202.624.2945

Aryeh S. Portnoy  
aportnoy@crowell.com  
(p) 202.624.2806

Katherine J. Nesbitt  
knesbitt@crowell.com  
(p) 202.624.2678

Lisa Savitt  
lsavitt@crowell.com  
(p) 202.624.2761

Daniel Vielleville  
dvielleville@crowell.com  
(p) 202.624.2768

John L. Murino  
jmurino@crowell.com  
(p) 202.624.2663

#### **NEW YORK**

Birgit Kurtz  
bkurtz@crowell.com  
(p) 212.803.4016

Pieter H.F. Bekker  
pbekker@crowell.com  
(p) 212.895.4305

William J. McSherry Jr.  
wmcsherry@crowell.com  
(p) 212.895.4207

#### **CALIFORNIA**

Kimberley Chen Nobles  
knobles@crowell.com  
(p) 949.263.8400

#### **LONDON**

Jane Wessel  
jwessel@crowell.com  
(p) +44.207.413.0071

#### **BRUSSELS**

Emmanuel Gybels  
egybels@crowell.com  
(p) +32.2.282.4082