

**Litigation Against "Foreign States" in the United States Courts:
An Overview of the American Foreign
Sovereign Immunities Act**

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**Presented at the Russian-American Symposium on Private International Law,
Moscow State Institute of International Relations**

29 June 2004

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By Guy S. Lipe and Amin Omar¹

I. Introduction²

Until 1952, the United States generally granted foreign sovereigns complete immunity from suit in courts in the United States. As early as 1812, the U.S. Supreme Court spoke on the subject, holding in *The Schooner Exchange v. M’Faddon*³ that the courts of the United States lacked jurisdiction over an armed ship of a foreign state found in a United States port. Later decisions interpreted the opinion in *The Schooner Exchange* to extend virtually absolute immunity to foreign sovereigns.⁴

The Schooner Exchange made it clear that foreign sovereign immunity is a matter of grace and comity on the part of the United States, and the courts therefore deferred to the decisions of the political branches on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities. Until 1952, the U.S. State Department usually requested immunity in all actions against friendly foreign sovereigns, but that year, the State Department announced the adoption of a “restrictive” theory of foreign sovereign immunity.⁵ Under that theory, immunity was confined to suits involving the

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² Much of the background information contained in the Introduction section of this paper is taken from *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

³ 7 Cranch 116 (1812)

⁴ See, e.g., *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926).

⁵ The change in policy was announced in a State Department letter known as “the Tate letter.”

foreign sovereign's public acts, but did not extend to cases arising out of the foreign sovereign's strictly commercial or private acts.

Application of the new theory proved troublesome. Initial responsibility for deciding questions of sovereign immunity fell primarily to the State Department, and foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led the State Department to suggest immunity in cases where immunity was not available under the "restrictive" theory. Additionally, foreign nations did not always make requests for immunity to the State Department, leaving the determination of the immunity issue to the court, by reference to prior State Department decisions. Thus, sovereign immunity determinations were sometimes made by the State Department, were sometimes made by the courts, and were subject to a variety of factors, including diplomatic considerations. The governing standards were not clear, and they were not uniformly applied.

Reacting to these problems, the United States Congress passed the Foreign Sovereign Immunities Act, 28 U.S.C. §§1602, *et. seq.* ("FSIA") in 1976. For the most part, the FSIA codified the restrictive theory of sovereign immunity, but under the FSIA, the courts make the sovereign immunity determinations without input from the State Department, applying the FSIA standards to the facts of particular cases.

Despite the policy goals that the FSIA's enactment was designed to achieve, the courts' application of the FSIA to specific cases has proven challenging. Many courts have criticized it as vague, requiring the courts to develop guidelines on a case-by-case

basis. The United States Court of Appeals for the Fifth Circuit had this to say about the FSIA:

The FSIA . . . is hardly a model of statutory clarity. While the Act states sweeping policy goals, it provides little guidance on specific situations that vary from the norm. The operative provisions of the FSIA are deliberately vague – leaving the courts to grasp for creative solutions to sticky questions of sovereign rights.⁶

II. Scope and Applicability of the FSIA

The FSIA is the exclusive basis of jurisdiction in state and federal courts in the United States in suits involving foreign states.⁷ The FSIA’s jurisdictional rules apply regardless of whether the conduct that is the subject of suit took place before or after the FSIA was enacted.⁸ The FSIA also provides the exclusive basis on which execution is permitted to satisfy a judgment against a foreign state.⁹ However, the FSIA only applies to actions against a “foreign state” as defined in the FSIA, and only those defendants who fall within the definition of “foreign state” in Section 1603 of the FSIA are entitled to the immunities from jurisdiction and the immunities from execution that are provided for in the FSIA. Thus, the applicability of the FSIA to a particular case turns on the question of whether the defendant falls within the definition of “foreign state” in the FSIA.

As with many of the other provisions of the FSIA, the definition of “foreign state” is not a model of clarity. The definition states that “a political subdivision of a foreign state” is a “foreign state,” but it does not define “political subdivision.” The definition

⁶ *Stena Rederi AB v. Comision de Contratos Del Comite Ejecutivo General*, 923 F.2d 380, 385 (5th Cir. 1991).

⁷ *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 485 n.5; *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989).

⁸ *The Republic of Austria v. Altmann*, ___ U.S. ___, 2004 WL 1238028 (June 7, 2004).

⁹ *Hercaire Int’l, Inc. v. Argentina*, 821 F.2d 559, 563 (11th Cir. 1987).

also states that “an agency or instrumentality of a foreign state” is a “foreign state,” but only if it meets certain general criteria, and as will be seen, *infra*, some of the protections of the FSIA that are available to the government and its political subdivisions are not available to an entity that is an “agency or instrumentality” of a foreign state. With regard to individual government officials, the FSIA’s definition of “foreign state” makes no explicit reference to such officials. The courts have been left the task of applying the general standards set out in the FSIA in determining whether particular entities or individuals who are sued in a United States court fall within the definition of “foreign state” under Section 1603. Some of the recurring issues that the courts have faced in carrying out that task are discussed below.

A. *Government Ministries, Consulates, and Departments*

As a general rule, government ministries have been held to be “political subdivisions of a foreign state,” and they therefore are entitled to “foreign state” status under the FSIA and are not subject to the limitations on the FSIA’s protections that apply to agencies and instrumentalities.¹⁰ Similarly, a government consulate is considered a “foreign state” under the FSIA.¹¹

¹⁰ See, e.g., *Magness v. Russian Federation*, 247 F.3d 609, 613 n. 7 (5th Cir. 2001) (characterizing Russian Ministry of Culture as political subdivision of Russia); *S & Davis Int’l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000) (characterizing Yemeni Ministry of Supply & Trade as political subdivision of Yemen for purposes of determining legal status of entity controlled by Ministry); *Filus v. LOT Pol. Airlines*, 819 F. Supp. 232, 236-37 (E.D.N.Y. 1993) (characterizing Ministry of Civil Aviation of USSR alternately as foreign state itself and as political subdivision thereof); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003) (holding that the Iranian Ministry of Foreign Affairs was to be “treated as the state of Iran itself rather than as its agent” because “the conduct of foreign affairs is an important and ‘indispensable’ governmental function”).

¹¹ *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1517 (9th Cir. 1987) (holding that the Mexican consulate in Puerto Rico was a political subdivision of a foreign state and entitled to “foreign state” status under the FSIA).

Government organizations that are not formal ministries or consulates have presented more difficult questions. For example, in *Transaero, Inc. v. La Fuerza Aerea Boliviana*,¹² the District of Columbia Court of Appeals held that the Bolivian Air Force was a foreign state rather than an agency or instrumentality of Bolivia because the air force’s “core functions” were “predominantly governmental.” The court said that the “armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the ‘foreign state’ itself, rather than a separate ‘agency or instrumentality’ of the state.”¹³ In *O’Connell Machinery Co. v. M.V. “Americana”*,¹⁴ the Second Circuit Court of Appeals concluded that “all governmental units beneath the central government” are properly characterized as “political subdivisions” of a foreign state, holding in that case that a corporation that was controlled by an entity that coordinated the management of the commercial enterprises of the Italian Government was a political subdivision of Italy.

B. State-Owned Corporations

The definition of “foreign state” includes those “agencies and instrumentalities” of a foreign state that meet certain criteria that are found in Section 1603(b). Under those criteria, if the majority of shares of a corporation are owned by the foreign state or by a political subdivision of the foreign state, and the corporation is incorporated in the country of the foreign state and has its principal place of business outside of the United States, the corporation falls within the definition of “agency or instrumentality of a

¹² 30 F.3d 148, 153 (D.C. Cir. 1994).

¹³ *Id.* at 153.

¹⁴ 734 F.2d 115, 116 (2d Cir. 1984).

foreign state” and is entitled to the limited protections available to agencies and instrumentalities under the FSIA.¹⁵

Until recently, the courts in the United States were divided on the question of whether a subsidiary of a corporation that is owned by a foreign government qualifies as an “agency or instrumentality of a foreign state” under the FSIA. The United States Supreme Court resolved that question in *Dole Foods Co. v. Patrickson*,¹⁶ holding that such indirect ownership is not sufficient under the FSIA. The Court said that only if the shares of the corporation are owned directly by the government or a political subdivision of the government does the corporation qualify as an “agency or instrumentality” of the foreign government based on share ownership.¹⁷ Thus, as a general rule, a subsidiary of a corporation that is owned by the foreign government is not entitled to the protections of the FSIA, at least not on the basis of share ownership alone.

Even if a corporation does not qualify as an “agency or instrumentality” by virtue of share ownership, it nevertheless may qualify as a “foreign state” entitled to FSIA protection if it can establish that it is an “organ of a foreign state” or a “political subdivision.” In *O'Connell Machinery Co. v. M.V. “Americana”*,¹⁸ the Second Circuit Court of Appeals held that a corporation can be a political subdivision if it can be properly characterized as a “governmental unit beneath the central government.” The court held that a corporation that was controlled by an entity that coordinated the

¹⁵ 28 U.S.C. §1603(b).

¹⁶ 538 U.S. 468 (2000).

¹⁷ *Id.* at 473-477.

¹⁸ 734 F.2d at 116.

management of the commercial enterprises of the Italian Government was a “political subdivision” of the Italian government, rendering it unnecessary for the court to rely on ownership of shares as a basis for applying the FSIA.¹⁹

A corporation also falls within the definition of “foreign state” if it is an “organ” of a foreign state.²⁰ Generally, a corporation is an “organ” if it engages in a public activity on behalf of the foreign government, even if it has some autonomy from the foreign government, and even if it has some involvement in commercial affairs.²¹ The factors that the courts have considered in determining “organ” status include: (1) Whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the activity; (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.²² It is not necessary that all factors point to “organ” status.²³

One final point regarding qualification of a corporation as an agency or instrumentality is worthy of note. The Supreme Court decided in the *Dole Foods* case that the relevant time for determining a corporation’s status is as of the time of filing of the complaint, not the time of the conduct that is the subject of the suit.²⁴ Thus, even if a corporation qualified as an agency or instrumentality of a foreign state at the time of the conduct giving rise to the claim, the FSIA does not apply if the corporation no longer

¹⁹ *Id.*

²⁰ 28 U.S.C. §1603(b)(2).

²¹ *EIE Quam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640-641 (9th Cir. 2003).

²² *Kelly v. Syria Shell Petroleum Development B.V.*, 213 F.3d 841, 846-847 (5th Cir. 2000).

²³ *Id.*

²⁴ 538 U.S. at 478-480.

qualifies as an agency or instrumentality of the foreign state at the time suit is filed. Likewise, even if a corporation was a private corporation at the time of the conduct giving rise to the claim, the FSIA will apply if the corporation qualifies as an agency or instrumentality of the foreign state at the time suit is filed.

C. *Individual Government Officials*

Although the FSIA is the “sole basis for obtaining jurisdiction over a foreign state,”²⁵ the FSIA does not expressly state whether its provisions apply to actions against individual government officials. While the Ninth Circuit Court of Appeals and the D.C. Circuit Court of Appeals have applied the FSIA to individual government officials acting in their capacity as officials of a foreign government,²⁶ other courts have held that the FSIA does not affect the common law “head-of-state” immunity that existed prior to the FSIA’s enactment.²⁷

Under common law “head-of-state” immunity, a suggestion of immunity submitted by the State Department with regard to a lawsuit against a “head-of-state”

²⁵ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. at 439.

²⁶ *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (“We thus join the majority of courts which have similarly concluded that section 1603(b) can fairly be read to include individuals sued in their official capacity”); *Hilao v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 25 F.3d 1467, 1472 (9th Cir. 1994) (FSIA immunity extends to an individual when acting on behalf of the state because actions against those individuals are the practical equivalent of a suit against the sovereign directly); *Trajano v. Marcos (In re Estate of Ferdinand Marcos, Human Rights Litigation)*, 978 F.2d 493, 498 (9th Cir. 1992) (holding that the former President’s daughter’s torturous acts as leader of the military police were not “taken within an official mandate and therefore cannot have been acts of an agent or instrumentality of a foreign state within the meaning of the FSIA”); *Jungquist v. Al-Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (“Individuals acting in their official capacities are considered ‘agenc[ies] or instrumentalit[ies] of a foreign state’; these same individuals, however, are not entitled to immunity under the FSIA for acts that are not committed in an official capacity”).

²⁷ See *Lafontant v. Aristide*, 844 F.Supp. 128, 137 (E.D.N.Y. 1994) (“The view that the FSIA is inapplicable to a head-of-state comports with both the history of the FSIA and the underlying policy of comity”; the FSIA leaves “traditional head-of-state and diplomatic immunities untouched”); *Tachione v. Mugabe*, 169 F.Supp.2d 259, 296 (S.D.N.Y. 2001) (“the FSIA does not serve to abrogate the State Department’s decisive role in the recognition of head-of-state immunity”).

establishes absolute immunity, requiring the court to dismiss the case.²⁸ Determinations as to whether a particular government official is a “head-of-state” are made by the Executive Branch and are not to be determined by the courts,²⁹ although one court has suggested that “a plausible argument may be constructed that, in light of the concerns pertaining to the State Department’s suggestion of immunity practices that prompted the adoption of the FSIA, there must be some limit on the circumstances and on the individual foreign officials on whose behalf the State Department may interpose the protection of the emerging head-of-state doctrine.”³⁰

III. Service Requirements of the FSIA

Section 1608 of the FSIA sets out very specific service requirements for service of the summons and complaint in a lawsuit against a foreign state, and the procedures for service are different for the government and its political subdivisions on the one hand, and agencies and instrumentalities of the government on the other hand. The different requirements are addressed separately below.

A. Service on the Government and its Political Subdivisions

Section 1608(a) sets out requirements for service of a complaint against a foreign government or its political subdivisions. The provisions for service “are hierarchical, such that a plaintiff must attempt the methods of service in the order they are laid out in the statute.”³¹

²⁸ *Lafontant v. Aristide*, 844 F.Supp. at 139-140; *Tachione v. Mugabe*, 169 F.Supp.2d at 296-297.

²⁹ *Lafontant v. Aristide*, 844 F.Supp. at 133.

³⁰ *Tachione v. Mugabe*, 169 F.Supp.2d at 295.

³¹ *Magness v. Russian Federation*, 247 F.3d at 613.

If a special arrangement for service between the plaintiff and the foreign government or political subdivision exists, that arrangement must be followed.³² If no such arrangement exists, the summons and complaint must be delivered in accordance with an applicable international convention on service of judicial documents.³³ If service cannot be made in that fashion, service may be accomplished by sending a copy of the summons and complaint and a “notice of suit,” together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state.³⁴ The “notice of suit” is “an integral part of the service requirements upon foreign states, and is ‘designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.’”³⁵ If service cannot be effected in that fashion within thirty days, service may be accomplished by sending two copies of the summons and complaint and a notice of suit, together with a translation of each, by any form of mail requiring a signed receipt, from the clerk of the court to the Secretary of State in Washington, D.C., to the attention of the Director of Special Consular Services.³⁶ The Secretary then is to forward one copy of the papers through diplomatic channels to the foreign state.³⁷

³² 28 U.S.C. §1608(a).

³³ *Id.*

³⁴ *Id.*

³⁵ *Magness v. Russian Federation*, 247 F.3d at 618 (quoting H.R. Rep. No. 94-1487, reprinted in 1976 U.S.C.C.A.N. 6604, 6609).

³⁶ 28 U.S.C. §1608(a).

³⁷ *Id.*

Plaintiffs often have attempted to serve foreign governments and their political subdivisions without strictly complying with these service requirements. The rule is now well-established in the United States that such efforts to avoid strict compliance are improper, and strict compliance with the hierarchical service requirements of Section 1608(a) is mandatory with regard to foreign governments and their political subdivisions.³⁸

B. Service on an Agency or Instrumentality of the Government

Section 1608(b) governs service on an agency or instrumentality of a foreign state.³⁹ Again, the procedures are hierarchical, beginning with service in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality.⁴⁰ If no such special arrangement exists, service is effected by delivery of a copy of the summons and complaint to an officer, managing or general agent, or any other agent authorized by law to receive service of process in the United States on behalf of the agency or instrumentality, or in accordance with an applicable international convention on service of judicial documents.⁴¹ If service cannot be effected in that fashion, service may be accomplished by delivery of a copy of the summons and complaint, together with a translation of each, as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or by any form of

³⁸ See, e.g., *Magness v. Russian Federation*, 247 F.3d at 615-616; *Gray v. Permanent Mission of People's Republic of Congo to United Nations*, 443 F.Supp. 816, 821 (S.D.N.Y.), *aff'd*, 580 F.2d 1044 (2d Cir. 1978); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995).

³⁹ 28 U.S.C. §1608(b).

⁴⁰ *Id.*

⁴¹ *Id.*

mail requiring a signed receipt, to be dispatched by the clerk of the court to the agency or instrumentality to be served, or as directed by order of the court consistent with the law of the place where service is to be made.⁴²

Despite the specific procedures set out in Section 1608(b), the prevailing rule in the United States is that service on an agency or instrumentality of a foreign state that is not in strict compliance with these requirements is nevertheless valid if there was “substantial compliance” with the requirements.⁴³ It is actual notice by the defendant that substantiates the compliance.⁴⁴ “Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service.”⁴⁵ Thus, a plaintiff need not comply with the detailed service provisions of Section 1608(b) with regard to an agency or instrumentality of a foreign state if the method of service utilized results in actual notice through service on a representative of the agency or instrumentality who would be expected to have authority to receive service.

IV. The Right of Removal to Federal Court of Actions Filed in State Court

In the procedural provisions enacted with the FSIA, “Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the

⁴² *Id.*

⁴³ *Magness v. Russian Federation*, 247 F.3d at 616-618; *Velidor v. L/P/G Benghazi*, 653 F.2d 812, 821 (3d Cir. 1981); *Sherer v. Construcciones Aeronauticas*, 987 F.2d 1246, 1249-1250 (6th Cir. 1993); *Straub v. Green, Inc.*, 38 F.3d 448, 453 (9th Cir. 1994); *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1352 (11th Cir. 1982); *Transaero*, 30 F.3d at 154.

⁴⁴ *Magness v. Russian Federation*, 247 F.3d at 617-618.

⁴⁵ *Gulf Petro Trading Co., Inc. v. Nigerian National Petroleum Corp.*, 288 F.Supp.2d 783, 791 (N.D. Tex. 2003).

courts of the 50 States.”⁴⁶ Congress believed that it was important to give foreign states clear authority to remove actions brought against them in the state courts to a federal forum, in view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in the area.⁴⁷ Congress accomplished this objective through enactment of 28 U.S.C. §1441(d), which grants to foreign states, including agencies and instrumentalities, the absolute right of removal to federal court of any action filed against a foreign state in a state court. Removal of a case under section 1441(d) does not require the joinder of all defendants.⁴⁸

Congress also gave the federal courts discretion to grant relief from a foreign state’s failure to comply with the deadline for removal of civil cases (thirty days after receipt of a copy of the complaint), for cause shown.⁴⁹ The courts have liberally allowed entities that qualify as “foreign states” under the FSIA an enlargement of time to remove in order to further the purpose of providing a federal forum to foreign states.⁵⁰ In view of these policy considerations, an enlargement of time to remove should be granted when “the rights of the parties and judicial economy would not be prejudiced.”⁵¹ The statute does not require “good cause,” but only “cause.”⁵²

⁴⁶ *Verlinden*, 461 U.S. at 497.

⁴⁷ *Proyecfin de Venezuela v. Banco Industriale de Venezuela*, 760 F.2d 390, 396 (2dCir. 1995)

⁴⁸ *Nolan v. Boeing Co.*, 919 F.2d 1058, 1065 (5th Cir. 1990).

⁴⁹ *Id.* The thirty day deadline for removal applicable to all civil cases is found in 28 U.S.C. §1446(b).

⁵⁰ *Talbot v. Saipem A.G.*, 835 F. Supp. 352, 355 (S.D. Tex. 1993).

⁵¹ *Id.* at 355.

⁵² *Id.* (citing *Tennessee Gas Pipeline Co. v. Continental Cas. Co.*, 814 F. Supp. 1302, 1304 (M.D. La. 1993)).

“[U]ntimely removal is generally allowed when there has been little prior activity in the state court.”⁵³ However, there are other circumstances in which the rights of the parties and judicial economy would not be prejudiced by the removal, and an enlargement of time is appropriate. For example, in *Gray v. Permanent Mission of People’s Republic of Congo to the United Nations*,⁵⁴ the court enlarged the time for filing the notice of removal, even though the notice was not filed until after a default judgment had been entered. The court noted that the officials of the foreign sovereign did not understand their rights under American law, and no prejudice resulted from the enlargement because the case was properly dismissed for failure to satisfy the service requirements of Section 1608 of the FSIA.⁵⁵

V. Immunity from Jurisdiction under the FSIA

Under the FSIA, a foreign state is presumed to have absolute immunity from jurisdiction of the state and federal courts in the United States.⁵⁶ Section 1604 of the FSIA provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States, except as provided in Sections 1605-1607 of this chapter.”⁵⁷ Unless a case falls within one of the FSIA’s enumerated exceptions to sovereign immunity, the court lacks subject-matter jurisdiction to hear it.⁵⁸ Thus, the key jurisdictional inquiry in a case against a “foreign state” is whether the requirements of one of the statutory exceptions to immunity is satisfied. If so, the case can proceed, and

⁵³ *Talbot*, 835 F. Supp. at 355.

⁵⁴ 443 F. Supp. 816, 820-21 (S.D.N.Y.), *aff’d* 580 F.2d 1040 (2d Cir. 1978).

⁵⁵ *Id.* at 821.

⁵⁶ *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

⁵⁷ 28 U.S.C. § 1604.

⁵⁸ *Verlinden*, 461 U.S. at 485 n.5; *Stena Rederi*, 923 F.2d at 386.

“the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.”⁵⁹ If no statutory exception to immunity applies, the court must dismiss the case for lack of subject-matter jurisdiction.

Section 1605 of the FSIA creates a number of independent exceptions to immunity from jurisdiction.⁶⁰ Additionally, Section 1607 creates an exception for certain counterclaims asserted in response to a complaint filed by a foreign state.⁶¹ This paper will not attempt to address all of the exceptions, but instead will focus on three exceptions that often arise in litigation against a foreign state in courts in the United States.

A. *The Waiver Exception*

Section 1605(a)(1) of the FSIA provides that a foreign state is not immune from the jurisdiction of courts of the United States or of the States in any case in which “the foreign state has waived its immunity either explicitly or by implication....”⁶² Thus, a court will have jurisdiction of an action against a foreign state under Section 1605(a)(1) if the foreign state has expressly waived its immunity or if it has impliedly waived its immunity. Each of these types of waivers is discussed below.

1. Express Waiver

The exception for express waivers of immunity typically is implicated in cases involving a written contract that contains a provision expressly waiving sovereign

⁵⁹ 28 U.S.C. §1606. A caveat to the rule that a “foreign state” is liable in the same manner and to the same extent as a private individual if it is not entitled to immunity is that a foreign state, other than an agency or instrumentality, may not be held liable for punitive damages. 28 U.S.C. §1606.

⁶⁰ 28 U.S.C. §1605.

⁶¹ 28 U.S.C. §1607.

⁶² 28 U.S.C. §1605(a)(1).

immunity. Such agreements often are found in loan agreements and other contracts entered into by foreign sovereigns or their agencies and instrumentalities.⁶³ As a general rule, “explicit waivers of sovereign immunity are narrowly construed ‘in favor of the sovereign’ and are not enlarged ‘beyond what the language requires.’”⁶⁴ “An express waiver under section 1605(a)(1) must give a clear, complete, unambiguous, and unmistakable manifestation of the sovereign’s intent to waive its immunity.”⁶⁵ In *World Wide Minerals, Ltd. v. Republic of Kazakhstan*,⁶⁶ the court applied these rules, finding that express waivers of sovereign immunity in two agreements did not constitute a waiver of sovereign immunity with regard to tort claims or with regard to claims for breach of other related contracts that did not contain waiver provisions.

2. Implied Waiver

The legislative history of the FSIA states that an implied waiver of sovereign immunity is ordinarily found in three situations: (1) the foreign state agrees to arbitration in another country; (2) the foreign state agrees that a contract is governed by the laws of a particular country; or (3) the foreign state files a responsive pleading in response to the complaint without raising the immunity defense.⁶⁷ The courts “have been reluctant to stray beyond the three examples given in the legislative history,” and “[t]he implicit waiver clause has been strictly construed; courts rarely find that a nation has waived its

⁶³ See, e.g., *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 & n. 13 (D.C. Cir. 2002) (express waiver of sovereign immunity contained in agreements entered into by Republic of Kazakhstan relating to the management and operation of a uranium complex).

⁶⁴ *Id.* at 1162 (quoting *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986)).

⁶⁵ *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999).

⁶⁶ 296 F.3d at 1162.

⁶⁷ H.R. Rep. No. 94-1487 (1976), 1976 U.S.C.C.A.N. at 6617.

sovereign immunity without strong evidence that this is what the foreign state intended.”⁶⁸ Each of the three bases for finding an implied waiver is discussed below.

a. Agreement to arbitrate in another country

Although the legislative history of the FSIA indicates that an implied waiver exists if the “foreign state agrees to arbitration in another country,” the courts generally have refused to find a waiver simply because an arbitration agreement exists. Consistent with the rule that an implied waiver should be found only when the foreign sovereign has clearly intended to waive its immunity, the courts have found that an arbitration agreement constitutes a waiver of sovereign immunity only if the foreign sovereign is a signatory to a convention providing for court enforcement of arbitration agreements and awards such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“the New York Convention”), and if the proceedings in the United States courts could have been contemplated by the foreign state in connection with the arbitration proceedings.⁶⁹

b. Agreement that a contract is governed by the laws of another country

The American courts also have narrowly interpreted the second ground for finding an implied waiver of sovereign immunity that is identified in the FSIA’s legislative history. Although the legislative history broadly states that waiver may be found if “the foreign state agrees that a contract is governed by the laws of a particular country,” the

⁶⁸ *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993).

⁶⁹ *Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 122-123 (D.C. Cir. 1999); *S & Davis Intern., Inc. v. The Republic of Yemen*, 218 F.3d 1292, 1301 (11th Cir. 2000); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 577-579 (2d Cir. 1993).

courts have held that an implied waiver may be found based on a contractual choice of law of another's country's laws only if the laws of the United States or one of its states is chosen as the law applicable to the contract; otherwise, a contractual selection of another country's laws is insufficient to support a finding of waiver.⁷⁰

The courts' rationale for finding waiver in these circumstances is that the foreign state, in agreeing to a contractual provision selecting application of United States law, must have intended a waiver of its right to avoid suit in the United States.⁷¹ That conclusion is based on the belief that (1) it is self-evident that a United States court is the best forum for addressing issues of United States law, and (2) it would be unfair for a foreign state to assume duties under United States law and then disclaim them by invoking immunity in a United States court when a controversy arises.⁷²

c. Filing of a responsive pleading without raising immunity

The third basis for finding an implied waiver of sovereign immunity is the filing of a responsive pleading in the United States lawsuit without raising sovereign immunity as a defense. Again, the courts have construed this basis for implied waiver narrowly, limiting its application to situations in which the foreign state has filed a "responsive pleading" under United States procedural rules without raising sovereign immunity, and

⁷⁰ See *Eckert Intern., Inc. v. Government of Sovereign Democratic Republic of Fiji*, 32 F.3d 77, 79-82 (4th Cir. 1994) (waiver of sovereign immunity found based on contractual choice of law clause providing for application of Virginia law); *Kao Hwa Shipping Co. v. China Steel Corp.*, 816 F. Supp. 910, 916-917 (S.D.N.Y. 1993) (rejecting argument that contractual agreement for application of Japanese law by instrumentality of the Republic of China constituted implied waiver of sovereign immunity); *Eaglet Corp. Limited v. Banco Central de Nicaragua*, 839 F.Supp. 232, 235-236 (S.D.N.Y. 1993) (Nicaraguan central bank's agreement that English law applied to agreement did not constitute waiver of sovereign immunity in the United States).

⁷¹ *Eckert Intern.*, 32 F.3d at 80-81.

⁷² *Id.*

even then, only when the foreign state's conduct evidences a conscious decision to participate in the litigation.

The Seventh Circuit Court of Appeals decision in *Haven v. Polska*,⁷³ illustrates the application of the “responsive pleading” rule. *Haven* was an action filed in Chicago against Poland. In response to the lawsuit, the Polish Consulate in Chicago delivered a letter to the district court expressing the Polish Ministry of Justice's view that service was improper under the Hague Convention. There was no mention in the letter of sovereign immunity. The plaintiff argued that the consulate's failure to raise immunity in the letter constituted an implied waiver. The district court and the Seventh Circuit Court of Appeals rejected the waiver argument, concluding that the letter was not a “responsive pleading” under federal procedural law. The Seventh Circuit held that under federal law, “only certain filings may be considered responsive pleadings, including a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third party complaint, and a third party answer.”⁷⁴ The court stated that the Polish Consulate's letter objecting to the propriety of service was properly treated as a motion to dismiss, not a responsive pleading, and that Poland therefore did not waive its sovereign immunity by virtue of the letter.⁷⁵ The court also noted that its holding was “consistent with Congress' requirement that waiver on the part of foreign sovereigns be knowing,” and that Poland's objection to the adequacy of service was not “a conscious decision to take part in the litigation.” *Id.*

⁷³ 215 F.3d 727 (7th Cir. 2000).

⁷⁴ *Id.* at 732.

⁷⁵ *Id.* at 732-33.

Other courts have held that even if a foreign state files a responsive pleading without raising immunity, no waiver will be found unless the foreign state's conduct reflects a conscious decision to take part in the litigation. Specifically, the courts have held that the filing of a "responsive pleading" that urges the court to refer the dispute to an arbitral or other forum does not constitute a conscious decision to take part in the litigation, and it therefore is not a waiver of sovereign immunity.⁷⁶

B. The Commercial Activities Exception

The "commercial activities" exception⁷⁷ creates three independent exceptions to sovereign immunity, all of which are based on a nexus between the claims asserted and commercial activity of the foreign state. Section 1605(a)(2) of the FSIA provides that a foreign state shall not be immune in any case

in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States....⁷⁸

⁷⁶ See *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (Iran's filing of answer to complaint that asserted that the claims should be resolved by the Iran-United States Claims Tribunal in the Hague did not constitute an implied waiver of immunity); *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for A. W. Galardi*, 12 F.3d 317, 327 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994) (foreign-state defendant's filing of answer without raising sovereign immunity did not constitute implied waiver because its "essential effort in this litigation has been to persuade the district court to defer to the proceedings before the Committee in Dubai"); *In re China Oil and Gas Pipeline Bureau*, 94 S.W.3d 50, 59-62 (Tex. App. – Houston [14th Dist.] 2002, orig. proceeding) (foreign state instrumentality's letters to court urging the court to refer the matter to arbitration, even if properly characterized as "responsive pleadings," did not evidence a conscious decision to take part in the litigation and therefore did not waive sovereign immunity).

⁷⁷ 28 U.S.C. §1605(a)(2).

⁷⁸ *Id.*

Each of the three clauses of the commercial activities exception requires a showing that the cause of action is “based” on activities that have a particular type of nexus with the United States. Each of the individual clauses of the commercial activities exception is discussed below.

1. Clause 1 Analysis: Are the Plaintiffs’ Claims Based on Commercial Activity Having Substantial Contact with the United States?

The first clause of the commercial activities exception confers subject-matter jurisdiction over claims that are “based upon a commercial activity carried on in the United States by the foreign state.”⁷⁹ Section 1603(e) defines the phrase “commercial activity carried on in the United States by a foreign state” as a “commercial activity carried on by such state *and having substantial contact with the United States.*”⁸⁰ As held by the United States Supreme Court in *Saudi Arabia v. Nelson*,⁸¹ for the clause 1 exception to apply, “the . . . action must be ‘based upon’ some ‘commercial activity’ by [the defendant] that had ‘substantial contact’ with the United States. . . .”

Further elaboration on the significance of the nexus required under clause 1 is found in the Fifth Circuit’s decision in the *Stena Rederi* case. In that case, the court said:

A foreign sovereign, however, does not abrogate its sovereign immunity simply because it conducts commercial operations that have a connection with the United States. Not only must there be a jurisdictional nexus between the United States and the commercial acts of the foreign sovereign, there must be a connection between the plaintiff’s cause of action and the commercial acts of the foreign sovereign. . . . In order to satisfy the commercial activities exception to sovereign immunity, the commercial activity that provides the jurisdictional nexus with the United States must

⁷⁹ *Id.*

⁸⁰ 28 U.S.C. §1603(e) (emphasis added).

⁸¹ 507 U.S. at 356.

also be the activity on which the lawsuit is based. . . . Isolated or unrelated commercial actions of a foreign sovereign in the United States are insufficient to support a commercial activities exception to sovereign immunity.

923 F.2d at 386-87. The requirement that the commercial activity have “substantial contact” with the United States has led some courts to reject jurisdiction if the claims are based primarily on commercial activity outside the United States and the activity in the United States is isolated or minimal.⁸² Whether the “substantial contact” requirement of clause 1 is satisfied is a fact-intensive inquiry that the courts decide on a case-by-case basis.⁸³

2. Clause 2 Analysis: Are the Plaintiffs’ Claims Based Upon Acts Performed in the United States in Connection with Commercial Activity Elsewhere?

The second clause of Section 1605(a)(2) provides an exception to immunity where “the action is based upon . . . an act performed in the United States in connection with a

⁸² See *Stena Rederi*, 923 F.2d at 389 & n. 11 (claim based on misrepresentation made by representative of foreign state instrumentality on isolated trip to Texas did not satisfy the “substantial contact” requirement of clause 1); *General Electric Capital Corporation v. Grossman*, 991 F.2d 1376 (8th Cir. 1993) (claims based in part on misrepresentations made during meeting in Minnesota and in telephone and wire communications into the United States failed to satisfy clause 1 requirements because the U.S. negotiations were not sufficiently extensive to constitute “substantial contact”); *Morgan Equip. Co. v. Novokrivorogsky State Ore Mining and Processing Enter.*, 57 F. Supp.2d 863, 872 (N.D. Cal. 1998) (rejecting contention that negotiations in San Francisco relating to contract between American plaintiffs and instrumentality of the Ukraine concerning mining operations in the Ukraine constituted “substantial contact” with the United States under clause 1 because most of the parties’ negotiations and dealings took place outside the United States).

⁸³ See *BP Chemicals Ltd. v. Jiangsu Sopo Corp. (Group) Ltd.*, 285 F.3d 677, 686-688 (8th Cir. 2002) (decision on “substantial contact” requirement turned on analysis of extent of foreign state instrumentality’s business solicitation efforts in the United States); *Gibbons v. Udaras na Gaeltachta*, 549 F.Supp. 1094 (S.D.N.Y. 1982) (question whether activities relating to joint venture between American parties and Irish state-owned company had “substantial contact” with the United States was a fact-intensive question that required analysis of the nature and extent of negotiations and performance that took place in the United States).

commercial activity of the foreign state elsewhere. . . .”⁸⁴ One United States court has held that this clause of the commercial activities exception applies only to non-commercial acts committed in the United States relating to commercial activities outside the United States.⁸⁵ No other court has adopted that rule.

The legislative history of the FSIA states that with regard to the second clause, “the acts (or omissions) encompassed in this category are limited to those which in and of themselves are sufficient to form the basis of a cause of action.”⁸⁶ This limitation, which has been applied by some courts in construing clause 2, requires that the acts in the United States must form the basis for the cause of action; the fact that there is a causal connection between the acts in the United States and the alleged damages is not sufficient.⁸⁷ While there is little court precedent addressing clause 2, it appears that the clause requires that the conduct alleged to have occurred in the United States be the conduct that satisfies the elements of the cause of action asserted.

⁸⁴ 28 U.S.C. § 1605(a)(2).

⁸⁵ See *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.2d 887, 892 n.5 (5th Cir. 1998) (“Because the first clause permits jurisdiction based on ‘commercial’ acts in the United States, the second clause is generally understood to apply to noncommercial acts in the United States that relate to commercial acts abroad”).

⁸⁶ H. R. Rep. No. 94-1487, 1976 U.S.S.C.A.N. 6604, 6618.

⁸⁷ See *General Electric and Capital Corp. v. Grossman*, 991 F.2d at 1384 (although the plaintiffs alleged fraudulent conduct occurred in the United States, the plaintiffs’ claims were based on activities that took place outside of the United States, and the second clause therefore did not apply). *In re Papandreou*, 139 F.3d 247, 253 n. 4 (D.C. Cir. 1998) (noting that a causal connection between conduct in the United States and acts giving rise to the cause of action outside of the United States is insufficient to support jurisdiction under clause 2). In the *In re Papandreou* case, the court disapproved its prior decision in *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1027 (D.C. Cir. 1982), in which the court held that clause 2 could confer jurisdiction if the plaintiff could show a direct causal connection between his enticement to employment in the United States and the misappropriations in Ireland on which his claims were based.

3. Clause 3 Analysis: Are the Plaintiffs' Claims Based Upon an Act Outside the United States in Connection with a Commercial Activity Outside the United States that Causes a Direct Effect in the United States?

The third clause of the commercial activities exception applies to a foreign state's acts outside the United States in connection with commercial activity outside the United States that "causes a direct effect in the United States."⁸⁸ An effect is direct if "it follows 'as an immediate consequence of the defendant's ... activity.'"⁸⁹

In a number of cases, American plaintiffs have argued that because of their presence in the United States, the economic effect of the foreign state's wrongful act is necessarily felt in the United States, and the "direct effects" test therefore is satisfied. The courts have uniformly rejected these arguments, refusing to find "direct effects" in the United States based solely on the fact that American plaintiffs suffer financial loss at their place of residence.⁹⁰ Furthermore, the majority of the federal circuit courts have held that for there to be "direct effects" in the United States under clause 3, a "legally significant act" must take place there.⁹¹ This test requires that conduct having a direct

⁸⁸ 28 U.S.C. §1605(a)(2).

⁸⁹ *Republic of Argentina v. Weltover*, 504 U.S. 607, 618 (1992) (quoting favorably *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991)).

⁹⁰ See *United World Trade, Inc. v. Mangyshlaknett Oil Prod. Ass'n*, 33 F.3d 1232, 1239 (10th Cir. 1994) ("Nor is the fact that [the plaintiff] is an American corporation that suffered a financial loss sufficient to place the direct effect of the defendants' actions 'in the United States.'"), *cert. denied*, 513 U.S. 1112 (1995); *Antares Aircraft, L.P. v. Federal Republic of Nigeria*, 999 F.2d 33, 36 (2d Cir. 1993) ("[T]he fact that an American individual or firm suffers some financial loss from a foreign tort cannot, standing alone, suffice to trigger the exception. . . . If a loss to an American individual and firm resulting from a foreign tort were sufficient standing alone to satisfy the direct effect requirement, the commercial activity exception would in large part eviscerate the FSIA's provision of immunity for foreign states").

⁹¹ See *Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876 (9th Cir. 2000) ("a direct effect requires that 'legally significant acts giving rise to the claim occurred in the United States'"); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998) ("We also recognize a 'legally significant acts' test in this Circuit").

effect in the United States be legally significant conduct in order for clause 3 of the commercial activity exception to apply.⁹² A number of cases have held that the contractual requirement that a letter of credit be paid into a bank account in the United States satisfies the “legally significant act” requirement of the “direct effects” test.⁹³ One court found jurisdiction over an action against The Bank for Foreign and Economic Affairs of the Russian Federation for failure to honor a letter of credit based on a contractual obligation in the letter of credit to pay drafts under the letter in New York, even though the obligation to pay drafts in New York was the obligation of the advising bank, not the Russian bank.⁹⁴ The court reasoned that the advising bank, in assuming the obligation to pay in New York, was acting at the issuing bank’s request.⁹⁵

Although a majority of the courts in the United States impose the “legally significant act” requirement in applying the direct effects test of clause 3, the Fifth Circuit Court of Appeals has rejected that requirement, adopting the minority position that the “immediate consequence” requirement is the only requirement for a finding of “direct effects” under clause 3.⁹⁶

⁹² *United World Trade*, 33 F.3d at 1237-38 (holding that there were no direct effects in the United States on the facts of that case because the contractual place of performance was outside the United States); *Goodman Holdings v. Rafidan Bank*, 26 F.3d 1143, 1147 (D.C.Cir. 1994) (foreign bank’s failure to honor a letter of credit was not a “direct effect” because no United States location was designated as the place of performance).

⁹³ See, e.g., *Hanil Bank v. PT Bank Negara Indonesia*, 148 F.3d 127, 132-33 (2d Cir. 1998); *Parex Bank v. Russian Savings Bank*, 116 F.Supp.2d 415, 420-21 (S.D.N.Y. 2000).

⁹⁴ *Reed Intern. Trading Corp. v. Donau Bank AG*, 866 F.Supp. 750, 754-755 (S.D.N.Y. 1994).

⁹⁵ *Id.*

⁹⁶ See *Voest-Alpine*, 142 F.3d at 894. The Fifth Circuit in *Voest-Alpine* held that Bank of China’s failure to pay on a letter of credit had an immediate effect in the United States, even though there was no provision in the letter of credit identifying a location in the United States as the place of payment, because the facts demonstrated that if not for the refusal of payment on the letter of credit, Bank of China “would have wired the money directly to Voest-Alpine’s Texas bank account.” 142 F.2d at 896. The court

C. *The Arbitration Exception*

Section 1605(a)(6) of the FSIA provides an exception to sovereign immunity in a case seeking to enforce an arbitration agreement or to confirm an arbitration award, if the arbitration takes place or is intended to take place in the United States, or if the agreement or award is governed by a treaty or international agreement in force for the United States that calls for the recognition and enforcement of arbitral awards.⁹⁷ The courts have utilized this section to exercise jurisdiction over foreign states in proceedings to enforce arbitration agreements under the New York Convention and in proceedings to confirm arbitration awards under the New York Convention.⁹⁸

VI. **Immunity from Execution under the FSIA**

Until the FSIA was enacted in 1976, the United States granted foreign states absolute immunity from execution on assets. That rule of absolute immunity applied to both commercial assets and non-commercial assets. Thus, if a judgment was taken against a foreign state in a United States court, the pre-FSIA rule precluded the United States courts from authorizing execution on the foreign state's assets to satisfy the judgment.

therefore held that Bank of China's breach of the letter of credit had an "immediate consequence" in the United States as required by *Weltover*, even though no legally significant act occurred there. *Id.*

⁹⁷ 28 U.S.C. §1605(a)(6).

⁹⁸ See *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017-1018 (2d Cir. 1993) (holding that the district court had jurisdiction under the arbitration exception over an action to compel arbitration in London under the New York Convention); *S & Davis Intern.*, 218 F.3d at 1301-1302 (holding that the district court had jurisdiction under the arbitration exception over an action to confirm an arbitration award under the New York Convention); *Crieghton Ltd. v. Republic of Qatar*, 181 F.3d at 123-124 (same).

Upon enactment of the FSIA, the absolute barrier against execution against the assets of a foreign state was “partially lowered.”⁹⁹ Specifically, in Sections 1609 and 1610 of the FSIA, the United States established a general rule of immunity from execution, but created limited exceptions to that immunity in specified circumstances for assets located in the United States.¹⁰⁰ The FSIA provides the exclusive basis on which execution is permitted to satisfy a judgment against a foreign state.¹⁰¹ The immunity extends not only to execution, but to any other process utilized to attach or seize assets in the collection of judgments, including attachments and garnishments.¹⁰²

There are two primary sets of exceptions to execution immunity contained in Section 1610 of the FSIA. Section 1610(a) identifies seven exceptions to immunity from execution that are applicable to the property of all “foreign states,” including the government, political subdivisions, and agencies and instrumentalities. Section 1610(b) identifies additional exceptions applicable to an “agency or instrumentality of a foreign state engaged in commercial activity in the United States.” The additional exceptions in Section 1610(b) have the effect of broadening permissible execution with regard to agencies and instrumentalities of a foreign state.

⁹⁹ H.R. Rep. No. 94-1487 (1976), 1976 U.S.C.C.A.N. at 6626.

¹⁰⁰ 28 U.S.C. §§ 1609, 1610.

¹⁰¹ *Hercaire Int’l, Inc. v. Argentina*, 821 F.2d at 563.

¹⁰² *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1283 (11th Cir. 1999).

A. *Section 1610(a) Exceptions to Immunity from Execution Applicable to All “Foreign States.”*

1. The Scope of Property Subject to Execution Under the Section 1610(a) Exceptions

Section 1610(a) identifies seven exceptions to immunity from execution that are applicable to all foreign states, including the government itself, its political subdivisions, and its agencies and instrumentalities.¹⁰³ With regard to each of these seven exceptions, the property that is subject to execution under the exception is limited to “property in the United States” that is “used for a commercial activity in the United States.”¹⁰⁴ Thus, even if one of the exceptions in Section 1610(a) applies, property that is not located in the United States or that is not used for commercial activity in the United States is not subject to execution, attachment, or garnishment by courts in the United States.

These limitations reflect a recognition by Congress that involvement by the U.S. courts in the seizure of assets of foreign governments has the potential for creating tension in international relations and should be limited to commercial property that is located in the United States.¹⁰⁵ The courts have consistently held that the exceptions to

¹⁰³ 28 U.S.C. §1610(a).

¹⁰⁴ 28 U.S.C. §1610(a); *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d 240 (5th Cir. 2002).

¹⁰⁵ See H.R. Rep. No.94-1487 (1976), 1976 U.S.C.C.A.N. at 6626 (“[A]ttachments [of property of a foreign state] can also give rise to serious friction in United States’ foreign relations”); see also *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480-81 (5th Cir. 1998) (stating the purpose of the FSIA is to promote harmonious international relations as the doctrine of sovereign immunity was created to effectuate comity among nations). The legislative history makes these limitations on the applicability of the exceptions clear: “Section 1610(a) relates to execution against property of a foreign state, including a political subdivision, agency, or instrumentality of a foreign state. The term ‘attachment in aid of execution’ is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment. . . . The property in question must be used for a

immunity in Section 1610(a) apply only to property located in the United States that is used for a commercial activity in the United States.¹⁰⁶

a. Is the Property Located in the United States?

While the inquiry concerning location of the property typically will be an easy one with regard to tangible property, the issue is more complex with regard to intangible property. As the Fifth Circuit Court of Appeals has stated, “[t]he situs of intangible property is about as intangible a concept as is known to the law.”¹⁰⁷ For example, the question of the situs of royalty obligations owed by a U.S. oil company to The Republic of Congo in connection with oil production there was presented but left unresolved in *Connecticut Bank of Commerce v. The Republic of Congo*, with the court concluding that the question of whether the government had “used” the royalty obligations for

commercial activity in the United States. If so, attachment in aid of execution, and execution, upon judgments entered by Federal or State courts against the foreign state would be permitted in any of the circumstances set forth in [the exceptions in] section 1610(a).” H.R. Rep. No. 94-1487, 1976 U.S.C.C.A.N. at 6627.

¹⁰⁶ See, e.g., *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 247, 251-52, 260-61, 265; *767 Third Ave. Assoc. v. Permanent Mission of the Republic of Zaire*, 787 F. Supp. 389, 393 n.3 (S.D.N.Y. 1992) (noting the waiver exception “apparently extends only to property ‘used for a commercial activity’”); *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) (“The statute thus sets forth a two-step analysis relevant here for determining immunity: the foreign state must have waived its immunity, and the property attached must be used for a commercial purpose.”); *Flatow v. The Islamic Republic of Iran*, 76 F. Supp. 2d 16, 22 (D.D.C. 1999) (“[T]he threshold requirement for invoking [the exceptions to immunity under Section 1610(a)] is that the property is ‘used for commercial activity in the United States.’”); *Fidelity Partners, Inc. v. Philippine Export & Foreign Loan Guar. Corp.*, 921 F. Supp. 1113, 1118 (S.D.N.Y. 1996) (“Section 1610 . . . ‘speaks only of a foreign state’s property in the United States . . . [and] creates no exception to immunity for property outside the United States.’”); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1477 (9th Cir. 1992) (“It is true that section 1610 does not empower United States courts to levy on assets located outside the United States”).

¹⁰⁷ *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1122 (5th Cir. 1985) (quoting *Tabacalero Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 714 (5th Cir.), cert. denied, 393 U.S. 924 (1968)).

commercial activities in the United States “appears much less difficult . . . than the legal question of determining the situs of the intangible royalty obligations.”¹⁰⁸

b. Is the Property “Used” for Commercial Activity in the United States?

What matters under Section 1610(a)’s “use” requirement is what the property is used for, not how it was generated or produced.¹⁰⁹ If the property of a foreign state is used for a commercial purpose in the United States, that property is within the scope of property subject to execution under the Section 1610(a) exceptions, regardless of whether it was acquired with a non-commercial source of government income.¹¹⁰ Conversely, even if a foreign state’s property has been generated by commercial activity in the United States, that property is not subject to execution if it is not used for a commercial activity within U.S. borders.¹¹¹

One legal issue that has not been resolved definitively is whether the “use” must be a present use. In *Connecticut Bank of Commerce v. The Republic of Congo*,¹¹² the court found it unnecessary to address “the temporal aspect of the phrase ‘used for.’” A subsequent district court opinion in the same case concluded that the “use” must be a present use, and that decision is now pending on appeal in the Fifth Circuit Court of Appeals.¹¹³

¹⁰⁸ 309 F.3d at 265.

¹⁰⁹ *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 251.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 257-258.

¹¹³ *Af-Cap, Inc. v. The Republic of Congo*, No. 03-50506, in the United States Court of Appeals for the Fifth Circuit. The *Af-Cap* case was argued in the Fifth Circuit on April 8, 2004. The district court opinion is unpublished.

2. The Exceptions to Immunity from Execution Enumerated in Section 1610(a)

Even if the property that judgment creditor of a foreign state seeks to attach is “property in the United States” that is “used for commercial activity in the United States,” Section 1610(a) allows execution only if the requirements of one of the seven enumerated exceptions is satisfied. A discussion of some of the exceptions found in Section 1610(a) follows.

a. The Waiver Exception

Section 1610(a)(1) provides an exception to execution immunity if “the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication”¹¹⁴ Express waivers of execution immunity often are found in contracts entered into by the foreign state with private parties.¹¹⁵ Consistent with the discussion above concerning the scope of property subject to execution under the Section 1610(a) exceptions, even when a foreign state completely waives its immunity from execution in a contract, courts in the United States may execute only against property that is located in the United States and that is used for commercial activity in the United States.¹¹⁶

¹¹⁴ 28 U.S.C. §1610(a)(1).

¹¹⁵ See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S.Ct. 2256 (2003).

¹¹⁶ *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 247.

Little guidance is found in the cases concerning the requirements for a finding of implied waiver of immunity from execution. Courts in two older cases have held that an agreement to arbitrate, accompanied by an agreement for court enforcement of the award, constitutes an implied waiver of immunity from execution,¹¹⁷ but those holdings are of little importance in light of the amendment of Section 1610(a) in 1988 to add an exception to execution immunity with regard to judgments enforcing arbitral awards.¹¹⁸

b. Exception for Property Used in the Commercial Activity on Which the Claim Was Based

Section 1610(a) provides no general exception to immunity for commercial assets of a foreign state. If none of the other exceptions in Section 1610(a) is applicable, Section 1610(a)(2) provides that the only commercial assets of a foreign state that are subject to execution are commercial assets that are or were used in the commercial activity on which the claim was based.¹¹⁹ Thus, if jurisdiction in the underlying lawsuit is predicated on the commercial activities exception, then the commercial assets of the foreign state used in that commercial activity that are located in the United States will be subject to execution in satisfying any judgment entered in the case, but other commercial assets of the foreign state will not be subject to execution.

c. The Arbitration Award Exception

¹¹⁷ *Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F.Supp. 311, 312 (D.D.C. 1980); *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 650 F.Supp. 73, 76 (S.D.N.Y. 1986).

¹¹⁸ 28 U.S.C. §1610(a)(6).

¹¹⁹ 28 U.S.C. §1610(a)(2). As discussed, *infra*, a different rule applies to an agency or instrumentality of a foreign state if the requirements of one of the exceptions applicable to agencies and instrumentalities in Section 1610(b) is applicable.

Section 1610(a)(6) creates an exception to execution immunity for judgments that confirm an arbitration award against the foreign state, provided that execution is not inconsistent with any provision in the arbitration agreement.¹²⁰ Accordingly, if the judgment confirms an arbitral award, any assets of the foreign state that are located in the United States and that are used for commercial activity in the United States are subject to execution.

B. Section 1610(b): Additional Exceptions to Execution Immunity for Agencies and Instrumentalities of a Foreign State

The exceptions to immunity in Section 1610(a) apply to the government as well as to political subdivisions and agencies and instrumentalities of the government. Section 1610(b) contains two additional exceptions applicable only to agencies and instrumentalities, making the property of agencies and instrumentalities more broadly subject to execution in the United States courts.¹²¹

1. Scope of Property of Agencies and Instrumentalities Subject to Execution

As noted above, all of the exceptions to immunity from execution in Section 1610(a) are limited to property that is both located in the United States and used for commercial activity in the United States. However, the introductory paragraph of Section 1610(b) broadens the scope of property of agencies and instrumentalities of a foreign state that is subject to execution to include *any* property in the United States, regardless of how the agency or instrumentality uses the property, if one of the two exceptions in

¹²⁰ 28 U.S.C. §1610(a)(6).

¹²¹ 28 U.S.C. §1610(b).

Section 1610(b) is satisfied.¹²² The premise for allowing broader execution against an agency or instrumentality than is allowed against the government itself “is that agencies or instrumentalities engaged in commercial activity are akin to any other player in the market, and . . . their functions are primarily commercial.”¹²³

2. The Section 1610(b) Exceptions

The broader scope of execution that is permitted against the property of agencies and instrumentalities is available if the requirements of one of the two exceptions described in Section 1610(b) is satisfied. Each of these exceptions is discussed below.

a. Waiver

Section 1610(b)(1) is a waiver exception for agencies and instrumentalities that is virtually identical in language to the waiver provision in Section 1610(a)(1). The only difference is that by virtue of the language in the introductory paragraph of Section 1610(b), the property of an agency or instrumentality that is subject to execution in the event of a waiver is broader, as discussed above.

b. Judgment Based on Specific Exceptions to Jurisdictional Immunity

Section 1610(b)(2) creates an exception applicable to agencies and instrumentalities for any judgment that relates to a claim for which the agency or instrumentality is not immune by virtue of certain specified exceptions to jurisdictional

¹²² *Id.*; *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 252-253.

¹²³ *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 253; *see also De Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984) (Congress “was more cautious when lifting immunity from execution against property owned by the State itself”).

immunity found in Section 1605.¹²⁴ The specified exceptions include the commercial activity exception, but do not include the arbitration exception.¹²⁵ Thus, if a court renders a judgment against an agency or instrumentality of a foreign state in a case in which jurisdiction existed under the commercial activities exception, any assets of the agency or instrumentality that are located in the United States are subject to execution, regardless of use.

C. *Prejudgment Attachment*

Section 1610(d) provides that prejudgment attachment is available against the assets of a foreign state only if the foreign state has explicitly waived its immunity from prejudgment attachment and the purpose of the attachment is to secure satisfaction of the judgment, not to obtain jurisdiction.¹²⁶ Although prejudgment attachment requires an express waiver, and implied waivers are not sufficient, the Second Circuit Court of Appeals has held that Argentina's successions to the New York Convention and the Panama Convention constituted a waiver of immunity from prejudgment attachment with

¹²⁴ 28 U.S.C. §1610(b)(2).

¹²⁵ *Id.* The exceptions to jurisdictional immunity that are identified in Section 1610(b)(2) that implicate a broader scope of execution include the commercial activities exception (Section 1605(a)(2)); the exception for claims in which rights in property taken in violation of international law are in issue (Section 1605(a)(3)); the exception for claims in which money damages are sought against a foreign state for personal injury or death or property damage occurring in the United States and caused by the tortious act or omission of an official or employee of the foreign state acting within the scope of his office or employment (Section 1605(a)(5)); the exception for claims in which money damages are sought against a foreign state that has been designated as a state sponsor of terrorism for personal injury or death that was caused by certain specified acts (Section 1605(a)(7)); and the exception for certain admiralty cases (Section 1605(b)).

¹²⁶ 28 U.S.C. §1610(d); *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 399-400 (2d Cir. 2003); *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205 (5th Cir. 1994).

regard to itself and its instrumentalities, in light of the provisions in the Conventions permitting the court in an enforcement action to order prejudgment security.¹²⁷

VII. Conclusion

The FSIA has been criticized for its failure to provide clear guidance to the courts in the United States in resolving difficult questions of foreign sovereigns' rights to immunity from jurisdiction and execution. However, almost thirty years of court precedents interpreting and applying the statutory language have resolved most open issues, yielding a body of immunity law that provides a framework for predictable results in most actions against foreign states in the United States.

This paper is designed to provide general information concerning sovereign immunity under the Foreign Sovereign Immunities Act. It is provided with the understanding that the author is not providing legal advice. This outline should not be used as a substitute for professional legal advice in specific situations. If legal advice is required, a legal professional should be engaged to render such advice. Although this outline is designed to provide accurate information as of June 2004, the rules and law described herein may change. Attorneys dealing with specific legal problems should conduct independent legal research. The opinions and characterizations contained in this paper are only those of the authors. This paper does not represent the opinions or positions of the United States Department of State or the United States Department of Justice.

¹²⁷ *Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d at 399-400.