American Bar Association
Section of International Law and Practice*

Report to the House of Delegates

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that the Congress and the President of the United States enact amendments to the Foreign Sovereign Immunities Act ("FSIA" or "Act") in accordance with the following principles:

(1) Amend the FSIA throughout to separate the definitions of "foreign state" and "agency or instrumentality" for all purposes, and amend section 1603 to (a) clarify the term "foreign state" to include the government of the State and its departments, ministries, armed forces, and independent regulatory agencies; and (b) shorten the phrase "agency or instrumentality" to just "instrumentality."

(2) Amend section 1603 to apply the Act to entities owned by more than one foreign state and to add to that section a provision to avoid the application of the FSIA to any entity designated under the International Organizations Immunities Act.

(3) Amend section 1603 to apply the Act to individuals who are officials or employees of a foreign state or instrumentality and who act within the scope of their office or employment, adding appropriate new provisions for service on individuals and provisions expressly preserving diplomatic, consular, or other immunity from suit or service under any treaty, other international agreement, or other federal statute of the United States. This amendment would not apply the Act to heads of state.

(4) Amend the waiver exception in section 1605(a)(1) to limit implied waivers to those situations in which a foreign state or instrumentality participates as a defendant in litigation without properly raising or preserving a defense of sovereign immunity and to specify the choice-of-law rule for determining a person's actual or apparent authority to waive sovereign immunity.

(5) Amend the commercial activity exception in section 1605(a)(2) to remove immunity for claims "based upon a legal obligation to make a payment at a location in the United

*This recommendation and report are the result of four years of work of the Section of International Law and Practice of the American Bar Association and a Working Group of its International Litigation Committee. The members of the Working Group are Andrew N. Vollmer (chair), David J. Bederman, Curtis A. Bradley, Mark A. Cymrot, and Joseph W. Dellapenna. The Council of the Section reviewed and approved a substantially similar recommendation and report in October 2001 and submitted the recommendation for approval by the ABA House of Delegates. Shortly before the House considered the measure, three changes were made to the recommendation. The House of Delegates voted to approve the revised recommendation on August 13, 2002.

The recommendation the House approved is below. The accompanying report explains the recommendation and describes the three changes made before the House vote.

The report is based on and is a summary of a more detailed research paper written by the Working Group and published as *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT'L L. 489 (2002). The report is printed with the permission of the Columbia Journal of Transnational Law Association, Inc.

States in connection with commercial activity," to require a "substantial" and direct effect in the United States when applying the third clause dealing with commercial activity and acts occurring outside of the United States, and to clarify that the types of claims that may not be brought under the tort exception, such as defamation, deceit, and malicious prosecution, may be brought under the commercial activity exception.

(6) Amend the tort exception in section 1605(a)(5) to make it available when a substantial portion of the tortious act or omission occurs in the United States, without regard to the place of injury or damage.

(7) Amend the service provisions of section 1608 to require strict enforcement of the service rules on both foreign states and instrumentalities and to encourage courts to find satisfactory service approaches when a plaintiff has difficulty serving an instrumentality or directors or employees of an instrumentality.

(8) Amend the execution provisions in section 1610 to relax the restrictions on executing a judgment against a foreign state by making any property of a foreign state in the United States used for a commercial activity available to satisfy a U.S. judgment, although retaining the immunity of specific categories of property and clarifying that official, diplomatic, and consular property are not subject to execution.

FURTHER RESOLVED, That the American Bar Association recommends that (1) U.S. courts determine whether an entity is separate from the foreign state itself by reviewing legal characteristics such as whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, contracts in its own name, and is able to sue and be sued, (2) that U.S. courts satisfy themselves, using traditional methods of contract interpretation, that a foreign state or instrumentality's explicit waiver of immunity was a consent to be sued in the United States, and (3) that the U.S. courts continue their incremental interpretation of the discretionary function provision in the tort exception to immunity.

FURTHER RESOLVED, That the American Bar Association does not recommend any alteration in the current structure of the FSIA combining issues of personal jurisdiction, federal court jurisdiction, and immunity from suit.

REPORT

A. Introduction

The Foreign Sovereign Immunities Act of the United States ("FSIA" or "Act")[1] is, as the Supreme Court said, "the sole basis for obtaining jurisdiction over a foreign state in our courts."[2] Although now over 20 years old, this important and complex statute has a variety

1. 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602–1611 (2002).

2. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); *see also* H.R. Rep. No. 94–1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6610 (Act contains the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States") [subsequent citations to the House Report will be to the page of the "1976 U.S.C.C.A.N." only].

There is extension commentary on the FSIA. *See, e.g.*, Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* (2d ed. 2002); Mark W. Janis, *An Introduction to International Law* 350–58 (3rd ed. 1998); Restatement (Third) of the Foreign Relations Law of the United States §§ 451–460 (1987) [hereinafter Third Restatement]; Barry E. Carter & Phillip R. Trimble, *International Law* ch. 6 (3d ed. 1995); Louis Henkin et al., *International Law* 1126–87 (3d ed. 1993); David Epstein & Jeffrey L. Snyder, *International Litigation: A Guide to Jurisdiction, Practice and Strategy* ch. 7 (2d ed. 1996).

of provisions that continue to divide courts and create uncertainty. The objective of this Report is to propose clarifications and improvements on issues that have posed problems for users of the Act while trying to avoid policy judgments and politically sensitive areas.

Since its enactment in 1976, the structure and language of the Act have challenged courts. The structure of the Act, unusually and perhaps uniquely, intertwines the substantive federal law on foreign sovereign immunity with personal jurisdiction and federal court subject-matter jurisdiction.[3] The provision forbidding jury trials in federal courts is buried and awkwardly worded.[4] Courts lamented the absence of a real definition of "commercial activity" and the circularity of the definitions that the Act does contain,[5] and, as this Report will show, found other difficulties with interpreting and applying various parts of the Act.

The courts have adequately addressed and resolved many of the problems with the FSIA, but many problems remain. The courts continue to struggle with the complicated statute and reach different and contradictory interpretations on a variety of important issues. For example, does the definition of "foreign state" apply to heads of state, individual officials, or second- and third-tier subsidiaries? Can and should the provisions on executing judgments be improved and strengthened? What connection with the United States should a foreign state's commercial activity have before a U.S. court proceeds to decide the case? At the moment, inconsistencies and circuit conflicts exist on these and other questions.

Given the inconsistencies and contradictions in judicial interpretations of parts of the FSIA and the complexity of other parts and given the long history of involvement of the ABA with the FSIA,[6] the International Litigation Committee of the Section of International Law and Practice created a Working Group in mid-1998 to examine these issues and the experience with the FSIA since its enactment in 1976. The mission of the Working Group was to evaluate the operation and application of the Act and consider whether any legislative improvements or clarifications should be recommended.

The intention was to improve and clarify the language and areas of the Act that have divided courts or that are potentially ambiguous or confusing. With these reforms and clarifications, the goal was to have the Act provide greater certainty and predictability on legal issues important to foreign states and those having contact with them and to courts and practitioners. The recommendations usually follow the rule reached by a majority of courts but often are more than technical corrections and, in a few instances, would alter existing law. The Working Group sought to make its recommendations consistent with the Constitution and international law as well as to conform with the general purposes, objectives, policies, and values in the current statute and the current legislative history and work within the framework of the existing law. We did not attempt to write an entirely new statute. The Working Group therefore often proposed no change to statutory language when judicial interpretations have largely resolved potential ambiguity or confusion.

3. 28 U.S.C. § 1330 (2002).

4. 28 U.S.C. §§ 1330(a), 1441(d) (2002).

5. Saudi Arabia v. Nelson, 507 U.S. 349, 358–59 (1993); Andreas F. Lowenfield, *Litigating a Sovereign Immunity Claim—The Haiti Case*, 39 N.Y.U. L. REV. 377, 435 n.244 (1974).

6. At the August 1976 meeting of the House of Delegates, the ABA adopted a resolution urging approval of the bill that became the FSIA. 1976 U.S.C.C.A.N. at 6608. At various times, the Section of International Law and Practice had a committee on revision of the FSIA. *See* Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302 n* (1986). In 1984, the House of Delegates approved a recommendation from the Section of International Law and Practice to adopt certain amendments to the FSIA, several of which were enacted in 1988.

The Working Group sought, to the extent possible, to avoid issues of political sensitivity and recommendations proposing policy judgments or value choices that would have new and significant implications for the domestic or foreign policy of the United States. For example, knowing that international human rights issues in connection with the FSIA are controversial and have been the subject of congressional attention in recent years, the Working Group decided not to propose changes to the judgments Congress already made in the area and to leave the state of the law where it is. The Working Group also decided not to address whether the FSIA applies in criminal cases.

The Working Group did not address the maritime exceptions from immunity. We defer to the work periodically done by the Maritime Law Association on those provisions.

B. Jurisdictional Structure of the FSIA

The FSIA provides that, subject to certain exceptions, foreign states are immune from suit in U.S. courts. The FSIA also specifies the conditions under which there is statutory personal and subject matter jurisdiction in suits against foreign states. The FSIA is structured so that the issues of personal jurisdiction, subject matter jurisdiction, and immunity from suit are intertwined. If proper service is made on a foreign state defendant,[7] statutory personal jurisdiction exists with respect to any claim for which there is federal subject matter jurisdiction.[8] Federal subject matter jurisdiction exists "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity."[9] And the FSIA in turn specifies various exceptions to sovereign immunity.[10] Under this structure, a court must determine whether the foreign state defendant is immune from suit to determine whether the court has personal and subject matter jurisdiction. If the court finds that the defendant is immune, the court lacks personal and subject matter jurisdiction. Conversely, if the court finds that there is an exception to immunity, and that proper service has been made, the court automatically has personal and subject matter jurisdiction (assuming no violation of due process requirements).[11]

This structure is confusing, appears to permit the exercise of personal jurisdiction with insufficient contacts, and creates the danger of unnecessary and potentially burdensome discovery to prove exceptions from immunity, thereby undermining one of the benefits of sovereign immunity.[12] One possible reform would be alter the structure so that the issues of subject matter and/or personal jurisdiction would be separated in some way from the issue of sovereign immunity, but, after considering the matter, the Working Group concluded that no amendment is necessary. Courts have become familiar with the structure,[13]

7. The rules for service of process on foreign states and agencies and instrumentalities appear in 28 U.S.C. § 1608.

8. 28 U.S.C. § 1330(b).

9. 28 U.S.C. § 1330(a).

10. *See* 28 U.S.C. §§ 1605, 1607.

11. The Supreme Court has held that the FSIA provides the exclusive basis for obtaining jurisdiction over foreign states in U.S. courts. *See Amerada Hess Shipping*, 488 U.S. at 434.

12. Arriba Ltd. V. Petroleos Mexicanos, 962 F.2d 528, 534 (5th Cir. 1992).

13. *See Amerada Hess Shipping*, 488 U.S. 428 (1989) ("Sections 1604 and 1330(a) work in tandem: § 1330(a) confers jurisdiction on district court to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity"); *see also Nelson*, 507 U.S. at 355; Whitehead v. The Grand Duchy of Lux., 1998 U.S. App. LEXIS 22307, at *10 (4th Cir. Sept. 11, 1998); Wolf v. Federal Republic of Germany, 95 F.3d 536, 540–41 (7th Cir. 1996); Hilao v. Estate of Marcos, 25 F.3d 1467, 1469–70 (9th Cir. 1994); Trans Chem.

and altering the structure could raise a constitutional issue in certain cases if the question of immunity is not raised at the outset.[14] Courts also have been alert to the need to address the potential due process concern of exercising personal jurisdiction over a foreign state or instrumentality with few contacts with the United States[15] and to protect foreign state defendants from burdensome discovery before resolving the immunity issue.[16]

C. Entities and Persons Entitled to Presumptive Immunity

The scope of the current FSIA, that is, the definition of the entities and persons entitled to presumptive immunity, raises several concerns. The scope of the Act is important not only because those covered by the FSIA are entitled to presumptive immunity but also because they enjoy many procedural protections even when an exception from immunity applies.[17] The concerns are with the ambiguity of the definition of "foreign state," the occasional difficulty in distinguishing between a foreign state and an "instrumentality," confusion about whether the FSIA applies to corporations indirectly owned by foreign states or owned by two or more foreign states, the absence of any reference to individuals such as government officials, and the appropriate time for determining when an entity qualifies for coverage under the Act.

1. *Distinguishing Between Foreign States and Instrumentalities*

The phrase "foreign state" is confusing because it has a dual definition; it sometimes means both states and instrumentalities and sometimes means just states. This has led to difficulties in interpreting the Act. An example is the tiering and pooling issue discussed below. The definitions of "foreign state" and "agency or instrumentality" therefore should be separated for all purposes. For clarity and convenience, we also propose shortening the phrase "agency or instrumentality" to just "instrumentality."

In addition, the courts disagree about the method for distinguishing parts of a foreign state from instrumentalities. The Working Group concluded that the "legal characteristics"[18] test rather than the "core functions"[19] test better serves the goals of the Act. The Supreme Court recognized that the legal characteristics test is the standard established in international law for determining whether an entity has autonomy from the

---

Ltd. v. China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266, 276 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998).

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

15. *See, e.g.*, Theo. H. Davis & Co. v. Republic of the Marshall Islands, 161 F.3d 550 (9th Cir. 1998); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1545–46 (11th Cir. 1993); Gregorian v. Izvestia, 871 F.2d 1515, 1529 (9th Cir. 1989). In evaluating whether there are minimum contacts, courts have looked to whether there are sufficient contacts with the nation as a whole rather than with any particular state. *See, e.g.*, Antoine v. Atlas Turner, Inc., 66 F.3d 105, 111 (6th Cir. 1995); Meadows v. Dominican Republic, 817 F.2d 517, 523 (9th Cir. 1987). The Working Group takes no position on whether a foreign state is a person for purposes of the due process clause. *See* Republic of Argentina v. Weltover, 504 U.S. 607, 619 (1992).

16. *In re* Papandreou, 139 F.3d 247 (D.C. Cir. 1998).

17. A defendant within the scope of the Act receives a variety of procedural benefits including the following: the absence of the plaintiff's right to a jury trial in federal court, 28 U.S.C. §§ 1330(a), 1441(d), the right to remove a state case to federal court, *id.* § 1441(d), the right to special service of process requirements, *id.* § 1608, and the right to special protections from pre-judgment attachment and execution, *id.* §§ 1609–11.

18. *See* Hyatt Corp. v. Stanton, 945 F. Supp. 675 (S.D.N.Y. 1996); *see also* Jane H. Griggs, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?* 20 W. New Eng. L. Rev. 387, 413–19 (1998) (discussing *Hyatt*).

19. *See, e.g.*, Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994).

state,[20] and, based on the plain meaning of the FSIA, it appears to be the test that Congress contemplated. The core functions test is vague and subjective, difficult to apply, and, as a practical matter, duplicative of the commercial activity analysis more appropriately applied later to determine whether the defendant is immune. Courts should determine whether an entity is separate from the foreign state itself by reviewing legal characteristics such as whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, contracts in its own name, and is able to sue and be sued. Although ministries, departments, the armed forces, and independent regulatory agencies occasionally have some of these characteristics, the definition of foreign state should make clear that the state includes these entities because they are traditionally viewed as part of the state itself and because they have structural characteristics closely connecting them to the state.

2. *Tiered and Pooled Entities*

In today's world of complex legal structures, two situations often arise that create substantial uncertainty about the appropriate application of the Act to instrumentalities. First, a corporation might not be directly majority owned by a foreign state but instead might be majority owned by another corporation that, in turn, is directly majority owned by a foreign state ("tiered" entity). Second, a corporation might be directly majority owned by two or more foreign states, with each state individually owning less than 50 percent of the corporation ("pooled" entity).

Because of ambiguous statutory language, the courts have struggled with whether such tiered and pooled entities fit within the FSIA's definition of a corporation majority owned by a foreign state and thus whether such entities enjoy the many protections that the FSIA affords.[21] The conflicting opinions of courts have undermined the FSIA's goal of achieving consistency and uniform decisionmaking in cases involving foreign sovereigns.

The Section and Working Group initially proposed a recommendation to apply presumptive sovereign immunity to corporations indirectly majority owned by foreign states but withdrew it because the U.S. Supreme Court granted certiorari to review the tiering issue in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W.

20. First Nat'l City Bank v. Banco Para el Commercio Exterior de Cuba, 462 U.S. 611 (1983).

21. The position of the majority of courts is that corporations indirectly owned by a foreign state through intermediary parent corporations fall within the FSIA. *See, e.g., In re* Air Crash Disaster Near Roselawn, Indiana, 96 F.3d 932, 939–41 (7th Cir. 1996); Antoine v. Atlas Turner, Inc., 66 F.3d 105, 109 (6th Cir. 1995); Linton v. Airbus Indus., 30 F.3d 592, 598 n.29 (5th Cir. 1994) (dicta), *appeal dismissed*, 30 F.3d 592 (5th Cir. 1994); Straub v. AP Green, Inc., 38 F.3d 448, 451 (9th Cir. 1994); Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982); Trump Taj Mahal Assoc. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A., 761 F. Supp. 1143, 1148–50 (D.N.J. 1991), *aff'd without opinion*, 958 F.2d 365 (3d Cir. 1992). Other courts held that corporations indirectly owned by a foreign state do not fall within FSIA. *See, e.g.*, Gates v. Victor Fine Foods, 54 F.3d 1457, 1461–63 (9th Cir. 1995); Fed. Ins. Co. v. Richard L. Rubin & Co., 12 F.3d 1270, 1285 n.12 (3d Cir. 1993) (dicta); *Stanton*, 945 F. Supp. at 685–90; Martinez v. Dow Chem. Co., No. 95-3212, 1996 U.S. Dist. LEXIS 13180, at *2 (E.D. La. Sept. 4, 1996); Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125, 130–31 (S.D.N.Y. 1995).

Most courts have allowed a corporation to "pool" the interests of all of the foreign states to reach the majority ownership required by section 1603(b)(2). *See, e.g., Roselawn*, 96 F.3d at 937–39. Mangattu v. M/V IBN Hayyan, 35 F.3d 205, 207–08 (5th Cir. 1994); LeDonne v. Gulf Air, Inc. 700 F. Supp. 1400, 1406 (E.D. Va. 1988). A few courts have expressed hesitation in allowing pooling. One court, for example, noted that the statutory text of section 1603(b)(2) literally requires majority ownership "by a foreign state," not "states," and that Congress could have explicitly allowed majority ownership "by a foreign state or states" but failed to do so. *See Linton*, 794 F. Supp. at 652.

3791 (U.S. June 28, 2002) (No. 01-593). The Court's decision should rectify the problems resulting from the lack of consistency and uniformity.

To achieve consistency and promote the other purposes of the FSIA, Congress should amend the Act to clarify that a foreign corporation may receive presumptive immunity by "pooling" the ownership interests of two or more foreign states to satisfy the majority-ownership requirement. Permitting pooling promotes the foreign policy concerns of the FSIA and has less serious implications for United States plaintiffs. The foreign policy interests of the United States are affected whether foreign states are sued individually or as part of a group, and a suit against a corporation 95 percent directly owned by two foreign states likely will have as great or greater foreign policy implications as a suit against a corporation 51 percent owned by one foreign state.

The pooling recommendation potentially creates confusion because the International Organizations Immunities Act ("IOIA") applies to some entities owned by more than one state, such as the World Bank and the International Finance Corporation. To avoid any possible overlap of the FSIA and the IOIA, the proposal contains a provision stating that the FSIA does not apply to entities designated under the IOIA. This provision is not meant to address any other possible relationship between the FSIA and the IOIA and is not meant to comment in any way on the privileges and immunities to which IOIA entities are entitled.

3. *Time for Determining Status*

The courts have been inconsistent in deciding the time at which a defendant may be considered a foreign state or instrumentality when the status of the defendant has changed between the time the claim arose and the time the claim is filed. The most common approach is for courts to make the decision based on the status of the defendant at the time the claim arose.[22] Other courts have found that the inquiry should be made at the time the claim is filed,[23] and a few courts have found that either time is acceptable.[24]

The Section and Working Group initially proposed a recommendation to apply the Act to defendants that are foreign states or instrumentalities at either the time the claim arose or the time the complaint is filed but withdrew the recommendation for the same reason the tiering proposal was withdrawn. The U.S. Supreme Court granted certiorari to review

22. *See* Peré v. Nuovo Pignone, Inc., 150 F.3d 477 (5th Cir. 1998); Gen. Elec. Capital Co. v. Grossman, 991 F.2d 1376 (8th Cir. 1993); Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988); *In re* Chase & Sanborn Corp., 835 F.2d 1341 (11th Cir. 1988), *rev'd on other grounds*, 492 U.S. 33 (1989); Daly v. Llanes, 30 F. Supp. 2d 407 (S.D.N.Y. 1998); Transamerica Leasing, Inc. v. La Republica de Venezuela, 21 F. Supp. 2d 47 (D.D.C. 1998), *rev'd on other grounds*, 200 F.3d 843 (D.C. Cir. 2000); *In re* Aircrash Disaster Near Monroe, 987 F. Supp. 975 (E.D. Mich. 1997); *Trans. Chem. Ltd.*, 978 F. Supp. 266; Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525 (S.D. Tex. 1994).

23. *See Straub*, 38 F.3d 448; Morgan Guaranty Trust Co. v. Republic of Palau, 639 F. Supp. 706 (S.D.N.Y. 1986) (finding that "jurisdictional questions are generally determined as of the date upon which the complaint was filed"), *vacated*, 924 F.2d 1237 (2d Cir. 1991) (reversal based on Second Circuit's finding that Palau did not qualify as a foreign state because it did not possess attributes of foreign sovereignty); Ocasek v. Flintkote Co., 796 F. Supp. 362 (N.D. Ill. 1992) (finding that FSIA immunity would not apply where defendant was a foreign state at the time events occurred but was not a foreign state by the time the complaint was filed); Tjontveit v. Den Norske Bank, 1997 U.S. Dist. LEXIS 22802 (S.D. Tex. Oct. 30, 1997), *vacated on other grounds*, 1998 U.S. Dist. LEXIS 11929 (S.D. Tex. Mar. 26, 1998) (defendant entitled to protections of the FSIA because although private when acts occurred, it had become public by the time the suit was filed; *vacated on grounds of forum non conveniens*).

24. *See, e.g.*, Belgrade v. Sidex Int'l Furniture Corp., 2 F. Supp. 2d 407 (S.D.N.Y. 1998).

the timing issue in *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001), *cert. granted*, 70 U.S.L.W. 3791 (U.S. June 28, 2002) (No. 01-593).

4. *Heads of State, Government Officials, and Employees of Instrumentalities*

Courts have periodically been obliged to consider whether individuals who are heads of state or who are officials or employees of foreign states or of instrumentalities of foreign states are covered by the immunities under the Act. The text of the FSIA is silent on the point, but a majority of courts that have considered the issue have concluded that, under certain circumstances, an individual officer or employee of a foreign state or instrumentality may receive immunity under the Act.[25] No court has applied the FSIA to a head of state, but one leading district court opinion and some other courts found a comparable common law immunity that depends for the most part on a suggestion of immunity from the U.S. Department of State.[26]

The current position of the courts should be codified but in a way that does not interfere with the evolution of the law on head-of-state immunity. The scope of the Act should be explicitly expanded to include officials or employees of foreign states or instrumentalities acting in an official capacity (and who are not otherwise U.S. citizens or permanent residents). Litigation of questions involving the immunities of individuals has been common in U.S. courts. These cases present controversial situations and could be a source of conflict with other countries because cases against foreign officials are often no more than cases against the foreign state or the instrumentality. A congressional codification of a rule extending foreign sovereign immunity to individuals is preferable to the potentially inconsistent and uncertain application of judicially-created standards. With appropriate new provisions for service on individuals, the recommended approach would be to treat government officials as part of the foreign state and to treat directors and employees of an instrumentality as part of the instrumentality. The individuals would retain immunity and, when an exception from immunity applies, would be subject to legal action in the United States in the same circumstances as the foreign state or instrumentality. This is the appropriate result because it would ensure that the individuals receive the procedural protections of the Act while providing potentially aggrieved plaintiffs an opportunity to obtain relief when foreign officials cause injury within the scope of their duties but outside of protected sovereign functions. The proposed amendments would contain provisions expressly preserving diplomatic, consular, and other immunity from suit and service under any treaty, other international agreement, or other federal statute of the United States.

The Working Group does not recommend that the FSIA apply to foreign heads of state and takes no position on the issue. Although several reasons to include heads of state within the Act exist, the proper treatment of heads of state should be left to the appropriate authorities to continue to develop. The position of the Executive Branch is that the ability

25. *See* Phaneuf v. Republic of Indonesia, 106 F. 3d 302, 306 (9th Cir. 1997); El-Fadl v. Cent. Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) ("Although El-Fadl claims to be suing Marto in an individual capacity, the only evidence in the record shows that Marto's activities in managing PIBC were neither personal nor private, but were undertaken only on behalf of the Central Bank."); Trajano v. Marcos, 978 F.2d 493,497-98 (9th Cir. 1992); Chuidian v. Phil. Nat'l Bank, 912 F.2d 1095 (9th Cir. 1990); Intercontinental Dictionary Serv. v. De Gruyter, 822 F. Supp. 662, 674 (C.D. Cal. 1993).

26. *See, e.g.*, Alicog v. Kingdom of Saudi Arabia, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff'd mem.*, 79 F.3d 1145 (5th Cir. 1996); Lafontant v. Aristide, 844 F. Supp. 128, 131 (E.D.N.Y. 1994); Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988), *aff'd*, 886 F.2d 438 (D.C. Cir. 1989).

to suggest head-of-state immunity in appropriate cases is important to preserve U.S. foreign policy interests. Because of the recommendation to have the Act cover foreign government officials, a proposed provision would make explicit that the Act is not intended to supersede head-of-state immunity.

D. The Waiver Exception

The Foreign Sovereign Immunities Act provides that a foreign state will not receive immunity if it "has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."[27] This language leaves several important questions unanswered. First, it is not clear what, if any, nexus is required for a court to exercise personal jurisdiction over a foreign state in this situation. Second, it is not clear what contractual language or foreign state conduct is sufficient to constitute a waiver "by implication." Third, it is not clear what law courts should apply in determining whether an individual or entity has authority to waive a foreign state's immunity.

On the first question, although there have been concerns about the absence of a requirement connecting an explicit waiver to the territory of the United States, no amendment to the current statutory language is needed as long as courts satisfy themselves, using traditional methods of contract interpretation, that a foreign state or instrumentality's waiver was a consent to be sued in the United States. Second, because courts rarely find an implied waiver and because of the costs and uncertainties associated with the provision on implied waivers, the Working Group proposes to amend the FSIA to limit implied waivers to those situations in which a foreign state or instrumentality participates as a defendant in litigation without properly raising or preserving a defense of sovereign immunity. To address the third question, the statute should be amended to include language specifying the choice-of-law rule for determining a person's actual or apparent authority to waive sovereign immunity.

E. The Commercial Activity Exception

The exception from immunity for commercial activity is one of the most significant exceptions in the Act and was the foundation for the emergence of the restrictive theory of immunity embraced by the Act. The statutory language of the exception initially raised a variety of questions, but the courts have made significant progress in resolving them, such as the meaning of the "based upon" requirement[28] and of the phrase "commercial activity."[29] Some potential confusion about the meaning of "commercial activity" remains, but an amendment to the statutory language could not completely solve the problem, and courts should be able to deal with any questions that occur.

The only significant change the Working Group recommends for the commercial activity exception is to require a "substantial" and direct effect in the United States when applying the third clause dealing with commercial activity and acts occurring outside of the United States. The Supreme Court's construction of the current "direct effect" language[30] has

27. 28 U.S.C. § 1605(a)(1) (2002).
28. *Nelson*, 507 U.S. at 356–58 (Souter, J.), 364 (White, J.), 370 (Kennedy, J.) (1993).
29. *Weltover*, 504 U.S. at 614; *see also id.* at 359–61.
30. *See Weltover*, 504 U.S. at 619.

caused confusion and disagreements in the lower courts[31] and permits U.S. courts to resolve commercial cases having only the most distant relationship with the United States.[32] The proposed additional word "substantial" should mean significant or weighty in relation to all of the circumstances of the case and its connections with the United States. Failure to provide a service or good in the United States would usually qualify, as would a concerted refusal to deal by foreign producers aimed at U.S. buyers; a financial loss by a U.S. person or at a U.S. bank account by itself would not.

F. The Tort Exception

The FSIA contains an exception to immunity for case, not otherwise covered by the commercial activity exception, involving tort claims for "personal injury or death, or damage to or loss of property, occurring in the United States." This exception does not apply to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function" or "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

The scope of this exception should be clarified. First, the language requiring the tort to have some connection with the United States should be amended to specify that the tort exception apply whenever a substantial portion of the tortious act or omission occurs in the United States. Although the current language of the exception makes it clear that the injury or damage in question must occur with the United States, there is no express requirement that the tortious act or omission also must occur in the United States. As most courts have held,[33] there should be a territorial restriction on the tortious act or omission. As courts have explained, if there are no territorial restriction on the tortious act or omission, foreign sovereigns could be subject to suit in U.S. courts for tortious conduct committed anywhere in the world, so long as the conduct had effects in the United States. These cases would likely be especially offensive to foreign sovereigns, raise difficult questions of causation, and burden an already overloaded federal court system. With a requirement for conduct in the United States, the current requirement that the injury or damage occur in the United States could be eliminated, especially since determining where the injury or damage occurs can be complicated and difficult.

To accommodate multi-country tort situations, the statute should require only that a "substantial portion" of the acts or omissions occur in the United States. This requirement would ensure that the tort exception is limited to situations in which there is a significant connection between the tort and the United States, while at the same time avoiding the inequity of disallowing claims just because some of the conduct took place outside of the United States.

The second amended proposed by the Working Group is to clarify that the limitations on the tort exception—for discretionary functions and for certain torts such as libel and

31. *See* Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887 (5th Cir. 1998); Hanil Bank v. PT. Bank Negara Indon., 148 F.3d 127 (2d Cir. 1998); Adler v. Fed. Republic of Niger., 107 F.3d 720 (9th Cir. 1997); Goodman Holdings v. Rafidain Bank, 26 F.3d 1143, 1146–47 (D.D. Cir. 1994).

32. *See Hanil Bank*, 148 F.3d 127.

33. *See, e.g., Amerada Hess Shipping Corp.*, 488 U.S. at 441 (dicta); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 379–80 (7th Cir. 1985); Persinger v. Islamic Republic of Iran, 729 F.2d 835, 842–43 (D.C. Cir. 1984); *In re* SEDCO, Inc., 543 F. Supp. 561, 567 (S.D. Tex. 1982).

defamation—do not apply to the commercial activity exception. When the commercial activity exception applies, the adjudication of misrepresentation, defamation, and similar claims is unlikely to pose serious foreign relations difficulties given the commercial context of the cases. Moreover, when foreign states act like private entities in the market, the restrictive theory of immunity suggests that they should be subject to the full range of claims available against private entities. Private entities, of course, have no immunity when they engage in conduct such as defamation or misrepresentation. This second proposed amendment is consistent with the majority view in the courts.[34]

A final issue important in some international human rights cases is whether the discretionary function limitation applies to illegal activity. Although there is some disagreement in courts over the legality issue,[35] the discretionary function provision need not be altered at this time. There is no severe conflict of authority, and courts should continue addressing the issue on a case-by-case basis because of the foreign relations issues.

G. Service of Process

In FSIA cases several issues concerning service of process exist. The FSIA contains separate service of process provisions in 28 U.S.C. § 1608 for foreign states and for instrumentalities. Courts disagree over whether strict compliance with these service requirements is necessary. Some courts find "substantial compliance" with service rules adequate, at least for instrumentalities, although courts differ on what constitutes substantial compliance.[36]

The recommendation is that courts should strictly enforce service rules on both foreign states and instrumentalities, and new statutory language should be added to make clear that substantial compliance with service rules is not acceptable. Most courts agree that the service rules should be strictly followed when a foreign state is the defendant. The substantial compliance rule is difficult to apply uniformly, and in the FSIA cases it has a potential adverse effect on international relations, comity, and the enforceability of U.S. judgments. Including the strict compliance rule in the statute will correct the approach followed by a minority of courts and will prevent future departures from the appropriate rule.

A strict compliance rule also should apply to instrumentalities. Although many instrumentalities engage in commerce, they differ from private entities because one or more foreign states hold ultimate majority ownership of them. Thus, service on an instrumentality implicates concerns about avoiding disruption to the foreign relations of the United States. In any event, many courts reject the substantial compliance approach in litigation between private parties and require full compliance with a method of delivery specified in a statute or rule.[37] Although plaintiffs may sometimes encounter special difficulties in serving foreign

34. *See, e.g.*, Southway Cent. Bank of Nig., 198 F.3d 1210, 1219 (10th Cir. 199); Exp. Group v. Reef Indus., Inc., 54 F.3d 1466, 1473–76 (9th Cir. 1995); Southway v. Cent. Bank of Nig., 994 F. Supp. 1299, 1310–11 (D. Colo. 1998); Yucyco, Ltd. v. Republic of Slov., 984 F. Supp. 209, 224 (S.D.N.Y. 1997). *But see* Bryks v. Canadian Broad. Corp., 906 F. Supp. 204, 208–10 (S.D.N.Y. 1995) (defamation claims could not be brought under the commercial activity exception because of the exclusion of such claims in the tort exception).

35. *See, e.g.*, Risk v. Halvorson, 936 F.2d 393, 396–97 (9th Cir. 1991); Liu v. P.R.C., 892 F.2d 1419, 1431 (9th Cir. 1989); Letelier v. Republic of Chile, 488 F. Supp. 665, 673 (D.D.C. 1980).

36. *See, e.g.*, *Straub*, 38 F.3d 448; Sherer v. Constucciones Aeronauticus, S.A., 987 F.2d 1246 (6th Cir. 1993).

37. Veeck v. Comty. Enters. Inc., 487 F.2d 423, 426 (9th Cir. 1973) (in personam jurisdiction can be obtained only by defendant's voluntary appearance in the action or service of the court's process on him in strict conformance with a valid statute authorizing it"; *see also* R. Griggs Group Ltd. v. Filanto Spa., 920 F. Supp. 1100, 1103 (D. Nev. 1996); Leab v. Streit, 584 F. Supp. 748 (S.D.N.Y. 1984). *But see* Sanderford v. Prudential Ins.

sovereign defendants, a substantial compliance rule is not necessary to address these situations. Instead, courts can, for example, allow a plaintiff additional time to cure the deficiency and re-serve the defendant in accordance with the Act. Courts also would retain the authority to find proper service when a minor technical defect in the form of a service document exists, as long as the method of delivery was in conformance with the rule.

In addition, there should be some adjustments to the part of section 1608 permitting courts to authorize use of a special method of service on an instrumentality when a plaintiff cannot effect service or has difficulty effecting service by one of the methods explicitly described in section 1608. The adjustments would ensure that a specially developed method of service is not prohibited by international agreement and does not violate foreign law. Under the recommended approach, the provision would apply to an instrumentality, director, officer, or employee of an instrumentality, but would not apply to foreign states proper (service by diplomatic channels under section 1608(a)(4) would continue to be the last resort for service on a foreign state) or foreign government officials (service by mail requiring a signed receipt and sent by the clerk of the court would be the last resort for service on a foreign official).

H. Execution

The FSIA has three sections addressing immunity from execution. Section 1609 establishes the general presumption of immunity "from attachment arrest and execution except as provided in sections 1610 and 1611." Section 1610(a) creates various exceptions from execution immunity for foreign states and instrumentalities. Section 1610(b) provides for additional exceptions from execution immunity for "property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States." Finally, section 1611 defines certain types of property that are always immune from execution.

Several factors combine to make execution against foreign states unduly restrictive.[38] As a threshold matter, section 1610(a) requires that the property against which attachment in aid of execution or execution is sought must be "used for a commercial activity in the United States." A party seeking execution against a foreign state must also satisfy an additional exception in section 1610(a). Section 1610(a)(2), for example, grants an exception for execution against property that "is or was used for the commercial activity upon which the claim is based." When read with the introductory language of section 1610(a) limiting execution to commercial property in the United States, a plaintiff has a double burden of seeking execution against a foreign sovereign. Moreover, only in rare instances would a foreign state have property in the United States "used" for the activity giving rise to the claim. In many cases, such as those involving a foreign state's failure to pay for U.S. goods or services or breach of an employment contract or lease, no property of the foreign state related to the claim exists at all, much less in the United States.

Co. of Am., 902 F.2d 897 (11th Cir. 1990) (defendant waived defense of insufficient service when it did not respond to a summons that was in substantial compliance with Rule 4).

38. Successful plaintiffs have encountered difficulty in enforcing judgments even when the court had found that it otherwise properly had jurisdiction to adjudicate over the foreign sovereign. *See, e.g.*, De Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984); LNC Inv., Inc. v. Republic of Nicar., 2000 U.S. Dist. LEXIS 7814 (S.D.N.Y. June 8, 2000); Liberian E. Timber Corp. v. Gov't of Republic of Liber., 659 F. Supp. 606 (D.D.C. 1987).

There is also no specific exception in section 1610(a) for noncommercial tort cases. Instead, there is simply an exception (in section 1610(a)(6) for "liability or casualty insurance covering the claim which merged into the judgment." The exception is inadequate to address potential liability from torts in the United States because insurance might not exist, might not exist in sufficient amount, or might not qualify as property in the United States.

To address these problems, execution against foreign states should be simplified by permitting execution of a judgment based on a claim for which the foreign state is not immune against any property in the United States used for a commercial activity. The immunity of specific categories of property would be retained, although the protections for property covered by diplomatic or consular immunity would be clarified. This approach would eliminate the requirement in section 1610(a)(2) that execution in a commercial activity case be limited to property related to the same commercial activity. It also would provide an execution remedy for non-commercial tort cases covered by section 1605(a)(5) substantially beyond the current exception for insurance proceeds. Because section 1610(a) applies to executions against both foreign states and instrumentalities, these proposed simplifying revisions would make the separate provisions on execution against instrumentalities in section 1610(b) unnecessary. These changes would not affect Congress's recent amendments relating to execution against blocked funds of certain foreign states.

I. Protections for Foreign States To Balance Narrowed Execution Immunity

The narrowing of the FSIA's immunity for foreign states from attachment and execution would create an imbalance between debtor protections and creditor rights for foreign states in financial distress. While corporate bankruptcy rules provide orderly procedures to balance the interests of creditors and private debtors, no such rules exist for foreign states. At times, this void has created a variety of difficult issues for both creditors and debtor countries.

One possible approach to this imbalance would be to grant courts explicit statutory authority to stay proceedings or enforcement against foreign states in certain narrow circumstances. Courts have already found discretion to stay proceedings and regulate execution of judgments in certain situations under a variety of legal principles and statutes. The Supreme Court has held that federal courts have inherent authority to stay lawsuits, and this power has been applied in lawsuits involving foreign parties.[39] Moreover, federal courts have denied prejudgment attachment orders and other relief against foreign states and instrumentalities at least in part on the ground that such orders would create undue hardship.[40] In fact, a provision of the current FSIA, section 1610, already provides a limited stay of execution until the court determines that "a reasonable period of time has elapsed

39. *See, e.g.*, Clinton v. Jones, 520 U.S. 681, 706 (1997); Landis v. North American Co., 299 U.S. 248, 254 (1936); Can. Southern Ry. V. Gebhard, 109 U.S. 527 (1883); Limonium Maritime, S.A. v. Mizushima Marinera, S.A., 201 F.3d 431 (2d Cir. 1999); Cunard S.S. Co. v. Salen Reeferes Servs. AB, 773 F.2d 452 (2d Cir. 1985); Drexel Burnham Lambert Group, Ltd. v. Galadari, 777 F.2d 877 (2d Cir. 1985) (Dubai liquidation proceedings); Pravin Banker Assoc. Ltd. v. Banco Popular del Peru, 165 B.R. 379, 388 (S.D.N.Y. 1994), 1995 U.S. Dist. LEXIS 2730 (S.D.N.Y. 1995), *aff'd*, 109 F.3d 850 (2d Cir. 1997).

40. *See* Elliott Assoc. v. Republic of Peru, 948 F. Supp. 1203, 1213–14 (S.D.N.Y. 1996); Meridien Int'l Bank v. Liber., 1996 WL 22338 at *6 (S.D.N.Y.); Interpetrol Bermuda Ltd. v. Trinidad and Tobago Oil Co., 513 N.Y.S.2d 598, 604–05 (Sup. Ct. 1987); Morgan Guaranty Trust Co. v. Republic of Palau, 702 F. Supp. 60, 66 (S.D.N.Y. 1988), *vacated on other grounds*, 924 F.2d 1237 (2d Cir. 1991).

following the entry of judgment." Finally, some state and federal laws provide the courts with specific authority to regulate the manner and timing of enforcement of judgments.[41]

Thus, including explicit statutory authority for courts to grant a stay of proceedings or execution of a judgment has merit as a possible way to address any imbalance between the rights of creditors and the rights of sovereign debtors that currently exists or that might be altered in favor of creditors if the recommendation to narrow execution immunity is adopted. The Working Group decided not to recommend adoption of an explicit stay provision, however. Proposals to address any imbalance should be considered in a context larger than recommended reforms to the FSIA and as part of an examination of international rules to protect foreign states in a manner similar to insolvency and bankruptcy codes. That larger context is beyond the scope of this FSIA work, but an effort should be undertaken to consider the larger set of issues, especially if narrower execution immunity for foreign states is adopted.

41. *See* N.Y.C.P.L.R. § 5240 (McKinney 1999); Federal Debt Collection Procedure, 28 U.S.C. § 3013 (2002).