A Primer on Foreign Sovereign Immunity

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I. Introduction

The doctrine of foreign sovereign immunity provides that a foreign state generally is immune from the jurisdiction of the courts of another sovereign state. State immunity developed as an “undisputed principle of customary international law” and the law of nations based upon core aspects of sovereignty applicable in common law, civil law and other judicial systems. Until the mid-Twentieth Century, sovereign immunity from the jurisdiction of foreign courts was almost absolute. However, as governments and state enterprises became more and more active in commercial activities in the modern era, private entities interacting with foreign states attacked complete sovereign immunity as fundamentally unfair in eliminating judicial recourse and favoring state companies.

The United States and some Western European nations reacted by adopting a “restrictive” approach to foreign sovereign immunity. The restrictive theory of state immunity provided that foreign states were immune from jurisdiction relating to their “public acts” (acta jure imperii) but were not immune from jurisdiction for their “private acts” (acta jure gestionis) including commercial activities. The United States codified the restrictive approach to state immunity through the Foreign Sovereign Immunities Act of 1976 (the “FSIA”). Two years later, the United Kingdom passed similar legislation: the State Immunity Act of 1978.

In addition to domestic law, efforts were undertaken to develop multilateral treaties governing foreign sovereign immunity issues. The Council of Europe adopted a European Convention on State Immunity and an Additional Protocol that became effective in 1976 (the “European Convention”). Most recently, the United Nations, which had been working on state immunity issues for decades, finalized its own restrictive approach to state immunity through the United Nations Convention on Jurisdictional Immunities of States and Their Property (the “UN Convention”). The United Nations General Assembly passed the UN Convention on December 2, 2004 and the treaty is currently open for signatures through 2007. If widely adopted, the UN Convention may serve as a new international norm in the field of state immunity.

The reality of modern international dispute resolution is that foreign states and their subdivisions, agencies, instrumentalities, organs and state-owned enterprises are often engaged in transnational commerce. Such entities are active in: energy exploration, development and production; mining and other natural resources exploitation; banking; maritime, rail and aerial transportation; tourism; utilities including electricity, water, natural gas and sewage; industrial manufacturing; international trade; and many other sectors of important commercial activity. Given the prevalence of state actors in the world economy, lawyers practicing international law should be knowledgeable concerning state immunity.

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1. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Chap. 5 at 390 (ALI 1986)[hereinafter, “Restatement Foreign Relations”].
2. 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602-1611. A copy of the FSIA is attached hereto.
4. The UN Convention is located at: http://untreaty.un.org/English/notpubl/English_3_13.pdf. A copy of the UN Convention also is attached hereto.
The balance of this presentation will provide a broad overview of foreign sovereign immunity with special focus on the FSIA and United States state immunity law including: (1) Historical Development of United States Foreign Sovereign Immunity Law; (2) the United States Foreign Sovereign Immunities Act; and (3) State Immunity Approaches in Other Jurisdictions and Multilateral Treaties.

II. Historical Development of United States Foreign Sovereign Immunity Law

The United States Supreme Court’s 1812 decision, The Schooner Exchange v. McFadden, is the source of American foreign sovereign immunity jurisprudence. In that case, American plaintiffs claimed to be the rightful owners of an armed French ship found in a United States port. The plaintiffs sought execution on the vessel. Citing international custom, Justice Marshall determined that state immunity was based upon the “perfect equality and absolute independence of sovereigns and [a] common interest impelling them to mutual intercourse.” Referring to the importance of maintaining friendly relations with other nations, the Supreme Court confirmed that state immunity is based upon international comity among nations. The Supreme Court ultimately endorsed the suggestion of the Executive Branch and refused to permit the exercise of jurisdiction by a United States court over the French war ship. Although The Schooner Exchange is usually cited for the proposition that the United States adopted a broad, absolute form of state immunity, Justice Marshall actually planted the seeds for the restrictive theory of foreign sovereign immunity by noting the distinction between an armed public vessel (such as the Schooner Exchange) and private merchant vessels entering the United States for purposes of trade.

In the decades after The Schooner Exchange decision, the doctrine of foreign sovereign immunity gradually evolved in the United States to give more and more deference to the Executive Branch in the decision-making process of whether immunity should be afforded. Until 1952 the Executive Branch, through the United States Department of State, “followed a policy of requesting immunity in all actions against friendly sovereigns.” During World War II, United States courts abdicated almost all judicial decision-making with respect to state immunity and instead determined that position statements (sometimes called “suggestions of immunity”) from the State Department were dispositive of a foreign state’s immunity. If the State Department suggested immunity, immunity was granted; if not, immunity was not afforded.

Meanwhile, for various reasons governments were increasingly becoming engaged in state-trading and various commercial activities. Lawyers, scholars and private parties urged that the complete immunity of states engaged in commercial activities was not required by international law and was undesirable because such absolute immunity (even for friendly nations) deprived private parties that dealt with state enterprises of judicial remedies and gave

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5 11 U.S. (7 Cranch) 116 (1812).
7 Schooner Exchange, 11 U.S. (7 Cranch) at 137.
8 Id. at 144.
9 Altmann, 124 S.Ct. at 2248.
state businesses an unfair competitive advantage. Some countries, notably Belgium and Italy, started to implement a restrictive approach to state immunity by denying immunity in cases stemming from commercial activity.

The United States adopted a restrictive approach to state immunity in 1952 through issuance of the so-called Tate Letter. In that correspondence, the Legal Adviser for the State Department wrote:

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of a sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis).... [I]t will hereafter be the [State] Department's policy to follow the restrictive theory ....

Under this new policy, the State Department retained initial responsibility to decide questions of sovereign immunity using the new restrictive immunity framework. However, application of the Tate Letter policy proved difficult and unpredictable. The State Department did not always opine in cases involving foreign sovereigns. Further, the State Department sometimes was guided by political or diplomatic considerations rather than the restrictive immunity approach.

While the United States was struggling to implement the new restrictive state immunity principle, other nations (notably in Europe) had also begun to formulate their own restrictive foreign sovereign immunity approaches. After more than a decade of study, the Council of Europe concluded the first comprehensive multilateral treaty on foreign sovereign immunity, the European Convention on State Immunity and Additional Protocol, in 1972. The European Convention entered into force on June 11, 1976 between eight European nations.

At almost the same time, the United States Congress passed the FSIA to provide a statutory framework for resolving issues of sovereign immunity through the judicial branch without exclusive reliance upon the State Department. In general, the FSIA codified the restrictive theory of sovereign immunity and brought the United States into alignment with other developed nations in implementing limited sovereign immunity approaches.

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11 See Restatement Foreign Relations, Chap. 5 at 391.
12 Tate Letter, reprinted in 26 Dept. State Bull. 984-85 (1952) and Altmann, 124 S.Ct. at 2248.
13 Restatement of Foreign Relations, Chap. 5 at 393.
14 Notwithstanding Western Europe's evolution toward the restrictive principle of state immunity, most Communist block countries initially insisted on absolute sovereign immunity for their state enterprises.
15 The European Convention parties are: Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. Portugal is also a signatory.
16 See United Kingdom State Immunity Act of 1978. The United Kingdom domestic legislation was modeled after the European Convention.
III. The United States Foreign Sovereign Immunities Act

A. General Scope of the FSIA

Enacted in 1976, the FSIA contains "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies or instrumentalities." The FSIA "codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity and transferred primary responsibility for immunity determinations from the Executive to the Judicial Branch." The FSIA mosaic contains the "sole basis for obtaining jurisdiction over a foreign state in federal court." Thus, the FSIA "must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity."

Structurally, the FSIA is a patchwork of provisions that appear in different sections of Title 28 of the United States Code. Together, these sections address: subject matter and personal jurisdiction (§§ 1330(a) and 1332(a)(4)); venue and removal to federal court (§§ 1391(f) and 1441(d)); procedural issues (§§ 1330(a) and 1608); the general principle of immunity for foreign states (§ 1604); exceptions to immunity (§§ 1605 and 1607); extent of liability (§ 1606); and execution upon property of foreign states (§§ 1609-1611). The various sections of the FSIA "work in tandem."

Although all of these provisions are intertwined in a sometimes Byzantine fashion that is "hardly a model of statutory clarity," the general thrust is clear. Under the FSIA, foreign states are presumed to be immune from the jurisdiction of United States courts and from liability in United States lawsuits unless a statutory exception to liability applies. Whether or not foreign states are immune from jurisdiction and liability, the FSIA also affords foreign states certain protections including a more formalized service of process regime, additional time to respond to actions, the right of removal to federal court, the right to decision by a judge instead of a jury, and certain rights with respect to attachment and execution on property of the foreign state.

B. Applicability of the FSIA: Foreign States

Because virtually all of the FSIA protections (including the core immunity provisions) apply only to a "foreign state," the threshold issue for application of the FSIA is whether or not the entity claiming FSIA protections is a "foreign state." The entity asserting FSIA protection bears the burden of making a prima facie showing of "foreign state" status.

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18 Altmann, 124 S.Ct. at 2249.
20 Verlinden, 461 U.S. at 493.
21 Amerada Hess, 488 U.S. at 434.
23 See Southway v. Central Bank of Nigeria, 328 F.3d 1267, 1271 (10th Cir. 2003).
The phrase “foreign state” is defined somewhat cryptically and circularly in Section 1603(a) of the FSIA as follows:

A ‘foreign state,’ except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state.

In turn, Section 1603(b) provides that an “agency or instrumentality of a foreign state” means any entity:

(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state... and (3) which is neither a citizen of a State of the United States... nor created under the laws of any third country.

The FSIA does not define “political subdivision” or “organ.” Further, there are no specific references with regard to whether the FSIA applies to individual government officials (i.e., head of state immunity).

Although application of the FSIA to the state qua state (i.e., the People’s Republic of China or the Bolivarian Republic of Venezuela) is virtually self-evident, numerous issues have arisen in FSIA litigation concerning whether different types of entities qualify as “foreign states” entitled to FSIA protection.

1. Political Subdivisions of a Foreign State

Rather than naming the state itself, sometimes government ministries, embassies, consulates, militaries or other related subdivisions of states are separately named as parties in FSIA litigation. Whether such entities are actually separate from the state itself may depend upon the unique factual situation presented. However, as a general rule, government ministries, embassies, consulates and militaries are usually afforded FSIA protection as foreign states or political subdivisions or agencies or instrumentalties of foreign states.24

2. Tiered State-Owned Companies

State-owned companies are often organized in complex legal structures with holding companies and numerous tiers of subsidiaries partly or fully owned by the parent. This is particularly the case in the energy and natural resources sector. For example, Mexico, which is the sole owner of that nation’s petroleum, restructured its ownership by establishing a holding

24 See Magness v. Russian Federation, 247 F.3d 609, 613 n. 7 (5th Cir. 2001)(government ministry); S & Davis Int’l, Inc. v. Republic of Yemen, 218 F.3d 1292, 1298 (11th Cir. 2000)(government ministry); Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1517 (9th Cir. 1987)(consulate); Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 153 (D.C. Cir. 1994)(air force).
company and several operating subsidiaries. Venezuela’s national energy company, Petróleos de Venezuela S.A., is similarly structured as a fully state-owned holding company that owns numerous operating subsidiaries in multiple tiers. The Republic of Honduras holds interests in the lumber industry through multiple corporate layers. These complex state-parent-subsidiary relationships have spawned substantial litigation concerning the applicability of the FSIA. Until recently, the position of the majority of courts was that corporations indirectly owned by a foreign state through intermediary parent corporations fall within the FSIA.

In the most important recent development in United States sovereign immunity law, the Supreme Court reversed this presumption in *Dole Food Co. v. Patrickson* and held that indirect ownership is not sufficient under the FSIA. The Supreme Court concluded that “the state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA.” This decision has been characterized by some commentators as “severely limit[ing]” the protections of the FSIA for state-owned companies and likely to result in state-owned companies being sued more often in the “less predictable atmosphere of state courts.” The opinion may also cause ironical results. For example, under *Patrickson* an entity that is just 51% directly owned by a foreign state would qualify for FSIA protection. However, an entity that is 100% owned by a foreign sovereign, but held through another 100% owned holding company, would not receive FSIA protection even though the foreign state’s real interests may be greater than in the case of direct partial ownership. In order to ensure FSIA protection, state-owned companies in tiered organizations may need to consider the benefits of restructuring with direct state ownership of all companies in the corporate group.

### 3. Organs of a Foreign State

The FSIA does not define the term “organ” as used in Section 1603(b)(2). However, the FSIA’s legislative history suggests that “Congress intended the terms ‘organ’ and ‘agency or instrumentality’ to be read broadly.” In the absence of a statutory definition, certain appellate courts have had occasion to construe the phrase: “organ of a foreign state” as used in the FSIA. In determining whether an entity is an “organ of a foreign state,” primary consideration should be given to “whether the entity engages in a public activity on behalf of the foreign government.”

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25 *Corporacion Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 653-54 (9th Cir. 1996).
26 *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 382 (5th Cir. 1999).
28 *538 U.S. 468, 123 S.Ct. 1655 (2003).*
29 *Id.* 123 S.Ct. at 1663.
31 *Id.* at 362 and 371.
32 *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460 (9th Cir. 1995).
The Third, Fifth and Ninth Circuits (and several lower courts) have adopted a series of factors to be considered in the organ analysis as follows: (1) the circumstances surrounding the entity’s creation; (2) the purpose of its activities; (3) the degree of supervision by the government; (4) the level of government financial support; (5) the entity’s employment policies, particularly regarding whether the foreign state requires the hiring of public employees and pays their salaries; (6) the entity’s obligations and privileges under the foreign state’s laws; and (7) the ownership structure of the entity (i.e., whether it is indirectly owned by the foreign state). No one factor is determinative and not all factors need be present for an entity to qualify as an “organ of a foreign government” under the FSIA.

Because of the Supreme Court’s recent ruling in Patrickson denying FSIA protection to tiered state enterprises, the issue of whether an entity may be considered an “organ” under the FSIA is likely to become more important and be the subject of much new FSIA litigation.

4. Time for Determination of Foreign State Status

Foreign states, particularly agencies or instrumentalities such as state-owned companies, are not static. To the contrary, foreign states frequently create new entities and change their ownership percentages in existing entities. Until recently, there was a split of authority in United States courts concerning when foreign state status should be assessed: as of the date of the contract or tort forming the basis of the lawsuit; as of the date that the underlying claim arose; or as of the date the lawsuit was filed. The Supreme Court answered this question definitively in Patrickson. An entity’s status as a foreign state under the FSIA should be considered as of the date that the lawsuit is filed. Thus, an entity may qualify as a foreign state at the time a contract is executed but be stripped of FSIA protection by reason of subsequent divestiture by the foreign state prior to the commencement of litigation.

C. The General Rule of Immunity for Foreign States

Under the FSIA, immunity remains the rule rather than the exception. Section 1604 of the FSIA expressly provides that:

... a foreign state shall be immune from the jurisdiction of the courts of the United States... except as provided in sections 1605 to 1607 of this chapter.

The FSIA immunity is immunity from jurisdiction and liability as well as from the burdens of litigation itself (i.e., cost, time, discovery, motions practice etc...). Accordingly, a foreign state

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35 Patrickson, 538 U.S. at 478.
36 Arguably, the reverse may also apply: a privately-held company that enters into a contract may be able to assert foreign sovereign immunity if a foreign state acquires complete and direct ownership prior to the filing of a lawsuit. This result may pose fairness issues if the other contracting party was not able to bargain for a contractual waiver of sovereign immunity provision.
37 Kelly, 213 F.3d at 849; United States v. Moats, 961 F.2d 1198, 1203 (5th Cir. 1992).
is "presumptively immune under the statute and remains so unless one of the specific statutory exceptions applies."\(^{38}\) Once an entity makes a prima facie showing of immunity (i.e., that it is a foreign state), the party seeking to litigate in the United States then has the burden of showing that an exception to immunity applies.

D. The Exceptions to FSIA Immunity

The heart of any FSIA case is whether the claimant can establish an exception to immunity. If so, the case may proceed and "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances."\(^{39}\) If not, the case should be dismissed based upon immunity for lack of subject matter and personal jurisdiction.

Section 1605 of the FSIA contains a listing of nine exceptions to sovereign immunity:

1. waiver;
2. commercial activity;
3. expropriation;
4. property in the United States;
5. tort injury occurring in the United States;
6. arbitration;
7. torture, extrajudicial killing, sabotage or kidnapping;
8. enforcement of a maritime lien;
9. foreclosure of a maritime mortgage.\(^{40}\)

Although all the exceptions are important in their own right, this Outline will focus only on the exceptions that are of most import for practitioners in the field of private international law. These key exceptions are the commercial activity, waiver and arbitration exceptions.

1. Commercial Activity Exception

By far the most frequently litigated exception to presumptive immunity is the "commercial activity" exception. This exception was the foundation for the development of the restrictive theory of state immunity. Embodied in Section 1605(a)(2) of the FSIA, the commercial activity exception states:

A foreign state shall not be immune from the jurisdiction of the courts of the United States... in any case -- (2) 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 of 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.

The term "commercial activity" is critical with respect to all of the subparts of the commercial activity exception. "Commercial activity" is defined in the FSIA as: "either a regular course of commercial conduct or a particular commercial transaction or act."\(^{41}\)

\(^{38}\) Southway, 328 F.3d. at 1271.


\(^{40}\) 28 U.S.C. § 1607 also contains an immunity exception with respect to counterclaims against a foreign state in actions brought by the foreign state or in which the foreign state intervenes.

\(^{41}\) 28 U.S.C. § 1603(d).
Because the FSIA contemplated that an entity may be engaged in both commercial and governmental activity, the inquiry under Section 1605(a)(2) must focus on the specific activity at issue and determine whether it may be characterized as commercial.\(^{42}\) Further, the character of the activity must be determined by reference to the nature of the act, rather than by reference to its purpose (i.e., the question is not whether the foreign state has a profit motive).\(^{43}\) Put another way by the Supreme Court in an important recent decision:

> [W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA.... The issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce”.... Thus a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a “commercial” activity, because private companies can similarly use sales contracts to acquire goods.\(^{44}\)

Examples of commercial activity generally include the “production, sale or purchase of goods; hiring or leasing of property; borrowing or lending of money; performance of or contracting for the performance of services; and similar activities carried on by natural or juridical persons.”\(^{45}\)

The “commercial exception,” outlined in Section 1605(a)(2), is composed of three distinct and alternative clauses describing connections of increasing distance and diminishing significance with the territory of the United States. All of these subparts are preceded by the common phrase “the action is based upon.” This “based upon” language requires some nexus between the conduct underlying the lawsuit and the United States.\(^{46}\)

a. **Clause One: Action Based Upon Commercial Activity Carried on in the United States**

The first clause of the commercial activity exception to FSIA immunity applies when a claim is “based upon commercial activity carried on in the United States by the foreign state.”\(^{47}\) Formulated another way by the Supreme Court, for this exception to apply, “the ... action must be ‘based upon’ some ‘commercial activity’ by [the defendant] that had ‘substantial contact’ with the United States.”\(^{48}\) The “substantial contact” requirement of Clause 1 has led courts to confirm state immunity if the conduct supporting the claims is only “isolated” or “minimal” in

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\(^{43}\) Saudi Arabia, 507 U.S. at 359; see 28 U.S.C. § 1603(d) (defining “commercial activity”).


\(^{45}\) Restatement Foreign Relations § 453, Comment b.

\(^{46}\) Corzo v. Banco Central de Reserva del Peru, 243 F.3d 519, 525-26 (9th Cir. 2001).

\(^{47}\) 28 U.S.C. § 1605(2).

\(^{48}\) Saudi Arabia, 507 U.S. at 356.
relation to the United States. According to the legislative history of the FSIA, examples of actions falling under the first clause include: cases based on commercial transactions performed in whole or in part in the United States, import-export transactions involving sales to, or purchases from, concerns in the United States, the negotiation or execution of a loan agreement in the United States, or the receipt of financing from a private or public lending institution located in the United States.

b. Clause Two: Action Based Upon an Act Performed in the United States in Connection with a Commercial Activity Elsewhere

The second clause of the commercial activity exception to FSIA immunity applies when a claim is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere." There is very little precedent with respect to Clause 2 of the commercial activities exception. However, the legislative history gives the following examples: a representation in the United States leading to a claim for unjust enrichment, an act in the United States that violates the federal securities laws, or the wrongful discharge in the United States of an employee working on commercial activity carried on in a third country. Clearly, this section requires some act in the United States that is the basis of the claim; however, the nexus to the United States need not be as strong as in Clause 1 of the commercial activity exception.

c. Clause Three: Action Based Upon an Act Outside the United States in Connection with Commercial Activity Elsewhere that Causes a Direct Effect in the United States

The third clause of the commercial activity exception to FSIA immunity applies when a claim is based "upon an act outside of 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." This last sub-section of Section 1605(a)(2) is the most tenuous of the FSIA commercial activity exceptions and has created difficulty and confusion in the judiciary. The central issue revolves around the question of what conduct is sufficient to satisfy the "direct effect in the United States" requirement.

The Supreme Court grappled with the "direct effect" prong in Republic of Argentina v. Weltover. In that case, the plaintiffs were two foreign companies that held certain Argentinean bonds. The bonds called for Argentina to make payment of principal and interest to bondholders in United States dollars through transfer on the London, Frankfurt, Zurich or New York markets, at the election of the creditor. After Argentina defaulted, the plaintiffs demanded payment in New York. When payment was not forthcoming, the plaintiffs brought suit against Argentina in New York for breach of the bond contract. The core issue was whether Argentina's refusal to

make payment caused a "direct effect in the United States" because the payment in New York was not made. Importantly, the Supreme Court rejected the argument that a "direct effect" must be "substantial" and "foreseeable." Instead, the Supreme Court determined that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity."55 Noting that the plaintiffs had requested payment in New York, the Supreme Court determined that the breach necessarily had a direct effect in New York. Thus, Argentina was held to be subject to the jurisdiction of United States courts and immunity was denied. The result in Weltover seemingly broadened the concept of "direct effect" such that many disputes (including some that have only the most distant relationship with the United States) may now satisfy the "direct effect" criteria. Weltover has been soundly criticized.56

According to some courts, the "direct effect in the United States" clause "seems hopelessly ambiguous when applied to any particular transaction"57 -- even after the meager, one-sentence guidance provided by the Supreme Court in Weltover. The result has been confusion and a plethora of seemingly contradictory decisions in the trial and appellate courts. Some courts have required that for there to be a "direct effect in the United States" there must be a "legally significant act" in the United States.58 Other courts have eschewed the "legally significant act" approach.59 Most courts have acknowledged that a "direct effect" also means that there is no intervening element; rather, the effect must flow from the foreign state's conduct without any deviation or interruption.60

A common theme in Clause 3 commercial activity cases is an allegation by the plaintiff that the plaintiff suffered financial loss in the United States which loss should serve as a "direct effect in the United States." For the most part, such arguments have not been successful. A "direct effect' does not include, standing alone, the suffering of financial hardship in the United States that took place abroad. Otherwise, the commercial activity exception would, in large part, eviscerate the FSIA's provision of immunity for foreign states."61

The Tenth Circuit's decision, United World Trade, Inc. v. Mangyshlakneft Oil Prod. Assoc.,62 illustrates the point. United World Trade involved a Colorado company that contracted with an agency or instrumentality of the Kazakhstan government to broker a series of purchases of oil from Kazakhstan. Although several oil shipments went smoothly, the final shipment did not. The Colorado company accused the Kazakhstan entity of breaching its contract and committing various business torts. The Kazakhstan state-owned company pled sovereign immunity under the FSIA. The Colorado company argued under Clause 3 of the commercial

55 Id. at 618 (emphasis added).
56 See ABA Report at 80-90; V. Nanda, Litigation of International Disputes in U.S. Courts § 3:21 (Thompson/West, 2nd ed. 2005).
57 United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n, 33 F.3d 1232 (10th Cir. 1994).
58 Id. at 1239; Antares Aircraft, L.P. v. Federal Republic of Nigeria, 999 F.2d 33, 36 (2nd Cir. 1993).
59 Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 894 (5th Cir. 1998).
61 C. Moore, 15 MOORE'S FEDERAL PRACTICE § 104.12[2][c][iv](M. Bender 3rd ed. 2003); see also Adler v. Federal Republic of Nigeria, 107 F.3d 720, 726-27 (9th Cir. 1997); Corzo, 243 F.3d at 525; Antares Aircraft, 999 F.2d at 36-37.
62 33 F.3d 1232 (10th Cir. 1994).
activity exception to immunity that it suffered financial damage in the United States through loss of profits and otherwise. The only disputed issue at the appellate level was whether the defendant’s actions caused a “direct effect” in the United States. The Tenth Circuit determined that case was correctly dismissed based upon sovereign immunity and held:

The requirement that an effect be “direct” indicates that Congress did not intend to provide jurisdiction whenever the ripples caused by an overseas transaction manage eventually to reach the shores of the United States.

We must conclude that [the Colorado company’s] allegation that it lost profits and suffered other harm in the United States as a result of the defendant’s actions does not meet the requirements of § 1605(a)(2). Although the loss of these funds could be characterized as a “direct effect” of the defendants’ act, we conclude that the direct effect cannot be characterized as occurring “in the United States.”

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.” Appellant would have us interpret § 1605(a)(2) in a manner than would give the district courts jurisdiction over virtually any suit arising out of an overseas transaction in which an American citizen claims to have suffered a loss from the acts of a foreign state.

Notwithstanding, and given the seeming ambiguity of Clause 3 of the commercial activity exception and the lack of detailed Supreme Court guidance, Clause 3 of the commercial activity exception is likely to generate substantial litigation for the foreseeable future.

2. Waiver Exception

A party’s express or implied waiver of immunity is another common exception to sovereign immunity. The FSIA provides that a foreign state will not receive immunity in any case in which it “has waived its immunity either expressly 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.”

a. Express Waiver

Private parties entering into contracts with foreign states and their agencies and instrumentalities typically negotiate express immunity waivers. In general, Section 1605(1) of the FSIA recognizes the enforceability of such express waivers. However, “explicit waivers of sovereign immunity are narrowly construed in favor of the sovereign and are not enlarged

63 United World Trade, 33 F.3d at 1238-39.
64 28 U.S.C. § 1605(1).
Beyond what the language requires. Furthermore, express sovereign immunity waivers "must give a clear, complete, unambiguous and unmistakable manifestation of the sovereign's intent to waive immunity."  

b. Waiver by Implication

Waiver of sovereign immunity by implication creates far more difficult and complex issues. According to the FSIA legislative history, waiver by implication may arise in at least three situations: (1) where a foreign state has agreed to arbitration in another country; (2) where a foreign state has agreed that the law of a particular country should govern; and (3) where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity. United States courts have been very reluctant to find waiver by implication beyond the three examples in the FSIA legislative history.

The implicit waiver rule has been construed fairly narrowly with respect to agreements to arbitrate in another country. The existence of an agreement to arbitrate in another country, without more, is generally not sufficient for a finding of implicit waiver. Instead, the courts have found that an arbitration agreement constitutes a waiver only if the foreign sovereign is a signatory to a treaty providing for court enforcement of arbitration agreements and awards such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention") and the foreign state contemplated the possibility of proceedings in United States courts in connection with the arbitration. Selecting United States law as governing law in a contract with a foreign state generally is viewed as a waiver of immunity; however, selection of the law of a third nation does not necessarily result in implicit waiver of sovereign immunity. Finally, active participation in a United States lawsuit without raising sovereign immunity as a defense in the responsive pleadings (i.e. an answer) or before may constitute waiver by implication.

c. Open Issues with Respect to the Waiver Exception

The rather cursory language of the FSIA waiver exception to immunity leaves many unanswered issues. For example, it is not clear: (1) how a court should assess whether the signatory of an express waiver had actual or apparent authority to execute the waiver; (2) what law should be applied in determining whether a signatory had authority to waive a foreign state’s

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66 Aquamar, S.A. v. Del Monte Fresh Produc N.A., Inc., 179 F.3d 1279, 1292 (11th Cir. 1999); see also Libra Bank Ltd. v. Banco Nacional de Costa Rica, S.A., 676 F.2d 47, 49 (2nd Cir. 1982).
68 Aquamar, 179 F.2d at 1291.
69 21 U.S.T. 2517.
72 Maritime Int’l, 693 F.2d at 1102 n. 13.
immunity; (3) whether there needs to be any nexus with the United States for a court to exercise personal jurisdiction; or (4) what conduct is sufficient for a waiver of immunity by implication.\textsuperscript{74} These open issues may be the source of future FSIA litigation.

3. **Arbitration Exception**

In 1988, Congress amended the FSIA to create a new exception relating to arbitrations. Under Section 1605(6) foreign states enjoy no immunity in actions to enforce arbitration agreements or to confirm arbitration awards if: (A) the arbitration takes place or is intended to take place in the United States; (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards; (C) the underlying claim, but for the arbitration agreement, could have been brought in the United States under the provisions of the FSIA; or (D) the FSIA waiver exception (Section 1605(1)) is otherwise applicable. Because the United States ratified the New York Convention, courts have routinely applied the FSIA arbitration exception to enforce arbitration agreements and confirm arbitration awards against foreign states under the New York Convention.\textsuperscript{75}

E.** Other Protections Under the FSIA**

1. **Service of Process**

The FSIA and certain companion procedural provisions in the Federal Rules of Civil procedure provide the exclusive means of service of process on both a foreign state and an agency or instrumentality of a foreign state.\textsuperscript{76}

With respect to foreign states, the FSIA service provisions (set forth in Section 1608(a)) are tiered in a four-step hierarchical manner: (1) service pursuant to a special arrangement between the plaintiff and a foreign state such as a contractual service provision; (2) as prescribed in an international convention such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters\textsuperscript{77} or the Inter-American Convention on Letters Rogatory and Additional Protocol;\textsuperscript{78} (3) via mail from the clerk of the court to the head of the foreign state’s ministry of foreign affairs provided that the mailing must include a summary notice of suit and the documents must be translated into the official language of the foreign state; and (4) via the diplomatic channel through the United States Department of State with translation into the official language of the foreign state.\textsuperscript{79} The plaintiff “must attempt the methods of

\textsuperscript{74} See ABA Report at 66-74. The Working Group identified these issues and suggested certain legislative amendments.


\textsuperscript{77} 20 U.S.T. 361.

\textsuperscript{78} 14 I.L.M. 339.

\textsuperscript{79} 28 U.S.C. § 1608(a).
service in the order they are laid out in the statute. Further, strict compliance with the hierarchical service requirements for foreign states is mandatory.

The FSIA requirements for service on agencies or instrumentalities of foreign states (set forth in Section 1608(b)) are organized in a similar hierarchical manner but are slightly less rigorous. Service on an agency or instrumentality of a foreign state must be made: (1) by delivery pursuant to any special arrangement for service such as a contractual provision; (2) if no special agreement exists, by service either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international treaty; or (3) if service cannot be made otherwise, and if reasonably calculated to give actual notice, by delivery of the summons and complaint, together with translation as directed by an authority of the foreign state in response to a letter rogatory or request or by any form of mail requiring a signed receipt or as directed by order of the court consistent with the domestic law of the place where service is to be made. With respect to service on agencies and instrumentalities, some courts have determined that "substantial compliance" with the FSIA service provisions may be sufficient especially 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.

To further protect the interests of foreign states and their agencies and instrumentalities, the FSIA also establishes a longer (60-day) response date after service is effected and a heightened burden for a claimant to obtain a default judgment.

2. Removal to Federal Court

In enacting 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 courts of the 50 states." Thus, Section 1441(d) of the FSIA grants foreign states (including agencies and instrumentalities) the absolute right of removal to federal court of any action filed against a foreign state in state court. The removal right typically should be exercised within thirty days of service of process; however, under the FSIA foreign states are liberally permitted extensions of time for removal in order to promote the purpose of providing a federal forum to foreign states.

3. Jury Trial

The FSIA restricts a court’s jurisdiction to “nonjury civil action[s] against a foreign state.” As a matter of statutory interpretation, United States courts have held uniformly that

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80 Magnness, 247 F.3d at 613.
81 Id.; Alberti v. Empresa Nicaraguense de la Carne, 705 F.2d 250, 253 (7th Cir. 1983).
83 28 U.S.C. §§ 1608(d) and (e).
84 Verlinden, 461 U.S. at 497.
foreign states and agencies or instrumentalities of foreign states not immune from suit under the FSIA have a right to a bench trial instead of a jury trial (if the foreign state so elects).  

4. Punitive Damages

The FSIA provides that a foreign state shall “not be liable for punitive damages.” However, this protection does not extend to agencies or instrumentalities of a foreign state.

F. Immunity from Attachment and Execution

If a plaintiff is successful in establishing jurisdiction and receiving a judgment against a foreign state, the plaintiff may wish to collect. Attachment and execution on the property of foreign states may be a difficult endeavor. Until the FSIA was enacted, the United States generally granted foreign states wide immunity from execution on assets. However, under the FSIA, the barriers against execution on assets of foreign states have been “partially lowered” or relaxed.

As with liability, the FSIA establishes a general rule of immunity -- but with exceptions. Section 1609 states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in Sections 1610 and 1611 of this chapter.

The regime of exceptions to the general rule of immunity from attachment and execution is extremely convoluted and complex. The FSIA makes distinctions between remedies available against foreign states and those available against agencies or instrumentalities of foreign states. “These distinctions reflect the premise that state instrumentalities engaged in commercial activities are akin to commercial enterprises, so that immunity is exceptional and limited, whereas the primary function of states is government and, absent waiver, their liability should be limited to particular claims and their amenability to post-judgment attachment should be limited to particular property.” There are also distinctions made between pre-judgment attachment and post-judgment execution (the former being more difficult than the latter).

One of the central features governing attachment or execution against foreign states is that the property must be “in the United States” and “used for a commercial activity in the United States.” Provided that the property potentially subject to attachment or execution meets

88 Id.
90 Restatement Foreign Relations § 460, Comment b.
those criteria, then the creditor must establish entitlement to at least one of seven listed exceptions to immunity from attachment and execution. The FSIA attachment and execution gauntlet for foreign states reflects a recognition by Congress that the seizure of assets of foreign states has the potential for creating serious friction in United States foreign relations and so should be limited to commercial property in the United States. The restrictions on attachment and execution against agencies and instrumentalities of foreign states are not as imposing as with respect to the state itself.

IV. State Immunity Approaches in Other Jurisdictions and Multilateral Treaties

The United States and the United Kingdom were leaders in enacting domestic state immunity legislation endorsing the restrictive theory of foreign sovereign immunity. Some other jurisdictions, particularly common law nations, adopted similar laws. See Singapore State Immunity Act of 1979; Pakistan State Immunity Ordinance of 1981; Canada State Immunity Act of 1982 (Chap. S-18); Australia Foreign States Immunities Act of 1985; South Africa Foreign States Immunities Act of 1987; Argentina Ley de Inmunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos 1995 (La Ley 24,488). However, most countries have not domestically codified state immunity principles and instead rely upon interpretation of customary international law. The lack of domestic legislation has sometimes resulted in inconsistent application of state immunity principles.

In addition to domestic legislation, there have been numerous efforts to develop a multilateral consensus on state immunity issues over the last several decades. The first regional development was the 1972 European Convention on State Immunity and Additional Protocol (sometimes referred to as the Basel Convention) which became effective June 11, 1976 between eight parties and one signatory. The European Convention generally endorses the restrictive approach to sovereign immunity and lists a series of exceptions to state immunity including waiver and contract (i.e., “if the proceedings relate to an obligation of the State, which by virtue of a contract, falls to be discharged in the territory of the State of the forum”). Latin America also attempted a similar regional treaty in 1983: the Inter-American Convention on the Jurisdictional Immunity of States. However, that treaty never entered into force.

Recognizing the desirability of legal uniformity in the field, in 1977 the United Nations General Assembly initially assigned the topic of state immunity to the United Nations International Law Commission for study and consultation with the member states of the United Nations.

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94 See C. Annacker and R. Greig, State Immunity and Arbitration, ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, Vol. 15, No. 2 (Fall 2004)(discussing lack of legislation in France, Italy and most civil law countries).
95 See e.g. Comments of L. Serrades Tavares, Transcripts of Chatham House Conference on State Immunity and the New UN Convention (2005). Mr. Serrades Tavares confirmed that Portugal lacks legislation on sovereign immunity and stated: “the result has been a complete mess with about 80% of decisions applying the absolute doctrine of sovereign immunity [instead of the restrictive sovereign immunity approach].”; Comments of P. Vareilles Sommieres, Transcripts of Chatham House Conference on State Immunity and the New UN Convention (2005). Mr. Vareilles Sommieres stated that France lacks “any hard and fast rules written in black letters” with respect to state immunity.

The UN Convention is open for signature through January 17, 2007 and will enter into force when and if it is ratified by at least thirty nations. As of December 27, 2005, seventeen nations had signed (but not ratified) the UN Convention. The current signatory countries are: Austria, Belgium, Finland, Iceland, Lebanon, Madagascar, Morocco, Norway, Paraguay, the People’s Republic of China, Portugal, Romania, Senegal, Slovakia, Sweden, Timor-Leste and the United Kingdom. The United States does not appear to have taken any formal position with respect to the UN Convention yet; however, ratification by the United States currently seems unlikely and may require some modifications to the FSIA to ensure full harmonization. 96

The UN Convention represents a series of compromises but broadly recognizes and endorses the trend of restrictive sovereign immunity. With respect to commercial activity (which is at the heart of the restrictive theory of state immunity) the UN Convention states:

If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, that State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

UN Convention at Article 10(1). The UN Convention defines “commercial transaction” as “(i) any commercial contract or transaction for the sale of goods or supply of service; (ii) any contract for a loan or other transaction of a financial nature...; and (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.” Id. Article 2(1)(c). In determining whether a matter is a “commercial transaction,” the UN Convention provides that “reference should be primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.” Id. Article 2(2).97

96 Although the United States has taken no official position vis-à-vis the UN Convention, the Head of the United States delegation to the United Nations Ad Hoc Committee on Jurisdictional Immunities of States and Their Properties has identified certain United States criticisms of the UN Convention and noted: “For the relatively few states that already have such statutes [on sovereign immunity], and particularly where domestic law has been extensively developed through judicial decision, ratification may prove a more difficult process requiring careful consideration of existing law.... That is likely to be the case for the United States, given the complexity of the FSIA and the wealth of interpretive judicial decisions thereunder.” D. Stewart, The UN Convention on Jurisdictional Immunities of States and Their Property, 99 AMER. J. INT’L. LAW 194, 211 (2005).

97 In the United States, sovereign immunity determinations must be determined “by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d).
The purpose of this presentation is not to compare all of the provisions of the FSIA against the UN Convention.\textsuperscript{98} The UN Convention is not in force and may never be (at least with respect to the United States). However, practitioners should be aware of the promulgation of the UN Convention. If nothing else, the UN Convention represents an international norm that reflects the current state of the customary international law of state immunity and enshrines the restrictive theory of foreign sovereign immunity.

V. Conclusion

State immunity is an important issue in international litigation and can sometimes have case dispositive impact. Because of the pervasiveness of foreign states, subdivisions, agencies, instrumentalities, organs and state-enterprises in the world economy, many disputes are likely to involve sovereignty issues. The United States and most other nations have endorsed a restrictive form of sovereign immunity pursuant to which the "public acts" of foreign states are immune from jurisdiction in another state but the "private acts" (particularly commercial activity) of the foreign state may be subject to jurisdiction in another state. In the United States, state immunity is based upon the FSIA. Some other countries have similar legislation. The UN Convention, which was only recently approved by the General Assembly, may serve as an important multilateral treaty governing the field. Regardless of what happens to the UN Convention, the legal landscape for state immunity has experienced dramatic change in the last several decades both in the United States and internationally. Evolution of the sovereign immunity doctrine will undoubtedly continue in the future.

This presentation is designed to provide general information concerning sovereign immunity under the Foreign Sovereign Immunities Act and certain other legal regimes. It is submitted 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 January 2006, 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 author.

\textsuperscript{98} The most complete and current United States resource for analysis of the UN Convention and the FSIA is the article: D. Stewart, \textit{The UN Convention on Jurisdictional Immunities of States and Their Property}, supra Note 96.