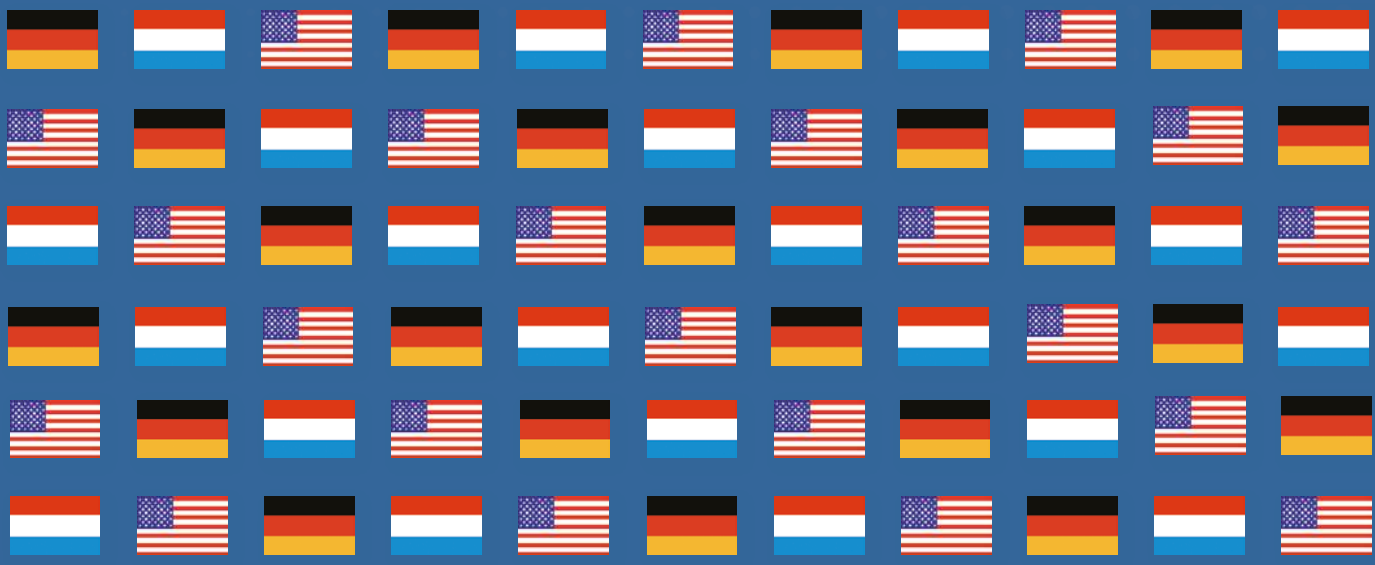
LEXOLOGY
Getting The Deal Through

SOVEREIGN IMMUNITY 2023

Contributing editors
Nicole Erb, Claire A DeLelle and Celia McLaughlin



LEXOLOGY
Getting The Deal Through

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Introduction

Nicole Erb, **Claire A DeLelle** and **Celia McLaughlin***

White & Case LLP

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We are pleased to present the sixth edition of Lexology Getting The Deal Through: *Sovereign Immunity*. This volume provides an updated analysis of key aspects of the law of sovereign immunity in three important jurisdictions: Germany, Luxembourg, and the United States. This volume provides an easy-to-use reference guide for anyone facing questions of sovereign immunity, such as investors assessing transactions with governments and state-owned entities in these jurisdictions, foreign states and sovereign entities with assets in these jurisdictions or facing litigation in these jurisdictions and judgment creditors seeking to execute on judgments or arbitral awards against sovereign assets in these jurisdictions.

Current events have had, and will continue to have, a large impact on transactions and disputes involving foreign states and their sovereign entities. The world is still emerging from the global pandemic, which led to significant mitigation measures taken by foreign states. The contraction of the world economy, national security threats and the increasing spectre of climate change have similarly led to increasing government regulation and sovereign engagement in the private sector. These developments will undoubtedly lead to transactional complications and new areas of litigation and arbitration, as well as heightened civil and criminal enforcement actions against foreign states and their sovereign entities and assets. Moreover, significant differences in the law of sovereign immunity remain across jurisdictions, with some, like the United States, codifying their laws of sovereign immunity, and others, like Luxembourg and Germany, following customary international law, including the European Convention on State Immunity.

The law of sovereign immunity continues to evolve and remains somewhat uncharted and untested, as evidenced by the landmark decision *Turkiye Halk Bankasi AS v United States* by the United States Supreme Court, and the recent decision *Certain Iranian Assets (Islamic Republic of Iran v United States)* by the International Court of Justice (ICJ).

In *Halkbank*, the United States Supreme Court held for the first time that the US Foreign Sovereign Immunities Act (FSIA) applies only in civil cases and does not provide foreign states and their sovereign entities with sovereign immunity from criminal prosecution. The United States had indicted Halkbank, a bank owned by the Republic of Turkey, on charges of conspiring to evade US sanctions related to Iran. Halkbank argued that because of its sovereign status, it had immunity from criminal prosecution under the FSIA. The Supreme Court disagreed, ruling that the FSIA extends immunity only in civil cases and remanding the case for further proceedings as to whether any sovereign immunity protections were still available at common law. *Halkbank* highlights the sovereign immunity implications arising from increased government regulation and enforcement in the area of national security. It

also heightens the already substantial risks for state-owned banks resulting from the global reach of international sanctions and anti-money laundering regimes.

In addition, the ICJ's decision in *Certain Iranian Assets* illustrates the consequences of a collision between a country's treaty obligations and its legislative exceptions to sovereign immunity. In this decision, the court addressed claims brought by Iran against the United States for violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States. Iran challenged, among other things, special US legislative mechanisms for enforcing default judgments entered against certain foreign states under the FSIA's terrorism-exception to sovereign immunity. The court held such mechanisms to be 'manifestly excessive'. The court determined, however, that it could only award compensation and could not order cessation of the United States' activities, because the United States had denounced the treaty in 2018. The ICJ decision demonstrates the potential tension between domestic legislation that expands the enforcement of judgments against foreign states, on the one hand, and the rights and obligations between sovereigns under international law, on the other.

The contents of this volume

The chapters in this volume are organised by jurisdiction and contain responses to a set of over 30 questions that we updated from the previous volume, based on our extensive experience representing foreign states, sovereign entities and private parties in transnational litigation and arbitration. The responses to these questions were completed by a group of elite practitioners and cover the latest interpretations of the law of restrictive sovereign immunity in the three subject jurisdictions.

The objective of this volume is to provide practitioners and parties with a comprehensive resource to navigate complex questions of sovereign immunity, and their differences across jurisdictions, in any sovereign-related transaction, litigation or arbitration.

* *Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.*

WHITE & CASE

Nicole Erb nerb@whitecase.com
Claire A DeLelle claire.delelle@whitecase.com
Celia McLaughlin cmclaughlin@whitecase.com

1221 Avenue of the Americas, New York NY 10020, United States
Tel: +1 212 819 8200
www.whitecase.com

United States

Nicole Erb, Claire A DeLelle and Celia McLaughlin*

White & Case LLP

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Summary

BACKGROUND

Concept of sovereign immunity

1 What is the general approach to the concept of sovereign (or state) immunity in your jurisdiction (eg, restricted or absolute immunity)?

The concept of sovereign immunity applied in the United States is that of restrictive immunity. The statute giving effect to this doctrine is the Foreign Sovereign Immunities Act of 1976 (as codified in 28 US Code sections 1330 and 1602 to 1611) (the FSIA). Section 1602 of the FSIA provides that:

> *the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.*

The FSIA applies only to foreign states and, therefore, not to the federal government, or to state or tribal governments, whose immunity is determined based on the US Constitution and US common law.

Legal basis

2 What is the legal basis for the doctrine of sovereign immunity in your jurisdiction (eg, customary international law or case law; give details of any specific statute or statutory provisions)?

The law of sovereign immunity derives from international law, but the United States was the first state to codify the law with the enactment of the FSIA. Section 1330 of the FSIA establishes that US federal courts have jurisdiction to adjudicate disputes against foreign states provided one of the exceptions to sovereign immunity, either under sections 1605 to 1607 of the FSIA or under any applicable international agreement, applies.

Multilateral treaties

3 Is your jurisdiction a party to any multilateral treaties on sovereign immunity (eg, the 1972 European Convention on State Immunity, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property)? Has your jurisdiction made any reservations or declarations regarding the treaties?

The United States is not a party to any multilateral treaty on sovereign immunity.

JURISDICTIONAL IMMUNITY

Domestic law

4 Describe your jurisdiction's law governing the scope of jurisdictional immunity (ie, whether a state itself, or its various political subdivisions, organs, agencies and instrumentalities would be covered by jurisdictional immunity in proceedings before a court and the types of transactions or proceedings to which such immunity would extend).

Jurisdictional immunity covers the foreign state itself and its various political subdivisions, organs, agencies and instrumentalities, and extends to all activities unless specifically excepted in the Foreign Sovereign Immunities Act of 1976 (FSIA) under sections 1605 to 1607. Under section 1603, a 'foreign state' includes 'a political subdivision of a foreign state or an agency or instrumentality of a foreign state'. An 'agency or instrumentality of a foreign state' is an 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 or political subdivision thereof, and (3) which is neither a citizen of a state of the United States . . . nor created under the laws of any third country.*

State waiver of immunity or consent

5 How can a state, or its various political subdivisions, organs, agencies and instrumentalities, waive immunity or consent to the exercise of jurisdiction (eg, through arbitration agreements)?

A foreign state may waive its immunity explicitly or implicitly (see section 1605(a)(1)). Waivers of immunity cannot be revoked unilaterally. An explicit waiver or consent may occur by treaty (as has been done concerning commercial and other activities in a series of treaties of friendship, commerce and navigation) or in a contract between a foreign state and a private party. Implicit waiver of sovereign immunity from jurisdiction ordinarily can be found 'in only three circumstances: (1) by executing a contract containing a choice-of-law clause designating the laws of the United States as applicable; (2) filing a responsive pleading without asserting sovereign immunity; or (3) agreeing to submit a dispute to arbitration in the United States'. See *Ivanenko v Yanukovich*, 995 F3d 232, 239 (DC Cir 2021); see also Report to the House Judiciary Committee, HR Rep No. 1487, 94th Congress, 2d Session (1976), at page 18. The US Court of Appeals for the DC Circuit observed in *Wye Oak Technology, Inc v Republic of Iraq*, that courts 'construe the implied waiver provision narrowly' and 'have been reluctant to recognize an implicit waiver of sovereign immunity' in circumstances other than the three listed above (24 F4th 686, 691).

The FSIA also establishes the arbitration exception to sovereign immunity, which concerns actions to enforce arbitration agreements between private parties and foreign states or actions to confirm arbitration awards rendered under such agreements (see section 1605(a)(6)). In these cases, a foreign state can be deemed not immune from the jurisdiction of US courts.

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6 In which types of transactions or proceedings do exceptions to sovereign immunity apply, such that states do not enjoy immunity from jurisdiction and suit (even without the state's consent or waiver) (eg, commercial transactions, participation in foreign companies, ownership of real estate assets)? How does the law of your jurisdiction assess whether a transaction or proceeding falls into one of these categories?

Apart from waiver and consent, a foreign state can lose its presumptive sovereign immunity from the jurisdiction of US courts in cases against it based upon:

- commercial activities (section 1605(a)(2));
- the taking of property in violation of international law (ie, expropriation) (section 1605(a)(3));
- rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States (section 1605(a)(4));
- personal injury or death, or damage to or loss of property caused by a tortious act occurring in the United States (section 1605(a)(5));
- claims against a designated state sponsor of terrorism concerning a terrorist act (section 1605A) or claims for damages concerning an act of international terrorism in the United States (section 1605B);
- admiralty proceedings (specifically suits involving maritime liens) (section 1605(b)); and
- counterclaims against a foreign state (section 1607).

All of these are exceptions to jurisdictional immunity and do not in themselves overcome enforcement immunity. Two of the more common exceptions to foreign sovereign immunity invoked in US litigation are the commercial activity exception and the expropriation exception. In addition, the newer terrorism exceptions to immunity in sections 1605A and 1605B are also frequently invoked in US litigation.

The commercial activity exception

The commercial activity exception withdraws immunity in cases 'in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States' (section 1605(a)(2)). A 'commercial activity' is defined as 'either a regular course of commercial conduct or a particular commercial transaction or act', whose commercial character 'shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose' (section 1603(d)). A 'commercial activity carried on in the United States by a foreign state' means a 'commercial activity carried on by such state and having substantial contact with the United States' (section 1603(e)).

In *Republic of Argentina v Weltover Inc*, the US Supreme Court held that the issuance of bonds by Argentina constituted a commercial activity under the FSIA because Argentina had acted 'not as a regulator of a market, but in the manner of a private player within it' (504 US 607, 614 (1992)). Argentina argued that the nature-purpose distinction is a formalistic distinction that is not appropriate because the 'essence of an act is defined by its purpose',

but the Supreme Court pointed to the wording of section 1603(d) and considered that such an argument was 'squarely foreclosed by the language of the' FSIA, as however 'difficult it may be in some cases to separate "purpose" . . . from "nature" . . . the statute unmistakably commands that to be done' (*Weltover*, 504 US 617). In addition, recently, the US Court of Appeals for the Ninth Circuit affirmed denial of dismissal of employment discrimination claims against Kuwait's Los Angeles consulate by a former administrative assistant, holding that 'employment of diplomatic, civil service or military personnel is governmental' and that 'employment of other personnel is commercial unless the foreign state shows that the employee's duties included "powers peculiar to sovereigns"' (*Mohammad v General Consulate of Kuwait in Los Angeles*, 28 F4th 980, 986 (9th Cir 2022),quoting *Saudi Arabia v Nelson*, 507 US 349, 360 (1993)).

The Supreme Court also held in *Weltover* that, for purposes of the commercial activity exception, an act has a direct effect in the United States 'if [an effect in the United States] follows as an immediate consequence of the defendant's . . . activity' (504 US at 618). The effect need not be 'substantial' nor 'foreseeable' but it must not be 'purely trivial' or 'remote and attenuated'. In *Daou v BLC Bank, SAL*, the US Court of Appeals for the Second Circuit considered whether American citizens who held Lebanese bank accounts could bring an action against the Lebanese central bank for its refusal to honour checks denominated in US dollars (42 F4th 120 (2d Cir 2022)). The court held that the commercial activity exception did not apply because 'the mere fact that a foreign state's commercial activity outside of the United States caused physical or financial injury to a United States citizen is not itself sufficient to constitute a direct effect in the United States' (at 135 (quoting *Guirlando v TC Ziraat Bankasi AS*, 602 F3d 69, 78 (2d Cir 2010)). The court also held that there was no direct effect in the United States because 'the place where a direct effect is felt is generally either a contract's designated place of performance (if any) or the locus of a tort' (*Daou*, 42 F4th at 135). The court reasoned that since there was no special obligation to pay the checks in the United States as opposed to anywhere else, 'any commercial activity within the gravamen of the Daous' complaint did not have a direct effect in the United States for purposes of the FSIA's commercial activity exception' (at 138).

The expropriation exception

The expropriation exception (section 1605(a)(3)) creates two exceptions to the general rule of sovereign immunity. First, a state is not immune in any case 'in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state'. Property is 'taken in violation of international law' through nationalisation or expropriation that does not serve a public purpose, is discriminatory and is without payment of prompt, adequate and effective compensation (see, eg, *Zappia Middle E Constr Co v Emirate of Abu Dhabi*, 215 F3d 247, 251 (2d Cir 2000)). Exhaustion of local remedies in the foreign jurisdiction is not a statutory prerequisite to jurisdiction under the FSIA's expropriation exception (see *Cassirer v Kingdom of Spain*, 616 F3d 1019, 1037 (9th Cir 2010) cert denied; however, see also Restatement (Third) of Foreign Relations Law, section 713, comment f (Am L Inst 1987): 'Under international law, ordinarily a state is not required to consider a claim by another state for an injury to its national until that person has exhausted domestic remedies, unless such remedies are clearly sham or inadequate, or their application is unreasonably prolonged').

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Second, a state is not immune when the taken property or any property exchanged for that property 'is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in commercial activity in the United States' (see section 1605(a)(3)). For example, in *De Sanchez v Banco Central de Nicaragua*, the US Court of Appeals for the Fifth Circuit found that the defendant was not engaged in commercial activity in the United States through the holding of funds in a US bank for the facilitation of currency exchanges (770 F2d 1385, 1394 to 1395 (5th Cir 1985)). Accordingly, in *Dayton v Czechoslovak Socialist Republic*, the US Court of Appeals for the DC Circuit held that the nationalisation of textile plants without the payment of compensation did not fall within the expropriation exception because the plants were located in Czechoslovakia, no property exchanged for the plants was located in the United States and a Czechoslovakian trading company, which was sought to be held liable, did not own or operate the plants or property exchanged for them (834 F2d 203 (DC Cir 1987) cert denied). In *Berg v Kingdom of Netherlands*, the US Court of Appeals for the Fourth Circuit held that it could not hear expropriation claims against the Ministry of Education, Culture and Science of the Netherlands and the Cultural Heritage Agency of the Netherlands because the ministries could not be considered agencies or instrumentalities of the Netherlands as their core functions were predominantly governmental and not commercial (24 F4th 987, 992 to 995 (4th Cir 2022)). Finally, the Supreme Court recently held in *Federal Republic of Germany v Philipp*, that the FSIA's expropriation exception does not apply to a sovereign's taking of its own nationals' property because such a taking does not involve 'rights in property taken in violation of international law' (141 Supreme Court 703, 715 (2021)).

Further, the Supreme Court opined in *Bolivarian Republic of Venezuela v Helmerich & Payne International Drilling Co* that 'whether the rights asserted are the rights of a certain kind, namely, rights in "property taken in violation of international law", is a jurisdictional matter that the court must typically decide at the outset of the case, or as close to the outset as is reasonably possible' (see 581 US 170, 178-79 (2017)).

The terrorism exceptions

The terrorism exceptions to immunity in sections 1605A and 1605B are relatively recent additions to the FSIA. Section 1605A (and its predecessor section 1605(a)(7)) withdraws immunity in cases in which damages are sought for 'personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support' for such an act by a state actor. The exception to sovereign immunity in section 1605A is only available against foreign states that have been designated as state sponsors of terrorism by the United States, which currently include Cuba, North Korea, Iran and Syria. Section 1605A also includes a private right of action through which claimants may seek punitive damages against a foreign state in actions where the exception to immunity in section 1605A applies (see section 1605A(c)). The Supreme Court held in *Opati v Republic of Sudan* that punitive damages may be available for claims brought under section 1605A(c) for conduct that preceded the enactment of section 1605A (140 Supreme Court 1601 (2020)). The Supreme Court held that the language in section 1605A(c) overcame the presumption of prospective application of US laws, because it contained a 'clear statement' that the remedies provided under section 1605A(c) were available for pre-enactment conduct. The Supreme Court did not, however, decide whether the availability of punitive damages under section 1605A(c) for pre-enactment conduct violated the *Ex Post Facto* Clause of the US Constitution.

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The FSIA includes special enforcement mechanisms to enforce judgments entered under section 1605A. The Terrorism Risk Insurance Act (TRIA) provides an exception to enforcement immunity for property of a foreign state that has been blocked under US sanctions laws (see section 1610 note). The TRIA, however, applies only in actions to enforce a judgment entered under section 1605A (or its predecessor, section 1605(a)(7)). In a recent decision addressing the TRIA, the US District Court for the Southern District of New York held that plaintiffs who held judgments against the Taliban could not execute against the blocked assets of Afghanistan's central bank, Da Afghanistan Bank (DAB) (*In re Terrorist Attacks on Sept 11, 2001*, No. 03 MDL 1570, 2023 WL 2138691 (SDNY 21 February 2023)). The court held that there was 'no waiver of jurisdictional immunity against DAB or Afghanistan in any of the Judgment Creditors' underlying judgments'. The court further found that it was barred by the political question doctrine from recognising DAB as an agency or instrumentality of the Taliban because that decision would require the court to find that the 'Taliban is Afghanistan's government' and '[t]he Constitution vests this authority to recognize governments in the Executive Branch alone' (pages 10 to 11). An appeal from this decision is currently pending before the US Court of Appeals for the Second Circuit.

In addition, section 1610(g) provides that the property of an agency or instrumentality of a foreign state is subject to attachment and execution to satisfy a judgment entered under section 1605A against the foreign state, regardless of the presumption of separateness set forth by the US Supreme Court in *First National City Bank v Banco Para El Comercio Exterior de Cuba* (*Bancec*) (462 US 611, 627 (1983)). Under *Bancec*, there is a presumption that agencies and instrumentalities of a foreign state are considered separate legal entities and are not liable for the acts of the foreign state (462 US 611, 626 to 627 (1983)). The Supreme Court explained in *Rubin v Islamic Republic of Iran* that section 1610(g) identifies property available for attachment and execution but 'it does not in itself divest property of immunity' (138 Supreme Court 816, 820 (2018)). Instead, plaintiffs may only attach and execute against property after they have established the property is exempt from immunity under one of the exceptions to attachment immunity in section 1610.

Section 1605B withdraws immunity in cases brought against any foreign state, but only in cases where damages are sought for 'physical injury to person or property or death occurring in the United States and caused by an act of international terrorism in the United States and a tortious act or acts' of a state actor. In addition, section 1605B(c) provides that, if immunity is withdrawn under section 1605B, a claim may be brought 'against a foreign state in accordance with section 2333' of the Anti-Terrorism Act (ATA), notwithstanding the bar to claims under the ATA against foreign states (see 18 USC section 2337(2)). One court has held that secondary liability claims under the ATA are nonetheless still barred against foreign states because such claims may only be brought against a 'person', and the term person, as defined in the ATA, does not include a foreign state (*In re Terrorist Attacks on Sept 11, 2001*, No. 03 MDL 1570, 2023 WL 1797629, page 7 (SDNY 7 February 2023)).

7 If one of the exceptions to sovereign immunity set out above applies, is there any related principle that could prevent a court having jurisdiction over a state (eg, the principle of non-justiciability and the act of state doctrine)?

In addition to sovereign immunity, the act of state doctrine could also prevent a court from deciding a case against a foreign state if deciding the case would require the court passing judgment on the validity of an act of state. Unlike the FSIA, however, which is jurisdictional,

the act of state doctrine is a '"rule of decision" for the merits' (*Celestin v Caribbean Air Mail, Inc*, 30 F4th 133, 138 (2d Cir 2022)). As its legislative history explains, the FSIA 'in no way affects existing law on the extent to which, if at all, the "act of state" doctrine may be applicable' (see, eg, *Nemariam v Federal Democratic Republic of Ethiopia*, 491 F3d 470, 479 (2007)).

The political question doctrine may also be a bar to actions against a foreign state. For example, the US District Court for the Southern District of New York held that it was barred by the political question doctrine from recognising Afghanistan's central bank as an agency or instrumentality of the Taliban because that decision would require the court to find that the 'Taliban is Afghanistan's government' and '[t]he Constitution vests this authority to recognize governments in the Executive Branch alone' (*In re Terrorist Attacks on Sept 11, 2001*, 2023 WL 2138691, at pages 10 to 11). The court found that because it could not make this determination, it could not enforce a judgment against the Taliban against Afghanistan's central bank.

Proceedings against a state enterprise

8 To what extent do proceedings against a state enterprise or similar entity affect the immunity enjoyed by the state? Is there precedent for piercing the corporate veil to subject the state itself to those proceedings?

Section 1603 of the FSIA provides that a foreign state 'includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state'. A state enterprise may qualify as a foreign state provided the tripartite test in section 1603(b) is met, namely, that the enterprise is:

- a separate legal person;
- 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 or political subdivision thereof; and
- neither a citizen of the United States nor created under the laws of any third country.

When a state enterprise qualifies as a foreign state, whether it will be amenable to suit depends on the applicability of the exceptions to sovereign immunity set out in sections 1605 to 1607 of the FSIA.

In *Filler v Hanvit Bank*, the US Court of Appeals for the Second Circuit held that certain South Korean commercial banks did not enjoy sovereign immunity under the FSIA because the majority of the banks' stock was owned by the Korean Deposit Insurance Corporation and was therefore not directly owned by South Korea (see 378 F3d 213 (2d Cir 2004) cert denied). This decision follows the Supreme Court's ruling in *Dole Food Co v Patrickson*, which settled the issue of 'tiering', finding that a foreign state must itself directly own a majority of the shares of an enterprise if that enterprise is to be deemed an instrumentality of the state under the FSIA (588 US 468 (2003)). In *Dole*, ownership of the defendant company was at various times separated from the state of Israel by one or more corporate layers.

However, even if the entity is not majority-owned by a foreign state, it may still qualify as an 'agency or instrumentality of a foreign state' if it is an 'organ' of a foreign state (section 1603(b)(2)). The term 'organ' is not defined in the FSIA, and the US courts of appeals have

adopted different tests to determine whether an entity is an organ of a foreign state. For example, in *USX Corp v Adriatic Insurance Co*, the US Court of Appeals for the Third Circuit considered whether an insurance company was an organ of the Irish government and concluded that 'for an entity to be an organ of a foreign state, it must engage in public activity on behalf of the foreign government' (see 345 F3d 190, 208 (3d Cir 2003), considering the findings of the Ninth and Fifth Circuits in *EOTT Energy Operating Ltd P'Ship v Winterthur Swiss Ins Co*, 257 F3d 992, 997 (9th Cir 2001) and *Kelly v Syria Shell Petroleum Dev BV*, 213 F3d 841, 846-47 (5th Cir 2000)).

The Third Circuit also synopsised in *USX Corp* the various factors employed by the Courts of Appeals for the Ninth and Fifth Circuits, in particular:

- the circumstances surrounding the entity's creation;
- the purpose of the entity's activities;
- the degree of supervision by the government;
- the level of government financial support;
- the entity's employment policies, particularly regarding whether the foreign entity requires the hiring of public employees and pays their salaries; and
- the entity's obligations and privileges, and added an additional factor, namely the ownership structure of the entity.

All of these factors are relevant, but none are determinative. What is critical is whether the entity in question performs a governmental function. Indeed, in *Murphy v Korea Asset Management Corporation*, the US Court of Appeals for the Second Circuit held that a corporation organised under the laws of the Republic of Korea qualified as a foreign state because that corporation had a quintessentially 'public' mission to service and stabilise the Korean economy by disposing of non-performing loans and restructuring failing corporations (see 421 F Supp 2d 627, 646 (SDNY 2005), aff'd, 190 F Appendix 43 (2d Cir 2006), cert denied). Conversely, in *Board of Regents of the University of Texas System v Nippon Telephone & Telegraph Corp*, the US Court of Appeals for the Fifth Circuit held that a Japanese telecommunications company was not an organ of Japan because it was not created for a national purpose, was not actively supervised by the Japanese government, was not required to hire public employees, did not hold exclusive rights under Japan's laws and was not treated as a governmental organ under Japanese law (see 478 F3d 274 (5th Cir 2007)) (following the test developed in *Kelly* by the US Court of Appeals for the Fifth Circuit).

Further, under the US Supreme Court's decision in *Bancec*, there is a presumption that agencies and instrumentalities of a foreign state are considered separate legal entities that are not liable for the acts of the foreign state (462 US at 626 to 627). The US Court of Appeals for the Third Circuit found in *Crystallex International Corporation v Bolivarian Republic of Venezuela* that a judgment creditor with a judgment against Venezuela overcame this presumption of separateness in respect of assets of Petróleos de Venezuela, SA (PDVSA), an agency or instrumentality of Venezuela (932 F3d 126, 151 to152 (3d Cir 2019)).

Standing

9 What does the plaintiff need to show to have standing to bring a claim against a state in your jurisdiction?

The FSIA provides 'the sole basis for obtaining jurisdiction over a foreign state in the courts of' the United States (see *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428, 443 (1989)). Section 1330(b) of the FSIA provides that personal jurisdiction is satisfied if subject-matter jurisdiction exists under the FSIA (ie, if one of the enumerated jurisdictional exceptions to immunity is satisfied) and service is perfected under section 1608. Since the Supreme Court's decision in *Amerada Hess Shipping Corp*, it is clear that the Alien Tort Claims Act (also known as the Alien Tort Statute), or federal statutes other than the FSIA, may not form the basis for subject-matter jurisdiction over a suit against a foreign state, agency or instrumentality (see 488 US, at 438 and 439).

Further, once a court determines that personal jurisdiction exists over the foreign state, agency or instrumentality, it must then consider whether the exercise of personal jurisdiction is permissible under the Due Process Clause of the Fifth Amendment. Although section 1330(b) grants district courts personal jurisdiction over foreign states in cases where an exception to sovereign immunity applies and when service has been made in accordance with section 1608, the reach of section 1330(b) does not extend beyond the limits set by the minimum contacts standard set forth in *International Shoe Co v Washington*, 326 US 310 (1945) (see also *Gilson v Republic of Ireland*, 606 F Supp 38 (DDC 1984), affd 787 F2d 655 (DC Cir 1986)). The US Court of Appeals for the Second Circuit, however, has 'held that foreign states do not enjoy due process protections from the exercise of the judicial power because foreign states, like US states, are not "persons" for the purposes of the Due Process Clause' (*Gater Assets Limited v AO Moldovagaz*, 2 F4th 42, 49 (2d Cir 2021)). Nevertheless, agencies and instrumentalities of foreign states *are* 'persons' for purposes of the Fifth Amendment, and, therefore, 'receive protection from the exercise of personal jurisdiction under the Due Process Clause' (*Gater Assets*, 2 F4th at 49).

Nexus of forum court

10 What is the nexus to your jurisdiction that the forum court requires to exercise jurisdiction over a state if the property or conduct that forms the subject of the claim is outside your jurisdiction's territory?

The required nexus to the United States is generally set out in the exceptions to immunity provided in sections 1605 to 1607 of the FSIA. For example, the US Court of Appeals for the District of Columbia Circuit explained in *De Csepel v Republic of Hungary* that one of the requirements of the expropriation exception to immunity 'is an adequate commercial nexus between the United States and the defendants' (859 F3d 1094, 1101 (DC Cir 2017)). The required nexus is satisfied if the expropriated property at issue (or property exchanged for the property at issue) is either present in the United States and connected with the foreign state's commercial activity in the United States, or 'owned or operated by an agency or instrumentality of the foreign state' that is engaged in commercial activity in the United States (*Id* at 1104; see also section 1605(a)(3)). The court further held that the first nexus requirement applies in cases brought against foreign states, and the second applies in cases brought against agencies and instrumentalities of foreign states (*De Csepel*,

859 F3d at 1107). The commercial activity exception similarly includes explicit requirements for a nexus between the foreign state's commercial activity and the United States, such as requiring a claim based on commercial activity outside the United States to cause a direct effect in the United States (section 1605(a)(2)).

Interim or injunctive relief

11 When a state is subject to proceedings before a court or other tribunal in your jurisdiction, what interim or injunctive relief is available? (Explain when interim relief would be available and whether a contractual provision to submit to the jurisdiction of a court or tribunal could constitute consent to be bound by interim relief.)

Under the FSIA, plaintiffs generally must have a judgment against a foreign state pursuant to an exception to jurisdictional immunity in order for one of the exceptions to enforcement immunity to apply, and may not attach any property of a foreign state until those requirements are met (sections 1606 and 1610).

There are, however, two exceptions to this general rule. Section 1610(d) permits prejudgment attachment of a foreign state's property if three conditions are met: the property is used for a commercial activity in the United States; the foreign state has explicitly waived immunity; and the purpose of the attachment is to secure the judgment or future judgment, not to establish jurisdiction.

Under section 1605A(g), when an action is brought against a foreign state under section 1605A's terrorism exception to immunity, 'the filing of a notice of pending action . . . shall have the effect of establishing a lien of lis pendens upon any' property of the foreign state located in the district where the action is filed and 'subject to attachment in aid of execution, or execution, under section 1610'.

Final relief

12 When a state is subject to proceedings before a court or other tribunal in your jurisdiction, what type of final relief is available (eg, specific performance, damages)?

Section 1606 of the FSIA provides that for 'any claim for relief with respect to which a foreign state is not entitled to immunity . . . the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances'. Therefore, relief such as damages or specific performance would be available against a foreign state if it would be available against a private individual 'under like circumstances'.

Punitive damages, however, are generally not available against foreign states. Nevertheless, section 1606 further provides that:

> *in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by*

the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Section 1605A(c) provides another exception to the prohibition against punitive damages if a plaintiff establishes that the terrorism exception to immunity in section 1605A applies and meets other specified requirements.

In principle, the final relief available against a state will be damages and remedies such as specific performance will be subject to the conditions of section 1606 of the FSIA.

Service of process

13 Identify the person or entity that must be served with process before any proceeding against a state (or its political subdivisions, organs, agencies and instrumentalities) may proceed in your jurisdiction.

Sections 1608(a) and 1608(b) identify the persons or entities that must be served with process in order to proceed in an action against a foreign state or its agency or instrumentality. For example, under section 1608(a)(3), process must be 'dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned'. The US Supreme Court in *Republic of Sudan v Harrison* held that service sent to Sudan's US embassy was not effective service under section 1608(a)(3) because it was not sent to the minister of foreign affairs at his office in Sudan (139 Supreme Court 1048, 1062 (2019)).

14 What are the requirements for service of process for states and their political subdivisions, organs, agencies and instrumentalities in your jurisdiction? (See eg, section 12(1) of the UK State Immunity Act 1978; section 14 of the Singapore State Immunity Act.)

Section 1608(a) provides the requirements for service of process on a foreign state or a political subdivision of a foreign state, and section 1608(b) provides the requirements for service of process on an agency or instrumentality of a foreign state.

Section 1608(a) provides, in hierarchical order, that service:

shall be made upon a foreign state or political subdivision of a foreign state:

1 by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
2 if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
3 if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

4 if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

Section 1608(b) provides that service:

shall be made upon an agency or instrumentality of a foreign state:

1 by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or
2 if no special arrangement exists, by delivery of a copy of the summons and complaint 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 convention on service of judicial documents; or
3 if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

    1 as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or
    2 by any form of mail requiring signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served; or
    3 as directed by order of the court consistent with the law of the place where service is to be made.

Strict compliance with the procedures set out in section 1608 of the FSIA is necessary for service on a foreign state to be proper. A plaintiff must exhaust attempts to effect service under each method set forth in each subsection of section 1608 in hierarchical order, before proceeding to the next method of service. In *Republic of Sudan v Harrison*, the US Supreme Court reversed the denial of vacatur of a default judgment against Sudan for lack of personal jurisdiction where service of process did not strictly comply with the requirements of section 1608(a)(3) (139 Supreme Court 1048, 1062 (2019)). In *Harrison*, the Court found service to be deficient because it was sent care of Sudan's embassy in the United States rather than 'directly to the foreign minister's office in the minister's home country' (139 Supreme Court at 1053). The Court explained that the service of process requirements for foreign states fall into a category of cases 'in which the rule of law demands adherence to strict requirements' (*Harrison*, 139 Supreme Court at 1062).

Judgment in absence of state participation

15 Under what conditions will a judgment be made against a state that does not appear or participate in the proceedings before a court or other tribunal in your jurisdiction?

Under section 1608(e) of the FSIA, no default judgment shall be entered 'against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court'. The US Court of Appeals for the District of Columbia held in *Kim v Democratic People's Republic of Korea* that the 'evidence satisfactory to the court' required under 1608(e) must be evidence that is admissible under the US Federal Rules of Evidence (774 F3d 1044, 1049 (DC Cir 2014)). A copy of any default judgment must be served on the foreign state or an agency or instrumentality of a foreign state in the manner prescribed in either section 1608(a) or 1608(b). In *Reichler, Milton & Medel v Republic of Liberia*, the District Court for the District of Columbia held that the default judgment was proper against Liberia because Liberia was properly served and the claim was proven (see 484 F Supp 2d 1, 3 (DDC 2007)).

16 Under what circumstances can a state challenge such a default judgment in your jurisdiction?

As an initial matter, in US courts, there is a general policy disfavouring default judgments, especially those against a foreign sovereign. For example, then-Judge Ruth Bader Ginsburg wrote in *Practical Concepts Inc v Republic of Bolivia*, '[i]ntolerant adherence to default judgments against foreign states could adversely affect this nation's relations with other nations' (811 F2d 1543, 1551 n.19 (1987)). Nevertheless, unless the court finds that it lacks subject-matter jurisdiction over the action, or personal jurisdiction over the foreign state, it remains within the court's discretion to set aside or vacate a default judgment.

The circumstances under which a foreign state can challenge a default judgment depend on the specific challenge to the default judgment and whether the judgment is final and appealable. If the default is an entry of default, a foreign state may move to set aside the default for 'good cause' under Rule 55(c) of the Federal Rules of Civil Procedure. In determining whether there is good cause to set aside a default, a court will balance 'whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious' (*Khochinsky v Republic of Poland*, 1 F4th 1 (DC Cir 2021)).

Once a court renders a final default judgment against a foreign sovereign defendant, the default judgment can be vacated only under the more stringent standard of Rule 60(b) of the Federal Rules of Civil Procedure. Rule 60(b) provides six bases for vacating a default judgment:

1 mistake, inadvertence, surprise, or excusable neglect;
2 newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
3 fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
4 the judgment is void;

5 the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
6 any other reason that justifies relief.

The bases for vacatur provided in Rules 60(b) (1) to (3) must be asserted within a year of the entry of the default judgment. Challenges to a court's jurisdiction under Rule 60(b)(4), however, 'are not governed by a reasonable time restriction' (see *Bell Helicopter Textron, Inc v Islamic Republic of Iran*, 734 F3d 1175, 1179 (DC Cir 2013)).

ENFORCEMENT IMMUNITY

Domestic law

17 Describe your jurisdiction's law governing the scope of enforcement immunity (ie, whether the property of a state may be subjected to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale).

Section 1609 of the Foreign Sovereign Immunities Act of 1976 (FSIA) provides that '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'. Section 1610 establishes several exceptions to enforcement immunity, and section 1611 identifies certain types of property that are immune from execution, notwithstanding the exceptions to enforcement immunity in section 1610. Such property includes: the property of organisations that are 'entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act'; property of a central bank 'held for its own account'; and property used in connection with military activity.

The exceptions to enforcement immunity in section 1610 are somewhat similar to the exceptions to jurisdictional immunity under sections 1605 to 1607. Further, under the Supreme Court's decision in *Bancec* a plaintiff may not execute on the property of an agency or instrumentality of a foreign state to satisfy a judgment against a foreign state, unless the plaintiff rebuts the presumption of separateness.

18 Describe any differences in your jurisdiction's law between the scope of enforcement immunity pre-judgment and post-judgment.

Under the FSIA, foreign states are immune from both suit as well as execution of judgments in the absence of an applicable exception. Sections 1605 to 1607 of the FSIA cover the exceptions to a foreign state's jurisdictional immunity, and sections 1610 and 1611 outline the exceptions to enforcement immunity. Plaintiffs generally must have a judgment against a foreign state pursuant to an exception to jurisdictional immunity in order for one of the exceptions to enforcement immunity to apply and may not attach any property of a foreign state until 'a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)', in the event of a default judgment (see sections 1610(a) and 1610(c)).

There are, however, two exceptions to this general rule. Section 1610(d) permits prejudgment attachment of a foreign state's property if three conditions are met:

- the property is used for a commercial activity in the United States;
- the foreign state has explicitly waived immunity; and
- the purpose of the attachment is to secure the judgment or future judgment, not to establish jurisdiction.

Under section 1605A(g), in an action brought against a foreign state under section 1605A's terrorism exception to immunity, 'the filing of a notice of pending action . . . shall have the effect of establishing a lien of upon any' property of the foreign state located in the district where the action is filed and 'subject to attachment in aid of execution, or execution, under section 1610'.

Application of civil procedure codes

19 When enforcing a judgment against a state in your jurisdiction, would debt collection statutes and the enforcement sections of domestic civil procedure codes or similar codes also apply (eg, debt or third-party debt orders, charging orders)?

Yes, to the extent enforcement immunity would not be applicable. Specifically, under the FSIA and the Federal Rules of Civil Procedure, state law governs the circumstances and manner of attachment and execution proceedings. When a foreign state is not protected by sovereign immunity, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances (see section 1606). In attachment and execution proceedings involving foreign states, the federal courts will generally apply Rule 69(a) of the Federal Rules of Civil Procedure, which states that execution procedures 'must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies'. For example, in an action in which the judgment creditors had obtained default judgments awarding compensatory damages against Cuba, the award creditors sought turnover orders under Rules 13 and 69 of the Federal Rules of Civil Procedure and section 5225(b) of the New York CPLR against garnishees that held funds belonging to entities that allegedly were agencies and instrumentalities of Cuba (see *Weininger v Castro*, 462 F Supp 2d 457, 462 (SDNY 2006)).

Consent for further enforcement proceedings

20 Does a prior submission by the state to the jurisdiction of a court or tribunal constitute consent for any further enforcement proceedings against the property of the state?

Prior submission to the jurisdiction of a court or tribunal does not establish waiver or consent to further enforcement proceedings against state assets. Enforcement proceedings require a judgment against the state and a corresponding waiver of enforcement immunity under sections 1609 to 1611 for the property at issue. The FSIA provides, among other things, that a foreign state shall not be immune from execution or attachment if the 'foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication' (section 1610(a)(1)) or when 'judgment is based on an order

confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement' (section 1610(a)(6)).

Property or assets subject to enforcement or execution

21 Describe the property or assets that would typically be subject to enforcement or execution (e.g., property which is in use or intended for use for commercial purposes).

Where a plaintiff seeks to execute on the property of a foreign state, the property that would be subject to enforcement, execution and attachment would be property used for commercial activity in the United States, provided that one of the exceptions to enforcement immunity in section 1610(a) applies.

Where a plaintiff seeks to execute on the property of an agency or instrumentality of a foreign state, the property of the agency or instrumentality would be subject to enforcement, execution and attachment, provided that the agency or instrumentality is 'engaged in commercial activity in the United States' and one of the exceptions to enforcement immunity in section 1610(b) applies.

Additionally, where a judgment has been entered against a foreign state under section 1605A's terrorism exception to immunity, section 1610(g) provides that the property of an agency or instrumentality of a foreign state is subject to attachment and execution to satisfy a judgment against the foreign state, regardless of the presumption of separateness set forth in *Bancec*. The Supreme Court explained in *Rubin v Islamic Republic of Iran*, that section 1610(g) identifies property available for attachment and execution but 'it does not in itself divest property of immunity' (138 Supreme Court 816, 820 (2018)). Instead, plaintiffs may only attach and execute against property after they have established the property is exempt from immunity under one of the exceptions to attachment immunity in section 1610.

Assets covered by enforcement immunity

22 Describe the property or assets that would normally be covered by enforcement immunity and give examples of any restrictive or broader interpretations of enforcement immunity adopted by the courts in your jurisdiction (eg, diplomatic premises, embassy accounts, 'mixed' embassy accounts).

Generally, property used for commercial activity in the United States or property of an agency or instrumentality of a foreign state that is engaged in commercial activity in the United States would be potentially exempted from enforcement immunity. For example, in *Aurelius Capital Partners, LP v Republic of Argentina*, the US Court of Appeals for the Second Circuit held that Argentinian social security funds were immune from attachment because those funds had not been used for any commercial activity whatsoever (see 584 F3d 120, 131 (2d Cir 2009)).

In addition, section 1610(a)(4)(B) provides that immovable property will not be subject to execution where it is 'used for purposes of maintaining a diplomatic or consular mission or

the residence of the Chief of such mission'. In *Connecticut Bank of Commerce v Republic of Congo*, the US Court of Appeals for the Fifth Circuit observed that in determining whether sovereign bank accounts are used for commercial activity in the United States, a court focuses 'on how the money from the accounts was spent, not where it came from' (309 F3d 240 No. 7 (5th Cir 2002)). In making this observation, the court referred to a District Court for the District of Columbia decision, which 'held that bank accounts "utilized for the maintenance of the full facilities of Liberia to perform its diplomatic and consular functions . . . including payment of salaries and wages of diplomatic personnel and various ongoing expenses incurred in connection with diplomatic and consular activities" were not "used for" a commercial activity within the meaning of the FSIA' (quoting *Liberian Eastern Timber Corp v Republic of Liberia*, 659 F Supp 606 (DDC 1987)).

Section 1611 of the FSIA further provides that, notwithstanding the exceptions to enforcement immunity in section 1610, certain property 'shall not be subject to attachment'. This property includes: the property of organisations that are 'entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act'; property of a central bank 'held for its own account'; and property used in connection with military activity.

23 Explain whether the property or bank accounts of a central bank or other monetary authority of a state would be covered by enforcement immunity even when such property is in use or is intended for use for commercial purposes (eg, section 14(4) of the UK State Immunity Act; article 21(1)(c) UNCSI).

Under section 1611(b)(1), the property of a foreign state shall be immune from attachment and execution, if:

> *the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.*

For example, the US Court of Appeals for the Second Circuit held that funds deposited with Argentina's central bank were immune from attachment and the 'commercial activity' exception to enforcement immunity in section 1610(a)(2) did not apply because the central bank used those funds for central banking purposes and therefore held the funds 'for its own account' (see *NML Capital, Ltd v Banco Cent De La Republica Arg*, 652 F3d 172 (2d Cir 2011) cert denied).

Test for enforcement

24 Explain whether domestic jurisprudence has developed any further test that must be satisfied before enforcement against a state is permitted (eg, the test applied in Switzerland according to which the legal relationship giving rise to the decision whose enforcement is sought must have a sufficiently close nexus to Switzerland).

A plaintiff must generally show that it has a judgment against a foreign state before enforcement against a foreign state is permitted. Then the plaintiff must apply to the court for an order under section 1610(c) establishing that 'a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e)' and, as such, the plaintiff should be permitted to begin enforcement proceedings. Once the plaintiff has identified potentially attachable property, it must establish that one of the exceptions to enforcement immunity applies to the property on which they seek to execute.

Service of arbitration award or judgment

25 How is a state served with process or otherwise notified before an arbitral award or judgment against it (or its organs and instrumentalities) may be enforced?

Process must be served on a state in accordance with section 1608 of the FSIA. In *Mobile Cerro Negro, Limited v Bolivarian Republic of Venezuela*, the US Court of Appeals for the Second Circuit held that because 'actions to enforce [arbitral] awards against a foreign sovereign fall within the FSIA's comprehensive scheme, plaintiffs pursuing such actions must satisfy the FSIA's procedural requirements', including the service of process requirements in section 1608(a) or (b) (863 F3d 96, 99 (2d Cir 2017)). In *Crystallex International Corporation v Bolivarian Republic of Venezuela*, the US Court of Appeals for the Third Circuit agreed that when a plaintiff files an action to confirm an arbitral award in the United States, the complaint for that action must be served in accordance with section 1608(a) or (b) (932 F3d 126 (3d Cir 2019)). Once a court enters a judgment in that action, however, the plaintiff may register the judgment in other US courts to enforce the judgment and need not serve the registration in accordance with section 1608(a) or (b) (Id at 137). Nevertheless, if the judgment confirming the arbitral award is a default judgment, it must be served in accordance with section 1608(a) or (b), and the requirements of section 1610(c) must be satisfied before enforcement may commence.

History of enforcement proceedings

26 Is there a history of enforcement proceedings against states in your jurisdiction? What portion of these proceedings is based on arbitral awards?

Yes, there is a long and ever-increasing line of cases relating to proceedings against states or state entities in the United States. A significant number of these proceedings are for the enforcement and execution of both commercial and investor-state awards.

Public databases

27 Are there any public databases in your jurisdiction through which property or assets held by states may be identified?

Yes, assets held by states may be identified by undertaking a variety of searches of public information, including, among others, searches on corporate registries or searches for real property through land registries (such as the office of the county tax assessor and the county recorder's and registrar's offices).

Court competency

28 Would a court in your jurisdiction be competent to assist with or otherwise intervene to help identify property or assets held by states in the territory?

In principle, yes (see section 1606), but discovery is subject to the limitations under section 1605(g)(1)(A), which applies in actions brought under the terrorism exceptions to immunity in sections 1605A and 1605B:

> *the court . . . shall stay any request, demand, or order for discovery on the United States that . . . would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.*

IMMUNITY OF INTERNATIONAL ORGANISATIONS

Specific provisions

29 Does your jurisdiction's law make specific provision for immunity of international organisations?

The privileges and immunities of international organisations are governed by the International Organizations Immunities Act of 1945 (28 USC sections 288 et seq) (IOIA).

30 What is the scope of immunity enjoyed by international organisations in your jurisdiction and what are the exceptions to that immunity?

The IOIA grants international organisations the 'same immunity from suit . . . as is enjoyed by foreign governments' (22 US Code section 288a(b)). In *Jam v International Finance Corporation*, the Supreme Court considered whether international organisations enjoyed the virtually absolute immunity foreign governments enjoyed in 1945, when the IOIA was enacted, or the more limited immunity foreign states enjoy today under the Foreign Sovereign Immunities Act of 1976 (FSIA) (139 Supreme Court 759 (2019)). The Supreme Court held that the immunity of international organisations from suit is governed by the FSIA, and the 'International Finance Corporation is therefore not absolutely immune from suit' (139 Supreme Court at 772). The Court nevertheless recognised that 'the privileges and immunities accorded by

the IOIA are only default rules' and the 'organization's charter can always specify a different level of immunity' (139 Supreme Court at 771).

Domestic legal personality

31 Does your jurisdiction consider international organisations headquartered or operating in its territory as enjoying domestic legal personality and could such organisations be subjected to proceedings before a court or other tribunal? (If so, please give examples of transactions or proceedings.)

Under section 288a(a), international organisations can contract, acquire and dispose of real and personal property, and institute legal proceedings.

Enforcement immunity

32 Would international organisations in your jurisdiction enjoy enforcement immunity? Are there any cases where debtors sought to enforce against a state by attaching or executing property or assets held by international organisations?

International organisations enjoy enforcement immunity. Specifically, section 288a(b) provides that international organisations:

> *their property and their assets . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract.*

Further, section 1611(a) of the FSIA provides that:

> *the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.*

As explained above, in *Jam v International Finance Corp*, the Supreme Court held that 'international organization immunity and foreign sovereign immunity are continuously equivalent' unless the organisation's charter specifies a 'different level of immunity' (139 Supreme Court 759, 768, 771 (2019)).

UPDATES & TRENDS

Key developments of the past year

33 | Are there any emerging trends or hot topics in your jurisdiction?

During the past few years, US courts have issued a number of significant decisions addressing the scope of foreign sovereign immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA).

For example, in *Federal Republic of Germany v Philipp*, a unanimous Supreme Court held that the FSIA's expropriation exception does not apply to a sovereign's taking of its own nationals' property because such a taking does not involve 'rights in property taken in violation of international law' (141 Supreme Court 703, 715 (2021)). The case before the Court concerned claims by descendants of German Jewish art dealers against Germany, arising out of Holocaust-era takings of the art dealers' property. Plaintiffs argued that the taking constituted genocide, and thus was a violation of international law that satisfied the FSIA's expropriation exception to sovereign immunity. The Court disagreed and explained, '[w]e do not look to the law of genocide to determine if we have jurisdiction over the heirs' common law property claims. We look to the law of property.' The Court concluded that what a country does to property belonging to its own citizens within its own borders is not the subject of international law and therefore could not involve 'rights taken in violation of international law' under the expropriation exception.

In its 2022 decision in *Cassirer v Thyssen-Bornemisza Collection Foundation*, the Supreme Court held that federal courts hearing state-law claims under the FSIA should apply the forum state's choice-of-law rules applicable in a similar suit against a private party (142 Supreme Court 1502, 1508 (2022)). The Court emphasised that the FSIA was 'never intended to affect the substantive law determining the liability of a foreign state or instrumentality deemed amenable to suit', rather, under section 1606 of the FSIA, 'when a foreign state is not immune from suit, it is subject to the same rules of liability as a private party'. The Court concluded that 'only the same choice-of-law rule can guarantee use of the same substantive law—and thus guarantee the same liability'.

Finally, and most significantly, in *Turkiye Halk Bankasi AS v United States*, the Supreme Court ruled, as a matter of first impression, that the FSIA does not grant immunity in criminal cases (143 Supreme Court 940 (2023)). The United States indicted a bank owned by the Republic of Turkey for conspiring to evade US sanctions against Iran. Halkbank moved to dismiss the indictment, arguing it was immune from criminal prosecution under the FSIA as an instrumentality of a foreign state. The Supreme Court disagreed, holding that the FSIA 'does not provide foreign states and their instrumentalities with immunity from *criminal* proceedings'. The Supreme Court reasoned that if Congress had intended to extend immunity to foreign sovereigns from criminal prosecution, such language 'undoubtedly would have surfaced somewhere in the Act's text'. The Court remanded the case to the US Court of Appeals for the Second Circuit so that it could consider the parties' common-law immunity arguments.

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WHITE & CASE

Nicole Erb nerb@whitecase.com
Claire A DeLelle claire.delelle@whitecase.com
Celia McLaughlin cmclaughlin@whitecase.com

1221 Avenue of the Americas, New York NY 10020, United States
Tel: +1 212 819 8200
www.whitecase.com

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