PANORAMIC

SOVEREIGN IMMUNITY 2025

Contributing Editors

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LEXOLOGY

Sovereign Immunity 2025

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Panoramic guide (formerly Getting the Deal Through) enabling side-by-side comparison of local insights into sovereign immunity issues, including in each jurisdiction the concept of sovereign immunity, its legal basis and the role of international treaties; jurisdictional immunity and the domestic law governing its scope; exceptions to sovereign immunity; proceedings against state enterprises or similar entities; interim, injunctive and final relief; service of process; judgment in absence of state participation; immunity from enforcement; applicability of debt collection statutes and the enforcement sections of civil procedure codes; property or assets typically subject to enforcement or execution; tests for enforcement; service of arbitration awards or judgments; the history of enforcement proceedings against states; public databases of states' assets; court competency; treatment of international organisations; and recent trends.

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Sovereign Immunity: Introduction

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We are pleased to present the eighth edition of *Sovereign Immunity*. This volume provides an updated analysis of key aspects of the law of sovereign immunity in four important jurisdictions: Brazil, France, Germany, Hong Kong and the United States. It provides a helpful 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 around the world. The world is still experiencing the ramifications from the global pandemic, which led to significant mitigation measures taken by foreign states. The contraction of the world economy, geopolitical risk and the spectre of climate change have similarly led to increasing government regulation and sovereign engagement in the private sector. These developments have already created and will undoubtedly lead to more 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. Most jurisdictions addressed in this edition of *Sovereign Immunity* generally apply the doctrine of restrictive immunity from suit. There are differences, however, among these jurisdictions with respect to enforcement immunity, with Brazil applying absolute enforcement immunity and France applying stricter exceptions to enforcement immunity under its Loi Sapin II. Indeed, the demanding requirements of the Loi Sapin II (enacted in 2016) for enforcement against state assets are having a chilling effect on sovereign asset enforcement. Sanctions regimes can further complicate enforcement against sovereign assets under French law. These effects were evident in a recent holding from the first-instance Paris court, Tribunal judiciaire de Paris, which held that enforcement of three ICC awards against Iraq was precluded by the sanctions regimes targeting Iraq and the inability of the claimants to obtain authorisation for enforcement from the competent French authority. Despite Loi Sapin II's chilling effect, however, claimants in two recent cases seeking to enforce awards against property of the Russian Federation have had initial success.

The effects of China's recently enacted Foreign Sovereign Immunity Law (FSIL), which applies in Hong Kong, remain to be seen. Under the FSIL, China and Hong Kong now apply the doctrine of restrictive sovereign immunity instead of the doctrine of absolute sovereign immunity. Since the FSIL only came into force at the beginning of last year, the effects of

the law are still untested, but foreign states and their constituents now face a much higher risk of being hauled into court in connection with their business in China and Hong Kong.

In contrast, Germany does not have a statutory regime for sovereign, instead relying on the general principles of international law. Under such principles, immunity from jurisdiction relies on separating sovereign and commercial acts and immunity from execution examines whether the at-issue property is sovereign or commercial.

In the United States, there have been further legal developments in interpretation of certain exceptions to sovereign immunity. For example, in *Simon v Republic of Hungary*, the US Supreme Court further narrowed the scope of the expropriation exception to sovereign immunity. The effects of the Supreme Court's 2023 decision in *Turkiye Halk Bankasi AS v United States* (*Halkbank*) continue to be borne out. That decision held that the US Foreign Sovereign Immunities Act does not grant sovereign immunity in criminal case and courts should, instead, look to the common law for rules of sovereign immunity. Since *Halkbank* was decided, lower US courts of appeals have denied various entities sovereign immunity under the common law in criminal actions against them brought by the US government.

The contents in 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 five 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 the differences across jurisdictions, in any sovereign-related transaction, litigation or arbitration.

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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.

Law stated - 12 June 2025

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 its enactment of the FSIA. Section 1330 of the FSIA provides that US federal courts have jurisdiction to adjudicate disputes against foreign states 'as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 [of the FSIA] or under any applicable international agreement'.

Law stated - 12 June 2025

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.

Law stated - 12 June 2025

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 one of the exceptions to sovereign immunity provided in sections 1605 to 1607 of the FSIA applies. 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.

Law stated - 12 June 2025

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 (such as agreements concerning commercial and other activities provided 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 is construed narrowly and must be 'unmistakable and unambiguous' (*Drexel Burnham Lambert Grp v Comm of Receivers for Galadari*, 12 F3d 317, 326 (2d Cir 1993)). A Report by the Committee on the

Judiciary of the US House of Representatives on the FSIA listed three examples of where pre-FSIA courts found implicit waiver: (1) executing a contract containing a choice-of-law clause designating the laws of the United States as applicable; (2) agreeing to submit a dispute to arbitration in a specific country; and (3) filing a responsive pleading without raising sovereign immunity (see 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 District of Columbia Circuit observed in *Wye Oak Technology, Inc v Republic of Iraq*, that courts 'have been reluctant to recognize an implicit waiver of sovereign immunity' in circumstances other than the three listed above (24 F4th 686, 691 (DC Cir 2022)). However, courts have struggled to reconcile how waiver through a responsive pleading comports with the requirement that the waiver be 'unambiguous'. For example, in *Foremost-McKesson Inc v Islamic Republic of Iran*, the US Court of Appeals for the District of Columbia Circuit found an answer which failed to raise jurisdictional defences was not a 'conscious decision' to waive immunity where the foreign state's other litigation activity did not exhibit an unambiguous intent to waive immunity (905 F2d 438 (DC Cir 1990). The split in authority is exemplified by recent case from the US Court of Appeals for the Eleventh Circuit which found the foreign state waived its immunity by filing a motion to dismiss the amended complaint that did not raise sovereign immunity despite having raised it in its motion to dismiss the initial complaint and in other filings (*Isaac Indus, Inc v Petroquímica de Venezuela, SA*, 127 F4th 289 (11th Cir 2025), *petition for cert. filed*, No 24-1117 (US Apr 24, 2025) (The authors served as counsel of record for defendants in *Isaac*.)).

The FSIA also establishes an 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 court may determine that a foreign state is not immune from the jurisdiction of US courts. In *Amaplat Mauritius Ltd v Zimbabwe Mining Development Corp*, the US District Court for the District of Columbia discussed the interplay between the waiver and arbitration exceptions to sovereign immunity (663 F Supp 3d 11 (DDC 2023)). In this action, the Plaintiffs sued the Republic of Zimbabwe along with several instrumentalities, seeking the federal district court's recognition of a foreign court judgment enforcing an arbitral award. The court granted the motion to dismiss as to the Republic of Zimbabwe and the Zimbabwe Mining Development Corporation for lack of subject-matter jurisdiction, but granted plaintiffs leave to amend their complaint. In considering the claims brought against the Zimbabwean Chief Mining Commissioner, the court rejected the plaintiffs' argument that the arbitration exception applied, because the action was not one brought 'to enforce an agreement', to arbitrate, or 'to confirm an award made pursuant to such an agreement'. Instead, the plaintiffs had brought an action under the District of Columbia Judgment Recognition Act 'to recognize and enforce the Zambian judgment, which itself confirms the underlying arbitral award'. The court explained further, however, that '[a]lthough that distinction was sufficient to take this case outside of the arbitration exception, which is expressly limited to cases brought to enforce arbitration agreements or confirm arbitral awards, it does not preclude the application of the waiver exception' (663 F Supp 3d at 35). The court ultimately denied the motion to dismiss the amended complaint and the case is currently on appeal (717 F Supp 3d 1 (DDC 2024), *appeal docketed*, No. 24-7030 (DC Cir Mar 11, 2024), *argued* Nov 18, 2024).

Law stated - 12 June 2025

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 that have certain nexus to the United States (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 only and do not 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)). The commercial activity exception applies only in cases involving the 'commercial activity' of a foreign state, not in cases involving purely sovereign acts. The FSIA defines 'commercial activity' 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)).

The US Court of Appeals for the Second Circuit has held 'that the issue of whether a sovereign's actions fit within the commercial activity exception is a fact-intensive one, and the court's inquiry should be guided by the following considerations:

- the particular conduct by the sovereign on which the actions is based;
- the nature of that conduct, that is, its outward form, rather than its purpose;
- whether the actions in question are similar to those that are typically taken by private citizens, or whether they are particular to sovereigns; and
- in the employment context, whether the plaintiff is a 'civil servant,' taking into account the broad range of civil service employment relationships existing in other countries'.

Nam v Permanent Mission of Republic of Korea to the United Nations, 118 F4th 234, 243-44 (2d Cir 2024).

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 US 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', since, however 'difficult it may be in some cases to separate "purpose"... from "nature"... the statute unmistakably commands that to be done' (*Weltover*, 504 US at 616-17). In addition, recently, the US Court of Appeals for the Ninth Circuit affirmed a district court's denial of a motion to dismiss 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 Gen Consulate of Kuwait in Los Angeles*, 28 F4th 980, 986 (9th Cir 2022) (quoting *Saudi Arabia v Nelson*, 507 US 349, 360 (1993))). In *Weltover*, the US Supreme Court also held 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, 126-27 (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' (*Daou*, 42 F4th 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' (*Daou*, 42 F4th at 138).

In *Harvey v Permanent Mission of Republic of Sierra Leone to the United Nations*, the US Court of Appeals for the Second Circuit applied the commercial activity exception in a case involving damage caused to the plaintiffs' home by the Mission's renovation of its headquarters (97 F4th 70, 78 (2d Cir 2024)). The court held that all the conduct related to the Mission's renovation efforts constituted commercial acts because having a contractor renovate a building is something that a private party can – and often does – do (*Harvey*, 97 F4th at 79).

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); however, see also Restatement (Third) of Foreign Relations Law, section 713, cmt 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').

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 held that the expropriation exception did not apply because 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, 1394-95 (5th Cir 1985)). In *Dayton v Czechoslovak Socialist Republic*, the US Court of Appeals for the District of Columbia 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 plaintiffs sought to hold 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, 992-95 (4th Cir 2022)). In *Federal Republic of Germany v Philipp*, the US 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' (592 US 169, 186-87 (2021)). Most recently, the US Supreme Court held in *Republic of Hungary v Simon* that proceeds from the sale of expropriated property that are comingled with government funds in an account and later used for commercial purposes in the United States do not satisfy the expropriation exception's commercial nexus requirement (145 SCt 480 (2025)).

Further, the US 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' (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 US 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 (590 US 418, 427 (2020) (The authors served as counsel of record for Sudan in *Opati*.)). The US Supreme Court held that the language in section 1605A(c) overcame the presumption of the 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 US 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. The US Court of Appeals for the District of Columbia Circuit in *KEFV v Islamic Republic of Iran* recently held that a child born after the terrorist attack that killed her father could recover solatium damages under section 1605A(c) (No. 23-7076, 2025 WL 1226714 (DC Cir Apr 29, 2025)). The court observed: 'The FSIA does not expressly provide for after-born plaintiffs to recover solatium. But neither does it expressly preclude their recovery' (*KEFV*, 2025 WL 1226714 at *3). Relying on 'analogues within all types of "well-established" state law to provide guideposts,' the court held 'that children in utero at the time a parent is killed in a terrorist attack and who are later born may seek solatium under the FSIA' (*KEFV*, 2025 WL 1226714 at *3, *7).

In 2020, the United States rescinded its designation of the Republic of the Sudan as a state sponsor of terrorism and enacted legislation to remove section 1605A as a basis for subject-matter jurisdiction over actions brought against Sudan in US courts, with one

exception for the pending claims of victims of the 9/11 attacks. The US Court of Appeals for the District of Columbia Circuit was the first appeals court to address that legislation in *Mark v Republic of the Sudan* in 2023 (77 F4th 892 (DC Cir 2023) (The authors served as counsel of record for Sudan in *Mark*.)). In *Mark*, the court held that the legislation precluded the court from exercising subject-matter jurisdiction under section 1605A over plaintiffs' action against Sudan, and that the legislation did not violate the plaintiffs' equal protection rights under the US Constitution (77 F4th at 899).

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*, 657 F Supp 3d 311, 320 (SDNY 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' (*In re Terrorist Attacks*, 657 F Supp 3d at 332). An appeal from this decision is currently pending before the US Court of Appeals for the Second Circuit (*appeal docketed*, No 23-258 (2d Cir Feb 28, 2023), *argued* Oct 1, 2024).

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 at 626-27 (1983)). The US 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' (583 US 202, 205 (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 US Code section 2337(2)). One federal district 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, *7 (SDNY 7 February 2023)).

Law stated - 12 June 2025

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 to pass 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*, 657 F Supp 3d 311, 331-32 (SDNY 2023), *appeal docketed*, No 23-258 (2d Cir Feb 28, 2023), *argued* Oct 1, 2024)). 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.

Law stated - 12 June 2025

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 if it meets the tripartite test in section 1603(b), 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, 218-19 (2d Cir 2004)). This decision follows the US 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, 473-74 (2003)). In *Dole*, ownership of the defendant company was at various times separated from the state of Israel by one or more corporate layers.

The status of a state enterprise as an agency or instrumentality of a foreign state is determined by the relevant ownership interest at time of filing of suit, and 'immunity under the Foreign Sovereign Immunities Act, 28 US Code § 1604, may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed'. *Bartlett v Baasiri* (81 F4th 28, 30 (2d Cir 2023)); see also *Schansman v Sberbank of Russia PJSC* (128 F4th 70, 79-80 (2025)).

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 when 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)). In coming to this conclusion, the Third Circuit considered decisions by the Ninth and Fifth Circuit Courts in *EOTT Energy Operating Ltd Partnership v Winterthur Swiss Insurance Co*, 257 F3d 992, 997 (9th Cir 2001) and *Kelly v Syria Shell Petroleum Development BV*, 213 F3d 841, 846-47 (5th Cir 2000).

Specifically, the Third Circuit in *USX Corp* described the various factors employed by the Ninth and Fifth Circuits in determining whether an entity is an organ of a foreign state. Those factors include:

- 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;
- the entity's obligations and privileges; and
- an additional factor, namely the ownership structure of the entity.

All of these factors are relevant, but none is 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 App'x 43 (2d Cir 2006)). 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, 279-80 (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 626-27627). 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 the assets of Petróleos de Venezuela, SA (PDVSA), an agency or instrumentality of Venezuela (932 F3d 126, 151 to152 (3d Cir 2019)). The Third Circuit reached a similar conclusion in*OI European Group BV v Bolivarian Republic of Venezuela*, holding that, despite subsequent changes to the Venezuelan government, PDVSA continued to be the alter ego of Venezuela for purposes of overcoming the presumption of separateness in respect of PDVSA's assets (73 F4th 157, 174 (3d Cir 2023), *cert denied*, 144 SCt 549 (Mem) (2024)).

Law stated - 12 June 2025

Standing

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

Standing requirements are generally not addressed in the individual exceptions to sovereign immunity under the FSIA and are instead governed by the US Constitution and the substantive law under which plaintiffs assert their claims against foreign states and their agencies and instrumentalities. There are a few exceptions, however. Section 1605A, for example, withdraws immunity only where 'the claimant or victim' was, at the time of the act of terrorism, a US national, a member of the US armed forces or a US government employee.

Law stated - 12 June 2025

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 (see *CC/Devas (Mauritius) Ltd v Antrix Corp. Ltd*, 605 US __, slip op at 9 (2025)). 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 (*De Csepel*, 859 F3d 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)).

In *CC/Devas (Mauritius) Ltd v Antrix Corp Ltd*, the US Supreme Court recently addressed whether the FSIA requires plaintiffs to show that a foreign state or its agency or instrumentality maintains certain minimum contacts with the forum to establish personal jurisdiction (605 US __ (2025)). The Court held that such a showing is not required under the FSIA because the 'most natural reading of section 1330(b) is that personal jurisdiction over a foreign sovereign is "automatic" whenever (1) "an exception to sovereign immunity applies" and (2) "service of process has been accomplished"' (*Devas*, 605 US __, slip op at 8 (quoting *Samantar v Yousuf*, 560 US 305, 311 (2010))). The Court, however, left open the question of whether the Due Process Clause of the Fifth Amendment to the US Constitution separately requires a showing of minimum contacts before a court may exercise personal jurisdiction over a foreign state or agency/instrumentality (see *Gater Assets Ltd v AO Moldovagaz*, 2 F4th 42, 49 (2d Cir 2021) (holding that 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'); *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F3d 82, 95-100 (DC Cir 2002) (holding that foreign states themselves are not 'persons' for purposes of the Fifth Amendment, and therefore a showing of minimum contacts with the forum is *not* required to exercise personal jurisdiction over them).

Law stated - 12 June 2025

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'.

Law stated - 12 June 2025

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)?

In general, the final relief available against a state will be damages and remedies such as specific performance that are subject to the conditions of section 1606 of the FSIA. 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'. The US Supreme Court observed in *Cassirer v Thyssen-Bornemisza Collection Foundation* that 'the FSIA was never "intended to affect the substantive law determining the liability of a foreign state or instrumentality" deemed amenable to suit'. (596 US 107, 113-14 (2022) (quoting *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 462 US 611, 620 (1983)) (holding that the applicable choice-of-law rule 'must mirror the rule that would apply in a similar suit between private parties')).

Section 1606 further provides that foreign states, excluding agencies or instrumentalities of foreign states, 'shall not be liable for punitive damages'. Section 1606 further provides, however, 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 an 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.

Law stated - 12 June 2025

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 (587 US 1, 19 (2019) (The authors served as counsel of record for Sudan in *Harrison*.)).

Law stated - 12 June 2025

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) (587 US 1, 19 (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' (587 US at 4). 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' (587 US at 19).

Law stated - 12 June 2025

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 Circuit 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 compelling and 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)). In *Haim v Islamic Republic of Iran*, the District of Columbia federal district court held that, in order to enter default judgment under section 1608(e) in an action brought under the terrorism exception to immunity against Iran, the district court was required to inquire into the plaintiffs' claims before entering judgment (784 F Supp 2d 1, 5-6 (DDC 2011)). However, the district court's statutory obligation to undertake such an investigation was not designed to impose the onerous burden of relitigating key facts in related cases, and thus, the district court could take judicial notice of proceedings in two prior cases, both of which arose out of the same bombing (*Haim*, 784 F Supp 2d at 6).

Law stated - 12 June 2025

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 n19 (1987)). However, even if the foreign state does not appear, the court must still determine whether foreign sovereign immunity is available under the FSIA (*Verlinden BV v Cent Bank of Nigeria*, 461 US 480, 493-94 n20 (1983)). 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, 7 (DC Cir 2021) (citation omitted)).

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)).

Law stated - 12 June 2025

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 US 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 (462 US 611, 627-28 (1983)).

Law stated - 12 June 2025

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. The US Court of Appeals for the District of Columbia Circuit in *Doe v Taliban* explained that when jurisdiction over a foreign sovereign is established, the FSIA separately protects that sovereign's 'property in the United States... from attachment, arrest, and execution,' except to the extent an exception applies (101 F4th 1, 1 (DC Cir 2024)). As a result of the FSIA's dual immunities, parties seeking judicial enforcement of an award against a foreign state face two hurdles: They 'must "establish *both* that the foreign state is not immune from suit *and* that the property to be attached or executed against is not immune" from execution' (*Doe*, 101 F4th at 1 (emphasis in original)). 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 they 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'.

Law stated - 12 June 2025

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 Civil Practice Law & Rules 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)).

Law stated - 12 June 2025

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)).

Law stated - 12 June 2025

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 US 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 US 816583 US 202, 205 (2018)). Instead, plaintiffs may only attach and execute against property after they have established that the property is exempt from immunity under one of the exceptions to attachment immunity in section 1610.

Law stated - 12 June 2025

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 (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, 257 n7 (5th Cir 2002)). In making this observation, the court referred to a US 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' (*Connecticut Bank*, 309 F3d at 257 n7 (quoting *Liberian ETimber Corp v Republic of Liberia*, 659 F Supp 606, 610 (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.

Law stated - 12 June 2025

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 Cap, Ltd v Banco Cent De La Republica Arg*, 652 F3d 172 (2d Cir 2011)).

In addition, in *In re Terrorist Attacks on Sept 11, 2001*, the US federal district court in the Southern District of New York observed in addressing assets held by Afghanistan's central bank, Da Afghanistan Bank, that courts must be 'especially cautious' about withdrawing immunity over central bank assets 'because such actions "could lead foreign central banks, in particular to withdraw their reserves from the United States and place them in other countries"' (657 F Supp 3d 311, 337 (SDNY 2023)).

Law stated - 12 June 2025

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 they have 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, they must establish that one of the exceptions to enforcement immunity applies to the property on which they seek to execute.

Law stated - 12 June 2025

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, Ltd 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, 137 (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) (*Crystallex*, 932 F3d 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.

Law stated - 12 June 2025

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.

Law stated - 12 June 2025

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).

Law stated - 12 June 2025

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.

Law stated - 12 June 2025

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 (as codified in 22 US Code sections 288 et seq) (IOIA).

Law stated - 12 June 2025

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 US 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) (586 US 199, 202 (2019)). The US 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' (586 US at 215). 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' (586 US at 214). The US Court of Appeals for the District of Columbia Circuit ultimately held that the International Finance Corporation was immune from suit because the plaintiffs could not establish an exception to sovereign immunity under the FSIA (*Jam v International Finance Corporation*, 3 F4th 405, 411 (2021)).

Law stated - 12 June 2025

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.

Law stated - 12 June 2025

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' (586 US 199, 207-08 (2019)).

Law stated - 12 June 2025

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).

Most recently, in *CC/Devas (Mauritius) Ltd v Antrix Corp Ltd*, the US Supreme Court held that the FSIA does not require plaintiffs to show that a foreign state or its agency or instrumentality maintains certain minimum contacts with the forum to establish personal jurisdiction (605 US __ (2025)). The Court, however, left open the question of whether the Due Process Clause of the Fifth Amendment to the US Constitution separately requires a showing of minimum contacts before a court may exercise personal jurisdiction over a foreign state or agency/instrumentality.

In *Turkiye Halk Bankasi AS v United States*, the US Supreme Court ruled, as a matter of first impression, that the FSIA does not grant immunity in criminal cases (598 US 264, 271 (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 US Supreme Court disagreed, holding that the FSIA 'does not provide foreign states and their instrumentalities with immunity from *criminal* proceedings' (598 US at 271 (emphasis in original)). The US 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. After considering these arguments, the Second Circuit held 'that common-law foreign sovereign immunity does not protect Halkbank from criminal prosecution based on the charges in th[e] indictment'. *United States v Bankasi* (120 F4th 41 (2d Cir 2024)). Halkbank recently filed a petition for certiorari seeking review of that decision by the US Supreme Court. Similarly, in *United States v Pangang Group Company, Ltd*, the Ninth Circuit held that Pangang Companies did not show that, under common-law immunity, they were the kind of entity eligible for immunity (135 F4th 1142 (9th Cir Apr 28, 2025)).

In *Chabad v Russian Federation*, the US Court of Appeals for the District of Columbia Circuit determined that the default judgment and sanctions judgments against the Russian Federation issued years prior were void for lack of subject matter jurisdiction (110 F4th 242 (DC Cir 2024)). The district court had based its jurisdiction on the expropriation exception to sovereign immunity under 28 US Code section 1605(a)(3). The appellate court, however, reaffirmed that the expropriation exception only provides a basis for jurisdiction over the foreign state itself (as opposed to an agency or instrumentality) when the expropriated property sits in the United States. Thus, because the property at issue was in Russia, the district court lacked jurisdiction over the claims against the Russian Federation when it entered the default judgment and sanctions judgments, and those judgments as to the Russian Federation are void and could not be enforced through attachment (Chabad, 110 F4th at 255). The court left undisturbed the judgments against the alleged Russian state instrumentalities. Chabad has filed a petition for certiorari seeking review of the decision by the US Supreme Court, and the Supreme Court has requested the views of the United States on the petition.

The US Supreme Court addressed the expropriation exception in *Simon v Republic of Hungary* (145 SCt 480 (2025)). On 21 February 2025, the US Supreme Court issued a

unanimous decision further narrowing the scope of the expropriation to sovereign immunity and requiring plaintiffs to trace directly to the United States either the specific expropriated property itself or 'any property exchanged for such property' (*Simon*, 145 SCt at 490). The Court determined that the plaintiffs' commingling theory — that Hungary and its instrumentality sold the plaintiffs' property, deposited the proceeds into an account with other government funds, and later used funds from that account for commercial purposes in the United States — could not satisfy the expropriation exception's commercial nexus requirement (*Simon*, 145 SCt at 498). *Simon* offers helpful guidance and sets limits on the scope of expropriation claims available against foreign sovereigns and their agencies or instrumentalities in US courts.

In *Mark v Republic of Sudan*, the US Court of Appeals for the District of Columbia Circuit affirmed the constitutionality of legislation restoring the Republic of the Sudan's sovereign immunity in cases brought against it under the terrorism exception to sovereign immunity (77 F4th 892, 899 (DC Cir 2023)). The legislation included a carve out for pending claims brought by victims of the 11 September 2001 attacks, but otherwise removed the terrorism exception to immunity as a basis for jurisdiction over Sudan in all other cases. The court rejected the plaintiffs' argument that the legislation's distinction between their claims and the claims of 9/11 victims did not violate equal protection rights under the US Constitution.

Finally, in *Bartlett v Baasiri*, the US Court of Appeals for the Second Circuit held that 'immunity under the Foreign Sovereign Immunities Act, 28 US Code § 1604, may attach when a defendant becomes an instrumentality of a foreign sovereign after a suit is filed' (81 F4th 28, 30 (2d Cir 2023)); accord *Schansman v Sberbank of Russia PJSC*, 128 F4th 70 (2d Cir 2025).

Law stated - 12 June 2025

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