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Expert Q&A on the Foreign Sovereign Immunities Act

Under the doctrine of sovereign immunity, a sovereign state generally is immune from the jurisdiction of the courts of other sovereign states. However, given the prevalence of state actors engaged in transnational commerce in today's global economy, disputes regularly arise where private parties may need to pursue judicial remedies against a foreign state. Practical Law asked *Andreas Frischknecht* of *Chaffetz Lindsey LLP* to explain the scope of foreign sovereign immunity in the US under the Foreign Sovereign Immunities Act (FSIA) and review some of the key issues in this area.



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What is the FSIA, and why was it enacted?

The FSIA determines when a plaintiff can sue a foreign state in US court. The statute establishes a general presumption of immunity for foreign states, but carves out a number of specific exceptions. These statutory exceptions are the only grounds on which a US court may exercise subject matter jurisdiction over claims against a foreign state. Additionally, the FSIA determines when a plaintiff may attach or execute against a foreign state's property in the US.

In the past, foreign states were completely immune from suit in the US under the doctrine of absolute sovereign immunity. Yet over time, a practice developed whereby courts usually deferred to case-by-case recommendations from the State Department concerning sovereign immunity. In 1952, the State Department issued a letter (known as the Tate Letter) abandoning absolute immunity in favor of the restrictive theory of sovereign immunity.

Under the restrictive theory, foreign states generally are entitled to immunity for their “public” or “sovereign” acts, but not for their “private” or “commercial” acts (*Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704-05 (1976)).

In 1976, Congress adopted the FSIA to codify the restrictive theory of sovereign immunity and to give courts (rather than the executive branch) the power to decide whether foreign states are entitled to immunity in individual actions. The legislative history indicates that Congress wanted to strengthen due process in this area and assure litigants that “these often crucial decisions are made on purely legal grounds” (H.R. Rep. No. 94-1487, at 7 (1976)).



Search [A Primer on Foreign Sovereign Immunity](#) for more on the FSIA, including details on each of the topics discussed below.

What is a foreign state for purposes of applying the FSIA?

The FSIA defines a “foreign state” broadly to include more than just a foreign country’s national government. Instead, a foreign state includes:

- **An agency or instrumentality of a foreign state.** Neither the FSIA itself nor the case law makes a clear distinction between agencies and instrumentalities. Instead, those terms are used more or less interchangeably. An agency or instrumentality can take many different forms, and among the most important in practice are foreign state-owned commercial enterprises.
- **A political subdivision of a foreign state.** A political subdivision also can take various forms, including local governments below the foreign state’s national government. (28 U.S.C. § 1603(a).)

Many of the FSIA’s provisions apply equally to any entity that qualifies as a foreign state, whether a political subdivision or an agency or instrumentality. However, some provisions treat foreign states and their political subdivisions differently from their agencies and instrumentalities, for example:

- Certain exceptions to sovereign immunity (such as the expropriation exception in 28 U.S.C. § 1605(a)(3)) are broader for agencies and instrumentalities than they are for foreign states and their political subdivisions.
- The scope of property that is subject to attachment and execution under the FSIA is broader for agencies and instrumentalities than it is for foreign states and their political subdivisions (28 U.S.C. § 1610(a), (b)).

Which exceptions to sovereign immunity under the FSIA are most important for litigants in suits arising from cross-border transactions, and what are the key provisions relating to a plaintiff’s ability to enforce a judgment?

Key exceptions to sovereign immunity include the following:

- **Commercial activity.** The single most important exception in practice is the commercial activity exception under 28 U.S.C. § 1605(a)(2). This exception flows directly from the restrictive theory of immunity discussed above, which distinguishes between sovereign and commercial acts.

- **Waiver.** The FSIA provides that a foreign state is not entitled to immunity where it “has waived its immunity either expressly or by implication” (28 U.S.C. § 1605(a)(1)).
- **Arbitration.** If a plaintiff has obtained an arbitration award against a foreign state, the foreign state does not have immunity in an action to enforce the award in most circumstances, including where the arbitration took place in the US or where the award is governed by an international convention to which the US is a party (mainly the New York Convention and the Panama Convention). Additionally, the FSIA establishes an exception to immunity for proceedings to enforce an arbitration agreement (for example, to compel arbitration) with a foreign state. (28 U.S.C. § 1605(a)(6).)

When a plaintiff obtains a judgment in its favor against a foreign state, that judgment has value only to the extent the plaintiff is able to enforce it. The FSIA establishes which types of property of a foreign state may be available for attachment and execution in the US. While the rules are fairly complex, generally, property used for a commercial activity may be available for execution, while property used for a non-commercial activity usually is not. (28 U.S.C. § 1610.) Additionally, the FSIA immunizes certain specific types of property from attachment and execution, such as the property “of a foreign central bank or monetary authority held for its own account” (28 U.S.C. § 1611(b)(1); see *NML Capital, Ltd. v. Banco Cent. de la República Argentina*, 652 F.3d 172, 187 (2d Cir. 2011)).

What are the grounds for invoking the commercial activity exception, and what constitutes a commercial activity?

There are three basic requirements for the commercial activity exception to apply, as follows:

- The foreign state has engaged in commercial (as opposed to sovereign) activity.
- The plaintiff’s lawsuit is “based upon” the foreign state’s commercial activity (or upon “an act in connection with” the foreign state’s commercial activity).
- The foreign state’s commercial activity that forms the basis for the plaintiff’s lawsuit has a sufficient nexus with the US. (U.S.C. § 1605(a)(2).)

The FSIA requires courts to determine whether a particular activity qualifies as commercial by reference to the nature of the activity instead of the activity’s purpose (28 U.S.C. § 1603(d)). The US Supreme Court has held that, regardless of a foreign state’s motive, the dispositive question is whether the foreign state has engaged in the type of conduct through which private parties engage in “trade and traffic or commerce” (*Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (citation omitted)). If so, the foreign state’s activity will qualify as commercial. By contrast, where the foreign state’s conduct is “peculiar to sovereigns” and is a type of conduct in which private citizens cannot engage, the foreign state’s activity will not qualify as commercial (see *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) (quoting *Weltover*, 504 U.S. at 614)).



Search [The Commercial Activity Exception to Sovereign Immunity Under the Foreign Sovereign Immunities Act](#) for more on the commercial activity exception.

How have courts construed the language requiring a sufficient nexus between the defendant's commercial activity and the US for the commercial activity exception to apply?

The nexus requirement manifests itself in the three distinct prongs of 28 U.S.C. § 1605(a)(2). Specifically, the plaintiff's lawsuit must be based on one of the following:

- **A commercial activity carried on in the US by the foreign state.** Litigants should be aware that 28 U.S.C. § 1603(e) defines this statutory language as "commercial activity carried on by such state and having substantial contact with the United States." To satisfy the substantial contact standard, courts typically require that at least part of the foreign state's commercial activity forming the basis of the plaintiff's lawsuit must have occurred in the US. Beyond that, determining whether the substantial contact standard has been met is a fact-specific inquiry.
- **An act performed in the US in connection with a commercial activity of the foreign state elsewhere.** There is comparatively little precedent for this second prong, and it is less relevant in practice than the first and third prongs, both of which have been extensively litigated.
- **An act outside the US in connection with the foreign state's commercial activity elsewhere that causes a direct effect in the US.** This is the most litigated prong. In *Republic of Argentina v. Weltover, Inc.*, the Supreme Court explained that an effect is direct if it follows as an immediate consequence of the defendant's activity and declined to interpret 28 U.S.C. § 1605(a)(2) as containing any "unexpressed requirement of substantiality or foreseeability" (504 U.S. at 618 (internal quotations omitted)). Under *Weltover*, a clear rule exists that where a contract requires a foreign state to make a payment or otherwise render performance to the plaintiff in the US, the foreign state's failure to do so will be deemed to have a direct

effect in the US. By contrast, the question of when a foreign state's tortious activity outside the US should be deemed to have a direct effect in the US is more unsettled. Frequently, a court must closely examine where the relevant injury or damage occurred to determine whether a direct effect exists.



Search [The Commercial Activity Exception to Sovereign Immunity Under the Foreign Sovereign Immunities Act](#) for more on each prong, including a detailed discussion of recurring fact patterns and key cases.

In what situations do courts recognize the implied waiver exception?

Implied waiver is an important, but narrow, exception to sovereign immunity. As the Second Circuit explained in *Shapiro v. Republic of Bolivia*, the FSIA's legislative history provides three examples of implied waiver, all of which involve circumstances where the foreign state's waiver of immunity is "unmistakable." Specifically, courts have found an implied waiver where a foreign state has either:

- Agreed to arbitration in another country.
- Agreed that the law of a particular country should govern a contract.
- Filed a responsive pleading in an action without raising the defense of sovereign immunity.

(930 F.2d 1013, 1017 (2d Cir. 1991); H.R. Rep. No. 94-1487, at 18.)

The first scenario above has little practical significance today. Ever since 1988 when Congress added a separate, arbitration-specific exception to immunity in 28 U.S.C. § 1605(a)(6), litigants typically have little need to resort to an implied waiver theory under § 1605(a)(1) (see generally *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118, 122-23 (D.C. Cir. 1999)).

The second scenario above is perhaps the least intuitive of the three examples. Courts usually do not hesitate to find an implied waiver where a contract explicitly calls for the application of US state or federal law (see, for example, *Ghawanmeh v. Islamic Saudi Acad.*, 672 F. Supp. 2d 3, 9-10 (D.D.C. 2009) (holding that the sovereign defendants implicitly waived immunity by

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executing an employment contract with a Virginia choice-of-law provision)).

However, where other factors weigh against finding an implied waiver, courts will take those into consideration to help establish the foreign state's true intent. For example, in *Kim v. Korea Trade Promotion-Investment Agency*, the court found that a Korean government agency did not implicitly waive its sovereign immunity, even though the agency's contracts with its employees were governed by local law and the agency published an employee handbook stating that its employees had the right to assert claims under the federal anti-discrimination laws. In reaching its conclusion, the court reasoned that the employee handbook explicitly stated on the first page that nothing in the handbook was intended as a waiver of the agency's sovereign immunity. (51 F. Supp. 3d 279, 285-86 (S.D.N.Y. 2014).)

As these cases show, the key recurring issue courts have grappled with is how to strike the right balance between requiring unmistakable and unambiguous implied waivers of immunity and holding foreign states accountable when their words or actions clearly demonstrate an intent to waive immunity.

While some countries have enacted domestic state immunity legislation similar to the FSIA, many others rely on the interpretation of customary international law. Are there any efforts to develop a multilateral consensus on state immunity issues?

In the vast majority of countries, sovereign immunity remains almost exclusively an issue of national law (and, indirectly, of customary international law). The sole multilateral treaty dealing with matters of sovereign immunity currently in effect is the European Convention on State Immunity, which dates back to 1972. The European Convention is presently in force in eight countries (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the UK), six of which (Austria, Belgium, Cyprus, Luxembourg, the Netherlands, and Switzerland) also are parties to an additional Protocol establishing a European Tribunal in matters of state immunity.

In 1983, there was an attempt to create a similar treaty in Latin America called the Inter-American Convention on the Jurisdictional Immunity of States. However, that treaty never entered into force.

More recently, an ambitious effort to achieve greater international harmonization in this area has emerged under the auspices of the United Nations. Toward that end, the United Nations General Assembly adopted in December 2004 the United Nations Convention on Jurisdictional Immunities of States and Their Property (UN Convention). The UN Convention will enter into force if and when it has been ratified or accepted by at least 30 nations. At present, 28 nations have signed the UN Convention, and 21 have ratified or accepted it.

Whether the US will ever sign or ratify the UN Convention remains unclear. Nothing in the UN Convention appears fundamentally inconsistent with US notions of sovereign

immunity. However, courts over the years have developed considerable expertise and a substantial body of case law under the FSIA, and there might be some reluctance to shed the familiarity of the FSIA for a new, and as yet untested, international convention.

What noteworthy trends or developments related to the FSIA should litigants be following?

Before finally settling last year, the long-running dispute between Argentina and the holders (mostly hedge funds) of billions of dollars in defaulted Argentinian bonds generated multiple cutting-edge decisions that have substantially developed the law of sovereign immunity in several areas, especially pertaining to post-judgment execution against a foreign state's assets.

Key decisions emanating from the Argentina bondholder litigation include the following:

- ***Republic of Argentina v. NML Capital, Ltd.*** In this case, the Supreme Court held that the FSIA did not prohibit a district court from authorizing post-judgment discovery aimed at identifying assets of Argentina outside the US. The Supreme Court explained that only two kinds of immunity exist under the FSIA, namely immunity from jurisdiction on the one hand and immunity from attachment and execution on the other. The FSIA has "no third provision forbidding or limiting discovery in aid of execution of a foreign-sovereign judgment debtor's assets." (134 S. Ct. 2250, 2256 (2014).) (For more information, search [US Supreme Court Rules FSIA Does Not Protect Foreign Countries from Postjudgment Discovery on Practical Law](#).)
- ***NML Capital, Ltd. v. Republic of Argentina.*** In this case, the Second Circuit held that a court order enjoining Argentina from making payments on certain bonds issued under a debt restructuring program unless and until Argentina also made comparable payments to holders of its defaulted bonds did not contravene the FSIA. The court reasoned that the injunctions did not attach or execute on any property as proscribed by the statute, but rather allowed Argentina to choose which of its assets it wished to use to satisfy its debts. (727 F.3d 230, 240-41 (2d Cir. 2013).)
- ***EM Ltd. v. Banco Central de la República Argentina.*** In this case, the Second Circuit held that Argentina's central bank was not an alter ego of Argentina (and therefore was not liable for Argentina's debts) because Argentina did not exercise "significant and repeated control" over the central bank's "day-to-day operations." Additionally, the court concluded that the plaintiff bondholders' claims were not "based upon" the central bank's commercial activity in the US because the bank's US activity was merely "incidental" to its activity outside the US on which the plaintiffs' claims were based. (800 F.3d 78, 91, 97-98 (2d Cir. 2015), cert. dismissed, 136 S. Ct. 1731 (2016).)