RECOMMENDATIONS AND REPORT
ON THE U.S. FOREIGN SOVEREIGN IMMUNITIES ACT

BY A WORKING GROUP
OF THE INTERNATIONAL LITIGATION COMMITTEE
OF THE SECTION OF INTERNATIONAL LAW AND PRACTICE
OF THE AMERICAN BAR ASSOCIATION

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April 2001

RECOMMENDATIONS

The Working Group on the U.S. Foreign Sovereign Immunities Act of the International Litigation Committee of the Section of International Law and Practice is pleased to submit its report and recommends that the Council of the Section approve the following resolutions for adoption by the House of Delegates of the ABA.

BE IT RESOLVED, That the American Bar Association recommends that the Congress and the President of the United States enact amendments to the Foreign Sovereign Immunities Act (“FSIA” or “Act”) (current version in Appendix A) in accordance with the following principles:

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

(2) Amend section 1603 to apply the Act to entities indirectly owned by a foreign state and entities owned by more than one foreign state, while adding to the commercial activity exception in section 1605(a)(2) a rebuttable presumption that an instrumentality owned by another instrumentality rather than the state itself is engaged in commercial activity.
(3) Amend section 1603 to provide that an entity is covered by the FSIA if the defendant was a foreign state or instrumentality at either the time the claim arose or the time the complaint is filed.

(4) Amend section 1603 to apply the Act to individuals who are officials or employees of a foreign state or instrumentality and who act within the scope of their office or employment, adding appropriate new provisions for service on individuals and provisions expressly preserving diplomatic and consular immunity. This amendment would not apply the Act to heads of state.

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

(6) Amend the commercial activity exception in section 1605(a)(2) to require a “substantial” and direct effect in the United States when applying the third clause dealing with commercial activity and acts occurring outside of the United States and to clarify that the types of claims that may not be brought under the tort exception, such as defamation, deceit, and malicious prosecution, may be brought under the commercial activity exception.

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

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

(9) Amend the execution provisions in section 1610 to make any property of a foreign state or instrumentality in the United States used for a commercial activity available to satisfy a U.S. judgment, although retaining the immunity of specific categories of property and clarifying that official, diplomatic, and consular property are not subject to execution.

(10) Amend sections 1608 and 1610 to authorize U.S. courts, in certain narrow circumstances, to stay pre-judgment proceedings or execution against foreign states.

BE IT FURTHER RESOLVED, That the American Bar Association commends to Congress and the President, as a way to implement these Recommendations, the revised Foreign Sovereign Immunities Act attached in Appendix B and the comparison in Appendix C of the current version of the Act to the proposed revised version.

BE IT FURTHER RESOLVED, That the American Bar Association (1) does not recommend any alteration in the current structure of the FSIA combining issues of personal jurisdiction, federal court jurisdiction, and immunity from suit, (2) urges U.S. courts to determine whether an entity is separate from the foreign state itself by reviewing legal characteristics such as whether the entity maintains a distinct personality, was sufficiently capitalized, observes
corporate formalities, contracts in its own name, and is able to sue and be sued, (3) urges U.S. courts to satisfy themselves, using traditional methods of contract interpretation, that a foreign state or instrumentality’s explicit waiver of immunity was a consent to be sued in the United States, and (4) urges U.S. courts to continue their incremental interpretation of the discretionary function provision in the tort exception to immunity.

REPORT

The Foreign Sovereign Immunities Act of the United States ("FSIA" or "Act")\(^1\) is now over 20 years old. It is, as the Supreme Court said, "the sole basis for obtaining jurisdiction over a foreign state in our courts."\(^2\)

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

The courts have adequately addressed and resolved many of the problems with the FSIA. For example, as discussed below, they have worked out the basic relationship among the immunity determination, the subject-matter jurisdiction of federal courts, personal jurisdiction over the defendant, and the occasional need to permit circumscribed, preliminary discovery on

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\(^{1}\) This Report is a summary of a more detailed version the Working Group prepared.

\(^{2}\) 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602 to 1611.


\(^{5}\) 28 U.S.C. §§ 1330(a), 1441(d).

immunity issues.\textsuperscript{7} The courts also have largely clarified other parts of the FSIA, such as the definition of commercial activity and its associated “based upon” requirement.

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

\section{A. Formation of the Working Group}

Given the inconsistencies and contradictions in judicial interpretations of parts of the FSIA and the complexity of other parts and given the long history of involvement of the ABA with the FSIA,\textsuperscript{8} the International Litigation Committee of the Section of International Law and Practice created this Working Group in mid-1998 to examine these issues and the experience with the FSIA since its enactment in 1976. The mission of the Working Group was to evaluate the operation and application of the Act and consider whether any legislative improvements or clarifications should be recommended.

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

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

\textsuperscript{7} See, e.g., First City, Texas-Houston, N.A. v. Rafidain Bank, 150 F.3d 172 (2d Cir. 1998); In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998) (before allowing FSIA discovery, consider other jurisdictional issues and, when permitting discovery, use less intrusive methods than oral depositions of ministers).

\textsuperscript{8} At the August 1976 meeting of the House of Delegates, the ABA adopted a resolution urging approval of the bill that became the FSIA. 1976 U.S.C.C.A.N. at 6608. At various times, the Section of International Law and Practice had a committee on revision of the FSIA. See Mark B. Feldman, The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View, 35 Int’l & Comp. L.Q. 302 n* (1986). In 1984, the House of Delegates approved a recommendation from the Section of International Law and Practice to adopt certain amendments to the FSIA, several of which were enacted in 1988.
The Working Group did not address the maritime exceptions from immunity. We defer to the work periodically done by the Maritime Law Association on those provisions.

B. Jurisdictional Structure of the FSIA

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

This structure is confusing, appears to permit the exercise of personal jurisdiction with insufficient contacts, and creates the danger of unnecessary and potentially burdensome discovery to prove exceptions from immunity, thereby undermining one of the benefits of sovereign immunity. One possible reform would be alter the structure so that the issues of subject matter and/or personal jurisdiction would be separated in some way from the issue of sovereign immunity, but, after considering the matter, the Working Group concluded that no amendment is necessary. Courts have become familiar with the structure, and altering the structure could raise a constitutional issue in certain cases if the question of immunity is not raised at the outset. Courts also have been alert to the need to address the potential due process concern of exercising personal jurisdiction over a foreign state or instrumentality with few

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2 The rules for service of process on foreign states and agencies and instrumentalities are set forth in 28 U.S.C. § 1608.


12 The Supreme Court has held that the FSIA provides the exclusive basis for obtaining jurisdiction over foreign states in U.S. courts. See Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

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


contacts with the United States\textsuperscript{17} and to protect foreign state defendants from burdensome discovery before resolving the immunity issue.\textsuperscript{18}

**C. Entities and Persons Entitled to Presumptive Immunity**

The scope of the current FSIA, that is, the definition of the entities and persons entitled to presumptive immunity, raises several concerns. The scope of the Act is important not only because those covered by the FSIA are entitled to presumptive immunity but also because they enjoy many procedural protections even when an exception from immunity applies.\textsuperscript{19} The concerns are with the ambiguity of the definition of “foreign state,” the occasional difficulty in distinguishing between a foreign state and an “instrumentality,” confusion about whether the FSIA applies to corporations indirectly owned by foreign states or owned by two or more foreign states, the absence of any reference to individuals such as government officials, and the appropriate time for determining when an entity qualifies for coverage under the Act.

1. Distinguishing Between Foreign States and Instrumentalities

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

In addition, the courts disagree about the method for distinguishing parts of a foreign state from instrumentalities. The Working Group concluded that the “legal characteristics”\textsuperscript{20} test rather than the “core functions”\textsuperscript{21} test better serves the goals of the Act. The Supreme Court recognized that the legal characteristics test is the standard established in international law for determining whether an entity has autonomy from the state\textsuperscript{22} and, based on the plain meaning of the FSIA, it appears to be the test that Congress contemplated. The core functions test is vague and subjective, difficult to apply, and, as a practical matter, duplicative of the commercial activity analysis more appropriately applied later to determine whether the defendant is immune.

\textsuperscript{17} See, e.g., Theo. H. Davis & Co., Ltd. v. Republic of the Marshall Islands, 161 F.3d 550 (9th Cir. 1998); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1545-46 (11th Cir. 1993); Gregorian v. Izvestia, 871 F.2d 1515, 1529 (9th Cir. 1989). In evaluating whether there are minimum contacts, courts have looked to whether there are sufficient contacts with the nation as a whole rather than with any particular state. See, e.g., Antoine v. Atlas Turner, Inc., 66 F.3d 105, 111 (6th Cir. 1995); Meadows v. Dominican Republic, 817 F.2d 517, 523 (9th Cir. 1987). The Working Group takes no position on whether a foreign state is a person for purposes of the due process clause. See Republic of Argentina v. Weltover, 504 U.S. 607, 619 (1992).

\textsuperscript{18} In re Papandreou, 139 F.3d 247 (D.C. Cir. 1998).

\textsuperscript{19} A defendant within the scope of the Act receives a variety of procedural benefits including the following: the absence of the plaintiff’s right to a jury trial in federal court, 28 U.S.C. §§ 1330(a), 1441(d), the right to remove a state case to federal court, id. § 1441(d), the right to special service of process requirements, id. § 1608, and the right to special protections from pre-judgment attachment and execution, id. §§ 1609-11.


\textsuperscript{21} See, e.g., Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994).

Courts should determine whether an entity is separate from the foreign state itself by reviewing legal characteristics such as whether the entity maintains a distinct personality, was sufficiently capitalized, observes corporate formalities, contracts in its own name, and is able to sue and be sued. Although ministries, departments, the armed forces, and independent regulatory agencies occasionally have some of these characteristics, the definition of foreign state should make clear that the state includes these entities because they are traditionally viewed as part of the state itself and because they have structural characteristics closely connecting them to the state.

2. Tiered and Pooled Entities

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

Because of ambiguous statutory language, the courts have struggled with whether such tiered and pooled entities fit within the FSIA’s definition of a corporation majority owned by a foreign state and thus whether such entities enjoy the many protections that the FSIA affords.23 The conflicting opinions of courts have undermined the FSIA’s goal of achieving consistency and uniform decisionmaking in cases involving foreign sovereigns. To achieve consistency and promote the other purposes of the FSIA, Congress should amend the Act to clarify that (1) it does not require direct majority ownership by a foreign state for an instrumentality to qualify for presumptive immunity and (2) a foreign corporation may receive presumptive immunity by “pooling” the ownership interests of two or more foreign states to satisfy the majority-ownership requirement.

The principal reason that presumptive sovereign immunity should apply to corporations indirectly majority owned by foreign states is that at least some states structure important areas


Most courts have allowed a corporation to “pool” the interests of all of the foreign states to reach the majority ownership required by section 1603(b)(2). See, e.g., Roselawn, 96 F.3d at 937-39; Mangattu v. M/V IBN Hayyan, 35 F.3d 205, 207-08 (5th Cir. 1994); LeDonne v. Gulf Air, Inc., 700 F. Supp. 1400, 1406 (E.D. Va. 1988). A few courts have expressed hesitation in allowing pooling. One court, for example, noted that the statutory text of section 1603(b)(2) literally requires majority ownership “by a foreign state,” not “states,” and that Congress could have explicitly allowed majority ownership “by a foreign state or states” but failed to do so. See Linton v. Airbus Industrie, 794 F. Supp. 650, 652 (S.D. Tex. 1992), appeal dismissed, 30 F.3d 592 (5th Cir. 1994).
of national interest, such as natural resources, through several levels of corporations. The strength of a foreign state's sovereign interests in an area do not necessarily dissipate when employing more complicated legal structures resembling those used by modern private businesses.

Under this approach, however, a potentially large number of corporations could have presumptive immunity and receive the procedural benefits of the FSIA. In addition, as a corporation becomes more distant from the foreign state, a plaintiff is much less likely to be aware that the entity benefits from sovereign immunity and therefore is less likely to obtain explicit waivers in contracts or to comply with the Act from the beginning of an action against the entity. The Act should address these issues by containing an explicit rebuttable presumption that a separate legal entity majority owned by an instrumentality as opposed to the foreign state itself is engaged in commercial activity.

Permitting pooling promotes the foreign policy concerns of the FSIA and has less serious implications for United States plaintiffs. The foreign policy interests of the United States are affected whether foreign states are sued individually or as part of a group, and a suit against a corporation 95 percent directly owned by two foreign states likely will have as great or greater foreign policy implications as a suit against a corporation 51 percent owned by one foreign state.

3. Time for Determining Status

The courts have been inconsistent in deciding the time at which a defendant may be considered a foreign state or instrumentality when the status of the defendant has changed between the time the claim arose and the time the claim is filed. The most common approach is for courts to make the decision based on the status of the defendant at the time the claim arose. Other courts have found that the inquiry should be made at the time the claim is filed, and a few courts have found that either time is acceptable. Legislation is therefore appropriate to resolve these inconsistencies, and the goals of the FSIA are best effectuated by applying the

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24/ See Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 382 (5th Cir. 1999); Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect, 89 F.3d 650, 653-54 (9th Cir. 1996).


26/ See Straub v. A.P. Green, 38 F.3d 448 (9th Cir. 1994); Morgan Guaranty Trust Co. v. Republic of Palau, 639 F. Supp. 706 (S.D.N.Y 1986) (finding that "jurisdictional questions are generally determined as of the date upon which the complaint was filed"), vacated, 924 F.2d 1237 (2d Cir. 1991) (reversal based on Second Circuit's finding that Palau did not qualify as a foreign state because it did not possess attributes of foreign sovereignty); Ocasek v. Flintkote Co., 796 F. Supp. 362 (N.D. Ill. 1992) (finding that FSIA immunity would not apply where defendant was a foreign state at time events occurred but was not a foreign state by the time the complaint was filed); Tjonveit v. Den Norske Bank, 1997 U.S. Dist. Lexis 22802 (S.D. Tex. Oct. 30, 1997), vacated on other grounds, 1998 U.S. Dist. Lexis 11929 (S.D. Tex. Mar. 26, 1998) (defendant entitled to protections of the FSIA because although private when acts occurred, it became public by the time the suit was filed; vacated on grounds of forum non-conveniens).

procedural protections of the Act to defendants that are foreign states or instrumentalities at either the time the claim arose or the time the complaint is filed. If a defendant was private at the time the claim arose, however, an exception from immunity should permit the litigation to proceed, and we therefore propose a new exception to make this clear.

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

Courts have periodically been obliged to consider whether individuals who are heads of state or who are officials or employees of foreign states or of instrumentalities of foreign states are covered by the immunities under the Act. The text of the FSIA is silent on the point, but a majority of courts that have considered the issue have concluded that, under certain circumstances, an individual officer or employee of a foreign state or instrumentality may receive immunity under the Act. See Phaneuf v. Republic of Indonesia, 106 F.3d 302, 306 (9th Cir. 1997); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996) (“Although El-Fadl claims to be suing Marto in an individual capacity, the only evidence in the record shows that Marto’s activities in managing PIBC were neither personal nor private, but were undertaken only on behalf of the Central Bank.”); Trajano v. Marcos, 978 F.2d 493, 497-98 (9th Cir. 1992); Chuidian v. Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990); Intercontinental Dictionary Services v. De Gruyter, 822 F. Supp. 662, 674 (C.D. Cal. 1993).

No court has applied the FSIA to a head of state, but one leading district court opinion and some other courts found a comparable common law immunity that depends for the most part on a suggestion of immunity from the U.S. Department of State.

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

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

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

continue to develop. The position of the Executive Branch is that the ability to suggest head-of-state immunity in appropriate cases is important to preserve U.S. foreign policy interests.

D. The Waiver Exception

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

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

E. The Commercial Activity Exception

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

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

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33. See Weltover, 504 U.S. at 619.
and disagreements in the lower courts and permits U.S. courts to resolve commercial cases having only the most distant relationship with the United States. The proposed additional word “substantial” should mean significant or weighty in relation to all of the circumstances of the case and its connections with the United States. Failure to provide a service or good in the United States would usually qualify, as would a concerted refusal to deal by foreign producers aimed at U.S. buyers; a financial loss by a U.S. person or at a U.S. bank account by itself would not.

F. The Tort Exception

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

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

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

The second amendment proposed by the Working Group is to clarify that the limitations on the tort exception – for discretionary functions and for certain torts such as libel and defamation – do not apply to the commercial activity exception. When the commercial activity exception applies, the adjudication of misrepresentation, defamation, and similar claims is

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35/ See Hanil Bank v. PT. Bank Negara Indonesia, 1998 WL 334342 (2d Cir.).

unlikely to pose serious foreign relations difficulties given the commercial context of the cases. Moreover, when foreign states act like private entities in the market, the restrictive theory of immunity suggests that they should be subject to the full range of claims available against private entities. Private entities, of course, have no immunity when they engage in conduct such as defamation or misrepresentation. This second proposed amendment is consistent with the majority view in the courts.37/

A final issue important in some international human rights cases is whether the discretionary function limitation applies to illegal activity. Although there is some disagreement in the courts over the legality issue,38/ the discretionary function provision need not be altered at this time. There is no severe conflict of authority, and courts should continue addressing the issue on a case-by-case basis because of the foreign relations issues.

G. Service of Process

Several issues concerning service of process in FSIA cases exist. The FSIA contains separate service of process provisions in 28 U.S.C. § 1608 for foreign states and for instrumentalities. Courts disagree over whether strict compliance with these service requirements is necessary. Some courts find "substantial compliance" with service rules adequate, at least for instrumentalities, although courts differ on what constitutes substantial compliance.39/

The recommendation is that courts should strictly enforce service rules on both foreign states and instrumentalities, and new statutory language should be added to make clear that substantial compliance with service rules is not acceptable. Outside the context of the FSIA, courts traditionally have required strict compliance with service of process rules, even for private persons. The substantial compliance rule is inconsistent with this traditional practice, is difficult to apply uniformly, and may undermine international relations, comity, and the enforceability of U.S. judgments. Although plaintiffs may sometimes encounter special difficulties in serving foreign sovereign defendants, a substantial compliance rule is not necessary to address these situations. Instead, courts can, for example, allow a plaintiff additional time to cure the deficiency and re-serve the defendant in accordance with the Act.

In addition, there should be some adjustments to the part of section 1608 permitting courts to authorize use of a special method of service on an instrumentality when a plaintiff cannot effect service or has difficulty effecting service by one of the methods explicitly described in section 1608. The adjustments would ensure that a specially developed method of service is not prohibited by international agreement and does not violate foreign law. Under the recommended approach, the provision would apply to an instrumentality and a director, officer, or employee of an instrumentality but would not apply to foreign states proper (service by


39/ See, e.g., Straub v. A.P. Green, 38 F.3d 448 (9th Cir. 1994); Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246 (6th Cir. 1993).
diplomatic channels under section 1608(a)(4) would continue to be the last resort for service on a foreign state) or foreign government officials (service by mail requiring a signed receipt and sent by the clerk of the court would be the last resort for service on a foreign official).

H. Execution

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

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

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

To address these problems, execution against foreign states should be simplified by permitting execution of a judgment based on a claim for which the foreign state is not immune against any property in the United States used for a commercial activity. The immunity of specific categories of property would be retained, although the protections for property covered by diplomatic or consular immunity would be clarified. This approach would eliminate the requirement in section 1610(a)(2) that execution in a commercial activity case be limited to property related to the same commercial activity. It also would provide an execution remedy for non-commercial tort cases covered by section 1605(a)(5) substantially beyond the current exception for insurance proceeds. Because section 1610(a) applies to executions against both

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40/ Successful plaintiffs have encountered difficulty in enforcing judgments even when the court had found that it otherwise properly had jurisdiction to adjudicate over the foreign sovereign. See, e.g., Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc., 183 F.3d 1277 (11th Cir. 1999); De Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984); LNC Investments, Inc. v. Republic of Nicaragua, 2000 WL 745550 (S.D.N.Y.); Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18, 76 F. Supp. 2d 16 (D.D.C. 1999); Liberian Eastern Timber Corp. v. Government of Republic of Liberia, 659 F. Supp. 606 (D.D.C. 1987).
foreign states and instrumentalities, these proposed simplifying revisions would make the separate provisions on execution against instrumentalities in section 1610(b) no longer necessary.

I. Stays of Pre-Judgment Proceedings and of Execution

If the FSIA’s immunity from attachment and execution is narrowed, corresponding protections for foreign states should be enacted to prevent extreme hardship. The property of foreign states would be more frequently subjected to seizure, but states in financial distress would not have the same protections that private market participants have. For instance, bankruptcy and insolvency laws do not apply to foreign states. To prevent an imbalance between creditor rights and debtor protections, courts should have explicit statutory authority to stay proceedings or enforcement in certain narrow circumstances. This authority would not apply in cases against instrumentalities.

Courts have already found discretion to stay proceedings and regulate execution of judgments under a variety of legal principles and statutes. The Supreme Court has held that federal courts have inherent authority to stay lawsuits, and this power has been applied in lawsuits involving foreign parties. Moreover, federal courts have denied prejudgment attachment orders against foreign states and instrumentalities when such orders would create undue hardship. And Section 1610 already provides a limited stay of execution until the court has determined that “a reasonable period of time has elapsed following the entry of judgment.” Finally, some state and federal laws provide the courts with specific authority to regulate the manner and timing of enforcement of judgments.

The Working Group’s proposal is designed to provide limited, specific authority for courts to provide foreign states with protection when the existence of the proceeding or the timing of execution inflict extreme hardship. Examples of such cases are natural disasters, civil wars, or extreme economic disruption. In one case, a court found that failure to stay a lawsuit would have disrupted Peru’s debt restructuring and economic redevelopment and injured hundreds of other creditors. By providing specific authority for a stay of proceedings or execution, the proposal is designed to provide for uniform application of an appropriate standard to foreign states and to reduce the need for litigation over those issues. This proposal is not intended to affect the substantive rights of creditors or other affected parties.

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45/ One member of the Working Group does not support the proposal to provide courts with statutory authority to stay pre-judgment proceedings. Another believes that the stay provisions do not go far enough and that the execution provisions should not be liberalized until a review of the laws and policies affecting sovereign debt defaults has been made.